

HONG KONG / JUDGMENT

YIU HON LAM v. CHAN YU CHUN**COURT**

District Court

DECIDED

20 August 2007

CASE / FILE NUMBER

DCCJ5351/2005

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj DCCJ 5351/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 5351 of 2005

BETWEEN YIU HON LAM Plaintiff and CHAN YU CHUN Defendant

Coram: His Hon. Judge Leung in Court Date of Hearing: 20, 23-25 April; 28-30 May 2007 Date of
handing down judgment: 20 August 2007

JUDGMENT**INTRODUCTION**

This is the Plaintiff's action against the Defendant for defamation allegedly committed in 2005. THE PARTIES The Plaintiff The Plaintiff has been a practising Chartered Secretary and Certified Public Accountant () since the 1980 s. In late July 1997, a company called Nelv (Asia) Limited (Nelv) was formed in Hong Kong. One of the shareholders and the managing director of Nelv was Hideaki Shiota (Shiota), who was from Japan. Through the introduction of Mok Kam Chun, Ray (), Shiota's friend, the Plaintiff was appointed as the company secretary and auditor of Nelv since its incorporation. The Plaintiff was also the auditor of Mok's company. The Defendant The Defendant joined Nelv as a company accountant on 8 April 2005 when she was aged about 48. She was not a qualified professional accountant but had over 20 years of relevant working experience by then.

BACKGROUND

On 28 June 2005, there was a meeting in which Shiota, Mok and the Defendant were present (the 28 June Meeting). On this occasion, the Defendant allegedly said things which were slanderous about the Plaintiff's performance and professionalism as Nelv's auditor. On the following day, Mok informed the Plaintiff of the Defendant's alleged criticism. This prompted the Plaintiff to send a letter to the Defendant on the same day, demanding her to specify the factual basis of her

adverse statements. The reply came from Shiota by letter in July 2005 on behalf of Nelv. It explained that this was a misunderstanding of language. Meanwhile, the Plaintiff received a letter from one Yip Man Tin (), CPA, saying that he had been invited to act as auditor of Nelv. The Plaintiff also received what appeared to be a letter from Nelv informing the Plaintiff of Nelv's decision to replace him by one Y s Consulting Limited () as the company secretary. The Plaintiff was asked to resign and to transfer all the company documents to Y s. By letter dated 25 July 2005, the Plaintiff, through his solicitors, demanded the Defendant, among other things, to withdraw the alleged defamatory statements and to apologise as well as to indemnify the Plaintiff for legal costs in the sum of HK\$1,000.00. Shiota had second thought about replacement of the auditor. He invited the Plaintiff to attend a meeting at the office of Nelv on 29 July 2005. There the Plaintiff confronted the Defendant. Shiota confirmed the retention of the Plaintiff as the company's auditor and company secretary. Upon that, the Defendant tendered her resignation and left the company on the same day. Shiota later revealed that prior to the 28 June Meeting, the Defendant had sent electronic mails to him including one dated 17 June 2005 and one dated 21 June 2005 (where appropriate, collectively referred to as the E-mails). The E-mails allegedly contained libellous remarks about the Plaintiff's performance and professionalism as Nelv's auditor. By letter dated 27 September 2005, the Plaintiff through his solicitors repeated his previous complaint. He also complained about the E-mails, copies of which were also enclosed. He made demand for, among other things, an apology and legal costs, this time in the sum of HK\$5,000. The Defendant's solicitors at first requested for time to reply. By subsequent letter, the Defendant's solicitors informed the Plaintiff's solicitors that they had no instruction to accept any service of legal proceedings. The Plaintiff commenced this action on the basis of the alleged slander during the 28 June Meeting and the alleged libel contained in the E-mails. Except for the alleged defamation, the above background was not in dispute. THE ALLEGED LIBEL I set out below the contents of the E-mails, rather than simply referring to the alleged libellous parts which were pleaded. The following is a direct recital of the contents as they actually appear. The e-mail dated 17 June 2005 (the 17 June E-mail) reads as follows: Dear Shiota san Just Audit firm Ms. Wandy call me, Ask our company to make the payment HK\$37,386.- I don't want to made the payment, holding the payment I want due to our company BACK the HK tax I ask tax department, we must audit firm to made the revise [f]inancial report, if we cannot claim back, we must pay money HK\$381,587. SO bigger. I think: 1). they have not professional audit firm they effect our company to pay more money yr. 2001 our company pay to hk government \$246,411 yr. 2002 our company pay to hk government \$144,958 yr. 2003 our company pay to hk government \$247,837 yr. 2004 our company pay to hk government \$337,127 yr. 2005 our company pay to hk government \$381,587 effect our company lost more money HK\$1,357,920.- 2). I check their audit report, they have not to made the account note below account:- -a). selling expenses, -b). administrative exps -c). turnover -d). costs of turnover FINANCE REPORT NOT CLEAR mainly they must do it clear, our company to made the comparative report we must support this report to banker we must know detail exp and to made the costing (increase or decrease) 3). Audit fee is too expensive, audit amount is HK\$37,386 I report to you. You consider this audit firm Thank you for your kind attention From: janny san I want to make the comparative report. I cannot do it. now our history accountant no record. The e-mail dated 21 June 2005 (the 21 June E-mail) reads as follows: Dear

Shiota san Old Audit firm ask me to made the payment HK\$37,386.- (too expensive) big amount. They audit make mistake, our company to pay more tax and audit report not better (Mizho banker talk to me). I want holding the audit fee up to Hk government Retfund tax income to us. Wandy say: if I don t pay the cheque, Yiu san will complain and direct call Shiota san. I want divided two cheque to Yiu san, but he don t agree. How to do it??? Thanks From: janny san

THE ALLEGED SLANDER The alleged slander consisted of 6 statements spoken in the Cantonese dialect. Together with their English translation, they were pleaded as follows: Statement 1 _}Yba, Q1XJT NAS~^t^ T\ON }Y;N [7bOU T g!qM k^Kb ation: I [the Defendant] have worked in the accounting field for more than 20 years and have worked with several auditing firms, the other firms were very proactive in contacting client and making enquiries on whether there are extra matters requiring services, our auditor has never taken the initiative to contact us to give advice. Their [the Plaintiff s] performance was not professional enough.) Statement 4 N0RlQ U}Y, adings, all the major issues in this action were in dispute. This remained to be the position at the commencement of the trial. The issues to be decided are: whether the statements were made; whether the statements, if made, were defamatory; whether the statements, if made and defamatory, were excused by the defence of qualified privilege (and in this regard, whether the defence did not avail the Defendant due to malice on her part); and if defamation is proved, what compensation should be awarded to the Plaintiff. Though the Plaintiff became aware of the E-mails subsequent to the 28 June Meeting, the meeting was apparently related to, if not a development of, what the Defendant said in the E-mails. I would therefore consider the matter in the right time sequence.

