Jeyasegaram David (alias David Gerald Jeyasegaram) v Ban Song Long David [2005] SGCA 18

Case Number : CA 96/2004

Decision Date : 04 April 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Steven Chong SC, Lee Eng Beng and Chan Hoe (Rajah and Tann) for the appellant; Davinder Singh SC, Adrian Tan and Chelsia Wong (Drew and Napier) for the respondent

Parties : Jeyasegaram David (alias David Gerald Jeyasegaram) — Ban Song Long David

Tort – Defamation – Defamatory statements – Respondent accusing appellant of "playing to the gallery" – Whether statement defamatory in natural and ordinary meaning – Test for determining natural and ordinary meaning of words

Tort – Defamation – Fair comment – Respondent accusing appellant of "playing to the gallery" – Whether respondent's statement comment or assertion of fact – Test for determining whether statement comment or assertion of fact – Whether sufficient factual basis for respondent's statement – Whether fair-minded person could honestly make same comment on facts

Tort – Defamation – Justification – Respondent accusing appellant of "playing to the gallery" – Whether respondent entitled to rely on all relevant facts to justify statement – Whether defence of justification made out

Tort – Defamation – Malice – Respondent accusing appellant of "playing to the gallery" – Whether respondent actuated by malice in making statement

Tort – Defamation – Qualified privilege – Appellant attacking respondent's character and conduct publicly – Whether respondent entitled to respond by making allegedly defamatory statement

4 April 2005

Yong Pung How CJ (delivering the judgment of the court):

1 This was an appeal against the decision of Tay Yong Kwang J, who dismissed the appellant's defamation suit against the respondent (see *Jeyasegaram David v Ban Song Long David* [2005] 1 SLR 1). The appellant had commenced his action after the respondent accused him of "playing to the gallery" in a newspaper article on the much-publicised NatSteel takeover battle. We agreed with the judge below that the appellant's action could not be sustained and dismissed the appeal accordingly. We now give our reasons.

Background facts

2 The appellant is the president and chief executive officer of the Securities Investors Association (Singapore) ("SIAS"), an association formed to protect investor rights and promote corporate governance in Singapore. The respondent is a shareholder and director of 98 Holdings Pte Ltd ("98 Holdings").

3 In early October 2002, 98 Holdings launched a takeover bid for NatSteel, a Singapore-incorporated company listed on the Singapore Exchange ("SGX"). Soon after 98 Holdings announced its bid for all NatSteel shares at $1.93 a share, Sanion Pte Ltd ("Sanion"), a company controlled by prominent businessman Oei Hong Leong, began actively acquiring NatSteel shares as well. As 98 Holdings and Sanion jostled for control of NatSteel, the former was forced to increase its offer

price four times (to $2.06) and extend the closing date of its offer an unprecedented six times. 98 Holdings finally emerged as the winner of the face-off when it managed to acquire 51.23% of the total shares by the final closing date of its offer. On its part, Sanion acquired a total of 29.99% of the shares, making it NatSteel's largest minority shareholder.

4 Four nominees of 98 Holdings, including the respondent, were appointed to NatSteel's board of directors. On 16 March 2003, the board announced its decision to recommend a total dividend payment of $1.00 per share, comprising a final dividend of $0.55 per share for 2002 and an interim payment of $0.45 per share for 2003. A circular to shareholders was subsequently issued to convene an extraordinary general meeting ("EGM") on 28 May 2003 for the purpose of passing a number of resolutions, both ordinary and special. The following proposed resolutions were relevant to this appeal:

(a) Special Resolution 1: Approval for amendments to the memorandum and articles of association ("the M&A resolution") to provide for the payment of future dividends in scrip instead of cash, *subject to and contingent upon the passing of Ordinary Resolution 3* (see sub-para (b) below) *and another resolution relating to financial assistance*;

(b) Ordinary Resolution 3: The payment of a special dividend of $0.55 per share ("the Special Dividend resolution"), *subject to and contingent upon the passing of the M&A resolution and the resolution relating to financial assistance*; and

(c) Ordinary Resolution 4: Approval of a scrip dividend scheme under which shareholders may elect to receive future dividends in scrip instead of cash ("the Scrip Dividend resolution"), *contingent upon the passing of the M&A resolution*.

5 The linkage of the resolutions caused a maelstrom of controversy. While 98 Holdings could single-handedly carry the Special Dividend and Scrip Dividend resolutions since they were ordinary resolutions that could be passed by a simple majority, the M&A resolution was a special resolution that required at least 75% of the shareholders' votes. Sanion, with 29.99% of the shares in NatSteel, was therefore in a position to scuttle the M&A resolution. Market observers suspected that the NatSteel board had linked the Special Dividend resolution with the M&A resolution to pressure Sanion into voting in favour of the latter, in order to receive the promised dividends.

6 After widespread speculation and formal queries from SGX and the SIAS, NatSteel finally issued a public announcement on 19 May 2003 to justify its actions. According to the NatSteel board, the M&A resolution was necessary for the company to retain cash to fund its continuing businesses, and to give it flexibility to raise capital efficiently. The appellant was less than satisfied with the board's response. In a press statement issued on behalf of the SIAS, he commented, "The Board has not answered the vital question; **what is the necessity for the tie-up**?" [emphasis in original].

