IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 191/2016

BETWEEN		**SHAILEND RAM KRISHNA** of Simla, Lautoka, Barrister & Solicitor **PLAINTIFF**
AND		**SUNG REA KIM (aka Tony Kim)** of Lautoka, Director **DEFENDANT**
APPEARANCES	:	Mr R Singh & Ms Vreetika for the Plaintiff Mr K Tunidau for the Defendant
DATE OF HEARING	:	5-6 November 2020
DATE OF JUDGMENT	:	11 March 2021

DECISION

1. The plaintiff is a solicitor practicing law in Lautoka since 1998, and is now the principal in his own law firm, Krishna & Co. But in addition to his law practice, the plaintiff also conducts business as a landlord, letting property he owns to commercial tenants. This claim arises mainly out of that latter business, but is also not unconnected with the former. While there can be attractive synergies between these two businesses, what occurred and led to these proceedings is perhaps a lesson about the risks involved, for both parties, where there is no clear demarcation between the different business interests, or where the interests of the two become intermingled.

Background and evidence

2. There is no significant disagreement between the parties about the main facts of the case. The defendant was at all material times the managing director and a shareholder of Biz Trading South Pacific Limited (*Biz Trading*), a company engaged in the export of scrap metal to Korea, and the import and sale in Fiji and the South Pacific, New Zealand and Australia of lubricants for motor vehicles. Also involved in Biz Trading at that time, as directors and shareholders were two prominent local businessmen, Mr Wella Pillay, and Mr Farook Daud Khan, who the defendant understood were friends with the plaintiff, and who – the defendant says – were influential in the decision by Biz Trading to take up premises in the plaintiff's building. Mr Khan's business, Daud's Transport (described by the plaintiff in his evidence as a 'massive company') was a client of the plaintiff's law firm.

3. In 2015 Biz Trading agreed to lease from the plaintiff for its business part (described as the 'front bottom' – which I assume means the showroom) of the plaintiff's commercial building at 13 Nacula Street, Lautoka. An undated tenancy agreement was produced in evidence. The important terms of the tenancy, for present purposes were:

> 1. *The Landlord hereby grant a tenancy to the Tenant and the Tenant hereby takes tenancy of the premises ... situated at 13 Nacula Steet, Lautoka with provision for car spaces behind the building for a period of three (3) years commencing from 1st September 2015 with a renewal option for a period of further one year thereafter with rental to be agreed between the parties however the landlord shall allow the tenant to occupy the said property free of rent for the first two months to allow the tenant to do fit out and install air-conditioners in the building.*
> 2. *The rental for the said premises shall be the sum of $6,000.00 (Six thousand Dollars) plus VAT per month fixed for three years and thereafter shall be a rental review every year. Any increase shall not exceed more than !0% of the current rental.*
> 3. *The rental shall be payable monthly in advance on the first of each and every month during the currency of the tenancy.*
> 4. *The Tenant shall pay to the Landlord an interest free, refundable, security deposit of $6,000 ... plus VAT at the time of execution of this agreement which sum shall be refunded to the Tenant by the Landlord upon expiry of this tenancy provided that the Landlord shall be entitled to apply the said sum or part thereof in the repair of damage caused to the said premises by the Tenants, its servants or agents.*
> 5. *The Tenant hereby convenants (sic) with the Landlord as follows:*
>   *(j) Not to place paint or affix upon any part of the exterior of the said premises or elsewhere in the said building any sign or business notice except signs or notices of a nature usually displayed by the Tenant in the course of business which the Tenant shall be entitled to place, paint and affix on the street front and sides of the premises and/or under the section of the canopy immediately in front of the said premises and upon the expiration or sooner determination of the said term at the tenants expense to remove paint out or clean off (as the case may require) all such signs and business notices which before or during the said term shall have been placed painted on or affixed to any part of the said premises by the Tenant and repair any damage caused in so doing.*
> 6. *The Landlord hereby covenants with the Tenant as follows:*
>   *(d) The Tenant may at its option and at its own costs, paint the interior and the exterior of the said premises or any part thereof during the currency of the tenancy.*
> 7. *And it is hereby agreed and declared by and between the parties as follows:*
>   *(b) If and whenever the rent hereby reserved shall be in arrears and unpaid for the space of fifteen (15) days after any of the days appointed for the payment thereof the Landlord may forthwith recover the same by distress.*
> 8. *In the event the Tenant intends to terminate the Agreement prior to expiry of the Tenancy then the Tenant covenants to give 1 month prior Notice to the Landlord.*

The Tenancy Agreement was signed for Biz Trading by the defendant and Mr Farook Khan (as directors) at the plaintiff's law office.

4. In his evidence the defendant explained that when Biz Trading took the tenancy in the plaintiff's building, and agreed to pay $6,000 + VAT per month for rent, he and his fellow directors did so in the expectation that business turnover would achieve and continue at a particular level. This did not happen, and early in 2016 the company was looking at moving to another, cheaper, location. Mr Kim says he spoke

to the plaintiff about this, who offered to reduce the rent to $5,000 + VAT per month. The company accepted this offer, and this reduced rent took effect from March/April 2016. However, when there was still no improvement in levels of work Mr Kim spoke again to Mr Krishna about the need to move elsewhere. He says he did so on two occasions, once in person at the Biz Trading showroom, and the second on the telephone. Mr Krishna, he says, was not happy, and told him (Mr Kim) that by letting Biz Trading take the tenancy he had lost the opportunity to let the premises to someone else who may have been able to stay, and pay the agreed rent. Although Mr Kim felt that Biz Trading had no choice but to go, he was sorry they couldn't stay. The company decided to give the plaintiff 3 month's notice of termination, rather than the one month required by clause 8 of the Tenancy Agreement. This notice was given at the end of April 2016, with the company stating its intention to leave the premises on 15th August. In the event Mr Kim found alternative premises at Nadi for $2000 per month.

5. Up until the point that Biz Trading gave the notice of termination Mr Kim felt his relationship with Mr Krishna was friendly. He saw him from time to time at the Northern Club, and he says Mr Krishna came into the premises. After the company gave notice of termination this changed somewhat, although Mr Kim still felt able, towards the end of June, to talk to Mr Krishna about payment of the final rental payment, due – in terms of the Tenancy Agreement – on 1 July 2016. The defendant says he asked the plaintiff in early July whether, instead of Biz Trading paying the last instalment of rent, the plaintiff was willing to deduct that amount ($5,000 + VAT) from the security bond of $6900 that the company had paid at the commencement of the tenancy. The defendant says that he spoke to the plaintiff by phone about this, and that Mr Krishna agreed to do this, but then rang back around two weeks later (other evidence suggests that this was on 27 July 2016 – more than three weeks after the rent was due) to say he had changed his mind, and now required the July rent to be paid. Mr Kim says that Mr Krishna did not explain why he had changed his mind. When this evidence was put to Mr Krishna in cross-examination he denied that he had ever agreed to deduct the rent from the bond.

