HCA 1253/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO 1253 OF 2010

BETWEEN

ORIENTAL PRESS GROUP LIMITED Plaintiff
（東方報業集團有限公司）

and

INMEDIAHK.NET LIMITED Defendant

Before: Deputy High Court Judge P Ng SC in Court
Dates of Hearing: 9 February 2012
Date of Judgment: 30 March 2012

J U D G M E N T

A. Introduction

1. These proceedings concern two allegedly defamatory articles in Chinese which appeared on the website http://www.inmediahk.net (the "Website") in January 2009 and October 2007 respectively. The articles were posted on the Website by persons unknown to the Plaintiff under the

pseudonyms “小狼” and “hevangel”. In addition to the usual remedies of damages and injunction, the Plaintiff in this action also seeks disclosure of information relating to the personal particulars of “小狼” and “hevangel”.

2. The Defendant is the provider, administrator and manager, or in common parlance, the host of the Website.

3. The Plaintiff is a publicly listed company in Hong Kong and the ultimate holding company of Oriental Daily Publisher Limited, the registered proprietor, publisher and printer of Oriental Daily News (東方日報), and the Sun News Publisher Limited, the registered proprietor, publisher and printer of The Sun (太陽報). Mr Ma Sik Chun (馬惜珍) was the founder of Oriental Daily News. Both Oriental Daily News and The Sun are daily Chinese newspapers with a wide circulation in Hong Kong.

4. The 1st Article, entitled “「東方佈孽集團」 圖毀維基百科記載事實的權利”, translated as “[Oriental Press Group] tried to destroy the right of Wikipedia to record the facts”, first appeared on the Website on 23 January 2009.

5. The 2nd Article, entitled “抗議東方報業打壓言論自由，呼籲網民齊貼事實”, translated as “Protest Oriental Press’ suppression of freedom of speech, call upon web users to post the facts”, first appeared on the Website on 12 October 2007.

6. On 13 August 2010, the Plaintiff sent a written demand to the Defendant requesting it to forthwith remove what the Plaintiff considered to be defamatory statements in the Articles from the Website. The demand met with no response. On 17 August 2010, the Plaintiff issued the Writ in the present proceedings.

7. After filing its Defence on 12 October 2010 which raised defences of, *inter alia*, justification, fair comment and qualified privilege, the Defendant had taken no further substantive steps in defending the proceedings – it had failed to give discovery, exchange witness statements or attend the trial.

B. The Articles

8. The words in the 1st Article which the Plaintiff complains of ("the 1st Offending Words") consist of its title "「東方佈孽集團」 圖毀維基百科記載事實的權利" and the following:

(1) "2009 年 1 月 21 日晚上 20:05, 中文維基百科裏「東方報業集團」條目，被編輯刪除了部份內容…然而，那部份內容，是當年確實發生了的新聞 --東方佈孽集團創辦家族的販毒大案。" translated as

> "At 20:05 on 21 January 2009, some of the contents of the entry for 'Oriental Press Group' in the Chinese Wikipedia were deleted by the editors… but those contents contained news which did take place then – the big drug trafficking case of the founding family of Oriental [Press] Group."

(2) “剛才我已把被刪去的、記述了事實的內容還原…希望各位 blogger 幫忙，齊齊抄下或廣傳這些事實，使真相不會因惡勢力耍橫手而淹沒。” translated as

> “I have just restored the contents which recorded the facts but had been deleted. I hope that each and every blogger can help in copying or disseminating these facts, so that the truth would not be buried by evil force hiring someone to do dirty work for it.”

(3) “馬惜珍在香港，負責接收白粉、洗黑錢，再把賺來的金錢投資在一般貿易公司。1969 年，他又創辦東方報業集團，旗下主要報紙 -- 即是極力親台的中文東方日報，後來發展成為全港第一大報。” translated as

> “Ma Sik Chun was responsible for receiving ‘white powder’ (ie heroin) and laundering money in Hong Kong, he then re-invested the money in general trading companies. In 1969, he established the ‘Oriental Press Group’, the flagship newspaper of which is the pro-Taiwan Chinese-language ‘Oriental Daily News’, which later became the number one newspaper in Hong Kong.”

(4) “東方報業集團並多番使用手段，企圖消滅上述的事實記述，包括對維基百科基金會作投訴，要求消滅上方的內容。” translated as

“Oriental Press Group repeatedly used various means to try to destroy the above-mentioned facts, including complaining to Wikipedia Foundation, demanding the above-mentioned contents be deleted.”

9. The words in the 2nd Article which the Plaintiff complains of (“the 2nd Offending Words”) consist of the following:

(1) “東方報業上星期控告 Uwants 論壇誹謗，並要求論壇交出張貼文章者的個人資料。此等惡勢力利用其龐大資金濫用司法制度，大興文字獄禁止網民的言論自由，用卑鄙手段抹黑掩飾事實真相。本著公義和良知，請大家站起來捍衛真相，說出事實的權利，向惡勢力說不，把白粉報的惡行傳播開去。” translated as

“Last week, Oriental Press sued Uwants discussion forum for defamation, and demanded the discussion forum to disclose the personal information of those who posted the articles. Such evil force, by making use of its vast financial resources, is abusing the process of the court. It went in for literary inquisition in a big way, suppressed freedom of speech on the Internet and used dirty tricks to conceal the true facts. Based

on justice and conscience, each and every one of you should stand up and defend the truth, tell the truth and say 'no' to evil force, and spread the misdeeds of 'White Powder' newspaper to others."

