

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0001 of 2023
Court of Appeal No. ABU 0039 of 2019

BETWEEN : **UMA DUTT SHARMA**
Petitioner

AND : **ISIRELI BIUMAITOTOYA**
Respondent

Coram : **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Justice Lowell Goddard
Judge of the Supreme Court

The Hon. Justice William Young
Judge of the Supreme Court

Counsel : **Mr. V. Sharma for the Petitioner**
Mr. A. J. Singh and Ms. P. D. Prasad for the Respondent

Date of Hearing. : **11 June, 2024**

Date of Judgment. : **28 June, 2024**

JUDGMENT

Temo, AP

[1] I agree entirely with the judgment and orders of the Hon Justice William Young.

Goddard, J

[2] I am also in agreement with the orders proposed and the reasons.

Young, J

The petition seeking leave to appeal

[3] Dr Uma Sharma sued Dr Isireli Biumaitotoya for defamation. He was successful at trial and was awarded damages of \$70,000. Dr Biumaitotoya's appeal to the Court of Appeal was successful, with that Court concluding that the statement Dr Sharma had sued on was not defamatory. Dr Sharma now seeks leave to appeal and an extension of time to do so.

[4] There being no prejudice associated with the relatively short delay in the filing of the petition, I would extend time as requested. The issues raised by the petition include the pleading, conduct and resolution of defamation cases. They are "of substantial general interest to the administration of civil justice" for the purposes of s 7(3)(c) of the Supreme Court Act 1998 and I would therefore grant leave to appeal.

Background

How the dispute started

[5] Many years ago, Dr Sharma developed a building complex in Nadi. For some time, he practised there as a dentist on the ground floor. Also on the ground floor was a medical centre which, in 2000, was taken over by Dr Biumaitotoya, a general practitioner. He practised there under the trading name, "Shortlane Medical Centre". On the first floor of the building were residential units. Dr Sharma and his family occupied one. From what seems to have been 2010 or perhaps early 2011, Dr Biumaitotoya rented another residential unit that he sublet to others. This was referred to by the parties as "the girls' hostel" and I will do the same.

[6] Relationships between Dr Sharma and Dr Biumaitotoya soured and eventually Dr Biumaitotoya was evicted. He left on 4 February 2012.

[7] On 27 February 2012, Dr Biumaitotoya sent an email to 144 recipients, most of whom were dentists or doctors practising in Nadi. This email was critical of Dr Sharma in his role as landlord. Passages in the email touched on aspects of the breakdown of Dr Sharma's marriage. These had affected Dr Sharma's relationship with Dr Biumaitotoya and formed part of the background to the eviction.

[8] Dr Sharma issued proceedings for defamation.

The litigation

The pleadings

[9] Dr Sharma's statement of claim pleaded in some detail the background to the dispute between him and Dr Biumaitotoya. It then set out the text of the email interposing between the passages to which Dr Sharma took exception, the meanings that he alleged those passages bore along with assertions that those meanings were false (including in some instances particulars as to why they were false). The email is set out below at [32]. As I will explain later, the substance of what was alleged in the email was that Dr Sharma had acted as a bad landlord in relation to his eviction of Dr Biumaitotoya.

[10] Dr Biumaitotoya's statement of defence denied all allegations that reflected badly on him, disputed the meanings attributed to the passages in the email about which Dr Sharma complained, set out what he claimed were the actual meanings and, in some respects, gave particulars as to why those meanings were true. Justification was not pleaded separately as a defence.

[11] In a pre-trial memorandum, the parties listed a number of agreed facts and summarised some agreed issues. Some of these issues seem to have been directed to whether aspects of what was said in the email were true. Others were expressed in such general terms (for instance whether the email was defamatory) as to be of no practical utility. They did not identify what I regard as the real issues in the case – that is, in what respects, if any, was the email defamatory; and if, in those respects, what Dr Biumaitotoya had said was true.

The trial

[12] The claim was heard by before Sapuvida J in November 2015. I will deal with the evidence later. Primarily in issue was the truth of what was said in the email.