6. The defendant acknowledges that he was annoyed by the plaintiff's change of mind regarding the deduction of the last rental payment. He accepted that the company needed to pay the rent, but because of his irritation over the matter he instructed his office clerk, rather than deliver the rent cheque to the plaintiff, to advise the plaintiff's office by email and telephone calls that the cheque was available for collection from the premises of Biz Trading. He was not cross-examined on this evidence by counsel for the plaintiff. He also tried calling the plaintiff himself, but the plaintiff would not answer his telephone calls. When asked about Mr Kim's evidence in the course of cross-examination, Mr Krishna was dismissive. He said that he did not get a call about the fact that the rent cheque was available to collect, and that if a call to that effect had been made to his office he would have been told about it. He was confident that no such calls had been received.

7. Because the rent due on 1 July 2016 had not been paid, the plaintiff, on Friday 29 July distrained for the unpaid rent, sending a bailiff round to seize and impound the

belongings of the company. The defendant says he was given no warning of the plaintiff's intention to levy distress, and there is no evidence from the plaintiff to suggest otherwise. The distress notice demanded payment of $9150.00 for *arrears of rental and damages for breach of agreement as at 1 July 2016 and Damages to the property to be quantified* made up as follows:

Rent due on 1 July 2016	$5450.00
Solicitors costs	$2500.00
Bailiff's fee	$1200.00
	$9150.00

Mr Kim says that he made numerous attempts to telephone Mr Krishna, but he wouldn't take the calls. He also tried to see the plaintiff at his office, but the office door was locked. The full amount demanded ($9150.00) was paid by 4.00pm of the 29th July, in cash because the plaintiff's office refused to accept payment by cheque.

8. The evidence is that Biz Trading vacated the plaintiff's building on 15 August as previously notified. On 16 August the plaintiff emailed the company notifying it that at an inspection of the premises conducted the previous day (the plaintiff had previously ignored the defendant's attempts to arrange a joint inspection) had shown that there was significant damage to the property, which was listed in the email as follows:

   i. *the outdoor aluco panels at the front of the building were 'damaged and hidden by a paper sticker'.*
   ii. *The indoor columns were damaged and filled with 'some substance which was not suitable'.*
   iii. *The interior and exterior walls were damaged with 'big holes, which were filled with some substance not suitable and thereafter painted over to hide the damage.*
   iv. *The flooring was damaged with holes in the tiles, and this penetrated through to the concrete floor and structure of the building and these were also filled with some substance that was not suitable.*
   v. *The tiles were damaged with stains and chips.*
   vi. *The backdoor framings were damaged and these were caused due to cutting of the actual timber out of the frames*
   vii. *The walls were damaged and discoloured ... and painted with a different colour than the original colour of the wall.*

9. Obviously still aggrieved about the plaintiff levying distress on 29th July, and no doubt anticipating, as a result of the email regarding the damage to the premises, that the plaintiff was intending to make further claims against the company, the defendant on 23 August 2016 sent to the following people by email a complaint about the plaintiff's conduct:

   The Prime Minister
   The Attorney General
   The Chief Registrar
   The Chief Justice
   The Director of Public Prosecutions
   The Korean Ambassador (the defendant is also a Korean citizen).

The email was also copied to the defendant's co-directors of Biz Trading, Mr Wella Pillay and Mr Farook Khan, and to the financial manager of Biz Trading, Mr Rajesh Kumar.

10. The 4-page letter attached to that email was headed:

> **COMPLAINT AGAINST SHALEND KRISHNA – ABUSE OF LAW OFFICE AND BEING LAWYER TO BLACKMAIL MONEY OUT OF MY COMPANY**

and went on to say:

> *I make this complaint as a director of Biz Trading South Pacific Ltd against Shalend Krishna, a Lautoka lawyer who has used the fact that he is a lawyer to fraudulently blackmail money out of me.*
> *First of all I would like to say that I am a foreign investor in Fiji. I come from Korea.*
> *In 2010 I won Prime Minister Asian Exporter of Year Award.*
> *I have been in Fiji for about 10 years and consider Fiji as my home now.*
>
> *Biz leased a premises from Shalend Krishna from last year September. 3 months ago we gave notice to Shalend that we will vacate. The tenancy agreement only required 1 month's notice but we gave 3 months notice. We were to vacate by 15th August as per notice.*
>
> *Everything went well and Shalend and I communicated regularly through email and phone. The total bond Shalend held was $6900 and current monthly rent $5450. At the beginning of July Shalend and I thought to agreed that the bond will be used for July's rent.*
> *Then on 27th July Shalend called and said we have to pay July rent contrary to our earlier agreement.*
> *I told him the bond was sufficient and we had already agreed that it will be used for July rent. Surprisingly he did not agree.*
> *I said I will issue you a cheque and send your employee to pick up.*
>
> *Instead 29th July at 10.30am Shalend sent a bailiff to close my shop with distress of rent.*
> *Before this distress Shalend never gave me any notice that he will do distress for July's rent that we initially agreed should be deducted from bond., and later asked him to pick up the cheque. The notice forms by bailiff is attached.*
> *The bailiff chased all my employees out of the premises and locked the place up.*
> *They never asked my employees to take inventory with them. The bailiff told my employees that it is Lawyer Shalend's instructions.*
>
> *I am told it is illegal for bailiff to chase my employees and knocked out and paste a notice on the main door. Under this manner as per Lawyer Shalend's instructions. All my employees upset and scared and are ready to come and give evidence if they have to.*
> *In the past in the normal course of tenancy we have given rent late. The timing of distress was to just blackmail the money out of me.*
>
> *The bailiff was on his mobile phone throughout this illegal process of eviction an told my staff that the lawyer Shalend or his chief clerk is on the phone so they should not argue. This is blackmail and abuse of power by the lawyer.*
> *This is unconstitutional.*
>
> *You will see further from the distress of rent forms that in addition to rent Shalend charged another $2725 solicitor's himself cost and $1200 bailiff cost for this illegal eviction.*
> *Moreover. Lawyer Shalend office chief clerk he threaten me everyday to increase our cost to pay Bailiff and the security company.*

Because my shop was closed with stock inside, I had no choice but to pay the entire amount of $9375 that Shalend claimed in the notice including $3935 for illegal distress.
I am advised that even distress was legal this amount is excessive and abuse of power. However I maintain distress was illegal and unconstitutional.