WITNESSES Besides the parties to the action, Shiota, Mok and Anita Leung, the warehouse supervisor of Nelv, also gave evidence. It should be noted that they were all called as the Plaintiff s witnesses.

WHETHER THE STATEMENTS WERE MADE The 17 June E-mail The Defendant argued that part of the 17 June E-mail, namely, the sentence effect our company lost more money HK\$1,357,290 as well as the paragraphs numbered 2 and 3 now appearing therein, never existed in this e-mail when she sent it to Shiota. She also argued that part of what should be in this e-mail had been deleted after she sent it. She specifically disputed the authenticity of this e-mail produced by the Plaintiff. During trial, Mr. Wong for the Defendant confirmed that the Defendant no longer disputed the authenticity of this e-mail. This happened only after the evidence of the Plaintiff and in the course of the cross-examination of Shiota. When the Defendant gave evidence, such concession appeared to be less than unequivocal, as she simply did not want to waste time on this issue.

The 21 June E-Mail There was no dispute over the Defendant s sending of the 21 June E-mail to Shiota.

The 28 June Meeting The Defendant denied that she spoke the words during the 28 June Meeting as pleaded by the Plaintiff. The Plaintiff learned about the alleged defamatory statements from Mok on the day following the meeting. Mok confirmed that. The accuracy of these statements would depend on first, the accuracy of Mok s recollection of what the Defendant said; and secondly, the accuracy of the Plaintiff s record of them. Mr. Wong for the Defendant attempted to cast doubt on the accuracy of what appeared to be a verbatim account of the statements. He questioned Mok s ability to fully understand and to remember what the Defendant said in the absence of spontaneous written record. What was said during the meeting probably exceeded the 6 statements in question. However, I have reasons to believe that Mok would register on his mind what the Defendant said about the Plaintiff s

performance as Nelv's auditor. There was no dispute that on the day in question, Shiota asked the Defendant to also meet with Mok for the exact purpose of explaining, directly and in Cantonese, her observation about the Plaintiff's performance. According to Mok, Shiota has prior to the meeting expressed concern about the performance of the Plaintiff as Nelv's auditor. What prompted Shiota to do so must be the Defendant's report to him previously including what she stated in the E-mails. One would expect the Defendant's explanation to Mok to be in line with her such report to Shiota including the E-mails too. Exact wordings aside, common in both the E-mails and the statements allegedly made during the meeting were the accusations that the Plaintiff has been unprofessional in auditing, which caused Nelv to pay more than necessary tax. Mok was concerned too. It was he who introduced the Plaintiff to Shiota. His company also used the Plaintiff's service. This was why Shiota believed that Mok should be informed. On the following day, Mok informed the Plaintiff of the accusations. As a result, the Plaintiff issued his letter dated 30 June 2005 to the Defendant demanding explanation. Prior to sending the letter, the Plaintiff took care to ask Mok to confirm the accuracy of the Plaintiff's recital of the meaning of the Defendant's statements in the letter. Mok did so. Therefore, much attention had in fact been paid by Mok in conveying and by the Plaintiff in reciting the Defendant's statements within just a couple of days after the 28 June Meeting. Even giving the benefit of doubt to the Defendant, I am still satisfied that statements 2, 3 and 6 did not involve any technicality which would have rendered it difficult for Mok to understand and to recite. Statements 3 and 6 were certainly in line with her criticism of the Plaintiff in the E-mails. As explained above, this would have been expected in the circumstances. I therefore disagree with the suggestion by Mr. Wong for the Defendant that Mok was influenced by the E-mails, which Shiota showed him after the 28 June Meeting, to believe that the Defendant said those defamatory words. What did the Defendant say in this regard? To begin with, the Defendant herself pleaded that she was supposed to tell Mok the full particulars of the Plaintiff's bad service and all the performance problems of the Plaintiff which she had spotted. One would have expected that to be in line with her previous reports to Shiota including the E-Mails. Contrary to that, her statement suggested that nothing sounding critical appeared to have been said about the Plaintiff during that meeting. Without reference to the bad service and performance problems of the Plaintiff, I wonder how she explained to Mok why the Plaintiff had to be replaced. As Mr. Wong for the Plaintiff submitted, one could not help feeling that the Defendant in her statement was just trying to exculpate herself from any remarks which attributed fault to the Plaintiff. The reply (by Shiota on behalf of Nelv) dated 4 July 2005 to the Plaintiff's letter dated 30 June 2005 suggested that the Plaintiff's account of what the Defendant allegedly said at the 28 June Meeting was the result of a misunderstanding of language. There was no elaboration. It was completely silent as to whether it was misunderstanding on the part of Mok or the Plaintiff or both. It was equally silent as to what misunderstanding of language there could be between the Defendant and Mok who talked the same dialect. The difference between the evidence of Mok/the Plaintiff and that of the Defendant in this respect could hardly be explained by simple reference to un-particularised misunderstanding of language. The Defendant's replies through her solicitors since the end of July 2005 contained simple denial without any elaboration of the alleged misunderstanding at the meeting either. Considering the evidence, I do not doubt Mok's understanding or memory of the

statements made by the Defendant during the 28 June Meeting. I also do not doubt the Plaintiff's recital of the same. I doubt the Defendant's evidence in this regard. I find that the statements, in particular statements 3 and 6, were in fact made. WHETHER THE STATEMENTS WERE DEFAMATORY The Defendant denied that the wordings of the statements, if made, were capable of bearing any meaning defamatory of the Plaintiff. She maintained this position until her counsel's submissions. A statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided: see Gatley on Libel and Slander (10th ed) at para.2.1. A person's reputation is not confined to his general character and standing but extends to his trade, business or profession, and words will be defamatory if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity: see also section 23 of the Defamation Ordinance, Cap.21. The principles of construction are well established and were most recently summarised in *Lee Ching & Anor v Lau May Ming*, unrep., HCA 108/2005, 26 April 2007. The learned Judge (at paras.39-41) said:

