

District Court
New South Wales

Case Name: Chow v Un

Medium Neutral Citation: [2017] NSWDC 254

Hearing Date(s): 15 – 19 May 2017; 7 June 2017

Date of Orders: 15 September 2017

Decision Date: 15 September 2017

Jurisdiction: Civil

Before: Gibson DCJ

Decision: (1) Judgment for the first plaintiff for \$95,000.
(2) Judgment for the second plaintiff for \$65,000.
(3) Costs reserved, with liberty to apply concerning interest and costs.
(4) Exhibits retained for 28 days.

Catchwords: TORT – defamation – extent of publication - pamphlet distributed in the foyer of a building where a Chinese community association meeting was to be held – whether pamphlet distributed indiscriminately to passers-by or only to community association members – whether imputations conveyed – whether imputations defamatory – defences of common law qualified privilege and statutory qualified privilege pursuant to s 30 Defamation Act 2005 (NSW) – damages – aggravated damages – mitigation of damages

Legislation Cited: Defamation Act 2005 (NSW), ss 30, 34 and 35

Cases Cited: Ainsworth v Burden [2005] NSWCA 174
Aktas v Westpac Banking Corp Ltd [2009] NSWCA 9
Al Muderis v Duncan (No 3) [2017] NSWSC 726
Aldridge v John Fairfax & Sons Ltd [1984] 2 NSWLR 544
Archer v Channel Seven Perth Pty Ltd [2002] WASC 160

Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366
Bennette v Cohen [2009] NSWCA 60
Bristow v Adams [2012] NSWCA 166
Chase v News Group Newspapers Ltd [2002] EWCA Civ 1772; [2003] EMLR 11
Coles Myer Ltd v Webster; Coles Myer Ltd v Thompson [2009] NSWCA 299
Cooper v Hobbs [2013] NSWCA 70
Cush v Dillon; Boland v Dillon (2011) 243 CLR 298
Dunsec Pty Ltd v Nationwide News Pty Ltd [2000] NSWCA 155
Enders v Erbas & Associates Pty Limited [2014] NSWCA 70
Evatt v Nationwide News Pty Ltd t/as Cumberland Newspapers [1999] NSWCA 99
Gross v Weston (2007) 69 NSWLR 279
Guise v Kouvelis (1947) 74 CLR 102
Hockey v Fairfax Media Publications Pty Ltd (2015) 332 ALR 257
Jones v Dunkel (1959) 101 CLR 298
Lindholdt v Hyer [2008] NSWCA 264
Mallik v McGeown [2008] NSWCA 230
Marshall v Megna; Megna v Tory; Tory v Megna [2013] NSWCA 30
Marshall v Smith [2013] WASC 452
Maxwell-Smith v Warren [2007] NSWCA 270
McGlen-McLeod v Galloway [2012] NSWCA 368
Milne v Eil [2014] NSWCA 407
Moran v Schwartz Publishing Pty Ltd (No 3) [2015] WASC 215
Otten v Schutt 15 Wis.2d 497, 113 N.W.2d 152 (1962)
Prince v Malouf [2014] NSWCA 12
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460
Ratcliffe v Evans [1892] 2 QB 524
Rigby v John Fairfax Group Pty Ltd (New South Wales Court of Appeal, Kirby P, Priestley and Meagher JJA, 1 February 1996)
Roberts v Bass (2002) 212 CLR 1
Sharma v Shandil [2011] NSWCA 155
Singleton v Ffrench (1986) 5 NSWLR 425
Skalkos v Assaf [2002] NSWCA 14

Sonier v Breau (1912) 41 N.B.R 177
Thornton v Telegraph Media Group Ltd [2011] EWHC 1884 (QB)
Watson v Foxman (1995) 49 NSWLR 315
Zarth v Williamson [2006] NSWCA 246
Zoef v Nationwide News Pty Ltd [2016] NSWCA 283

Texts Cited: New South Wales, Government Gazette, No 56, 26 May 2017, 1782
Professor R. E. Brown, Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), Second Edition (formerly The Law of Defamation in Canada) (Carswell)
R Parkes QC; Professor A Mullis; G Busuttill; A Speker; A Scott; C Strong, Gatley on Libel and Slander (12th ed, 2013, Sweet & Maxwell)

Category: Principal judgment

Parties: First Plaintiff: Sum Chow
Second Plaintiff: Colin Chiu Kwan Chau
Defendant: Chi Keong Un

Representation: Counsel:
Plaintiffs: Mr R Rasmussen
Defendant: Mr M Karam / Mr H Grace

Solicitors:
Plaintiffs: Pancific Legal
Defendant: Rydge Evans Lawyers

File Number(s): 2014/362714

Publication Restriction: None

JUDGMENT

1 The plaintiffs by statement of claim filed on 10 December 2014 bring proceedings for defamation for an article published by the defendant in the Traditional Chinese language. The English translation of this article, which is the matter complained of in these proceedings, is set out at paragraph 3 of this judgment.

Issues for determination

2 The parties identified the issues as follows:

1. **Publication:** did the defendant publish the matter complained of in the manner alleged in the statement of claim?

2. **Imputations:** does the matter complained of bear the imputations pleaded in the statement of claim?

3. **Common law qualified privilege:**

3.1 If published, was the matter complained of published on an occasion of qualified privilege?

3.2 Was there the necessary reciprocity of interest between the information communicated and the interests of the recipients?

3.3 In publishing the matter complained of, was the defendant actuated by malice towards the plaintiff?

4. **Statutory qualified privilege:**

4.1 Did the recipients have an interest or apparent interest in having the information contained in the matter complained of?

4.2 If so, was the matter complained of published to the recipients in furtherance of this interest or apparent interest?

4.3 Was the defendant's conduct reasonable in the circumstances, taking into account the matters in s 30(3) of the Act?

4.4 In publishing the matter complained of, was the defendant actuated by malice towards the plaintiffs?

5. **Damages.**

The text of the matter complained of

3 The text of the matter complained of in traditional Chinese (Exhibit B) is as follows:

	有關部門:
	我的名字叫阮志強Chi Keong Un, 住在 [Street Address] Belmore N.S.W. 2192 我的駕駛證號碼:[Driver's Licence Number]. 我現年78歲, 在澳大利亞這和平, 民主, 自由的社會裡本應是安渡晚年的時候了. 但我看到東莞同鄉會公義堂管理委員會內出現非常嚴重的問題, 所以我要向你們投訴.
	我來到澳洲後即加入了東莞同鄉會公義堂GOON YEE TONG Inc, 祈望得到鄉親之間的守望相助, 當時確有所益, 後因腳痛行走不便, 很少參加公義堂活動, 但投票開除會員的大會我一定參加, 第一次是周森Sum

Chow要開除李學東**Wiley Lee**因未得到**75%**票同意無法得逞,
第二次是陳日坤利用周森**Sum**
Chow非法修改會章後只需超過**50%**票同意在換屆選舉前開除了兩位參加競選
委員的會員, 此是嚴重犯法.現在陳日坤只能是偽會長.

周森**Sum Chow**他在香港曾破產, (聽他舅仔葉吉慶**Raymond Yip**說),
周森移民到悉尼後, 隱瞞此事, 當選公義堂管理委員會委員後長期結黨營私,
當上會長後即盜用公款, 排除異己.
在會員大會或小組會均僱用保安公司人員幫助他們禁止反對他的會員發言,
驅趕反對者離場. 僱用無良律師, 誘騙會員, 將他們的違法行為裁決為合法,
更荒唐的是向會員發律師信, 公義堂委員會**21**個成員中有**20**個是法盲,
全部是周森及陳日坤**Justin Chin**的追隨者.
更可笑是利用會規第**54(1)b**(未經委員會同意向第三者洩露任何保密資料)可停
止和解除委員會成員職務這一條款, 封了全部委員的口,
現在每月的委員會例會的會議記錄, 財政報告均不准向會員洩露,
周森和陳日坤對委員的管治, 更甚過黑社會,
他們不想知道委員會即管理委員會的含意,
他們以為委員會的權力可不受任何約束, 未經會員大會通過,
更沒有成立經會員大會選出的修改會章小組,
竟以委員會名義訂出修改會章細則, 由僱來的無良律師向會員講解,
騙取會員使修改大會通過. 在**2007**年已修改一次, 加入排除異己的條文,
本次修改主要目的是為管理委員會取得更大的權力,
將以往周森及陳日坤所做的違法事情變為合法. 附兩次修改會章通知,
閱後即可明白(附件1). 本年**12月29**日為會員大會投票日, 請有關部門制止,

1. 周森用公義堂**Goon Yee Tong**

Inc積存的**120**萬元再向銀行借**200**萬元由他舅仔葉吉慶一人包辦一切購買物
業的事宜.此物業當時租金回報率為**4%**而銀行供屋利率為**7%**.設有任何理據,
購買前從未提及此事, 更沒有在會員大會上通過. 我壞擬有龐大的利益輸送,

<p>否則他為何要犯會規第30條C的規定, 即超過50,000元的開鑰要由會員大會通過, 而本次修改會章提案中竟提出不受此條款限制.(附件1, 修定第六條).</p>
<p>2. 周森拿政府養老金, 更有長達十年時間在東海酒樓打工不報稅. 此事在陳日坤與阮志強對話錄音中可證實.</p>
<p>3. 周森召開會員大會開除反對他此違法行為的委員李學東Wiley Chan. 因未得75%會員通而能得逞.(此次大會我亦有上臺講話反對).</p>
<p>4. 周森卸任後夥同其追隨者陳日坤逼走繼任會長袁柱深Sum Yuen由陳日坤任會長至現在, 使能繼逐掩蓋他的犯法行為.</p>
<p>5. 周森沒有通過會員大會成立修改會章小組而擅自聘用梁志超律師以管理委員會名義修改了22條會規並騙取會員大會通過, 使陳日坤得以利用超過50%的票數同意即可開除會員的一條會規, 在2012年換屆選舉前開除了兩名資深的參加競舉委員會委員的會員葉聖枝Max Yip和張春榮C.W.L Cheong. 以達到繼續霸佔公義堂管理委員會的目的.</p>
<p>6. 周森指使陳日坤以東莞同鄉會公義堂管理委員會名義封他為終身名譽會長, 此事沒有通過會員大會的同意, 會章更無此終身名譽會長規定.</p>
<p>7. 陳日坤拿了公義堂4萬5千元以個人名義入稟悉尼高等法院(附件2), 狀告會員葉勝枝Max Yip誣謗, 指葉勝枝使他聲譽受損, 導致他的200萬元古董無法賣出而索賠8萬元, 此乃陳日坤公款私用, 在2003年財政報告中明確標明<附件3-2013年公義堂財務報告>並在陳日坤與阮志強對話錄音中, 陳日坤自己證實.(附件4 USB儲存器中錄有陳日坤與阮志強24/04/2013在皇冠酒樓內對話錄音全過程</p>

及經阮志強整理的摘要,此錄音是由陳日坤提出阮志強同意下錄製),請徹查。

8. 2012年中秋節陳日坤縱容打手周照坤Colin

Chau毆打張春榮並指使七名委員去警局報案,誣告張春榮打人且恐嚇張春榮,陳日坤說張春榮犯了七條法,要坐四年監,嚇得張春榮不敢追究,聽說張春榮在Redfern警局有報案,請徹查。

此事已在陳日坤與阮志強對話錄音中自行證實。周照坤原為有精神問題的人,現在仍在接受藥物治療,聽說周照坤曾毆打過自己的父親,其父曾到警局報案要求警局管制其兒行為,請警局核查有無此檔案。現張春榮已處於癡呆狀態實屬由陳日坤引起,請警局追查陳日坤此嚴重犯罪行為。

9. 陳日坤更聘用律師欺騙及恐嚇會員,凡大小會議,

均雇用保安壓制發言者。在去年周年大會不給我發言機會,在通過財務報告的時候,我提出三個問題質問主持人陳澄江Gordon Chen,講到第二條問題時,委員鐘揚輝Yeung Fai Chung即趕我離場,在我堅持講完後,主持人陳澄江不理會我的提問和反對,就宣佈同意者舉手,我看會場大概一百幾十人,只有十幾人舉手就算通過了,沒有宣佈反對者舉手,其實管理委員會的很多開支是不合理更不符合公義堂宗旨的,利用如此荒謬的做法就通過了周年財務報告,這是極端違法行為,以往歷年皆如此。

10. 我與鐘揚輝辨論三次,他無法回答在通過財務大會上不準我發言的理據,他找來陳日坤,我們三人在皇冠酒樓玻璃房內談話,陳日坤將手機放在桌上,說要錄音告我,我說好。錄下大家聽,在長達兩小時的對話中,他未能錄到任何可以告我的內容,反而給我錄下他眾多恐嚇我的講話內容和他親口說出的犯罪事實,陳日坤實屬狂至極請有關部門沏查。

11. 現在我受到周森扶持出來的偽會長陳日坤的恐嚇和威脅,

我時刻處於恐懼和彷徨之中, 為了伸張正義, 我很想找到辦法與他抗衡, 我聘了翻譯希望在本月 15 日的修改會章研討會上向本地土生的公義堂後裔說明我的觀點使能得到多數會員的支持, 但陳日坤在當日的會上多次禁止我發言並動用保安參與驅趕, 更指示幾名委員將我的翻譯人員趕出會場, 為此我已於 12 月 16 日向 Surry Hill 警局報案, 現已該案轉到唐人街警局辦理, 所以懇請你們給我幫助. 因我有與陳日坤長達兩小時的廣東話對話錄音, 並且整理出了陳日坤對我的恐嚇內容。及他自行供認的犯罪事實. 要向貴局投訴, 請務必安排一名能精通廣東話的翻譯人員, 接受我的投訴.

陳日坤在 12 月 29 日必定會用以往的手法強行通過年度財政報告及投票修會章, 請貴局轉達有關部門設法制止其違法行為。

22/12/2013 Chi Keong Un 阮志強

4 The text of the matter complained of, as translated, is as follows:

To the relevant departments,

My name is Chi Keong Un. I live at [Street Address], Belmore, NSW 2192. My driver's licence number is [Driver's Licence Number]. I am 78 years old. I should have enjoyed my sunset years in this peaceful, democratic and free society in Australia, but when I saw the very serious problems that arose in the Management Committee of Goon Yee Tong of Dongguan Association of Fellow Townsman, I therefore have to lodge a complaint with you.

I joined Goon Yee Tong Inc. of Dongguan Association of Fellow Townsman soon after I arrived in Australia, hoping to obtain some support and help from my folks. I benefitted from it at that time. Later on, I seldom got involved in the activities of Goon Yee Tong because it is inconvenient for me to walk due to the pain in my legs. But I would definitely attend the meetings when votes are cast to expel any member. The first time was when Sum Chow intended to expel Hok Dong Lee * (Wiley Lee), but failed

as less than 75% of the votes were in favour of that. The second time was after Yat Kuen Chan * made use of Sum Chow to change the Constitutions of the Association illegally prior to the election for the changeover of the committee. Only more than 50% of the votes for approvals were required to expel the two members who were running for the election to become committee members. This is a serious illegal act, and as such, Yat Kuen Chan * is now an illegitimate President.

(According to his brother-in-law Gut Hing Yip * (Raymond Yip)), Sum Chow has been bankrupted in Hong Kong. Sum Chow concealed this fact after he migrated to Sydney. He engaged in factional activities for personal gains over a long period of time after he became a member of the Management Committee of Goon Yee Tong. When he became the President, he immediately embezzled the public funds and got rid of his dissenters. In both members' meetings and group meetings, he hired security personnel to help to ban dissenters from voicing their opinions and to expel them from meetings. [He] retained an unscrupulous lawyer to deceive the members and make their illegal acts legal. The more ridiculous thing was letters were sent from the lawyer to the members. 20 out of 21 Goon Yee Tong Committee members were ignorant of the law. All of them were followers of Sum Chow and Yat Kuen Chan * (Justin Chin [sic]). The more laughable thing is by making use of clause 54(1)b of the Constitution (to divulge any confidential information to a third party without the consent of the Management Committee), committee members can be suspended or expelled. That has silenced all the Committee members. Now, both the minutes of the monthly regular Committee meetings and the financial reports are not allowed to be divulged to the members. The way Sum Chow and Yat Kuen Chan treat the committee members is worse than that of gangsters. They do not want to know the meaning of the current committee of the Committee [sic]. They think that the power of the Committee can be unfettered. With neither approval from members' meetings nor a Constitution Amendment Team elected by the members' meetings, they even drew up the Constitution Amendment Rules in the name of the

Committee. They retained an unscrupulous lawyer to explain things to the members. They deceived the members to enable the amendments to be passed at the meeting. It was already amended once in 2007. The clause with respect to eliminating dissenters was inserted. The main purpose for the amendment this time was to confer more power on the Management Committee, in order to legalise the illegal things done by Sum Chow and Yat Kuen Chan. Two Constitution Amendment Notices are attached. [You] will understand them after you read them (Attachment 1). 29 December this year is the election day for the Members' Meeting. Could relevant departments please stop the meeting?

1. Sum Chow used the \$1.2 million saved by Goon Yee Tong Inc. to borrow \$2 million from the bank. His brother-in-law Gut Hing Yip * was the one who handled solely all the matters concerning the purchase of the property. The return from the rent collected from this property at that time was 4%. The interest for the mortgage from the bank was 7%. Any justification was provided [sic]#. [He] never mentioned this matter before he purchased it. The purchase has not been approved by the members' meetings. I suspect that he must be getting a great deal of benefit from it. Otherwise, why would he breach clause 30(c) of the Constitution? That regulation stipulates that any expense exceeding \$50,000 must be approved by a members' meeting. However, the current amendment of the Constitution proposes that such action will not be restricted by this clause (Attachment 1, clause 6 amended).

2. Sum Chow receives the Age Pension. He has been working in East Ocean Restaurant for ten years but he has not lodged any tax return. This matter can be verified in the recorded conversation between Yat Kuen Chan and Chi Keong Un.

3. Sum Chow convened a members' meeting to expel the Committee member Hok Dong Lee * (Wiley Chan [sic]) who opposed this illegal action of his. But the attempt failed as less than 75% of the members voted in favour of this. (I also went onto the stage and spoke against it.)

