Lim Eng Hock Peter v Lin Jian Wei and Another and Another Appeal [2009] SGCA 48

Case Number : CA 25/2009, 38/2009

Decision Date : 08 October 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Alvin Yeo SC, Chan Hock Keng, Koh Swee Yen, Suegene Ang and Reina Chua (Wong Partnership LLP) for the appellant; Ang Cheng Hock SC, William Ong, Kristy Tan and Ramesh Selvaraj (Allen & Gledhill LLP) for the respondents

Parties : Lim Eng Hock Peter — Lin Jian Wei; Tung Yu-Lien Margaret

Tort – Defamation

Civil Procedure – Appeals

8 October 2009 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 These two appeals arise out of a defamation action commenced by Lim Eng Hock, Peter ("the Appellant") against Lin Jian Wei and Tung Yu-Lien, Margaret ("the Respondents") which was dismissed by the High Court (see *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR 1004 ("the GD")).

2 The Appellant claimed that he had been defamed in three passages ("the Extracts") contained in an Explanatory Statement dated 2 November 2005 ("the ES") explaining a Scheme of Arrangement and Compromise ("the Scheme") proposed by Raffles Town Club Pte Ltd ("the Company") to members of Raffles Town Club (the "Club"). The Company owned and operated the Club as a proprietary club. The Respondents were the controlling shareholders and directors of the Company since April 2001.

Background

3 As the facts of this case have been fully set out in the GD, we will only refer to the salient facts in this judgment. In or around March 1996, the Company purchased a 30-year lease on a piece of land from the Government for the purpose of developing and operating on it a high class recreational club. The Appellant was a consultant to the Club. In November 1996, the Company invited selected members of the public to join the Club at a discounted price of $28,000 payable in instalments over four years. The selected invitees were promised membership in an exclusive club which would be one of the most prestigious and lavish clubs in Singapore. More than 24,000 applications were received, out of which 5,000 were rejected.

4 After the Club was opened in March 2000, the members realised that the recreational facilities were inadequate to meet their needs. Unknown to the members, the Club had 19,000 members. This meant that the entrance fees collected and to be collected by the Company amounted to more than $500 million. Disputes subsequently arose between the Appellant and the then shareholders of the Company, Lawrence Ang Yee Lim ("Ang"), William Tan Leong Ko ("Tan") and Dennis Foo Jong Long ("Foo"). Their subsequent court actions against one another led to the disclosure to the members that the Club had 19,000 members. This number made a mockery of the Company's promise of the

Club's exclusivity to the original members. The court actions were settled in April 2001, with the existing shareholders selling their shares in the Company to the Respondents and the first Respondent's wife under certain agreements dated 23 April 2001 and 6 June 2001. The second Respondent was appointed an executive director of the Company before the change of ownership. As at April 2001, the Company had current assets of $206 million and receivables of $65 million in directors'/shareholders' loans. This strong financial position was due principally to a deferred tax and accounting policy adopted by the Appellant ("the DA Policy").

5 The original members were unhappy that they had been deceived by the Company concerning the Club's exclusivity. They wrote to the Company on 25 April 2001 and demanded compensation. On 12 June 2001, they made a claim for $120,484,000. On 15 November 2001, 4,895 members of the Club ("the Raffles 5000") filed Suit No 1441 of 2001 against the Company claiming damages for misrepresentation and/or breach of contract. The action was dismissed by the High Court on 22 November 2002. On appeal, however, the decision was reversed by this court on 11 August 2003. Damages were assessed by the High Court at $1,000 per member on 23 February 2005. The members appealed and on 23 August 2005, this court increased the damages to $3,000 per member. This meant that the Company was liable to pay the members damages ranging from $14,685,000 (for 4,895 members in the suit) or about $48,000,000 (for all eligible members as at March 2001) or $52,122,000 (for 17,374 members who were the Scheme creditors) (see GD at [48]).

6 The Company was unable to pay the damages at any of these levels as it had insufficient funds. As at 31 December 2003, it had only $7.5 million in assets and cash reserves of $1.8 million. In July 2005, its assets (apart from the Club premises) were made up of cash reserves of $1 million, $7 million in receivables and $5.8 million paid into court. Thus, it was not surprising that even before the damages awarded by the High Court were increased on appeal on 23 August 2005, the Company had made preparations to introduce the Scheme pursuant to s 211 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Companies Act"). Essentially, the Scheme creditors were asked to accept payment of damages (*i.e*. $3,000 each) in kind, in the form of food and beverage vouchers for use in the Club, or cash instalments or reductions of transfer fees of membership of the Club, or alternatively, a combination of these options. On 31 August 2005, the Company obtained the approval of the court in OS No 1164 of 2005 to convene the Scheme creditors' meeting for the purpose of approving the Scheme.

7 The Raffles 5000 were dissatisfied with the Scheme and questioned the motives of the Company as they were aware that the Company had collected more than $500 million in entrance fees and also had an annual income stream of $20.4 million in subscription fees. They were surprised that the Company had no money to pay the damages and sought to appoint a special receiver and manager to examine the accounts of the Company. One of the matters that the Raffles 5000 wanted to look into was an item in the Company's unaudited accounts showing that $124,213,169.46 had been paid out as dividends. They wanted to know when and to whom the dividends were paid. They also wanted to know what had happened to the $53 million collected in subscriptions from March 2000 to September 2002 and the yearly subscriptions of $19 million thereafter. The application to appoint a special receiver and manager was dismissed by the High Court on 22 September 2005 (see *Re Raffles Town Club Pte Ltd* [2005] SGHC 178 (*"Re Raffles Town Club"*)). An appeal to this court was likewise dismissed. However, during the hearings in both courts, the Company gave assurances to the members that all their queries in relation to the Company's financial position would be addressed in an explanatory letter to be published later (*i.e*., the ES).

8 On 7 November 2005, the Company sent to each of the 17,374 Scheme creditors a copy of the 391-page ES. It is not disputed that the Respondents, being the sole shareholders and directors of the Company, caused the ES to be published and circulated to all the Scheme creditors. On

30 November 2005, 90% of the members, apparently satisfied with the Company's explanation of its financial position and explanations as set out in the ES, voted to approve the Scheme. On 6 January 2006, the Scheme was approved by the court. Unfortunately for the Respondents, the Appellant read the ES and found that the Extracts in the ES were defamatory of him as they called into question his competence and/or integrity in managing the Company prior to April 2001. He then commenced the present action against the Respondents for damages for defamation.