7 Sanion issued its own press release on 22 May 2003 to explain why it intended to vote against the Scrip Dividend resolution and, by necessity, the M&A resolution. Since it already held 29.99% of the shares in NatSteel, it could not opt to receive future scrip dividends without potentially crossing the 30% threshold and incurring an obligation to effect a general takeover of the company. However, if other shareholders were to opt for scrip instead of cash, Sanion's percentage shareholding in NatSteel would effectively be diluted. In fact, Oei Hong Leong expressed his concern that the linkage was designed to dilute Sanion's shareholding to below 25%, at which level it would not be able to veto any future special resolutions.

8 To allay Sanion's suspicions, 98 Holdings proposed a whitewash resolution on the evening of

27 May 2003, just one day before the EGM. Essentially, this was aimed at waiving Sanion's obligation to make a takeover bid in the event that it crossed the 30% threshold by electing to receive its dividends in scrip, subject, of course, to the required approval from the Securities Industry Council.

The EGM

9 With the approval of the NatSteel board, the appellant attended the EGM on 28 May 2003 as an observer. After Sanion's representative requested for more time to review the last-minute whitewash proposal, the other shareholders began to express their frustration with the linkage of the resolutions. As the proceedings became increasingly chaotic, the appellant rose to speak with the permission of the chairman, Dr Cham Tao Soon. As we found the appellant's conduct at the EGM to be highly relevant to the allegedly defamatory remarks made by the respondent about him, we shall refer to the transcript of the EGM in some detail.

10 Addressing the minority shareholders, the appellant said:

> **David Gerald:** … Let me first inform the shareholders that the Board has, under the rules governing under the conduct of the board as they complied with the request of any shareholders, alright, that's fine. So we should not be questioning them as to why they are putting in these proposals. What should concern you is whether or not you should be voting on the special resolutions as requested by the majority shareholder to the Board. If you think that you want to support the resolution, you vote for it. If you think that you will not want to vote for the amendments to the resolution requiring the amendment to the M&A, which again, the scrip dividend resolution, then you vote against them, bearing in mind that they are given you the reasons as to why they are doing this, bearing in mind the reasons advanced by SIAS will be hung, alright, whether or not Sanion is going to win here or Ong Beng Seng is going to win here, does not matter. ***We are small investors, and we want dividends, alright?****…*
>
> Whether or not they have an agenda, Sanion has an agenda or whether the other party has an agenda, should not concern us as small investors. SIAS took objection to creating a precedent that payment of the dividend is to be subject to the resolution. This is the first time I think this is done. But there are reasons.
>
> *(applause)*
>
> We objected to it but if you want the board to give you understand, the board here is not doing it. ***It is the minority shareholders versus, you see, when 2 elephants fighting, we are under their feet****.*
>
> *(laughter from shareholders)*
>
> ***We small fellows, we want the money****.* You want to give the money. You say give us the money, but there are some complications here, alright? …
>
> *You should not be blaming the Board.* You should be asking yourselves whether you want to vote on the resolutions in the manner in which it is presented. So do not complicate the issues. ***Do you or do you not want the shares? I mean the cash or dividends*****.**
>
> A shareholder: We want the cash!
>
> **David Gerald:** You don't want shares, you want cash, therefore you have the right to vote.

50:18 mins

(laughter from shareholders)

[??]: that's why I said cannot vote! (inaudible)

David Gerald: Conduct yourself in the (inaudible) because it is difficult for them to carry on with the meeting if everybody shouts.

…

[A]s far as its special dividend, it should not be linked with any the amendment or any other resolutions.

Lim Su-Ling: Yes … but …

David Gerald: they can stand independent. ***There is no law that requires you in linking. That is what they are angry about. Is that correct?***

AUDIENCE: Yes!

(loud clapping from audience)

[emphasis added in bold italics]

11 While the appellant did make apparent attempts to restore order when the proceedings threatened to get out of hand, it was clear to us that much of his speech was in fact directed at eliciting a strong response from the crowd of disgruntled shareholders. This was confirmed by his conduct near the end of the EGM, when the board had decided to adjourn the meeting to give Sanion time to consider the whitewash resolution. Even as the board was simply discussing the appropriate time to hold the next meeting, the appellant interjected frequently with his own superfluous comments:

Dr Cham: ok, if 2 days not enough, how much time do you want?

David Gerald: *(interrupting)* I think, Mr Chairman, if Sanion is going to vote against, the members of Small Investors Association will be wasting time and money coming back again. So whether you expressly say that you are going to come back and vote against (inaudible)

Dilhan Pillay: Mr Chairman, as I understand it, I understand Sanion's concern that they have no time to consult their lawyers as to the amendments that we are proposing … I welcome the opportunity for the Sanion's lawyer to look at it, see whether the legal issues are there and if they want to, they can contact 98's lawyers as well and to see whether, you know, you see, 98 is proposing this as amendments to allow all the resolutions to go through …

David Gerald: *(interrupting)* SIAS will also be happy to have both of them in our office.

(laughter and clapping from audience)

Dr Cham: So is two days …

David Gerald: *(interrupting)* I think actually we can find a compromise. You do not want to be

told that we will pay you dividend, that's what they tell me, because you must do this, this, this. Right?

[unable to identify]: right, right.

