IN THE HIGH COURT OF THE COOK ISLANDS)
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO: **11/2006**

BETWEEN: **WILLIAM FRAMHEIN** of Rarotonga, Consultant

Plaintiff

AND: **TEPAKI NOOAPII (TIM) TEPAKI** of Wellington, New Zealand, Property Developer Director

Defendant

Mr Charles Little for Plaintiff

Mr Tevita Vakalalabure and (part only) Mr Norman George for Defendant

Hearing: 25, 26, 27, 28 and 29 June 2007

Decision: 29 June 2007

Written reasons for decision: 4 July 2007

JUDGMENT OF FISHER J

Introduction

1. The plaintiff claims $120,000 damages for alleged defamation by the defendant in two publications of the newspaper *Cook Islands News*. The passages in question were contained in the defendant's letter to the editor published on 9 December 2005 and in an article quoting the defendant published on 26 April 2006. The defendant admits the essentials of the claims but invokes the defences of fair comment and justification. He also denies some of the defamatory meanings alleged by the plaintiff.

2. At the conclusion of the hearing on 29 June 2007 I gave judgment for the plaintiff in the sum of $80,000 and awarded the plaintiff costs recorded in a separate ruling. I indicated at the time that although the reasons for decision had been dictated they

would be provided to the parties as soon as was practicable thereafter. The reasons for decision now follow.

Factual Background

3. The defendant was a property developer operating through companies in New Zealand and the Cook Islands. His Cook Islands companies included Tepaki Investments Ltd ("TIL") and Tepaki Properties Ltd ("TPL"). He was a director and principal shareholder of both. It was common ground that he exercised de facto control over both companies and was their alter ego.

4. During 2004 the plaintiff was employed by the defendant and his companies in New Zealand. Towards the end of that year they agreed that the plaintiff would move with his partner to the Cook Islands to continue work for the defendant in two recently formed businesses there incorporated as TIL and TPL. The two formed part of the Tepaki Group which tended to be treated as one overarching business, albeit divided into various activities intended to be associated with particular companies.

5. The plaintiff and his partner duly moved to the Cook Islands in December 2004. The plaintiff was made director and company secretary of TIL but was the Cook Islands Manager of both TIL and TPL. As such he was given primary responsibility for managing both companies and their financial affairs in the Cook Islands. This included being an authorised signatory of their cheque accounts.

6. The plaintiff's partner was also made an employee of the Tepaki Group. The agreement they had with the defendant was that throughout their employment they would be paid salaries and would also be provided with free board. The two continued in their respective roles with the Group until they resigned nine months later on 2 September 2005.

7. When the plaintiff and his partner arrived in the Cook Islands TIL and TPL were still at an embryonic stage. Essentially it was the plaintiff's brief to launch and promote their trading activities. This was complicated, however, by a severe cash shortage under which the Group operated during the nine months of the plaintiff's employment in the Cook Islands.

8. The liquidity problems had several consequences. One was that during the nine months they had with the Group the wages of the plaintiff and his partner were not paid in any normal sense. The second was that from time to time the plaintiff paid certain items on behalf of the Group. The third was that the plaintiff allowed some intermingling between the plaintiff's financial affairs and those of the Group. This included the plaintiff's payment of some of the Group's debts and also occasions on which Group cheques were used in whole or in part to pay for food, petrol and other such items from which the plaintiff and his partner benefited. Essentially these benefits were drawings in lieu of wages.

9. The liquidity problems were combined with some rather amateurish bookkeeping and financial practices. In the real world this is probably common enough. However, the plaintiff's approach of intermingling his financial affairs with those of the two companies was less than ideal. In an ideal world his wages and those of his partner would have been regularly paid, whether in cash or by journal entry, if necessary associated with simultaneous advances by the plaintiff and his partner back to the company in question. Benefits derived by the plaintiff and his partner could then have been either paid by them directly or debited against their advance accounts with the company.

