

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

**CIV-2015-404-001745
[2016] NZHC 1771**

BETWEEN SUNG HYUK KIM
 Plaintiff

AND KUM NAM CHO
 Defendant

Hearing: 25 May 2016

Appearances: S J Corlett for Plaintiff
 No appearance for Defendant

Judgment: 1 August 2016

JUDGMENT OF COURTNEY J

Summary

[1] Mr Kim and Mr Cho are active members of the Korean community in New Zealand. In March 2015 Mr Kim was the President and Mr Cho the auditor of the Korean Society of Auckland Incorporated (Korean Society). The Department of Internal Affairs – Charities Services had recently completed an investigation and released a report into certain aspects of the Society’s affairs, including transactions involving Mr Kim. Mr Cho published an advertisement in a Korean language newspaper that purported to outline the Department’s findings. Mr Kim has sued Mr Cho, alleging that the article defamed him by conveying that he had acted illegally, including by misappropriating funds for his own benefit.

[2] Substituted service was effected on Mr Cho in October 2015 but he did not take steps to defend the proceeding. As a result, the matter proceeded by way of formal proof.

Formal proof in defamation proceedings

[3] Rule 15.9 of the High Court Rules relevantly provides that if the defendant in a proceeding does not file a statement of defence within the specified time and the plaintiff seeks judgment by default, the proceeding must be listed for formal proof. Under r 15.9(4), before or at the formal proof hearing, the plaintiff must file affidavit evidence establishing, to a Judge’s satisfaction, each cause of action relied on and, if damages are sought, providing sufficient information to enable the Judge to calculate and fix the damages. The standard to which a Judge is required to satisfy himself or herself regarding the plaintiff’s evidence “is much the same as it would be if the proceeding had gone to trial.”¹

[4] It is, however, generally accepted that a judge in formal proof proceedings is not required to engage with any matters of affirmative defences, set-off or counterclaim.² That is relevant because the evidence advanced in support of Mr Kim’s case suggests that affirmative defences under the Defamation Act 1992 may have been available to Mr Cho in relation to some of the statements sued on.

¹ *Ferreira v Stockinger* [2015] NZHC 2916 at [35].

² At [36], referring to *BBC Technologies Ltd v Sociedad Agricola Topagri Ltd* [2014] NZHC 2386 at [5].

However, the Defamation Act requires affirmative defences to be specifically pleaded.³

[5] The objective of r 15.9 is to achieve just, speedy and inexpensive determination of the proceedings.⁴ Decisions under that rule can be varied or set aside if it appears there may have been a miscarriage of justice⁵. But there is no indication that a judge considering the formal proof of a claim can consider matters beyond proof of the claim and calculation of damages.

[6] I note that the proposed amended High Court Rules as they stood in 2012 suggested that a judge could decline to enter judgment by way of formal proof if doing so would or might result in a miscarriage of justice.⁶ But that proposed amendment was never adopted in such broad terms.⁷ As it currently stands, the scheme of r 15 only permits a miscarriage of justice to be addressed after judgment has been entered.⁸

[7] In *Lee v The New Korea Herald* Heath J did consider affirmative defences in the context of a defamation case in which the defendant had raised affirmative defences in his statement of defence but which ultimately proceeded by way of formal proof:⁹

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

³ Defamation Act 1992, s 40.

⁴ High Court Rules, r 1.2. See also *Madsen-Ries v Thompson* [2015] NZHC 3270 at [15].

⁵ High Court Rules, r 15.10.

⁶ Proposed High Court Rule 15.9, and as discussed by Asher J in *Madsen-Ries v Thompson (No 3)* [2012] NZHC 1260 at [10].

⁷ High Court Rules, r 15.9(3), amended 4 February 2013 provides a Judge discretion to allow a party to file a statement of defence after a proceeding has been listed for formal proof if refusal to do so may result in a miscarriage of justice if judgment by default is entered. It does not extend so far as to allow a judge to take into account the risk of a miscarriage of justice in making his or her determinations on the causes of action.

⁸ High Court Rules, r 15.10.

