IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0024 of 2023
Court of Appeal No. ABU 035 of 2021

BETWEEN	:	**SHAILEND RAM KRISHNA**
		Petitioner
AND	:	**SUNG REAM KIM**
		Respondent
Coram	:	**The Hon. Mr. Justice Brian Keith** **Judge of the Supreme Court**
		The Hon. Madam Justice Lowell Goddard **Judge of the Supreme Court**
		The Hon. Mr. Justice William Young **Judge of the Supreme Court**
Counsel	:	**Mr S K Ram for the Petitioner**
	:	**Ms A D Durutalo for the Respondent**
Date of Hearing	:	**24 April, 2025**
Date of Judgment	:	**30 April, 2025**

JUDGMENT

Keith, J

[1] I agree with Young J that this appeal should be allowed for the reasons which he gives, and that we should make the orders which he proposes. I wish to add a few words of

my own out of deference to both the trial judge and the Court of Appeal with whom we are disagreeing, and because simplifying things in a complex area of the law may be helpful.

[2] Leaving aside those facts which are protected by privilege, one of the ingredients of the defence of fair comment is that the comments complained of have to be based on facts which are true. In my opinion, there were six factual assertions about Mr Krishna which Mr Kim's email made:

(i) Mr Krishna had gone back on his promise to set off the rent due on 1 July 2016 against the security deposit.

(ii) Mr Krishna had gone ahead with distraining for rent when Mr Kim had informed him that a cheque for the outstanding rent would be available for someone to collect.

(iii) Mr Krishna had claimed legal fees for work which he had done himself.

(iv) Mr Krishna had threatened to increase the sums payable by Mr Kim if Mr Kim did not pay the outstanding rent, legal fees and bailiff's costs.

(v) Mr Krishna had not been prepared to engage in a joint inspection of the condition of the premises for the purposes of determining whether Mr Kim was entitled to the return of the security deposit.

(vi) Mr Krishna was not telling the truth when he alleged that the premises had not been left in a good condition.

Subject to section 16 of the Defamation Act 1971, these were the facts which Mr Kim had to prove were true if his defence of fair comment was to succeed.

[3] A defendant who wishes to rely on the defence of fair comment is required to plead in the defence the facts on which the comments complained of were based.[1] Three of the six factual assertions in the email were not pleaded at all. They were (iii) that the

[1] See the judgment of Denning LJ (as he then was) in *Cunningham-Howie v F W Dimbleby & Sons Ltd* [1951] 1 KB 360 at page 364.

legal fees claimed by Mr Krishna were for work he had done himself, (iv) that Mr Krishna had threatened to increase the sums payable by Mr Kim if the sums due were not paid, and (vi) that Mr Krishna's claim that the premises had been left in a poor condition was false.

[4] As it was, the trial judge made no explicit findings on any of these three factual assertions. As for (iii), Mr Krishna's firm may have done the legal work in connection with the distraint, but there was no finding that the person within the firm who had done the work had been Mr Krishna himself. As for (iv), there was no finding by the trial judge one way or the other. As for (vi), as Young J has pointed out, the trial judge was not prepared to infer from Mr Kim's failure to defend the claim in the magistrates' court that his claim that he had left the premises in good condition was false. But that does not mean that the trial judge made any finding on the condition of the premises. The fact is that he did not. Indeed, he could not in view of the very limited evidence called on Mr Kim's behalf at the trial.

[5] Of the three factual assertions in the email which *were* pleaded in the defence and which therefore formed the basis for the defence of fair comment, the trial judge made no findings on two of them. They were (i) that Mr Krishna had promised to set off the rent due against the security deposit, and (v) that Mr Krishna had been unwilling to participate in a joint inspection of the premises. Having said that, I agree with Young J that although the judge made no explicit finding about whether Mr Krishna had promised to set off the rent due against the security deposit, he must implicitly have found that he had not: to hold otherwise would have been inconsistent with his finding that the distraint had been legal. The only finding which the trial judge explicitly made in favour of Mr Kim on the three pleaded factual assertions in the email was (ii) that Mr Krishna had proceeded with the distraint despite being aware that a cheque for the rent would be available for collection.

[6] The bottom line here is that only two of the six factual assertions in the email were proved to be true, and only one of them had been pleaded in the defence. That is where section 16 of the Defamation Act 1971 is engaged. A defence of fair comment will not be defeated simply because not all the factual assertions on which the comments complained of were based were not proved. The court has to address

whether, on the factual assertions which have been proved, the comments complained of were fair in the sense that they could have beren made by an honest person, though that has to be limited to those factual assertions which were pleaded – in this case, just the one, namely the assertion that Mr Krishna had proceeded with the distraint despite being aware that a cheque for the rent would be available for collection.

[7] Having said all that, the fact that only one of the two factual assertions in the email was pleaded should not, I think, be held against Mr Kim. This particular pleading point was not taken by Mr Krishna's legal team. In any event, the remedy for not pleading any of the factual assertions on which the comments complained of were based would have been to require Mr Kim to giver proper particulars of them, rather than prevent him from relying on them at trial – unless he had refused to give those particulars after being alerted to the need to do so.

[8] I turn, then, from the factual assertions in the email to the comments complained of. There were nine of them:

(i) Mr Krishna's conduct had amounted to blackmail.

(ii) Mr Krishna had acted fraudulently, dishonestly and criminally.

(iii) Mr Krishna had abused his power as a lawyer.

(iv) Mr Krishna had acted unconstitutionally.

(v) Mr Krishna typically made things up.

(vi) The distress had been illegal.

(vii) The amount claimed had been excessive.

(viii) The claim advanced by Mr Krishna had been fabricated and made up.

(ix) Mr Krishna's withholding of the security deposit had been unlawful.

[9] In the light of that, there were two question for the trial judge to address. One was whether these comments about Mr Krishna could have been made by an honest

person. The other was whether Mr Kim himself believed that these comments could honestly have been made about Mr Krishna. In other words, there was both a subjective and an objective element to this ingredient of the defence of fair comment. The context in which both of these questions had to be addressed, of course, was the judge's findings (one explicit, the other implicit) that what Mr Krishna had done was to renege on the agreement to set off the rent due against the security deposit, and proceed with the distraint when he knew that a cheque for the rent was available for collection.