39. First, the words complained of in a libel action are to be construed in their natural and ordinary meaning, i.e., in which reasonable people of ordinary intelligence, with the ordinary person's general knowledge and experience of worldly affairs, would be likely to understand them. The question is what would the word convey to the mind of the ordinary, reasonable, fair-minded reader? See Gatley on Libel and Slander (10th ed) at paras. 3.15 at pp.92 and 93.
40. Second, the ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond the general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge, and not fettered by any strict legal rules of construction would draw from the words: *Jones v Skelton* [1963] 1 WLR 1362, per Lord Morris at pp.1370-1371, quoted in Gatley, para. 3.16 at p.94.
41. Third, it is necessary to take into consideration, not only the actual words used, but the context of the words and the persons to whom the communications were made: *Nevill v Fine Arts & General Insurance Co. Ltd.* [1987] AC 68, per Lord Halsbury LC at p.72. With the above principles in mind, I proceed to consider the statements. The 17 June E-mail Paragraphs numbered 1 and 2 of this e-mail conveyed the meaning that: the Plaintiff was an unprofessional audit firm which caused Nelv to pay more tax than it should have paid and thus causing loss to Nelv; the Plaintiff has not made account note of the items listed there; and the financial report was not clear. In his submissions, Mr. Wong for the Defendant conceded that these statements were untrue and defamatory. Though late, the concession was a right one. Paragraph numbered 3 in this e-mail reads that the Plaintiff's audit fee was

too expensive. According to the Defendant, what she actually meant was that the fee was a relatively big sum in the light of the cash flow problem of Nelv. I am not impressed by the Defendant's explanation. Mr. Wong for the Defendant argued that in any event, comment that the Plaintiff's fee was too expensive could not be defamatory. However, one needs to understand this statement in the context and as a part of this e-mail. In my view, this was part of the Defendant's criticism that the Plaintiff was unprofessional in the audit and guilty of causing financial loss to the company. This statement would reasonably be understood to mean that the fee, for these reasons, far exceeded what the Plaintiff's service was worth. This too was just defamatory. The 21 June E-mail Once again, the Defendant stated at the beginning of this e-mail that the audit fee charged by the Plaintiff was too expensive. I refer to what I said above. The Defendant went on to say that the Plaintiff made mistake in the audit and thus causing the company to pay more tax than it should have paid. The audit report was said to be no good after she has consulted one of Nelv's bankers. Mr. Wong for the Defendant conceded in his submissions that these statements were also untrue and defamatory. 28 June Meeting Without necessarily endorsing entirely the meaning of the 6 statements in question as pleaded by the Plaintiff, I am of the view that their ordinary and natural meaning should be quite apparent to any ordinary, reasonable and fair-minded reader. Guided by general knowledge, such a reader should be able to infer and imply from statements 1, 4, 5 and 6 that the Plaintiff was being accused of being incompetent in carrying out the audit in accordance with accountancy principles. This caused the company to pay more tax than it should have paid a consistent accusation against the Plaintiff. Statements 2 and 3 suggested the lack of efficiency and professionalism in the Plaintiff's discharge of his duty as the auditor. This should also be obvious to any reader. As regards the 6 statements in question, the Plaintiff gave evidence in detail to point out their falsity from the accountancy and professional auditing perspectives. Between the Plaintiff and the Defendant, I have no difficulty in preferring the Plaintiff's explanation in these respects. I find that they were untrue and defamatory. QUALIFIED PRIVILEGE The defence The Defendant relied on the defence of qualified privilege. The relevant principles of law are trite and may be summarised as follows: It is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak and to tell all they know or believe, or on occasions where it is necessary to speak in the protection of some self or common interest. On the first type of occasions, the maker of the statement would be under a legal, social or moral duty to make the statement and the recipient (himself or through his representative) has a corresponding interest to receive it. On the second type of occasions, the maker of the statement is acting pursuant to his interest and the recipient has such a corresponding interest or duty in relating to the statement; or the maker is acting in a matter in which he has a common interest with the recipient. In both cases, there must be reciprocity of interest. Interest is not construed in a technical sense but in the broadest popular sense as when we say a man is interested in knowing a fact not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news. It matters not whether the statement is made pursuant to the recipient's enquiry or voluntarily so long as it is made in discharge of the duty to inform. See Gatley at paras.14.4;

