

Hytech Builders Pte Ltd v Goh Teng Poh Karen
[2008] SGHC 52

Case Number : Suit 75/2007

Decision Date : 08 April 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Wong Soon Peng Adrian and Firdaus Mohideen Rubin (Rajah & Tann) for the plaintiff; Tan Gim Hai Adrian, Wong Hin Pkin Wendell and Chin Wei Yin Sophine (Drew & Napier LLC) for the defendant

Parties : Hytech Builders Pte Ltd — Goh Teng Poh Karen

Tort – Defamation – Fair comment – Whether defamatory statement was comment or statement of fact – Whether there was basis of fact shown to be true for making comment – Whether fair-minded person would honestly make such comment – Whether comment is on matter of public interest

Tort – Defamation – Qualified privilege – Whether statement was made in protection of common interest – Whether there was express malice by tortfeasor sufficient to defeat the defence of qualified privilege

8 April 2008

Judgment reserved.

Judith Prakash J:

1 This is a defamation action.

2 The plaintiff, Hytech Builders Pte Ltd ("Hytech"), is a building contractor. Hytech was employed by the developer, City Developments Ltd ("CDL"), as the main contractor to construct the residential project known as Emory Point Condominium ("the condominium") in Ipoh Lane, Singapore. The defendant, Karen Goh Teng Poh ("Ms Goh") is the owner of one of the units in the project. The managing agent of the condominium is a company called Dickson Property Consultants Pte Ltd ("Dickson").

3 On 16 January 2007, Ms Goh sent an e-mail ("the E-mail") to one Ms Jenny Hong ("Ms Hong"), an employee of CDL. A copy of the E-mail was forwarded to Hytech by Ms Hong and Hytech immediately took umbrage to some of the statements made by Ms Goh. Hytech considered them to be defamatory. Ms Goh did not apologise and Hytech commenced this action on 6 February 2007. Ms Goh pleaded defences of qualified privilege and fair comment but did not seek to justify her statements.

4 The words in the E-mail ("the said words") which Hytech considered defamatory read as follows:

I have checked around in the industry and I am alarmed to learn that Hytech Builders is on the verge of collapse as a company!

Hytech pleaded that in their natural and ordinary meaning, the said words meant and/or were understood to mean that:

(a) Hytech was and/or is in a state of financial hardship and/or insolvency and/or on the verge

of insolvency; and

(b) Hytech's state of financial hardship and/or insolvency and/or being on the verge of insolvency was generally known or well known in the building and construction industry.

5 In the course of the proceedings, Hytech filed an application under O 14 r 12 for a determination of the natural and ordinary meaning of the said words. On appeal, Andrew Ang J found that the said words were defamatory and held that the natural and ordinary meaning to be given to them was the pleaded meaning as cited in [4] above. Since, by the time the trial started, the defamatory meaning of the said words had already been established, the trial revolved around the defences and what I now have to consider is whether Ms Goh has succeeded in substantiating either of her pleaded defences. For this purpose, the facts have to be considered in some detail.

The facts

6 Some time in March 2006, Ms Goh moved into unit 15-02 of the condominium. It was her first home and, like many proud homeowners, Ms Goh spent a substantial sum of money renovating the unit and decorating it to her liking. She was therefore dismayed in December 2006 when she discovered that water was seeping into the utility area of the unit through the external wall. The seepage led to fungus growing on her wall. She had to collect water dripping from the wall and she had to place a cloth at the window to soak up the water that collected on the floor. The seepage continued almost every day for more than a month during the period between December 2006 and early January 2007.

7 Ms Goh asked a contractor to look at the water seepage and advise her on what could be done. After inspecting the premises, this contractor advised her that the source of the problem was not clear and that it would be better to consult the management corporation on what should be done since the condominium was a new development. Accordingly, in mid December 2006, Ms Goh contacted Mr Asher Toh of Dickson and told him of the water seepage problem. He stated that he would inform the relevant parties and ask them to investigate. There was, however, no early response and none of these relevant parties contacted Ms Goh. Further telephone communication between Ms Goh and Dickson took place and Mr Toh advised Ms Goh to send a letter to Hytech because Dickson was finding it difficult to get Hytech to attend to Ms Goh's complaint.

8 In the meantime, unknown to Ms Goh, on 29 December 2006, Mr Toh had sent an e-mail to Mr Phoa Choon Yau, Hytech's Contacts Manager, informing him that two units at the condominium, #15-02 and #16-02 had complained of water seepage problems and requesting that Hytech investigate the matter. Mr Phoa replied to Mr Toh the same day asking for further details in the form of:

- (a) a notice lodged by the residents;
- (b) photographs/digital images showing the seepage; and
- (c) if possible, information as to whether the windows were made of aluminium or PVC.

9 Mr Phoa did not hear from Mr Toh again until 5 January 2007. Meanwhile, on 3 January 2007, Ms Goh wrote an e-mail addressed to Hytech and sent it to Dickson for forwarding to Hytech (as Mr Toh had advised her). From the evidence, it is not clear whether Mr Toh forwarded Ms Goh's e-mail to Mr Phoa on 5 or 11 January 2007. In any event, Mr Toh wrote to Mr Phoa on 5 January 2007 enclosing photographs of the affected units. Mr Phoa's response the next day asked for more details

and did not propose any action or solution. On 10 January 2007, Ms Goh asked Mr Toh for an update given that a week had passed since her e-mail to Hytech. She was informed that her e-mail had been forwarded to Hytech.