[10] Unfortunately, the trial judge thought that the law required him to address only the second of these issues. By doing so, he chose to put his own spin on the law relating to the defence of fair comment. Whether he was right to focus only on the subjective element of this ingredient raises a far-reaching question of law, which triggers the power of the Supreme Court to grant Mr Krishna leave to appeal. The trial judge did not say why the objective element of this ingredient could be ignored, and I have not discerned any basis for overturning the orthodox view that both elements of this ingredient must be established if the defence of fair comment is to succeed.[2]

[11] There are, in my opinion, two critical features about the case. The first is that the trial judge found that, although it had been unreasonable for Mr Krishna to proceed with the distraint, it had nevertheless been legal. The second was that he made no finding about the condition of the premises – understandably because the evidence to support a finding on that topic one way or the other was just not there. That meant that the trial judge would have had to find that four of the comments complained of were not of a kind which an honest person could have made – namely (vi) that the distraint had been illegal, (vii) that the amount claimed had been excessive, (viii) that the claim advanced by Mr Krishna had been fabricated and made up, and (ix) that Mr Krishna's withholding of the security deposit had been unlawful. Nor was there any basis for concluding that Mr Krishna could honerstly be described as a man who *typically* made things up when the whole dispute was about two things only – proceeding with the

[2] The orthodox view was set out by the High Court of Australia in *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60 and by the United Kingdom Supreme Court in *Spiller v Joseph* [2010] UKSC 53.

distraint when the outstanding rent was available for collection, and whether the security deposit should have been returned to Mr Kim.

[12] In these circumstances, the remaining issue for the trial judge related to Mr Kim's comments that Mr Krishna's conduct had amounted to blackmail, that he had acted fraudulently, dishonestly, criminally and unconstitutionally, and that he had abused his power as a lawyer. In an important passage in para 52 of his judgment – a passage which Young J has set out in his judgment – the trial judge described these comments as no more than "rhetorical hyperbole": a florid description of conduct which Mr Kim regarded as reprehensible, *but which would not have been – and was not intended to be – taken literally*. This is where I respectfully but profoundly disagree with the trial judge. This was not a brief, spur-of-the-moment outburst. It was a long diatribe, addressed to, among others, the Prime Minister (who was responsible for upholding the Constitution), the Director of Public Prosecutions (who was responsible for initiating criminal proceedings for blackmail, fraud and dishonesty), and the Chief Registrar and the Legal Practitioners Unit (who were responsible for initiating disciplinary proceedings against legal practitioners whose conduct fell below the high standards expected of them). In my opinion, an unbiased reader of the email would inevitably think that the email was sent to them – not because he simply wanted to scare Mr Krishna into repaying him the money which Mr Kim says Mr Krishna extorted from him – but *because Mr Kim wanted them to act upon it.* After all, he asked the recipients of the email to "take appropriate measures" against Mr Krishna, and asked them to "give me justice". Ms Durutalo for Mr Kim conceded as much when the point was put to her, though it may be that she did not fully appreciate the significance of that concession. I therefore agree with Young J that the email meant – and was intended to mean – what it said.

[13] In these circumstances, the ultimate question is whether an honest person could concluded that Mr Krishna had acted fraudulently, dishonestly, criminally and unconstitutionally, and had abused his power as a lawyer. In the light of the two critical features of the case to which I have referred – that the trial judge found that the distraint had been legal, and that no finding could be made on the evidence about the state of the premises - the answer to that question has to be No. For these reasons, the defence of fair comment had to fail

Goddard, J

[14] I have read the judgments of Keith and Young, JJ and concur with them in their entirety.

Young, J

The proposed appeal

[15] The petitioner, Shailend Ram Krishna, was the plaintiff in proceedings for defamation against Sung Rea Kim. The subject matter of the claim was an email that Mr Kim had circulated to a number of people including some public officials. The email was very critical of Mr Krishna in relation to his role as the landlord of a company with which Mr Kim was associated. Mr Krishna's claim was unsuccessful as the trial Judge upheld Mr Kim's defence of fair comment. Mr Krishna's appeal to the Court of Appeal was dismissed. He now seeks leave to appeal to this Court.

[16] I would grant leave to appeal. This is because, as I will explain, the Judge decided the case at trial on the basis of a formulation of the elements of the fair comment defence that is incorrect and this formulation was not corrected by the Court of Appeal in its judgment. This means that the leave criteria in s 7(3) of the Supreme Court Act 1998 are satisfied.

The legal setting

[17] The primary issue before us is whether Mr Kim was entitled to succeed on his defence of fair comment. As there are some legal intricacies to this defence, I think it best to start with a brief outline of how it operates.

[18] The elements of the defence of fair comment at common law were outlined by Lord Nicholls of Birkenhead in *Albert Cheng v Tse Wai Chun Paul* in this way:[3]

> First, the comment must be on a matter of public interest. …
>
> Second, the comment must be recognisable as comment, as distinct from an imputation of fact. …

[3] *Albert Cheng v Tse Wai Chun Paul* [2000] HKCFA 35 at [16] – [20].

> Third, the comment must be based on facts which are true or protected by privilege … .
>
> Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.
>
> Finally, 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: ….

Section 16 of the Defamation Act 1971 supplements the third element by providing:

> … 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.

[19] Lord Nicholl's remarks should not be applied as if they appeared in a statute and there remains scope for debate about some of the detail of what he said. This is apparent from the judgment of the United Kingdom Supreme Court in *Joseph v Stiller*.[4] In particular, there is scope for debate as to Lord Nicholls' fourth point, that is the extent to which the facts on which the comment is based should be stated or indicated in the defamatory remarks so that the reader "can judge for himself can how far the comment was well founded". But because this is not an issue in this case, Lord Nicholls' approach provides a useful framework for a structured analysis of the soundness of the fair comment defence advanced by Mr Kim.[5]

[20] A few additional comments may be of assistance in terms of what follows:

(a) In issue in many defamation proceedings is what the allegedly defamatory publication meant. In his email, Mr Kim said, amongst other things, that Mr Krishna had acted dishonestly, fraudulently and criminally. In his judgment in favour of Mr Kim, the trial Judge concluded that, as used in the email, these expressions did not have their ordinary meanings. Rather he appears to have concluded that all they meant was that Mr Krishna's conduct had

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4 *Joseph v Stiller* [2011] 1 All ER 947 at [98] per Lord Phillips.

5 Lord Nicholls' remarks have been adopted in Fiji, see for instance, *Abbas Ali v Thompson and others* [2012] FJCA 12.

been extremely unreasonable. A major issue for us is whether the Judge was right to so conclude.

(b) The distinction between comments and assertions of fact is sometimes difficult to apply. Rather than discuss it in abstract terms now, I do so later when I come to Mr Kim's email. But, to anticipate the result I arrive at, I see the most defamatory assertions in the email – that Mr Krishna had acted dishonestly, fraudulently and criminally – as comments.

