

District Court  
New South Wales

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Case Name: Sum Yuen v Justin Yat-kun Chan

Medium Neutral Citation: [2018] NSWDC 274

Hearing Date(s): 25 June 2018 – 27 June 2018

Decision Date: 27 September 2018

Jurisdiction: Civil

Before: Mahony SC DCJ

Decision: Verdict for the defendant. For Orders see [138]

Catchwords: Defamation; Words spoken at meetings held by incorporated association; defence of qualified privilege upheld

Legislation Cited: Defamation Act 2005

Cases Cited: Amalgamated Television Services Pty Limited v Marsden (1998) 43 NSWLR 158  
Enders v Erbas & Associates Pty Limited [2014] NSWCA 70  
Gross v Western [2007] 69 NSWLR 279  
Guise v Kouvelis (1946) SR (NSW) 419  
Horrocks v Lowe [1975] AC 135  
Lindholdt v Hyer (2008) 251 ALR 514  
Radio 2UE Sydney Pty Limited v Chesterton (2009) 238 CLR 460  
Roberts v Bass [2002] 212 CLR 1

Texts Cited: Gatley on Liable and Slander 12th Ed

Category: Principal judgment

Parties: Sum Yuen (Plaintiff)  
Justin Yat-kun Chan (Defendant)

Representation: Counsel:  
R Potter with H Elachkar (Plaintiff)

R Rasmussen (Defendant)

Solicitors:  
Rydge Evans Lawyers  
Pancific Legal

File Number(s): 16/45042

Publication Restriction: Nil

## **JUDGMENT**

### **The plaintiff's claim**

- 1 By a Further Amended Statement of Claim ("FASOC") filed on 13 October 2016, the plaintiff claims damages, including aggravated damages, interest and costs for defamation which he said occurred when the defendant published defamatory statements of the plaintiff at two meetings of an incorporated association known as Goon Yee Tong ("GYT") on 15 September 2015 and on 13 December 2015. GYT was formed well over a century ago as an unincorporated association for the purpose of providing welfare and assistance to individuals and their families originally from the Chinese county of Dongguan, within the province of Guangdong.

### **Background to the dispute**

- 2 In 1990 GYT was incorporated as an incorporated association, pursuant to the Incorporated Associations Act 1984.
- 3 GYT had a sister society known as Luen Fook Tong ("LFT"), which had been formed for a similar purpose to assist individuals and families coming from a neighbouring county in China.
- 4 In 1917, GYT and LFT agreed to buy vacant land in Dixon Street, Sydney, upon which they built two properties. The title to those properties was held by four trustees from time to time, two from each society. Two three-storey buildings were subsequently erected on the land which still exists today at 50 and 52 Dixon Street, Sydney. The plaintiff contends that they have a value somewhere in the region of \$7.5 million.
- 5 In 1995, the title of those two properties was transferred to a third incorporated association called Luen Yee Tong ("LYT"). It was incorporated on 1 February

1995, following which, it was managed by a committee of 14 people comprising seven representatives from each of GYT and LFT.

6 In January 2008, an annual general meeting of GYT was held, in which two resolutions were adopted by the members. The first was for a new constitution. The second resolution was to “legally separate the ownership of properties at 50 and 52 Dixon Street”. Problems had arisen with the management of those properties by LFT, and separation of the properties meant that each association, namely GYT and LFT, could manage their own affairs with one building each.

7 The new constitution contained the following clause:

**“Special Resolution**

30 A resolution of the association is a special resolution if –

(a) It is passed by a majority which comprises not less than three quarters of the total ballot (total votes cast) of such members of the Association as, being entitled under these rules to do so, that in person or by proxy at a general meeting of which not less than 21 days written notice specifying the intention to propose the resolution as a special resolution was given in accordance with these rules;

(b) Where it is made to appear to the commission that it is not possible or practicable for the resolution to be passed in the manner specified in paragraph (a) – the resolution is passed in a manner specified by the commission; or see,

(c) Any sale, disposal, mortgage or dealing with any asset of the Association greater than \$50,000 in value and the altering of the objects and rules of the association require a special resolution SR.”

8 The plaintiff gave evidence, which was not challenged, that he first became a member of GYT in the early 1990's. In 1995/96 he was the treasurer, in 2005/06 the vice president, and in 2009/10 he was president of GYT. At the same time he was president of GYT, he also held the office of president of LYT. There was a system in place for rotation of the presidents of GYT and LFT to hold the position of president and treasurer, of LYT, rotating every two years.

9 In 2011, the plaintiff resigned from the management committee of GYT, but remained a member of the Association.

10 In August 2014, the plaintiff received information from a committee member of GYT that she had attended a meeting at which she was asked to witness a

draw between GYT and LFT of the two properties at Dixon Street, following which, a contract for the purchase of 50 Dixon Street by GYT from LYT for a consideration of \$4 million, was executed on 10 August 2014. By letter dated 20 August 2014, the plaintiff wrote to the general manager, Office of Land and Property Information, setting out the concerns he held that the properties had been transferred to each of the incorporated associations, GYT and LFT, from LYT for a purported consideration of one dollar, when no general meetings of the associations had been convened to approve those transactions.

- 11 The relevant officer from Land and Property Information replied by letter dated 25 August stating that the properties remained in the ownership of LYT, but stated that the plaintiff would be informed if any transactions were lodged relating to either property. A recommendation was also made to raise his concerns with NSW Fair Trading Registry Services.
- 12 On 9 September 2014, the plaintiff received a phone call from an employee of the Commonwealth Bank of Australia stating she had received an application for discharge of a mortgage over the two properties which had been sold. By email dated 10 September 2014, the plaintiff confirmed advice he had given to that employee that he was “one of the persons named as trustees in the application for incorporation of LYT in 1995”, and attached a copy of that application. The plaintiff further advised that the properties had been sold through a purported consideration of one dollar each without first calling a special general meeting or obtaining the consent of the members (as required by cl 30(c) of the constitution).
- 13 On 29 September 2014, the plaintiff wrote to the general manager, NSW Fair Trading Registry Services, setting out details of the sale and raising his concern that the transaction had been conducted without the consent of members of the association. The plaintiff asked whether such a transfer would be considered unlawful under the Associations Incorporation Act 2009, of which, the authority was the regulating authority.
- 14 The plaintiff received a letter dated 2 October 2014 from the Acting Director of Land and Property Information, advising that that office had been contacted by a solicitor acting for one of the incorporated associations, regarding settlement

of transfer of the land. That solicitor was advised that documents relating to the transfer would be accepted for lodgement, but would not be registered at this stage. The plaintiff was asked to contact the Director of Conveyancing Property and Litigation (“LPI”) in respect of the matter. The plaintiff then contacted a Mr Bhatia to confirm his concerns about the transfers.

- 15 The plaintiff then had a conversation with Mrs Daphne Lowe, who was president of LFT at a time when the plaintiff was president of GYT.
- 16 On 8 October 2014, the defendant had issued a newsletter as president of GYT announcing the transfer of each property from LYT at a consideration of one dollar.
- 17 Ms Lowe had solicitors representing her, who thereafter lodged a caveat on the title on behalf of the plaintiff and Ms Lowe. In December 2014, they commenced injunctive proceedings in the Equity Division of the Supreme Court on behalf of the plaintiff and Ms Lowe against LYT, LFT and GYT, to restrain them from transferring the properties.
- 18 An extraordinary general meeting of GYT was held on 15 February 2015. It is from that meeting, the first matters complained of are pleaded in the FASOC as conveying the following implications, which were alleged to be defamatory of the plaintiff:

“9 The first matter complained of, in its ordinary and natural meaning, conveyed the following imputations each of which is defamatory of the plaintiff:

- (a) That he falsely claims to be the trustee for Loong Yee Tong.
- (c) That he is causing unnecessary expense to Goon Yee Tong by bringing legal proceedings of a “hair-splitting” nature.
- (d) That he has misled the members of Goon Yee Tong.
- (f) That he bullies members of Goon Yee Tong by addressing them in English.
- (g) That he deliberately attempts to provoke members to say things that would advantage him in the court proceeding.
- (i) That when he was President of Goon Yee Tong a number of things were done that were not in accordance with its rules.”

- 19 That meeting was conducted principally in Cantonese. A transcript of what occurred during that meeting, translated into English, became exhibit B in the proceedings. It is attached to this judgment as Schedule A.

20 The second matter complained of in the FASOC arose from the annual general meeting of GYT held on 13 December 2015, at which the plaintiff was not present. The following imputations said to be defamatory of the plaintiff are pleaded against the defendant arising from that meeting:

“(a) That he will cause significant problems for the next generation of Australian-born Chinese members of Goon Yee Tong by taking it to Court.

(b) That for his own nefarious purposes, he caused the constitution of Loong Yee Tong to be changed without first obtaining approval of a meeting of members.

(c) That he has caused unnecessary problems and expense for Goon Yee Tong by changing the constitution of Loong Yee Tong.

(d) That he managed Loong Yee Tong’s affairs incompetently.