14.6; 14.13; 14.19; 14.21; 14.32 The Defendant pleaded that even if the statements were made and defamatory, she made them under a legal, moral or social duty to tell her honest opinion on the performance of the Plaintiff as auditor of Nelv to Shiota and Mok; and they also had corresponding interest to be so told. In other words, the Defendant's pleaded case was the first type of qualified privilege mentioned above. The Defendant alleged that it was Shiota who by e-mail initiated the non-payment of the Plaintiff's audit fees and asked whether she agreed. It was also Shiota who asked her whether the Plaintiff was professional. The E-mails were merely her replies. Shiota denied that. Neither were there such e-mails from Shiota in the evidence nor request for specific discovery of such e-mails from Shiota, if they did exist but were withheld. I am also not convinced that if Shiota had formed his view about withholding payment of audit fee as alleged, he would have found it necessary to seek the Defendant's agreement. I do not accept the Defendant's evidence that the E-mails were her replies to previous e-mails from Shiota. However, as mentioned above, it matters not whether the statements were made as replies to enquiries or voluntarily so long as they were made in discharge of the duty to inform. I agree that the occasions on which the E-mails were sent to Shiota and the conversation between the Defendant and Mok took place were prima facie such privileged occasions. In his submissions, Mr. Wong for the Defendant also proceeded on the basis that the statements, in the E-mails and the 26 June Meeting, were made in pursuance of interest, whether common or independently. In other words, he argued that the present case was also the second type of privileged occasions. Such contention has not been pleaded. However, in view of the lack of objection by Mr. Wong for the Plaintiff and also for completeness, I state my views on this alternative contention of the Defendant. Employees in a business, or employer and employee, have common interests in the success of the business or the way it is being carried on: see Gatley at para.14.46. Communication by the Defendant to Shiota about the company's situation and the performance of its auditor, whose services the company had to pay for, squarely fell into this category of common interest. This applied to the statements made in the E-mails. In the 28 June Meeting, the Defendant started the conversation with Mok pursuant to the instruction of Shiota. This arose out of the fact that the Plaintiff was introduced by Mok and that Mok was also concerned about the allegedly bad performance of the Plaintiff as auditor of Nelv. Mr. Wong for the Defendant relied on the case of *Angel v Bushell* [1968] 1 QB 813 at 830D-F, which, I agree, offers a comparable analogy. The court held that in view of the third party's introduction and recommendation of the plaintiff, qualified privilege would attach prima facie to a communication from the defendant to the third party stating the reasons for the termination of the Defendant's business relations with the plaintiff. It would so attach notwithstanding that the communication did not purport to be or was not in fact conveyed with a view to discharging any duty or furthering any common interest (as discussed above). I find that the 28 June Meeting was (by analogy) prima facie a privileged occasion on this basis. Malice If the statement maker is actuated by malice, he will not be able to rely on the privilege: see Gatley at para.14.4. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this, the defence vanishes, and it becomes immaterial that the publication was on a

privileged occasion: see Gatley at para.16.2 citing *Smith v Streatfeild* [1913] 3 KB 764, 796-770 per Bankes J. The relevant law regarding malice was authoritatively reviewed by the English House of Lords in *Horrocks v Lowe* [1975] AC 135. Lord Diplock's speech was referred to by the Hong Kong Court of Final Appeal in *Albert Cheng & Anor v Tse Wai Chun Paul* [2000] HKCFAR 339 (in the context of the defence of fair comment). The principles are succinctly summarised in Gatley (at para.16.3) as follows:

- (1) **Improper motives** There is some special reason of public policy for giving immunity in all cases of qualified privilege. If the maker of a statement uses the occasion for some other reason he loses the protection of the privilege. The defendant is entitled to be protected unless some dominant improper motive on his part is proved.
- (i) **The usual motive** relied on is that of injuring the claimant, but there may be others. Knowledge that a statement will injure the claimant does not destroy the privilege if the defendant was using the occasion for its proper purpose. **Absence of honest belief** If it can be proved that the defendant did not believe that what he published was true, that is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another. The burden of proof, at least where conduct extraneous to the privileged occasion is not relied on, is not a light one. If the defendant publishes untrue matter recklessly, without considering or caring whether it be true or not, he is treated as if he knew it to be false, but carelessness, impulsiveness or irrationality in arriving at a belief is not to be equated with indifference to truth. There are exceptional cases where a person may be under a duty to pass on defamatory reports made by another even if he believes them to be untrue: he is not then malicious. **Positive belief** Positive belief in the truth of what is published will usually protect the defendant unless he can be proved to have misused the occasion. Judges and juries should be slow to draw the inference that he has misused the occasion, and the defendant's desire to use the occasion for its proper purpose must be shown to have played no significant part in his motives if malice is to be found. Where the defendant believes in the truth of what he has published and conduct extraneous to the privileged occasion is not relied on, the claimant can only succeed if he shows that the publication contains irrelevant matter, and that it can be inferred that the defendant did not believe it to be true or realised that it was irrelevant, and brought it in for some improper motive. Judges and juries should be slow to draw this inference too. (emphasis added) Upon my drawing counsel's attention to the recent case of *Lee Ching, Mr. Wong for the Plaintiff* sought to rely on all 4 grounds relied on by the plaintiff in that case to show the malice of the Defendant, namely: no honest belief in the truth of the defamatory statements or reckless indifference to whether they were true or not; improper motive, namely, replacement of the Plaintiff by Y's; maintaining a plea of justification which was bound to fail; and inconsistent or contradictory statements by the Defendant and overt hostility towards the Plaintiff. The Plaintiff's pleadings permitted (1) and (2) above as grounds of malice. Justification under (3) above was a defence actually pleaded in *Lee Ching* but not in the present case. By justification, Mr. Wong for the Plaintiff was referring to the Defendant's justification of her