(c) Lord Nicholls' third and fifth elements address whether a comment is relevantly "fair". Privilege not having been raised, to establish the defence of fair comment, Mr Kim had to show that his comments asserting dishonesty, fraud and criminality were "based" on facts that were true and persuade the Judge that they "could have been made by an honest person". There are two points to note about this:

(i) Fairness depends on an objective assessment based on the relationship between the comment in question and the facts relied on and proved, rather than what the defendant thought.

(ii) Whether the defence of fair comment succeeds in this case depends in large measure on what the email meant. If the meaning was simply that Mr Krishna had acted in an extremely unreasonable way, it was much easier to defend as fair comment than if it meant that he had acted dishonestly, fraudulently and criminally. This is because, on these meanings, Mr Kim could only succeed on fair comment if, based on the facts he proved at trial, an honest person could have asserted dishonest, fraudulent and criminal conduct.

(d) A defence of fair comment is defeated if the plaintiff establishes that the defendant was actuated by malice. A finding of malice can be made only if the defendant's comments were expressions of opinions which he or she did not genuinely hold.[6]

[6] See Lord Nicholls in *Albert Cheng v Tse Wai Chun Paul*, at [22] – [24].

The point that comes out of (c) and (d) is that fairness is assessed objectively and the actual state of mind of the defendant is relevant only to malice.

The factual background to the litigation

[21] Mr Krishna is a both a solicitor and a commercial landlord. He has practised law for many years, and he has held a number of offices and positions, including being the Sugar Industry Tribunal, the chair of the Ethics Committee of the Fiji Football Association and the chair of the Legal Aid Appeals Review Committee. He has also served on the Council of the Fiji Law Society.

[22] Mr Krishna owns a commercial building in Lautoka. In 2015 he let part of this building to Biz Trading South Pacific Ltd, the managing director of which is the respondent, Mr Kim. The other directors of Biz Trading, Messrs Wella Pillay and Farook Daud Khan, were friends of Mr Krishna. Mr Khan was also a client of Mr Krishna.

[23] The lease commenced on 1 September 2015. Biz Trading had a right to terminate on one month's notice. The agreed rent was $6,900 (including VAT) a month. A security bond of $6,900 was paid to Mr Krishna. The agreement conferred on Mr Krishna a right to distrain for rent that was overdue for 15 days.[7]

[24] The leased premises were used as a showroom and thus contained stock that belonged to Biz Trading.

[25] In or around March 2016, the rent was reduced to $5,450 a month. Subsequently, in what I think was either late April or early May 2016, Biz Trading gave notice of termination of the lease to take effect on 15 August 2016.

[26] At trial Mr Krishna alleged, and Mr Kim did not deny, that throughout the lease there had been a pattern of late rent payments by Biz Trading.

[27] A payment of $5,450 for rent was due on 1 July 2016. According to Mr Kim:

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[7] Distraint for rent is both provided for and regulated by the Distress for Rent Act 1961. Mr Kim did not contend that there had been a breach of this statute.

(a) He and Mr Krishna agreed in June 2016 or perhaps early July that the rent could be deducted from the security bond held by Mr Krishna. But:

(b) Mr Krishna telephoned him some weeks later to say that he had changed his mind and required the July rent to be paid.

Mr Krishna denied that he had ever agreed to off-set the rent due on 1 July against the bond.

[28] On Mr Kim's evidence, he was annoyed about Mr Krishna's change of heart. So rather than pay Mr Krishna the rent that was owing in the ordinary way, Mr Kim advised Mr Krishna's office by email and telephone calls that he could pick up the cheque from Biz Trading. Mr Krishna denied that he had been told this.

[29] On 29 July, Mr Krishna distrained for the outstanding rent. A bailiff seized and impounded Biz Trading's chattels that were in the leased premises. The distress notice demanded payment as follows:

(a)	Rent due on 1 July 2016	$5,450
(b)	Solicitor's costs	$2,500
(c)	Bailiff's fee	$1,200
	TOTAL	$9,150

The figure for solicitor's costs was expressed to be "VEP", which I assume means that it did not include value added tax.

[30] Mr Kim was critical of the amounts claimed for solicitor's costs and the bailiff's fees. Mr Krishna's evidence was that both amounts claimed corresponded to costs he had incurred – the solicitor's costs, to fees charged to him by his own firm and the bailiff's fee, to what the bailiff charged Mr Krishna. I would have expected that all of this would have resulted in documentation (for instance, in relation to the solicitor's costs, how they were accounted for by the firm along with an invoice from the bailiff or a

quotation). Mr Krishna did not discover or produce such documentation. In truth, it is not very likely that he (as the principal of his firm) charged himself (as a landlord) fees for work that either he or his employee had carried out.

[31] Late in the afternoon of 29 July, Mr Kim paid the amount demanded in cash at Mr Krishna's office.

[32] Biz Trading vacated the premises on 15 August 2016. According to Mr Kim he had sought to arrange for a joint inspection of the property with Mr Krishna, but Mr Krishna did not agree to this. In his evidence, Mr Krishna could not recall whether a joint inspection had been proposed.

[33] On 16 August 2016, Mr Krishna wrote to Biz Trading notifying it of a claim for damages arising out of the condition of the leased premises at termination of the lease.

[34] At trial, there was disagreement as to the condition of the premises when Biz Trading vacated. Mr Kim said that he had hired a contractor to tidy the premises up and they were left in appropriate condition. Without denying that a contractor had been hired, Mr Krishna disagreed with Mr Kim as to the condition of the premises. In his evidence Mr Kim claimed to have video footage and photographs to show the state of the premises on 15 August 2016. But such footage and photographs were neither discovered nor produced in evidence. I will mention shortly a judgment obtained by Mr Krishna against Biz Trading in relation to the premises and then a little later, how the evidence came out at trial on this issue.

[35] On 23 August 2016, Mr Kim sent an email to the Prime Minister, the Attorney-General, the Chief Registrar, the Legal Practitioners Unit, the Chief Justice, the Director of Public Prosecutions and the Korean ambassador to Fiji, Messrs Pillay and Khan and the financial manager of Biz Trading. It was headed:

> **COMPLAINT AGAINST SHALEND KRISHNA – ABUSE OF LAW OFFICE AND BEING LAWYER TO BLACKMAIL MONEY OUT OF MY COMPANY**

The full text of the email is set out in the appendix to this judgment.

[36] The email is concerned with both the events of 29 July 2016 and the claim by Mr Krishna for compensation for the condition of the leased premises. It is a lengthy document and makes many allegations. The most significant, at least to my way of thinking, are:

(a) Conclusory assertions *that Mr Krishna's actions amounted to blackmail* and that *he had acted fraudulently, dishonestly and criminally, had abused his position as a lawyer, acted unconstitutionally, and typically makes things up*.