10 On 16 January 2007, Mr Phoa wrote a letter to a subcontractor, KSM Engineering Pte Ltd ("KSM") instructing KSM to contact the owners of units #14-02, #15-02 and #16-02 with a view to undertaking immediate rectification of the water seepage problem. Presumably this letter was sent out during business hours. Ms Goh certainly was not aware of it. Later that evening, at or around 10.36pm, Ms Goh sent the E-mail to Ms Hong expressing her feelings about the situation. In view of the fact that Ms Goh's defences are qualified privilege and fair comment, I think it useful to set out the E-mail in full. It reads:

I am the owner of Apt. #15-02 at Emery Point Condominium. I spoke with Lucille last Saturday about the problem here at Emery Point and she advised me to contact you on this matter.

From the month of December, the room in the utility area (which most residents use as a maid's room) has been leaking from the window. From a minor leak at the window, it has now become streams of water flowing through the wall whenever it rains. Fungus is growing on the window, to the wall adjacent to it and now down to the floor. It is obviously a problem with the external water proofing and the matter is getting worse by the day.

I contacted Mr Asher Toh from the management committee to inform him of this matter last month. He has been trying to deal with the main contractor on this condominium project, a Mr Phuah from Hytech Builders. Up to now, the main contractor has not even come to view this problem and this problem not only concerns my unit but it also involves 4 other units here - #13-02, #14-02, #16-02 and #18-02. Almost a month has past and nothing seems to be done about this, the main contractor has not indicated to any of us here when and how they will rectify this problem.

Now, we cannot wait here, indefinitely, for something to happen. I am most upset about this matter as I purchased this apartment believing that it, being a City Development project, would have a higher quality of workmanship and finish than other condominium projects done by other developers. With fungus growing on the wall and Chinese New Year fast approaching, it is an embarrassment (*sic*) for friends or family who come to visit to see as well as most unhealthy for the residents to be living under such conditions. Besides the problem of water leaking in the apartments, there are leaks throughout the underground car park as well!

I can fully understand and accept that as long as the weather remains wet, the main contractor may not be able to rectify the problem. But, the point now is that Hytech Builders have not come to the condominium to cite (*sic*) the problem. *I have checked around in the industry and I am alarmed to learn that Hytech Builders is on the verge of collapse as a company!*

I am appealing to you to look into this matter seriously and advise me on what should be done. If I have no other recourse and have no other option but to solve this matter myself, then I will most certainly be forced by such circumstances to engage a lawyer to take action on all the respective responsible parties. As a good citizen, I may also need to highlight this matter to the media to ensure that the public is well aware of the poor work performed by Hytech Builders and not have to go through such an unpleasant experience as I have. This is a course of action I do not wish to take. I only want the problem to be rectified accordingly at the earliest opportunity available.

I anxiously await your reply on this matter. Thank you.

(Emphasis added to indicate the words complained about)

11 The next day, Ms Hong forwarded the E-mail to Dickson. In his reply which was sent on the same day and copied to Ms Goh, Mr Toh informed Ms Hong that KSM had made an appointment with the owners of units 14-02, 15-02 and 16-02 to inspect their units at 10am on 19 January 2007. Mr Toh also attributed the delay to Hytech's insistence on receiving letters of complaint, photographs and written confirmation about the type of windows installed before it would take action.

12 On 19 January 2007, Ms Goh received a letter from Hytech's solicitors informing her that Hytech considered the said words "to be seriously defamatory, and it is clear that the Words were published maliciously and/or recklessly". The letter also stated that the said words had impugned Hytech's reputation, credit and integrity. It further alleged that the defamation of Hytech would serve to damage its relations with CDL and cause financial loss to Hytech. The letter demanded that Ms Goh cease and desist from making further defamatory statements and that she provide certain irrevocable undertakings.

13 Ms Goh did not apologise. She thought that Hytech was attempting to silence her. She had waited for a month for Hytech to respond and, up to then, no constructive action had been taken. She was also taken aback by the letter of demand since all she had done, in her view, was to make a complaint to the developer, CDL.

The defences

14 The defamatory meaning of the said words as pleaded having been established by the application heard by Andrew Ang J, I can proceed to deal with the defences pleaded by Ms Goh. At the time she filed her defence, in early March 2007, Ms Goh did not acknowledge that the said words were defamatory. After Ang J established the defamatory meaning of the words, Ms Goh did not attempt to amend her defence to include a defence of justification. Thus, she has never tried to establish the truth of the words. That of course does not mean that she can be found liable for defamation. Even though the said words were defamatory, if one of her pleaded defences is established, Hytech's claim must fail.

Fair comment

15 The elements that a defendant must establish in order to avail himself or herself of the defence of fair comment are the following:

- (a) that the defamatory statement complained of was a comment and not a statement of fact;
- (b) that there was a basis of fact, which must be shown to be true, for the comment;
- (c) the comment is one which a fair-minded person can honestly make on the facts proved;
and
- (d) the comment is on a matter of public interest.

(See *Chen Cheng v Central Christian Church* [1999] 1 SLR 94 ("the *Chen Cheng* case"))

16 Hytech submitted that in relation to the first two requirements, if a defamatory allegation is to

qualify as a comment, the allegation must have been supported by the facts on which it was based. In the present case, it argued, there was nothing in the E-mail to show what the words were based on. Accordingly, the said words had to be treated as a statement of fact relating to Hytech's purported financial insolvency and the widespread knowledge thereof in the building and construction industry and not as a comment. If the said words had to be construed as a statement of fact rather than as a statement of opinion, then the defence would fail. In any case, the defence would fail because Ms Goh had not proved that the said words were true either with respect to the allegation that Hytech was financially insolvent or with respect to the allegation that this situation was well known in the building and construction industry.

