

**IN THE COURT OF APPEAL, FIJI**  
**On Appeal from the High Court**

**CIVIL APPEAL NO.ABU 035 OF 2021**  
High Court Civil Case No. HBC 191 of 2016]

**BETWEEN** : **SHAIEND RAM KRISHNA**

*Appellant*

**AND** : **SUNG REAM KIM**

*Respondent*

**Coram** : **Dr. Almeida Guneratne, P**  
**Andrews, JA**  
**Qica, JA**

**Counsel** : **Mr R. P Singh for the Appellant**  
**Ms A. D. Durutalo for the Respondent**

**Date of Hearing** : **15 September, 2023**

**Date of Judgment** : **29 September, 2023**

**JUDGMENT**

**Dr. Almeida Guneratne, P**

[1] I agree with the judgment of Her Ladyship Justice Andrews which I read in draft.

## Andrews, JA

### Introduction

[2] The appellant, Mr Krishna, has appealed against the judgment given by his Honour Justice Stuart in the High Court at Lautoka on 11 March 2021, which dismissed Mr Krishna's claim of defamation against the respondent, Mr Kim.<sup>1</sup>

[3] Mr Kim is a shareholder in and managing director of Biz Trading South Pacific Limited (Biz Trading). Mr Krishna is a solicitor and businessman. Mr Krishna issued proceedings claiming damages for defamation following a letter being sent by email by Mr Kim to the Prime Minister, the Attorney General, the Chief Registrar, the Director of Public Prosecutions, and the Korean Ambassador, on 23 August 2016 ("the letter"), and copied to Mr Kim's two co-directors of Biz trading, Mr Wella Pillay and Mr Farook Khan, and the financial manager of Biz trading, Mr Rajesh Kumar. In order to consider the appeal it is necessary to set out the letter in full. For ease of reference, I have underlined the words and phrases later alleged to be defamatory ("the underlined words").

[4] The letter, as set out at paragraph 10 of the High Court judgment, said:

*I make this complaint as a director of Biz Trading South Pacific Ltd against Shalend Krishna, a Lautoka lawyer who has used the fact that he is a lawyer to fraudulently blackmail money out of me.*

*First of all I would like to say that I am a foreign investor in Fiji. I come from Korea.*

*In 2010 I won Prime Minister Asian Exporter of Year Award.*

*I have been in Fiji for about 10 years and consider Fiji as my home now.*

*Biz leased premises from Shalend Krishna from last September. 3 months ago we gave notice to Shalend that we will vacate. The tenancy agreement only required 1 month's notice but we gave 3 months. We were to vacate by 15<sup>th</sup> August as per notice.*

*Everything went well and Shalend and I communicated regularly through email and phone. The total bond Shalend held was \$6900*

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<sup>1</sup> *Shalend Ram Krishna v Sung Rea Kim* High Court of Fiji (Western Division) at Lautoka, Civil Action No. HBC 191/2016, 11 March 2021.

and current monthly rental \$5450. At the beginning of July Shalend and I thought to agreed that the bond will be used for July's rent. Then on 27<sup>th</sup> July Shalend called and said we have to pay July rent contrary to our earlier agreement.

I told him the bond was sufficient and we had already agreed that it will be used for July rent.

Surprisingly he did not agree.

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

Instead 29<sup>th</sup> July at 10.30 am Shalend sent a bailiff to close my shop with distress of rent.

Before this distress Shalend never gave me any notice that he will do distress for July's rent that we initially agreed should be deducted from bond, and later asked him to pick up the cheque. The notice forms by bailiff is attached.

The bailiff chased all my employees out of the premises and locked the place up.

They never asked my employees to take inventory with them. The bailiff told my employees that it is Lawyer Shalend's instructions.

I am told it is illegal for bailiff to chase my employees and knocked out and paste a notice on the main door. Under this manner as per Lawyer Shalend's instructions. All my employees upset and scared and are ready to come and give evidence if we have to.

In the past in the normal course of tenancy we have given rent late. The timing of distress was to just blackmail the money out of me.

The bailiff was on his mobile phone throughout this illegal process of eviction and told my staff that the lawyer Shalend or his chief clerk is on the phone so they should not argue. This is blackmail and abuse of power by the lawyer.

