Lee Hsien Loong v Review Publishing Co Ltd and Another and Another Suit [2008] SGHC 162

Case Number : Suit 539/2006, 540/2006, SUM 3833/2007, 3834/2007

Decision Date : 23 September 2008

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Davinder Singh, SC, Jaikanth Shankar and Wilson Wong (Drew & Napier LLC) for the plaintiffs; Peter Cuthbert Low, Carrie Gill and Han Lilin (Colin Ng & Partners LLP) for the defendants

Parties : Lee Hsien Loong — Review Publishing Co Ltd; Hugo Restall

Civil Procedure – Amendments – Whether plaintiff might amend statement of claim after application for summary judgment first determined

Civil Procedure – Rules of court – Whether application for summary judgment under O 14 r 1 could be combined with striking out application under O 18 r 19 – Order 14 r 1 and O 18 r 19 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Civil Procedure – Summary judgment – Plaintiffs suing defendants for publishing allegedly defamatory articles about them – Whether articles defamatory in nature – Whether plaintiffs' applications for summary judgment should be allowed

Tort – Defamation – Defamatory statements – Whether allegedly defamatory words referring to plaintiffs – Whether allegedly defamatory words defaming plaintiffs – Whether the defendants entitled to rely on defences of justification, qualified privilege and fair comment – Whether court might reach meaning of allegedly defamatory words different from that pleaded

23 September 2008 Judgment reserved.

Woo Bih Li J:

Introduction

1 The present actions stem from the publication of an allegedly defamatory article ("the Article") in the July/August 2006 issue of the Far Eastern Economic Review ("FEER"). The plaintiff in Suit No 539 of 2006 is Mr Lee Hsien Loong ("LHL"), the Prime Minister of Singapore. The plaintiff in Suit No 540 of 2006 is Mr Lee Kuan Yew ("LKY"), the Minister Mentor in the Prime Minister's office and a cabinet minister. The first defendant in both suits, Review Publishing Co Ltd ("RP"), is the publisher of the FEER. The second defendant in both suits, Mr Hugo Restall ("HR"), is the editor of the FEER and the author of the article complained of in both actions. For ease of reference, I shall refer to both plaintiffs collectively as "the Plaintiffs" and both defendants collectively as "the Defendants". I shall also refer to Suit 539 of 2006 and Suit 540 of 2006 collectively as "the present actions", and individually as "the LHL action" and "the LKY action" respectively. I will refer to Defence (Amendment No 1) in the LHL action and Defence (Amendment No 2) in the LKY action collectively as "the Amended Defences".

2 In the present summonses before me, viz, Summons No 3833 of 2007 and Summons No 3834 of 2007, each of the Plaintiffs seek the following reliefs:

(a) the determination of the natural and ordinary meaning of certain words ("the Disputed

Words") contained in the Article pursuant to Order 14 Rule 12 of the Rules of Court (Cap 322, R5, 2006 Rev Ed);

(b) interlocutory judgment:

(i) with damages to be assessed; and

(ii) an order that the Defendants be restrained from the publication, sale, offer for sale, distribution or other dissemination by any means whatsoever of the defamatory allegations, or other allegations to the same effect, in Singapore,

pursuant to Order 14 Rule 1 of the Rules of Court on the basis that the Defendants have no defence.

(c) Alternatively,

(i) that substantial portions of the Amended Defences ought to be struck out pursuant to Order 18 Rule 19(a), (b), (c) and/or (d) of the Rules of Court and/or the inherent jurisdiction of the court and for interlocutory judgment with damages to be assessed and;

(ii) an order that the Defendants be restrained from the publication, sale, offer for sale, distribution or other dissemination by any means whatsoever of the defamatory allegations, or other allegations to the same effect, in Singapore.

3 The Article was entitled "Singapore's 'Martyr', Chee Soon Juan" and was written after an interview with Dr Chee Soon Juan ("CSJ"), the secretary-general of the Singapore Democratic Party ("SDP").

4 On 30 August 2007, the Plaintiffs filed the present summonses (with supporting affidavits).

Combination of an O 14 Rule 1 application with an O 18 Rule 19 application

5 Before I proceed to deal with the substantive merits of the present summonses, I should address one preliminary point. This is the Defendants' preliminary objection pertaining to the combination of an Order 14 Rule 1 application with an Order 18 Rule 19 application. The former is an application for summary judgment while the latter, in the present summonses, is an application to strike out substantial portions of the Amended Defences. After hearing submissions from both parties, I dismissed the Defendants' objection.

6 In essence, it was submitted by Mr Peter Low ("Mr Low"), counsel for the Defendants, that there is a rule against combining Order 14 Rule 1 and Order 18 Rule 19 applications, premised apparently on the ground that each Order has a different procedure. Mr Low relied on the decision of Siti Norma Yaacob J in *Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861 ("*Wagon Engineering*"), where she said (at 861):

> At the outset, I need to point out that it is very important that the plaintiff should state categorically under which Order or Rule of the Rules of the High Court that it is proceeding with, so as to give the defendant due notice of the nature of the application to enable it to direct its mind as to the issues that are really in dispute. The plaintiff should elect whether it wished to proceed under 0.18 r.19 or under 0.14, but it cannot proceed on both.

However, with respect, the judgment of Yaacob J does not point to any rationale for the need to

make this election.

7 Indeed, the learned judge went on to say at 861:

> In this suit the application was filed 9 months after the Statement of Defence was filed and 3 months after the Summons for Directors [*sic*] were given and under such circumstances, I considered that the most appropriate application should have been under O.18 r.19 but since resort to O.14 is also pleaded in the alternative and considering that the hearing before me was in the nature of a rehearing, I had likewise proceeded to deal with the application in the alternative and heard submissions on both O.18 r.19 and O.14.

In my respectful view, this passage appears to contradict the earlier one requiring a plaintiff to *elect* between the two applications under O 14 r 1 and O 18 r 19 respectively.

8 Mr Low also relied on *Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd* [1995] 2 MLJ 851 ("*Mohd Azam Shuja*"), a decision of the Malaysian Court of Appeal. In that case, the applications under O 14 and O 18 respectively were each pleaded as alternative prayers. Nonetheless, the court concluded that a plaintiff has to elect between the two applications. In his separate judgment, Zakaria Yatim JCA pointed to the "obvious" reasons why this is so. He said at 858:

> I entirely agree with Siti Norma Yaakob J and Haidar J that a plaintiff cannot proceed with both prayers for striking out and for summary judgment in one application. The reasons are obvious. Firstly, under O 26A of the SCR the primary emphasis is on the affidavit. No defence need be filed. In an application under O 14 r 21 of the SCR, there must be a statement of defence. Secondly, in an application under O 26A, the court has to decide whether there are triable issues which ought to be tried.
>
> In the present case, since there were two such prayers in one application, the sessions court ought to have proceeded with the application for summary judgment and not with the striking out application…

In the context of the quoted passage, "SCR" refers to the (Malaysian) Subordinate Court Rules 1980, "O 14 r 12 of the SCR" refers to the order that allows the court to strike out a statement of defence and "O 26A of the SCR" refers to the order that allows the court to grant summary judgment.

9 Similarly, N H Chan JCA in the same case said at 861:

> In my judgment, I think that where there are two such applications in one summons-in-chambers, even though the applications are in the alternative (which, incidentally, means one or the other), the party applying has to elect as to which application he wishes to proceed on.This is because that since both the applications are the applicants' and since it has been determined by this court in the present appeal that the two applications could not be proceeded on in the same summons in chambers, the summons would be dismissed unless the applicant elects as to which of the two applications he would wish to proceed on.

Siti Norma Yaakob JCA concurred with the view and reasons of N H Chan JCA.

10 On the other hand, Mr Davinder Singh SC ("Mr Singh"), counsel for the Plaintiffs, relied on the English position where apparently such combined applications are entertained. In this respect, *Gatley on Libel & Slander* (Sweet & Maxwell, 10th Ed, 2004) ("*Gatley*") states at [30.31] that:

> **Striking out pleadings: CPR r.3.4(2).** This rule, which is the successor to the old RSC Ord.18 r.19, enables the court to strike out a statement of case (or of course a part of it) if the statement of case (1) discloses no reasonable grounds for bringing or defending the claim, (2) is an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings, or if (3) there has been a failure to comply with such a rule, practice direction or court order. The jurisdiction to strike out is frequently invoked in defamation, *although applications under r.3.4(2)(a) are increasingly combined with applications for summary judgment under Pt 24*, which has become the weapon of choice for the litigant seeking to shut out an issue. *It is unclear what, if anything, such "double-barrelled" applications achieve: recent authorities tend to show that the court will politely note the r.3.4(2) application but actually decide the application under Pt 24…* [emphasis added]

11 In addition, Mr Singh also submitted that he could not see any rationale for the rule requiring the Plaintiffs to elect.

12 I dismissed the Defendants' objections for the following reasons. First, it must be noted that the process for summary judgment under the Malaysian SCR would not require the defendant to have filed his defence first before an application for summary judgment is filed. In contrast, our O 14 r 1 allows a plaintiff to apply for summary judgment to be made only after a defence is filed.

13 In any event, with respect, I did not agree with the rationale in *Mohd Azam Shuja.* The question is not so much whether a defence needs to be filed first or whether an application for summary judgment is based primarily on affidavits. Depending on the nature of the application to strike out, such an application may also largely depend on affidavits. True, it may be that the test is not always the same but often they overlap to the extent that a decision on one application will determine the outcome of the other. Thus, *Gatley* wonders about the purpose of such combined applications where the alternative application to strike out is really a mirror of the application for summary judgment.

14 However, there may be instances where the application to strike out is not such a mirror. The application to strike out may pertain to one or some or all of the defences where multiple defences are pleaded. Where the application to strike out pertains to all the defences it may appear as a mirror of the application for summary judgment but the outcome is not necessarily the same. For example, a plaintiff may fail in his application for summary judgment but yet succeed in striking out one or some of the defences, but not all. *A fortiori*, where the application to strike out does not pertain to all the defences.

15 The question before me then was whether the Plaintiffs should be allowed to have such alternative applications. I saw no reason why this should not be allowed so long as the Defendants knew the case they had to meet. For the present summonses, the Defendants were not suggesting they did not know the case they had to meet.

16 Furthermore, if both of such applications may not be heard together, what then is a plaintiff to do? For example, is a plaintiff to file two separate applications and request for them to be heard one after the other? Alternatively, is a plaintiff to file the application to strike out only after the application for summary judgment is heard? With the avenues of appeal available, such an approach will delay the main trial if the plaintiff is not successful in obtaining summary judgment or in striking out the entire defence. Besides, the arguments often overlap and it will be unproductive to have counsel repeating them.

The Disputed Words in the Article and an article in a newsletter of the Singapore Democratic

Party

17 In order to appreciate the context in which the Disputed Words appear in the Article, I set out below paragraphs from the beginning of the Article to a few paragraphs after the Disputed Words end (with added paragraph numbers for easy reference):

> [1] Striding into the Chinese restaurant of Singapore's historic Fullerton Hotel, Chee Soon Juan hardly looks like a dangerous revolutionary. Casually dressed in a blue shirt with a gold pen clipped to the pocket, he could pass as just another mild-mannered, apolitical Singaporean. Smiling, he courteously apologizes for being late—even though it is only two minutes after the appointed time.
>
> [2] Nevertheless, according to prosecutors, this same man is not only a criminal, but a repeat offender. The opposition party leader has just come from a pre-trial conference at the courthouse, where he faces eight counts of speaking in public without a permit. He has already served numerous prison terms for this and other political offenses, including eight days in March for denying the independence of the judiciary. He expects to go to jail again later this year.
>
> [3] Mr. Chee does not seem too perturbed about this, but it drives Singaporean Prime Minister Lee Hsien Loong up the wall. Asked about his government's persecution of the opposition during a trip to New Zealand last month, Mr. Lee launched into a tirade of abuse against Mr. Chee. "He's a liar, he's a cheat, he's deceitful, he's confrontational, it's a destructive form of politics designed not to win elections in Singapore but to impress foreign supporters and make himself out to be a martyr," Mr. Lee ranted. "He's deliberately going against the rules because he says, 'I'm like Nelson Mandela and Mahatma Gandhi. I want to be a martyr.'"
>
> [4] Coming at the end of a trip in which the prime minister essentially got a free ride on human rights from his hosts—New Zealand Prime Minister Helen Clark didn't even raise the issue—this outburst showed a lack of self-control and acumen. Former Prime Minister Lee Kuan Yew, the man who many believe still runs Singapore and who is the current prime minister's father, has said much the same things about Mr. Chee—"a political gangster, a liar and a cheat"—but that was at home, and in the heat of an election campaign.
>
> [5] Mr. Chee smiles when it's suggested that he must be doing something right. "Every time he says something stupid like that, I think to myself, the worst thing to happen would be to be ignored. That would mean we're not making any headway," he agrees.
>
> [6] But one charge made by the government does stick: Mr. Chee is not terribly concerned about election results. Which is just as well, because his Singapore Democratic Party did not do very well in the May 6 polls. It would be foolish, he suggests, for an opposition party in Singapore to pin its hopes on gaining one, or perhaps two, seats in parliament. He is aiming for a much bigger goal: bringing down the city-state's one-party system of government. His weapon is a campaign of civil disobedience against laws designed to curtail democratic freedoms.
>
> [7] "You don't vote out a dictatorship," he says. "And basically that's what Singapore is, albeit a very sophisticated one. It's not possible for us to effect change just through the ballot box. They've got control of everything else around us." Instead what's needed is a coalition of civil society and political society coming together and demanding change—a color revolution for Singapore.
>
> [8] So far Mr. Chee doesn't seem to be getting much, if any traction. While many Singaporeans

don't particularly like the PAP's arrogant style of government, the ruling party has succeeded in depoliticizing the population to the extent that anybody who presses them to take action to make a change is regarded with resentment. And in a climate of fear—Mr. Chee lost his job as a psychology lecturer at the national university soon after entering opposition politics—a reluctance to get involved is hardly surprising.

[9] Why is all this oppression necessary in a peaceful and prosperous country like Singapore where citizens otherwise enjoy so many freedoms? Mr. Chee has his own theory that the answer lies with strongman Lee Kuan Yew himself: "Why is he still so afraid? I honestly think that through the years he has accumulated enough skeletons in his closet that he knows that when he is gone, his son and the generations after him will have a price to pay. If we had parliamentary debates where the opposition could pry and ask questions, I think he is actually afraid of something like that."

[10] That raises the question of whether Singapore deserves its reputation for squeaky-clean government. A scandal involving the country's biggest charity, the National Kidney Foundation, erupted in 2004 when it turned out that its Chief Executive T.T. Durai was not only drawing a $357,000 annual salary, but the charity was paying for his first-class flights, maintenance on his Mercedes, and gold-plated fixtures in his private office bathroom.

[11] The scandal was a gift for the opposition, which naturally raised questions about why the government didn't do a better job of supervising the highly secretive NKF, whose patron was the wife of former Prime Minister Goh Chok Tong (she called Mr. Durai's salary "peanuts"). But it had wider implications too. The government controls huge pools of public money in the Central Provident Fund and the Government of Singapore Investment Corp., both of which are highly nontransparent. It also controls spending on the public housing most Singaporeans live in, and openly uses the funds for refurbishing apartment blocks as a bribe for districts that vote for the ruling party. Singaporeans have no way of knowing whether officials are abusing their trust as Mr. Durai did.

[12] It gets worse. Mr. Durai's abuses only came to light because he sued the Straits Times newspaper for libel over an article detailing some of his perks. Why was Mr. Durai so confident he could win a libel suit when the allegations against him were true? Because he had done it before. The NKF won a libel case in 1998 against defendants who alleged it had paid for first-class flights for Mr. Durai. This time, however, he was up against a major bulwark of the regime, Singapore Press Holdings; its lawyers uncovered the truth.

[13] Singaporean officials have a remarkable record of success in winning libel suits against their critics. The question then is, how many other libel suits have Singapore's great and good wrongly won, resulting in the cover-up of real misdeeds? And are libel suits deliberately used as a tool to suppress questioning voices?

[14] The bottling up of dissent conceals pressures and prevents conflicts from being resolved. For instance, extreme sensitivity over the issue of race relations means that the persistence of discrimination is a taboo topic. Yet according to Mr. Chee it is a problem that should be debated so that it can be better resolved. "The harder they press now, the stronger will be the reaction when he's no longer around," he says of Lee Kuan Yew.

[15] The paternalism of the PAP also rankles, especially since foreigners get more consideration than locals. The World Bank and International Monetary Fund will hold their annual meeting in Singapore this fall, and have been trying to convince the authorities to allow the usual

demonstrations to take place. The likely result is that international NGO groups will be given a designated area to scream and shout. "So we have a situation here where locals don't have the right to protest in their own country, while foreigners are able to do that," Mr. Chee marvels. Likewise, Singaporeans can't organize freely into unions to negotiate wages; instead a National Wages Council sets salaries with input from the corporate sector, including foreign chambers of commerce.

[16] All these tensions will erupt when strongman Lee Kuan Yew dies. Mr. Chee notes that the ruling party is so insecure that Singapore's founder has been unable to step back from front-line politics. The PAP still needs the fear he inspires in order to keep the population in line. Power may have officially passed to his son, Lee Hsien Loong, but even supporters privately admit that the new prime minister doesn't inspire confidence.

18 The Disputed Words as pleaded by the Plaintiffs are at [9] to [13] of the Article. In addition, the words "How many libel suits have Singapore's great and good wrongly won, covering up real misdeeds?" were repeated and given prominence in a box in the Article.

19 From the reproduced paragraphs above, it can be seen that the Article adopts the following broad approach. The first two paragraphs set the background of the interviewee, CSJ, portraying him as an opposition leader who has been jailed several times. [3] then proceeds to outline LHL's comments about CSJ before setting out LKY's own views about CSJ in [4]. In particular, [4] refers to LKY as "the man who many believe still runs Singapore". [5] to [7] discuss CSJ's views of the political situation in Singapore, culminating in his belief that there is a need for a "color revolution" for Singapore. [8] sets out the supposed political climate in Singapore, which the Article describes as being "a climate of fear".

20 Finally, we come to the Disputed Words at [9] to [13] of the Article. [9] refers to LKY as the "strongman" and questions why "all this oppression" is necessary in Singapore. [10] raises the question of whether Singapore deserves its reputation for "squeaky-clean government" and alludes to the "scandal" involving the National Kidney Foundation ("NKF") and its Chief Executive Mr T T Durai ("Durai"). I shall term this the "NKF Saga". Alluding to the NKF Saga "scandal" as having "wider implications", [11] then mentions that the government controls huge pools of money in the Central Provident Fund ("CPF") and the Government of Singapore Investment Corp ("GIC") both of which are described as "highly nontransparent". The government is also said to control spending on public housing. I should mention that public housing is provided by the Housing and Development Board ("the HDB"). [12] then discusses the libel suit which Durai had won in 1998 but his abuses subsequently came to light in another case because the lawyers of Singapore Press Holdings in that case had unravelled the truth. In [13], the Article questions "how many other libel suits have Singapore's great and good wrongly won…" and whether libel suits are "deliberately used as a tool to suppress questioning voices". This marks the end of the Disputed Words, but it should also be noted that [14] - [16] then talks about the "bottling up" of dissent and of the People's Action Party's ("PAP") "paternalism" and [16] refers again to LKY as "strongman Lee Kuan Yew".

21 Mr Singh submitted that the Article adopts a very similar style (in terms of both flow and substance) as certain passages of an English article which was published in or around February 2006 in the *New Democrat Issue 1*, a newsletter of the SDP. That article, which I shall refer to as the "SDP article", was in fact adjudged to be defamatory of the same plaintiffs by Justice Belinda Ang ("Ang J") in *Lee Hsien Loong v Singapore Democratic Party and Others and Another Suit* [2007] 1 SLR 675 ("*Singapore Democratic Party*"). The relevant portions of the SDP article, as set out by Ang J in *Singapore Democratic Party* at [21]–[23], are as follows:

21 The English Words appeared in an article ("the English Article") which spanned pp 4–5 of *The New Democrat Issue 1*. The English Article was entitled "Govt's role in the NKF scandal" and was referred to on the cover page of the newspaper as follows:

> What's the Govt's role in the NKF [National Kidney Foundation] scandal? – page 4 Peanuts Action Party.

