IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 119

Suit No 311 of 2015
(Summons Nos 2424, 2672 and 2820 of 2015)

Between

Estate of Lee Rui Feng
Dominique Sarron, deceased

… *Plaintiff*

And

(1) Najib Hanuk bin Muhammad Jalal
(2) Chia Thye Siong
(3) Attorney-General

… *Defendants*

GROUNDS OF DECISION

[Tort] – [Negligence] – [Government Proceedings Act]
[Contract] – [Formation] – [Enlistment Act] – [Singapore Armed Forces Act]

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v
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[2016] SGHC 119

High Court — Suit No 311 of 2015 (Summons Nos 2424, 2672 and 2820 of 2015)
Kannan Ramesh JC
15 November 2015, 3 March 2016

28 June 2016

Kannan Ramesh JC:

Introduction

1 Suit No 311 of 2015 ("Suit 311/2015") centres on the untimely passing of full-time national serviceman Lee Rui Feng Dominique Lee Sarron ("Mr Lee") shortly after a military training exercise on 17 April 2012 ("the Exercise").

2 The plaintiff is the estate of Mr Lee. On 1 April 2015, the plaintiff commenced an action against Najib Hanuk bin Muhammad Jalal, the first defendant ("D1"), Chia Thye Siong, the second defendant ("D2"), and the Attorney-General, the third defendant ("the AG"). D1 and D2 are full-time Singapore Armed Forces ("SAF") officers who were involved in the Exercise. The AG was joined as a party to the proceedings by virtue of s 19(3) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) ("the GPA").

3 By Summons Nos 2424, 2672 and 2820 of 2015 (collectively, "the Applications"), the defendants applied under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") to strike out the statement of claim. The plaintiff was represented by Mr Irving Choh ("Mr Choh") and Ms Melissa Kor. D1 and D2 were represented by Mr Ragbir Singh s/o Ram Singh Bajwa ("Mr Singh") and Mr Laurence Goh Eng Yau ("Mr Goh"), respectively. Mr Jeyendran s/o Jeyapal ("Mr Jeyapal") and Ms Debra Lam represented the AG.

4 On 3 March 2016, I heard and allowed the Applications, and delivered oral grounds. The plaintiff subsequently appealed, and these are the detailed grounds of my decision.

The facts

5 Mr Lee enlisted in the SAF on or about 8 November 2011. He was posted to the 3rd battalion of the Singapore Infantry Regiment in or around January 2012. Prior to his enlistment, Mr Lee had been diagnosed with asthma. To indicate his asthmatic condition, Mr Lee had to wear a blue band around his wrist while enlisted in the SAF.

6 On 17 April 2012, Mr Lee participated in the Exercise. The Exercise simulated an attack on four buildings in a residential area. At the material time, D1 was the Platoon Commander of the platoon which Mr Lee was attached to for the Exercise, and D2 was the Chief Safety Officer of the Exercise.

7 While participating in the Exercise, Mr Lee experienced difficulties breathing following the discharge of six smoke canisters by D1. The smoke

canisters had been discharged by D1 for the purpose of providing cover for the simulated attack by Mr Lee's platoon on the buildings. Subsequently, around the mid-point of the Exercise, Mr Lee collapsed and lost consciousness. He was first conveyed to the Sungei Gedong Medical Centre ("SGMC") for medical attention. Thereafter, at or around 1.10pm, he was transported to the National University Hospital ("NUH"). He was pronounced dead on the same day at approximately 2.05pm.

8 Following Mr Lee's passing, on 14 May and 14 November 2012, the Minister for Defence ("the Minister"), apprised Parliament on the Ministry of Defence's investigation into the incident (see *Singapore Parliamentary Debates*, *Official Report* (14 May 2012) vol 89 (Dr Ng Eng Hen, Minister for Defence) ("the May Debate") and *Singapore Parliamentary Debates*, *Official Report* (14 November 2012) vol 89 (Dr Ng Eng Hen, Minister for Defence) ("the November Debate")). In particular, during the May Debate, the Minister informed Parliament that the Armed Forces Council had convened an independent Committee of Inquiry ("COI") to thoroughly examine the circumstances surrounding Mr Lee's death.

9 On 11 October 2012, the Minister for Finance (acting through the Permanent Secretary of the Ministry of Defence pursuant to the Delegation of Powers (Ministry of Finance) (Consolidation) Notification (Cap 1, N6, 2002 Rev Ed)) issued a certificate under s 14(1)(*b*) of the GPA ("the Certificate"). This certified that the death of Mr Lee would be treated as attributable to service for the purpose of an award under the Singapore Armed Forces (Pensions) Regulations (Cap 295, Rg 9, 2001 Rev Ed) ("the Pensions Regulations"). The plaintiff, while not disputing that the Certificate had been

issued, raised issues as to the timing of its issuance. These allegations were not material to the Applications.

10 The COI concluded its investigations, and the Minister reported the findings of the COI to Parliament in the November Debate. I quote from the relevant portions of the November Debate:

> [Mr Lee's] cause of death was certified by the forensic pathologist of the Health Sciences Authority … to be due to an "acute allergic reaction to zinc chloride due to inhalation of zinc chloride fumes". Zinc chloride is a primary component of smoke grenades currently used in the SAF.
>
> The COI found that the number of smoke grenades used in the exercise exceeded the limit specified in training safety regulations. The Training Safety Regulations (TSR) stipulate that the minimum distance between each thrown smoke grenade should not be less than 20 metres and that the minimum distance between troops and the thrown smoke grenade should not be less than 10 metres. Based on the exercise layout, not more than two smoke grenades should have been used, but [D1] had thrown six grenades instead. The COI opined that "if the TSR had been complied with, [Mr Lee] and his platoon mates would not have been subjected to smoke that was as dense as that during the incident, and for as long as they were during the incident" and that "reduced exposure to smoke would have reduced the risks of any adverse reactions to the smoke." The COI concluded that "the cause of death of [Mr Lee] resulted from inhalation of the fumes from the smoke grenades used in the incident".
>
> The COI is of the opinion that the actions of [D1], a Regular Captain, were negligent as he was aware of the specific TSR but did not comply with it.
>
> …
>
> To prevent a recurrence, the COI recommended measures to ensure compliance with TSRs through strengthening the role of the Safety Officer and educating commanders and troops on the [TSRs].
>
> …

> [The Ministry of Defence] has relieved the exercise Chief Safety Officer, [D2], and the Platoon Commander who threw the smoke grenades, [D1], of their duties. They have been re-deployed to assignments which do not oversee soldiers in training or operations. Following procedures and due process, the Chief Military Prosecutor will determine if these personnel should be subject to a General Court Martial …, to establish their degree of culpability and if found guilty to mete out the appropriate punishment. Police investigations are also ongoing to determine whether to prosecute the personnel involved in Civil Court.
>
> …

It is pertinent that the COI only appeared to have found negligence on the part of D1 and not D2.

11 A coroner's inquiry was conducted on 22 April, 10 July and 30 August 2013. On 30 August 2013, the State Coroner issued a Coroner's Certificate, which stated as follows:

> On 17th Apr 2012 at 1405 hours, at the [NUH], [Mr Lee] … died from Acute Allergic Reaction due to Inhalation of Zinc Chloride Fumes. Earlier that same day, he participated in a military training exercise. The exercise simulated an attack on 4 buildings in a residential area. During the attack, the platoon commander [D1] discharged smoke from smoke canisters. He said that he discharged one canister at Intervals of 10-second or thereabouts, totalling six. [Mr Lee] inhaled zinc chloride fumes and reacted adversely to the fumes, in what was then thought, to be an asthma attack. According to the pathologist, the history of asthma had predisposed [Mr Lee] to an allergic reaction although he could not be definitive whether the reaction here was due to inhalation of excessive fumes or mere inhalation of fumes. Both were possible. When [Mr Lee] became unconscious, CPR was initiated by [D2] and later, by a combat medic. He was rushed to the [SGMC] 10 minutes from the incident location. Upon arrival, he was already in a collapsed state and the [advanced cardiac life support] protocol was initiated. Shortly thereafter, he was rushed to the [NUH] where resuscitation efforts continued. But he succumbed to the acute episode of allergic reaction.

12 On 1 April 2015, the plaintiff commenced Suit 311/2015 against the defendants. In a pre-trial conference on 21 May 2015, the assistant registrar ordered that the filing of the defendants' respective defences be stayed pending the outcome of the Applications.

Summary of the plaintiff's pleadings

13 The plaintiff framed the causes of action against D1 and D2, and the AG on quite different footings. This is important.