17 Ms Goh on the other hand submitted that the said words were clearly comment. The expression "on the verge of collapse" was a metaphor, likening a company to a building. The said words did not mean that Hytech was literally going to fall down but were a colourful figure of speech. More importantly, whether or not something is on the verge of collapse is an expression of opinion, rather than a statement of fact. It is a prediction of what may happen in the future, and naturally such a prediction can only be a personal belief or opinion. No reader would take it as a fact.

18 With respect, I cannot accept the arguments made on Ms Goh's behalf. In the context in which they were said, the ordinary reasonable reader would not have recognised the said words as comment or prediction or opinion; instead, he would have taken the said words as an assertion of fact. The standard to be met for words to be recognisable as comment is high. In this regard, valuable guidance on how to distinguish between a statement of fact and a comment was given in the following passages of LP Thean JA's judgment in the *Chen Cheng* case:

35 At the end of the day much depends on how the defamatory statement is expressed, the context in which it is set out and the content of the entire article or passage in question. One should adopt a common sense approach and consider how the statement would strike the ordinary reasonable reader, ie whether it would be recognisable by the ordinary reader as a comment or a statement of fact. In this connection, it is helpful to look at some pronouncements made in decided cases to see how the courts have approached this vexing issue.

36 In *Hunt v The Star Newspaper Co, Ltd* [1908] 2 KB 309, 319-320 Fletcher Moulton LJ said:

In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v Chapman* (1853) 3 C & K 286. The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negated by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. In this relation I must express my disagreement with the view apparently taken by the Court of Queen's Bench in Ireland in the case of *Lefroy v Burnside* 4 LR Ir CL 556, where the imputation was that the plaintiffs dishonestly and corruptly supplied to a newspaper certain information. The court treated the qualifications 'dishonestly' or 'corruptly' as clearly comment. In my opinion they are not comment, but constitute allegations of fact. It would have startled a pleader of the old school if he had been told that, in alleging that the defendant 'fraudulently represented,'

he was indulging in comment. By the use of the word 'fraudulently' he was probably making the most important allegation of fact in the whole case. Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment.

...

38 Another clear pronouncement on statements recognizable as comment is found in the following passage of the judgment of Jordan CJ of the Supreme Court of New South Wales in *Goldsbrough v John Fairfax & Sons Ltd & Anor* (1934) 34 SR 542, 531:

For the defence [of fair comment] to succeed, it is essential that the whole of the words in respect of which it is relied on should be comment, that they should be fair, and that they should be on a matter of public interest. It must be indicated with reasonable clearness by the words themselves, taking them in the context and the circumstances in which they were published, that they purport to be comment and not statements of fact; because statements of fact, however fair, are not protected by this defence. In other words, it must appear that they are opinions stated by the writer or speaker about facts, which are at the same time presented to, or are in fact present to, the minds of the readers or listeners, as things distinct from the opinions, so that it can be seen whether the opinions are such that they can fairly be formed upon the facts: *Myerson v Smith's Weekly Publishing Co Ltd* 24 SR 20 at 26-27; *Cole v Operative Plasterers' Federation* 28 SR 62 at 67-68.

19 Bearing the above principles in mind, the said words, taken in the context and the circumstances in which they were published, do not indicate with reasonable clearness that they were comment rather than assertions of fact. It would be noted from the E-mail that nothing in the paragraphs prior to the said words dealt in any way with the financial status of Hytech. Instead, the earlier paragraphs set out the history of Ms Goh's complaint and her concerns about the damage being done to her premises and desire for an early resolution of the problem. Next is the paragraph that contains the said words. There are three sentences in that paragraph. The said words comprise the whole of the final sentence. The first two sentences have nothing to do with the final sentence insofar as the final sentence deals with Hytech's financial position and the first two sentences are not related to that position. The first sentence reflects Ms Goh's understanding that the defect cannot be rectified during bad weather and the second sentence contains her complaint that Hytech had not even gone down to the site to inspect the defects. Whilst that is a statement of fact, it is not a statement that can be construed in any way as giving information on Hytech's financial position. When that statement of fact is followed by the statement that Ms Goh has "checked around in the industry" and is "alarmed to learn" that Hytech is on the verge of collapse, a reasonable reader would construe the whole of the third sentence as also being an assertion of fact in particular, the phrase "I have checked around" must be a statement of fact in that it refers to actions taken by the maker and the other phrase "alarmed to learn" indicates that what was learnt from the check that was conducted was a fact.

20 As for the second ingredient, that there must be a factual basis for the comment, this too was missing. Under cross-examination, Ms Goh admitted that the words were untrue because only one person from the construction industry had represented to her that Hytech had financial problems. She could not, therefore, assert that she had "checked around the industry". Further, she admitted that while in recent years Hytech had had negative cash flow and was not profitable, this was not the same as being "on the verge of collapse". Ms Goh had not checked Hytech's financial statements before making her statement. If she had, she would have known that there was no basis to state that Hytech was on the verge of collapse.

21 It is not necessary for me to go further and consider the other two ingredients of fair comment since the defence has not been able to establish the first two. Accordingly this defence fails.

Was there an occasion of privilege?

22 Qualified privilege is the more substantive defence. In this case, the learned authors of *Carter-Ruck on Libel and Slander* (5th Ed Butterworths: London, 1997) explain the rationale of the defence of qualified privilege in the following terms (at p 135):

Generally speaking an occasion of qualified privilege arises when the common convenience and welfare of society demands that the statements made upon such occasion should be protected. It is the occasion which is privileged and therefore the communication is protected.