[13] Written submissions were filed in May and June 2016. In his submissions, counsel for Dr Biumaitotoya explicitly asserted that “the words complained of were true in substance and fact”. And in his submissions, counsel for Dr Sharma responded by contending that what had been said was false.

The High Court judgment

[14] Sapuvida J not having delivered a judgment before he resigned from the High Court, the case was dealt with by Nanayakarra J. This was on the basis of the transcript of the hearing. This posed some practical difficulties as the evidence of Dr Sharma and Dr Biumaitotoya had been in sharp conflict on a number of issues and there were not many hard facts against which the plausibility of the conflicting accounts could be assessed. That said, the agreement that the case be determined in that way implied that any necessary credibility findings would be made on the basis of that transcript.

[15] As it happened, the approach taken by Nanayakkara J meant that he did not have to make findings of credibility. This is because he took the view that in the absence of an expressly pleaded defence of justification, there was no occasion to go into whether what had been said was true. So, in holding that Dr Biumaitotoya was liable, he put entirely to one side the evidence adduced as to the truth of what was said. He also did not engage with the detail of what the words used in the email were alleged to have meant. In the result, he awarded Dr Sharma damages of \$70,000, together with interest and ordered Dr Biumaitotoya to pay cost on an indemnity basis.

The Court of Appeal judgment

[16] The Court of Appeal allowed Dr Biumaitotoya’s appeal. The nub of its reasoning is captured in the following passage from the reasons of Guneratne P (with whom the other two judges agreed):

While disagreeing with Mr Singh (for [Dr Biunaitotoya]) that the impugned words were a mere hyperbole, nevertheless, the words did not constitute defamatory content in as much as the consequential criterion of (a) the Respondent's reputation and/or (b) he had suffered financial loss were not established

[17] The Court of Appeal did not closely examine the email, or the meanings attributed to it. The judgment was thus pitched at a high level of generality. Because it proceeded on the basis that the email was not defamatory, it did not address the truth of what was said.

[18] In what he described as “some final reflections, Guneratne P referred to the Defamation Act 2013 (UK) under which a claim for defamation can only succeed if the publication complained of had caused or was likely to cause serious harm to the plaintiff's reputation. He also noted that prior to that Act, the Court of Appeal of England and Wales had held in *Jameel v Dow Jones & Co Inc*,¹ that balancing the right of freedom of speech against the right to reputation, a claim for defamation could be struck out as an abuse of process if the alleged defamation had caused little or no damage.

The basis of the application for leave to appeal

[19] The application for leave to appeal is advanced largely on the assumption that the Court of Appeal decided the case by adopting into the law of Fiji recent developments in the United Kingdom, most particularly the serious harm test provided for by the Defamation Act 2013 (UK). I think that this is a mistaken assumption. However, the petitioner advances more straight-forward arguments that the email was defamatory and that the Court of Appeal was wrong to find otherwise. As well, the petitioner:

- (a) defended the conclusion of Nanayakkara J that justification not having been pleaded, the truth of what was said was not a defence; and
- (b) argued that the truth of what was alleged in the email had not been established.

¹ *Jameel v Dow Jones & Co Inc* [2005] QB 904.

Why I think that the judgments of the courts below were wrong

[20] Nanayakkara J was wrong to decide the case on the basis that he did. This is for two reasons:

- (a) He did not recognise that the combined effect of the unorthodox statement of claim (which pleaded that the defamatory meanings were false for reasons that were particularised) and the statement of defence which denied that falsity, meant that issue had been joined as to the truth of what Dr Biumaitotoya had said. And
- (b) The trial in November 2015 had been conducted on the basis that the truth of the allegations was very much in issue. By May 2019, when Nannayakara J delivered his judgment, it was far too late in the day to say that justification had not been raised.