David Gerald: Sanion is saying, "I have certain concerns. I'm going to vote against." I as president of SIAS is prepared to meet Mr Oei Hong Leong and the majority shareholder and discuss this and come to a compromise. Are you all agreeable to that?

AUDIENCE: Yes.

(clapping from audience)

12 After some discussions, the EGM was finally adjourned for a week to 4 June 2003. On the day of the adjourned EGM, an article written by Catherine Ong was published in the *The Business Times* (4 June 2003) at p 2 ("the BT article"). The contents of the offending article, in so far as are material, read as follows:

No resolution in sight for NatSteel-Oei stalemate

…

[SINGAPORE] No compromise between NatSteel and tycoon Oei Hong Leong appears in sight as shareholders gather today for a second time to approve payment of a cash dividend and the right to scrip dividends in the future.

David Ban, a NatSteel director representing hotelier Ong Beng Seng's interests, told BT that attempts by the company's legal counsel, Allen & Gledhill, to sound out Mr Oei's intentions have come to naught.

"He's playing his card close to his chest. His lawyer said the client is away," Mr Ban said of Mr Oei.

NatSteel wasn't the only party who couldn't contact Mr Oei. David Gerald, president of the Securities Investors Association of Singapore (Sias), said yesterday he had failed to arrange a meeting between Mr Oei and NatSteel's board.

Mr Oei is out of town, an Sias statement said. "Up to now, it appears that minority shareholders are inclined to vote against all resolutions currently on the table."

Minority shareholders, Sias added, are "outraged" that despite an assurance by the NatSteel board at the last annual general meeting that shareholders could expect dividends of $1 a share, only 45 cents has been paid.

"NatSteel is now employing a new stance when paying the balance of the remaining one dollar … Sias calls on NatSteel board to [sever] the linkage (between the resolution to amend the M&A (memorandum and articles of association) and the resolution to pay the balance of 55 cents) and keep its promise to its shareholders," the Sias statement added.

Mr Ban, however, feels that Mr Gerald is "playing to the gallery".

"What you have here is the obstructive action of a minority shareholder that is disadvantaging the majority, including 98 Holdings. It is not oppression by the majority but the minority. Everyone including 98 wants the dividends. If shareholders don't get their dividends, they should be blaming him."

…

[emphasis added]

13 The appellant claimed that the respondent's suggestion that he was "playing to the gallery" had caused him considerable distress and injured his character and reputation, as it suggested that he was only opposing the linkage of the resolutions for the dominant purpose of gratifying the public, without impartially and seriously assessing the merits of that position. His solicitors demanded that the respondent retract his statement, apologise and pay the appellant damages and legal costs. The respondent refused, and the appellant commenced the present action in defamation on 2 September 2003. Oei Hong Leong has also instituted his own defamation suit against the respondent, among others, for other comments published in the BT article (Suit No 670 of 2003), although it would be premature for us to discuss the merits of that action in this appeal.

1 4 A week before the trial of the appellant's action was slated to commence, the respondent applied to determine the meaning of the words "playing to the gallery" as a preliminary issue. At the close of the appellant's case, the respondent elected to call no evidence and submitted that there was no case to answer because:

(a) the words in issue were not in their natural and ordinary meaning defamatory of the appellant;

(b) even if the words were defamatory, the defamatory imputation was justified on the appellant's own evidence; and/or

(c) the words were published on an occasion of qualified privilege and the appellant had failed to prove malice on the respondent's part; and/or

(d) the words were fair comment on a matter of public interest and the appellant had failed to prove malice on the respondent's part.

The decision below

Meaning of the words

15 In the court below, Tay J accepted that the phrase "playing to the gallery" was unflattering and implied that the appellant enjoyed attention and applause. However, he found that the respondent's words did not amount to defamation in law. At [67] of his judgment, he observed that:

[T]he common theme of the [dictionary] definitions [of the phrase] is the focus on the manner of doing or saying things. The words in issue do not impugn a person's integrity or belief in doing or saying those things. In other words, they do not imply that the person does not believe in what he is doing or saying. The words convey the speaker's opinion of that person as someone who concentrates more on form and flamboyance than substance and subtlety. Saying a person has rather more form than substance is no worse than saying a person has a lot of substance but little form. The former implies a dramatic, stylish showman while the latter conjures up an image

of a dull, soporific speaker. However, it seems to me that the remarks in both instances, while not complimentary, are not defamatory. [emphasis added]

16 That finding alone was sufficient to dispose of the appellant's case. Nevertheless, for the sake of completeness, Tay J went on to consider each of the respondent's defences.

Justification

17 In order to establish justification, the respondent had to prove that the defamatory imputation was true, and he had to prove the truth of the very imputation complained of: *Sin Heak Hin Pte Ltd v Yuasa Battery Singapore Co Pte Ltd* [1995] 3 SLR 590. Although the appellant alleged that the respondent's comment was made only in response to the SIAS statement quoted in the BT article itself, Tay J held that the respondent's words were also directed at the appellant's conduct at the EGM held on 28 May 2003. In his opinion, the appellant's performance at the EGM could, without any distortion of language, be described as "playing to the gallery". The appellant had chosen to address many of his statements to the minority shareholders sitting behind him, instead of the board of directors in front of him. Completely ignoring the whitewash proposal by 98 Holdings, he was instead intent on galvanising the audience to voice their disapproval of the linkage of the resolutions. Tay J also took the view that the SIAS statement quoted in the BT article was made just for dramatic effect, since it simply repeated the appellant's previous arguments against the linkage and conveniently ignored the crucial whitewash proposal.

