

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N: )  
)  
CHUNG-WAH WAN aka HOWARD ) Mr Wan, for himself  
WAN )  
Plaintiff )  
)  
- and - )  
)  
RAYMOND LAU ) Mr Lau, for himself  
)  
Defendant )

JUDGMENT

**D.L. Corbett J.:**

[1] Howard Wan sues Raymond Lau for defamation. The impugned words are in an email sent my Mr Lau to fourteen recipients on March 20, 2011. Some brief background is necessary to place the impugned words in context.

**Background**

[2] Mr Wan and Mr Lau both own commercial condominiums in First Markham Centre, a 107 unit commercial condominium near Fairburn Drive and Rodick Road in Markham, Ontario, next to the much larger First Markham Place shopping centre.

[3] Mr Wan is a real estate agent who works with Tradeworld Real Estate, a large real estate brokerage firm located in First Markham Centre (I was told that about 300 real estate agents work out of this office).

[4] Mr Lau is a locksmith and has his business at First Markham Centre. In 2008, he was elected as one of three directors on First Markham Centre’s first board of directors by independent unitholders of the condominium. He remained as a director in 2009 but did not run for re-election in 2010.

[5] Mr Lau sought election to the condominium’s board again in 2011. The election was held during the condominium’s annual general meeting on March 9, 2011 (the “AGM”).

[6] Prior to the AGM, Mr Lau sought proxies from some unitholders, including Mr Huang, who operated a restaurant at the plaza. Mr Huang told Mr Lau that his family held title to two units in the condominium, units 15 and 16. Title was in the name of a numbered company that was legally owned by Mr Huang's wife. The wife, Mrs Huang, was living in Hong Kong and was not available to provide a proxy, but Mr Huang said that he could sign the proxy on Mrs Huang's behalf. And that is what Mr Huang did: he signed his wife's name on the proxy and gave it to Mr Lau.

[7] On March 9, 2011, Mr Lau attended the AGM, registered his proxies, and went into the meeting room. A few minutes later, before the meeting started, Mr Lau was approached by Fanny Liu, the senior manager of the condominium's management company. There was a problem. Someone was seeking to register another proxy for a unit owned by the Huangs. Mr Lau returned to the registration table to discuss the proxies.

[8] The competing proxy was tendered by Margaret Chiu, who had a "batch" of proxies. The proxy brought by Ms Chiu was made out on behalf of units 14 and 15. It was otherwise blank but appeared to be signed by Mrs Huang.

[9] Mr Lau explained that he had personally obtained his proxy from Mr Huang and provided Mr Huang's phone number so that Ms Liu could confirm matters with Mr Huang. Ms Chiu said that she had not obtained her proxies herself. She said that they had been given to her by Howard Wan of Tradeworld Realty. Ms Chiu had no information about how her proxy could be confirmed by condominium management.

[10] Ms Liu telephoned Mr Huang, who confirmed what Mr Lau had said. On the basis of this confirmation, and the mis-identification of units in the competing proxy, it was decided that the proxy tendered by Mr Lau would be effective and the proxy tendered by Ms Chiu would not be effective at the meeting.

[11] There were about 70 unitholders at the AGM. Some of them heard about the proxy issues as they were being discussed at the registration table.

[12] Mr Wan was not at the AGM.

[13] The AGM was held. The meeting passed a resolution increasing the size of the board of directors from three to five. Mr Lau was elected as one of the directors.

[14] Eleven days later, Mr Lau went for dinner at Mr Huang's restaurant. He took with him a photocopy of the proxy that had been tendered by Ms Chiu at the meeting. He told Mr Huang that this proxy had been held by Margaret Chiu and that she had said that it had been given to her by Howard Wan.

[15] Mr Huang examined the proxy and said that the signature appeared to be his wife's. However, he was adamant that the signature could not be genuine. To his knowledge, his wife

was in Hong Kong and knew nothing about the AGM. To his knowledge, his wife knew no one named “Margaret” or “Howard”.