This is unconstitutional.

You will see further from the distress of rent forms that in addition to rent Shalend charged another \$2725 solicitor's himself cost and \$1200 bailiff cost for his illegal eviction.

Moreover. Lawyer Shalend office chief clerk he threaten me everyday to increase our cost to pay Bailiff and the security company.

Because my shop was closed with stock inside, I had no choice but to pay the entire amount of \$9375 that Shalend claimed in the notice including \$3935 for illegal distress.

I am advised that even distress was legal this amount is excess and abuse of power.

However I maintain distress was illegal and unconstitutional.

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

*inspection and the chief clerk told that Lawyer Shalend will do the building inspection alone.*

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

*I am now advised that I did not have to paint the shop because fair wear and tear is excepted. I painted and touch up before I went out of my way to return the place to Shalend exactly how I found it because of undue pressure from Shalend.*

*I want my bond back.*

*However after we vacated Shalend fabricate issues about building damages that we are not responsible for. He is not returning my bond of \$6900.*

*Sirs, in my 10 years in being in Fiji I have never experienced such dishonesty and fraud from anyone.*

*My confidence in Fiji is being tested because a lawyer thinks he can abuse his position in the manner Shalend has illegally levied distress and unlawfully withholds my bond money.*

*I need your help.*

*I need my \$3295 paid for unlawful and unconstitutional distress back and I need my bond money of \$6900 back – both Total \$10,825.*

*I also suffer damages and loss due to Shalends unlawfulness.*

*I am sending this letter to Chief Registrar, Chief Justice and DPP as well because what Shalend has done is also criminal in my opinion. As a lawyer he will typically make things up to try to defend his position – I am ready for it because all 4 employees will independently give evidence against Shalend. In fact I am copying Shalend as I am ready for him because enough is enough. In my dealings with Shalend his moral character due to what he has done is highly questionable.*

*He cannot even face me and do a joint inspection, but relies on his power of lawyer and makes things up and writes to me.*

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

*Sirs, I am begging you. Please give me justice. I want my \$10,825 back as soon as possible.*

*Please also take appropriate measures against Shalend Krishna.*

*Lawyers cannot be allowed to abuse their powers like he has done.*

*Sir My phone number is [ ] and my email contact is [ ].*

*Thank you*

*Yours sincerely*

*Sung Rea Lim*

*Director*

*Biz Trading South Pacific Limited*

*...*

[5] In a writ of summons and statement of claim filed on 14 September 2016 Mr Krishna alleged, at paragraph 9, that the underlined words in their

natural and ordinary meaning were to be understood as saying that Mr Krishna was a dishonest person, a fraudulent person, a person who had abused trust placed on him, an unethical legal practitioner, a person who blackmails people, a liar, a person who uses high handed tactics including dictatorial and arbitrary conduct, and a cheat.

[6] It was also alleged at paragraph 10 of the statement of claim, in the alternative, that the underlined words bore the meanings by way of innuendo that Mr Krishna was unprofessional and unethical and operated his office in that manner, he was not fit to be a barrister and solicitor, he should not be operating a law firm, he was unscrupulous, a criminal and untrustworthy, was dishonest, a liar, had no regard for the rule of law and engaged in illegal activities, was a blackmailer and was a common criminal.

[7] It was further alleged, at paragraphs 11 and 12 of the statement of claim:

*11 That by the words and statements published by [Mr Kim] ... [Mr Krishna] has been greatly injured to his credit, character and his reputation and has been brought into the public scandal, ridicule, odium and contempt and has been subject to mental agony, distress, loss, suffering and damages and continues to suffer damages to his reputation, character and credit.*

*12 That [Mr Krishna] has also suffered general damages and loss of business, full particulars of which will be provided at the trial and continues to suffer.*

[8] In his statement of defence, filed on 1 December 2017,<sup>2</sup> Mr Kim set out a statement as to his dealings with Mr Krishna. He concluded with the allegation:

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

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<sup>2</sup> A default judgment was entered against Mr Kim on 7 October 2016 but set aside following an application by Mr Kim to set aside the judgment. In an affidavit filed in support of the application Mr Kim said that he had not been served with the writ of summons and that an affidavit of service of the writ of summons did not contain his signature acknowledging service.