14 The plaintiff sued D1 in the *tort of negligence*. The plaintiff pleaded that D1 was negligent in:

(a) failing to adhere to the SAF's Training Safety Regulations ("the TSR") when conducting the Exercise;

(b) failing to take into consideration Mr Lee's asthmatic condition (presumably with regard to the Exercise); and

(c) detonating six smoke grenades instead of two in full knowledge that the detonation of the additional four grenades was excessive and not connected with the execution of his duties.

15 The plaintiff also sued D2 in the *tort of negligence*. The plaintiff pleaded that D2 was in breach of his duty of care as the Chief Safety Officer of the Exercise in:

(a) failing to adhere to the TSR when conducting the Exercise;

(b) allowing D1 to detonate six grenades instead of two in full knowledge that detonation of the additional four grenades was excessive and not connected with the execution of his duties;

(c) failing to ensure that there were medical officers present who were trained to recognise the severity of Mr Lee's symptoms;

(d) failing to ensure that the appropriate medical equipment was available on site in case of medical emergencies; and

(e) failing to ensure that Mr Lee received prompt and adequate medical attention from a hospital instead of a military medical facility.

16 The plaintiff's cause of action against the AG was for *breach of contract*. The contract relied upon was an alleged contract of service which Mr Lee and the SAF entered into on or about 8 November 2011 when Mr Lee enlisted for national service. The plaintiff pleaded that the SAF had an obligation under the alleged contract to provide a safe and conducive environment for Mr Lee to train in, and that the SAF had breached this obligation as it failed to:

(a) provide proper medical care and staff in place to deal with medical emergencies;

(b) provide adequate protective gear for national servicemen undergoing exercises that involved the detonation of smoke grenades;

(c) ensure that proper medical equipment was provided on site to deal with medical emergencies; and

(d) provide a sufficient system of checks to ensure that regulations such as the TSR would be complied with.

17 By the foregoing, the plaintiff claimed against D1, D2 and the AG, jointly and severally, damages, the costs of Mr Lee's tomb, amounting to $34,300, interests, costs, and such further or other relief as the court deemed fit. While ultimately it was not relevant to how I decided the Applications, it was unclear to me how the AG could be jointly and severally liable with D1 and D2 when the applicable causes of action were quite different. In fact, the claims were not framed on the basis that the three defendants were joint tortfeasors.

The applications and the issues arising therefrom

18 D1, D2 and the AG respectively applied to strike out the plaintiff's claims. Both D1 and D2 sought to strike out the plaintiff's negligence actions against them on the basis that s 14 of the GPA ("s 14") (and in particular, s 14(1) of the GPA) absolved them of tortious liability. The AG, on the other hand, sought to strike out the plaintiff's action against the SAF on the ground that, in law, no contract of service existed between Mr Lee and the SAF.

19 The legal principles applicable to applications for striking out under O 18 r 19 of the ROC are well-established. O 18 r 19 states:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
>
> 19.—(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be;

> (*b*) it is scandalous, frivolous or vexatious;
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(*a*).
>
> (3) This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

The defendants relied on O 18 r 19(1)(*a*), (*b*) and (*d*).

20 The test for whether a claim should be struck out under O 18 r 19(1)(*a*) depends on whether the statement of claim discloses some cause of action or raises a question fit to be decided at the trial (*Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [21]). However, no evidence is admissible where the ground relied on for striking out is O 18 r 19(1)(*a*). A statement of claim might also be struck out under O 18 r 19(1)(*b*). Under this limb, the court considers whether the action being brought is "plainly or obviously unsustainable": *The "Bunga Melati 5"* [2012] 4 SLR 546 at [32]–[33]. Such an action could be one that is either legally or factually unsustainable. In *The "Bunga Melati 5"*, the Court of Appeal explained that an action could be said to be legally unsustainable if it is clear as a matter of law that even if a party were to succeed in proving all the facts which it offered or was required to prove, it would not be entitled to the relief sought. A factually unsustainable action is one where it is possible to say with confidence before the trial that the factual substratum of the claim is fanciful and entirely without substance (at [39]). Finally, a claim would be

struck out as an abuse of the court's process under O 18 r 19(1)(*d*) where the process of the court is being used *mala fide* or as a tool for vexation and oppression (see *Singapore Civil Procedure 2016 (Vol I)* (Foo Chee Hock, Gen Ed) (Sweet & Maxwell, 2016) at para 18/19/14). Some examples of conduct constituting an abuse of the court's process include the issuing of multiple or successive proceedings, issuing a writ for a collateral purpose, or commencing proceedings which involve a deception on the court.

21 It is also hornbook law that the court's power to strike out pleadings should only be invoked in plain and obvious cases. The court would not engage in a minute and protracted examination of the documents and the facts of the case to determine if the plaintiff had a cause of action: *Gabriel Peter* at [18]. In the present case, save for the legal issues raised by the pleadings, the facts as the plaintiff pleaded were assumed to be true.

22 In the light of the above arguments and legal principles, the following issues arose for determination:

(a) What is the effect of s 14(1) of the GPA ("s 14(1)") on the plaintiff's claim as against D1 and D2? It would be recalled that the plaintiff had pleaded that D1's and D2's breach of the TSR was a *negligent* (as opposed to *intentional*) act. The issue before me was therefore this: even if it was assumed that D1 and D2 *had* acted negligently, did s 14(1) preclude the plaintiff from suing either D1 or D2 in the tort of negligence? This raised a pure question of law that was fit to be decided in a striking out application.

(b) It was not disputed that there is no *written* contract of service between Mr Lee and the SAF. The plaintiff's case was that Mr Lee and the SAF had entered into a contract under the Enlistment Act (Cap 93, 2001 Rev Ed) ("the EA"). If Mr Lee did not have a contractual relationship with the SAF, the bedrock for the plaintiff's claim for breach of contract would fall away. The issue before me was therefore this: did a contract of service exist between Mr Lee and the SAF? Again, this was an issue that was fit to be decided in a striking out application.

In the next section, I consider each issue in turn within the context of the plaintiff's case against D1 and D2 on the one hand, and the plaintiff's case against the AG on the other.

The decision

The plaintiff's case against D1 and D2

23 At the outset, it should be remembered that the courts are mandated by s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) to prefer a statutory interpretation that would promote the purpose or object of the written law. As was stated by V K Rajah JA (sitting in the High Court) in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 (at [57]):

> … [Section] 9A of the Interpretation Act mandates that a purposive approach be adopted in the construction of all statutory provisions, and allows extrinsic material to be referred to, even where, on a plain reading, the words of a statute are clear and unambiguous. The purposive approach takes precedence over all other common law principles of interpretation. However, construction of a statutory provision pursuant to the purposive approach stipulated by s 9A is constrained by the parameters set by the literal text of the

> provision. The courts should confine themselves to interpreting statutory provisions purposively with the aid of extrinsic material within such boundaries and assiduously guard against inadvertently re-writing legislation. …

24 Hence, the analysis begins by considering the history, language, purpose and scope of s 14, before consideration is given to how the legal principles apply to the facts of this case.

The history and purpose of s 14

25 Section 14 of the GPA provides as follows:

> **Provisions relating to the armed forces**
>
> 14.—(1) Nothing done or omitted to be done by a member of the forces while on duty as such shall subject either him or the Government to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the forces if —
>
> (*a*) at the time when the thing is suffered by that other person, he is —
>
> (i) on duty as a member of the forces; or
>
> (ii) though not on duty as a member of the forces —
>
> (A) on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the forces; or
>
> (B) on any journey necessary to enable him to report for duty as such or to return home after such duty; and
>
> (*b*) the Minister responsible for finance certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under any written law relating to the disablement or death of members of the force of which he is a member:

Provided that this subsection shall not exempt a member of the forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of the forces.

(2) No proceedings in tort shall lie against the Government for death or personal injury due to anything suffered by a member of the forces if —

(*a*) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of the forces; and

(*b*) the Minister responsible for finance certifies as mentioned in subsection (1),

nor shall any act or omission of an officer of the Government subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered by a member of the forces being a thing as to which the conditions aforesaid are satisfied.

(3) The Minister charged with the responsibility for defence or internal security, as the case may be, if satisfied that it is the fact —

(*a*) that a person was or was not on any particular occasion on duty as a member of the forces;

(*aa*) that a person was or was not on any particular occasion either on any journey necessary to enable him to report for duty as such or to return home after such duty; or

(*b*) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the forces,

may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which it certifies.