[16] Mr Lau asked Mr Huang to call his wife to confirm these things. Mr Huang refused. In his view there was no need. The signature could not possibly be genuine. How dare “these people” have the audacity to forge his wife’s signature? They could just as easily forge her signature on a deed selling the properties!

### **The Impugned Email**

[17] With this information from Mr Huang, Mr Lau went home and sent an email to fourteen people. The email (in translation) reads as follows:

On the night of the FMC AGM, I had 6 proxies (10 units) with signatures that I had personally collected from the landlords. One of the proxies, which pertained to two units (an alphabet company that belongs to Mr and Mrs Wong of Bayview Court Restaurant), was duplicated. One of the landlords, Magrate Chiu (on the FMP Board of Directors for 2010 and owner of Ivan Optical), had a batch of proxies that contained to duplicate. The document was a photocopy and not addressed to anyone. Margrate said that one of the landlords, Howard Wan (a Tradeworld Realty Inc. broker) had given it to her. At the time, Franny Liu had telephoned Mr Wong and confirmed that the proxy was, indeed, for me. Tonight, while having dinner at Bayview Court with my family, I talked about this matter with Mr Wong and he indicated that his wife had been in Hong Kong all that time and did not know any Magrate or Howard. I showed the document to him, and he confirmed that although the format of his wife’s signature was correct, they had not written the rest of the document. The questions are: who would know the format of his wife’s signature, and how did it appear on a proxy about which he knew nothing? I asked him to phone his wife in Hong Kong tonight to clarify the matter, but he adamantly insisted that his wife had not signed it and also denounced these people angrily for their audacity in forging the document. They could have sold his property without his knowing it. I also found this proxy dubious: the unit numbers were wrong, showing #14 and #15, instead of the proper #15 and #16 after the Builder had eventually eliminated the numbers 4, 14 and 24. In addition, the bottom of the sheet showed the name of a computer user – a lady named Flora. As far as I know, this is the name of one of the secretaries in Tradeworld Realty Inc.’s Marker Village Office. Tomorrow, I shall go to PalMax as an election candidate and ask to examine all of Magrate’s proxies, as the *Condominium Act* allows. I will help Mr Wong to investigate this matter and check to see if there are any more questionable proxies. For the moment, I do not wish to elevate the matter and shall let Mr Wong decide is he wishes to

pursue any recourse. On the other hand, I would like all of you to contemplate why Tradeworld Realty would go to this length and deploy all resources to help certain candidate succeed in the election. What is their ulterior motive? Why would they try to thwart the fairness and justice of our election? Is our democracy secure?<sup>1</sup>

[18] Mr Huang was wrong. His wife's signature was not a forgery. The truth emerged over the following two days, immediately following which Mr Lau sent out the following email correcting his earlier email:

Today I received a phone call from Mr T.C. Chan of Tradeworld Realty, and also contacted the restaurant owner, Mr Huang, in order to understand the matter. Mr Huang told me that there is some misunderstanding. What happened was the youngest son of Mr Huang is also engaged in real estate, so he knows Howard Wan of Tradeworld Realty. Mr Wan asked Mr Huang's son to fax the proxy to Hong Kong, in order to let Mr Huang's wife sign the proxy, but Mr Huang did not know. That's why he had that conversation with me that night before and I was too aggressive, (this is my complex relationship with Tradeworld Realty, I did not understand why they do not help us canvassing with each election), I did not think too much, and immediately inform you all about the matter.

Mr T.C. Chan has also criticized the last few words that I said is not correct. I hereby acknowledge my Fault, and would like to clarify the misunderstanding immediately. I would like to sincerely extend my apology to Tradeworld Realty. In fact I did go to the restaurant last night with the intention to talk to Mr Huang to confirm whether Mr Huang has asked Mrs Huang who was in Hong Kong to sign or proxy not. However, Mr Huang was off so that I was not able to confirm the case. Actually, it was never my intention to email this to the public. I just sent it confidentially to some people, because I believed that all the intended recipients would not let it go to public and will wait and leave the matter to my last clarification, I hope the person who forwarded my last e-mail will also forward this e-mail to Mr T.C. Chan too. Again, I hope that Mr T.C. Chan will accept my apology and I will be careful with my own words, and I will not make the same mistakes. If this matter has caused damage or loss to anyone, I will do my best to compensate!