then belief rather than its truth. By (3) and (4) above, Mr. Wong was referring to the Defendant conduct of the defence. The defamatory statements basically arose out of two major criticisms about the Plaintiff: First, the Plaintiff had made mistakes in the audit which caused Nelv to pay more than necessary tax. Secondly, the qualified opinion contained in his auditor report has caused problems to Nelv and was not justified. In her evidence and not before, the Defendant conceded that such criticisms of the Plaintiff were wrong. Nevertheless, she maintained that that was her then honest belief. According to the pleading, such belief was allegedly based on the facts and matters then known to her shortly after she had joined Nelv (see paras. 3A and 3B of the Amended Defence). The relevant time must be when the defamatory statements were made. Was the Defendant indeed led by the facts and matters then known to her to make those criticisms? Did she have any improper motive then in making those criticisms? Audit mistake In her e-mail dated 27 April 2005, the Defendant first raised the issue of the company's tax liability and alleged accounting problems of Nelv. This was less than 3 weeks since she started working there and was the day following the date of the notice of assessment of Nelv's tax liability. The Defendant computed in the 17 June E-mail how much tax the Plaintiff has allegedly caused Nelv to pay over the 5 years from 2001 to 2005. With reference to the financial statements in the reports, her computations were proved to be incorrect. Her accusation of the Plaintiff about missing account notes was also unfounded. It was eventually revealed that while she criticised the Plaintiff for audit mistakes, she herself had not really prepared any accounts for the company during the entire period of her employment. In view of the relevant notice of assessment being dated 26 April 2005, any objection had to be lodged within 1 month from that date. These were also prescribed in the notice. No objection had been lodged by 25 May 2005. However the Defendant still suggested seeking tax refund in the E-mails in June 2005. Allegedly that was what the Inland Revenue Department (the IRD) told her during her visit on 21 May 2005. The Defendant's recollection of her visit at the IRD was so confusing that she kept correcting her statements, the last time just before the trial. But it was her approach of trying to puzzle together the visit and what might justify her statements in the E-mails which caused me concern. One might at most infer from the IRD's record that it might have been the Defendant who attended the enquiry centre on 21 May. However there was no record of any interview, not to mention the advice which the IRD allegedly gave her on that day. Assuming that the Defendant did visit the IRD enquiry centre on 21 May, that should be the first such visit she made for the purpose of Nelv's tax liability. I would be surprised if the IRD considered it appropriate to give her such advice on that very day when a prima facie case of mistakes in the financial reports and the tax returns was yet to be established. The IRD record revealed that during the other visit by the Defendant in as late as July 2005, the IRD still only advised her to apply for payment of tax by instalment. In my judgment, the Defendant's recklessness was clearly evidenced by the fact that she did not realise the computation mistakes she made in the 17 June E-mail and the account notes which she missed until being cross-examined in court. Like how she came to conclude about the Plaintiff's alleged audit mistakes, that Nelv could still obtain tax refund was, in my judgment, her subjective belief rather than one arrived at on an informed basis as alleged. The

qualified opinion There was no dispute that Nelv should know its tax liability at the end of April 2005. According to the Defendant, the company did not have sufficient cash flow to discharge the tax liability. She therefore approached various banks in May 2005 with a view to applying for loan. The banks refused the applications invariably for one of the reasons that Nelv's financial reports contained the qualified opinion of the Plaintiff or stock qualified as referred to in the evidence. In his evidence, Shiota confirmed that the Defendant mentioned the tax liability of the company. He did not deny that the company might have tight cash flow at the time. He knew that the Defendant approached the banks and she reported that the qualified opinion in the auditor's report affected the company's ability to borrow from the banks. The qualified opinion referred to was contained in the auditor's reports appended to the financial reports. Typically, the auditor's report began with the definition of the respective responsibilities of the company's directors and the Plaintiff as the auditor. The rest went like this: Basis of opinion We planned and performed our audit so as to obtain all the information and explanations which we considered necessary in order to provide us with sufficient evidence to give reasonable assurance as to whether the financial statements are free from material misstatement. However, the evidence available to us was limited because we did not attend the physical taking conducted by the Company at [date] of the stock valued at [value] and there were no practicable alternative auditing procedures that we would apply to confirm quantities. In forming our opinion, we also evaluated the overall adequacy of the presentation of information in the financial statements. We believe that our audit provides a reasonable basis for our opinion. Qualified opinion arising from limitation of audit scope Except for the effects of any adjustments which might have been shown to be necessary had we been able to obtain sufficient evidence concerning stocks, in our opinion, the financial statements give a true and fair view, in all material respects, of the state of the Company's affairs as at [date] and of its profit and cash flows for the year then ended and have been properly prepared in accordance with the Companies Ordinance. In respect alone of the limitation on our work relating to stocks: we have not obtained all the information and explanations that we considered necessary for the purpose of our audit; and we were unable to determine whether proper books of account had been kept. It could be seen that the Plaintiff openly stated the basis for the qualified opinion in the reports. There was no technical difficulty in this part of the report. One needs no more than reading this part to know precisely why the qualified opinion was given. The Defendant claimed that she was not aware of the existence of the qualified opinion until being informed by the banks as mentioned above. She attributed this partly to her mere attention to the figures in the reports and partly to her poor English standard. She also claimed that she had no idea what the qualified opinion meant until she went to consult the IRD. The Defendant was not a CPA. However she went so far as suggesting that she was essentially a bookkeeper and would not know much about auditing. Referring to her over 20 years of relevant working experience, I share the difficulty of Mr. Wong for the Plaintiff in believing in the extent of ignorance she alleged. Having said that, in view of her English standard both as demonstrated in the E-mails and as confirmed by Shiota, I am not surprised that she would not have the initiative of reading the auditor's report in detail. The Defendant could have

