IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 11

Civil Appeal No 54 of 2016

Between

(1) **GOH LAY KHIM**
(2) **AAMER BIN TAHER**
(3) **LOH JIN AI**
(4) **CHEN KEEN CHING KENNETH**
(5) **CHNG ENG KAH**
(6) **LIM GEOK SUN**
(7) **HOO SOO SUM**

… *Appellants*

And

ISABEL REDRUP AGENCY PTE LTD

… *Respondent*

In the matter of Suit No 755 of 2011

Between

ISABEL REDRUP AGENCY PTE LTD

… *Plaintiff*

And

(1) A L DAKSHNAMOORTHY
(2) BALA BHANU S/O ABBAI LAKSHMANASAMY
(3) L KARUNAAMOORTHI
(4) GOH LAY KHIM
(5) AAMER BIN TAHER
(6) LOH JIN AI

(7) CHEN KEEN CHING KENNETH
(8) CHNG ENG KAH
(9) SAWARAN SINGH S/O BANTA SINGH as trustee of SIKH BUSINESS ASSOCIATION
10 BALOUR SINGH S/O MOKHAND SINGH as trustee of SIKH BUSINESS ASSOCIATION
11 LIM YEOK SUN
13 HO SOO SUM
14 SIMON LOH TIONG SOO
15 SIKH BUSINESS ASSOCIATION

… *Defendants*

Civil Appeal No 55 of 2016

Between

SIMON LOH TIONG SOO

… *Appellant*

And

(1) ISABEL REDRUP AGENCY PTE LTD
(2) SUSAN ELEANOR PRIOR

… *Respondents*

In the matter of Suit No 381 of 2011

Between

(1) ISABEL REDRUP AGENCY PTE LTD
(2) SUSAN ELEANOR PRIOR

… *Plaintiffs*

And

(1) SIMON LOH TIONG SEE
(2) A L DAKSHNAMOORTHY
(3) BALA BHANU S/O ABBAI LAKSHMANASAMY
(4) L KARUNAAMOORTHI
(5) GOH LAY KHIM
(6) AAMER BIN TAHER
(7) CHEN KEEN CHING KENNETH
(8) LOH JIN AI
(9) CHNG ENG KAH
10 SAWARAN SINGH S/O BANTAN SINGH
11 BALOUR SINGH S/O MOKHAND SINGH
12 LIM GEOK SUN
13 HO SOO SUM
14 SIKH BUSINESS ASSOCIATION

… Defendants

JUDGMENT

[Agency] — [Rights of agent] — [Remuneration]
[Tort] — [Defamation] — [Absolute Privilege]
[Tort] — [Defamation] — [Qualified Privilege]
[Tort] — [Defamation] — [Justification]

TABLE OF CONTENTS

Goh Lay Khim and others
v
Isabel Redrup Agency Pte Ltd and another appeal

[2017] SGCA 11

Court of Appeal — Civil Appeal Nos 54 and 55 of 2016
Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
28 October 2016

10 February 2017

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 These appeals arise from a collective sale of nine neighbouring properties located at Sophia Road ("the Properties"). Civil Appeal No 54 of 2016 ("CA 54/2016") concerns a claim for commission for the collective sale whereas Civil Appeal No 55 of 2016 ("CA 55/2016") concerns claims in defamation. The decision of the High Court judge ("the Judge") is reported as *Isabel Redrup Agency Pte Ltd v A L Dakshnamoorthy and others and another suit* [2016] SGHC 30 ("the Judgment").

Background

2 The background facts are set out in detail at [1]–[29] of the Judgment and we only summarise them here. The Properties involved in the disputes

were situated in a row along Sophia Road. Immediately behind and adjacent to the Properties was an L-shaped plot of land ("the L-shaped Lot") which belonged to a deceased person. Just behind that was a triangular-plot of land ("the Triangular Lot") that was state land. For convenience, we will refer to these plots of lands collectively as "the Lots". The site plan of the Properties and the Lots is shown below:

3 In 2008, the owners of the Properties ("the Owners") appointed one Simon Loh Tiong Soo ("Loh") to represent them in the collective sale of the Properties. Loh had previously owned one of the Properties. He sold his property to his sister and her husband in 1998 but continued to live in it until 2011. Loh played a primary and central role in the events leading up to the disputes.

4 In late 2008, Loh met with one Michelle Yong ("Ms Yong"), a director of Aurum Land Pte Ltd ("Aurum"), to negotiate the sale of the Properties. While Aurum came close to purchasing the Properties at $31.5m in January 2009, the deal eventually fell through because the Properties were

subject to certain restrictions that Aurum considered would affect the feasibility of redeveloping them.

5 In June 2009, Loh approached Isabel Redrup Agency Pte Ltd ("the Agency") to market the Properties. The Agency was at all material times represented by its Managing Director, Ms Susan Eleanor Prior ("Ms Prior"). By way of a Letter of Appointment dated 26 August 2009 ("the Letter of Appointment"), signed by Loh on behalf of the Owners, the Agency was appointed as the "sole and exclusive marketing agent for the project for a period of 6 months [from] 25 August 2009". Loh clarified in his e-mail dated 26 August 2009 enclosing the Letter of Appointment that this arrangement was not exclusive in nature and that no commission would be due to the Agency if the Properties were sold through other agents.

6 After the Agency's appointment, Ms Prior began to market the Properties. Her marketing efforts caught the attention of Ms Yong who discovered that the development restrictions that the Properties were previously subject to had been removed. She contacted the Agency and expressed Aurum's interest in the Properties. Negotiations followed which culminated in a letter of offer dated 20 January 2010 ("the Letter of Offer") executed by the Owners and Aurum. The key terms of the Letter of Offer were as follows:

(a) The purchase price was $32.5m which was to be divided equally amongst the Properties.

(b) The purchase was conditional upon the Singapore Land Authority's ("SLA") acquisition of the L-shaped Lot and thereafter Aurum's acquisition of the Lots from the SLA.

(c) None of the Properties could be offered for sale to anyone else for a period of two months.

7 At around the same time, the Owners and the Agency executed a commission agreement dated 21 January 2010 under which it was agreed that the Agency would be paid 2% of the sale price plus Goods and Services Tax ("GST") upon the successful completion of the sale of the Properties. Unfortunately, the parties did not manage to achieve a binding sale and purchase agreement within the two-month period stipulated in the Letter of Offer.

8 Over the next few months, the Owners continued to negotiate with Aurum with the Agency as their intermediary. Sometime in June 2010, Loh was introduced to a potential buyer and his daughter (collectively "JT"). Parallel negotiations were conducted by Loh with JT at the same time that the Agency was trying to reach an agreement with Aurum. The negotiations between Loh and JT reached an advanced stage and a draft option to purchase the Properties at $32.5m was exchanged ("the Jessica Option"). A copy of the Jessica Option was forwarded by Loh to Ms Prior on a confidential basis.

9 As at 12 August 2010, there were two issues that stood in the way of the collective sale of the Properties to Aurum. The first issue pertained to the forfeiture of the L-shaped Lot and the second was in respect of the legal ability of one of the owners, the Sikh Business Association ("the SBA"), to sanction the sale of 124 Sophia Road which was held in the names of trustees who had passed away. Despite these issues, Aurum was willing to purchase the Properties at $33.8m subject to SLA's approval to alienate the Lots to them, and to pay a 4% deposit for the grant of the option to purchase. At this time,

the Owners' insistence on having 1% of the sale price released to them immediately upon grant of the option ("the Release Term") was also hindering the progress of the negotiations.

10 On 23 August 2010, in an attempt to get Aurum to come to a decision on certain disputed conditions, Ms Prior forwarded the Jessica Option to Ms Yong and said:

> To be fairer than fair to you, I am (CONFIDENTIALLY) enclosing the Jessica Option. [Please] do not tell anyone (not even [Loh]). I will get into BIG trouble.

The disputed conditions were eventually waived by Aurum.

11 By 2 September 2010, the parties had reached an agreement on the material terms save for the Release Term. Two draft options were circulated on 3 September 2010. The first was sent by Ms Yong to Ms Prior at 4.48pm ("the Michelle Option"), and the second was sent by Ms Prior to Loh at 5.22pm ("the Prior Option"). The particulars of these are given below:

(a) The Michelle Option contained the Release Term that the Owners had required. In her e-mail enclosing the Michelle Option, Ms Yong made it clear that the terms stated in the draft remained subject to the approval of Aurum's Board:

> Please find attached revised Option reflecting 1% Option money to be released to the Vendors but remaining 4% Option deposit payable only upon exercising the Option.
>
> I cannot guarantee that the Board will accept these terms and suggest that you get all the vendors to sign this and present to our Board ASAP.

> We are also working on other deals at the moment and if they go through before Sophia we may not have the funds to invest in Sophia as well.

(b) The Prior Option was identical to the Michelle Option save for a clause providing for commission to be paid to the Agency that Ms Prior had inserted. By an e-mail titled "Option from Michelle – subject to contract", Ms Prior sent the Prior Option to Loh:

> Please find attached revised Option reflecting 1% Option money to be released to the Vendors but remaining 4% Option deposit payable only upon exercising the Option.
>
> Your clause is deleted (re forfeiture). She spotted it on her own.
>
> [Ms Yong] said they are also working on other deals at the moment and if they go through before Sophia they may not have the funds to invest in Sophia as well.
>
> So they [*sic*] you get all the other vendors to sign this and show to the Board ASAP with the signatures and I will hold the Option until the Sikh Assn can sign.
>
> [underlined text in original]

12 On 8 September 2010, the final draft option from the Owners was sent to Aurum through the Agency. Aurum did not agree to its terms. On 15 September 2010, Ms Yong informed Ms Prior that the transaction was off and that the Owners should proceed with the other buyer. A few days later, Ms Prior informed Loh that Ms Yong had said her board was no longer so keen to meet the Owners' terms "due to [a] lull in [the] market."