22 On p 5, there was a standfirst which formed part of the English Article. It read as follows:

> It is impossible not to notice the striking resemblance between how the NKF operated and how the PAP [People's Action Party] runs Singapore. It would take someone foolishly blind not to be concerned with how our financial reserves and CPF [Central Provident Fund] savings are dealt with. Here are the similarities.

There was a text box on that same page, which contained the following words in bold, enlarged font:

> If you think the running of NKF was bad, read this …

23 The English Words which the plaintiffs complained of were these:

> The NKF fiasco is not about bad practices. It is not even about negligence on the Government's part.
>
> It is about greed and power.
>
> It is about the idea that the political elite must be paid top dollar, no matter how obscene those amounts are and regardless of who suffers as a result of it.
>
> It is about a system engineered over the decades by the PAP that ensures that it and only it has access to public information and by fiat decides what is allowed and what is not.
>
> It is about what a "democratic society, based on justice and equality" should not be.
>
> Singaporeans must note that the NKF is not an aberration of the PAP system. It is, instead, a product of it.
>
> …
>
> **Lack of Transparency**
>
> …
>
> How does this compare to the PAP? The Government of Singapore Investment Corporation (GIC) is a business entity set up, and chaired, by Mr Lee Kuan Yew to manage and invest our national reserves.
>
> Incredibly, the GIC will not give an account of its investments (how and where our money is invested, and the profits/losses they record) to the people. Even Parliament is not privy to the information. The GIC operates in secrecy.
>
> The HDB [Housing and Development Board] is no better. It continues to stonewall

longstanding questions about the actual cost of building the flats and the profits it makes when it sells these flats to the people.

What about the CPF? Many Singaporeans are still concerned that the Fund is broke and that is the reason why the Government comes up with all these schemes to retain our CPF savings even when we retire.

…

Defamation suits

Singaporeans have known this for a long time but it needed the NKF scandal to drive home the point: The use, or rather abuse, of defamation laws in this country has led to a situation where wrong-doings cannot be exposed.

…

Its [The PAP's] officials, starting from Mr Lee Kuan Yew on down, regularly sue their political opponents.

The cases of Mr JB Jeyaretnam, Mr Tang Liang Hong, and Dr Chee Soon Juan are just a few examples.

Authoritarian control

It is obvious now that the NKF was run in an autocratic manner. The KPMG report said: "Power was centred around one man, and was exercised in an ad-hoc manner through Mr Durai and his coterie of long-serving assistants."

Is not power in Singapore centred around one party, if not one individual?

With the PAP monopolizing power and making sure that no one has the means to challenge that hold on power (by banning protests, introducing GRCs [Group Representation Constituencies], suing political opponents, making legitimate democratic actions criminal offences, etc) are we not witnessing the NKF but on a larger and national scale?

…

The use of the media

…

With the control of the media, the PAP Government has likewise been able to present good news to the people and take credit for them (justified or not), hide the bad news, and portray the opposition in the most undesirable light possible.

Again, without a free media to expose the excesses of the Government, Singaporeans will never know what is going on behind the scenes and officials like Mr Durai and the PAP will continue to use their "victorious" lawsuits as a measure of competence and absence of wrongdoing.

22 As Mr Singh pointed out, the Article bears a degree of similarity with the cited passages of the

SDP article. First, the SDP article discusses the NKF Saga before delving into comparisons with the Government run by the PAP. As the Article proceeds to do at [11], the SDP article discusses about a lack of transparency and cites as examples the GIC, the HDB and the CPF. These examples were the same ones raised in the Article. The SDP article then refers to defamation suits filed by officials "starting from Mr Lee Kuan Yew on down" to sue their political opponents. Similarly, this is what the Article proceeds to do at [13] although LKY is not specifically mentioned in [13] of the Article. Finally, the SDP article talks about the "authoritarian control" exercised by the PAP in Singapore. Similarly, the Article discusses the "bottling up of dissent" and PAP's "paternalism" at [14]–[15], although the Disputed Words end at [13] of the Article.

Jurisdiction

23 In approaching the broad question of whether summary judgment should be granted to the plaintiffs pursuant to O 14 of the Rules, the starting point is that as stated in *Gatley* at p 182: To succeed in an action of defamation, the plaintiff must (a) prove that the defendant published the words; (b) prove that the words are defamatory; and (c) identify himself as the person defamed.

24 As for (a), it is not disputed that RP is the publisher and HR is the author, respectively, of the Article.

25 As for (b) and (c), the present summonses rely on the natural and ordinary meaning of the Disputed Words and not on innuendo, as the Defendants wrongly thought, although the Plaintiffs' pleadings do rely on innuendo.

26 Paragraph 80 of the Defendants' Reply Submissions ("DRS") states that they do not concede that the court has jurisdiction to award summary judgment in defamation cases but will not contest such jurisdiction at the hearing because in other cases, for example, *Microsoft Corporation v SM Summit Holdings Ltd* [1999] 4 SLR 529 ("*Microsoft Corporation*"), the court had assumed such a jurisdiction in libel cases. I am of the view that the court does have such a jurisdiction. I add that, in an application pursuant to O 14 r 12 for the determination of meaning, the court is required to fix a single "right" meaning of the words complained of. The court does not fix a range of possible meanings. As was held by the Court of Appeal in *Microsoft Corporation* (at [44]–[48]):

> 44 Mr Elias next refers to O 82 r 3A of the English Rules of Supreme Court ('RSC') and submits that, should the court decide to apply O 14 r 12, it should do so along the lines as contemplated in O 82 r 3A and fix a range of possible meanings, which the alleged defamatory words were reasonably capable of bearing, and should not, at this stage, determine the meaning of the words, which is the sole function of the trial judge as the finder of fact and the decider of law. In summary, his submission is first, that the court cannot and should not, in the present case, determine the natural and ordinary meaning of the words complained of pursuant to O 14 r 12, as the criterion in r 12(1)(a) has not been satisfied, and secondly, that if the court is minded to apply O 14 r 12, it should do so along the lines of O 82 r 3A of the RSC.
>
> 45 We propose to take the second argument first. It seems to us that the argument flows from a misinterpretation of the respective provisions and a failure to appreciate the differences in the manner in which defamation actions are tried in England and Singapore. In England, a defamation action is tried before a judge and a jury, and two questions invariably arise: first, whether the words complained of are reasonably capable of bearing the defamatory meaning as pleaded by the plaintiff or some lesser defamatory meaning, and secondly, whether the words do bear the defamatory meaning, whether that as pleaded by the plaintiff or the lesser defamatory meaning. The first is a question of law and is decided by the judge, and the second is one of fact

and is decided by the jury. Should the judge decide that the words are not reasonably capable of bearing a defamatory meaning the judge will dismiss the claim. Only if the judge decides that the words are reasonably capable of bearing a defamatory meaning will the second question arise and be put to the jury.

46 Our O 14 r 12 is identical with and, in fact, was derived from O 14A of the RSC. But in England O 14A of the RSC cannot be employed for determining the defamatory meaning of the words complained of in an action for defamation, as that issue is a question of fact for the jury to determine at the end of the trial. The determination of the meaning of the words is, therefore, clearly not an appropriate issue under O 14A in England. Hence, O 82 r 3A was enacted to enable the court in a defamation action to determine, before trial, the meaning or meanings, which the words complained of are reasonably capable of bearing. Order 82 r 3A of the RSC, so far as relevant, reads:

> (1) At any time after the service of the statement of claim either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings.
>
> (2) If it appears to the judge on the hearing of an application under para (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the pleadings, he may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.

47 In *Mapp v News Group Newspapers Ltd* [1998] QB 520, the Court of Appeal held that the purpose of O 82 r 3A is to enable the court, in appropriate cases, to determine before trial the permissible meanings of the allegedly defamatory words, and that on such an application the judge should evaluate the words and delimit the range of meanings of which they are reasonably capable. Hirst LJ explained the approach to be taken at p 526:

> In my judgment, the proper role for the judge, when adjudicating a question under O 82 r 3A, is to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising his own judgment in the light of the principles laid down in the … authorities and without any O 18 r 19 overtones. If he decides that any pleaded meaning falls outside the permissible range, it is his duty to rule accordingly. It will, as is common ground, still be open to the plaintiff at the trial to rely on any lesser defamatory meanings within the permissible range but not on any meanings outside it. The whole purpose of the new rule is to enable the court in appropriate cases to fix in advance the ground rules on permissible meanings which are of such cardinal importance in defamation actions, not only for the purpose of assessing the degree of injury to the plaintiff's reputation, but also for the purpose of evaluating any defences raised, in particular, justification or fair comment.

48 In our jurisdiction, we do not have a jury, and all actions or suits are tried and decided by a judge sitting alone as the decider of fact and law. In a defamation action, so far as the meaning of the words is concerned, the only question before the trial judge is whether the words complained of bear the defamatory meaning as pleaded by the plaintiff or some lesser defamatory meaning. There is no need for the judge to determine first whether the words are reasonably capable of bearing the defamatory meaning and then whether the words do bear that defamatory meaning. It would be too 'artificial' an exercise to do so. This position was admirably stated by Diplock LJ in *Slim & Ors v Daily Telegraph & Ors* [1968] 2 QB 157 at pp 174–175:

> The decision as to defamatory meanings which words are capable of bearing is reserved to the judge, and for this reason, and no other, is called a question of law. The decision as to the particular defamatory meaning within that category which the words do bear is reserved to the jury, and for this reason, and no other, is called a question of fact. But the recognition that there may be more than one meaning which reasonable men might understand words to bear does not absolve the jury from the duty of deciding upon one of those meanings as being the only 'natural and ordinary meaning' of the words … But where an action for libel is tried by a judge alone without a jury, it is he who has to arrive at a single 'right' meaning as 'the natural and ordinary meaning' of the words complained of; and with the concentration of functions in a single adjudicator, the need for his distinguishing between meanings which words are capable of bearing and the choice of the one 'right' meaning which they do bear disappears. It would be carrying artificiality too far, even for the law of libel, to suggest that a judge sitting alone must approach the issue as to the natural and ordinary meaning of the words complained of by asking himself not only the question: 'What is the natural and ordinary meaning in which the words would be understood by reasonable men to whom they were published?' but also the further question: 'Could reasonable men understand them as bearing that meaning?'…

Whether the Disputed Words refer to the Plaintiffs

27 Where a plaintiff is expressly identified by name, there is generally no problem with identification. Problems arise where a plaintiff is not specifically named, but even then it is not necessary to produce evidence that anyone to whom the statement was published did identify the plaintiff. In this respect, the question in all cases is whether the words might be understood by the ordinary and reasonable person to refer to the plaintiff in the context of the statement as a whole and in its proper setting: *Gatley* at pages 182–3, and this is an objective test: see *Lee Kuan Yew v Davies* [1989] SLR*1063 ("Davies").* The analysis on reference overlaps with the analysis on meaning.

28 I now turn to the facts at hand and consider whether the Disputed Words refer to the Plaintiffs. In this regard, I will deal first with the question of reference to LKY followed by the alleged reference to LHL.

Whether the Disputed Words refer to LKY

29 The DRS (at [76] and [77]) states that the Defendants do not dispute that the Disputed Words refer to LKY. [77] states:

> … The words [*ie*, the Disputed Words] obviously and expressly refer to [LKY], whose power and influence in Singapore is known to all readers and is a matter of public interest in the region.

However, [77] then goes on to state:

> The ordinary reader would not know that he is specifically retained by the Prime Minister as a member of cabinet; they would probably think that his ministerial office is provided for in the constitution which it is not) or is held by virtue of his former Prime Ministership rather than by gift from his son. They would not identify him as "the government".

30 The DRS then goes on in [78] to dwell on the distinction between "officials" and "ministers" to submit that the use of "Singaporean officials" in [13] of the Article does not refer to cabinet members, thus suggesting that the ordinary and reasonable reader would not have understood [13] of the Article as referring to LKY, even though earlier paragraphs of the Article do refer to him.

31 However, [26] of the Amended Defence in respect of the LKY action states that the Disputed Words mean, *inter alia,* that LKY has persecuted political opponents and sued them under unaltered and antiquated English libel laws that favour political plaintiffs. The reference to LKY's suits in [26] of the Amended Defence must clearly refer to [13] of the Article. Indeed, Mr Low conceded during submissions that "Singaporean officials" in [13] refers to LKY but, he submitted, not to LHL.

32 Before I continue, I should also mention that it is not necessarily the case that LKY, or LHL, has *locus standi* to sue for defamation each and every time defamatory remarks are made of the government. *Gatley* states at p 190 to 192:

> … Where the words complained of reflect on a body or class of persons generally, such as lawyers, clergymen, publicans, or the like, no particular member of the body or class can maintain an action. "If", said Willes J. in *Eastwood v Holmes*, "a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual". As this statement makes plain there is no special rule about "class libel", it is simply a question of whether a reasonable reader could conclude that the claimant as an individual was pointed at and the broader the "class" the less likely this is. The leading case is *Knupffer v London Express Newspaper* in which a war-time article accused a Russian emigré group, "Mlado Russ", of being instruments of Hitler. The group numbered 24 members in England and about 2,000 in the world and the plaintiff was head of the British branch. Although four of the plaintiff's witnesses said that their minds went to him when they read the article, the House of Lords held that as a matter of law the words were incapable of referring to the plaintiff as an individual. According to Lord Atkin, the "reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be facetious exaggeration."
>
> …
>
> Again, the words, though directed at a group, may be used in circumstances which point at a particular individual. For this purpose the knowledge of the recipients of the statement about whom the defendant is aiming at is relevant. In *Le Fanu v Malcolmson* a newspaper article imputed that "in some of the Irish factories" cruelties were practiced upon the employees, and the plaintiffs, who were the owners of a factory in Ireland, proved to the satisfaction of the jury that the newspaper was referring especially to their factory, the House of Lords refused to arrest judgment for the plaintiff. In giving judgment Lord Campbell said:
>
> > "Where a class is described it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.

33 In *Singapore Democratic Party,* Ang J said at [35] and [36]:

> 35 … There are cases in which the language used is intended to refer to a body or class of

persons so much so that every individual member of the body or class so referred to (whether expressly, impliedly or inferentially) may have a cause of action. This legal principle was affirmed by VK Rajah J in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 where *Derbyshire* was considered at [68]:

> The case [*Derbyshire*], however, makes it clear that the decision itself does not affect the right of an individual member or officer of a government body to sue if the statement about the body is capable of being interpreted as referring to the individual. Indeed, the ability of the individual to sue seems to be regarded as a reason for denying such a right to the body: *Gatley* on *Libel and Slander* [Sweet & Maxwell, 10th Ed, 2004] … at para 8.20.

36 The Court of Appeal in *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 rejected the proposition that *Derbyshire* restricts the rights of individuals who hold public office to sue for libel. The appellate court said (at [116]–[119]):

> 116 Clearly these two cases [*Derbyshire* and *City of Chicago v Tribune Co* (1923) 139 NE 86] are distinguishable from the instant cases. In each of the two cases the party suing was a public authority and as a matter of policy the laws in those jurisdictions do not permit such an authority to bring an action for libel. In the cases before us, the plaintiffs are individuals suing as private citizens. None of them brought the actions in their official capacity. Even under English law, a prime minister or a minister in office may sue in their private capacity for damages in respect of defamatory matters published of them and depending on the circumstances may recover substantial damages. Mr Gray himself realises this crucial difference because, in the next breath, he says that Mr Tang 'is not arguing that politicians should forfeit the right to protect their reputations by means of libel actions'.

34 I should mention that the case of *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 ("*Tang Liang Hong*") was on the assessment of damages for defamation and the case of *Chee Siok Chin and others v Minister for Home Affairs* [2006] 1 SLR 582 ("*Chee Siok Chin v MHA*") was not a defamation case. Nevertheless, the observation of the court in each of these two cases is helpful although neither spells out definitively, as it is not possible to do so, when a politician may initiate a defamation action where he is not expressly identified by the defamatory words.

35 Coming back to the Article, it must be remembered that [4] thereof states that many believe that LKY still runs Singapore and [9] thereof describes him as "strongman Lee Kuan Yew". This description is repeated in [16]. Accordingly, even though LKY is not the prime minister, it seems to me that the Article is saying that he is the person or at least one of the persons, holding the reigns of power in government. LKY is also the chairman of the GIC.

36 So, seen in context, when reference is made in [11] of the Article to the government's control of huge pools of public money in the CPF and GIC and its control of spending on public housing, I am of the view that LKY is being referred to. As an aside, I note that although [77] of the DRS says that the ordinary reader would not identify LKY as "the government", HR's own affidavit refers at [13] to "the Plaintiffs and their government" and [38] of the Defendants Written Submissions ("DWS") refers to the Plaintiffs as "the two most powerful men in Singapore".

37 As for "Singaporean officials" in [13] of the Article, I add that even if Mr Low did not concede that this refers to LKY, it is clear to me that, in context, the words refer to LKY. True, the word "officials" may ordinarily mean government officers lower in rank than a cabinet minister but, before [13], the only two government officers referred to explicitly are LKY and LHL. Secondly, and more significantly, the use of "Singaporean officials" in [13] is in the context of those who "have a

remarkable record of success in winning libel suits against their critics". This must immediately bring to mind LKY as he has successfully initiated the most libel suits against those who have defamed him. The next sentence in [13] refers to Singapore's "great and good" again in the context of libel suits, this time said to be wrongly won. This reference is highlighted in the box I mentioned above. The phrase "great and good" cannot be referring to the ordinary mandarin or even to chief executive officers of public corporations and charities as the Defendants were suggesting. It is a sarcastic reference to LKY and reinforces the contention that "Singaporean officials" in [13] refers to LKY in the context of LKY's libel suits.

38 In my view, there is undeniably reference to LKY by the Disputed Words.

Whether the Disputed Words refer to LHL

39 Mr Singh submitted that there can be no dispute that the ordinary reader would clearly understand that the Disputed Words, in context, refer to LHL as well. The reasons given by Mr Singh were as follows:

(a) LHL is referred to as LKY's "son", for example, in [9] of the Article.

(b) In [11] of the Article, the word "government" is used twice.

(c) LHL is the head of the government.

(d) When the ordinary reader in Singapore reads the word "government", his mind is immediately and naturally drawn to the head of the government, who is LHL.

(e) In any case, where words are published of the "government", and if, by those words, the individual reputations of members of the government are wronged, any of the members of the government (which in the present case clearly includes LHL) would be entitled to sue (in their personal capacities) for defamation.

(f) The Article goes on, in [11] of the Article (the third paragraph of the Disputed Words), to state: "Singaporeans have no way of knowing whether officials are abusing their trust as Mr Durai did." An ordinary reader would have read the word "officials" in the context of the entire Article, to refer to LHL as the reference to officials immediately follows references to the "government" and LHL is the head of the government.

(g) The reference in [13] of the Article to "Singaporean officials" and "Singapore's great and good" in the context of a remarkable record of success in winning libel suits is to LHL who has at various times, successfully initiated defamation actions.

40 The Defendants deny that the Article refers to LHL in any defamatory sense (see DRS at [79]). They submitted that there was no accusation made against LHL. On the contrary, LHL was presented "as a victim of his father's culture of non-transparency", drawing support from this expression in the Disputed Words, "His son [that is, LKY's son, LHL] and the generation after him will pay a price…" It was further submitted that LHL is not merely an "official" in that he is not an employee or bureaucrat who is permanently employed in the Government apparatus (see DRS at [79]).

41 I do not need to reiterate what I said above as to whether LKY or LHL has *locus standi* to sue for defamation each and every time defamatory remarks are made of the government.