The occasions of qualified privilege are:

- (a) statements made in the performance of a legal, moral or social duty;
- (b) statements made in the protection, or furtherance, of a public or private interest; and
- (c) statements made in the protection of a common interest.

23 To support her pleading that the E-mail and the said words were published on an occasion of qualified privilege, Ms Goh gave the following particulars (somewhat paraphrased by me):

- (a) there was a widespread and serious water leakage problem suffered by various units in the condominium including that belonging to Ms Goh;
- (b) Ms Goh discovered the leakage problem in her unit in December 2006 and informed the condominium's managing agent of it;
- (c) Hytech failed and/or refused to:
 - (i) resolve the serious leakage problem;
 - (ii) view the leakage problem at Ms Goh's unit;
 - (iii) indicate to Ms Goh how and when it would resolve this problem.
- (d) Ms Goh repeatedly asked Mr Toh when Hytech would take steps to inspect her leakage problem and she was told by Asher Toh that Hytech was being difficult and behaving in an uncooperative manner;
- (e) Ms Goh then spoke to CDL's agent who advised her to contact Ms Hong and pursuant to this advice, Ms Goh wrote the E-mail;
- (f) the E-mail was addressed and delivered to Ms Hong only. It was not published nor intended to be published or caused to be published by Ms Goh to the public at large or to any sector of the public;
- (g) Ms Goh is a subsidiary proprietor of the condominium and Ms Hong was a representative of CDL, the developer. Ms Goh was asked by one Lucille of CDL to communicate with Ms Hong as the

latter was at all material times responsible for handling complaints regarding defects in the condominium;

(h) the communication by Ms Goh was reasonable in all the circumstances, its dissemination being limited to Ms Hong only and such dissemination was no wider than necessary in order to inform Ms Hong; and

(i) on the basis of the matters set out above, Ms Goh was under a duty to send the E-mail to Ms Hong, who had a corresponding duty and/or interest to receive it.

24 Ms Goh submitted that all persons who were affected by the leakage in the condominium, *ie*, CDL, Dickson, the managing agent and the subsidiary proprietors shared a common interest and a common concern: they wanted the seepage problem resolved. All of them looked to Hytech to resolve the problem and no one could understand why Hytech had not rectified the seepage. Ms Goh thought that one possible reason for Hytech's lack of activity was its financial situation and communicated that concern to CDL. She further submitted that there could be no doubt that she and CDL shared a common interest and that the communication was made pursuant to that common interest and therefore the defence of qualified privilege had been established.

25 Before I go on to deal with the merits of that submission, I have to consider an objection to it made by Hytech. Hytech submitted that Ms Goh was barred from relying on "common interest" privilege by her pleaded case. It noted that in para 21 of the defence, it had been pleaded that "On the basis of the matters set out above, the Defendant was under a duty to send the E-mail to [Ms Hong] who had a corresponding duty and/or interest to receive it". On this basis, Ms Goh's pleaded case of qualified privilege was not one based on the "common interest privilege" but based on the duty privilege. Ms Goh's response to that submission was that para 8 of the defence showed that Ms Goh had an interest in resolving the water seepage problems and para 21 of the defence stated that Ms Hong had a corresponding duty and/or interest in receiving the E-mail. Therefore, it was submitted, the "common interest" privilege had been sufficiently pleaded in the defence and there was no surprise nor any prejudice caused to Hytech.

26 I have come to the conclusion that Hytech's objection is over technical. Although the defence was pleaded in a rather loose fashion and did not specifically refer to the common interest between Ms Goh and CDL, it did contain all the factual particulars (in paras 8 and 21 thereof) from which, assuming they were established at trial, it could be subsequently argued that the parties shared a common interest. There was also the brief reference to the interest of CDL in receiving the information which Ms Goh was sending it. It is also important to remember that only facts need to be pleaded. The law does not need to be pleaded.

27 *Gatley on Libel and Slander* (10th Ed, London Sweet & Maxwell, 2004) ("*Gatley*") at para 14.6 cites the following words of Murray J in *Mallan v Bickford* (1915) South Australia Law Report 47 at 84:

It may be accepted as a well-established rule that some duty or interest must exist in the party to whom the communication is made as well as in the party making it. The duty or interest may be common to both parties, but this is not essential. It is enough if there is a duty or interest on one side, and a duty or interest, or interest or duty (whether common or corresponding or not) on the other.

The defence expressly indicated that the defence of qualified privilege would be relied on and set out sufficient details of the factual position from which it could be argued that the ingredients of this plea as indicated above were made out. Hytech's legal advisors, if not Hytech itself, would have been fully

aware of the occasions that can give rise to a plea of qualified privilege. Thus, from the time the defence was served, Hytech would have been able to foresee the possibility that the basis for the defence in this case could be, not only the existence of a duty on the part of Ms Goh to convey the information to CDL but also, in the alternative, the existence of a common interest which would protect the dissemination of the information. I think that an averment of common interest though it would have been preferable was not strictly necessary.

28 In closing, as I have adverted to above, the only occasion of qualified privilege on which Ms Goh sought to rely was that arising out of a common interest. I think it was wise for her not to pursue the claim to have a legal, moral or social duty to say the said words. She did not give any evidence of how such a duty could have arisen and, in any case, if she had been acting in relation to a duty, that duty could not have been owed to CDL as that company was the developer and possibly could have been alleged to bear some responsibility for rectification of the defect.