I hope everyone understands that all candidates are able to do their own canvassing and not rely on other people during each election, then similar misunderstanding can be easily avoided.

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<sup>1</sup> Exhibit 1. The accuracy of the translation is not challenged. I have not corrected spelling errors or variable spellings of proper names. "Magrate" is Margret Chiu. "Wong" is "Huang".

[19] Mr Wan had no role in collecting Mrs Huang's proxy. He was involved in collecting other proxies, and he turned over all of the proxies collected by persons associated with Tradeworld – including the proxy from Mrs Huang – to Ms Chiu prior to the AGM. Thus Ms Chiu was telling the truth when she said that she received the proxy from Mr Wan.

[20] I will refer to the first email as the “impugned words” and the second email as the “Retraction”.

### **The Issues**

[21] The parties had counsel of record when they delivered their pleadings. Those pleadings define the issues for trial.

[22] The statement of claim pleads publication of the impugned words “to the directors of the Condo Corporation” and that the email “was subsequently re-circulated to others, including but not limited to the Condo Corporation members” (para. 11). The statement of defence admits publication of the impugned words to the board of directors, but not the allegation of “re-circulation” (para. 2).

[23] In his defence, Mr Lau pleads that the impugned words:

- a. are “accurate and truthful” (para. 5)
- b. were made in good faith and without malice upon a matter of public interest and are therefore “fair comment” (para. 7)
- c. are responsible communication on matters of public interest (para. 8)
- d. were made in good faith and in the honest belief that they were true on an occasion of qualified privilege (para. 10)

[24] Mr Lau pleads that the impugned words were made “without malice” as part of his pleading the defence of qualified privilege. Mr Wan did not deliver a reply in which he raises the issue of malice in response to the defence of qualified privilege.

[25] Finally, Mr Lau pleads and relies upon the Retraction as an apology. Mr Wan did not plead over to this allegation, and did not plead in respect to the Retraction in his statement of claim.

### **Analysis**

#### **(a) Summary and Disposition**

[26] I conclude that Mr Lau succeeds in his defence of qualified privilege and for that reason the claim must be dismissed.

**(b) Analysing the Law in this Case**

[27] Defamation law is notoriously technical. This is not some defect in the law. The interests at play, which need to be balanced, are themselves complex and require a textured and nuanced response from the law.

[28] As noted above, the parties were self-represented at trial. It became apparent to me that a central issue in the case is the application of the defence of qualified privilege. It is not the job of the court to educate the parties in the applicable law in order to help them frame the issues in the case. The issues are supposed to be framed by the pleadings, at the start of the case, and not by the judge, after hearing the evidence. I provided that parties with a copy of the Divisional Court decision in *Whitehead v. Sarachman* to help them understand some basic principles of defamation law, and in particular, the law of qualified privilege.<sup>2</sup>

**(c) The Impugned Words are defamatory of Mr Wan**

[29] In the statement of claim, Mr Wan alleged that the impugned words “alleged that

- a) [Mr Wan] had forged Mrs Wong’s signature on the proxy given to Margaret Chiu;
- b) [Mr Wan]’s action were part of a scheme by the plaintiff and the real estate broker with whom the plaintiff was associated, Tradeworld..., to help other candidates at the AGM other than Lau; and that
- c) The plaintiff was trying to “ruin” the election (para. 12).

[30] This pleading is not accurate and does not comply with the rules of pleading in defamation actions. However, read with reasonable liberality, this shortcoming can be overlooked. The impugned words have been quoted in full, above and are not in dispute. I read paragraph 12 of the statement of claim as a pleading of the fair meaning of the impugned words.