(2) "...大財團才有機會濫用司法手段，用高昂的法律訴訟費用，阻嚇小市民說出真相，達到禁若寒蟬言論審查的效果。" translated as

"… only big financial institution has the chance to abuse the process of the court by using expensive litigation costs to threaten and prevent citizens from telling the truth and therefore producing the result of suppressing the freedom of speech."

(3) "東方報業集團

...馬惜珍在香港，負責收白粉、洗黑錢，再把賺來的錢投資在一般貿易公司，1969 年，他又創辦「東方報業集團」，旗下主要報紙即是極力親台的中文東方日報，後來發展成為全港第一大報。報紙除了用作洗黑錢外，又作毒品消息通傳。…" translated as

"Oriental Press Group

Ma Sik Chun was responsible for receiving 'white powder' (ie heroin) and laundering money in Hong Kong, he then re-invested the drug money in general trading companies. In

1969, he established the 'Oriental Press Group', the flagship newspaper of which is the pro-Taiwan Chinese-language 'Oriental Daily News', later developed to be the number one newspaper in Hong Kong. Apart from being used for laundering money, the newspaper is also used for dissemination of drugs news."

C. The Issues

10. In view of the Defendant's failure to adduce evidence in support of its Defence, the main issues before this court are:

(1) Whether the 1st and 2nd Offending Words were defamatory of the Plaintiff;

(2) Whether the Defendant was responsible for the publication of those words;

(3) If liability on the part of the Defendant is established, what should be the appropriate reliefs.

D. Were the Offending Words defamatory of the Plaintiff

D1. Applicable Principles

11. Since I am trying this action without a jury, I can go straight to the question: Is the natural and ordinary meaning of the Offending Words defamatory? See *Slim v Daily Telegraph Ltd* [1968] 2 QB 157; *Eastern Express Publisher Ltd v Mo Man Ching Claudia* [1998] 2 HKC 593; *Next*

Magazine Publishing Ltd v Oriental Daily Publisher Ltd (2000) 3 HKCFAR 160.

12. For the present purpose, I would put myself in the position of an ordinary reader when construing each Article as a whole, and adopt the following as a working definition of the meaning of "defamatory": a defamatory imputation is one to the claimant's discredit, or which tends to lower him in the estimation of others or causes him to be shunned or avoided, or exposes him to hatred contempt or ridicule: Gatley on Libel and Slander 11th Ed paras 2.1 and 3.25; *Tang Wing Lam David v Yick Kam Ping Belinda* HCA 1852/2003 unreported, 29.11.2004, Chung J; *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* HCA 2140/2008 & HCA 597/2009 unreported, 25.2.2011, Chung J.

13. I would also take into account

(1) Lord Reid's dictum in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 259 that I must try to envisage an ordinary person, not unusually suspicious and not unusually naive, and see what is the most damaging meaning that he would put on the words in question; and

(2) Lord Devlin's reminder in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 277 that the layman's capacity for implication is much greater than the lawyer's, and the layman reads in an implication much more freely and is especially prone to do so when it is derogatory.

14. A trading company with a trading reputation within the jurisdiction is entitled to sue for general damages in respect of defamatory

publication which has a tendency to damage it in the way of its business: *Jameel v Wall Street Journal Europe* [2007] 1 AC 359, 374.

D2. Whether the 1st Offending Words Were Defamatory of the Plaintiff

15. There is no question that the 1st Offending Words referred to the Plaintiff – its corporate name was expressly mentioned in the 1st Article.

16. Ms Lee for the Plaintiff, basically repeating what was pleaded in the Statement of Claim, submitted that the 1st Offending Words, read in the context of the 1st Article as a whole, were defamatory of the Plaintiff in that, in their natural and ordinary meaning, they meant and were understood to mean:

(1) The Plaintiff and/or Oriental Daily News were founded with money earned from drug trafficking;

(2) The Plaintiff was evil;

(3) The Plaintiff tried to destroy or conceal evidence of its misdeeds;

(4) The Plaintiff hired someone to do the dirty work of destroying or concealing evidence of its misdeeds.

17. I am not satisfied that the 1st Offending Words meant the Plaintiff tried to destroy or conceal evidence of its own misdeeds. It seems to me what the Plaintiff was alleged to have covered up, by procuring the removal of the same from the Chinese Wikipedia, was news concerning the founder of the Oriental Press Group viz Ma Sik Chun, and more

specifically, news concerning his drug trafficking and money laundering activities.

18. Other than that, I am satisfied that the Plaintiff has made out its pleaded case that the 1st Offending Words bore the following meanings which were defamatory of the Plaintiff:

(1) The Plaintiff tried to destroy or conceal news concerning the misdeeds of its founder Ma Sik Chun, which were facts.

(2) The Plaintiff did so by hiring someone to do the dirty work.

(3) The Plaintiff was evil.

19. To suggest that the Plaintiff, being the ultimate owner of two newspapers in Hong Kong, hired someone to destroy or conceal news which contained facts was clearly to the Plaintiff's discredit and tended to lower it in the estimation of others. The suggestion also had a tendency to damage the Plaintiff in the way of its business. Newspapers thrive on credibility, and credibility is earned by reporting facts, not destroying or concealing them. The 1st Offending Words were an assault on the Plaintiff's credibility.