- [9] Mr Krishna's Notice of Appeal set out ten grounds of appeal. In substance, the issues to be determined on appeal may be summarised as being,
- [a] whether the Judge erred in allowing Mr Kim to rely on the defence of fair comment;
  - [b] whether the Judge erred in holding that the statements in the letter were not defamatory.
  - [c] whether the Judge erred in finding that the letter did not amount to a personal attack on Mr Krishna; and
  - [d] whether the Judge erred in holding that Mr Kim was protected by the defence of fair comment.

### **Background**

- [10] The Judge said, at paragraph 2 of the judgment, that there was no significant disagreement between the parties about the main facts of the case. The summary below is derived from the Judge's narration of the facts and evidence.
- [11] Pursuant to a tenancy agreement between Mr Krishna, as landlord, and Biz Trading, Biz Trading was the tenant of premises in Lautoka for a term of three years as from 1 September 2015. The rental was initially \$6,000 plus VAT per month, but was reduced as from March/April 2016 to \$5,000 plus VAT per month. Mr Kim paid a security deposit (referred to at the High Court trial as "the bond") of \$6,000 plus VAT which could be used by the landlord to cover the cost of any damage to the property.
- [12] At the end of April 2016, Mr Kim gave Mr Krishna three months' notice of termination of the tenancy (that is, as from 15 August 2016). Mr Kim said in evidence at the High Court trial that towards the end of June 2016, he asked Mr Krishna if, instead of making the final rental payment which was due on 1 July 2016, Mr Krishna would take it from the bond. Mr Kim

said Mr Krishna initially agreed but about two weeks later told Mr Kim he had changed his mind, and Mr Kim would be required to make the final rental payment. Mr Krishna denied that he had ever agreed to deduct rental from the bond.

[13] Mr Kim was upset by Mr Krishna's refusal to deduct the final rental payment from the bond and instructed his office clerk to advise Mr Krishna's office by email and telephone calls that the final rental cheque was available to be collected. Mr Kim also said he tried telephoning Mr Krishna but he would not take his calls. Mr Krishna said in evidence that he did not receive a call regarding collecting the final rental cheque. He said if a call had been made to his office, he would have been told.

[14] On 29 July 2016 Mr Krishna levied distress for unpaid rental, sending a bailiff to the premises to seize and impound Biz Trading's belongings. Mr Kim was not given any prior warning of the intent to levy distress. The Notice of Distress demanded payment of \$9150 for unpaid rental, solicitor's costs, and the bailiff's fee.

[15] Mr Kim said he made numerous attempts to telephone Mr Krishna, but he would not take his calls. He also said he tried to see Mr Krishna at his office but found the door locked at 4 pm. He then paid Mr Krishna the full amount owing in cash, because Mr Krishna's office refused to accept a cheque.

[16] Biz Trading vacated the premises on 15 August 2016. Mr Kim's evidence was that he tried to arrange a joint inspection of the premises with Mr Krishna, but Mr Krishna ignored his requests. On 16 August 2016, Mr Krishna notified Mr Kim that the premises had been inspected, and he claimed there was significant damage to the premises.

[17] It was after this claim was made that Mr Kim sent the letter set out at paragraph [4], above.

## The High Court judgment

[18] After reviewing the background, evidence, and the pleadings, the Judge set out a comprehensive analysis of the defence of fair comment, including reference to the relevant judicial authorities and academic comment. He set out his conclusion as to the elements of the defence of fair comment, then considered whether the defence was available to Mr Kim.

[19] The Judge recorded, at paragraphs 31 and 32, that although he had concluded that “*the common law had already moved past this as a requirement for the defence*”, even if he were wrong as to “*the abandonment of the public interest element of the defence*” Mr Krishna’s position in society and public life was such that comment on his conduct was a matter of public interest.