13 On 22 September 2010, Ms Prior informed Loh that "[Ms Yong] said her Board is walking away from the deal." Later that day, Loh contacted Ms Yong directly and asked her why Aurum was no longer interested in the Properties. Ms Yong informed him that Aurum could not agree to the Release

Term and that they would be prepared to revive their interest in the Properties if this term was dropped. Loh responded that the Release Term had always been open for discussion. He then proposed continuing negotiations without the Agency and Ms Yong agreed to this proposal. This arrangement is evidenced by Loh's e-mail to Ms Yong which reads:

> Further to our tele-conversation of 22 Sept 2010, attached please find a copy of [the Prior Option] that [Ms Prior] claimed was from you. I am going to keep this matter away from her until everything is concluded as I have now come to realise that like all the other agents who have come our way in the past, she is as unscrupulous or even more so, now that I have found out the lies and false claims that she has made. And if she is able to do what she has done after claiming that she is well known in the market to be totally honest in all her dealing, I really wonder what other underhanded things she can be capable of.
>
> As such, I am now cutting her off and will be dealing only directly with you. I trust that you would assist by [not] letting her in on this arrangement until everything is settled.

14 Ms Prior was kept out of the new arrangement between Loh and Ms Yong, and was told that Loh was pulling the Properties off the market until the forfeiture of the L-shaped Lot was completed and that she should not market the Properties anymore. Ms Prior continued, however, to monitor developments in respect of the Properties and resumed marketing them as the date of forfeiture of the L-shaped Lot neared. Ms Prior also resumed contact with Ms Yong on 6 January 2011 and informed the latter that the SBA had "kicked out the troublesome trustee" and that the prices of the Properties had reached $2,000 per square foot. In response to the Agency's attempts to market the Properties, Loh reiterated in various e-mails that the Properties were no longer up for sale and that the Agency should stop marketing them.

The eventual sale of the Properties to Aurum

15 On 23 February 2011, the Owners granted Aurum an option to purchase the Properties at $33.8m ("the Agreed Option") on the following terms:

(a) Aurum would pay 4% of the purchase price for the grant of the Agreed Option, with all 4% to be held by the Owners' solicitor as stakeholders pending completion of the sale of the Properties, subject to (c) below.

(b) The grant of the option was subject to the forfeiture of the L-shaped Lot.

(c) 1% out of the 4% would be released to the Owners upon the exercise of the Agreed Option by Aurum.

It is important to note that the Release Term was not part of the Agreed Option and that the purchase price was the same as that agreed on 2 September 2010 when the Agency was still handling the negotiations. On 5 September 2011, Aurum exercised the Agreed Option.

16 In the meantime, on 4 March 2011, the sale of the Properties had been discovered by Ms Prior. Subsequently, she had informed Loh that the Agency would be claiming its agreed commission. Loh replied:

> Good try. Asking for a commission for a sale that you botched up totally??? In your dreams!!! Let's meet in court and see what the judge and the real estate agents' controlling body has to say about this.

17 On 5 March 2011, the Agency informed the Owners of its intention to claim its commission for the sale of the Properties and asked for a copy of the Agreed Option and other documents relevant to the sale of the Properties. Ms Prior also sent an e-mail to Loh and asked, *inter alia*:

> What is your status? You are not the legal owner of any unit. You have told me before that, owing to your status as a bankrupt, you wanted to deceive your creditors and the Official Assignee by asking your sister to purchase the unit 120 Sophia Road on your behalf. Is this true?

This allegation was refuted by Loh. Subsequently, Loh sent a letter to the Straits Times complaining about his experience with unethical real estate agents (who were unnamed) ("the ST Letter"), lodged a complaint with the Council for Estate Agencies ("the CEA") in respect of Ms Prior ("the CEA Complaint"), and filed a police report in respect of Ms Prior's alleged forgery of the Prior Option ("the Police Report"). For convenience, we will refer to the CEA Complaint and the Police Report collectively as "the Complaints". The Complaints were later provided by Loh to one Ms Jessica Cheam ("Ms Cheam"), a Straits Times reporter, ("the ST Publication"). The Complaints and the ST Publication will be collectively referred to as "the Publications".

The Actions and the decision of the Judge

18 The events described above resulted in two actions, one for commission due to an agent and the other for damages for defamation. Although the defamation claim was filed earlier, in this judgment we will deal with the commission claim first because of the chronological order in which the events took place. This will make the account easier to follow.

Suit No 755 of 2011

19 The Agency commenced Suit No 755 of 2011 ("S 755/2011") against the Owners and Loh for the sum of $723,320 (2% of the sale price plus GST) ("the Commission Claim"). The Commission Claim was brought on the basis that the Agency was the effective cause of the sale of the Properties. In the alternative, the Agency pleaded that it was entitled to damages of $723,320 by reason of Loh's fraudulent misrepresentations which caused the omission of the Agency from the eventual sale of the Properties to Aurum. Further and in the alternative, the Agency averred that it was entitled to damages in the sum of $723,320 against all the defendants for conspiring to deprive it of commission.

The decision below

20 The Judge held that the Agency was entitled to commission for the collective sale as it was the effective cause of the sale of the Properties to Aurum (the Judgment at [60] and [65]). While the Owners and Loh resisted the Commission Claim on the basis that Ms Prior had breached her duties as estate agent, the Judge found that none of the alleged breaches was sufficient for the termination of the agency relationship (the Judgment at [77]) and even if they had been, the Judge found on the facts that the agency relationship had not actually been terminated.

Suit No 381 of 2011

21 The Agency and Ms Prior commenced Suit No 381 of 2011 ("S 381/2011") against Loh and the Owners for defamation, malicious falsehood and conspiracy by unlawful means. Their primary case was that Loh had defamed both the Agency and Ms Prior herself by publishing the CEA

Complaint to the CEA, the Police Report to the police and both Complaints to Ms Cheam ("the Defamation Claim"). The pleaded defamatory sting was that:

> (a) Ms Prior had behaved unethically in her capacity as a property agent and/or as the key executive officer of the Agency by committing forgery.
>
> (b) The Agency was dishonest and/or unfit to carry out the business of real estate agency because it improperly allowed or was vicariously liable for the alleged forgery.

22 Further, and in the alternative, the Agency and Ms Prior averred that Loh and the Owners were liable in the tort of malicious falsehood. The Complaints and the ST Publication were false because Ms Prior had not committed forgery and they had been published maliciously in order to intimidate the Agency into abandoning its claim for commission. The claims in defamation and malicious falsehood formed the basis for the alternative claim in conspiracy which was that the Owners and Loh had unlawfully conspired to defame or maliciously publish falsehoods against the Agency and Ms Prior. They claimed damages (including aggravated damages) as well as an injunction restraining Loh and the Owners from further communicating the defamatory words.

The decision below

23 The Judge dismissed the Agency's Defamation Claim as he found that the publications were not defamatory of the Agency as an entity independent of Ms Prior (the Judgment at [98]). The Judge, however, allowed Ms Prior's Defamation Claim as he found that the defamatory sting of the Complaints

was that there were reasonable grounds to suspect Ms Prior had committed forgery (the Judgment at [97]) and that none of the defences raised by the Owners and Loh applied. In particular:

(a) The Judge rejected the defence of justification because he found that Loh had no reason to suspect that Ms Prior had committed the offence of forgery and thus had failed to justify the sting of the defamatory statements (the Judgment at [106]).

(b) The Judge rejected the defence of absolute privilege in respect of the Complaints on the basis that it did not apply to gratuitous complaints made to prosecuting authorities (the Judgment at [117]). Notably, the Judge made a conscious choice to depart from the English/Malaysian position on this issue, and to instead adopt the Australian position.

(c) The Judge held that the defence of qualified privilege applied to the Complaints (the Judgment at [118]), but found that it was defeated by malice (the Judgment at [133]).

(d) The Judge held that the defence of qualified privilege did not apply to the ST Publication (the Judgment at [122]) as he took the view that it would broaden the ambit of the defence too far if he were to find that Loh had a duty or interest to communicate the contents of the Complaints to members of the press simply on the basis that the regulation of estate agents was the subject of the public attention at the material time (the Judgment at [123]).

(e) The Judge held that the "reply to attack" defence did not apply since the allegation of forgery raised by Loh had not been made in

response to any attack made on him by Ms Prior (the Judgment at [135]).

24 The Judge found that Ms Prior had failed to prove that the Owners had acted with malice in authorising Loh's acts of filing the Complaints. Thus, the defence of qualified privilege applied in favour of the Owners and they were not liable for those publications. The Owners, together with Loh, were, however, found liable for the ST Publication since the defence of qualified privilege was not available for that publication. The Judge then ordered Loh to pay damages of $30,000 to Ms Prior and the rest of the defendants to pay $10,000 to Ms Prior (the Judgment at [154]).

The appeal on the Commission Claim (CA 54/2016)

25 The appeal against the Judge's decision on the Commission Claim is largely a factual one. The appellants were the owners of 116, 118, 120, 122 and 126 Sophia Road, and the 4th to 8th, 11th and 12th defendants in S 755/2011. The other defendants in S 755/2011 did not file an appeal against the Judge's decision. For ease of reference and to avoid confusion, we will refer to the appellants in CA 54/2016 as "the Appellants" and the other parties in the appeals will be referred to by their names.