20. Further, newspapers thrive in a society where freedom of the press and freedom of publication are respected. Both freedoms are part of the core values of a society like Hong Kong and are guaranteed by the Basic Law. What the Plaintiff was alleged to have done was to suppress the publication of news and facts. This is anything but respect for freedom of the press and freedom of publication. The 1st Offending Words also meant the Plaintiff had done a great disservice to the publication industry, of which it was a member.

21. For the avoidance of doubt, I am also satisfied that the 1st Offending Words bore the meaning in para 16(1) above, but I am not satisfied that it was defamatory to allege that the Plaintiff was founded decades ago with drugs money. The allegation could well be defamatory of its founder Mr Ma, but that would not assist the Plaintiff.

D3. Whether the 2nd Offending Words Were Defamatory of the Plaintiff

22. There is no question that the 2nd Offending Words referred to the Plaintiff – its corporate name was expressly mentioned in the 2nd Article. Further, in the present context, I am satisfied that the reference to "White Powder newspaper" in the 2nd Article was a reference to Oriental Daily News.

23. Ms Lee submitted that the 2nd Offending Words, read in the context of the 2nd Article as a whole, were defamatory of the Plaintiff in that, in their natural and ordinary meaning, they meant and were understood to mean:

(1) The Plaintiff and/or Oriental Daily News were founded with money earned from drug trafficking.

(2) The Plaintiff and/or Oriental Daily News were involved in drug trafficking and money laundering activities.

(3) The Plaintiff and/or Oriental Daily News were involved in illegal and/or immoral activities.

(4) The Plaintiff and/or Oriental Daily News were corrupt, illegal, immoral or unethical.

(5) The Plaintiff abused the process of the court.

(6) The Plaintiff suppressed freedom of speech on the Internet.

(7) The Plaintiff was evil.

(8) The Plaintiff destroyed or concealed evidence of its misdeeds.

(9) The Plaintiff used dirty tricks to destroy or conceal evidence of its misdeeds.

24. I am satisfied that the 2nd Offending Words which bore the following meanings were defamatory of the Plaintiff:

(1) The Plaintiff used Oriental Daily News for drugs-related activities and money laundering activities.

(2) The Plaintiff was evil, corrupt, immoral or unethical.

(3) The Plaintiff abused the process of the court.

(4) The Plaintiff suppressed freedom of speech on the Internet.

(5) The Plaintiff used dirty tricks to destroy or conceal the truth and evidence of its misdeeds.

25. I adopt the reasons given in paragraphs 19 to 21 above in relation to the 1st Offending Words.

26. Further, the Plaintiff was said to have been involved in money-laundering and drugs-related activities, both serious criminal offences. I have little doubt that accusing the Plaintiff of using its newspaper to participate in criminal activities was defamatory and had a

tendency to damage it in the way of its business: *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* HCA 2140/2008 & HCA 597/2009 unreported, 25.2.2011, Chung J at paras 22-24.

E. Was the Defendant responsible for the publication of the Offending Words

E1. General Principles

27. At common law, the person who first composes the defamatory material is liable, provided he intends to publish it or fails to take reasonable care to prevent its publication. Liability extends to any person who participates in, secures or authorizes the publication of the defamatory material.

28. Special rules apply to mere distributors who have only taken a subordinate part in disseminating defamatory material eg news vendors and proprietors of libraries. Such persons can escape liability by showing

(1) They do not know that the publication eg a book or paper contains the libel complained of or that it is of a character likely to contain a libel;

(2) Such want of knowledge is not due to any negligence on their part.

29. These persons may be referred to as subordinate distributors. To escape liability, they bear the onus of proving facts necessary to establish the above, commonly known as the defence of innocent dissemination.

30. Lastly, the common law recognises that persons may be involved as intermediaries in the publication of defamatory material simply as mere conduits and do no more than fulfill the role of a passive medium for communication eg telephone carriers or postal service. They do not publish at all and therefore do not even have to rely on the defence of innocent dissemination.

Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd [2012] 1 HKLRD 848 at paras 58-61; 118-127

Gatley on Libel and Slander 11th Ed paras 6.4; 6.16 & 6.19

E2. Liability of Internet discussion forum hosts in general

31. In *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* [2012] 1 HKLRD 848, the defendants were the provider, administrator and manager of a website with the address http://www.hkgolden.com. Among other things, the website hosted an Internet discussion forum. One of the issues before the Court of Appeal was whether the defendants should be held liable as primary publishers of certain defamatory postings, as contended by the plaintiffs, or merely as subordinate distributors to whom the defence of innocent dissemination was available, as contended by the defendants and held by the trial Judge.

32. The judgment on this issue was given by Fok JA. His Lordship held that the defendants in that case were only responsible as subordinate distributors of the defamatory postings on their forum for the following reasons:

"104. First, I do not regard the defendants as being in the same position as the broadcaster of a live television programme. Just as the context of the Internet is clearly different to that of the publication and sale of a newspaper, it is also different to the broadcasting of a live television programme. It is difficult, in my opinion, to equate the voluntary assumption of liability by the television station in [*Thompson v Australian Capital Television Pty* (1996) 186 CLR 574] with the activities of a website forum host…

105. The defendants' position as a website host is very different.… In short, the evidence shows that it would be wholly disproportionate to expect the defendants to vet every posting on the forum. Even if it were possible to do so, the ascertainment of a defamatory meaning is not simply a mechanical matter and requires the exercise of judgment. The reality is that the imposition of legal responsibility as a primary publisher might well cause many website hosts to cease hosting their websites.