4. After retiring from the office, Sum Chow together with his follower Yat Kuen Chan forced out the incoming President Chu Sum Yuen *. Yat Kuen Chan has been the President until now so that he can continue to cover up his illegal action.

5. Sum Chow did not seek approval from a members' meeting to establish a Constitution Amendment Team. But rather, he took it upon himself to retain a lawyer called Chi Chiu Leung to amend 22 clauses of the Constitution in the name of the Management Committee and he also deceived the members' meeting into passing them. This enable Yat Kuen Chan to expel a member with over 50% of the approval votes. In 2012 prior to the changeover election, he expelled two distinguished members who joined the Election Committee – Sing Ji Yip * (Max Yip) and Chun Wing Cheong (C W L Cheong) so that he can continue to usurp the Management Committee of the Goon Yee Tong.

6. Sum Chow directed Yat Kuen Chan to confer upon him the title of Life Honorary President in the name of the Management Committee of Goon Yee Tong of Dongguan Association of Fellow Townsmen. This matter has not been approved by a members' meeting. There is no provision for a Life Honorary President in the Constitution either.

7. Yat Kuen Chan took \$45,000 that belongs to Goon Yee Tong to commence his proceedings against Sing Ji Yip * (Max Yip) in the Sydney Supreme Court for defamation (Attachment 2), claiming that Sing Ji Yip * has ruined his reputation, making it impossible for him to sell his antiques which are worth \$2 million, and he was claiming damages of \$80,000. Yat Kuen Chan embezzled public funds for his personal purposes. The expense was clearly stated in the 2003 Financial Report (Attachment 3 – Financial Report for Goon Yee Tong 2013) and was also verified by the recorded conversation between Yat Kuen Chan and Chi Keong Un. Yat Kuen Chan himself has verified that. (Attachment 4 The USB saving device contains the entire conversation between Yat Kuen Chan and Chi Keong Un on 24/4/2013 at Emperor's Garden Restaurant as well as a summary sorted

out [sic] by Chi Keong Un. This recording was proposed by Yat Kuen Chan * and consented by Chi Keong Un). Please check.

8. During the Moon Festival in 2012, Yat Kuen Chan connived with his hatchet man Chiu Kuen [sic – Kwan] Chau * (Colin Chau) to assault Chun Wing Cheong * and directed seven committee members to report the incident to the police station. He brought false accusation against Chun Wing Cheong * for assaulting someone and he threatened Chun Wing Cheong *. Yat Kuen Chan * said that Chun Wing Cheong * had committed seven offences and that he would have to serve four years of imprisonment. Chun Wing Cheong * was so freaked out that he dared not pursue the matter. [I] heard that Chun Wing Cheong * has reported the case to the Redfern Police Station. Please check. This matter has been verified in the recorded conversation between Yat Kuen Chan * and Chi Keong Un. Chiu Kuen [sic – Kwan] Chau * has mental issues. He is still receiving treatment by medications. [I] heard that Chiu Kuen [sic – Kwan] Chau has assaulted his own father who reported the matter to a police station and has asked the police to restrain his son's behaviour. Could the police station please check whether there is such a file on this? Chun Wing Cheong is now in a demented state which was actually caused by Yat Kuen Chan. Could the police station please investigate this serious offence committed by Yat Kuen Chan?

9. Yat Kuen Chan has also retained a lawyer to deceive and intimidate the members. He hires security personnel to suppress the speakers at both big and small meetings. I wasn't given the opportunity to speak during the annual meeting last year. When the financial report was pursued, I put three questions to the chairperson Chengjiang Chen ** (Gordon Chen). When I asked the second question, the committee member Yeung Fai Chung immediately expelled me from the venue. After I insisted on finishing what I was going to say, the chairperson Chengjiang Chen ** ignored my questions and objection. He then asked those who agreed to raise their hands. I saw approximately more than 100 people at the meeting. Only more than 10 people raised their hands and it was passed. Dissenters were

not asked to raise their hands. In fact, a lot of the expenses incurred by the Management Committee were unreasonable and inconsistent with the goals of Goon Yee Tong. [He] made use of such an absurd method to get the annual financial reports passed. This is an extremely illegal action. It was like that every year in the past.

10. I argued with Yeung Fai Chung three times. He couldn't give me the reason why I was not allowed to speak at the meeting when the financial report was passed. He came with Yat Kuen Chen [sic]. The three of us had a talk in the glass room of the Emperor's Garden Restaurant. Yat Kuen Chan * put his mobile phone on the table, saying that he would record our conversation and sue me. I said, "Fine, so that everyone can hear what you said." During the two-hour conversation, he could not record anything that could be used to sue me. On the contrary, it recorded many of his threats towards me and he gave the facts of his illegal acts from his own mouth. Yat Kuen Chan * is indeed extremely crazy. Could relevant departments please investigate that?

11. I am now intimidated and threatened by the illegitimate President Yat Kuen Chan who has the support of Sum Chow. I am always living in fear and uneasiness. In order to uphold justice, I really want to find a way to counteract him. I hired an interpreter hoping that during the discussion meeting on the amendment of the Constitution on the 15th of this month I can explain my opinions to the young members of Goon Yee Tong who were locally born so that I can obtain the support from the majority of the members. But during the meeting on that day Yat Kuen Chan banned me from speaking many times and he directed security officers to expel [me]. He also directed several committee members to expel my interpreter out of the meeting venue. I have reported the matter to the Surry Hills Police Station on 16 December. That matter has been now transferred to the Chinatown Police Station for them to deal with it. Therefore, I earnestly hope that you would help me as I have a record of a two-hour conversation between Yat Kuen Chan and me in Cantonese. It sorted out [sic] Yat Kuen Chan's threat towards me and the facts of the offence that he himself has

admitted to. I would like to lodge a complaint with your station. Please arrange a Cantonese interpreter to accept my complaint.

On 29 December Yat Kuen Chan will surely use his usual method to forcefully pass the annual financial report and cast votes to amend the Constitution. Please inform the relevant departments to stop his illegal actions.

22/12/2013 Chi Keong Un

[Translator's Notes:

* These names have been transliterated according to the Cantonese way.

** These names have been transliterated according to the Mandarin way.]

The imputations

5 The imputations pleaded to arise from the matter complained of are as follows (paragraph 2 of the statement of claim):

- (a) The first plaintiff is a bankrupt in Hong Kong (paragraph 4 of the matter complained of);
- (b) The first plaintiff concealed his bankruptcy from the department of immigration (paragraphs 1, 4 and 16 of the matter complained of);
- (c) The first plaintiff concealed his bankruptcy from the members of Goon Yee Tong after he migrated to Sydney (paragraph 4 of the matter complained of);
- (d) The first plaintiff engaged in factional activities for personal gain over a long period of time after he became a member of the Management Committee of Goon Yee Tong (paragraph 4 of the matter complained of);
- (e) The first plaintiff, whilst he was President of Goon Yee Tong, embezzled public funds (paragraphs 1, 4 and 16 of the matter complained of);
- (f) The first plaintiff hired a lawyer who he knew to be unscrupulous in order to deceive the members of Goon Yee Tong and make his illegal acts legal (paragraph 4 of the matter complained of);
- (g) The first plaintiff committed illegal acts (paragraphs 1, 4, 5, 7, 12 and 16 of the matter complained of);

- (h) The first plaintiff treats the committee members worse than gangsters (paragraph 4 of the matter complained of);
- (i) The first plaintiff has been working in the East Ocean Restaurant for 10 years and has not lodged any Tax Returns in Australia in that period (paragraph 6 of the matter complained of);
- (j) The second plaintiff is a hatchet man for Yat Kuen Chen [sic] (paragraph 12 of the matter complained of);
- (k) The second plaintiff connived with Yat Kuen Chen [sic] to assault Chun Wing Cheong (paragraph 12 of the matter complained of);
- (l) The second plaintiff has mental issues for which he receives treatment by medication (paragraph 12 of the matter complained of);
- (m) The second plaintiff has assaulted his own father (paragraph 12 of the matter complained of).

6 I note that the matter complained of refers to a Mr “Yat Kuen Chan” whilst the imputations pleaded (imputations (j) and (k)) refer to a Mr “Yat Kuen Chen”. As the parties did not raise any objections nor made submissions as to this inconsistency, I propose to disregard it. I prefer to adhere to the spelling in the matter complained of (i.e. “Yat Kuen Chan”) throughout this judgment, as this is in fact the spelling as documented in other evidence in the trial.

The relevant features of the matter complained of

7 The ostensible purpose of publication – which counsel for the defendant submits is a letter to “responsible authorities” – is agreed by the parties to be important to a series of issues, namely defamatory meaning and whether the publication is made on an occasion of privilege. I am here concerned only with the impact of these features upon defamatory meaning. As is noted at paragraph 53 of the defendant’s submissions, it is helpful to look at the format, layout and content of the matter complained of when determining whether each of the imputations is conveyed.

8 The manner of presentation of a publication, including headlines and opening words, play a role in determining the meaning (*Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283 at [155] – [159]). Relevant setting-out features to note are:

- (a) The publication is not addressed to the members of the association, but “the Relevant Departments” (which, upon reading the publication, appear to include the Chinatown police and the Department of Fair Trading);

(b) The date of the publication (22 December 2013), which is the week before the 29 December 2013 meeting.

- 9 These features, and the request at the end of the matter complained of for these “relevant departments” to follow up on the defendant’s complaints and to stop the 29 December 2013 meeting from going ahead, create the impression that this is a document which has already commenced a process of some kind, a copy of which is being provided after these events.
- 10 The contents consist of a catalogue of complaints regarding the conduct of the plaintiffs, allegedly as officers of the Association but in fact on a far wider basis (such as bankruptcy in Hong Kong and assaulting a parent) to which the defendant seeks to draw attention. The publication concludes with the statement that the defendant “would like to lodge a complaint with your station” and the request “please inform the relevant departments to stop [the first plaintiff’s] illegal actions.” (paragraph 16).
- 11 As to whether the language is that of inquiry, investigation or allegation of guilt, the following passages of the matter complained of are relevant:
- (1) The first paragraph concludes with the statement: “... when I saw the very serious problems that arose in the Management Committee of Goon Yee Tong of Dongguan Association of Fellow Townsfolk, I therefore have to lodge a complaint with you” (paragraph 2). This is not the language of inquiry but of accusation of wrongdoing.
 - (2) Repeated requests to stop the meeting: “Could relevant departments please stop the meeting” (paragraph 4); “please inform the relevant departments to stop [the first plaintiff’s] illegal actions.” (paragraph 16). This creates a sense of urgency that wrongful (or even criminal) activities must be stopped immediately.
 - (3) The language is that of direct accusation, such as “immediately embezzled the public funds” (paragraph 4).
 - (4) However, not all the allegations are stated categorically; the defendant submits that all the relevant departments are asked to do is to “check”. There are three references to checking in the publication, namely:
 - (a) “Please check” (paragraph 11);
 - (b) “I heard that Chun Wing Cheong has reported the case to the Redfern Police Station. Please check” (paragraph 12); and
 - (c) “Could the police station please check whether there is such a file on this” (paragraph 12);

However, the word “check” is followed in each case by an indication of where the evidence may be found to support what is being alleged. This is not the language of inquiry but of prosecution.

- (5) The defendant also points to the references to “investigate”:
- (a) “Could the police station please investigate this serious offence committed by Yat Kuen Chan?” (paragraph 12); and
 - (b) “Could relevant departments please investigate that?” (paragraph 14)

Again, the “relevant authorities” are being asked to check the evidence in circumstances where there is no doubt expressed as to their having been committed.

- (6) The defendant also draws my attention to a reference, apparently in relation to all the allegations, to a need for help: “... I earnestly hope that you would help me ...” (paragraph 15). However, this is put in the context of the defendants “living in fear and uneasiness” of the plaintiffs and of having sought police help.
- (7) The defendant clearly wants the police to deal with complaints. He says: “I would like to lodge a complaint with your station. Please arrange a Cantonese interpreter to accept my complaint” (paragraph 15).
- (8) As to the subject matter of these requests for the “relevant departments” to act, the publication is replete with references to the Goon Yee Tong and its solicitor, as well as the plaintiffs, behaving in an “illegal” fashion. Words like “unlawful” and “illegal” appear throughout:
- (a) “illegally prior to the election”; “serious illegal act”; “illegitimate President” (paragraph 3);
 - (b) “illegal acts”; “legalise their unlawful activities and resolutions”; “legalise the illegal things done by Sum Chow and Yat Kuen Chan” (paragraph 4);
 - (c) “opposed this illegal action of his” (paragraph 7, defendant’s point number 3);
 - (d) “cover up his illegal action” (paragraph 8, defendant’s point number 4);
 - (e) “serious offence” (paragraph 12, defendant’s point number 8);
 - (f) “this is an extremely illegal action” (paragraph 13, defendant’s point number 9);
 - (g) “he gave the facts of his illegal acts from his own mouth” (paragraph 14, defendant’s point number 10);
 - (h) “Please inform the relevant departments to stop his illegal actions” (paragraph 16);

- (9) Not only the plaintiffs but also other members of the Goon Yee Tong are accused of a series of finance-related crimes such as embezzlement (Sum Chow in paragraph 4; Yat Kuen (Justin) Chan in paragraph 11) and making personal gains (paragraphs 4 and 5). These extend well beyond Goon Yee Tong in the case of the plaintiffs, who are also accused of concealing bankruptcy in Hong Kong (the first plaintiff) and assault of a parent (the second plaintiff). In a very general sense, however, the allegations about the first plaintiff may be described as a range of claims of financial dishonesty and standover tactics, while the second plaintiff is accused of violence-related activity as the first plaintiff's "hatchet man".

The relevant principles of law

- 12 The principles to be applied during a trial in the determination of capacity and defamatory meaning of imputations are well settled, having been stated in numerous decisions of the High Court (most recently *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460), Federal Court (most recently *Hockey v Fairfax Media Publications Pty Ltd* (2015) 332 ALR 257) and the New South Wales Court of Appeal (most recently in *Milne v Ell* [2014] NSWCA 407). It is important not to conflate those principles with the more generous threshold test given to the capacity of imputations to arise: *Dunsec Pty Ltd v Nationwide News Pty Ltd* [2000] NSWCA 155 at [16] per Mason P. However, the same basic principles apply.
- 13 In particular, in relation to this case, as Mason P noted in *Dunsec Pty Ltd v Nationwide News Pty Ltd* at [18] (citing Kirby P in *Rigby v John Fairfax Group Pty Ltd* (New South Wales Court of Appeal, Kirby P, Priestley and Meagher JJA, 1 February 1996)):
- "The more melodrama and sensation, or prejudicial comment, in a news report, the more ready will the Court be to permit the plaintiff an imputation of guilt".
- 14 This decision is also of relevance in that it delineates between the test for imputations at a threshold level and at a trial, as well as explaining the judge's function in determining these issues at the trial. As it happens, the defendant never sought any rulings on the form or capacity of the imputations prior to the trial.
- 15 The principal submission of the defendant was that the imputations pleaded could not arise as all that was conveyed was an imputation of suspicion rather than actual wrongdoing. The defendant relied upon the categorisation of

imputations as “Chase imputations” (*Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772; [2003] EMLR 11 (“Chase”) at [45]) as to whether outright guilt or suspicion was conveyed (see R Parkes QC; Professor A Mullis; G Busuttil; A Speker; A Scott; C Strong, *Gatley on Libel and Slander* (12th ed, 2013, Sweet & Maxwell) (“Gatley”) at [11.13]). The defendant also challenged the defamatory meaning and the form of certain of the imputations.

The imputations

16 I set out each of the imputations, the defendant’s arguments, and my reasons for my findings.

Imputation 2(a): The first plaintiff is a bankrupt in Hong Kong

17 The relevant portions of the matter complained of are:

“(According to his brother-in-law Gut Hing Yip (Raymond Yip)) [sic], Sum Chow has been bankrupted in Hong Kong. Sum Chow concealed this fact after he migrated to Sydney.” (paragraph 4 of the matter complained of).

18 The defendant’s submission is that this is pitched at a level of suspicion only, in that it is expressly based on information received from the first plaintiff’s brother-in-law, and also that the bankruptcy is an event in the first plaintiff’s past, and thus not capable as a statement of his current status.

19 When viewed in context, the reference to the first plaintiff’s brother-in-law is not given as the passing on of allegations of a third party requiring investigation, but as a guarantee of the reliability of the information. Part of the reason for this is that the first plaintiff’s brother-in-law is mentioned again at paragraph 5 (“His brother-in-law Gut Hing Yip”) as one of the first plaintiff’s partners in crime in another illegal transaction involving misuse of the association’s funds. The strong language and general accusatory tone of the matter complained of both underline this impression. The ordinary reasonable reader, standing in the shoes of an association member, would infer that, if anyone knew the truth about the first plaintiff’s financial circumstances, it would be the first plaintiff’s brother-in-law.

20 The term “has been bankrupted” has been accepted as a correct translation and the use of the phrase “has been” must connote that this is still his status in Hong Kong.

21 This imputation is conveyed and is defamatory.

Imputation 2(b): The first plaintiff concealed his bankruptcy from the Department of Immigration; and

Imputation 2(c): The first plaintiff concealed his bankruptcy from the members of Goon Yee Tong after he migrated to Sydney

22 The plaintiff abandoned the imputation 2(b) at the end of the trial. The question is whether imputation 2(c) is conveyed by the words “Sum Chow concealed this fact [being bankrupt in Hong Kong] after he migrated to Sydney”, which is then followed by a long list of the first plaintiff’s financial crimes.

23 This imputation is stated in categorical terms and in the context of the plaintiff’s financial dishonesty in the course of his dealings with the association. The concealing of such information is acknowledged to be defamatory.

24 This imputation is conveyed and defamatory.

Imputation 2(d): The first plaintiff engaged in factional activities for personal gain over a long period of time after he became a member of the management committee of GYT

25 The defendant accepts that this imputation is conveyed by the matter but submits that this is not capable of being defamatory.

26 Imputations that a plaintiff takes advantage of a responsible position to engage in activities for personal gain are common in defamation actions (for a recent example, *Marshall v Smith* [2013] WASC 452; the classic example would be *Singleton v Ffrench* (1986) 5 NSWLR 425) where the allegation was of breach of trust for such activities.

27 The concept of creating factional issues so that the first plaintiff could personally profit from his position on the management committee would be viewed by the ordinary reasonable reader as conduct of a reprehensible kind.

