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Case Comment: Golden Season Pte Ltd and others v Kairos Singapore Holdings Pte Ltd and another [2015] SGHC 38

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SINGAPORELAWBLOG

Case Comment: Golden Season Pte Ltd and others v Kairos Singapore Holdings Pte Ltd and another [2015] SGHC 38

This 111-page judgement has highlighted a number of significant points of law relating to the treatment of Facebook postings, emails and SMS texts in the tort of defamation. They relate primarily to the legal requirements of establishing defamatory meaning, reference to the plaintiff and defences. In addition, the case examines the awards of general and special damages as well as the viability of awarding aggravated damages to corporate plaintiffs. Apart from the plaintiff's actions in defamation and malicious falsehood, the defendant successfully counterclaimed for copyright infringement but failed in the action based on passing off. This brief case comment focuses on defamation and malicious falsehood.

Facts

The first plaintiff company is in the business of providing military and humanitarian relief products. The second plaintiff is a company specialising in contemporary home décor products and the third plaintiff is the director of both the first and second plaintiffs. The first defendant provides inflatable boats, marine products and yacht charter services suitable for flood disaster relief work. The second defendant is the director of the first defendant. The actions arose out of a dispute relating to the first plaintiff's purchase of inflatable boats and other related equipment from the first defendant for donation purposes in aid of the floods in Thailand in 2011. The defendants also donated boats and related equipment, which were conveyed to and acknowledged by Mercy Relief (an NGO), but the latter's acknowledgement was not made known by the plaintiffs to the defendants.

The defendants made various statements via Facebook, emails and SMS messages which, the plaintiffs alleged, were defamatory, in particular, by imputing that the plaintiffs were, amongst others, dishonest for selling the inflatable boats to Mercy Relief at a profit, for overcharging and improper use of donors' monies.

Defamation: The Two Facebook Postings

The two Facebook postings were clearly defamatory based on the abovementioned imputations. The defendants' second Facebook posting only referred to a "third party". But the third plaintiff, in responding to the defendants' postings, identified himself as the person being referred to in the defendants' postings. The High Court held, however, that the plaintiff's act in identifying himself as the person being referred to in the defendants' defamatory posting cannot, on its own, satisfy the requirement of reference to plaintiff.

Although the self-identification by the plaintiff cannot be taken into consideration for fulfilling the legal requirement under the tort of defamation, the second Facebook posting had subsequently confirmed the plaintiff's identity ("Dear all, by following on this thread, it seems like the some folks are feeling the heat....."). In this connection, George Wei JC made important observations on the proper treatment towards the Facebook postings. First, he noted that the content of the postings continues to change as threads of comments are added. Secondly, his Honour analysed the Facebook posting and the accompanying thread of comments as a "conversation" building upon previous threads. Finally, he regarded the conversation as a "single publication" where the subsequent comments belong to a single thread of comments originating from the same post. By responding to the third plaintiff's comment, the second defendant was building upon his original post in such a way as to confirm the third plaintiff's identity. Hence, the defendants' second Facebook posting consisting of the thread of comments, as a whole, did ultimately refer to the plaintiff. (The defence of fair comment, however, defeated the defamation action as the learned judge found that the second defendant was merely "expressing his concerns as to what he thought might have gone wrong".)

His Honour's approach to Facebook postings and the thread of comments is common-sensical and comports with reality. His analysis is also consistent with the recent case precedents. In *Smith v ADVFN Plc* [2008] EWHC 1797 at [14], the English High Court similarly referred to communications on bulletin boards as a "casual conversation". In the Ontario Superior Court of Justice decision of *Baglow v Smith* 2011 ONSC 5131 at [59] and [60], Internet blogging was described as a form of "public conversation" and "live debate" due to its contemporaneous nature. (The Court of Appeal for Ontario in *Baglow v Smith* 2012 ONCA 407, however, preferred to leave this issue open and suggested that the answer could depend on expert evidence.) On the issue of the postings constituting a single publication, the English High Court in *McGrath v Dawkins* [2012] EWHC B3 (QB) at [53] had also remarked on the possible change of meaning ensuing from each contribution of threads of comments on website forums and the approach of treating the combination of threads as a single publication.

As for the first Facebook posting, there was no reference to the plaintiffs. Further, the plaintiffs could not rely on the second Facebook post to establish reference to the plaintiffs in the first Facebook post. The High Court applied the general rule in *Grappelli v Derek Block (Holdings) Pte Ltd* [1981] 1

WLR 822 at 825 per Lord Denning that “the inferences which were put upon the statements *after* the publication (by facts subsequently learnt) do not render them defamatory in the beginning”. Though *Grappelli* was, strictly speaking, concerned with *defamatory meaning*, Wei JC appeared to have extended the principle to the present case to deny that there was a *reference to the plaintiff* in a posting by recourse to a subsequent posting.