(4) No act or omission of a public officer shall subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered by a member of the forces being a thing as to which the conditions mentioned in subsection (1) or (2) are satisfied.

> (5) In this section —
>
> "armed forces" means the Singapore Armed Forces raised and maintained under the Singapore Armed Forces Act [Cap. 295];
>
> "forces" includes the armed forces and the police force; and
>
> "police force" means the Singapore Police Force established under the Police Force Act [Cap. 235] and includes any volunteer, auxiliary or special police force attached to, or coming under the jurisdiction of, the Police Force.

At the outset, it may be noted that the main sub-section that is directly relevant to the Applications is s 14(1).

26 I begin by recounting the history of s 14. By virtue of the Malaysian Modification of Laws (Government Proceedings and Public Authorities Protection) (Extension and Modification) Order 1965 which came into operation on 25 February 1965 ("the Modification of Laws Order"), the Crown Suits Ordinance (Cap 12) was repealed and the provisions found in the Malaysian Government Proceedings Ordinance 1956 (No 58 of 1956) ("the 1956 Ordinance") were extended to Singapore, with minor modifications. Thus, ss 14(1)–(3) of the GPA were originally brought into and made part of Singapore law by the 1956 Ordinance and the Modification of Laws Order.

27 When Singapore separated from Malaysia and became an independent nation state on 9 August 1965, the provisions of the 1956 Ordinance remained the law in Singapore by virtue of s 13 of the Republic of Singapore Independence Act 1965 (Act 9 of 1965). By the Government Proceedings (Amendment) Act 1966 (Act 20 of 1966), the provisions of the 1956 Ordinance were formally amended ("the 1966 Amendment"). This was

necessary as a consequence of Singapore ceasing to be a part of Malaysia (see *Singapore Parliamentary Debates*, *Official Report* (22 June 1966) (E W Barker, Minister for Law and National Development) vol 25 at cols 135–136). Sub-section (4) of s 14, which deals with acts or omissions of *public officers*, was also introduced via the 1966 Amendment.

28 Given that the parentage of ss 14(1)–(3) is the 1956 Ordinance, in order to glean the purpose and rationale of the relevant sub-sections, it is important to first understand the origins of the 1956 Ordinance.

29 In this regard, s 14 of the 1956 Ordinance, which is substantially similar to ss 14(1)–(3) of the GPA (though note my comments at [40] below), *was derived from s 10 of the English Crown Proceedings Act 1947* (c 44) (UK) ("the 1947 UK Act"). I quote from the Attorney General's speech in the Legislative Council of the Federation of Malaya at the second reading of the Government Proceedings Bill 1956 where the position is clearly stated (Federation of Malaya, *Legislative Council Debates*, *Official Report* (8 November 1956) at cols 1746–1751):

> The law embodied in this Bill follows very closely the existing law contained in the Government Suits Enactment of the Federated Malay States and in certain other Un-federated States. It also contains a number of provisions which have been taken from the Crown Proceedings Act of 1947 of England. … [A] *further provision is made in Clause 14 which is taken from the English legislation to deal with the Armed Forces. The effect of that Clause is to make neither the Government nor fellow-members of its Forces liable for acts of negligence and so forth committed whilst in the course of service against a fellow member of the Forces also on duty.* … [I]t has always been assumed, that *on grounds of public policy at any rate, such actions would in many cases be strongly discouraged by the Courts*. It would be most unfortunate, for example, if after every battle a member of the force sued his

> Company Commander for what he considered gross negligence in the handling of his Company. …
>
> [emphasis added]

30 Given that the origins of s 14 of the 1956 Ordinance is the English legislation (*viz*, the 1947 UK Act), it would be salient to consider the purpose behind the enactment of the equivalent provision in the 1947 UK Act. As the 1947 UK Act was designed to change the common law position, a brief background of the position under the common law prior to the enactment of the 1947 UK Act is apposite.

31 Prior to the enactment of the 1947 UK Act, the English Crown could not be sued. This common law position of Crown immunity against legal suits stemmed from the maxim that "the Crown could do no wrong". An exception to this rule was contract claims, for which a special "petition of right" had to be filed and endorsed by the English courts. The position was considered quite unsatisfactory. The 1947 UK Act was thus enacted by the English Parliament, opening the door to the citizenry to sue the Crown in both tort and contract without requiring the application of special rules of procedure (see also the recent Court of Appeal decision in *AHQ v Attorney-General and another appeal* [2015] 4 SLR 760 at [11]–[12]).

32 However, the removal of the Crown's immunity against suit was not intended to be and was not absolute. One area that received particular attention was the armed forces. The English Parliament took the view that Crown immunity should be retained when it came to the armed forces. This was achieved by s 10 of the 1947 UK Act, which states as follows:

10.–(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if —

(*a*) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the Crown; and

(*b*) the Minister of Pensions certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member:

Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.

(2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown if —

(*a*) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; and

(*b*) the Minister of Pensions certifies as mentioned in the preceding subsection;

nor shall any act or omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered by a member of the armed forces of the Crown being a thing as to which the conditions aforesaid are satisfied.

> (3) The Admiralty or a Secretary of State, if satisfied that it is the fact: —
>
> > (*a*) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or
> >
> > (*b*) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces;
>
> may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which it certifies.

It would be noted straightaway that there are striking similarities in the language of the 1947 UK Act and ss 14(1)–(3) of the GPA.

33 The purpose and rationale for the enactment of s 10 of the 1947 UK Act was explained by the then Attorney-General of the United Kingdom, Sir Hartley Shawcross, in the second reading of the Crown Proceedings Bill ("the UK Crown Proceedings Bill") in the House of Commons, in the following terms (see United Kingdom, House of Commons, *Parliamentary Debates* (4 July 1947) vol 439 at cols 1675–1753):

> … Although the general effect of the Bill is to place the Crown in exactly the same position as the subject, there are, obviously, as the House will appreciate, a number of matters in which an analogy cannot be drawn between the Crown and a private citizen. *The private citizen does not have the same kind of responsibility for protecting the public, such as the Crown possesses*; he does not have the care of the public safety; he does not have the defence of the realm to consider; he is not responsible for the organisation of such great services as the Post Office. In these matters—and there are others which will occur to hon. Members—the functions of the Crown, under our constitution, *involve duties and responsibilities which no subject is required to undertake, and these distinctions are inevitably, necessarily and properly reflected by various provisions of this Bill*. But, subject to

necessary and inevitable distinctions of that kind the broad purpose and effect of this Bill is to enable the citizen to take exactly the same kind of proceedings against the Crown, and in the same circumstances, as if the Crown were a fellow citizen.

…

Clause 10 is another Clause to which the attention of the House ought to be directed, because it contains a special exemption, or exclusion, in the case of claims between members of the Armed Forces in respect of personal injury which they have sustained while on duty as members of the Forces, or on Service premises. Here, again, I think Members will appreciate the special position, which exists. For instance, it is necessary *in the course of Service training, in order to secure the efficiency of the Forces,* to exercise them in the use of live ammunition, in flying in close formation and, in the Navy, in battle conditions, with, perhaps, destroyers dashing about with lights out, and so on. *These operations are highly dangerous* and, if done by private citizens, would, no doubt, be extremely blameworthy, *but it is impossible to apply the ordinary law of tort in regard to them, or make the Crown liable for any injury which, unhappily, results.*

It is right that I should point out that under the existing law one member of the Forces might, in theory, at all events, in circumstances like that, bring an action against another. … *But now that legal liability on the part of the Crown is being created we have felt it essential … to provide that neither the Crown, nor its servants or officers, shall be liable for accidents which occur while both parties are on Service duty, or on Service premises.*

…

… Although, at first sight, it is a withdrawal of the right of action which does theoretically exist at the moment it is one which is very infrequently exercised, to say the least. Hon. Members will appreciate … that *it would be impossible to risk prejudicing the efficiency and discipline of the Forces by doing less than we propose to do, or that any officer or soldier ought to be placed in the position of feeling that if he makes a mistake, and personal injury results to another soldier, or man under his command, he may be liable to pay damages and the Crown will not be obliged to stand behind him.*

> … I ought to add that while the solider who receives an injury on duty will not be able to recover damages in the courts, that does not mean that he will go unrecompensed. If he is injured, and remains in the Service, he will get proper medical treatment, and care; if he is invalidated out, or dies, he, or his dependents, will have pension rights. As to that, the capital value of the pension rights, in terms of money is, in general … as valuable as the probable damages which may be recoverable in an action at law if such an action lay.
>
> …
>
> The effect of [Clause 10(1)] is certainly to bar a soldier who, while on duty, was injured by the tortious act of another soldier, also on duty at the time [from claiming against the tortfeasor]. The effect of the proviso is that if a soldier, although doing what he did in the course of his period of duty, was doing something which was quite outside the scope of his duty, an action will not be barred. If, for instance, a soldier, because of a personal dislike for the sergeant-major, or some other member of the sergeant's mess, strikes him in the face, and causes him injury, that would not be a case where Clause 10(1) would operate to exclude an action. …
>
> [emphasis added]

34 It is clear from the foregoing that the English Parliament and Malayan Legislative Council had similar reasons for enacting s 10 of the 1947 UK Act and s 14 of the 1956 Ordinance, respectively. I summarise the rationales from the parliamentary speeches cited above:

(a) While the general effect of the 1947 UK Act and the 1956 Ordinance was to place the Crown or the Government in the same position as a citizen, a distinction had to be drawn when it came to matters concerning the defence of the country. In such matters, the Crown's or the Government's special position and responsibility had to be recognised and safeguarded through legislation.