(e) That he failed to competently manage Loong Yee Tong’s property portfolio, resulting in a debt of \$260,000 for land tax and Council rates and exposing the properties to confiscation.

(f) That he stirs up trouble within Goon Yee Tong to waste its time and money.

(g) That he causes trouble within Goon Yee Tong due to his jealousy.

(h) That by bringing unnecessary proceedings against Loong Yee Tong and Goon Yee Tong he has prevented members’ activities from taking place.

(i) That due to his actions, Goon Yee Tong only has two title deeds instead of three.”

21 Again, the meeting was conducted in Cantonese. A transcript of that meeting, translated into English, became exhibit C in the proceedings. It is attached to this judgment as Schedule B.

22 On 18 February 2016, the proceedings in the Equity Division were resolved by consent and the following short minutes of order were noted:

(1) “The plaintiffs accept the offer of the first second and third defendants that they will not act upon any past resolutions if any, for the transfers of properties at 50 and 52 Dixon Street, Haymarket, and the abandonment by them of any past agreement between the defendants in respect of the purported transfers.

(2) Each party to bear their own costs of the motion filed 30 July 2015, otherwise the defendants jointly and severally pay the plaintiff’s costs of the proceedings as agreed or assessed.

(3) Proceedings are otherwise discontinued.”

### **Issues to be determined**

23 The defendant did not plead a defence of honesty. Rather, the following issues are to be determined in respect of each publication:

- (1) Do each of the pleaded imputations arise from the matter complained of?
- (2) Are each of the imputations found to have arisen from the matter complained of defamatory of the plaintiff?
- (3) Were each of the imputations, found to have arisen and found to be defamatory, published on an occasion of qualified privilege?
  - (i) At common law; or
  - (ii) In reply to an attack on Goon Yee Tong; or
  - (iii) Pursuant to section 30 of the Defamation Act.
- (4) Was a matter published by the defendant for a predominantly improper purpose?
- (5) Were the circumstances of publication such that the plaintiff was unlikely to suffer harm in the sense there is an absence of a real chance or possibility of harm?
- (6) Damages.
- (7) Pre-judgment interest and costs.

24 As to (3) above, the plaintiff, by his counsel, conceded that each of the meetings of GYT held on 15 February 2015 and 13 December 2015 were occasions of qualified privilege, however, he contends that any defence of qualified privilege would be defeated because the publication of the matters complained of was actuated by malice on the part of the defendant. The particulars of the defendant's malice are set out in a detailed Reply to the Amended Defence to the FASOC.

### **The plaintiff's evidence**

- 25 The plaintiff gave evidence that he was born in 1948 in Dongguan County, Guandong Province in China, and he moved to Fiji when he was eight years of age. In 1969, he received a scholarship to study in New Zealand and enrolled in the University of Canterbury, being awarded a degree of Bachelor of Civil Engineering in 1973. He had a successful career in engineering construction in both New Zealand and Sydney, and lived in Sydney from 1983 until he retired in 2009.
- 26 The plaintiff first became a member of GYT in the 1990's. From 1995/96, he was the treasurer, 2005 to 2006 he was the vice president, and in 2009 to 2010 he was president of GYT. At the same time, he was also president of LYT. He gave evidence of the history of GYT, LFT and LYT as outlined above. In 1993

GYT became a legally incorporated association, and in 1995 LYT was incorporated. Prior to its incorporation, land held in its name at Dixon Street, Sydney, was held in the name of four persons, two each from GYT and LFT. After LYT was incorporated, the property at Dixon Street was transferred to its name.

27 Prior to its incorporation, LYT was governed by 14 committee members, seven of whom came from each of GYT and LFT.

28 The plaintiff gave evidence that he was appointed a trustee of LYT, and he identified an application for incorporation of the association dated 4 July 2006 (Ex A.2). That application referred to him in clause 7 thereof, where the following handwriting appeared:

“Trustees: Percy Wong  
Wayne Chen  
Edward Yip  
Sum Yuen”

29 The plaintiff gave evidence that between 1998 and 2004 he was not involved in any GYT activities. He returned as a committee member in 2005, and at a meeting in 2008, the plaintiff attended a general meeting of GYT in which two resolutions were passed, namely, to adopt a new constitution, and the other was to split the two properties at 50 and 52 Dixon Street, Sydney, between the two organisations, i.e. GYT and LFT. The plaintiff gave evidence that in 2010 when he was president of GYT, there was an issue relating to the collection of rent of one of those properties.

30 In February 2011, the plaintiff attended an executive meeting of GYT which he believed had been irregularly called. He left. He then continued on the committee until 2011, when he tendered his resignation from GYT. He was unhappy about a number of aspects of the management of GYT. His letter of resignation dated 31 October 2011 became Ex A.9.

31 The plaintiff gave evidence that on 9 September 2014, he received a phone call from a lady at the CBA bank, which was totally unexpected. She advised that the two properties at Dixon Street had been sold. The plaintiff told her that he had been appointed a trustee of LYT prior to its incorporation in 1995, and

that night he sent her an email attaching the application for incorporation of LYT in 1995.

- 32 The plaintiff gave evidence that he wrote to the Department of Fair Trading about his concern with the transaction on 29 September 2014. He had previously written to the Office of Land and Property Information on 20 August 2014 about his concerns. He spoke to a Mr Gavin Bartier, Director, Conveyancing Property and Litigation, on 8 October 2014 in order to confirm his concerns.
- 33 By letter dated 17 October 2014, solicitors acting on behalf of both the plaintiff and Daphne Lowe commenced proceedings in the Supreme Court to prevent the transfers of the properties and restrain LYT, LFT and GYT from transferring the properties.
- 34 The plaintiff gave evidence that he received a notice of meeting dated 12 January 2015, together with a newsletter (Ex A.29). He attended the extraordinary general meeting on 15 February 2015, as one of 300-350 people in attendance.
- 35 The plaintiff was given a microphone to ask questions at the meeting, but it only worked for a while and was then turned off. He sent his son to ask the sound technician to turn it back on. He was then given another microphone and the same thing happened. A security guard then took the microphone from him, and the plaintiff gave evidence that he did not get to speak at all at the meeting.
- 36 The plaintiff was then shown a transcript of the meeting, or part of it, and referred to page 2 thereof, and the words used by the defendant at lines 6-20. He was asked what his reaction was, and he gave evidence that he was angry, because by the words spoken, the defendant was inciting the members' feelings against him, "so humiliating me, ridiculing me". By saying the words:
- "Okay he believes he is the trustee, we need his permission"
- the plaintiff gave evidence that he was "pretty disappointed and angry because that wasn't true". The plaintiff was not a trustee in 2014, but had been a trustee prior to incorporation of LYT in 1995. He had never said at any time that

anybody needed his permission to split the properties. He described that as “a slur against my name”.

37 When the defendant said “He’s the trustee for LYT, therefore he definitely is suing us”, the plaintiff said he felt very upset as it was “an untruth”.

38 When the defendant said, at page 2, line 29 of Ex B, that the plaintiff “has to speak in English”, the plaintiff gave evidence that he felt he was being ridiculed.

39 Further, on page 4, line 6, where the defendant said of the plaintiff:

“He understands Chinese, but he does not speak Chinese today. He pretends to be a Guilao today.”

the plaintiff gave evidence that he was being ridiculed by the defendant. He understood that to mean that he was being called:

“Somebody who’s pretending to be Guilao. To me, that an even worse insult.”

40 At page 4, line 15, the defendant insisted, in the face of the plaintiff’s denial, that he had written to the bank stating:

“I am the trustee. Do not give the title deeds to Dong Guan or Zheng Cheng. If you do, I will sue you. There are serious consequences (sic).”

41 The plaintiff gave evidence that he felt that he was being really put down because of those words, and felt insulted and very embarrassed in front of so many people.

42 At page 4, line 27 of Ex B, when the defendant said:

“Oh, start speaking Chinese”,

the plaintiff believed that the defendant was trying to belittle him in front of the members of the association.

43 On page 5 of Ex B, where the defendant stated:

“Bully us, we do not understand English”,

the plaintiff gave evidence that those words were spoken to belittle him and demean him.

44 At page 6, line 13 of Ex B, the defendant stated:

“Because today Sum Yuen deliberately came here to provoke us, to provoke us to say the wrong things, which were unfavourable to us in court.”

The plaintiff gave evidence that he felt very upset because he was accused of doing something that he did not go to do.

45 At page 6, line 32 of Ex B, the defendant stated:

“For previous presidents, we will not ask them what they have done. But now some people are trying to find a bone in an egg.”

The plaintiff gave evidence that he understood that to mean that some people were trying to find fault where there was none, and that was a slur against him. It meant that he was being dishonest and devious and trying to be difficult and upsetting things.

46 When the defendant said at page 7, line 5 of Ex B:

“Sum Yuen has been president before. When he was president, a lot of things were not done according to the rules.”,

the plaintiff felt very insulted:

“Because I have done everything to the best of my ability, and the best that I can. And for somebody to say that I broke the rules, that is very, very insulting, because I’m a chartered engineer and I don’t do things like that.”