106. It is true that the defendants have the technical ability to remove postings from the website but that ability on its own is not sufficient, in my opinion, to give rise to a voluntary assumption of liability for the content of any messages posted on the forum as from the very instant the material is posted.

….

109. Thirdly, as Eady J observed in [*Bunt v Tilly* [2007] 1 WLR 1243] (at §§21 to 23, quoted above), for a person to be held responsible for publishing defamatory matter, there must be knowing involvement in the process of publication of the relevant words. I would be slow to conclude that the defendants should be fixed with that degree of knowledge in respect of each and every posting out of thousands of postings made hourly to their website forum…

110. Fourthly, in the absence of authority directly on this point, I would, for my part, regard the defendants here as being in the same position as the person responsible for a notice board. In my opinion, the host of a website forum can be regarded as being in a position similar to that of someone who makes a notice board available to third parties to post notices. In such circumstances, the analysis of Hunt J in [*Urbanchich v Drummoyne Municipal Council*, unrep. Case No. 17557 of 1985 (22.12.1988)] is, in my view, a persuasive basis on which to impose legal responsibility for publication, namely by asking the question whether it can be inferred that the website host accepts responsibility for the published material.

> 111. Given the number and popularity of social networking sites today, it is reasonable to assume that there is a huge number of web postings placed on virtual notice boards or walls by the hour (if not by the minute). It might be thought surprising if readers of comments posted on those notice boards or walls thought that the website host had accepted responsibility for the publication of any and all defamatory material on the forum regardless of the host's knowledge of the presence of the particular words. I do not think such an inference would be warranted, nor that it would be fair to impose legal responsibility for publication on the website host as from the very instant the material was posted…
>
> 112. A more logical approach, in my opinion, would be to impose legal responsibility for publication on the basis of acquiescence. On this basis, liability for defamatory material would attach to the host of a website forum once it had been notified of the existence of the material and requested to remove it but had failed to do so within a reasonable time. This approach is also consistent with the observation of Eady J in §54 of [*Metropolitan International Schools v Designtechnica Group & Ors* [2011] 1 WLR 1743] and the commentary in [Collins The Law of Defamation and the Internet 3rd Ed.] at §6.29.
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> 113. Fifthly, to impose legal responsibility on the host of a website forum for defamatory postings as primary publisher might well, as I have already observed, result in the closure of website forums. To the extent that this would suppress the thousands, if not millions, of non-defamatory postings that might be made to such forums, it is strongly arguable that this would be a disproportionate interference with the freedom of speech guaranteed to Hong Kong residents under article 27 of the Basic Law and article 16 of the Hong Kong Bill of Rights….
>
> 115. Sixthly, the conclusion that the defendants are not primary publishers of material found to be defamatory does not leave the plaintiffs without remedy. The originator of the posting will remain liable for the defamation as primary publisher. So too, a website host who fails to establish the defence of innocent dissemination will be liable as a subordinate distributor." (emphasis added)

33. Thus, it seems to me that, in general, a website host's liability for the publication of a third party's defamatory posting to someone who has access to its website and reads the defamatory posting is in the nature of a subordinate distributor, rather than a primary publisher.

E3. Defendant's liability for the publication of the Offending Words

34. Of course, publication is a question of fact and it must depend on the circumstances of each case whether or not publication has taken place. The decision in *Oriental Press Group Limited v Fevaworks Solutions Ltd* is not intended to and does not apply to every website host regardless of the particular facts of the publication complained of. It certainly does not rule out the possibility that a website host may be held liable as primary publisher of postings on its website eg by inviting defamatory comments on a particular person or if the circumstances are such that the host has accepted or should be taken to have accepted responsibility for the content of the website: *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* at para 117 (per Fok JA).

35. In the present case, Ms Lee submitted that the Defendant was a primary publisher of the Offending Words.

36. She sought to distinguish *Oriental Press Group Limited v Fevaworks Solutions Ltd* by pointing to the unchallenged evidence in that case that at any given time there might be over 30,000 users of the website and during peak times, there might be over 5,000 posts generated in an hour, such that it would be wholly impractical to expect the defendants to vet every posting on the forum: para 105 of Fok JA's judgment. No similar evidence was adduced in the present case. She further submitted that the Defendant in the present case was clearly able to put in place a system to make sure that the contents of any uploaded article were reviewed and scrutinized before the same could be seen or downloaded.

37. I do not accept the submission.

38. It is true that in the present case, there is no evidence before this court on the number of users of or daily/hourly postings on the Website. But equally, there is no evidence as to the Defendant's ability to vet the contents of every third party posting and screen out potentially defamatory material.