[20] The Judge held, at paragraph 34, that he was satisfied on balance that:

*... the letter ..., at least in so far as it directly makes accusations of criminal, unethical or immoral conduct, is an expression of opinion rather than of fact.*

[21] The Judge went on to accept that there were factual assertions in the letter (as when Mr Kim referred to discussions with Mr Krishna and the bailiff) but said that:

*... in the context of these assertions, as to which [Mr Kim] has given evidence which I accept, the statements about blackmail, fraud, criminality and illegality appear as comments, not statements of fact that [Mr Krishna] is actually guilty of blackmail in the criminal sense.*

[22] The Judge referred to assertions which were not absolute, but qualified by the words “*I thought [we had] agreed*”, “*I am advised*”, “*I maintain*”, and “*in my opinion*”. The Judge considered that Mr Kim had allowed for the possibility that his understanding or advice was wrong, and that the distress levied by Mr Krishna was legal. The Judge concluded that the thrust of



Mr Kim's complaint was clear: that the distress was improper in the circumstances.

[23] The Judge considered the conflict in the evidence as to whether Mr Kim and his staff had told Mr Krishna that a rent cheque was available to be collected, and found, at paragraph 35, that Mr Kim believed what he said in evidence, such that the facts so far as they were stated in the letter were not "*untruly stated*". He further found that Mr Kim had set out in the letter sufficient background information about each of the matters of distress and Mr Krishna's claim for damage to the premises to explain the basis of his grievance.

[24] The Judge further found that Mr Kim's assertions of blackmail, illegality, criminality and abuse of power would not be seen by those reading the letter as Mr Kim charging Mr Krishna with a criminal offence.

[25] The Judge then considered the issue of malice. He found, at paragraph 37, that Mr Kim genuinely held the opinion he had expressed, and had not descended into personal abuse.

[26] The Judge concluded, at paragraph 39, that Mr Kim's letter, read in its entirety, was fair comment, and that he had not defamed Mr Krishna. Mr Krishna's claim was dismissed and he was ordered to pay \$3,000 costs to Mr Kim, summarily assessed.

**Did the Judge err in allowing Mr Kim to rely on the defence of fair comment?**

[27] Mr Singh submitted for Mr Krishna that the defence of fair comment had not been properly pleaded and particularised in Mr Kim's statement of defence. He submitted that the particulars of the defence had been "elicited" from Mr Kim's final submissions. He referred the Court to the closing submissions for Mr Krishna in the High Court, in which the issue as to the pleading of fair comment was raised. He submitted that there was no proper defence pleaded which could be considered by the plaintiff. He referred to authority to the effect that for the defence of fair comment, a

defendant must give particulars as to the facts and matters relied on, and that a plaintiff is entitled to know what case he has to meet.<sup>3</sup>

[28] In oral submissions, Mr Singh submitted that fair comment must be pleaded carefully, so that the other party has the opportunity to consider and respond to the matters relied on. He submitted that that had not occurred in the present case, with the result that Mr Krishna's defence was not prepared. He submitted that had fair comment been properly pleaded he would have cross-examined on it, and called evidence.

[29] Ms Durutalo submitted that although the manner in which Mr Kim's defence was pleaded was "far from conventional",<sup>4</sup> he had asserted in his statement of defence the essential facts that were said to be the foundation for the opinion expressed in his letter of 23 August 2016. She submitted that the Judge did not err in allowing Mr Kim to rely on the defence of fair comment, as his judgment drew on the stipulated facts laid out in the statement of defence.

[30] The Judge referred to Mr Kim's statement of defence in the course of his discussion of the pleadings, at paragraph 22, and said that although the minutes of the pretrial conference made no reference to the defence of fair comment:

*... it is apparent from the submissions filed that [Mr Krishna] is aware of and prepared to argue this defence at least. This decision is therefore given on the basis that the defence relies only on that defence, and not on any of the other possible defences that might arguably be available.*

[31] The Judge dealt further with the issue of pleading at the end of the judgment. He said, at paragraph 38:

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<sup>3</sup> *Precedents of Pleadings*, Bullen & Leake & Jacobs, 13<sup>th</sup> ed: *Cunningham-Howie v F W Dimbleby & Sons Ltd* [1951] KB 882; *Control Risks v New Library Ltd* [1990] 1 WLR 833; *Dr Ganesh Chand v Fiji Times Ltd* [2011] FJSC 2, Supreme Court of Fiji, Civil Appeal No. CBV 0005/2009 (8 April 2011).

<sup>4</sup> This was the wording used by the learned High Court Judge.