29 I turn now to the consideration of whether there was a common interest shared by Ms Goh and CDL that would create an occasion of qualified privilege. In this connection, the relevant facts are that CDL was the developer of the condominium and the person who sold Ms Goh's unit to her. Ms Goh was a subsidiary proprietor who was concerned about the condition and quality of her unit. She testified that she had purchased this unit in the condominium because she believed that CDL was a good developer and she would obtain a quality home. Ms Hong, the person to whom the E-mail was addressed, was both an employee of CDL and also a member of the managing council of the condominium.

30 The context in which the E-mail was sent was not in dispute. There was a water seepage problem in Ms Goh's unit and she had complained about this to Mr Toh. Subsequently, on 29 December 2006, Mr Toh notified Mr Phoa of Hytech of the complaints from units 16-02 and 15-02 of the water seepage and said that he himself had observed that this seepage was from the external wall and windows. Mr Phoa's response was to ask for more details as set out in [8] above. Ms Goh was informed of this request and she wrote to Hytech on 3 January 2007 giving the necessary notice. A similar notice was given by the owner of unit 16-02. Mr Toh then submitted two photographs of the affected units together with the two complaints. Mr Phoa, however, did not do anything at that stage. He wanted the photographs marked for his "easy reference". He said that "apparently" four units had "water ingress" but Mr Toh had given him details of only two and he wanted images of all the units before he would act on any of them. He also asked if the windows were aluminium or PVC despite having earlier said that this information was only to be supplied if possible. On 10 January 2007, Mr Toh told Mr Phoa the windows were aluminium and also identified the units in the photographs. He asked Mr Phoa to attend to those units on an urgent basis. It was not till 16 January 2007, however, that Hytech instructed KSM to remedy the problem.

31 Ms Goh testified that she had written the E-mail to CDL in order to complain about the lack of action on the part of Hytech. Her concern was to ensure that if Hytech was not able to carry out the rectification work, there would be someone else who would do it. She said:

I highlighted one sentence that I heard about Hytech being on the verge of collapse. It didn't matter to me whether Hytech was on the verge of collapse. It was important to me as a first time home owner to hear from CDL that it would be responsible towards owners and that the problem would be rectified.

She also said that Hytech's financial position was not an issue that she would lose sleep over but that her main concern was regarding the rectification of the defects. She stated:

At that time I was worried that if indeed Hytech was on the verge of collapse, it would have problems on defects to be rectified.

32 It was submitted that Ms Goh's situation was analogous to that of the defendants in the case of *Aspro Travel v Owners Abroad Group* [1996] 1 WLR 132 ("*Aspro Travel*"). In that case, the defendants made statements to hoteliers to the effect that the plaintiff companies were about to become bankrupt or that there were reliable rumours to that effect. The English Court of Appeal refused the plaintiffs' application to strike out the defendants' defence of qualified privilege. It held that it was arguable that the manager of a hotel has, *inter alia* an interest in knowing that if a travel agent goes bankrupt, another identified travel agent is ready to take over the former's obligations.

33 Quite apart from the parallel with the *Aspro Travel* case, there is another argument to support an assertion of privilege. *Gatley* states at 14.54 that the seeking of redress for grievances is a privileged occasion:

Where a person believes that he has suffered a grievance at the hand of another, he is entitled to bring his grievance to the notice of the person or body whose power or duty it is to grant redress or to punish or reprimand the offender, or merely to inquire into the subject-matter of the complaint, and any statement so made is privileged, if made in good faith and not for the purpose of defaming the plaintiff.

34 As a homeowner whose unit was being affected by water seepage, Ms Goh had a legitimate interest in having the defect remedied at the least possible expense to herself. She also had an interest in ensuring that the person responsible for the defect that had led to the water seepage would take steps to remedy it. She had tried through dealings with the managing agent to have the contractor look into the matter and had received no response. She knew that as the developer, CDL would have employed Hytech for the construction and therefore she was entitled to bring her grievance to the notice of the one person who presumably had the leverage to induce or persuade Hytech to act. At the same time, it was of importance to her that Hytech had the financial capability to carry out the remedial work. She had a legitimate interest in its financial status. CDL also had a legitimate interest in Hytech's financial viability. CDL's reputation might suffer if it was associated with a main contractor that was insolvent. Not only that but if Hytech was insolvent, then CDL might have to incur expense in employing someone else to do the work. Ms Goh's concern that the collapse of the main contractor could affect the timeliness of the repairs that needed to be carried out would be shared by other subsidiary proprietors as well as prospective purchasers, and CDL would have been conscious of this. In all the circumstances I agree with the submission that CDL, Dickson, Ms Goh and the other subsidiary proprietors shared a common interest and a common concern: to have the seepage problem resolved. The communication was made pursuant to that common interest and thus on an occasion to which privilege attached.

Can the privilege be defeated?

35 It is well established that the defence of qualified privilege can be defeated if express malice on the part of the defendant can be established by the plaintiff. The principles applicable to this defence were enunciated in *Horrocks v Lowe* [1975] AC 135 at 149-151 ("*Horrocks v Lowe*"). This case has been applied many times in the local courts. The rationale for the protection afforded to defamatory statements by this defence was explained by Lord Diplock as follows:

The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in

respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. (at p149)

Lord Diplock then, in the same paragraph, laid down how and why the defence could be lost:

With some exceptions ... the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege, there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason, he loses the protection of privilege.

In the paragraph that followed the foregoing passage, Lord Diplock emphasised the vital role played in the defence by the defendant's motive for the publication of the defamatory statements and it would be noticed that it was in this context that he used the term "express malice":

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

Having given the definition of malice in the context of qualified privilege, Lord Diplock went on to consider how the motive of the defamer could be established and it was in this connection that he discussed the role that honesty of belief (in the truth of the statements made) plays in the determination of malice:

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. ...