⁹ *Lee v The New Korea Herald* HC Auckland, CIV-2008-404-005072, 9 November 2010. The present case is distinguishable from *Lee* on the basis that, in *Lee*, the defendant had filed a statement of defence before becoming unrepresented. The Court had notice of the defences that were likely to be raised by the defendant and at least some basis for them. Here Mr Cho has not engaged with the Court's process at all.

statements to which Mr Yoo could properly have raised the defences of truth and honest opinion.

[8] Although there is some attraction in approaching the matter in this way, for the reasons outlined earlier, I consider that I am required to set aside the issues that that would have arisen had the matter been defended on the basis of truth and honest opinion. I therefore do not give any consideration to those possible affirmative defences.

[9] I note that in cases involving formal proof in other contexts, this Court has disregarded defences where the relevant legislation requires that a defence be expressly pleaded. In *Dieulangard v Dyson* Muir J disregarded a possible limitation defence arising under the Fair Trading Act 1986 on the basis that it was an affirmative defence that had not been pleaded.¹⁰ In *Haden v Wells*, Brewer J considered that a District Court Judge who had considered (but dismissed) defences in a defamation proceeding by way of formal proof had made “an offer of more latitude than would normally be given in a formal proof situation.”¹¹ In neither case, however, was the issue specifically considered and in both cases the Judges went on to rule out success on the prospective affirmative defences.

Background

[10] The evidence in support of Mr Kim’s formal proof came from affidavits by Mr Kim himself, his wife and three other members of Auckland’s Korean community.

[11] Mr Kim came to New Zealand in 1997. He and Mr Cho became acquainted in 2011 when Mr Kim was encouraged to become involved in the Korean Society by its then President, Mr Hong. Mr Kim was elected as President of the Society in June 2013. Mr Cho was the Society’s auditor at the time and remained in that role until his membership in the Society was revoked in May 2015.

[12] On 3 March 2015 Charities Services released its report of an investigation into the Society concerning two matters involving both Mr Kim and Mr Hong. The

¹⁰ *Dieulangard v Dyson* [2016] NZHC 346.

¹¹ *Haden v Wells* [2013] NZHC 2753 at [4].

first related to loans by Mr Kim to the Society in breach of the Society's rules and which appeared to be inconsistent with its charitable purposes. The second related to contributions made by the Society on behalf of the Korean Development Bank (KDB) to further Lydia Ko's golfing career. Ultimately, Charities Services determined that any formal action taken to remove the Society from the Charitable Register would be disproportionate to the wrongdoing and would unfairly impact the ongoing membership, function and reputation of the Society. A formal warning and continued monitoring were considered the appropriate solutions. Charities Services also required that the Society disclose details of the transactions and loan arrangements to its members at a General or Special General Meeting or formally in writing.

[13] On 6 March 2015, three days after the Charities Services report was released, an advertisement appeared in the Sisa Sun Newspaper purporting to detail the findings of Charities Services on "Mr Sung Hyuk Kim's illegal acts and misconduct". The advertisement was signed off by Mr Cho as the Society's auditor.

[14] The Sisa Sun is a free Korean-language newspaper distributed to the local Korean community in Auckland, Hamilton and Rotorua. It is made freely available in Korean shops, supermarkets and the like. It is also published online on a weekly basis. The paper has a circulation of approximately 3,000 copies, primarily in the Auckland region where around 25,000 people of Korean origin now live.

Are the statements defamatory?

Relevant principles

[15] Mr Kim must establish that the statements were published by Mr Cho in circumstances in which Mr Cho was responsible for the publication.¹² The only evidence on this aspect was the fact that Mr Cho's name and position as the (then) auditor of the Society appeared at the end of the notice. I am, however, satisfied from these facts that it was Mr Cho who wrote the notice and procured the Sisa Sun to publish it.

¹² See *R v Burdett* (1820) 4 B & Ald. 115 and *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA).