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

[32] I do not accept Mr Singh's submission that he had had no opportunity to consider and respond to the matters relied on by Mr Kim. The transcript of the High Court trial records a discussion between the Judge and counsel at the start of the trial, in the course of which Mr Singh said:<sup>5</sup>

*... they have pleaded that in paragraph 2.27 at the statement of defence and the general defence that they have pleaded is and I quote, they said 'the defendant considers therefore that he has the right to take issue justify make complaint and make fair comment of his experience with the plaintiff as highlighted here above'. So no other particulars are given in terms of justification but they have said fair comment so we have taken that the defence generally is of fair comment.*

[33] It is clear from Mr Singh's remarks to the Judge that as counsel for Mr Krishna he proceeded with the trial on the basis that Mr Kim's defence was fair comment. It does not appear from the transcript of the trial that he was under any disadvantage as to understanding Mr Kim's defence. Mr Singh referred to the defence of fair comment in the course of the cross-examination of Mr Krishna by counsel for Mr Kim, during Mr Kim's examination in chief (although his concern at that point was more as to whether privilege was to be raised as a defence) and again in his cross-examination of Mr Kim.<sup>6</sup> Any concerns that he may have had as to the pleadings should properly have been raised at a much earlier stage.

[34] I have concluded that it has not been established that the Judge erred in allowing Mr Kim to rely on the defence of fair comment.

<sup>5</sup> At page 492 of the High Court Record.

<sup>6</sup> At pages 522, 533 and 591 of the High Court Record.

**Did the Judge err in finding that the letter was not defamatory of Mr Kim?**

[35] The first substantive ground of Mr Krishna's appeal was that the Judge erred in finding that the letter was not defamatory of Mr Krishna. In his submissions, Mr Singh elaborated on this by submitting that the Judge found that the letter was not defamatory of Mr Krishna and did not amount to a personal attack on him, but in doing so the Judge erred in that he "disregarded that the words contained in [the letter] were maliciously used against [Mr Krishna]".

[36] I consider Mr Singh's submissions as to whether the letter was a "personal attack" and the issue of "malice" later in this judgment. I have concluded from that consideration that it has not been established that the Judge erred in finding that the letter did not descend into personal abuse or that he erred in finding that Mr Kim genuinely held the opinion expressed in the letter (that is, that there was no "malice"). Accordingly, it cannot be said that the Judge "disregarded" that the words in the letter "were maliciously used against [Mr Krishna]".

[37] Further, in the light of the Judge's consideration of the defence of fair comment and his finding that the defence was available to Mr Kim (which is discussed later in this judgment), he cannot be said to have erred in concluding that the letter, read in its entirety, was fair comment and that he had not defamed Mr Krishna.

[38] It must also be noted that Mr Krishna gave evidence in the High Court as to what he perceived to be damage to his reputation. He said that his reputation was attacked, and that people would have thought he was a liar, a corrupt person, dishonest, in the game of blackmailing people, and that he had abused his position as a lawyer.<sup>7</sup>

[39] He also said that three people (whom he named) had spoken to him about it and looked at him as if he had done something wrong. He said people

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<sup>7</sup> At page 509 of the High Court Record.

shied away from him and avoided him.<sup>8</sup> He also said that his position as the Sugar Industry Tribunal was not renewed, and that a client instructed another firm, because of the letter.<sup>9</sup>

[40] The only direct evidence as to how Mr Krishna's reputation was affected by the letter was given by a fellow lawyer, Mr Charan, who said he received instructions from a new client, who had previously been a client of Mr Krishna's firm. He said that when he asked the client why he was not going to Mr Krishna's firm, he responded that it was because Mr Krishna was under investigation. Mr Charan further said that he had been told that the name of Mr Krishna's firm had been removed from a panel of lawyers acting for a bank, because it had heard of an investigation against him.<sup>10</sup>

[41] Mr Charan agreed under cross-examination that he did not know the truth of what had happened between Mr Krishna and Mr Kim. He also agreed that anyone could make a complaint about a lawyer, the complaint would be investigated, and that in fairness no adverse conclusion could be drawn until there was a determination of the complaint.<sup>11</sup>

[42] Other than Mr Krishna's own perception, there was no evidence of any damage to Mr Krishna's reputation. Further, as the Supreme Court of Fiji said in *Chand v Fiji Times*, it is not *per se* defamatory to allege or imply that a person is suspected of an offence.<sup>12</sup>

[43] I have concluded that for that reason, also, it cannot be said that the Judge erred in finding that the letter was not defamatory.