[31] I find that the impugned words, in their ordinary and plain meaning, assert that the proxy from Mrs Huang was a forgery that was obtained by Mr Wan and provided to Ms Chiu as part of an organized plan to subvert the election of directors to the board of directors of the condominium. This meaning is obviously defamatory of Mr Wan. These findings are not challenged seriously by Mr Lau.

**(d) The Impugned Words Are Not True**

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<sup>2</sup> *Whitehead v. Sarachman*, 2012 ONSC 6641 (Div. Ct.).

[32] A person who publishes defamatory words is not insulated from liability because he is repeating words said by another person:

Our... law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided in its circulation. He must answer for it just as if he had started it himself.<sup>3</sup>

[33] Thus the focus is not whether it is true that Mr Lau was told the things he claims to have been told by Mr Huang, but whether the assertions by Mr Huang were true. They were not. And thus it is not necessary to assess whether the inferences drawn by Mr Lau from Mr Huang's words were reasonable, based on what Mr Huang said. Mr Huang's assertion that the proxy was forged were false in fact, and Mr Lau is not insulated from liability because the words came originally from Mr Huang.

[34] It is conceded that Mr Huang's words were not true – the proxy was not a forgery – and the inferences drawn from those untrue facts are also untrue. The defence of truth, or justification, fails.

#### **(e) The Impugned Words Are Not Fair Comment**

[35] Comment is a statement of opinion. Assertions of fact are not protected by the defence of fair comment. And to be protected as fair comment, matters of opinion must be clearly stated as such, and not mixed with statements of fact so that the reader cannot distinguish between expressions of opinion and statements of fact.<sup>4</sup> Here, the plain meaning of the impugned words is as described above: that Mr Wan participated in obtaining and using a forged proxy to subvert an election. Those are not statements of opinion but rather assertions of fact. The defence of fair comment fails.

[36] There are other statements included in the impugned words that might fairly be characterized as opinions. However, those words are not the words and meanings that are the subject-matter of Mr Wan's claim, and so there is no need to determine whether a defence of fair comment would apply to them. Further, since I have concluded that the defence of qualified privilege applies, it is not necessary to decide the issue of the defence of fair comment in any event.

#### **(f) “Responsible Communication” Is Not An Available Defence**

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<sup>3</sup> *Associated Newspapers Ltd. v. Dingle*, [1964] A.C. 371 at 410-11, per Denning L.J.

<sup>4</sup> R.E. Brown, *The Law of Defamation in Canada*, 2<sup>nd</sup> ed. (1994), 15.3(2), pp. 15-29 to 30; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420.

[37] The defence of “responsible communication does not apply in the circumstances of this case. This defence generally applies to journalists acting in the scope of their profession. This does not describe Mr Lau and his communication with directors of the condominium corporation. Further, there was no “urgency” to report these matters before further investigation of Mr Huang’s assertions. Indeed, the need for further investigation was identified by Mr Lau himself, in the impugned publication. And finally, Mr Lau took no steps to obtain Mr Wan’s side of the story, a requirement inherent in the word “responsible” as it applies to this defence.<sup>5</sup>

### **(g) Qualified Privilege Applies in this Case**

[38] Qualified privilege applies “to the occasion when a defamatory statement is made, not to the statement itself”.<sup>6</sup> The “occasion”, in this case, refers to an election for the board of directors of the condominium corporation, and Mr Lau’s position as a stakeholder in respect to that election.

[39] Mr Lau was a candidate in the election for which the proxy was obtained from Mrs Huang. He was elected to the board and thus was a director of the condominium corporation at the time of his conversation with Mr Huang. And he was also a unitholder in the condominium corporation. All three of these circumstances were sufficient to give rise to a legitimate interest to report his conversations with Mr Huang to the board of directors and/or to management of the condominium corporation. I would go further and also conclude that Mr Lau had an interest in communicating these matters to other unitholders in the condominium corporation. These communications would have, as their underlying legitimate purposes, identifying a need for further investigation into Mr Huang’s allegations that the proxy was a forgery. The directors, management, and all unitholders, had a legitimate interest in knowing that a unitholder was alleging fundamental misconduct in the conduct of condominium affairs.