28 This imputation is defamatory.

Imputation 2(e): The first plaintiff, whilst he was President of GYT, embezzled public funds

29 The defendant argues that “public funds” denotes money that is generated by the government to provide goods and services to the general public. Despite

the wording of the matter complained of, it is submitted that the ordinary reasonable reader would not have understood the matter complained of as referring to funds to be provided to the public at large and the imputation is not conveyed.

30 This is a specious objection. It is clear from the matter complained of that this is referring to funds of the association donated by its members.

31 The defendant's alternative answer is that, if the reference to "public funds" means the funds of the association, this is merely an allegation at *Chase* level 2 or 3, namely that there are grounds for suspicion or investigation regarding the matter, and the imputation is not conveyed.

32 The first plaintiff is accused of having "immediately embezzled public funds and got rid of dissenters" once he became president, and much of the rest of the matter complained of is a description of these activities. The fact that the "relevant authorities" are asked to investigate is not because there is any doubt about these offences but because the degree of criminality of this "worse than gangsters" person should lead to his prosecution. To the ordinary reasonable reader, given the tenor of this publication as a whole, this is the language of guilt, not suspicion.

33 This imputation is conveyed and defamatory.

Imputation 2(f): The first plaintiff hired a lawyer who he knew to be unscrupulous in order to deceive the members of GYT and make his illegal acts legal

34 The defendant submits that this is a *Chase* level 2 or 3 imputation and that "illegal acts" refers only to activities not authorised by the Association's Constitution and merely ultra vires conduct, as opposed to criminal conduct.

35 Nothing could be clearer, from the matter complained of, than that the first plaintiff was engaged in criminal activities including embezzling and using standover tactics. The language is of guilt, not suspicion.

36 This imputation is conveyed and defamatory.

Imputation 2(g): The first plaintiff committed illegal acts

37 The defendant raised the same objections to this imputation as to imputation 2(f).

38 This is an unsatisfactorily worded imputation, but nevertheless manages to capture the “condition” of the previous imputation, namely hiring an equally dishonest lawyer to help the first plaintiff cover up his illegal acts.

39 This imputation is conveyed and defamatory.

Imputation 2(h): The first plaintiff treats the committee members worse than gangsters

40 The defendant submits that a reasonable reader in the shoes of a member of Goon Yee Tong would not take this literally and that, despite it reflecting the words in the matter complained of, the imputation is “vague and imprecise” and thus not defamatory. This conflates the test for capacity at a threshold level with findings at trial.

41 To compare a person unfavourably with gangsters, who notoriously use violence of the worst kind, is an imputation with clear defamatory meaning. This imputation is conveyed and defamatory.

Imputation 2(i): The first plaintiff has been working in the East Ocean Restaurant for ten years and has not lodged any tax returns in Australia in that period.

42 The defendant submits that, when the matter is read as a whole, for the reasons outlined in paragraphs 48 to 54 of the defendant’s submissions, and in relation to imputation 2(a), this is an allegation at *Chase* level 2 or 3, namely that there are grounds for suspicion or investigation regarding the matter.

43 This allegation is made in categorical terms. There is not even a suggestion of any need for investigation; there is just a statement about where to find the evidence.

44 This imputations is conveyed and is defamatory.

Imputation 2(j): The second plaintiff is a hatchet man for Yat Kuen Chan

45 The defendant appears to concede that this imputation is conveyed, but submits that a reasonable reader in the shoes of a member of Goon Yee Tong

would not take this literally and that “the imputation is vague and imprecise” (for unspecified reasons).

- 46 To call a person a “hatchet man” in the context of this publication, where the second plaintiff is asserted to have assaulted a man and caused serious injury, is gravely defamatory. There can be no doubt that such an imputation is conveyed.

Imputation 2(k): The second plaintiff connived with Yat Kuen Chan to assault Chun Wing Cheong

- 47 This is the “act” which corresponds with the imputation of “condition” which is set out in imputation 2(j).

- 48 The defendant submits that, when the matter is read as a whole, this is an allegation at *Chase* level 2 or 3, namely that there are grounds for suspicion or investigation regarding the matter. This is asserted to be because the matter complained of goes on to say: “I heard that Chun Wing Cheong has reported the case to the Redfern Police Station. Please check.”

- 49 However, this is a directive as to where to find the evidence, not a statement to the effect that the assault should be investigated.

- 50 This imputation is conveyed and defamatory.

Imputation 2(l): The second plaintiff has mental issues for which he receives treatment by medication

- 51 The defendant submits that this is an allegation at *Chase* level 2 or 3, namely that there are grounds for suspicion or investigation regarding the matter. That cannot be so. This is stated as a categorical truth and illustrated not only by the second plaintiff assaulting his own father but also Chun Wing Cheong and causing the defendant himself to be “always living in fear and uneasiness” (paragraph 11 of the defendant’s numbered paragraphs). The picture is painted, for the ordinary reasonable reader, of a dangerous and violent mentally ill person.

- 52 The defendant also submits that the imputation, if conveyed, is not defamatory, drawing my attention to the discussion in *Mallik v McGeown* [2008] NSWCA

230 at [82] – [87] as to whether an imputation as to mental illness was defamatory.

- 53 That cannot be the case here. The second plaintiff is portrayed as a dangerous and mentally ill person. In the context of the allegations of violent behaviour of the kind described and of his role as “hatchet man”, this is clearly defamatory.

Imputation 2(m): The second plaintiff has assaulted his own father

- 54 The relevant passage from paragraph 12 of the matter complained of is as follows:

“I heard that Chiu Kuen [sic – Kwan] Chau has assaulted his own father who reported the matter to a police station and has asked the police to restrain his son’s behaviour. Could the police please check whether there is a file on this.”

- 55 It is submitted that, in the context of the matter as a whole, as well as the specific passage quoted, this is an allegation at *Chase* level 2 or 3, namely that there are grounds for suspicion or investigation regarding the matter.

- 56 However, all the defendant is doing here is asking the police to check to find the evidence of guilt. He is not setting out the issues for investigation. In the context of the second plaintiff being described as a violent person who has assaulted others, the imputation conveyed is one of guilt. There was no challenge to defamatory meaning for this imputation if what is conveyed is the imputation as pleaded.

Findings as to imputations

- 57 All imputations except for imputation 2(c) (which was withdrawn) are conveyed and defamatory.

Publication – the evidence and the issues

- 58 The evidence is as follows:

- (a) The parties’ description of the foyer area where publication is alleged to have occurred;
- (b) The evidence of the plaintiffs’ witnesses as set out below, with particular regard to the publications about which they were cross-examined;
- (c) The defendant’s evidence as to publication and his admissions (as set out above), including any inference to be drawn from his

failure to call the two persons who assisted him to arrive at the Marigold Restaurant and accompanied him into the meeting;

- (d) Contemporaneous documents and pleadings relied on by each of the parties. These include:
 - (i) The letter from the plaintiffs' solicitor to the defendant dated 21 January 2014;
 - (ii) The draft apology attached to that letter;
 - (iii) The contents of the Goon Yee Tong Newsletter dated 8 October 2014, referring to what occurred on 29 December 2013;
 - (iv) The contents of the pleadings, including particularisation referring to the foyer in the Reply, as well as the description of publication in the statement of claim and the defendant's answers to interrogatories.

59 The plaintiffs' case is that the defendant published the matter complained of as follows:

- (a) On 29 December 2013, the defendant stood near the lifts on the ground floor of the building located at 693 George Street, Sydney, handing copies indiscriminately to persons in the building foyer of the low-storey shopping centre and restaurant venue where the meeting was to be held, whether they were members of the Goon Yee Tong or not, including persons using the lift to go to the Marigold Restaurant. This is the case pleaded in relation to the publication of the matter complained of in the statement of claim and, in the Reply, as to publication in excess of the occasion.
- (b) Some time after 29 December 2013, the defendant also gave copies to the Chinatown police and the Department of Fair Trading. This came to the plaintiffs' attention after the plaintiff made statements to this effect in the first defence (after expiry of the limitation period). This is not relied upon as to publication; its significance is that the defendant denied publication to anyone other than the first plaintiff.
- (c) Some time after 29 December 2013, the defendant gave copies of the matter complained of to his cronies at the Chinese restaurant in Hurstville. This came to the plaintiffs' attention only after the defendant volunteered this information in cross-examination. It is relied upon in relation to the defence of qualified privilege but not as to publication.

60 Before considering the evidence of the plaintiffs' witnesses, it is necessary to set out the defendant's evidence, much of which is conflicting.

The defendant's evidence concerning publication

61 The defendant's description of his activities on the day in question starts with his description of how he arrived at the Annual General Meeting. As the defendant notes in the matter complained of, he has restricted mobility. He described how he went to the home of another member and was accompanied to the Marigold Restaurant:

"Q. Please explain to her Honour how you got to the AGM from your home that morning.

A. INTERPRETER: At first I go to the home of another member and then that member accompanied me to go to Marigold. First I took the train, then I used my scooter.

Q. What did you take with you?

A. INTERPRETER: I took these documents. I took a carton box, and I taped on three sides of the carton, three notices, identical." (T 327)

62 The defendant went on to explain who was accompanying him at T 329-330:

"Q. How did you move between the entry to the building and the lift?

A. INTERPRETER: I used my scooter.

Q. Who were you with?

INTERPRETER: Who are you with?

Q. Who were you with at the time, if anyone?

A. INTERPRETER: Rose, one person called Rose and another one is Lee Heung Wing.

Q. Roast?

A. INTERPRETER: Rose.

A. WITNESS: Rose.

A. INTERPRETER: R-O-S-E. Rose, Rose. Yip Lai Wah, Y-I-P, L-A-I, W-A-H, female.

Q. Who was the other?

A. INTERPRETER: Lee Heung Wing. L-E-E, H-E-U-N-G, W-I-N-G.

Q. Are they members?

A. INTERPRETER: Yes."

63 The defendant's case was that when he arrived with these two persons, he went straight up in the lift because he had arrived late and the meeting had already started:

“Q. Can you please describe for the Court what you did when you arrived at the bottom floor of the Marigold, or at least, the building where the Marigold Restaurant is, on the day in question?

A. INTERPRETER: When I arrived I quickly got into the lift and then I went to the opposite side facing the table of the executive committee.

Q. No before, if you could look please at the photograph of the foyer, do you recognise that there's a sign saying City Mart in the middle?

A. INTERPRETER: Yes.

Q. How did you get from the outside of that building to the lift?

A. INTERPRETER: I entered via George Street.

Q. How many people approximately were there when you went to the lifts?

A. INTERPRETER: Not many people.

Q. Did you do anything on the way to the lift?

A. INTERPRETER: I was in a hurry to get into the lift because I was running late.” (T 329)

64 He then described how he took only one copy with him to the Annual General Meeting and gave it to the first plaintiff (T 331). He did not give it to the second plaintiff at all.

65 According to the defendant’s written submissions, the defendant denies publication other than to the first plaintiff at the meeting on 29 December 2013, when he gave him a copy of the matter complained of after the meeting had commenced (T 325 – 327). That was the response the defendant gave in his answers to interrogatory 1(vii), where he claimed that only two copies of the matter complained of were printed, one of which was given to the first plaintiff (Exhibit F). This is the basis of the defendant’s claim that there was never any publication to a third party at all (although publication to one of the plaintiffs about the other plaintiff would nevertheless constitute actionable publication: *Zarth v Williamson* [2006] NSWCA 246).

66 The result was a confusing and contradictory series of admissions and denials by the defendant about the extent of publication, such as the following (T 369):

“Q. You wanted all of the members of Goon Yee Tong to know all about the terrible things that Chow Sum had been doing.

A. INTERPRETER: At first, no, but afterwards, yes.

Q. You wanted them all to know when you went to the meeting on 29 December that he was a bankrupt.

A. INTERPRETER: I want him to know all the contents of my letter.

Q. Yes, that's right, you did. You wanted them to know everything, including that he was a bankrupt, or that you said he was a bankrupt.

A. INTERPRETER: No. I - I hope all the matters will be handled by the relevant authorities and treat the matters in a good way.

Q. You were so concerned that the members should know about these things, you made many, many copies of exhibit B, didn't you?

A. INTERPRETER: No, only one."

67 This evidence and the defendant's answer to interrogatory 1 are untrue and, as is set out below, must be untrue to his knowledge, in that:

- (a) It is clear from the text of the matter complained of that it has been published to others: the matter complained of is addressed "to the relevant departments" in line one and in the fourth paragraph "the relevant departments" are asked to stop the proposed meeting.
- (b) The defendant made admissions in the course of his evidence to having made other publications of the matter complained of, which included giving a copy to the Department of Fair Trading and to the police (T 373) as well as to friends he had yum cha with (T 374).
- (c) Evidence was given for the plaintiffs by a series of members of the Goon Yee Tong that when they went to the elevator which would take them to the meeting, the defendant was handing copies of the matter complained of to the people getting into the lift, not merely to Goon Yee Tong members. This included persons who remained in the lift to travel to the floor above, where there was a yum cha restaurant. Although some witnesses were challenged as to what document they were given in the foyer, this evidence were not challenged.

68 As noted above, the only basis upon which evidence of publication by members of Goon Yee Tong was challenged was that the defendant had been handing out another document entirely (Exhibit 6, a document dated 5 June, 22 and 30 August and 8 September 2013).

69 The defendant's evidence about this other document was as follows:

"Q. How many copies of this document do you say you took with you to the AGM, that exhibit 6?

A. INTERPRETER: Between 20 and 30 copies.

Q. Why did you want to give members copies of those letters?

A. INTERPRETER: Because I want the other members to know what has happened.

Q. Why were they printed in English and Chinese?

A. INTERPRETER: Because some members do not understand Chinese”

70 However, the defendant first gave evidence at T 330 (note that Exhibit 6 was inadvertently referred to as Exhibit 5 and that this was corrected by counsel) that he had just put Exhibit 6 on “my table” (or alternatively on top of some boxes he brought) after he went inside to the meeting, as he had arrived after the meeting had started:

“INTERPRETER: This one. I - I put the pile of documents on the table so that whoever want to get a copy can pick up a copy.

KARAM

Q. How many tables did you put them on?

A. INTERPRETER: At my table, when there's a empty space I put it there.

Q. On your own table or on other tables?

A. INTERPRETER: Maybe on top of some of the small boxes that I brought with me.” (T 330)

71 As Mr Rasmussen noted, it was never put to the plaintiffs’ witnesses that they were given Exhibit 6 upstairs at the meeting (T 338).

72 Another problem occurred when the defendant volunteered that he had had an argument with the first plaintiff and the committee lawyer about these issues, and had given the first plaintiff a week to respond to his allegations, or he would complain to the Department of Fair Trading.

73 None of these matters had been particularised; they came as “news” to counsel for the defendant (T 335) and parts of the evidence concerning the alleged argument with the committee lawyer were withdrawn (T 336).

74 However, in cross-examination, the defendant admitted that he had not handed out Exhibit 6 at all, even in the meeting, and claimed the only document he had handed out was the one copy of Exhibit B:

“Q. You stood out in front of the lifts with the copies of exhibit B and you handed them to every person that you saw coming into the lifts, yes or no?

A. INTERPRETER: No, I've already said no.

Q. You handed those documents to whomever you saw who looked like they might be Chinese, yes?

A. INTERPRETER: I don't have that many copies.

Q. This was a busy shopping centre with lots of people going--

A. INTERPRETER: By the time I got there, there were very few people at the lobby.

Q. There were lots of people going upstairs to have yum cha at the restaurant, weren't there?

A. INTERPRETER: By the time I arrive, there were not that many people.

Q. You heard your barrister suggest to some of those witnesses that you were in fact handing out a different document, didn't you?

A. INTERPRETER: Yes.

Q. Did you tell him that was wrong?

A. INTERPRETER: It's not wrong, it's not wrong. Not - not exhibit B.

Q. Did you tell him it was wrong that you were handing out some other document when you were standing in front of the lifts?

A. INTERPRETER: Who ask me?

[Objection: legal professional privilege]

Q. Did you tell your barrister--

A. INTERPRETER: What?

Q. Did you tell your barrister, when he asked those questions of the witnesses, that it was wrong to suggest that you'd been handing something out--

A. INTERPRETER: What is not right?

Q. You say, don't you, that you gave exhibit B to Sum Chow at the meeting, that's what you're telling us, isn't it?

A. INTERPRETER: Yes.

Q. And that that was the only copy that you made of exhibit B, is that right or wrong?

A. INTERPRETER: Yes, yes, only one copy.

Q. What you're saying is that you threatened him that if he didn't make a comment to you about that letter, you would report it to the proper authorities, is that what you said to him?" (T 369 – 372)

- 75 The defendant's written submissions as to publication do not refer to Exhibit 6 at all. Instead I am invited to reject the evidence of the plaintiffs and all their witnesses because of their collective "fallibility of memory" (written submissions, paragraph 24), partiality (paragraphs 29 – 31) and/or on the basis that the evidence was "rife with inconsistencies" (paragraph 32).
- 76 Counsel for the plaintiffs submits that the circumstances in which the plaintiffs' witnesses were cross-examined about Exhibit 6 (and not the matter complained of) being given to them, where at least one totally different account

of events is given by the defendant in the witness box, is such that I would have no hesitation in rejecting the defendant's evidence.

The foyer

77 The meeting took place on a weekend at lunchtime (T 20) on one level of the Marigold Restaurant, a very large Cantonese restaurant at 693 George Street in the centre of Sydney's Chinatown, which specialises in yum cha for lunch and was open for business as the members arrived. The photographs show other shops and businesses in the mall as well.

78 The second plaintiff described the number of persons in the area as follows:

“Q. In your estimation of the number of persons roughly who might've been present was it a busy restaurant on a Sunday or not a busy restaurant?

A. INTERPRETER: It was very busy.

Q. The place at George Street where the restaurant is, is it on a single level or is the restaurant up above?

A. INTERPRETER: We had our meeting on level two and upstairs was the yum cha place.

Q. Do you know how many levels, that is, how many floors the restaurant has?

A. INTERPRETER: Two levels.

Q. And the Goon Yee Tong meeting was on one of those levels, is that right?

A. Yes.

Q. On 29 December when you went there was the other level of the restaurant - did that appear to be open to you?

A. INTERPRETER: Yes very busy.

Q. When you say, "Very busy", do you have some rough idea of approximate idea of how many people you think there might've been on that upper level?