Alleged defamatory statements

9 The alleged defamatory words are contained in the Extracts which are found in various parts of the ES. It is not disputed that the Extracts referred to the Appellant as one of the persons involved in the management of the Company prior to April 2001. The first passage in the ES complained of ("Extract 1") was published under the section entitled "Background to Company's Current Financial Difficulties" (starting at page 15 of the ES). For convenience, the full text of the section is reproduced below. The words that the Appellant claimed were defamatory are highlighted (in italics):

> **1.4.4 Background to Company's Current Financial Difficulties**
>
> All the original promoters, directors, and shareholders of the Company have left. At the time the new shareholders assumed control, a substantial portion of the monies collected in entrance fees had already been spent. An explanation of some of the more sizable expenses follows.
>
> <u>High start up costs</u>
>
> The 30-year leasehold site at the junction of Dunearn Road and Whitley Road on which the Club is erected was leased from the URA at a high price of $108,140,542.00, which reflected the robustness of the economy pre-Asian Financial Crisis. The sum of $108,140,542.00 includes stamp duty, property tax as well as interest levied for late completion. The costs of constructing the Club added another $107,574,209.00 to the bill. *The unit cost of constructing the Club was $6,204.70 per square meter. Seah Choo Meng, a chartered quantity surveyor and Executive Chairman of Davis Langdon & Seah gave evidence of this number during the hearing before the Honourable Justice Belinda Ang in September 2004. He noted that this figure was the highest in his 37 years of experience*.
>
> Additionally, a sizeable portion of the entrance fees collected went towards pre-operating costs for the Club, which came up to $115,558,751.00. This included $79,535,510.00, the bulk of which were sales and marketing commissions paid to Europa Holdings Pte Ltd a company managed by former directors of the Company, Lawrence Ang Yee Lim, Dennis Foo Jong Long and William Tan Leong Ko. Sales and marketing commissions were paid to banks involved in the membership launches. Also included is the cost of processing the application forms received by members, which totalled $1,126,211.00. The Company believes that a bulk of the $1,126,211.00 was paid to Ms Chan Lay Hoon of JS Corporate Services and an Indonesian company, both engaged by Lim Eng Hock, Peter to assist in the processing of approximately 24,000 application forms. Ms Chan Lay Hoon was a director of the Company from July 1998 to April 2001.
>
> Other expenditure include directors' remuneration of $9,682,512.00 paid out between 1997 and March 2000, and staff and other payroll costs of $10,753,846.00. *Moreover, approximately $70 million has been paid out to the Company's former registered shareholders, namely Lawrence Ang Yee Lim, William Tan Leong Ko and Dennis Foo Jong Long by way of, inter alia, loans that were subsequently off set against dividends from the Company*.

Loss making Food & Beverage outlets

The income from the monthly subscription is used to subsidise the loss making Food & Beverage operations of the club. Generally, the Food & Beverage outlets in the club have been under-utilised. The usage levels of all the Food & Beverage outlets in the past 2 years (based on 1 seating per meal period on weekdays and 1.5 seating per meal period on weekends) are summarised below.

10 The second passage complained of ("Extract 2") begins at page 21 of the ES:

Litigation involving the Company and ex-shareholders of the Company

In 2001, the Company came under the public spotlight with several lawsuits involving its directors and shareholders.

(1) Suit No. 742 of 2000/F was a lawsuit where one Lim Eng Hock, Peter sued Lawrence Ang Yee Lim, William Tan Leong Ko and Dennis Foo Jong Long for the specific performance of an oral agreement whereby he stood to gain a 40% shareholding of the Company. It was Lim Eng Hock, Peter's case that in consideration of his assistance to Europa Holdings Pte Ltd and the Company (where the said defendants were majority shareholders) to raise the necessary financing, shares in the Company were promised to him. Peter Lim claimed to have been entitled to 40% of the total shareholding in the Company, and Dennis Foo was to become a 10.1% shareholder.

(*2*) *Suit No. 782 of 2000/C was an action brought by the Company against Lawrence Ang Yee Lim (a 75% shareholder of the Company) and Peter Lim (Third Party), for a sum in excess of $51m being advances made by the Company to Lawrence Ang Yee Lim from 13 April 1998 to 30 June 2000. Lawrence Ang Yee Lim's defence was that the shareholders had agreed to offset the loan against future dividends by the club and he joined Peter Lim as a third party, claiming that $26.6 million was given to him. This was denied*.

(3) Suit No. 905 of 2000/K was an action brought by the Company against William Tan (a 11% shareholder of the Company) for the sum of almost $6 million being advances made by the Company to William Tan.

(*4*) *Suit No. 1000 of 2000/M was an action commenced by Lawrence Ang Yee Lim and William Tan against Dennis Foo and Peter Lim, where it was alleged that the defendants wrongfully converted to their own use, certain bearer share certificates*.

11 The third passage complained of ("Extract 3") is in an Appendix (at page 190 of the ES):

Shareholders Equity

1.50 The components of Shareholders Equity [are] set out as follows:

a. Share capital

The authorised share capital of the Company is $20,000,000 divided into 20 million ordinary shares with a nominal value of $1 per share, of which 1,000,000 of the said ordinary shares have been issued and paid up.

b. Retained Earnings

This represents the accumulated profits of the Company since its inception.

c. *Dividends Paid*

Based on the Company's audited financial statements for the period 31 December 2001 to 31 December 2004 and the un-audited financial statements for the seven months ended 31 July 2005, the Company, since its inception, paid dividends to shareholders of $124,213,169.

d. Profit for the Year

This represents the current year profits for the period 1 January 2005 to 31 July 2005.

Conclusion

1.51 The financial position of the Company as at 31 July 2005 shows, inter alia that:

a. The Company's current cash balance is not sufficient to pay the potential damages claim of all Scheme Creditors (estimated at approximately $48 million before set off);

b. Management has confirmed that the Company has enquired with banks and other financial institutions as to the possibility of raising funds to pay the potential damages claim of all Scheme Creditors and the response from these banks and other financial institutions have not been favourable; and

c. Unless the issue of the Company's obligations to all Scheme Creditors is addressed, continuous use of the Club on the same terms and conditions presently enjoyed and the ability of the Company to meet its obligations may be adversely affected.