Further more We were to do touch up and painting the shop for next tenant and building owner satisfaction so we painted and fixed everything that pointed out to us by 11th August 2016. Then we waited for Shalend for joint inspection but he never came. And we send him emails and called the chief clerk for the confirmation of the building inspection and the chief clerk told that Lawyer Shalend will do the building inspection alone.

Then have vacated the premises on 15th August as per notice. All the keys we gave to Wara, Shalend's caretaker of his buildings.

I am now advised that I did not have to paint the shop because fair wear and tear is excepted. I painted and touch up before I went out of my way to return the place to Shalend exactly how I found it because of undue pressure from Shalend.
I want my bond back.
However after we vacated Shalend fabricate issues about building damages that we are not responsible for. He is not returning my bond of $6900.

Sirs, in my 10 years in being in Fiji I have never experienced such dishonesty and fraud from anyone.
My confidence in Fiji is being tested because a lawyer thinks he can abuse his position in the manner Shalend has illegally levied distress and unlawfully withholds my bond money.
I need your help.
I need my $3925 paid for unlawful and unconstitutional distress back and I need my bond money of $6900 back – both Total $10,825.
I also suffer damages and loss due to Shalends unlawfulness.

I am sending this letter to Chief Registrar, Chief Justice and DPP as well because what Shalend has done is also criminal in my opinion.
As a lawyer he will typically make things up to try to defend his position – I am ready for it because 4 employees will independently give evidence against Shalend. In fact I am copying Shalend as I am ready for him because enough is enough. In my dealings with Shalend his moral character due to what he has done is highly questionable.
He cannot even face me and do a joint inspection, but relies on his power of lawyer and makes things up and writes to me.
What Shalend has done is for no reason but to blackmail money out of me abusing his power as a lawyer – that is the simple fact.

Sirs, I am begging you. Please give me justice, I want my $10,825 back as soon as possible.
Please also take appropriate measures against Shalend Krishna.
Lawyers cannot be allowed to abuse their powers like he has done.
Sir My phone number is [redacted] *and my email contact is* [redacted].
Thank you
Yours sincerely
Sung Rea Kim
Director
Biz Trading South Pacific Limited.
...

11. On 30 August 2016 the plaintiff's solicitors wrote to the defendant complaining about this letter, and saying that it was *false, unjustified and untrue save as to the distress* and was *written by you with malice to bring our client into disrepute.* The letter demanded:

- A suitable withdrawal and apology sent to all the recipients in a wording approved by the solicitors
- An assurance in writing not to repeat the publication of those or similar allegations
- Indemnity for Mr Krishna against costs *to which [he] has been put to in the matter*
- Payment of $50,000 in damages.

This request was quickly and firmly rejected by the defendant in a letter dated 13 September 2016 which included the following:

> *I have received legal advice and the distress of rent by Shalend is unlawful both by the manner in which it was carried out and by the excessive amount charged for legal cost for distress. Shalend is making money by abusing his power as a lawyer.*

12. The plaintiff gave evidence as to his reputation, and also the harm caused to him by what he says is the defendant's defamation of him. He has been practising as a solicitor in Fiji for over 20 years and is the principal in his own firm. He is currently Chair of the Legal Aid Appeals Review Committee, and of the Ethics Committee, the Appeals Committee and the Arbitration Tribunal of the Fiji Football Association. For 3 years from March 2015 he was the Sugar Industry Tribunal on the appointment of the Chief Justice pursuant to the Sugar Industry Act Cap 206, and he is inclined to believe that the failure to renew that appointment in 2018 is attributable to the defendants defamation of him. He also says that he has lost staff, and has had difficulty obtaining staff because of publicity attracted by the defendant's complaint. Other evidence suggests that potential clients have been deterred from coming to his firm by the fear that he would be disciplined by the Chef Registrar on the defendant's complaint. I note of course the principle that a plaintiff who has been defamed is not obliged to prove the extent of his loss.

13. In concluding this section of the decision, I note that in 2016 the plaintiff commenced proceedings in the Magistrates Court against Biz Trading South Pacific Limited seeking compensation for damage (see paragraph 8 above) said to have been done to his property during the company's tenancy. It seems that the claim was not defended, and in 2020 following a formal proof hearing the Court awarded the plaintiff judgment in the sum of $42,350 for that damage. A copy of that decision was put in evidence by the plaintiff. It seems that the basis for the award was a quote obtained by the plaintiff in September 2016 for the repairs of the items listed. The learned magistrate's decision notes that the building has since been repaired, but does not say when, how much those repairs actually cost the plaintiff, or that the repairs were carried out by the contractor who supplied the quote. The decision refers to a receipt for payment of the repairs being 'lost' in Cyclone Kina that struck Fiji in 2018, and there is no reference to credit being allowed for the bond still held by the plaintiff. But while these issues may give rise to queries about the claim and its outcome, if the defendant and his company chose not to defend

those proceedings, in spite of their complaint that the damages claimed were exaggerated, they must accept that result.

Pleadings & matters at issue

14. On 14 September 2016 (the day after the defendant's response to the plaintiff's initial complaint) the plaintiff commenced these proceedings by writ of summons. The accompanying statement of claim lists the following assertions from the letter/email of 23 August 2016 as defamatory of the plaintiff:

- *... Shalend Krishna, a Lautoka lawyer who used the fact he is a lawyer to fraudulently blackmail money out of me.*
- *... Then on 27th July 2016 Shalend called and said we have to pay July rent contrary to our earlier agreement.*
- *... Shalend never gave me any notice that he will do distress for July's rent.*
- *... the lawyer Shalend or his chief clerk is on the phone so that they should not ...argue. This is blackmail and abuse of power by a lawyer. This is unconstitutional.*
- *... illegal eviction.*
- *Moreover, Lawyer Shalend office clerk he threaten me everyday increase our cost to pay Bailiff and the security company.*
- *However after we vacated Shalend fabricated issues about building damage.*
- *Sirs, in my 10 years in being in Fiji I have never experienced such dishonesty and fraud from anyone. My confidence in Fiji is being tested because a lawyer thinks he can abuse his position in the manner Shalend has illegally levied distress and unlawfully withheld my bond money*
- *... due to Shalend's unlawfulness.*
- *What Shalend has done is criminal in my opinion.*
- *In my dealings with Shalend, his moral character due to what he has done to me is highly questionable.*
- *... relies on his power of lawyer and makes things up and writes to me.*
- *What Shalend has done is for no reason but to blackmail money out of me abusing his power as a lawyer – that is the simple fact.*
- *Lawyers cannot be allowed to abuse their powers like he has done.*

15. These assertions by the defendant, in his letter to the persons listed in paragraph 9 above, are said by the plaintiff to have the following natural and ordinary meaning that the plaintiff is:

- dishonest
- a fraud
- someone who has abused the trust placed in him
- an unethical legal practitioner
- a person who blackmails people
- a liar
- a person who uses high-handed tactics, including a dictatorial and arbitrary conduct
- a cheat

and to bear, through innuendo, the following meanings of the plaintiff:

- he is unprofessional and unethical and operates his office in this manner
- he is not fit to be a barrister and solicitor
- he should not be operating a law firm
- he is unscrupulous person, is a criminal and untrustworthy
- he is dishonest
- he is a liar
- he has no regard for the Rule of Law and engages in illegal activities
- he is a blackmailer
- he is a common criminal.