(b) Assertions that for the rent due on 1 July there had been an off-set agreement in the terms already outlined and that Mr Krishna reneged on this agreement on 27 July.

(c) An assertion that Mr Kim had told Mr Krishna that he would write a cheque for the rent and Mr Krishna should get someone to pick it up.

(d) A description of what happened when Mr Krishna distrained for rent which included complaints *about Mr Krishna claiming $2,500 costs for work carried out by himself or an employee and as to the amount of the bailiff's fee* and that he (Mr Kim) was told that if he did not pay up, the costs would increase. There were also *assertions that the distress was illegal and, even if it was not illegal, the amount claimed was excessive* but that he had paid because with all his stock seized, he had no other choice.

(e) As to the claim in relation to the condition of the building, assertions that Mr Krishna had not been willing to engage in a joint inspection, the premises were in good condition when Biz Trading left, *the claim advanced by Mr Krishna was fabricated and made up and Mr Krishna was unlawfully withholding the bond money*.

I regard the summarised assertions that I have italicised as comments and everything else as assertions of fact.

[37] By way of explanation, my general approach has been to classify as comments assertions that were presented as either (a) inferences that Mr Kim had drawn from the primary facts that he had asserted, or (b) comments on what these primary facts meant as to Mr Krishna's character and conduct. There is scope for argument whether the assertions about fabrication of the damages claim (see above, [36](e)) were by way of comment, but I see no need to go into it in more detail because the fabrication allegation was clearly based on the assertion of fact that the premises were left in good condition. Unless this could be shown to be true, the defence of fair comment in relation to the fabrication allegation was not available.

[38] On 30 August 2016, Mr Krishna's solicitors wrote to Mr Kim threatening defamation proceedings. Mr Kim responded with an email of 13 September 2016 in which he defended his email of 23 August and concluded with a demand that Mr Krishna refund the bond along with the solicitor's costs and bailiff's fee that he had had to pay, failing which he would sue him for $500,000.

[39] The following day, Mr Krishna issued proceedings for defamation against Mr Kim in the High Court

[40] On 28 August 2020, Mr Krishna obtained a judgment against Biz Trading for $42,450 in relation to the condition of the building at the termination of the lease. Although Biz Trading had instructed lawyers to defend the proceedings, it did not appear at the hearing to defend the claim.

The proceedings in the High Court

The pleadings

[41] Mr Krishna's statement of claim was in reasonably orthodox form. This was not the case with the statement of defence. It set out a lengthy narrative of the history of the dispute as Mr Kim saw it. In it, Mr Kim asserted:

> 2.26 The Defendant considers that the manner, conduct and treatment he experienced from the Plaintiff as unacceptable as a lawyer.

> 2.27 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 highlight hereinabove.

[42] Mr Kim also counter-claimed for the recovery of, amongst other things, the costs associated with the distress and the security bond ($6,900). The counterclaim does not appear to have been pursued. Presumably this was because Biz Trading, and not Mr Kim, had funded the payments.

[43] There was a pre-trial conference on 18 July 2018 which resulted in (a) a set of agreed facts and (b) an identification of the issues to be determined. The identification of the issues to be determined was not particularly helpful. One of the issues was:

> Whether the statements made via letter dated 23rd August 2016 are absolutely false and unjustified?

Another was:

> Whether the statements made via letter dated 23rd August 2016 are libelous, slanderous and defamatory?

The first of these might be thought to encompass a defence of justification, albeit in a back-to-front way and the second was conceivably regarded by Mr Kim as opening up all defences that might be available. But absent from the list was anything specifically about fair comment as a defence.

The trial

[44] In his opening submissions, counsel for Mr Krishna referred to para 2.27 of the statement of defence. His submission then continued:

> The defence of fair comment is raised by the Defendant.

The transcript of what he said to the Judge includes discussion as to the availability of defences of justification and fair comment. Counsel made it clear that his position was that justification had not been pleaded. But he treated fair comment differently, saying:

> … 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.

[45] Mr Krishna gave evidence. He also called an additional witness who spoke of the damage that the 23 August 2016 email had caused to Mr Krishna's reputation in the Lautoka legal and business communities. Mr Kim gave evidence on his own behalf and called a Mr Chand to discuss the removal of stickers from aluco panels on the outside of the building.

[46] The evidence mainly focused on the events leading up to, and associated with, what happened on 29 July 2016. The evidence as to the factual background to the allegedly fabricated damages claim was far from complete. Neither party made a systematic attempt to show the state the premises were in on 15 August 2016 and if so to what extent, that state differed from what was required under the lease. More generally:

(a) Mr Krishna's case was presented on a basis that relied heavily on the judgment he had obtained against Biz Trading. His counsel's cross-examination of Mr Kim as to the condition of the premises addressed only that judgment.

(b) Mr Kim's evidence focused almost entirely on the stickers that had been placed on the aluco panels and did not address, at least in any detail, the other complaints that formed the basis of the judgment against Biz Holdings. He did, however, confirm in cross-examination that Biz Trading had retained lawyers to defend the proceedings.

(c) As noted, Mr Kim called Mr Chand to say what he had done in relation to the stickers. While Mr Chand was giving evidence, the Judge expressed concerns as to whether he could engage closely with the condition of the premises on 15 August 2016 given the judgment that Mr Krishna had obtained against Biz Trading. This disrupted the flow of Mr Chand's evidence which, in the end, came down to no more than assertions that he had removed stickers and had used kerosene to remove the glue that had affixed them to the panels. He did not explicitly address Mr Krishna's claim that removal of the stickers had damaged the aluco panels,

[47] In his closing submissions, counsel for Mr Krishna took a rather different approach to that adopted in opening to whether fair comment was in play. For instance, when he came to identify what he said were the issues, he said:

> **10.** The issue before this Honourable Court is:
>
> …
>
> **10.2** Whether the Defendant's defence of fair comment has been properly pleaded for the Court to consider such a defence?

[48] In his closing submissions, counsel for Mr Kim maintained that the defence of fair comment was available and maintained that it had been made out. This prompted reply submissions from counsel for Mr Krishna in which he engaged with the defence and argued that it had not been established. He did, however, maintain the contention that fair comment had not been properly pleaded.

The judgment

[49] The trial Judge held that fair comment had been advanced as a defence in the statement of defence and, in any event, Mr Krishna had appreciated that fair comment was being relied on and was "prepared to argue this defence".