42 As for the Article and LHL, the first explicit reference to LHL is at [3] where he is referred to as "Singaporean Prime Minister Lee Hsien Loong". This is followed by the next sentence in respect of "his government's persecution…". At [4], LHL is referred to as "the prime minister" and "the current prime minister".

43 In my view, when reference is made in [11] of the Article to the government's control of huge pools of public money in the CPF and GIC and its control of spending on public housing, LHL is also being referred to.

44 As for "officials", this is used twice in [11] and [13]. As I said, I do not agree that the word means the ordinary mandarin or even a CEO but LKY. However, does the word "officials" in [11] and [13] refer to LKY only? It is used in the plural, not the singular. LHL was the first government official to be referred to in the Article, before LKY was referred to, and in LHL's capacity as prime minister, the head of the government. LHL is also known to have had successfully initiated defamation actions.

45 I am of the view that, in the context of the Article, the reference to "officials" in the Disputed Words refer to LHL, as well as to LKY.

Whether the Disputed Words are defamatory of the Plaintiffs

The applicable law

(1) When words are defamatory

46 The Plaintiffs have relied on the natural and ordinary meaning of the Disputed Words. As stated in *Evans on Defamation in Singapore and Malaysia (Third Edition)* at p 12, words can be defamatory in their natural and ordinary meaning, which includes any meaning capable of being inferred from the words standing on their own in addition to their literal meaning. But before we can even come to that, we must first understand *when* words are defamatory.

47 Mr Singh submitted that the general test of whether particular words are defamatory is set out by the Court of Appeal in *Aaron v Cheong Yip Seng* [1996] 1 SLR 623 ("*Aaron*"), adopting the views of Lord Atkin in *Sim v Stretch* (1936) 52 TLR 669, as follows (at [51]):

> … [W]hether words are defamatory must be determined by an objective test, being whether 'the words tend to lower the [plaintiff] in the estimation of right-thinking members of society generally'.

This is but one manifestation of the myriad of tests. Words are said to be defamatory when they tend to lower the plaintiff in the estimation of right thinking men in general (*Chiam See Tong v Xin Zhang Jiang Restaurant Pte Ltd* [1995] 3 SLR 196), or if they would expose him to hatred, contempt or ridicule (*JB Jeyaretnam v Goh Chok Tong* [1984 –85] SLR 516), or would cause him to be shunned or avoided (*Mohd Onn Muda v Saniboey Mohd Ismail* [1998] 1 CLJ 569).

(2) Constructing the natural and ordinary meaning

48 The next question is *how* the court should construe the natural and ordinary meaning of certain words to determine if they are defamatory. The Court of Appeal elaborated on the applicable test in *Microsoft Corporation* as follows (at [53]):

> The principles applicable in determining the natural and ordinary meaning of the words complained

> of in a defamation action are well established. The court decides what meaning the words would have conveyed to an ordinary reasonable person using his general knowledge and common sense: *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1984-1985] SLR 516; [1985] 1 MLJ 334… The test is an objective one: it is the natural and ordinary meaning as understood by an ordinary, reasonable person, not unduly suspicious or avid for scandal. The meaning intended by the maker of the defamatory statement is irrelevant. Similarly, the sense in which the words were actually understood by the party alleged to have been defamed is also irrelevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire passage in which they are set out. The court is not confined to the literal or strict meaning of the words, but takes into account what the ordinary, reasonable person my reasonably infer from the words. The ordinary, reasonable person reads between the lines. …

49 An important element of the aforementioned test is the characteristics of the ordinary and reasonable person, for it is this hypothetical character's reading and understanding of the defamatory words which assume legal significance and translate into a definitive legal ruling of the status of allegedly defamatory words. While this hypothetical character has been variously referred to as the "law-abiding citizen" (*Lau Chee Kuan v Chow Soong Seong & Ors* [1955] MLJ 21.1), "average thinking man" (*id*. at 22) or "right thinking members of society in general" (*Workers' Party v Attorney General of Singapore* [1972–74] SLR 621), the formulation "reasonable and ordinary person" is by far the most common formulation, and I shall be using this expression in this judgment. However, it must not be mistaken that these different tags carry with them different legal connotations. These are simply different ways of naming the same hypothetical character from whose perspective the court will examine the allegedly defamatory statements.

50 Mr Singh also submitted that "reading between the lines", drawing inferences and understanding implications are all activities which the ordinary and reasonable person will engage in. The Court of Appeal in *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 3 SLR 337 ("*Goh Chok Tong*"), held (at [25]):

> In considering the inferences to be drawn it is relevant to bear in mind the observations made by the Court of Appeal in England in *Skuse v Granada Television Ltd* [1996] EMLR 278, p 285:
>
> …
>
> (2) The hypothetical reasonable reader [or viewer] is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> …
>
> (3) …
>
> (4) The court should not be too literal in its approach. We were reminded of Lord Devlin's speech [in *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234].

The passage of Lord Devlin's speech in *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 which the Court of Appeal referred to is as follows:

[T]he natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.

51 Mr Singh also submitted that the following guidance is provided by the courts:

(a) The ordinary reader may be guilty of a certain amount of loose thinking and does not read a sensational article with cautious and critical care: per Lord Reid and Lord Morris in *Morgan v Odhams Press Ltd*.

(b) A first impression may be lasting: *Hayward v Thompson* [1982] QB 47.

(c) The ordinary person does not live in an ivory tower and will be assumed to be possessed of general knowledge and experience of worldly affairs: *Rubber Improvement Ltd v Daily Telegraph* [1964] AC 234 and *Jones v Skelton* [1963] 1 WLR 1362.

52 Mr Low cited the following characteristics of the reasonable reader:

(a) The reader does not select the most extreme meanings, but strikes a balance between suspicion and naivety: *Nevill v Fine Arts and General Insurance Co Ltd* [1897] AC 72 at 78; *Lewis v Daily Telegraph* [1964] AC 234; *English and Scottish Co-op Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440 at 452.

(b) The reader does not strain the language of the Article: *Straits Times Press (1975) Ltd v Workers' Party* [1986] SLR 253 at 256 and any strained or forced or utterly unreasonable interpretation must be rejected: *Jones v Skelton* [1963] 3 All ER 952 at 958E.

(c) The reader does not draw unsustainable inferences from it: *Straits Times Press,* op.cit.

(d) The reader does not draw grave imputations from extravagant language out of the context in which it is expressed: ibid, at 257C.

(e) The reader considers the publication as a whole: *Mirror Newspapers Ltd v World Hosts Pty Ltd* [1979] 141 CLR 632 at 646; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 at 70.

(f) The reader is both reasonable and fair-minded: *Charleston* at 71.

(g) The reader reads a book with more care than he or she would a newspaper: *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165E.

(h) The reader does not infer guilt or misconduct by drawing an inference upon an inference: *Lewis v Daily Telegraph* [1964] AC 234 at 274: *Mirror Newspapers Ltd v Harrison* (1982) 42 ALR 487; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 166-167.

(3) Defamation by implication

53 For present purposes, it is important to bear in mind that there may be defamation by implication through the natural and ordinary meaning of words. *Gatley* notes at para 3.16:

> It is immaterial whether the defamatory imputation is conveyed by words of direct assertion or by suggestion, for insinuation may be as defamatory as an explicit statement and even more mischievous. Similarly words may be defamatory even though they are used in an interrogative form, and in principle the same should apply if they are used in a hypothetical way, so long as the context in which they are used they may reasonably be interpreted to convey the truth. The tendency and effect of the language, not its form, is the criterion and a defendant cannot defame and escape the consequences by dexterity of style. "The results of a calumnious falsehood arise from the impression which it – all of it, including reservations, cautions, and all the rest – makes upon the minds of the readers, an impression which may be quite apart from any artificial restriction which the author of the falsehood sought to impose." (*citing Stubbs v Mazure (1920) A.C. 66 at 80*).

54 As for an example of defamation by implication, *Gatley* cites (at p 95) *Hasnul bin Abdul Hadi v Bulat bin Mohamed* [1978] 1 MLJ 75 ("*Hasnul*"), a decision of the Malacca High Court. In that case, the plaintiff, *Hasnul*, sued the defendant for publishing an article containing the following words:

> …the citizens in the town whether they are Malays or Chinese look at Hasnul as "Abu Jahal" because of his very big lies.

55 The plaintiff *Hasnul* pleaded that the name "Abu Jahal" is an expression commonly used and understood by Muslims all over the world to describe a person who is an enemy of Islam, an infidel, a troublemaker and a liar. The court ruled in *Hasnul*'s favour. Ibrahim J said at p 76:

> …
>
> It has been held defamatory to publish of a man that he is a liar (see para 50 of *Gatley*) and a defamatory imputation can be conveyed by a comparison of a person's character and transactions with those of any treacherous, disgusting, odious, disreputable or contemptible person, e.g., to liken a man to Judas (see para 104 of *Gatley*). …

56 *Hasnul* was mentioned with apparent approval by Ang J in *Singapore Democratic Party* at [57]:

> Adopting this approach, I was satisfied that the Disputed Words bore the ordinary and natural meanings asserted by the plaintiffs as a result of "defamation by implication". This type of defamation arises when the reader is invited to compare a person with another disreputable individual, for example, a historical or fictional figure perceived to be treacherous. Mr Singh cited as an example the Malaysian case of *Hasnul bin Abdul Hadi v Bulat bin Mohamed* [1978] 1 MLJ 75. There, the Malacca High Court held that it was defamatory to describe the plaintiff as "Abu Jahal", who was one of the chief enemies of Prophet Mohamed and a person of detestable qualities. The judge observed (at 76):
>
> > [A] defamatory imputation can be conveyed by a comparison of a person's character and transactions with those of any treacherous, disgusting, odious, disreputable or contemptible person, e.g., to liken a man to Judas … I agree … that "Abu Jahal" may be used to denote a Muslim who has one of the qualities, character and attitudes of … a person who tells lies and [who believes] that "one of the ways of disrupting the good work of another would be by telling lies against him.

57 However, Mr Low argued that Ang J had misapplied *Hasnul* because *Hasnul* was also an innuendo case and not a case solely about natural and ordinary meaning. Evidence was called in on the meaning in that case and Mr Low submitted that evidence would only be admissible to support or attack an innuendo. Yet, Mr Low also acknowledged that *Hasnul* did not say whether it was ruling in favour of the plaintiff there based on the natural and ordinary meaning or on innuendo. In any event, it seems to me that the point is not whether evidence was led or not but whether a person may be defamed by implication whether through the natural and ordinary meaning of words used or innuendo. The Defendants do not dispute the principle of defamation by implication but its application to the facts before me.

State of the general knowledge

58 As a preface, it is indisputable that the Disputed Words were published *inter alia* in the context of and following the spectacular revelations about the NKF Saga. The Plaintiffs allege that the NKF and the conduct of its management were used by the Defendants in the Disputed Words to damage the reputation of the Plaintiffs.

(1) General matters and the NKF Saga

59 Mr Singh submitted and I accept that the following matters are undisputed and/or have been admitted by the Defendants:

(a) LHL is the Prime Minister of Singapore.

(b) LKY is the Minister Mentor in the Prime Minister's Office, a Cabinet Minister and the first Prime Minister of Singapore. He is also the current Chairman of the GIC, a founding member of the PAP and its first Secretary-General.

(c) The first Defendant is the publisher of FEER. The second Defendant is the editor of FEER and the author of the Article.

(d) In the July/August 2006 Issue of the FEER, the Defendants published, and/or caused to be published, the Article in respect of an interview with CSJ. CSJ is the Secretary General of the Singapore Democratic Party ("SDP").

I should mention that in the Amended Defences, the Defendants do not admit that the office of "Minister Mentor" exists as a matter of constitutional law but this is immaterial to the issues before me.

60 The Plaintiffs have averred that the following matters are in the public domain and/or are of general knowledge.

(a) The Plaintiffs have at various times sued for defamation and have also successfully obtained damages and/or apologies from others where, *inter alia*, allegations of criminal conduct and/or corruption were made against them.

(b) From July 2005, there has been widespread interest in Singapore in the NKF Saga. On 11 July 2005, the trial of a libel action ("NKF Suit") brought by the NKF and Mr T T Durai ("Durai"), its CEO, against Singapore Press Holdings Ltd commenced. The NKF Suit was extensively reported in the local press.

(c) In the course of, and after, the trial, issues arose about NKF's funds and their use, the benefits enjoyed by its former management, the characterisation of Durai's salary and defamation suits brought by NKF and/or Durai.

(d) Over the next few days, public outrage erupted across Singapore. It culminated on 14 July 2005, when Durai and his entire 15-member board of the NKF resigned.

(e) In August 2005, the interim board of the NKF invited the police and the Inland Revenue Authority of Singapore to investigate into the activities of the former board of NKF.

(f) On 19 December 2005, an independent auditor appointed by the interim board of the NKF released a 332-page report criticising the manner in which the former NKF board and Durai managed the financial affairs of the NKF.

(g) On 17 April 2006, Durai was arrested by the Corrupt Practices Investigation Bureau, released on police bail and ordered to appear in court the following day.

(h) On 18 April 2006, Durai, three former directors and an employee of the NKF were charged in court, *inter alia*, for corruption and breach of fiduciary duties.

(i) On 24 April 2006, it was reported that the NKF had commenced civil proceedings against Durai and some former members of the NKF board of directors for, *inter alia*, breach of fiduciary duties.

(2) The SDP protest and the SDP proceedings

61 The Plaintiffs also averred that the following matters are in the public domain and/or are of general knowledge.

62 On 11 August 2005, several members of the SDP, including CSJ's sister, Chee Siok Chin, held a protest outside the CPF building. Two of the protestors wore T-shirts with the words "National Reserves" and "HDB GIC" inscribed on either side. Two other protestors wore T-shirts with the words "Be Transparent Now" and "NKF CPF" inscribed on the either side. Other protestors held up placards which read "Singaporeans spend on HDB; whole earnings on CPF; life savings – but cannot withdraw when they need" and the word "Accountability" in Chinese. The Plaintiffs also averred that the facts and circumstances relating to the protests were extensively reported in the local print and broadcast media and were and are widely known in Singapore. For convenience, I shall term this the "SDP protest".

63 On 26 April 2006, the same plaintiffs commenced proceedings in *Singapore Democratic Party* for libel against the SDP and eight of its members, including CSJ, in respect of the SDP article. The SDP failed to file a defence, and judgment for damages to be assessed was entered against it. Only two out of nine defendants, CSJ and Chee Siok Chin, filed defences in the action. I shall term such proceedings as the "SDP proceedings".

64 The DWS states at [19] that the facts pleaded (*ie*, the NKF Saga and the SDP proceedings as outlined above) were:

> … so well known that they constitute facts of which judicial notice maybe taken, since they are court judgments such as the Plaintiffs' libel victories, Mr Durai's libel case and criminal case, the SDP protest case and the independent auditors' public enquiry report into NKF.

I should mention that this submission is made in the context that the Defendants were arguing that as those facts were so well known, the Plaintiffs were not entitled to rely on them for innuendo. As I mentioned above, the Defendants were of the view, wrongly, that the Plaintiffs were relying on innuendo in the present summonses.

65 Unsurprisingly, Mr Low belatedly made an attempt before me to withdraw [19] of DWS. However, Mr Singh objected. Mr Singh also pointed out that [19] is not a genuine mistake as it is not an isolated instance in the submissions for the Defendants which appear to make the concession that such matters were within the general knowledge of the public. Indeed, at [7] and [8] of the DWS, the same admission is made in respect of the libel actions as being "public knowledge" and the NKF Saga, the SDP protest and proceedings were "matters known to the general public".

66 I accept that the ordinary and reasonable man would know that LHL and LKY are the Prime Minister and Minister Mentor respectively, that they have at various times successfully sued for defamation and the ordinary and reasonable man would have been aware generally about the NKF saga. I will say more later about the NKF saga.

The meaning of the Disputed Words in relation to LKY

67 The case on behalf of LKY was that the Disputed Words, in context and in their natural and ordinary meaning, meant and were understood to mean that he is unfit for office because (see [23] of the Statement of Claim in Suit 540 of 2006):

> …he is corrupt and has set out to sue and suppress those who would question him as he fears such questions would expose his corruption.

68 The Amended Defences have the same contention about the natural and ordinary meaning of the Disputed Words for each action. The contention is found in [26] of the Amended Defences. I set out below the one in respect of LHL for convenience.

> … over the course of half a century as Singapore's most powerful political leader Minister Mentor Lee Kuan Yew has taken anti-democratic positions and has made some mistakes and misjudgments that will return to haunt his successors, especially since much of his governance has been non-transparent (e.g. NKF, CPF and GIC) and he has responded to criticism by treating political opponents with contempt, persecuting them and suing them under unaltered and antiquated English libel laws that favour political plaintiffs. This behaviour gives reason to inquire/alternatively reason to suspect, as to whether there may be other NKF-type scandals lurking below the surface in Singapore and in any event will affect his legacy. When Minister Mentor Lee Kuan Yew dies, the plaintiff i.e. his son [Prime Minister Lee Hsien Loong] and future politicians will have had no mentoring in how to work within a genuine multi-party democracy committed to free speech, and will for that reason have difficulty when their government faces an effective opposition party.

69 What then is the natural and ordinary meaning of the Disputed Words with respect to LKY? In my view, the meaning as pleaded by the Plaintiffs is correct, that is, LKY is unfit for office because he is corrupt and has set out to sue and suppress those who would question him as he fears such questions would expose his corruption. There are two parts to this pleaded meaning, both of which I find satisfied. Let me explain.

70 The first part to the Plaintiffs' meaning is simply that LKY is corrupt. At [21] of the DWS, the Defendants submitted that an allegation of corruption implies either the commission of a serious

criminal offence or conduct destructive of the very fabric of society. All that is being said is that LKY has been an oppressive leader who has been afraid of criticism and has not, in his supposed role as mentor, taught openness. Hence, the lack of proper supervision of highly secretive public entities, like CPF, GIC and NKF, and the deployment of libel actions by officials who have been brought up by the Plaintiffs in a culture of fearing criticism.

71 Mr Low also submitted that even though Durai was charged under the Prevention of Corruption Act, the actual charge was more akin to cheating rather than corruption. On this point, Mr Singh submitted that Durai was associated with corruption and in a Business Times article of 19 April 2006, the headline was "Ex-NKF Chief Durai charged with graft", (see p 185 of LKY's affidavit and also p 256 of LHL's affidavit). Interestingly, Mr Low also submitted that while the allegation that the Defendants contended for may be defamatory of the Plaintiffs (although this was not admitted) insofar as it suggests that they are anti-democratic, afraid to own up to their mistakes, oppressive and suppressive, it does not mean that the Plaintiffs have governed Singapore corruptly.

72 In my view, the Article does not simply mention an autocratic and oppressive LKY or LHL. It also mentions NKF and law suits. What then does the reference to the NKF saga mean in the context of the Article?

73 In the DRS, [42] argues that in the Article, Durai was accused of having a large salary, taking first class flights, having gold taps in the office bathroom. This would bring home to the ordinary and reasonable reader that Durai was extravagant, not corrupt. [54] of DRS then acknowledges that NKF and its management is associated with abuse of power. Furthermore, in oral submissions, Mr Low said that Durai's conduct may amount to betrayal of trust but not corruption. When I asked him which was worse, he said both are equally bad.

74 I am of the view that while the Article mentions certain specific misconduct on the part of Durai, that was not all that the ordinary and reasonable reader would associate him and the NKF with, especially in the context of the Article.

