Lim Eng Hock Peter v Lin Jian Wei and Another
[2009] SGHC 31

Case Number : Suit 514/2007

Decision Date : 10 February 2009

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Alvin Yeo SC, Chan Hock Keng, Koh Swee Yen, Suegene Ang and Reina Chua (Wong Partnership LLP) for the plaintiff; Ang Cheng Hock, William Ong, Ramesh Selvaraj, Kristy Tan, Lim Dao Kai and Tay Yong Seng (Allen and Gledhill LLP) for the defendants

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

Evidence – Principles – No case to answer – Legal implications following submission of no case to answer – Burden of proof

Tort – Defamation – Absolute privilege – Publication of defamatory statements in explanatory statement – Occasions of absolute privilege – Whether publication of explanatory statement made on occasion of absolute privilege

Tort – Defamation – Defamatory statements – Passages published in explanatory statement to explain scheme of arrangement and compromise under s 211 Companies Act (Cap 50, 1994 Rev Ed) – Whether allegedly defamatory statements in explanatory statement referring to plaintiff – Whether allegedly defamatory words defaming plaintiff – Whether allegedly defamatory words defaming plaintiff by innuendo – Whether defendants entitled to rely on defences of justification, absolute privilege and qualified privilege

Tort – Defamation – Justification – Whether defence available – Passages in explanatory statement explaining current financial difficulties of company

Tort – Defamation – Malice – Defendants published passages in explanatory statement alleging that plaintiff responsible for current financial difficulties of company – Whether defendants acted with malice against plaintiff

Tort – Defamation – Qualified privilege – Publication of explanatory statement in the context of member litigants' request for greater disclosure of information – Whether defence of qualified privilege favoured defendants

10 February 2009 Judgment reserved

Chan Seng Onn J:

1 In this action, the plaintiff, Mr Peter Lim Eng Hock ("Mr Lim"), a businessman, seeks damages in respect of certain allegedly defamatory passages in an Explanatory Statement ("ES") dated 2 November 2005, issued by Raffles Town Club Pte Ltd ("the Company") purportedly to explain the Scheme of Arrangement and Compromise ("Scheme") that the Company was proposing to its members.

2 The plaintiff is by no means a stranger to the chain of litigation that has dogged the Company since early 2000 and this action marks yet another chapter in this protracted saga. The plaintiff claims that he was a former "consultant" to the Company which owns a proprietary club known as the Raffles Town Club ("the Club"), situated at 1 Plymouth Avenue and had assisted Europa Holdings Pte Ltd ("Europa Holdings") and the Company to raise monies to complete the construction of the Club.

3 The first defendant, Mr Lin Jian Wei, and the second defendant, Ms Margaret Tung Yu-Lien, are presently the directors and shareholders of the Company and were also the directors and shareholders of the Company at the time the ES was published. The plaintiff alleges that the defamatory statements in the ES were either made or authorised by the defendants.

Background to the present proceedings

4 In *Lim Eng Hock Peter v Lin Jian Wei and Another* [2008] SGHC 108, the defendants had applied to strike out the plaintiff's action and sought a determination under O 14 r 12 of the Rules of Court (Cap 332, R5, 2006 Rev Ed) that the allegedly defamatory words referred to in the statement of claim were not defamatory in nature.

5 This application was heard before Tan Lee Meng J and he dismissed the application and held that it was not a case where there ought to be a preliminary ruling under O 14 r 12. The background to this action was set out comprehensively by Tan J (at [3] to [20] of his Grounds of Decision ("GD")). By way of a prelude to the discussion below, the background to this action can be dealt within a brief compass.

6 At the inception of the Company, the only shareholders and directors were Mr Lawrence Ang Yee Lim ("Mr Ang"), Mr William Tan Leong Ko ("Mr Tan") and Mr Dennis Foo Jong Long ("Mr Foo"). Sometime in March 1996, bids were invited for a plot of land at Plymouth Avenue. The highest bid of $100 million (and more than twice the next highest offer) for a 30-year lease of the land came from Europa Holdings. In May 1996, the plaintiff was approached to assist Europa Holdings in meeting its substantial payment obligations to the Urban Redevelopment Authority for payment of the purchase price. He agreed to do so and on 11 July 1996, the Company was incorporated as a wholly-owned subsidiary of Europa Holdings. The Company decided to venture into setting up Singapore's first prestigious private proprietary club at the site.