[21] The Court of Appeal judgment did not analyse the email for what it meant and offered no opinion in this respect. Its finding that it was not defamatory was entirely conclusory. Instead of deciding the case on this basis, it should have engaged in a granular way with the text of Dr Biumaitotoya's email, the meanings Dr Sharma attributed to it, and whether it was, in any event defamatory just on the ordinary meaning of the language used. If it had done so, it would (or at least should) have concluded that the email was defamatory. In short, I consider that the Court of Appeal was wrong to allow the appeal on the basis it did.

Overview of what follows

[22] In subsequent sections of this judgment, I will discuss (a) the legal background (by reference to the common law and the Defamation Act 1971), (b) explain that the case came down to whether Dr Sharma had acted as a bad landlord in relation to Dr Biumaitotoya's eviction, (c) conclude that Dr Biumaitotoya did establish that Dr Sharma had acted as bad landlord and (d) revert to the harm requirement alluded to by the Court of Appeal in its judgment.

The legal background

The common law

- [23] The law of defamation addresses damage to reputation. Such damage is likely to depend on a range of factors, including: the seriousness of the defamatory imputation, the number of people to whom it is published and any connections between those people and the plaintiff (for instance as actual or potential customers).
- [24] Up until this century, defamation has been defined by reference largely to the seriousness of the imputation and, since the 1936 judgment of the House of Lords in *Sim v Stretch*, against the standard of whether the tendency of the words used was to “lower the plaintiff in the estimation of right-thinking members of society.”² On publication of such a statement to at least one person, damage was presumed and a claim for defamation lay.³
- [25] More recently, there has been a focus in the United Kingdom and in New Zealand on the significance of actual or likely harm, with attention paid to the extent of publication and its actual or probable effect on the plaintiff, reputationally, financially and otherwise. Associated developments have included:
- (a) In the United Kingdom, a willingness to strike out proceedings as an abuse of process where the associated costs will be disproportionate to the harm caused, as in *Jameel v Dow Jones & Co Inc*,⁴ the recognition by Tugendhat J, in *Thornton v Telegraph Media Group Ltd*,⁵ of a “substantial harm” threshold and the adoption of a rather more stringent “serious harm” requirement by s 1 of the Defamation Act 2013 (UK), the impact of which is discussed in the judgment of the Supreme Court of the United Kingdom in *Lachaux v Independent Print Ltd*.⁶

² *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.

³ Halsbury, Laws of England 5th edit vol 32 Defamation (2023), at [519].

⁴ See above at fn 1. In *Jameel*, the imputation was extremely serious, that the plaintiff was a supporter of terrorism. But the defamatory statement had been seen by only five people.

⁵ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985.

⁶ *Lachaux v Independent Print Ltd* [2019] 4 All ER 485.

(b) in New Zealand, the adoption by the Court of Appeal of a more than minor harm threshold but with the onus of proof as to it lying on the defendant.⁷

[26] My current thinking is that it would be too big a jump from the law as previously understood for this Court to impose a “serious harm” requirement. In the United Kingdom, this requirement was introduced by legislation. I therefore apply a substantial harm threshold. I do so provisionally: it seems to me to be the highest standard that could plausibly be applied on the common law authorities; and, for the reasons I give shortly, Dr Sharma’s claim crosses this threshold. I will revert at the end of these reasons to whether such a threshold should be adopted as part of the law of Fiji.⁸

[27] Against this background, Dr Sharma had to establish that the email:

- (a) had a tendency to lower Dr Sharma in the estimation of right-thinking members of society; and
- (b) caused or was likely to cause him substantial harm.

I will say more about the substantial harm issue when dealing with the one respect in which I regard the email as defamatory.⁹ But some elaboration of what is and is not defamatory is appropriate at this stage.

[28] Whether a statement is defamatory depends on the meaning of the words used. This is determined by the trier of fact objectively, by reference to what an ordinary person would take from the alleged defamatory statement when considered in the context of the surrounding circumstances, including the mode and style of its publication. As well, there are two particular aspects of defamation practice that warrant mention:

⁷ *Craig v Slater* [2020] NZCA 305.

⁸ See below, at [63]

⁹ See below, at [44].