39. On the technical aspect, filtering by keywords is unlikely to be effective, and the Plaintiff has not adduced any evidence to show otherwise, since the defamatory meaning of a posting may be communicated by a combination of words which are individually innocuous. A fortiori, filtering by keywords is unlikely to screen out defamatory innuendoes. Manual screening is theoretically possible, but may or may not be practical, depending on the number of visitors to and the number of daily/hourly postings on the Website, as well as the manpower and resources of the Defendant. As I said, there is no evidence on this. But more importantly, the ascertainment of a defamatory meaning requires the exercise of judgment and, save in very clear cases, a minimum level of legal knowledge. In the absence of evidence, I am not prepared to assume that the Defendant was at the time clearly able to put in place a system to ensure that the contents of any uploaded article were reviewed and scrutinized before the same could be seen or downloaded.

40. In any event, even if the Defendant had the technical ability to remove defamatory postings from the Website, this ability, on its own, was not sufficient to give rise to a voluntary assumption of liability for the defamatory content of a third party posting from the very instant the

material was posted: *Oriental Press Group Limited v Fevaworks Solutions Ltd* para 106.

41. On this issue of voluntary assumption of liability, there is no evidence from which I can reasonably infer that the Defendant had accepted or should be taken to have accepted responsibility for the contents of all third party postings on its Website from the moment they were posted. The mere fact that the Defendant allowed third party postings on the Website is clearly not sufficient. There must be something more. Otherwise, the host of every internet discussion forum will be taken to have voluntarily assumed responsibility for the defamatory content of a third party posting regardless of its knowledge of the content, which is an unreal proposition.

42. In the present case, the Plaintiff has not adduced evidence of that something more. Quite on the contrary, the evidence is that at the bottom of each page of the Website, there appeared an icon entitled "免責條款" ie "Exemption Clauses" and if one clicked the icon, one would find a "Disclaimer" in the following terms:

> "香港獨立媒體網是一個多媒體平台，內容和資訊的真確性由訊息提供者承擔，香港獨立媒體網，有權但無此義務，改善或更正網站內容內任何部分之錯誤或疏失。故此，讀者於此接受並承認信賴任何「資料」所生之風險應自行承擔。
>
> 網站文章中的超連結或會導引讀者至有些人認為是具攻擊性或不適當的網站，香港獨立媒體網對這些超連結內容所涉及之正確性、著作權歸屬，或是其合法性或正當性如何，並不負任何責任。"

43. The Defendant's translation reads

> "www.inmediahk.net is a multi-media platform, the liability of the content and information solely belongs to the content creator. Inmediahk.net Limited has the right but not obligation to edit the content when there are mistakes or errors. The readers have to decide whether or not to believe and accept the potential risk in entrusting the information.
>
> Some of links in the websites may be considered as aggressive or inappropriate, Inmediahk.net Limited disclaim the liability regarding the accuracy and copyrights of the content where these links lead to."

44. As I have not heard arguments on it, I do not for one moment suggest that this Disclaimer had the legal effect of excluding the Defendant's liability towards the Plaintiff. The relevance of the Disclaimer is that it militates against any scope for inference that the Defendant, in hosting the Website, was content to accept or should be taken to have accepted responsibility for the defamatory contents posted by all and sundry.

45. In the end, I am not persuaded that the Defendant should be held liable as a primary publisher of the Offending Words.

46. I now turn to Ms Lee's fallback position that the Defendant was liable as a subordinate distributor on the basis of acquiescence ie it had been notified of the existence of the defamatory material and had been requested to remove it but had failed to do so within a reasonable time.

47. In this regard, I accept the evidence of Ms See Ling Yee Biana that the Plaintiff had sent a demand letter to the Defendant on 13 August 2010 alerting it to the defamatory nature of the Offending Words and requested that they be removed from the Website. By

17 August 2010, the Defendant had still taken no action, and hence the issue of the Writ on that day. While it was pleaded in the Defence that the Defendant had removed the two Articles from the Website on 25 August 2010, this was not substantiated by evidence. On the contrary, this plea was contradicted by Ms See's evidence that copies of the Articles could still be downloaded from the Website on 6 September 2010 - copies of the two Articles before this court actually bore that date.

48. On the evidence, I am satisfied that the Defendant had actual notice of the Offending Words on or shortly after 13 August 2010 and had failed to remove the same from the Website within a reasonable time ie by 17 August 2010. In the circumstances, I am satisfied that the Defendant had acquiesced in the publication of the Offending Words and was in the position of a subordinate distributor. As the Defendant has not sought to rely on the defence of innocent dissemination or adduced evidence in support of the same, I hold the Defendant liable for the publication of the Offending Words.

F. Damages

49. In *John v MGN Ltd* [1997] QB 586 at 607, Sir Thomas Bingham MR set out the three essential elements of general compensatory damages in a defamation case as follows:

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused."

50. In *Cassell & Co v Broome* [1972] AC 1027, 1071, Lord Hailsham of St Marylebone LC said of the subjective element in the assessment of damages for defamation:

> "In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitutio in integrum* has necessarily an even more highly subjective element…
>
> As Windeyer J well said in *Uren v John Fairfax & Sons Pty Ltd* 117 CLR 115, 150:
>
> 'It seems to me that, properly speaking, a man defamed does not get compensation *for* his damaged reputation. He gets damages *because* he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.'…
>
> Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libeled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being 'at large'."

51. Ms Lee referred this court to the first instance judgment of *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* in which Chung J awarded one global sum of HK$100,000 as general damages to both plaintiffs in HCA 2140/2008 upon finding that Fevaworks was only liable in respect of the "Mar 2007" words. The words were found by his Lordship to carry the imputation that the plaintiffs were in some way accomplices to the murder of a newspaper vendor by the name of "Sister Ha", and that the plaintiffs deliberately avoided reporting the case, in

particular, the murder trial and conviction of the offenders. The award was upheld by the Court of Appeal.