made enquiry with the Plaintiff about the qualified opinion. The evidence was that the staff of the Plaintiff's firm whom she normally contacted did suggest this. However the Defendant claimed that taking such a step would exceed her position. Rather, she chose to ask Shiota to contact Mok so that Mok would contact the Plaintiff about this. She did not know whether Shiota did so. This is difficult to understand. According to her resume, one of the duties of the Defendant when working for her previous employers was invariably to contact the auditors directly. She was specifically put in charge of the accounts of the company. It would be odd for Shiota to expect the need to deal with the accounting matter personally, particularly when he obviously did not understand accounting better. Consistently this explained why he had to ask the Defendant to talk directly to Mok in the 28 June Meeting about the Plaintiff. It seems to me that it was not whether the Defendant was objectively in a position to contact the Plaintiff. Rather, I doubt whether the Defendant intended to do so as far as she was able to avoid that. In view of the auditor's statutory and professional duty, one would not criticise his professionalism on the ground that his report may have problematic implication on the company, so long as it is sound. The Defendant did criticise the basis of the Plaintiff's qualified opinion. In criticising the Plaintiff's practice of not attending the stocktaking at Nelv, the Defendant said she had never come across an auditor who would not attend stocktaking. She further took the view that an auditor should have reserved his qualified opinion as a last resort. She also believed that whether the accounts and stock records were accurate, an auditor could and should still have attended stocktaking. Now she appealed to her knowledge and experience whilst at the same time claiming that she did not really know much about auditing. The Defendant also criticised the factual basis of the qualified opinion. She suggested that the stock and accounts documents were in fact not as messy as the Plaintiff described. This was proved to be wrong as the stocktaking attended by Y's in July 2005 detected an average percentage error of 22.6% between the stock and the record. According to the Plaintiff, a percentage error of more than 5% would already render any stocktaking meaningless for the purpose of verifying accounts. Cheung of Y's also confirmed that the qualified opinion in the auditor's report could not be removed in such circumstances. The Defendant even went as far as suggesting that not attending stocktaking was the Plaintiff's conscious decision due to his lack of manpower to cope. I simply do not see any factual basis for this suggestion at all. This appeared to me to be nothing more than an afterthought of the Defendant rather than her belief at the relevant time. The Defendant alerted Shiota that Nelv might be subject to investigation and field audit by the IRD if the Plaintiff's qualified opinion remained in the company's financial reports continuously. Mr. Wong for the Defendant suggested that this was in line with the IRD's relevant Practice Directions. However, reference to the relevant Practice Directions reveals a wide discretion in the IRD to select targets for such investigation. A limited company may become a target if the auditor has given a qualified opinion in a significant aspect of the company accounts. This could happen even in the absence of a period of repeated qualified opinion. However the fact was the IRD had never indicated such intention despite the existence of the qualified opinion in Nelv's reports since the second year of its business. Further, I would understand if the IRD was concerned about whether the tax liability of the company

targeted might have been under-assessed. The investigation would therefore be conducted to reveal the true state of affairs of the company on which the auditor has expressed a qualified opinion. However, if the Defendant were believed in, Nelv had paid more tax than it should have. Even the Defendant allegedly wanted to investigate the error in the financial statements in order to get a tax refund. In my judgment, when criticising the Plaintiff's qualified opinion, the Defendant concluded from nothing more than the fact that the existence of such opinion had caused problems and her surprise about the Plaintiff's non-attendance of the stocktaking at Nelv for consecutive years. Likewise I do not believe that her belief of what the qualified opinion might entail to the detriment of the company was really founded on any properly informed basis. So there were all these problems with the basis of the Defendant's criticisms of the Plaintiff. They were hardly objective and sometimes without any informed basis. Was that malice? What is required before recklessness is equated with knowledge of falsity or indifference to truth has been mentioned above. Specifically, *Horrocks v Lowe* (above) at 150D-E says: In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at, it may still be honest, that is a positive belief that the conclusions they have reached are true. The law demands no more. The Defendant did impress me as being subjective and stubborn. I find that this resulted in her reckless and impulsive adverse conclusions about the Plaintiff. However, as reminded by *Horrocks v Lowe* (above), I should be slow to conclude that the Defendant did not believe in her words. As mentioned above, she told Mok during the 28 June Meeting essentially what she meant in the E-mails to Shiota. She knew she was called upon to do that because it was Mok who introduced the Plaintiff to Shiota. Had she been malicious, I wonder if she would have spelt out the defamatory statements without fear to Mok as the Plaintiff would likely get to know the same afterwards from Mok. Indeed Mok did tell the Plaintiff. Conduct of the defence Mr. Wong for the Plaintiff also invited me to draw inference of malice from the conduct of the defence in the course of litigation. The most deplorable part of the defence must be the Defendant's assertion that the 17 June E-mail had been tempered with and his refusal to acknowledge the falsity of her criticism about the Plaintiff until during the trial. The Defendant effectively suggested that the disputed part of the 17 June E-mail was inserted after she had sent it to Shiota. This could only be an allegation against the Plaintiff and/or Shiota. She effectively made the same allegation against them in respect of the part of the e-mail allegedly crossed out. Her concession in court was equivocal and entailed retraction of a substantial part of her evidence contained in her statements. The last-minute retraction of such allegation and evidence, in the absence of satisfactory explanation, inevitably entitled the court to draw adverse inference against her. The Defendant apparently had no intention of conceding that her criticism about the Plaintiff's qualified opinion was wrong even though she was aware, at the latest by mid-July 2005, that there were indeed problems with the company's stock lists and records which well accounted for the Plaintiff's qualified

opinion. She actually acknowledged those problems in her e-mail and the minutes of the company meeting then. Notwithstanding that, there was no hint of concession in the pre-action correspondence or pleading or her statements. To the letter from the Plaintiff's solicitors in September 2005 before the commencement of this action, she consciously gave no instruction to her then solicitors to reply, as she said she did not want to incur legal costs. She did not concede that until during trial. Her explanation that she came to be aware of her mistake only after her lawyers explained to her with reference to Accountancy textbook and materials prior to the trial was just incredible. Even if that were true, Mr. Wong for the Defendant confirmed that still no indication of such concession had been conveyed to the Plaintiff prior to the commencement of the trial. Gatley (at para.32.42) has this to say: As malice can be inferred from the defendant's conduct at any time, whether before or after publication, his actions during the course of litigation, and his demeanour and attitude at trial, may well be believed to have existed at the time when the words were published. It has been stated that the pleading of the defence of justification may be evidence of malice, but clearly this cannot be a general rule, as raising such a plea is consistent with a belief in the truth of the words, and it is probably only applicable where the defence is put forward recklessly, or with knowledge that it is unsustainable. The same approach should be adopted as regards persisting, unsuccessfully, with the plea of justification at trial: of itself, such conduct is not evidence of malice, but a jury may infer malice if the defendant refuses to withdraw the defence at trial having called no evidence to support, or it is abundantly plain that the defamatory statement is untrue. Answers given by the defendant in the course of his evidence at trial, and his demeanour in the witness box, displaying, e.g. overt hostility towards the plaintiff, can be urged upon the jury as indicating malice. So too, that the defendant has lied whilst giving evidence, but some caution should be exercised before basing a finding of malice on these grounds. (emphasis added) The Defendant's refusal to acknowledge her mistaken belief about the Plaintiff after the same should be discovered reinforces my impression that she was subjective and stubborn. The irresponsible allegation of tempering of document and the equivocal retraction of the same displayed hostility in the conduct of the litigation. These may be said to be malicious. However, the key is whether the same afford inference of malice of the Defendant which actually existed at the time when she made the defamatory statements. That I could not say was the case. Improper motive The Plaintiff contended that the Defendant made use of the occasions on which she made the defamatory statements for an improper purpose. Essentially, it was said that the Plaintiff procured Shiota to terminate the retainer with the Plaintiff and to replace him by Y's. The Defendant admitted introducing Henry Cheung (Cheung) of Y's to Shiota but denied doing so with a view to replacing the Plaintiff. Her evidence was that Cheung spoke fluent Japanese. She merely intended that Shiota could consult Cheung if necessary on Nelv's accounting matters. From Nelv's point of view, Cheung was an outsider. I wonder how Shiota would find it appropriate to consult Cheung on the company's accounting matters while at the same time retaining the Plaintiff as the auditor. For convenience in communication in Japanese, there were staff members of Nelv who managed to do that and there was no indication of communication problem for the past years. From Cheung's point