16. Accordingly the statement of claim goes on to assert that the plaintiff has suffered damage to his reputation, character and credit, and seeks damages (including punitive and exemplary damages), interest and costs. In his closing submissions counsel for the plaintiff seeks damages of $80,000, and does not pursue the claim for punitive and exemplary damages.

17. In his statement of defence the defendant does not specifically plead to all the allegations in the statement of claim. Rather, the statement of defence resembles an affidavit in which the defendant asserts facts that are said to justify the conclusion in paragraph 2.27 that:

> *The Defendant considers therefore that he has the right to take issue, justify, make complaint and make fair comment of his experience with the Plaintiff as highlighted above.*

and invites the court to dismiss the plaintiff's claim 'with costs'.

18. This absence of clarity in the defendant's pleading is then reflected in the Minutes of the Pre-trial Conference dated 5 July 2018, signed by representatives for both plaintiff and defendant. This repetitive and long-winded document lists the issues for determination at trial as follows:

1. *Whether on 23rd August 2016 the Defendant falsely and maliciously accused the plaintiff via a letter addressed to several people and government agencies against the plaintiff where the accusations were libelous, slanderous and defamatory statements and continues to do as particularised in Paragraph 4 of statement of claim. (*Libel and slander are different categories of defamation, in general, one deals with the written word, the other deals with spoken statements. Both are included in the term 'defamation'. In most cases, and this is one of them, it is unnecessary to make the distinction. It is sufficient to refer to the statements as defamatory, and adds nothing – and in this case is wrong – to describe them as 'libellous, slanderous and defamatory').
2. *Whether the statements made via letter dated 23rd August 2016 are absolutely false and unjustified (*if they are defamatory – i.e. damaging of the plaintiff's reputation - the statements are assumed to be false, unless proven to be true. If truth is an issue – i.e. if the defendant has pleaded that his statements were true – the issue should be expressed in that way, not as set out here).
3. *Whether the statements made via letter dated 23rd August 2016 are libelous, slanderous and defamatory.*
4. *Whether the publication of these defamatory comments poses serious threat to the reputation of the plaintiff and his several positions in various organisations and appointments he holds.*

5. *Whether the statements and words published by the defendant in their natural and ordinary meaning were to understand that the plaintiff [had the characteristics listed in paragraph 9 of the statement of claim]* (see paragraph 14 above).
6. *Whether the said words and statement were understood to bear meaning by way of innuendo as particularised in paragraph 10 of the statement of claim* (see the second list in paragraph 14 above).
7. *Whether the due to the words and statements published by the defendant, the plaintiff has been greatly injured to his credit, character and reputation* (this paragraph goes on at great length without adding anything further).
8. *Whether the plaintiff has suffered general damages and loss of business and continues to suffer for which full particulars will be provided at trial.*
9. *Whether the defendant withdrew and apologies or gave assurances and undertaking not to repeat the publication or similar allegations* (I don't know why this is listed as an issue. There is no suggestion anywhere in pleadings, discovery or evidence that suggests that the defendant ever withdrew and apologised. This was never a contested issue that has to be decided by the court).
10. *Whether the defendant indemnified or made a counter offer to pay damages* (again, I don't know why this is listed as an issue. There is no suggestion in any part of the defendant's case that he accepted that he was wrong in what he said and did, such that he should offer compensation).
11. *Whether the statement made via letter dated 13th September 2016 'Shalend will typically make things up' is false and in the natural and ordinary meaning it means the plaintiff is a liar.* (Although there is a reference in the statement of claim to this letter of 13 September, there is no allegation that the letter was published. It is a letter from the defendant to the plaintiff's lawyer in response to their letter of complaint. It simply repeats an assertion made in the original letter which is the subject of this claim. Nothing that happened in the course of the trial or submissions suggests that this letter is the subject of a separate defamation claim, and it should not have been listed as an issue to be decided).
12. *Whether due to the words and statements published by the defendant in his letter dated 13th September 2016 the plaintiff has been greatly injured ... etc* (See my comments in the previous paragraph).
13. *Whether the plaintiff has also suffered general damages and loss of business for which full particulars of which will be provided at the trial and continues to suffer.*
14. *Whether the actions and conduct and the continued actions and conduct of the defendant continues to cause the plaintiff injury to his credit, character and reputation and has been brought into the public scandal, ridicule, odium and contempt and as been subject to mental agony, distress, loss, suffering and damages and continues to suffer damages to his reputation, character and credit.*
15. *Whether the defendant published those statements knowing it to be false with the abovementioned bodies and persons so as to cause substantially damage, embarrassment to the plaintiff* (I assume that this relates to whether the defendant is guilty of malice. If so I don't know why it doesn't say so).

19. This list of issues for determination does not include any of the issues that might have been relied on by the defendant, and that I would have expected to be separately referred to as issues for determination, i.e. truth, qualified privilege, and fair comment. Although the Agreed Facts refer to the fact that the defendant issued the letter of 23 August, it does not explicitly record that the addressee's received the letter, i.e. that it was published. On the other hand, the defendant's statement of defence does not deny this.

20. The purpose of pleadings, and the pre-trial conference and agreed list of issues, is to define for the benefit of the parties and the court the issues that arise for

determination. The reason for holding the pre-trial conference after all pleadings, discovery and interlocutories have been completed, is that by that stage of the proceedings the parties and their advisers can be expected to have a much clearer idea than they would have had at the commencement of the proceedings, of what is in contention. Certain facts will no longer be in issue, and some contentions may prove to be unsustainable. A properly conducted pre-trial discussion between counsel who will be responsible for the conduct of the case at trial should in most cases result in a set of issues to be determined that properly informs the court of what will really be in contention in the trial. It enables them to ensure that the issues that they contend for are listed, so that all parties know what will be argued. It is not merely an opportunity to repeat or restate the parties' pleadings.