The Appellants' case

26 The Appellants' case rests on three main planks:

(a) The effective cause term should not have been implied into the agency contract because that contract contained an expression that the Agency would only be entitled to commission in the event that it actually sold the Properties to Aurum.

(b) The Agency was not the effective cause of the sale because (i) Aurum had been familiar with the Properties before the Agency's involvement; and (ii) the Agency's efforts resulted in Aurum walking away from the deal.

(c) The Agency was not entitled to be paid commission for the sale because Ms Prior had breached duties that were owed to the Owners.

The Agency's case

27 Against the above, the Agency submitted that:

(a) The allegation of an express term was inconsistent with the position taken by the Appellants in the court below. There, the Appellants argued that there was no agency contract between the parties after 22 March 2010. In the absence of an agency contract, there could be no express term that the Agency would only be entitled to commission if it actually sold the Properties to Aurum.

(b) The Agency was the effective cause of the sale. Aurum's familiarity with the Properties did not prevent the Agency from being the effective cause of the sale. Ms Prior's efforts did not cause Aurum to walk away; it was Loh's insistence on the Release Term that caused Aurum to walk away.

(c) Ms Prior did not breach her duties. Further, the breaches of duty, even if established, were not sufficiently serious to entitle the Owners to terminate the agency relationship. In any case, the Appellants failed to show that they had terminated the agency relationship as a result of the alleged breaches of duty.

Our decision on the Commission Claim

Whether the "effective cause term" should be implied into the agency relationship between the Owners and the Agency

28 It is well-established that the relationship between an agent and his principal is a contractual one with any entitlement to commission being governed by the terms of that contract: *Deans Property Pte Ltd v Land Estates Apartments Pte Ltd and another* [1994] 3 SLR(R) 804 at [17] ("*Deans Property*"). In the absence of an *express* contractual term governing the agent's right to commission, the agent is only entitled to commission if his services were the effective cause of the transaction, this being an implied term of the agency contract: *Deans Property* at [17]. We will refer to this implied term as the "effective cause term".

29 The first question that arises is whether there was a contractual term governing the Agency's entitlement to commission such that the implication of the effective cause term becomes unnecessary. The Appellants asserted that there was a contractual term that the Agency would only be paid commission if the Agency had actually sold the Properties, that is, if there was no break in the Agency's involvement in the collective sale from the start until the Final Option was signed. At the hearing of the appeal, Mr Damodara, counsel for the Appellants, began his arguments by conceding that there was no express term governing the Agency's right to commission. It is unclear what he meant by that since the effect of his concession, if accepted, is that the effective cause term will be implied into the agency relationship. Whatever the case, we proceed to consider whether the evidence supports the existence of an express term that the Agency's right to commission would crystallise only if there was no break in its involvement in the sale process until the signing of the option.

30 In our judgment, the Judge did not err in implying the effective cause term into the agency relationship. The Appellants' position that the Agency's right to commission was governed by an express term in the contract was not pleaded and appears to be an afterthought. At the trial, the Appellants, together with the rest of the Owners, took the position that there was no agency agreement between them and the Agency after 22 March 2010. If there was no agency agreement, there could not have been any express term.

31 Quite apart from the fact that the express term was not pleaded, the existence of the term as alleged by the Appellants is not borne out by a closer examination of the documents that the Appellants rely on. The first is an e-mail sent by Loh to Ms Prior on 26 August 2009 which states:

> Attached please find the letter of appointment. Please note that as per our discussion, this letter is purely meant as a marketing tool and as such, we have your understanding that your [*sic*] will not hold the contents of the letter of appointment against us should the other agent, who is a friend of the owner of 3 of the units, be able to **close the deal** at an acceptable price **before you do**, something that I feel is unlikely anyway. I would need you to sign an acceptance to this effect on my copy of the Letter of Appointment, which would probably read as 'I, [Ms Prior], Managing Director of Isable [*sic*] Redrup Agency Pte Ltd, hereby agrees [*sic*] that this letter is meant purely as a marketing tool and that I will not hold the contents against [Loh] or any of the individual owners'.
>
> [emphasis added in bold underline]

The Appellants asserted that the underlined part of the quotation above (*ie*, the words "close the deal … before you do") is evidence of a term that the Agency's entitlement to commission was contingent on the sale of the Properties by it. This argument, however, depends on the meaning of the phrase "clos[ing] the deal". Obviously "clos[ing] the deal" did not mean completion in the legal sense. Further, the concern underlying the e-mail was

the purported exclusivity of the agency arrangement. As we understand it, there was another agent who was trying to close the sale of the Properties at the material time and Loh wanted assurance that neither he nor the Owners would be held responsible in the event that the other agent closed the deal before the Agency did. Reading this e-mail in its context, we are unable to conclude that it was intended to set out terms governing the situations in which the Agency would be entitled to commission, let alone that it was meant to release the Owners from their obligation to pay commission in the event that the agency relationship was put to an end prior to the completion of the sale.

32 The second document that the Appellants relied on is the Commission Agreement which states, *inter alia*:

> We, the Vendors of the above mentioned properties, each warrant to pay the agent a commission [of] two (2) percent of the sale price of the property and GST thereon upon successful completion of the sale of the property and the Vendor's solicitors shall accept this letter as the Vendor's irrevocable authority and undertaking to 1) retain the commission from the sale proceeds or collect the same from each Vendor prior to completion of sale and to 2) pay the same directly to the agent forthwith on completion of the sale of the property.

33 The Appellants contended that the facts that the commission was stated to be paid out of the sale proceeds and that it was payable on completion of the sale reflected an understanding that is inconsistent with the implication of the effective cause term. We do not accept this contention. Under the Commission Agreement, the commission was to be paid out of the sales proceeds obtained from the collective sale and it is hardly surprising that payment to the agent would only be effected after the completion of the sale. Nothing is said about when the Agency would be deemed to have earned its commission or whether

it would be entitled to commission earned in the event that the agency relationship was terminated before the option to purchase was granted. In the absence of clear and express language to the effect that the agent's right to commission would only crystallise if it saw the transaction to the end, the Appellants' argument must be rejected. Otherwise, it would be all too easy for vendors (in the context of the sale and purchase of properties) to deprive their agents of commission simply by terminating the agency relationship shortly before executing the option to purchase.

34 We note that the Appellants relied on the following passage from the case of *Luxor (Eastbourne), Limited v Cooper* [1941] AC 108 ("*Luxor*") at 120–121:

> But there is a third class of case (to which the present instance belongs) where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to me to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him.

35 This passage should not be taken out of context. The facts of *Luxor*, and the legal questions which arose therefrom, are quite different from those in the case before us. In *Luxor*, the agent introduced a ready and willing buyer to the owners of property but the sale never took place. The issue was whether there was an implied term that the owner of a property had to give up all freedom of choice, from the moment the agent introduced a ready and willing buyer, so as to carry through the bargain with that buyer if it reasonably could (at 117). On the facts of *Luxor*, it was held that there was no ground on which

such a term could be implied into the agency contract. If anything, *Luxor* reinforces the point made earlier at [28] that an agent's right to commission falls to be determined as a matter of contract between the buyers and sellers, and has to be decided on the facts of each case. In this regard, the observation made by Viscount Simon LC (at 119) is germane:

> There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms.

36 It is plain from the facts of the present case that the parties did not expressly provide for the situations under which a commission ought to be paid to the Agency. Therefore, the Judge did not err in implying the effective cause term into the agency relationship such that the Agency would be paid commission as long as it was the effective cause of the sale of the Properties. On this basis, we turn to consider if the Judge erred in finding that the Agency was the effective cause of the sale of the Properties to Aurum.

Whether the Agency's efforts were the effective cause of the sale of the Properties to Aurum

37 No precise definition of "effective cause" has been attempted in case law given that the inquiry is fact-specific. The decision of the High Court in *Grandhome Pte Ltd v Ng Kok Eng and another* [1996] 1 SLR(R) 14 ("*Grandhome*"), however, offers some guidance as to what may constitute effective cause. At [31], the court held that:

> Where as in this case it is established that:

> (a) an owner agreed to pay an agent a commission for finding a buyer for a property;
>
> (b) the agent engendered the interest of a buyer in the property;
>
> (c) the buyer made an offer for the property which the agent conveyed to the owner;
>
> (d) the owner eventually sells the property to the same buyer at the same price offered through the agent; and
>
> (e) (b) and (d) take place within a short space of time;
>
> the agent would have discharged the necessary burden of proof to establish a *prima facie* case for being the *causa causans* or effective cause of the sale. The owner can of course seek to show why despite all this the agent is not the effective cause. But if he fails to do so the agent will succeed.

It is apposite to note that the *Grandhome* factors only serve as a rough-and-ready guide in assessing an estate agent's contributions. A steadfast adherence to the *Grandhome* factors could in some cases lead to a wholly unjust outcome, as Lai Siu Chiu J noted in *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR(R) 230 at [76]. No one factor is determinative and the inquiry entails a holistic assessment of all the relevant facts of each case. It is insufficient for the agent to show that it was one of the causes of the sale; it would have to show that it was the critical cause: *Grandhome* at [7].

38 On the facts of the present case, we agree with the Judge that the Agency's efforts were the effective cause of the sale of the Properties to Aurum. First, Aurum's interest in the Properties was rekindled by Ms Prior's marketing efforts. Although Aurum had a pre-existing familiarity with the Properties, the fact is that Aurum was no longer in the picture at the time the Agency was appointed to market the Properties. Aurum had earlier decided to

abandon its pursuit of the Properties, and its interest was only re-ignited by the Agency's advertisement in the newspaper. In other words, Ms Prior's marketing efforts led directly to Aurum's renewed attempt to purchase the Properties.

