Ramesh s/o Krishnan *v* AXA Life Insurance Singapore Pte Ltd
[2015] SGHC 125

Case Number : Suit No 1022 of 2012

Decision Date : 06 May 2015

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Eugene Singarajah Thuraisingam, Cheong Jun Ming Mervyn and Jerrie Tan Qiu Lin (Eugene Thuraisingam LLP) for the plaintiff; K Muralidharan Pillai, Luo Qing Hui and Huang Jieyang (Rajah & Tan Singapore LLP) for the defendant.

Parties : RAMESH S/O KRISHNAN — AXA LIFE INSURANCE SINGAPORE PTE LTD

Tort – Defamation – Defamatory statements

Tort – Defamation – Justification

Tort – Defamation – Qualified privilege

Tort – Defamation – Malice

Tort – Malicious falsehood

Tort – Negligence – Duty of care

Tort – Negligence – Breach of duty

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 112 of 2015 was allowed in part by the Court of Appeal on 27 July 2016. See [2016] SGCA 47.]

6 May 2015 Judgment reserved.

George Wei JC:

1 This case concerns a claim for defamation arising from several reference checks and communications made in respect of the plaintiff, a financial adviser ("the Plaintiff"). These were provided by the defendant, AXA Life Insurance Singapore Pte Ltd ("the Defendant"), to the Monetary Authority of Singapore ("MAS") and potential employers of the Plaintiff, namely, Prudential Assurance Company Singapore Private Limited ("Prudential") and Tokio Marine Insurance Singapore Limited ("Tokio Marine").

2 The Plaintiff also claims malicious falsehood and negligence on the part of the Defendant in the reference checks that were provided to these potential employers. The trial took place over a period of eight days. I reserved judgment upon the conclusion of the trial. Having considered both the evidence and the parties' submissions, I dismiss the Plaintiff's claims in defamation, malicious falsehood and negligence. I now set out the grounds for my decision.

The facts

3 Prior to joining the Defendant, the Plaintiff worked as an insurance agent at other insurance companies including Phillip Securities and Manulife Financial. It is not in dispute that the Plaintiff's services at Manulife Financial were terminated for reasons relating to persistency and compliance issues. [note: 1]

4 The Plaintiff was first engaged by the Defendant as a financial adviser and financial services manager on 26 July 2005. At that time, the Defendant engaged the Plaintiff subject to a period of close supervision due to reference check reports the Defendant had received, and on which MAS had made enquiries of the Defendant. [note: 2] That said, it is apparent that the Plaintiff performed well enough to be promoted to the position of a financial services director in 2007, when he led a group of advisers under his own agency organisation, "Ramesh Organisation". These advisers were formally employed by the Defendant. In 2009, the Plaintiff was promoted to a senior financial services director ("Senior FSD"). At all material times, the Plaintiff was authorised to act as an agent for the Defendant for the purposes of soliciting and advising on life insurance applications, annuities and other products offered by the Defendant. [note: 3] The Plaintiff was not an *employee* of the Defendant. It is apparent that the Plaintiff received commissions based on the insurance policies sold by Ramesh Organisation.

5 The Plaintiff's scope of work as a Senior FSD was to recruit, train and supervise advisers for the Defendant. In doing so, the Plaintiff would assess the sales figures and persistency ratios of the advisers directly under him.

6 Persistency ratios are essentially a measure used to track the number of insurance policies sold by advisers that are still in force over a certain period of time. The Plaintiff gave evidence that from January 2007 to April 2011, the Defendant had always relied on a 19-month persistency ratio to assess the performance of the advisers under his supervision. The 19-month persistency ratio was a measure of how many regular and single premium policies are still in force over an 18-month period. As at April 2011, the Plaintiff had 47 advisers under him in Ramesh Organisation.

Industry reference check system

7 The MAS prescribes fit and proper guidelines for representatives of financial institutions ("FIs") in relation to their competency, integrity, and financial soundness ("the Guidelines on Fit and Proper Criteria"). In September 2006, the MAS introduced an industry reference check system ("the Industry Reference Check System") to facilitate effective and efficient compliance with the Guidelines on Fit and Proper Criteria. The Industry Reference Check System was implemented on 2 October 2006. This was followed by a Representative Notification Framework ("RNF") licensing regime introduced on 26 November 2010, which imposes a duty on an FI to respond to queries by MAS and reference check requests by other FIs in relation to its ex-financial advisers.

8 It is not disputed that the Defendant, Prudential and Tokio Marine are FIs subject to regulation by MAS. Specifically, they are subject to the abovementioned Industry Reference Check System, the Guidelines on Fit and Proper Criteria and the RNF.

9 Under the Industry Reference Check System, FIs are obliged to conduct reference checks on persons applying to them for jobs involving regulated activities under the Financial Advisers Act (Cap 110, 2007 Rev Ed) ("FAA") and the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA"). These reference checks are obtained from the job applicant's ex-principal(s) using a standard industry reference check form ("the Industry Reference Check Form"). The checks are conducted to ensure that the job applicant satisfies the Guidelines on Fit and Proper Criteria. The ex-principals are expected to respond in a timely and forthcoming manner to facilitate such reference check requests.

10 The Industry Reference Check Form comprises four parts: (a) Section A (minimum compulsory information); (b) Section B (optional information); (c) Written authority to conduct the reference check; and (d) Guidelines for use of the reference check form ("the RCF Guidelines"). The Industry Reference Check Form was developed by the Life Insurance Association ("LIA") in 2006. The RCF Guidelines stress that the prospective employer or principal is at liberty to request more information under the optional section (*eg*, information on persistency ratios). [note: 4]

11 The Industry Reference Check Form contains a section where the applicant gives written authorisation to the prospective hiring FI to conduct the inquiry into his or her previous employment, and to release from liability all persons or entities requesting or supplying such information that pertains to the applicant's previous employment.

12 Under the RNF, FIs are to notify MAS whenever they intend to appoint a representative to provide financial advisory or capital markets services under the FAA or the SFA. They are to ensure that any proposed representative satisfies the Guidelines on Fit and Proper Criteria. The FIs do this by making due and diligent enquiries on the applicant's background based on all relevant information that is available. This includes conducting the necessary reference checks with the applicant's ex-employer or principal using the Industry Reference Check Form. The FIs must also ensure that their appointed representatives are, and continue to be, fit and proper under the Guidelines on Fit and Proper Criteria.

13 On 26 November 2010, MAS revised the Guidelines on Fit and Proper Criteria. The revised guidelines (like its predecessor) provided that FIs must implement appropriate recruitment policies, and adequate controls and procedures to ensure that their representatives meet the fit and proper criteria. The fit and proper criteria included (but was not limited to): (i) honesty, integrity and reputation, (ii) competence and capability, and (iii) financial soundness. [note: 5]

14 Reference should also be made to the MAS Circular of 7 February 2011, which states (amongst other matters) that a FI is expected to conduct probity checks on the proposed representative's past record by confirming that he has not been dismissed or asked to resign. The FI is also to enquire whether the proposed representative has any adverse material record such as a warning, reprimand or other disciplinary action for misconduct. [note: 6]

15 On 26 November 2010, the Defendant successfully applied for an RNF licence for the Plaintiff.

Plaintiff's resignation from the Defendant

16 An issue apparently arose between the parties in or around October 2010, when the Plaintiff realised that the advisers in Ramesh Organisation might not be receiving the Defendant's Top Awards for 2010 due to an apparent mismatch in the parties' expectations. At that point in time, Ramesh Organisation had focused predominantly on regular premium policies. The Plaintiff claims that Ramesh Organisation's targeted approach of focusing on regular premium policies was highlighted to the Defendant's then chief executive officer ("CEO"), Mr Gilbert Pak ("Mr Pak"). Through Mr Pak, the Defendant apparently assured the Plaintiff that only regular premium policies would be considered for the purpose of assessing the top awards.

17 On or around 1 December 2010, Mr Glenn Williams ("Mr Williams") replaced Mr Pak as the Defendant's CEO. On 11 January 2011, Ramesh Organisation held its annual function to celebrate the organisation's performance the year before. At this function, Mr Williams complimented the organisation's performance. In addition, Mr Williams also communicated the Defendant's position that

it would be taking into account the persistency ratios for *single* premium policies in assessing the Defendant's top performers. It thus transpired that the Defendant determined the top performers based on *both* single and regular premium policies. Dismayed at the Defendant's stance, the Plaintiff notified the Defendant via an email to Mr Williams dated 14 January 2011 that Ramesh Organisation had decided to leave the Defendant.

18 The Plaintiff claims that thereafter, a few of the Defendant's executive officers, including Mr David Matthews ("Mr Matthews"), the Regional Chief Executive Officer of South East Asia, asked him to stay with the Defendant. According to the Plaintiff, Mr Matthews invited him to Hong Kong to meet him from 18 to 21 February 2011. The Plaintiff's travel expenses were fully paid by the Defendant. Subsequently, in March 2011, the Defendant offered the Plaintiff a remuneration package known as the "AXA Growth Package", which was worth $1.3 million.

19 On 29 April 2011, the Defendant's Mr Williams met the Plaintiff and told him that he knew of the Plaintiff's intention to leave the Defendant. On the same day, the Defendant terminated the Plaintiff's contract with the Defendant via a termination letter dated 29 April 2011, giving the Plaintiff 14 days' notice in accordance with his contract. The Plaintiff requested to resign instead. Mr Williams acceded to the Plaintiff's request, and gave the Plaintiff up until 1pm of the same day to do so. The Plaintiff tendered his written resignation by the deadline stipulated by Mr Williams.

Plaintiff's application to Prudential

20 On or around 20 May 2011, the Plaintiff applied to join Prudential. The next day, Prudential sent a reference check request to the Defendant pursuant to the Industry Reference Check System. This reference check was a necessary step in kicking start the process of Prudential applying for an RNF licence for the Plaintiff. Depending on the response received, this may lead to a chain of enquiry into the Plaintiff's background. The Plaintiff's written authorisation was enclosed in Prudential's request to the Defendant as follows: [note: 7]

> I Ramesh s/o Krishnan hereby irrevocably and unconditionally authorise you to perform reference checks of my previous employment(s) and release from liability all persons or entities requesting or supplying such information.

21 On 7 June 2011, the Defendant provided its written response to Prudential. This response forms an important part of the basis of the Plaintiff's claim for defamation.

22 In the Defendant's response under the section titled "Optional Information", it referred Prudential to an Annex A attached therein. Annex A stated as follows: [note: 8]

> **2. Ramesh s/o Krishnan Organisation Persistency (as of 30 April 2011)**
>
> 19mth Single Premium persistency = 43%
>
> 13mth Regular Premium persistency = 39.6%
>
> [hereinafter referred to as the "First Statements on Persistency"]
>
> **3. Compliance Issues**
>
> Between 2008 to 2011, 14 Advisers under Ramesh's organization were investigated (including Ramesh).

- Disciplinary actions were taken against 5 advisers
- 3 cases were referred to the Police for further investigation

[hereinafter referred to as the "First Statements on Compliance"]

23 While the First Statements on Compliance stated that disciplinary actions and police referrals were made against some advisers in "Ramesh's organization", nothing further was mentioned about the outcome of the investigations against the Plaintiff.

24 I highlight that the Defendant's written response on 7 June 2011 touched on two areas in particular: (i) persistency, and (ii) compliance. As indicated above, these will be referred to as the "First Statements on Persistency" and the "First Statements on Compliance" respectively. Where reference is made to the whole of the Defendant's written response of 7 June 2011 as extracted above, it shall, for convenience, be referred to as the "First Statements on Persistency and Compliance".

25 On the same day, Prudential wrote back to the Defendant seeking clarification in respect of, amongst others, the names of the advisers involved in the investigations and whether the investigations had been concluded. It is noted that the MAS Circular of 7 February 2011 requires an FI who assesses an individual as fit and proper despite uncovering adverse information in the due diligence checks to justify and document the basis for that assessment. [note: 9] On 9 June 2011, the Defendant replied Prudential's email stating that the Plaintiff was investigated in August 2010 for unprofessional conduct. However, no further action was taken because the evidence substantiating the allegation was inconclusive.

26 Thereafter, Prudential sought another round of clarification from the Defendant on 21 June 2011 in respect of, amongst others, the Defendant's derivation of the figures in the First Statements on Persistency. The Defendant did not respond to this email. As such, on 18 July 2011, Prudential sent another email with the same questions.

27 I note that persistency is a matter of some concern and importance to the insurance industry as a whole. Indeed, this is borne out by Prudential's request for more information on persistency as well as the guideline by LIA, which names persistency as an example of relevant optional information.

28 In response to Prudential's second round of clarification, the Defendant's Mr Williams issued a letter dated 14 October 2011 directly addressed to Prudential's CEO, Mr Kevin Holmgren. The said letter highlighted Ramesh Organisation's low 13-month persistency ratio of 9% and the Defendant's belief that ex-advisers in the organisation had been involved in the twisting of clients' policies. In brief, twisting concerns a situation where a policyholder is persuaded to allow an existing policy to lapse and to enter into a new policy on similar terms. [note: 10] To be clear, the Plaintiff does not plead this letter to Prudential, with its suggestion of twisting, as a defamatory statement upon which it makes a claim.

29 On or around 12 August 2011, Prudential applied to MAS for an RNF licence for the Plaintiff. MAS was prepared to issue a conditional licence to the Plaintiff. This effectively meant that conditions would be imposed on Prudential in the event that the Plaintiff was hired as its representative. Prudential eventually decided against employing the Plaintiff and withdrew its application for an RNF licence for the Plaintiff in December 2011.

Plaintiff's application to Tokio Marine

30 Thereafter, in January 2012, the Plaintiff applied to Tokio Marine for the position of a financial adviser and was orally offered a sign-on fee of $20,000. Tokio Marine requested a reference check of the Plaintiff from the Defendant on 19 January 2012. The Plaintiff's written authorisation was also enclosed in Tokio Marine's request as follows: [note: 11]

> I, Ramesh s/o Krishnan ... , authorise [Tokio Marine] and/or any of its subsidiaries or affiliates, and any persons or organisations acting on its behalf, to verify information presented on my employment application/resume and/or to conduct enquiries and perform reference check of my previous employment(s) as may be necessary. I authorise all persons who may have information relevant to this enquiry to disclose it to [Tokio Marine] and release all persons from liability on account of such disclosure.

31 On 2 February 2012, Tokio Marine received a response from the Defendant broadly similar to the response that Prudential had received earlier. Specifically, the response to Tokio Marine included an Annex A containing similar statements on persistency and compliance issues. For convenience, I shall refer to the corresponding statements that were made to Tokio Marine as the "Second Statements on Persistency", the "Second Statements on Compliance", and collectively, the "Second Statements on Persistency and Compliance".

32 By way of an email dated 8 March 2012, Tokio Marine followed up on the Defendant's response with some enquiries. It is noteworthy that Mr Williams circulated an internal email dated 9 March 2012 to the Defendant's compliance manager, Mr Jack Ng ("Mr Ng"). It stated that the Defendant "need[ed] to be much stronger than this", that they "need[ed] to mention [the Plaintiff's] very poor persistency" and that "[f]or the 5 disciplinary cases if any of these are bad [they] should highlight those case[s]". [note: 12] Thereafter, on 21 March 2012, Mr Ng responded to Tokio Marine by way of an email stating that: [note: 13]

> Ramesh was investigated in June 2010 for unprofessional conduct (being rude and aggressive) based on a client's brother complaint. In view of the inconclusive evidence to substantiate the allegation, no action was taken against Ramesh.
>
> Between 2008 to 2011, there were disciplinary actions taken against 5 advisers under Ramesh Krishnan Organization. During the same period, there were also 3 cases involving 3 advisers under Ramesh Krishnan Organization that were referred to the Police for further investigation.
>
> We wish to highlight that Ramesh organisation's 13mth persistency is 11.22% as at end Feb 2012. We recommend that TM Life PO phone AXA PO, [Mr Williams], for more details on this case.

33 Tokio Marine subsequently informed the Plaintiff that it could not hire him due to the Defendant's response to its reference check request. [note: 14]

Defendant's communications with MAS

34 At the time of Prudential's application for an RNF licence for the Plaintiff, MAS contacted the Defendant. In or around October 2011, MAS queried the Defendant on its basis for terminating the Plaintiff's employment and the reasons why he was subsequently allowed to resign instead. By way of an email to MAS dated 21 October 2011, the Defendant's Mr Ng stated that: [note: 15]

> The reason for allowing Ramesh to resign, rather than terminate is that we suspected persistency

will be poor but at the time of termination the business had not reached 13 months so we had no tangible proof other than suspicions.

35 The Defendant also provided MAS with information on the Plaintiff's low group persistency ratios, high lapse rates, and the conduct of several agents under Ramesh Organisation who were disciplined for improper sales practices and unprofessional conduct. In this regard, Mr Ng sent an email to MAS dated 9 November 2011 stating that: [note: 16]

> ... Persistency was the main concern although we were also worried about the general culture of Ramesh's organisation. The culture seemed to be overly sales orientated e.g. Ramesh had a high number of managers who had faced disciplinary action over the previous years' the average productivity of his advisers seemed to be very much higher than we would expect, potentially indicating gaming of compensation. We felt that he "sailed very close to the wind" and ultimately crossed the line. We believe the fact that his persistency has fallen to ONLY 9% supports our view and intuition at the time.