47 At page 8, line 29 of Ex B, the defendant stated:

“There are many misleading rumours outside nowadays.”

The plaintiff gave evidence that he understood that that meant that the plaintiff had lied to members who were assembled there. The plaintiff gave evidence that he “felt very, very angry about that”.

48 At page 9, line 9 of Ex B, the defendant said that the plaintiff, together with Daphne Lowe, was claiming that they had no right to sell the properties:

“Since he said he is the trustee. Therefore we have to respond because they are suing us.”

The plaintiff gave evidence that he was very upset and embarrassed in front of all the people present. He had never claimed to be the trustee.

49 At page 9, line 27 of Ex B, the defendant stated:

“There is someone who is saying all the time that he is the trustee. I don’t know what his intentions are. All of you have the measure in your hearts.”

The plaintiff gave evidence that he understood the defendant to be saying that he had devious intentions and that he was inciting and planting the seeds of mistrust in the minds of the members against the plaintiff.

- 50 Whilst at the meeting, the plaintiff gave evidence that a lady came up to his table where the plaintiff was seated with family and friends and said:

“Do you know what you are doing? Have you been to court? Do you know you will lose?”

The plaintiff had replied:

“Actually I know what I’m doing. I have been to court. Why are you asking me these questions?”,

and then the lady left. The plaintiff went on to give evidence that he felt there was an immediate reaction from people in the audience to the comments made about him that were untrue, and that had been believed by at least by that one person.

- 51 The plaintiff then gave the following evidence:

“Q: Did the events of that meeting afterwards that day and onwards have any effect in relation to your mood?”

A: Yes, when I – when I got home, I was – was quite depressed. I’m very generally not a very demonstrative person, however I – I felt very hurt – very, very, very hurt, and deeply, deeply – you know, gutted.”

- 52 The plaintiff gave evidence that he did not attend the meeting on 13 December 2015 because he was overseas. In January 2016, he was given a recording of the meeting, which became Ex C. The plaintiff was referred to page 7 of Ex C, where the defendant told the meeting that in 1995, when LYT was incorporated, the constitution was changed. The plaintiff gave evidence that he was quite confused when he heard those words because he did not know that there was a constitution before incorporation. When asked how he felt about words used by the defendant at page 7, line 24 of Ex C:

“We discovered that someone is”

followed by a Chinese idiom, which stated literally:

“a deliberate plot over a long time ...”,

the plaintiff gave evidence that those words meant that the plaintiff had a hand in changing the constitution with a deliberate plot, over a long period of time,

which was a devious and evil plot. Further, words used by the defendant meant it was the plaintiff who had caused the constitution to be changed, and he felt very embarrassed and very angry when he heard those words, notwithstanding that he had not, at that time, been named.

53 On page 8, line 11 of Ex C, the defendant stated:

“Now because someone changed the constitution, we have the old and the new, and because there were no members’ general meetings to approve, we can challenge the validity of this new constitution. Therefore, temporarily, we are unable to split the properties.

Because Sum Yuen sued us, he has caused us a lot of expense.

Because he knew we could not split the properties. That is why he sued us. Because we did not know anything and there was no constitution at incorporation. Only now when we want to split, then we realised and we got challenged. Therefore we cannot do anything.”

54 The plaintiff gave evidence that he understood those words to mean that it was his fault that he had caused GYT to spend a lot of money.

55 When the defendant stated at page 8, line 21 of Ex C:

“Only a portion of the people changed it. Why was it changed? We are not sure. What were the objectives, the motives? We should all ask why. This is a very serious question”,

the plaintiff gave evidence that those words meant that he, the plaintiff, was very, very dishonest to have the constitution changed without going through the proper process, and he was inciting the members to say:

“This is a very serious question and this is the person who did it.”

The plaintiff gave evidence that he was upset that someone would make that false charge against him.

56 The plaintiff was asked about the words the defendant stated at page 9, line 5 of Ex C, concerning \$260,000 in rent that was not collected. He believed those words meant that he, the plaintiff, was incompetent by not managing the properties, namely, by not increasing the rent and having a running debt of \$260,000. He was upset because that was totally untrue.

57 At page 9, line 15 of Ex C, the defendant stated:

“We use our time and effort but a lot of members are very selfish because they just want the benefits, are jealous and do not want us to do well because they believe ‘there is nothing in it for me’, therefore they have to stir up trouble so

that we cannot achieve anything, give us headaches and waste our time, waste our money.”

58 The plaintiff gave evidence that by those words the defendant was saying that the plaintiff was being jealous, selfish and not wanting the association to move forward. His reaction was that he was upset because he had “done to the utmost of my integrity”.

59 The plaintiff was referred to page 9, line 19 in Ex C, and the reference to the defendant to fighting a court case:

“We have to see lawyers because Sum Yuen sued LYT and GYT ... therefore a lot of these people are damaging us and messing up our activities.”

The plaintiff gave evidence that when he heard that, he was disappointed, upset and angry.

60 On page 10, line 9 of Ex C, the defendant stated:

“Today we should have three title deeds but we only have two. This is because Sum Yuen sued us causing us to be short of another title deed because we cannot get the other title as we cannot split the properties, but temporarily only.”

The plaintiff gave evidence that he felt very annoyed and very upset that someone would say those things about him.

61 The plaintiff was then asked about the defendant’s words at page 10, line 13 of Ex C:

“But luckily, because we cannot split the properties, I was able to find out the true situation why we cannot split the properties. Why do we not have the right to split our own properties? Very absurd. You know what the barrister said? He said these people are very selfish, jealous and crazy. Because he couldn’t stand you doing well, you understand?”

The plaintiff gave evidence that he understood the defendant to be saying that he, the plaintiff, was being absurd, selfish, jealous and crazy, and that he could not stand the association or the executive doing well. Those words made him feel so upset and annoyed that all these untrue things were being said to members of the society.

62 At page 12, line 6 of Ex C, the defendant had stated:

“Some people still challenge our results of the ballot so we cannot pass the resolution. Better that the association breaks up. His motive is like this, is it not

so? He challenges us so that we cannot pass and the association will break up. We don't know this person's motive, really! What a motive!"

63 The plaintiff gave evidence that he understood the defendant to be saying that he, the plaintiff, wanted to break up the association and that he had very devious motives. He was very, very, very upset by those words.

64 When at page 12, line 13, someone from the audience had spoken the following words:

"In this world there are all sorts of people ... he can't stand things going well ..."

65 The plaintiff gave evidence that he felt terrible because immediately before that, the defendant had said that he, the plaintiff, had wanted the association to not do well and that he wanted to break it up. Those words indicated that a person in the audience had been affected by what he had said, and the plaintiff felt angry because people believed what the defendant said.

66 On page 12, line 31 of Ex C, the defendant had stated:

"I wish to tell you another story. When we went to get the two title deeds, Sum Yuen wrote a letter saying: 'I am the trustee, you cannot give them the title deeds'. Sum Yuen did this. He wrote a letter to the CBA. Our lawyer went to get the title deeds but Sum Yuen went to nail our title deeds, nail our title deeds."

67 The plaintiff gave evidence that he understood the defendant to be saying that he, the plaintiff, was dishonest, in claiming that he was a trustee and in writing a letter to the Commonwealth Bank, so that they could not get the title deeds. His reaction was that he was "totally angry".

68 On page 13, line 1 of Ex C, the defendant stated:

"We wasted another sum of money, to get a lawyer, et cetera to get the title deeds back. This type of people, what kind of motive, what kind of intention? You people have to think clearly."

69 The plaintiff gave evidence that he understood the defendant to be saying that he, the plaintiff, was dishonest and had ulterior motives, and devious intentions. That the members of the association would have to be careful of me and think twice about him.

70 On page 13, line 4 of Ex C, the defendant had stated:

“But finally, our lawyers found a way to retrieve these two title deeds. But we spent a lot of unnecessary money again. Do you understand?”

Some members always bring in lawyer letters and so on. So that we waste a lot of unnecessary money. After we have split the properties, later on, we will pursue our loss of money, manpower and resources up till today.”

71 The plaintiff gave evidence that his understanding of those words was that he, the plaintiff, had been selfish and had caused the association to spend unnecessary money. By saying that they would pursue the loss of money was a clear threat to the plaintiff. By saying at line 13 that:

“Well I’ll not allow such members to remain in our association”,  
The plaintiff’s understanding was that he would be expelled from the association. He did not want the stigma of being expelled from the association.

72 When asked whether he said anything about his feelings in relation to what was said about you, the plaintiff’s answered:

“A: To my family, yes, but not so much, because I – I don’t generally express my feelings a lot. And my family will know when I’m angry, because I become quiet and I – and I sort of intend to withdraw to myself a bit more.”

73 The plaintiff went on to give evidence that on an occasion when he had visited China, and was on his way back to Hong Kong, he had been shunned by a person at a railway station who was a GYT member. He had known this person for some years and had business dealings with him. The plaintiff gave evidence that:

“His demeanour and attitude towards me was quite cold, and he indicated to me that there were seats at the back of the waiting room that I could go, when next to him were vacant seats. So I took the hint and I went and sat – sat in the back.”