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<sup>8</sup> At page 510 of the High Court Record.

<sup>9</sup> At page 511 of the High Court Record.

<sup>10</sup> At pages 560-563 of the High Court record.

<sup>11</sup> At pages 565-6 of the High Court record.

<sup>12</sup> *Chand v Fiji Times* [2011] FJSC 2; CBV 0005/2009 (8 April 2011).

**Did the Judge err in finding that the letter did not amount to a personal attack, or malice, against Mr Krishna?**

[45] As recorded above, Mr Singh submitted that the letter amounted to a personal attack on Mr Krishna, and was maliciously used against Mr Krishna. He submitted that the letter was not a letter of honest opinion but a letter written out of spite and vengeance. As recorded earlier, the Judge concluded, at paragraph 37, that he had:

*... no doubt that Mr Kim genuinely held the opinion he was expressing, and I don't accept that in expressing that opinion as he did that [Mr Kim] crossed any line to descend into personal abuse. [Mr Kim's] letter referred to [Mr Krishna's] business conduct, not to his personal qualities.*

[46] The Judge's assessment that the letter concerned Mr Krishna's business conduct, not his personal qualities, followed from his conclusion that Mr Kim genuinely held the opinions he expressed. The Judge saw and heard the witnesses give evidence before him. I have concluded that it has not been established that the Judge erred in his assessment that Mr Kim genuinely held the opinions he expressed, and did not "*descend into personal abuse*".

[47] The Judge referred in paragraph 34 to assertions which were not absolute, but qualified by the words "*I thought [we had] agreed*", "*I am advised*", "*I maintain*", and "*in my opinion*". The Judge considered that Mr Kim had allowed for the possibility that his understanding or advice was wrong, and that the distress levied by Mr Krishna was legal. The Judge concluded that the thrust of Mr Kim's complaint was clear: that the distress was improper in the circumstances.

[48] The Judge considered the conflict in the evidence as to whether Mr Kim and his staff had told Mr Krishna that a rent cheque was available to be collected, and found, at paragraph 35, that Mr Kim believed what he said in evidence, such that the facts so far as they were stated in the letter were not "*untruly stated*". He further found that Mr Kim had set out in the letter sufficient background information about each of the matters of distress for

recovery of the July rental, and Mr Krishna's claim for damage to the premises, to explain the basis of his grievance.

[49] On the issue of malice, the Judge said, at paragraph 37:

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

[50] The Judge further found that Mr Kim's assertions of blackmail, illegality, criminality and abuse of power would not be seen as Mr Kim charging Mr Krishna with a criminal offence. The Judge held, at paragraph 36 (after referring to the judgment of his Honour Justice Stewart in the Court of Appeals for Maryland, USA, in *Greenbelt Pub. Assn v Bresler*<sup>13</sup>):

*... It is simply impossible to believe that a recipient of [Mr Kim's] letter, reading what he says, would not have understood exactly what was meant; i.e. that it was [Mr Krishna's] business conduct and in particular his use of the distress tactic that was being criticized. No-one reading the letter (taking into account who they were) could have thought that [Mr Kim] was charging [Mr Krishna] with the commission of a criminal offence; they would have realized the assertions were no more than "rhetorical hyperbole", a vigorous, emotional and perhaps exaggerated, but nevertheless heartfelt description by someone who obviously regarded [Mr Krishna's] business conduct as extremely unreasonable. ...*

[51] Mr Singh submitted that the circumstances of the *Greenbelt* case are distinguishable from the present case, as that case concerned a report in a newspaper that citizens at a public meeting had characterised the negotiating position the respondent, Mr Bresler, had taken in an

<sup>13</sup> *Greenbelt Pub. Assn v Bresler* (1970) 398 U.S.6 Ct 1537 (18 May 1970).

application for zoning variations by as “blackmail”. It was held that there was no evidence that the word was used to impute a crime, or was intended as more than a “vigorous epithet”.<sup>14</sup>

[52] Mr Singh submitted that it was not contended in the present case that Mr Kim had said that Mr Krishna committed the crime of blackmail. Rather, the issue was whether the underlined words would have the meaning pleaded in the statement of claim. He submitted that the Judge’s conclusion that no one reading the letter could have thought that Mr Kim was charging Mr Krishna with the commission of an offence was irrelevant.