[italics and bold font in original removed]

12 The Appellant pleaded in his Statement of Claim that the natural and ordinary meaning of the passages complained of meant and were understood to mean in their proper context within the ES as a whole that:

a. [The Appellant] was party to the culpable mismanagement of [the Company] prior to April 2001 and primarily responsible (with others) for [the Company's], then serious financial difficulties and the need for an arrangement with creditors;

b. [The Appellant] negligently approved, condoned or otherwise failed to prevent [the Company from] paying an excessive or unreasonable construction cost for the Club;

c. [The Appellant] culpably or negligently approved, condoned or otherwise failed to prevent an improper preferment of Lawrence Ang, William Tan and Dennis Foo, whereby very substantial loans made to them (when they were directors of [the Company]) by [the Company] in the sum of $70 million were not repaid by them as they should have been but later set off against dividends and/or [the Appellant] culpably or negligently permitted, condoned or otherwise failed to prevent [the Company] from voting grossly excessive dividends to its own directors/shareholders, having particular regard to [the Company's] financial position;

d. [The Appellant] culpably or negligently approved, condoned or otherwise failed to prevent the payment of further grossly excessive dividends to shareholders (the dividends in their entirety

totalling $124 million), having particular regard to [the Company's] financial position; and there are strong, reasonable or some grounds for suspecting that some of this sum was received by [the Appellant];

e. There are strong, reasonable or some grounds for suspecting that [the Appellant] was himself given and fraudulently or improperly received $26.6 million of the loan made by [the Company] to Lawrence Ang (being over half of the loan which was in excess of $51 million) without declaring it and strong, reasonable or some grounds for suspecting that [the Appellant's] denial of receipt of this sum is a lie;

f. There are strong, reasonable or some grounds for suspecting that [the Appellant] wrongfully converted bearer share certificates in [the Company] to his own use.

13 Further or in the alternative, the Appellant pleaded that the passages that were complained of in the ES bore the above meanings by way of innuendo. The extrinsic facts relied on by the Appellant were the following (see GD at [74]):

(a) The press articles which have referred to [the Appellant] as a "shadow director" and "shareholder" of [the Company];

(b) The High Court judgment in suit No. 1441 of 2001 which was publicly reported and where it was stated that [the Appellant] was "one of the original shareholders" of [the Company];

(c) Shortly after the Scheme was announced, but before the distribution of the ES, the [1st Respondent] wrote on or about 7 September 2005 to members of the Club to seek support for the Scheme;

(d) On 12 September 2005, a letter was posted by the Raffles 5000 Committee on the website (www.Rafflesmembers.com.sg), which specifically complained of the lack of information as to when and to whom the total dividends of $124,213,169 had been paid. This letter would have been read by all or most of the participating members to whom it was addressed.

(e) Accordingly members of the Club reading the ES would have paid particular attention to the issue of dividends. The ES solely refers to dividends being voted to the former directors/shareholders with no reference to any payment of dividends to the [Respondents].

The decision below

14 In a 112-page factually well-analysed judgment, the trial judge ("the Judge") found that the passages in question bore some but not all of the defamatory meanings pleaded by the Appellant, both in their natural and ordinary meaning and by way of innuendo. The Judge made the following findings:

(a) that the crucial sting of the defamatory statements was that the Appellant (together with the other shareholders and directors, Ang and Tan) was primarily responsible for the financial plight of the Company (see GD at [130]);

(b) that when the Appellant left the Company, it had a strong financial position with current assets of $206 million in April 2001 due to his prudent management of the finances of the Company, but that after the Respondents became owners of the Company, they "unabashedly and systematically bled the Company dry", and "systematically stripped the valuable assets of

the Company to the bone", by a series of actions, such as: (i) abandoning the DA Policy so as to declare dividends to Ang and Tan as part of the consideration for their own purchase of the Company; (ii) declaring as much dividends as they could to benefit themselves; and (iii) entering into questionable transactions, which, together, reduced the cash position of the Company to a very low level (see GD at [15], [22], [43]– [44] and [101]);

(c) that they had systematically drained the Company of current assets during before and after the commencement of Suit No 1441 of 2001, and even after this court had assessed damages at $3,000 per member. As at 31 December 2003, the Company was left with $7.5 million in assets and cash reserves of about $1.8 million (see GD at [38]– [39]);

(d) that they had camouflaged their involvement in depleting the Company of its current assets after April 2001 by telling the Scheme creditors half-truths and omitting material information from the ES, and they had a personal agenda to suppress important information in relation to what they had themselves done (see GD at [186] and [200]).

15 In relation to Extract 1, the Judge found that it carried the following defamatory meanings:

(a) The Appellant was party to the culpable mismanagement of the Company prior to April 2001 and was primarily responsible (with others) for the Company's then serious financial difficulties and the need for an arrangement with creditors.

(b) The Appellant negligently approved, condoned or otherwise failed to prevent the Company from paying an excessive or unreasonable construction cost for the Club.

(c) The Appellant culpably or negligently approved, condoned or otherwise failed to prevent an improper preferment of Ang, Tan and Foo, whereby very substantial loans made to them (when they were directors of the Company) by the Company in the sum of $70 million were not repaid by them as they should have been but later set off against dividends and/or the Appellant culpably or negligently permitted, condoned or otherwise failed to prevent the Company from approving the payment of grossly excessive dividends to the shareholders (who were also directors), having particular regard to the Company's financial position.

16 The Judge held that Extract 2 was not defamatory, but held that Extract 3 was defamatory of the Appellant in that the offending words meant that:

(a) the Appellant was party to the culpable mismanagement of the Company prior to April 2001 and primarily responsible (with others) for the Company's then serious financial difficulties and the need for an arrangement with creditors;

(b) the Appellant culpably or negligently approved, condoned or otherwise failed to prevent the payment of further grossly excessive dividends to shareholders (the dividends in their entirety totalling $124 million), having particular regard to the Company's financial position; and there were strong, reasonable or some grounds for suspecting that some of this sum was received by the Appellant.