A. INTERPRETER: I believe there were at least several hundred people.

Q. To get to that restaurant do you need to go through a shopping centre and up some elevators?

A. INTERPRETER: Yes.” (T 16)

79 All of the witnesses, including the first plaintiff (T 143), identified the foyer area where these elevators were situated and as shown in the photographs tendered, as busy. While the meeting was open to members only, and a membership card needed to be shown before anyone was permitted to join the meeting group, the meeting had to be accessed from the building foyer. All these witnesses except the plaintiffs, said that they were given the document in

the foyer, where it was being passed out indiscriminately (to use the words of the statement of claim) by the defendant to persons in the foyer getting into the lifts.

80 I set out the evidence of each of these witnesses.

The first plaintiff – Mr Sum Chow

81 The first plaintiff, who was born in 1928, is 89 years old. A member of the association since 1993, he had a long career of committee membership and two periods as the association's president. As a mark of respect, he had been given an honorary committee title, but in practical terms he had little or nothing to do with the association's affairs. He described the function that he was attending as a "party" (T 143).

82 The first plaintiff described the building foyer as having "a lot of people going upstairs and downstairs" and did not see the matter complained of after his arrival at the meeting, when another association member came over to him and said he had been given the matter complained of by somebody "downstairs" (T 143):

"Q. That person indicated to you that they had received it from somebody downstairs, is that right or wrong?

A. INTERPRETER: Yes.

Q. Did they tell you from whom they received it?

A. INTERPRETER: No he just said that he has received this document.

Q. Did you read that document?

A. INTERPRETER: Not at that time but when I went home I read it.

Q. When you read it, did you see anything in there about you?

A. INTERPRETER: Yes, yeah, I saw things for which I was being slandered against.

Q. Whilst you were at the party do you recall seeing that document being given to any other person at the party?

A. INTERPRETER: Yeah, I - I saw someone, it seems that someone was handing them out at the party too." (T 143)

83 The first plaintiff's wife was with him at the time.

84 The first plaintiff said that he was unhappy about the publication, and that his wife was angry. The level of distress he felt was very apparent in the witness

box. He said that his reputation had been ruined (T 150). This is set out in more detail in the section of this judgment on damages.

85 The first plaintiff denied that he had been given the matter complained of by the defendant, or that the defendant had spoken to him (T 154 – 155):

“Q. It's possible, isn't it, that you spoke with him on that day?

A. INTERPRETER: I don't think so.

Q. He gave you that document and asked for you to comment on it within a week.

A. INTERPRETER: It was not him who handed it to me.

Q. He said to you that if you didn't respond within a week he would give it to the police or the Office of Fair Trading?

A. INTERPRETER: I'm sorry, can you say again?

Q. He said to you that if you did not respond within a week he would give it to the police or the Office of Fair Trading, didn't he?

A. INTERPRETER: I did not hear that.

Q. From him?

A. INTERPRETER: Or did not hear him say that.”

86 He also denied that the defendant telephoned later him (T 160).

87 The first plaintiff was cross-examined at some length about the truth of certain of the imputations (T 190 ff). He gave firm answers and made no concessions. I am satisfied by his straightforward and frank evidence that he is a witness of truth in relation to these issues as well as to the issue of publication, where I prefer his evidence to that of the defendant. The circumstances in which he was cross-examined about the truth of imputations are relied upon by Mr Rasmussen in relation to aggravated damages.

The second plaintiff – Mr Colin Chiu Kwan Chau

88 The second plaintiff, like the first plaintiff, did not receive the matter complained of until after the meeting was over. He arrived very early before the meeting because he had to go to work first. He described how he was given the document by his wife after the meeting:

“Q. When you went to this meeting of the Goon Yee Tong on 29 December 2013 did you see a man called Chi Keong Un?

A. INTERPRETER: I went there very early because I had to go upstairs to work. At that time I did not see anyone.

Q. During the meeting did you see Mr Un present at the meeting?

A. INTERPRETER: Yes.

Q. Did you see him doing anything during the meeting?

A. INTERPRETER: He was making a very tall like a poster board.

Q. Did you see anything on that poster board?

A. INTERPRETER: I did not get there. I did not get close to, to look at it.

Q. At some point during the meeting were you given a document in Chinese script of a few pages?

A. INTERPRETER: I did not receive one but he put the pile on table and he gave them out to the people at the meeting.

Q. Can I show you a document? Do you recognise that document?

A. INTERPRETER: Yes.

Q. Can you tell me when you first saw that document?

A. INTERPRETER: It was at home. My wife give it to me. It was then that I saw it.

Q. Did you read that document?

A. INTERPRETER: Yes I have.

EXHIBIT #B DOCUMENT TENDERED, ADMITTED WITHOUT OBJECTION

Q. When your wife gave it to you did she say anything about the document to you when she gave it to you?

A. INTERPRETER: She just read it and she said I was being defamed, the defamation by someone else and he - she was very angry." (T 18)

- 89 It was put to the second plaintiff that he was not shown the matter complained of by his wife at all, and that the document he was shown was in fact another document (Exhibit 6): T 51 – 52.
- 90 As the second plaintiff and other committee members had consulted the association lawyer shortly afterwards and a Concerns Notice was sent, he was cross-examined about why this Concerns Notice (which was in English, which he could not read) did not refer to the foyer and only referred to the document being handed out at the meeting.
- 91 The explanation for this is that neither of the plaintiffs received the matter complained of in the foyer. Each of them was shown the matter complained of by another person who had received it. The significance of the defendant's activities in the foyer handing out the matter complained of probably would not have been immediately apparent in those circumstances. By the time that the

statement of claim was filed, however, publication in the foyer had been identified and was pleaded in the statement of claim. In those circumstances, the omission of the reference to the foyer in the Concerns Notice is immaterial.

Mrs Helen Chiu Foon Chau

92 Mrs Chau is the second plaintiff's wife. She described how she approached the lifts to go into the Marigold Restaurant when she saw a man handing out leaflets to a large crowd of people waiting at the lifts:

“Q. As you came up to the lifts were you with other people, or by yourself?

A. INTERPRETER: There were many people.

Q. Did you see this person give the document to anyone other than you?

A. INTERPRETER: Should be so.” (T 74)

93 In court she identified the defendant as the man she saw and the leaflet he handed to her as the matter complained of:

“Q. On 29 December as you were coming up to those lifts, did you see anything?

A. INTERPRETER: I saw someone handing out the pamphlets.

Q. Male or female, man or woman?

A. INTERPRETER: Male.

Q. Do you see him in court today?

A. INTERPRETER: Yes I do, I do.

Q. Is he sitting over there in the chair with the green jacket on?

A. INTERPRETER: That's him.

Q. He was handing out a document is that right?

A. INTERPRETER: Yes.

Q. Did you see the people to whom he was handing it?

A. INTERPRETER: Just at that time there were a lot of people going up, so I did not pay much attention.

Q. As you approached the lift, did he give you a copy?

A. INTERPRETER: Yes.

EXHIBIT B SHOWN TO WITNESS

INTERPRETER: This is the copy.

RASMUSSEN

Q. You recognise that document?

A. INTERPRETER: Yes I do.

Q. Is that a copy of the document that he gave to you?

A. INTERPRETER: Yes.” (T 74)

94 Mrs Chau was able to read and understand this publication:

“Q. Did you read the document when you sat down?

A. INTERPRETER: Yes.

Q. You understood what it said about your husband?

A. INTERPRETER: I understood.” (T 75)

95 After Mrs Chau received the leaflet she entered the lift with other persons and read it. She identified the matter complained of as referring to her husband.

96 In cross-examination, it was put to Mrs Chau that she could be mistaken in believing it was the defendant who handed Exhibit B in the foyer:

“Q. Well I suggest to you that you’re mistaken in saying that the defendant did so at the bottom of the foyer and that you’re incorrect in relation to that?

A. INTERPRETER: I feel that I cannot agree with you.” (T 77-78)

97 It was also put to her that she might have been given a different document, namely Exhibit 6, which she denied:

“Q. Sorry, tab 4 please, page 29. Or in fact page 28.

A. INTERPRETER: Did you say page 28?

Q. Thank you.

A. INTERPRETER: That’s 28, is English.

Q. No, that’s in English. If you go to page 29 is the Chinese. Have you seen that document before?

A. INTERPRETER: I can’t remember.

Q. And page 31?

INTERPRETER: This question again is has she seen before?

KARAM

Q. Yes.

A. INTERPRETER: I can’t remember either.

Q. And page 35?

A. INTERPRETER: Can’t remember.

Q. And I jumped one. Have you seen page 33 before?

A. INTERPRETER: I can’t remember either.

Q. Well this bundle of documents behind tab 4 is the document that the defendant says he handed out at the AGM, and I suggest to you that this is the document that you received on that day?

A. INTERPRETER: I can't just answer, give you any answer. I saw it's a big pile.

Q. Yes. Well it's a big pile of documents that was stapled. Does she remember receiving that?

A. INTERPRETER: I can't remember either. I only received this one.

INTERPRETER: She's pointing to exhibit B." (T 76-77)

98 She was not challenged as to her claim to have seen document being handed out in the foyer.

Mr Tony Yuk Kay Wong

99 Mr Wong is a member of the executive committee. He said that he saw the defendant handing out the matter complained of at the lift well:

"Q. When you approached that lift to get to the Marigold Restaurant, did you see anything?

A. INTERPRETER: Yes.

Q. What did you see?

A. INTERPRETER: I saw Mr Chi Keong Un, he was giving out the pamphlets outside the lifts in the second photograph.

Q. Is he a person known to you? That is, do you recognise him?

A. INTERPRETER: Yes, I know him.

Q. Do you see him in Court today?

A. INTERPRETER: Yes, I saw him.

Q. Is that the same person that you saw outside the lifts?

A. INTERPRETER: Yes, correct.

Q. Can you tell me what you saw him doing?

A. INTERPRETER: He was giving out many pamphlets. He gave out the leaflets to all the people pass by this lobby out of the lifts. Everyone he gave them a copy.

Q. Did you approach the lifts to go up to level 4 whilst Mr Un was handing out leaflets?

A. INTERPRETER: Yes, correct.

Q. Did he hand one to you?

A. INTERPRETER: Yes.

Q. Can I show you exhibit B, and ask you whether you recognise that document?

A. INTERPRETER: Yes, I can.

Q. Is that the document that was given to you by Mr Un?

A. INTERPRETER: Yes, correct.

Q. Is that the document you saw Mr Un handing to other people?

A. INTERPRETER: Give me some time to have a look first please. Yes, correct." (T 207-208)

100 He said that the defendant gave him a copy (T 207) which he read and understood in Cantonese:

"Q. That document, exhibit B, did you read it?

A. INTERPRETER: Yes, I have.

Q. When did you read it?

A. INTERPRETER: When Mr Chi Keong Un gave me this document, when I was in the lift I started reading this document." (T 208)

101 Before he got into the lift, he saw the defendant handing out the leaflets to everyone who was walking through the foyer of the Marigold Restaurant building. This was challenged on the basis that the defendant had a disability, which he challenged:

"Q. What informed your opinion from that day that the defendant was indeed faking his immobility?

A. INTERPRETER: Because in the foyer of the Marigold Restaurant downstairs, when I received a leaflet from him, he was not sitting.

Q. What did you observe him doing then if he wasn't sitting?

A. INTERPRETER: He was standing distributing the leaflets to anyone who passed through the foyer." (T 239)

102 Mr Wong travelled to level 4 to the meeting where he later saw the defendant handing out the same document at the meeting on level 4:

"Q. You were at the meeting on 29 December. Did you observe Mr Un doing anything during that meeting?

A. INTERPRETER: Yes, I saw him.

Q. Can you tell us what you saw?

A. INTERPRETER: After he got, after he went up to level 4 he continued to give out the same, give out the same document to all the people who were present at the meeting." (T 208)

103 In cross-examination, he was challenged only as to whether it was the defendant he saw in the foyer handing out documents (T 233), which he

confirmed. He was not cross-examined about the document he received, or about having received it in the foyer.

Mr Gary Chan

104 Mr Gary Chan is also a committee member. As he approached the lift in the foyer of the Marigold Restaurant building, he saw a person handing out leaflets to any passer-by:

“Q. On 29 December did you approach those lifts?

A. Yes.

Q. When you were approaching those lifts did you see something happening?

A. Yes there's lots of people waiting to go on the lift and there's also a person handing out leaflets.

Q. Was that person sitting or standing, the one handing out the leaflet?

A. Sitting.

Q. Did you, do you--

A. You mean, at that time or now?

Q. Yes at the time that you saw him in front of the lifts?

A. Standing.

Q. Sorry?

A. Standing.

Q. What did you see him doing?

A. Just handing out leaflet to any passer by.

Q. Did he give you a copy of the leaflet?

A. Yes he gave me one.

Q. Did you see him give a copy of that leaflet to anyone else?

A. Yes.” (T 242)

105 This person handed a copy to him. Mr Chan was certain that it was the defendant who had handed him this document:

“Q. Do you recognise the person who gave that leaflet to you in court today?

A. Yes.

Q. Can you just point out where you think he is?

A. He's sitting over there.

Q. He's sitting over there in the chair, the gentleman with the greyish hair?

A. That's correct.” (T 244)

106 Mr Chan travelled up in the elevator with a number of other persons who he had seen being given copies of the leaflet and who still had copies of those leaflets:

“Q. What did you see him doing?

A. Just handing out leaflet to any passer by.

Q. Did he give you a copy of the leaflet?

A. Yes he gave me one.

Q. Did you see him give a copy of that leaflet to anyone else?

A. Yes.

Q. Did you get into the lift?

A. Yes.

Q. Did any of those other people who had copies of the leaflet get into the lifts?

A. Yes.” (T 242)

107 He observed, when he got out of the lift, that there were still other persons in the lift who did not get out at level 4 with him, but who had copies of the matter complained of in their hands:

“Q. Did they get out or did they stay in the lift for eternity?

A. Some went - stay on and went on the fifth floor and some came out on the fourth floor with me.

RASMUSSEN

Q. How do you know that some of them might've got out on the fifth floor?

A. Well fifth floor is the next floor up.

HER HONOUR

Q. What's on the fifth floor?

A. Restaurant.

Q. These people who were going up to the fifth floor restaurant, did you observe anything about those people?

A. Just people going for yum cha lunch.

RASMUSSEN

Q. Were they holding anything?

A. Yes, leaflet that was handed out to them.” (T 243)

108 He was also certain that the document handed to him was Exhibit B:

“EXHIBIT B SHOWN TO WITNESS

Q. Do you recognise exhibit B?

A. Yes.

Q. What do you recognise it to be?

A. The leaflet that was handed out to me.

Q. This is the one that was given to you just before you got into the lift, is that what you're saying?

A. That's correct." (T 243)

109 He had a quick glance at it (T 244), understanding it to be written about the plaintiffs:

"Q. What idea did you get of it?

A. Just some, I guess the slander remark about people in our association, especially Mr Chow Sum who is the ex-president of our association and also remarks - slander remark to one of our vice - current vice-president I think at that time also, Colin Chau." (T 244)

110 In cross-examination, it was put to Mr Chan that he saw Exhibit 6 to which he disagreed:

"KARAM

Q. Can I suggest to you that you may be mistaken and that this was the document that you saw on the day of 29 December 2013?

HER HONOUR

Q. And not the document you identified previously, that's what he's asking.

A. Sorry, what was that?

Q. He's asking you whether, when you were handed a document by that gentleman--

A. Yes.

Q. --it was this document or the other document, the one you've got in your hands.

A. It's this one." (T 252)

111 He was certain that he was handed Exhibit B (T 252-254).

112 He was not cross-examined about seeing a person in the foyer handing out documents.

Mr Man Ke

113 Mr Ke was not a member of the executive committee. He was an ordinary member of the Goon Yee Tong who was going to the Annual General Meeting in the Marigold Restaurant building. When he arrived at the building, he saw a

man, whom he identified as the defendant, handing out Exhibit B to people in the lift well:

“Q. When you were approaching those lifts did you see something happen on that day, on 29 December 2013?

A. INTERPRETER: Yes.

Q. Can you tell me please what you saw?

A. INTERPRETER: Someone who was handing out pamphlets.

Q. This person that you saw handing out pamphlets do you see him in court today?

A. INTERPRETER: Yes, where? Over there.

Q. Are you indicating to the gentleman sitting in the back of the court in the chair with silver hair?

A. INTERPRETER: Yes.

Q. You saw him, I think you said, handing out a document is that right?

A. INTERPRETER: Yes.

Q. Did you see him give it to people who were there at the lift?

A. INTERPRETER: Yes.

Q. Did he give the document to you?

A. INTERPRETER: Yes.” (T 137)

114 Mr Ke said he was himself given a copy of the matter complained of by the defendant:

“RASMUSSEN: Could I show the witness exhibit B please?

HER HONOUR: Yes.

KARAM: Your Honour?

HER HONOUR: Yes?

KARAM: Prior to the witness being shown the document--

HER HONOUR: Wait a moment give me the document please? Yes.

KARAM: I think my learned ought to establish the contents of it to some extent other than just showing him and asking him whether it's the document he saw. It's some years ago and the witness ought to be able to say what he perceived the document to comprise.

HER HONOUR: What do you say about that Mr Rasmussen?

RASMUSSEN: Your Honour it's my witness. If my learned friend wants to cross-examine him he can do so.

HER HONOUR: Yes, I agree Mr Rasmussen. I won't stop the question.

Q. Just have a look at that document, we'll give it back to you. Can you tell us what this document is?

A. INTERPRETER: This document is about Chow - Sum Chow and Chiu Kwan Chau.

RASMUSSEN

Q. Do you recognise that document?

A. INTERPRETER: This is the document.

HER HONOUR

Q. The document what? This is the document that?

A. INTERPRETER: This document. This is, this is the document.

RASMUSSEN

Q. You recognise the document. How did you come to receive that document?

A. INTERPRETER: Downstairs, downstairs where Marigold Restaurant is.

Q. By whom was it given to you?

A. INTERPRETER: That man there.

INTERPRETER: He was pointing to him your Honour.