21. Importantly, given that all parties participate in the pre-trial conference, and sign the minutes, the parties and the court are entitled to rely on the accuracy of the statement of issues to be determined. Items not listed can safely be assumed not to be at issue, and there is therefore no need for parties to prepare for them, either as to evidence or submissions.

22. However, although the pleading in the statement of defence is not particularly clearly stated (paragraph 2.27 of the statement of defence, in asserting that the defendant will 'justify' his statements, suggests that the defence of truth is relied on, - in addition to fair comment- , and 'make complaint' suggest a qualified privilege defence, but these does not appear now to be part of the defence), and although the statement of issues to be determined in the minutes of the pre-trial conference makes no reference to fair comment, it is apparent from the submissions filed that the plaintiff is aware of and prepared to argue this defence at least. This decision is therefore given on the basis that the defence relies only on that defence, and not on any of the other possible defences that might arguably be available .

The law & submissions

23. The defence of fair comment has been the subject of a number of decisions of the Court of Appeal, in particular in **Abbas Ali v Thompson** [2012] FJCA 12 (followed in **Patel v Gosai** [2014] FJCA 37) sets out what must be shown for the defence to succeed. The Court applied the five criteria laid down by the Hong Kong Court of Appeal in **Albert Cheng v Tse Wai Chun Paul** (2000) HKCFA 35 as follows:

> 1. *The comment must be on a matter of public interest.*
> 2. *The comment must be recognizable as comment as distinct from an imputation of fact.*
> 3. *The Comments must be based on facts which are true or protected by privilege.*
> 4. *The comment must be explicitly or implicitly indicate at least in general terms, what the facts are of which the comments are being made.*
> 5. *The comments must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his view. It must be germane to the subject matter criticized.*

and went on to say:

[37] *The Court of Appeal in **Fiji Times Ltd v Vayeshnoi** ABU 002/08 citing the decisions in **Reynolds v Times Newspapers Ltd and Others** (2001) 2 AC 127 and **Branson v Bower** [2002] QB 737 concluded that the only requirements for establishing this defence was that a defendant should have expressed the opinions honestly and he should have done so upon facts accurately stated.*

[38] The learned trial Judge dealt with the law relating to the defence of Fair Comment as applied in England and in Fiji exhaustively and held that the statements of the Appellant cannot be justified as fair comment.

24. I take from these passages at least implicit approval of the Court of Appeal to apply the law of fair comment as it is now interpreted. One of the most recent commentaries on the law is the decision of the Supreme Court of England & Wales in **Joseph & ors v Spiller** [2011] 1 All ER 947. In commenting on the decision of Lord Nicolls in the Hong Kong Court of Final Appeal decision of **Albert Cheng** (see above) Lord Phillips made the following observations:

*3. Sitting in the Court of Final Appeal of Hong Kong in **Cheng Albert v Tse Wai Chun Paul** ... Lord Nicholls of Birkenhead was concerned with the ingredients of malice that can defeat the defence of fair comment. Before considering that question he set out [in paras 16–21] under the heading 'Fair Comment: The Objective Limits' what he optimistically described as five 'non-controversial matters', which were 'well established' in relation to the defence of fair comment:*

> ***First**, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in [London Artists Ltd v Littler [1969] 2 All ER 193 at 198].*
>
> ***Second,** the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of Myerson v Smith's Weekly (1923) 24 SR (NSW) 20 at 26:*
>
> > *"To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment."*
>
> ***Third**, the comment must be based on facts which are true or protected by privilege: see, for instance, London Artists Ltd v Littler [supra] at 201. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.*
>
> ***Next**, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.*
>
> ***Finally**, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in Turner v Metro-Goldwyn-Mayer Pictures Ltd [1950] 1 All ER 449 at 461, ... It must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in Gardiner v Fairfax (1942) 42 SR (NSW) 171 at 174.*

These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence.'

4. *These five propositions relate to elements of the defence of fair comment in respect of which the burden of proof is on the defendant. Cheng's case was primarily concerned with a sixth element—absence of malice. A defendant is not entitled to rely on the defence of fair comment if the comment was made maliciously. The onus of proving malice lies on the claimant.*
5. *The second proposition. This merits elaboration. Jurists have had difficulty in defining the difference between a statement of fact and a comment in the context of the defence of fair comment. The example in Myerson v Smith's Weekly (1923) 24 SR (NSW) 20 at 26 cited by Lord Nicholls is not wholly satisfactory. To say that a man's conduct was dishonourable is not a simple statement of fact. It is a comment coupled with an allegation of unspecified conduct upon which the comment is based. A defamatory comment about a person will almost always be based, either expressly or inferentially, on conduct on the part of that person. Judges and commentators have, however, treated a comment that does not identify the conduct on which it is based as if it were a statement of fact. For such a comment the defence of fair comment does not run. The defendant must justify his comment. To do this he must prove the existence of facts which justify the comment.*
6. *The fifth proposition. The requirement to show that the comment is germane to the subject matter criticised and is one that an honest person could have made, albeit that that person may have been prejudiced, or have had exaggerated or obstinate views, is one that is bizarre and elusive. I am not aware of any action in which this has actually been an issue. I shall describe this element as 'pertinence'.*
7. *The fourth proposition. It is this proposition that is directly in issue in this appeal. The facts on which the defendants wish to rely in support of their plea of fair comment include a fact to which they made no reference in the publication complained of. The claimants say that they cannot rely on this, for this would run foul of Lord Nicholls's fourth proposition. Mr Price submits that far from being well established, that proposition is contrary to authority and wrong. Mr Caldecott supports that submission. The important issue raised by this appeal is thus the extent to which, if at all, the defence of fair comment requires that the comment should identify the matter or matters to which it relates.*

25. This passage from **Joseph v Spiller** is sufficient to show the truth of Lord Phillips opening comments about the 'tangled web' of defamation law, particularly – he said – the defence of fair comment. Lord Phillips went on in his decision to comprehensively analyse the development of the fair comment defence through a series of important and authoritative decisions, including the decision of the House of Lords in **Kemsley v Foot** [1952] 1 All ER 501 from which counsel for the plaintiff quoted the following passage:

> *The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action, and I find my view well expressed in the remarks contained in Odgers On Libel And Slander (5th ed, 1911) at p 203:*
>
> > *"Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful', this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct,*

and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact."

But the question whether an inference is a bare inference in this sense must depend on all the circumstances.