17 The Judge also rejected the Respondents' defences based on justification and absolute privilege.

18 However, the Judge accepted the Respondents' defence based on qualified privilege. He held that the publication of the ES was made on an occasion of qualified privilege in that (a) the Company

and the Scheme creditors shared a common or mutual interest in the subject matter and/or (b) that the Company published the ES in discharge of its legal duty pursuant to s 211 of the Companies Act. Section 211 of the Companies Act reads as follows:

> **211**. —(1) Where a meeting is summoned under section 210, there shall —
>
> (a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining *the effect of the compromise or arrangement* and in particular stating *any material interests of the directors*, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons; and
>
> (b) in every notice summoning the meeting which is given by advertisement, be included either such a statement or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.
>
> [emphasis added]

19 The Judge dismissed the Appellant's argument that the issues discussed in the ES, in particular those impugned by the Appellant, were not protected by qualified privilege because they were extraneous and irrelevant to explain the effect of the Scheme. The Judge held that, at best, it could only be said that these matters were in excess of the Respondents' prescribed duty under s 211 of the Companies Act (GD at [180]), but that was not sufficient to take the publication out of the cover of qualified privilege. After reviewing the English and Australian authorities (and in particular, *Bashford v Information Australia (Newsletters) Pty Ltd* [2001] NSWCA 47 at [43]) the Judge said, at [179] of the GD:

> I think that a middle ground can be found: *first*, there is a distinction between *irrelevance* and *excess* or *exaggeration* (*Gatley on Libel and Slander*, at para 14.62) and *second*, it is a question of *fact* and *degree* in each case where privilege is raised as a defence, as to which parts are *fairly* and *reasonably connected* to the matters occasioning the privilege and thus given consequential protection, and which parts are not so connected such that they cannot enjoy the protection of qualified privilege. Where the issue is not of irrelevance but simply of *excess* or *exaggeration* and the statement still has reference to the subject-matter of the privilege, or is in any way pertinent or germane to it, it is material only as evidence of malice and *not* to the question of privilege. [emphasis in original]

20 The Judge accordingly found that the publishing of the Extracts was fairly connected to the Scheme and therefore within the scope of the Respondents' legal duty to provide information on the effect of the Scheme, and that any excessive publication would go towards proving malice, and not towards disproving the occasion as one of qualified privilege. The Judge was of the view that this was a logical approach and, in support, he relied on Lord Diplock's judgment in *Horrocks v Lowe* [1975] AC 135 ("*Horrocks v Lowe*") at 151, as follows:

> … Logically it might be said that … matter [which is irrelevant] falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost

in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam* v. *Ward* … the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. …

The Judge's finding that the Appellant had not proved malice

21 The Appellant had also pleaded that even if the publication of the ES was made on an occasion of qualified privilege, the Respondents were not entitled to the protection of the privilege as they were actuated with malice in publishing the ES, in that they knew that the offending statements were false and that the offending statements in the Extracts were in excess of their legal duty under s 211 of the Companies Act. The Judge rejected this argument on the ground that their predominant motive was not to injure the Appellant but to persuade the Scheme creditors to approve the Scheme. The Judge gave the following reasons for his conclusion:

(a) "In proving malice, *mere proof that the words are false was insufficient*. Instead, the courts would look into the motive with which the statements were made."[emphasis added, original emphasis removed] (see GD at [181], citing Lord Diplock's judgment in *Horrocks v Lowe* at 149–150 (reproduced at [36] *infra*)).

(b) "Motive rather than honesty of belief was the essential indicator of the existence of express malice" (citing *Hytech Builders Pte Ltd v Goh Teng Poh Karen* [2008] 3 SLR 236 ("*Hytech*") at [36]), and the desire to injure must be the dominant motive for the publication of the statements. Where the improper motive was to advance or protect their own interest, then the Respondents would be able to claim the protection of the privilege (at GD [182]– [183], citing *Yeo Nai Meng v Ei-Nets Ltd* [2004] 1 SLR 73 ("*Yeo Nai Meng*"); at [184], citing *Tan Chor Chuan v Tan Yeow Hiang Kenneth* [2006] 1 SLR 16 ("*Tan Chor Chuan*")).

(c) Malice must be a causative factor leading to the publication and the threshold of proving malice is high (GD at [186], citing Tay Yong Kwang J in *Oei Hong Leong v Ban Song Long David* [2005] 1 SLR 277) and that the court should be slow to draw such an inference (GD at [187], citing Yong Pung How CJ in *Maidstone Pte Ltd v Takenaka Corp* [1992] 1 SLR 772). The Respondents were not actuated by malice in publishing the ES as it had been prepared with the help of independent financial advisers, and for the court to make such a finding would mean that these professional advisers had conspired with the Respondents to "maliciously injure the reputation of the [Appellant]" (GD at [188]).

(d) The publication of the extraneous matters in the ES did not go beyond stating what was reasonably necessary in the ES and did not show any malice on the part of the Respondents (GD at [190]). The Respondents published the ES to fulfil their obligation to provide as much information as possible to the Scheme creditors in order to address their concerns about where the Club's funds had gone to, and why the Company could not pay the damages. Because of pressure from the Raffles 5000, the Respondents had no choice but to make the disclosures in the ES (GD at [191]) which had taken on a *wider* purpose (GD at [193]).

(e) The Respondents could not afford to take the risk of disclosing their role in depleting the Company of its assets and cash reserves as the Scheme creditors might not approve the Scheme if they were told the whole truth. "[T]he predominant motive in their conduct was to ensure the success of the Scheme and not so much as to injure the reputation of the [Appellant]" (GD at [195]). "Being economical with the truth is insufficient evidence of express malice on the facts of this case."(GD at [196]). "From the totality of the evidence, [there was insufficient] evidence to… infer express malice in this case on a balance of probability" (GD at [201]).

(f) The Appellant's counsel had conceded that the predominant motive of the Respondents was not to injure the Appellant in submitting that one of the *real and collateral* purposes the Respondents had in publishing the ES was to convince as many Scheme creditors as possible to accept the Scheme by misleading them as to their role in the financial plight of the Company and in deflecting the blame on to the Appellant (GD at [198]).