74 The plaintiff gave this evidence:

“Q: How did that make you feel?”

A: Well I felt that my reputation has been damaged already beyond the shores of Australia.”

75 The plaintiff gave evidence that he felt quite upset that his reputation had been tarnished. He gave further evidence that since December 2015, when he had attended GYT functions or events, he felt uncomfortable, “because I don’t know what people think of me now”.

### **Cross-examination of the plaintiff**

- 76 In his cross-examination, the plaintiff clarified that he had previously sworn an affidavit in the Supreme Court proceedings, that in about 1993 he was appointed as a trustee of LYT. Further, in 1995, he was listed as a trustee in LYT's application for incorporation. That was what he asserted to the bank manager, Ms Abustan, on 10 September 2014 in an email. He did that to establish his bona fides.
- 77 The plaintiff gave evidence that he did not mean to suggest to Ms Abustan that he was in fact a trustee, and denied that a reasonable reading of that document would suggest that he was asserting that he was in fact a trustee at the time he wrote it.
- 78 Cross-examination also established that he had no involvement in the incorporation of LYT, nor did he have any involvement in the transfer of the subject property to LYT.
- 79 The plaintiff was asked about attending the meeting on 15 February 2015, and the two resolutions to be approved at that meeting. He agreed that he chose to speak at that meeting in English, and the reason he did that was because he thought it would be important for a Judge to know about what was said in English. He knew that the persons present at the meeting spoke and understood mostly Cantonese.
- 80 The plaintiff agreed that it was an important meeting, and that his desire was to speak to the members. He did so in English, but when it was put to him that he made no attempt to speak in Cantonese, he said that he did speak in Cantonese later on in the meeting. When he said at the meeting the words that "this thing may come to court", the plaintiff gave evidence that he had concerns about his personal safety because of a previous incident.
- 81 When asked about the question the plaintiff asked about people casting their votes by proxy, the plaintiff gave the following evidence:

Q: So are you there accusing members of the committee of tampering with a proper democratic process and is it a criminal offence? Is that what you level at the members of the executive committee?

A: I'm not accusing anybody.

Q: Isn't that what you say?

A: I'm asking questions.

Q: Isn't that what you were saying?

A: I'm always asking the question.

Q: Who was responsible, do you think, for this so-called "tampering" of proxy votes?

A: Somebody - somebody who would have been involved in organising the proxies and the votes.

Q: So that would have been a member of the committee, wouldn't it?

A: Yes.

Q: So your accusation is levelled against a member of the committee, isn't it?

A: I did not accuse; I only asked a question."

82 The plaintiff agreed that it would have been wrong for him to have asserted to anyone deliberately that he was a trustee of LYT Incorporated. He further agreed that his real complaint was that the proper procedure for the splitting of the properties in Dixon Street had not been followed. However, he did not any time try and discuss with the defendant or other members of the executive committee, a way of fixing up what he understood to have been the wrong process.

83 When asked about his understanding of his role as trustee of LYT, the plaintiff said he had very little understanding of his role, however, his name was never put on the title deeds. At the time he wrote to the LPI, he did not claim to be a trustee of LYT.

84 The plaintiff was cross-examined about the letter of resignation he wrote to the committee (Ex A.6). By using the words "open resignation", he intended that other GYT members would be able to read his views set out in that letter. He himself did not pass the letter around to any GYT member. He agreed that he had said some strong things about the committee in that letter, that is the committee serving in 2011. By stating:

"In addition, before this year, I'd never encountered such an atmosphere of antagonism, threats of legal action and intimidation as this current committee.",

the plaintiff gave evidence that it was an observation he was stating, not an accusation.

- 85 In respect of Ex C, the plaintiff gave evidence that the audio files of that meeting, which he did not attend, were given to him by Ms Man-Yee Leanfore, who is also referred to in the transcript as Ho Man-Yee. She had been responsible for identifying the voices from the audio tapes for the Chinese transcripts, which were then translated into English by a translator.
- 86 In re-examination, the plaintiff gave evidence that at the meeting on 15 February 2015, he had asked a Mr Geoffrey Lee to translate what he was saying into Cantonese.
- 87 The previous incident that he referred to in his evidence in chief, occurred at a Moon Festival luncheon, at which an elderly GYT member, who had been a committee member of GYT and a member of GYT for a long period of time, was assaulted by one of the committee members.

*Evidence of Daphne Lowe*

- 88 Ms Lowe gave evidence that she had been involved in a number of Chinese-Australian organisations over the years, including the Australian-Chinese Community Association of New South Wales and the Chinese Heritage Association of Australia. She was a member from 2013 of the New South Wales Police Multi-cultural Advisory Council, from which she retired a few months previously. She had been a member since the 1980's of LFT and had served as president and on a number of other committee positions. She met the plaintiff when he was president of GYT and she was president of LFT. When asked what her assessment was of the plaintiff's reputation in the Chinese-Australian community, she gave this evidence:

“A: At that time I found that Mr Yuen was a very able, intelligent person at the meetings of the LYT, he conducted those very ably. I found that he was efficient, honest, and I'd say that I only had a positive, right view of Sum Yuen.”

- 89 Ms Lowe gave evidence that after the February 2015 meeting there was a change in that reputation, not from her point of view, but from a number of innuendos. When asked what the change was, she gave the following evidence:

“A: The change was that, amongst some of the people, especially even amongst some of the LFT people that I obviously mixed with, they had heard – and even I had heard – various comments that had been made negatively

about Sum Yuen, and therefore some of those people, because they didn't know the actual – didn't know him well – was starting to believe some of the comments, negative comments, being made regarding Sum Yuen.”

90 There was no cross-examination.

#### *Evidence of Man-Yee Leanfore*

91 Ms Man-Yee Leanfore was a retired former bookkeeper who had been a member of GYT since 2007, and had held positions on the committee. She attended the meeting on 15 February 2015 and described an incident where a security person took the microphone from the plaintiff. She gave evidence that Mr Yuen had been “very upset” at the meeting because he was not allowed to speak, because he had not applied one month before the meeting to speak. He was allowed to ask a question by the defendant, who was chairman of the meeting.

92 Before that meeting, Ms Leanfore gave evidence that the plaintiff's reputation was that of an honest man. After the February meeting, she gave the following evidence:

“A: That's – the China town people, the community people, doesn't believe in Sum Yuen any more.”

Q: Did you notice any, or observe any change in him after the 2015 meeting in February?

A: Yeah, of course. He no go to the – a function – no go to the join in the people, not talk to any more the people. This – this – just – he feel the – someone hurt him – just I – I don't know English language – the way we say ... to someone little bit slow down, slow down out of him. Yeah.”

93 There was no cross-examination.

#### *Evidence of Wei Gu*

94 Ms Gu gave evidence that she had been a member of GYT for 10 years. She had known the plaintiff for about 23 years, and attended the meeting on 15 February 2015. At that meeting she observed the plaintiff trying to ask questions, when he was interrupted from time to time, and the microphone was taken away from him. When asked about her assessment of his prior reputation, she gave evidence that her late husband always talked about the plaintiff's good reputation. In the community he was regarded as “a very respectable and responsible person”, and had a very good reputation in the

community. When asked what change she observed in the plaintiff after February 2015, she answered:

“A: At the meeting, the February meeting, I – I saw he was very frustrated and upset and I talked with him at the meeting – after the meeting – and he was upset that he was not allowed to continue to say things that he wanted to say.”

95 There was no cross-examination.

#### *Evidence of Denise Yuen*

96 Mrs Yuen was the plaintiff’s wife and had been a member of GYT for 15 years. She had filmed part of the meeting on 15 February 2015 on her mobile phone, and gave evidence of her observation of her husband not being able to continue to ask questions because there was no sound coming out of his microphone. Following the meeting, she observed that the plaintiff’s mood had changed and he had become quieter, “much quieter”. She gave the following evidence:

“Q: Has anything changed to your observation in relation to your husband attending events organised by GYT?

A: He very rarely attends anything now, only the cemetery days where we – it’s mainly just to go to respect the ancestors – not a social function.”

97 In cross-examination Mrs Yuen was asked about cemetery visits that she had attended since 2015, when a large number of people attended.

#### *Evidence of Ms Helen Leung*

98 Mrs Leung had been a member of GYT since 2011. She had known the plaintiff only since becoming a member and she gave evidence of attending the meeting on 15 February 2015, when an incident occurred with Mr Yuen and the microphone which did not work. He was then given an alternative microphone and the same thing happened. When asked about his reputation in the circles she mixed in prior to that meeting, she answered:

“A: That he was a friendly person, good character. He was willing to help and tried to do the best for his village people, yeah.”

99 She was unable to give evidence of any change to the plaintiff’s reputation within the Chinese community, because she did not see a lot of people in that community. After the meeting, she was asked whether he appeared angry, and she answered:

“A: He stayed calm. He stayed calm.”

100 In the weeks or months following the meeting, she gave evidence that the plaintiff was obviously upset about the incident. There was no cross-examination.