[40] Although it was not pleaded, Mr Wan led evidence and argued at trial that the impugned words were published by Mr Lau to persons not connected to the condominium corporation. I consider this issue below in a separate section of these reasons.

[41] I find that Mr Huang did make the statements attributed to him by Mr Lau. I find that Mr Lau believed these statements, but also recognized that he had received Mr Huang’s opinion, based on the facts described, and that confirmation could only be obtained from Mrs Huang. However, Mr Lau identified this deficiency in his information in the impugned publication and identified the need for further investigation. Taking all of this into account, I find that Mr Lau honestly believed the impugned words.

### **(h) Qualified Privilege Is Not Defeated By Malice**

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<sup>5</sup> See *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640.

<sup>6</sup> *RTC Engineering Consultants Ltd. v. Ontario* (2002), 58 O.R. (3d) 726 (C.A.), per Laskin J.A.



[42] There is no evidence that Mr Lau bears malice towards Mr Wan. There is no evidence that the impugned words were published for the primary purpose of causing harm to Mr Wan. Quite the contrary, the predominant purpose of the impugned words was to put the board of directors on notice that there were concerns about the propriety of the election.

[43] Qualified privilege is a robust defence. As is reflected in the reasoning in *Whitehead v. Sarachman*, it is the plaintiff's burden to plead and prove malice to overcome a defence of qualified privilege.<sup>7</sup> And the malice that must be shown is not simply ill-will towards the plaintiff or a desire to cause him harm. I have found that Mr Lau honestly believed the impugned publication. And thus to establish malice to defeat qualified privilege, Mr Wan would have to establish that Mr Lau's dominant purpose in publishing the impugned words was some improper purpose. There is simply no evidence of that in this case.

**(i) Overbreadth of Publication**

[44] This issue was not pleaded. I appreciate that the parties were self-represented through most of this proceeding. Amendments to the pleadings can be permitted at any time, even after the evidence is completed. However, I would not exercise my discretion to permit amendments to raise this issue in this case. I so conclude for two reasons:

- (a) The pleadings define what the case is "about", giving both sides notice of the case to be tried. The case was pleaded on the basis that the impugned words were published to the board of directors. It was not pleaded on the basis that they were published beyond the board of directors. It is not fair to the defendant to have the case transformed at trial to a complaint focused on publication beyond the board of directors.
- (b) There is one recipient of the impugned words who was not on the board of directors who was not also sent the Retraction. I have no evidence of damages arising from this underbreadth in the publication of the Retraction. I have no evidence that this underbreadth was raised as an issue with the defendant in a timely way so that he could address it. And I have no evidence that it was not open to the plaintiff to mitigate any damage caused by underbroad publication of the Retraction.

[45] To be fair, the court identified these issues arising from the evidence during the course of the trial, and the parties then addressed them. This touches on the delicate balance the court strives to achieve when the parties are self-represented and may not be able to identify the legal issues themselves. I let the parties develop this evidence, even though it had not been pleaded, so that I could assess whether justice required that the pleadings be amended. Having considered that evidence, I am satisfied that there was some slight overpublication of the impugned words, and some underpublication of the retraction, but that these defects were not malicious. The

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<sup>7</sup> *Whitehead v. Sarachman*, 2012 ONSC 6641 (Div. Ct.).

essence of Mr Wan's claim has always been that the impugned words ought never to have been published at all.

[46] Accordingly I conclude that the slight overpublication of the impugned words does not undermine or qualify the application of the defence of qualified privilege in this case, and that in any event the plaintiff should not be permitted to assert this theory of liability without having pleaded it.