36 To be clear, there were a few other communications between the Defendant and MAS in 2011 which the Plaintiff referred to in his pleadings. However, it is apparent that these two emails in particular form the core of his complaint. [note: 17]

37 One limitation the Plaintiff faces in its defamation claim is that whilst the aforementioned emails sent by the Defendant to MAS in 2011 ("the MAS Emails") were referred to in the Plaintiff's claim for defamation, the majority of its content was not specifically pleaded as part of the allegedly defamatory words. The Plaintiff pleaded as follows at para 27 of his statement of claim: [note: 18]

> The words in the First and Second Statements on Persistency and Compliance Issues ... which were published and/or caused to be published by the Defendant in (i) the Defendant's Reply to Prudential, (ii) the Defendant's Correspondence With the MAS in 2011 and the Defendant's Subsequent Statements to the MAS, and (iii) the Defendant's Reply to Tokio Marine, were defamatory of the Plaintiff.

38 It is clear that the only words pleaded as defamatory are the "words in the First and Second Statements on Persistency and Compliance Issues". While reference is made to "the Defendant's Correspondence With the MAS in 2011", the only words the Plaintiff pleads as being defamatory in the said correspondence with MAS are the "words in the First and Second Statements on Persistency and Compliance Issues".

39 To be clear, the phrase "First and Second Statements on Persistency and Compliance Issues" refers to the reference check responses provided by the Defendant to Prudential and Tokio Marine. The reference to "Subsequent Statements to the MAS" refers to communications that took place in 2012. In that year, MAS sought the Defendant's consent to disclose the information given by the Defendant to the Plaintiff. The Defendant consented, and MAS thereafter notified the Plaintiff by way of a letter dated 31 August 2012 that: [note: 19]

> (i) Your former agency unit, Ramesh Organisation, had a low group persistency and high lapse rate; and
>
> (ii) Several of your agents were disciplined by AXA for issues such as improper sales practices and unprofessional conduct.

40 Returning to the statement of claim, the Plaintiff then pleaded that the defamatory words caused injury to his reputation, distress, hurt feelings and financial loss. I note that there are no other paragraphs in the statement of claim that contain pleadings on statements which the Plaintiff asserts are defamatory. Looking at the statement of claim as a whole, therefore, the only words complained of in respect of the communications to MAS, and indeed any other communications made by the Defendant, are the same words set out in the "First and Second Statements on Persistency and Compliance Issues". [note: 20]

41 The references made in the MAS Emails to "gaming of compensation", "sailed very close to the wind", and "crossed the line" are not pleaded as defamatory statements. Indeed, at the start of the trial, the Plaintiff confirmed in cross-examination that the claim in defamation was based only on the First and Second Statements on Persistency and Compliance contained in the Defendant's reference check responses to Prudential and Tokio Marine.

42 That said, whilst the references in the MAS Emails to "gaming of compensation" and "crossing the line" are not part of the defamatory statements relied upon by the Plaintiff, they may still be relevant in the context of showing malice.

Present proceedings

43 In the present action, the Plaintiff is seeking compensation for losses allegedly suffered as a result of both Prudential and Tokio Marine's rejection of his job application. The Plaintiff claims that the said rejections were caused by the Defendant's actions.

The parties' arguments

44 The Plaintiff makes three claims in respect of the First and Second Statements on Persistency and Compliance:

(a) defamation;

(b) malicious falsehood; and

(c) negligence.

45 I shall now describe the Plaintiff's claims and the Defendant's responses.

Plaintiff's arguments

46 The Plaintiff's case focuses primarily on the claim in defamation. In this regard, the Plaintiff is relying on the natural and ordinary meaning of the words in the First and Second Statements on Persistency and Compliance, as well as the communication of these statements in the MAS Emails.

47 The Plaintiff asserts that the natural and ordinary meaning of the words, as understood by the ordinary reasonable person, is as follows: [note: 21]

(a) the Plaintiff was incompetent in his work and/or profession and/or trade and/or business and/or services provided;

(b) the Plaintiff was not a fit and proper person to be appointed as the representative of a FI to conduct regulated activities under the FAA and the SFA;

(c) the Plaintiff was not a person of credit and integrity; and

(d) the Plaintiff was an incompetent and unprofessional manager and supervisor.

48 With reference to the First and Second Statements on Compliance, the Plaintiff argues that the Defendant had made incomplete disclosure of the investigations conducted on the 14 advisers in Ramesh Organisation. In particular, the Defendant failed to state that the advisers in question were not under the Plaintiff's direct supervision and that the Plaintiff had not been held personally responsible for these advisers. The Plaintiff submits that this information was of especial importance given that these matters subsequently escalated into police investigations.

49 In relation to the First and Second Statements on Persistency, the Plaintiff argues that the Defendant had, throughout his tenure, relied on the 19-month persistency ratio for the purpose of assessing his performance and calculating his bonuses. In this regard, the Plaintiff gave evidence that he had not been informed at any time during his tenure of the Defendant's intended assessment of its financial advisers' performance based on the 13-month persistency ratio. To this end, the Defendant's reference to the Plaintiff's 13-month regular premium persistency ratio in its response to the reference check requests would lead the ordinary reasonable man to think that the Plaintiff had been incompetent in his work. [note: 22]

50 In addition, it is also the Plaintiff's case that the Defendant agreed to assess Ramesh Organisation's performance based only on regular premium policies and not single premium policies for the purpose of the Defendant's top awards. The Plaintiff submits that this agreement was not upheld by the Defendant.

51 In response to the Defendant's reliance on the defence of justification, the Plaintiff contends that the Defendant's proof of the truth in the words is insufficient to establish the defence as it does not meet the sting of the charge in the allegedly defamatory statements. Furthermore, the Defendant's incomplete disclosure and exclusive focus on the adverse points in its responses were said to have distorted the facts such that the defence of justification must necessarily fail. In particular, the Plaintiff points to the Defendant's failure to explain the context behind Ramesh Organisation's low single premium persistency ratio and the investigations conducted on the 14 advisers of the organisation. The Plaintiff also asserts that the Defendant did not have any factual basis for referring to the time period of "2008 to 2011" in the First and Second Statements on Compliance as the Defendant had admitted that there were no investigations in 2011.

52 In so far as the defence of qualified privilege is concerned, the Plaintiff simply made a bare denial of the defence. [note: 23] He explained that the privilege, even if established on the facts of the case, was necessarily lost because the Defendant had no honest belief in the truth of the words and had used the occasion for improper purposes. In other words, the Plaintiff claims that on the facts, the defence of qualified privilege is defeated by the Defendant's malice.

53 The Plaintiff contends that the Defendant had no honest belief in the truth of its words on the basis that the Defendant had chosen to be economical with the truth. The Defendant failed to provide the context of the Plaintiff's low single premium persistency ratios and the investigations conducted into the 14 advisers in Ramesh Organisation.

54 With regard to his second claim that the Defendant was motivated by improper purposes, the Plaintiff argues that in making the defamatory statements, the Defendant intended to prevent him from joining its competitors and ultimately drive him out of the financial advisory services industry.

The Plaintiff also submits that the Defendant's intention was to send a warning to all of the Defendant's financial services directors to make them think twice about leaving the Defendant.

55 The Plaintiff refers to the Defendant's conduct to support his argument that the latter was motivated by malice. First, the Plaintiff points to the Defendant's adoption of the 13-month persistency ratio in its response to the reference check requests. Notably, the 13-month persistency ratio was calculated based on a time period *after* the advisers in Ramesh Organisation, including the Plaintiff, had left the Defendant. Furthermore, in Mr Williams' letter to Prudential's CEO dated 14 October 2011, it was said that the former explained the 13-month persistency ratio by drawing up a table of policies issued in 2005 which were attributed to the Plaintiff.

56 Second, the Plaintiff highlights Mr Ng's testimony that the Defendant's usual practice was not to reveal the details of investigations and names of advisers who were not the subject of the reference check request. On this point, the Plaintiff referred to a similar reference check provided by the Defendant for another financial adviser who had left the Defendant, Mr Philip Tan. In the reference check provided by the Defendant on Mr Philip Tan, the Defendant had only released information that solely pertained to him. The Plaintiff submits that the contrast reveals double standards and is evidence of malice.

57 Third, the Plaintiff also refers to the usage of strong language in Mr Williams' internal email to Mr Ng dated 9 March 2012 (see [32] above) as evidence of the Defendant's, and specifically Mr Williams', deliberate emphasis on the adverse aspects of the Plaintiff's tenure with the Defendant. In this regard, the Plaintiff points out that the Defendant failed to furnish any explanation for its choice of language in that email. Indeed, the strong stance relayed by the Defendant's Mr Williams may have been the basis upon which Mr Ng had crafted his response to MAS (see [34] and [35] above). To this end, the Plaintiff highlights that the Defendant had failed to inform MAS of the following material facts:

(a) First, most of the advisers in Ramesh Organisation had left the Defendant in April and May 2011.

(b) Second, the Defendant had not assigned any agent to attend to the clients of these ex-advisers.

According to the Plaintiff, these facts were crucial in explaining the low persistency ratio at the time when the policies under Ramesh Organisation were due for renewal.

58 Furthermore, the Plaintiff avers that the Defendant's inclusion of the fact that the Plaintiff owed the Defendant monies in its response to Prudential's reference check request is evidence of the latter's intention to create an impression that the Plaintiff was a person of poor credit and integrity.

59 The Plaintiff further submits that the defence of consent, waiver or estoppel based on the written authorisations given by the Plaintiff has not been made out on the facts. First, he asserts that the Defendant could not obtain a benefit under the written authorisations because it was not the intended recipient. On this basis, reliance on the phrase "release all persons from liability" in the written authorisations does not absolve the Defendant from liability because the Plaintiff had not consented to the words being published. Furthermore, it is asserted that the phrase was unclear in scope. To this end, it is ambiguous whether the phrase covers liability in respect of defamation, malicious falsehood or negligence.

60 In respect of the claim in malicious falsehood, the Plaintiff essentially relies on the same set of

facts described above. In particular, the Plaintiff relies on the Defendant's series of conduct allegedly actuated by malice (see [55] to [58] above).

61 To support the claim in negligence, the Plaintiff relies heavily on the English decision of *Spring v Guardian Assurance Plc and others* [1995] 2 AC 296 ("*Spring v Guardian*") to argue that the existence of causes of action in defamation and malicious falsehood does not prevent the recognition of a duty of care in negligence in respect of the making of a false statement. This is said to have been cited in the local decision of *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter and others* [2013] 2 SLR 193 ("*CCL v Byrne*"), notwithstanding the fact that the principles in *Spring v Guardian* were not considered as the legal issues therein were different from that in *CCL v Byrne*.

62 In asserting the presence of a duty of care on the part of the Defendant, the Plaintiff reiterates the reasons set out above (see [59] above) in support of his position that the duty was not negated by the written authorisations signed by him. After his resignation, the Defendant was clearly aware that its responses to reference checks would have a critical impact on the Plaintiff's employability or job prospects in the insurance industry. Yet, the Defendant's responses showed a blatant failure to exercise due care as incomplete information was given in reply to various aspects of the reference checks. For instance, the Defendant's response regarding investigations of the Plaintiff did not state that the complaint was found to be unsubstantiated and that no follow-up action was eventually taken. Furthermore, the 13-month persistency ratio was said to have been calculated for the time period *after* the Plaintiff had already left the Defendant.

63 As a result of the Defendant's actions, the Plaintiff has claimed that he was unable to be employed or engaged by either Prudential or Tokio Marine and consequently suffered, amongst others, the following damages:

(a) loss of an opportunity to earn a 24-month financial package of at least $2.2 million purportedly offered by Prudential;

(b) loss of a sign-on fee of $20,000 purportedly offered by Tokio Marine; and

(c) loss of remuneration he had earned in 2010 up till his last day with the Defendant on 12 May 2011.

In total, the Plaintiff's claims amount to $1,702,250.87. With a view to being gainfully employed in the insurance industry again, the Plaintiff also prays that the Defendant be ordered to withdraw its statements made to MAS.

Defendant's arguments

64 In its pleadings, the Defendant has relied on the defences of consent, justification and qualified privilege.

65 With regard to the defence of consent, the Defendant relies on the Plaintiff's written authorisations enclosed in the reference check requests to support its position that the Plaintiff had consented to the Defendant's release of information relating to his previous employment to Prudential and Tokio Marine. In the written authorisations, the express reference to the phrase "release from liability" meant that the Plaintiff had waived his right to bring a claim in defamation against the Defendant in relation to the latter's responses to Prudential's and Tokio Marine's reference check requests. [note: 24]

66 Notably, the Defendant admits to the publication of the First Statements on Persistency and Compliance to Prudential, and the Second Statements on Persistency and Compliance to Tokio Marine. The Defendant also admits that it passed the First Statements on Persistency and Compliance to MAS in 2011. [note: 25] However, the Defendant disputes the Plaintiff's assertion that the Second Statements on Persistency were published or caused to be published by the Defendant to either Prudential or MAS. The Defendant's position is that the Second Statements on Persistency Issues were only published to Tokio Marine.

67 With regard to the defence of justification, the Defendant argues that the natural and ordinary meaning of the First and Second Statements on Persistency and Compliance ought to be understood to mean that the Plaintiff was not an effective *leader* and *supervisor* of his advisers in Ramesh Organisation.

68 To this end, the Defendant submits that a distinction ought to be drawn between comments on the Plaintiff's managerial skills as opposed to his personal conduct. A reasonable reader would not have understood the First and Second Statements on Persistency and Compliance to indicate anything adverse about the Plaintiff's honesty, integrity, or his personal competency as a representative of a FI. Instead, it is apparent that the Defendant's statements relate only to the Plaintiff's managerial skills. Moreover, the Defendant's answers indicated that no personal misconduct report of the Plaintiff had been filed by the Defendant with MAS.

69 In support of its interpretation of the First and Second Statements on Persistency and Compliance, the Defendant contends that the natural and ordinary meaning of the statements must be determined in the light of the circumstances and manner of publication. The Defendant asserts that its multiple responses to both Prudential and Tokio Marine should be taken into account in determining the natural and ordinary meaning of the First and Second Statements on Persistency and Compliance because the subsequent responses were given in "close temporal proximity" to the said statements. [note: 26]

70 In particular, the Defendant submits that the alleged defamatory statements must be interpreted in the light of the clarificatory emails the Defendant sent out shortly thereafter. In its subsequent email to Prudential on 9 June 2011, [note: 27] the Defendant clarified its responses to Prudential's reference check requests by stating that:

> An investigation was conducted on ex-SFSD Ramesh s/o Krishnan in August 2010 on unprofessional conduct – rude and aggressive in his approach. (Finding: Inconclusive evidence to substantiate the allegation, no action was taken)

In its email to Tokio Marine on 21 March 2012, it was clarified as follows: [note: 28]

> Ramesh was investigated in June 2010 for unprofessional conduct (being rude and aggressive) based on a client's brother complaint. In view of the inconclusive evidence to substantiate the allegation, no action was taken against Ramesh.

71 Taking the above interpretation of the First and Second Statements on Persistency and Compliance, the Defendant submits that its comments on the Defendant's managerial skills are justified by the following facts which the Plaintiff admitted to during cross-examination:

(a) The organisation's 13-month persistency ratio was low at 39.6% as at 30 April 2011 and 13 May 2011.

(b) Five out of 14 advisers in Ramesh Organisation were disciplined by the Defendant for issues such as improper sales practices and unprofessional conduct.

(c) Three of the 14 advisers were referred to the police for further investigations.

72 Thus, it is the Defendant's position that the First and Second Statements on Persistency and Compliance, read together with its subsequent emails, are true and not misleading. In response to the allegation that the Defendant had failed to provide the context, the Defendant explained that it was not in a position to provide details of the investigation outcomes in respect of the other advisers in Ramesh Organisation because the Plaintiff was the only subject of the reference check. Further, no written authorisation had been provided by the other advisers.

73 With regard to the defence of qualified privilege, the Defendant argues that it sent the MAS Emails in discharge of its duty as an MAS-regulated entity and a member of the LIA. [note: 29] In this regard, the Defendant would be expected to participate in the Industry Reference Check System and RNF. It is emphasised that the Plaintiff accepted, upon further questioning, that the Industry Reference Check System was at least "the first step" towards the ultimate objective of enabling FIs to be satisfied that their prospective representatives satisfy the Guidelines on Fit and Proper Criteria. [note: 30]

74 Further, the Defendant argues that it was obligated to furnish information to MAS upon the latter's request pursuant to s 33 of the Insurance Act (Cap 142, 2002 Rev Ed) ("IA"). In addition, the Defendant was also bound by MAS Notice 306 ("MAS Notice 306") on "Market Conduct Standards For Life Insurers Providing Financial Advisory Services As Defined Under the Financial Advisers Act". A copy of the MAS Notice 306 was put before me on 7 January 2014 by counsel for the Defendant, Mr K Muralidharan Pillai. [note: 31] In particular, the Defendant's duties include ensuring that its representatives comply with the FAA and the IA, and lodging information on its provision of financial advisory services annually. To this end, it was argued that the Defendant's communications with MAS were protected by privilege in so far as it had a duty to provide MAS information about the Plaintiff for the MAS's assessment of whether the Plaintiff met the Guidelines on Fit and Proper Criteria.