Qualified privilege

18 Tay J was also satisfied that the defence of qualified privilege was established. On 3 June 2003, the day the appellant released the SIAS statement to Catherine Ong, the issue was not so much the linkage of the resolutions, but whether Sanion would accept the whitewash proposal. Despite this, the appellant insisted on rehashing the old arguments, and further attacked the NatSteel board by publicly stating that the minority shareholders were "outraged" by the board's failure to pay the dividend. In the circumstances, the respondent was entitled to respond to the appellant's attack, for the law justifies a man in repelling a libellous charge by a denial or an explanation, and affords him a qualified privilege to answer the charge, provided he does so in good faith and without malice: *Gatley on Libel and Slander* (Sweet & Maxwell, 10th Ed, 2004) at para 14.49.

1 9 Moreover, NatSteel was a listed company, and the public had an interest in its corporate governance. Just as the respondent had a duty to respond to the appellant's criticism, the investing public had a corresponding interest in his response.

Fair comment

20 In *Chen Cheng v Central Christian Church* [1999] 1 SLR 94 ("*Chen Cheng*"), this court held at [33] that the following elements had to be proved for the defence of fair comment to succeed:

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

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

(c) the comment was based on facts; and

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

2 1 Following the framework outlined above, Tay J found that the first element was easily satisfied, as the words used were, by their nature, an expression of opinion. The facts of the NatSteel saga leading up to the respondent's comment were also certainly matters of public interest. As for the third requirement, Tay J noted at [88] of his judgment that a reasonable reader reading the article would immediately know that other matters had occurred, as:

> The defendant was speaking to someone who was obviously aware of all that had transpired and it would be ridiculous to require him to spell out to the reporter all the facts on which he based his description of the plaintiff as playing to the gallery.

There was therefore a sufficient substratum of facts for the respondent to base his comment on. Finally, Tay J saw no reason why the respondent or any other fair-minded person could not have honestly felt that the appellant was playing to the gallery, especially where his speech-making at the EGM was concerned.

Malice

22 If the respondent had been actuated by malice when he made his comment, he would be disqualified from relying on the defences of qualified privilege and fair comment. The burden of proving malice fell on the appellant, yet the only evidence he put forward to support his allegation was the simple fact that the SIAS had sided with Sanion and the other minority shareholders in opposing the linkage of the resolutions. In Tay J's opinion, to infer the presence of ill will and malice from such evidence was tantamount to saying that "he who has not shown me love hates me", which could hardly be correct. He therefore found that the appellant had failed to prove any malice on the respondent's part.

Damages

23 In the event that his action in defamation succeeded, the appellant suggested that any award in damages ought to be similar to the range awarded to senior political leaders here ($200,000 or more), as his role as the head of an important organisation like the SIAS depended on his credibility. Tay J disagreed, and held that even if calling a person a showman in these circumstances was actionable in defamation, an award of $10,000 would be more than adequate.

The appeal

24 The issues raised in this appeal were essentially the same as those raised in the court below, namely:

(a) whether the natural and ordinary meaning of the phrase "playing to the gallery" was defamatory at law;

(b) if it was defamatory, whether the respondent could succeed on the defences of justification, qualified privilege and/or fair comment; and

(c) whether there was sufficient evidence of malice to disqualify the respondent from relying on the defences of qualified privilege and fair comment.

Meaning of the words

25 In determining the natural and ordinary meaning of the respondent's words, we took into

account the following well-established principles, as set out by this court in Microsoft Corp v SM Summit Holdings Ltd [1999] 4 SLR 529 at [53]:

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

26 In the court below, Tay J had held that the respondent's words "playing to the gallery" did not carry any defamatory meaning, as they did not impugn the appellant's impartiality or objectivity or suggest in any way that he was biased or not diligent. With the greatest respect, we found ourselves unable to arrive at the same conclusion.

2 7 In determining the meaning of the words alleged to be defamatory, a holistic approach had to be adopted, as it was the broad impression conveyed by the alleged libel that fell to be considered, and not the meaning of each word or sentence under analysis: *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234. No doubt, suggesting that the appellant possessed more style than substance was not necessarily defamatory. However, saying that the appellant was "playing to the gallery" did not simply mean that he was a "showman" trying to rally support for his cause. To our minds, the respondent's words also insinuated that popular support was the *dominant motive* behind the appellant's crusade against the NatSteel board. This was plain from a careful examination of the dictionary definitions of the phrase. In the *Cambridge International Dictionary of Idioms* (Cambridge University Press, 1998) quoted by Tay J in the court below, "play to the gallery" is defined as "to spend time doing or saying things that will make people admire or support you, *instead of dealing with more important matters*" [emphasis added]. The *Collins COBUILD Dictionary of Idioms* (HarperCollins Publishers, 2nd Ed, 2002) offers a similar definition:

> If you say that someone such as a politician **is playing to the gallery**, you are criticizing them for ***trying to impress the public and make themselves popular, instead of dealing seriously with important matters*.** [emphasis added in bold italics]

28 In our opinion, the real sting of the respondent's words did not lie in the implication that the appellant possessed more style than substance. What we found to be defamatory was the suggestion that the appellant's dominant motive in objecting to the linkage was to attract media attention and to boost his own popularity. Such an allusion would surely have lowered the appellant's reputation in the estimation of right-thinking members of society, since it suggested that he was merely pandering to the masses for his own selfish purposes, instead of actually attempting to further the interests of the minority shareholders.

