

IN THE KIRIBATI COURT OF APPEAL
CIVIL JURISDICTION
HELD AT BETIO
REPUBLIC OF KIRIBATI

Civil Appeal No. 13 of 2011

BETWEEN

**HON. TABERANNANG TIMEON AS
PUBLISHER OF BOUTOKAAN TE KOAUA
NEWSLETTER**

APPELLANT

AND

NABUTI MWEMWENIKARAWA

RESPONDENT

Before:

Paterson JA
Williams JA
Barker JA

Counsel:

*Taoing Taoaba for appellant
Banuera Berina for respondent*

Date of Hearing:

29 August 2011

Date of Judgment:

31 August 2011

JUDGMENT OF THE COURT

1. This case came to trial before the Chief Justice on 13 December 2010. On 13 January 2011, the defendant (who is now the appellant) invited the Judge to disqualify himself from hearing the case on the ground of alleged bias. The trial judge adjourned further hearing until 17 January 2011 to hear the anticipated application. However, the defendant did not pursue such an application and the hearing of the case then immediately

resumed. Nothing further was raised at trial on this topic. However, the notice of appeal raises the issue for our determination.

2. No evidence to support the defendant's contention was placed before the trial judge or supplied to us.
3. Counsel for the appellant (who also appeared at trial) informed us that the question of bias was raised in anticipation of obtaining the client's instructions.
4. In our view it was not proper for this serious allegation to be raised except upon an evaluation of the available evidence (if any) and upon the client's instruction. Having embarked upon the hearing the Judge had a responsibility to both parties to complete the hearing and to deliver judgment upon the merits of the case. He was not at liberty to abandon the hearing upon a whim. In re *JRL Ex parte CJL* (1986) 161 CLR at 352 Mason J made the point that encouragement should not be given to litigants to believe that if they disqualify the Judge they will have their case tried by someone more likely to decide in their favour. The courts therefore have emphasized that the critical question on a disqualification application is whether the judge will decide the matter fairly and impartially, not whether they have an intention to decide a point in a particular way. Parties and their legal representatives should take care to approach in a responsible manner any allegation of bias and consider carefully whether they are really "Judge shopping". The parties should recognize the considerable cost to the Republic if it should become necessary to import an acting Judge to conduct a fresh hearing.

5. The defendant Timeon has brought this appeal from the decision of the High Court whereby the plaintiff was held to be entitled to recover \$55,000 in damages in respect of the publication by the defendant of a defamatory statement concerning the plaintiff.
6. The defendant was the publisher of a newsletter called "Boutokaan te Koaua Newsletter" which is owned by Boutokaan te Koaua Party - being a political party of which the appellant was a member. At the time of publication of the July 2010 issue of the newsletter the plaintiff was the Parliamentary Leader of the Opposition and a former Government Minister.
7. The Newsletter published in July 2010 contained an article written entirely in the Kiribati language of which English translation of the relevant extracts reads as follows:

"What is Your Responsibility for Your Country as Leader of the Opposition" (all in the Kiribati language):

Who has betrayed Kiribati? The current President with one of his Ministers when they signed the making of some foreigners who had been confirmed by the Court to be of I-Kiribati descent or having been born in Kiribati as clearly stated in the laws to become citizens of Kiribati or was it him who betrayed Kiribati in what he did when he tried to transfer funds from the Insurance in the sum of \$3 million, or \$50 million from the reserve fund to a Japanese lady?

No one is immune from making mistakes but in gravely offending mistakes, we believe that one ought to do what should be done. The Member of Parliament should apologise to Kiribati and if he is a real man and he has committed a very grave mistake he ought to know what he should do.

From the discussions of the Leader of the Opposition who is a member from North Tarawa it became widespread knowledge that the reason he was not made a Minister was because he competed against the Beretifenti to replace him.

This information is not true, and let you the people of North Tarawa be assured that the real reason why he was not accepted back was because he had done a lot of things which had caused doubts about him when he was a Minister and what he had done before. One of such things was what he did with this Japanese lady.

He was given responsibility and what he did was he was trying to enrich himself with public funds. A request is being asked of the member of Parliament from North Tarawa who is the Leader of the Opposition to make explanations to his people in North Tarawa and Kiribati as a whole and to properly explain about his NEM".

"The discussion about the "Transfer of Funds" and the discussion about the company NEM these two things are related since they all aim at one goal and that clarifies what was attempted to be done. The attempt to transfer the money \$3 million, and \$50 million in the year 2004, was the result of the connections between the member from North Tarawa, when he was the Minister of Finance and one Japanese lady".