(b) There was a need to ensure that the armed forces and its members would be able to train in a disciplined and efficient manner, and conduct their operations effectively so as to ensure that their paramount purpose of safeguarding the defence of the country was not compromised. The operations of the armed forces, whether in war or during training, carried with it a high element of risk. Public policy dictated that it was necessary to ensure that no right of action in tort lay against the Crown or the Government for any injury or death that resulted from such operations. The immunity ought not to be limited to the Crown or the Government – it was equally a matter of public policy that members of the armed forces ought not to feel threatened or burdened by the prospect of legal action for acts of negligence committed in the course of and for the purpose of discharging their duties.

(c) Although the relevant provision removed the injured member's right of action in tort against the member who had occasioned the injury while discharging his duty, this did not mean that there would be no recompense for the injured member. A statutory mechanism ensured that compensation would be given to the injured member or, in the event of death, the member's estate.

35 It should be mentioned that the immunity only extended to tortious acts committed *in connection with the execution of the member's duties* as a member of the armed forces. This followed from the rationale stated at [34(b)] above. If the member of the armed forces did something outside of the scope of his duty, for example, striking another member out of animosity or spite (as per the example given by Sir Shawcross at [33] above), an action in tort by the

injured member against the tortfeasor would not be barred. This was reflected in the proviso to s 10(1) of the 1947 UK Act and s 14(1) of the 1956 Ordinance, which may also be found in s 14(1). It would follow that so long as the acts of negligence were committed by the member of the armed forces in the course of and for the purpose of discharging his duties (*ie*, in connection with the execution of his duties), he would fall within the scope of s 14(1), and would be immune to liability in tort.

36 As the wellspring of s 14 is s 10 of the 1947 UK Act and s 14 of the 1956 Ordinance, there is sound reason to proceed on the footing that the *raison d'être* for all three enactments is the same. Accordingly, I am of the view that the purpose or object of s 14 would encompass the rationales mentioned above.

37 Section 14 was debated in Parliament in 1986. In that debate, the Member of Parliament for Anson, Mr JB Jeyaretnam, posed a question concerning s 14. Specifically, Mr Jeyaretnam queried why the families of personnel employed in the armed forces were discriminated against when other ordinary citizens could recover the full amount of damages and compensation in respect of injuries or death occurring outside the SAF. The reply of the then Minister of State for Defence, BG Lee Hsien Loong, is noteworthy and crystallises the thinking that underpins s 14 (see *Singapore Parliamentary Debates*, *Official Report* (19 March 1986) (BG Lee Hsien Loong, Minister of State for Defence) vol 47 at cols 741–742):

> As for the Government Proceedings Act and why the Government cannot be sued, we do not follow British precedent blindly. We follow it when there are good reasons to do so. Why can you not sue the State in case a serviceman dies in training or in action? The reason as given by the

> British is that in this case, *the State is fundamentally different from a private citizen, and therefore cannot be treated on the same standing*. I will quote here from a submission in the House of Lords in 1947, when the Crown Proceedings Bill was introduced in Britain and it applies to us.
>
> "'The private citizen does not have the same kind of responsibility as the Crown for protecting the public. He does not have the care of public safety. He does not have the defence of the Realm to consider. In these matters, the functions of the Crown involve duties and responsibilities which no subject is required to undertake and these distinctions are inevitably, necessarily and properly reflected by various provisions in the Bill." In other words, that is the reason why you cannot sue the Government under such cases. And *to be able to sue the Government under such cases would be destructive to the morale, discipline and efficiency of the service*. We concur with these views and we have adopted the same practice.
>
> …
>
> An alternative could be to sue an individual instead of the Crown under such circumstances, namely, the officer involved who gave the order. However, this is also not allowed, for a specific reason, namely, that if we propose to do so, *any officer or soldier who is making an operational decision*, is placed in a difficult position. And in training you make decisions which are just the same as operational ones. *You have to have the absolute confidence that you can make the judgment correctly*. You cannot afford always to have at the back of your mind the thought that, "If I do wrong, will I be sued? Will the Government not back me? Should I have to appear in court?" That is the reason why the law stands as it is.
>
> …
>
> [emphasis added]

The above extract from the parliamentary debates mirrors the rationales referred to at [34] above. Thus, it may be seen that the consistent legislative intention underpinning s 14 is to ensure that the Government and the members of the armed forces are shielded from liability in tort in order to ensure that the efficiency and discipline of the armed forces in both training and operations

are safeguarded. It is a recognition of the special position of the armed forces and its members.

38 I should point out that Singapore does not stand alone in enacting legislation similar to s 10 of the 1947 UK Act. In this regard, it should be noted that s 14 of the 1956 Ordinance remains in force in Malaysia under s 14 of the Malaysian Government Proceedings Act 1956 (Act 359). Similar provisions excluding liability in tort for the armed forces and its personnel can be found in jurisdictions across the Commonwealth too, and this includes:

(a) Hong Kong (see s 8 of Hong Kong's Crown Proceedings Ordinance 1957 (Cap 300));

(b) Fiji (see s 7 of Fiji's Crown Proceedings Act (Cap 24));

(c) Jamaica (see s 8 of Jamaica's Crown Proceedings Act 1959); and

(d) Canada (see s 8 of Canada's Crown Liability and Proceedings Act (RSC, 1985, c 50), though it should be noted that s 8 of the Act does not appear to be limited only to *tortious* liability and appears to cover only the liability of the Crown itself and not individual personnel).

39 For completeness, I note that s 10 of the 1947 UK Act has been replaced by the provisions in the Crown Proceedings (Armed Forces) Act 1987 (c 25) (UK) ("the 1987 UK Act"). This Act repealed s 10 of the 1947 UK Act and provided for the revival of s 10 of the 1947 UK Act by the Secretary of State only where "it appears to him necessary and expedient" to

do so, such as by reason of (a) an imminent national danger or great emergency that has arisen, or (b) for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world (see s 2(2) of the 1987 UK Act). This is not the position in Singapore. Section 14 defined the scope and content of the inquiry before me.

40 Finally, it should be noted that in 1996, sub-s (1)(*a*)(ii)(B) (and other consequential sub-sections) was inserted into s 14 in response to the decision of the High Court in *Abdul Rahman v Attorney-General* [1985–1986] SLR(R) 705 where F A Chua J decided that a member of the armed forces who was negligently injured by a lorry driven by an employee of the Government while on his way home from camp was *not* barred by s 14 of the Government Proceedings Act (Cap 21, 1970 Rev Ed) from suing the Government in tort (see *Singapore Parliamentary Debates*, *Official Report* (11 December 1996) (RAdm Teo Chee Hean, Second Minister for Defence) vol 66 at cols 972–974). Section 14(1)(*a*)(ii)(B) of the GPA (and other consequential sub-sections) was therefore enacted to cater for a situation where a member of the armed forces was injured outside the confines of a military installation while he was on the way to or from duty. Section 14(1)(*a*)(ii)(B) of the GPA is not relevant to the present case save to the extent that its introduction demonstrates the importance that Parliament has placed on giving adequate immunity from liability in tort to the Government and members of the armed forces while performing their duties whether such duties are performed inside or outside a military installation.

The application of s 14 to the facts of this case

41 Under s 14(1), the Government or the member of the SAF will not be subject to liability in tort for causing death or personal injury to another member of the SAF ("the injured member") if:

> (a) at the time of the injury, the injured member was on duty ("condition 1"); and
>
> (b) the Minister responsible for finance certifies that the injured member's injury has been or will be treated as attributable to service for the purposes of entitlement to an award under any written law relating to the disablement or death of members of the SAF ("condition 2").