2 9 Counsel for the respondent repeatedly attempted to cast the phrase as nothing more than a description of the appellant's way of saying and doing things. Indeed, he went so far as to suggest that, as the chairman of the SIAS and self-appointed champion of shareholders' rights in Singapore, it was part of the appellant's job to play to the gallery to rally support for his cause. We found this line

of reasoning to be contrived, to say the least. As we had stated earlier, the phrase "playing to the gallery" carried a meaning beyond a mere description of a person's way of saying and doing things – it also made grave imputations on the person's *motivation* for saying and doing things, since it suggested that the person was only doing so to impress the public and make himself popular, *instead of dealing seriously with more important matters*.

30 To fulfil his role as chairman of the SIAS, the appellant had to maintain a reputation as a serious critic who held the highest regard for shareholder interests. It was his job to seriously consider and protect the interests of minority shareholders for *their* benefit, not his own. To the ordinary and reasonable reader who was familiar with corporate matters and the developments in the NatSteel saga, to say that the appellant was "playing to the gallery" suggested that he opposed the linkage with the predominant intention of impressing the public and gaining popularity, *instead of dealing seriously with important matters* such as the interests of those whose rights he ostensibly championed. This was undoubtedly defamatory, and we therefore found ourselves unable to agree with Tay J's conclusion on this point.

The defences

31 Given our finding that the respondent's words were defamatory to the appellant, it became necessary for us to examine the merits of the three defences the respondent sought to rely on: justification, qualified privilege and fair comment.

Justification

32 As Tay J noted in the court below, to succeed in the defence of justification, the respondent had to prove that the defamatory imputation of his remark was true and he had to prove the truth of the very imputation complained of. Therefore, by alleging that the appellant was "playing to the gallery", the respondent had to prove that the appellant was only opposing the linkage of the resolutions to boost his own popularity, and not because he was genuinely concerned for the rights of the minority shareholders of NatSteel.

33 The appellant sought to exclude his conduct at the EGM from consideration, as he claimed that there was no indication that the respondent's remark was directed at his behaviour on 28 May 2003. We had little difficulty in rejecting this argument, for the simple reason that the respondent's allegation that the appellant was "playing to the gallery" was not a specific one directed at any particular incident. To our minds, it was clear that the respondent's allegation, read in the context of the entire BT article, was a *general* criticism of the appellant's behaviour throughout the NatSteel saga. In the circumstances, the respondent was entitled to rely on all *relevant* facts to justify his charge: see, for example, *Maisel v Financial Times, Limited* [1915] 3 KB 336 (where evidence of facts which occurred after the libel was held to be admissible to establish justification).

34 We had no doubt that the appellant's conduct at the EGM was a relevant fact in this case. From the extracts of the EGM transcript reproduced above, it was evident that the appellant "worked the crowd". Although he had attended the EGM ostensibly as an independent observer, and he did make a few apparent attempts to restore order to the proceedings, the bulk of his speeches were designed to rouse the crowd into a collective outpouring of dissent. He made them shout and applaud in unison, used colourful phrases such as "when 2 elephants fighting [*sic*], we are under their feet", and frequently interrupted the board when it was simply trying to decide on an appropriate time to hold the next meeting. His expression of "outrage" in the SIAS statement published in the BT article was also incendiary, and appeared to be tailored to attract maximum publicity. Evaluating his conduct throughout the saga, it was clear to us that the appellant was encouraging and revelling in the public

attention. Indeed, if that were the sole implication of the respondent's comment, we would have held that the defence of justification had been established.

3 5 Unfortunately for the respondent, we could not accept that the phrase "playing to the gallery" simply meant that the appellant was actively courting publicity. As we had repeatedly emphasised, saying that the appellant was "playing to the gallery" also carried the implication that popularity was the dominant motivation for the appellant's actions, which was a serious accusation indeed. From the numerous articles exhibited by the appellant in his own affidavit, we had no doubt that the appellant courted and basked in the limelight that his position in the SIAS brought. However, we were not prepared to infer from this that the appellant cared only for the publicity that the NatSteel battle brought him, and did not harbour genuine concerns about the board's behaviour in linking the resolutions.

3 6 As the founder and chairman of the SIAS, the appellant has consistently championed the cause of shareholder rights, most significantly during the Central Limit Order Book International (CLOB) controversy. Despite the appellant's penchant for self-promotion, we had no reason to doubt that he was sincerely motivated by concerns of shareholder rights in the present case. After all, the appellant's opinion that the linkage was prejudicial to the rights of NatSteel's minority shareholders was one that was widely held among market observers, and he was certainly voicing very real concerns. In the absence of any substantive evidence to prove that he had ignored important issues and opposed the linkage with the primary intention of boosting his own popularity, we could not accept that the defence of justification had been established.

Qualified privilege

37 The categories of qualified privilege cover a wide range of situations, one of the most common being when a person's character or conduct has been attacked. In these circumstances, the person is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published *bona fide* and are *fairly relevant to the accusations made*: *Gatley on Libel and Slander*, ([18] *supra*), at para 14.49; *Oversea-Chinese Banking Corp Ltd v Wright Norman* [1994] 3 SLR 760 ("*OCBC v Wright*").