52. Ms Lee submitted that the Defendant was in a similar position to Fevaworks in that it was not the originator of the Offending Words. She invited this court to take into account the following matters in awarding general damages:

(1) Both the 1st and 2nd Offending Words were highly defamatory of the Plaintiff;

(2) Even after the Plaintiff had put the Defendant on notice of the Offending Words on its Website, it failed to remove the same prior to the commencement of the action;

(3) The Defendant denied the Offending Words were defamatory and proceeded to plead substantive defences including justification but had completely failed to adduce any evidence in support.

53. Regarding 52(1), naturally the gravity of the libel is the single most important factor in assessing the appropriate general damages for injury to reputation: *John v MGN Ltd* [1997] QB 586, 607. In my view, the imputation of criminal activities in the 2nd Offending Words is less serious than that in *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd*, but there are other imputations in the 2nd Offending Words, as well as the 1st Offending Words, which were absent in that case.

54. The extent of the publication is also highly relevant. Following the guidance of Hartmann JA in *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* at paras 18 to 22, I should also take into

account *inter alia* the fact that the Offending Words were posted on the Website by anonymous persons identified only by their pseudonyms.

55. On the question of publication, the burden is on the Plaintiff to prove, by inference as well as by direct evidence (if any), the fact of publication and its extent - there is no presumption that material placed on a generally accessible website has been published to a substantial albeit unquantifiable number of persons (whether within the jurisdiction or elsewhere): Duncan & Neill on Defamation 3rd Ed para 8.03; *Al Amoudi v Brisard* [2006] EWHC 1062 [2007] 1 WLR 113 paras 32 - 37; *Trumm v Norman* [2008] EWHC 116 paras 33 - 35; *Brady v Norman* [2008] EWHC 2481 paras 23 - 24.

56. In the present case, there is no direct evidence on the extent to which the Articles have been published ie accessed or downloaded from the Website. Nevertheless, I am prepared to infer the Articles have been published to some third parties from (1) the fact that it was a general discussion forum on critical social issues (see its Mission Statement); (2) the period of time from which the Articles first appeared on the Website to the date of the Writ; (3) the existence of a number of replies to the 2nd Article which appeared on the face of the copy shown to this court; (4) the fact that in the Defence, the Defendant had not specifically denied the Articles had been published at all – what was denied was that the Defendant was in any way responsible for their publication.

57. However, in the absence of evidence as to how well established or popular the Website was, I am not prepared to infer that the Articles have been accessed or downloaded by a substantial number of

persons. This is something I will take into account in assessing the quantum of general damages.

58. As for the matters in paragraphs 52(2) & 52(3) above, in assessing general damages, I am entitled to look at the whole conduct of the defendant, particularly the conduct of its defence in the action: *Cassell & Co v Broome* (per Lord Hailsham of St Marylebone LC at 1071H-1072A; per Lord Reid at 1085F).

59. In the present case, the Defendant's conduct of its defence is deplorable. It filed a Defence containing pleas of *inter alia* justification, fair comment and qualified privilege but did not follow up with any efforts to substantiate them – it had failed to comply with orders made by Masters in the proceedings for discovery and exchange of witness statements.

60. Ms Lee wished to take the matter further and invited this court to take into account the Defendant's unsubstantiated plea of justification and make an award for aggravated damages. In so far as a defendant's conduct aggravates the injury to a plaintiff's feelings, it is well-established that such damages may be appropriate: Gatley on Libel and Slander 11th Ed para 9.14.

61. The question is whether aggravated damages are as a matter of law available to a corporate plaintiff. In this regard, Ms Lee referred this court to a number of authorities.

62. In *Collins Stewart Ltd v Financial Time Ltd* [2006] EMLR 5, Gray J held that aggravated damages were in principle not available to a corporation as it had no feelings to injure and could not suffer distress.

63. After reviewing the authorities, Gray J at p 114, concluded as follows:

> "30. It appears to me from those authorities that Mr Browne is right when he says that the defining characteristic of an award of aggravated damages is that its function is to provide a claimant with compensation ('*solatium*') for injury to his or her feelings caused by some conduct on the part of the defendant or for which the defendant is responsible. The concept of injury to feelings runs through the cases, whether caused by the high-handed or insulting behaviour of the defendant either before or after publication or by repetition of the libel or by persistence in a plea of justification or by a failure to apologise. It seems to me that the essence of an award of aggravated damages in libel is not making good damage to the claimant's reputation as such but rather compensating the claimant for the extra injury to his or her feelings.
>
> 31. If that be the correct analysis of the proper function of aggravated damages, it seems to me to follow that aggravated damages are in principle not available to a corporate claimant. The reason is that, as Mr Spearman rightly concedes, a company has no feelings to injure and cannot suffer distress: see *Lewis v Daily Telegraph* [1964] AC 234, per Lord Reid at 262."

64. The editors of Carter-Ruck on Libel and Privacy 6th Ed at para 15.39, after referring to *Collins Stewart Ltd v Financial Time Ltd* and the seemingly contrary decision by Caulfield J in *Messenger Newspapers Group Ltd v National Graphical Assn* [1984] IRLR 397, submit that the more convincing view is that a corporate claimant cannot recover aggravated damages in a defamation action.