75 Dealing with the NKF saga generally, Rajah J said in *Chee Siok Chin v MHA*at [121]:

> An objective view of the printed words on the T-shirts and the placards would leave no doubt that the protestors were neither affably nor gently raising queries; rather they were patently attempting to undermine the integrity of not just the CPF Board but also the GIC and the HDB by alleging impropriety against the persons responsible for the finances of these bodies ("the institutions"); in addition, they were calling into question the dealings of the institutions with the "National Reserves". This was a conscious and calculated effort to disparage and cast aspersions on these institutions and more crucially on how they are being managed. I cannot but take judicial notice of the fact that any attempt to link the institutions to the NKF at that point of time, 11 August 2005 and pending further public clarification, would be tantamount to an insinuation of mismanagement and financial impropriety. The governance and finances of the NKF were in July and early August 2005 caught in a swirl of negative and adverse publicity. Information and material that entered the public domain as a consequence of litigation involving its former chief executive officer, became the source of widespread and grave public disquiet. A toxic brew of inexplicable accounting practices, corporate unaccountability, lack of financial disclosure and questionable management practices created an atmosphere cogently suggesting financial impropriety. On 20 July 2005, the Minister of Health, Mr Khaw Boon Wan, announced in Parliament that the new NKF Board had appointed an accounting firm, KPMG, to commission a detailed review of the NKF's financial controls; see s 59(1)(d) of the Evidence Act (Cap 97, 1997 Rev Ed). To associate or link the institutions (and in particular the CPF) with the NKF, as it

was then perceived, is to tarnish them with financial impropriety and sully their standing and integrity. Such an association does not merely allege impropriety. It was a patent attempt to scandalise the institutions and their management by association. Leaving aside for present purposes the question as to whether the words are *per se* defamatory of these corporate entities and/or their management, the issue is whether these words are *prima facie* insulting and/or abusive within the meaning of ss 13A and/or 13B of the MOA.

76 The above passage was cited with approval by Ang J at [16] in the *Singapore Democratic Party.* She agreed with the submission for CSJ and Chee Siok Chin in that case that the NKF had become a byword for "corruption, financial impropriety and the knowing abuse of unmeritorious defamation suits" and the defendants before her had all but directly accused the plaintiffs there of being dishonest, see [62] of her judgment.

77 Mr Low submitted that Rajah J did not say that to associate one with the NKF was to suggest corruption, only financial impropriety. It was Ang J who found that the association meant corruption. He urged me not to follow her decision. I should mention that when CSJ applied to the Court of Appeal in *Singapore Democratic Party* for, *inter alia*, an extension of time to file an appeal against the decision of Ang J, his application was dismissed, see *Lee Hsien Loong v Singapore Democratic Party and others* [2008] 1 SLR 757. Andrew Phang Boon Leong JA said at [72] that it was hard to fault the reasons of Ang J for entering summary judgment although in that appeal, CSJ did not present any submission on the merits of his substantive appeal.

78 Coming back to *Chee Siok Chin v MHA*, I note that Rajah J referred to the NKF saga as a toxic brew and that to associate one with the NKF then was not merely to allege impropriety but to scandalise.

79 Before me, Mr Singh reiterated that the NKF and its management had in Singapore become bywords for corruption, financial impropriety and the knowing abuse of unmeritorious defamation suits at the time the Disputed Words were published.

80 I note that the Article contains more than just a passing reference to NKF and Durai. At [9] of the Article, the question is asked: "Why is all this oppression necessary in a peaceful and prosperous country like Singapore where citizens otherwise enjoy so many freedoms?" The Article then goes on to say (at [9]):

> Mr Chee has his own theory that the answer lies with the strongman Lee Kuan Yew himself: "Why is he still so afraid? I honestly think that through the years he has accumulated enough *skeletons in his closet that he knows that when he is gone, his son and the generations after him will have a price to pay*." [emphasis added]

81 Mr Singh submitted that the natural and ordinary meaning of the phrase "skeletons in the closet" is: "any embarrassing, shameful, or damaging secret" (see www.dictionary.com), or "a shameful or slanderous fact concerning oneself or one's family that one tries to keep secret" (see www.chambersharrap.co.uk). The ordinary and reasonable person is therefore invited to conclude that LKY is hiding embarrassing, shameful or damaging secrets so that when he is gone, "the generations after him will have a price to pay". That leads to the ordinary and reasonable person to ask himself: what secrets is LKY hiding? I agree. I also accept that the allegation that LKY has "accumulated skeletons in his closet" is used as a basis for the suggestion in the following paragraph of the Article (at [10]): "That raises the question of whether Singapore deserves its reputation for squeaky-clean government." When read in context, the question is a suggestion that the government does not deserve its reputation for "squeaky-clean government". It may be that

"squeaky-clean" means "beyond reproach and above criticism" as Mr Low suggested, but the Article does not stop at the question whether Singapore deserves its reputation for squeaky-clean government. Significantly, it goes on to refer to the NKF saga and to associate institutions which the government controls with NKF.

82 The Article goes on to state:

> [10] … A *scandal* involving the country's biggest charity, the National Kidney Foundation, erupted in 2004…
>
> [11] The *scandal* was a gift for the opposition, which naturally raised questions about why the government didn't do a better job of supervising the *highly secretive* NKF… But it had *wider* implications too … [and the reference is then made to CPF, GIC and public housing].
>
> Singaporeans have no way of knowing whether officials are *abusing their trust as Mr Durai did*.
>
> [emphasis added]

83 The use of words such as "scandal" and "highly secretive" only serves to reinforce the perception of some serious wrongdoing by Durai in the NKF Saga.

84 The Article details how the NKF "scandal" "erupted". In [11] of the Article, a comparison is drawn between the failure of the government to supervise NKF and the fact that the government controls huge pools of money in CPF and GIC, both of which are said to be "highly nontransparent". I have already said that the reference to the government in the Disputed Words refers to LKY (and LHL).

85 I am of the view that the association with NKF and Durai is more than a mere suggestion of extravagance or abuse of power or some sort of financial impropriety and that the Disputed Words suggest corruption on the part of LKY. This is defamation by implication by associating institutions which the government, *ie*, LKY (and LHL) run, with NKF and Durai.

86 As for [12] and [13] of the Article, I am of the view that the suggestion in these two paragraphs is similar to the suggestion made by the SDP article: although Durai knew that he had things to hide, he was confident that he could keep the truth from coming to light by suing those who alleged corruption or any kind of impropriety on his part. But his plan backfired since, in the course of his libel action against the Singapore Press Holdings, the truth about Durai's misuse of monies surfaced. The Article then invites the ordinary reader to associate Durai's modus operandi with that of other persons (by the use of the words "Singaporean officials" and "Singapore's great and good"), *ie*, such persons' knowing abuse of defamation suits to conceal their improprieties. For ease of reference, I set out again [12] and [13] of the Article:

> [12] It gets *worse*. Mr Durai's abuses only came to light because he sued the Straits Times newspaper for libel over an article detailing some of his perks. Why was Mr Durai so confident that he could win a libel suit when the allegations against him were true? Because he had done it before. The NKF won a libel case in 1998 against defendants who alleged it had paid for first-class flights for Mr Durai. This time, however, he was up against a major bulwark of the regime, Singapore Press Holdings; its lawyers uncovered the truth.
>
> [13] Singaporean officials have a remarkable record of success in winning libel suits against their critics. The question then is, how many other libel suits have Singapore's great and good wrongly

won, resulting in the cover-up of real misdeeds? And are libel suits deliberately used as a tool to suppress questioning voices?

87 I have said earlier that the terms "Singaporean officials" and "Singapore's great and good" refer to LKY (and LHL). When [13] of the Article is read in light of the immediately preceding reference to Durai's libel suit in 1998 which he had won and the manner in which the truth about his and NKF's practices came to light, the message to the ordinary and reasonable person is clear: that is, LKY is like Durai who has "wrongly won" libel suits and those suits were deliberately used to cover up real misdeeds, *ie*, LKY's corruption. Under such circumstances, the ordinary and reasonable person is left in no doubt that the imputation in the Article is that LKY is unfit for office.

88 Accordingly, I find that the natural and ordinary meaning of the Disputed Words is that LKY is, like Durai, corrupt. He has been running and continues to run Singapore in the same corrupt manner as Durai operated NKF and he has been using libel actions to suppress those who would question to avoid exposure of his corruption. It follows that I do not accept the contention in [26] of the Amended Defences which I set out at [68] above.

The meaning of the Disputed Words in relation to LHL

89 LHL's case is that the Disputed Words, in context and in their natural and ordinary meaning, meant and were understood to mean that he is unfit for office because (see para 23 of the Statement of Claim (Amendment No 1) in Suit 539 of 2006) he is corrupt and has set out to sue and suppress those who would question him as he fears such questions would expose his corruption, alternatively because:

(a) LHL, as Prime Minister, has *retained* LKY, who is corrupt, as a member of his Cabinet and Chairman of GIC, and has thereby *condoned LKY's corruption;* and

(b) LHL has set out to sue and suppress those who would question him because he fears such questions would expose the truth of *such* corruption or his *condonation.*

[emphasis added]

90 As mentioned above, the Defendants adopted the same meaning of the Disputed Words in respect of LHL as they alleged in respect of LKY.

91 The alternative meaning pleaded for LHL was the sole meaning pleaded for LHL before his Statement of Claim was amended. I will address that allegation first. For the alternative meaning, Mr Singh relied first on the last sentence of [9] of the Article:

If we had parliamentary debates where the opposition could pry and ask questions, I think *he* is actually afraid of something like that. [emphasis added]

Mr Singh submitted that the "he" in this sentence means LHL, not LKY.

92 Mr Singh also submitted that the ordinary and reasonable reader knows that (a) LHL is the head of the government, (b) he is the son of LKY, (c) LKY continues to be retained by LHL as a member of his Cabinet and as the Chairman of GIC, (d) LHL directs and formulates the policies of the government and (e) LHL, as head of the government and the Cabinet and as head of the party with an overwhelming majority in Parliament, can decide how discussions in Parliament are to be conducted.

93 Mr Singh submitted that when the ordinary and reasonable person reads the Article in light of the general knowledge possessed by him and the context of the Article (including the allegations against LKY), he would understand the sentence quoted above to mean that in light of LKY's "skeletons", LHL does not allow or permit "parliamentary debates where the opposition could pry". The only reason LHL would not want the opposition to pry would be that he does not want the truth of LKY's corruption to surface.

94 Mr Singh then argued that the reference in [12] and [13] of the Article to Singaporean officials who deliberately use libel suits, like Durai, to cover up real misdeeds means that LHL was deliberately using such suits to cover up LKY's corruption and in so doing, LHL was condoning LKY's corruption. Thus, the imputation is that LHL is unfit for office.

95 However, it is important to note that Mr Singh's submission is predicated firstly on the "he" in the last sentence of [9] of the Article referring to LHL and secondly on the allegation that the Disputed Words mean that LHL has condoned LKY's corruption.

96 When read in context, I am of the view that the word "he" in the said sentence in fact refers to LKY and not LHL. I set out [9] of the Article again:

> Why is all this oppression necessary in a peaceful and prosperous country like Singapore where citizens otherwise enjoy so many freedoms? Mr. Chee has his own theory that the answer lies with strongman Lee Kuan Yew himself: "Why is *he* still so afraid? I honestly think that through the years *he* has accumulated enough skeletons in his closet that he knows that when *he* is gone, *his* son and the generations after *him* will have a price to pay. If we had parliamentary debates where the opposition could pry and ask questions, I think *he* is actually afraid of something like that." [emphasis added]

When one looks at the various references to "he", "his" and "him" before the final "he" in [9], it is clear to me that the prior references are to LKY. In my view, the final "he" also refers to LKY.

97 Mr Singh also asked rhetorically why LHL would have a price to pay unless there is complicity on LHL's part. I do not agree that is what [9] means. It means that since LKY is gone, his skeletons will be uncovered and LHL, as well as the generations after LKY, will have to deal with LKY's skeletons, whether there is complicity or not. If the reference to paying a price means complicity, then [9] also means that future generations are complicit. I do not agree that that is what it means.

98 The point is what the ordinary and reasonable reader understands from the Disputed Words. The fact that LHL is the head of the government and has an overwhelming majority in Parliament does not lead to the conclusion that [9] of the Article is referring to LHL's retention of LKY. The fact that LHL as head of the government sets the rules for the opposition also does not lead to the conclusion that [9] of the Article means that LHL will not allow parliamentary debates to avoid exposure of LKY's corruption. In [9], the Article is portraying LHL as the victim, not the accomplice, of LKY. It is LKY's oppressive conduct, not LHL's, of not allowing open parliamentary debate that is referred to.

99 Accordingly, I also do not agree with the second part of the alternative pleaded meaning, *ie*, that LHL had set out to sue and suppress those who would question him for fear of exposure of the truth of LKY's corruption or LHL's condonation thereof.

100 Do the Disputed Words then mean what the Defendants contend? For the reasons that I gave in respect of LKY, I am of the view that they mean the same thing of LHL as they do of LKY, that is, the first meaning pleaded for LHL in the Statement of Claim (Amendment No 1) of the LHL action. In other

words, the Disputed Words also mean that LHL too is unfit for office because he is corrupt and he too has set out to sue and suppress those who question him to cover up his, not LKY's, corruption.

The amendment by LHL

101 There are two points which I would like to address before I come to the defences.

102 After the initial round of arguments, LHL made an application to amend paragraph 23 of his Statement of Claim to include the first interpretation which I set out above at [89]. The application was made after I raised some queries in order to give both sides an opportunity to address me on the queries.

103 Mr Low submitted that I should not allow the amendment. He relied on paragraph 14/1/1A of the Singapore Court Practice 2006 which in turn refers to *Chun Thong Ping v Soh Kok Hong and another* [2003] 3 SLR 204. That was a case in which a plaintiff had applied to amend the Statement of Claim to include an additional averment after a defendant had been granted unconditional leave to defend. Thereafter, the plaintiff filed an appeal against the decision to grant unconditional leave to defend. Eventually both the application to amend and the appeal were heard before Justice Tay Yong Kwang ("Tay J"). He indicated that the correct approach would be for the plaintiff to withdraw his appeal and to proceed with a fresh O 14 application based on the amended Statement of Claim, assuming that the proposed amendment was allowed. Counsel for the plaintiff then applied for leave to withdraw the appeal. This was granted as was the application to amend the Statement of Claim. In his grounds of decision, Tay J explained as follows:

> 9 Since 1 December 2002, pursuant to the Rules of Court (Amendment No 4) Rules 2002 (S 565/2002), an application under O 14 may be taken out only after a Defence has been served. Before that date, such an application could be taken out as soon as the defendant had entered an appearance in the action and, in that event, the Defence need not be served until after the determination of the O 14 application (see the previous O 18 r 2(2) which was deleted by the same amendment rules).
>
> 10 It follows that a plaintiff cannot add a new cause of action between the hearing at first instance and the appeal therefrom and proceed on that new cause of action at the appeal (even as an alternative claim). If it were otherwise, the defendant would be left without an answer in his Defence to the amended claim. That would defeat the purpose of the 1 December 2002 amendments to O 14 which sought to crystallise the issues and to set the parameters for the summary judgment hearing. Indeed, if the plaintiff could make such a material change to his claim during the journey from registry to judge, the appellate judge would be virtually hearing a fresh O 14 application, not an appeal from the existing one.
>
> 11 …
>
> 12 Leaving aside the position on appeal, where a plaintiff amends his Statement of Claim materially (that is, by altering the factual or legal basis of the claim) after the defendant has served his Defence, he should not take out an application under O 14 until after the defendant has had an opportunity to amend his Defence.
>
> 13 Where such amendments are made to a plaintiff's Statement of Claim after an application under O 14 has been taken out but before it has been heard at first instance, the plaintiff should not be allowed to proceed with the O 14 application until after the defendant has had an opportunity to amend his Defence. If the plaintiff's affidavit, which has to be filed at the same

time as the O 14 application (see O 14 r 2(2)), does not "contain all necessary evidence in support" (see O 14 r 2(8)) of the claim as amended, then the plaintiff should not proceed with the O 14 application. He should withdraw it and lodge a new application with the proper affidavit.

14 It is incumbent on a plaintiff who wishes to proceed under O 14 to get all his pleadings and evidence in order before launching an application meant to obviate a trial in open court.

104 Tay J's grounds make it clear that a plaintiff should amend his Statement of Claim before even making an application for summary judgment under O 14. That is uncontroversial. It also goes without saying that a plaintiff should apply to amend his Statement of Claim as soon as possible. The question is whether different consequences flow depending on whether the application to amend is made before or after the application for summary judgment is heard, *ie*, determined at first instance. Tay J's decision suggests that there are different consequences. If it is made before the application for summary judgment is first determined, it may be allowed subject to the defendant being given an opportunity to amend his Defence. However, if the application to amend the Statement of Claim is made after the application for summary judgment is first determined, then the appeal should be withdrawn, otherwise the appellate judge would be virtually hearing a fresh application and not an appeal from an existing one.

105 Even if I were to agree with Tay J's distinction, LHL's application to amend was made before I had determined his application for summary judgment. Hence, Tay J's decision would not mean that such an application should be refused. On the contrary, it should be allowed so long as the Defendants were given an opportunity to amend their defence.

106 I would add that the proposed amendment of LHL did not add a new cause of action but attributed a meaning different from and in addition to that originally pleaded. The cause of action was still the same and the Article and the words in dispute were still the same. I will say more on the difference in meaning when I come to the court's role in an application to determine the meaning of allegedly defamatory words. I should however mention some observations on the distinction made by Tay J.

107 The proposed amendment before Tay J was apparently to introduce another cause of action. Where the proposed amendment to a Statement of Claim is minor, a plaintiff should not be required to withdraw his appeal and file a fresh application for summary judgment.

108 Before the 2002 amendment which Tay J alluded to, I believe that it was possible for a plaintiff to apply to amend his statement of claim when appealing to a judge in chambers on a summary judgment application, even though that amendment was to introduce a new cause of action. In other words, he was not necessarily compelled to withdraw his appeal because he was introducing a new cause of action then. Whether he should be allowed to continue with his appeal in view of the particular amendment being sought was another matter.

109 Did the 2002 amendment affect a plaintiff's right to appeal to a judge if he wanted to amend to introduce a new cause of action? I would not have thought so. It seems to me that the purpose of the 2002 amendment was two-fold. First, a plaintiff would have the benefit of knowing what the defence was before deciding to embark on an application for summary judgment which could be time-consuming and costly, especially bearing in mind the avenues for appeal available to a defendant. Secondly, a plaintiff was, in a sense, obliged to consider the defence before so embarking. This in turn might have cost consequences. However, the purpose was not to stultify his right to amend pending an appeal to a judge.

110 If the 2002 amendment precluded a plaintiff from making an amendment pending his appeal to a judge, why then would it not also preclude him from amending after a defence is filed? I also see no reason why he should be precluded from proceeding with his appeal simply because there is an amendment. The concern about a judge hearing a fresh application for summary judgment is, with respect, unconnected with the 2002 amendment which deals with the stage when an initial application for summary judgment may be filed.

111 Furthermore, if a plaintiff is obliged to withdraw his appeal because of his proposed amendment, this means that he can no longer rely on his original cause of action for summary judgment. In a fresh application for summary judgment, he can only proceed on the additional cause of action as there is already a ruling on his earlier application based on the original cause of action. Such a consequence would be unduly prejudicial to him.

112 The alternative then will be for a plaintiff to proceed with his appeal based on the original cause of action first and defer making an application to amend. If he does not succeed in the appeal, he can apply to amend to bring in the additional cause of action and then file a fresh application based on the additional cause of action. However, this alternative route runs counter to the principle that he should apply to amend as soon as possible and is likely to encourage multiple applications for summary judgment.

113 I should mention that Tay J had considered that *Techmex Far East Pte Ltd v Logicraft Products Manufacturing Pte Ltd* [1998] 1 SLR 483 was consonant with his decision but that decision was on a different point. In that case, the plaintiff had failed in his application for summary judgment. He did not appeal. He amended his Statement of Claim and a second application for summary judgment was made. The application was refused by a deputy registrar on the ground that a second application was not permissible. Justice Chao Hick Tin allowed the second application to be made. However, on the facts before him, he granted the defendant unconditional leave to defend. Justice Chao made it clear that it was not always the case that a plaintiff would be precluded from making a second application for summary judgment. Therefore, that was not a case involving an amendment being made to a Statement of Claim after the first determination and while a pending appeal was yet to be heard.