[16] The plaintiff in a defamation proceeding must also show that the statement published by the defendant was about him or her and was defamatory. There is no statutory definition of what constitutes a defamatory statement. However, the common law has produced a number of well recognised characteristics of defamatory statements. Relevantly, these include a statement that may tend to lower the plaintiff in the estimation of right-thinking members of society generally,¹³ and a false statement about a person to his or her discredit.¹⁴ This second definition makes the important point that if a statement about a person is true, an action in defamation will not succeed in respect of it. However, as I have said earlier, it is not for the plaintiff to establish falsity as part of his or her cause of action.

[17] The principles to be applied in determining whether the various statements have the meaning Mr Kim attributes to them are summarised in *New Zealand Magazines Ltd v Hadlee (No 2)*:¹⁵

- a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
- b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
- c) The Court is not concerned with the literal meaning of the words or meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would have a matter of impression carry away in his or her head after reading the publication.
- d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
- e) But the Court will reject those meanings which can only emerge as the produce of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
- f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared.

¹³ *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.

¹⁴ *Youssouppoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 (CA) at 587.

¹⁵ *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

The statements complained of

[18] The publication was, of course, in the Korean language. A certified translation was annexed to Mr Kim's affidavit.

[19] The publication was entitled:

The public notice in relation to the result of investigation by the Department of Internal Affairs – Charities Services.

[20] Under the heading “The Department of Internal Affairs – Charities Services [DIA] findings on Mr Sung Hyuk Kim's illegal acts and misconduct” Mr Cho summarised the Department's findings and said:

“... they [the Department] require that the results of Mr Sung Hyuk Kim's illegal acts are to be announced in the community and appropriate solutions are to be suggested in relation to the wrongdoings.”

[21] Mr Kim complains that this statement meant and was understood to mean that Mr Kim acted illegally, that the Department made a finding to this effect, and directed that the results of Mr Kim's illegal actions be publicly announced and addressed. I agree that the statement does carry these meanings. A statement that a person has committed a criminal offence will ordinarily be, and is in this case, defamatory.¹⁶

[22] Under the heading “Stating \$423,000 as loans and converting \$30,000 as donations and claiming credits of \$10,000 is illegal” Mr Cho said:

“It is estimated that Mr Sung Hyuk Kim has acquired a minimum of \$52,562 and a maximum of \$90,248 and additional interest for personal benefit and this is a Criminal Act.”

[23] Mr Kim complains that this statement means he acted illegally, has fraudulently obtained funds which rightfully belonged to the Korean Society, and used the fraudulently obtained funds for his own personal benefit without any right to do so, and the Department has made a finding to this effect. I agree that the reference to Mr Kim's “Criminal Act” for his “personal benefit” bears the natural

¹⁶ *McGee v Independent Newspaper Ltd* [2006] NZAR 24; *Barron v Collins* [2015] EWHC 1125 (QB).

and ordinary meaning that he has acted illegally and, specifically, is guilty of fraud. These statements are defamatory for the reasons already discussed.¹⁷

[24] Under the same heading Mr Cho said:

“Mr Sung Hyuk Kim acknowledged that there was a loss of \$59,529 as a building maintenance cost and this is not related to the two individuals. He concealed this from executive commit [sic] members and the society members. This was to seek his personal benefit and this is illegal.”

[25] Mr Kim argues the meaning of this statement is that he is a criminal and has acted illegally. I am satisfied this is the natural and ordinary meaning of this statement. The suggestion of concealment and use of the word “illegal” both leave the clear impression that Mr Kim has acted illegally and is defamatory.

[26] Also under the same heading Mr Cho said:

“Mr Sung Hyuk Kim claimed \$13,333 in donation credits for the \$40,000 amount. It was dishonest and it is a criminal act.”

[27] Again, Mr Kim says the meaning of this statement is that he acted dishonestly and, in doing so, committed a criminal offence. I am satisfied that that is the natural and ordinary meaning of the statement. In addition to the defamatory effect of the suggestion of criminal behaviour, which I have earlier outlined, describing a person as being dishonest can be defamatory.¹⁸

[28] Under the heading “Investigation Results on Society involvement and the false description about financial support for Miss 00 [sic]” Mr Cho said:

“Although funds was (sic) deposited with the Society’s bank account from Korea on 25 September 2012 first and on 28 March 2012 second [sic], the funds were used illegally.”