10. On the other hand a full record was kept of all relevant transactions. This included the extent to which the plaintiff and his partner were benefiting from some transactions in which one of the companies purchased goods or services from which the plaintiff and his partner benefited. In addition to primary documents, records were kept in the accounting system kept by the plaintiff in an accounting package on a Dell computer.

11. This meant that at any given time it would always be possible to reconcile the state of accounts between the companies on the one hand and the plaintiff and his partner on the other. Essentially the reconciliation at that time would require a balancing between undrawn wages plus other payments which the plaintiff had incurred on the companies' behalf against any cash or other benefits received by the plaintiff and his partner on the other. The difference between the two could then be paid in cash. So in the long run there was no inherent reason why the intermingling and amateurish approach to bookkeeping would disadvantage either party.

12. Another feature of the casual way in which the business was run involved the use of the companies' bank accounts. The official Tepaki Group policy, as recorded in documentation with the bank and at least one set of group minutes recorded on 29 August 2005, was that all cheques would bear two signatures. In fact for the last three months of the plaintiff's employment cheques were often drawn using only the plaintiff's signature. In itself that does not seem to have mattered given that, with matching casualness, the bank always accepted all such cheques without insisting on a second signature.

13. Following unhappy differences between the plaintiff and the defendant, the plaintiff sent the defendant his resignation on 2 September 2005, effective immediately. On the same day he faxed to the defendant, via the defendant's lawyer Mr Sparhawk, a full set of company account records. Despite some equivocation by the defendant on the point, I accept the plaintiff's evidence that this included a full print out of the TIL and TPL cheque book registers from his computer. It also included lists of creditors, a calculation of the wages due to the plaintiff and his partner totalling $24,800.00, and a list of the drawings by way of benefits derived direct from the companies for which they would need to give credit. At that time these drawings were thought to total $5,073 (all cents will be omitted). After deducting the value of the drawings from his calculation of unpaid wages the plaintiff claimed the net sum of $19,726.

14. Two days later the plaintiff and his partner vacated the company property. On leaving, the plaintiff took with him the Dell computer and fax machine which he had been using in the business.

15. On receiving the financial records and statement of accounts from the plaintiff, Mr Sparhawk recalculated the sum due to the plaintiff by way of wages at $12,785. He sent his calculation on to the defendant by email, commenting that the $12,785 "will need to be adjusted to reflect any drawings, purely personal expenditure for advances made to William [the plaintiff] by group companies and trusts over the period from 26/12/04 to 2/09/04".

16. On 5 September 2005 the defendant forwarded the Sparhawk email to the plaintiff adding his own comments. He referred to Mr Sparhawk's calculation of salary as $12,785 and commented "you and Eddie will now have to adjust this against funds

you have drawn from TPL and TIL...". He criticised the plaintiff's transfer of funds from TPL to TIL. He went on to make various other criticisms but neither Mr Sparhawk nor the defendant criticised the fact that, as the plaintiff's records revealed, various drawings had been made in lieu of wages.

17. The plaintiff replied the next day, 6 September 2005, rejecting the defendant's criticisms, essentially stating that everything he had done had been done with the knowledge and authority of the defendant. He also advised "I have taken the Dell computer and the fax machine and the value of the computer and fax machine can be deducted from the $19,726.30. I calculate the value of the Dell to be $2,500 and the fax machine which I bought and was reimbursed was $450. So you owe us $16,776.30".

18. In an email of the same date (the precise order of these two emails being unclear) the defendant traversed various aspects of the argument between the two and stated "I understand you have claimed the Dell computer presented to me by ANZ Bank. You can keep it provided you allow our troops to download information belonging to Tepaki Group".

19. The plaintiff duly arranged with TIL and TPL representatives in Rarotonga to download the Tepaki Group accounting information from the Dell Computer. He also met with the Group's accountant, Mr Eddie Drollet, to go through the accounts in detail. In the course of doing so minor adjustments were made in various respects but the plaintiff's claim remained the same in its essentials. The plaintiff then produced a revised reconciliation in which the deduction for drawings was increased by $641 from $5,073 to $5,714 and an additional deduction of $2,500 was allowed for the Dell computer. The revised figures were conveyed to the defendant.