42 Importantly, there is a proviso to s 14(1) ("the Proviso"), the effect of which is that if the Proviso applies, the member of the SAF will be subject to liability in tort notwithstanding the satisfaction of condition 1 and condition 2. I had touched on this earlier. The Proviso states that the member of the SAF will not be exempted from liability in tort in a case where the court is satisfied that the act or omission of that member was *not connected with the execution of his duties as a member of the SAF*. The term "member of the forces" in s 14(1) is broad and would include, for example, a full-time national serviceman and a regular serviceman as defined under the EA.

43 It was common ground that:

> (a) D1 and D2 were members of the SAF at the time of the incident that formed the basis of the claim;

(b) the Exercise, which was the setting of the incident, was an authorised military exercise;

(c) D1 and D2 were carrying out the Exercise in discharge of their duties as members of the SAF;

(d) D1 and D2 committed the alleged acts of negligence for the purpose of the Exercise; and

(e) Mr Lee participated in the Exercise in the discharge of his duties as a full-time national serviceman.

44 Based on the foregoing, condition 1 (that Mr Lee was on duty as a member of the SAF at the time of the incident) was satisfied. As stated at [9] above, it was not disputed by the plaintiff that the relevant certificate under s 14(1)(*b*) of the GPA was issued (*ie*, the Certificate). Condition 2 was thus satisfied as well.

45 The foundation of the plaintiff's complaint was that by breaching relevant safety regulations and protocols, D1 and D2 acted negligently in exceeding or falling short of their duties thereby causing or contributing to the death of Mr Lee. Thus, the sole issue to be considered in the Applications as regards D1 and D2 was whether the Proviso applied to disentitle D1 and D2 to the exemption under s 14(1) from tortious liability to the plaintiff.

46 For the Proviso to apply, the plaintiff had to show that the acts or omissions of D1 and D2 were *not connected with* the execution of D1's and D2's duties as members of the SAF. Mr Choh submitted that the detonation of smoke grenades in excess of the numbers prescribed in the TSR was an act

that was *extraneous* to the scope of their respective duties simply by reason of the fact that it constituted a breach of the TSR. Specifically, his submission was that: (a) D1 had breached the TSR and thereby acted outside the scope of his duties by detonating six smoke grenades (where the TSR only provided for the detonation of two smoke grenades); and, (b) D2 had acted outside the scope of his duties by *allowing* D1 to breach the TSR and detonate six smoke grenades. It was argued that, as a result, D1 and D2 fell outside of the immunity afforded by s 14(1). In this regard, Mr Choh was not asserting that the alleged breach of the TSR on the part of D1 and D2 was *intentional*. Neither was he asserting that the conduct in question did not take place while D1 and D2 were attempting to execute their duties as members of the SAF. In other words, Mr Choh's submission was that the alleged fact that a breach of the TSR had occurred in the conduct of the Exercise must *ipso facto* lead to the conclusion that the acts and omissions of D1 and D2 were extraneous to or not in connection with the execution of their duties as members of the SAF. This was so even if the said acts and omissions occurred in the course of and in an attempt to genuinely execute the Exercise. Put simply, his submission was effectively that the Proviso applied once the TSR was breached regardless of whether the breach was a result of acts of negligence committed by D1 and D2 in the course of and for the purpose of discharging their duties. I was unable to agree with Mr Choh.

47 I was of the view that the Proviso was not intended to be construed in such a narrow manner such that any breach of a safety regulation (or, for that matter, any regulation) would *in and of itself* lead to the conclusion that the act or omission was not connected with the execution of the serviceman's duty as a member of the forces. Mr Choh was effectively making the following *a*

priori argument: once the act of negligence was the failure to follow rules or regulations, that act would fall within the Proviso and the immunity under s 14(1) would therefore not apply. This surely could not be correct. It seemed to me fairly self-evident that most (if not all) acts of negligence would involve some form of non-compliance with safety regulations and procedures, and it is difficult to imagine that Parliament had intended to so limit the reach of s 14(1).

48 In my view, to construe s 14(1) as applying only to situations where injury or death had resulted despite safety guidelines and protocols being observed would be to unduly limit the scope of s 14(1) on a number of levels. First, Mr Choh's interpretation did not flow from a plain reading of s 14(1). Second, if Mr Choh's interpretation of s 14(1) was adopted, there would be little room for s 14(1) to operate and the purpose of the immunity under s 14(1) would be effectively neutered. This is because where safety guidelines and procedures are assiduously followed but injury nonetheless results, it would be very unlikely that it could be said that the injury resulted from an act of negligence. After all, safety guidelines and procedures are designed to prevent the occurrence of such incidents. I therefore had difficulty seeing how a member of the SAF who had followed safety regulations and procedures could be regarded as negligent if an injury nonetheless ensued. Such a member would, in all likelihood, not require the immunity afforded by s 14(1) simply because there would be no tortious liability to begin with. This being the case, the question was whether there was any conceivable reason why a member of the SAF who had negligently failed to comply with safety regulations and procedures ought not to be covered by the immunity under s 14(1). I was not able to see any. The section is targeted at offering protection to members of

the SAF against liability for, *inter alia*, negligent conduct where the negligent conduct is *connected with the execution of the member's duties*. If the member was negligent in the execution of his duties, did it matter that the act of negligence involved a breach of safety regulations and procedures? In my view, it did not. The section was not concerned with *how* the negligence occurred. What mattered was whether the negligent conduct occurred in connection with the execution of the member's duties.

49 It should be noted that if Mr Choh's argument were to succeed, this would effectively mean that the SAF would not be obliged to stand behind D1 and D2 because the finding would be that D1 and D2 had acted in a manner extraneous to the scope of their duties as members of the SAF. The SAF would thus *not* be responsible for the consequences of such actions. This is a point that the plaintiff recognised, as the plaintiff did not sue the AG in tort. The result would be D1 and D2 being left high and dry even though it was not disputed that their acts were solely for the purpose of the Exercise. To my mind, this could not be right, and illustrated the difficulties with Mr Choh's argument.

50 That s 14(1) immunises a member of the SAF and the SAF from liability in negligence where the negligence is committed by the member *in the course of executing his duties* is crystal clear from the language of the Proviso. The Proviso states that the immunity would not extend to a situation where "the act or omission *was not connected with the execution of his duties* as a member of those forces" [emphasis added]. In my judgment, the relevant (and indeed the sole) question was *not* whether D1 and D2 had complied with the TSR or *how* they had committed the allegedly negligent acts, but whether

they had committed the allegedly negligent acts *in connection with the execution of their duties as members of the SAF*. The language of the Proviso was deliberately and carefully chosen. The Proviso states that the act or omission on the part of the allegedly negligent member of the SAF had to be *not* connected with the execution of his duties for that member to fall outside the scope of immunity conferred by s 14(1). The emphasis is on the nexus between the act or omission and the member's execution of his duties. In other words, the act or omission must have had *no connection* to the discharge of the member's duties for the Proviso to apply. A negligent discharge of duty would by any account be an act or omission that was connected with the execution of duty. Framing the point another way, negligently acting in excess of the TSR (assuming that this was indeed true) did *not* mean that D1 and D2 did not act in a manner unconnected with their duties as members of the SAF.

51 I was fortified in my view by the legislative purpose of s 14. As stated, one purpose of s 14 is to safeguard the efficiency of the armed forces' training. Another object of s 14 is to ensure that members of the SAF would not be burdened by the prospect of legal action when training to the point of having to constantly look over their shoulders. The two rationales go hand-in-hand. If members of the SAF are constantly worried about facing an action in negligence and thereby second-guessing the consequences of every action, the SAF would not be able to train effectively or act decisively when conducting operations. This is the reason why s 14(1) adopts broad language and immunises members of the SAF from liability in tort when the relevant act or omission is *connected* with the execution of the member's duties.