114 Mr Low also relied on *Samsung Corporation v Chinese Chamber Realty Pte Ltd and others* [2004] 1 SLR 382 to persuade me that I should not allow LHL to amend his Statement of Claim. I need only say that the facts there were different and did not involve the question of an amendment to a Statement of Claim. I would add that there is no provision in the Rules of Court precluding a plaintiff from amending his Statement of Claim before an appeal on a summary judgment application is heard. Whether the amendment should be allowed with consequential orders and whether the plaintiff should be allowed to carry on with his appeal are matters to be determined on the facts of each case.

The court's role in determining the meaning of words alleged to be defamatory

115 As I have mentioned, the original meaning which LHL relied on was, in a nutshell, that he was condoning LKY's corruption and using libel suits to cover up such condonation. The amendment introduces the meaning that it is he who is corrupt and he who uses libel suits to cover up his own corruption. I will refer to this amendment as "the amended meaning" for convenience.

116 On the one hand, it could be argued that the amended meaning does not alter the substantive allegation under the original pleaded meaning (which continues to be pleaded), *ie*, corruption, whether LHL's own or his condonation of LKY's. It is but a nuance of the original meaning and no amendment need even be made as a court may grant judgment if the substantive meaning is still the same and there is no prejudice to the defendant whose pleading and arguments are not affected by the

amended meaning.

117 On the other hand, it could also be argued that the amended meaning is substantively different because to say that a person is corrupt is quite different from saying that he has condoned corruption. On this argument, it could then also be argued that the amended meaning is more defamatory than the original meaning.

118 The question might then arise as to what a court can or should do if no amendment were made to the Statement of Claim. As LHL did apply to amend and the application was granted, the question is academic for present purposes. However, because of its importance, I wish to share my thoughts on it.

119 The cases so far suggest that a court cannot find a more defamatory meaning than that pleaded by a plaintiff although it may find a less defamatory meaning.

120 The *locus classicus* is *Slim v Daily Telegraph Ltd and others* [1968] 2 QB 157 ("*Slim*"). The off-cited passage is from the judgment of Diplock LJ at p 175 which states:

> … The plaintiffs, as they were entitled to do, chose to set out in their statement of claim the particular defamatory meaning which they contended was the natural and ordinary meaning of the words. Where this manner of pleading is adopted, the defamatory meaning so averred is treated at the trial as the most injurious meaning which the words are capable of bearing, and the plaintiff is, in effect, estopped from contending that the words do bear a *more* injurious meaning and claiming damages on that basis.

121 Diplock LJ however continued to say at p 175 to 176:

> But the averment does not of itself prevent the plaintiff from contending at the trial that even if the words do not bear the defamatory meaning alleged in the statement of claim to be the natural and ordinary meaning of the words, they nevertheless bear some other meaning *less* injurious to the plaintiff's reputation but still defamatory of him, nor does it relieve the adjudicator of the duty of determining what is the right natural and ordinary meaning of the words, though nice questions may arise as to whether one meaning is more or less injurious than another.
>
> …
>
> Where an action for libel is tried by judge and jury, it is for the parties to submit to the jury their respective contentions as to what is the natural and ordinary meaning of the words complained of, whether or not the plaintiff's contention as to the most injurious meaning has been stated in advance in his statement of claim. And it is for the judge to rule whether or not any particular defamatory meaning for which the plaintiff contends is one which the words are capable of bearing. The only effect of an allegation in the statement of claim as to the natural and ordinary meaning of the words is that the judge must direct the jury that it is not open to them to award damages upon the basis that the natural and ordinary meaning of the words is more injurious to the plaintiff's reputation than the meaning alleged, although if they think that the words bear a meaning defamatory of the plaintiff which is either that alleged or is less injurious to the plaintiff's reputation, they must assess damages on the basis of that natural and ordinary meaning which they think is the right one. But where a judge is sitting alone to try a libel action without a jury, the only questions he has to ask himself are: "Is the natural and ordinary meaning of the words that which is alleged in the statement of claim?" and: "If not, what, if any, less injurious defamatory meaning do they bear?"

122 In the same case, Salmond LJ said at p 185:

> … Without committing myself to any concluded view, I am inclined to think that the plaintiff is bound by his pleading—otherwise it may prove to be nothing but a snare for the defendant. I do not mean, of course, that the plaintiff is strictly confined to the very shade or nuance of meaning which he has pleaded—but what he sets up at the trial must come broadly within the meaning he has pleaded. Nor do I think that, without any amendment of his statement of claim, it would be permissible for him to set up any entirely different meaning, even if it were less injurious to the plaintiff than the meaning pleaded.

123 The first passage I quoted from Lord Diplock's judgment at p 175 is often cited as authority for the principle that even where there is no jury trial, a court may not conclude that allegedly defamatory words have a meaning more defamatory than that pleaded by the plaintiff even though Lord Diplock also said (in the same page) that the adjudicator is not relieved by the averment of the duty to determine the right natural and ordinary meaning of the words.

124 Mr Low submitted that Lord Diplock's exposition has been followed in all cases in the United Kingdom and most recently by the Privy Council in *Bonnick v Morris* [2003] 1 AC 300 ("*Bonnick*") and by the Court of Appeal in *Jameel v Wall Street Journal Europe* [2003] EWCA Civ 1694.

125 While I accept the submission that Lord Diplock's exposition has been followed in the United Kingdom, I note that the two recent cases mentioned by Mr Low refer to a different part of Lord Diplock's judgment and not the one in question.

126 In Singapore, L P Thean J referred to the second part of Lord Diplock's judgment (from p 176) with approval in *Bank of China v Asia Week Ltd* [1991] SLR 486 at p 491 and I reiterate:

> But where a judge is sitting alone to try a libel action without a jury, the only questions he has to ask himself are: "Is the natural and ordinary meaning of the words that which is alleged in the statement of claim? and: "If not, what, if any, less injurious defamatory meaning do they bear?

127 It is, however, important to bear in mind that both Lord Diplock and Justice Thean were remarking on the role of a judge and the facts before them did not actually raise the issue of a meaning more defamatory than that pleaded by a plaintiff. The same applies to all the other Singapore cases I am aware of which say essentially the same thing.

128 In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 ("*JJB v LKY*"), the Court of Appeal said at p 321 that a lesser defamatory meaning can be found:

> It is usual for a plaintiff in a defamation action to plead the highest defamatory meaning of the words complained of and the court may well find a lesser defamatory meaning than that pleaded by the plaintiff. If such lesser defamatory meaning is found, the plaintiff's claim will still succeed, unless there is some valid defence to the claim.

129 In *Goh Chok Tong,* Yong Pung How CJ stated at [43] that in *JJB v LKY*, the Court of Appeal had adopted Lord Diplock's view in *Slim* although *Slim* was not expressly referred to. CJ Yong also stated at [45] and [46] that the court cannot find a more defamatory meaning:

> 45 … The trial judge in determining the true meaning of the words must have regard, inter alia, *to the pleadings* before him and apply the tests for determining the right meaning as laid down by case law.

> 46 We are not saying that the plaintiff is not bound by the meaning of the offending words he has pleaded, whether it be the natural and ordinary meaning or the innuendo meaning. Certainly he is bound by the pleadings, like in all other cases. But the court in deciding the right meaning the words convey to the ordinary man may determine, and is entitled to determine, a meaning less defamatory than that pleaded by the plaintiff. *Of course, the court cannot determine a meaning more defamatory than that pleaded by the plaintiff, as that would be giving to the plaintiff more than what he has asked for*. …
>
> [emphasis added]

130 However, *Goh Chok Tong* was a case in which the trial judge found a less defamatory meaning than that pleaded by the plaintiff.

131 In *Microsoft Corporation*, L P Thean JA said at [48] that, "the only question before the trial judge is whether the words complained of bear the defamatory meaning as pleaded by the plaintiff or some lesser defamatory meaning" but this was in the context of the role of the trial judge. Again, the Court of Appeal was not in fact considering a more defamatory meaning. L P Thean JA's statement in *Microsoft* was paraphrased by Ang J in *Chee Siok Chin v Attorney-General* [2006] 4 SLR 541 at [26] which I need not set out.

132 Mr Singh suggested that if a plaintiff were to apply for a determination of the meaning of the words in question under O 14 r 12 first, this would result in a two stage process. The first stage would be the determination. In such a stage, the court's sole role would be to determine the natural and ordinary meaning of the words (assuming innuendo is not in issue) irrespective of the pleadings. After doing so and assuming the court were to find a defamatory meaning, then the court would consider in the second stage what to grant the plaintiff judgment for. He submitted that in the second stage, the plaintiff would be confined to damages no higher than the defamatory meaning he had pleaded provided that the meaning found by the court were one which fell broadly within the meaning pleaded by the plaintiff. Thus, the court might conclude that the words have a more defamatory meaning but the court would not be able to grant damages to the plaintiff based on the more defamatory meaning but on the less defamatory meaning as pleaded by the plaintiff.

133 Mr Singh drew my attention to the Australian High Court decision in *Chakravarti v Advertiser Newspapers Limited* [1998] 193 CLR 519 ("*Chakravarti*") to support the proposition that a court is not confined to the pleadings in determining the meaning of the words in dispute and that the consequence of the court's determination is another matter.

134 In *Chakravarti*, the plaintiff had pleaded that an article was defamatory because it meant that his conduct in receiving loans direct to himself as an executive of a company, which loans were in excess of his entitlement, was such as to render him not a fit and proper person to be or remain an executive of the company or to be or remain in any other position of trust. A question which arose was whether he could rely on the meaning that by reason of loans received, he was not a fit and proper person to be or remain as an executive, that is, without referring to the allegation about the excess of entitlement.

135 There are passages in *Chakravarti* which appear to support the proposition that a court may find a meaning more defamatory than that pleaded, although these passages do not draw a distinction between a situation where an application is made for a determination of the meaning before trial and one where no such application is made.

136 Brennan CJ and McHugh J said at p 532 to 534:

In *Slim v Daily Telegraph Ltd*, Diplock LJ and Salmon LJ expressed views which, at least textually, appear to conflict. Salmon LJ said that a plaintiff is bound by his or her pleading – "otherwise it may prove to be nothing but a snare for the defendant". Diplock LJ said that a plaintiff could rely on any meaning which was less injurious than the pleaded meaning. In *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*, Stephen J referred to both views, saying that the plaintiff "was not free thereafter to rely upon some quite different meaning which he might seek to read into the words complained of … at least not one more injurious".

The proposition advanced by Salmon LJ in *Slim* is too rigorous: it appears to sacrifice form to substance and to elevate minute differences from the meaning pleaded to the status of a substantial defence. On the other hand, a less injurious meaning than the meaning pleaded is not always without significance as Diplock LJ seems to imply. A defendant who could not justify or otherwise defend a publication having the meaning pleaded by the plaintiff might have been able to justify or otherwise defend a defamatory publication having a less injurious meaning. But a different nuance of meaning from the meaning pleaded may go to, and be found by, the jury provided it is not unfair to the defendant to allow the plaintiff so to depart from the meaning pleaded.

Thus, Fox J in *Hadzel v De Waldorf* said that:

> "a judge can find for the plaintiff on a *nuance of meaning not put by him*, but it would be a strange reversal of ordinary practice, and possibly very unfair to one or both parties, for the judge to find that the plaintiff was defamed in some way not averred by the plaintiff." [emphasis added]

The critical consideration is whether it is prejudicial, embarrassing or unfair to the defendant to allow a plaintiff to amend the statement of claim or otherwise to raise as an issue or to seek a verdict on the basis that the matter complained of bears a meaning different from the meaning previously pleaded or relied on by the plaintiff.

…

Similarly, Mahoney A-CJ in *Crampton v Nugawela* said:

> "where the imputation specified by the plaintiff is not the imputation made by the published material, the plaintiff will fail, even though another and different imputation was made by the published material and the plaintiff could have pleaded that imputation.
>
> But, in my respectful opinion, that should not mean that the plaintiff should fail where the published material is before the jury, the imputation which it makes may be seen from it, and the plaintiff's error is merely that his pleading of the imputation errs in that it does not with complete accuracy state in the pleading the imputation that is in the published material … Where … the complaint is not that the published material conveys one imputation and the pleading pleads a quite different one, but that the pleader has erred in attempting to translate the imputation from the published material to the pleading, I do not think the law to be that a plaintiff's claim must necessarily fail. It would be sad if the law held the plaintiff's claim defeated because, in pleading, he did not precisely translate from the letter to the pleading the imputation as precisely as should have been done."

If the defendant is, or might reasonably be thought to be, prejudiced, embarrassed or unfairly disadvantaged by the departure – whether in pleading or preparing for trial, or adducing evidence

or in conducting the case before verdict – the plaintiff will be held to the meaning pleaded. If the meaning pleaded goes to the jury and is not found by the jury, the plaintiff fails. If there be no unfair disadvantage to the defendant by allowing another defamatory meaning to be relied on and to go to and be considered by the jury – as where the plaintiff seeks to rely on a different nuance of meaning or, oftentimes, merely a less serious defamation – the different defamatory meaning may be found by the jury.

137 Gaudron and Gummow JJ said at p 545 to 546:

…

Doubtless, the pressures on court time and the cost of litigation ordinarily require that, at trial, a party be held to the particulars or those parts of the pleadings which specify the case to be made if departure would occasion delay or disadvantage the other side. The same considerations apply to defamation proceedings. Words do not mean what the parties choose them to mean and, at least ordinarily, the defamatory material will, itself, sufficiently identify and, thus, confine the meanings on which they may rely. Moreover, as was pointed out in *National Mutual Life Association of Australasia v GTV Corporation Pty Ltd*, "[I]t would be most unlikely that the parties would between them fail to hit upon, at least approximately, all the reasonably open meanings".

…

As a general rule, there will be no disadvantage in allowing a plaintiff to rely on meanings which are comprehended in, or are less injurious than the meaning pleaded in his or her statement of claim. So, too, there will generally be no disadvantage in permitting reliance on a meaning which is simply a variant of the meaning pleaded. On the other hand, there may be disadvantage if a plaintiff is allowed to rely on a substantially different meaning or, even, a meaning which focuses on some different factual basis. Particularly is that so if the defendant has pleaded justification or, as in this case, justification of an alternative meaning. However, the question whether disadvantage will or may result is one to be answered having regard to all the circumstances of the case, including the material which is said to be defamatory and the issues in the trial, and not simply by reference to the pleadings.

138 Kirby J said at p 578 to 581:

The imputation issue – principles

The respondent next submitted that, whatever the natural and ordinary meaning of the articles was, the appellant was strictly confined to the imputations which he had pleaded in his amended statement of claim. It claimed that the primary judge had found broader, or other, defamatory meanings in the articles and that he had erred in so doing. The starting point is to determine the proper approach. I take the following principles to be established:

1. …

2. …

3. In jurisdictions where this matter is not regulated by statute, courts have commonly exercised a measure of discretion and flexibility where the essence of the sting of the defamation complained of at the end of the trial does not exactly, or entirely, coincide with the imputations which were pleaded. In part, this approach reflects the modern attitude to pleading of civil

causes by which overly pedantic or rigidly technical rules tend to be avoided where they would inhibit the attainment of justice. In part, it arises from the recognition by courts of the way in which pleading is commonly done. In part, it arises from a recognition of the ample power of the trial judge to protect a defendant from injustice by ordering further particulars before the trial or by adjourning or terminating the hearing if that course is needed to prevent surprise or injustice. In part, the judicial approach arises from the entitlement of the tribunal of fact always to examine the entire publication to see the matter complained of in its context. An overly rigid rule, strictly confining a plaintiff to the pleaded imputations, would run the risk that the alleged wrong was forgotten or overlooked. Instead of measuring the damage done by the publication itself, the trial might be diverted to a different document, namely the pleading containing the imputations formulated by lawyers. I agree, in this regard, with the comments of the Full Court of the Supreme Court of Victoria in *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd*. Speaking with approval of the now common practice of pleading "false innuendos", the Court said:

> "But the practice did not, and in our opinion could not, alter the position at law that the meaning of the words was ultimately a question for the jury, and that the jury must be at large in finding the true meaning amongst such possible meanings as were left to them by the judge, and that the judge was not bound to confine the jury to the false innuendos asserted by the plaintiff."

Where, as in South Australia, there is no jury trial, the entitlement of the judge to consider the meaning of the entire matter complained of, notwithstanding the pleaded imputations, is even more clear.

4. In an attempt to reconcile the desirable encouragement of particularisation of claims, the avoidance of "trial by ambush" and the consideration of the entirety of the publication in question, courts will uphold the discretion of the trial judge, including a discretion to confine parties to the imputations pleaded where that is required by considerations of fairness. However, a more serious allegation will generally be taken to include a less serious one unless the latter is of a substantially different kind. It is true that dicta appear in decisions of this Court, other Australian courts and courts overseas which favour a strict approach: binding a plaintiff at the trial to the précis imputations pleaded. However, I do not consider that these dicta represent the law. The better view is that the rules of pleading must, in those jurisdictions governed by the common law, adapt to the fair evaluation by the tribunal of fact of the matter complained of. If the publisher claims surprise, prejudice or other disadvantage, the trial judge may protect it. No complaint can arise where additional imputations found represent nothing more than nuances or shades of meaning of those pleaded. The position will be otherwise in jurisdictions which, by statute, provide that each imputation is a cause of action upon which the plaintiff may sue. But South Australia is not one of these.

139 I would add that in *Chakravarti*, the High Court was not considering a substantially different meaning from that pleaded, let alone a substantially different meaning which is more defamatory than that pleaded.

140 Nevertheless, it does seem to me that Diplock LJ in *Slim* and, for example, Yong CJ in *Goh Chok Tong* were concerned more with the quantum of damages to be awarded than the finding of a more defamatory meaning *per se*.

141 I hope the role of the court in determining the meaning of disputed words in defamation actions will be re-visited again by the Court of Appeal. Pending such a consideration, I would respectfully say

that it seems to me that the court is not obliged to find a meaning within the perimeters of the pleadings. As was said by Gaudron and Gummow JJ in *Chakravarti*, "Words do not mean what the parties choose them to mean…". The pleadings may guide the court but it seems illogical to me that a court should say that it finds the meaning to be that pleaded by a plaintiff when in fact the court has come to a different and more defamatory meaning. The consequence of the court's determination of the meaning is another matter. It may be that the court should award damages on the less defamatory meaning pleaded by the plaintiff if there has been no prejudice to the defendant or the court may allow the defendant an opportunity to address it on the more defamatory meaning before reaching a conclusion. Another possibility is that the court might decline to grant any judgment without prejudice to a fresh claim being made by the plaintiff although this alternative will have its own detractors. There are various permutations of the consequences if a court reaches a conclusion on the meaning which is more defamatory than that pleaded but I do not think that that should deter or preclude a court from doing so.

142 It should also be borne in mind that there may be instances where the opposite may occur, *ie*, the court may otherwise conclude that the meaning is less defamatory than that contended by a defendant or not even defamatory at all. For the same reasons, I would have thought that a court is not precluded from doing so. Again, the consequences would be another matter.

143 I also do not think that the court's role in determining the meaning of disputed words in defamation actions differs depending on whether the plaintiff has or has not applied first for such a determination under O 14 r 12. The court's role is the same although it may have more options on the consequences if there is no trial yet.

144 Coming back to the case at hand, I would not have thought that the amended meaning was substantially different from the original meaning. Indeed, in HR's affidavit to resist the present summonses, he does not draw a distinction between condonation of corruption or corruption *per se*. His affidavit states at [18] that "… the plaintiffs do not seem to understand that there is a world of difference between accusing them of corruption and merely accusing them of a policy of non-transparency". The pleadings and the arguments of the Defendants, before further amendment, already cover both meanings. Therefore, even if LHL had not amended his statement of claim, I would have been inclined to grant him summary judgment.