39 Secondly, the Agency had laid the groundwork for the subsequent negotiations between the parties. At the trial, Loh did not dispute the following contributions made by Ms Prior (see the Judgment at [49]):

(a) She persuaded the Owners to enter into an agreement which allowed the Properties to be marketed as a collective whole.

(b) She discovered that the L-shaped Lot was not state land and advised Loh accordingly.

(c) She arranged for the Owners and Aurum to enter into the Letter of Offer which enabled Aurum to liaise with the authorities so that it could assess the development potential of the Properties.

(d) She discovered that the original trustees in whom title to 124 Sophia Road was vested had passed away and advised the SBA accordingly.

40 Apart from laying the necessary groundwork, Ms Prior was also instrumental in getting the Owners and Aurum to come to an agreement on the material terms upon which the sale was finally concluded. As at 2 September 2010, the parties had reached agreement on all the terms save for the Release Term. At the trial, Loh was hard-pressed to identify differences between the terms agreed upon by the parties as at 2 September 2010 and the terms of the

Final Option that was executed on 23 February 2011 and he eventually conceded that they were the same.

41 Admittedly, the collective sale was only concluded a few months after the Agency was cut out of the deal. Nevertheless, we are of the view that this delay did not break the chain of causation between the Agency's efforts and the eventual sale of the Properties to Aurum. The only significant development after Aurum walked away from the deal was Loh's (and the Owners') about-turn on the Release Term. Aside from that, the sale was concluded on essentially the terms that had been negotiated by Ms Prior. Further, the delay in the grant of the Final Option must also be viewed in the context of outstanding issues which were outside of the parties' control. These included the vesting of title to the SBA's property in new trustees and the forfeiture of the L-shaped Lot. The vesting of title took place on or about 17 February 2011 while the forfeiture of the L-shaped Lot was only completed on 18 February 2011. We consider it to be significant that the Final Option was granted on 23 February 2011, shortly after these issues had been resolved. In the circumstances, we share the Judge's view that the delay would have arisen even if the Agency had brokered the deal and was therefore not a sufficient reason to deprive the Agency of its commission.

42 In view of the above, we are satisfied that the Agency's efforts were the effective cause of the sale of the Properties to Aurum. This is, however, not the end of the matter as the Appellants contended that the Agency was, in any case, not entitled to commission for Ms Prior's role in bringing about the sale because she had breached her duties as an estate agent.

Whether the alleged breaches of duty affect the Agency's claim to commission

43 At the hearing of the appeal, Mr Damodara suggested that even if the Agency had been the effective cause of the sale of the Properties, the Owners were nevertheless entitled to terminate the agency relationship and thereby deprive the Agency of commission by reason of its breaches of duty. There are two distinct strands to this argument. The legal strand relates to the question of whether an agent can lose his right to commission by reason of his breaches of duty notwithstanding that his efforts had, by the time of those breaches, become the effective cause of the sale of the property in question. The factual strand of the argument requires consideration of: (a) whether on the basis of Ms Prior's actions after 2 September 2010 (the date by which she had done all that she could do to bring about the transaction (see the Judgment at [62])) the Agency had breached its duties; and (b) if so, whether Loh had severed the agency relationship on the basis of these breaches.

44 We turn now to consider the legal aspect of the argument. Counsel for the Agency noted two lines of authority. The first exemplified by the decision of the High Court of Australia in *Macnamara v Martin* [1908] 7 CLR 699 ("*Macnamara*"), is that where the agent has earned the commission, it is entitled to be paid notwithstanding any subsequent breaches of duty on its part. In *Macnamara*, the vendor engaged an estate agent to find a purchaser for his hotel on certain terms. The agent introduced a person who was ready and willing to purchase on the terms proposed. Subsequently, the vendor instructed the agent to have no further dealings with the prospective purchaser. In spite of the vendor's instructions, the agent drew up a sale agreement, signed it on behalf of the vendor and induced the purchaser to sign it; all in violation of the vendor's instructions. When the estate agent sued for

commission, the vendor argued, *inter alia*, that the estate agent was guilty of fraud. The High Court of Australia held that the estate agent was entitled to commission because he had already earned it before the revocation of his authority and that: "where a man has earned a remuneration his right to receive it can only be taken away by something in the nature of payment, accord and satisfaction, or release" (at 706).

45 A similar position appears to have been reached in *Sellers v London Counties Newspapers* [1951] 1 KB 784, a decision which was considered and followed by the Judge. In that case, the plaintiff was a sales representative who was tasked to secure orders for advertisements in the defendants' newspapers. He was dismissed and claimed commission in respect of orders effected by him before his employment was terminated. His claim was allowed by the English Court of Appeal in a majority decision. Although Sir Raymond Evershed MR dissented on the outcome, he observed at 790 that, in the case of an agent engaged to contract a specific piece (or specific pieces) of business:

> … if the agent is promised a commission provided that he produces for his principal, e.g., a person ready and willing to buy his house, then, if he does the work for which commission was promised, he becomes entitled to that commission, although his principal afterwards purports to put an end to the agency.

46 The other line of authority, supported by a number of English cases, holds that whether the agent should be held to have effectively lost his right to commission depends on the type and nature of the breach of duty. In *Keppel v Wheeler* [1927] 1 KB 577, the issue was whether the estate agents, having introduced a willing purchaser to the vendor, were under an obligation to disclose to the vendor a better offer made by someone else and if the agents

failed to do so, whether they were nonetheless entitled to claim commission for the sale of the property to the purchaser they had introduced to the vendor. The English Court of Appeal held that the estate agents had the duty to communicate to the vendor offers that were better than the one which they had already submitted to the vendor. On the facts of that case, the agents' failure to communicate the better offer was found to be a *bona fide* mistake and they were held to be entitled to commission for the sale of the property to the purchaser they had introduced to the vendor. At 588, Bankes LJ said: "an agent might properly claim his commission, and yet have to pay damages for committing a *bona fide* mistake which amounts to a breach of duty." In a similar vein, Atkin LJ stated, at 592:

> Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of his fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith, and as the transaction was completed and the appellant has had the benefit of it, he must pay the commission. …

On this point, Sargant LJ agreed with the other two members of the court.

47 The holding in *Keppel v Wheeler* was applied in the case of *Robinson Scammell & Co v Ansell* [1985] 2 EGLR 41, the facts of which bear some similarity to the present case. In that case, the estate agents discovered from a third party that the vendor's purchase of a new house was in serious danger of falling through and communicated this piece of information to the prospective purchaser before communicating it to the vendor. The vendor terminated the services of the estate agents and completed the sale to the purchaser. The

English Court of Appeal held that the estate agents were entitled to commission. Goff LJ said at 43:

> We are not of course here concerned with the case of an agent who has procured a sale to himself or to a company in which he is interested, so that he has placed himself in a position where his interest conflicts with his duty to his principal; nor are we concerned with a case where an agent has received a secret commission from the purchaser, an act which has been regarded as per se dishonest. … Now I am satisfied that, in informing the prospective purchaser before informing their vendors … the [estate agents] did indeed commit a breach of duty to the [vendors] … But there is no question here, in my judgment, of any dishonesty or bad faith on the part of the [estate agents]. … In these circumstances, having regard to the decision of this Court in *Keppel v. Wheeler*, I can see no basis for depriving the Appellants of their commission.

48 The *Keppel v Wheeler* line of cases suggests that where dishonesty or bad faith on the part of the estate agent has been shown, the agent may not be entitled to commission that he had already earned prior to the breach and the termination of the agency. In contrast, the Australian case of *Macnamara* suggests that an agent's right to remuneration (if earned) cannot be taken away.

49 In the present case, it is unnecessary for us resolve the legal conundrum of whether an agent can lose his right to commission already earned by reason of subsequent breach of duty. Even if we accept that such an outcome may be appropriate in cases of dishonesty or breach of fiduciary duty, we are not persuaded that this is such a case.

50 The Appellants claimed that Ms Prior had led them to believe that Aurum had accepted the terms of the Prior Option, in particular, the Release Term which the parties had not been able to agree on previously. This "misrepresentation", they said, was the reason for the breakdown in the

communications between Loh and Ms Yong. The Appellants' claim is not supported by a plain reading of the e-mail on which they relied. This e-mail, sent on 3 September 2010, is reproduced, in relevant part, at [11] above. For present purposes, the most significant features of the e-mail are its title ("Option from Michelle – subject to contract") and its last sentence (which referred to showing the option to the Aurum Board once it had been signed).

51 It is clear from the e-mail that the terms of the Prior Option had not been accepted by the Aurum Board. The subject title of the e-mail made it plain that the draft option remained "subject to contract" and the last sentence of the e-mail indicated that the Prior Option had to be shown to the Board subsequently. Obviously, the Board would have to see the Prior Option in order to decide whether to approve it or not. If it had already been approved, no such production would have been required. Further, it was in fact true that the terms of the Prior Option (including the Release Term) emanated from Ms Yong save for the commission clause which was inserted by Ms Prior. The commission clause was meant to operate between the Owners and the Agency. It had no impact on the proposed deal between Aurum and the Owners. Therefore, we are unable to agree that it was Ms Prior who had caused Aurum to walk away from the deal whether by misrepresenting Aurum's position in relation to the Release Term or otherwise. In fact, quite to the contrary, it was Loh's (and the Owners') insistence on the Release Term that scuppered the deal that was on the table as at 2 September 2010.