#### *Evidence of Ms Regina Yuen*

101 Ms Yuen was not related to the plaintiff. She had been a member of GYT for 10 years, but had known the plaintiff for 40 years. She also attended the meeting on 15 February 2015 and gave evidence that she observed that Mr Yuen had a microphone and an incident occurred. She gave this evidence:

“A: Yeah, sometime in the proceedings, someone was attempting to speak and I saw Justin Chan, and I think the current president, he – they were waving their hands to someone in the back, so I turned around to see what they were waving at, and I think they were signalling to the waiter or ...

He was signalling to someone at the back so I had a look and I think – it could be the waiter or there’s somebody at the – the stand, the microphone stand at the back, the controls, and I think they went to it and suddenly Sum couldn’t speak and that was it.”

102 She gave evidence that she had known the plaintiff for 40 years and that he was held in high regard and was very well respected. She was asked whether after the meeting she was able to assess whether there had been any change in that reputation, and she gave this evidence:

“A: They generally were afraid to say – they were more – they talked in hushed tones when his name was brought up, so I think they had – it had a negative impact on – on the group. On the people that knew him.

Q: Did you observe any change in Mr Yuen personally after February 2015?

A: Yeah, I used to – when – when we entered the meeting – some of the meetings that I went to, I generally saw him there but I think that after that we – I didn’t see a lot of him in the community. Yeah. He’s withdrawn a bit from community services.”

103 There was no cross-examination.

#### *Evidence of Jeremy Yuen*

104 The plaintiff’s son, Jeremy Yuen, gave evidence. He had a degree in engineering and was an IT expert. He had been a member of GYT for about 20 years and was at the meeting on 15 February 2015. He described an incident at the meeting when his father was attempting to speak and ask some questions, but the microphone was switched off, so he was unable to make

himself heard. He then went to ask a sound technician to turn the microphone back on to allow his father to speak, but the sound did not come back on. When asked whether after the meeting he observed any change in his father, he said “Not an overt change in demeanour”.

105 In cross-examination, the witness was asked whether the sound technician was one of the waiters at the restaurant, and he gave evidence as follows:

“A: I – I believe so, yes. He was near the sound equipment so my understanding was he was a – a sound technician.”

#### **Other evidence adduced by the plaintiff**

106 The plaintiff also adduced an extract of answers to interrogatories sworn by the defendant. The first set out the documents that the defendant had referred to prior to publishing any of the matters complained of (interrogatory 3(ii)(c) contained in Ex D). Also adduced was the answer to interrogatory 4, which set out the steps that the defendant took to verify the truth of the matters contained in the matters complained of. Exhibit F was an answer to interrogatory 5 in which the defendant identified enquiries he made with a view to ascertaining whether any of the matters contained in the documents were true or not.

107 Exhibit G was an extract from Justice Link as to the final orders made in the Supreme Court proceedings by Registrar Walton on 18 February 2016.

108 Exhibit H was a copy of the front page of the relevant contract for sale of land with a purchase price of \$4,000,000.00 and carrying the stamp of the office of State Revenue in respect of stamp duty paid on the contract for sale.

#### **The parties' submissions**

109 The plaintiff relied on a detailed written outline of submissions, together with a detailed outline on the imputations conveyed by the publication in question. The submissions set out well known principles which are referred to below in respect of each of the issues raised.

110 Both the plaintiff and defendant also made detailed oral submissions. I will refer to some of the submissions in my analysis of the various imputations alleged by the plaintiff to arise from the matters complained of, having set out some general principles.

## Legal principles as to the alleged imputation

111 In *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at 165B, Hunt CJ at CL said as follows:

“The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, what is implied by that matter, or what is inferred from it. In deciding whether any particular imputation is capable of being conveyed, the question is whether it is reasonably so capable, (Defamation Act, s 7A), reflecting the common law: ... and any strained or forced or utterly unreasonable interpretation must be rejected ...

The ordinary reasonable reader (or listener or viewer) is a person of fair, average intelligence who is neither perverse nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs (authority and citations omitted).”

112 The character of the ordinary reasonable reader have long been settled as follows:

- “(a) is of fair, average intelligence;
- (b) is a fair-minded person;
- (c) is not overly suspicious but can read between the lines;
- (d) is not avid for scandal but is not naïve;
- (e) does not search for strained or forced meanings; and
- (f) reads the entire matter complained of.”

113 In *Radio 2UE Sydney Pty Limited v Chesterton* (2009) 238 CLR 460, the plurality in the High Court referred to the common law test of defamatory material as follows:

“5 The common law test of defamatory matter propounded by Lord Atkin was applied in *Slatyer v Daily Telegraph Newspaper Co Limited*. Although Griffith CJ expressed some concern about the ambiguity of the expression ‘right thinking members of the community’, the general test stated is whether the published material is likely to lead an ordinary, reasonable person to think the less of a plaintiff was confirmed by this court.

6 Putting aside Lord Atkin’s additional requirement of being ‘right thinking’, the hypothetical audience, that is to say the referees of the issue whether a person has been defamed has been regarded as composed of ordinary, reasonable persons who Spencer Bower described as ‘of ordinary intelligence, experience and education’. Such persons have also been described as ‘not avid for scandal’ and ‘fair-minded’. They are expected to bring to the matter in question their general knowledge and experience of worldly affairs.”

114 As submitted by the plaintiff, each imputation relied upon has to be considered in the context of the entire matter complained of. That must mean that the

context in which the words were spoken, namely, at the extraordinary general meeting of GYT held on 15 February 2015, and the annual general meeting of GYT held on 13 December 2015, at which the plaintiff was not present.

**Determination as to whether the imputations are defamatory,**

115 As outlined above, the question to be determined in respect of each alleged imputation is whether it is likely to lead an ordinary, reasonable person to think less of a plaintiff. I therefore deal with each of the imputations seriatim:

(1) Imputation 9(a) – “The plaintiff falsely claims to be the trustee for the LYT”.

The plaintiff relies on the defendant’s statement to the meeting contained in Ex B, pg 2, lines 6-20 to establish this imputation was defamatory. The plaintiff had been a trustee of LYT and, as outlined above, had sent an email dated 10 September 2014 to the Commonwealth Bank of Australia stating that he was “one of the persons named as trustee in the application for incorporation of LYT in 1995”. The imputation is said to arise from the following:

“Okay, he believes he is the trustee and we need his permission”.

“He says he is the trustee for LYT. Therefore he and Daphne Lowe are suing us”.

“Sum Yuen wrote a letter to the bank saying ‘I am a trustee. Do not give the title deeds to Dongg Uan or Zheng Cheng. If you do I will sue you”.

“Claiming that we have no right to sell the properties since he said he is the trustee”.

“As to the trustee for LYT, there is no such thing existing according to investigations by the lawyer”.

I find that imputation 9(a) was conveyed and was defamatory of the plaintiff.

(2) Imputation 9(c) – “The plaintiff is causing unnecessary expense to GYT by bringing legal proceedings of a ‘hair splitting’ nature

The plaintiff alleges that there were numerous reminders to members from the defendant that the plaintiff had initiated the Supreme Court proceedings against GYT and that GYT was forced to respond to those proceedings. The gravamen of the plaintiff’s complaint here is that the defendant was saying “we do not want to go to court with other people and we do not want to waste money”. The proceedings were of a ‘hair-splitting nature’ because they were fruitless and characterised by the defendant’s expressed language “some people are trying to find a bone in an egg”, a Chinese saying denoting an attempt to find fault where none exists.

Whilst the defendant did refer in terms to wasting money in the context of the Supreme Court proceedings, I do not find that he characterised the Supreme Court proceedings as being of a “hair splitting nature” in the manner described above. I therefore do not find that the imputation arises as alleged by the

plaintiff in imputation 9(c), nor could any such imputation be defamatory to the plaintiff.

(3) Imputation 9(d) – “the plaintiff has misled the members of GYT”

The plaintiff relied on the same material as in imputation 9(a). By falsely claiming to be a trustee of GYT, the defendant was misleading members present by making the statements:

“There are many people trying to mislead”, “there are many misleading rumours outside nowadays. They have misled you”.

“Another misleading thing is ... there is no such thing”, and

“It is wrong that someone is misleading members” impute dishonesty to the plaintiff.

I find that the imputation was directed to the plaintiff and was defamatory of him.

(4) Imputation 9(f) – “the plaintiff bullies members of GYT by addressing them in English”

The plaintiff submits that the sting is that, despite understanding Chinese, the plaintiff insisted on speak English and was pretending to be a “guilao”. By refusing to speak Chinese he was accused by the defendant of bullying his listeners. The imputation said to arise here was in the nature of ridicule. In its context it was demeaning of the plaintiff to speak in English to a Chinese audience.

In all of the circumstances of the context in which the defendant referred to the plaintiff as speaking English and pretending to be a “guilao”, I find that the imputation alleged in 9(f) does not arise, and could not be defamatory of the plaintiff.

(5) Imputation 9(g) – “the plaintiff deliberately attempts to provoke members to say things that would advantage him in the court proceeding”.