HER HONOUR: Yes, so the transcript should reflect that he was pointing at the defendant." (T 137-138)

115 Mr Ke said that he read and understood Exhibit B:

"Q. When you were given that document did you read it or did--

A. INTERPRETER: Yes I have read it.

Q. Can you tell me when you read it?

A. INTERPRETER: I have - I've read it at the restaurant, and when I went home I read it also.

Q. Can I assume that you understand the Chinese script that it's written in?

A. INTERPRETER: Yes I know." (T 138)

116 In cross-examination, Mr Ke was challenged as to whether he was provided with the matter complained of or another document:

"KARAM

Q. Do you recognise this document? Yes it is.

RASMUSSEN: I don't believe this document's had an MFI yet.

HER HONOUR: No they don't. I'll give one of them shortly. I'm sorry I didn't think of that before.

KARAM: No, sorry.

HER HONOUR: Look it's taking a long time to read. He doesn't have to read the whole document. What's your question?

KARAM

Q. Does he recognise that document?

A. INTERPRETER: This document I have not seen it before.

Q. I suggest to you that this may have been the document that you were provided with on 29 December 2013 at the AGM.

A. INTERPRETER: No, not this one.

INTERPRETER: He was pointing to the other one. He was pointing to exhibit B, exhibit B. He was pointing to exhibit B.

HER HONOUR: Yes. So he's saying no he didn't read - this is the first time he's seen this document. The document he received is exhibit B.

KARAM: That was his evidence?

HER HONOUR: Yes.

INTERPRETER: Yeah he, he pointed to exhibit B. He said that was the document." (T 140)

117 He was not challenged about his evidence that he saw the defendant in the foyer.

Mrs Maria Na Soo

118 Mrs Soo is a member of the Goon Yee Tong by reason of her husband being a member, but had no interest in its activities. She was handed the matter complained of but cannot read the Chinese language.

119 Mrs Soo saw a queue of people preparing to enter the lift. The foyer was crowded. She said there were about 20 or 30 people waiting to get into the lift (T 259). However, the defendant did not allow her or others in the queue to enter the lift until they took a leaflet:

"Q. If you could just have a look at those photographs and tell me if you recognise the images that are depicted in those photographs?

A. Yes.

Q. Do you recognise that to be the foyer of the shopping centre in which the Marigold Restaurant is located?

A. Yes.

Q. Do you see one of the photographs depicts three lifts, can you see that one?

A. Yes.

Q. What do you know about those lifts?

A. One of those lift that I have to go up to the fourth restaurant and at that lift I was stopped from going in.

Q. Yes?

A. Unless I take a flyer.

Q. Were there other people there at the lift as well?

A. Yes. We were joining a queue to go into the lift, so when it's up to my turn I cannot enter the lift unless I take a flyer.

Q. Did you see the person who was handing out the flyer?

A. Yes.

Q. Do you see that person in court today?

A. Yes.

Q. Can you point out to me?

A. The man with the white hair.

Q. With the greyish hair sitting at the back there?

A. Yes.

HER HONOUR: For the purpose of the transcript I will note that the witness has just pointed to the defendant who sitting at the side of the Court.

RASMUSSEN

Q. It was that person who stopped you from getting into the lift, is that correct?

A. Yes.

Q. Unless you took a flyer?

A. Yes.

Q. Did you observe him do that same thing with other people getting into the lift?

A. He does, he stand near the lift and giving the flyer. When it comes to my turn I refuse the flyer because I felt very scared and like I've been harassed to take the flyer, so, I mean the people at the back were shouting at me, "Go into the lift, go into the lift", so I become so frightened that this is a trap or what, if I don't take the flyer I cannot enter the lift, so I became very scared. So in the end I took the flyer and went up the lift to the fourth floor.

Q. Did you see anyone else take the flyer?

A. Yes, everyone took the - I see a lot of people taking the flyer." (T 257-258)

120 She said further at T 261:

"Q. When you say you were stopped at the lift by the defendant, how do you say that he stopped you?

A. He was physically, like you cannot enter the lift unless you take this form and then I ask, "What is this form?", "You take it", but because it look to me is Chinese, I never like to take flyers from anywhere, but then I can't enter the lift - because the people at the back is angry with me, "Go in, take the form and go in" and that's why I had to go in.

Q. Just so I'm clear, so is your evidence that he was standing blocking the entrance of the lift and not letting people in unless they took a flyer, is that right?

A. Mm.

Q. Was anyone assisting him to do that or was he by himself?

A. He was by himself."

121 She then went on to say at T 262:

"Q. Do you mind if I just ask for clarification, did he say that to you in English or in Cantonese?

A. In Cantonese.

Q. So you speak Cantonese but you can't read it very well, is that right?

A. No I can't read at all.

Q. But you speak Cantonese?

A. I can - no I don't speak Cantonese, I'm a Hokkien by dialect.

Q. So he spoke to you in Cantonese and you understood him?

A. Not really understood him fully, but I do understand him the people at the back say "pick the flyer, he's telling you to pick the flyer".

Q. So he spoke to you in Cantonese, you didn't quite understand it, the people at the back said, he's telling you to take the flyer, take the flyer.

A. Mm."

122 Mrs Soo was given Exhibit B by the defendant, which she said upset her because she did not want to take it. She was unable to read it, but she recognised the English portions:

"Q. Do you recognise that document?

A. Yes, I recognise the document.

Q. What do you recognise that document to be?

A. I only recognise the document because I can read the English part of it, the Chi Keong Un and the Canterbury, and then in the middle I recognised a few name, Colin Chau, Sum Yuen, and then at the end of it I recognised the signature and that's how I recognise the document.

Q. Do you recognise that document to be the one that was given to you, or is it something else?

A. Yeah, this is the document that I recognise because I, I look at the English part of it.

Q. So you were given that document by the defendant, is that correct?

A. Yeah.

Q. When you were given that document what did you do?

A. Well I have to take the document to go upstairs. Straight away I ask, "What the hell is this document about? I don't understand it. Can someone explain to me?". So the people ask me what do I want to know? I said, "But what is this document that is like a threat, threat to me that I must take this document to enter the lift and I need to know what's inside this document."

Q. I think you're indicating that you have some difficulty reading the Chinese script, is that right?

A. Yeah.

Q. Could you indicate yes or no?

A. Yes.

Q. So people in the lift told you what was in that document, is that what you say?

A. No, the people, they all squashed up in the lift. It was in the restaurant that the people upstairs they explained to me.

Q. When you got to the fourth floor did you get out?

A. Yes, I did get out.

Q. What about the other people in the lift? Did they all get out with you or--

A. No.

Q. --did some of them continue - sorry?

A. I got out. A few, a lot of people got out, but there's some people going upstairs.

Q. When you got to the restaurant, that was when you asked people to explain what was in it?

A. To explain to me because I don't know what is this letter so important? So I like to know the contents.

Q. Do you recall what those people told you was in that document?

A. Well the document was saying that something against Colin Chau and Chow Sum, and he, Chow Sum is in bankrupt before. I say what has it got to do with me? And then they talk about this - they explain to me that Colin Chau was a mad person. I said, "I didn't see him mad". (T 259-260)

123 She gave a similar version of this evidence in cross-examination:

"Q. So you didn't understand that from him, you understood it from whoever was standing behind?

A. Yeah.

Q. Did they say that in English?

A. Pardon?

Q. Did they say that to you in Cantonese or in English?

A. English, because they knew that I can't answer back, I wasn't able to answer I just say, "I don't want".

Q. Just so--

A. I just say that..(foreign language)..in Chinese the two words.

Q. I understand, just to be clear though, are the people in the queue saying take the flyer and move on, or are they saying, he's telling you to take the flyer?

A. They go in - they want to go in the lift.

Q. So what are they saying, can you just repeat for the Court what are they saying to you in English?

A. Say "take the flyer and move on we want to go into the lift don't block, don't block us".

Q. You didn't really understand any of the contents of that document when you receive it did you?

A. No.

Q. You can't understandably if you can't read the Chinese?

A. No I can't.

Q. This was three years ago?

A. Yep, I have never been to a Chinese school anyway.

Q. You couldn't be sure could you that it wasn't - that this is definitely the document given you can't in fact read?

A. No I can't read I only look at the English word and then I recognise some name and I recognise the Goon Yee Tong and then I look into the centre then I recognise another name Colin Chau, I said "What is all this?" and then at the back that's how I recognise the document.

Q. What you are recognising is a few English words scattered throughout, the document?

A. Yeah.

Q. That's the extent of it?

A. Mm.

HER HONOUR: No that's not a question of the extent, she said she recognised that document because she read the names of these people in it, so that's how she recognised it. What's your next question?

MFI 6 SHOWN TO WITNESS

KARAM

Q. Do you recognise this document?

HER HONOUR

Q. Have you seen it before?

A. No.

KARAM

Q. Can you be sure that the front page of that document isn't the document you saw on the day?

A. No, I don't know.

HER HONOUR

Q. How is it that you can be sure?

A. Because it has - don't have the Goon Yee Tong on it, community justice centre, I've never seen this document before." (T 262-264)

124 When she arrived on level 4, she showed the document to other persons present and asked them to tell her what the document said. This is of some significance to the extent of publication in that it is indicative that persons who could not read the document might well show it to persons who could, and learn about its contents through republication of the contents of the matter complained of in this fashion.

125 Like Mr Chan, Mrs Soo noted that not everyone in the lift with her got out on the same floor; some went upstairs to the yum cha section of the Marigold Restaurant on level 5:

"Q. What about the other people in the lift? Did they all get out with you or--

A. No.

Q. --did some of them continue - sorry?

A. I got out. A few, a lot of people got out, but there's some people going upstairs." (T 260)

126 Mrs Soo understood the matter complained of to be of and concerning the plaintiffs by reason of the English content (T 259-260).

127 In cross-examination, it was put to her that Exhibit B was not the document she was given. She disagreed that it was Exhibit 6, saying that she recognised the English portions (T 263-264; see portions of transcript set out above).

Mr Tommy Way Ming Tong

128 Mr Tong is a journalist for the Australian Chinese Daily who was in the vicinity of the shopping centre when he saw members of the Goon Yee Tong whom he recognised going into the building in reasonably large numbers. He described what he saw as follows:

"Q. On this day did you see anything happening around the lifts?

A. INTERPRETER: Because I always doing community news on that day I just passed it by, and I noticed a group of people there, so I went closer to see whether they are something that I can make a report on.

Q. Did you see anything happen at the lift well there?

A. INTERPRETER: Some people are there waiting for the lift; some people are chatting; and some people are handing out leaflets.

Q. Did you recognise somebody handing out the leaflets?

A. INTERPRETER: No. Someone that I recognise because they are always with the Dongguan Association.” (T 96 – 97)

129 He also saw the defendant:

“Q. Could you give us a brief description of who you're talking about?

A. INTERPRETER: The man sitting there with grey hairs.

Q. This is the gentleman wearing the olive green jacket, is that correct?

A. INTERPRETER: Yes.

Q. Do you know who that person is? Do you know his name?

A. INTERPRETER: I recognise the face, I don't know his name.

Q. You saw him handing out a leaflet, is that correct?

A. INTERPRETER: Yeah, from my memory, yes.

Q. I'm sorry, I didn't hear that.

A. INTERPRETER: From my memory, yes.

Q. Did you see who he was giving that leaflet to?

A. INTERPRETER: I didn't see in particular to whom the leaflets were delivered, I just saw a group of people around there.

Q. Did you get a chance to see that leaflet?

A. INTERPRETER: Because I tried - I was on duty on that day and I passed by and I notice someone delivering the leaflets there so I went - approached there and noticed that they are sort of letters.

EXHIBIT B SHOWN TO WITNESS

Q. If you could just have a quick look at that and tell me whether you recognise that document?

A. INTERPRETER: Because on that day I was looking at that distance so I try to do it similarly now to - to see whether it is the document. It looks like the one I saw on the day.” (T 97)

130 In cross-examination Mr Tong identified a number of members of the association whom he identified as being known to him as committee members. He was unsure whether he saw one or more persons handing out leaflets (T 114). He was shown the document which later became Exhibit 6 but did not agree that this was the document he saw (T 114 – 115), as the document he saw did not have “big writing” (T 116).

131 Mr Karam put to Mr Tong that he worked for a Communist newspaper and was a communist, which Mr Tong described as an insult:

“Q. The newspaper you report for is a communist newspaper is that right?

HER HONOUR: What?

RASMUSSEN: I object your Honour, I mean, really/

HER HONOUR: I beg your pardon?

KARAM: It's a communist newspaper. I understand that's not controversial.

HER HONOUR: What do you mean?

RASMUSSEN: What's the point of it? I'm sorry what

HER HONOUR

Q. Sorry, what is the name of the publication you work for?

A. WITNESS: Australian Chinese Daily.

Q. All right and is it written in Cantonese or what?

A. INTERPRETER: Traditional Chinese characters.

Q. The question was, is this a communist newspaper?

HER HONOUR: What sort of communist? Chinese, Russian, what?

KARAM: Chinese, sorry your Honour. Chinese.

HER HONOUR: When you say, "Communist," do you mean a Chinese government communist newspaper?

KARAM: Yes.

HER HONOUR

Q. He wants to know if this is a Chinese government communist newspaper?

A. INTERPRETER: Personally I think this is an insult." (T 117 – 118)

132 This question was withdrawn, but it is of some relevance because it was a question put on instructions and, as is set out later in this judgment, the defendant's resentment of the association's willingness to have functions involving the Chinese Government is a significant issue in relation to his objections to the conduct of the plaintiffs and to malice.

133 Mr Tong was the only person to give evidence who was not a member of the association. As is noted in the transcript, Mr Tong gave other evidence about publication which I excluded on the basis of failure of the plaintiffs to plead and particularise these matters (at T 188 – 189).

Resolving the differing accounts

134 Mr Karam asks me to treat the oral evidence of the plaintiffs' witnesses "with caution" (paragraph 9, written submissions), on the basis that these are inconsistent with "contemporaneous documents and objective probabilities" (paragraph 9, written submissions), such as the apology and that the oral evidence should be treated with caution because of the passage of time,

“perceptions of self-interest and allegiance” (in other words, the witnesses are not being truthful; paragraph 26, written submissions) and the warnings of McDougall J in *Watson v Foxman* (1995) 49 NSWLR 315 at 319.

135 The submissions of the defendant refer only briefly and in passing to the actual evidence of the defendant (in paragraph 8 of the written submissions), and do not answer the inconsistencies in his evidence as set out above, particularly in relation to whether the defendant gave copies of Exhibit 6 in the foyer, a line of cross-examination wholly at odds with the defendant’s claim that he had to hurry into the meeting late.

136 Relevantly, as set out above, the defendant admitted in cross-examination that he wanted every person at the Annual General Meeting to know what was in the matter complained of:

“Q. You wanted all of the members of Goon Yee Tong to know all about the terrible things that Chow Sum had been doing.

A. INTERPRETER: At first, no, but afterwards, yes.

Q. You wanted them all to know when you went to the meeting on 29 December that he was a bankrupt.

A. INTERPRETER: I want him to know all the contents of my letter.

Q. Yes, that's right, you did. You wanted them to know everything, including that he was a bankrupt, or that you said he was a bankrupt.

A. INTERPRETER: No. I - I hope all the matters will be handled by the relevant authorities and treat the matters in a good way.

Q. You were so concerned that the members should know about these things, you made many, many copies of exhibit B, didn't you?

A. INTERPRETER: No, only one.”

137 The defendant took an angry and combative approach to these questions:

“Q. You stood out in front of the lifts leading up to the Marigold Restaurant with those copies, didn't you?

A. INTERPRETER: He's asking you to show the Court the security camera.” (T 369)

138 Although the evidence of the plaintiff’s witnesses that they received documents in the foyer was not challenged, it was put to the defendant that his evidence was false:

“Q. You told the Court today several times that you made one copy. Do you agree with me or not?

A. INTERPRETER: The fact is I only brought to the AGM one copy of the letter, but I have a copy at home.

...

Q. The fact is that you gave many copies to many people when you were standing outside of the lifts leading up to the Marigold Restaurant.

A. INTERPRETER: No.

Q. You're trying to hide that fact by giving false evidence today, aren't you?

A. INTERPRETER: What evidence have you got?

Q. I've asked you a question.

HER HONOUR

Q. You have to answer the question. You're not there to ask questions.

A. INTERPRETER: It's not the truth that I distributed many."

139 I also note that the two persons the defendant said that he arrived with were not called to give evidence and that their absence is unexplained. Counsel for the plaintiffs asks me to draw a *Jones v Dunkel* inference (*Jones v Dunkel* (1959) 101 CLR 298) from their absence, on the basis that it is to be assumed that their evidence would not have assisted the defendant. Having regard to the materiality of that evidence, I am prepared to draw that inference.

140 The differing versions of events and the defendant's demeanour in the witness box paint an unflattering picture of the defendant's credibility. I note the analysis by Tugendhat J of the relevant considerations in relation to findings of credit as set out in *Thornton v Telegraph Media Group Ltd* [2011] EWHC 1884 (QB), observations which have been endorsed and approved by the New South Wales Court of Appeal in *McGlen-McLeod v Galloway* [2012] NSWCA 368. I adopt and apply those principles here.

Conclusions concerning the oral evidence

141 First, I note the evidence supports the plaintiffs' position. None of the plaintiffs' witnesses was challenged to the effect that the defendant was not in the lift well handing out Exhibit B (or for that matter any document). Those witnesses who were challenged as to the identity of the document (including Mr Chan, who was given a quick Cantonese test in the witness box) all said that it was Exhibit B and not some other document. However, the defendant in his evidence did not say that he was handing out Exhibit 6 in the lift well area at all.

142 Next, I note the contents of the matter complained of and the defendant's desire to make these allegations public. The defendant's claim that he wanted to give the first plaintiff an opportunity to respond to Exhibit B is implausible because:

- (a) The document's date and content are suggestive of a document which has already been sent to the relevant authorities, not a document in draft for the first plaintiff to respond to;
- (b) The document contained allegations not only against the first plaintiff but also the second plaintiff and Mr Justin Chan;
- (c) It could not have been the defendant's true purpose to seek only the first plaintiff's comment if what he was going to do was to pass on the document to the Police and the Department of Fair Trading, or if indeed he had already done so, as any comment by the first plaintiff would have been either too late or irrelevant.