52 The Appellants also appeared to suggest that the Agency had failed to adhere to explicit instructions from its principal (*ie*, the Owners) in January 2011 by refusing to stop marketing the Properties despite instructions to do so. Even assuming that Ms Prior had defied instructions to stop marketing the

Properties, it is difficult to appreciate how such alleged "breach" caused the Owners any damage or difficulty whatsoever. Further, it is arguable that Loh had, on behalf of the Owners, waived the breach. If Loh had truly wanted the Agency to stop marketing the Properties, it is curious to say the least that he allowed Ms Prior to conduct a viewing of the Properties on 4 January 2011 (see the Judgment at [76]). (Loh's explanation, in his email to Ms Prior, was that he had allowed the viewing "out of plain simple courtesy"; suffice it to say that we do not find this explanation consistent with his previous and subsequent pattern of behaviour.) In any case, there is no evidence that this marketing effort was done in bad faith or with dishonest intent such that it should deprive the Agency of its commission. At all times, Ms Prior was upfront about her continued efforts to secure a buyer for the Properties in the hopes of enticing the Owners to put the Properties back on the market and she had kept Loh updated on the progress of her efforts.

53 Finally, even if we accept the Appellants' contention that Ms Prior had committed breaches of duty that were sufficiently grave to entitle them to terminate the agency relationship and to deprive the Agency of its commission, the evidence shows that they did not actually terminate the agency relationship. A repudiatory breach of contract does not automatically bring the contract to an end; rather, it is the innocent party's *election* to treat the contract as discharged which brings the contract to an end: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract*") at para 17.221. Further, termination is prospective in effect, and does not affect any rights or obligations which have already accrued at the point of termination: *The Law of Contract* at para 17.006. It follows that it is not sufficient for the Appellants to show that Ms Prior had committed a repudiatory breach (which, for the

avoidance of doubt, we do not accept). They must additionally show that they *in fact* elected to terminate the agency relationship and that they did this before the Agency's right to payment of the commission accrued.

54 In the present case, there is no evidence that Loh, as the Owners' representative, at any point elected to terminate the agency relationship between the Owners and the Agency. Instead, the evidence shows that Loh was stringing Ms Prior along, leading her to believe that the agency relationship continued to subsist, albeit in a state of temporary suspension. In his communications with Ms Prior, between September 2010 and 20 January 2011, Loh repeatedly made statements to the effect that the Properties were only *temporarily* off the market.

55 Most tellingly, in an e-mail on 11 January 2011, Loh referred to Ms Prior as still being the Owners' agent when he stated: "[y]ou as ***our agent*** should be looking after our interest" [emphasis added in bold italics]. Also significant is an e-mail dated 19 January 2011 in which Loh instructed Ms Prior to continue working for her commission:

> It is ***YOUR duty as an agent*** to find out how and to advise ***your client*** how to get the approval to go beyond the 4 storeys. Your [*sic*] are the one asking for the 2% commission, I am getting zero, so ***work for it and find out how it can be done***.
>
> [emphasis added in bold italics]

We find the above e-mail difficult to reconcile with the idea that by this stage, the Agency was no longer entitled to be remunerated for its efforts in bringing about the sale of the Properties to Aurum. One would have expected Loh, if his intention was to sever the agency relationship, to tell Ms Prior in the clearest possible terms that the Owners did not think she was trustworthy and

could not work with her or the Agency anymore. But he did not. Under cross-examination, when asked why he did not tell the Agency that it had been terminated, Loh replied that although he could have tolds Ms Prior – in his words – "[g]o to hell, you are out", he chose to "play along" instead. Upon further questioning, he conceded that what he had done amounted to a form of deception: "you want to call it 'lies', fine, let it be called 'lies'." In our view, since Loh's intention – which he put into effect – was to string Ms Prior along instead of telling her that he was putting an end to the agency relationship, it does not now lie in his mouth to claim that he had actually terminated the agency relationship. Assuming an intention to terminate even existed, there was simply no communication of that intention to the agent, and thus no valid election. Further, if Loh had indeed terminated the Agency's services, it would not have been necessary for him to keep the Agency in the dark about his subsequent dealings with Ms Yong. The fact that Loh went behind Ms Prior's back to close the deal with Ms Yong fortifies our view that he had not terminated the Agency's services, but had led Ms Prior on to think that the Properties might be put up for sale when the property market improved.

56 To conclude, we have found that the Judge was correct in: (a) implying the effective cause term into the agency relationship between the Owners and the Agency; and (b) finding that the Agency's efforts were the effective cause of the sale of the Properties to Aurum. We are further of the view that the alleged breaches of duty (even if established) could not have deprived the Agency of the commission that had been earned prior to those alleged breaches.

57 For these reasons, we see no basis to interfere with the Judge's decision to allow the Commission Claim. The Owners are jointly and severally

liable for the full commission and their contributions, *inter se*, are to be assessed on a per unit basis.

The appeal on the Defamation Claim (CA 55/2016)

Loh's case

58 Loh argued that he was not liable in defamation because:

(a) The Complaints were protected by absolute privilege. The scope of absolute privilege should be extended to cover gratuitous complaints to the authorities.

(b) The Publications were not motivated by malice and were protected by qualified privilege.

(c) The Publications were justified as Ms Prior had engaged in unethical and dishonest behaviour.

59 Loh also asserted that the tort of malicious falsehood was not made out because his statements did not contain falsehoods.

Ms Prior's case

60 Ms Prior raised a preliminary point in respect of the scope of the appeal. She submitted that Loh was not entitled to challenge the Judge's decision on issues that went towards liability because he had only appealed against the parts of the judgment that deal with damages and costs.

61 On this point, the position is not as clear as Ms Prior submitted. The relevant part of the notice of appeal states:

> Take Notice that an appeal has been filed by the 1st Defendant(s) to the Court Of Appeal.
>
> The appeal is against the part of the decision of Justice Lee Seiu Kin given on 03-March-2016 as follows:
>
> 1. That the 1st Defendant does pay the Plaintiffs damages in the sum of $30,000.00;
>
> 2. That the 1st to 14th Defendants do pay the Plaintiffs damages in the sum of $10,000.00; and
>
> 3. Costs to be decided at a later date.

62 From the notice of appeal, it is unclear whether Loh is challenging the Judge's decision on the ground that Ms Prior is not entitled to damages at all (*ie*, that there was no justifiable claim) or that the quantum of damages awarded was excessive. The language can be interpreted both ways. In the light of this ambiguity, we are not inclined to construe the notice of appeal so narrowly as to preclude Loh from challenging the Judge's decision on liability and we prefer to dispose of the appeal on its substantive merits. It should be noted that his Appellant's Case made the full scope of Loh's appeal clear and thus little, if any, prejudice was caused to Ms Prior by the said ambiguity.

63 As for the substantive aspects of the appeal, Ms Prior submitted that:

(a) Absolute privilege should not be extended to cover complaints to the police or regulators such as the CEA. In any case, the defence of absolute privilege should not be extended to false complaints made gratuitously.

(b) The Complaints were published on occasions of qualified privilege but the defence of qualified privilege is clearly defeated by malice on Loh's part. The ST Publication was not protected by qualified privilege.

(c) The defamatory sting of the Publications was not justified since Loh has not proved that he had a level of reasonable suspicion that Ms Prior had committed forgery.

(d) The "reply to attack" defence must fail since (i) Ms Prior's alleged "attack" was not defamatory of Loh since it was not circulated to third parties; (ii) Loh's "reply" was not *bona fide*, and was made with malice; and (iii) Loh's "reply" was not relevant to the "attack" of bankruptcy and went beyond that to allege forgery.

(e) The tort of malicious falsehood was made out since the two key elements of the tort were satisfied, namely: (a) that the words were published maliciously; and (b) the published words were false.

(f) The quantum of damages should be affirmed since the awards are in line with the applicable precedents.

Our decision on the Defamation Claim

64 The Defamation Claim concerned separate publications made on three different occasions. The relevant portions of the Complaints are reproduced below:

(a) The CEA Complaint (filed on 17 March 2011):

> 03/09/2010: "Email from [Ms Prior] with [Option to Purchase] supposedly from Aurum, which on 22 September 2010 was found out was never issued by Aurum Land.
>
> …
>
> [Ms Prior] in all probability, out of desperation to prevent us from closing the deal with the other party,

> forged the [Option to Purchase] in the hope that she could persuade Aurum to agree.

(b) The Police Report (filed on 29 March 2011):

> … Sometime in 28/08/2009, I engaged the services from [Ms Prior] of [the Agency Pte Ltd] to find us a buyer for our 9 units collectively. On 03/09/2010, [Ms Prior] sent me an email with an option document attached purportedly from the buyer … We as such suspect that [Ms Prior] might have forged the option document. …

65 The third publication (*ie*, the ST Publication) concerned the provision of the Complaints to Ms Cheam on 18 April 2011. The pleaded sting of the Publications is that Ms Prior had behaved unethically as an estate agent by forging an option to purchase.

Whether the Complaints are protected by absolute privilege

66 As the law stands, absolute privilege covers: (a) statements made in the course of judicial or quasi-judicial proceedings; (b) statements made in the course of parliamentary proceedings; and (c) communications in relation to Executive matters: see Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ("*The Law of Torts*") at para 13.041. These are regarded as matters in which "[f]ree speech is so significant … that complete immunity is afforded to defamatory statements even where they may be untrue and made maliciously": *The Law of Torts* at para 13.041. The present appeal concerns the first category of statements, *viz*, statements made in the course of judicial or quasi-judicial proceedings. The rule concerning this category of statements (as it was originally conceived) as well as its rationale were stated in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at 451:

> … The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. This "absolute privilege" has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them. …

67 One of the key controversies in this appeal is whether the scope of absolute privilege should be extended to include gratuitous complaints made to prosecuting authorities. This issue throws into sharp relief the tension between the public interest in the detection and deterrence of unlawful conduct and the interest of individuals in not being vexed or harassed by malicious complaints against them to prosecuting authorities.