75 With respect to the Defendant's responses to both Tokio Marine and Prudential, it is contended that the latter two, being fellow MAS-regulated entities and members of the LIA, share with the Defendant a common or mutual interest in the subject matter of the communications. The First and Second Statements on Persistency and Compliance would therefore be covered by qualified privilege. Notably, it was pointed out that employment references are one of the most common examples of qualified privilege. In addition, the Defendant also refers to s 33(1) of the IA and MAS Notice 306 in support of the duty-interest relationship that it claims to have with Prudential and Tokio Marine in its communication of the First and Second Statements on Persistency and Compliance.

76 Indeed, it is noted that when the Plaintiff applied for a position with the Defendant in 2005, the Defendant had also sought a reference check from the Plaintiff's then former FI, Manulife Financial. The reference check received by the Defendant included information on persistency and compliance. Under cross-examination, the Plaintiff agreed that information on persistency had a bearing on competency, and information on compliance would include matters such as whether an adviser had been subject to internal investigation, disciplinary proceedings or was referred to the police. [note: 32]

77 It is also the Defendant's position that its actions were not actuated by malice. First, the Defendant asserts that it had, in fact, informed the Plaintiff and other advisers of its reliance on the 13-month persistency ratio at a workshop conducted on 8 March 2011. To this end, the Defendant

was therefore entitled to rely on and provide both Prudential and Tokio Marine with the 13-month persistency ratios in its responses to the reference check requests.

78 Second, the Defendant argues that its provision of additional information in relation to the investigations conducted on several advisers in Ramesh Organisation was not actuated by malice. The information is relevant to Prudential and Tokio Marine's assessment of the Plaintiff's competency as a Senior FSD. In this regard, the Defendant asserts that brief details of the investigations, such as whether disciplinary action was taken and whether referrals were made to the police, were sufficient to enable the requesting FI to conduct its own checks and enquiries. The Defendant justifies its omission to provide details on the outcome of the three cases referred to the police on the ground that none of the three advisers were the subject of the reference check request, and that it did not have written authorisation from the three advisers to disclose such information.

79 In response to the Plaintiff's assertion that the Defendant's conduct was actuated by malice, in particular Mr Williams' letter to Prudential dated 14 October 2011 on the high number of lapsed or surrendered policies, the Defendant asserts that it is "very standard practice" for a CEO of an insurance company to write to the CEO of another insurance company concerning an FSD to highlight issues such as "suspected twisting of policies". [note: 33] In support of this, the Defendant referred to MAS Notice FAA-N16 on Notice on Recommendations on Investment Products, which indicates that a financial adviser shall not make recommendations on switching of designated investment products.

80 As for Mr Williams' email to the compliance manager, Mr Ng, on 9 March 2012, stating that the Defendant would need to be "stronger" in its position, the Defendant explained that its CEO was merely acting in accordance with a sense of duty or in *bona fide* protection of the Defendant's own legitimate interests. Furthermore, it has been highlighted that the Plaintiff agreed that "the only party who profits in relation to premature lapsing of [regular premium] policies would be the advisers, and not either [the Defendant] or the policyholders". [note: 34]

81 Notwithstanding the defences above, the Defendant further argues that the Defendant's publication of the First and Second Statements on Persistency and Compliance had not caused the Plaintiff to suffer the alleged losses. There was a break in the chain of causation when the insurance companies decided not to engage the Plaintiff. First, notwithstanding the Defendant's response to Prudential's reference check request, the latter had, in fact, submitted an RNF application to MAS on behalf of the Plaintiff. This indicates that Prudential had conducted its internal review and checks, and assessed that the Plaintiff satisfied the Guidelines on Fit and Proper Criteria before deciding to make an RNF application on his behalf. To this end, the intervening act that broke the chain of causation was Prudential's eventual decision to withdraw the RNF application.

82 Second, it was also the case that Tokio Marine had made its own decision not to employ the Plaintiff as its representative. In this regard, the Defendant relied on the answers given by Tokio Marine's Ms Donna Tan, the Section Head of the Compliance Department, during cross-examination that such applications were actually decided by the head of the agency of the distribution department and that there were many factors involved apart from the reference check.

83 In response to the Plaintiff's claim that the Defendant's words were responsible for him not being able to find a reasonable alternative position despite his efforts, and for his general lack of employability in the industry, the Defendant asserts that MAS' decision whether to appoint an individual under the RNF was based on a basket of considerations, and not solely on his or her ex-employer's reference check. As the regulator, MAS makes its own decisions and investigations in respect of the RNF.

84 In response to the Plaintiff's comparison between his case and that of another insurance adviser (who had left the Defendant), the Defendant pointed out that the cases were distinguishable. In the case of the other adviser, a substantial period of time had passed since the time when there were questions about his suitability as an insurance adviser. In that case, the adviser (a former adviser in Ramesh Organisation) had applied for a position at Prudential at about the same time as the Plaintiff. As MAS took a long time to process his application, the adviser withdrew his application sometime in January 2012 and left the industry. Thereafter, in May 2013, he was successful in securing a position as an adviser at another insurance company in Singapore. The Defendant submits that the other adviser was able to secure employment as a financial adviser again at least in part because a substantial period of time had passed since January 2012, when there had been questions about his suitability as a financial adviser. The Defendant also points out that under the MAS Revised Guideline FSG-G01, "[t]he significance of a relevant person failing to satisfy MAS that it or her meets a specific criteria depends on … the passage of time since the failure by the relevant person to meet the specific criteria". [note: 35]

85 In response to the Plaintiff's claim in the tort of malicious falsehood, the Defendant argues that the First and Second Statements on Persistency and Compliance were true. In addition, the Defendant repeats its arguments on the absence of malice in its conduct. With regard to the last element of special damages, the Defendant relies on its position that the intervening acts of third parties had resulted in a break in the chain of causation. The Defendant further submits that the Plaintiff would not be able to discharge his burden of proving the existence of special damages as a direct and natural consequence of the Defendant's publication of the First and Second Statements on Persistency and Compliance.

86 Lastly, with respect to the Plaintiff's claim in negligence, the Defendant quoted a number of English and local authorities in contending that the English decision of *Spring v Guardian* is inapplicable in Singapore. The Defendant examined the local case law on negligence and submits that the position set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") is the applicable law governing whether a duty of care exists. In applying *Spandeck* to the facts in the present case, the Defendant argues that a duty of care cannot arise in the light of the policy considerations such as the Plaintiff's written authorisations in respect of the requests by Prudential and Tokio Marine. Furthermore, *vis-à-vis* MAS, the Defendant relies on the objectives of the Industry Reference Check System and the RNF in support of its position that a duty of care could not have arisen in the present case.

87 Further, even if a duty of care were to exist, the Defendant denies that it breached its duty to the Plaintiff based on its submissions on the defences of justification and qualified privilege, and the absence of malice in its conduct.

88 The Defendant also denies the existence of any damage or loss suffered by the Plaintiff as a result of any alleged malicious falsehood. The Defendant relies on its submissions on causation that were made in relation to the Plaintiff's defamation claim. In particular, with respect to the Plaintiff's claims for loss of the remuneration packages with Prudential and Tokio Marine, the Defendant pointed out that the Plaintiff had failed to discharge his burden of proof given the absence of written confirmation of the packages. The point however remains that the Plaintiff's claim is that he has lost the opportunity to gain re-employment in the insurance industry. With regard to the Plaintiff's claim of being unable to find reasonable alternative employment despite his efforts, the Defendant pointed to evidence that after his departure from the Defendant, the Plaintiff had been engaged in running a vegetarian restaurant known as Tulasi Vegetarian & Café Pte Ltd. In view of the above, the Defendant argued that the Plaintiff was not entitled to claim aggravated damages in respect of his alleged claims.

The decision

89 I will now deal with each of the Plaintiff's claims in turn below.

Defamation

90 To succeed in an action for defamation, the Plaintiff must prove that (a) the Defendant published the words, (b) the words identify the Plaintiff as the person defamed, and (c) the words are defamatory (see *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2009] 1 SLR(R) 177 at [23] ("*Review Publishing*")). In the present case, both elements (a) and (b) are not disputed. The only contention relates to the issue of whether the words complained of are defamatory of the Plaintiff. In particular, the parties disagree on the meaning that should be ascribed to the First and Second Statements on Persistency and Compliance.

91 I shall thus first consider whether the statements are defamatory. Thereafter, I will consider the defences the Defendant raises, namely, consent, estoppel or waiver, justification and qualified privilege.

Are the statements defamatory?

92 There is no one all-encompassing test that exhaustively sets out what is "defamatory". Nevertheless, it is well-established that the allegedly defamatory statement should relate to the *reputation* of the person so defamed (see Gary Chan & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*") at para 12.011). In this regard, the commonly used test is whether the words tend to lower the Plaintiff in the estimation of right-thinking members of society generally (see *Aaron Anne Joseph and others v Cheong Yip Seng and others* [1996] 1 SLR(R) 258 ("*Aaron*"), adopting the views of Lord Atkin in *Sim v Stretch* (1936) 52 TLR 669; *Review Publishing*; *Macquarie Corporate Telecommunications Pte Ltd v Phoenix Communications Pte Ltd and another* [2004] 1 SLR(R) 463 at [19]).

93 The circumstances in which a person's reputation may be impugned in the eyes of members of the society are varied. In particular, in *ABZ v Singapore Press Holdings Ltd* [2009] 4 SLR(R) 648 at [31], it was held that a statement that would ordinarily lead reasonable people to the opinion that the plaintiff had conducted its business in a dishonest, improper or inefficient manner would be defamatory of the plaintiff.

94 The test for determining if a statement is defamatory is an objective one. It is based on the view of the "ordinary reasonable person" who is not unduly suspicious or avid for scandal (see *Microsoft Corp and others v SM Summit Holdings Ltd and another and other appeals* [1999] 3 SLR(R) 465 at [53], applied in *Oei Hong Leong v Ban Song Long David and others* [2005] 3 SLR(R) 608 at [22]). This court considers the general knowledge possessed by the ordinary man, which would include facts and circumstances that are well known to ordinary members of the public and which are relevant to the publication (see *Chiam See Tong v Ling How Doong and others* [1996] 3 SLR(R) 942 at [47]). That said, the natural and ordinary meaning of a statement may include inferences that can reasonably be drawn from the publication (see *Aaron* at [41]).

95 The meaning of the words intended by the publisher is irrelevant to the inquiry (see *E Hulton & Co v Jones* [1910] AC 20 at 23). As succinctly summarised in *Gatley on Libel and Slander* (Professor Alastair Mullis & Richard Parkes QC eds) (Sweet & Maxwell, 12th Ed, 2013) ("*Gatley*") at para 3.16, the words complained of may be defamatory either in their natural and ordinary meaning or by way of

an innuendo.

96 In the latter situation (*ie*, innuendo), the claimant has to show that the words are defamatory by reason of some special facts outside the statement itself and known to those to whom it was published, and that evidence is admissible as to the sense in which they understood it (see *Gatley* at para 3.16).

97 In this instance, the Plaintiff is relying only on the *natural and ordinary meaning* of the Defendant's First and Second Statements on Persistency and Compliance.

98 For convenience, I set out again the Plaintiff's pleaded position on the ordinary and natural meaning of the Defendant's words. The Plaintiff claims that the First and Second Statements on Persistency and Compliance possess the following meaning: [note: 36]

(a) The Plaintiff was incompetent in his work and/or profession and/or trade and/or business and/or services provided.

(b) The Plaintiff was not a fit and proper person to be appointed as the representative of a FI to conduct regulated activities under the FAA and the SFA.

(c) The Plaintiff was not a person of credit and integrity.

(d) The Plaintiff was an incompetent and unprofessional manager and supervisor.

99 Whilst the Plaintiff's pleadings could have been much clearer as to the precise words in which complaint is made, it appears that the ordinary and natural meaning (*ie*, the defamatory sting) complained of is based essentially on the Defendant's statement in respect of his persistency ratio coupled with the statement that he had been personally investigated on compliance issues.

100 That said, I note that in the MAS Emails, express reference was also made to the "overly sale orientated culture" of Ramesh Organisation, how it had "sailed very close to the wind" and how it had "crossed the line". In short, the Defendant appears to have expressed the view that the Plaintiff's problem with persistency suggests that consumers may have been misguided or ill-advised. Nevertheless, as noted above, these phrases have not been pleaded as the relevant defamatory phrases. I thus confine my subsequent analysis to whether the First and Second Statements on Persistency, as well as the First and Second Statements on Compliance, are defamatory.

Statements on Persistency

101 From the Defendant's statements regarding the Plaintiff's "13mth Regular Premium" persistency ratio of 39.6% and "19thmth Single Premium" persistency ratio of 43% as at 30 April 2011, the Plaintiff submits that an "ordinary, reasonable person" would understand the Plaintiff to be "incompetent in his work". [note: 37]

102 In my view, it is unlikely that an ordinary reasonable reader would be able to make sense of the First and Second Statements on Persistency such as to infer that the Plaintiff is incompetent at his work. It is clear that the comprehension of the figures on persistency ratios will require a certain degree of special background knowledge. Without information on the calculation process and the industry norms, an ordinary reasonable man is unlikely to know what is considered a low persistency ratio. It could very well be that a 90% persistency ratio would be considered abysmal by industry standards.

103 Much will of course depend on who is the ordinary or reasonable person to whom the statement is assumed to have been made. This in turn depends on whether the Plaintiff is relying on the ordinary and natural meaning of the words, or an innuendo meaning that requires knowledge of special facts. The Plaintiff has pleaded that the words are defamatory in their *ordinary and natural meaning*. This means the Plaintiff must argue, as he has, that an ordinary, reasonable person would understand the "low" persistency ratio figure as implying incompetence. No claim has been raised based on innuendo; special knowledge therefore cannot be imputed to the ordinary, reasonable person.

104 Moreover, it is irrelevant at this stage whether the *actual recipient* understood the defamatory meaning. As stated in *Gatley* at para 3.16, "[i]f words convey a defamatory imputation to those to whom they were published, but would not have done so to the hypothetical reasonable person in that position, they are not defamatory".

105 A reasonable person who has knowledge of the insurance industry, and the regulatory and commercial concerns in respect of persistency and sale of policies may agree that the natural meaning of the First and Second Statements on Persistency reflect poorly on the Plaintiff's competence. However, without special knowledge of the extrinsic facts (*eg*, the facts concerning the standards and practices of the insurance industry), what is the ordinary reader to make of a statement that the "single premium persistency is low" or that the "regular premium persistency ratio is 39.6%"? Indeed, I would point out that the First and Second Persistency Statements simply set out the relevant percentages without *even* describing these figures as being "low".

106 Furthermore, there is much to be said about the absence of a common industry standard on persistency ratios. First, different insurance companies employ differing methodologies in calculating persistency ratios. [note: 38] Second, there is no standard time period for the calculation of persistency ratios – some insurance companies rely on a 13-month period whereas others consider a longer period of 19 months. Third, the type of products relied upon in the calculation of persistency ratios may differ. Some calculations may be based solely on single or regular premium policies, while other calculations may be based on a mix of both types of policies. For example, the Defendant calculates its 19-month persistency ratios on the basis of a mix of both policies.

107 To this end, a persistency ratio of 70% may be acceptable on one measure while a persistency ratio of 85% may be unacceptably low on another. In fact, a large part of the Plaintiff's complaint was that the Defendant used a 13-month persistency ratio as opposed to a 19-month persistency ratio. This alone suggests that there are significant differences in the methods of calculation. An ordinary, reasonable person cannot be expected to appreciate and understand the figures.

108 On the basis of the above discussion, I find that the First and Second Persistency Statements are not defamatory. I emphasise that the Plaintiff has not raised any claim of innuendo in respect of the words complained of. In Brian Neill *et al*, *Duncan and Neill on Defamation* (LexisNexis, 3rd Ed, 2009) ("*Duncan and Neill*"), the learned authors state (at para 5.21) that the natural and ordinary meaning of words complained of must be decided by reference to the ordinary reasonable reader:

> Any meaning which deviates from that standard because it represents the understanding of a particular group or class of people will be an innuendo requiring evidence to support it.

109 Therefore, while it may be argued that a person with "special knowledge possessed not by the general public but by a limited number of people" (*Duncan and Neill* at para 5.33) would have understood the First and Second Persistency Statements to be defamatory in meaning, I cannot find defamation on this ground because innuendo meaning was not specifically pleaded by the Plaintiff. I am limited by the pleadings to considering the perspective of the ordinary, reasonable person.

110 In the event that I am wrong, and the Plaintiff is entitled to rely on the knowledge of a reasonable person working in the insurance industry (even without it being specifically pleaded), I would have come to the view that the words in the persistency statements are capable of bearing the defamatory sting of incompetence that has been contended for by the Plaintiff. Both parties agree that the figures reflect a rather poor performance to people familiar with the insurance industry. Even if the First and Second Statements on Persistency refer to Ramesh Organisation as opposed to the Plaintiff specifically, it is clear that the Plaintiff is responsible for the agents under Ramesh Organisation and that his ability to manage the agents is therefore called into question.