(g) The Respondents did not set out with the intention to injure or defame the Appellant in the ES. They did not know the Appellant personally and had no reason to be spiteful or vindictive in relation to him (GD at [199]). No predominant motive could be discerned from the conduct of the Respondents to injure or defame the Appellant by publishing the ES. Their predominant motive for their action (in camouflaging their involvement in depleting the funds of the Company) was therefore to influence the Scheme creditors and win their support for the Scheme and not to deliberately and maliciously injure the reputation of the Appellant (GD at [200]).

22 The Judge summarised his finding that the Respondents were not actuated by malice in these words, at [204] of the GD:

> … In all the circumstances of the case, it is my view that the predominant motive of the defendants in sending out the ES was to fulfil their legal duty under s 211 of the Act as well as allay the concerns of the Scheme creditors and not to injure the plaintiff's reputation. While the defendants may have concealed the role they played in causing the Company to land in dire financial straits to make it easier for them to persuade the Scheme creditors to approve the Scheme, I would not go so far as to say that it was their dominant motive to smear and damage the plaintiff's reputation. Therefore, the plaintiffs have not made out their case that the defendants were actuated by express malice in publishing the statements. The relatively high threshold for proving express malice on the part of the defendants has not been satisfied by the plaintiff. It has not been shown on a balance of probability that the defendants' desire to use the ES for its proper purpose played no significant part in his motives and that his dominant purpose was to injure the plaintiff's reputation by way of the statements complained (*ie*, **Extracts 1 and 3**) of in the ES, the publication of which was a legal requirement under statute before seeking the necessary approvals from the Scheme creditors and the court for the Scheme.

23 In relation to costs of the proceedings, the Judge awarded costs to the Respondents. However, in relation to the costs in relation to the plea of justification (which was unsuccessful), the Judge did not award costs to the Appellant but ordered him to pay the Respondents' photocopying expenses. The Appellant appealed against the Judge's decision on liability as well as costs.

The Appellant's case on appeal

24 The Appellant's appeal against the Judge's decision dismissing his claim is based on two main grounds as follows:

(a) that since the Judge found that the Respondents had acted in excess of their prescribed

duty under s 211 of the Companies Act, it must follow that they were not entitled to rely on the defence of qualified privilege; and

(b) that the Judge erred in his formulation and application of the test of malice to the relevant findings of fact in focusing solely on whether there was proof of a dominant motive to injure or defame the Appellant. In so doing, the Judge had failed entirely to consider that malice could be proved in other forms, in the present instance, by showing knowledge or recklessness as to the falsity of the statements or abuse of the occasion by the pursuit of some private advantage unconnected with the duty or interest.

The Respondents' case on appeal

25 The Respondents naturally disagreed with the Appellant's arguments. Before us, they had wanted to put forward a new ground in support of the dismissal of the Appellant's claim. The new ground was that, contrary to the Judge's decision, the relevant Extracts were not defamatory of the Appellant, even though they had not appealed against the Judge's decision on this issue. They argued that they were entitled to do so under O 57 r 9A(5) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) as interpreted by this court in *Siti v Lee Kay Li* [1996] 3 SLR 310 ("*Siti*"). We rejected the argument, and we now explain why we did so before we address the other issues.

Decision of the court

Order 57 Rule 9A(5)

26 Order 57 r 9A(5) provides as follows:

> A respondent who, not having appealed from the *decision* of the Court below, desires to contend on the appeal that the *decision* of that Court should be varied in the event of an appeal being allowed in whole or in part, or that the *decision* of that Court should be affirmed on grounds other than those relied upon by that Court, must state so in his Case, specifying the grounds of that contention. [emphasis added]

What is the *decision* of the court contemplated by this rule? Given that the rule refers to varying and/or affirming a decision of the court, the word "decision" implies that it is a finding of law or fact that can be varied or affirmed and that the party seeking to do it has a material or substantial reason for doing so. The purpose of the rule is to allow a successful respondent to support the court's decision in his favour, by varying or affirming it, on a ground which the court had not relied on.

27 In the present case, the Judge had made the following decisions: (a) the relevant Extracts were defamatory of the Appellant; (b) they were published on an occasion of qualified privilege and so the Respondents were protected by the privilege; and (c) the Appellant had failed to prove that the Respondents were actuated by malice and therefore the defence of qualified privilege succeeded, and therefore the claim had to be dismissed. The dismissal of the Appellant's claim was not a separate and independent decision as it was merely a consequence of the Judge's finding that there was no malice.

28 Applying our analysis of the rationale of the rule to each of the decisions of the Judge, we concluded that the *decision* could not be decision (a) because the Respondents would not want to affirm that the relevant Extracts were defamatory of the Appellant. The word "vary" was not apt to apply to the Respondents' intention which was to reverse the decision and not to vary it. Also, the *decision* could not be decision (b) because the ground that the Respondents relied on had nothing to do with that decision. The same reasoning applied to decision (c) – the Respondents' additional

ground (that the relevant Extracts were not defamatory) had nothing to do with decision (c) which was that there was no evidence that the Respondents had been actuated by malice. Furthermore, the additional ground would not have the effect of affirming decisions (b) and (c): its effect would simply have made both decisions irrelevant or redundant. Hence, the Respondents' additional ground could not be relied on to vary or affirm any of the Judge's three decisions.

29 We must explain why we did not follow *Siti* although the decision appears, on the face of it, to support the Respondents' argument. In that case, the appellant purchasers agreed to purchase a flat from the respondent vendor with completion scheduled on 14 September 1995. Because of a dispute between the parties, completion did not take place on the stipulated date. On 15 September 1995, solicitors for both parties issued 21-day notices pursuant to condition 29(2) of the Law Society's Conditions of Sale 1994. On 18 September 1995, the purchasers issued another 21 days' notice. On 7 October 1995, the vendor terminated the agreement and sought to forfeit the deposit. The High Court held that all the 21-day notices were invalid as both parties had failed to discharge their respective obligations.