20. When the defendant rejected their claims the plaintiff and his partner issued proceedings for unpaid wages less drawings. After amendments their claim was for unpaid wages at the rate of $800 per week ($29,600) plus sums paid by them on behalf of the companies to Telecom ($3,263) and to Te Aponga Uira ($287) less drawings in the form of payments made by the company to the benefit of the plaintiff and his partner ($5,714).

21. The plaintiff's wage claim was reported in the *Cook Island News* of 7 December 2005. The defendant responded in a letter to the editor published in the *Cook Island News* of 9 December 2005. In the letter the defendant referred to the plaintiff's wage claim and went on to say:

> "Had you bothered to contact our office at Nikao you would have found out that a recent reconciliation by our accounts division show that William Framhein in fact owed some $3,000 to the group accounts and not the other way round, and transfers of funds have occurred under William's watch of the group accounts that amounts to fraud. As for the Dell computer he said he bought, that simply isn't true. The particular computer was gifted to the group by a Wellington bank for being a preferred customer.
>
> The disappointment for me is that I asked the Tepaki Group board meeting of 5 December, prior to my departure for New Zealand, that the debt owed by William be waived and the board refrain from handing their findings to the police."

22. The plaintiff's solicitor wrote to the defendant's solicitor alleging that the published letter was defamatory and seeking a retraction failing which proceedings would be issued. The defendant rejected this request. Shortly after he gave an interview to a journalist from *Cook Island News* which published the result in an article on 26 April 2006. The article contained a number of comments by the defendant upon the plaintiff's threat of defamation action describing it as "attention seeking" predicting that the plaintiff would defame himself rather than the defendant, describing the defamation proceedings as a publicity stunt and concluding "if he wants to file for defamation anchored on the information we have supplied to CI News to defend ourselves from his media outbursts let him, and let the courts decide who defamed who".

23. The article also quoted the defendant in the following terms:

> "Tepaki said there were irregularities and unexpected shortage of funds during Framhein's watch of the accounts, which could not be explained until Framhein left Tepaki Group, when new staff uncovered that he as a signatory to both accounts had moved money between the two accounts without the authority of a second signatory. In other words, cheques were signed by him alone, which breached the authorisation process lodged with the banks.

> He said he had not bothered to respond to Framhein's attention seeking through the media as the manner of his handling Tepaki Group's accounts had been placed in the hands of the police. Tepaki said he has been told that the police now had the evidence they required from the banks, which should enable them to move forward, and that's where that matter sat for now.
>
> Tepaki said Framhein was an enigma. He must have known when the police fingerprinted him and told him to hand in his passport on Friday 23 December 2005, only avoiding being jailed that day through the intervention of one of Tepaki Group's staff, that he had been snapped."

24. Noting the allegation that the Police had apprehended him, the plaintiff obtained from the Cook Islands Police a letter of 3 May 2006 confirming that the Police never interviewed, charged, arrested or fingerprinted the plaintiff nor demanded his passport as alleged. The plaintiff's solicitors sent this to the defendant's solicitor along with a letter stating that the latest *Cook Island News* article was defamatory and asking for an apology and retraction. The defendant again refused any apology or retraction. The plaintiff then issued the present proceedings for defamation.

25. The plaintiff's wage claim came on for hearing in the High Court on 18 and 19 June 2007. In a judgment of 20 June 2007 Weston J found for the plaintiff and his partner. He held that each was entitled to wages at $800 per week (totalling $29,600) plus the two further items paid on behalf of the two companies ($3,263 and $287) less the drawings from the company to benefit of the plaintiff and his partner ($5,714). He held that no further money was due to the companies for the Dell computer as the defendant had said in his email of 5 September 2005 that the plaintiff could keep the computer so long as access was provided to extract relevant data. As the data had been downloaded, the condition was satisfied and no account had to be given by the plaintiff for the computer. In the result judgment was entered for the plaintiff and his partner in the sum of $25,024 plus interest. The Judge held that the actual employers had been TIL and the defendant personally.