7 In August 1996, an alleged oral agreement was reached between Mr Ang, Mr Tan, Mr Foo and the plaintiff whereby in return for his assistance to Europa Holdings in raising monies to complete the construction of the Club, the plaintiff would receive a 40% stake in Europa Holdings upon its successful opening. He would also stand to receive "consultancy fees" for other services he rendered to the Club from 1996 to 2000.

8 In November 1996, the Company invited selected members of the public to join the Club at a discounted price of $28,000. These founding members were baited by promises of joining one of the most prestigious and lavish city clubs in Singapore. Over 24,000 applications were received and about 5,000 of these applications were rejected.

9 In March 2000, the Club began its operations and it was then that its members started to realise that there was overcrowding at the premises and its various facilities. In actual fact, the directors and shareholders of the Company did not reveal to the members that their prestigious club had taken on more than 19,000 members in total. The successful membership launch meant that the Company would be receiving a considerable amount of cash amounting to over $500 million to be collected from the members over 4 years, *viz*, the period allowed for the instalment plan for payment of their membership entrance fees, quite apart from the monthly subscription fees that would have to be paid by them after the Club opened.

10 Disputes arose between the plaintiff and the then shareholders of the Company sometime in September 2000 and the plaintiff was "embroiled in the following suits" ([4] *supra*, see [6] of GD):

(a) In the first suit, [the plaintiff] sued the former shareholders of the Company (Mr Ang, Mr Tan and Mr Foo) for specific performance of [the] oral agreement, under which he was entitled to 40% of the shares in the Company;

(b) In the second suit, the Company sued Mr Ang for advances of more than $51m that had been made out to him. Mr Ang joined the plaintiff as a third party, claiming that $26.6m had been handed over to the latter;

(c) In the third suit, the Company sued Mr Tan for advances of almost $6m that had been made out to him; and

(d) In the fourth suit, Mr Ang and Mr Tan sued [the plaintiff] and Mr Foo, alleging that the latter two had wrongly converted to their own use certain bearer share certificates.

11 In April 2001, these suits were settled by the parties. Under the terms of the deed of settlement dated 19 April 2001, Mr Foo's shares in the Company were to vest in Mr Ang and Mr Tan, who then entered into a 'back to back' sale of 50% of the shares in the Company to the defendants. This settlement was facilitated by the defendants who provided financial assistance to Mr Ang and Mr Tan. Further, the defendants also agreed that the loans granted by the Company to Mr Ang and Mr Tan did not need to be repaid to the Company and that such loans were to be set off against dividends. The Company therefore discontinued their actions against Mr Ang and Mr Tan for the return of such loans ([10], (b) and (c) above).

12 What emerged from the proceedings, however, was the revelation to the public that the Club in fact, had taken on 19,000 members. Given the Club's promises of providing an exclusive membership, this sent ripples through the Club's members, who were understandably not happy that their prestigious private city club was not so exclusive after all.

13 Between April to June 2001, there was a change in management of the Company. In fact, the 2nd defendant was appointed as an executive director of the Company on 30 April 2001. It was admitted by the 2nd defendant (through her lawyers' correspondence with M/s Harry Elias Partnership and the Securities Industry Council) that this was because she wanted to familiarise herself with the operations of the Company. On 30 April 2001, the 2nd defendant had even signed off on various directors' resolutions, including approving the transfer of Mr Foo's shares in the Company to Mr Ang, this being one of the terms of the deed of settlement dated 19 April 2001.

14 The defendants' and the first defendant's wife's acquisition of all the shares in the Company from the former shareholders was effected through:

(a) The 1st Exchange Facility Agreement ("1st EFA") between Mr Ang and the defendants, dated 23 April 2001, for the sale and purchase of 50% shares in the Company[note: 1];

(b) The 2nd Exchange Facility Agreement ("2nd EFA") between Mr Ang and the defendants, dated 11 May 2001, which superseded the 1st Exchange Facility Agreement[note: 2];

(c) An Agreement in respect of the Sale and Purchase of Shares in the Company ("S & P for [the Company]") between Mr Ang, Mr Tan and the defendants, dated 6 June 2001, for the sale and purchase of the remaining 50% shares in the Company[note: 3].

15 As at April 2001, it must be noted the Company had current assets of $206 million, consisting of

cash reserves of $114 million (in fixed deposits and cash and bank balances), short-term investments of $27 million and receivables of $65 million in directors' and/or shareholders' loans. This was what was available as current assets in the Company just before the plaintiff exited the Company and just before the defendants became involved with the Company commencing on 30 April 2001. This strong financial position of the Company in April 2001 is undisputed and has not been challenged by counsel for the defendants during the cross-examination of the plaintiff. It is also not disputed that this strong financial position was principally due to a certain deferred tax and accounting policy ("Deferred Accounting Policy") (see [16] below) that was put in place while the plaintiff was still involved in the Company.