52 In this regard, it is also useful to refer to the comments made by the Lord Chancellor, Viscount Jowitt, on the occasion of the second reading of the UK Crown Proceedings Bill in the House of Lords (see United Kingdom, House of Lords, *Parliamentary Debates* (4 March 1947) vol 146 at cols 60–93):

> To give a simple illustration, let me take the Charge of the Light Brigade. Could a trooper who took part in that Charge, whose leg was shattered by a cannon-ball, have brought an action against Lord Raglan (I think it was), to recover damages on the ground that Lord Raglan had blundered? When the "Victoria" and the "Camperdown" came into collision, could a sailor who went down in the "Victoria" have brought an action against the Admiral for giving an order which, as he would say, brought about the damage? Have you to empanel a jury in the King's Bench Division to determine whether there was or was not a case of negligence? And consider the case of Passchendaele. Could a soldier who was injured through sticking in the mud at Passchendaele have brought an action against Sir Douglas Haig alleging that he had not properly considered the nature of the terrain or the effect of the bombardment on the drainage system? And would Sir Douglas Haig have been able to answer: "Well, I quite realize all those things, but I had to do this because the French were being hard pressed at the time"? Have a jury to be empanelled to try all those questions which are obviously quite unfitted for them? Therefore we make it quite plain here that there must be no action in respect of these matters, either against the Crown or against a servant of the Crown, behind whom of course the Crown would have to stand if an action were allowed in respect of these matters.

53 The examples given by Viscount Jowitt are of various incidents that occurred between the 1800s and the 1900s which involved the United Kingdom's armed forces. These are famous examples where mass casualties resulted from the alleged negligence or tortious acts of the commanding officers. Clearly, the English Parliament had contemplated that s 10 of the 1947 UK Act would apply broadly such that an action in tort would not lie

against the Crown or the member of the armed forces even in such circumstances.

54 The examples given by Viscount Jowitt above may be contrasted with the example given by Sir Shawcross in his speech quoted above at [33]. Therein, Sir Shawcross made the point that the immunity conferred by s 10 of the 1947 UK Act would not cover a member of the armed forces who, out of *personal* dislike for another member, struck that member in the face. This contrast highlights the essential scope of s 10 of the 1947 UK Act. Clearly, the act of injuring another out of *personal dislike* would not by any stretch of the imagination be an act that was connected with the execution of the member's duties. It could not be said to be an act authorised by the armed forces or incidental to the serviceman's duties as a member of the armed forces. In fact, Sir Shawcross described it as "quite outside the scope of [the member's] duty". It is also significant that such an act would not be a *negligent* act, but an *intentional* one. Evidently, it was envisaged that the immunity conferred under s 10 of the 1947 UK Act would not extend to an intentional tortious act wholly separate and independent of the member's duties as a member of the armed forces. This, in my view, is equally the position under s 14(1).

55 It should also be reiterated that the plaintiff had *not* suggested that D1's or D2's breach of the safety regulations was an act done *intentionally*. Rather, the plaintiff's allegation was that the breach of the TSR was a negligent act on the part of both D1 and D2. In my judgment, the allegedly negligent conduct on D1's and D2's part *was intrinsically connected to and a result of* the execution of their duties in the conduct of the Exercise as members of the SAF. Such conduct occurred when they were functioning as

the Platoon Commander and the Chief Safety Officer. It was not possible to divorce the relevant acts and omissions of D1 and D2 from the Exercise. There was nothing in the pleadings or the various affidavits filed that indicated that D1's and D2's conduct was not precipitated by the Exercise. Instead, the throwing of the smoke grenades by D1 was an *integral* part of the Exercise and his duties.

56 In fact, the plaintiff's allegation was that D1 and D2 had *carried out the Exercise* negligently. The plaintiff's pleadings stated that D1 and D2 had failed to "adhere to the TSR *when conducting the military exercise*" [emphasis added].[1] This was a recognition on the plaintiff's part that the allegedly negligent act of failing to act in accordance with the TSR was an act that was done *in the course of conducting the Exercise*. Significantly, Mr Choh also stated during the hearing of the Applications that he did not disagree that D1 and D2 were carrying out "an authorised military exercise" and that the plaintiff's complaint was "as regards the way it was carried out".[2] Specifically, the plaintiff would have no basis to sue D2 if his conduct was not a result of acting in connection with the Exercise because the plaintiff's action against D2 was premised *solely* on the fact that D2 was, at the time of the incident, the Chief Safety Officer of the Exercise. Acting as the Chief Safety Officer of the Exercise was undoubtedly part of D2's duty as a member of the SAF. On the basis of the plaintiff's pleadings and Mr Choh's submissions, it was difficult to see how it could be said that the relevant acts and/or omissions on the part of D1 and D2 were *unconnected* with their duties as members of the SAF in the conduct of the Exercise.

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1 Statement of Claim dated 1 April 2015 ("SOC"), paras 19(1) and 22(1).

2 Notes of Evidence for oral hearing on 3 March 2016 ("NOE"), pp 5:18–5:20.

57 If Mr Choh's argument was that an act of negligence *per se* would attract the application of the Proviso, this was also an argument that could not succeed. As explained above, the purpose or object of s 14(1) is to grant the Government and members of the SAF immunity from liability in tort. This encompasses the tort of negligence. To accept the argument that acts of negligence *per se* engaged the Proviso would be counterintuitive to the purpose of s 14(1), and indeed, would circumvent the grant of immunity in the first place. It was hard to imagine that was Parliament's intention.

58 Ultimately, the immunity granted under s 14(1) extended to acts or omissions committed in the course of the execution of the member's duties. The relevant question of whether the act or omission was connected with the course of the member executing his duties is a question of fact. As I have explained, the undisputed facts indicated that D1 and D2 were at all material times acting in the course of their duties as Platoon Commander and Chief Safety Officer. The question is *not* whether the said act or omission was connected with the member of the SAF executing his duties *in accordance with prescribed rules and regulations*. Mr Choh sought to read those words into the Proviso. I was not convinced that there was a principled basis to do so. In fact, to so expand the width of the Proviso (and concomitantly, to restrict or perhaps neuter the immunity conferred by s 14(1)) would, given the purpose and rationale behind s 14(1), amount to impermissible judicial legislation. In the final analysis, the allegation against D1 and D2 was that they had discharged their duties negligently; the relevant acts and omissions were therefore clearly connected with D1's and D2's execution of their duties as members of the SAF.

59 In the circumstances, I concluded that, even assuming the veracity of the plaintiff's pleadings, the acts and/or omissions of D1 and D2 did not fall outside the scope of s 14(1), and the statutory immunity thereunder applied to bar the plaintiff's right of action in negligence against D1 and D2. The portions of the plaintiff's statement of claim that concerned the plaintiff's claim against D1 and D2 were therefore struck out.

The plaintiff's case against the AG

60 The plaintiff's case against the AG was based on the breach of a contract of service under the EA between Mr Lee and the SAF. The question of whether a contract of service existed between Mr Lee and the SAF is a question of law that could be answered based on the facts as pleaded by the plaintiff.

61 The alleged contractual relationship was, in the course of submissions and arguments, characterised by Mr Choh in a variety of ways. It was first referred to as a "mandatory contract", and then later as a "quasi-contract" or a "unilateral contract". He also argued that the relationship between Mr Lee and the SAF could be viewed as a contractual relationship in a "*sui generis* sense". The state of flux that Mr Choh exhibited in his attempts to put a label on the alleged contract previewed the inherent flaw in the cause of action against the AG.

62 Mr Choh relied on the cases of *Sakinas Sdn Bhd v Siew Yik Hau and another* [2002] 5 MLJ 498 ("*Sakinas*") and *Yap Yew Cheong and another v Dirga Niaga (Selangor) Sdn Bhd* [2005] 7 MLJ 660 ("*Yap Yew Cheong*") to contend that mandatory contracts under statutory legislation did exist, and

were not an illusory or wholly unsustainable legal concept. He also cited the example of compulsory third party motor insurance as a type of mandatory contract. In his submission, the contract between the SAF and Mr Lee was a form of mandatory contract where one or both parties had been mandated (by statute or otherwise) to enter into a contract with a fixed form and express and/or implied terms. In this regard, he argued that even if the creation of the relationship between the SAF and Mr Lee stemmed from statute, it did not necessarily mean that it could not be characterised within a contractual framework or that a contractual relationship could not exist. Ultimately, I took the view that the examples offered Mr Choh no foothold for him to make his submission.

63 The discussion of the plaintiff's case against the AG will proceed as follows. First, I consider the relationship between full-time national servicemen and the SAF in the context of the relevant statutory instruments and the applicable contractual principles. I then apply the law to the facts of this case.

The nature of the relationship between full-time national servicemen and the SAF

(1) Statutory instruments

64 In my view, the nature of the relationship between full-time national servicemen and the SAF is undoubtedly statutory in nature. This becomes apparent upon examination of the statutory instruments that establish and govern the SAF and national service.