30 Dissatisfied with the High Court's decision, the purchasers appealed. The vendor then sought to argue that his notice to complete was valid on the ground that he was ready, able and willing to complete on 15 September 1995. The purchasers objected to this argument as the vendor did not file an appeal against the court's finding that his notice was invalid and he could not be allowed to argue that the finding was wrong. The Court of Appeal held that O 57 r 9A(5) was applicable and allowed the vendor to raise the argument. The court said, at 315, [18]:

> His contention that the notice to complete given by the vendor was valid is being relied upon as an additional ground in support of the decision below. It is true that if this argument is accepted, it follows that the learned judge's decision that the vendor's 21 days' notice was invalid was wrong. But the vendor is not asking for the order made by the learned judge to be set aside or varied; he is quite content to accept the order. In our judgment, the vendor is entitled to put forward as his case the proposition that his 21 days' notice was valid and to rely on it as an additional ground on which he asks that the judgment below be affirmed.

31 It is clear from this passage that the decision the court had in mind was not the decision that the sale became aborted as a result of both notices being invalid, but that, as a consequence, the purchaser was entitled to the return of the deposit. Therefore, even if the court were to accept the argument that the vendor's notice was valid, it would have made no difference to the "decision" that the deposit be returned to the appellant *because the vendor* was not seeking to forfeit the deposit, but only to have the judgment affirmed. But, as a matter of law, if the vendor's notice had been valid, the purchasers would have repudiated the purchase, with the consequence that the deposit would have been forfeited to the vendor. In truth, counsel for the respondent vendor was not seeking to affirm the judgment of the court, but to reverse it, *but* with the intention of not enforcing the judgment. Counsel might have his reasons for adopting that course of action, but it seemed to us that the court in that instance wasted its time in indulging counsel. The court eventually rejected counsel's argument based on this ground. In our view, the decision in *Siti* should be confined to its own peculiar facts.

32 We would like to complete our discussion on this point by stating that, in any case, we would have rejected the Respondents' additional ground if we had allowed him to argue it. In our view, the Judge's analysis of the natural and ordinary meanings and also innuendo meanings of the relevant Extracts could not be faulted.

Was the publication of the relevant Extracts in excess of the Respondents' legal duty under

s 211 of the Companies Act?

33 Before us, the Appellant argued that the Respondents did not have any duty to publish matters beyond that of explaining the effects of the Scheme, and that, correspondingly, the Scheme creditors did not have any interest in receiving it. Counsel for the Appellant referred to the speeches of Lord Finlay LC (at 318), Earl Loreburn (at 320–321), Lord Dunedin (at 327) and Lord Shaw of Dunfermline (at 348) in *Adam v Ward* [1917] AC 309 ("*Adam v Ward*") in support of his argument that privilege does not extend to matters wholly irrelevant and unconnected with the discharge of the prescribed duty. It is not necessary for us to consider these passages, as in our view they were made in the context of a case where (as pointed out by Earl Loreburn at 321) "there [was] no occasion for his publishing it to the persons to whom he in fact publish[ed] it".

34 We agree with the Judge's decision on this issue. In our view, the legal position is neatly summarised in *Halsbury's Laws of Singapore* vol 18 (LexisNexis, 2004 Reissue) at para 240.155 as follows:

> The defence of qualified privilege attaches to the occasion on which the words are published, rather than to the words themselves. It would be contrary to the purposes for which qualified privilege exists if the law applied an objective test of relevance to every part of the defamatory matter, as a precondition to the existence of the privilege. Words wholly unconnected with and irrelevant to the occasion may not be privileged; but generally, irrelevant and unnecessary words having some relation to the occasion will be within the privilege but will constitute evidence of express malice.

Did the Judge err in finding that there was no malice?

35 The Appellant's case is that the Judge erred in his formulation of malice by his excessive pre-occupation with whether the Respondents had the "desire to injure" the Appellant and in regarding the dominant intention or motive to do so as the only proof of malice that could defeat the protection of qualified privilege. Counsel for the Appellant argued that the Judge had failed to give due weight to other portions of Lord Diplock's judgment in *Horrocks v Lowe* where His Lordship referred to other instances when malice could be proved, at 149–150:

> (a) the protection of qualified privilege is lost if the occasion giving rise to the privilege is misused;
>
> (b) if the defendant did not believe that what was published was true, this was generally conclusive evidence of express malice;
>
> (c) if the defendant's dominant motive is to obtain some private advantage unconnected with the duty or interest which constitutes the reason for the privilege, it is an improper motive which would destroy the privilege.

36 For convenience, we set out below the relevant passages from Lord Diplock's judgment at 149–150:

> … *It* [*ie*, the privilege] *is lost if the occasion which gives rise to it is misused*. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit—the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. *If he uses the occasion for some other reason*

he loses the protection of the privilege.

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. *'Express malice'* is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove*. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests*.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. *If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate or injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person*.

…

Even a positive belief in the truth of what is published on a privileged occasion—which is presumed unless the contrary is proved—may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames. If this be proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled*. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true*.

[emphasis added]

37 We agree with counsel for the Appellant that these passages support his case on express malice. With respect to the Judge, he has misunderstood the substance of Lord Diplock's speech by focusing solely or predominantly on Lord Diplock's statement that "to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication ... in bona fide protection of his own legitimate interests", and interpreting them to mean that the privilege could be destroyed only in that way. As such, the Judge made two errors of law arising firstly, from failing to read those words in context and, secondly, from not giving any meaning or weight to the other passages.

3 8 *Apropos* the first error, Lord Diplock's statement was made in the context of the defendant having a genuine or honest belief in the truth of what was published on an occasion of qualified privilege. It is only in this context that the question of whether there was a dominant motive to injure the plaintiff becomes relevant. The dominant motive test has no relevance if the defendant has no

honest belief in the truth of what he is publishing. The fact that the defendant did not have a dominant motive of injuring the plaintiff did not necessarily mean that the publication of the defamatory statements was not made with malice. The word "malice" is used in a special sense in the law of defamation. If a defendant knows that what he is publishing is false, there is express malice in law. In the other parts of his speech, Lord Diplock referred to other instances of improper motives which would destroy the privilege, such as personal spite or the abuse of the occasion to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. In such instances, the defendant would lose the benefit of the privilege *despite his positive belief that what he said or wrote was true*. Where the defendant had no belief that what he published was true or, worse, if he knew that what he published was untrue (as in the present case), it would have been an *a fortiori* case that the protection of the privilege would have been lost.

