FEDERAL COURT OF AUSTRALIA

Chau v Fairfax Media Publications Pty Ltd [2019] FCA 185

**SUMMARY**

*In accordance with the practice of the Federal Court in cases of public interest, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court’s reasons is that contained in the published reasons for judgment which will be available on the internet at the Court’s website. This summary is also available there.*

In this proceeding, the applicant, Dr Chau Chak Wing, alleged that the respondents, Fairfax Media Publications Pty Limited and Mr John Garnaut, defamed him. The defamatory imputations were alleged to have been conveyed by an article written by Mr Garnaut which was first published on or in Fairfax’s Sydney Morning Herald online edition on 15 or 16 October 2015. The article appeared under the headline “Are Chau Chak Wing’s circles of influence in Australia-China ties built on hot air?” In broad terms, the article described Dr Chau’s supposed connection with what was said to be an “unfolding international bribery scandal”. The so-called scandal had resulted in charges being filed in the United States against several people, including the person who was alleged to have received the bribes, the then President of the United Nations General Assembly, Mr John Ashe. Dr Chau was not one of those who had been charged.

The article also detailed Dr Chau’s apparent wealth, the various political and other donations he had made in Australia over the years, and his contacts and associations with certain Australian politicians on both sides of the divide. It appeared to somehow link the bribery allegations with Dr Chau’s donations and political connections and, in that context, concluded with the tantalizingly obscure observation that: “[t]his story is likely to have much more to tell, while we all learn whether the extraordinary Kingold kingdom of Australia and China relations was built upon illicit payments and hot air”. Kingold was one of Dr Chau’s companies.

Dr Chau alleged that the article written by Mr Garnaut and published by Fairfax conveyed four defamatory imputations. Those imputations were:

(a) Dr Chau bribed the President of the United Nations General Assembly, Mr John Ashe;

(b) Dr Chau participated in a conspiracy to bribe the President of the United Nations General Assembly;

(c) Dr Chau acted in so seriously wrong a manner as to deserve extradition to the United States on criminal charges, including charges of bribery;

(d) Dr Chau created his business empire in Australia by making illicit payments to government officials.

Dr Chau claimed that his business, personal and professional reputation had been brought into public disrepute, odium, ridicule and contempt as a result of the publication of those defamatory imputations. He also claimed that Mr Garnaut and Fairfax were actuated by malice. He sought compensatory and aggravated damages.

Fairfax and Mr Garnaut defended the proceedings. They denied that the articles conveyed the alleged imputations. They contended, in that regard, that the article conveyed no more than a strong suspicion that Dr Chau had bribed, or conspired to bribe, Mr Ashe, or had otherwise acted in so serious a manner as to deserve extradition. They claimed that it did not go so far as to imply or impute guilt. Fairfax and Mr Garnaut also claimed that, even if the article did convey the alleged imputations, the subject matter of the article was a matter of legitimate public interest and their conduct in publishing it was reasonable in the circumstances. They contended that the article was accordingly published on an occasion of qualified privilege pursuant to s 30 of the *Defamation Act 2005* (NSW) and the corresponding provisions in the defamation legislation of the other Australian States and Territories. Needless to say, Fairfax and Mr Garnaut also denied that they were actuated by malice. It is worth noting, however, that they did not contend that, if the imputations were conveyed, they were substantially true.

It will be apparent from this brief summary of the proceeding that there were two critical issues that needed to be resolved.

The first issue was whether the article conveyed one or more of the four alleged defamatory imputations. That issue was to be addressed from the perspective of the hypothetical ordinary reasonable reader. The article plainly did not expressly or explicitly assert any of the alleged imputations; but would the article nonetheless have conveyed those meanings to the ordinary reasonable reader? Would the ordinary reasonable reader have “read between the lines” and inferred, implied or deduced those meanings from the article considered as a whole?