Even a positive belief in the truth of what is published on a privileged occasion – which is presumed unless the contrary is proved – may not be sufficient to negative express malice if it

can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. ...

Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found. (at p 149 – 151)

36 The formulation in *Horrocks v Lowe* has been applied and commented on in many subsequent cases in relation to the ingredient of express malice as it applied both to the defence of qualified privilege and that of fair comment. Until the Privy Council decision of *Cheng Albert v Tse Wai Chun Paul* [2000] 4 HKC 1 ("*Cheng Albert*"), it was widely thought that "express malice" meant the same thing for both defences. The position changed after that case. *Cheng Albert* dealt with the meaning and application of "malice" in relation to the defence of fair comment. It was decided that "express malice" means something different for the purpose of the defence of fair comment from what it means in relation to the defence of qualified privilege because of the different rationale that underpin these two defences. In relation to fair comment, it was held that a comment that falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed and that honesty of belief is the touchstone (per Lord Nicholls of Birkenhead at p 22). In his view "actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation" does not of itself defeat the defence. In relation to qualified privilege, however, Lord Nicholls noted that the "observations" made on malice in *Horrocks v Lowe* by Lord Diplock:

are in point to the extent that they enunciate the principle that express malice is to be equated with use of a privileged occasion for some purpose other than that for which the privilege is accorded by law. The same approach is applicable to the defence of fair comment. Beyond that his observations do not assist in the present case, because the purposes for which the law has accorded the defence of qualified privilege and the defence of fair comment are not the same. So his examples of misuse of qualified privilege cannot be carried across to fair comment without more ado. Instances of misuse of qualified privilege may not be instances of fair comment. (at p 17)

It was clear from Lord Nicholls' judgment that he accepted the position that in relation to qualified privilege, motive rather than honesty of belief was the essential indicator of the existence of express malice. This distinguished it from fair comment where motive was irrelevant. Lord Nicholls concluded (at p 22) that in order to avoid confusion by using the term "malice" in different ways in respect of these two defences, that word should be shunned and instead:

Juries can be instructed, regarding fair comment, that the defence is defeated by proof that the defendant did not genuinely believe the opinion he expressed. Regarding qualified privilege, juries can be directed that the defence is defeated by proof that the defendant used the occasion for some other purposes than that for which the occasion was privileged.

It should be noted that nowhere in his judgment did Lord Nicholls comment on how the dominant motive of the defamer was to be established. Nor did he make any observation on what Lord Diplock had said regarding the place of honesty of belief in the establishment of dominant motive.

37 In *Oei Hong Leong v Ban Song Long David* [2005] 3 SLR 608 ("the *Oei Hong Leong* case"), the Court of Appeal rejected a defence of qualified privilege but ruled that the defendant was entitled to invoke the defence of fair comment. For the purpose of its decision, the court did not have to consider the meaning of "express malice" in relation to the qualified privilege defence but needed to do so in relation to the fair comment defence. In the course of its deliberations on the latter issue, the court endorsed *Cheng Albert* and adopted Lord Nicholls' formulation of honesty of belief being the essential prerequisite of entitlement to that defence since as it explained "no one has the right to make defamatory comments on matters of public interest that he himself does not believe in" (per Kan Ting Chiu J at [52]). Whilst the court agreed with Lord Nicholls' exposition as to why the test for malice in qualified privilege was not the same as the test for malice in fair comment, the court did not go on to make any remarks regarding the test for malice in qualified privilege.

38 The question is whether the test for malice in qualified privilege as established in *Horrocks v Lowe* has been altered in any way by *Cheng Albert* and the *Oei Hong Leong* case. I do not think that it has. *Horrocks v Lowe* established that the predominant consideration in finding malice to exist when qualified privilege is invoked is the motive with which the statement was made. That rule was not, in my view, changed by *Cheng Albert*. In [36] above, I have indicated what Lord Nicholls had to say about malice in relation to qualified privilege. His Lordship did not comment directly on how the defendant's honest belief (or lack thereof) in the truth of the statements he had uttered would affect assessment of the defendant's motive. As such, I think that what Lord Diplock said in *Horrocks v Lowe* on honest belief has still to be considered by every judge when considering the motive of the defamer.

39 As would be noted from the passages cited above (at [35]), whilst the motive of the person who published the defamation is the primary determinant of whether he acted with or without the "express malice" required to defeat qualified privilege, whether such person believed that what he said or wrote was true or not is also relevant to the inquiry. It is relevant to the inquiry because generally, to say something defamatory that you know is untrue is an indication of spite which would constitute an improper motive. Thus, usually, if the plaintiff can establish that the defendant knew that he was spreading a lie, in the absence of being able to show that he had a duty to pass on that information even though he did not believe it to be true, the defendant will not be able to rely on qualified privilege. Lord Diplock makes clear that a reckless publication of an untrue defamatory statement can also suffice to ground a plaintiff's submission that the defendant acted with express malice and had an improper motive. On the other hand, as the passage also indicates, someone who honestly believed that what he said was true could still be found to have acted maliciously if he was not trying to protect an interest or discharge a duty but acted out of ill will or spite. It is in this respect that malice in qualified privilege is quite different from the position of malice in fair comment since, after *Cheng Albert*, honesty of belief completely nullifies malice for the purpose of fair comment.