Defence of justification

145 The first defence relied on by the Defendants is the defence of justification: see [26] of the Amended Defences. The Defendants only seek to justify the Defendants' meaning. As the Defendants do not seek to justify the defamation as alleged by the Plaintiffs and since I have accepted the Plaintiffs' meaning to the extent mentioned above, the defence of justification falls away. As an aside, I would also mention that Brennan CJ and McHugh J expressed an interesting opinion in *Chakravarti* at p 526 to 528 on the situation where a defendant pleads and justifies a meaning which a plaintiff has not pleaded.

Defence of fair comment

146 The Defendants have also pleaded the defence of fair comment at [27] of the Amended Defences, which provides as follows:

> 27. Further and/or alternatively, if and so far as the words made or contained the following comments or expressions of opinion, namely:

- Minister Mentor Lee Kuan Yew's actions in taking or supporting measures to curb political opposition indicates that he is fearful of criticism, especially criticism from opposition MPs if they could investigate and ask questions about errors and mistakes he has made whilst in government; and/or

- the National Kidney Foundation scandal illustrates the dangers of an over-powerful and over-secretive government, of the kind Minister Mentor Lee Kuan Yew has fostered and directed in Singapore, and it is reasonable to ask whether similar irregularities or malfeasance attend similar organization and entities operated under the direction, control or influence of the government; and/or

- the fact that Mr TT Durai could win a libel suit in 1998 over allegations which were true raises the question of whether Singapore's defamation laws are over-favourable to [the] plaintiff and may in consequence have been utilised by other officials to cover up misdeeds or to silence critics

they were fair comment on matters of public interest, namely

- the degree of democracy and accountability in the governance of Singapore;

- Minister Mentor Lee Kuan Yew's conduct towards critics of himself and his government;

- The political legacy of the plaintiff[s];

- The extent to which libel laws can be, and/or are, used to cover up malfeasance; and

- The motivations of Dr Chee and the SDP in contesting the 2006 Singapore elections.

Particulars

(1) The following statements in the article are matters of fact on which the above comments are based and on which the defendants propose to rely. These facts were in existence and known to the defendants at the time the article was published:

(a) Dr Chee was an opposition leader who had faced eight charges of speaking in public without a permit and who had served several prison sentences for political offences, including eight days for contempt in March 2006. [See paragraph 2 of the Article].

(b) Dr Chee had been vilified by the plaintiff in the terms recorded in paragraph 3 of the Article.

(c) Dr Chee had been vilified by Minister Mentor Lee Kuan Yew in like terms as recorded in paragraph 4 of the Article.

(d) Dr Chee made the statements reported in paragraphs 5 to 8 of the Article. The SDP did not do well in the election held on 6th May 2006. The PAP resents critics; Dr Chee lost his job as a psychology lecturer at the National University of Singapore soon after entering politics.

(e) Singapore is a peaceful and prosperous country where many freedoms are enjoyed by the populace.

(f) Minister Mentor Lee Kuan Yew is a strong man. Like any politician who has held power for as long as he has, Minister Mentor Lee Kuan Yew has made some errors and mistakes in the course of his political career. His errors can be characterised as "skeletons in his closet" because they are not debated in parliament adequately or at all because the opposition is not significant and is not permitted to investigate or ask embarrassing questions. There was no opposition in parliament between the years 1965 to 1981.

(g) There was a scandal in 2004, as described in the Article, involving the NKF and its chief executive Mr T.T. Durai. The patron of the NKF was the wife of the former Prime Minister Goh Chok Tong who called Mr T.T. Durai's excessive salary "*peanuts*".

(h) The government controls high pools of public money in the CPF and the GIC, both of which are highly non-transparent. It also controls spending on public housing and there have been occasions when government ministers have threatened not to spend housing and other funds on electorates which do not re-elect PAP members. Singapore has no freedom of information legislation or similar access laws which could enable its public or press to discover whether officials are abusing their trust as Mr T.T. Durai is alleged to have done.

(i) The NKF won a libel case in 1998 over a true allegation about T.T. Durai. In 2004, he sued *The Straits Times* for defamation and the truth came out. Singapore officials have a remarkable record of success in winning libel suits against critics.

(j) The opinions attributed to Dr Chee in paragraphs 15 to 18 and paragraphs 20 to 21 of the Article are his honest opinions, accurately reported. The statement attributed to Minister Mentor Lee Kuan Yew is accurate.

(k) Minister Mentor Lee Kuan Yew is 83 years old.

(l) The film "*Singapore Rebel*" about Dr Chee was banned in Singapore, and later subject to a police investigation." *The Straits Times*, 22nd March, 10th May, 2005.

(2) The following words in paragraphs 9 to 12 of the impugned Article are comments:

Paragraph 9:

"Why is all this oppression necessary in a peaceful and prosperous country like Singapore where citizens otherwise enjoy so many freedoms? Mr Chee has his own theory that the answer lies with strongman Lee Kuan Yew himself: "Why is he still so afraid? I honestly think that through the years he has accumulated enough skeletons in his closet that he knows that when he is gone, his son and the generations after him will have a price to pay. If we had parliamentary debates where the opposition could pry and ask questions, I think he is actually afraid of something like that."

Paragraph 10:

"That raises the question of whether Singapore deserves its reputation for squeaky clean government."

Paragraph 11:

"The scandal was a gift for the opposition, which naturally raised questions about why the

government didn't do a better job of supervising the highly secretive NKF… But it had wider implications too. The government controls huge pools of public money in the CPF and GIC, both of which are highly non-transparent. It also controls spending on public housing… And opening uses the funds as a bribe for districts that vote for the ruling party. Singaporeans have no way of knowing whether officials are abusing their trust as Mr Durai did."

Paragraph 12:

"It gets worse."

Paragraph 13:

"Singaporean officials have a remarkable record of success… The question then is "How many other libel suits have Singapore's great and good wrongly won, resulting in the cover up of real misdeeds? And are libel suits deliberately used as a tool to suppress questioning voices?"

(3) The defendants will rely, in support of this plea, on the facts and matters set out in paragraph 26 (above) and in paragraphs 28 to 29 (below).

147 In *Chen Cheng v Central Christian Church* [1999] 1 SLR 94 ("*Chen Cheng*"), the Court of Appeal held that, to succeed in the defence of fair comment, a defendant must prove the following elements:

(a) the words complained of were comments and not assertions of fact;

(b) the comment was on a matter of public interest;

(c) the comment was based on facts; and

(d) the comment was one which a fair-minded person could honestly make on the facts.

148 Mr Singh submitted that the statements alleged to be comments are definitive statements with no hint of an opinion. *Gatley* states at [12.6] on "Comment":

The distinction. The fundamental rule is that, subject to what is said below, the defence applies to comment but not to imputations of fact. If the imputation is one of fact the defence must be justification or privilege. However, the matter is complicated for two reasons: first, there may be difficulty in distinguishing comment and fact; secondly, a statement of fact which is an inference from other facts stated or referred to may be a comment for the purposes of the defence. Though "comment" is often equated with "opinion" this is an over-simplification. More accurately it has been said that the sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc." It is possible to distinguish at least three situations.

(1) A statement may be a "pure" statement of evaluative opinion which represents the writer's view on something which cannot be meaningfully verified—"I do not think Jones is attractive".

(2) A statement which is potentially one of fact or opinion according to the context—"Jones' behaviour was disgraceful".

(3) A statement which is only capable of being regarded as one of fact—"Jones took a bribe"—but which may be an inference drawn by the writer from other facts.

Gatley continues at [12.7]:

> So if the defendant alleges that a person has been guilty of disgraceful or incompetent conduct, or has been actuated by corrupt or dishonourable motives and does not state what those disgraceful or incompetent acts are, or assign any grounds from which such motives can reasonably be inferred, his allegations are allegations of fact and not comments. The underlying reason of this policy is said to be that to:
>
> > "state accurately what a man has done, and then to say that such conduct is dishonourable or disgraceful, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well-founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging for himself of the character of the conduct condemned, nothing but a false picture being presented for judgment."
> >
> > [citing Windeyer J. in *Christie v Robertson* (1889) 19 N.S.W.L.R. 157 at 161].
>
> The force of this reasoning is somewhat diminished by the clear rule that the facts commented on do not have to be set out in the article complained of but may be merely indicated therein and many readers may not in practice be in a position to make such a judgment. …

At [12.11], *Gatley* states:

> **Comment and fact confused**. If the defendant has failed to distinguish clearly in what he has published between the facts on which he is commenting and the comments he wishes to make on those facts, those to whom the words are published may regard the comments either as statements of fact or as founded upon unrevealed information in the possession of the publisher; in such circumstances the publication may stand in the same position as any ordinary allegation of fact. Where the comment is not clearly identified there is a tendency to hold the entire statement to be one of fact. "In the first place," said Fletcher-Moulton L.J. in *Hunt v Star Newspaper*:
>
> > "comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v. Chapman*. The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses … Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment."

149 Were all of the statements from [9] to [13] of the Article, comments? It is not disputed that an article on CSJ and LKY and LHL would be of public interest. That would satisfy requirement (b) of *Chen Cheng*. I now deal with the other requirements (a), (c) and (d) of *Chen Cheng* together.

150 What were the alleged comments commenting on? The Defendants did not say specifically. They had simply grouped the statements together as comments with a whole series of alleged facts found in [27], as well as in [26], [28] to [29] of their Amended Defences.

151 From such various paragraphs of the Amended Defences, it seems to me that what the Defendants were alleging, in summary, was that because LKY is the most powerful person in Singapore and CSJ is an opposition figure who has been subject to vilification and attacks by oral criticism and various proceedings from various persons in Singapore and because FEER is a journal circulating to politically aware persons in Singapore, FEER is entitled to publish HR's views on the Singapore political scene. Such views would enjoy the defence of fair comment.

152 It seems to me that the Disputed Words do not distinguish clearly between facts and comments. Having considered them from the viewpoint of the ordinary and reasonable reader, I do not agree with the Defendants' approach. I am of the view that the statements from [10] to [13] of the Article alleged by the Defendants to be comments were statements of fact. Likewise, for the interpretation of corruption and the cover-up of corruption by libel suits. If such statements were comments, they were not comments based on facts.

153 Also, the fact that some of the allegations in the Disputed Words are couched as questions rather than statements is irrelevant, see again *Gatley* at para 3.16 cited above at [53]. An assertion of fact, expressed as a question, does not convert it into a comment. So, for example, the question: "whether Singapore deserves its reputation for squeaky-clean government" is a suggestion that the government is not squeaky-clean. Similarly, the question: "how many other libel suits have Singapore's great and good wrongly won, resulting in the cover-up of real misdeeds" is an assertion of fact that Singapore's great and good have wrongly won libel suits, which has resulted in the cover-up of their "real misdeeds". The question: "And are libel suits deliberately used as a tool to suppress questioning voices?" is not an expression of opinion or comment. It is an assertion of fact that libel suits are deliberately used as a tool to suppress questioning voices which would expose "real misdeeds" rather than to vindicate one's reputation. I need not reiterate my views about the references to LKY and LHL.

154 In the circumstances, I am of the view that the defence of fair comment fails.

Defence of qualified privilege

155 The next defence pleaded by the Defendants is that of qualified privilege, see [28] of the Amended Defences. The essence of this defence of qualified privilege can be found in sub-paragraphs (8), (12), (13) and (14) of [28] which are set out below for convenience:

> 28. If (which is denied) the words were defamatory of the plaintiff, the same were published on an occasion of qualified privilege.
>
> **Particulars of Privilege**
>
> …
>
> (8) Ever since Dr Chee became involved in politics, Minister Mentor Lee Kuan Yew has subjected his character and conduct to a public barrage of personal vilification, insult and defamation, such attacks describing him (inter alia) as:
>
> …

(12) In consequence of the campaign of accusations and vilification against Dr Chee mounted over many years by Minister Mentor Lee Kuan Yew his PAP associations [including [Prime Minister Lee Hsien Loong], Dr Chee had a duty to make bona fide and relevant statements in response to such attacks and vilification and persons in Singapore and in the region who have heard or read the aforementioned vilification have an interest in receiving a communication of this response.

(13) The Far Eastern Economic Review…, as a journal circulating to politically aware persons in Singapore and in the region, is an appropriate vehicle for communicating such response, and has done so in a measured, moderate and appropriate way by means of an interview with Dr Chee.

(14) The appropriateness of FEER as a media for Dr Chee's privilege response to [Prime Minister Lee Hsien Loong's] as well as Minister Mentor Lee Kuan Yew's defamation of him is further demonstrated by the fact that:

(a) his written responses have not been carried by newspapers published in Singapore; and

(b) his oral responses have been the subject of libel suits brought by [Prime Minister Lee Hsien Loong and Minister Mentor Lee Kuan Yew] and other PAP identities.

156 Mr Singh summarised the Defendants' contentions on qualified privilege as follows:

(a) CSJ had a duty to make bona fide and relevant statements in response to a campaign of attacks against him by the Plaintiffs over the years, and persons in Singapore and in the region who are aware of such attacks have an interest in knowing CSJ's response;

(b) FEER is an appropriate vehicle for the communication of CSJ's response.

157 Mr Singh also submitted that, in other words, the Defendants' contention is that they enjoy a "derivative privilege" based on the privilege enjoyed by CSJ himself in making a statement in protection of his (CSJ's) own self-interest: see *Oversea-Chinese Banking Corp Ltd v Wright Norman and others and another* action [1994] 3 SLR 760; *Oei Hong Leong v Ban Song Long David and Others* [2005] 1 SLR 277; *Gatley* at para 14.73; *Davies;Adam v Ward.*

158 Mr Low did not dispute that the Defendants rely on derivative privilege, see [96] of DRS, but he submitted that they also claim "a non-derivative privilege as a newspaper engaged in the public interest exercise of neutral reportage".

159 As with all other defences, the burden of establishing qualified privilege lies with the defendants: *Aaron*.

160 In so far as derivative privilege is concerned, the applicable principles are straightforward. First, a person whose character or conduct has been attacked is entitled to answer such an attack, and any defamatory statement he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made. In *Turner v Metro-Goldwyn-Mayer Pictures* [1950] 1 All ER 449, the principle was enunciated as follows at p 470-471:

There is an analogy between the criminal law of self-defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offense. That is to say, the circumstances in which he defends himself, either by acts or by

words, negative the malice which the law draws from violent acts or defamatory words.

161 *Gatley* states at [14.65]:

> **Answers to attacks.** A person responding to an attack upon him must not make countercharges or unnecessary imputations on the private life of the person who has attacked him wholly unconnected with the attack and irrelevant to his vindication. The privilege "extends only so far as to enable him to repel the charges brought against him-not to bring fresh accusations against his adversary." [citing May C.J. in Dwyer v Esmonde (1878) 2 L.R.Ir.243 at 254].
>
> > "If, for example, A should charge B with theft, a denial by B of the charge would not warrant an action for damages by A however vigorous or gross the language might be in which B's denial was couched. But if B should go on to charge A with theft that would be actionable, and it would not be protected or privileged to any extent on account of A's previous attack. [citing *Lord Kincairney in Milne v Walker* (1898) 21 R. 155 at 157].

162 Therefore, if A attacks B verbally, B is entitled to reply to A but B cannot use his reply to attack A. However, this does not mean that A can attack B with impunity. If B thinks that A was defaming him in the first place, B can sue for defamation. Likewise, if B exceeds the limit of his reply to A, A can sue B for defamation. Neither is entitled to defame the other without sanction unless he has a valid reason or defence.

163 I have accepted that the Article is alleging corruption against LKY and against LHL. Even if there were in fact a campaign of attacks, accusations and vilifications by the Plaintiffs against CSJ, the allegation of corruption in the Article against LKY and LHL is, in my view, plainly an example of someone going beyond defence and proceeding to offense.

164 The example which *Gatley* cited at [14.65], see [161] above, is similar to the situation in the present case. The Defendants' contention is that LKY and LHL (A) have charged CSJ (B) with a number of accusations. If CSJ (B) simply denied those accusations, that denial would not warrant an action by LKY or LHL (A) however vigorous or gross the language might be in which CSJ (B's) denial was couched. But in the present case, the Disputed Words have gone further and charged LKY and LHL with corruption. That is actionable by LKY and by LHL. CSJ is not protected by the defence of qualified privilege even if all the Disputed Words came from him and neither would the Defendants even if they had merely reported what CSJ had said.

165 The Defendants also rely on the defences of public interest privilege and neutral reportage.

166 For the former, the Defendants allege in [29] of their Amended Defences that the publication of the Article "was privileged because it served the public interest as a serious contribution to discussion of Singapore governance and politics, published reasonably and with editorial and journalistic responsibility." The essence of this allegation is found in sub-paragraphs (8) to (14) of the particulars provided. They state:

> (8) Mr Restall recorded his interview with Dr Chee and later took notes from the recording which then formed the basis of the Article. The Article thus accurately and carefully reflected what Dr Chee had said during the interview.
>
> (9) The Article was an excellent example of a "profile" – a way of introducing readers to a public figure, using their own words so that readers know what they stand for and can make an accurate judgement on whether they are motivated, e.g. by ambition or martyrdom and whether

their outlook is rational. It enables a "*warts and all*" appreciation of a public figure, in which the journal does not vouch for the truth of what that political figure says. It is not the occasion for a right of reply or for contacting any person who is disparaged by the subject of the profile. Responsible journalism will offer such a right of reply by way of a letter to the editor in subsequent editions.

(10) The public importance of the allegations made by Dr Chee are self-evident, given that more transparency in government means better government, going as they do to the governance of Singapore under the plaintiff and his son and to the question of whether Singapore is truly democratic. The public interest is not (like the issue of meaning and damages) limited to Singaporeans in this case: there is a regional interest which must be put on the scales in favour of publication.

(11) There was a further public interest, both Singaporean and regional, in bringing the NKF scandal to the fore to highlight the lessons to be learned from it, in particular from a KPMG report.

(12) There was a public interest in references to libel actions brought by Singapore officials and the role of libel actions in Singapore politics. …

(13) Any miscarriage of justice is a subject of vital public interest, and the question of why Mr T.T. Durai won his case goes to the issue of the need to reform plaintiff-friendly Singaporean libel law in order to give the media and political opponents the opportunity of a fair trial when sued by the plaintiff and/or other PAP members.

(14) The defendants will rely upon Article 14(1)(a) of the Singapore Constitution, which states that: "*every citizen of Singapore has the right to freedom of speech and expression".*

167 As for Article 14(1)(a) of the Singapore Constitution, DWS states at paragraphs 40 and 41:

40. The courts of all other advanced Commonwealth countries have developed the common law to provide a public interest defence for responsible journalism. This has been based on the principles of common law privilege developed by constitutional guarantees of free speech of the kind found in Article 14 of the Singapore Constitution. (Article 14 is particularly protective of judge-made law, because it sets out the right to freedom of speech and expression in 14(1A), and makes it defeasible *only* by laws which are passed by Parliament, and not by judge-made laws. This means that the right of free speech cannot be infringed or cut back by the common law.) …

41. It is not the intention of the Defendants, unless called upon, to explain in detail why Singapore common law should follow *Jameel*. This is an extensive argument that should be left to the trial…

168 Then, [48] to [109] of DRS goes into a discourse as to why Singapore should follow other common law jurisdictions. At [109], the argument goes that there is no power under Article 14 to restrict freedom of speech by abolishing or cutting back on the common law and the courts have no power to abolish or refuse to acknowledge the public interest or neutral reportage privilege raised in some cases which I shall come to. Only parliament may abolish any aspect of the common law of defamation.

169 It seems to me that this submission contradicted itself. Article 14(1)(a) is subject to clauses (2) and (3). Article 14(2)(a) states that parliament may by law impose restrictions on the rights conferred

by clause (1)(a). It is not necessary for me to set out Article 14(2)(a). Does Article 14(1)(a) and 14(2)(a) mean that freedom of speech is subject only to such laws that have been enacted by parliament? The submission accepted that there may be judge-made law, ie, common law, on defamation in Singapore. Indeed, it argued that Singapore's common law should follow that in other jurisdictions. Then, it contradicted itself by submitting that only parliament can abate such law.