3 8 In this case, the appellant had publicly attacked the directors of NatSteel, including the respondent, in his press statements criticising the linkage of the resolutions. He also conceded that he was the one who had taken the argument to the public forum. In the circumstances, the respondent was fully entitled to protect his reputation by publicly responding to the appellant's attack, and we found nothing disproportionate or irrelevant in the respondent's rejoinder. The appellant had used the media to cast aspersions on the board's (and therefore the respondent's) integrity, expressing his "outrage" and accusing them of reneging on their promise to shareholders. Given the appellant's accusations, we had no doubt that the respondent ought to be given a degree of latitude in defending himself, and he was clearly acting within his rights when he explained what he believed to be the real reason for the appellant's vehement opposition.

3 9 The appellant also suggested that the respondent could not invoke the defence of qualified privilege as he had directed his comment at the appellant *personally*, in response to criticism levelled against the board by the SIAS. We found little merit in this argument. By its very nature, the SIAS could only act through its members, and the appellant was certainly the prime mover of the campaign against the NatSteel board. All the comments and press statements attributed to the SIAS and exhibited before us were written by the appellant, and there was no evidence to show that anyone other than the appellant had actively campaigned against the linkage on behalf of the SIAS. Given that the appellant was the author of the SIAS statements that criticised the board, it was perfectly

reasonable for the respondent to respond to the appellant, instead of the SIAS as an entity.

4 0 In any case, we were in firm agreement with the court below that the appellant had cultivated his reputation as the alter ego of the SIAS. In fact, this was reflected in the way the appellant has conducted his case. Besides referring to himself and the SIAS interchangeably during the trial below, the appellant also sought to rely on the role and standing of the SIAS to augment his case on damages before us. The appellant's attempt to ride on the SIAS's reputation was inherently inconsistent with his claim that he was not the alter ego of the organisation, and it was plain that he was simply aligning himself with the SIAS when it suited his purposes, and distancing himself from it when it did not.

4 1 We also found no substance in the appellant's argument that the respondent had made the offending remark in his capacity as a director of 98 Holdings and not NatSteel. This was relevant as the appellant had attacked the respondent as a director of NatSteel, not 98 Holdings. If the respondent had responded to the attack in any capacity other than as a director of NatSteel, he would not be able to avail himself of the defence of qualified privilege since he would not be technically responding to the appellant's attack.

4 2 Much of the appellant's evidence on this point simply boiled down to the fact that the respondent was a nominee of 98 Holdings on the NatSteel board, which, by itself, was clearly insufficient for us to infer that he was necessarily speaking on behalf of 98 Holdings in this particular instance. The capacity in which the respondent made his statement had to be gleaned from the contents and context of the BT article in question, which, taken together with the other relevant factors, suggested that the respondent was speaking on behalf of NatSteel rather than 98 Holdings. The BT article was headlined "NatSteel-Oei stalemate", not "98 Holdings-Oei stalemate". The respondent was identified as a director of NatSteel, and the contents thereof discussed issues relating to NatSteel as a company, rather than 98 Holdings' interests in NatSteel. The only factor in support of the appellant's contention that the respondent was speaking as a director of 98 Holdings was the fact that the respondent had said "*we've* addressed that with the white-wash" [emphasis added], since the whitewash originated as a proposal from 98 Holdings. However, we found that the respondent's use of the word "we" was ultimately inconclusive, since the directors of NatSteel had already endorsed the whitewash proposal in the first EGM on 28 May 2003. On the whole, we were of the view that the contents of the article suggested that the respondent was speaking on behalf of NatSteel rather than 98 Holdings.

43 Finally, the appellant also relied on the case of *Fraser-Armstrong v Hadow* [1995] EMLR 140 ("*Fraser-Armstrong*") to argue that qualified privilege could not attach to a response to what a defendant knew to be a justifiable attack. In *Fraser-Armstrong*, the plaintiff had made various allegations against his company. He was dismissed, and the first and second defendants who worked at the company subsequently wrote a letter to a magazine (published by the third defendant), explaining that the plaintiff had been dismissed because he was incompetent, had waged a personal vendetta against the company and had harassed and threatened the staff. The plaintiff sued all three defendants for libel, and argued that they could not rely on the defence of qualified privilege because their motive for publishing the comments was improper. In his judgment, Simon Brown LJ commented at 143:

> I cannot accept that anyone enjoys a privilege to protect himself against a *justifiable* attack upon his own character or conduct. If, therefore, the plaintiff can show that he was defamed by the defendants for the purpose of undermining what they knew to be his perfectly valid criticism of the first and second defendants' business, that would seem to me to destroy any question of privilege. *It would either demonstrate that no such privilege properly arises in the first place or*

it would defeat the defence by a successful reply of malice, it matters not which. [emphasis added]

44 While Simon Brown LJ did not decide if the justifiability of the attack would prevent the privilege from arising in the first place, or whether it was defeated by the malice inherent in a dishonest rebuttal, we were inclined to favour the latter analysis. To decide that no privilege could even arise in the first place when an attack was justified would, in our opinion, create a possible chilling effect on self-defence generally. Such an approach could also encourage future litigants to concentrate solely on the justifiability of the attack, instead of considering other equally important aspects of the defence.