The plaintiff submitted that by saying “today Sum Yuen deliberately came here to provoke us, to provoke us to say the wrong things, which will be unfavourable to us in court”, amounted to a serious charge, namely, accusing the plaintiff of seeking to manipulate the court proceedings by provoking the defendant and others to say wrong things.

In the context outlined above, I do not find that the imputation arises at all.

(6) Imputation 9(i) – “when the plaintiff was president of GYT a number of things were done but were not in accordance with its rules”

I find that this imputation is made out. Words were expressly stated by the defendant, they amount to a serious allegation about a former president and were defamatory of the plaintiff.

116 In respect of the second matter complained of, namely, the imputations said to arise during the annual general meeting of GYT held on 13 December 2015, at which the plaintiff was not present, I deal with each of the imputations again seriatim:

(7) Imputation 13(a) – “The plaintiff will cause significant problems for the next generation of Australian-born Chinese members of GYT by taking it to court”

The plaintiff relies on the defendant saying “The previous president Sum Yuen, went to court and did not allow us to split”, and “If we don’t split the properties now then it will be a big problem when left to the next generation”. He later referred to the “Next generation of ABC”, meaning “Australian Born Chinese”. The plaintiff submitted that the imputations holds him responsible by his actions in blocking the split, for damaging GYT and more specifically, if it cannot be split, then future generations of members will suffer as a result of his actions.

When read in context as to what was in fact said by the defendant at the annual general meeting, the imputation that it was the plaintiff that caused significant problems for the next generation of Australian-born Chinese members of GYT does not arise. The defendant correctly told the meeting that the matter was “now in the courts”, and that “several problems had been discovered in respect of transactions”.

(8) Imputation 13(b) – “That, for his own nefarious purposes, the plaintiff caused the constitution of LYT to be changed without first obtaining approval of a meeting of members”

Whilst it is clear that the defendant referred to the apparent change in the constitution of LYT in 1995 and the need for an application for membership to have legal status, he also told the meeting that the new constitution had never been passed. That was the context in which he stated “We can challenge the validity of this new constitution”, and that “Therefore, temporarily, we are unable to split the properties”.

By raising rhetorically, “why was the constitution changed?; what were the objectives? and “This is a very serious question”, these are merely statements arising out of that factual matrix. I therefore do not find that the imputation arises as alleged by the plaintiff in Imputation 13(b), nor could such any imputation be defamatory to the plaintiff.

(9) Imputation 13(c) – “The plaintiff has caused unnecessary problems and expense for GYT by changing the constitution of LYT” The plaintiff relies on the same evidence in respect of (8) above. The inferences said to arise from the following paragraph:

“Because Sum Yuen sued us, he has caused us a lot of expense. Because he knew we could not split the properties. That is why he

sued us. Because we did not know anything and there was no constitution and incorporation. Only now when we want to split then we realised and we got challenged. Therefore we can't do anything."

Whilst those words were spoken in the context of the change to the constitution, the imputation does not arise from the statements made by the defendant, and are not defamatory of the plaintiff.

(10) Imputation 13(d) – "The plaintiff managed LYT affairs incompetently"

Whilst the plaintiff was identified as a previous president in relation to the plaintiff going to court to restrain the split in properties, he was not identified as incompetent in managing LYT's affairs. Rather, the defendant spoke of LYT's affairs over several decades, difficulties in collecting rent and payment of land tax and council rates. The plaintiff was not responsible for managing LYT's affairs during the whole of that time and was not identified as failing to manage LYT's affairs competently. Whilst a comparison was made with the current management, mainly "because we do things properly", the imputation does not arise and could not be defamatory of the plaintiff.

(11) Imputation 13(e) – "The plaintiff failed to competently manage LYT's property portfolio, resulting in a debt of \$260,000.00 for land tax and council rates and exposing the properties to confiscation.

The plaintiff relies on the same evidence in respect of imputation 13(d).

For the same reasons, I find that the imputation does not arise and could not be defamatory of the plaintiff.

(12) Imputation 13(f) – "The plaintiff stirs up trouble within GYT to waste its time and money"

The plaintiff submits that this imputation arises from the following statements made by the defendant:

"Therefore they have to stir up trouble so that we cannot achieve anything, give us headaches and waste our time, waste our money."

"We should have been able to provide a lot of activities, one day excursions et cetera. But we have too many things to face up to. Fighting a court case, we have to see lawyers because Sum Yuen sued LYT and GYT. Also with the former president of LFT, Daphne Lowe, together they sued us. Therefore a lot of these people are damaging us and messing up our activities."

The plaintiff submitted that the allegation was made explicitly and identified the plaintiff as the former president referred to.

In the context of an annual general meeting, where words were spoken in Cantonese, given the overall context, I do not find that the imputation arises, or that the statement could be defamatory of the plaintiff.

(13) Imputation 13(g) – “The plaintiff causes trouble within GYT due to his jealousy”

The plaintiff relies on the same evidence in respect of this imputation.

For the same reasons outlined in (12) above, I find that the imputation is not made out.

(14) Imputation 13(h) – “That by bringing unnecessary proceedings against LYT and GYT, the plaintiff has prevented members’ activities from taking place”.

The plaintiff relies on the same evidence as outlined in (11) and (12) above.

For the same reasons, I find that the imputation is not made out.

(15) Imputation 13(i) – “That due to the plaintiff’s actions, GYT only has two title deeds instead of three”

The plaintiff submits that this imputation arises from the words “Today we should have three title deeds but we only have two. This is because Sum Yuen sued us causing us to be short of another title deed because we cannot get the other title as we cannot split the properties, the temporarily only”.

I do not find that the imputation arises, nor that it could be defamatory to the plaintiff. What the defendant stated was his interpretation of the current state of affairs, which were temporary only.

(16) Imputation 13(j) – “The plaintiff causes trouble within GYT because he is crazy”

The plaintiff submitted that this imputation arose from the defendant saying to the annual general meeting:

“But luckily, because we cannot split the properties, I was able to find out the true situation why we cannot split the properties. Why do we not have the right to split our own properties? Very absurd. You know what the barrister said? He said these people are very selfish, jealous and crazy. Because he couldn’t stand you doing well, you understand?”

We do things properly. We are not afraid if we offend you as we do things for the association. We do not mind if people criticise us, but we do not want people to defame us. Some members ask why we spend a lot of money on legal fees suing people. This is because you say our president is a bankrupt, you say our vice president and his father has mental illness. This is defamatory.”

The plaintiff has submitted that by those words one conclusion is clear, namely, that the plaintiff has adopted a position that causes trouble to GYT, a position that is absurd because he is crazy.

I do not find, by passing on comments made by “the barrister”, the literal conclusion could be drawn that the defendant was accusing the plaintiff of causing trouble within GYT because he was crazy. I therefore find that the imputation does not arise.

(17) Imputation 13(k) – “The plaintiff is motivated to break up GYT”

The plaintiff relies on evidence that the defendant stated in relation to a ballot taken out before the meeting, “some people still challenge our results of the ballot so that we cannot pass the resolution, better that the association breaks up, his motive is like this, is not so? He challenges us so that we cannot pass and the association will break up. We don’t know this person’s motive, really! What a motive!

Whilst there is no direct reference to the plaintiff, I find that it is clear that the defendant was referring to the plaintiff by stating those words in the context of the annual general meeting where several people were recorded as speaking. I find that the imputation does arise here and would give rise to the ordinary reasonable listener to think less of the plaintiff, and is therefore defamatory.

(18) Imputation 13(l) – “The plaintiff has caused unnecessary expense to GYT by bringing frivolous proceedings”

The plaintiff submits that the imputation was conveyed by numerous references throughout the transcript of the annual general meeting, by referring to the court proceedings and the expense involved in those proceedings. Some of the matters relied on relate to other imputations referred to above. Whilst it was submitted that the imputation is clearly defamatory, there was no doubt the factual basis for the defendant to be stating to the annual general meeting that money had been spent on the court proceedings.

I do not find that the imputation arises or that it could be defamatory of the plaintiff, based on that material.

117 In respect of the first matter complained of, I have therefore held that the following imputations set out above are defamatory of the plaintiff, namely, Imputation 9(a), 9(d), and 9(i). In respect of the second matter complained of, I find that the following imputation was defamatory of the plaintiff, namely, imputation 13(k). The plaintiff conceded that each of the meetings of GYT held on 15 February 2015 and 13 December 2015 were occasions of qualified privilege, and therefore protected the defendant from liability in defamation.

## **Defence of “Reply to Attack”**

118 The defendant also relied on its pleaded defence of “Reply to Attack”, which was particularised as follows:

“11(h) The attack was the commencement of legal proceedings by the Plaintiff in the Supreme Court of New South Wales which required expenditure by GYT of members’ funds and an extraordinary meeting of members which required an explanation to members of the reasons for that expenditure, the extraordinary meeting, as well as the Plaintiff’s involvement in the facts, matters and circumstances that underpinned that legal dispute, and his credibility by reason of his long association with the GYT and his leadership of the GYT (as president of its Committee) at the times relevant to the legal proceedings brought by him.