The Singapore position

68 We will first examine the local cases. We begin with the High Court's decision in *D v Kong Sim Guan* [2003] 3 SLR(R) 146 ("*Kong Sim Guan*") where it was held that certain statements made to the Complaints Committee of the Singapore Medical Council ("SMC") were protected by absolute privilege. In that case, a child was referred to the defendant, Dr Kong, for an assessment following a police report by her mother that the child may have been abused by the father. Dr Kong concluded in his report that the child had been sexually assaulted by the father. The father made a complaint to the SMC alleging, *inter alia*, that Dr Kong had not conducted a sufficiently thorough diagnostic investigation into the mother's complaint and had come to the

wrong conclusion that the child had been sexually assaulted by the father. The SMC referred the complaint to its Complaints Committee and Dr Kong was called upon to answer the allegations against him. Dr Kong provided a detailed response which dealt specifically with the criticisms levelled against him. The father then brought a claim against Dr Kong for the allegedly defamatory statements contained in Dr Kong's response to the Complaints Committee. Dr Kong raised the defences of absolute privilege and qualified privilege.

69 The High Court found that Dr Kong's response to the Complaints Committee was protected by qualified privilege and that Dr Kong had not been motivated by malice (at [96]). In the light of this finding, it was strictly speaking not necessary for the court to consider whether Dr Kong's response was also protected by absolute privilege, and it did so only for the sake of completeness. It was in this context that the court observed that Dr Kong's response was also protected by absolute privilege. It reasoned that absolute privilege "also extends to evidence before tribunals which, although not courts of law, nevertheless act in a manner similar to that in which a court of law acts" (at [99]). As the SMC's disciplinary functions were sufficiently similar to proceedings in a court of law and since Dr Kong's response was a necessary step in the adjudication of the complaint by the SMC, it would have been protected by absolute privilege which offered a complete answer to the defamation claim brought by the father.

70 *Kong Sim Guan* does not stand for the proposition that absolute privilege attaches to gratuitous complaints made to the authorities. In that case, investigations had already been commenced pursuant to the father's complaint and Dr Kong was invited by the Complaints Committee to provide

his response to the complaint as part of the investigation process. Clearly, Dr Kong's alleged defamatory statements were not part of the initial complaint volunteered to the SMC. Indeed, the broadest proposition that *Kong Sim Guan* can be said to stand for is that statements made by witnesses who have been summoned to give evidence before an investigating authority would attract absolute privilege. The issue of whether absolute privilege covers gratuitous complaints made to the authorities did not arise and, therefore, could not have been decided in that case.

71 There are, as far as we are aware, only two cases in which qualified privilege has been said to apply to police reports. In *Silas Saul Robin v Sunrise Investments (Pte) Ltd and another* [1991] 1 SLR(R) 169, counsel conceded that a police report had been made on an occasion of qualified privilege and the court proceeded on that basis (at [48]). In *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576, this court observed that a police report would ordinarily be made on an occasion of qualified privilege (at [174]). It bears stating that a holding that a class of communications is protected by qualified privilege does not necessarily entail a holding that it is *not* protected by absolute privilege. Although the issue of absolute privilege could have been raised in those cases, the fact is that it was not; it would therefore be inappropriate to rely on the two cases as authority for the proposition that only qualified privilege (and not absolute privilege) applies to police reports. Hence, it seems to us that save for the Judgment in the present case, the issue of whether absolute privilege covers gratuitous complaints to the authorities has not been explored by the Singapore courts.

72 Turning now to consider the approaches adopted by other jurisdictions, there appears to be a clear divergence in the Commonwealth jurisprudence on

this point. The Malaysian and English courts have taken the position that the defence of absolute privilege applies to gratuitous complaints to prosecuting authorities whereas the Australian and Canadian courts have gone in the opposite direction and declined to extend the defence of absolute privilege to such complaints.

The English and Malaysian positions

73 In *Buckley v Dalziel and another* [2007] 1 WLR 2933 ("*Buckley*"), the English High Court held that absolute privilege applied to a statement made to the police. It reasoned that the need to protect those who provided evidence to police officers, or other investigatory agencies, in the course of an inquiry into possible illegality or wrongdoing had to take priority over any competing public policy consideration regardless of whether the informant was a mere witness or the initial complainant. Significantly, the statement in question had been recorded in the course of investigations which commenced after a complaint was made. Subsequently, in *Westcott v Westcott* [2009] 2 WLR 838 ("*Westcott*"), the English Court of Appeal extended the scope of absolute privilege further to cover the initial complaint to the police. Ward LJ took the view that the necessity of allowing informants to speak freely overrides the sanctity of a good reputation in such cases (at [38]). He stated at [36]:

> The police cannot investigate a possible crime without the alleged criminal activity coming to their notice. Making an oral complaint is the first step in that process of investigation. In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank attack. There is no logic in conferring immunity at the end of the process but not from the very beginning of the process. Mr Craig's distinction between instigation and investigation is flawed accordingly. In my

> judgment, any inhibition on the freedom to complain will seriously erode the rigours of the criminal justice system and will be contrary to the public interest. In my judgment immunity must be given from the earliest moment that the criminal justice system becomes involved. It follows that the occasion of the making of both the oral complaint and the subsequent written complaint must be absolutely privileged.

74 In *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ("*Lee Yoke Yam*"), the Federal Court of Malaysia held that the defence of absolute privilege should be extended to statements made in a first information report for reasons of public policy. In its view, there was an "overriding public interest that a member of the public should be encouraged to make [a] police report with regard to any crime that comes to his or her notice" (at [32]). Such public interest outweighed the countervailing consideration that this could sometimes lead to an abuse by a malicious informant, and in any case, there would be a sufficient safeguard against such malicious report in that informants could be prosecuted for making a false report (at [32]).

The Australian and Canadian positions

75 In the Australian case of *Mann v O'Neill* (1997) 145 ALR 682 ("*Mann*"), the appellant made a complaint to the Attorney-General about the respondent's mental capacity to discharge his duties as a special magistrate and the respondent sued for defamation. By a six to one majority, the High Court of Australia held that complaints to prosecuting authorities enjoy only qualified privilege. In a joint judgment, Brennan CJ, Dawson, Toohey and Gaudron JJ considered the policy considerations for the extension of absolute privilege to such complaints and concluded (at 689):

> It is not necessary that statements to prosecuting authorities be absolutely privileged. The function of an authority charged with investigation and prosecution, whether in the courts or elsewhere, is not to ascertain the truth and justice of the

> matter in a final or binding way, but to decide whether the circumstances warrant the institution of proceedings to ascertain the truth of the matter. Absolute privilege is not required for the effective discharge of that function. Nor is it required for complaints inviting investigation of a special magistrate's ability to discharge his duties of office.

All the Australian judges in the majority focussed on the requirement of "necessity for complete immunity from suit". This requirement had to be established by the litigant advocating the application of the doctrine of absolute privilege in any particular situation. In this regard, in his concurring judgment at (706), Gummow J cited a passage from an earlier decision of the High Court:

> The immunity has been accepted as applicable in various instances from which there emerges "[n]o single touchstone". All involved particular determinations of the policy of the common law. The authorities concern statements touching the exercise of the legislative, executive and judicial powers of government. They deal with such statements as those made by high executive officers in performance of their duties relating to matters of State, made during parliamentary proceedings and made in the course of judicial proceedings. In approaching the issues which arise on the present appeal, it is appropriate to bear in mind the remarks by Gavan Duffy CJ, Rich and Dixon JJ in *Gibbons v Duffell*, that what they identified as this "indefeasible immunity";
>
> > is given only where upon clear grounds of public policy a remedy must be denied to private injury because complete freedom from suit appears indispensable to the effective performance of judicial, legislative or official functions. This presumption is against such a privilege and its extension is not favoured: *Royal Acquarium and Summer and Winter Garden Ltd v Parkinson*. Its application should end where its necessity ceased to be evident.
>
> …

76 In *Hanisch v Canada* [2003] BCJ No 1518, the judge observed at [141]:

> … it is not clear to me that absolute privilege would apply where information was maliciously proffered, as I have found to be the case here. … I am unable to see how [the defendants] can rely on the existence of a criminal investigation, which they wrongly set in motion, as the basis for protecting their defamatory statements made against the plaintiff.

That decision was reversed in part on other grounds, but the position stated remains good law in Canada. More recently, in *Caron v A* [2015] BCCA 47, the appellant argued that failing to protect complaints to the police with an absolute privilege could lead to a chilling effect, as victims could be deterred from reporting crimes through the threat of possible defamation litigation. This concern appears to have been dismissed by the British Columbia Court of Appeal which declined to extend the scope of absolute privilege to cover police reports.

Conclusion on absolute privilege

77 Having reviewed the authorities, we prefer the view that gratuitous complaints to prosecuting authorities should be protected by qualified privilege only and that absolute privilege should not extend to such complaints. While we recognise that some communications to the authorities are sufficiently important to trump reputation, communications actuated by malice are not. A balance must be struck between the freedom of speech and the protection of reputation. In this regard, the foreign authorities that have been cited in respect of absolute privilege must be viewed with some circumspection since the balance between freedom of expression and protection of reputation depends on local political and social conditions: *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*") at [226]. It must not be readily assumed that the foreign judicial pronouncements on defamation laws should

apply in our local context without modification. The determination of "necessity" is an exercise that must be carried out in the context of a particular society and its mores, values and expectations of the proper behaviour of its members.