"We thank the staff of Kiribati Insurance Corporation and those responsible for looking after the reserve funds of Kiribati for their good efforts in protecting the monies of the people of Kiribati from the deceitful ways of this Japanese woman which was well known by the then Minister of Finance".

8. The article contained a number of alleged defamatory imputations but the Trial Judge did not identify which of these he accepted as having been established. In a letter of complaint to the defendant, the plaintiff's solicitor (himself a member of Parliament) alleged that the article in its ordinary meaning conveys the following meaning to any reader.

1. That the plaintiff, when he was a Minister of Finance, fraudulently tried to transfer \$3 million from Kiribati Insurance Corporation and \$50 million from the government's reserve fund to the lady from Japan for his own benefit and had it not been for the diligence of the staff at the Kiribati Insurance office and of those who look after the reserve fund, the Insurance Corporation and the government reserve fund would have lost \$3 million and \$50 million respectively.
 2. That the plaintiff, when he was the Minister of Finance, had conspired with the lady from Japan to fraudulently transfer monies from Kiribati Insurance Corporation and from the reserve fund for their own benefits.
 3. That the plaintiff had abused his office when he was a Minister of Finance in his attempt to obtain benefits for himself at the expense of public funds.
 4. That the plaintiff is dishonest, deceitful and not to be trusted.
 5. That the plaintiff is not fit to hold any position of trust.
 6. That the plaintiff, because of his deceitful nature, should resign from being Leader of the Opposition and from his seat as a Member of Parliament.
9. Sub silentio the Judge in his reasons for judgment appears to have accepted that the article contains each of these imputations which he treated as being defamatory of the plaintiff.
10. The defendant made no attempt to dispute the meaning of the article. Indeed, in a letter in reply written on behalf of the defendant Mr Tatireta MP confirms the general thrust of the intended imputations when he responds as follows:
- "In response to paragraph 5 of your letter I wish to elaborate that:
1. That your client (not fraudulently) but did try to transfer \$3 million from Kiribati Insurance Corporation and did also try to transfer \$50

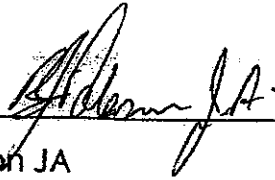
million from government reserve fund to the lady from Japan for Kiribati and for his own benefit.

2. That was exactly what transpired. Why accept the envelope? Bona fide agreement in an envelope???
3. I second you on that.
4. I can word it no better.
5. Analyse it yourself. Is he to be trusted after what he did?
6. Boutokaan te Koaua members have nothing to do with the article. It is solely my article and they are not assertions nor assumptions. I wrote what actually transpired without malice.
7. You must inform your client that he will never receive an apology from me but if BTK Publisher wishes to apologize for printing the truth then let him do so.
8. If this is what your client is worth then I pity the value of your Leader bearing in mind what you consider as assertions.
9. You make claims as much as you want for I will never cease in requesting true and factual events and happenings to be released by BTK newsletter.
11. At trial, the defendant denied that the words were published maliciously and claimed that the publication was protected by qualified privilege. This defence was raised upon the basis that "the publication was on an occasion where the person who makes the communication has an interest or a duty, legal-social or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it". (See per Parke B in *Toogood v Spyring* 149 ER 1044 at 1049-1050 and per Lord Atkinson in *Adam v Ward* [1917] AC 309 at 334).
12. This same argument was relied upon by the appellant before us.

13. In general there is no common interest (as now relevant) between a newspaper and its readers unless the circulation of the paper is strictly limited within a clearly defined group. Spreading the calumny to an excessive degree to others who do not have the same interest will deprive the defendant of the privilege which might otherwise be available (*Guise v Kouvelis* (1947) 74 CLR 102).
14. In *Stephens v WA Newspapers* [124 ALR 80] there is an extensive discussion of the special circumstances in which a newspaper might claim privilege for the general dissemination of information to its readers. However, these special circumstances do not here arise. As Cockburn CJ said in *Campbell v Spottiswoode* 122 ER at 291:

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men, and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation.
15. In our view the Trial Judge was correct when he rejected the defendant's defence of qualified privilege.
16. The appellant complains that the award of damages namely \$55,000 was excessive. In view of the reply given to the respondent's request for an apology the Trial Judge was entitled to include in the damages a component for exemplary damages. The exact amount has not been identified but the overall amount of the award of damages is not excessive.

17. In the result the appeal will be dismissed. The appellant will pay the costs of the respondent to be fixed by the Registrar in default of agreement.



Paterson JA



Williams JA



Barker JA