The second issue arose only if one or more of the imputations was conveyed by the article. The issue was whether Fairfax and Mr Garnaut had made out the defence of qualified privilege. The defence of qualified privilege has two elements. The first element, in broad terms, is whether the defamatory matter was published in the course of giving people information about matters of public interest. It was common ground in this matter that the first element of the defence was made out: the article conveyed information of interest or apparent interest to its recipients. The second element is whether the conduct of those who published the defamatory matter was reasonable in the circumstances. The key question, then, was whether Fairfax and Mr Garnaut had acted reasonably in publishing those defamatory imputations that were conveyed. In considering reasonableness, the Court was required to have regard to all of the circumstances leading up to and surrounding the publication.

It was only if those two issues were resolved favourably to Dr Chau that the issue of damages arose.

## Were the defamatory imputations conveyed?

Turning, then, to the first major issue, I have concluded that the first three of the alleged defamatory imputations were conveyed by the article in question. I was not, however, satisfied that the fourth imputation was conveyed.

The judgment which will be published contains a detailed discussion of my reasons for arriving at that conclusion. Following is but a short summary of those reasons.

As for the first three imputations, a number of features of the article compelled the finding that it went beyond simply conveying a suspicion that Dr Chau had bribed, or conspired to bribe, Mr Ashe. Rather, by a combination of disparagement, insinuation and suggestion, it effectively imputed guilt. The following features of the article were particularly significant in that regard.

First, as a matter of first impression, the general tone and tenor of the article as a whole is rather derisive and disparaging, if not, at times, sneering and contemptuous, towards Dr Chau. That tone flows from the sensational and hyperbolic language at times employed, as well as from some rather gratuitous barbs and insinuations; some subtle, others not so.

Second, the article immediately commences with the implicit assertion that Dr Chau was implicated in the bribery by insinuating that he was conscious of his guilt in that regard. Why else might he never get to live in the “$70 million Vaucluse mansion” which he had supposedly bought “sight unseen”, but instead “bunker down” in China “beyond the reach of extradition treaties”? The reference to unnamed officials supposedly holding this view lent some credence to the suggestion that Dr Chau might remain in China to avoid extradition.

The suggestion of Dr Chau’s consciousness of guilt was further highlighted by the equally damaging assertion that certain “offending web pages” had been “scrubbed from cyberspace” after the filing of the Complaint. The “offending web pages” were said to have been those on “Chau’s Kingold company website” which “trumpeted” Mr Ashe’s attendance at “Chau’s resort”. The hyperbolic and derisive language, in the context of the entire article, clearly suggested that the “scrubbing” was an attempt by Dr Chau to conceal apparently damning evidence of his connection with Mr Ashe and the supposed purpose of the bribe.

Third, while Dr Chau’s apparent response to, or denial of, some aspects of the allegations are referred to at various parts of the articles, the manner in which they are disaggregated and inserted in the narrative undermines their effect and was likely to cause an ordinary reader to be dismissive and sceptical about them. There is a general tone of incredulity in relation to the denials.

Fourth, there are precious few references to the fact that the Complaint apparently filed by the United States prosecutors contained only allegations or accusations, as opposed to proven or uncontroverted facts. Indeed, there are numerous instances where what appear to have been mere assertions or allegations are presented as unequivocal facts.

To give but one example, it was unequivocally asserted that Dr Chau was involved in a “virtuous circle of guanxi – the Chinese method of making social networks to facilitate business dealings – and the perception of access and power created its own reality, which extended right up to the president of the UN General Assembly, John Ashe”. Thus, it was unequivocally asserted that Dr Chau had acquired access to Mr Ashe and the alleged bribe was effectively portrayed as an example Dr Chau’s usual practice of currying favour with people in positions of power or influence. This was not presented as a mere allegation. Rather, it was presented as an established or incontrovertible fact.