65. A contrary view was expressed in an obiter dictum in *Hiltz & Seamone Co v Nova Scotia* (AG) (1999) 172 DLR (4th) 488 at 530-531 by the Court of Appeal of Nova Scotia. The Court did not take issue with the notion that "a company is not entitled to compensation for injury to hurt feelings or, it follows, to compensation by way of aggravated damages for a loss of this nature." What the Court did not accept was that aggravated

damages could only be awarded for injured feelings. Rather, they took the view that aggravated damages could be awarded to a corporate plaintiff where a defendant, motivated by actual malice, had increased the injury to the plaintiff's reputation by its conduct.

66. Lastly, I was referred to *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* (No 1) [2011] 3 HKLRD 393, paras 60 – 62, where the point was left undecided as the Court of Appeal held that it was not a case which called for aggravated damages at all.

67. On this limited review of the authorities, it seems to me whether one should prefer the traditional approach, as in *Collins Stewart Ltd v Financial Time Ltd*, or the broader approach, as in *Hiltz & Seamone Co. v Nova Scotia* (AG), depends *inter alia* on one's view of the proper function of aggravated damages in the law of defamation, a subject which no doubt warrants more detailed consideration by the higher courts.

68. For the present purpose, I am content to be guided by the following analysis by Lord Diplock in *Cassell & Co v Broome* of the distinction among the three heads of damages which are at large:

> "The three heads under which damages are recoverable for those torts for which damages are ' at large ' are classified under three heads. (1) Compensation for the harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value upon… injury to reputation, as in defamation... (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. This Lord Devlin calls 'aggravated damages'. (3) Punishment of the defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls ' exemplary damages '. (1124F-H)

> The tort of defamation, to which Lord Devlin made only a passing reference in *Rookes* v. *Barnard*, has special characteristics which may make it difficult to allocate compensatory damages between Head (1) and Head (2). The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the damages under Head (1) itself even in cases in which there are no grounds for ‘ aggravated damages ’ under Head (2). Again the harm done by the publication, for which damages are recoverable under Head (1) does not come to an end when the publication is made…The defendant's conduct between the date of publication and the conclusion of the trial may thus increase the damages under Head (1). In this sense it may be said to ‘aggravate’ the damages recoverable as, conversely, the publication of an apology may ‘mitigate’ them. But this is not ‘ aggravated damages ’ in the sense that expression was used by Lord Devlin in Head (2). On the other hand the defendant's conduct after the publication may also afford cogent evidence of his malice in the original publication of the libel and thus evidence upon which ‘aggravated damages’ may be awarded under Head (2) in addition to damages under Head (1).” (1125E-1126B)

69. In the end, I find myself inclined to the view that the function of an award of aggravated damages is to provide a claimant with compensation for the additional injury to his or her feelings caused by the defendant’s conduct.

(1) Where a defendant, albeit motivated by actual malice, has not by his conduct increased the injury to a corporate plaintiff’s feelings, because there are none, I do not see how aggravated damages, being compensatory in nature, would be appropriate.

(2) In cases contemplated in *Hiltz & Seamone Co. v Nova Scotia* (AG) where a defendant, motivated by actual malice, has increased the injury to a corporate plaintiff’s reputation, the increased injury to reputation will not go uncompensated - it

can be reflected in the award for general damages ie damages under Head (1).

(3) Lastly, in cases where malice on the part of a defendant is clearly established but there is no additional injury to a plaintiff's feelings or reputation, whether or not a defendant should or can lawfully be punished for his conduct seems to me a matter properly within the province of exemplary damages.

70. For these reasons, I am not persuaded that I should make an award for aggravated damages in the present case.

71. Looking at the matter in the round, I consider an award of general damages in the sum of $100,000 would sufficiently compensate the Plaintiff in this case.

72. Accordingly, judgment is so entered.

G. Final Injunction

73. The Defendant's liability having been established, in the absence of an undertaking by the Defendant that it will not repeat the publication of the Offending Words or any other circumstances which satisfy this court that there will not be any further publication, an injunction would be appropriate: Gatley on Libel and Slander 11th Ed para 9.28; *John v MGN Ltd* [1997] QB 586, 607.

74. I therefore grant an injunction in terms of paragraph 2 of the prayer for relief in the amended Statement of Claim.

H. Norwich Pharmacal Relief

75. In the prayer for relief in the amended Statement of Claim, the Plaintiff sought an order for disclosure in the following terms:

(1) The disclosure of the number of hits and the number of visitors to the Website:

(a) from 23 January 2009 to 17 August 2010 in respect of the 1st Article;

(b) from 12 October 2007 to 17 August 2010 in respect of the 2nd Article;

(2) The disclosure of the information and documentation in the Defendant's possession, custody or power relating to the (i) full name (as per Hong Kong Identity Card), (ii) Hong Kong Identity Card number; (iii) mobile phone number; (iv) email address and (v) residential address of:

(a) the internet user who posted the 1st Offending Words on the Website on 23 January 2009 at about 4.36 a.m. under the username "小狼"; and

(b) the internet user who posted the 2nd Offending Words on the Website on 12 October 2007 at about 3.39 a.m. under the username "hevangel".