40 Returning to the case at hand, therefore, the issue is whether Hytech was able to establish that Ms Goh acted with malice. This means that it must be able to establish that she said the said words with predominant intention of injuring it or was motivated by spite or some other improper motive. If her predominant intention was to advance or protect her own interest, then she would be able to claim the protection of the privilege.

41 Hytech submitted that Ms Goh had written the said words with the knowledge that they were untrue. She told lies with the ulterior motive of getting CDL's attention at Hytech's expense and gave

the impression that it was industry wide knowledge that Hytech was on the verge of collapse despite knowing that her information came from one "phantom" person who had neither been named nor called to testify in the proceedings. The statement was published in the hope that Ms Goh would get her way and have the defects in her unit repaired. Additionally, Ms Goh made the statement for the purpose of getting back at Hytech for what she perceived to be unreasonable delay in attending to the water seepage issue. At the heart of her conduct were frustration, anger and vengeance and these were shown by her threat to take legal action against CDL or all parties responsible. That threat demonstrated her true state of mind. The E-mail was not copied to Hytech because Ms Goh wanted to deprive Hytech of a chance to respond. Ms Goh's conduct was surreptitious and malicious and calculated to harm Hytech's reputation in the eyes of a valued client.

42 Hytech emphasised evidence given by Ms Goh in cross-examination. She had agreed at one stage that she did not look at Hytech's accounts before making the assertion that it was on the verge of collapse and therefore that she had no sound basis to make that assertion. Subsequently, she changed her answer and said that she had made the assertion on the basis of a decision to believe the information that she had been given by a client (a client whom she refused to name and did not call to testify). Ms Goh had eventually admitted that this part of the E-mail was a lie. Given that Ms Goh agreed that she should have checked Hytech's account but did not do so prior to her publication of the said words, Hytech submitted that her conduct was deliberate or reckless given her qualifications (double degree in financing and accounting), her background as a senior financial analyst in Keppel Securities and her current employment as a senior vice president in a well established stockbroking firm. She well knew what the term "verge of collapse" meant when used with reference to a company and intentionally used the term in the E-mail even though she had no objective basis for it.

43 The position taken by Hytech was that no client existed and that was why his name could not be disclosed. It submitted that there was no evidence of his existence apart from bare allegations. It was pretence on the part of Ms Goh to say that she had been given the information about Hytech by her client so that she could conjure up some flimsy basis for the second part of the said words when there was absolutely none. Ms Goh had conceded on the stand that she was aware that the identity of the client was a relevant issue in the trial but had decided not to name him even though there was no legal basis for her to refuse to disclose his identity. Hytech said that therefore an adverse inference had to be drawn to the effect that if the client had been called, his evidence would have undermined Ms Goh's allegations that he was in the building and construction industry; that she discussed Hytech with the client; that the client told her that Hytech was on the verge of collapse; and that the client had some basis for so saying.

44 Hytech did not accept Ms Goh's reason for not disclosing the client's name and labelled it "disingenuous". In her affidavit, Ms Goh had stated that she did not name the client of her firm as one of the persons she had spoken to because she was under a duty of confidentiality as a trading representative of her company. It would also amount to a breach of her trading representative licence issued by the Singapore Stock Exchange. To avoid her duties of client confidentiality, she was willing to give up liability in the proceedings. In court, however, Ms Goh had conceded that the foregoing did not constitute legal justification for non-disclosure. She admitted that she had shown disrespect for the law by refusing to name the client when directed to do by order of court but asserted that integrity was the reason why she could not make the disclosure. Hytech said that that was not a basis that someone who showed disrespect for the law could rely on. It asserted that Ms Goh refused to disclose her client's identity purely for financial considerations in that she wanted to preserve the possibility of future business from him. She was driven by self-interest and was prepared to go against the law if necessary.

45 It was submitted for Ms Goh that Hytech had not offered any evidence to show that she published the said words with the dominant motive of injuring it. Indeed, the point was hardly put to her. In any case, Ms Goh had stated forthrightly in cross-examination that Hytech's financial position was not an issue that she would lose any sleep over. Her predominant motive was simply to have the seepage problem fixed by Hytech or anyone else. It was submitted that it was absurd to suggest that Ms Goh, who had never met anyone from Hytech and had had no prior dealings with it, would by 16 January 2007 have developed such an antipathy towards Hytech that she would have a predominant motive to injure its reputation. On the contrary, the evidence was that there had only been one prior communication between the two parties: Ms Goh's e-mail dated 3 January 2007 which Hytech had not bothered to answer. It was not as if the parties had had a long running battle between them. Rather, there was no personal history between them at all. The only contact was the 3 January 2007 e-mail, the E-mail and then the letter of demand from Hytech's solicitors.

46 In regard to Hytech's submission that Ms Goh knew at the time of publication that the said words were false, the defence pointed to Ms Goh's evidence in cross-examination that she knew "in her heart" that the said words were true and she explained the source of her belief. Under cross-examination, she was asked if she had "carelessly published the [E-mail]". She rejected the suggestion and said that she had relied on information received from a client who was "someone familiar with the industry". Ms Goh did say in re-examination why she thought her client was an authoritative source: her client was supposed to be the "boss" of a publicly listed construction company and had been in the construction industry for more than 20 years. On that basis, Ms Goh considered her client's position on Hytech to represent the industry's position.

47 It was also submitted on Ms Goh's behalf that carelessness would not amount to malice. It was pointed out that when she was asked in cross-examination whether she was totally reckless about the truth of the words, her reply was that the time she published the E-mail, she believed that what she was saying was true. Counsel for Hytech also suggested that the purpose of Ms Goh's inclusion of the said words in the E-mail was that she wanted CDL to take her seriously and that the said words were intended to "shock some sense into CDL". Ms Goh rejected that suggestion but her counsel submitted that even if the suggestion had been correct, it did nothing more than reinforce the point that Ms Goh's predominant motive for publishing the said words was to get CDL to attend to the seepage. It was not to cause injury to Hytech.