65 The SAF is established and organised pursuant to, *inter alia*, s 7 of the Singapore Armed Forces Act (Cap 295, 2000 Rev Ed) ("the SAF Act"). The enlistment of persons in the SAF is governed by the EA. Under s 10(1) of the EA, the proper authority under the EA, *viz*, the Armed Forces Council and any person or body appointed by it, may require by notice a person who is a Singaporean citizen or permanent resident not below the age of 18 years to report for enlistment for national service. A full-time national serviceman is a person who is enlisted in national service. Failure to comply with this notice would render the person guilty of an offence that carries with it a sentence of fine or imprisonment (see s 33(*a*) of the EA). In other words, national service is a matter of legislative compulsion.

66 Matters that would otherwise be governed by an employment contract, such as leave and duration of service are legislated for. Section 12 of the EA provides for the duration of national service. The number of days of vacation leave a full-time national serviceman may have is also provided for under reg 1(3) of the First Schedule of the Singapore Armed Forces (Leave) Regulations (Cap 295, Rg 12, 2001 Rev Ed).

67 Under s 205(*i*) of the SAF Act and s 37(2)(*a*) of the EA, the Armed Forces Council and the Minister are respectively empowered to make regulations pertaining to the payment of allowances of persons in national service. While there do not appear to be specific regulations governing the remuneration of full-time national servicemen, I note that in an affidavit filed by Ni De'En, the Deputy Director (National Service Policy) with the Manpower Division of the Ministry of Defence, on the Government of the

Republic of Singapore's behalf, the position concerning the remuneration of full-time national servicemen was stated to be as follows:[3]

> [W]hile a full-time National Serviceman is given a National Service allowance during the period of his liability to serve full-time National Service, this allowance is meant to support the full-time National Serviceman for his basic personal upkeep. The allowance is neither a salary nor is it computed as a salary…

68 Furthermore, there are obligations imposed on a full-time national serviceman that are not consistent with an employment relationship based on contract. These include, for example, the requirement that all eligible persons register and be subject to a fitness examination for assessment of suitability for national service (see ss 3, 4 and 5 of the EA); the requirement for a full-time national serviceman to apply for an exit permit in certain circumstances when leaving Singapore (see s 32 of the EA read with reg 25 of the Enlistment Regulations (Cap 93, Rg 1, 1999 Rev Ed)); and the fact that a full-time national serviceman is subject to military law from the time of his liability to report for enlistment until such time of lawful discharge or release (see s 3(*a*) of the SAF Act). A person liable for full-time service and who is fit for national service is also liable to render operationally ready national service under ss 13 and 14 of the EA. These are significant because they demonstrate that statutory obligations are imposed both *before* and *after* a person enlists in the SAF. Indeed, they are imposed on a person by virtue of their citizenship or residency status in Singapore. Clearly, the terms of the relationship are statutorily prescribed.

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3 First affidavit of Ni De-En dated 19 May 2015, para 16.

69 It is also of note that it is constitutionally provided under art 10(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) that while all forms of forced labour are prohibited, Parliament may by law provide for *compulsory* service for national purposes. Furthermore, in contrast to national service which is a requirement imposed on qualifying persons under the EA, under s 19 of the EA, any person *may apply* to be enlisted for regular service in the SAF. In this regard, s 20(2) of the EA provides that "[n]o person shall be liable to render regular service in excess of the period for which *he has applied* to serve" [emphasis added].

70 To my mind, all the above are obvious indicia that full-time national service is a *statutorily imposed duty*. This duty or obligation is imposed on qualifying persons in Singapore for the purposes of national security. The SAF is a statutorily created body and the relationship between the SAF and a full-time national serviceman is clearly governed by statute and subsidiary legislation.

(2) Contractual principles

71 Having examined the statutory framework which governs the enlistment of qualifying persons into the SAF, I now consider contractual principles to ascertain if a contract of service exists between a full-time national serviceman and the SAF, in an ordinary case, *in parallel* with the statutory relationship.

72 Contract law encompasses a vast body of legal principles and rules which determine amongst other things, how and when a contract is formed, the ascertainment of the terms of the contract, the circumstances in which the

contract may be vitiated or discharged, and the remedies for a breach of contract. Here, I briefly set out a general discussion on the applicable contractual principles.

73 There are generally speaking, four elements for the formation of a valid contract, being:

(a) offer;

(b) acceptance;

(c) consideration; and

(d) intention to create legal relations.

74 These four elements of the formation of a valid contract are based on the general vision of contract law as governing the *voluntary* entry between parties possessing capacity into legally binding agreements. The formation of a contract requires a meeting of minds or *consensus ad idem* between the offeror and the offeree. In *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"), the Court of Appeal defined an offer as "a definite promise to be bound, provided that certain specified terms are accepted" and an acceptance as "a final and unqualified expression of assent to the terms of an offer" (at [47]).

75 The duty to enlist is a requirement imposed by statute and a breach of this duty renders a person liable to penalties such as a fine or a term of imprisonment under s 33 of the EA. It is artificial, in such circumstances, to characterise the relationship between the SAF and a full-time national serviceman who enlists due to the compulsion of the law as contractual

relationship with a meeting of minds or *consensus ad idem* between the full-time national serviceman and the SAF. There is no freedom in the formation of the relationship which one would regard as a necessary ingredient in the formation of the consensual relationship that is a contract. As stated, enlistment is a matter of legislative compulsion. The fact that full-time national servicemen may enlist willingly and with the ardent intention of serving the nation does not change how the relationship is created or the nature of the relationship.

76 Even assuming that the elements of offer and acceptance can be satisfied, there is, in addition, an issue as to whether a full-time national serviceman has provided valid consideration for the alleged contract. I note that the modern approach in contract law requires little to find the existence of valid consideration (see *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139] *per* V K Rajah JC (as he then was)). However, there may be legal impediments to the finding of valid consideration, one of them being the fact that the promisee promises to perform (or performs) an existing duty imposed on the promisee *by law* (see *Gay Choon Ing* at [87]).

77 The position is succinctly explained in John Cartwright, *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (Sweet & Maxwell, 2014) at para 8–38:

> Where the claimant is already under a statutory or other legal obligation to do what he undertakes to the defendant to do in return for the defendant's promise, the courts will generally not accept that his undertaking constitutes good consideration.

> … [T]he rejection of contractual liability where the claimant alleges that he provided consideration by promising or performing a duty which already lay upon him by the general law may be put in … general terms of absence of consideration: the promise or performance of a service which is required by law to be performed in favour of the defendant neither provides benefit to the defendant nor constitutes detriment to the claimant.

78 In the same vein, it is difficult to construe the full-time national serviceman's promise to perform national service or the performance of national service, as valid consideration on the full-time national serviceman's part so as to satisfy the element of consideration of a contract between him and the SAF where the full-time national serviceman is already under a statutory obligation to do so. Furthermore, the result of finding that a contract exists between the SAF and a full-time national serviceman would result in the curious consequence that the SAF would be entitled to sue the full-time national serviceman for damages for breach of that contract.

79 In my view, where a person enlists for national service with the SAF, neither the full-time national serviceman nor the SAF possesses any *intention* to enter into a *contractual* relationship with the attendant rights and obligations that flow from the presence of such a relationship. Instead, the enlistment of a full-time national serviceman in national service is an act done as a discharge of the duty imposed on him by s 10 of the EA, and cannot be construed as leading to the creation of a contractual relationship under the common law without more.

80 It must also be noted that there is no provision in the various applicable legislative instruments that imposes a *statutory contract* between the SAF and a full-time national serviceman. The position may be contrasted with the

position under s 39(1) of the Companies Act (Cap 50, 2006 Rev Ed) which provides:

> **Effect of constitution**
>
> 39.—(1) Subject to this Act, the constitution of a company shall when registered bind the company and the members thereof to the same extent as if it respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the constitution.

81 The effect of this provision is that under the Companies Act, a company is regarded as being in a contractual relationship with its members and the members of the company are also regarded as being in a contractual relationship with each other (Dan W Puchniak and Tan Cheng Han, "Company Law" (2013) 14 SAL Ann Rev 179 at para 9.10). In a statutory contract such as that under s 39 of the Companies Act, the efficacy and the existence of the contract is derived from the statutory provisions. No similar provision exists with respect to full-time national servicemen, and accordingly there is no statutory contract between the SAF and a full-time national serviceman.