78 In our judgment, in Singapore, the suggested extension to the scope of absolute privilege would be wholly disproportionate to and unnecessary for the aim of encouraging members of the public to report suspected wrongdoings. It has been suggested that potential complainants may be discouraged from making complaints by the fear of a defamation suit: see for example the dissenting judgment of McHugh J in *Mann* at 699. That may be so, but it by no means follows that absolute privilege should therefore attach to gratuitous complaints to prosecuting authorities. As pointed out by Kirby J in *Mann* at 734:

> … It is true that withholding absolute privilege might sometimes result in inhibitions upon such correspondence [*ie*, complaints to the authorities]. But that might not necessarily be a bad thing if it encouraged the author of the complaint to restrict the communication to truthful allegations, checked by reference to reasonably available evidence and confined to that which was necessary and could be said bona fide and upon personal knowledge.

We agree. This position would adequately serve the public interest by promoting responsible reporting – an informant will be able to freely make reports but will not be able to get away with malicious reporting. It would also provide an avenue for persons who have had their reputations smeared by malicious complaints to seek legal redress for their injury. There is also a safeguard that is inherent in the defence of qualified privilege. Where the defamatory statement is made on an occasion of qualified privilege, the plaintiff bears the burden of proving malice to defeat the defence. In our view,

this burden is not easy to discharge and would make potential plaintiffs think twice about threatening defamation proceedings to stymie genuine complaints to prosecuting authorities.

Whether the Publications are protected by qualified privilege

79 We turn now to consider whether all three publications which Ms Prior complains of should be protected by qualified privilege. As Ms Prior accepted that the Complaints were made on occasions of qualified privilege, we need only determine whether that defence applies to the ST Publication as well.

80 Whether the ST Publication was made on an occasion of qualified privilege depends on whether Loh was under a legal, social or moral duty to communicate the Complaints to Ms Cheam, and whether Ms Cheam had a corresponding interest to receive the communication: see *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 ("*Bernard Chan*") at [87]. This is a fact-sensitive enquiry which is tightly focused on the specific sender and receiver of the communication, its content, and its surrounding circumstances. Loh claimed to have provided the Complaints to Ms Cheam out of a moral and social duty as well as on the basis of public interest because the conduct of real estate agents was being discussed in Parliament then. In our judgment, it would be stretching the limits of qualified privilege to say that it would attach to a communication so long as there was some vague, ill-defined sense of moral or social duty to communicate the said information. Indeed, it has been said that the defence of qualified privilege does not ask whether the communication is for "the common convenience and welfare of society" (*Bernard Chan* at [87]). A more specific duty and interest on the part of the sender and receiver are required, and these have not been proven by the Appellants. For this reason, we agree

with the Judge that the defence of qualified privilege has no application in so far as the ST Publication is concerned.

Whether there was malice

81 In any case, the defence of qualified privilege would be defeated by proof that the communications were actuated by malice. Malice might be proved in two ways: first, by showing that the defendant knew the statement was false or was reckless as to its truth or did not believe in its truth; and second, even if the defendant had a genuine or honest belief in the truth of the defamatory statement, by showing that his dominant motive was to injure the plaintiff or was otherwise improper: *Bernard Chan* at [90].

82 In our judgment, the facts of the present case strongly support a finding of malice, whichever basis is used. We reject Loh's submission that he genuinely believed that Ms Prior had forged the option to purchase. On 29 September 2010, Loh forwarded to Ms Yong an e-mail sent to him by Ms Prior and suggested that Ms Prior had wrongly represented to him that the option attached to her e-mail had been obtained from Ms Yong. Ms Yong disagreed and pointed out that Ms Prior's e-mail did not claim that the option attached had come from Ms Yong, stating: "Yes the email is from me [*ie*, Ms Yong] but as it says in the email, the Option was from her [*ie*, Ms Prior]."

83 On 30 March 2011, after reviewing the Police Report, Ms Yong had pointed out to Loh that "[t]o say that [Ms Prior] forged the Option is probably not fair." Loh also conceded under cross-examination that in an e-mail sent to Ms Yong on 30 March 2011, he had agreed with Ms Yong's view that the evidence for his allegation of forgery was not watertight. Even though this exchange between Loh and Ms Yong took place only after the Complaints had

been filed, the fact that Loh expressed no surprise at Ms Yong's view and did not proceed to withdraw his allegation of forgery points towards the conclusion that he was motivated by malice. In this regard, the Judge's finding was that having known of the falsity of his allegations, Loh not only made no attempt to withdraw the Complaints, but escalated matters by forwarding them to Ms Cheam. Further, it is also telling that it was not until Aurum disclosed Ms Yong's e-mails in court that Loh proceeded to disclose them (see the Judgment at [55]). The lateness of his disclosure shows that it was not entirely voluntary.

84 We next address Loh's point that there could be no malice in his filing of the Complaints since (a) he had filed the CEA Complaint after being told by the CEA that a complaint was "in order"; and (b) he had filed the Police Report after being told by the CEA that he had "no choice" but to do it. He also claimed that he had made the Police Report pursuant to his duty under s 202 of the Penal Code which, according to him, arose once he was directed by the CEA to file a police report.

85 First, it is evident from the CEA's e-mail dated 9 March 2011 that Loh was not told that a complaint was "in order". The e-mail stated:

> … [I]f you allege that the agent had fraudulently produce[d] documents and made unsubstantiated claims as to the authenticity of the documents, you may lodge a complaint with CEA and be prepared to produce/substantiate your allegation. …

The CEA was making a suggestion, not directing a course to be taken. Quite apart from that, the evidence shows that Loh had formed an intention to make a complaint to the CEA even before he received this e-mail. On both 5 and 6 March 2011, he had threatened to lodge a complaint to the CEA against

Ms Prior and the Agency. Secondly, little if any weight should be placed on the CEA's views in this regard since any views it had formed at this point were based solely on the facts given to it by Loh.

86 As for the filing of the Police Report, there is no evidence to corroborate Loh's claim that he was told by the CEA that he had "no choice" but to file the Police Report. There is also no merit in his suggestion that he had made the Police Report pursuant to his duty under s 202 of the Penal Code. This reads:

> 202. Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give *any information respecting that offence* ***which he is legally bound to give***, shall be punished with imprisonment for a term which may extend to 6 months, or with fine, or with both.
>
> [emphasis added in italics and bold italics]

The words of the provision are clear: an offence would only be committed if the accused was *legally bound* to provide the information in question but failed to do so. The provision does not impose an obligation on a private person to report an offence of forgery. In the present case, Loh has not explained why he was legally bound to make the Police Report and we see no basis for so concluding.

87 Moving on, even if Loh can be said to have had a genuine or honest belief in the truth of the forgery allegation, we are prepared to infer from the facts that his dominant motive in making the Publications was to injure Ms Prior. We agree with her submission that a series of text messages sent by Loh to Ms Prior between 4 March 2011 and 19 April 2011 painted "an overwhelming picture of spite, ill will and vicious intent" on the part of Loh. A sampling is sufficient to demonstrate the truth of that description:

(a) On 21 March 2011:

> U will soon be the talk of the town, with articles written in the newspaper. In short, u will achieve fame, albeit for the wrong reason. And oh yes, life is [*sic*] the women's prison will be no fun.

(b) On 24 March 2011:

> U hv been covering up one lie with another that u dun even know what the truth is anymore. Thats the problem with lies. But becos of all the emails etc that i hv dutifully kept, the truth will now be revealed. U claimed recently that u hv been conducting yrself professionally and asked me for proof of what i am accusing u of. I give u my word that i will produce all the proof u need to prove convincingly of all i hv said, but i will only do so before the disciplinary board and the court. And i guarantee u this, both u and [the Agency] will lose their license and be barred permanently and also, u will experience life in a prison cell. And also, u will see a series of articles in the newspaper soon abt u and [the Agency] which is now being prepared. And u can only blame all these misfortune on no one but yrself. I will be extremely viscious [*sic*] in bringing u to justice.

(c) On 15 April 2011 at 4.52pm:

> Still think i am joking? U hv not seen anything yet, this is jus the tip of the iceberg, there will be many more governmental agencies to come, and they will come like an avalanche! Every single phone call to any of the 9 owners comes immediately to my attention. Thats jus how much backing i hv.

(d) 19 April 2011:

> Oh wow, what a joke, telling people that all the owners are not against yr claim for the 2% commission and that i am the only one against it. And that i am acting without the other owners authorisation when I make the report to the CEA, police etc. And that u had a good mtg with the CEA and that they say they will exonerate u!!! What a joke :p!! wait for the next big one coming yr way and lets see how u deal with it! I hv jus more or less finish preparing it and making some final

> adjustments b4 sending it out to the relevant authority. And bingo, u r history!

88 To pressure Ms Prior to drop the Agency's claim for commission, Loh threatened her with the prospect of imprisonment, revocation of her estate agent licence and destruction of her reputation. It seems to us that Loh was making good on his threats to publicly destroy Ms Prior when he filed the Complaints and later caused them to be published to Ms Cheam. In one of his text messages to Ms Prior, he said "I spoke, i promised u action and now, i have delivered." We are compelled to conclude that malice has been shown and Loh is not entitled to hide behind the shield of qualified privilege. It is therefore not necessary for us to delve into the further issue of whether the facts point towards an additional motive for Loh to obtain the Agency's commission for himself. With that, we turn to consider whether the defence of justification applies to the Publications.