111 Before leaving the complaint made in respect of persistency, I note that the Defendant accepts that it had provided MAS (in response to queries from MAS) with a copy of the First Statements on Persistency and Compliance. As mentioned earlier, the MAS Emails also set out statements explaining the concerns of the Defendant in response to queries from MAS.

112 In the email sent to MAS on 21 October 2011, it was said that the reason for allowing the Plaintiff to resign was because the Defendant suspected that persistency was going to be "poor". This was followed by another email dated 9 November 2011, when express reference was made to the overly sales orientated culture of Ramesh Organisation and the possibility of "gaming of compensation", "sail[ing] very close to the wind", and "cross[ing] the line". [note: 39]

113 In respect of these statements (especially those in the email dated 9 November 2011), it may be argued that an ordinary reasonable person (even one who is not acquainted with the insurance industry) would understand that the competence and integrity of the Plaintiff was being called into question. The Plaintiff has not, however, pleaded these words (and phrases) as part of the words or statements said to be defamatory.

Statements on Compliance

114 The Plaintiff submits that the First and Second Statements on Compliance naturally and ordinarily give rise to the understanding that Plaintiff was guilty of wrongdoing during the period from 2008 to 2011. At the very least, the Plaintiff submits that the statements imply there were reasonable grounds for suspecting wrongdoing on the part of the Plaintiff.

115 The key question that arises is whether a statement that a person is under investigation implies guilt. This is a question of fact. It depends on how the ordinary, reasonable person would understand the words in question. Specifically, the court must determine whether the ordinary person would understand the Defendant's statements to mean that the Plaintiff is guilty of wrongdoing, or that there is some reasonable or good basis for suspecting some form of wrongdoing. Much will depend on the context in which the statement was made. As in *De Souza Tay & Goh (suing as a firm) v Singapore Press Holdings Ltd and another suit* [2001] 2 SLR(R) 201, the spectre of liability for defamation (defences aside) will arise if on the facts, the ordinary reader will likely take the view that there is a reasonable basis for the investigation, or even worse, that the person is guilty.

116 In the present case, the Defendant made the following statements in the First and Second Statements on Compliance:

> Between 2008 to 2011, 14 Advisers under Ramesh's organization were investigated (including Ramesh).
>
> - Disciplinary actions were taken against 5 advisers

- 3 cases were referred to the Police for further investigation

117 Nothing was said about what the Plaintiff was investigated for. Indeed, little was said about the Plaintiff specifically. Looking at the statement as a whole, I am not satisfied that an ordinary reader would form the view that there were good or reasonable grounds for the investigation into the Plaintiff, or that the Plaintiff himself was actually guilty of some misconduct. I come to this conclusion even without taking into account the Defendant's subsequent clarifications on the result of the investigation. Indeed, in my view, an ordinary, reasonable person would only understand the statements to mean that the Plaintiff was investigated for compliance issues, and hence was probably suspected of some misconduct (of an uncertain severity).

118 However, that is not the end of the matter. Imputing guilt on the Plaintiff is not the only way that the statement could be defamatory. As the learned authors in *Gatley* point out (at para 2.28), the statement that someone is suspected of an offence (without necessarily implying guilt) may be defamatory in its own right. Similarly, it was observed in Alastair Mullis and Cameron Doley MA, *Carter-Ruck on Libel and Privacy* (LexisNexis, 6th Ed, 2010) ("*Carter-Ruck*") at para 4.15 that it may even be defamatory to say that a person has been charged, suspected, or even acquitted of an offence if the imputation is that the acquittal was wrong. The type and seriousness of offence may also be relevant.

119 In the present case, while there is no imputation of actual wrongdoing by the Plaintiff personally, the statement that 14 advisers under Ramesh Organisation were investigated (including Ramesh) for compliance issues is, in my view, defamatory. To be clear, I find that the defamatory sting of the statements lies in the very assertion that there were investigations into the Plaintiff and his team, and hence that there was some suspected misconduct. The defamatory sting does not lie in any imputation of actual wrongdoing or guilt on the Plaintiff's part. In this regard, I agree with the Plaintiff that the First and Second Statements on Compliance suggest the following:

(a) The Plaintiff had been investigated in respect of a complaint in his work and/or profession and/or trade and/or business and/or services provided.

(b) The Plaintiff was an incompetent manager and supervisor.

120 In response, the Defendant submits that the natural and ordinary meaning of the First and Second Statements on Compliance is that the Plaintiff is not an effective leader and supervisor of his advisers in Ramesh Organisation. These are not statements that go towards his personal conduct. It may be said that the distinction the Defendant attempts to draw is a little contrived. That said, even if the statement is properly read as solely concerning the Plaintiff's ability as a leader and supervisor, this is still defamatory if it carries the sting that he is an incompetent or poor leader. To be clear, a bare statement that an agent or employee had been investigated for an unspecifed customer complaint on its own may not even be defamatory. But, in the present case, the compliance statements go further and suggest a degree of lack of supervision and control on the part of the Plaintiff. On the whole, I am satisfied that the statements on compliance are defamatory of the Plaintiff.

121 At this juncture, it is pertinent to address the Defendant's argument that in determining whether the First and Second Statements on Compliance are defamatory, the court must read the statements together with the Defendant's subsequent emails to Prudential and Tokio Marine due to their close proximity in time. The Defendant's case is that the subsequent responses would neutralise or take away the sting of the defamation as found in the First and Second Statements on Compliance. This is because the subsequent responses very clearly clarify that the Plaintiff was not

disciplined and that the complaint against the Plaintiff was not proceeded with due to inconclusive evidence.

122 In making this submission, the Defendant is relying on the principle that the natural and ordinary meaning of statements must generally be considered in the light of the *context* in which the statements were made. The question, however, is what ought to form part of the context in which a statement is made. In particular, can events that happen *after* the statement is made form part of the context for understanding the statement? In this regard, it is useful to refer to the decision of the learned Chan Seng Onn JC (as he then was) in *Arul Chandran v Chew Chin Aik Victor JP* [2000] SGHC 111 ("*Arul Chandran*") at [118]–[119]:

> 118. Alderson B in *Chalmers v Payne* (1835) 2 Cr.M & R 156 said at p 159 that if "in one part of the publication something disreputable to the plaintiff is stated, but that is removed by the conclusion, the bane and the antidote must be taken together." I am thus conscious of the *need to take account of the entire context and circumstances of each publication at the time of publication*, and to consider whether any other part of the *same* publication might have removed the sting in the words complained of in that publication.
>
> 119. *But I do not think that a subsequent publication to the same persons removing the sting so to speak of an earlier publication will help the defendant if the earlier publication is already defamatory of the plaintiff. The damage has already been done. The subsequent publication diluting or erasing the sting will only be relevant to the question whether the damages suffered should be reduced.* For the purpose of determining the defamatory meaning in the first publication, it will be wrong to read it together with a later publication. One must read the first publication by itself. However, for determining the defamatory meaning in the second publication, the information provided in the first publication to the same body of persons may be taken as background information or part of the overall context, *depending on how close in time the two publications are*. If it is separated by a long lapse of time, with the likely result that an ordinary reader of normal memory span, would not have recalled or remembered what was said in the earlier publication, then it may not be proper to take that earlier publication into consideration as part of the total context in which to construe the meaning in the second publication.
>
> [emphasis added]

123 In addition, *Gatley* (at para 3.31) identifies various circumstances under which a publication would be taken as a whole. These include instances where publications were referred to as a *series* or *segments* (see *eg*, *Australian Broadcasting Corp v Obeid* (2006) 66 NSWLR 605 ("*Obeid*"), though in that case, the court found that on the facts, it would not consider the later parts of the broadcast in determining whether the earlier segment was defamatory). Temporal proximity is a relevant factor in deciding whether various publications should be interpreted in the light of each other: see *Obeid* and *Brown v Marron & Anor* [2001] WASC 100 ("*Marron*").

124 In *Obeid*, the defendant broadcasted allegations of corruption against the claimant at 9.05 am. Between 10.05 am and 11.50 am, the defendant then broadcasted the claimant's denials of those allegations. The court held that the publication ought not to be taken as a whole given that the news was not "breaking news" and it was unlikely that many people would have listened to the whole programme. This can be contrasted with *Marron*, another Australian decision where the court held that the qualifications made by the defendant with officials of a golf club some two to four days after his letter opposing the admission of the claimant as a member was of close temporal proximity such that it would form part of the context in ascertaining whether the words complained of were defamatory.

125 In my view, the legal principles that govern what forms the context of a publication have been succinctly laid down by the court in *Marron* at [56]:

> *Each case must depend on its own facts. There must be an intimate connection between the primary source of the alleged defamation and the other material which is said to form part of the context. The primary and secondary sources must be so closely connected, interwoven or enmeshed that it is necessary to take them effectively as one transaction in order to arrive at the true import and meaning of what was written and said.* The requisite degree of intimacy will usually (although not always, for example in the serialisation situation) demand contemporaneity. It will be necessary to consider all of the surrounding circumstances to decide whether the secondary materials are so intimately connected with the primary sources that they are to be taken to be a part of the context which might affect the way in which the ordinary reasonable reader would understand the words complained of.
>
> [emphasis added]

126 Based on the legal principles above, the Defendant's subsequent responses to the queries from Prudential and Tokio Marine cannot reasonably be construed as forming part of the context against which the First and Second Statements on Compliance are to be interpreted. As the court held in *Arul Chandran* at [119], a subsequent publication that removes the sting of an earlier publication will not help the defendants if the earlier publication on its own is defamatory. Perhaps, there may be exceptions to the rule (as in *Marron*). However, in my view, such exceptions are likely to be few and far between.

127 Moreover, in the context of employment references, prospective employers may not always ask for further clarification following on from the response of an ex-employer to a reference check request. The need to follow up on a response to a reference check request differs based on a multitude of factors, such as the potential employer's subjective assessment of the sufficiency of the ex-employer's reply. It is possible that a potential employer receiving the First and Second Statements on Compliance may not have followed up on the matter with more queries to the Defendant. It is therefore unlikely that a reasonable person would have regarded the subsequent responses to be "so closely connected" to the First and Second Statements on Compliance as to form part of the context.

128 Instead, the First and Second Statements on Compliance are likely to be construed as separate, self-contained publications. To this end, a reasonable reader construing the First and Second Statements on Compliance would likely have understood the words to mean (at the very least) that the Plaintiff's competence as a supervisor had been questioned. In addition, the statement that the Plaintiff had also been investigated for (an unspecified) compliance matter is defamatory even though there is no necessary implication of actual guilt on the part of the Plaintiff. To be clear, the Plaintiff was cleared of any wrongdoing. This was not made known, however, to a reasonable reader of the First and Second Statements on Compliance at the time of its publication.

129 In conclusion, I find that the First and Second Statements on Persistency are not defamatory. However, I find that the First and Second Statements on Compliance are defamatory. In particular, the statements bear the following defamatory meaning:

(a) The Plaintiff had been investigated in respect of a complaint in his work and/or profession and/or trade and/or business and/or services provided.

(b) The Plaintiff was an incompetent manager and supervisor.

Consent, estoppel and waiver

130 The Defendant pleads the defence of "consent, estoppel and waiver" to the Plaintiff's claim for defamation. These defences are primarily based on the written authorisations signed by the Plaintiff and enclosed in the requests to the Defendant from Prudential and Tokio Marine.

131 While I have already reproduced the said written authorisations earlier in this judgment, I shall do so again because of the importance of those written authorisations to the present discussion.

132 The written authorisation enclosed in the reference check request by Prudential states as follows: [note: 40]

> I Ramesh s/o Krishnan hereby irrevocably and unconditionally authorise you to perform reference checks of my previous employment(s) and *release from liability all persons or entities requesting or supplying such information*.
>
> [emphasis added]
>
> [hereinafter referred to as the "Prudential Written Authorisation"]

133 The written authorisation enclosed in the reference check request by Tokio Marine is slightly different, and states as follows: [note: 41]

> I, Ramesh s/o Krishnan ... , authorise [Tokio Marine] and/or any of its subsidiaries or affiliates, and any persons or organisations acting on its behalf, to verify information presented on my employment application/resume and/or to conduct enquiries and perform reference check of my previous employment(s) as may be necessary. *I authorise all persons who may have information relevant to this enquiry to disclose it to [Tokio Marine] and release all persons from liability on account of such disclosure*.
>
> [emphasis added]
>
> [hereinafter referred to as the "Tokio Marine Written Authorisation"]

134 From their submissions, it appears that neither party found it necessary to clearly distinguish between the defence of consent to the publication of the allegedly defamatory statements on the one hand, and the defence based on estoppel or waiver of claims on the other. Indeed, both sides seemed to have muddled the two distinct defences by treating it as a single defence based on the Plaintiff's written authorisations.

135 While it is undeniable that the two defences share the same factual basis (that is, the Plaintiff's written authorisations), they are legally and conceptually distinct. The defence of consent is based on the principle of law that a claimant's consent to the publication of defamatory statements about him is a complete defence to a claim in defamation. In other words, if this defence succeeds, the plaintiff's claim in defamation fails on the merits. In considering this defence, the crucial questions for the court include the scope of the consent given by the plaintiff, and whether the defendant's publication falls within the scope of the plaintiff's consent. On the other hand, the defence of waiver or estoppel does not relate to whether the claim in defamation succeeds on the merits. Even if the claimant has a perfectly valid claim in defamation, a defendant may still plead that the claimant has waived its right to pursue the claim, or that it is estopped from doing so.

136 While the parties have not touched on this distinction, conceptual clarity requires that I discuss the defences of consent, and estoppel and waiver, separately.

Consent

137 The Defendant submits that by signing the written authorisations enclosed in Prudential's and Tokio Marine's reference check requests, the Plaintiff unequivocally consented to the Defendant's publication of the First and Second Statements on Persistency and Compliance.

138 In law, consent to the publication of defamatory statements operates as a full defence to any action in defamation arising from the publication of those statements (see *Gatley* at para 19.10). To successfully invoke the defence of consent in a defamation suit, proof of consent must be clear and unequivocal. The Defendant must prove that the claimant has authorised or assented to the publication of the specific defamatory words complained of.

139 It must be noted that the defence of consent is to be *narrowly construed*. First, the defendant must prove that consent was given or can be adequately inferred with respect to *each publication of defamatory material*. Second, the defendant must prove that consent is clearly and unequivocally given to the *fact of publication* and to the *content of the publication* (see *Carter-Ruck* at para 14.56).

140 Thus, where the eventual publication is not substantially the same as that to which the claimant consented to, or where the publication is to a wider audience than the claimant consented to, the defence would fail (see *Gatley* at para 19.11). In such a case, it is likely that the publication would be actionable to the extent that it exceeds the terms of any consent given (see *Halsbury's Laws of England* vol 32 (5th Ed, Vol 32, 2012) ("*Halsbury's England*") at para 669).

141 In the present case, interpreting the scope of the Plaintiff's consent is not a straightforward matter. Both the Prudential Written Authorisation and the Tokio Marine Written Authorisation, broadly speaking, contain two distinct clauses. For the avoidance of doubt, in referring to the "first clause", I am referring to the non-italicised portions of the written authorisations quoted above. The first clause of both written authorisations empowers the prospective hirers, *ie*, Prudential and Tokio Marine. It plainly gives Prudential and Tokio Marine authorisation to conduct reference checks and/or the necessary enquiries into the Plaintiff's employment history. What is less clear, however, is whether the first clause of the written authorisations can be interpreted to be the Plaintiff's consent to the Defendant "publishing" information to Prudential and Tokio Marine pursuant to the reference checks done by them. I note that neither side made specific submissions on this issue.

142 On the one hand, it may be argued that a *necessary corollary* of authorising Prudential and Tokio Marine to conduct reference checks with the Defendant, is consenting to the Defendant providing the necessary information to the two companies pursuant to those reference checks. Without consenting to the latter, the Plaintiff's authorisation to the two companies becomes practically meaningless.

143 On the other hand, it can be appreciated that a clear conceptual difference lies between (a) authorising Prudential and Tokio Marine to conduct reference checks, and (b) consenting to the Defendant (or other ex-employers) publishing information about the Plaintiff's employment. The words in the first clause of the written authorisations only expressly authorise the Plaintiff's prospective hirers to conduct reference checks; they do not *expressly consent* to the Plaintiff's ex-employers or principals releasing information about the Plaintiff pursuant to those reference checks. While drawing this distinction might seem contrived, I am bound to consider this possibility in the light of the

principle that the defence of consent is a narrow defence in so far as it requires proof of consent to be clear and unequivocal.

144 On balance, looking at the written authorisations and the facts as a whole, I am of the view that a reasonable interpretation of the first clause of the Prudential Written Authorisation and the Tokio Marine Written Authorisation, is that the Plaintiff did consent to the Defendant publishing information about his employment history to Prudential and Tokio Marine. I come to this view because the authorisation to conduct reference checks must mean that the ex-principals are permitted to disclose all relevant information pursuant to those reference checks. In other words, granting authorisation to conduct reference checks and granting consent to the Defendant to reveal all relevant information pursuant to those reference checks are inextricably linked. Without the latter, the authorisation to conduct reference checks becomes a hollow one.