(i) At the time of the meetings in question the Defendant was a member of GYT and was a member of the governing Committee of GYT.”

119 The plaintiff submitted that the notion of commencement of proceedings in the Supreme Court could constitute an attack on the defendant (or on behalf of GYT) was unsustainable. The defendant was not a party to the Supreme Court proceedings, which were not served on member of GYT and therefore the members had no notice of any attack on the defendant in any event. It was submitted that the defendant was permitted to defend himself in the “field in which the plaintiff had assailed him”. It was further submitted that a response or counter-attack to what amounts to a “justifiable attack” was itself evidence of express malice on the part of the replier (referring to Gately on Liable and Slander 12th Ed at 14.51, p 596). For the reasons outlined below, it is unnecessary for me to make a determination, however, I do find that as the defendant himself was not a party to the Supreme Court proceedings, they did not constitute an attack on him.

## **Malice**

120 In his reply to the Amended Defence, the plaintiff pleaded that the publication of the matters complained of were actuated by express malice in that they were published for the predominant motive of harming the plaintiff. If it was able to establish that the imputations were published by the defendant for a predominantly improper purpose, that would overcome the defences relied on by the defendant, namely, qualified privilege, either at common law or pursuant to s 30 of the *Defamation Act*, and reply to attack.

121 In *Gross v Western* [2007] 69 NSWLR 279 at [52], Hunt AJA distilled the following relevant principles from the judgment of the High Court of Australia in *Roberts v Bass* [2002] 212 CLR 1:

“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.

(1) 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 has 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.”

122 The plaintiff also relied on the following further principles:

“(a) the introduction of material irrelevant to the privilege can also be evidence of malice: *Lindholdt v Hyer* (2008) 251 ALR 514 per McColl JA at [143];

(b) often the best and only evidence of the publisher’s state of mind towards the subject of the publication will be found in the publication itself (*Lindholdt* at [177]);

(c) even if the defendants believed that the defamatory statements were true, malice will be established by proof that the publications were actuated by motive foreign to the privileged occasion (*Horrock v Lowe* [1975] AC 135 at 149 and *Lindholdt* at [140]);

(d) regard should be had to all relevant material to discern the publisher’s state of mind prior to and at the date of publication of the matters complained of (*Lindholdt* at [180]);

(e) material published by the defendant subsequent to the publication of the defamatory material may provide evidence of improper motive at the time of publication (*Guise v Kouvelis* (1946) SR (NSW) 419 at 422-3).”

123 The plaintiff relied on a schedule of matters evidencing malice on the part of the defendant to establish that malice, namely, facts that he knew to be false or was wilfully blind as to the truthful falsity thereof, or evidence of matters of which he had knowledge or was recklessly indifferent to, to establish improper motive. That schedule may be summarised under the following sub-headings:

- (1) *Trustee of LYT issue* This related to the defendant stating that the plaintiff believed he was a trustee of LYT and that GYT needed his permission to split the property. Further, the plaintiff had written to the bank stating "I am the trustee". The defendant relied on the answers to interrogatories in Ex D and the email from the plaintiff to the CBA that he was saying that he was "one of the persons named as a trustee prior to incorporation in 1995", and that "nowhere does he say he is an existing trustee of LYT". Further, it was clear that LYT was an incorporated association and as such, would not have trustees, but committee members, and it was clear that the plaintiff was not holding himself out as a current trustee of LYT. A statutory declaration of Edward Yip, dated 28 January 1995, had made it clear that the plaintiff was named as one of four trustees. An inference therefore arose, it was submitted, that the defendant knew what he said about the plaintiff being a trustee of LYT in 2014 was false, or so reckless as to be wilfully blind as to the truth or falsity, which equated to knowledge of falsity, relying on *Roberts v Bass*, supra, at [84].
- (2) *Other statements about the CBA letter to the meeting were false.* This also related to the plaintiff writing a letter to the CBA Bank, stating, "I am the trustee. Do not give the title deeds to Don Guan or Zeng Cheng, if you do, I will sue you". The plaintiff submitted that the email did not say either of those things and the defendant knew that they were both false or that he was wilfully blind as to the truth and falsity of those statements.
- (3) *Statement that the plaintiff chaired the 2008 meeting to drive through the split and then sued to prevent it.* The plaintiff submitted that the defendant stated at the first meeting, "We have already passed the resolution to split the properties (in 2008). At that time, Sum Yuen, the previous president, was the chairperson who held the meeting. He vigorously agreed to split the properties then. But now, he is suing GYT in his name, saying that we brought the properties illegally". The plaintiff submitted that the clear inference here was that the plaintiff was acting very foolishly and taking proceedings when he was the very person who was in favour of the split in 2008. The minutes of the AGM on 20 January 2008 were silent as to the participation by the plaintiff, who was not even an executive officer of GYT at the time, but a committee member. Those minutes stated the president was Mr Sum Chow. The court would therefore infer that the defendant was either wilfully blind or recklessly indifferent to the truthful falsity of this statement which was clearly damaging to the plaintiff. It was further submitted that the statement goes to the animus as the defendant had painted the plaintiff

as a person who was acting irrationally in championing the cause on one minute and suing to prevent it the next. The defendant's motive was to alienate the plaintiff with the members by making statements which he knew were false or alternatively, was wilfully blind as to the truth or falsity thereof.

- (4) *The plaintiff changed the constitution without approval* This submission concerns statements made by the defendant at the second meeting about the change to the constitution of LYT when it became incorporated in 1995. Clear inference in those statements was that the plaintiff was responsible for illegal changes to the constitution of LYT, which has prevented the splitting of the properties and caused a great deal of expense. At the time of making the statements, the defendant had had access to the 1995 constitution which clearly stated it was approved by special resolution dated 28 December 1994. The constitution was clearly produced pursuant to the model rules under the 1984 Act. That was identified in the answers to interrogatories. It was submitted that there was nothing sinister in those new rules in terms of the membership requirements. Further, the 2007 constitution of GYT has exactly the same provisions and no change was advocated by the defendant in 2008. Therefore, what was said by the defendant was demonstrably false on the face of the documents and he must have known those statements to be false.
- (5) *The executive meeting of 28 February 2011 – accusation of dishonesty and failure to follow orders as a committee member of LYT* Exhibit A8 comprised two sets of minutes prepared for the executive meeting of GYT on 28 February 2011. Those minutes recited that the plaintiff considered the meeting was illegally called. After the plaintiff left the meeting, there was an allegation that he had collected a sum of \$76,000.00 from the agent responsible for renting the property. The inescapable inference was that the plaintiff had dishonestly taken that money and deposited it into the personal account of Daphne Lowe. No steps were taken to verify the truth of that allegation and the defendant had seen, prior to publication of those statements, a document which was a release to the agent for the sum of \$76,181.00 by the plaintiff as president of LYT, if it was paid by cheque to LFT and given to their solicitors. Secondly, it was recorded that both the plaintiff and another person be stripped as delegates of LYT, as the plaintiff was at fault for causing LYT to be unable to function as normal, with the clear indication that the plaintiff had not followed direct orders from the GYT executive committee. Not only was the plaintiff the president of LYT at the time, but the executive committee of GYT, under the presidency of the defendant, was in essence demanding that the plaintiff ignore his legal duty to act as committee member of LYT in the best interests of LYT when dealing with its business. The plaintiff submitted that this was a prime example of the spite and motive to destroy the reputation of the plaintiff by the defendant as president of GYT. These matters, it was submitted, go to the animus of the defendant only.

(6) *Events at EGM of 15 February 2015* The plaintiff submitted the following matters should be taken into account:

(1) The notice of special resolutions dated 12 January 2015 expressly stated that members could only ask questions on matters relating to the two special resolutions. The court would infer that this was an attempt to restrict the plaintiff from speaking at the meeting.

(2) The newsletter contained only very forceful messages that the split-up of the property was absolutely necessary and must be done, and if it could not proceed due to the unreasonable obstructions of a tiny few people, then GYT would face “catastrophic loss and harm”. It was submitted that the newsletter tolerated no balance of views on the issue of splitting the properties.

(3) At the meeting on 15 February the defendant said to the plaintiff, “If you want to speak, you have to inform us one month in advance”. It was submitted that there was no rule in the constitution prohibiting members speaking at a general meeting concerning the business of the resolutions proposed.

(4) The reference by the defendant to the plaintiff as a “guilao”. It was submitted that this was an attempt to intimidate and ridicule the plaintiff by using a pejorative phrase, thereby displaying animus towards the plaintiff.

(5) *The microphone* – this concerned the plaintiff’s evidence that his microphone ceased working and then a second microphone given to him ceased working when he was speaking to the meeting. This was submitted to be a deliberate attempt to sabotage the plaintiff’s attempts to address the meeting. The evidence of the defendant had signalled to someone at the back of the room, gave rise to an inescapable inference that the defendant had played a role in arranging the microphone to be switched off when the plaintiff was trying to address the meeting.