143 Third, I do not accept the defendant's submissions about the asserted importance of the Concerns Notice. Despite the statement of claim clearly identifying the place of publication in the statement of claim as being published "indiscriminately to persons who entered the foyer of 683 – 689 George Street and to persons who attended the Marigold Restaurant on level 5", counsel for the defendant in written submissions (paragraphs 10 to 20) relies upon the correspondence sent by the plaintiff's solicitor dated 21 January 2014 as being inconsistent with publication taking place to persons other than the members of the Goon Yee Tong or as taking place other than outside the meeting. He asks me to read down the pleadings (including the Reply) on this basis, drawing to my attention that the plaintiff's meeting with their lawyer occurred one day after the Annual General Meeting (T 52) and submitting that this proximity is of the utmost importance.

144 The allegation of publication made in the letter of 21 January 2014 was in the following terms:

"On 29 December 2013 you published a leaflet by handing it to the attendees of the Annual General Meeting of Goon Yee Tong Incorporated held at Marigold Restaurant at Haymarket."

145 To this was attached an apology which was drafted in similar terms, namely:

"On 29 December 2013 I, Chi Keong Un, handed a leaflet to the attendees of the Annual General Meeting of Goon Yee Tong Incorporated at Marigold Restaurant at Haymarket."

- 146 It is submitted that the terms of the draft apology, which do not refer to the fact that these documents were handed out in the lift foyer, or reference to publication to persons who were not members of Goon Yee Tong, is fatal to the claim of publication. The submissions point out that there is no reference in the draft apology to the defendant “indiscriminately” handing out the matter complained of, or any reference to the foyer. For these reasons, Mr Karam submits that the evidence of the witnesses to the contrary should be rejected, conformably with the decision of the New South Wales Court of Appeal in *Cooper v Hobbs* [2013] NSWCA 70.
- 147 The reference to the leaflet having been handed to the attendees of the Annual General Meeting does not identify the foyer (as opposed to level 4 of the Marigold Restaurant building where the meeting was held in the restaurant), but this reads too much into the word “at” in both these documents. As noted above, neither of the plaintiffs received the documents in the foyer; one received it at the meeting and the other from his wife after the meeting. The plaintiffs’ approach to the place of publication would be based principally upon their own experiences.
- 148 The defendant’s complaint that the statement of claim just identifies the building and not the “foyer” is simply wrong: see paragraph 5 of the statement of claim. The witnesses were shown photographs of the building entrance where lift area set into one side of the wall and identified this area as the place in question; it is clearly not a designated area for the Goon Yee Tong meeting but a corridor through the building which includes lifts on one side. The meeting room was on one of a number of floors and the witnesses’ evidence was that these lifts were used to ascend to that meeting room. A yum cha restaurant (the Marigold Restaurant) was situated on the floor above and several of the witnesses described persons getting into the lift remaining in the lift after they got out at the meeting site. The general picture painted was of a crowd of people filling up the lifts and being handed leaflets by the defendant, who was standing in front of the lifts.
- 149 The same degree of specificity is given in the amended Reply. Although no reference to “foyer” was included in the original Reply (4 June 2015), it is

included four times in the Amended Reply (filed on 3 February 2016) at paragraphs (d)(i) - (ii) and (e)(i) – (ii), each of which relies upon excessive publication by describing the plaintiff handing the matter complained of “indiscriminately to persons who entered the foyer of 683 – 689 George Street and to persons who attended the Marigold Restaurant at Level 5”.

- 150 The challenge to the Concerns Notice for failing to identify the publication of the matter complained of to the Chinatown Police, the Department of Fair Trading and patrons at the Hon Young Hin Restaurant in Hurstville RSL is similarly specious. It is unclear whether these events had in fact occurred prior to the date of this notice (21 January 2014). The first indication that such publications had in fact been made is set out in the Defence the defendant filed on his own behalf on 11 March 2015, where in the “Reply details” referred to on the first page of that Defence he discloses that information. The plaintiffs do not rely upon these publications either as a cause of action or as publications in excess of the occasion; the plaintiffs rely upon the defendant’s denial, in his answers to interrogatories and evidence, of actionable publication to any third party as evidence of his dishonesty as a witness.
- 151 At all relevant times the defendant has had to meet the plaintiffs’ claim as pleaded and particularised. That clearly includes references to the foyer and to the Marigold Restaurant.
- 152 The defendant has not done so. All of the evidence points to the defendant handing out the matter complained of indiscriminately in the foyer to anyone getting into the lift, including persons who were not necessarily attending the meeting, and who were there for yum cha or other business or pleasure activities.

The defences

- 153 The defences pleaded are common law qualified privilege and statutory qualified privilege pursuant to s 30 *Defamation Act 2005* (NSW).

Common law qualified privilege

- 154 Mr Rasmussen pointed out that this defence is commonly pleaded to limited publication where defendant admits publication but relies upon duty and interest, but that the defendant in these proceedings does none of those things.

In his pleadings and interrogatories, the defendant not only denies publication other than to the first plaintiff (although later admitting to publications to the police, the Department of Fair Trading and the Hurstville Hon Young Hin Chinese restaurant patrons), but also that the imputations were conveyed, that he intended to convey them and that he had any belief in the truth. (I note in passing that some of the answers to interrogatories about intention to convey and belief appear to attempt to claim some other meaning, which is impermissible: *Evatt v Nationwide News Pty Ltd t/as Cumberland Newspapers* [1999] NSWCA 99 at [38] – [44]).

- 155 However, as Mr Rasmussen also acknowledged, the courts have repeatedly permitted defendants who deny all these matters to rely upon a defence the essence of which is a claim of acting in pursuit of a duty to persons with an interest in receiving the information (*Cush v Dillon*; *Boland v Dillon* (2011) 243 CLR 298; *Maxwell-Smith v Warren* [2007] NSWCA 270 (identification also denied); *Coles Myer Ltd v Webster*; *Coles Myer Ltd v Thompson* [2009] NSWCA 299; *Sharma v Shandil* [2011] NSWCA 155). This is a curiosity found only in the law of qualified privilege at common law in New South Wales (Professor R. E. Brown, *Brown on Defamation* (Canada, United Kingdom, Australia, New Zealand, United States), Second Edition (formerly *The Law of Defamation in Canada*) (Carswell) ("*Brown on Defamation*").
- 156 At first blush, the circumstances of a member of a community group circulating a document to fellow members at a community group meeting about that group's activities would appear to have a substantial community of interest of the kind where a publisher has an interest which corresponds with that of the publishee. However, the mere fact that a member of an organisation makes a publication to other members at a meeting does not mean that there should be no further investigation of the occasion in question.
- 157 In *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [54] ("*Bashford*"), all members of the court stressed that, when determining whether the occasion is privileged the Court should examine all the circumstances of the case. This examination includes:

- (a) The nature of the defamatory communication. For example, a privilege may be lost if the communication is not made for the reason that makes the occasion privileged, even though the person to whom the communication is otherwise appropriate. In particular, criminal allegations which are not for the protected purpose of instituting an inquiry but for the purposes of insulting the plaintiff (*Sonier v Breau* (1912) 41 N.B.R 177) or embarrassing him (*Otten v Schutt* 15 Wis.2d 497, 113 N.W.2d 152 (1962)) are not protected.
- (b) The status or position of the publisher and the relevance to the occasion. For example, merely being a member of an organisation does not entitle that person the right to publish indiscriminately or contrary to meeting procedure.
- (c) The number of recipients and the nature of the interest they had in receiving it.
- (d) The time, place and manner of, and reason for, each publication.

158 It is after a consideration of these matters that the court makes a judgment as to whether the publisher had a duty or interest that justified the making of the publication and whether the recipients or some of them had a duty to receive or interest in receiving it. It is not the case, as appears to have been assumed by the defendant's submissions, that the mere fact of the publication being made by the defendant to other members of the Goon Yee Tong automatically triggers the occasion of qualified privilege.

159 As to (a) above, the communication must be reasonable to the requirements of the occasion: *Archer v Channel Seven Perth Pty Ltd* [2002] WASC 160 at [71] per Hasluck J; *Skalkos v Assaf* [2002] NSWCA 14; *Guise v Kouvelis* (1947) 74 CLR 102. In *Bashford* (at [77]), the example was given of the customer who is entitled to give an opinion as to the quality of the shopkeeper's goods which will be published on an occasion of qualified privilege; however, this may cease to be the case where the customer voluntarily defames the character or reputation of the shopkeeper to potential customers.

160 There must be a substantial connection between the communication and the occasion. As Kirby J noted in *Bashford* (at [192]) that the mere fact that in a general sense the publication of defamatory matters is included in the context of a discussion of a subject where there is the requisite reciprocity does not ensure there is protection. If this were not so, wrongs to the reputation of individuals would be privileged against redress simply because of a tenuous,

remote or contrived connection between the defamatory imputation and the context. There is a very helpful collection of the relevant authorities to this effect by McColl JA in *Lindholdt v Hyer* [2008] NSWCA 264 at [125]–[135].

161 In *Aktas v Westpac Banking Corp Ltd* [2009] NSWCA 9 (“*Aktas*”), McClellan CJ at CL (at [39], referring to *Bashford*) explained that the defence focuses on the subject matter of the communication rather than the actual communication, adding (at [41]) that two questions arise:

- (a) Whether the “occasion” of publication was one where the necessary reciprocity existed; and
- (b) Whether the matter defaming the plaintiff is sufficiently “relevant” to the privileged occasion to attract the defence.

162 When analysing the evidence in accordance with these principles, it is important to remember that the court carries out what McClellan CJ at CL in *Aktas* (at [70]) refers to as a balancing exercise, namely the need to weigh up the damage done by the mistake and the good reasons why the communication (in that case, the writing of “refer to drawer” on a cheque) should be protected. However, what if, instead of writing “refer to drawer”, the bank staff had written “this man is an embezzler”, or that he had assaulted his father? This is what Kirby J was referring to in *Bashford* at [194]:

“In some instances the titillating character of an irrelevant defamatory imputation in an otherwise justifiable context will be plain.”

163 As to (b), relevance to the occasion should not be presumed merely because there is a common reason for presence, such as attending a meeting. The question is first, whether the occasion of the publication was one in respect of which the necessary reciprocity of interest existed and, second, whether the matter which defamed the plaintiff was sufficiently connected or relevant to the privileged occasion (if there was one) to attract the defence (*Bennette v Cohen* [2009] NSWCA 60). Statements outside the umbrella of the applicable privilege are not protected by the occasion: *Cush v Dillon*; *Boland v Dillon* at [17] – [19]. This may be particularly the case where the statements are a combination of “falsity, irrationality and extreme language” (*Skalkos v Assaf* at [132]).

164 The defendant had not sought to put his complaints onto the agenda and never led evidence of what issue (if any) on the meeting’s agenda (as placed before

the meeting) the matter complained actually referred to, beyond stating in the most general terms that there was discussion of issues relevant to the committee constitution. In the case of the first plaintiff, who played no part in the committee and was there to attend the party, there was no relevance whatsoever for any of the allegations in question to be made.

165 As to status, the defendant acknowledges in the matter complained of that, despite his many years of membership, he had “seldom” even attended. He gave no evidence of playing any role in any committee position, or of attending any of the meetings beyond those at which Mr Max Yip and his associates had been expelled. He could have achieved some form of status by putting an application or motion before the meeting, but failed to do so.

166 As to (c) above, the common law defence is generally applicable where the publication has been made only to a limited and identifiable group of persons. In *Marshall v Megna; Megna v Tory; Tory v Megna* [2013] NSWCA 30 at [17]-[19]. The court noted at [18]:

“[18]...At common law, once an occasion of qualified privilege is found to exist, the privilege traditionally protects a communication made on that occasion unless the plaintiff is actuated by malice in making the communication. But, apart from a few exceptional cases, the common law categories of qualified privilege protect only occasions where defamatory matter is published to a limited number of recipients.” (Citations omitted)

167 The relevant principles were further noted at [19] as follows:

“[19]...If a publication is made to a large audience, a claim of qualified privilege at common law is rejected unless, exceptionally, the members of the audience all have an interest in knowing the truth. Publication beyond what was reasonably sufficient for the occasion of qualified privilege is unprotected. Because privileged occasions are ordinarily occasions of limited publication — more often than not occasions of publication to a single person — the common law has seen honesty of purpose in the publisher as the appropriate protection for individual reputation. As long as the publisher honestly and without malice uses the occasion for the purpose for which it is given, that person escapes liability even though the publication is false and defamatory. But a test devised for situations where usually only one person receives the publication is unlikely to be appropriate when the publication is to tens of thousands, or more, of readers, listeners or viewers.” (Citations omitted)

168 The same views were expressed in *Bennette v Cohen*, namely that where a large group of persons are present, difficulties must arise. Even for Goon Yee Tong members, some of those present, such as Mrs Soo, were there for personal reasons and had no interest in hearing these issues. Anyone who

received a copy of the matter complained of while on their way to yum cha (and, as Mr Chan noted, there were several such persons in the lift when he got out) would have had no interest whatsoever.

169 As to (d) above, the timing of the defendant's publication was not for the purpose of provoking discussion or debate, but to frighten those present into agreeing with what he said, under threat that the police and/or other "relevant departments" would be called in to shut down the meeting.

The protected occasion

170 The protected occasion is asserted to be the 29 December Annual General Meeting of the Goon Yee Tong.

The 29 December 2013 Annual General Meeting of the Goon Yee Tong

171 What the Goon Yee Tong were actually discussing, in terms of constitutional amendments, was never made clear. It would appear that the purpose of the meeting was to consider nine proposed amendments to the constitution of the association. The President, Justin Chan, circulated the following memorandum:

"Newsletter

Dear members and friends

Hope you are all well.

The first Annual General Meeting of the 11th Executive Committee will be held soon. I call on all our Dongguan GYT members to enthusiastically attend, it will be held on Sunday 29/12/13 at Level 4 Marigold Restaurant, Haymarket. Snacks will be available after the meeting. Door will open at 11am. Members are requested to bring their membership cards, and will be admitted after verification of membership validity.

AGM agenda

1. To confirm Treasurer's report
2. President's report
3. President to explain objectives of proposed amendments to GYT Constitution
4. Proceed to cast ballots for proposed amendments to GYT Constitution

Our dear members. At the last AGM there were 22 amendments. There was not enough time for our members to digest them. It resulted in the required 75% not being reached to pass those amendments. However our committee members of this term kept working hard on these amendments. After overcoming difficulties we have now decided on 9 important proposed amendments to make them simpler for everyone to understand. Also members

can choose each amendment to vote for yes or no. All our members must understand when these amendments have been passed GYT will send them to Department of Fair Trading for registration and incorporation into our GYT Constitution. These amendments and the new Constitution will become the foundation and the rock of GYT, and will be passed down from generation to generation.

The 9 proposed amendments, proxy form and the notice of AGM will be sent out together with this newsletter. Also before we vote we hope to hold a meeting to examine and discuss these proposed 9 amendments. We hope that our members can give us opinions and suggestions. If you have questions we can discuss and explain. This meeting will be held on Sunday 2pm 15/12/13 at our GYT premise. Refreshments will be provided. We hope that you will come along to examine these amendments. Those interested to attend please telephone our office to register before 15/12/13. Due to limited space a maximum of 80 persons is the provisional limit on a first come first served basis.

Voting procedure

1. Produce your membership card to receive a ballot paper.
2. If unable to attend you can appoint a proxy to vote on your behalf. Complete the proxy form with the name and signature of your proxy and your own signature. Registration for proxy form commences on 5/12/13 and closes 14/12/13 at the GYT office. You are then given a registered certificate which is required to be produced by your proxy at the AGM, and verified before you receive a ballot, if the above procedure is not adhered to the proxy form will be invalidated.
3. A member can not vote with more than two proxy forms.
4. On Sunday between 11 am and 1 pm 29/12/13 please come to Marigold Restaurant Level 4, 683-689 George St, Haymarket (press 4 in the lift). Use your membership card, proxy form and obtain ballot to vote. Voting will close at 1 pm(this time may be adjusted in accordance with how many members attending).The ballots will then be counted and the results announced.
5. Members are eligible to vote only if they have been a member for a full year and have paid ail outstanding membership fees. Those who have been a member for less than a year can not vote, but are entitled to vote on behalf other members by proxy. No postal vote will be accepted. Please remember to bring your membership card.

At last I would like to wish everyone:

Merry X'mas

Move forward in the new year

Everything will be smooth and all your wishes come true

Good health

Justin Chan

President

Goon Yee Tong

1/12/13”

172 The defendant does not identify which, if any, of those proposed nine amendments were relevant to the matter complained of. The matter complained of appears to be asking “the relevant departments” to shut the meeting down.

The relevant publications

173 Each publication to each person is, by reason of the multiple publication rule, a separate publication. The relevant publications fall into the following categories:

- (a) The handing out of the matter complained of to persons in the Marigold Restaurant foyer who were waiting to take the lift;
- (b) Members of the Goon Yee Tong who had shown their membership details for the purposes of the meeting on the fourth floor;

174 The Chinatown police and the Department of Fair Trading and some of the patrons at the Hurstville Hon Young Hin Chinese restaurant also saw the matter complained of. However, no issue is raised in relation to the first two and the third category only emerged in cross-examination.

Conclusions concerning the defence of qualified privilege at common law

175 Mr Karam did not attempt to submit that there was any reciprocity between persons having yum cha in the Marigold Restaurant or otherwise in the vicinity to use the lifts and who were not members of the association. I am satisfied, from the evidence of witnesses such as Mr Chan, that the other persons he saw in the lift holding the matter complained of who remained in the lift travelling beyond the meeting floor were such persons.

176 However, I am also satisfied that the defendant’s publication of the matter complained of to members of the association was similarly outside the “umbrella” (*Cush v Dillon; Boland v Dillon* at [17]) of the protected occasion. As the facts of *Cush v Dillon; Boland v Dillon* demonstrate, the word “umbrella” is used advisedly. For the reasons set out above, in the present case, the matter complained of fails each of the requirements set out in *Bashford*.