Fifth, the overarching theme of the article attempts to link Dr Chau’s connection with the bribery allegations in the United States to his “circles of influence in Australia-China ties”. The apparent suggestion was that Dr Chau’s influence and connections may have been acquired by means of “illicit payments” and therefore amounted to nothing more than “hot air”. In making that link, the article also effectively implies that the payment that had been made to Mr Ashe was entirely in keeping with the pattern of payments Dr Chau had made to people and entities of power and influence in Australia.

In all the circumstances, the language, tone and content of the article went well beyond imputing mere suspicion. As Lord Devlin pointed out in *Lewis v Daily Telegraph* [1964] AC 234 at 285, “loose talk” about investigations, allegations or suspicions can very easily convey the impression of guilt. That is essentially what occurred here. The language was not only at times imprecise, ambiguous and loose, but also sensational and derisory. The language used was also, for the most part, not the language of mere allegation or suspicion, but rather the language of assertion or uncontroverted fact.

As for the fourth imputation, in summary I was not satisfied that the article conveyed to the ordinary reasonable reader that Dr Chau had created any “business empire” he may have had in Australia by making “illicit payments to government officials”. While the article posed a rhetorical question, or posited a rather nebulous theory, about “illicit payments” and “hot air”, that question or theory related to what was said to be a “kingdom of Australia and China relations”, not any business empire that Dr Chau might have had in Australia.

## Was the conduct of Fairfax and Mr Garnaut reasonable?

Turning next to the question whether Fairfax and Mr Garnaut had made out the defence of qualified privilege, I have found that that defence was not made out because I was not persuaded that the conduct of Fairfax and Mr Garnaut in publishing the defamatory imputations was reasonable in all the circumstances. Indeed, I found that their conduct was unreasonable in a number of material respects.

My reasons for so finding are again set out in detail in the judgment, however, in summary the following considerations were important in arriving at that conclusion.

First, it would appear that Fairfax and Mr Garnaut failed to reasonably or properly analyse or appreciate the contents of the Sealed Complaint which had been filed by the United States prosecutors. Mr Garnaut plainly appreciated that Dr Chau had not been charged and had not even been named in the Complaint. It was perhaps open to Mr Garnaut to infer that the individual referred to as “CC-3” in the Complaint was Dr Chau. What Mr Garnaut apparently failed to appreciate, however, was that the Complaint did not directly allege that CC-3 instigated, directed, or even knew about the payment that was made to Mr Ashe which was said to constitute the bribe. Nor did Mr Garnaut make any attempt to contact the prosecutors to ascertain why the individual referred to as CC-3 had not been identified, let alone charged.

Second, it was not reasonable for Fairfax and Mr Garnaut to include in the article the damaging claim that Dr Chau might remain in China to avoid extradition. I was not satisfied that Mr Garnaut had any, or any reliable, source for that claim. Perhaps more significantly, even if Mr Garnaut had been given information on that topic by some unnamed official, I was not satisfied that Mr Garnaut had any reasonable basis to conclude that that information amounted to anything more than mere speculation. The real reason for including the claim about fear of extradition was because it provided a sensationalist local angle for the story: the claim that Dr Chau may never get to live in the Vaucluse mansion which he was said to have purchased from James Packer “sight unseen”.

Third, it was also not reasonable in all the circumstances for Fairfax and Mr Garnaut to have included in the article the inaccurate, unjustified and damaging assertion that most of the “offending” pages on the Kingold website, being those pages which supposedly revealed contact between Dr Chau and Mr Ashe at the conference which had been held at Kingold’s resort, had been “scrubbed from cyberspace.” The investigations which had been conducted by other Fairfax journalists had in fact revealed that Kingolds’s website still contained some live links to web pages which contained details of the conference.

Fourth, the presentation of Dr Chau’s side of the story in the article was, in my view, not fair and reasonable. While a Fairfax journalist had briefly spoken by telephone with Dr Chau about some parts of the proposed story, and Mr Garnaut had even more briefly spoken to Dr Chau’s daughter, Ms Winky Chow, the responses that had been given to the journalists by Dr Chau and Ms Chow were, for the most part, presented in the article in a way which undermined, subverted and even ridiculed or disparaged what they had said.