Issues in the defamation proceedings

26. The defamation proceedings originally involved the plaintiff's partner as a second plaintiff and another Tepaki Group director and the *Cook Island News* as second and

third defendants. As the proceedings progressed the parties were progressively pared down to the present plaintiff and defendant.

27. At a formal level the issues between the parties are identified in the third amended statement of claim filed on 11 June 2007 and the second amended statement of defence filed on 8 June 2007 (applied with all necessary modifications to the third amended statement of claim) as refined by agreement in my ruling of 26 June 2007.

28. In the result the prima facie essentials for the defamation claimed are common ground, namely the facts that:

(a) The words complained of were published in the *Cook Islands News* on the dates alleged.

(b) The plaintiff was identifiable as the subject of the criticisms made in the two publications.

(c) It was the defendant who wrote the letter published on 9 December 2005 and who made the statements quoted in the publication of 26 April 2006.

(d) The extracts relied upon by the plaintiff were defamatory of the plaintiff (see statement of defence para 3).

(e) The words complained of "meant and were understood to mean that the ... plaintiff was a dishonest employ [sic] of the defendant" (statement of defence para 3).

29. As the prima facie ingredients of a cause of action for defamation are common ground the principal question is whether the defendant can escape liability by successfully relying upon an affirmative defence.

30. The only affirmative defence of consequence advanced by the defendant is justification. The defendant alleges that when the plaintiff signed cheques from which he benefited to the extent of $5,714 he did so dishonestly in that he was drawing these cheques for his own personal benefit knowing that he had no right to do so. The defendant also criticises the plaintiff for using these cheques with one signature rather than two, and also for transferring funds from TPL to TIL, but in the

end, as I understand it, those are alleged to be merely the means by which the plaintiff dishonestly took funds to which he was not entitled rather than dishonesty per se.

31. Secondly, and independently, the defendant relies for its justification defence upon the allegation that the plaintiff's removal of the Dell computer amounted to theft.

32. In his statement of defence the defendant had also purported to rely upon the defence of fair comment on a matter of public interest. On a closer examination of the statement of defence, however, it was clear that this added nothing to the defence of justification since the particulars upon which the defendant relied were essentially allegations of fact. The sting of the publications lay in the express or implied factual allegations. There was little or nothing of significance by way of comment.

33. The principal issues in the case are therefore whether the defendant can show that when the plaintiff made drawings from the companies totalling $5714, and/or when the plaintiff removed the Dell computer, the plaintiff was acting dishonestly. Further issues are whether the published words carry all the defamatory meanings alleged by the plaintiff and, if the plaintiff succeeds on liability, the assessment of damages. Of these issues, it will be convenient to begin with defamatory meanings.

Additional defamatory meanings

34. The meanings to be taken from the letter published on 9 December 2005 must be derived from the particular words pleaded by the plaintiff, namely "...and transfers of funds have occurred under William's watch of the group account that amounts to fraud", albeit interpreted in the wider context of the articles as a whole and the preceding article of 7 December 2005.

35. Similarly, the meaning to be taken from the article published on 26 April 2006 must be taken from the particular sentence:

> "...He must have known when the Police finger printed him and told him to hand in his passport on Friday, 23 December 2005, only avoiding being jailed that day through the intervention of one of the Tepaki Group staff, that he had been snapped."

again interpreted in the wider context of the articles I have mentioned.

36. The plaintiff alleges that in their natural and ordinary meaning the words complained of meant that the plaintiff was:

> "(i) A dishonest person who is guilty of criminal dishonesty and breach of trust in handling company funds and company property;
>
> (ii) A dishonest person who acted fraudulently whilst in the employ of the defendant; and
>
> (iii) Guilty of theft.
>
> (iv) A criminal
>
> (v) A person who engages in criminal behaviour."