39 In relation to the concept of a dominant intention to injure the plaintiff as proof of malice, it is salutary to note the observation of Eady J in *Lillie v Newcastle City Council* [2002] EWHC 1600 (QB). There, he said, at [1091]:

> I am not aware of any example of malice having been found (in a case where the judge or jury concluded that the relevant defendant was honest) simply on the basis that the dominant motive was to injure the claimant. It is, in the light of Lord Diplock's speech, at any rate a theoretical possibility.

In other words, Eady J had not encountered such a case in his long experience as counsel and judge in dealing with defamation cases. Eady J's observation is consistent with the experience in Singapore concerning cases involving qualified privilege. In each of the three local decisions referred to by the Judge, *viz*., *Hytech*, *Yeo Nai Meng* and *Tan Chor Chuan*, the defendant had an honest belief in the truth of the statements he published and, in each case, the court held that the defendant did not have a dominant motive to injure the plaintiff. However, in contrast, the present case is unusual because the Judge found that the Respondents had opposing motives. On the one hand, they wanted to secure the approval of the Scheme creditors to the Scheme but, on the other hand, they chose not to disclose the whole truth to the latter on how and why the Company came to be financially distressed as they might not then approve the Scheme. Under s 211 of the Companies Act, the Company had a duty to explain "the effect of the … arrangement and in particular stating any material interests of the directors". The Company had no difficulty in explaining the effect of the Scheme, but the Respondents, in concealing their past actions in taking out all the cash assets of the Company in the form of dividends in order to, *inter alia*, avoid paying the damages payable to the Scheme creditors, were in breach of their duty to state the material interests of the Respondents in the Scheme as shareholders of the Company. They had deliberately caused the Company not to make full and frank disclosure to the Scheme creditors so as to obtain their un-informed consent to the Scheme.

40 The law on these issues has been stated in clearer terms in the joint judgment of Gaudron, McHugh and Gummow JJ in *Roberts v Bass* 212 CLR 1, a decision of the High Court of Australia, at [75]– [77] and [98]:

> 75 An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion and actuates the making of the statement is called express malice. The term "express malice" is used in contrast to presumed or implied malice that at common law arises on proof of a false and defamatory statement. Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice (malice) is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the

plaintiff. …

76 Improper motive in making the defamatory statement must not be confused with the defendant's ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice or any other motive than duty or interest for making the publication. If one of these matters is proved, it usually provides a premise for inferring that the defendant was actuated by an improper motive in making the publication. Indeed, proof that the defendant knew that a defamatory statement made on an occasion of qualified privilege was untrue is ordinarily conclusive evidence that the publication was actuated by an improper motive. … Even knowledge or a belief that the defamatory statement was false will not destroy the privilege, if the defendant was under a legal duty to make the communication. In such cases, the truth of the defamation is not a matter that concerns the defendant, and provides no ground for inferring that the publication was actuated by an improper motive. Thus, a police officer who is bound to report statements concerning other officers to a superior will not lose the protection of the privilege even though she knows or believes the statement is false and defamatory unless the officer falsified the information. Conversely, even if the defendant believes that the defamatory statement is true, malice will be established by proof that the publication was actuated by a motive foreign to the privileged occasion. That is because qualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication.

77 If the defendant knew that the statement was untrue when he or she made it, it is almost invariably conclusive evidence of malice. That is because a defendant who knowingly publishes false and defamatory material almost certainly has some improper motive for doing so, despite the inability of the plaintiff to identify the motive. …

…

98 When the plaintiff proves that the defendant knew the defamatory matter was false or was reckless to the point of wilful blindness, it will constitute almost conclusive proof that the publication was actuated by malice. A deliberate defamatory falsehood "could not have been for a purpose warranted by any privilege; and hence it is unnecessary to determine what the exact purpose was in order to ascertain whether the privilege has been lost for the particular defamatory statement which has been proved to be wilfully false". When the plaintiff can only prove that the defendant lacked a belief in the truth of the defamatory material, however, it will be no more than evidence that may give rise with other evidence to an inference that the publication was actuated by malice.

41 Consistent with the value of reputation in society, it is not surprising that the law does not countenance a defendant deliberately publishing a defamatory statement by affording him the protection of qualified privilege. The rationale underpinning the privilege is that because the defendant has a moral, social or legal duty to disclose the information and the recipient has an interest in receiving it, he should not be penalised for making an honest mistake. This will be the case where the defendant publishes statements which he genuinely believes to be true and accurate. He cannot claim the protection of privilege, whatever his dominant intention or motive may be, if he knows that what he has written or said was untrue. As Lord Diplock said (see [36] above):

… for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate or injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

The present case does not fall within the exception because the Respondents' duty was not confined to conveying information to others without endorsing the truth or otherwise of such information. In the present case, they caused the misleading and defamatory statements to be inserted in the ES in order to persuade the Scheme creditors to approve the Scheme.

42 In this connection, we do not agree with the Judge's finding that the Respondents had no choice but to publish the ES in the form that they did. At [191] of the GD, the Judge said:

> From the totality of the evidence, I am of the view that in publishing the ES, there is no denying that the defendants had several motives. They wanted to fulfil their obligation to provide as much information as possible to the Scheme creditors. They also wanted to address some of the concerns of the Scheme creditors (see [111] above). It must also be remembered once again that the Raffles5000 had questioned the Company's motives behind the Scheme and their lawyers had applied to the court to suspend any approval of the Scheme and they wanted an appointment of a special receiver and manager to look into the Company's accounts. They wanted to know more about what had happened to the monies collected from the entrance fees and not so much the "effects of the Scheme" and the mechanics of the Scheme, which I think was not really their concern. They wanted to know how the Company ended up in this sorry financial state where a Scheme was now needed. They wanted the Company to show cause why it could not pay the damages. All of these have to be addressed by the defendants in the ES. I would have thought that if there was no pressure from the members to explain how the Company's finances ended up this way, the defendants would rather not disclose anything in the ES on how monies were spent but simply explain neutrally the "effects of the Scheme" and how the Scheme works. *The defendants had no choice but to make the disclosure in the ES under the "Background to [the] Company's* ***Current*** *Financial Difficulties"*. Due to the unique situation that the defendants and the Company were faced with here, the ES was thus appropriately not limited merely to explaining the effects of the Scheme.
>
> [emphasis in original in bold and underlining, emphasis added in italics]