[50] As to the legal components of the defence, the Judge said:

> In the context of the present case, I conclude 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),
> - 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. This analysis … omits any reference to the public interest requirement.

[51] This formulation is wrong in at least two, and possibly three, respects. First, it does not include the requirement for the comment to be of a kind that an honest person could have made on the facts that are shown to have been true. This is a requirement, as Lord Nicholls made clear, see above at [18] and this was confirmed in *Joseph v*

Stiller. Secondly, it incorrectly asserts that the public interest requirement has been abandoned. That this remains a requirement was affirmed both by Lord Nicholls and in *Joseph v Stiller*. Thirdly, the requirement that the statement did not "misstate the facts" was expressed in terms that did not make it clear that the onus of proof is on a defendant advancing a fair comment defence to show that the facts relied on were true. So, if the Judge, by his formulation meant to imply that it was for Mr Krishna to show that the facts asserted by the Mr Kim were misstated, he was wrong. As will become apparent later, I rather think that this may be what the Judge meant.[8]

[52] The Judge concluded that the allegations of dishonesty, fraud and criminality were expressions of opinion rather than assertions of fact and that they should not be taken literally.

> It is simply impossible to believe that a recipient of the defendant's letter, reading what he says, would not have understood exactly what was meant; i.e. that it was the plaintiff'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 the defendant was charging the plaintiff with the commission of a criminal offence; they would have realised the assertions were no more than 'rhetorical hyperbole', a vigorous, emotional and perhaps exaggerated, but nevertheless heartfelt description of conduct by someone who obviously regarded the plaintiff's business conduct as extremely unreasonable.

[53] As to the facts in relation to the distraint for rent, the Judge found that Mr Kim had told Mr Krishna that a cheque for the rent was available to be picked up from the leased premises. However, he did not make any explicit finding as to whether there had been a rent off-set agreement, as Mr Kim asserted and Mr Krishna denied.

[54] In discussing whether the allegations of "criminal, unethical or immoral conduct" were by way of comment, the Judge referred to what Mr Kim had said in his email about the events leading up to what happened on 29 July (including what he had to say about the off-set agreement) and then went on:

> … in the context of *these assertions, as to which the defendant has given evidence which I accept,* the statements about blackmail, fraud, criminality and illegality appear as comments, not statements of facts that the plaintiff is actually guilty of blackmail in the criminal sense.

[8] See below at [58](c).

But while this passage (and in particular, the words I have italicised) is at least consistent with a finding of fact in favour of Mr Kim on the off-set agreement issue, I do not think that this is what the Judge meant.

(a) The "evidence which I accept" comment is made only in passing and in a context in which he was addressing another topic, namely whether the most defamatory of Mr Kim's allegations were by way of comment or assertions of fact.

(b) A little later, the Judge stated that the dispute whether Mr Kim had told Mr Krishna or his office that a rent cheque was available and could be collected:

> … was really the only important conflict between the plaintiff and the defendant.

He would not have said that if he had already made a finding of fact in favour of Mr Kim on the off-set agreement issue.

(c) The Judge gave appropriate reasons for his finding of fact in relation to the rental cheque issue. So, if he had found in favour of Mr Kim's account of the off-set agreement, I would have expected him to have provided similar reasons. This is especially so as there was no logical reason for Mr Krishna to have agreed to the off-set proposal as it would have prejudiced his position in relation to the security bond in favour of a tenant who had been serially in default of rent payments and who had one more rent payment to make (on 1 August). So, if the Judge had rejected Mr Krishna's evidence, I would expect him to have explained why he chose to accept Mr Kim's inherently less plausible account. But no such explanation was given.

(d) If the Judge had found that Mr Krishna had entered into an off-set agreement and then reneged, I would have expected him to have mentioned it as part of his analysis of the facts that supported the fairness of what he took to be Mr Kim's complaint that the distraint was extremely unreasonable. Such a finding is conspicuously absent from that analysis. All he said was that Mr Kim's advice on 27 July 2016 that Mr Krishna could pick up the rent cheque meant that:

> the issue of distraint for recovery of the July rental payment was unnecessary … .

(e) Most significantly, the Judge held that the distraint was legal.[9] This would not have been the case if there had been an off-set arrangement as alleged by Mr Kim. This is because:

(i) While the postulated agreement was in place, it would have at least waived the obligation to pay rent on 1 July.

(ii) The earliest that rent could have become payable on Mr Kim's evidence was when Mr Krishna disavowed the off-set agreement and he (that is Mr Kim) told Mr Krishna he could pick up a cheque for the rent at Biz Trading's premises. On Mr Kim's evidence, this must have been on or around 27 July, which is the date referred to in the email. On this narrative, the rent could not have been outstanding for long enough – 15 days as required by the lease – to justify the distraint when it took place on 29 July.

[55] So, despite having misgivings about being required to reconstruct what I think the Judge's findings of fact were (or were not), I consider that I must approach the case on the basis that Mr Kim did not establish that there had been an off-set agreement from which Mr Krishna had reneged. This means that on the basis of the findings of fact that the Judge did make, the only factual criticisms that could be accurately made of Mr Krishna's conduct was that distraint for the recovery of the July rental payment had been unnecessary (and commercially unreasonable) because Mr Krishna could have picked up a cheque by going to the premises of Biz Trading and that the solicitor's fees for which Mr Krishna sought recovery were for work that either he or an employee had carried out.

[56] Although the Judge approached the case on the basis that there was no objective element to the defence,[10] my reading of his judgment is that he was of the view that

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[9] He said at [34] of his judgment that he had "no doubt" that the distraint was legal "in the technical sense".

[10] See above, at [51].

comments that the distraint was unreasonable were of a kind that an honest person could have made:

> What the plaintiff did in executing distress for rent in the circumstances may have been perfectly legal, but it was at the very least unsympathetic, it cost the defendant a substantial sum more than was otherwise due (a good part of which directly benefitted the plaintiff via his law firm) and was always likely to provoke the sort of outraged reaction he got from the defendant.

[57] As to the fabrication allegation, the Judge said this:

> With regard to the building damage, the defendant sets out in his letter the fact that remedial work had been voluntarily carried out by the company prior to vacating the premises, and his attempts to arrange an inspection with the plaintiff – something the plaintiff refused to participate in. This provides context for the defendant's assertion in the letter that:
>
> > after we vacated Shalend fabricate[d] issues about building damages that we are not responsible for.
>
> *Mr Kim was not asked in evidence in chief or in cross-examination about the Magistrates Court judgement against Biz Trading for damage to the premises.* Taking into account that his letter was written only the week after the termination of the lease on 15 August 2016, in the absence of some evidence on the subject I am not prepared to conclude that the failure to defend the Magistrates Court claim four years later means that the defendant's earlier statements are untrue. In any case, applying section 16 Defamation Act 1971 … any failure by the defendant to prove this element of his letter does not in my view invalidate the defendant's comment based on the other material in the letter that is proved. The thrust of the letter is a commentary by the defendant on the plaintiff's business practices as described, and the absence of proof of the factual basis for one, relatively minor, element of that commentary does not disqualify the commentary as a whole from being fair comment.