The plaintiff institutionalised the "Deferred Accounting Policy" for the Company

16 That it was the plaintiff who put in place the "Deferred Accounting Policy" for the Company is not seriously disputed by the defendants. I will now set out the submissions of the plaintiff detailing the evidence on this issue which I have no reason not to accept:

> Taking into account that the land upon which the Club stood could only be used for that purpose, and that members had bought memberships which entitled them to use the Club up to the expiry of the lease in 2026, Peter Lim sought to put in place a tax and accounting policy on the following basis:
>
> a. [The Company] would start to pay tax on the entrance fees only upon the Club being opened;
>
> b. [The Company] would be entitled to deduct for tax purposes, the costs of the land, construction costs and expenses of launching, setting up and opening the Club; and
>
> c. The surplus of the entrance fees (after deducting expenses) should be amortised over the period from the opening of the Club up to the expiry of the lease in 2026, and [the Company] would pay tax only on the amount amortised each year.
>
> The result would be that [the Company] would enjoy large tax savings.
>
> In about June 1998, before [the Company] filed its accounts for its first financial year, Peter Lim sought advice on these issues from Mr Sat Pal Khattar, a tax lawyer from Khattar Wong & Partners. Mr Sat Pal Khattar thought that subject to an external auditor's views, [the Company] may adopt the principle of amortising the entrance fees and costs of land over the leasehold period in order to keep the option open for [the Company] to argue that its tax position should follow its accounting treatment. He then referred Peter Lim to a former Ernst & Young partner, Mr N Subramaniam.
>
> Mr Subramaniam referred Peter Lim to his colleagues from Ernst & Young, namely Mr Roy Brittain (their audit partner) and Mr Steve Timms (their tax partner). They both advised that [the Company] was entitled to adopt the Deferred Accounting Policy, which would also be applicable for the purposes of computing [the Company's] income tax liabilities. They took the view that [the Company] had a "*strongly arguable case*". As a matter of public record, both of them have filed AEICs in Suit Nos. 782 and 905 of 2000 confirming this position.
>
> Accordingly, [the Company] adopted a tax and accounting policy whereby instead of recognising entrance fees as revenue in full when the Club memberships were sold, it amortised the surplus of entrance fees (after deducting expenses) to the profit and loss account over the 26-year period

from the opening of the Club (in 2000) to the expiry of the lease (in 2026) ("Deferred Accounting Policy"), so as to enjoy the tax savings discussed above.

The Deferred Accounting Policy also resulted in the creation of a deferred account in [the Company's] balance sheet which reserved the surplus entrance fees for future costs of operating and maintaining the Club, capital expenditure and contingencies for the benefit of the members (the "Deferred Account"). At the time Peter Lim ceased his involvement in the Club, the Deferred Account stood at $179 million.

Ernst & Young incorporated the Deferred Accounting Policy into [the Company's] first set of accounts (which was for its financial period ended 30 November 1997), and this was also incorporated into [the Company's] accounts for the financial year ended 30 November 1998, up to the draft accounts for its financial year ended 30 November 1999.

[The Company's] tax submissions for Years of Assessment 1998 and 1999 (i.e. for its financial periods ended 30 November 1997 and 30 November 1998 respectively) were based on the Deferred Accounting Policy. [The Company] made full disclosure of all its accounts to the IRAS, including the Deferred Accounting Policy.

Based on [the Company's] submissions, the IRAS issued Notices of Assessments assessing [the Company's] income tax for financial year ended 30 November 1997 as $0 and for the financial year ended 30 November 1998 as $124,020.

Due to Peter Lim's disputes with Lawrence Ang and William Tan, which led to Suit 742 of 2000 being commenced in September 2000, [the Company's] accounts for its financial year ended 30 November 1999 was not signed. Accordingly, for Year of Assessment 2000 (in respect of [the Company's] financial year ended 30 November 1999), [the Company's] tax submissions were computed based on draft unsigned accounts which adopted the Deferred Accounting Policy. Based on [the Company's] estimated chargeable income, IRAS issued a Notice of Assessment assessing [the Company's] income tax for the year of assessment to be $286,000.

On the basis of the 3 assessments by IRAS, it is reasonable to infer that IRAS had initially accepted [the Company's] Deferred Accounting Policy, and were taxing [the Company] on that basis.

17 Counsel for the plaintiff poignantly submitted that this "Deferred Accounting Policy" which was designed for the members' benefit, was later deliberately changed by the defendants for their own personal benefit.