[29] Mr Kim says the meaning of this statement is that he misused the powers of his office as President of the Korean Society, and used funds belonging to the Society illegally and criminally and the Department of Internal Affairs has made an

¹⁷ Additionally, for imputations of fraud, see *Karam v Parker* [2014] NZHC 737 at [64].

¹⁸ *Goldstein v Foss* (1827) 6 B & C 153, 108 ER 409, *Maclaren v Robertson* (1869) 21 D 183.

official finding to this effect. Allegations that someone has abused their position will ordinarily be defamatory.¹⁹

[30] I do not consider this statement to be actionable because it makes no mention of Mr Kim. In later statements on this topic Mr Kim is named but this particular statement gives no indication that the subject of the statement is Mr Kim or that he has done anything wrong.

[31] In the same section of the publication Mr Cho said that:

“Although this money had to go to Bangsuk Hyon, Mr Kim misappropriated the funds.”

[32] The natural and ordinary meaning argued is that Mr Kim stole money. The words do carry this meaning and are defamatory.

[33] A little later in the same section Mr Cho said:

“Mr Sunk [sic] Hyuk Kim rejected two times in relation to the request of sending the financial statement made by Kum Nam Cho, the elected Auditor for Society for the purpose of concealing the use of money. This is a breach of Rules. On 21 Feb 2014 at the special meeting, Mr Kim interrupted the role of Auditor physically and tried to expel the Auditor from the meeting using the power of police. Finally, the auditor was removed from the Society and these series of actions are considered as the way of concealing his misappropriation.”

[34] It is alleged that Mr Kim refused to disclose the Society’s financial statements, tried to exclude Mr Cho from meetings by physical violence and improperly engaged the use of the New Zealand Police to conceal the wrongful use of the money. I consider these are the natural and ordinary meanings of the statement and that they are defamatory.

[35] In the same section Mr Cho said:

“According to the investigation results, his actions to profit through the actions of the Society without any notice to the Society’s members are in breach of Rules.”

¹⁹ *Hawkins v Ayers* HC Auckland CP1246/92, 6 March 1992. See also *Truth (New Zealand) Ltd v Holloway* [1961] NZLR 22 (PC).

[36] Mr Kim says this suggests he acted in breach of the Society's rules for his own personal benefit, and the Department made an official finding to this effect. Although Mr Kim is not named, I accept that the paragraph does refer to him and that that fact is clear from the context in which the statement appears. I also accept that the natural and ordinary meaning of the statement is that he sought to profit through the actions of the Society in breach of its rules and that the meaning is defamatory.

[37] The last statement complained of is:

... we tried to remove the Korean Society from the Charities Register, we did not because of Mr Kim's request."

[38] Mr Kim says the statement means that he had acted in such a way that as a direct result, and following its official investigation, the Department attempted to remove the Korean Society from the Charities Register. I do not consider that this statement is actionable. It contains nothing that reflects badly upon Mr Kim and merely conveys that the Department acceded to Mr Kim's request that the Society not be removed from the Charities Register.

Damages

[39] Mr Kim claims a total of \$300,000 against Mr Cho, comprising compensatory damages of \$250,000 and punitive damages of \$50,000. The Defamation Act requires that I address the compensatory and punitive aspect separately, considering punitive damages is subject to a specific statutory test.

Compensatory damages

[40] General damages in defamation are directed towards the injury sustained as a result of the damage to the plaintiff's reputation. In *Siemer v Stiassny* the Court of Appeal said:²⁰

First, in relation to general damages, in defamation actions that term is taken to refer to losses sustained which are normal and to be anticipated when a person's reputation is impaired. When that occurs, such an offence affects one's relation with others which could be in business, social, religious,

²⁰ *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361.

familial or other contexts. The impairment of one's relations can interfere in quite unpredictable and unknowable ways with the enjoyment of life and, therefore, the common law took the view that in such an action damages may be awarded by the judge or jury without proof by a plaintiff that there has been any impairment of reputation. To put this another way, at common law general damages are an estimate, however rough, of the probable extent of actual loss a person has suffered, and will likely suffer in the future. That is so despite the fact that such loss cannot be identified in terms of, say, advantageous relationships lost, whether from a monetary or what might be termed an enjoyment of life standpoint. And, since the interests served by way of protecting a good reputation are of a dignitary and peace of mind character, it is relatively obvious that such damages are very difficult to measure in monetary terms.