43 This passage is concerned with the question of whether the Respondents acted in breach of s 211 of the Companies Act by providing an explanation going beyond the effects of the Scheme. The Judge held that they had no alternative but to do so. The truth of the matter was that the Respondents had a choice. They chose to be economical with the truth, instead of being candid with it. They told half-truths to put the blame on the Appellant for the financial plight of the Company. The Scheme was simply a convenient means to cover up their past actions in extracting as much cash out of the Company as they effectively could as proprietors of the Club. Having undertaken to Kan Ting Chiu J in *Re Raffles Town Club*, and also to this court that they would explain to the Scheme creditors what they wanted to know, *viz*., as succinctly put by the Judge at [111] of the GD, "*[H]ow did the $515m collected as entrance fees end up as a meagre balance of only $13.6m as stated in the unaudited pro forma balance sheet*?" [emphasis added], the Respondents failed to do so. Instead, they sought to put the blame on the Appellant for the disappearance of the Company's funds when they themselves bore responsibility for it. They deliberately omitted the equally material aspects of the Company's financial history from April 2001 to November 2005 after they had taken over the ownership and management of the Company. By such omission, the Respondents gave the impression that they themselves were victims of the incompetence, negligence or profligacy of the previous management. In our view, the Judge was overly generous in excusing the Respondents for misleading the Scheme creditors, and in the process defamed the Appellant.

44 The second error made by the Judge was in holding that qualified privilege could only be destroyed by a dominant motive to injure the defendant. Lord Diplock stated explicitly that, *inter alia*,

the privilege was also lost if the occasion (giving rise to the privilege) was used for an improper purpose. The present case is one such instance. The Respondents' improper purpose was to conceal their past actions in causing the financial plight of the Company. They did not want to risk having the Scheme rejected if the Scheme creditors were told of their own actions. They thereby obtained a private advantage for themselves. As a matter of fact, in our view, the Judge did not go far enough in analysing the likely consequences if the Scheme creditors had been told the truth. They might well have rejected the Scheme and demanded payment of the damages in cash, failing which they might have served a statutory notice on the Company to pay the judgment debt. The Respondents would then have to put the Company in funds by borrowing from financial institutions to prevent it from being wound up, or risk having the Company's premises seized by the Scheme creditors or the Company placed in receivership. Either event might result in the sale of the premises to pay the judgment debt or even the conversion of the Club into a members' club. The Respondents have cleverly averted those risks by getting the Scheme creditors to accept the Scheme. Their motive was certainly commercially driven, but nevertheless the means to do it was anything but proper *vis-à-vis* the Appellant. They were, as stated in *Gatley on Libel & Slander* (Patrick Milmo & W V H Rogers eds) (Sweet & Maxwell, 11th edition, 2008) at para 17.8, "acting solely to further [their] own interests in a manner not allowed by the privilege and without thought of harm to the [Appellant]". The Respondents could not have discharged their statutory duty by telling deliberate half-truths to mislead the Scheme creditors and also to the court in approving the Scheme. They had used the occasion for an improper purpose *vis-à-vis* the Appellant, and thereby lost the protection of qualified privilege.

45 We should conclude with some comments on the approach of the Judge in holding that the Respondents' dominant motive was to make sure that the Scheme would be accepted by the Scheme creditors. At [195] of the GD, the Judge also said:

> … I find that the predominant motive in their conduct was to ensure the success of the Scheme and not so much as to injure the reputation of the [Appellant]. While the [Respondents'] main intention and dominant motive might have been to mislead the investors into accepting the Scheme by highlighting only the role of the [Appellant] and the former shareholders and directors on the one hand and by suppressing on the other hand their own role in depleting the Company's funds, it was nevertheless *not* the [Respondents'] dominant motive to defame the [Appellant]. [emphasis in original]

46 But, with respect, this finding was to be expected as the Respondents would not have proposed the Scheme if they had not intended to ensure its success. Every material fact contained in or omitted from the ES was calculated to achieve that result. It is difficult to fault the Judge for taking a realistic view of the situation given that, as we have mentioned earlier, the Scheme was primarily to achieve the commercial objective of retaining ownership of the Club by the Respondents without having to pay out any cash from their pockets. It was an exercise in commercial survival at the lowest possible cost to the Respondents. The Judge's finding of the dominant motive of the Respondents (to ensure the success of the Scheme) was a rational and realistic finding. However, it was wrong in law as the publication was actuated by malice on the part of the Respondents. The Judge's focus on the intention of the Respondents to ensure the success of the Scheme has missed the important point that the Respondents had breached their duty under s 211 of the Companies Act to obtain the informed consent of the Scheme creditors. They were deliberately economical with the truth in the way they had worded the Extracts which, apart from misleading the Scheme creditors, also had the consequence of defaming the Appellant. The actions or omissions of the Respondents were double-edged. They were two sides of the same coin. In this sense, although the Respondents' dominant motive in publishing the defamatory Extracts was to ensure the success of the Scheme, they acted with express malice in publishing statements concerning the Appellant which they knew

were untrue and were later proven to be defamatory of the Appellant.

Civil Appeal No 38 of 2009

47 Having regard to our decision on Civil Appeal No 25 of 2009, this appeal is automatically allowed.

Conclusion

48 For the reasons given above, we allow the appeals in Civil Appeal No 25 of 2009 and Civil Appeal No 38 of 2009 and set aside the Judge's decision. There will be judgment for the Appellant for damages and costs. In view of the circumstances of this case, and in particular the conduct of the Respondents in these proceedings, we award damages on an aggravated basis (as claimed by the Appellant). As for costs, we are also of the view that the Appellant should have his costs here on the standard basis and costs below on an indemnity basis, with the usual consequential orders, since this is a clear case where the qualified privilege was lost for the reasons we have given. This court will assess the aggravated damages unless oral evidence is required to be led. Parties are to notify the Registrar within 7 days from the date hereof to give their suggestions on the appropriate directions to be given by this court to proceed with the assessment.