45 To our minds, the issue of whether an attack was justified could be better dealt with within the framework of the established doctrine of malice, which disqualifies a defendant from relying on the defence if he was actuated by improper motives in making his statement. This was the approach favoured by Eady J in *Richardson v Schwarzenegger* [2004] All ER (D) 432 at [13] and [14], and is also more consistent with Staughton LJ's judgment in *Fraser-Armstrong* ([43] *supra*) itself. In his judgment, Staughton LJ had commented at 142 that:

> [I]t would not be an improper motive to seek to defend oneself if the attacks that were being made by the plaintiff were untrue. It would be perfectly proper to do that, as appears in Gatley on Libel & Slander, paragraph 514. It does not seem to me to be a proper motive to seek to defend oneself if the attacks which are made by the plaintiff are true.

46 Staughton LJ's focus on the relevance of motive fit neatly into the framework of malice, and we proceeded to consider the justifiability of the appellant's attack on the basis of malice as well. Before us, the appellant argued that the linkage of the resolutions was part of a dishonest scheme by the NatSteel board to dilute Sanion's shareholding, thereby justifying his attack on the honesty and integrity of the directors. Despite the appellant's fervent allegations, however, we found little by way of hard evidence to substantiate his case. Most significantly, the SGX had investigated the entire controversy and ultimately exonerated the board from any wrongdoing.

4 7 Although 98 Holdings had been embroiled in a bitter fight with Sanion for control of NatSteel, and there could have been a certain degree of animosity between the nominees of 98 Holdings and Oei Hong Leong, this was by itself insufficient for us to infer the existence of the grand conspiracy alleged by the appellant. He conveniently failed to address the fact that there were five other independent members on the board who were not nominees of 98 Holdings, and they all approved of the linkage of the resolutions as well.

4 8 Having been the target of the appellant's attacks on his integrity, we found that the respondent was entitled to respond to the appellant's allegations. As the appellant had failed to justify his accusations or otherwise establish malice on the part of the respondent, the latter's comment was therefore protected by the defence of qualified privilege.

Fair comment

49 In our opinion, the respondent had also succeeded in establishing the defence of fair comment. The requirements of the defence are well established (see *Chen Cheng*, [20] *supra*, following *Jeyaretnam JB v Goh Chok Tong* [1984–1985] SLR 516 and *OCBC v Wright*, [37] *supra*):

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

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

(c) the comment must be based on facts; and

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

5 0 In determining whether a particular statement was a comment or an assertion of fact, the test was whether an ordinary reasonable reader on reading the whole article would understand the words as a comment or as a statement of fact: see *Chen Cheng* and *Lee Kuan Yew v Davies* [1989] SLR 1063. In the present appeal, we had no doubt that the respondent's suggestion that the appellant was "playing to the gallery" was in the nature of a comment rather than an assertion of fact. Admittedly, the respondent did not expressly refer to any supporting facts as a basis for his statement. However, we recognised that he had little control over the exact contents of the BT article, as it was ultimately up to Catherine Ong and the editors of *The Business Times* to edit the contents as they saw fit.

5 1 Reading the respondent's statement in the context of the BT article itself, we found that it was obviously an expression of opinion directed at the appellant's behaviour. As Tay J pointed out in the court below, the words in issue were, by their very nature, an expression of opinion, and we failed to see how they could, by any stretch of the imagination, be understood as an assertion of fact. Adopting a common-sense approach, we therefore found that the respondent's words would have struck an ordinary reasonable reader as a comment, thus satisfying the first element of the defence.

5 2 The parties rightly chose not to dispute the fact that the subject matter of the action was one of public interest. We therefore turned to consider the third requirement of the defence, which was the issue of whether the respondent's comment was based on facts. In this respect, we noted that it was unnecessary for all the facts which formed the basis of the comment to be referred to, so long as there was a sufficient substratum of facts referred to or implied from the defamatory words: *Kemsley v Foot* [1952] AC 345, approved in *Chiam See Tong v Ling How Doong* [1997] 1 SLR 648; *Jeyaretnam JB v Goh Chok Tong*, [49] *supra,* and *Chen Cheng*. In some cases, the matter may be so notorious that the supporting facts could be implied by any reference to the claimant: *Gatley on Libel & Slander* at para 12.12.

5 3 In this case, we found a sufficient factual basis for the respondent's comment from the sheer notoriety of the appellant's behaviour throughout the entire NatSteel saga. Although there was no express reference to the appellant's conduct at the EGM in the BT article, we noted that the publicity accorded to the affair was unprecedented. Articles updating readers on the latest developments, including the rowdy EGM on 28 May 2003, appeared almost daily in all the major newspapers in Singapore (including *The Business Times*). Contrary to the appellant's submissions, we found ample evidence that his antics at the EGM were widely reported and quoted. To our minds, on the day the respondent's remark was published in the BT article, these facts would have remained fresh in the minds of the investing public and the ordinary reasonable reader of *The Business Times*. We were therefore satisfied that there was a sufficient substratum of facts to form a basis for the respondent's comment.