Change of accounting policy in the Company

18 In summary, it can be seen therefore that prior to the defendants coming on board to the Company, the Company adopted a "Deferred Accounting Policy", where instead of recognising entrance fees as revenue in full in the profit and loss account at the point of sale of the Club memberships, the Company amortised the surplus of the entrance fees over the lease period of the Club. This resulted in the creation of a deferred account in the balance sheet of the Company. Further, it reserved the surplus entrance fees for future costs of operating and maintaining the Club, capital expenditure and contingencies for the benefit of the members.

19 With the defendants coming on board, a change in the accounting policy was instituted immediately. *First*, as part of their buy-out of Mr Ang's and Mr Tan's shares in the Company, the

defendants agreed to allow the directors' and shareholders' loan of $65 million owed by them not to be repaid. In effect, they agreed to change the accounting policy to recognise the entrance fees as *profits*, pay tax on these profits and declare dividends to off-set the loans. The corollary of this however, was that the Company incurred an immediate tax liability of over $100 million regardless of any instalment payment scheme for the entrance fees.

20 *Second*, only by changing this Deferred Accounting Policy, were the defendants able to declare dividends to Mr Ang and Mr Tan and to themselves as well, a point of much significance, which I shall elaborate on later.

21 That the defendants were instrumental in effecting the change can be seen in clause 4.2(b) of the 2nd EFA (worded in similar terms in Clause 6.2(a) of the 1st EFA) to which the defendants were parties. Clause 4.2 (b) provides that:

> [The defendants, Margaret Tung and Lin Jian Wei,] hereby agree and acknowledge to [Mr Ang]… [the Company] may and shall declare and pay dividends (including interim dividends) of not less than [$65 million in directors' and shareholders' loans] out of the accumulated profits of [the Company] payable either prior to or as soon as practicable following the RTC Completion to [Mr Ang] and/or [Mr Tan] in proportion to their shareholdings in [the Company] so as to set off such dividend against the [$65 million in directors' and shareholders' loans] and, in connection therewith, [the Company] shall make such changes as may be necessary to its accounting policies so as to recognize the entrance fees paid or payable to members of [the Club] as income and shall make payment of the relevant tax payable thereon for the purposes of the declaration of such dividends.

22 This change in accounting policy was effected by the defendants by amending the draft accounts for the financial year ended 30 November 1999 (which had not been signed yet) to remove the Deferred Accounting Policy and recognise the entrance fees due as revenue in full. The 1999 accounts were then signed by the defendants on 26 June 2001. This change in accounting policy enabled the defendants to declare dividends to Mr Ang and Mr Tan, as part of the terms of the sale and purchase of the Company and for their own personal benefit as well.

23 With this change in accounting policy, the plaintiff's counsel submitted that the Company would have had to pay about $138 million in taxes for its first financial year ending on 30 November 1997 (based on the prevailing tax rate of 26% of $531.78 million to be collected from the 18,992 members at $28,000 each). This large amount of taxes would have depleted the surplus entrance fees available for future costs of operating and maintaining the Club, capital expenditure and contingencies. Further, no reliance is now possible on the previous Deferred Accounting Policy in any appeals against the additional assessment subsequently imposed by IRAS in April 2001 on the basis of entrance fees being subject to tax upfront in the year of receipt.

24 I am of the view that if the Deferred Accounting Policy that the plaintiff had put in place had continued, the large declaration of dividends would not have taken place and there would then clearly be more than sufficient funds available in the Company to meet the damages of $3,000 per person (in cash) to be paid to the Raffles5000 members and the other members. No Scheme would have been necessary. Faithful adherence to the Deferred Accounting Policy would have been very much in the interest of the members of the Club as unforeseen contingencies would be well catered for and buffered by the reserves in the Company maintained as a result of that Deferred Accounting Policy. Scrapping the Deferred Accounting Policy and stripping the Company almost bare of *all* its reserves through large declarations of dividends upfront on the other hand, would not be in the members' interests.

Members' suit, declaration of dividends and questionable transactions

25 The Company directors were aware that the members were dissatisfied and were contemplating taking legal action against the Company. At the time the defendants were negotiating to buy over the Company, there were already widespread reports of possible legal action by the founder members for alleged misrepresentations as to the exclusivity of the Club. It was also reported that the Commercial Affairs Department was "*looking into the complaints of numerous [Club] members who claim they have been misled by the Club*". Founder members of the Club also began rallying for support for an action to be commenced against the Company for breach of contract/misrepresentation by the Company, as these members felt that the Club had fallen short of the "premier and exclusive" club they were promised. The very **first formal letter of demand** was in fact sent by one of these founder members of the Club on **25 April 2001**.