[53] That submission ignores the balance of the passage set out above at paragraph [50], where the Judge stated (in summary) that a recipient of the letter would have understood that it was Mr Krishna’s business conduct and in particular his use of the distress tactic that was being criticised, and that those reading the letter (taking into account who they were) would have realised the assertions were no more than a vigorous, emotional and perhaps exaggerated, but nevertheless heartfelt description by someone who obviously regarded [Mr Krishna’s] business conduct as extremely unreasonable. While the Judge’s reference to “rhetorical hyperbole” may have been misplaced, as Mr Singh submitted, that does not render the remainder of his conclusion, based on the evidence he saw and heard, erroneous.

**Did the Judge err in holding that Mr Kim was protected by the defence of fair comment?**

*The defence of fair comment*

[54] Section 16 of the Defamation Act 1971 provides in respect of the defence of fair comment:

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<sup>14</sup> *Greenbelt*, at pp 11-14.



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

[55] In his judgment in the present case, the Judge referred to the judgment of the Supreme Court of England and Wales in *Joseph v Spiller* in which Lord Phillips P discussed and outlined the elements of the defence of fair comment.<sup>15</sup> Lord Phillips endorsed the analysis of the elements of the fair comment defence by Lord Nicholls in his judgment in the Court of Final Appeal in Hong Kong in *Albert Cheng v Tse Wai Chun Paul*,<sup>16</sup> with one modification (to the fourth element). Those elements (as modified by Lord Phillips) are:

- [a] the comment must be on a matter of public interest;
- [b] the comment must be recognisable as comment, as distinct from an imputation of fact;
- [c] the comment must be based on facts which are true or protected by privilege;
- [d] the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based; and
- [e] the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.

[56] The elements set out above have been applied by this Court, most recently in *Riyaz Sayed Khayum v Niko Nawaikula*.<sup>17</sup>

<sup>15</sup> *Joseph v Spiller* [2011] All ER 947, at [3] and [105]

<sup>16</sup> *Albert Cheng v Tse Wai Chun Paul* (2000) HKCEA 35

<sup>17</sup> *Riyaz Sayed Khayum v Niko Nawaikula* Fiji Court of Appeal Civil Appeal No ABU 104/2020, 30 September 2022, at [92].

[57] The Judge concluded, at paragraph 31 of the judgment:

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

- *clearly an opinion,*
- *is made honestly (in the sense that the maker of the statement genuinely holds the opinion being expressed), and*
- *does not misstate the facts upon which it is said to be based,*

*it cannot be the foundation for a defamation claim, regardless of how humiliating, hurtful or damaging the comment is.*

Except as to whether it remains a requirement in Fijian law that the statement must have been made on a matter of public interest, the Judge's summary of the elements of the defence of fair comment was not challenged in this Court.

*Did the Judge err in finding that comment as to Mr Krishna's conduct was in the public interest?*

[58] The Judge acknowledged in the judgment that the elements he outlined omitted any reference to any requirement that the comment is on a matter of public interest. He expressed the view that "*the common law had already moved past this as a requirement for the defence*". At paragraph 32, however, the Judge said that even if he were wrong as to "*the abandonment of the public interest element of the defence*" Mr Krishna's position in society and public life was such that comment on his conduct was a matter of public interest.

[59] Mr Singh submitted that the only basis for Judge's conclusion was that Mr Krishna is a lawyer, and in that capacity, all of his conduct is matter of public interest. He submitted that this was not only a fundamental error in the interpretation of the law, but also reprehensible, as a person does not lose basic human rights simply by becoming a lawyer.

[60] I do not accept Mr Singh's submission. The Judge referred to Mr Krishna's "position in society and public life"; he did not focus on Mr Krishna's profession as a lawyer. Mr Krishna pleaded his position in society and public life in his statement of claim, and gave evidence on the subject at the High Court trial. He gave evidence of a position in society and public life that went well beyond the practice of law.