82 Finally, I come to Mr Choh's submission that the contract may be characterised as a mandatory contract. As stated above, he relied on the cases of *Sakinas* and *Yap Yew Cheong* for this submission. With respect, Mr Choh's reliance on these cases was misconceived. The reference to a "mandatory contract" in both these cases was a reference to the fact that the relevant statutes and regulations had laid down prescribed terms for the sale and purchase of condominium apartments which parties where required to adopt when entering into such transactions. It was not a situation where the underlying obligation itself, *viz*, the purchase of the apartment, was a duty

imposed by statute. Compulsory third-party motor insurance was also not a relevant example because that is an example of a situation where legislation mandates the *purchase* of third-party insurance; legislation does not *govern the relationship between the insurer and the insured*, which falls to be determined by the rights and obligations the insurer and the insured have expressly agreed to under the relevant policy of insurance (though, again, the statutes and regulations may lay down certain guidelines for the terms of such insurance policies). Further, the requirement to purchase insurance only rises *if and when a person decides to buy a motor vehicle.* There is no compulsion to purchase insurance otherwise.

(3) Conclusion on the nature of the relationship between the SAF and a full-time national serviceman

83 In conclusion, I found that in the ordinary case, the nature of the relationship between the SAF and a full-time national serviceman is governed by the applicable legislation and regulations made thereunder. In the absence of special circumstances (such as the presence of a written contract), the SAF does not enter into any private, statutory or mandatory contract with the full-time national serviceman.

84 I am supported in this view by the comments made by P Coomaraswamy J in *PQR v STR* [1992] 3 SLR(R) 744 concerning the nature of national service. While these comments were made by Coomaraswamy J in the context of ancillary matters arising out of a divorce, they provide a useful insight into the legal nature of the relationship between a full-time national serviceman and the SAF. Section 125(*b*) of the Women's Charter (Cap 353, 1985 Rev Ed) provided that maintenance for a child would ordinarily expire

upon the child obtaining "gainful employment". The question that confronted the court in that case was whether a full-time national serviceman could be considered as being in "gainful employment" under that section. Coomaraswamy J stated (at [39]–[40]):

> 39 The elder son is currently in National Service. The question is whether National Service may be defined as "gainful employment" for the purpose of s 125(*b*) [of the Women's Charter]. …
>
> 40 The key words here are "contract of service". The national servicemen *cannot be said to be under a contract of service in the ordinary sense. He is a conscript and the nature and length of service is determined by statue, the Enlistment Act, not by contract as is normal with employment.* Therefore, it would be quite inappropriate to consider National Service as "gainful employment" under s 125(*b*) of the Women's Charter such that a parent's legal duty to provide maintenance extinguishes upon the enlistment of the son under 21.
>
> [emphasis added]

85 In this regard, it is also worth pointing out that the position in the United Kingdom appears to be that no contractual relationship of employment exists between a serviceman in the armed forces and the Crown (see generally *Quinn v Ministry of Defence* [1998] PIQR 387 at 396).

86 Finally, to recognise that the plaintiff has an action in breach of contract based on the particular facts of this case would be tantamount to allowing the plaintiff to circumvent the immunity of action afforded to the Government by s 14. Section 14 was enacted to account for the special position of the Government in relation to the defence of the nation. In the light of this, Parliament perceived it necessary to ensure that the Government would not be sued for, *inter alia*, the negligent acts of members of the SAF that caused injury or death to other members where this occurred in the course of

duty. To my mind, it would be antithetical to the purpose behind s 14 if the plaintiff's contractual claim against the AG is recognised. In effect, recognising such a cause of action would be for the court to allow, through the backdoor, what the legislature has prohibited by the front. That would be an inappropriate exercise of the judicial function.

87 For the avoidance of doubt, my decision concerning the nature the relationship between full-time national servicemen and the SAF does *not* apply to a relationship between a regular serviceman (as defined by s 2 of the EA) and the SAF, which falls to be decided on another occasion.

The application of the legal principles to the facts of the case

88 I return now to the facts of the present case.

89 Aside from pleading that Mr Lee was a full-time national serviceman and that Mr Lee and the SAF entered into a contract of service, the plaintiff introduced no further particulars in the statement of claim to indicate that a contract had been formed. There was nothing in the pleadings or the affidavit evidence that indicated that Mr Lee's enlistment into the SAF departed from the norm. I therefore found that the plaintiff's claim in breach of contract against the AG was legally unsustainable. In the circumstances, I also allowed the AG's application to strike out the relevant portions of the plaintiff's statement of claim.

90 That said, it bears emphasis that this is not a situation where no compensation is payable. The immunity of D1, D2 and the Government under s 14(1) only arose when the Certificate was issued. The plaintiff is thus

entitled to compensation under the Pensions Regulations. The entitlement of the plaintiff to compensation under the Pensions Regulations serves to alleviate the consequences of the immunity conferred under s 14(1) (see also [34(c)] above).

Conclusion

91 The circumstances of this case are undoubtedly tragic. It is about a life taken in the prime of youth, far too early and suddenly. I am mindful of the anguish, pain and grief that this has caused Mr Lee's family and all who cherish him. It is perfectly understandable for Mr Lee's parents to feel that their son has been wrongfully and prematurely taken from them and to direct their pain at those whom they feel were responsible. I have great sympathy for them.

92 Whilst the tragedy behind this case and the pain and anguish it has engendered should be recognised, we should not forget that this case also engages a matter of great importance – the ability of the SAF and its members to safeguard our nation and her security without being burdened by the yoke of tortious civil liability. Parliament has removed that yoke by enacting s 14 of the GPA, subject to safeguards and conditions. It is the responsibility of the courts to give effect to that legislative intention.

93 The immunity accorded by s 14 does not mean that the SAF and its officers have carte blanche to act without sufficient regard to the safety of the young men and women whose lives are entrusted to them. Indeed, to the contrary, the fact that such immunity exists in and of itself imposes an even heavier moral burden on the SAF and its officers to exercise utmost care in

looking after their young charges. While it is critical that the integrity and robustness of SAF as a fighting force is not compromised by the spectre of tortious civil liability arising from the inevitable risk entailed by military training and operations, it must be remembered that a large proportion of our armed forces is made up of full-time national servicemen who make substantial personal sacrifice in serving Singapore. They must be assiduously protected and safeguarded. I am entirely convinced that the SAF and all who command it fully recognise the weight of that burden and do their very best to sedulously discharge it. However, despite the best intentions and careful and meticulous planning, mistakes can and unfortunately sometimes do happen. This is an ineluctable fact given the attendant risks that come with the terrain. This makes the *raison d'être* for the immunity under s 14 clear. However, Parliament has ameliorated the impact of the immunity by providing for compensation in the form of payment of an *ex gratia* sum through a military compensation framework, rather than having that extracted through the courts. That is the heart of this case and the legal reality that the plaintiff must unfortunately come to terms with no matter how difficult that may be.

94 In the circumstances, while I fully sympathised with the sufferings of Mr Lee's family and friends, it was clear that the plaintiff's case, as pleaded, was without reasonable prospect of success in law. For the above reasons, I allowed the Applications and dismissed the plaintiff's suit.

95 On costs, Mr Singh and Mr Goh for D1 and D2 respectively submitted a sum of $6,000 for the costs for their respective applications and the action (inclusive of disbursements), each on a standard basis. Mr Jeyapal for the AG submitted that costs for its application and the action (inclusive of

disbursements) ought to be $10,000 on a standard basis. Mr Choh did not substantially disagree, indicating in response that the sum for each of the defendants ought to be $6,000, amounting to $18,000 in total.

96 Costs followed the event and it was clear that the AG had taken on significantly more work for the Applications. It did not seem equitable that there should be parity of costs for all the defendants. The AG was entitled to more than D1 and D2. On quantum, the amounts sought were very much within the range of costs awarded for matters of this nature and complexity. Three factors were relevant in this regard. The costs were for the Applications and the action. Second, the Applications were fixed for a special half-day sitting which usually attracts a higher cost attribution. Third, the costs sought were inclusive of disbursements. Disbursements were indicated to be fairly substantial. For instance, disbursements on the AG's part were close to $1,900. In the round, I felt that the costs sought by the defendants were reasonable. I therefore awarded costs of the respective applications and the action (inclusive of disbursements) to D1 and D2 ($6,000 each) and the AG ($10,000).

Kannan Ramesh
Judicial Commissioner

Irving Choh Thian Chee and Kor Wan Wen Melissa (Optimus Chambers LLC) for the plaintiff;
Ragbir Singh s/o Ram Singh Bajwa (Bajwa & Co) for the first defendant;

Goh Eng Yau Laurence (Laurence Goh Eng Yau & Co) for the second defendant;
Jeyendran s/o Jeyapal and Lam Qian Yi Debra (Attorney-General's Chambers) for the third defendant.