The requirements of defamatory meaning and reference to the plaintiff can sometimes intersect. In the interesting case of *Samuel Kingsford Budu v The British Broadcasting Corporation* [2010] EWHC 616, for example, there was publication in the form of articles on the web in BBC’s archives and Google entries or snippets on a Google page when a search term is entered. The first article was defamatory but did not refer to the plaintiff. The second and third articles, containing a link to the first article, referred to the plaintiff but had the effect of diluting the defamatory meaning in the first article.

Defamation: Emails

The emails sent by the defendant were defamatory of the plaintiffs as they imputed that the plaintiffs were, amongst others, dishonest, cheats and in a position of conflict of interests.

The defendant raised the defence of qualified privilege. Here the second defendant had a legitimate interest to communicate the emails to Mercy Relief and the latter had an interest to receive the communications concerning the donations of the boats and the discounts the defendants had given to the first plaintiff which may not have been extended to Mercy Relief. In particular, the second defendant had an interest to know whether the first defendant had been acknowledged for the donations to Mercy Relief.

However, the second defendant’s malice in making the statements defeated the defence of qualified privilege. His statements had gone beyond the two matters concerning the donations and the discounts given to the first plaintiff for the boats. Moreover, he did not contact the third plaintiff to clarify the issues and in fact filed a police report. Hence, the plaintiff’s defamation claims based on the emails remained intact.

Defamation: SMS Messages

The SMS text messages were sent by the second defendant to a third party at or about the same time and were thus regarded as part of a single communication. The messages stated that a police report had been made against the third plaintiff, that a defamation suit had been brought by the third plaintiff for “300K” followed by the request that the recipient of the SMS texts “be truthful and not be afraid” and that “come what may, the truth will be out abt [the third plaintiff] and the way he do his business”.

The learned judge found that the communication was not, on the whole, defamatory. It only conveyed to the reasonable reader that a serious legal dispute between the plaintiff and defendant had arisen out of business dealings. Notwithstanding one of the statements that the defendant had

reported the third plaintiff to the police, the learned judge concluded that the SMS messages as a whole “do not necessarily bear the meaning that [the third plaintiff] is guilty of an offence or that there are good grounds to think that an offence had been committed”.

Malicious Falsehood

There is no malicious falsehood in respect of either the Facebook posts or the SMS texts. As the first Facebook post does not adequately refer to the plaintiffs, it is not likely to cause pecuniary damage to the plaintiff, a requirement under section 6(1) of the Defamation Act. Section 6(1) reads as follows:

Slander of title, etc.

6.—(1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage —

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form.

Though the second Facebook post was defamatory, there was no malice on the part of the second defendant in publishing the post. Hence, no tort of malicious falsehood can be made out.

Defamation: General Damages but No Award of Aggravated Damages for Corporate Plaintiff

With respect to the defamatory email communications, Wei JC awarded the first plaintiff \$15,000 for the injury done to its business reputation, and for the third plaintiff, \$30,000 by way of general damages for the injury to his reputation and the consequential injury to his feelings and dignity (ie, aggravated damages of \$20,000). The first plaintiff was the main vehicle through which the third plaintiff carried out the relevant transactions. To Mercy Relief, the first and third plaintiffs were commonly associated with each other. The second plaintiff, on the other hand, was hardly mentioned in the chain of emails.

As for the claim for special damages, Wei JC noted that there was no evidence that the decrease in the first plaintiff's sales was attributable to the defamatory emails. Rather, the court found that Mercy Relief and Singapore Red Cross had chosen to stop ordering from the plaintiffs because of complications arising from the litigation and the deterioration of ties between the plaintiffs and the defendants (see *Low Tuck Kwong v Sukanto Sia* [2014] 1 SLR 639).

Finally, should corporate plaintiffs be awarded aggravated damages? The Court of Appeal in *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 had previously left the issue open. In this regard, Wei JC has now decided that a corporate entity cannot and should not be awarded aggravated damages since aggravated damages are to be awarded for injury to

feelings and pride aggravated by the defendant's conduct. His Honour noted that the English High Court decision of *Messenger Newspapers Group Ltd v National Graphical Association* [1984] 1 All ER 293, which purportedly awarded aggravated damages to a corporate plaintiff, was in fact based on the need to punish the defendant for his deliberate wrong doing (ie, exemplary damages) and not in respect of injury to feelings. Exemplary damages tend to be limited to cases where the defendant publishes the defamatory statement, which he knows to be false or is reckless as whether it is true or false, and with the expectation of obtaining profits as a result of the publication.

Conclusion

The High Court's analysis of Facebook postings and the accompanying thread of comments as a form of "conversation" and as constituting a single publication for purposes of defamation law have been particularly instructive. In addition, the erstwhile uncertainty as to whether aggravated damages may be awarded to corporate plaintiffs in the tort of defamation has now been clarified by the High Court. It remains to be seen if the Court of Appeal will revisit this issue in the near future.

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