170 The Defendants have pre-determined what the common-law of defamation in Singapore is or should be and then argued that only parliament may abate such law. It is for the courts to say what the common-law is or should be. It is up to Parliament to abate or expand that common-law.

171 In any event, the point about the application of the common law of defamation in respect of the right of free speech has been settled in Singapore by the Court of Appeal. In *JJB v LKY*, LP Thean J said at p 332:

> It has been decided by this court in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* that the right of free speech under art 14 is subject, *inter alia*, to the common law of defamation as modified by the Defamation Act (Cap 75, 1965 Ed). That was an appeal against the decision of the High Court on an interlocutory application made in this same action. The appellant applied for leave to amend the defence by pleading that this action sought to restrict the appellant's right under art 14(1) and was therefore an unlawful interference of his fundamental rights, and for that reason the action was not maintainable. The High Court dismissed the application, and on appeal, that decision was affirmed by this court. Wee Chong Jin CJ, delivering the judgment, said, at p 65:
>
> > The constitutional right of freedom of speech and expression is unarguably restricted by the laws of defamation. Article 14(1)(a) is subject to cl (2), which provides that 'Parliament may by law impose — (a) on the rights conferred by cl (1)(a) … restriction … to provide against … defamation …'. The relevant enactment is the Defamation Act (Cap 75). In addition, by enacting the Defamation Act, which was enacted by the Malaysian Federal Parliament as Act 20 of 1957 and was extended to Singapore (by way of modification) pursuant to s 74 of the Malaysia Act 1963 in May 1963, the legislature has clearly intended that the common law relating to defamation, as modified by the Act, should continue to apply in Singapore. The Act is premised on that underlying assumption and has to be read against matrix of the common law. Moreover, the definition of law in art 2(1) of the Constitution includes 'the common law in so far it is in operation in Singapore'. In our view, it is manifestly beyond argument that art 14(1)(a) is subject to the common law of defamation as modified by the Act and, accordingly, does not, in itself, afford a defence.
>
> Across the causeway, the High Court in Malaysia has expressed a similar opinion: see *Lee Kuan Yew v Chin Vui Khen*, at pp 502–503.

172 As for what the common law position in Singapore on public interest and neutral reportage should be, the Defendants take the position that this should be decided at a trial and, as I mentioned, that Singapore should follow other common law jurisdictions. For the former, the Defendants relied primarily on the following cases which I set out in chronological order:

(a) *Lange v Australian Broadcasting Corporation* [1997] 145 ALR 96 ("*Lange v ABC*");

(b) *Reynolds v Times Newspapers Ltd and Others* [2001] 2 AC 127 ("*Reynolds*");

(c) *Lange v Atkinson* [2000] 3 NZLR 385 ("*Lange v Atkinson*").

The Defendants also submit that the Malaysian courts have applied *Reynolds.*

173 Accordingly, they submit that even if I should conclude that the court ought to make a decision without a trial, I should not follow the decision of Ang J in *Singapore Democratic Party* in which she declined to follow *Reynolds* and the two *Lange* cases.

174 For the point as to whether a trial is necessary, the Defendants relied on *X v Bedfordshire* [1995] 2 AC 633 where Lord Browne-Wilkinson said at 740 to 741:

> …
>
> Actions can only be struck out under R.S.C., Ord. 18 r. 19 where it is clear and obvious that in law the claim cannot succeed. Where the law is not settled but is in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts.

However, he also went on to say at 741:

> But I agree with Sir Thomas Bingham M.R. ante, p. 694_{B-D} that there is nothing inappropriate in deciding on these applications whether the statutes in question confer private law rights of action for damages: the answer to that question depends upon the construction of the statutes alone.
>
> Much more difficult is the question whether it is appropriate to decide the question whether there is a common law duty of care in these cases. There may be cases (and in my view the child abuse cases fall into this category) where it is evident that, whatever the facts, no common law duty of care can exist. …

175 I point out that the first passage which the Defendants rely on refers to hypothetical facts. The facts before me are not hypothetical.

176 The Defendants also relied on Singapore Court Practice 2006 by Jeffrey Pinsler which states at p 457:

> A court should not strike out a claim if it arises out of a developing area of law. In the circumstances, the plaintiff should not be deprived of his opportunity to argue his case. It is otherwise if his claim is bound to fail.

However, the two cases cited in support of this proposition were cases which expressed concern over a decision on hypothetical facts. They are *Hughes v Richards* [2004] EWCA Civ 266 and *Barrett v Enfield LBC* [2001] 2 AC 550.

177 The Defendants also suggested that because the present actions are commenced by the two most powerful men in the land against foreign defendants, there ought to be a trial to do justice to the Defendants. I do not agree. Otherwise foreign defendants will be in a more favourable position than local ones. If there is no need for a trial, then this court should proceed to make its decision.

178 As *Gatley* puts it at p 451, there was prior to *Reynolds* a strong reluctance to extend the protection of qualified privilege to publications in the news media. The fundamental principle was that a statement was protected by privilege only if the publication of it was to persons who had a proper interest or duty in the matter with which it was concerned, and the public as a whole was not generally regarded as having a relevant interest or duty. The media defendant was in no different

position from anyone else and had to show the relevant reciprocity of duty and interest. Such a duty only arose "where it is in the interests of the public that the publication should be made and will not arise simply because the information appears to be of legitimate public interest": citing *London Artists v Littler* [1968] 1 WLR 607 at 619.

179 There was however an exception to this general rule. While the law did not recognize an interest in the public strong enough to give rise generally to a duty to communicate in the press, such a duty was held to exist on special facts. This was recognized by the Court of Appeal in *Aaron.* In that case, LP Thean JA said at p 651-652:

> Generally, qualified privilege is available to newspapers as much as to any other person. Privilege for publication in the press of information of general public interest is limited to cases where the publisher has a legal, social or moral duty to communicate. The law does not recognize an interest in the public strong enough to give rise generally to a duty to communicate in the press; such a duty has been held to exist on special facts, and there is no general 'media privilege at common law'. *Gatley* on Libel and Slander (8th ed) in para 560 states:
>
> > … it is now the general rule that the law does not recognize an interest in the public strong enough to give rise to a duty to communicate in the press. Such a duty has been held to exist on special facts, but there is no general 'media privilege at common law'.
>
> …
>
> The relevant factors are by whom and to whom, when, why and in what circumstances the publication is made, and whether these things establish a relation between the parties which gives rise to a social or moral duty, and the consideration of these things may involve the consideration of questions of public policy. It does not follow that publication of all matters of public interest is in the public interest such that it would give rise to a duty to publish them. The right of a publisher of a newspaper to report truthfully and comment fairly on matters of public interest must not be confused with a duty of the sort that gives rise to an occasion of qualified privilege: per Cartwright J in *The Globe And Mail Ltd v Boland* (1960) 22 DLR (2d) 277 at pp 280–281.
>
> The onus was on the respondents to establish the circumstances which will support a plea of qualified privilege. The respondents have only shown that the publication of the information was in the interest of a section of the public, namely, members of the Christian community. That is sectional rather than general interest of the public at large. On the authorities, such sectional interest does not give rise to a moral or social duty to publish the report. The respondents have, therefore, not succeeded on the defence of qualified privilege.

180 The approach in *Aaron* was reiterated in *Chen Cheng* where LP Thean JA said at [63]:

> While it is rather unclear what 'special facts' must be shown in order for a newspaper publication to succeed on the defence of qualified privilege, the requisite standard or test for such special facts is an onerous one. Stephenson LJ in *Blackshaw v Lord* [1984] QB 1 at p 27, [1983] 2 All ER 311 at p 327 said that the cases where the defence was established for newspaper publications were those:
>
> > … extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of a suspicion or speculation is justified; for example where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs.

> And indeed the decided cases where the defence was successfully pleaded do bear this out. In *Allbut v General Council of Medical* Education and Registration (1889) 23 QBD 400 it was held that the Medical Council had a social or moral duty to publish the name of a doctor who had been taken off the medical register. In *Camporese v Parton* (1983) 150 DLR (3d) 208, it was held that a published warning of possible food contamination from canning lids in a newspaper article fell within the ambit of the defence. In *Perera v Peiris* [1949] AC 1, it was held that the newspaper publication of an extract from a government report on bribery which accused the plaintiff of lack of candour was held to be privileged.

I would add that *Chen Cheng* was a decision made after *Lange v ABC* but before *Reynolds*. However, *Lange v ABC* was apparently not cited in *Chen Cheng*.

181 It was not disputed that based on the position in Singapore prior to *Lange v ABC*, the Defendants would not have succeeded on the defence of qualified privilege. They did not allege any special fact or facts. Hence, their reliance on *Lange v ABC, Reynolds* and subsequent cases.

182 In *Lange v ABC*, the High Court of Australia noted that the common law in Australia had initially simply reflected the English common law. However, by 1992, it was decided that the common law rules of defamation must conform to the requirements of the Commonwealth Constitution. The High Court decided that when a publication concerning a government or political matter is made in circumstances which would otherwise have failed to attract a defence of qualified privilege under English law, it may nevertheless enjoy such a privilege if the publisher had acted reasonably. It was said that reasonableness of conduct seemed the appropriate criteria to apply. At p 118, the High Court also said:

> Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.
>
> …

183 The decision in *Lange v ABC* was reached upon consideration of the Australian constitutional system of representative government for which freedom of communication on matters of government and politics was considered an indispensable incident of that system. The decision also took into account the statutory defence of qualified privilege contained in s 22 of the Defamation Act 1974 (NSW) which required the conduct of the publisher in publishing the matter in issue to be reasonable in the circumstances. Thus, that statutory provision was not inconsistent with the decision and vice versa.

184 In *Reynolds*, the defendant argued for a new category of qualified privilege which derives from the subject matter, that is, political information. Its alternative argument was that qualified privilege should be available for political discussion unless the plaintiff proved that the publisher had failed to exercise reasonable care. This alternative appeared similar to the decision in *Lange v ABC*. These arguments were rejected by the House of Lords although the actual decision on the subject of the appeal was a majority of three to two. The headnote states:

Held, (1) that the common law should not develop a new subject matter category of qualified privilege whereby the publication of all political information would attract qualified privilege whatever the circumstances, since that would fail to provide adequate protection for reputation, and it would be unsound in principle to distinguish political discussion from other matters of serious public concern; but that qualified privilege was available in respect of political information upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had had an interest in receiving it, taking into account all the circumstances of the publication including the nature, status and source of the material; and that, accordingly, a claim to privilege stood or fell according to whether it passed that test.

185 Lord Nicholls of Birkenhead referred to the standard of responsible journalism at p 202. He also said at p 204 to 205:

Conclusion

My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop "political information" as a new "subject matter" category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the, common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.

186 In considering whether a publication qualifies for the protection of the *Reynolds* defence, Lord Nicholls sets out ten comments of circumstances to be taken into account, for illustration only (at 205):

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

However, the House of Lords did not agree with the Court of Appeal that there should be a third and separate requirement which was referred to as the circumstantial test. The traditional twofold test of duty and interest was considered flexible enough.

187 As stated in *Evans* at p 133, the underlying basis of the *Reynolds* defence appears to be that

where the media has behaved responsibly in connection with a defamatory publication and the content of the publication is of importance and interest to the public, it will be protected. As the learned authors of Media Law (Sweet & Maxwell, 4th Ed, 2002) put it at p 12, the publication to a general audience of information which the public has a "right to know", notwithstanding that it later turns out to be false, may be made on an occasion of privilege – a status lost only if the publisher is actuated by malice, legal (dishonesty, or recklessness towards truth) or actual (spite or desire for personal profit). In other words, qualified privilege is available in respect of political information upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had had an interest in receiving it, taking into account all the circumstances of the publication including the nature, status and source of the material. Accordingly, a claim to privilege stood or fell according to whether it passed that test.

188 One may of course argue that *Reynolds* does not represent a new or substantive development in the duty-interest analytical framework but it is significantly different from *Aaron* which is authority for the proposition that the law does not recognize an interest in the public strong enough to give rise generally to a duty on the part of the press to communicate and there must be special facts.

189 In *Lange v Atkinson*, the Wellington Court of Appeal had initially expressed its views on the defence of qualified privilege but the Privy Council remitted the matter to it for rehearing so that the Court of Appeal could take into account the House of Lords' decision in *Reynolds*. Having taken into account that decision and declining to follow it, the Court of Appeal maintained and amplified its views. In summary, the Court of Appeal was of the view that the defence of qualified privilege may be available in respect of a statement published generally and a proper interest does exist in respect of statements made about the actions and qualities of current or former members of Parliament and those with immediate aspirations to such office, so far as the actions and qualities directly affected their capacity to discharge their public responsibilities. However, they amplified that a statement, the subject matter of which qualifies for protection is not always made on an occasion of privilege.

190 The Court of Appeal said there was no specific requirement of reasonableness. In reaching its views, the Court of Appeal took into account the prevailing electoral system and s 19 of the Defamation Act 1992 which prevents reliance on qualified privilege if the defendant is predominantly motivated by ill will against the plaintiff or otherwise takes improper advantage of the occasion of publication.

191 I come now to the Malaysian cases which the Defendants rely on. DRS states at [103] that the Malaysian courts applied *Reynolds* without demur. However, the Defendants are not quite correct.

192 In *Dato Seri Anwar bin Ibrahim v Dato Seri Dr Mahathir bin Mohamed* [1999] 4 MLJ 58, the High Court at Kuala Lumpur had to deal, inter alia, with the defence of qualified privilege. It found that this defence was made out because of the right to reply to an attack from the plaintiff. It also dealt with *Lange v ABC, Lange v Atkinson*[1998] 3 NZLR 424, that is, before the case was remitted by the Privy Council back to the New Zealand Court of Appeal ("the pre-Privy Council *Lange v Atkinson*") and *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 863 which reports the decision of the English Court of Appeal ("*CA Reynolds*"). The High Court considered that the three stage test stated in *CA Reynolds* was applicable, ie, including the third test which was the circumstantial test eschewed by the House of Lords. However, in setting out the first two cases, ie, the duty and the interest tests, the High Court did not say whether it was following the more restrictive approach pre-*Lange v ABC* or not, although it seems that it was assuming that these two tests were met once the publication of the subject matter was in the public interest, an approach which the subsequent case of *Jameel* favoured. Significantly, the High Court did not draw any distinction between the Australian, New Zealand and English positions.

193 In *Dato Seri Anwar bin Ibrahim v Dato Seri Dr Mahathir bin Mohamed* [2001] 1 MLJ 305, the Court of Appeal considered the pre-Privy Council *Lange v Atkinson* to be applicable.

194 In *Dato Seri Anwar bin Ibrahim v Dato Seri Dr Mahathir bin Mohamed* [2001] 2 MLJ 65, the Federal Court was of the view that *Lange v ABC* was applicable and not the pre-Privy Council *Lange v Atkinson*.

195 In *Halim bin Ansyat v Sistem Televisyen Malaysia Sdn Bhd & Ors* [2001] 6 MLJ 353, the High Court was of the view that the Federal Court had accepted CA *Reynolds* although the Federal Court had actually endorsed *Lange v ABC*, as I mentioned above.

196 Mr Singh submitted that *Lange v ABC* was largely influenced by s 22 of the Defamation Act 1974 (NSW) and the Australian political and social model which Singapore has not adopted. Also, the court there was influenced by the requirements of the Commonwealth Constitution which are different from the Singapore Constitution. For example, Article 14(2) of the latter provides that Parliament may by law impose restrictions on the right of freedom of speech and expression. According to him, there is no such provision in the Commonwealth Constitution.

197 As for *Reynolds*, Mr Singh submitted that the House of Lords were compelled by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and s 12 of the English Human Rights Act 1998 to give the media more latitude in reporting. In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, the Court of Appeal declined to follow a decision of the European Court of Human Rights which was premised on Article 10 of the European Convention. He further submitted that the rejection of Article 10 is sufficient to dispose of the Defendants' reliance on a *Reynolds* type of defence and noted that Australia and New Zealand have departed from *Reynolds*.

198 As for *Lange v Atkinson*, Mr Singh submitted that the New Zealand Court of Appeal had pointed out differences between the New Zealand electoral system and the English and Australian systems. The court also noted that wider protection to a plaintiff under s 19 of the New Zealand Defamation 1992 was possible.

199 As for the Malaysian cases, Mr Singh submitted that the Malaysian courts appear to have accepted both *Reynolds* and *Lange v Atkinson*.

200 Mr Singh stressed that different conclusions were reached in Australia, England and New Zealand and each was based on the conditions applicable then. In *Lange v Atkinson,* the Privy Council pointed out the significance of local political and social conditions. This observation was reiterated at p 388 of *Lange v Atkinson:*

> [2] "Against this somewhat kaleidoscopic background, one feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity; the recognition that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press. In Their Lordships' view, *subject to one point mentioned later*, this feature is determinative of the present appeal. For some years Their Lordships' Board has recognized the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy. The present case is a prime instance of such a case. As noted by Elias J and the Court of Appeal, different countries have reached different conclusions on the issue arising on this appeal. The Courts of New Zealand are much better placed to assess the requirements of the public interest in New Zealand than Their

Lordships' Board. Accordingly, on this issue the Board does not substitute its own views, if different, for those of the New Zealand Court of Appeal."

[3] …

[4] I would add that the "one point" referred to in the passage quoted above which the Privy Council identified as standing in the way of deference to the New Zealand Court's assessment of local public policy arose from the later decisions of the English Court of Appeal and the House of Lords in *Reynolds* which the New Zealand Court had not had the advantage of considering.

201 Mr Singh also submitted on the position in Singapore. As mentioned above, the Court of Appeal in *Aaron* reiterated the duty and interest tests and the need for special facts to rely on the defence of qualified privilege. As I mentioned, this approach was also adopted in *Chen Cheng*.

202 Mr Singh submitted that in *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 ("*Tang Liang Hong*"), the Court of Appeal made it clear that cases concerning political matters or politicians were not to be treated any differently from other defamation cases. He relied on the following passages from [117] and [118]:

117 As Mr Gray concedes, politicians, like any other citizens, do not forfeit the protection of their reputations merely because they have entered the political arena and assumed high offices. …

118 …Any argument which calls for a reduction or moderation of damages purely on the basis that the successful plaintiff is a politician, say a minister, or that the case has a political flavour is untenable and wrong. …

203 Mr Singh referred to some post-*Lange v ABC* cases. He submitted that in *Oei Hong Leong v Ban Song Long David* [2005] 3 SLR 608, the Court of Appeal reiterated the principles in *Aaron* without reference to *Reynolds* in their judgment on qualified privilege. I believe this is inaccurate as it appears that the Court of Appeal did not reiterate the principles in *Aaron* in its judgment on qualified privilege. *Aaron* is also not listed as one of the cases referred to by the Court of Appeal. In any event, the Court of Appeal in that case appeared to have focused on the right to reply aspect of qualified privilege and not a *Reynolds* type defence.

204 Mr Singh relied on *Chee Siok Chin v MHA* and submitted that the divergence in judicial thinking between Singapore and England was implicitly recognized by Justice Rajah when he cast doubt on the applicability of *Derbyshire County Council v Times Newspaper Ltd* [1993] AC 534 ("*Derbyshire*") which was one of the cases relied on in *Reynolds*. I do not think Justice Rajah had cast doubt on *Derbyshire* and it was the other way round. True, he did observe that the terms and tenor of Art 10(2) of the European Convention are very different from Art 14 of the Constitution but that is a separate point.

205 Mr Singh also relied on Ang J's decision in *Singapore Democratic Party.* In that case, the learned judge said at [76] that she agreed that "given the Court of Appeal's rejection [in *JJB v LKY*] of Art 10 of the European Convention, it is fairly clear that the *Reynolds* position on "responsible journalism" should not be followed and applied in Singapore. As for the Australian and New Zealand positions, she concluded at [73], [81] and [82] that they are inconsistent with the law of defamation in Singapore in view of *Aaron* and *JJB v LKY*.