Fifth, while Mr Garnaut claimed that he had taken care to avoid conveying anything beyond a strong suspicion that Dr Chau had bribed Mr Ashe, I was not satisfied that Mr Garnaut had in fact exercised reasonable care. Had he done so, he would not have used the sensationalist, hyperbolic and generally derisive language that he used in the article. Nor would he have included the assertions about Dr Chau possibly remaining in China to avoid extradition, or about the supposed scrubbing of websites. Those features contributed to the overall sneering and deprecating tone of the article. Perhaps more significantly, had Mr Garnaut exercised reasonable care, he would have been at pains to distinguish between suspicions, allegations and proven facts. There were precious few references in the article to the fact that the Complaint contained allegations and accusations, not proven facts. He also would have included a more complete, accurate and balanced account of the allegations, instead of some of the sensationalist titbits that he chose to include.

While I accepted that Fairfax and Mr Garnaut may not have intended to convey the imputations of guilt that were in fact conveyed by the article, it was reasonably foreseeable that, unless care and caution was exercised, those imputations would be conveyed. Given the seriousness of the imputations, the obligation upon Fairfax and Mr Garnaut to take reasonable steps to ensure that the imputations were not conveyed, and to otherwise act reasonably, was considerable. I concluded that they did not satisfy that obligation.

Having regard to those considerations, as well as other facts and circumstances set out in more detail in the judgment, I was not satisfied that the conduct of Fairfax and Mr Garnaut was reasonable.

I should note, in this context, however, that I was not satisfied that Fairfax and Mr Garnaut had been actuated by malice as alleged by Dr Chau. In short terms, I was not satisfied that Fairfax and Mr Garnaut had any improper motive or purpose in publishing the article.

**Damages**

Having found that Dr Chau had been defamed, and that the defence raised by Fairfax and Mr Garnaut had not been made out, it was necessary to assess the appropriate award of damages. The purpose to be served by damages awarded in cases of defamation include consolation for the personal distress and hurt caused by the publication, reparation for the harm done to the plaintiff’s reputation and vindication of the plaintiff’s reputation.

In assessing damages, I had regard to the evidence which demonstrated the personal distress and hurt suffered by Dr Chau as a result of the defamatory imputations published by Fairfax and Mr Garnaut. I also had regard to the evidence which established Dr Chau’s good reputation prior to the publication. There was no evidence that his reputation was blemished in any way. Given his previously unblemished reputation, and his position and profile, it was important for the award of damages to be such as to send a strong signal to the public of the vindication of Dr Chau’s reputation.

In all the circumstances, I considered that the appropriate award of compensatory damages was $250,000. It was, however, necessary to reduce that award by $25,000 to take into account compensation that had been received by Dr Chau from another media organisation which had also published a story containing imputations with the same meaning or effect of those published by Fairfax and Mr Garnaut. I also considered that it was appropriate to include in the sum for which judgment was to be given, an amount of $55,000 in lieu of interest pursuant to s 51A(1)(b) of the *Federal Court of Australia Act 1976* (Cth).

Dr Chau also claimed that he was entitled to aggravated damages. For the reasons detailed in the judgment, I concluded that Dr Chau had failed to show that aggravated damages were warranted or appropriate.

It should finally be noted that I did not consider it necessary or appropriate to make the orders, in the nature of injunctions, sought by Dr Chau. In that regard, I accepted the undertaking proffered on behalf of Fairfax that the offending article would be removed from Fairfax’s website if found to be defamatory. There was no evidence to indicate that Fairfax or Mr Garnaut were likely to publish the same or similar defamatory imputations in the future.

**JUSTICE MICHAEL WIGNEY**

**22 February 2019**