- (a) Word of abuse or insult are not usually construed literally.¹⁰ Dr Biunaitotoya's email was something of a rant and, for this reason, unlikely to be read literally.
- (b) Statements are defamatory only if they relate to the reputation of a person. So, while a statement that disparages the goods a person supplies may give rise to a claim for slander of goods or malicious falsehood, a claim for defamation will not usually lie in respect of it.¹¹ The same principle must also apply to the supply of services. For instance, that a landlord chooses to lease mid-range commercial premises does not mean that he or she is a worse person than a landlord who only leases premium commercial premises. So, to say of a landlord that the premises he or she leases out are not as good as premises available elsewhere is not defamatory of the landlord.

The Defamation Act 1971

[29] The Defamation Act 1971 merely amended the common law as to defamation and did so in a piecemeal way.

[30] The only provision of the Act that is relevant to the case at hand is s 15 which provides:

In an action for defamation in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

The case comes down to whether Dr Sharma acted as a bad landlord in the events leading to Dr Biunaitotoya eviction

Preliminary comments

[31] A party alleging defamation customarily pleads the statement or statements that are said to be defamatory. Where the natural and ordinary meaning of the words in issue is obvious, no elaboration is necessary. But commonly a plaintiff will allege meanings that go beyond the literal and plead them. This is what Dr Sharma did in this case.

¹⁰ Halsbury, *Laws of England* 5th edit vol 32 Defamation (2023), at [548].

¹¹ Halsbury, *Laws of England* 5th edit vol 32 Defamation (2023), at [554].

The text of the email

[32] The email at the heart of the case reads as follows:

Subject: SHORTLANE MEDICAL CENTRE”

Totally different here folks

As you have heard I have been vacated by my landlord Dr Uma D Sharma from Shortlane Medical Center, Namaka. This after 12 years in that location.

I hear a group of Dr’s including Dr Tui Taoi from Lautoka are planning to move in there.

I have moved to a better location, however, I want everyone interested that there is a LEGAL ACTION by me against Dr Uma coming up in 3 weeks at Nadi Court. I will be suing for DAMAGES. After all I have been at that location for a long time, marketed it well as a medical centre, and if I move normally I would sell it to incoming Drs at a fee.

Those moving in there may find themselves inconvenienced by this Legal Suit.

Dr Uma’s wife is also for Filing for Divorce, so the property may go into receivership, causing future problems to tenants.

Also Dr Uma is a Landlord from hell, his Interference into the rented premises and into your businesses, refusing to do repairs, refusing to renew the Legal Lease Agreement after the 1st 5 years, so that he can chase you away anytime and, and every disagreement he will say that to your face.

This is what he did to me. He is landlord that will involve you and expect you to do silly things like spying on his wife for lovers etc. I have been through that rubbish.

What did the email mean?

[33] The recipients of the email would have understood that Dr Biumaitotoya was cross with Dr Sharma over his eviction and the events that preceded it. It being in the nature of a rant, those reading it would not construe it in a particularly literal way.¹² They would also appreciate that there was likely to be another side to the story.

Was the email defamatory?

[34] In his pleadings and at trial, Dr Sharma objected to just about everything that was in the email. He also set out in detail what the passages that he objected to meant. These meanings were expressed in extravagant language. By way of example, Dr

¹² See fn 10, above.

Biumaitotoya's description of Dr Sharma as a "Landlord from hell" was alleged to mean that he was:

... evil, bad, unreasonable, immoral, vile, foul, baleful, wicked, untrustworthy, noxious, villainous, manipulative, hateful, deceitful, unsound, sinful.

Most of the other pleaded meanings are similar in style and likewise have little or no relationship with the words used. Save to the limited respects to which I refer to them in passing in what follows, I do not propose to analyse them.

[35] In deciding whether the email was defamatory there are four passages in it that warrant attention.

[36] The first is the reference in the email to Dr Biumaitotoya having moved to a better location. This was pleaded as meaning that:

[Dr Sharma's] property was in a location which was not suitable, conducive, adequate, appropriate, proper, satisfactory for the purposes for which [Dr Biumaitotoya] had rented the subject premises for.