of view, he might be willing to assist the Defendant on a friendly basis. However I saw no reason for him to agree to assist Shiota on an ad hoc basis without a view to a retainer. The development proves my observation. The Defendant introduced Cheung to Shiota in early June 2005, i.e., after her alleged discovery of the accumulated accounting problems. The 17 June E-mail followed. In the e-mail, after stating her criticism of the Plaintiff, the Defendant concluded by advising Shiota to consider the Plaintiff as the auditor. This was suggestive of consideration of the appropriateness of the Plaintiff as the auditor. In reply to the Plaintiff's letter to the Defendant dated 30 June 2005, Shiota signed the letter dated 4 July 2005 purporting to be Nelv's reply. It sought to explain that there was only a misunderstanding and no criticism of the Plaintiff was meant. According to Shiota, that was not his idea but that of the Defendant with the assistance of Cheung. More importantly, the reply could not genuinely mean what it said because on the same day, Cheung issued on behalf of Y's a quotation to Nelv for company secretarial service, tax return submission and auditing with a view to replacing the Plaintiff. Shiota signed on this quotation. Y's, by itself and through Yip, also informed the Plaintiff of the replacement subsequently. Yip attended the stocktaking at Nelv soon afterwards. The Defendant said it was eventually Shiota who decided to replace the Plaintiff against her advice and without prior notice to her. Shiota denied that.

Whichever the case was, it can hardly be denied that the Defendant's criticism about the Plaintiff must have influenced Shiota before he decided to engage Y's. I have no reservation that the Defendant introduced Y's with the motive by the time of the E-mails that Shiota could consider Y's as a replacement of the Plaintiff. Was that improper motive? In my view, introducing Y's or even promoting Y's to Shiota as a replacement of the Plaintiff per se would not be considered to be improper motive. The Plaintiff asked me to consider the other circumstances surrounding the replacement of the Plaintiff. Suspicion had once been raised about Y's, which is not a CPA firm registered in Hong Kong. It is apparently a member of an international tax consultancy group. There was insufficient basis to query the legitimacy of Y's providing such accounting and auditing services through associates such as Yip who is a registered CPA. The Plaintiff pointed out that Y's quoted a higher fee than that charged by him for the same services. Counsel for both parties also did their own comparison of the fees charged by the Plaintiff with that quoted by Y

- s. In my view, conclusion could not be drawn simply from whether one would be charging more than the other for similar services particularly when the difference actually shown was not remarkable and could vary from year to year. Likewise, I would not conclude that causing Nelv to pay a higher fee for another auditor's service to the extent shown in the circumstances was a manifestation of the Defendant's motive to jeopardise the company (financially) as alleged by the Plaintiff. According to his statement, Shiota believed that the Defendant engineered the replacement of the Plaintiff by Y's so that she could be subject to the least monitoring. This implied possible collusion between Y's and the Defendant. This suggestion was not borne out by the evidence at all. Mr. Wong for the Plaintiff in his submission seemed to accept that. What at one point of time caused me some concern was the Defendant's introduction of a couple of strangers to Shiota. Shiota changed his mind

about the replacement of auditor after his meeting with a Chinese man whom he said the Defendant introduced to him. The man had not left behind any business card and Shiota could not recall his name. The man informed him of a possible financial penalty imposed by the IRD for the consecutive qualified annual reports. This man lastly offered to assist at a fee. What might lend weight to Shiota's evidence about this meeting was that he distinctly remembered that the Defendant arranged that meeting on a Saturday. As a result, he actually consulted the Plaintiff and Cheung separately on the following working day or so regarding whether the financial penalty would be imposed as he was told. The Defendant denied knowledge about such meeting. In the meeting on 29 July 2005, the Plaintiff attended the office of Nelv at the request of Shiota. The proceeding was audio-recorded. When confronted about the meeting between Shiota and the mysterious Chinese man, the Defendant refused to answer, saying that the Plaintiff was not the auditor of Nelv. Upon Shiota's confirmation of the retention of the Plaintiff, she tendered her resignation. The Plaintiff believed that she was avoiding having to answer. Though I am inclined to accept what Shiota said, this episode involving the Chinese man remained largely a mystery. Shiota said that he then believed that the Chinese man was from Y

- s. But he also said that he subsequently consulted Cheung about this and Cheung actually confirmed that there was no basis for the alleged financial penalty. Mr. Wong for the Defendant submitted that had that Chinese man been associated with Y's, Cheung's response to Shiota's such enquiry would probably have been different. I tend to agree. There was no suggestion that either Yip or Cheung had given any suspicious advice to Shiota on Nelv's company affairs. This contrasted with this episode involving this unknown Chinese man. In this connection, there was insufficient evidence to implicate Y's or Cheung. The Defendant also introduced a Thomas Tang (Tang) to Shiota on 28 July, the day before the confrontation between her and the Plaintiff. According to the Defendant, she introduced Tang to Shiota after receipt of the letter from the Plaintiff's solicitors dated 25 July 2005. Tang was a friend who she understood to have studied Law. She asked him to help explain in English on her behalf to Shiota. Mr. Wong for the Defendant pointed out that there was no suggestion of any impropriety or solicitation of advantage by Tang. This episode also did not develop into anything. There was also no evidence of any connection between Tang and Y's. Considering the evidence, I am not prepared to conclude that on the basis of the Defendant's then belief about the Plaintiff (though wrong), her introduction of Y's as a potential replacement of the Plaintiff was due to any other surrounding circumstances an improper motive. The Plaintiff therefore fails to overcome this hurdle of proving malice on the part of the Defendant at the time of the publication of the defamatory statements.