5 4 The final question was an objective one: Could a fair-minded person have honestly made the same comment on the proven facts? It was important to note that the test was not whether we agreed with the respondent's assessment of the appellant's character, but whether the hypothetical fair-minded person could have come to the same conclusion as the respondent. As we observed in *Aaron v Cheong Yip Seng* [1996] 1 SLR 623 at 650, [77]:

We refer to the very concise and oft-quoted passage of Diplock J's direction to the jury in *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743, at p 749:

> … I will remind you of the test once more. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view — could a fair-minded man have been capable of writing this? That is a totally different question from the question: Do you agree with what he said?

55 On the undisputed facts, we took the view that a fair-minded person could honestly have felt that the appellant was "playing to the gallery". Throughout the entire saga, the appellant had consistently taken his campaign to the media through the use of stridently-worded press releases. The SIAS statement issued to BT on the day just before the adjourned EGM was scheduled to take place was also obviously timed to draw maximum media coverage. The appellant's dramatic performance at the EGM also appeared to be calculated at inflaming shareholder passions and attracting newspaper headlines. Given the appellant's behaviour, we had no difficulty in finding that a fair-minded person could reasonably have formed the general impression that he was "playing to the gallery". The respondent had therefore established the defence of fair comment as well.

Malice

56 It was of course open to the appellant to rebut the defences of qualified privilege and fair comment by proving that the respondent was actuated by malice when he accused him of "playing to the gallery". Although we had earlier rejected the appellant's allegation of malice in relation to the defence of qualified privilege, we found it apposite at this juncture to highlight a fairly recent development in this area of law, which was touched upon in the court below.

5 7 While it was previously assumed that the tests for malice in qualified privilege and fair comment were identical, the Hong Kong Court of Final Appeal held otherwise in the case of *Cheng Albert v Tse Wai Chun Paul* [2000] 4 HKC 1. While malice for the purposes of qualified privilege is proved once the defendant misuses the privileged occasion for some purpose other than that for which the privilege is accorded (*Horrocks v Lowe* [1975] AC 135), the court held that a comment which fell within the objective limits of the defence of fair comment could only lose its immunity by proof that the defendant did not genuinely hold the view he expressed. In other words, honesty of belief was the touchstone, and actuation by spite, animosity, intent to injure or other motivation did not of itself defeat the defence of fair comment. Explaining the rationale for the wider latitude given to a defendant in the case of fair comment, Lord Nicholls of Birkenhead, who delivered the leading judgment of the court, said at 17–18:

> [T]he purposes for which the two defences exist are not the same. The rationale of the defence of qualified privilege is the law's recognition that there are circumstances when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source … Traditionally, these occasions have been described in terms of persons having a duty to perform or an interest to protect in providing the information. If, adopting the traditional formulation for convenience, a person's dominant motive is not to perform this duty or protect this interest, he is outside the ambit of the defence …
>
> The rationale of the defence of fair comment is different, and is different in a material respect. It is not based on any notion of performance of a duty or protection of an interest … [I]ts basis is the high importance of protecting and promoting the freedom of comment by everyone at all times on matters of public interest, irrespective of their particular motives.

58 If we were to adopt Lord Nicholls' reasoning, the appellant could rebut the respondent's defence of qualified privilege by simply proving that when the latter made his comment, he was not seeking to reply to the appellant's attack, but was actuated by other improper motives. However, to defeat the defence of fair comment, the appellant would have to go further and prove that the respondent did not genuinely believe that the appellant was "playing to the gallery".

5 9 Although Lord Nicholls' judgment is now established law in Hong Kong, and has also been cited favourably in a number of English decisions (see, for example: *Manches & Co v Joseph* [2001] EWHC 448 and *Lillie v Newcastle City Council* [2002] EWHC 1600), we agreed with the judge below that it would be unnecessary to conclusively decide the issue in this appeal, as the appellant failed on either test. Bearing in mind that the appellant bore the burden of proving his allegation of malice, we found no grounds to believe that his attack on the NatSteel board was justified, nor could he prove that the respondent had made the comment for any other reason than to respond to his provocation. There was similarly no evidence to suggest that the respondent did not honestly believe that the appellant was "playing to the gallery".

6 0 Ultimately, the central basis of the appellant's case on malice boiled down to the alleged conspiracy by the NatSteel board to dilute Sanion's shareholding in the company. However, as we had held earlier, there was not a shred of substantive evidence to support these serious and wide-ranging accusations. We would hasten to add that the tussle between 98 Holdings and Oei Hong Leong (whom the appellant aligned himself with) for control of NatSteel was, by itself, also insufficient for us to infer malice in the present case. As the Hong Kong Court of Final Appeal observed in the case of *Next Magazine Publishing Ltd v Ma Ching Fat* [2003] 343 HKCU 1, there is nothing sinister *per se* in being business competitors or even rivals. Even if ill feeling could be inferred from the bare fact of such rivalry between the appellant and the respondent, it was far too nebulous a concept for us to make a finding that malice had been established. We had no choice but to conclude that the appellant had failed to establish malice, as his case was founded on nothing more than mere conjecture.

Conclusion

61 Given that the respondent had established the defences of qualified privilege and fair comment, the appeal was accordingly dismissed. Although the appellant had succeeded in proving that the respondent's words were defamatory, we decided not to apportion the costs of the appeal, in view of the serious and ultimately unfounded allegations that the appellant had levelled at the respondent at the trial below and before us. The respondent was therefore awarded the entire costs of the appeal.

Appeal dismissed.