[58] This passage of the judgment is difficult to follow:

(a) The passage that I have italicised is wrong as Mr Kim was cross-examined on the judgment Mr Krishna obtained against Biz Trading.

(b) The Judge did not make an explicit finding whether Mr Krishna had declined an invitation to participate in a joint inspection of the premises before Biz Trading vacated the premises.

(c) His refusal to conclude that "the failure to defend the Magistrates Court claim … means that the defendant's … statements [as to the condition of the premises] are untrue" suggests an inversion of the burden of proof rather than

a positive finding that Mr Kim's statements about the condition of the premises – which were the factual basis for his fabrication comments – were true.[11]

(d) I do not see the allegations of fabrication, linked as they were to more general allegations of dishonesty, as a "relatively minor … element" of what Mr Kim said.

[59] The Judge concluded his judgment in this way:

> For these reasons, I find that the defendant's letter, read in its entirety, was fair comment as he pleads, and he has not defamed the plaintiff.

The Court of Appeal judgment

[60] The Court of Appeal dismissed Mr Krishna's appeal.

(a) It was of the view that the Judge had been entitled to deal with the case on the basis that fair comment was available as a defence.

(b) It set out without adverse comment the passage from the judgment in which the Judge had recorded wrongly what he considered the elements of the defence to be (see above, at [50]).[12] On the Judge's formulation, there was no objective element to the defence. For presumably this reason, the Court of Appeal did not inquire into what facts had been established and whether on those facts an honest person could have made the allegations that Mr Kim made against Mr Krishna.

(c) It held that the Judge had been entitled to conclude that the comments made by Mr Kim were on a matter of public interest.

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[11] Compare above, at [51].

[12] The Court observed merely that the Judge's formulation had not been challenged by counsel for Mr Krishna, see the Court of Appeal judgment at [57]. It is true that the written submissions of counsel for Mr Krishna did not directly challenge the Judge's formulation of the elements of fair comment. Those submissions did, however, set out what counsel maintained were the facts and then argued that those facts did "not justify" the comments. As well, it is an odd feature of all this that just before setting out the Judge's formulation of the defence, the Court of Appeal (at [55]) had paraphrased accurately the effect of what Lord Nicholls said in the Hong Kong case and Lord Phillips said in the *Joseph v Stiller* but made no attempt to correlate what Lords Nicholls and Phillips had said with the very different formulation of the Judge.

(d) It considered that the statements alleging blackmail, dishonesty, fraud and criminality were statements of opinion rather than assertions of fact.

(e) In rejecting a submission from counsel for Mr Krishna that the facts that were said to have warranted Mr Kim's comments had not been identified, it referred to the argument of counsel for Mr Kim that he had given evidence as to the relevant facts and that a reader of the email would have been able to identify those facts. The Court then went on to say that it:

> … has not been established that the Judge erred in finding sufficient factual background, upon which Mr Kim's opinions were based was set out in the letter.

This passage is at least consistent with the Court's adoption of the purely subjective approach proposed by the Judge.

[61] It will be recalled that the trial Judge had concluded that the email had not been defamatory of Mr Krishna (see [59], above). When the Judge said this, all he meant was that the defence of fair comment had succeeded. He was not denying that the letter had been defamatory of Mr Krishna in the usual sense of being sufficiently damaging to his reputation to warrant defamation proceedings. But although it had never been in dispute that the email was defamatory of Mr Krishna in that usual sense, the Court of Appeal concluded that there had been insufficient damage to Mr Krishna's reputation for the email to be the foundation for a defamation claim. It cited no authority for the approach it took.

My approach

Was the email defamatory?

[62] I am discussing this only because the Court of Appeal concluded that the email was not defamatory, see above at [61].

[63] Until recently, the recognised threshold for defamation was the tendency of the words complained of "to lower the plaintiff in the estimation of right-thinking members of society."[13] As this Court explained in *Sharma v Biumatotoya*, there has recently been

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

focus in both the United Kingdom and New Zealand on whether there should be a requirement for actual or likely harm to the plaintiff "reputationally, financially and otherwise".[14] The Court noted that a "serious harm" threshold has been introduced in the United Kingdom by the Defamation Act 2013.[15] Prior to the enactment of that statute, Tugendhat J had proposed a "substantial harm" threshold in *Thornton v Telegraph Media Group Ltd.*[16] In New Zealand, the courts have adopted a "more than minor" threshold, but with the onus of proof as to it lying on the defendant.[17] In *Biumatotoya*, this Court concluded that in the absence of a statutory provision along the lines of s 1 of the Defamation Act in the United Kingdom, the highest liability threshold that could be adopted would be "substantial harm".

[64] The allegations made by Mr Kim of dishonesty, fraud and criminality were more serious than those in issue in *Sharma v Biumatotoya*. Mr Krishna was a lawyer and held several significant positions. The email put directly in issue his honesty. On any plausible view of the harm threshold, the email was defamatory.

Aspects of the case on which I agree (at least broadly) with the Judge

[65] Given the way counsel for the plaintiff opened the case at trial, it was open to the Judge to conclude that the defence of fair comment could be relied on by Mr Kim.

[66] On the basis of the Judge's findings of fact, Mr Kim had, prior to the 29 July, told Mr Krishna that he could pick up a cheque for the July rent. This was a finding of fact that was open to the Judge. As well, Mr Krishna claimed solicitor's costs for the work that his firm (of which he is the principal) had provided. Based on those facts, an honest person could have asserted by way of comment that Mr Krishna's actions had been unreasonable, what he had claimed for solicitor's costs should not have been demanded and he had abused his position as a lawyer. This is what the Judge concluded in the passage of his judgment I have set out at [56], above.

[14] *Sharma v Biumatotoya* [2024] FJSC 17 at [23] – [26].
[15] See s 1 of the Defamation Act 2013 (UK).
[16] *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985.
[17] *Craig v Slater* [2020] NZCA 305.