145 I come to this finding bearing in mind that proof of consent must be clear and unequivocal. On the facts of the present case, I find that there is clear and unequivocal proof that the Plaintiff did consent to the Defendant publishing information on his employment to Prudential and Tokio Marine pursuant to their reference check requests. Of course, the scope of this consent must be properly construed. The Plaintiff does not consent to the Defendant publishing *anything* about him in response to the reference checks. Naturally, to fall within the scope of the Plaintiff's consent, the information published by the Defendant must at the least be reasonably related to the express or implied requests made by Prudential and Tokio Marine in their reference checks.

146 My finding is affirmed by the second clauses of the written authorisations (the italicised portions of the written authorisations quoted above). In the Tokio Marine Written Authorisation, it clearly states that the Plaintiff "authorise[s] all persons who may have information relevant to this enquiry to disclose it to [Tokio Marine]". This is clear and unequivocal consent to the Defendant publishing information relevant to the reference checks to Tokio Marine. The Prudential Written Authorisation is not as clear, but it does "release from liability all persons or entities requesting or supplying such information". This second clause clearly contemplates and indicates the Plaintiff's consent to the "supplying" of all relevant information in response to Prudential's reference checks.

147 In this regard, I note but reject the Plaintiff's submission that the written authorisations do not "benefit" the Defendant in any way because it was addressed to Prudential and Tokio Marine only. In my view, this submission is untenable because the written authorisations do grant the Defendant permission to publish information to Prudential and Tokio Marine, and the Plaintiff must have contemplated that the Defendant would have sight of these written authorisations when receiving the reference check requests from the said FIs. To say that the written authorisations do not empower the Defendant in any way just because they are not directly addressed to the Defendant must be wrong. At the minimum, they do empower the Defendant to provide information about the Plaintiff to Prudential and Tokio Marine. I should clarify that consent in this context is not limited to contractual consent. The Plaintiff and the Defendant need not have entered into a contractually binding relationship. Consent given gratuitously by the Plaintiff to the Defendant is still consent. It need not be given as part of a valid, legally binding contract.

148 Therefore, in view of the discussion above, I find that by signing the written authorisations, the Plaintiff did consent to the Defendant publishing all information relevant to the Plaintiff's reference checks to Prudential and Tokio Marine. To be clear, based on my findings at this stage, consent cannot operate as a defence to the Plaintiff's claim in respect of the publication of defamatory statements to MAS.

149 At this juncture, a question of law arises as to whether the defence of consent can only

successfully operate in a claim for defamation if the Plaintiff gave his consent to the specific words published in the defamatory statements. In other words, is the Plaintiff's *general consent* to the Defendant publishing all information relevant to the reference checks to Prudential and Tokio Marine sufficient consent for the purpose of the defence of consent in defamation? In particular, must the Plaintiff have specific knowledge of the contents of the defamatory statements before his consent can, in law, give rise to a complete defence against a defamation claim?

150 I have already noted that a claimant must consent to the *content* of the defamatory statements for his consent to be a complete defence to a defamation claim. The question of law thus, is how broadly or narrowly "content" should be interpreted. Is it enough that the claimant consents to the publication of the *type* of content in the defamatory statements (*ie*, content relating to the Plaintiff's employment history as requested in the reference checks)? Or must the claimant consent to the specific content of the defamatory statements? It is clear that this is absolutely crucial to the issue of whether the defence of consent has any chance of succeeding in the present case.

151 On one view, consent must be directed to the specific content of the defamatory statements actually published. Nothing short of fully informed consent can operate as a defence to defamation. It may be suggested that an individual's general consent to the publication of his employment history to another party must be read as impliedly limited to *non-defamatory* material. Consent is only effective in the case of defamatory material where the plaintiff has directed his mind to the specific statements.

152 Having said that, I note that the authorities do not apply such stringent standards to the consent required. One helpful authority that suggests the defence of consent does not require the Plaintiff to consent to the specific content of the defamatory statements is *Michael James Austen v Ansett Transport Industries (Operations) Pty Ltd and Civil Aviation Authority* [1993] FCA 403 ("*Ansett*"). In that case, the second defendant, the Director of Aviation Medicine, had disclosed to the first defendant airline company that the plaintiff (the first defendant's employee then) had a "history in 70s of suicide attempt – but thought to be not serious". On the basis of this disclosure, the plaintiff sued the second defendant in defamation. In its defence, the second defendant raised the fact that as part of his job application to the first defendant, the plaintiff had signed a Medical Information Authority which contained the following statement:

> I Michael James Austen authorise the Director of Aviation Medicine, Aviation Medicine Branch, D.O.A. to supply details of my medical history to the Medical Director, Ansett.

153 Based on the above statement, the Federal Court of Australia held that the defence of consent had been made out. The above statement constituted sufficient consent to the second defendant to publish the plaintiff's medical history to the first defendant. It was irrelevant that the plaintiff did not know what exactly was in his medical file or that it was likely to contain so much of his psychiatric history (see [44] of *Ansett*). It was also immaterial that the plaintiff did not know or expressly consent to the specific statements published to the first defendant by the second defendant. The Federal Court was of the view that on the facts, the consent provided a complete defence to the claim in defamation provided that the medical file was honestly kept. In this regard, the court noted that it was the duty of the Director of Aviation Medicine to keep the file properly.

154 The court in *Ansett* clearly adopted a broader understanding of the "content" of the defamatory statements that the claimant must consent to. Consent need only pertain to the broad category of information or statements, of which the specific defamatory statement falls under the scope of. However, limits were still read into the *type of information* that may be provided. In

particular, it was not enough that the information came from the second defendant's medical file. The court in *Ansett* was also of the view that the medical file had to be "honestly kept". In short, the court interpreted the plaintiff's consent as limited only to the disclosure of medical history from *honestly kept medical records*.

155 Similarly, in the English case of *Chapman v Lord Ellesmere and Others* [1932] 2 KB 431 ("*Chapman*"), the claimant generally authorised the defendants, who were stewards of the Jockey Club, to publish the Jockey Club's racing calendar with their decisions inside. The defendants published a notice in the Jockey Club's Racing Calendar to its members stating that the plaintiff had been warned off all future races following drug tests on the horse trained by the plaintiff. The plaintiff sued the defendants in defamation for the publication of that statement.

156 On appeal, Slesser LJ held that the plaintiff's consent to the publication of the stewards' decisions in the Racing Calendar was a defence to any claim of defamation arising from the publication of those decisions in the Racing Calendar. At 463–464, Slesser LJ held that:

> ... if the plaintiff assented to a report of the decision of the stewards, and they used words which were not a report of that decision, [the plaintiff's] argument would have great weight; but if, on the other hand, in fact, they did report the actual decision, but in such a way that the jury say that it was to be understood to mean something other than the actual decision, that is a risk which the plaintiff, by agreeing to a report of the decision, has elected to run.

157 It can be seen that significant emphasis is placed on the need for the publication to contain an accurate report of the decision of the stewards. Indeed, Slesser LJ also (at 464–465) cited a passage from Scrutton LJ's judgment in *Cookson v Harewood* [1932] 2 KB 478, which states "[f]rom that point of view … questions about innuendoes are quite beside the mark. If you get a true statement and an authority to publish the true statement, it does not matter in the least what people will understand it to mean".

158 The English Court of Appeal decision of *Friend v Civil Aviation Authority* [1998] IRLR 253 ("*Friend v CAA*") is instructive in this regard. In *Friend v CAA*, the plaintiff was employed by the defendant as a flight operations inspector. As part of his employment contract, the plaintiff consented to the defendant's disciplinary code. The court found that this consent entailed assent to the republication of accusations or complaints against the plaintiff in the course of internal disciplinary proceedings as part of the disciplinary process. The court therefore held that the plaintiff's consent to the defendant's disciplinary code gave the defendant a defence of consent against any defamation proceedings arising from its publication of defamatory material relating to the plaintiff in the course of internal disciplinary proceedings.

159 *Friend v CAA* is important for several reasons. First, based on its outcome alone, it is clear that the claimant need not have consented to the specific defamatory words before his consent may operate as a defence to his claim for defamation against the defendant.

160 Second, the case holds that "the falsity of the words complained of does not vitiate consent". In this regard, the court's interpretation of *Chapman* becomes vital and illuminating for our present purposes.

161 At [36] of his judgment, Hirst LJ affirmed *Chapman* as the "locus classicus" on the defence of consent in defamation. However, he clarified that *Chapman* did not stand for the proposition that there can be no consent to untruthful statements. Rather, "[i]n this branch of law the decision turns on the particular facts". I find it helpful to set out [44] of Hirst LJ's judgment:

> Indeed, *Chapman v Ellesmere* itself is a very good illustration of how important it is to focus upon the particular facts. As already noted, the plaintiff's assent stemmed from the closing words of rule 17, under which the stewards were authorised to publish in the Racing Calendar their decision respecting the matters referred to earlier in the rule (eg to grant or withdraw a licence to a trainer). This is precisely what the stewards had done. *If, on the other hand, they had published an inaccurate or untruth account of their decision, then that would have been without the authority granted by rule 17, and therefore not within the scope of the plaintiff's assent – hence the significance of any references in the judgments to truth in the context of consent* …
>
> [emphasis added]

162 The point is that truth is not always relevant to consent; the applicability of the defence depends on the facts. In *Chapman*, publishing an accurate account of the stewards' decision was crucial because the plaintiff had only assented to the accurate publication of such. The relevance of truth therefore turns on the scope of consent given. In particular, interpreted in context, did the Plaintiff only consent to the publication of true statements? Or should the Plaintiff's consent be interpreted to be broader than that?

163 In *Friends v CAA* itself, Hirst LJ held that serious consideration must be given to the nature of disciplinary proceedings, which are "launched as a result of some kind of accusation or complaint against an employee, and their essential purpose is to decide whether that accusation is true or false" (*Friends v CAA* at [40]). Therefore, to interpret the plaintiff's consent to be limited to the republication of *true accusations* in the course of disciplinary proceedings would be absurd. Disciplinary proceedings are intended precisely to ascertain truth or falsity.

164 From the above authorities, it is clear that a plaintiff need not have consented to the specific words found in the defamatory statements before the defence of consent may operate against him in his claim for defamation. However, courts must still give serious consideration to the scope of the plaintiff's consent. As in *Chapman*, the plaintiff's consent to the publication of stewards' decisions did not extend to consent to the *inaccurate* publication of the stewards' decisions. Everything turns on the facts.

165 Indeed, the landing we have reached allows a reconciliation of the argument I described at [151] above. The key question before me is what the Plaintiff can be taken to have consented to by signing the written authorisations.

166 Coming to the present case, I reiterate that it is necessary to consider the *scope of the Plaintiff's consent* for the Defendant to publish information to Prudential and Tokio Marine about his employment history. In particular, the question is whether the publication of the First and Second Statements on Persistency and Compliance fall within the scope of the Plaintiff's consent.

167 As stated previously, I find on the facts that the Plaintiff has consented to the Defendant publishing all information *relevant* to the Plaintiff's reference checks to Prudential and Tokio Marine. Following the decision in *Ansett*, the information must be honestly and properly kept by the Defendant. Whether or not the information was honestly and properly kept is a question of fact which depends on all the circumstances. That said, where the Defendant's records include inaccurate information carelessly documented, publication of such information is likely to be outside the scope of the consent. When signing the written authorisations, the Plaintiff must have expected that the records were honestly and properly kept, and that due care will be exercised on the Defendant's part in responding to reference checks.

168 In making this finding, I am alive to the evidence of the executive director of the LIA that the purpose of the written authorisation is to prevent information provided by ex-employers or ex-principals in compliance with the Industry Reference Check System from being used as the subject matter of civil claims in respect of reference checks. Be that as it may, I am of the view that this is not inconsistent with the holding that the information or record must be one that is honestly and properly kept.

169 With this finding, I now turn to consider if the First and Second Statements on Persistency and Compliance were relevant to the reference check requests made by Prudential and Tokio Marine, and if they were, whether they relate to records and information properly and honestly kept. I am, of course, proceeding with this analysis on the assumption that the statements are defamatory for if they were not, no question of defences would arise. I first set out my findings on relevance.

170 I find that the First Statements on Persistency made to Prudential were relevant to Prudential's reference check request. In particular, the section on "Optional Information" in Prudential's reference check form expressly made provision for the Defendant to state the Plaintiff's "Persistency Ratio in the last calendar year".

171 Next, I find, on balance, that the First Statements on Compliance made to Prudential were not relevant to Prudential's reference check request. Nowhere in the reference check request is there mention of compliance issues or internal investigations into the Plaintiff. In addition, the "Optional Information" section in the Prudential reference check form was *not open-ended*. It appears to be concerned only with "production", "persistency", and the Plaintiff's "termination code". I therefore find that the First Statements on Compliance made to Prudential was irrelevant to the reference check request Prudential actually made. In particular, information on compliance was not expressly or impliedly asked for in Prudential's reference check request because of the limited range of optional information expressly referred to in the form. Its publication is therefore not covered by the Plaintiff's consent in the Prudential Written Authorisation.

172 Finally, I find that the Second Statements on Persistency and Compliance were relevant to Tokio Marine's reference check request. I note that neither "persistency" nor "compliance" are expressly mentioned in Tokio Marine's reference check form. The "Optional Information" section is simply left open-ended (unlike Prudential's form). However, I also take note of the following:

(a) Tokio Marine's reference check form states that the enquiry was made "[i]n compliance with the MAS' circular on "Due Diligence Checks and Documentation in respect of the Appointment of Appointed, Provisional and Temporary Representatives" dated 7 February 2011". [note: 42] With this context, information on the Plaintiff's persistency ratios or compliance issues are more likely to be relevant. I note that the MAS Circular of 7 February 2011 expressly mentions, *inter alia*, "any material adverse record … taken by the previous employer(s)".

(b) Ms Donna Tan (of Tokio Marine) gave evidence that Tokio Marine required information on the Plaintiff's persistency ratios and conduct whilst he was employed by the Defendant. According to her, this was the purpose of providing the section entitled "Optional Information". [note: 43]

173 On the whole, taking into account the factors highlighted above, I am satisfied that the Second Statements on Persistency and Compliance are relevant to the Tokio Marine reference check request.

174 The next question therefore, is whether the First Statements on Persistency, as well as the Second Statements on Persistency and Compliance, were published from records and information properly and honestly kept by the Defendant. On this, I find that the Defendant's records were indeed properly and honestly kept. In my view, the statements were neither published negligently nor in bad faith. I explain my findings in more detail later when I discuss whether there was malice or negligence in the Defendant's reference check responses.

175 In concluding this section on consent, I make the following comment in view of the importance of the issue. The difficulty in proving the defence of consent lies in the need to match the information *requested* by Prudential in the reference check form, and the information *actually provided* by the Defendant. It may be that one approach will be to specify the sections and/or type of information to be provided in response to the reference check request, without leaving any section open-ended. Where this is done, the defence of consent may achieve an appropriate balance between the competing interests of both employers/principals and employees/agents. Care, however, is still needed since drafting the consent and the reference check request in relation to tightly defined areas of information may result in unnamed areas being excluded by implication. This is a matter which the insurance industry may wish to consider. In any case, the fact that the defence of consent has failed in the case of the First Statements on Compliance provided by the Defendant to Prudential does not necessarily mean that liability will be established in the final analysis. Other defences such as justification and qualified privilege remain to be considered.

176 To sum up, I find that the defence of consent successfully operates as a complete defence to the Defendant's publication of the First Statements on Persistency as well as the Second Statements on Persistency and Compliance. The defence of consent fails in relation to the First Statements on Compliance because the said statements were not relevant to Prudential's actual reference check request, and hence, its publication was not covered by the Plaintiff's consent in the Prudential Written Authorisation.

Waiver and estoppel

177 The defence of waiver or estoppel is based on the second clause of the written authorisations extracted above (*ie*, the portion in italics). The issue is whether the waiver as drafted does have its stated legal effect – namely, to release all persons providing information pursuant to reference checks from *all liability*, including liability for defamation. Indeed, if the waiver does have its stated legal effect, this would be a defence to all of the Plaintiff's claims, not just his claim in defamation.

178 While the defence of waiver and estoppel was pleaded, the Defendant did not make detailed submissions explaining why it was entitled to rely on the waiver against the Plaintiff in the present suit. I note that its submissions on "consent, waiver and estoppel" were focused primarily on the fact that there was consent to the publication of the allegedly defamatory material.

179 Indeed, without further assistance from counsel, I have some reservations about the waiver absolving the Defendant of all possible liability arising out of its responses to the reference check requests. First, no consideration was given to the Plaintiff for such a waiver. It is questionable if the Defendant has a legal basis to enforce the waiver against the Plaintiff. Second, even if the Defendant pleads estoppel, it is not clear if it had detrimentally relied on the waiver in providing the reference checks. Indeed, the statutory regulations *require* that ex-employers or ex-principals respond to reference checks. If so, it is not clear whether the Defendant can be said to have *detrimentally relied* on the Plaintiff's representation such that all liability is waived in responding to the reference check requests. The Defendant was arguably merely performing its legal duty under the statutory regulations.