CONCLUSION

For the above reasons, I find that the Defendant remained under the cover of the defence of qualified privilege. COMPENSATION For completeness, I proceed to consider compensation assuming I am wrong above. The Plaintiff claimed an injunction restraining the Defendant from publishing the defamatory statements as well as damages. Injunction As to the injunction prayed

for, I see no suggestion that the Defendant ever intended to publish the defamatory statements since they had been made. There is no basis or need for granting such relief. Damages The pleaded basis for claiming damages was the damage to the reputation and the alleged considerable distress and embarrassment caused to the Plaintiff. General damages is compensatory and in cases of libel and slander actionable per se, the law presumes damage arising from the publication and the claimant is entitled to look to an award of damages sufficient to vindicate his reputation according to (1) the seriousness of the defamation, (2) the range of its publication and (3) the extent to which the defendant has persisted with the charge: see Gatley at para.9.2. The objective is to restore the plaintiff, as far as money can do, to the position he would have been in if the tort had not been committed: *Hung Yuen Chan Robert v Hongkong Standard Newspaper Ltd.* [1996] 4 HKC 519. Mr. Wong for the Plaintiff referred me to numerous authorities with a view to giving me some idea about the appropriate level of damages to be awarded. Those were cases since the 1980 s, carrying awards from a few thousand to tens of thousand. The court in *Hung Yuen Chan Robert* (above) (at 536G-H) remarked that the circumstances of each libel are likely to differ and the factors to be taken into account depend on the facts of each individual case, it would be difficult to extrapolate from previous awards unless there are significant similarities. Indeed I find the cases cited to me differ substantially from the present case. To begin with, the publication of the defamatory statements and its effect in the present case was basically kept within a relatively limited group of persons. In saying that his reputation as a professional accountant or auditor was damaged, the Plaintiff was referring to his reputation in the eyes of Mok and Shiota specifically. Such damage should be manifested by the attitude of Shiota and Mok towards the Plaintiff as a professional and auditor as a result of the defamation. Both of them have queried but soon retained the Plaintiff s service. They have stood by him so much so that they came forward to testify for him. Essentially any doubt Shiota and Mok might have about the Plaintiff, and therefore the lowering of the Plaintiff s reputation in their eyes as well as the Plaintiff s embarrassment have been short lived. The Plaintiff felt embarrassed and being wronged at a certain point but I do not have the impression that there has been significant distress and embarrassment as suggested. The Plaintiff prayed for exemplary damages. Exemplary damages are awarded on a more restricted basis. This was punitive in nature for the defendant s wilful commission of a tort with a view to material gain: see Gatley at paras.9.15-9.17. However in his submissions, Mr. Wong for the Plaintiff did not actually ask for exemplary damages. Instead, he asked for aggravated damages. Claim for aggravated damages can be justified by the conduct of the defendant including failure to apologise or to withdraw the defamatory statement, conduct calculated to deter the plaintiff from proceeding, persistence by way of prolonged or hostile cross examination of the plaintiff, maintaining a plea of justification which is bound to fail or any conduct calculated to attract wide publicity: *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153 at 184; *Lee Ching* (above). In the light of how I view the conduct of the defence above, I would have made an award of aggravated damages. It was pleaded that the Plaintiff has expended substantial time and effort to clarify the matters and to clear his professional name before he could salvage the retainers with Mok s company and especially Nelv. According to his evidence in court, he had spent not less than 1,000 hours on this case including 1 to 2 hours each day during the last 2 years. This might have been claimed as actual loss suffered by the Plaintiff.

However, in absence of proper quantification and evidence, I would not have been prepared to award special damages. The Plaintiff rationally suggested during his evidence that he had not expected that the matter would have had to proceed beyond the time when he wrote to the Defendant in June and July 2005 to demand an explanation and nominal costs. Considering all the factors, I am of the view that justice would have been served by an award of damages and aggravated damages each in sum of HK\$10,000 and HK\$10,000, or a total of HK\$20,000. COSTS The Plaintiff's claim fails. Should costs follow the event? I have no doubt that they should not, in the circumstances of this case. Considering how the Defendant came to publish her defamatory statements as well as the various untenable positions which she maintained until after the commencement of the trial, I am of the view that discretion should be exercised in favour of a costs order which would reflect my disapproval of such deplorable conduct. I therefore order that the claim be dismissed but the Defendant shall bear half of the Plaintiff's costs of this action, including any costs reserved. Such costs shall be taxed, if not agreed, with certificate for counsel. The order is nisi and would become absolute in the absence of application in 14 days from today. Simon Leung District Judge Representation: Mr. Wong Po Wing instructed by Messrs. Vongs (until 17 June 2007) and Messrs. Siao, Wen & Leung (from 18 June 2007) for the Plaintiff Mr. Damian Wong instructed by Messrs. Benny Kong & Peter Tang for the Defendant - PAGE 1udk |rgr| : &0 : &0 >*6D :i#z *\mT zo/< xC&1 ({m8 =J+> P0} W~7gb W~7g xC&1 ({m8 =J+> KZ1H n*\U & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=58285

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/yiu-hon-lam-v-chan-yu-chun-2007>

Prepared on 27 October 2026 · Esheria