(6) (7) and (8) These were examples where the plaintiff was prevented from asking legitimate questions when the defendant ridiculed the plaintiff in a clear attempt to prevent any legitimate discussion about the resolutions. Secondly, when he said that the court would decide the matter of the split and thirdly, when he told the plaintiff that he could speak no more, and that they could not allow him to monopolise the microphone.

(7) *Events at the AGM of 13 December 2016* The plaintiff relied on the following matters:

(1) In the notice of AGM dated 11 November 2015, the plaintiff was accused of obstructing the executive’s proposal for separation.

(2) During the meeting the defendant referred to the plaintiff regarding the alleged different forms of constitution and inferred illegality.

(3) The defendant stated that the plaintiff had caused GYT a lot of expense, as set out above.

(4) The defendant stated that the plaintiff’s real motivation was to break-up GYT.

(5) This involved a repetition of the allegation that the plaintiff said he was a trustee to the CBA.

(6) GYT were put to a lot of unnecessary expense in getting the title deeds back.

(7) That the GYT would not allow such members to remain in the association.

It was submitted that all of these matters went to the animus of the defendant and were relevant to establishing malice on his behalf, or alternatively, that the imputations made out above, were published for an improper purpose.

### **Determination re malice/improper purpose**

124 In *Roberts v Bass*, supra, at [76], the plurality in the High Court said as follows:

“Improper motive in making the defamatory publication must 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. If one of these matters is proved, it usually provides a premise for inferring that the defendant was actuated by an improper motive in making the publication. Indeed, proof that the defendant knew that a defamatory statement made on an occasion of qualified privilege was untrue is ordinarily conclusive evidence that the publication was actuated by an improper motive in making the publication.”

125 The onus is on the plaintiff to establish malice by proof that the publication was actuated by a motive foreign to the privileged occasion. Further, a mere lack of belief does not defeat the privilege where the defendant honestly believed in the truth of the statements made. It is possible for a person to have an honest belief in what they publish, although they have no belief in the truth of a defamatory imputation to be inferred from that publication. In *Roberts v Bass*, supra, the plurality stated:

“The ultimate issue is always whether the publication was made for a purpose foreign to the duty or interest that protects the occasion of the publication, not whether the defendant believed the matter to be true.” (at [89])

126 The Court went on to hold that not only must the plaintiff prove that an improper motive existed in order to prove malice, but also that was the dominant reason for the publication. The Justices went on to say:

“103 Carelessness of expression or carelessness in making a defamatory statement never provides a ground for inferring malice. The law of qualified privilege requires the defendant to use the occasion honestly in the sense of using it for a proper purpose; but it imposes no requirement that the defendant use the occasion carefully. Even irrationality, stupidity or refusal to face facts concerning the plaintiff is not conclusive proof on malice although in “an extreme” case it may be evidence of it. And mere failure to make enquiries or apologise or correct the untruth when discovered is not evidence of malice.

104 Finally in considering whether the plaintiff has proved malice it is necessary that the plaintiff not only prove that an improper motive existed that it was the dominant reason for the publication ...”

127 In the circumstances of the first meeting of GYT held on 15 February 2015, I find in respect of the imputations which I have found were defamatory, namely,

imputations 9(a), 9(d) and 9(i), the plaintiff's case arises no higher than evidence that the defendant did not have a positive belief in the truth of what he published. Whilst there was extravagant language used during that meeting, I find that there is no evidence here that the publication of the three imputations was actuated by an improper motive. Further, whilst the defendant was somewhat reckless in publication of some of the material, for example, imputation 9(i), ("when the plaintiff was president of GYT a number of things were done but were not in accordance with its rules"), such recklessness does not in the circumstances establish either an improper motive or malice.

128 Similarly, in respect of the second meeting, at which the plaintiff was not present, by saying "the plaintiff is motivated to break up GYT", as per imputation 13(k), the defendant again used extravagant language in describing the plaintiff's motive. However, that of itself does not prove that he was actuated by malice or had an improper motive himself.

129 It is well settled that the test for malice is subjective, meaning that it depends on the defendant's intention and his state of mind when publishing the defamatory material – see *Enders v Erbas & Associates Pty Limited* [2014] NSWCA 70 at [61] and following. At [70], Tobias AJA (with whom Ward and Leeming JJA agreed) set out a number of propositions which included the following:

(ii) The existence of malice involves the subjective test entirely dependant upon the defendant's state of mind and intention;

(iii) In order to constitute malice the defendant's intention must be such that it can be said that he had an improper motive in publishing the defamatory statement, being a motive or purpose that is foreign to the occasion of qualified privilege;

(iv) Although knowledge that a defamatory statement is untrue is almost invariably conclusive evidence of malice, it is still necessary for the plaintiff to establish that the defendant had an improper motive for publishing the false and defamatory material;

(v) The test for determining whether the matter complained of conveys a defamatory imputation is objective and is entirely independent of the defendant's state of mind or intention. As such, the words used may have meaning A but the defendant may have subjectively intended B which is not defamatory;

(vi) Accordingly, for malice to be established the plaintiff must first persuade the finder of fact that the defendant intended the matter complained of to convey the defamatory imputations pleaded. In some cases those imputations

would be conveyed directly from the matter complained of; in other cases they will not. There is no presumption that the defendant so intended which he is then required to rebut. This proposition may be subject to the plaintiff establishing that notwithstanding that the defendant did not intend to convey the defamatory imputations pleaded, nevertheless, the defendant was actuated by an improper purpose.”

130 Here, the defendant did not give evidence of his intention at the time of making the statements during the two meetings. The evidence relied on by the plaintiff, namely, the defendant’s statements in answer to interrogatories in Exs D, E and F, do not establish the requisite intention, for example, in Ex E, in answer to the interrogatory 4(b), “What steps did the defendant take in relation to each such matter”. The answer was as follows:

“Defendant together with the assistance of some other members of the association reviewed the documents referred to in the answer to 3(ii)(c) above and did not find any official records stating that the plaintiff is the trustee ...”

131 Each of the seven matters relied on by the plaintiff as set out in [123] above, falls short of establishing that the defendant’s intention at each meeting was actuated by malice or by an improper purpose. The plaintiff has not established that the defendant’s knowledge of falsity of any of the defamatory material actuated the publication of that material.

132 I am therefore not persuaded that the publication of the matters complained of were actuated by express malice so as to defeat the defence of qualified privilege relied on by the defendant, let alone that such malice or improper purpose was the dominant reason for the defendant’s statements.

133 These findings make it unnecessary for me to make a determination in respect of the issue of “Reply to attack” as a defence and s 30 of the *Defamation Act*. But for these findings however, I would not have upheld the defendant’s contention that the plaintiff was unlikely to suffer harm in the sense that there is an absence of a real chance or possibility of harm in the circumstances here. The plaintiff was well regarded within the Chinese Australian community. I accept the evidence outlined above, which was not challenged, that he suffered hurt feelings and loss of his reputation in that community. Therefore, in the event that I am wrong in the findings made above, I proceed to assess damages the plaintiff would have been awarded but for those findings.

## **Damages**

134 The purposes of an award of damages in a defamation case are threefold:

- (a) Consolation for hurt feelings;
- (b) Recompense for damage to reputation; and
- (c) A vindication of the plaintiff's reputation.

135 Damages are capped under the Act at \$365,000.00. As outlined above, I have accepted the plaintiff's evidence as to his hurt feelings and that of his wife as to the effect she observed on him following these two meetings. I have also had regard to other awards of damages referred to me by counsel, however, each case turns on its own facts. Here, I have taken into account the following:

- (1) That the publication was in each case to a meeting of some 300 – 350 Cantonese speaking persons;
- (2) That for some of those persons, who knew the plaintiff well, the material published would not have been accepted as particularly damaging to the plaintiff's reputation;
- (3) Others in the meeting would have seen the material as quite damaging to the plaintiff's reputation;
- (4) The imputations, particularly those contained in imputation 9(d) and 9(i) above, were quite serious, and to the ordinary listener would have seriously damaged the plaintiff's reputation; and
- (5) Further, I accept that that damage occurred not only within this jurisdiction but also extended to persons outside New South Wales, for example, Hong Kong.

136 I therefore would have awarded to the plaintiff damages of \$75,000.00. He would also have been entitled to interest at 2% for a period of 1.5 years.

## **Conclusion**

137 Whilst I have found that four of the imputations relied on by the plaintiff as arising from the statements made by the defendant at the two meetings of GYT held on 15 February 2015 and 13 December 2015 were defamatory of the plaintiff, I have upheld the defence relied upon by the defendant of qualified privilege. That defence has not been defeated by the pleading of malice relied on by the plaintiff. There will therefore be a verdict for the defendant and consequential costs orders adverse to the plaintiff.

## Orders

138 I make the following orders:

- (1) There will be a verdict for the defendant.
- (2) The plaintiff is to pay the defendant's costs of the proceedings.
- (3) The exhibits are to be returned forthwith.
- (4) Any application for special costs order is to be made by way of Notice of Motion, together with affidavit evidence in support thereof.

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