37. As indicated earlier, the defendant admitted that the words meant that the plaintiff "was a dishonest employee of the defendant" but this does not exactly match any of the meanings pleaded by the plaintiff and I will therefore take it that the defendant rejects all five of the alleged meanings.

38. I accept Mr Vakalalabure's helpful submissions as to the test for the meanings to be extracted for present purposes derived from *Lewis & Anor v Daily Telegraph Ltd etc* [1963] 2 All ER 151 (HL) at 155. The question is what the ordinary reasonable reader of the *Cook Island News* would take from the published item.

39. The test does not involve any careful semantic or legalistic analysis. It is the ordinary reader of the daily Cook Islands newspaper that matters. In approaching this question I bear in mind that Rarotonga is a relatively small place, that the businesses and persons involved were relatively well known, and that a substantial body of readers would be capable of remembering the gist of the first article over the period of several months that separated it from the second.

40. Given the wider context I accept that the ordinary reader would take from the statement made on 9 December 2005 "...transfers of funds have occurred under William's watch of the group account that amounts to fraud" the meaning that while in the employ of the defendant and his companies the plaintiff was responsible for the fraudulent use of funds. I further accept that the ordinary reader would take from the references to dealings with the Police in the article of 26 April 2006, coupled with the allegations that the plaintiff had been "snapped" and that this was of sufficient seriousness that, but for intervention by the defendant's staff, the plaintiff would have

been jailed, that the plaintiff had committed a crime in the course of his employment with the Tepaki Group.

41. I further accept that the ordinary reader would understand the published words to have each of the meanings pleaded by the plaintiff. Fraud is an example of "dishonesty". The references to the Police, jail and "snapped" import criminality. I reject the argument that in this context "snapped" might be taken as a reference to police photography. I prefer Mr Little's submission that in the context, the word "snapped" imports being caught red-handed in some form of behaviour that one should not engage in. "Employment" with the defendant is clearly the context. "Theft" is not quite so obvious but in my view the ordinary reader, seeing the reference to transfer of funds in association with fraud, would be likely to conclude that in lay persons' terms there had been the theft of company money. It follows that the pleaded meanings (i) to (v) inclusive fall within the natural and ordinary meaning of the words complained of.

The defence of justification

42. It is common ground that the onus of proving that the facts imported by the defamatory statements were true lies upon the defendant although truth in substance will suffice. It is criminal dishonesty that lies at the heart of the two particulars pleaded in justification – the fraudulent use of company cheques to take funds to which the plaintiff was not entitled and theft of the Dell computer.

43. Because criminal dishonesty lies at the heart of those two allegations I think it important to set to one side other potential criticisms of the plaintiff. This is not a case about carelessness, inefficiency, failure to follow instructions or amateurish bookkeeping. It is important to emphasise that at the outset because throughout the case the defence appears to have been distracted by such criticisms. The plaintiff has not sued over criticisms of that nature. He has sued over allegations of criminal dishonesty.

44. An example was the plaintiff's use of cheques bearing one signature rather than two. There is a direct conflict between the plaintiff and the defendant as to whether the defendant specifically authorised the use of one signature alone. In that conflict I happen to prefer the evidence of the plaintiff for a number of reasons: there were

occasions when the defendant was with the plaintiff when cheques of that nature were used; the defendant was a "big picture" man who prided himself upon not being concerned with details; the defendant preferred that the plaintiff use the TPL cheque account rather the TIL cheque account wherever possible and yet during the period June to September 2005 the plaintiff was the sole employed signatory authorised to sign such cheques; during that period the only other Tepaki Group employee or officer who had been authorised to sign cheques on that account, Rosemary Fletcher, had left her employment with the Tepaki Group; if any cheques were to be signed at all during that period, the plaintiff was the only person authorised to do it; on the TPL account the only signatory other than the plaintiff in the Cook Islands (the defendant himself was normally based in New Zealand), Mr Short, was not normally at the companies' office, lived on the other side of Rarotonga, and was away from his home on building sites and in other places in the course of his work. The Group company policy that cheques would always bear two signatures was one of those rules which sounded good in theory but was bound to fail in the real world. The plaintiff had no real incentive to spend valuable time chasing Mr Short around the countryside to obtain his signature to company cheques on the TIL account when the bank unfailingly demonstrated that it was content to meet cheques with only one signature.