180 Therefore, given that hardly any submissions were made on this, and given the difficulties I have identified above, I find that the waiver and estoppel defence fails.

Justification

181 In relation to the defence of justification, the essence of the Defendant's claim is that the First and Second Statements on Persistency are true and not misleading. Similarly, the Defendant takes the position that the First and Second Statements on Compliance, when read with its subsequent communications on compliance issues, are true and not misleading. As a whole, the Defendant submits that its correspondence presented the truth.

182 The defence of justification requires a defendant to prove the truth of the "substance or gist" of the defamatory material; it is not necessary to prove the truth of every word in the defamatory publication (see *Aaron* at [73]; *Tan Chor Chuan and others v Tan Yeow Hiang Kenneth and others* [2006] 1 SLR(R) 16 at [72]; *Chase v News Group Newspapers Ltd* [2003] EMLR 11 at [34]). As provided for in s 8 of the Defamation Act (Cap 75, 2014 Rev Ed) ("Defamation Act"), the defendant is not required to prove every charge so long as the other unproved charges do not materially injure the plaintiff's reputation any further (see also *Arul Chandran* at [134]). Section 8 of the Defamation Act would, however, not assist the defendant if the words complained of only give rise to one charge against the claimant or if the defendant can only prove a charge that is different or less serious than the one he is required to. In the circumstances, the court must therefore first identify the appropriate level of defamatory meaning or imputation before determining whether the defence of justification has been made out on the facts of the case.

183 As I have found that a *prima facie* case of defamation has not been made out in respect of the First and Second Statements on Persistency (because the statements are not defamatory), I will go no further to discuss the defence of justification on the same. I should, however, mention that even if the First and Second Statements on Persistency bore a defamatory meaning, on the facts and evidence placed before me, the 13-month and 19-month persistency ratios set out in the First and Second Statements on Persistency appear to be correct. On the evidence, the Plaintiff's persistency ratios (whether 13-month or 19-month) appear to have been correctly calculated. Although the Plaintiff has complained that the performance of Ramesh Organisation using a 19-month persistency ratio was much better (and that the 13-month ratio should not have been used at all), the evidence is clear that there is no standard norm used in the industry. Indeed, as mentioned above, it appears that some insurance companies use one formula for calculating persistency and assessing remuneration, and another method for assessing the quality of an insurance policy. According to Mr Williams, the Defendant had decided to use a 13-month persistency ratio as this was a better measure of quality. [note: 44]

184 What is clear is that persistency ratio is an important measure of the quality of the policies that have been entered into. Insurance commissions earned by agents are normally front-loaded in that they are paid in the first year of the policy. In most cases, it would not be in the interests of the policyholder to surrender his policy or to let it lapse at the end of the first year. [note: 45] This is a point that I will return to in connection with the defence of qualified privilege.

185 I therefore find that the defence of justification would have succeeded in relation to the First and Second Statements on Persistency.

186 I now come to the First and Second Statements on Compliance. It will be recalled that the defamatory sting of the First and Second Statements on Compliance is not that the Plaintiff is guilty

of some misconduct, wrongdoing or offence. There is nothing in the First and Second Statements on Compliance which suggests that the Plaintiff was guilty or that there were good reasons to suspect guilt. At most, the defamatory sting was that a complaint had arisen and that the Plaintiff had been investigated. As such, the Defendant does not have to prove that the Plaintiff was actually found guilty to successfully raise the defence of justification. It is sufficient if the Defendant can prove that the Plaintiff had indeed been investigated on a compliance matter. On the evidence, it is clear that a complaint had indeed been made and that whilst the Plaintiff was investigated, the matter did not proceed further due to inconclusive evidence.

187 To be clear, if the defamatory sting was that the Plaintiff was guilty of actual misconduct, the defence of justification would fail. The Defendant would then be liable for defamation unless some other defence (*e.g.* qualified privilege) can be established on the facts of the case.

188 The other defamatory sting arising from the First and Second Statements on Compliance is that the Plaintiff was incompetent in the sense of being a poor manager. This sting arises from the revelation that 14 advisers under Ramesh Organisation had been investigated and that disciplinary actions were taken against five advisers with three cases referred to the police for further investigations. In fact, it is clear that these advisers had indeed been investigated and actions were taken against some of them. The Plaintiff was the manager of Ramesh Organisation and it was his duty to supervise the advisers in Ramesh Organisation. That being the case, I am satisfied that the substance of the sting has been justified.

189 Earlier, I also noted that the First and the Second Statements on Compliance could not be regarded as a single publication together with the subsequent emails clarifying that the complaint against the Plaintiff was not proceeded with. Be that as it may, bearing in mind my finding that the defamatory sting of the statements is limited to the fact that the Plaintiff had been investigated and that he was an incompetent manager, the defence of justification succeeds.

Qualified privilege

190 Given my findings above, there is no need for me to consider the defence of qualified privilege. The Plaintiff's claim in defamation fails. However, given that both parties made substantial submissions on this defence, and in the event I am wrong on any of the points above, I shall consider whether the defence of qualified privilege can succeed on the facts of the present case.

191 The Defendant relies on the duty-interest test to submit that the defence of qualified privilege is made out. In relation to its publication to MAS, the Defendant argues that it had published the First and Second Statements on Persistency and Compliance to MAS in discharge of its legal, social, and moral duty. These duties were premised, *inter alia*, on MAS Notice 306. In relation to its publication to Prudential and Tokio Marine, the Defendant submits that it shared common or mutual interests with the said FIs under the Industry Reference Check System.

192 In response, the Plaintiff argues that the defence of qualified privilege is nevertheless defeated by the malice in the Defendant's conduct.

193 At common law, the categories of qualified privilege include (see *Lim Eng Hock Peter v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 ("*Lim Eng Hock*") at [163]–[164]):

(a) statements made between parties who share a common or mutual interest in the subject matter of the communication;

(b) statements made in the discharge of a legal, social or moral duty;

(c) statements made in the protection of one's own self-interest; and

(d) fair and accurate reports of certain proceedings.

194 The rationale of the defence of qualified privilege is succinctly set out by Chan Seng Onn J in *Lim Eng Hock* (at [163]) as follows:

> Unlike the defence of absolute privilege, *the focus of this defence is on the communication that contains the statement complained of that is privileged, not the entire occasion on which the statement was made*. The rationale behind this defence is the law's recognition that there are circumstances where the law allows an individual to make statements which may be defamatory without incurring legal liability 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 (*Oei Hong Leong v Ban Song Long David* [2005] 3 SLR(R) 608). The authors of *Gatley on Libel and Slander* explain the rationale ... as follows:
>
> > Statements published on an occasion of qualified privilege 'are protected for the common convenience and welfare of society'.
> >
> > 'It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, *because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest*.'
> >
> > [*per* Bankes LJ in *Gerhold v Baker* [1918] WN 368 at 369]
> >
> > 'In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, *the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury*.'
> >
> > [*per* Willes J in *Huntley v Ward* (1859) 6 CB (NS) 514 at 517]
>
> [emphasis added]

195 Under the defence of qualified privilege, the first question to be considered is whether the publications were made on an occasion of qualified privilege. Second, if such an occasion of qualified privilege is found, the court then asks whether the defence is defeated by the plaintiff being able to show that the defamatory statements were made with express malice (see *Low Tuck Kwong v Sukamto Sia* [2014] SLR 639 ("*Low Tuck Kwong*") at [52]).

196 With regard to [193(b)] above, the duty-interest test is applicable in determining if the defence of qualified privilege has been made out on the facts of a case. The defendant must have an interest or duty (whether legal, social or moral) to communicate the information and the recipient must have a corresponding interest or duty to receive the information (see *The Law of Torts in Singapore* at para 13.061).

197 In particular, one accepted instance where qualified privilege applies is in the context of

employment references. A reference for an ex-employee written by his previous employer for a potential employer is considered privileged communication. In *Carter-Ruck* (at para 12-51), the learned authors explained the rationale for protecting such communication as follows:

> With regard to the characters of servants and agents, it is so manifestly for the advantage of society that those who are about to employ them should be enabled to learn what their previous conduct has been, that *it may be well deemed the moral duty of former employers to answer inquiries to the best of their belief*.
>
> [emphasis added]

198 Another accepted category of qualified privilege is the "common interest" scenario set out in [193(a)] above. In a "common interest" situation, the maker of the defamatory statement and the recipient must share a common interest. For example, the owner of a condominium unit and the developer have a shared legitimate interest in knowing a contractor's financial viability in so far as the latter's ability to effect repairs of a development was concerned (see *Hytech Builders Pte Ltd v Goh Teng Poh Karen* [2008] 3 SLR(R) 236).

199 In this instance, the Plaintiff's response to the defence of qualified privilege was a bare denial without more. He did not furnish any explanation as to why the Defendant would not be able to avail itself of the defence of qualified privilege in the present case.

200 I am of the view that the defence of qualified privilege applies in relation to the Defendant's communication to MAS, Prudential and Tokio Marine.

201 As stated at [197] above, employment references form an accepted instance where the defence of qualified privilege will apply to protect the communication made by an ex-employer to the prospective employer. This is to enable the ex-employer to answer queries to the best of its belief with a view to giving a full and frank assessment of the employment history of the employee in question. The position is the same where the reference check is made in respect of an ex-principal concerning a former agent. The communications made by the Defendant to Prudential and Tokio Marine are therefore privileged on this ground.

202 In addition, I also accept that the Defendant did indeed share a common interest with both Prudential and Tokio Marine under the Industry Reference Check System and the RNF framework in its communication of the Plaintiff's persistency ratios and compliance record. In this regard, it is noted that the Plaintiff recognised during cross-examination that the responses given under the Industry Reference Check System is the first step towards the ultimate objective of enabling FIs to be satisfied that their prospective representatives satisfy the Guidelines on Fit and Proper Criteria. [note: 46] As regards the Defendant's communication with MAS, I agree that the defence applies in the light of its duty to report to the regulator as expressly set out in the MAS Notice 306.

Malice

203 The Plaintiff submits that qualified privilege was lost because the Defendant's conduct was actuated by malice. This assertion is supported by two reasons: (a) the Defendant had no honest belief in the truth of the statements; and (b) the occasion was used by the Defendant for an improper purpose.

204 As mentioned, the defence of qualified privilege is defeated by proof of malice on the part of the Defendant. In this regard, the Plaintiff must prove that malice on the part of the Defendant

existed at the time of publication, and that it had resulted in the publication.

205 Proof of malice in the context of qualified privilege primarily concerns the *improper motive* of the defendant (see *Gatley* at para 17.4 and 17.6). In *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110, the Court of Appeal observed (at [60]) that:

> … there is a distinction between the type of malice which defeats the defence of qualified privilege and that which defeats the defence of fair comment. The defence of fair comment does not apply if the defamer did not honestly believe in the truth of the defamatory comment. The fact that the defamer was acting with ulterior purposes is by itself immaterial for the purposes of the defence of fair comment, though it can, depending on the facts, give rise to an inference that the defamer did not honestly believe in the truth of the comment he or she made. For the defence of qualified privilege, *motive rather than honesty of belief is the essential indicator of malice. The defence of qualified privilege is not an available defence if the defamer does not make the defamatory statement for the purposes of protecting the interest or discharging the duty which gives rise to the privilege*.
>
> [emphasis added]

206 The emphasis on the improper motive of the Defendant was also highlighted in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 ("*Peter Lim v Lin Jian Wei*"). In that case, the Court of Appeal cited the Australian High Court decision of *Roberts v Bass* (2002) 212 CLR 1 ("*Roberts v Bass*") at [40], which stated as follows:

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

207 Proof of motive is commonly established by inferences drawn from evidence concerning acts and conduct of the defendant both before and after publication (see Lord Diplock's comments in *Horrocks v Lowe* [1975] AC 135 at 149–150 ("*Horrocks*")). As rightly pointed out in *Arul Chandran* at [301], "[e]vidence of the defendant's conduct and action prior to the publication, at the time of the publication and after the publication including the entire surrounding circumstances, must be viewed in totality".

208 It is a truism that an individual's conduct usually stems from a mixed bag of motives. It is quite often impossible to attribute a precise degree of causative effect to the different motives at play. For this reason, the applicable test adopted by the law is the "dominant motive" test. As the Court of Appeal in *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 stated at [90], malice is proved "where the defendant has a genuine or honest belief in the truth of the defamatory statement, but his dominant motive is to injure the defendant or some other improper motive". From this, it follows that the "dominant motive" test only applies if the defendant has a genuine or honest belief in the truth of what he has published on an occasion of qualified privilege (see also *Peter Lim v Lin Jian Wei* at [38]).

209 Notably, one must not confuse the defendant's improper motive with his ill-will or desire to injure (see *Gatley* at para 17.8). As further elaborated in *Roberts v Bass* at [76], and accepted by the Court of Appeal in *Peter Lim v Lin Jian Wei* at [40]:

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

210 Given that the defence of qualified privilege applies in this instance, I must consider the following questions to determine if malice exists on the facts:

(a) Did the Defendant have a genuine or honest belief in the truth of the defamatory statement?

(b) Is there proof that the Defendant's dominant motive is to injure the Plaintiff or some other improper motive?

211 Given that the Defendant has specifically pleaded that the contents of the First and Second Statements on Persistency and Compliance are true, and given that it has consistently taken that position throughout the trial, I find that the Defendant did have, at the very least, a genuine and honest belief in the truth of those statements. Indeed, on the basis of the witnesses' testimonies and the evidence placed before me, I find no reason to doubt the genuineness or honesty of the belief possessed by the Defendant's office holders (in particular, Mr Williams) at the time the responses or communications were made.

212 As for whether there is proof that the Defendant's dominant motive is to injure the Plaintiff (or something else improper), it is pertinent to note that the Plaintiff bears the burden of proof on a balance of probabilities. In this regard, looking at the evidence as a whole, I am of the view that the Plaintiff has not discharged his burden of proof.

213 The Plaintiff relies mainly on the following points in support of his assertion that there was malice on the Defendant's part:

(a) The Defendant had invented the 13-month persistency ratio to prevent the Plaintiff from joining Prudential and Tokio Marine. [note: 47]

(b) The Defendant's witnesses admitted that it was not the Defendant's usual practice to disclose information regarding other agents when responding to the reference check request of one agent. [note: 48]

(c) Mr Williams' internal email to his subordinate, Mr Ng, dated 9 March 2012, where the former instructed the latter to highlight the Plaintiff's poor persistency and disciplinary cases in replying to Tokio Marine on behalf of the Defendant.

(d) The Defendant displayed double standards as can be seen from the contrasting treatment of the Plaintiff as opposed to another ex-adviser, Philip Tan.

214 In my view, the Plaintiff has not adduced sufficient evidence to discharge his burden of proof. The evidence stated above does not prove, on a balance of probabilities, that the Defendant's *dominant* motive was to injure the Plaintiff. First, the Plaintiff has failed to prove the allegation at [213(a)]. As mentioned at [77] above, the Defendant had shown the Plaintiff and other financial services directors its calculation of the 13-month persistency ratio at a workshop conducted on 8 March 2011. To this end, in the absence of further evidence, the Plaintiff's allegation that the 13-month persistency ratio was "invented" to prevent him from joining other insurance companies is unsubstantiated.

215 As regards the allegations at [213(b)] to [213(d)], these are insufficient to show that the Defendant's *dominant motive* in publishing the First and Second Statements on Persistency and Compliance is to injure the Plaintiff. In response to the Plaintiff's allegation that the Defendant wanted to injure his reputation by emphasising his compliance records, [note: 49] the Defendant explained that it felt it was under a duty to inform the Plaintiff's prospective employers of his *leadership* issues. This also explains the differences in the Defendant's responses to the reference check requests for the Plaintiff as opposed to Philip Tan. It bears emphasising that in *Peter Lim v Lin Jian Wei*, the Court of Appeal opined that even the *knowledge or belief* that the publication would have the effect of injuring the plaintiff is insufficient if the defendant had acted in accordance with a sense of duty or in *bona fide* protection of its own legitimate interests. In the present instance, the Defendant was bound by the rules of the financial industry to inform both MAS and the prospective employers of the Plaintiff's employment history.

216 I note also that Mr Williams had initially intended to terminate the Plaintiff's contract. However, at the Plaintiff's request, he allowed the Plaintiff to resign instead. Whilst this is not conclusive, it does point against any malice on Mr Williams' part at the time when the Plaintiff left the Defendant or thereafter.

217 Indeed, I note that it was because of the Plaintiff's complaints and queries to the Ministry of Finance in October 2011 (in relation to his RNF application) that MAS queried the Defendant about the facts and circumstances surrounding the Plaintiff's departure from the Defendant. It is further noted that the Defendant's explanation to MAS in 2011 as to why the Plaintiff had been allowed to resign (rather than to be dismissed) was given in response to queries from MAS. [note: 50] In these circumstances, the fact that the Defendant provided information to MAS is hardly evidence suggestive of malice.