Whether the Publications are protected by the defence of justification

89 The defence of justification provides a complete defence to a claim in defamation if the defendant manages to prove that the statement was true in substance and fact. The rationale for the defence of justification is based on the presumption that by telling the truth about the plaintiff, his reputation is not lowered beyond its proper level, but is merely brought down to it: *The Law of Torts* at para 13.004.

90 Significantly, where a publication contains more than one defamatory allegation but the allegations do not have a common sting, the claimant is entitled to select which of the allegation(s) he complains of: Rt Hon Sir Brian Neill *et al*, *Duncan and Neill on Defamation* (LexisNexis, 3rd Ed, 2009) ("*Duncan and Neill on Defamation*") at para 12.30. If the claimant does so

choose, the defendant is not entitled to seek to justify the allegations of which the claimant does not complain: *Duncan and Neill on Defamation* at para 12.30. Therefore, in the present case where the pleaded defamatory sting was that Ms Prior had behaved unethically and was dishonest *because* she had forged an option to purchase, Loh was not entitled to rely on other instances of alleged dishonesty and unethical behaviour to justify the defamatory sting of the Publications.

91 There are generally three levels of defamatory meaning that are relevant to the defence of justification. According to the English Court of Appeal in *Chase v News Group Newspapers Ltd* [2003] EMLR 11 ("*Chase*") at [45], publications may convey that the claimant has in fact committed some serious act ("*Chase* Level 1"), or that there are reasonable grounds to suspect that he or she has committed such an act ("*Chase* Level 2"), or merely that grounds exist for investigating them ("*Chase* Level 3"). In this appeal, Loh submitted that the Complaints carry only a *Chase* Level 3 meaning, that is, that there were *grounds for investigating* whether Ms Prior had committed the act of forgery. We do not accept this submission. The use of the words "in all probability" in the following part of his CEA Complaint implies something more than grounds for investigation (and, it seems to us, more than reasonable grounds for suspicion):

> … It was then that I realised that [Ms Prior], ***in all probability***, out of desperation to prevent us from closing the deal with the other party, forged the OTP in the hope that she could persuade [*sic*] Aurum to agree. …
>
> [emphasis added in bold italics]

Further, in the CEA Complaint, Loh had stated categorically that Ms Prior had been "[m]isleading clients by the falsification of Option Documents". As for

the Police Report, the statement "[w]e as such *suspect* that Ms Prior] might have forged the option document" [emphasis added] falls squarely within *Chase* Level 2. In our judgment, the allegations of forgery that were made in the Complaints carried *at least* a *Chase* Level 2 meaning, *ie*, that there were *reasonable grounds* to suspect that Ms Prior had forged/falsified an option to purchase. On this basis, we turn to determine whether this defamatory sting was justified on the facts of the present case.

92 In our judgment, there were no reasonable grounds on which Loh could have suspected that the Prior Option was forged. Ms Prior pointed out that the Prior Option was not signed and thus could not have been forged. To counter her point, Loh relied on the Indian case of *Siddapa v Lalithamma* [1954] CriLJ 1235 ("*Siddapa*") for the proposition that a forged document does not have to be signed. In *Siddapa*, the issue was whether the petitioner had forged marriage invitations. It was established that the marriage invitations were unauthorised and contained facts that were absolutely false. The Karnataka High Court held (at 3) that what constitutes the "making" of a document depends essentially upon the nature and the use it is intended for, and the definition of a document does not necessarily require that it should in every case be in the writing or contain the signature or facsimile of any person, but includes what is done by way of printing. Since the marriage invitations were documents that were complete in themselves, it was not necessary that they be signed in order to establish the forgery offence.

93 *Siddapa* does not assist Loh. As pointed out in that case, the marriage invitations were documents that were complete in themselves. No signature was required to make them effective. In contrast, an option to purchase property would not be complete without the signature of the relevant party.

Until an Option to Purchase is signed by the grantor, it is merely a draft or a proposed document. Seen in this light, the Prior Option, which remained unsigned and was circulated as a document for acceptance, cannot be said to be a forged document. It must also be pointed out that subject line of the e-mail attaching the Prior Option made it clear that the Prior Option remained "subject to contract" and it was still open to Loh or the Owners to raise their objections to the commission clause if they had any.

94 In any case, there was no basis for any suspicion that the *mens rea* for forgery had been made out. Section 464(1) of the Penal Code requires the making of a false document or a false electronic record to be done "dishonestly or fraudulently", that is, with the intention of causing wrongful gain or wrongful loss, or with the intent to defraud. Such an intention was not present in this case. Ms Prior was simply reducing the commission agreement to writing and was not attempting to cause wrongful loss to the Owners. The bargain between the parties was always that the Agency would be paid 2% of the sale price if Ms Prior brought about the sale. Moreover, Loh had specifically approved earlier draft options containing the commission clause as shown by an e-mail sent on 30 June 2010 which attached a draft option containing a commission clause similar to the one found in the Prior Option.

95 Loh failed to show reasonable grounds for suspecting that Ms Prior had committed the offence of forgery and his defence of justification was rightly rejected by the Judge.

Whether the Publications are protected by the "reply to attack" defence

96 The principles governing the "reply to attack" defence are set out in *Review Publishing* at [153]–[158]. A person who has been publicly defamed is

entitled to reply to the defamation publicly and such reply may be made through the press and is privileged. In order to establish the "reply to attack" privilege, Loh would have to show that his defamatory statements were published *bona fide* and are *fairly relevant* to the accusations made. It would follow that the "reply to attack" privilege only enables the defendant to repel the charges made against him by the plaintiff but not to bring fresh and irrelevant accusations against the plaintiff.

97 Loh claimed that the defamatory statements were made in reply to Ms Prior's accusations in her e-mail dated 6 March 2011. Among other things, she had accused him of transferring his property at 120 Sophia Road to his sister in order to deceive his creditors and the Official Assignee. For ease of reference, we set out relevant extracts from the e-mail sent by Ms Prior to Loh:

> Dear [Loh]
>
> Since I have now received several abusive/threatening smses from you, I guess you are now allowing communication, so perhaps email is better.
>
> …
>
> As you know, I have many questions: for now, I wish to ask:
>
> 1. What is your status? You are not the legal owner of any unit. You have told me before that, owing to your status as a bankrupt, you wanted to deceive your creditors and the Official Assignee by asking your sister to purchase the unit 120 Sophia Road on your behalf. Is this true?
>
> 2. …
>
> 3. …
>
> 4. Was it September or October 2010 when you approached [Ms Yong] of Aurum Land directly? Please provide the exact date.
>
> 5. Why did you lie to me about the agreement formed with Aurum from September 2010 to two days ago, in effect

> keeping me in the dark for 5 to 6 months till I found the caveats myself?
>
> 6. …
>
> 7. …
>
> 8. Why do some of the owners not seem to know the property is contracted to be sold when I spoke to them? Is Aurum aware they did not realise exactly what they were signing two weeks ago?
>
> I warn you against making any further threats against me, or using blackmail or defamation to any third party, including the Sellers or the Purchaser. If you wish to refer this matter to the authorities (as you repeatedly threaten to do), then I will answer to them at the appropriate juncture. I have acted in accordance with the law and ethics, so I am confident that they will dismiss your complaint.

98 In the present case, the arguments concerning the "reply to attack" defence can be easily disposed of. First, the defence is only available to one who has been "publicly defamed". It is not available here as the alleged attack was contained in a private e-mail from Ms Prior to Loh and the latter cannot be said to have been publicly defamed. Secondly, nothing in the Publications could properly be said to be "fairly relevant" to the statements made by Ms Prior in the e-mail. It bears reiterating that the defence is not an excuse for bringing fresh and irrelevant accusations against Ms Prior which is precisely what Loh did. Therefore, the "reply to attack" defence does not apply on the facts of this case.

Whether the damages awarded are excessive

99 Loh has not argued against the quantum of damages awarded by the Judge. However, for the sake of completeness, we note that the quantum of damages awarded (total of $40,000) is in line with precedent. The facts of the present case are analogous to those of *Yeap Beng San Louis v Choo Pit Hong Peter* [1999] 1 SLR(R) 397 ("*Louis Yeap*"). That case involved a complaint to

the Council of the Association of Singapore Realtors ("ASR") as well as letters to the plaintiff's solicitors which were copied to the ASR, the Singapore Institute of Surveyors and Valuers and the Association of Singapore Real Estate Agents. The defamatory sting was that the plaintiff had conspired with others to deprive the defendant of his commission; and that the plaintiff was a liar and had unjustifiably disparaged the defendant. The court held that the defence of qualified privilege did not apply as the publications had been actuated by malice. The plaintiff in *Louis Yeap* was awarded $40,000 by way of damages and costs. The awards of $30,000 (to be paid by Loh) and $10,000 (to be paid by all the defendants) are comparable and cannot be criticised.

Whether the tort of malicious falsehood is made out

100 It is not necessary to address Loh's argument that the tort of malicious falsehood was not made out. The Judge's decision on the Defamation Claim was sufficient to dispose of S 381/2011 but he proceeded to record his observations in respect of the alternative claim in malicious falsehood (the Judgment at [141]). No remedy was granted in respect of the claim and it is unclear why Loh took issue with the Judge's observations in this regard.

Conclusion on the Defamation Claim

101 To sum up, the Judge correctly rejected the defences of (a) absolute privilege; (b) qualified privilege; (c) justification; and (d) reply to attack. We thus uphold his decision that Loh was liable in defamation.

Conclusion

102 In the premises, both appeals are dismissed with costs to the respective respondents to be taxed if not agreed. The usual consequential orders will apply.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal

Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

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