**(j) Substance of the Retraction**

[47] The issue here is whether the Retraction has effect in reducing any damages awarded to Mr Wan. Since I have concluded that the defence of qualified privilege succeeds in this case, the effectiveness of the Retraction is not relevant. However, the Retraction is also evidence that bears on the issue of malice, and is part of the evidence I have considered in concluding that I should not give effect the "underbreadth" and "overbreadth" arguments.

[48] The substance of the retraction is that the misconduct alleged by the impugned words never took place. In my view, this is a complete retraction of the impugned words. That said, I agree with Mr Wan that the Retraction should have mentioned Mr Wan by name and expressly said that he had done no wrong, contrary to what had been suggested in the impugned words. I find that the Retraction is effective, but not 100% effective, in eliminating the damage caused by the impugned words. Thus, had I found Mr Lau liable, I would have discounted the damages arising from the defamatory publication by 80% because of the swift publication of the Retraction.

**(k) Damages**

[49] It is not necessary for me to fix damages, since I have concluded that the defence of qualified privilege succeeds in this case. However, it is customary to fix damages, even if they are not awarded, so that the court has provided a decision on each contested issue at trial.

[50] No special damages are proved.

[51] I agree with Mr Wan that the impugned words cast aspersions on his reputation in a manner touching upon his professional reputation. They are allegations of dishonesty. The implication is drawn expressly that Mr Wan is the kind of person who would fraudulently transfer real estate, an aspersion that cuts directly to Mr Wan's career as a real estate agent.

[52] Republication does not serve to increase damages in this case. Only one instance of republication was proved at trial: a copy was faxed to Tradeworld to the attention of TC Chan, Tradeworld's principal. It is likely that republication to the principal of Mr Wan's brokerage firm was protected by qualified privilege, but even if it was not, no damage was caused by bringing it to the attention of Tradeworld. Rather, the "misunderstanding" was discovered by Mr Chan and, as a result, and the correct version of events was promulgated.

[53] Given all of these circumstances, but in the context of the limited original publication and the swift and abject Retraction, I would have awarded general damages of \$40,000, had I found Mr Lau liable. This figure would have been discounted by 80% by virtue of the Retraction, leaving a net award of damages of \$8,000.

### **Summary and Order**

[54] The impugned words are defamatory of Mr Wan. They are untrue.

[55] The impugned words were published to the board of directors and some condominium unitholders by Mr Lau on an occasion of qualified privilege. Mr Lau honestly believed that the words were true. There is no evidence of malice in the publication of the impugned words. Therefore the defence of qualified privilege succeeds and the claim must be dismissed.

[56] Had I concluded that Mr Lau was liable to Mr Wan for publishing the impugned words, I would have concluded that the Retraction should have the effect of reducing the damages by 80%, given the timing and content of the Retraction. I would have awarded no special damages, and I would have found general damages of \$40,000. Discounting the general damages by 80%, I would have awarded damages to Mr Wan of \$8,000.

[57] I understand why Mr Wan is upset here. The impugned words are clearly defamatory of him, and he did nothing to deserve them. But, truly, this was a misunderstanding. Mr Wan testified that he was particularly upset that Mr Lau had not seen fit to apologize to him personally, in the Retraction or any time afterwards. Mr Lau was unrepentant on this point: clearly he feels that he has done enough. The absence of a personal apology does not affect liability, but it is a matter that may be raised again when it comes to the issue of costs.

[58] The action is dismissed. If the parties cannot agree upon costs then Mr Lau shall serve and file his costs submissions by February 1, 2016, and Mr Wan shall serve and file his responding submissions by February 15, 2016.

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D.L. Corbett J.

January 7, 2016

**CITATION:** Wan v. Lau, 2016 ONSC 127  
**COURT FILE NO.:** CV-11-424289  
**DATE:** 20160107

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

CHUNG-WAH WAN aka HOWARD WAN

Plaintiff

- and -

RAYMOND LAU

Defendant

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**REASONS FOR JUDGMENT**

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D.L. Corbett J.

**Released:** January 7, 2016