177 The matter complained of in these proceedings is not dissimilar, in terms of content and scope, to the matter complained of in *Skalkos v Assaf*, where Mason P explained (at [130] – [132]) the circumstances in which irrational,

intemperately expressed and untrue publications will warrant the withdrawal of the protected occasion even if (as was the jury finding in those proceedings) malice is not established. His Honour noted at [130] – [131]:

“[130] It must be remembered that the inquiry into relevance of the defamatory imputation to the occasion, whether expressed in those terms or in the various other ways to be found in the cases, is intended to distinguish between an imputation which should not bring liability for defamation and one which should. As in so many other areas of the law, the function of attribution of legal responsibility necessarily affects the inquiry (causation is a well-known illustration, see *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 516-517, 523-524; *Environment Agency v Empress Car Co (Albertilly) Ltd* (1999) 2 AC 22 at 29-31). The inquiry is not a mechanical application of a form of words. Something may be privileged although untrue, irrational, or intemperately expressed. But that it is untrue, irrational or intemperately expressed may warrant the conclusion, or contribute to the conclusion, that the protection of the privilege should not be afforded. Absence of malice does not mean that all that is published is within the occasion of privilege.

[131] In the present case there may have been an interest in the readers of *Novosti* in the efficient and cost effective communication of government advertising and information, which the defendants were entitled to satisfy. In satisfying the interest they could publish under the protection of privilege material defamatory of the plaintiffs, within limits marked by the relevance of any defamatory imputation to the occasion. But in determining whether they exceeded the limits it must be relevant to take into account the truth, rationality and manner of expression of what was published, because in the end a judgment must be made: was the publication in such circumstances that, according to the test of relevance to the occasion (or other expression) the imputation should bring liability for defamation?”

178 The same is the case here. Even if the defendant had been able to demonstrate the requisite duty and interest, the irrational and intemperate nature of the matter complained of robs it of its relevance to the occasion. The publication was accordingly not made on a protected occasion.

179 In the event that I have erred in holding that the matter complained of was not published on a protected occasion, I set out my findings on malice.

Malice

180 Malice is the state of mind (*Aldridge v John Fairfax & Sons Ltd* [1984] 2 NSWLR 544 at 550 per Hunt J) at the time the publication takes place which the plaintiffs assert is the defendant’s primary or predominant motive in publishing the remark that is determinative: *Roberts v Bass* (2002) 212 CLR 1.

181 Malice should not “be confused with the defendant's ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice

or any other motive than duty or interest for making the publication” (*Roberts v Bass* at [76]). However, evidence of this kind of conduct is not necessarily irrelevant because, if proved, such evidence “usually provides a premise for inferring that the defendant was *actuated by an improper motive* in making the publication” (*Roberts v Bass* at [76]; emphasis given in the original text). Nevertheless, mere proof of the defendant's ill-will, prejudice, bias, recklessness, lack of belief in truth or improper motive is not sufficient to establish malice. The evidence on the publication “must also show some ground for concluding that the ill-will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privileged occasion *and actuated the publication*” (*Roberts v Bass* at [76]; emphasis given in the original text).

182 Hunt AJA in *Gross v Weston* (2007) 69 NSWLR 279 at [52] summarises the relevant principles as follows:

[52] In my opinion, the joint judgment in *Roberts v Bass* is authority for the following propositions relevant to the present appeal:

(1) Except where the defendant was under a legal duty to publish the matter complained of, the defendant's knowledge that it was false is ordinarily conclusive evidence that the publication was actuated by an improper motive.

(2) Recklessness in the publication of the matter complained of does not establish knowledge of its falsity unless it amounts to wilful blindness on the part of the defendant which the law equates with knowledge.

(3) Recklessness — when present with other evidence — may nevertheless be relevant to whether the defendant had an improper motive which actuated the publication.

(4) If a plaintiff's case rises no higher than evidence that the defendant did not have a positive belief in the truth of what he published, there is no evidence that its publication was actuated by an improper motive.

(5) The absence of a positive belief in the truth of what was published may nevertheless be relevant — with other evidence — to whether the defendant's improper motive actuated the publication, but it will not establish that fact by itself.

(6) Where the plaintiff relies on the defendant's knowledge of the falsity of the matter complained of to establish an improper motive, it is unnecessary to identify that improper motive, as there can be no proper motive in those circumstances unless the defendant has a duty to publish the matter complained of.”

183 In *Prince v Malouf* [2014] NSWCA 12 at [214] – [215] and in *Enders v Erbas & Associates Pty Limited* [2014] NSWCA 70 at [61] the Court of Appeal emphasized that the burden resting upon the plaintiff to prove malice is a heavy one, and that the focus must be on the motivation of the publisher at the time of publication, and I respectfully adopt the Courts’ extensive analysis of malice in both these decisions. In particular, noting the observations of the Court in *Enders v Erbas & Associates Pty Limited* at [4] at [67] concerning the emphasis on the statement rather than the imputation, I take into account the defendant’s submissions (at paragraph 113 of the written submissions) as to his belief in the truth of any imputations the defendant wished to convey.

184 Where a statement is gratuitously volunteered, the motives of the publisher will be scrutinised with care. The fact that a communication was volunteered and the information was not solicited may be considered with other evidence in supporting an inference that the defendant was actuated by enmity and ill will: *Brown on Defamation* at [16-151], citing *Coles Myer Ltd v Webster*; *Coles Myer Ltd v Thompson*.

Application of these principles to the relevant facts

185 One of the difficulties with this case is that the defendant did not address the issue of malice in relation to each of the plaintiffs separately, referring to them jointly in submissions (for example, paragraph 121) or not at all. This is particularly important in relation to the first plaintiff, whose role in the Goon Yee Tong as President had finished in 2008 and who essentially held an honorary position of the “life member” type at the time of publication.

186 This brings me to the particulars of malice set out in the Amended Reply.

Reckless indifference to truth or falsity of the imputations

187 The defendant claimed that he made extensive inquiries to ensure that the contents of the matter complained of were true. These are listed in the defendant’s submissions as being the following:

- (a) Reviewing all available official Goon Yee Tong documentation, including newsletters, annual reports, financial statements, constitution and rules (T 282 lines 9-11; T 310-311);
- (b) His own observations at Goon Yee Tong meetings and events (T 324 lines 33-34);

- (c) Discussing the affairs of Goon Yee Tong on frequent occasions with other members at the yum cha meetings with other members (T 282-284);
- (d) Meeting with the President of Goon Yee Tong, Justin Chan, for over 2 hours in April 2013, which the plaintiff says included discussing the allegations about the plaintiffs (T 288-291 and T 294-295);
- (e) Sending numerous letters to the officials at Goon Yee Tong seeking to mediate the dispute in accordance with the constitution (Exhibit 6; T 296-303);
- (f) Reviewing the resignation letter of former Goon Yee Tong President Sum Yuen in 2011 (Exhibit 5) (T311 line 40 – T 312 line 5; T 324 line 39 – T 325 line 25);
- (g) Reviewing an open letter to the Executive Committee by the first plaintiff's brother-in-law, which included the allegation that the first plaintiff had been bankrupt in Hong Kong (Exhibit 5), and speaking with the writer of that letter (T 283-286);
- (h) Attending a preliminary AGM meeting at Goon Yee Tong on 15 December 2015 regarding the proposed changes to the constitution (a matter that is also prominent in the matter complained of), but being removed from the meeting (T 304-305).

188 At first blush, this list may seem impressive. However, closer analysis demonstrates that the defendant, who rarely attended meetings and played no part in the association's activities, restricted his inquiries to gossip with like-minded friends over yum cha and to reading publications which supported his own views and writing angry letters (or demanding meetings) about them.

189 The defendant not only failed to make inquiries of the plaintiffs but also of third parties who could have provided him with information as to the truth or falsity of his allegations, namely the "relevant departments" he asks others, in the matter complained of, to follow up. He published serious allegations of criminal conduct with no real inquiry at all.

190 It is a rare case where malice is established on the basis of recklessness, but the facts of this case would establish that this is one of those rare cases. The defendant knew that he had no evidence, and his response, in the matter complained of, was to ask others to gather it for him. His reckless disregard was so extreme as to amount to evidence of malice.

Spite and ill-will towards each of the plaintiffs

- 191 The defendant submits (written submissions, paragraph 122) that there is “no evidence of history of bad blood between the defendant and the plaintiffs” and that there was “little evidence of any relations between the plaintiffs, good or bad, prior to the AGM.”
- 192 This head of malice was the subject of specificity in the Amended Reply as well as in the evidence. Some of that evidence relates to both the plaintiffs while other issues relate to the plaintiffs individually.

The first plaintiff

- 193 Although the first plaintiff was no longer a part of the committee, the defendant considered it important to target him because of what he saw as his ongoing influence on the activities of Goon Yee Tong.
- 194 The defendant gave the following evidence about his feelings towards the first plaintiff and the reasons for those feelings:

“Q. You think that the Goon Yee Tong is using money to pay for Chinese Communist Party related activities in order to safeguard the stability of Sum Chow.

A. INTERPRETER: I don't know what he thinks but all I know is they are breaching the oath, not adhering to the principles of Goon Yee Tong.

Q. You think that Sum Chow is responsible for that, don't you, for the use of that money?

A. INTERPRETER: Chow Sum and his team, not just Chow Sum but he has a team of people helping him to plan, to plan for it.

...

Q. You think that about Sum Chow.

A. INTERPRETER: Yes.

Q. You don't like him, do you?

A. INTERPRETER: No.

Q. You didn't like him at the time you published exhibit B, did you?

A. INTERPRETER: No.

Q. In fact you hated him, didn't you?

A. INTERPRETER: No, on the contrary, I hoped - I hoped that they will come to a mediation and settle that. I have repeatedly asked them for mediation.

Q. When you went to the AGM on 29 December 2013, you knew that Chow Sum was no longer a member of the executive committee of Goon Yee Tong.

A. INTERPRETER: I'm not too sure, but from the newsletter, I think he's left executive committee but - but he still have tremendous influence in the association, from the evidence of Mr Wong the other day, that Chow Sum is his mentor and good friend." (Emphasis added)

195 The reasons for the defendant's anger arise not so much from his personal relationship or friendship with expelled members such as Max Yip and Chun Wing Cheong, but from his belief that the executive had no right to expel these "distinguished" persons because of their origin and standing and in particular to the defendant's profound and bitter hatred for the Chinese Communist Party. I am satisfied that they also spring from his dislike for the first plaintiff.

196 The defendant's resentment of the Goon Yee Tong's spending of money on functions involving the current government in China is also part of his rationale. He commenced his evidence by a lengthy diatribe concerning the current government in China and the suffering his family underwent, which resulted in his fleeing the country and eventually migrating to Australia, and his anger that organisations such as the Goon Yee Tong will spend its money in social functions with the Chinese government rather than on Dongguan community members requiring assistance:

“Q. You don't like the communists, do you?”

A. INTERPRETER: They have killed people so I don't know what to say.

...

Q. You don't like people who you think are sympathetic to the communists, do you?”

A. INTERPRETER: Not true. Because everyone is entitled to his own opinion, I cannot say for everyone.

Q. What about if you thought the person was using funds for Chinese Communist Party related activities?”

A. INTERPRETER: I think with charitable organisations they should only use money for the needy, or for those people who need help, the Dongguan people in Australia.

Q. By which you mean that you think Goon Yee Tong have been spending money on Chinese Communist Party related activities?”

HER HONOUR: Okay stop there and just translate that bit, so first of all what?

INTERPRETER: He said that I brought an interpreter to Goon Yee Tong and got evicted. Those Chinese officials are not from Dongguan. If you are going to help people you should help the people in need and not those people.

RASMUSSEN

Q. You thought that Goon Yee Tong money was being spent on a number of Chinese Communist Party related activities in order to safeguard the stability of Chow Sum, didn't you?

A. INTERPRETER: All I know is this is contrary to the constitution of Goon Yee Tong.

Q. Yes, but that's what you think isn't it, that they're spending money to do those things?

[Objection]

Q. You think that the Goon Yee Tong is using money to pay for Chinese Communist Party related activities in order to safeguard the stability of Sum Chow.

A. INTERPRETER: I don't know what he thinks but all I know is they are breaching the oath, not adhering to the principles of Goon Yee Tong.

Q. You think that Sum Chow is responsible for that, don't you, for the use of that money?

A. INTERPRETER: Chow Sum and his team, not just Chow Sum but he has a team of people helping him to plan, to plan for it.” (T 368-369)

(Emphasis added)

197 I am satisfied that the defendant bears the first plaintiff longstanding hostility and ill will and blames him, among other things, for the association's relationship with the Chinese government. This ill will and the desire to harm the first plaintiff, even though his official role in the Goon Yee Tong is long gone, is evidence of malice.

The second plaintiff

198 At the commencement of cross-examination, Mr Rasmussen asked:

“Q. Will you apologise to Mr Colin Chau?

A. INTERPRETER: No.

Q. Why not?

A. INTERPRETER: Why should I apologise for--

Q. Because sir--

INTERPRETER: Let me finish.

RASMUSSEN: I'm sorry.

HER HONOUR: Why should you apologise--

INTERPRETER: He was trying to - I was trying to translate and then he--

HER HONOUR: Ms Poon, thank you. I'm allowing you to finish.

RASMUSSEN: It was my fault.

INTERPRETER: No, he said why should I apologise? Because he beat up someone.” (T 340)

199 The defendant went on to say he believed this was true, and to ask Mr Rasmussen if it was true the second plaintiff had assaulted someone else:

“Q. None of that is true is it, at least at the time you wrote it you didn’t believe it to be true, did you?

A. INTERPRETER: I definitely believe because at the Mid-Autumn Festival Colin Chau actually beat up Cheung Ching Wing. Because Colin Chau practiced martial arts.

Q. You did not believe it to be true that Colin Chau assaulted his own father, at the time that you wrote it you didn’t believe it to be true, did you?

A. INTERPRETER: I believe it's true.

Q. I suggest to you that you're making that evidence up right now?

A. INTERPRETER: What did I manufacture - make up?

Q. That you believe it to be true when you wrote it, you're inventing that aren't you to help your case, am I right or am I wrong?

A. INTERPRETER: What did I make up?

Q. That you believed that Colin Chau assaulted his own father?

A. INTERPRETER: I heard that from the other members, but I can ask also did Colin Chau beat up someone at the Mid-Autumn Festival?” (T 343) (Emphasis added)

200 The defendant’s answers to interrogatories (see the answer to interrogatory 7(i)(a) in Exhibit 7) also state that the defendant “considered there were reasonable grounds to believe that the second defendant assaulted Chun Wing Cheong at the 2012 Moon Festival”, not that he believed that it had occurred, but it is clear from his evidence that he considered the second plaintiff was in fact guilty of this assault.

201 These combative responses are indicative of the defendant’s true feelings towards the second plaintiff, namely hostility and ill will. However, the answers to interrogatories do not reflect these feelings, as the following exchange (concerning his admission in interrogatories that he did not believe the second plaintiff had assaulted his own father) demonstrates:

“Q. It's the answer to question number 7D and it was translated to you, wasn't it?

A. INTERPRETER: It's after so long ago, I can't remember what was being asked.

Q. You understood what was being asked of you because you gave an answer to that question that suggests you knew perfectly well what you were being asked. Do you agree with me or not?

A. INTERPRETER: When I gave the answer, the interpreting was in Chinese.

Q. Of course it was, it was supposed to be, wasn't it?

A. INTERPRETER: Can you please repeat the interpretation of the question so that I can refresh my memory?

Q. You were asked whether you believed it to be true, at the time that you wrote it, that Colin Chau assaulted his father, and you answered "no".

A. INTERPRETER: Do you mean do I believe that the facts are true?

Q. At the time that these questions were being translated to you by the translator--"

202 At this stage the interpreter interrupted Mr Rasmusen, but cross-examination later continued as follows:

"Q. You answered that question "no" and then you said, and I'm going to say the English--

A. INTERPRETER: A very probable - it's very probable the interpreter asked me, "Do you know this?" There's a difference between "do you believe" and "do you know".

Q. You were asked do you believe, did you believe at the time you wrote it, and your answer was--

A. INTERPRETER: My understanding was I was being asked "do you know". I don't recall being asked "do you believe".

Q. The answer that you gave in addition to the word "no", and I'm talking about the question, is this, "I believed there were grounds to investigate. Whether this was the case," and I'm pausing, and, "this is why the allegation was included in the document"--

A. INTERPRETER: Yes. I believe there were grounds for the investigation.

Q. --"given the high office the second plaintiff held with the association." That's your full answer to that question, isn't it?

INTERPRETER: That is not there, "the high office held by the second"--"

203 Mr Rasmussen was again interrupted by the interpreter and, when pressed to reply, the defendant first said it was too long ago and then that the interrogatory answer was "not true":

"Q. That answer shows that you knew what the translator was telling you or asking you to answer at the time.

INTERPRETER: It's been so long ago, I can't remember the exact words.

Q. Will you apologise to Mr Chau for having accused him of that?

A. INTERPRETER: No.

Q. Will you apologise to Mr Chau for accusing him of having mental issues for which he receives treatment by medication?

A. INTERPRETER: No.

Q. You knew at the time that you wrote that in exhibit B that you didn't believe it, correct?

A. INTERPRETER: This is not true. If I don't believe it, why should I go to the police to investigate?" (T 350 – 351)

204 The defendant then attempted to blame the translator of the interrogatories:

"Q. And the question was this. At the time of publication did you believe to be true that the second plaintiff has mental issues for which he receives treatment by medication?

A. INTERPRETER: Yes. I believe he has mental problems.

Q. Your answer to that question was no. Do you agree or disagree?

A. INTERPRETER: Maybe, maybe is lost in translation and if you just ask me in Chinese I'll say. Can you ask the question to me and then I give you the correct answer?

Q. Would you like to change your evidence would you?

A. INTERPRETER: I don't want to change my evidence. Because there's a difference between Chinese and English.

Q. When you were given these questions you were told that you had to answer them truthfully, weren't you?"

205 This answer was objected to on the basis of legal professional privilege, one of a series of interruptions of Mr Rasmussen's cross-examination which, when coupled with the interpreter's interruption, made Mr Rasmussen's task difficult. After further interruptions from the interpreter, Mr Rasmussen was met with the claim that the plaintiff did not know what the answers meant because he did not understand English, in that the questions had been answered in the English language but the Cantonese they were translating from was not there:

"Q. At the time that this, the questions and these answers were translated to you, you checked the answers to make sure they were truthful, didn't you? A. INTERPRETER: No, I didn't check because they're all in English.