45. None of that matters in the slightest, however, unless the use of one signature rather two was associated in some way with the fraudulent taking of funds to which the plaintiff was not entitled. Shorn of that element, the use of one signature rather than two had no more significance than failing to abide by conventional bookkeeping practices, failing to put the correct postage on company envelopes, or exceeding the speed limit while using a company car.

46. It is also important to note that the use of cheques bearing one signature was not confined to the making of drawings in favour of the plaintiff or his partner. Cheques signed in that way were equally used for other legitimate company purposes such as paying the companies' trade creditors. No complaint has been, or could be, made that the use of single signature cheques for legitimate company purposes was in some way dishonest.

47. I am bound to conclude that the time and energy devoted by the defendant to the subject of single or double signatures on cheques was misdirected. The real target

had to be the use of company cheques for dishonest personal gain, not the number of signatures on the cheques for its own sake.

48. In a similar category was the defendant's criticism of the transfer of funds between companies within the Tepaki Group. Again there is a dispute between the plaintiff and the defendant over whether the defendant had authorised transfers between TPL and TIL. But whether or not authorised, it could not be suggested that the transfer of funds between one Tepaki company and another was dishonest per se. The properly documented intra-group transfer of funds between companies forming part of the same group of companies is a standard practice. In the present case such transfers conferred no personal benefit on the plaintiff and caused no loss to the Tepaki companies. As with single or joint signatories, the practice could be of relevance for present purposes only if it provided the means by which the plaintiff was able to dishonestly take company money to which he was not entitled. Whether he did so remains the only real question.

49. A third distraction was criticism of the plaintiff's approach to bookkeeping. The defendant criticised the way in which the plaintiff intermingled his personal affairs with those of the company. In this I have some sympathy with the defendant. There were ways in which the plaintiff could have better managed the company financial records. But it is important to remember that this not a case about standards of bookkeeping. It is a case about dishonesty.

When the plaintiff took benefits through the use of company cheques was he acting dishonestly?

50. It is common ground that, through the use of company cheques the plaintiff and his partner derived benefits to a total value of $5,714. The sole question for present purposes is whether the taking of those benefits was dishonest. The onus is on the defendant to prove that it was.

51. I am satisfied that the defence has failed to establish either that the plaintiff was not entitled to the benefits he took or that in taking them he did so without any honest belief in his right to do so. In the end the defendant effectively admitted at least the first of those elements. In his evidence he did not challenge the plaintiff's entitlement to the $5,714. The benefits were no more than drawings in lieu of the wages to which

the plaintiff and his partner were entitled. The defendant also admitted that it was immaterial to him whether the plaintiff took his wages in cash or in kind so long as the value of the benefits did not exceed the wages owed.

52. The defendant's evidence on this aspect was entirely consistent with the lack of any complaint over the drawings from the outset. Drawings in principle were anticipated by Mr Sparhawk in his email to the defendant on 5 September 2005 and in the defendant's email to the plaintiff on the following day. The defendant's complaint has never been that the plaintiff was not entitled to take all or part of his wages in the form of benefits rather than cash. The defendant's fundamental complaint was that the plaintiff had overstated the wages due to him and his partner. On that dispute the defendant has by now lost before Weston J. The defendant has allowed himself to be distracted by an aspect of signing of the cheques which had nothing to do with the plaintiff's honesty or lack of it.