26. A reading of the whole decision in **Joseph v Spiller** is instructive, including as it does a review of the progression of the defence through history from the time when it applied only to criticism of published works, to its modern application to any commentary on matters of public interest, but rather than repeat more of it, I will go straight to Lord Phillips' conclusion, which was to endorse the five point analysis of Lord Nicholls in **Albert Cheng**, with one refinement:

> *For the reasons that I have given I would endorse Lord Nicholls's summary of the elements of fair comment that I have set out at [3], above, save that I would re-write the fourth proposition:*
> *'Next the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based.'*

This very minor change from the wording used by Lord Nicholls (*what are the facts on which the comment is being made* replaced by the words *the facts on which it is based*) nevertheless is significant. The change reflects the following analysis by Lord Phillips in **Joseph v Spiller** of this aspect of the fair comment defence:

> *101. There are a number of reasons why the subject-matter of the comment must be identified by the comment, at least in general terms. The underlying justification for the creation of the fair comment exception was the desirability that a person should be entitled to express his view freely about a matter of public interest. That remains a justification for the defence, albeit that the concept of public interest has been greatly widened. If the subject-matter of the comment is not apparent from the comment this justification for the defence will be lacking. The defamatory comment will be wholly unfocussed.*
>
> *102. It is a requirement of the defence that it should be based on facts that are true. This requirement is better enforced if the comment has to identify, at least in general terms, the matters on which it is based. The same is true of the requirement that the defendant's comment should be honestly founded on facts that are true.*
>
> *103. More fundamentally, even if it is not practicable to require that those reading criticism should be able to evaluate the criticism, it may be thought desirable that the commentator should be required to identify at least the general nature of the facts that have led him to make the criticism. If he states that a barrister is 'a disgrace to his profession' he should make it clear whether this is because he does not deal honestly with the court, or does not read his papers thoroughly, or refuses to accept legally aided work, or is constantly late for court, or wears dirty collars and bands.*
>
> *104. Such considerations are, I believe, what Mr Caldecott had in mind when submitting that a defendant's comments must have identified the subject-matter of his criticism if he is to be able to advance a defence of fair comment. If so, it is a submission that I*

would endorse. I do not consider that Lord Nicholls was correct to require that the comment must identify the matters on which it is based with sufficient particularity to enable the reader to judge for himself whether it was well founded. The comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism.

27. On the issue of malice in the context of fair comment Lord Phillips made the following observations about Lord Nicholls' decision in **Albert Cheng**:

> *67. Lord Nicholls broke new ground in holding that malice in the context of fair comment had a different meaning from malice in the context of qualified privilege. In the former context, the motive for making the comment was irrelevant. All that mattered was whether or not the commentator honestly believed in the truth of his comment. This was an evolution of the view that Lord Nicholls had expressed in **Reynolds v Times Newspapers Ltd** [1999] 4 All ER 609:*
>
> > *Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth.*
>
> *68. The authors of **Gatley on Libel and Slander** (11th edtn, 2008) comment, at para 12.25:*
>
> > *Formerly, it was widely believed that the idea of malice was essentially the same in fair comment [as in qualified privilege] and that the cases were essentially interchangeable. It has now been demonstrated that this is incorrect.*
>
> *The last sentence is a remarkable tribute to the standing of the Court of Final Appeal of Hong Kong and, more particularly, of Lord Nicholls.*
>
> *69. In holding that not even spite or ill-will constituted malice, Lord Nicholls (2000) 10 BHRC 525 at 534, [2001] EMLR 777 (para 48) once again returned to his fourth proposition:*
>
> > *Thus, the comment is one which is based on fact; it is made in circumstances where those to whom the comment is addressed can form their own view on whether or not the comment was sound; and the comment is one which can be held by an honest person.*

Dissenting from Lord Nicholls's fourth proposition in **Albert Cheng** Eady J (a judge commended by Lord Phillips as having 'great experience in the law of defamation on the subject matter of this appeal') in **Lowe v Associated Newspapers Ltd** [2006] 3 All ER 357 had said this (at paragraph [57]):

> *Whilst it is necessary for readers to distinguish fact from comment, it is not necessary for them to have before them all the facts upon which the comment was based for the purpose of deciding whether they agree with the comment (or inference). I draw that conclusion with all due diffidence, since Lord Nicholls has twice expressed the opposite view, but it does seem consistent with principle and, in particular, with the undoubted rule that people are free to express perverse and shocking opinions and may nevertheless succeed in a defence of fair comment without having to persuade reasonable readers, or the jurors who represent such persons, to concur with the opinions. It is difficult to see why it should matter whether a reader agrees; what matters is whether he or she can distinguish fact from comment. Sometimes that will be possible, as it was in **Kemsley v Foot**, without any facts being stated*

expressly, because either they are referred to or they are sufficiently widely known for the readers to recognise the comment as comment.

In saying this Eady J noted:

> *... the words of Lord Oaksey in Kemsley v Foot ... 'What is meant in cases in which it has been said that comment to be fair must be on facts truly stated is, I think, that the facts so far as they are stated in the libel, must not be untruly stated.'*

And it seems that in his conclusion in **Joseph v Spiller** (see paragraph 25 above) broadening the basis upon which a finding that a statement is a comment, rather than an assertion of fact, Lord Phillips was influenced by this dissenting view.

28. In his submissions counsel for the defendant referred me to the decision of the Court of Appeals in Maryland, USA in **Greenbelt Pub. Assn v Bresler** (1970) 398 US.6, 90 S. Ct.1537. That decision, involving – as does this case – the use of the word 'blackmail' in relation to the plaintiff, reflects the same approach to the defence of fair comment as that taken by the Supreme Court of England & Wales in **Joseph v Spiller.** In distinguishing whether the statement is one of fact (i.e. that the plaintiff is guilty of the crime of blackmail), or a comment, the court (per Stewart J) said:

> *[The plaintiff] Bresler's proposal was accurately and fully described in each article, along with the accurate statement that some people at the meeting had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable.*
> *It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant; it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meeting or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offence. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.*

29. In commentary on the decision in **Albert Cheng** published in the Melbourne University Law Review the author Jill Cottrell, in an article titled **Fair Comment, Judges and Politics in Hong Kong** (2003) 27(1) Melbourne University Law Review 33 summarised the conclusions thus:

> *In Albert Cheng v Tse Wai Chun Paul ,... Nicholls NPJ made essentially three important point about malice in fair comment. Firstly, provided the basic requirements of the defence of fair comment are satisfied, the only way in which the defence can fail is if the defendant is shown to have had no honest belief in the truth of what was said. Secondly, this is not best described as 'malice' — which usually requires an improper motive — for motive is now irrelevant. Rather, juries should be directed that the issue is simply whether the defendant honestly believed the opinion expressed. Thirdly, in the case of qualified privilege, the use of the expression 'malice' is unnecessary and direction should be in terms of whether the defendant used the occasion for some purpose other than that for which the privilege is recognised. Any such remarks are of course obiter, qualified privilege not being at issue in the case*

and I think that the su(bsequent decision in **Joseph v Spiller** confirms this view. Since the decision was issued by the Hong Kong Court of Final Appeal in 2000 the

courts in Fiji have consistently relied on the five criteria from **Albert Cheng**, and in my view, if and when the issue arose, would be inclined to agree with the reinterpretation of that decision that has occurred since it was given. Indeed, in **Patel v Gosai** (supra), the most recent decision of the Court of Appeal in which the issue was raised, the court commented at paragraph 37, about the defence of fair comment:

> *the only requirements for establishing this defence was that a defendant should have expressed the opinions honestly and he should have done so upon facts accurately stated.*

In its decision in **Fiji Times Ltd v Vayeshnoi** [2010] FJCA 35 the Court quoted with approval the closing address to the jury by Diplock J (as he then was) in **Silkin v Beaverbrook Newspapers Limited** [1958] 2 All ER 516, including the following comments:

> *People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate, or prejudiced, provided – and this is the important thing – that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?*

30. Also relevant to the defence of fair comment is section 16 Defamation Act 1971, which states:

> *16. In an action for defamation in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.*

This section, which is identical to section 6 in the UK Defamation Act 1952, reflects the broadening application of the fair comment defence to commentary on matters beyond published works, and the distinction between the requirement, where the defence of fair comment is invoked, on the fairness and honesty of the comments, as opposed to proof of truth as is required by the defence of justification. As the section makes clear, it is not necessary to prove all the facts alleged, as long as those that can be proved are sufficient to justify the opinion. The section does not interfere with the requirement that the opinion expressed must, even if misguided, must be genuinely held. If none of the facts relied are capable of justifying the opinion, it follows that the opinion cannot be the honest opinion of the commentator, and the comment cannot therefore be fair.

31. In the context of the present case, I conclude from all of these decisions and commentary, that as long as the statement complained of is:

- clearly an opinion,
- is made honestly (in the sense that the maker of the statement genuinely holds the opinion being expressed),

- does not misstate the facts upon which it is said to be based,

It cannot be the foundation for a defamation claim, regardless of how humiliating, hurtful or damaging the comment is. This analysis reflects the statutory defence of 'honest opinion' created in the United Kingdom by section 3 of the Defamation Act 2013, and in doing so it omits any reference to the public interest requirement. But in my view, looking at the way the cases on fair comment have developed, and the myriad situations to which the defence has applied (**Joseph v Spiller** is essentially a contractual spat between a musical performer and his booking agent, but there is no suggestion in the Supreme Court decision that the defendant is disqualified because of that from raising the fair comment as his defence), the common law had already moved past this as a requirement for the defence.

Analysis

32. Even if I am wrong in the conclusion I have reached in paragraph 26 above about the abandonment of the public interest element of the defence, I would find that the plaintiff's position in society and public life, which he has described in outlining the impact on him of the defendant's alleged defamation, is such that comment on his conduct is a matter of public interest. While perhaps not commanding the universal admiration accorded to other professions or callings in the community, members of the legal profession are still vastly privileged educationally, legally (for very sound reasons, the legal profession is in many ways still a closed shop), and in their influence in the conduct of their work, and that work attracts great loyalty and deference, carries financial rewards (both direct and indirect) and often opens opportunities for leadership in the public arena. The plaintiff is an example of this; as he has himself described, his recognised abilities as a lawyer and businessman have seen him appointed to important and prestigious public roles both in his professional and business interests (chair of the Sugar Industry Tribunal, and of the Legal Aid Appeals Review Committee, council member of the Fiji Law Society) and in his private interests (Chair of the Fiji Football Ethics Committee). In the present case these advantages are illustrated by the plaintiff's ability to access the assistance of his law firm to help in the conduct of his business as a landlord. Even if, as the plaintiff insists, he pays his firm for its assistance, nevertheless the close association he has with it enables him to do what he unquestionably did here; call for the instantaneous assistance of the firm in executing distress to help him in an issue he had as a landlord. These factors together, to my mind, mean that the expression of an opinion upon the way the plaintiff conducts his business is a comment on a matter of public interest.

33. The remaining questions for the court to answer, raised by the defendant's defence of fair comment, are whether the damaging statements in the defendant's letter of 23 August, taken as a whole – including his use of the term 'blackmail' in describing the plaintiff's conduct - were comment, rather than factual accusations, and if so, were those comments made maliciously (in the sense required in connection with the fair comment defence).

34. As to the first of these issues, I am satisfied that on balance the letter (the full text of which is set out in paragraph 10 above), at least in so far as it directly makes accusations of criminal, unethical or immoral conduct, is an expression of opinion rather than of fact. Certainly there are factual assertions in the letter whereby the defendant asserts what happened in relation to the demand for payment of rent, and the subsequent levying of distress, for example:

> *At the beginning of July Shalend and I thought to agreed that the bond will be used for July's rent.*
> *Then on 27th July Shalend called and said we have to pay July rent contrary to our earlier agreement.*
> *I told him the bond was sufficient and we had already agreed that it will be used for July rent. Surprisingly he did not agree.*
> *I said I will issue you a cheque and send your employee to pick up.*
>
> *Instead 29th July at 10.30am Shalend sent a bailiff to close my shop with distress of rent.*
> *Before this distress Shalend never gave me any notice that he will do distress for July's rent that we initially agreed should be deducted from bond., and later asked him to pick up the cheque*

and:

> *The bailiff was on his mobile phone throughout this illegal process of eviction an told my staff that the lawyer Shalend or his chief clerk is on the phone so they should not argue.*

But in the context of these assertions, as to which the defendant has given evidence which I accept, the statements about blackmail, fraud, criminality and illegality appear as comments, not statements of fact that the plaintiff is actually guilty of blackmail in the criminal sense. This I think is made clear by statements such as:

> *I am advised that even [if] distress was legal this amount is excessive and abuse of power. However I maintain distress was illegal and unconstitutional.*

and:

> *This is blackmail and abuse of power by the lawyer*

and:

> *because what Shalend has done is also criminal in my opinion.*

and:

> *What Shalend has done is for no reason but to blackmail money out of me abusing his power as a lawyer – that is the simple fact.*

and:

> *Sirs, in my 10 years in being in Fiji I have never experienced such dishonesty and fraud from anyone. My confidence in Fiji is being tested because a lawyer thinks he can abuse his position*

which explain the point of view of the defendant. These assertions are qualified (*'I thought [we had] agreed', I am advised', 'I maintain', 'in my opinion'*), not absolute. The defendant allows for the possibility that his understanding/advice is wrong, and that the distress was 'legal', as I have no doubt it was in the technical sense, but the

thrust of his complaint is clear – i.e. that the distraint issued by the plaintiff was improper in all the circumstances he describes, and (although he does not use the word himself) opportunistic. If, as the defendant asserts and I accept, he had told the plaintiff's office that a rental cheque was waiting for him to collect, the levying of distress was 'hard-nosed' and perhaps, with hindsight, unwise.