Q. They were being translated for you, weren't they?

A. INTERPRETER: I don't understand, maybe the translation, I don't quite understand.

Q. At the time that these answers were translated for you, you checked them to make sure they were true, didn't you?

A. INTERPRETER: I still don't understand.

Q. Do you tell the Court that you knew that the answers that you gave to these questions were not the truth?

A. INTERPRETER: I don't know because I don't understand English.

Q. I will ask you again. You had a translator, didn't you?

A. INTERPRETER: His or her translation may not be accurate, and I may not fully understand what they say.

Q. The answer to the question went more than just no, didn't it? You tried to explain yourself in the answer to that question, didn't you? A. INTERPRETER: In like being translated the questions to him, no." (T 353)

206 I am satisfied that the witness well knew what these questions and answers said, and that he was obfuscating. I made a ruling (at T 353 and T 356) that, unless the accuracy of the English translation of his answers was challenged, I proposed to regard the answers to interrogatories as correct. No such challenge was made.

207 Accordingly I am satisfied that the defendant, when asked if he believed in the truth of this imputation, knowingly answered no in order to hide his malice and ill will. He was, however, prepared to challenge Mr Rasmussen from the witness box as to the truth of the imputations, to say that these answers were wrong, to try to blame the translator and to take refuge behind unacceptable reasons such as the length of time since these events.

208 I am also satisfied that when he swore that he believed in a lesser imputation, namely that these were matters which warranted investigation, that this was not a truthful answer. This was to cover up his malice towards the second plaintiff.

Motivation arising from factional disputes

209 Sub-paragraphs (b)(i) – (b)(iv) (concerning the expulsion of Max Yip) and sub-paragraphs (b)(v) – (b)(viii) (concerning the expulsion of Chun Wing Cheong) of the Reply assert that the defendant was motivated by malice because of the way that these persons had been treated. The defendant's submissions are that there was "no evidence of the defendant's alleged friendship and affection (written submissions, paragraph 122.2) for either of these persons or that these were sufficient to support the allegation of spite and ill-will against the plaintiffs.

210 The defendant's submissions do not refer to the discussion of the wrongs done to these two former committee members (as the defendant calls them) in the matter complained of. That the matter complained of is all about these two

persons is evident not merely from their names (at the paragraphs numbered 5 and 8 by the defendant) but from the allegations throughout the matter complained of, in that its principal theme is the plaintiffs' asserted role in the expulsion of these "two distinguished members" of the Committee (paragraph 5).

211 I am satisfied that the motivation of a factional dispute was an ancillary dominant improper motive and is evidence of malice.

Language of the matter complained of

212 Particular (c) of the Reply refers to the "deliberately misleading" language of the matter complained of, in that it was addressed to "the relevant departments" and asked for the meeting to be stopped, while the defendant maintained that it was only published to the first plaintiff (or, at best, the Goon Yee Tong) to investigate the conduct of the plaintiffs.

213 The setting out and text of the matter complained of are both evidence of the defendant's attempt to frighten and intimidate association members by hints that the police and other organisations will be investigating them unless they accede to his demands.

214 This is strong evidence of malice in relation to both of the plaintiffs. The intemperate language and serious allegations similarly support this finding.

Deliberate excessive publication

215 I have found that the defendant gave copies of the matter complained of indiscriminately to anyone in the foyer, and not just to association members. This includes, in the case of one of the witnesses, someone who did not want to receive it, and creating the kind of stir that was seen by a passing journalist.

216 I am satisfied that this publication was made for the purpose of causing both the plaintiffs humiliation and embarrassment in the eyes of members of the Chinese community generally. In particular, I consider the allegations of mental illness and parental assault, for the second plaintiff, were made for this purpose.

217 The plaintiff would successfully establish all the particulars of malice in the Reply, having regard to the facts as found in this case.

Section 30 qualified privilege

218 Section 30 *Defamation Act 2005* (NSW) provides:

“30 Defence of qualified privilege for provision of certain information

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the “recipient”) if the defendant proves that:

- (a) the recipient has an interest or apparent interest in having information on some subject, and
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
- (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

(2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:

- (a) the extent to which the matter published is of public interest, and
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and
- (c) the seriousness of any defamatory imputation carried by the matter published, and
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and
- (f) the nature of the business environment in which the defendant operates, and
- (g) the sources of the information in the matter published and the integrity of those sources, and
- (h) whether the matter published contained the substance of the person’s side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
- (i) any other steps taken to verify the information in the matter published, and
- (j) any other circumstances that the court considers relevant.

(4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.”

- 219 The list of inquiries the defendant made is set out in relation to issues as to malice. With one exception, namely the defendant’s visit to the president, Justin Chan, they amount to making inquiries of himself and his friends. While the defendant did go to see Justin Chan, he appears to have argued with him rather than sought information.
- 220 I am satisfied that publication extended well beyond members of the Goon Yee Tong in that copies were handed out to anyone in the foyer but, even if this were not the case, any publication of the matter complained of would fail to attract the protection of this defence because none of the matters set out in s 30(3) can be made out.
- 221 Perhaps the most significant of these is s 30(3)(h), namely the failure to ascertain “the substance of the person’s side of the story” or to establish that “a reasonable attempt was made by the defendant to obtain and publish a response from the person”. Mr Karam’s submission is that the defendant “sought the comment of the first plaintiff and to mediate the broader dispute on numerous occasions, all of which were refused” (written submissions, paragraph 139(h)). No evidence is cited for this claim. If the evidence relied upon is the meeting with Justin Chan or some of the information set out in Exhibit 6, none of this was put to the first plaintiff in cross-examination. Nor was any approach by the defendant to the first plaintiff at the association meeting on 29 December (which I am satisfied did not occur) for the purpose of showing him the matter complained of sufficient to amount to a kind of post-publication “inquiry”.
- 222 No attempt is made by the defendant in his submissions to make any case in relation to contacting the second plaintiff. Reasonableness in terms of publishing some kind of response needs to be established in relation to each of the plaintiffs.
- 223 I set out my findings in relation to each of s 30(3) as follows:
- (a) For the reasons set out above, the extent of publication (s 30(3)(a) was excessive.

- (b) The matter complained of could not relate to the performance of the first plaintiff's functions because he had long since ceased to hold any committee role, and the allegations about the second plaintiff were of a personal nature, so s 30(3)(b) is not made out.
- (c) As to s 30(3)(c), it is not within the context of "robust exchanges" (written submissions, paragraph 139(c)) for members of an association to make extremely serious allegations of criminal conduct and report (or threaten to report) them to the police unless the association shut down or changed its activities.
- (d) This publication signally fails to differentiate between suspicions, allegations and proven facts, in that anything bad the defendant can find about the plaintiffs is put forward as a fact (s 30(3)(d)).
- (e) It was not in the public interest for these matters to be published "expeditiously" (s 30(3)(e)). The defendant's complaints related largely to events some years beforehand. The fact that a vote was taking place on unrelated issues at an annual general meeting is irrelevant.
- (f) The nature of the business environment (s 30(3)(f)) is important. This was an association of volunteers who gave up their time to organise social functions and community activities and to help community members. It was inconsiderate of the defendant, who had never volunteered to help and who seldom participated in association activities, to expect the more active members of the community to put aside their own roles in the association to listen to his querulant and irrational complaints.
- (g) The defendant had no sources for his information and beliefs beyond his own factional loyalties and irrational beliefs (ss 30(3)(g) and 30(3)(i)). For example, he had not undertaken any of the inquiries he now expected others to make.
- (h) I have set out above my reasons for holding that s 30(3)(h) has not been established.
- (i) As to s 30(3)(j), the defendant also asks me to take into account that there was "a high degree of animosity and unrest" in the Goon Yee Tong, and that members had been excluded from meetings. There is evidence of there being prior problems as set out in the prior minutes and reports of the association in Exhibit 3, but this seems to relate only to the conduct of the faction that the defendant was supporting. There is no suggestion, for example, of other ongoing problems. The publication of the matter complained of does not justify the continuation of those factional disputes, particularly given its irrational allegations and extreme language (*Skalkos v Assaf* at [131]).
- (j) While I take into account my findings of malice, if I have erred in finding malice, the absence of that finding would not be sufficient for the defendant to succeed under s 30, due to his failure to satisfy any of the provisions of s 30(3).

224 As the defences have failed I next consider the issue of damages.

Damages

225 Damages for non-economic loss in defamation are capped (s 35 *Defamation Act 2005* (NSW)). The cap on damages as at 1 July 2017 is \$389,500 (New South Wales, *Government Gazette*, No 56, 26 May 2017, 1782).

226 Where damages are awarded, careful attention must be paid to s 34 *Defamation Act 2005* (NSW) to ensure an appropriate relationship between the harm sustained and the amount of damages awarded.

227 Damage is presumed, and the law presumes that some damage will flow, in the ordinary course of things, from the mere invasion of his absolute right to reputation (*Ratcliffe v Evans* [1892] 2 QB 524 per Owen LJ at 528). In colloquial terms, the purpose of an award of damages is to nail the lie (*Ainsworth v Burden* [2005] NSWCA 174 per Hunt AJA at 89). It is unnecessary to lead evidence of damage (*Bristow v Adams* [2012] NSWCA 166 per Basten JA at [21]).

Heads of damage

228 The heads of damage identified by the plaintiffs are as follows:

- (a) Injury to feelings (*Gatley* at [32.54]).
- (b) Position and standing of each of the plaintiffs (*Gatley* at [9.5]).
- (c) The mode or nature of the libel (oral, written, headlines, setting out etc.) (*Gatley* at [9.5]).
- (d) The mode and extent of publication (*Gatley* at [9.5] and [32.52]).
- (e) The grapevine effect (in that these matters were extensively later discussed by association members and the committee (T 26) and by the Chinese community (T 25 – 26)).
- (f) The unexpectedness of the libel (*Gatley* at [9.5]).
- (g) Conduct of case at trial (*Gatley* at [32.59]). In particular, the Court can take into account that the claimant has been cross-examined in a wounding or insulting way.
- (h) The conduct of the plaintiff (*Gatley* at [9.5] and [33.51]).
- (i) The conduct of the defendant from the time when the libel was published down to the verdict (*Gatley* at [9.5]).
- (j) Evidence of injury to reputation (*Gatley* at [32.53]);

- (k) Upset due to the defence of truth (*Gatley* at [9.5]) (The defendant did not plead justification, but stated in his evidence that certain of the imputations, such as the second plaintiff's assault, were true).
- (l) The credibility and conduct of each of the plaintiffs (*Gatley* at [9.5]).
- (m) The gravity of the libel (*Gatley* at [9.5]).

229 I have taken these factors, as well as the provisions of s 34, into account in my determination of general damages, as well as the relevant provisions of the uniform legislation.

Aggravated damages

230 The plaintiffs claim aggravated damages in relation to the following:

- (a) Knowledge of the falsity, which increased the hurt;
- (b) The defendant's conduct of the trial, including cross-examination of the first plaintiff in relation to the alleged bankruptcy, working in a restaurant for cash and falsely claiming the pension, where there was no evidence to support this and where the defendant had not been prepared to plead justification;
- (c) Wrongful failure to apologise, including refusing to apologise in court, although Mr Rasmussen's cross-examination had commenced with a request to apologise.

231 The defendant's conduct of the trial is a substantial factor in terms of an award of aggravated damages. He showed a contumelious disregard for the truth not only in the extreme language of the matter complained of (for which he had no evidence whatever) but in his conduct in the witness box. His demeanour was rude and unco-operative and, as the extracts from the evidence set out above show, he refused at times to answer Mr Rasmussen's questions, answering with a question or allegation of his own. His answers to interrogatories, like much of his evidence in the witness box, contained untruths. I am satisfied that the defendant's extreme language and allegations were intended to smear and upset the plaintiffs and that he conducted these proceedings for the same purpose.

The quantum to award

232 The principal target of this attack was the first plaintiff and a substantial award of damages should be made.

- 233 Although this was not a publication on the internet, it has many of the features of vituperative publications found there which have been the subject of substantial award. The defendant saw himself as a crusader who, although he “seldom got involved” (很少參加 – to quote the matter complained of) in association activities and had never held any role or position, expected to be consulted and obeyed concerning his irrational and unfounded claims about alleged wrongs involving third parties which had occurred a number of years ago. Part of this seems to have been triggered by his all-consuming hatred of the current Chinese government and his anger at association activities involving the Chinese government, for which he blamed the first plaintiff.
- 234 Where a scurrilous attack is made by a penniless defendant using internet or social media on a responsible member of the community, damages awards have been extremely high: see, for example, *Al Muderis v Duncan (No 3)* [2017] NSWSC 726. However, I should take into account that the matter complained of in these proceedings was a printed leaflet in the Cantonese language with very limited publication, and moderate both general and aggravated damages awards.
- 235 Mr Rasmussen states that the median award is \$190,000. Looking at the differing facts set out in the table of 159 damages awards under the uniform legislation in *Australian Defamation Law and Practice (Vol 3)* at [60.000], I am of the view that median awards are not of assistance. The facts of the case should be the guide, as interpreted in accordance with the legislation and with regard to comparable awards where appropriate. It is not necessary to set out what those awards are, beyond noting that I have had particular regard to awards where the matter complained of involves community activities and associations and where publication has been limited to that particular community in much the same way as was the case here.
- 236 Taking all of the above into account, an appropriate amount to award for the first plaintiff is \$95,000, including \$25,000 aggravated damages. He was the principal target and the imputations raised against him were extremely serious in that he is charged with a series of serious crimes, including embezzlement

and using standover tactics. Only the limited nature of the publication saves the defendant from a more substantial award.

237 The amount I propose to award the second plaintiff is \$65,000, including \$20,000 aggravated damages. Although he was the lesser target, the imputations concerning him were of a personal and hurtful nature, particularly in relation to the allegation he assaulted his father. I was satisfied by his evidence that this imputation in particular caused him great distress.

238 I briefly note my reasons for rejecting the defendant's submissions concerning mitigation.

Mitigation

239 The following matters were raised in mitigation:

- (a) The matters set out in paragraphs 14(a) to 14(f) of the Amended Defence;
- (b) The plaintiffs' asserted delay in commencement of proceedings.

240 The mitigation of damages pleaded in the Amended Defence were as follows:

"Mitigation of damages

14 The defendant says further that to the extent the Court finds that (a) the words complained of carried any or all of the meanings alleged by the plaintiffs; (b) such meanings were defamatory of either or both of the plaintiffs; (c) were published to any third persons; and (d) that the defence of qualified privilege does not apply (all of which are denied) then damages ought to be mitigated on the following bases.

Particulars of circumstances in mitigation

- (a) The Constitution of Goon Yee Tong was amended during the course of the plaintiffs' tenure on the Management Committee to enable expulsion of members by bare majority instead of a 75% majority as previously required.
- (b) The Management Committee of Goon Yee Tong did engage security personnel to attend committee meetings and prevent dissenters from expressing their views.
- (c) The allegedly defamatory imputations have been repeated by the Management Committee of Goon Yee Tong to the wider membership of the Association in a newsletter circulated to all members.
- (d) The Management Committee of Goon Yee Tong has used the Association's assets to fund personal defamation litigation on the part of Committee members including the plaintiffs in this proceeding.
- (e) Members of Goon Yee Tong seeking to express dissenting views from those held by the Management Committee during the tenure of

the plaintiffs' have been prevented from doing so and expelled from the Association.

(f) Further particulars to be provided upon completion of discovery.”

241 Particulars 14(a), 14(b), 14(d) and 14(e) are an attempt to go behind the failure to plead justification and to rely upon the truth of certain portions of the matter complained of. This is impermissible: *Moran v Schwartz Publishing Pty Ltd (No 3)* [2015] WASC 215. These were withdrawn during closing submissions.

Delay

242 Mr Karam submitted that damages should be minimal because of the delay in bringing the proceedings.

243 The first plaintiff, who is 89 years of age, was asked why he had not commenced proceedings for defamation earlier:

“Q. The letter I was showing you was sent on 21 January 2014, but you did not commence this case until December 2014, what is your explanation for that?

A. INTERPRETER: Because I don't know English and also I'm getting old so I let them deal with the matter.”

244 The second plaintiff explained that they were waiting for other defamation proceedings to be completed, an explanation which I accept.

245 The plaintiffs sent a Concerns Notice promptly and commenced proceedings within the limitation period after the other defamation proceedings (which appear to have related to the persons with whom the defendant had aligned himself) were resolved.

246 Mr Rasmussen complained that there was no particularisation of delay in commencement of proceedings by way of mitigation of damages. However, the issue was raised in evidence without objection.

247 I also note that Mr Karam appeared to hint, at least in regard to certain of the imputations (such as the “hatchet man” imputation), that nobody would take the defendant's allegations seriously. It might be thought by laypersons that the damages should be reduced because the defendant's allegations were so ridiculous, garbled and without foundation that no ordinary reasonable reader would take anything he wrote seriously. That is not, however, a reason for reducing the damages, and I have not taken it into account. As Rothman J noted in *Al Muderis v Duncan (No 3)*, when awarding damages for one of the

worst and most scurrilous defamations to come before the Australian courts, the hurt to feelings and damage to reputation which arise from publications of this kind is significant and must be compensated.

Costs, interest and injunctive relief

248 Mr Rasmussen did not seek the injunctive orders foreshadowed in his clients' pleadings.

249 The parties have liberty to bring in Short Minutes of Order reflecting the agreed total of interest and costs. If the parties cannot agree on the rate of interest or date when it should commence, there will be liberty to apply. However, given the asserted impecuniousness of the defendant, it is to be hoped that this is a matter upon which the parties can agree.

250 As to costs, Mr Rasmussen said (at T 335):

“RASMUSSEN: Can I indicate that the way this case is being conducted, it's starting to cause us considerable concern and there may be consequences for persons other than the defendant if it continues, this is a fairly basic problem.”

251 I have accordingly reserved the issue of costs, with liberty to apply.

Orders

- (1) Judgment for the first plaintiff for \$95,000.
- (2) Judgment for the second plaintiff for \$65,000.
- (3) Costs reserved, with liberty to apply concerning interest and costs.
- (4) Exhibits retained for 28 days.