It did not mean that at all. All it meant was what it said – that Dr Biumaitotoya's new premises were in a better location than those he had rented from Dr Sharma. So construed, this passage is not defamatory; this for the reasons given in [28], above. This, however, is not to say that the passage is entirely irrelevant as it provides context in relation to the later reference to Dr Sharma being a "Landlord from hell", as I will explain shortly.

[37] Secondly, the email refers to proceedings by Dr Biumaitotoya in the Nadi Magistrates Court and by Dr Sharma's wife for divorce. Counsel for Dr Sharma argued that these references were untrue because the proceedings that were referred to had not been commenced on 27 February 2012. They were in fact commenced not long afterwards. The relevant passages did not have the floridly defamatory meanings alleged in the statement of claim¹³ and in their ordinary and literal meaning were not defamatory of Dr Shama. In any event, when construed in accordance with their ordinary meaning they were true, at least in substance. This is because the references to the proceedings

¹³ By way of example, that the reference to divorce proceedings meant that Dr Sharma was "abusive, intolerant, manipulative" and so on.

in the email can be read as encompassing proceedings that were about to be commenced. As a matter of ordinary English usage, a person who says, “I’m really unhappy about what X did and I’m suing him”, could be referring to proceedings that are in preparation and about to be commenced.

[38] Thirdly, the email claimed that the building complex “may go into receivership, causing future problems to tenants”. I agree that references to likely receivership would usually be taken to imply financial difficulties. And I also see the reference as having at least some materiality to the impact of the later allegation that Dr Sharma was a “Landlord from hell”. But, standing alone, it was not defamatory. This is because the reference to “receivership” was linked so closely to litigation between Dr Sharma and his wife that it can only be construed as an opinion that a possible outcome of the proceedings brought by Dr Sharma’s wife would be court-directed changes in the operation or ownership of the building complex. Construed in this way, it was not defamatory. In any event, as at 27 February 2012, that opinion was a fair assessment of what might happen, as I will now explain.

[39] In July 2004, Dr Sharma had created a trust of which he was the sole trustee. The certificate of title to the property records a later transfer (in 2005) to Dr Sharma as trustee of this trust. The beneficiaries of the trust include Dr Sharma and his children but not his wife. The trust deed is couched in extremely discretionary terms and confers broad powers on Dr Sharma as trustee. These are not confined to distributions (including to himself) but extend to a power to resettle all trust assets on himself. It must be at least open to argument that the trust is illusory (because Dr Sharma retains full control of the assets and can wind the trust up in his favour at any time) and was a device to deprive his wife of any interest she might otherwise claim in the property. For those reasons, proceedings challenging the trust might result in ownership and operation of the building complex coming under court control or being subject to court direction.

[40] This leaves in play a fourth passage of the email that I consider warrants more sustained discussion:

Also Dr Uma is a Landlord from hell, his Interference into the rented premises and into your businesses, refusing to do repairs, refusing to renew the Legal Lease Agreement after the 1st 5 years, so that he can chase you away anytime and, and every disagreement he will say that to your face.

This is what he did to me. He is landlord that will involve you and expect you to do silly things like spying on his wife for lovers etc. I have been through that rubbish.

The meaning alleged in the statement of claim discussed above, at [34]) are not available on the language of the email. However, the words did mean that Dr Sharma had acted as a bad landlord in relation to eviction (including the events that led up to it).

[41] At this point, there is a process issue I should mention.

[42] Where all pleaded meanings are rejected (as I have rejected them in this case), a plaintiff is not usually be able to fall back on another meaning that has not been pleaded.¹⁴ As it happens, however, I think it clear the parties conducted the case on that basis that Dr Sharma could rely on the ordinary meaning of the words “Landlord from hell”. This is apparent from the closing submissions in the High Court in which:

(a) counsel for Dr Biuamaitotoya recognised that the email conveyed that Dr Sharma was a “difficult or hard Landlord” but argued that this was not defamatory and in any event was true.