35. The factual issue – i.e. whether the defendant and his staff had told the plaintiff or his office that a rent cheque was waiting to be collected – was really the only important conflict of evidence between the plaintiff and the defendant. As I have discussed in paragraph 6 above, the latter was clear in the evidence he gave at trial (on which he was not cross-examined) which was consistent with what he says on that subject in his letter. On the other hand the plaintiff was less clear in giving his evidence. All he was prepared to say on the subject was that he was not aware of the defendant's communication, and he would have been told if such a message had been left. I was left with the impression that he felt unable to be more definite on this issue – and he is to be commended for resisting the temptation to do so. I am certainly satisfied that the defendant believed what he said, and – to apply the words of Lord Oaksey from **Kemsley v Foot** (see above at paragraph 26) - *the facts so far as they are stated in the libel,* were not *untruly stated* in the defendant's letter of 23 August. There are two core issues covered by that letter, one dealing with the distraint for rent, and the other dealing with the 'fabrication' of damage to the building. Mr Kim has set out in the letter sufficient background information about each issue to explain the basis for his grievance. As to the distraint issue, the issue of distraint for recovery of the July rental payment was unnecessary because, as he says in the letter, when the plaintiff demanded payment of the July rent on 27 July 2016:

> *I said I will issue you a cheque and send your employee to pick up.*

With regard to the building damage, the defendant sets out in his letter the fact that remedial work had been voluntarily carried out by the company prior to vacating the premises, and his attempts to arrange an inspection with the plaintiff – something the plaintiff refused to participate in. This provides context for the defendant's assertion in the letter that:

> *after we vacated Shalend fabricate[d] issues about building damages that we are not responsible for.*

Mr Kim was not asked in evidence in chief or in cross-examination about the Magistrates Court judgement against Biz Trading for damage to the
premises. Taking into account that his letter was written only the week after the termination of the lease on 15 August 2016, in the absence of some evidence on the subject I am not prepared to conclude that the failure to defend the Magistrates Court claim four years later means that the defendant's earlier statements are untrue. In any case, applying section 16 Defamation Act 1971 (see above at paragraph 29), any failure by the defendant to prove this element of his letter does not in my view invalidate the defendant's comment based on the other material in the letter that is proved. The thrust of the letter is a commentary by the defendant

on the plaintiff's business practices as described, and the absence of proof of the factual basis for one, relatively minor, element of that commentary does not disqualify the commentary as a whole from being fair comment.

36. With regard to the allegations of 'blackmail', illegality, criminality and abuse of power I accept that the defendant was making these assertions in the same manner as those referred to by the Maryland Court of Appeals in the **Greenbelt** case referred to in paragraph 27 above. It is simply impossible to believe that a recipient of the defendant's letter, reading what he says, would not have understood exactly what was meant; i.e. that it was the plaintiff's business conduct and in particular his use of the distress tactic that was being criticized. No-one reading the letter (taking into account who they were) could have thought that the defendant was charging the plaintiff with the commission of a criminal offence; they would have realised the assertions were no more than 'rhetorical hyperbole', a vigorous, emotional and perhaps exaggerated, but nevertheless heartfelt description of conduct by someone who obviously regarded the plaintiff's business conduct as extremely unreasonable. As I observed at the start of this decision, there can be risks involved for a lawyer utilising the knowledge and advantages that that role gives him in pursuit of his personal objectives. What the plaintiff did in executing distress for rent in the circumstances may have been perfectly legal, but it was at the very least unsympathetic, it cost the defendant a substantial sum more than was otherwise due (a good part of which directly benefitted the plaintiff via his law firm) and was always likely to provoke the sort of outraged reaction he got from the defendant. In my view those receiving the defendant's letter would have seen it in this light, rather than as an assertion that the plaintiff was guilty of a criminal offence or offences.

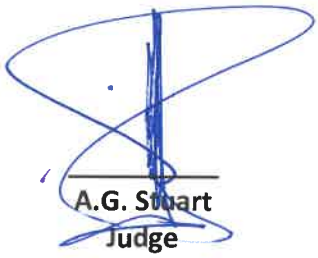
37. Finally under this heading I need to discuss the issue of malice. The law makes clear that in the context of the defence of fair comment, 'malice' refers to the genuineness of the opinion. If the opinion expressed is not genuine, but – for example – is expressed for some ancillary purpose – it is not the legitimate exercise of freedom of speech (the only philosophical basis for the fair comment/honest opinion defence), and does not entitled the defendant to say something that is damaging. The line between the legitimate exercise of freedom of speech (in Fiji a constitutional right) and abuse (or 'hate speech' in modern parlance) can be a difficult one to draw. But I have no doubt that Mr Kim genuinely held the opinion he was expressing, and I don't accept that in expressing that opinion as he did that the defendant crossed any line to descend into personal abuse. The defendant's letter referred to the plaintiff's business conduct, not to his personal qualities.

38. In his submissions, counsel for the plaintiff complains that the defendant has failed to properly plead the facts on which he relies to establish that the comments were fair. Although the way Mr Kim's defence is pleaded in his statement of defence is far from conventional, he does assert in the pleading the essential facts that are said to be the foundation for the opinion expressed in his letter of 23 August 2016. It is clear that the plaintiff well understood what was the basis of the defence, and had the opportunity to, and did plead to the defendant's allegations, admitting some of the alleged background events, and denying others. It is important to note that the

defendant did not rely on an assertion that the statements were true (which he would have had to prove), nor did he raise the defence of qualified privilege, which would have required him to show that all those to whom the letter was sent had a sufficient interest in his complaint to justify the publication to them of the letter, even if it was not true.

Conclusion

39. For these reasons I find that the defendant's letter, read in its entirety, was fair comment as he pleads, and that he has not defamed the plaintiff. The plaintiff's claim is dismissed, and he is ordered to pay costs to the defendant of $3,000 summarily assessed.



A.G. Stuart
Judge

At Lautoka this 11th day of March, 2021

SOLICITORS:
Patel & Sharma, Nadi for the plaintiff
Kevueli Tunidau Lawyers, Lautoka, for the defendant