[67] I accept that lawful but unreasonable distraint of goods leading to an arguably excessive payment having to be made to secure release of the distrained property might be described in ordinary parlance as "blackmail" without necessarily invoking the definition of blackmail in the Crimes Act 2009. In this respect too, I agree with the approach the Judge took.

[68] The allegation that the distraint was illegal must have rested on the premise that the off-set agreement meant that the July rent had not been outstanding for 15 days prior to 29 July 2016. The Judge, however, held that the distraint was legal. The factual premise for this comment having not been established, the defence of fair comment is not available. But since the difference between an illegal distraint and an unreasonable distraint is of limited moment and the assertion as to excessive charges was in any event protected by fair comment, I see this aspect of the case as being so inconsequential as not to warrant further analysis.

[69] What all of this means is that if the email could be construed as alleging no more than a complaint that the distraint had been unreasonable and the charges excessive, Mr Kim's defence of fair comment would succeed. However, as I will now explain, I consider that the email alleged considerably more than that.

The meaning of the assertions of dishonesty, fraud, criminality and fabrication of the damages claim,

[70] Read literally, the email alleges that Mr Kim had been dishonest, possibly in reneging from the alleged off-set agreement and more explicitly in fabricating his damages claim in relation to the state of the premises at the end of the tenancy.

[71] In the email, assertions of fabrication are linked with making things up and unlawfully withholding the bond:

> 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.
>
> …
>
> As a lawyer he will typically make things up to try to defend his position – I am ready for it because 4 employees will independently give evidence against Shalend. ...
>
> 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.

When these passages from the email are read together, they convey the ideas that the claim in relation to the premises was based on lies and that Mr Krishna's purpose was to fabricate a basis on which he could withhold the bond.

[72] The emphatic nature of the language, for instance, "in my 10 years in being in Fiji I have never experienced such dishonesty and fraud from anyone", supports a literal interpretation of the email.

[73] In assessing what the email meant, the recipients are of relevance. If all Mr Kim was alleging was a commercially unreasonable distraint, why was the email sent to the Prime Minister, the Attorney-General, the Chief Registrar, the Chief Justice, the Legal Practitioners Unit and the Director of Public Prosecutions? By way of most obvious example, the Director of Public Prosecutions would have an interest in allegations of criminality but no interest at all in whether the landlord of commercial premises had acted unreasonably in lawfully distraining goods to cover unpaid rent. That he saw these public officials as having a role to play in relation to his allegations is made clear by his request in the email to them:

> Please …take appropriate measures against Shalend Krishna.

[74] For these reasons I conclude that the email meant what it said.

On the facts that were shown to be true, were the assertions of dishonesty, fraud, criminality and fabrication fair comment?

[75] The factual basis that the Judge held to have been established for the comments was confined to the distraint having been commercially unreasonable. As well, it was shown that Biz Trading had engaged a contractor to remove stickers from the aluco

panels. Although the Judge said that the judgment Mr Krishna obtained against Biz Trading did not mean that Mr Kim's statements about the condition of the premises were untrue, he did not make a positive finding of fact that they were true, and indeed, given the inconclusive evidence that was led, could not properly have done so.

[76] This means that the success or failure of the fair comment defence turns on whether a person acting honestly could, on the basis of an unreasonable but lawful distraint and a contractor having been hired to tidy up the premises, assert that Mr Krishna had acted in a criminal, fraudulent and dishonest way and fabricated the damages claim.

[77] As will be apparent, this is not a question that the trial Judge asked himself. As to the distraint, the Judge treated the email as meaning no more than that Mr Krishna's conduct had been "extremely unreasonable". He does not appear to have considered what the fabrication allegation meant. It follows that his assessment of fairness was not addressed to what I regard as the real sting of what Mr Kim had said.

[78] The fabrication allegation was so closely tied up with the factual premise on which it was primarily based – that the premises were left in an appropriate condition – that the failure to prove that at trial means that the fair comment defence in this respect fails. And more generally, I am of the view that a person acting honestly could not have asserted by way of comment that Mr Krishna had acted dishonestly, fraudulently or criminally on the basis of the limited facts that Mr Kim proved.

A personal attack?

[79] Both the Judge and Court of Appeal addressed whether the email should be regarded as a personal attack on, or personal abuse of, Mr Krishna. Both concluded – rather implausibly to my way of thinking – that the email should not be so categorised.[18] They did this without explaining why this issue might matter.

[80] In his submissions on behalf of the petitioner, Mr Ram explained why it might be relevant to the case to determine whether the email was a personal attack. This is because there is a line of authority that started with *Campbell v Spottiswode* and proceeds on the basis that in relation to personal attacks – for instance alleging

[18] See the High Court judgment, at [37] and the Court of Appeal judgment, at [45] – [46].

disgraceful conduct – a fair comment defence can only succeed if the comment in issue was a reasonable inference from the facts stated and proved.[19]

[81] It is not easy to find modern cases where *Campbell v Spottiswode* has been applied. Indeed the reasonable inference approach was rejected by Eady J in *Branson v Bower*.[20] As well, statutory formulations of the defence of honest opinion (which in some jurisdictions has replaced fair comment) exclude any reasonableness requirement.[21] On the other hand, although *Branson v Bower* was cited in argument in *Joseph v Stiller*, the *Campbell v Spottiswode* line of cases was discussed at some length by Lord Phillips without apparent disapproval. On this basis there remains a question whether *Campbell v Spottiswode* is still good law.

[82] On the *Campbell v Spottiswode* approach, Mr Kim's defence would plainly fail; this given the allegations of dishonesty fraud and criminality which were not reasonable inferences from the facts he proved at trial. But since the defence fails anyway on the less stringent "honest person" approach, I see no need to engage with whether *Campbell v Spottiswode* should be applied in Fiji.

Other liability issues: public interest and malice

[83] As the reasons I have given mean that the defence of fair comment fails in relation to the allegations of dishonesty, fraud, criminality and fabrication, I can deal with other liability issues briefly.

[84] As I have explained, public interest remains a requirement of the defence of fair comment, see above at [50]. The Judge's conclusion to the contrary was wrong. But, as noted, the trial Judge held that. in any event, Mr Krishna's profession as a lawyer

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19 *Campbell v Spottiswoode* (1863) 3B & S 769, (1863) 122 ER 288. Other cases to the same effect include *Merivale v Carson* (1888) 20 QBD 275, *Dakhyl v Labouchere* (*Note*) reported at [1908] 2 KB 325n and *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309.

20 *Branson v Bower* [2000] QB 737. This case was cited with approval by the Court of Appeal in Fiji *Times Ltd v Vayeshnoi* [2010] FJCA 35 but without mention of the *Campbell v Spottiswode* line of cases.