48 Counsel for Ms Goh also drew attention to Ms Goh's answer when she was asked why she had thought it relevant to tell CDL that Hytech was on the verge of collapse. Her reply was:

I understand that if there are defects and applicable warranties, the main con would have to step in to do the work. If they are not financially sound, I would presume a problem in getting rectification done.

Counsel submitted that this was more evidence of Ms Goh's motive being the protection of her own interests in having the seepage problem rectified.

49 Ms Goh had agreed in cross-examination that a company that was loss-making such as Hytech was not necessarily one that was on the verge of collapse. That was accurate said her counsel and was the type of analysis that lawyers and judges are used to. But it had to be borne in mind that Ms Goh was neither. In this respect, counsel relied on the following passage of Lord Diplock's judgment in *Horrocks v Lowe*:

But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech

protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life, it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity on the conclusions that they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true. The law demands no more. (at p 150)

Counsel submitted that this was not a situation in which Ms Goh was indifferent to the truth. She had some basis to say what she did, though it might not have been sufficient, with hindsight, and a lawyer would have no problem in picking out the inaccuracies in what she said. Yet that was not sufficient for Hytech to discharge its burden of proving malice. In every day life, people mis-speak and gloss and generalise, but that does not mean that they have a predominant motive to injure. Even professionals are not held to such a high standard as Hytech was arguing for. In *Price Waterhouse Intrust Ltd v Wee Choo Keong* [1994] 3 SLR 801, the court said of a firm of solicitors acting in their professional capacity:

Although the first respondent was imprudent in omitting to make independent inquiries, that did not demonstrate a lack of honest belief in the information acquired from his clients. (at p 816)

It was submitted that a homeowner acting in her personal capacity should not be held to a higher standard.

50 In all the circumstances of this case, it is my conclusion that Ms Goh's predominant motive in sending out the E-mail and in writing the said words was to obtain redress for her grievance in respect of the water seepage in her unit. She wanted to obtain redress either from CDL or from Hytech: it did not really matter to her whether CDL acted directly or procured action on the part of Hytech. Her concern was that if Hytech was in financial difficulties, it would not be able to do the work and therefore she wanted to alert CDL to the situation so that something could be done earlier rather than later. I do not think that she was aware at the time that she made the statements that they were untrue. I accept that at that time, she did believe in their veracity on the basis of the information she had been given even though she did not check on it independently. Whilst Ms Goh was an experienced financial analyst and was experienced in analysing audited accounts in the course of her work, in relation to her own personal matter which did not involve giving advice on investments but instead involved the ability of a construction company to do certain work, she did not find it necessary to do such a check but thought that she could rely on information that she was given. From the point of view of an ordinary person, that is understandable conduct. As Lord Diplock pointed out, it is rare in ordinary life that a person conducts a rigorous search for evidence before coming to a conclusion. Many people will accept as true information given to them by persons whom they know and whom they reasonably think are in a position to have such information. In this case, the profile of the client as given by Ms Goh was such that one can understand why in her capacity as a homeowner seeking redress rather than as a professional asked to advise on the viability of the company, she was content to rely on his information without seeking further clarification.

51 Whilst Ms Goh's conduct in consistently refusing to disclose the name of her client was deplorable, having seen her in the witness box, I believe that the client existed and that she relied on what he told her and thought, wrongly as it turned out, that his information was correct. Ms Goh's

decision not to reveal his name was not I think an easy one. Whilst I do not discount her evidence by reason of that refusal, I do think that her actions were not legally justified and, perhaps, contributed to the continuing prosecution of this case. There may have to be a costs consequence of this behaviour.

52 I accept that Ms Goh was not motivated by spite or any intention to injure Hytech though she must have been aware when she made the statement about Hytech's financial status that it could possibly cause Hytech damage. She did not know Hytech. She was not, and had no reason to be, spiteful or vindictive in relation to Hytech. She was, however, frustrated and felt helpless because of what she saw as a lack of response to her continuing complaints. Hytech cannot deny that it had never responded directly to Ms Goh nor had it ever attempted to assure her that it was investigating the matter. She was trying to find a reason for its behaviour. She had also been told by Mr Toh that Hytech had not been cooperative and was difficult. At all times, her main concern was her home and the damage that was being caused to it. It was in protection of that interest that she acted.

53 In the cross-examination Ms Goh had reiterated her concern that if Hytech was not financially sound, it might not be in a position to carry out the necessary repairs:

Court: -- That's not the question. The question is: Why did you consider it relevant to tell CDL that Hytech was on the verge of collapse?

Witness: Because from the little that I gathered on warranties and relationships between [sic] the main contractor and the developer, I understand that if there are defects and applicable warranties in such projects, the main con [sic] would have to step in to --- to do the work. And if they were to be not financially sound then I presume there would be a problem.

Court: A problem in?

Witness: In getting the --- the rectification done.

That passage and others in the notes of evidence establish beyond doubt what the predominant motive behind the E-mail and the said words was. Hytech therefore has not been able to establish malice on the part of Ms Goh.

Conclusion

54 In the circumstances, Ms Goh is entitled to invoke the defence of qualified privilege. This action must be dismissed. I will, however, hear the parties on costs as the circumstances of the action may require a different order on costs to be made from the usual one.

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