206 Mr Low submitted that Art 10 of the European Convention was not as much of an influence in *Reynolds* as was submitted by Mr Singh.

207 He also submitted that differences between New Zealand and England in terms of electoral structure do not justify a rejection by Singapore which is a common law country, in rejecting *Reynolds* entirely. He submitted that all the other courts accept that a common law of qualified privilege contains a public interest defence for publication of important information by the media to the public at large and given "that basic fact", each country has a discretion to develop the public interest defence in its own way as confined to governmental matters or as extending to important matters which are apolitical. He also submitted that the margin of discretion does not concern the Defendants because the public interest defence must always, in any view and in any location, apply to coverage of politics. He stressed that the recent common law development had began in Australia, was followed in New Zealand and has been endorsed by the Privy Council for all Caribbean countries and Mauritius in view of *Bonnick* and *Seaga v Harper* [2008] UKPC 9 (30 January 2008). It is accepted in Malaysia, *Samoa* (in *Alesana v Samoa Observer Ltd* [1998] WSSC 1), Brunei Darussalam (*Rifli bin Asli v Ahmed Kawarilsa,* September 10, 2001, HC – footnote 75 in *Gatley* p 471). It applies in Hong Kong (Next *Magazine Publishing Ltd v Ma Ching Fat*, HKCFA, 5 March 2003), Canada and various Commonwealth countries in Africa. He submitted that it is incorrect to suggest that "peculiar local conditions" can justify the disappearance of public interest privilege.

208 Art 10 of the European Convention provides as follows:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In Singapore, the Court of Appeal in *JJB v LKY* discussed the relevance of Art 10 of the European Convention in the following terms at p 330 to 332 (at [56] and [59]–[61]):

> … The terms of art 14 of our Constitution differ materially from the First and Fourteenth Amendments of the Constitution of the United States and also from art 10 of the European Convention on Human Rights. The First Amendment, by its express terms, prohibits Congress from making any laws "abridging the freedom of speech, or of the press". … As for art 10 of the European Convention on Human Rights, it is true that the wording in para 1 thereof is similar to cl 1(a) of art 14. However, para 2 of art 10 is in no way similar to cl (2) of art 14: para 2 provides that the exercise of the freedom under para 1 is subject to "restrictions or penalties as are prescribed by law and are *necessary* in a democratic society … for the protection of the reputation or rights of others ...". Clearly, the terms allowing restrictions to be imposed under art 10(2) are not as wide as those under art 14(2).
>
> …
>
> It has been decided by this court in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 2 MLJ 65 that the right of free speech under art 14 is subject, *inter alia*, to the common law of defamation as modified by the Defamation Act (Cap 75, 1965 Ed). That was an appeal against the decision of the High Court on an interlocutory application made in this same action. The appellant applied for leave to amend the defence by pleading that this action sought

to restrict the appellant's right under art 14(1) and was therefore an unlawful interference of his fundamental rights, and for that reason the action was not maintainable. The High Court dismissed the application, and on appeal, that decision was affirmed by this court. Wee Chong Jin CJ, delivering the judgment, said, at p 65:

> The constitutional right of freedom of speech and expression is unarguably restricted by the laws of defamation. Article 14(1)(a) is subject to cl (2), which provides that 'Parliament may by law impose — (a) on the rights conferred by cl (1)(a) … restriction … to provide against … defamation …'. The relevant enactment is the Defamation Act (Cap 75). In addition, by enacting the Defamation Act, which was enacted by the Malaysian Federal Parliament as Act 20 of 1957 and was extended to Singapore (by way of modification) pursuant to s 74 of the Malaysia Act 1963 in May 1963, the legislature has clearly intended that the common law relating to defamation, as modified by the Act, should continue to apply in Singapore. The Act is premised on that underlying assumption and has to be read against matrix of the common law. Moreover, the definition of law in art 2(1) of the Constitution includes 'the common law in so far it is in operation in Singapore'. In our view, it is manifestly beyond argument that art 14(1)(a) is subject to the common law of defamation as modified by the Act and, accordingly, does not, in itself, afford a defence.

Across the causeway, the High Court in Malaysia has expressed a similar opinion: see *Lee Kuan Yew v Chin Vui Khen*, at pp 502–503.

It therefore cannot be disputed that the freedom of speech and expression provided in art 14 is not absolute or totally unrestricted. Certainly Mr Gray is not disputing this, and is not contending that the appellant under art 14 has the right to say "anything".

209 That discussion was, however, in respect of qualified privilege for a speech made in the course of an election rally. The defendant's argument in *JJB v LKY* was that he enjoyed qualified privilege based on Art 14(1) and (2) of the Constitution.

210 The plea of qualified privilege was formulated at p 326 as follows: qualified privilege attaches to defamatory publications concerning public officials (or candidates for a public office) relating to their official conduct or the performance of their public duties by those who have an honest and legitimate interest in the matter to those who have a corresponding and legitimate interest (whether as electors or as citizens potentially affected by the conduct of public officials). The reliance on Art 14(1) and (2) was rejected by the Court of Appeal who distinguished Art 10 of the European Convention from Art 14(2)(a). The Court of Appeal said at p 336:

> Parliament has thus legislated [in s 14 of the Defamation Act] that the circumstances of a general election are not sufficient to give rise to an occasion of privilege even if the subject matter of the publication is material to an issue in the election. It is true that the section is limited to publications by or on behalf of a candidate in an election. But that is indicative of Parliament's intention as to the scope of privilege to be attached to a speech made at an election, and the court should be slow to extend such privilege. This is particularly so having regard to the circumstances in which the Act became part of the law of Singapore. It is wholly untenable that the speech made by the appellant at the election rally on 28 August 1988 was privileged, when the same speech if made on the same occasion by or on behalf of the candidate for the election would not, under s 14 of the Act, be privileged. It cannot, therefore, be contended that on the basis of art 14 of our Constitution the common law privilege should be extended to speeches made at an election as contended on behalf of the appellant.

> In our opinion, the appellant's interest in the subject matter of his speech and the interest, if any, of the audience in the same subject matter are not enough, by themselves, to found the defence of privilege; there must also be present a legal, moral or social duty on his part to communicate the subject matter of his speech to the audience.

211 As mentioned above, Mr Singh stressed that the *Reynolds* defence was premised on Art 10 of the European Convention while Mr Low submitted it was not. *Gatley* notes at p 455 that Art 10 played a "major formative role" in *Reynolds*. However, Mr Low submitted that *Gatley* somewhat retreated from this in the second supplement, in which Article 10 is reduced to a "major influence". It is only necessary for me to say that *Reynolds* was influenced by Art 10. It matters not how great that influence was as that influence in itself does not necessarily mean that *Reynolds* should not apply in Singapore. Likewise for the point about legislation and/or circumstances prevailing in Australia or New Zealand.

212 The defence of "neutral reportage" is pleaded in paragraph 30 of the Amended Defences:

> 30. Alternatively, the article was a neutral report of the political assertions of Dr Chee, who has for many years been conducting a vigorous and ongoing debate with the [Prime Minister Lee Kuan Yew] and [Minister Mentor Lee Kuan Yew] over their governance of Singapore. [The Plaintiffs'] side of the debate has always been fully reported by the press in Singapore, and the defendants were doing no more than reporting Dr Chee's side. In the context of the whole profile, readers would accept that the matters taken out of context in paragraph 15 of the Statement of Claim [the Disputed Words] were summaries of Dr Chee's long-standing arguments, which were not endorsed or approved by the defendants but rather were presented as Dr Chee's "own theory". The defendants will rely upon relevant particulars in paragraphs 26 to 29 above.

213 The material parts of paragraphs 26 to 29 of the Amended Defences are set out above at [68], [146], [155] and [166].

214 The doctrine of "neutral reportage" first saw the light of day in *Al-Fagih v H.H. Saudi Research & Marketing (U.K.) Ltd* [2001] EWCA Civ 1634 ("*Al-Fagih*"). It was then applied in a number of cases, including *Mark v Associated Newspapers Ltd* [2002] E.M.L.R. 38 ("*Mark*"), *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] AC 359 ("*Jameel*") and *Roberts v Gable* [2007] EWCA Civ 721 ("*Roberts*").

215 *Al-Fagih* is authority for the proposition that if a newspaper were to report a matter of public interest neutrally, it should enjoy the defence of qualified privilege. *Mark* suggests that the defence is not confined to reports of statements made in a political dispute.

216 In *Jameel*, Lord Hoffmann referred, at p 381 to 383, to *Reynolds* as a public interest defence rather than one of privilege. He considered that the first question is whether the subject matter of the article in question is a matter of public interest. If so, he considered that the two-fold test of duty and interest to have been met. He did not think it helpful to ask whether there was a duty to communicate the information and an interest in receiving it. If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. If so, the inquiry shifts to ascertain whether the steps taken to gather and publish the information were responsible and fair. He referred to this as "responsible journalism" for convenience.

217 Baroness Hale of Richmond also expressed the view at, p 408, that it is not helpful to analyse the particular case in terms of a specific duty and a specific right to know as this could easily lead to a narrow and rigid approach. She referred to the *Reynolds* type of defence as a defence of publication

in the public interest. Yet, she also pointed out that two conditions must be fulfilled. First, there must be a real public interest in communicating and receiving the information. Secondly, the publisher must have taken the case that a responsible publisher would take to verify the information published.

218 In *Roberts*, Ward LJ said at [34]:

> Reportage is a fancy word. The *Concise Oxford Dictionary* defines it as "the reporting of news by the press and the broadcasting media". It seems we have Mr Andrew Caldecott QC to thank—or to blame—for its introduction into our jurisdiction. The doctrine first saw the light of day in the *Al-Fagih* case. Simon Brown LJ said in para 6 that it was "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper". That may indeed conveniently describe what it is but there is more to it than that and it is necessary to see how this new doctrine fits into the firmament.

The learned judge went on to say at [60] to [68]:

> 60 Once reportage is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is, as was conceded in the *Al-Fagih* case [2002] EMLR 215 a form of, or a special example of, *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. It cannot be a defence sui generis because the Reynolds case [2001] 2 AC 127 is clear authority that whilst the categories of privilege are not closed, the underlying rationale justifying the defence is the public policy demand for there to be a duty to impart the information and an interest in receiving it. If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed.
>
> *The proper approach to the reportage defence*
>
> 61 Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of reportage.
>
> (1) The information must be in the public interest..
>
> (2) Since the public cannot have an interest in receiving misinformation which is destructive of the democratic society (see Lord Hobhouse of Woodborough in the *Reynolds* case, at p 238), the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published: see, also in the *Reynolds* case, Lord Nicholls's factor 4, at p 205B, and Lord Cooke, at p 225, and in the *Jameel* case [2007] 1 AC 359, Lord Bingham of Cornhill, at para 12 and Baroness Hale, at para 149. This is where reportage parts company with the *Reynolds* case [2001] 2 AC 127. In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.
>
> (3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ in the *Al-Fagih* case [2002] EMLR 215, paras 65, 67-68 and the speech of Lord Hoffmann in the *Jameel* case [2007] 1 AC 359, para 62 cited in paras 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramaniam v Public Prosecutor* [1956] I WLR 965, 969. If upon a proper construction of the thrust of the article the defamatory material is attributed to

another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.

(4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.

(5) This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report.

(6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from the *Reynolds* case [2001] 2 AC 127, the burden being on the defendants. In this way the balance between article 10 and article 8 [of the European Convention] can be maintained. All the circumstances of the case and the ten factors listed by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered in order to reach the necessary conclusion that this was the product of responsible journalism.

(7) The seriousness of the allegation (Lord Nicholls's factor I) is obviously relevant for the harm it does to reputation if the charges are untrue. Ordinarily it makes verification all the more important. I am not sure Latham LJ meant to convey any more than that in para 68 of his judgment in the *Al-Fagih* case [2002] EMLR 215 cited in para 39 above. There is, however, no reason in principle why reportage must be confined to scandal-mongering as Mr Tomlinson submits. Here equally serious allegations were being levelled at both sides of this dispute. In line with factor 2, the criminality of the actions bears upon the public interest which is the critical question: does the public have the right to know the fact that these allegations were being made one against the other? As Lord Hoffmann said in the *Jameel* case [2007] 1 AC 359, para 51:

> "The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article."

All the circumstances of the case are brought into play to find the answer but if it is affirmative, then reportage must be allowed to protect the journalist who, not having adopted the allegation, takes no steps to verify his story.

(8) The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as preconditions for reportage on the defendant being a responsible prominent person or the claimant being a public figure as may be required in the USA.

(9) The urgency is relevant, see factor 5, in the sense that fine editorial judgments taken as the presses are about to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time. That is not to say, as Mr Tomlinson would have us ordain, that reportage can only flourish where the story

unfolds day by day as in the *Al-Fagih* case. Public interest is circumscribed as much by events as by time and every story must be judged on its merits at the moment of publication.

219 I come back to the position in Singapore. As I mentioned, before *Lange v ABC*, the Court of Appeal in *Aaron* had stated that unless there are special facts, there is no general media privilege. This was followed in *Chen Cheng*. In *Singapore Democratic Party*, Ang J was of the view that *Lange v ABC*, *Reynolds* and *Lange v Atkinson* were inconsistent with the law of defamation in Singapore. In endorsing her reasons for granting summary judgment in that case, the Court of Appeal must be taken to have also implicitly endorsed her view that those three cases do not represent the law in Singapore.

220 It seems to me also that if *Reynolds* does not apply in Singapore, then neither would the cases from *Al-Fagih* to *Roberts* in so far as they are extensions of *Reynolds*.

221 I am bound by the doctrine of precedence to adopt the same position as Ang J which was endorsed by the Court of Appeal. The position in Singapore on qualified privilege is as stated in *Aaron*. The defence of qualified privilege fails. Nevertheless, I would like to make some additional observations.

222 Section 12 of the Defamation Act already provides for qualified privilege for a newspaper. It states:

> **Qualified privilege of newspapers.**
>
> 12. —(1) Subject to this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule shall be privileged unless the publication is proved to be made with malice.
>
> (2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule, this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.
>
> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.
>
> (4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of the Defamation Ordinance 1960*) immediately before the commencement of this Act.

223 The Schedule states:

> THE SCHEDULE
>
> NEWSPAPER STATEMENTS HAVING QUALIFIED PRIVILEGE
>
> PART I

STATEMENTS PRIVILEGED WITHOUT EXPLANATION OR CONTRADICTION

1. A fair and accurate report of proceedings —

(*a)* in public of the legislature of any part of the Commonwealth outside Singapore;

(*b*) in public of an international organisation of which Singapore or the Government is a member;

(*c*) in public of an international conference to which the Government sends a representative;

(*d*) before any court exercising jurisdiction throughout any part of the Commonwealth outside Singapore or a court martial held outside Singapore under any written law in force in Singapore; and

(*e*) in public of a body or person appointed to hold a public inquiry by the Government or legislature of any part of the Commonwealth outside Singapore.

2. A fair and accurate copy of or extract from any register kept in pursuance of any written law in force in Singapore which is open to inspection by the public or which members of the public are entitled to have searched or of any other document which is required by any such law to be open to inspection by the public or to which members of the public are entitled on payment of a fee to a copy.

3. A notice, advertisement or report issued or published by or on the authority of any court within Singapore or any judge or officer of such court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law.

PART II

STATEMENTS PRIVILEGED SUBJECT TO EXPLANATION OR CONTRADICTION

1 . A fair and accurate report of the findings or decision of any association formed in Singapore for the purpose of —

(*a*) promoting or encouraging the exercise of or any interest in any art, science, religion or learning; or

(*b*) promoting or safeguarding the interests of any trade, business, industry or profession or of persons carrying on the same or engaged therein or the interests of any game, sport or pastime to the playing or exercise of which members of the public are invited or admitted,

where —

(*c*) the finding or decision relates to a person who is a member of or is subject by virtue of any contract to the control of the association; and

(*d*) the association is empowered by its constitution to exercise control over or to adjudicate upon the matters to which the finding or decision relates.

2 . A fair and accurate report of the proceedings at any public meeting held in Singapore,

being a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted.

3. A fair and accurate report of the proceedings at any meeting or sitting in any part of Singapore of —

(*a*) any commission, tribunal, committee or person appointed for the purpose of any inquiry by or under any written law or by the President or by any public officer of the Government; or

(*b*) any other tribunal, board, commission, committee or body whether incorporated or not constituted and exercising functions by or under any written law in or under any other lawful warrant or authority for public purposes,

being a meeting or sitting to which admission is not denied to representatives of newspapers or other members of the public.

4. A fair and accurate report of the proceedings at a general meeting wherever held of any joint-stock company or corporation wherever registered whose business is in any way directly concerned with Singapore or of any company constituted, registered or incorporated under the provisions of any written law not being a private company within the meaning of the Companies Act.

5. A copy or a fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of the Government or by any public officer or authority.

224 A "newspaper" is defined in s 2 of the same Act:

"newspaper" means any paper containing public news or observations thereon or consisting wholly or mainly of advertisements which is printed for sale and is published in Singapore either periodically or in parts or numbers at intervals not exceeding 36 days.

225 No evidence was tendered to show whether FEER comes within the statutory definition of a "newspaper", but in any event FEER is not relying on s 12 of the Defamation Act.

226 It may be said that the scope of such privilege, as provided under the Defamation Act, should be extended. Even if that were so, that should be done by Parliament. The court should be slow to extend such a privilege. A similar approach was adopted by the Court of Appeal in *JJB v LKY* at p 336 in respect of s 14 of the Defamation Act.

227 I would also add that neutral reportage applies where the publication does not adopt the views of the maker of the statement. Although the Defendants stressed that the Article is merely expressing the views of CSJ, I do not agree with that contention. True, parts of [9] are expressions of CSJ's views but not [10] to [13] where the sting is carried. The Article could have made it clear that [10] to [13] are views of CSJ and/or were taken from the SDP article. It did not. It seems to me that this was not due to inadvertence. The Article conveys the message that the views expressed are those of HR.

Lack of Defamatory Impact in Singapore

228 The Amended Defences also refer to the lack of defamatory impact in Singapore. I need only refer to [31] of the Amended Defence in relation to the LHL action for convenience. It states:

> 31. The defendants will contest both liability and (if necessary) damages on the basis that whatever the meaning and effect of the Article within Singapore, the plaintiffs' undertaking to confine this action to publication in Singapore is fatal to [their] success. Minister Mentor Lee Kuan Yew has been the most powerful and best known figure in Singapore for fifty years and his reputation is unassailable, certainly by reports of comments made by Dr Chee, who has been making comments of this kind about him for many years. Whether Singaporeans love or loath the plaintiff, their estimation of his reputation after exposure to [him] after so long could not possibly be altered by any republication of Dr Chee's comments in the defendant journal [emphasis added]

229 This contention assumes that the law of defamation is concerned only with the depreciation in value of a plaintiff's reputation but that is not true. The law of defamation involves an "essential element of vindication" as the Court of Appeal stressed in *Tang Liang Hong* at [111] when dealing with an assessment of damages. A similar argument was raised in that case to minimize the damages awarded and the Court of Appeal rejected the argument as fallacious.

230 If the Defendants' contention were valid, it would mean that in Singapore, a person could continue to make defamatory remarks about a person who enjoys the highest of reputations without being liable under the law of defamation. I reject such a contention.

Conclusion

231 I have determined the natural and ordinary meaning of the Disputed Words.

232 For the reasons stated above, I grant interlocutory judgment to LKY with damages to be assessed and I order that the Defendants be restrained from the publication, sale, offer for sale, distribution or other dissemination by any means whatsoever of the defamatory allegations, or other allegations to the same effect, in Singapore.

233 I make the same orders in favour of LHL against the Defendants.

234 I will hear parties on costs.