218 On balance, I am of the view that malice has not been established by the Plaintiff. In the circumstances, the defence of qualified privilege applies and the Plaintiff's claim for defamation fails on this ground as well.

Malicious Falsehood

Malicious Falsehood

219 The Plaintiff relies on his submissions on defamation and his submissions on malice made in the context of qualified privilege to support his claim of malicious falsehood.

220 In *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd and others* [2008] 4 SLR(R) 727 ("*WBG*"), the court held (at [68]):

> Under the common law, a claim in malicious falsehood succeeds upon proof:
>
> (a) that the defendant published to third parties words which are false;
>
> (b) that they refer to the claimant or his property or his business;
>
> (c) that they were published maliciously; and
>
> (d) that special damage has followed as a direct and natural result of their publication: see *Gatley* at para 20.1 and *Clerk & Lindsell* at para 24-09.
>
> Section 6(1)(*b*) of the [Defamation Act], if satisfied, relieves WBG from having to prove special damage. It reads:
>
> 6. - (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage —
>
> …
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

221 In this case, the elements which are primarily in issue are the presence of malice in respect of the Defendant's publication, and the falsity of the alleged statements. The Plaintiff bears the burden of proving the falsity of the First and Second Statements on Persistency and Compliance (see *Challenger Technologies Pte Ltd v Dennison Transoceanic Corp* [1997] 2 SLR(R) 618).

222 In the circumstances, the claim in malicious falsehood must necessarily fail because malice has not been made out on the facts of the present case.

223 Malice would be made out if there is a reckless disregard of the true facts (see *WBG* at [72]; *Maidstone Pte Ltd v Takenaka Corp* [1992] 1 SLR(R) 752 ("*Maidstone*")). In *Maidstone*, Yong Pung How CJ made the following observations (at [50]) on the element of malice:

> ... A defendant is not reckless, for the purposes of proving malice, *if he did so believing it was true, even if he was careless, impulsive or irrational in coming to that belief*. The law does not require him to be logical. In order for him to be held to be reckless, he must be shown to have not cared or considered if the statement was true. ...
>
> [emphasis added]

224 In this case, it cannot be said that the element of malice has been made out. The Defendant had not been reckless in making the First and Second Statements on Persistency and Compliance.

With respect to the statements on persistency, the Defendant's Senior Actuarial Specialist, Mr Tian Cheng, had given evidence to confirm the accuracy of Ramesh Organisation's 13-month persistency ratio to be 39.6% as at 30 April 2011.

225 As regards the Defendant's First and Second Statements on Compliance, I am not satisfied that the Defendant had been reckless in describing the issues faced by the Plaintiff and Ramesh Organisation. Notably, in his internal email dated 9 March 2012, Mr Williams instructed his subordinate, Mr Ng, to highlight the Plaintiff's poor persistency and "disciplinary cases *if any of these are bad*" [emphasis added]. I am therefore of the view that the Defendant had regard to the confines of the truth in presenting the state of affairs to MAS and the other insurance companies.

226 Moreover, with reference to my findings above, the Plaintiff is clearly unable to prove malice for the purpose of defeating the defence of qualified privilege. The same reasons I cited above apply to fortify my holding that malice for the purposes of malicious falsehood is not established either.

227 In any event, the Plaintiff would have failed to prove the falsity of the allegedly defamatory statements. The Plaintiff has not raised any argument to dispute the Defendant's computation of the 13-month persistency ratio. The Plaintiff's only grievance is that he was not informed of the Defendant's intended reliance on the 13-month persistency ratio. First, this has no bearing on the *truth* of the 13-month persistency ratio provided by the Defendant. Second, based on the cross-examination of the Plaintiff, I am not satisfied that he did not know about the 13-month persistency ratio. Notably, at the workshop conducted by the Defendant on 8 March 2011, the Defendant was said to have informed the Plaintiff of the 13-month persistency ratio and its differences from the 19-month persistency ratio.

228 For the reasons set out above, the action in malicious falsehood fails.

Negligence

229 The Plaintiff asserts that the Defendant owed him a duty to take reasonable care in the preparation of its responses to MAS and the other insurance companies. In making this submission, the Plaintiff relies primarily on the authority of *Spring v Guardian*. To this end, it is the Plaintiff's case that the Defendant had breached its duty by providing the low 13-month persistency ratios that were calculated using different parameters from the figures actually given to the Plaintiff during the course of his tenure with the Defendant. [note: 51] The Plaintiff also cited the Defendant's failure to provide the outcome of the investigations on the Plaintiff to both Prudential and Tokio Marine as a breach of duty by the Defendant. In response, the Defendant questions the Plaintiff's reliance on *Spring v Guardian* and asserts that the applicable test for establishing a duty of care in Singapore is found in *Spandeck*. In this regard, the Defendant takes the position that it does not owe the Plaintiff a duty of care.

Establishing a duty of care in an employment reference check

230 Prior to examining the issue of whether a duty of care arises and has been breached on the facts of this case, it is pertinent to ascertain whether in law, *Spring v Guardian* establishes a duty of care in respect of statements under the tort of negligence in Singapore. I shall now proceed to examine the relevant case law.

231 It is well-settled that in Singapore, regardless of the nature of damage caused (be it physical, pure economic loss *etc*), the test laid down in the landmark decision of *Spandeck* sets out the applicable framework for determining if a duty of care in the tort of negligence arises (see *Ngiam Kong*

Seng and another v Lim Chiew Hock [2008] 3 SLR(R) 674; *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*"); *AEL and others v Cheo Yeoh & Associates LLC and another* [2014] 3 SLR 1231).

232 The *Spandeck* test consists of two stages, namely, proximity and policy considerations. The two-stage test is preceded by the threshold question of factual foreseeability, which is not strictly considered as being part of the *Spandeck* test due to the likelihood of it being fulfilled in most cases. Whether or not it is better regarded as a three-stage or two-stage test is, in my view, largely a matter of semantics. What is clear is that in the vast majority of cases, plaintiffs are unlikely to face difficulty in meeting the threshold test of factual foreseeability. That said, factual foreseeability is not a mere formality and plaintiffs must still satisfy the court that the threshold requirement is met (see *The Law of Torts in Singapore* at para 03.046, citing *Man Mohan Singh s/o Jothirambal Singh and another v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd) and another and another appeal* [2008] 3 SLR(R) 735 as an example where the Plaintiff failed to meet the threshold test).

233 The Court of Appeal in *Spandeck* (at [73]) has also given helpful guidance on the relevance of judicial precedents:

> … We would add that this test is to be applied *incrementally*, in the sense that *when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy*. As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. We would admit at this juncture that this is basically a restatement of the two-stage test in *Anns*, tempered by the preliminary requirement of factual foreseeability. Indeed, we should point out that this is the test applied in substance by many jurisdictions in the Commonwealth: see, for example, the Canadian case of *Cooper v Hobart* (2001) 206 DLR (4th) 193; the New Zealand case of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey* Ltd [2005] 1 NZLR 324 …
>
> [emphasis added]

234 Since *Spandeck* was decided, local courts have consistently applied the test therein to determine whether a duty of care exists in claims of negligence. To this end, as observed by the Court of Appeal in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*") at [28], the English approach of a general exclusionary rule against recovery of pure economic loss has been rejected in Singapore. Rather than taking established principles and rules from foreign jurisdictions, therefore, what *Spandeck* requires is an incremental application of the test that was formulated therein *in the local context*.

235 I am therefore of the view that *Spring v Guardian* on its own does not apply as a direct authority in the local context for the existence of a duty of care with respect to employment references. That is not to say that *Spring v Guardian* is entirely irrelevant. Rather, the factors taken into account by the court in *Spring v Guardian* may be relevant in so far as they can be analysed within the *Spandeck* framework.

236 This approach has been affirmed by the Court of Appeal in *Go Dante Yap*. In that case, a businessman alleged that a bank had breached its duty to advise him in respect of his investments,

thereby causing him to suffer loss in relation to several investments. On appeal against the dismissal of his claims, the Court of Appeal noted (at [29]) that:

> … in the Judgment, the Judge did not apply the *Spandeck* test in order to arrive at his conclusion that no duty of care in the tort of negligence was owed by the Respondent to the Appellant, but, instead, adopted and applied several "'lower level' factors" formulated by Gloster J in *Springwell* ... *While this was not necessarily incorrect in so far as these factors could ultimately be placed within the framework of the Spandeck test (and indeed we will refer to them later in these grounds), we believed that applying the Spandeck test would have allowed these factors to be seen in their proper perspective, thereby yielding a different answer.*
>
> [emphasis added]

237 The Plaintiff placed emphasis on Woo Bih Li J's *dicta* in *CCL v Byrne*. It must be highlighted that in that case, Woo J had not sought to apply or distinguish *Spring v Guardian*. Rather, he observed that the legal issues in *Spring v Guardian* were not the same as those before him. To this end, Woo J's decision cannot be said to be applying or affirming the applicability of *Spring v Guardian* in Singapore.

238 Therefore, in ascertaining whether a duty of care has been made out on the facts of the present case, it is apposite that the court should primarily apply the *Spandeck* test, and fit whatever insights it may glean from *Spring v Guardian* into the *Spandeck* framework.

Factual foreseeability

239 It is clearly foreseeable in the present case that the Plaintiff would suffer loss should the Defendant not exercise due care in its responses to MAS, Prudential and Tokio Marine. The threshold requirement of factual foreseeability is therefore satisfied on the facts of the present case.

Proximity

240 The proximity inquiry is primarily concerned with the closeness and directness of the relationship between the parties. The court's focus is on the "specific relationship between the parties" (*The Law of Torts in Singapore* at para 03.052).

241 That said, I acknowledge that there has been considerable discussion and disagreement over the meaning and content of the proximity inquiry. Indeed, it has even been said that proximity may be nothing more than a conclusion on the facts that it is proper to recognise the existence of a duty of care (see *Caparo Industries plc v Dickman and Others* [1990] 2 AC 605 at 618 *per* Lord Bridge of Harwich).

242 After *Spandeck*, it is now clear that proximity is not to be regarded as a mere label or badge. What is required is a careful examination of the closeness of the relationship between the parties to determine if a duty of care properly arises on the facts. Indeed, as Professor Tan Seow Hon suggests in her recent publication Tan Seow Hon, *Justice as Friendship: A Theory of Law* (Ashgate, 2015) at p 154, the court is primarily concerned with achieving interpersonal justice between the parties.

243 Proximity involves physical, causal or circumstantial closeness in the relationship between the parties. It can also involve the twin concepts of assumption of responsibility and reliance (*The Law of Torts in Singapore* at para 03.054). In *Spandeck* (at [78]–[79]), the Court of Appeal cited Deane J's judgment in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 ("*Sutherland*") at 55–56 with

approval, holding that his analysis "unpacks "proximity or neighbourhood" as a composite idea":

> The requirement of proximity is directed to *the relationship between the parties* in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves *the notion of nearness or closeness and embraces physical* proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, *circumstantial* proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (*perhaps loosely*) be referred to as *causal* proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect *an assumption by one party of a responsibility* to take care to avoid or prevent injury, loss or damage to the person or property of another or *reliance* by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. *Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case*.
>
> [emphasis in original]

244 I respectfully agree that the above passage helpfully unpacks the meaning of physical, circumstantial and causal proximity, and distinguishes it from proximity based on an assumption of responsibility and reliance. Moreover, it correctly clarifies that the relative importance of the factors which are determinative of proximity will depend on the circumstances. In particular, much depends on the *nature or quality of the event giving rise to the loss* and injury, as well as the *type of harm caused*. For example, it will often be highly relevant to consider if the tortious act consists of an act or an omission, or whether it consists of a statement or a physical act. Similarly, it is also important to consider whether the type of harm in question is physical injury, psychiatric harm, loss of liberty, damage to property, or purely economic loss.

245 To further illustrate the point, I observe that the twin concepts of assumption of responsibility and reliance tend to be more useful for particular types of cases involving negligent advice or provision of professional services (*The Law of Torts in Singapore* at para 03.059). However, it is usually less important in cases where a careless act has caused physical harm or psychiatric injury to plaintiffs who were strangers at the relevant time.

246 When the court is faced with novel relationships, an incremental approach is to be taken. Such an approach entails bearing in mind analogous cases in so far as they are relevant.

247 Finally, I should make clear that it is unnecessary for all facets of proximity to be found on the facts before the requirement of proximity is satisfied (see *The Law of Torts in Singapore* at para 03.056).

248 I now turn to the facts of the present case. In my view, sufficient proximity has been established. In this regard, I found it useful to refer to the observations of Lord Goff in *Spring v Guardian* (at 319):

> ... it is my opinion that an employer who provides a reference in respect of one of his employees to a prospective future employer will ordinarily owe a duty of care to his employee in respect of the preparation of the reference. The employer is possessed of *special knowledge*, derived from his experience of the employee's character, skill and diligence in the performance of his duties while working for the employer. Moreover, *when the employer provides a reference to a third party in respect of his employee, he does so not only for the assistance of the third party, but*

also, for what it is worth, for the assistance of the employee. Indeed, nowadays it must often be very difficult for an employee to obtain fresh employment without the benefit of a reference from his present or a previous employer. It is for this reason that, in ordinary life, it may be the employee, rather than a prospective future employer, who asks the employer to provide the reference; and even where the approach comes from the prospective future employer, it will (apart from special circumstances) be made with either the *express or the tacit authority of the employee*. The provision of such references is a *service regularly provided by employers to their employees*; indeed, references are part of the currency of the modern employment market. Furthermore, when such a reference is provided by an employer, *it is plain that the employee relies upon him to exercise due skill and care in the preparation of the reference before making it available to the third party*.

[emphasis added]

249 From the above passage, it is clear that the following facts were important in the court's finding that a duty of care exists on the part of an employer writing a reference for an employee:

(a) The employer has special knowledge about the employee.

(b) The employer provides a reference to a third party for the assistance of the employee.

(c) The employer provides a reference with the tacit authority of the employee.

(d) The provision of a reference is a service provided by employers to their employees.

(e) The employee relies on his employer to exercise due skill and care in preparing the reference.

250 Indeed, I note that all of the above is also true of the relationship between the Plaintiff and the Defendant in the present case. No doubt, a principal and agent relationship no longer existed between the parties at the time when Prudential, Tokio Marine, and MAS sought reference checks and information from the Defendant. Moreover, the Plaintiff has not actively relied on the statements made in the reference checks. Instead, the reference checks and statements were provided to Prudential, Tokio Marine and MAS.

251 However, on the facts, I find that there is both causal and circumstantial proximity, as well as an "attenuated" form of assumption of responsibility and reliance.

252 First, as stated in the extract from *Sutherland* at [243] of this judgment, causal proximity refers to the "closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained". In this case, it is *more* than reasonably foreseeable that the Defendant's actions would have an impact on the Plaintiff's livelihood given that its responses would be seriously considered by the Plaintiff's prospective employers. I am therefore of the opinion that there is a close and direct causal connection between the Defendant writing a negligent reference for the Plaintiff (if indeed it did) and the Plaintiff suffering harm in terms of loss of job prospects. This justifies a finding of "causal proximity" in the relationship between the parties in the present case.

253 Second, I also find that there is circumstantial proximity. It is undoubtedly the case that the requirement of circumstantial proximity is most directly satisfied when the parties share an *ongoing* overriding relationship at the material time (*eg*, an employment relationship). However, I am of the

view that *in this particular case*, the fact that the Plaintiff and the Defendant stood in relation to each other as ex-principal and ex-agent at the material time suffices to satisfy the requirement of circumstantial proximity. In coming to this conclusion, I cannot emphasise enough how important it is that the alleged tortious act in this case is the provision of an employment reference. As the House of Lords noted in *Spring v Guardian*, in providing an employment reference for an ex-employee, an employer does so having special knowledge of the ex-employee, for the assistance and in the service of the ex-employee, and with the express or implied authority of the ex-employee. In my view, these facts render the ex-agency relationship shared by the parties at the material time a sufficiently close relationship to justify a finding of circumstantial proximity. The fact that the reference check response is underscored or driven by regulatory requirements does not, in my view, make any difference on the present facts.

254 In coming to this view, I am aware of the dangers of finding that an expired or past relationship can constitute a present relationship for the purposes of circumstantial proximity. However, in my view, an ex-principal/employer and ex-agent/employee do not stand as total strangers in relation to each other; they do share a more substantial relationship than total strangers do *even* after the end of the agency/employment period. In my view, the provision of an employment reference is one example where the ex-agency/employment relationship is indeed sufficient to satisfy the requirement of circumstantial proximity.

255 Finally, I find that the Plaintiff's "reliance" on the Defendant on the present facts also contributes to the ultimate finding that there is proximity between the parties. Within the scheme of regulation of the insurance industry as a financial service industry, and the scheme to ensure that representatives were fit and proper persons (for employment, engagement as advisers and issuance of certificates), it is clear that ex-agents and employees of insurance companies rely heavily on their former principals or employer to take due care in the provision of reference checks. Of course, reliance in this context is used in a broad and loose sense. It is clear that the Plaintiff does not specifically *act in reliance* on the Defendant writing a non-negligent reference. The most that can be said is that the Plaintiff *expects* the Defendant to exercise due care.