(b) counsel for Dr Sharma argued that Dr Biuamaitotoya had not shown that Dr Sharma was “a difficult landlord”.

Given this I proceed on the basis that Dr Sharma could rely on the ordinary but unpleaded meaning that Dr Sharma had acted as a bad landlord in the events leading to Dr Biuamaitotoya’s eviction.

[43] So construed, the email was not highly defamatory and there is at least scope for debate whether it had caused or was likely to cause Dr Sharma substantial harm.

[44] With some hesitation, I conclude that the substantial harm threshold was satisfied. In this context, “substantial” means “real and of substance” rather than serious.¹⁵ The

¹⁴ There is elaborate discussion of this in *Broadcasting Corporation of NZ v Crush* [1988] 2 NZLR 234 at 239-240 by Sir Robin Cooke P.

¹⁵ See *Laschaux*, fn 6, above at 489-90 per Lord Sumption.

allegation that Dr Sharma was a bad landlord included particulars of odd behaviour on his part. The email was addressed to a group of people who were likely to know Dr Sharma and from whom Dr Sharma might have hoped to obtain a tenant. Indeed, looking at the situation in the round (including the references in the email to better location, Dr Tui Taoi and possible receivership), it is reasonable to infer that Dr Biumaitotoya's purposes included warning prospective tenants not to deal with Dr Sharma. That being Dr Biumaitotoya's intention, it seems reasonable to conclude that it had the tendency to impact on Dr Sharma's ability to rent out the premises to a doctor or dentist. Indeed, as late as the trial before Sapuvida J, the premises once occupied by Dr Biumaitotoya were still vacant. Although the courts below were not prepared to conclude that there was a "but for" link between the email and the vacancy of the premises, the combination of Dr Biumaitotoya's purpose of warning off prospective tenants and the continuing vacancy are material to at least the likelihood of substantial harm

Had Dr Sharma acted as a bad landlord in relation to his eviction of Dr Biumaitotoya?

My approach to the facts

- [45] The basis on which it was agreed that Nanayakkara J deal with the case meant that it was open to him to make findings of fact as to whose narrative of events was correct. As I have explained, he did not do so; this because he wrongly concluded that he did not need to engage with whether what was said in the email was true. Likewise, on the approach of the Court of Appeal – that the email was not defamatory – there was no need to go into the facts.
- [46] Given my conclusions that the email was defamatory, but that truth is a defence, I have no choice but to make findings of fact, despite the difficulties of doing so on the basis of the transcript.
- [47] Having read that transcript, I prefer the narrative given by Dr Biumaitotoya to that of Dr Sharma. I will give the reasons for this after discussing the facts primarily by reference to Dr Biumaitotoya's evidence.

Dr Biumaitotoya's account of the event leading to his eviction

[48] Dr Sharma leased the Shortlane Medical Centre to Dr Biumaitotoya in 2000 for five years.

[49] On the expiry of the lease, Dr Sharma did not engage with Dr Biumaitotoya with the latter's request for a written renewal of the lease. At trial he said that this was because he was too busy. So, from 2005 on, Dr Biumaitotoya had no security of tenure. It was entirely a matter for Dr Sharma whether he renewed Dr Biumaitotoya's lease. But I can see some justification for Dr Biumaitotoya's sense that Dr Sharma had given him the run-around on this issue.

[50] In or about March 2011, Dr Sharma separated from his wife. He stopped living in the building complex. On Dr Biumaitotoya's account of events, his relationship with Dr Sharma broke down in June 2011 in respects that were in large part related to this. This seems to have occurred in the following way:

- (a) Dr Sharma questioned him about his suspicions that his wife was having an affair with a man who he claimed had been hiding in the girls' hostel. Dr Biumaitotoya said he made some inquiries of those living in the girls' hostel, was told that there was no man there and reported this back to Dr Sharma. Dr Sharma's response was that the girls' hostel would have to be closed down because (i) there was no monitoring of who was there and, in any event, (ii) he wanted to occupy the flat.
- (b) Dr Sharma asked him to fire his receptionist or give her and another employee warning letters because of their supposed involvement with Dr Sharma's wife and her alleged lover.
- (c) Dr Sharma's wife told him that she had obtained a domestic violence restraining order against Dr Sharma, that there was next to no food in the flat and she and her children did not have enough money to buy food. So, after obtaining some legal advice, Dr Biumaitotoya began paying rent to her rather than Dr Sharma. It is not clear to me when Dr Biumaitotoya stopped paying rent. Some evidence

suggested that this was in March 2011 but there were also indications in the evidence that it may have been as late as June. As I have noted, Dr Biumaitotoya took legal advice as to this. As well, he later signed what purported to be a lease from Dr Sharma's wife which had been legally prepared.

- [51] On 14 June 2011, Dr Sharma's solicitors wrote to Dr Biumaitotoya claiming that Dr Sharma wished to carry out repairs to the girls' hostel and then occupy it himself. The letter required Dr Biumaitotoya to pay all outstanding money and to vacate the premises within 30 days.
- [52] Dr Biumaitotoya responded by his solicitors on 15 June 2011. The letter asserted that Dr Biumaitotoya regarded Dr Sharma's wife as the landlord. It went on to make a number of complaints about Dr Sharma in relation to the matters referred to in [49] above. The narrative set out in the letter was consistent with the evidence Dr Biumaitotoya gave at trial. It also referred to logged calls from Dr Sharma's cell phone that correlated with the complaints recorded in that letter.
- [53] Dr Sharma's solicitors replied on 28 June denying that Dr Sharma's wife had any interest in the property, disputing the allegations set out in the letter of 15 June and indicating that proceedings would be issued.
- [54] Dr Sharma took no immediate steps to obtain possession of the premises. But in August 2011, he leased to a friend the unit adjacent to the Shortlane Medical Centre from which that friend operated a fish shop and proposed also to run a pool parlour. The front door to the fish shop was close to the front door to the surgery and Dr Biumaitotoya said that he was severely affected by smell, flies and noise associated the fish shop. He complained to the Nadi Town Council which shut the fish shop down.
- [55] Dr Biumaitotoya said he came to work one morning to find that one of two back doors to his surgery that opened out onto a balcony had been welded shut and a barricade had been placed so as to block access to the balcony. He made contact with the National Fire Authority which required that the barricade be removed. However, the door remained welded shut. In his evidence he referred to a letter of 24 August 2011 that he

had written to the National Fire Authority. At this point, an issue was raised as to the letter not having been discovered and it was not produced. However, and unsurprisingly, he was not put to him that his evidence in this respect was wrong.

[56] On 5 January 2012, Dr Sharma's solicitors wrote to Dr Biumaitotoya demanding possession of the rented premises. Dr Biumaitotoya complied with this demand and left the rented premises on 4 February 2012. My assumption is that at the same time he abandoned his tenancy of the unit that was used as a girls' hostel. It will be recalled that in June 2011, Dr Sharma had said that he intended to renovate that unit and move into himself. However, once he regained possession of the unit, he continued to run it as a girls' hostel.

[57] In his evidence, Dr Biumaitotoya did not make much of the repairs issue that was mentioned in his email but did maintain that he had asked Dr Sharma to carry out certain repairs to the leased premises and that he refused to do so.

Why I prefer to the evidence of Dr Biumaitotoya

[58] My reasons for this are as follows:

- (a) Many of Dr Sharma's answers to questions asked in cross-examination have the appearance of being evasive. Examples of this are very vague evidence about the non-renewal of Dr Biumaitotoya's lease, other litigation to which he was or had been a party, including the property proceedings with his wife, and the fish shop tenancy. As well, what began as unequivocal denials of recruiting Dr Biumaitotoya to assist in relation to the suspected lover of his wife, his evidence became vague when the detail of logged telephone calls was put to him.
- (b) It is clear that Dr Sharma did arrange for a fish shop to open next to Dr Biumaitotoya's surgery and I see this as straight-out harassment.
- (c) Dr Biumaitotoya gave evidence of events so strange that I think it unlikely that he could have made them up. I have in mind here the engagement by

Dr Sharma with him over the supposed lover of Dr Sharma's wife, the welding shut of his back door and the steel barricade. Dr Biumaitotoya's evidence in relation to the supposed lover was consistent with the letter his solicitors wrote on 15 June 2011 and the record of calls to his cell phone in June 2011. There was no challenge to Dr Biumaitotoya's very specific evidence of the letter that he wrote to the National Authority and, more generally, given that the welding and barricade incidents followed the fish shop episode, the inference that they were instigated by Dr Sharma is obvious.