53. It is also clear that the plaintiff thought he was entitled to take part of his remuneration by that means. He was perfectly open about the process. There was no attempt to conceal. The defence of justification under this heading fails.

When the plaintiff took the Dell computer was it theft?

54. I accept that since the plaintiff has alleged that one of the meanings to be derived from the impugned words was that the plaintiff was guilty of theft, without qualification, the defendant is entitled to justify, if he can, on the basis of theft in general. I accept that in principle he could rely upon theft of the Dell computer even though the meaning of which the plaintiff complained had been derived from the allegedly dishonest transfer of funds.

55. Much of the background is beyond dispute. It is clear that in late 2004 one of the defendant's companies owned a Dell computer; that the plaintiff asked for a computer, saying that the plaintiff's existing computer was too small to undertake the operations which would be required in the Cook Islands; that the defendant said that the plaintiff could take the Dell computer; that the plaintiff personally paid the duties arising from its importation into the Cook Islands; that during the nine months of his employment in the Cook Islands the plaintiff used the computer to keep track of the accounts of TIL and TPL along with his personal computer requirements; that when

the plaintiff left his employment in September 2005 he took the computer with him; that when he removed it the computer still had on it the financial records of TIL and TPL; and that at that time the Tepaki companies owed the plaintiff and his partner a substantial sum in unpaid wages.

56. It is against that background that the defendant alleges that the plaintiff's removal of the computer constituted theft. For present purposes "theft" is the act of fraudulently and without colour of right taking anything capable of being stolen with intent to deprive the owner permanently of such thing. It is complete when the object is moved with intent to deprive the owner permanently of it. "Colour of right" is an honest belief that the act is justifiable even though the belief may be based upon ignorance, mistake of fact, or any matter of law other than the law as to theft.

57. The plaintiff says that when the defendant assigned the computer to him in late 2004 the plaintiff understood it to be a gift. The defendant denies this. I can see ample room for the two participants to come away from that meeting with a different construction of the conversation as to the future ownership of the computer. Indeed it seems quite probable that neither party turned their mind to the point until recent events.

58. However it is not necessary to decide whether or not this was technically a gift because by 4 September 2005 events had moved on. By that stage the Tepaki companies owed the plaintiff a substantial sum in unpaid wages; the practice by which the plaintiff was taking some of his wage entitlement in kind rather than in cash was by then well-established, and, to the knowledge of both the plaintiff and the defendant there was a recent precedent in which another resigning Tepaki Group executive had been allowed to take with her as a set-off against unpaid wages the company computer which she had been personally using. Like the plaintiff, Rosemary Fletcher had been an executive within the Tepaki Group and an authorised signatory of the TPL cheque account. She left in the first half of June 2005. When she left, the plaintiff proposed at a Tepaki Group board meeting that if she asked to keep the company laptop she be permitted to do so subject to removal of Tepaki Group details and information stored on it. The defendant responded that he did not mind whether or not she returned the laptop and went on to state "payment

outstanding to Rosemary at $1,000 net per week since she started less amounts drawn by her, and less the sum paid out for laptop if she keeps it".

59. For all those reasons I accept that when he left the company the plaintiff was entitled to think that whatever the technical position might have been as to ownership, he would at least be entitled to take the Dell computer in part satisfaction of unpaid wages. In his email of 6 September 2005 he explicitly said that he had taken the Dell computer. Indeed this must have been obvious to anyone entering the Tepaki office following his departure. There was no attempt at concealment.

60. In a curious reversal of roles at the time, the plaintiff suggested in his email of 6 September 2005 that there be a deduction of $2,500 from his wages on account of the computer, while in the defendant's email at approximately the same time he said "you can keep it provided you allow our troops to download information belonging to Tepaki Group".