256 As such, while I note that the Plaintiff does in this sense rely on a "non-negligent" reference from the Defendant, I make clear that such reliance would not have been nearly sufficient on its own to give rise to proximity between the parties. However, as part of the multi-faceted matrix of facts in the present case, I found it to be relevant although not conclusive or sufficient on its own.

257 At this juncture, it is appropriate to address the Defendant's submission that the Prudential Written Authorisation and the Tokio Marine Written Authorisation negate any finding of duty of care at the proximity stage. In making this submission, the Defendant relies on the observations made by the Court of Appeal in *Go Dante Yap* at [38]. The Court of Appeal stated that "[i]t was clear from the actual decision in *Hedley Byrne* … that an express disclaimer of responsibility could prevent a tortious duty of care from arising, by negating the proximity sought to be established by the concept of an 'assumption of responsibility'".

258 In my view, the aforementioned quote simply cannot assist the Defendant. I fully agree that a disclaimer *by the Defendant* would have made it factually difficult for the Plaintiff to argue that he had reasonably relied on the Defendant, or that the Defendant assumed responsibility vis-à-vis him. However, in the present case, the Defendant did not make an express (or implied) disclaimer. The written authorisations were part of the standard forms signed by the Plaintiff. They were not requested or drafted by the Defendant. They were simply presented to the Defendant as part of Prudential's and Tokio Marine's reference check requests.

259 For this reason, I do not agree that the scope of the consent is sufficiently clear and unequivocal so as to amount to a disclaimer that has an impact on the question of whether there was sufficient proximity to support the finding of a duty of care.

260 Therefore, I do not think that the written authorisations assist the Defendant at this stage of the proximity inquiry. Moreover, even if they did affect the issue of whether the Defendant had assumed responsibility, my finding on proximity is not based on an assumption of responsibility or reliance. Of course, I am not immediately dismissing the relevance of the written authorisations entirely. I note that the Defendant also submits that the written authorisations should be considered at the *policy stage* of the duty of care inquiry. It is to that which I now turn.

Policy considerations

261 At this stage, what is required is a focus on broader communitarian interests rather than the particular relationship between the Plaintiff and Defendant. The Plaintiff's individual rights may be overridden by strong countervailing policy considerations which have an impact on persons outside the boundaries of the courtroom (*The Law of Torts in Singapore* at para 03.063).

262 The learned authors of *The Law of Torts in Singapore* suggest at para 03.064 that policy considerations can have one of the following impact on a duty of care analysis: (i) negate the *prima facie* duty of care that has arisen under proximity; (ii) affirm the absence of a *prima facie* duty of care under proximity; or (iii) affirm the presence of a *prima facie* duty of care under the proximity stage. However, as can be seen from *Spandeck* at [83], what is important at the second stage of the *Spandeck* inquiry is *policy that may negate the duty of care arising based on proximity*:

> Assuming a positive answer to the preliminary question of factual foreseeability and the first stage of the legal proximity test, a *prima facie* duty of care arises. *Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty.* Among the relevant policy considerations would be, for example, the presence of a contractual matrix which has clearly defined the rights and liabilities of the parties and the relative bargaining positions of the parties.
>
> [emphasis added]

263 It is apposite to note that this stage of the inquiry does not require an assessment of the policy considerations *in favour of* the imposition of a duty of care. Rather, all that is required is the *absence* of policy considerations militating *against* the imposition of such a duty (see *Animal Concerns* at [77]). It is also important that the courts do not utilise policy considerations as an overarching determinant of liability. That would potentially result in arbitrary decisions.

264 In the present case, given my finding that a *prima facie* duty of care was owed (since the elements of threshold foreseeability and proximity are satisfied), the matter that remains to be considered is whether there are sufficiently cogent and specific policy considerations which negate that duty of care. In this regard, the Defendant highlighted several policy concerns for my consideration:

> (a) Whether the imposition of a duty of care in negligence may result in inconsistent findings of liability under the tort of negligence and the tort of defamation and/or malicious falsehood, especially where employment references are an established category of communications covered by the defence of qualified privilege.

(b) Whether the imposition of a duty of care in this instance would hinder full and frank disclosure by ex-employers of the employee in question, the policy underlying qualified privilege.

(c) Whether the written authorisations give rise to policy concerns regarding the imposition of a duty of care.

265 I shall now consider these policy concerns in turn.

Effects on the law of defamation and malicious falsehood

266 There appears to have been some concern that imposing a duty of care on an employer giving an employment reference may result in some inconsistency between the tort of negligence and the tort of defamation or malicious falsehood. In particular, it may lead to a finding of liability under negligence even when there is no liability under the tort of defamation and/or malicious falsehood because of qualified privilege. In my view, the imposition of a duty of care in this particular instance will not undermine the scope of the law of defamation and/or malicious falsehood. Indeed, it is perfectly legitimate that in some instances, the tort of defamation and negligence may give rise to different outcomes on liability based on the same fact patterns.

267 First, I agree with the views of both Lord Lowry and Lord Slynn in *Spring v Guardian* that the basis of liability in the torts of defamation and negligence are different. There are different requirements for establishing the defence of qualified privilege and a claim in negligence. This translates into different *areas* of protection conferred upon the plaintiff in each case. In a case of malicious falsehood, the primary question at hand is whether a false statement has been maliciously made against the plaintiff. In a case of defamation, the primary question is whether a defamatory statement injurious to reputation has been made. In both instances, the tort depends on the making of a false statement. Moreover, in both instances, there need not be the loss of a job for the claim to succeed (*ie*, special damage). However, in a claim in negligence, damage such as the loss of a job or an opportunity to earn remuneration must result.

268 The differing bases of establishing liability and conferring protection is illustrated by two decisions of the Court of Appeal of New Zealand, namely *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 ("*Bell-Booth*") and *Balfour v Attorney-General* [1991] 1 NZLR 519 ("*Balfour*").

269 In *Bell-Booth*, the primary claim was premised on an alleged defamation arising out of a television programme which described a company's product as being ineffective for its intended purpose. While the claim in defamation failed based on the defence of justification, the claim in negligence was established given that the statements in question had been made negligently.

270 The negligence in question arose from the defendant's failure to disclose the result of certain product trials or to give the plaintiff an opportunity to comment. The Court of Appeal of New Zealand commented that the "suggested duty [in respect of the claim in negligence] could possibly be refined as simply a duty to take reasonable care to safeguard the interests of the plaintiff". On the other hand, the duty in defamation was different as it concerned "not defaming the plaintiff without justification or privilege or otherwise than by way of fair comment" (*Bell-Booth* at 155–157). The court also formulated the duty in malicious falsehood as not disparaging the plaintiff untruthfully and maliciously.

271 In the later decision of *Balfour*, which affirmed *Bell-Booth*, the duty under a claim in negligence was framed as a duty to exercise care as to the accuracy of information disseminated.

272 Put in another way, whilst it is not defamatory *per se* to tell an unpleasant truth about the Plaintiff, it may still be negligent if the Defendant failed to qualify or explain circumstances and other facts which put a different colour on the unpleasant truth.

273 In view of the above, I do not think that imposing a duty of care in negligence undermines boundaries set up in the tort of defamation or malicious falsehood in any way. The tort of negligence and the tort of defamation or malicious falsehood are distinct and separate torts with their separate policy concerns and objectives.

Full and frank disclosure by ex-employers in employment references

274 The second concern relating to the first is that imposing a duty of care in this instance may undermine the policy underlying qualified privilege, namely, the encouraging of full and frank disclosure on the part of ex-employers providing employment references.

275 I do not agree that a duty to take reasonable care in giving employment references would contradict or undermine full and frank disclosure on the part of ex-principals/employers in giving employment references. As will be discussed below, even in the tort of defamation, the defence of qualified privilege is not absolute and is subject to limitations which are intended to balance the rights of the parties.

276 In *Horrocks* (at 309), Lord Goff explained the policy underlying the defence of qualified privilege as follows:

> The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny, has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognises that they have a duty to perform or an interest to protect in doing so. *What is published in good faith on matters of these kinds is published on a privileged occasion.* It is not actionable even though it be defamatory and turns out to be untrue.
>
> [emphasis added]

277 From the above, it is clear that the policy underlying the defence of qualified privilege was never to allow an employer giving an employment reference to be *absolutely uninhibited and unrestrained* in his giving of a reference. On the contrary, it is clear that under qualified privilege, he is at least under an obligation to act in good faith. In my view, the added obligation to act with reasonable care under the tort of negligence is consistent with the policy embedded in the spirit of the defence of qualified privilege. To be sure, the fact that the defendant has been careless in his belief will not deprive him of the defence of qualified privilege assuming that his belief was one that was honestly held and that he did not act with an improper motive. That said, the law is clearly alive to the need to take care of the important interests of the employee which are at stake. Defamation is concerned with protecting reputation. Liability is strict (barring certain defences such as qualified privilege). Negligence is concerned with ensuring a standard of conduct (*ie*, reasonable care) and the avoidance of loss and damage within the framework of a duty of care.

Policy concerns arising from the written authorisation

278 The final policy concern raised by the Defendant is that the written authorisation militates against a duty of care. The Defendant's submissions on this were brief. Its point was simply that given that the Plaintiff expressly consented to releasing the Defendant from liability, policy

considerations militated against the finding of a duty of care on the facts.

279 I reject this submission. Without the assistance of more detailed submissions, I take the view that the written authorisations are best taken on board at the stage of determining whether the proximity requirement has been satisfied. As stated earlier, I am of the view that the written authorisations provided do not negate the finding of proximity on the facts before me. In any case, the written authorisation does not go so far as to exclude liability for negligence in the sense of a failure to provide more information.

280 In the totality of the circumstances, and based on the reasoning set out above, I am of the view that the Defendant did have a duty of care to take reasonable care in providing information to other organisations in respect of the Plaintiff's employment history.

Breach of duty of care

281 Given my finding that the Defendant owed the Plaintiff a duty to take reasonable care in responding to Prudential, Tokio Marine, and MAS, I now consider whether the Defendant has breached the standard of care required of it. After considering the evidence and submissions, I find that the Defendant did not breach the duty it owes to the Plaintiff to take reasonable care.

282 With regard to the First and Second Statements on Persistency, there is no breach in so far as the accuracy of the Defendant's calculations of the persistency ratios is supported by the evidence and remains largely unchallenged by the Plaintiff. It bears emphasising that I have previously rejected the Plaintiff's argument that the Defendant had "invented" the 13-month persistency ratio to give rise to a lower persistency ratio. Instead, I found that the Defendant had, at a workshop conducted on 8 March 2011, introduced the Plaintiff and other financial services directors to the 13-month persistency ratio. As this was the primary ground for the Plaintiff's argument that the Defendant breached its duty of care in relation to the First and Second Statements on Persistency, I find the Plaintiff's claim on this front unsustainable.

283 With regard to the First and Second Statements on Compliance, I am also of the view that there has not been a breach of duty of care. I shall now explain my conclusion. First, the statements on compliance were not carelessly prepared in so far as the information stated therein about the Defendant's investigations into the Plaintiff and Ramesh Organisation is true. Second, while the information might not have been complete given that the outcome of the investigations was not made known until later, it is clear that as a result of the subsequent responses to queries raised by Prudential and Tokio Marine on the result of the investigations, the Defendant did provide the relevant information, namely, that the complaint against the Plaintiff was not proceeded with as the evidence was found to be inconclusive. By the time Prudential and Tokio Marine took their decisions on the Plaintiff's application, they had been apprised of the facts as they stood. Therefore, in so far as the standard of care is concerned, looking at the Defendant's conduct as a whole, it cannot be said that the duty to exercise reasonable care has been breached by the Defendant.

Causation of loss

284 In any event, even if the Defendant can be said to have been negligent *vis-à-vis* its response to Prudential, the Defendant submits that there is a break in the chain of causation. In brief, upon receiving the Defendant's statements, Prudential had gone ahead and applied for an RNF licence on behalf of the Plaintiff. Indeed, it managed to obtain a conditional licence from MAS. The terms of the conditions were not put before me. However, for reasons only known to Prudential, it subsequently decided against hiring the Plaintiff. To this end, it seems clear to me that the Defendant did not

cause the Plaintiff any loss of chance in becoming employed by Prudential. Similarly, in the case of Tokio Marine, it is argued that by the time the latter took the decision not to engage the Plaintiff, it had been apprised of the complete picture. Moreover, evidence from Tokio Marine suggests that the company took into account many factors in deciding not to hire the Plaintiff; the defendant's reference check response was only one factor. It is therefore questionable if it can be said that the Defendant's conduct *caused* the Plaintiff to be rejected by Tokio Marine. Nevertheless, given my earlier finding that there is no breach of duty of care and the relatively thin evidence on the matter, I do not find it necessary to make a firm decision on causation.

285 Looking at the totality of the evidence, I find that the Plaintiff's claim in negligence has not been established on the facts of the present case.

Conclusion

286 In summary, I conclude that:

(a) The Plaintiff's claim in defamation in respect of the First and Second Statements on Persistency fails. I find that the statements do not even bear a defamatory meaning. And, even if that were not the case, the Defendant has succeeded in raising the defences of justification and qualified privilege. Moreover, in relation to the Second Statements on Persistency, the defence of consent succeeds.

(b) The Plaintiff's claim in defamation in respect of the First and Second Statements on Compliance fails because the defences of consent, justification and qualified privilege apply to negate the Defendant's *prima facie* liability.

(c) The Plaintiff has failed to prove malice to counter the defence of qualified privilege.

(d) Accordingly, the Plaintiff's claim in malicious falsehood must also fail.

(e) Finally, while a duty of care in negligence exists, the Plaintiff has not proven, on a balance of probabilities, that there has been a breach of duty by the Defendant to take reasonable care in providing the reference checks to Prudential and Tokio Marine.

287 The Plaintiff's claims are therefore dismissed. Costs are awarded to the Defendant to be taxed unless agreed.

[note: 1] Defendant's Closing Submissions dated 14 February 2014 ("DCS") at pp 18–19, para 40(c).

[note: 2] DCS at pp 19–20, paras 40(e), 41.

[note: 3] DCS at p 20, para 43.

[note: 4] Agreed Bundle ("AB") Vol 1 at p 616, para 4.

[note: 5] AB Vol 2 at p 1341, para 8.

[note: 6] AB Vol 2 at p 1540, para 4(a).

[note: 7] AB Vol 3 at p 2119.

[note: 8] AB Vol 3 at p 2118.

[note: 9] AB Vol 2 at p 1540, para 7.

[note: 10] Notes of Evidence ("NE") (15 January 2014) at pp 119–120.

[note: 11] AB Vol 4 at p 2398.

[note: 12] AB Vol 4 at p 2414.

[note: 13] AB Vol 4 at p 2425.

[note: 14] Plaintiff's Affidavit of Evidence-in-Chief ("AEIC") at p 79, para 176.

[note: 15] AB Vol 4 at p 2329.

[note: 16] AB Vol 4 at p 2352.

[note: 17] Plaintiff's Statement of Claim (Amendment No 3) ("SOC3") at pp 15–17, para 21.

[note: 18] SOC3 at p 22, para 27.

[note: 19] AB Vol 4 at p 2487.

[note: 20] SOC3 at pp 15–17, para 21; pp 21–22, para 26.

[note: 21] SOC3 at pp 22–23, para 28.

[note: 22] Plaintiff's Closing Submissions dated 14 February 2014 ("PCS") at pp 94–95, para 129.

[note: 23] PCS at p 106, para 146.

[note: 24] DCS at p 44, para 87.

[note: 25] DCS at pp 25–26, para 58(d).

[note: 26] DCS at p 70, para 153.

[note: 27] AB Vol 4 at pp 2242–2243.

[note: 28] AB Vol 4 at p 2425.

[note: 29] DCS at p 77, para 178.

[note: 30] NE (8 January 2014) at pp 64–66.

[note: 31] NE (7 January 2014) at pp 112–113.

[note: 32] NE (7 January 2014) at pp 115–116, 121–125.

[note: 33] DCS at p 94, para 215(c); NE (15 January 2014) at p 118.

[note: 34] DCS at p 95, para 216.

[note: 35] DCS at paras 240–241.

[note: 36] SOC3 at pp 22–23, para 28.

[note: 37] PCS at p 97, para 133.

[note: 38] DCS at p 65, para 142(a).

[note: 39] AB Vol 4 at p 2352.

[note: 40] AB Vol 3 at p 2119.

[note: 41] AB Vol 4 at p 2398.

[note: 42] AB Vol 4 at p 2396.

[note: 43] Tan Mui Hong's Affidavit of Evidence-in-Chief at p 5, para 11(a).

[note: 44] Glenn John Williams' Affidavit of Evidence-in-Chief at pp 11–12, para 15(f).

[note: 45] Glenn John Williams' Affidavit of Evidence-in-Chief at p 10, para 15(b).

[note: 46] NE (8 January 2014) at pp 64–66.

[note: 47] PCS at pp 85–86, para 114.

[note: 48] PCS at pp 110–111, para 153.

[note: 49] PCS at p 112, para 155.

[note: 50] DCS at pp 24–26, paras 54–59.

[note: 51] PCS at p 142, para 197.