Was the defence of justification made out?

[59] I accept and that in paying money to Dr Sharma's wife, Dr Biumaitotoya thought he was doing the right thing. He was, however, unwise to cease paying rent to Dr Sharma. If Dr Sharma had merely sought to evict Dr Biumaitotoya by legal means, that would have been reasonable and would not have justified calling him a bad landlord. However, the allegation that Dr Sharma was a bad landlord was based on far more than that.

[60] I consider that Dr Sharma acted as a bad landlord in:

- (a) allowing the fraught nature of his relationship with his wife to become entangled with his landlord and tenant relationship with Dr Biumaitotoya, in particular by attempting to recruit Dr Biumaitotoya to assist with inquiries about his wife and interfering in Dr Biumaitotoya relationships with his staff.
- (b) placing a fish shop next to his surgery; and
- (c) causing the rear door of his surgery to be welded shut and the steel barricade to be placed so as to block access to the balcony.

[61] In reaching my conclusion that the defence of justification was made out, I have taken into account also the non-engagement by Dr Sharma over the non-renewal of the lease

in 2005. This is not particularly cogent in itself but it has some materiality when considered alongside the three aspects of Dr Sharma's conduct just referred to.

[62] I have not relied on the events surrounding the termination of the tenancy for the girls' hostel and Dr Sharma continuing to operate the girls' hostel. It is true that Dr Sharma's post-eviction actions were not consistent with the reasons given in June 2011 for terminating the tenancy. But the time that elapsed between the letter and my assumption as to when the eviction occurred (February 2012) and the fluidity of Dr Sharma's situation after the breakdown of his marriage leave ample scope for him to have changed his plans. I have likewise not relied on the rather limited evidence as to Dr Sharma not carrying out repairs as it was not correlated to the lease requirements as to who was legally responsible for carrying them out.

A harm requirement?

[63] As will be apparent, I adopted, but only provisionally, a substantial harm threshold in determining whether the email was defamatory. As I have explained, Dr Sharma was able to satisfy this threshold and, for this reason would have been able to satisfy any lower threshold.

[64] Whether a substantial harm threshold, a lower harm threshold or no threshold should finally be adopted is for a future case and should be determined following a review of current practice in Fiji, analysis of the approaches taken in jurisdictions other than just England and Wales and New Zealand and careful consideration of the significance of the reasonably particular ways in which freedom of expression is protected by s 17 of the Constitution of Fiji.


Outcome


[65] I would extend time for the filing of the petition, grant leave to appeal, dismiss the appeal (albeit for reasons that differ from those provided by the Court of Appeal) and order Dr Sharma to pay costs, summarily assessed, of \$10,000.

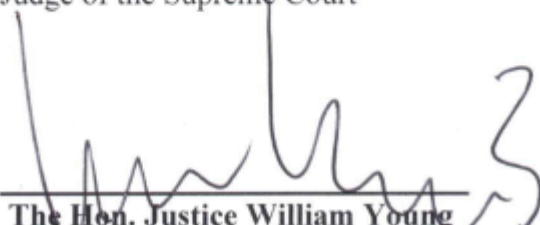
[66] **Orders of the Court**

1. *Leave to appeal is granted.*
2. *The appeal is dismissed.*
3. *Dr Sharma is to pay Dr Biunaitotoya costs (summarily assessed) of \$10,000.*




The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court


The Hon. Justice Lowell Goddard
Judge of the Supreme Court


The Hon. Justice William Young
Judge of the Supreme Court