21 See for instance, s 12 of the Defamation Act 1992 (NZ): "In any proceedings for defamation in which the defendant relies on a defence of honest opinion, the fact that the matter that is the subject of the proceedings attributes a dishonourable, corrupt, or base motive to the plaintiff does not require the defendant to prove anything that the defendant would not be required to prove if the matter did not attribute any such motive". Section 3 of the Defamation Act 2013 (UK) is not so explicit but defines the defence in terms that leave no room for a reasonable inference requirement.

and the various roles he has held meant that the comments made by Mr Kim about him were in the public interest, a view with which the Court of Appeal concurred.

[85] The public interest requirement is not very demanding.[22] In practice this means that a defendant who establishes a sufficient factual basis for comments made about a public figure is likely to succeed on public interest. Mr Krishna was sufficiently a public figure to mean that criticism of him, if otherwise protected by the fair comment defence, would be in the public interest. That, however, is not the situation we face. On the case as I see it, Mr Kim, having been involved in a series of comparatively minor disputes concerning the termination of a lease, made extravagant criticisms of Mr Krishna that were not substantially founded on the facts that he could prove. Looked at in this way, it is not easy to see how his email advanced the public interest.

[86] As it happens, I consider that the determination as to whether the public interest requirement has been satisfied is best made once the Judge has decided what the defamatory publication meant and whether the facts that were proved provided a sufficient factual foundation for it – that is, whether an honest person could have made the comments in question on those facts. Where a fair comment defence has failed for other reasons, I see no point in addressing public interest.

[87] The question whether Mr Kim was actuated by malice turns on if he genuinely believed the comments that he made. There is an issue, at least in my mind, whether honesty in this context is to be determined by reference to the message Mr Kim was trying to convey or what the Court concludes his email meant. But given that the defence of fair comment fails anyway, I see no need to engage with this not entirely easy question.

Should this Court resolve the case now or remit it to the High Court for a new trial or assessment of damages?

[88] Mr Kim's statement of defence and the subsequent statement of issues did not set out the fair comment defence in a conventional and orderly way. Most importantly, the statement of defence did not distinguish between the allegations in the email that were

[22] *London Artists Ltd v Littler* [1969] 2 All ER 194 at 198 per Lord Denning MR.

factual and those that were by way of comment. So, there was no identification of the factual premises for the allegations that were by way of comment. These problems were exacerbated when the Judge decided to approach the case on the basis that the defence depended on Mr Kim's subjective belief in the honesty of what he said rather than whether, on the facts that were proved, an honest person could have said what Mr Kim had said. In turn this contributed to the Judge not expressly determining two important factual issues, whether (a) there had been an agreement to off-set rent against the security bond and (b) whether the state of the premises when Biz Trading left provided an adequate factual foundation for the allegation that Mr Krishna had fabricated his claim for damages. His failure to do so, especially in relation to the alleged offset agreement, has driven me to rely on inferences as to what he found.

[89] I have considered whether the case should be remitted to the High Court for a new trial as to liability and damages. Although such remittal would enable a more orderly determination of the issues in the case, I do not see it as appropriate. This is because of the additional expense that this would cause, the time that has now elapsed since the events that gave rise to the litigation – nearly nine years – and the only moderate significance of the case.

[90] Although it would be possible to remit the case to the High Court for an assessment of damages, I think it more appropriate for us to carry out this exercise. We are as well-placed to fix damages as a High Court judge would be and remitting the case to the High Court would result in further costs and delays.

An appropriate award of damages

[91] Mr Kim's direct attack on Mr Krishna's honesty invited a defamation claim. This attack must have been distressing for Mr Krishna and no doubt caused him some embarrassment in his dealings in the legal and business communities of Lautoka. As well, I consider that Mr Kim was setting out to cause Mr Krishna reputational harm. So, I do not see the case as warranting nominal damages.

[92] All of that said, there are a number of factors that point to an only moderate award of damages.

(a) This judgment will serve to vindicate Mr Krishna's reputation, clearing him of the imputations of dishonesty, fraud, criminality and fabricating the claim for damages over the condition of the leased premises when vacated.

(b) The email was sent to a limited number of people. The officials who received it did not act on it. The only other recipients were Messrs Pillay and Khan and an employee of Biz Trading. The drift of Mr Krishna's evidence is that his friendship and business relationships with Messrs Pillay and Khan broke down as a result of the events of July 2016. There is, however, no evidence to link that to the email, as opposed to what they knew of the dispute as a result of their roles as directors and shareholders of Biz Trading.

(c) Although the allegations in the email were serious, anyone reading the email would have seen it as basically a rant by Mr Kim and likely to be more reflective of his anger than the substance of what he was alleging.

[93] Mr Ram very helpfully provided us with a number of cases in which damages have been awarded for defamation. On my reading of them, they deal with situations that are not closely comparable to the present case, arising as it does out of a private business dispute and involving only limited publication of the defamatory material.

[94] I would therefore award $25,000 by way of general damages, an award that I see as being sufficient to meet the gravity of Mr Kim's conduct and thus to render unnecessary an award of exemplary damages.

Orders of the Court

1. *The judgments of the High Court and Court of Appeal are reversed.*

2. *We enter judgment for Mr Krishna as to liability and award him $25,000 damages to be paid by Mr Kim.*

3. *The awards of costs against Mr Krishna in the High Court and Court of Appeal are set aside.*

4. *Mr Kim is to pay Mr Krishna costs of (a) $3,000 in respect of the High Court proceedings, (b) $3,000 for the Court of Appeal hearing and (c) $10,000, summarily assessed for the appeal to this Court.*

The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Madam Justice Lowell Goddard
Judge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court

Appendix

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 a premises from Shalend Krishna from last year 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 notice. We were to vacate by 15th August as per notice.

Everything went well and Shalend and I communicated regularly through email and phone. The total bond Shalend held was $6900 and current monthly rent $5450. At the beginning of July Shalend and I thought to agreed that the bond will be used for July's rent.

Then on 27th 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 you a cheque and send your employee to pick up.

Instead 29th July at 10.30am 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 they 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 an 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 this 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 excessive and abuse of power. However I maintain distress was illegal and unconstitutional.

Further more We were to do touch up and painting the shop for next tenant and building owner satisfaction so we painted and fixed everything that pointed out to us by 11th 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 the confirmation of the building inspection and the chief clerk told that Lawyer Shalend will do the building inspection alone.

Then have vacated the premises on 15th 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 $3925 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 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.

…

Thank you

Yours sincerely

Sung Rea Kim

Director

Biz Trading South Pacific Limited.