[61] He said he was also a business man, and had held or was currently holding important positions in society. He referred to his positions as Chairman of the Legal Aid Appeals Review Authority, Chairman of the Ethics Committee of the Fiji Football Association, Chairman of the Fiji Football Appeals Committee and Arbitration Tribunal, and the Sugar Industry Tribunal. The only purpose for giving that evidence would have been to establish his position in society and public life. I have concluded that it has not been established that the Judge erred in finding that comment on Mr Krishna's conduct was a matter of public interest.

*Did the Judge err in finding that the letter was "comment" rather than "fact"?*

[62] The Judge held, at paragraph 34, that he was satisfied on balance that the letter was an expression of opinion (that is, comment) rather than fact. He accepted that there were factual assertions in the letter (as when Mr Kim referred to discussions with Mr Krishna and the bailiff) but said that read in context, it was clear they were not absolute, but qualified by the words "*I thought [we had] agreed*", "*I am advised*", "*I maintain*", and "*in my opinion*".

[63] The Judge considered that Mr Kim had allowed for the possibility that his understanding or advice was wrong, and that the distress levied by Mr Krishna was legal. However, he found that the thrust of Mr Kim's complaint was that the distress was improper in the circumstances. The Judge further found that Mr Kim's assertions of blackmail, illegality, criminality and abuse of power would not be seen as Mr Kim charging Mr Krishna with a criminal offence.

[64] Mr Singh submitted that the Judge was wrong to find that use of the words “*I thought*”, “*I maintain*”, “*in my opinion*”, or “*I am advised*” rendered Mr Kim’s statements comments rather than (defamatory) statements of fact.

[65] Ms Durutalo submitted that Mr Kim’s letter clearly contained expressions of opinion, not statements of fact. She submitted that in using the words such as “*I thought*”, “*in my opinion*” and “*I am advised*” Mr Kim was commenting as to his opinion, not alleging that Mr Krishna was guilty of an offence.

[66] Mr Singh has not established that the Judge erred in finding that the letter contained expressions of opinion, not allegations of criminal offending, and that the Mr Kim’s opinion was honestly and genuinely held. It is evident from a reading of Mr Kim’s evidence that those findings were open to the Judge on the evidence before him.

*Identification of facts justifying the comments*

[67] Mr Singh submitted that Mr Kim had not identified any facts that justified Mr Kim’s statements, as all Mr Krishna had done was to exercise the right of distress, legally. Ms Durutalo submitted that Mr Kim’s evidence was consistent with the statements made in his statement of defence, and showed that his opinion was based on truly stated facts. She submitted that Mr Kim had given evidence as to the facts upon which his opinions and beliefs were held. She submitted that a reader of the letter would be able to identify the facts upon which the opinion was held.

[68] I accept Ms Durutalo’s submission. Mr Singh has not established that the Judge erred in finding that sufficient factual background, upon which Mr Kim’s opinions were based, was set out in the letter. That finding was open to the Judge on the evidence before him.

**Outcome**

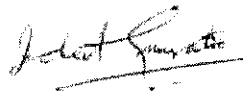
[69] For the reasons set out above, I have concluded that it has not been established that the Judge erred in dismissing Mr Krishna's claim against Mr Kim. The appeal should be dismissed, and an order made that Mr Krishna is to pay costs to Mr Kim.

**Qica, JA**

[70] I have read and considered the decision of Andrews, JA. I concur that the appeal be dismissed with costs.

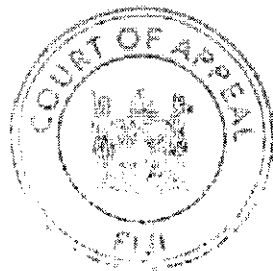
**Orders of Court**

1. The appeal is dismissed.
2. Mr. Krishna is ordered to pay costs to Mr. Kim in the sum of \$3,000.00



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**The Hon. Justice (Dr) Almeida Guneratne**  
PRESIDENT COURT OF APPEAL



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**The Hon. Madam Justice Pamela Andrews**  
JUSTICE OF APPEAL



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**The Hon. Justice Samuela Qica**  
JUSTICE OF APPEAL

**SOLICITORS:**

Patel and Sharma Lawyers for the Appellant  
Durutalo Lawyers for the Respondent