61. I am inclined to think that in both of those emails the parties were offering concessions with a view to avoiding a potential dispute. What I am clear about, however, is that this could not possibly have been theft. Theft would have required knowledge on the plaintiff's part that he was not entitled to remove the computer and a dishonest intention to permanently deprive the Tepaki companies of it. Given the history that the companies owed him a substantial sum in unpaid wages, that the companies had cash flow problems, that in the past wages had been met in part by taking equivalent benefits, and that there was a very recent precedent for including a personal computer in lieu of wages, the plaintiff would have been astonished at the suggestion that by taking the computer he was stealing. One of the essential ingredients for theft is lack of an honest belief in the right to take the item. The defendant has failed to showed the requisite dishonesty. The defence of justification under this heading therefore fails as well.

62. I mentioned earlier that the prima facie elements for an action for defamation were established. The defence rested upon justification. This having failed, liability is established. The next question is the damages which the defendant must pay the plaintiff.

Damages

63. The allegation that a businessman is dishonest, a thief, a fraudster and a criminal is one of the most serious forms of defamation that can be made. After being warned over the first defamatory publication, the defendant proceeded with a second one.

64. The breadth of the publication was very wide. Wide publication is inherent in publication in a newspaper. Predictably, the damage then spread further by re-publication in other media including the *Cook Islands Herald*, two internet websites, and Radio New Zealand.

65. The plaintiff has adduced convincing evidence of the damage to his reputation within his family, relatives, the wider community, and in the business community.

66. Within his family he was questioned whether the allegations were true, saw distancing from one of his close relatives inferentially as a result of the publications, and had to read in the *Cook Island News* a letter from another branch of Framhein family distancing itself from the plaintiff.

67. Before the publication the plaintiff has started a consultancy business of his own offering services in business plan writing, finance brokering, property development facilitation, project management and land acquisitions. I accept that in immeasurable ways the defamation would have harmed his image in a commercial context. His bank, and others who came into contact in a business context asked questions about the allegations. It is not necessary for the plaintiff to prove damage to his business reputation in any tangible form. Damage to some degree can be inferred.

68. In addition to the damage to the plaintiff's reputation he is entitled to compensation for the distress that he suffered as a result of the publications and their repercussions. The nature of the defamations was serious and their publication wide. The claim to $80,000 by way of general damages was not irresponsible. I consider a reasonable assessment under this heading to be $60,000.

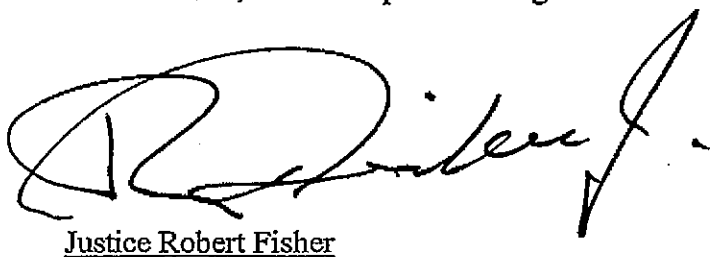
69. The plaintiff also claims aggravated damages of $40,000. The purpose of aggravated damages is to recognise exacerbation to the plaintiff's feelings due to the defendant's improper conduct in association with, and following, the defamations.

70. In the present case the defendant was warned after the first publication but persisted in the second. The second publication formed part of an article in which the defendant repeated defiant dismissals of the plaintiff's threatened defamation action. The defendant reinforced the defamation in a Radio New Zealand interview on 26 April 2006 and in the *Cook Islands Herald* of 13 May 2006. He persisted in the allegations, and the details concerning the alleged encounter with the Police on 23 December 2005, notwithstanding his knowledge of a letter from the Police refuting those aspects.

71. Again, the claim of $40,000 by way of aggravated damages could not be dismissed as irresponsible. I consider $20,000 to be suitable under this heading.

Result

72. There will be judgment for the plaintiff in the total sum of $80,000 in damages for the publications on 9 December 2005 and 26 April 2006. In addition the defendant must pay the plaintiff's costs which have been set at $10,383.in a separate ruling.



Justice Robert Fisher