76. The jurisdiction to grant Norwich Pharmacal relief is well established. If, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. It is also clear that if the person mixed up in the affair has to any extent incurred liability to the person wronged, he must make full disclosure: *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133 at 175B-D per Lord Reid. A fortiori, in the present case where the Defendant's liability to the Plaintiff has been established at trial.

77. The duty to provide "full information" includes information and documents necessary for bringing a civil action against the wrongdoers or ascertaining whether a cause of action exists: *Yew Seng Computer (HK) Ltd v Computerland Corporation* [1986] HKLR 283 at 286E per Cons JA*; P v T Ltd* [1997] 1 WLR 1309 at 1318H-1319B per Sir Richard Scott V-C; *A Co v B Co* [2002] 3 HKLRD 111 at 120 per Ma J (as he then was); *Carlton Film Distributors Ltd v VCI Plc* [2003] FSR 47 at para 11 per Jacob J.

78. The jurisdiction has been exercised in requiring website hosts to identify the originators of defamatory statements who posted them on the websites: *Totalise Plc v The Motley Fool Ltd* [2001] EMLR 29; *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375.

79. In the present case, I am satisfied that (1) a wrong has been committed by the persons who posted the two Articles on the Website and identified themselves as "小狼" and "hevangel"; (2) the Plaintiff needs to

identify these persons in order to consider whether to bring action against them; and (3) the Defendant (a) has been mixed up in their wrongdoing so as to have facilitated it and (b) is likely to be able to provide at least some information relating to their identities.

80. Accordingly, I am satisfied there is jurisdiction to grant the relief sought under the Norwich Pharmacal principles.

81. I am also satisfied that, in the exercise of my discretion, it is appropriate to make an order for disclosure. In this regard, I have considered in particular (i) the strength of the Plaintiff's case against the two wrongdoers; (ii) the gravity of the allegations in the two Articles; (iii) the fact that the wrongdoers were hiding behind the anonymity which the Website allowed. I have placed particular weight in this case on (iii) and I venture to suggest that, in general, the balance should weigh heavily in favour of granting Norwich Pharmacal relief in cases like the present. Otherwise, it would give the clearest indication to those who wish to defame others or maliciously publish false statements against others that they can do so with impunity, as long as they do it behind the screen of anonymity on the Internet: *Totalise Plc v The Motley Fool Ltd* [2001] EMLR 29 para 29. Provided always that the objective of and the principles of data protection in Personal Data (Privacy) Ordinance, Cap 486, are borne in mind.

82. As for the scope of disclosure, at trial, Ms Lee informed this court that the Plaintiff no longer sought disclosure of the number of visitors to the Website as such, but only the number of hits relating to the two Articles. Since the Plaintiff's purpose is to ascertain the extent of

publication of the two Articles, it would seem to me that disclosure in this form would be sufficient for the purpose.

83. In relation to personal particulars of the Internet users under the pseudonyms "小狼" and "hevangel", the purpose is obviously to enable the Plaintiff to identify the originators of the two Articles with a view to taking legal action against them. However, I am not satisfied that their Hong Kong Identity Card numbers or mobile phone numbers are even remotely likely to be in the possession of the Defendant, as it seems to me rather unusual for internet discussion forums to require such information from their registered users. No evidence has been placed before this court to establish otherwise. Whether all or only some of the other information sought is in the possession of the Defendant remains to be seen.

84. In any event, I do not see why such highly intrusive information is necessary for the contemplated legal action. No explanation has been provided to this court. Hence, I have grave doubts as to whether the provision of such information would come within the exemption under sections 58(1)(d) and 58(2) of the Personal Data (Privacy) Ordinance, Cap 486: *Cinepoly Records Company Ltd v Hong Kong Broadband Network Ltd* [2006] 1 HKLRD 255.

85. To conclude, there will be an Order that the Defendant do disclose to the Plaintiff information and documentation, in so far as the same is in its possession, custody or power, relating to the number of hits

(1) from 23 January 2009 to 17 August 2010 in respect of the 1st Article;

(2) from 12 October 2007 to 17 August 2010 in respect of the 2nd Article.

86. There will also be an Order that the Defendant do disclose to the Plaintiff information and documentation, in so far as the same is in its possession, custody or power, relating to the (i) full name (ii) email address and (iii) residential address of:

(1) the internet user who posted the 1st Offending Words on the Website on 23 January 2009 at about 4.36 a.m. under the username "小狼"; and

(2) the internet user who posted the 2nd Offending Words on the Website on 12 October 2007 at about 3.39 a.m. under the username "hevangel".

87. I order that such disclosure is to be made by a director of the Defendant and verified on affidavit within 21 days of the date of the sealed Order. I also give liberty to apply.

I. Costs

88. There will be an Order *Nisi* that the Plaintiff is to have the costs of the action.

89. Regarding the costs of complying with the disclosure order, given that the Defendant is not an innocent party, I do not consider the usual rule that costs incurred by a defendant in complying with a Norwich Pharmacal order should be recovered from a plaintiff is applicable in the

present case: *Totalise Plc v The Motley Fool Ltd* [2002] 1 WLR 1233 paras 30 -31. The Defendant will have to bear such costs itself.

(Peter Ng SC)
Deputy High Court Judge

Ms Connie Lee, instructed by Iu Lai & Li, for the Plaintiff

Defendant, in person, absent