[41] On the evidence I find the following factors relevant in assessing the appropriate level of damages. First, Mr Kim, who is now aged in his seventies, enjoyed a good reputation in the small but apparently tight-knit Korean community prior to the Charities Services investigation and the Sisa Sun advertisement. He had a reputation for reliability as a business man. He was also trusted and respected for his active service to many community organisations since he came to New Zealand – in addition to his involvement in the Korean Society, Mr Kim has given his time to other community organisations, including the Salvation Army Korean Community Church, the Asian Community Society in New Zealand, the Auckland Council, the Overseas Korean Foundation and NZ Veterans' Association.

[42] Secondly, the publication resulted in Mr Kim becoming the subject of gossip in the Korean community, with some people believing the allegations or at least thinking that they might have been true. As a result, Mr Kim's reputation and standing in the community, and that of his family, were adversely affected. However, I also take into account that an accurate report of the Department's findings would very likely have resulted in Mr Kim being the subject of comment in any event, some of which would have had an element of negativity about it.

[43] Thirdly, there was only one publication in print with a relatively limited circulation. I accept that the article was (and probably still is) available online but it seems unlikely that the reach of the article, whether in print or online, would have gone beyond the Korean community itself.

[44] Fourthly, the effect of the publication and the spread of the allegations through his peers have caused significant stress to Mr Kim, with witnesses referring to the effect on his mental health. Mr Kim's wife has noticed a loss of confidence in her husband, with him becoming withdrawn and reluctant to engage in social activities.

[45] Comparison with other cases requires care because of the relatively few cases which come before the courts and the variety in the circumstances of each case. To dispose of one of Mr Kim's arguments, I do not think the analogy with *Karam v Parker* is appropriate because the conduct in that case was so much worse in that it was effected through means of a website that was promoted in the knowledge that defamatory statements were being posted on it, involved a great number of statements and two defendants.²¹

[46] I see some comparisons with *Lee v New Korea Herald* in that the defamation occurred within a relatively small community with the same limited circulation.²² On the other hand, that case involved more than one defamatory article. In that case compensatory damages of \$250,000 were awarded.

[47] Looking at the level of damages awarded in other cases and taking particular note of the damages in *Lee v New Korea Herald* I consider that compensatory damages of \$100,000 is appropriate.

Punitive damages

[48] Section 28 of the Defamation Act 1992 provides for punitive damages in limited circumstances:

In any proceedings for defamation, punitive damages may be awarded against a defendant only where that defendant has acted in *flagrant disregard* of the rights of the plaintiff.

[49] The purpose of punitive damages is to punish and deter. In *Siemer* the Court of Appeal said:²³

²¹ *Karam v Parker*, above n 12.

²² *Lee v The New Korea Herald*, above n 11.

²³ *Siemer v Stiassny*, above n 17, at [65].

... the question is simply “[did] the defendant act in flagrant disregard of the rights of the plaintiff?” Of course, if one acts in flagrant disregard the defendant will routinely have a mental intent or motive which would, in any event, satisfy the New Zealand common law test.

[50] In *Siemer*, the defendant engaged in sustained personal attacks using different forms of media, including a billboard and web-site and continued the defamation in the face of an injunction.

[51] In this case, while the statements were clearly defamatory, a comparison of the Charities Services report and Mr Cho’s notice shows that, to a significant extent, Mr Cho’s notice related to conduct that had been the subject of the investigation but simply went beyond what had been reported. There is no evidence of motive. I have already referred to the relatively limited reach of the publication. In these circumstances, I do not consider that punitive damages would be justified.

Conclusion

[52] I am satisfied that seven of the nine statements sued on are actionable. There is judgment against Mr Cho by way of compensatory damages in the sum of \$100,000.

[53] Mr Kim is entitled to costs on a 2B basis with reasonable disbursements to be fixed by the Registrar.

P Courtney J