26 Fully aware of the potential lawsuits from members, the defendants lost no time in taking active steps to declare large dividend payouts out of the entrance fees collected. As the members were gathering forces to sue the Company, the directors of the Company were busy declaring dividends to empty the bank account of the Company. Such was the picture that was unfolding as can be seen from the events that I have set out below.

27 On 11 May 2001, dividends of $65 million were declared to Mr Ang and Mr Tan[note: 4]. It was not disputed that the $65 million dividends declared was used to set off the loans of $65 million taken by them.

28 The very next day on 12 May 2001, the defendants further declared dividends of $5 million to Mr Ang and Mr Tan collectively, as well as $5 million to themselves collectively. Thus, by 12 May 2001, within weeks of the plaintiff ceasing his involvement with the Company, the carefully thought out tax and accounting policies he had put in place were discarded and with that, dividends of **$75 million** had been declared.

29 Meanwhile, the solicitors for the Raffles5000 were preparing to sue the Company. A month later on 12 June 2001, the solicitors for the Raffles5000 sent their first letter of demand to the Company, notifying the Company of the Raffles5000's minimum claim of $120,484,000. In the letter of demand, it was specifically highlighted that:

> [The Raffles5000] would view with great concern, any dealings or proposed dealings with [[The Company's] assets or undertakings to the extent that such dealings would affect your ability to meet [the Raffles5000's] claims or prejudice their right to have their claims satisfied should judgment be obtained against you. …

30 The concerns expressed in the letter of demand obviously cut no ice with the defendants. Despite the imminent legal action, the defendants went about declaring and approving even more dividends to themselves.

31 On 1 October 2001, further dividends of $6.5 million were declared by the Company and paid to the defendants. On the same day, further dividends of $24.5 million were declared by the Company and paid to the defendants and the wife of the 1st defendant.

32 On 15 November 2001, 4,895 disgruntled members of the Club ("the Raffles5000 suit") filed a representative action in Suit No. 1441 of 2001/Q against the Company over alleged misrepresentations in the Company's promotional launch material and/or breach of contract. They alleged that the Company had failed to fulfil its promise of establishing a premier and exclusive club

and sought *inter alia,* the return of the $28,000 entrance fees.

33 Whilst the lawsuit was pending against the Company in the High Court, the defendants and the wife of the 1st defendant systematically withdrew even more dividends: $4.7 million on 23 April 2002, $2.4 million on 3 June 2002 and $7 million on 1 July 2002. This withdrawal of a total of $14.1 million caused the cash holding of the Company (primarily from the entrance fees collected by the Company) to be further depleted.

34 On 22 November 2002, the High Court dismissed the members' Raffles5000 suit with costs. The members appealed. Whilst the appeal before the Court of Appeal was still pending, the defendants persisted with their policy of declaring dividends and had declared additional dividends totaling $1.5 million between 28 December 2002 and 8 March 2003.

35 On 11 August 2003, the Court of Appeal reversed the decision of the High Court holding that the Company was in breach of its implied contractual obligation to provide a premier club by failing to control the total number of people admitted as members, which had resulted in overcrowding in the Club. The Court of Appeal ordered damages to be assessed. Even *after* the Court of Appeal had decided that the Company was liable to the members and ordered damages to be assessed, the defendants continued to declare more dividends. By 29 March 2004, well before the assessment of damages by the High Court could even be completed, further dividends totalling another $3.5 million had been paid out to the defendants and the wife of the 1st defendant between 21 November 2003 and 29 March 2004.

36 The High Court finally completed the assessment of damages on 23 February 2005 and awarded damages of $1,000 to each member of the Raffles5000 suit. However by this time, a total of some $125.1 million dividends had been declared and paid out by the Company (based on the approximate figures set out in the summary table below). All this happened ***after*** the defendants had become involved with the Company. For more accurate figures, see **Annex A** which shows the dividends declared yearly from 2001 to 2004, adding up to a total of $124,213,169. Plaintiff's counsel very helpfully prepared **Annex A** to assist the court and the contents therein have not been disputed by the defendants. The small discrepancy of 0.7% between the two figures (*i.e.* $125,100,000 and $124,213,169) does not in any way affect the analysis or the result of this judgment and as such, I will not attempt to reconcile these two figures.

37 On 23 August 2005, the Court of Appeal in *Raffles Town Club Pte Ltd v Tan Chin Seng and others* [2005] SGCA 40 allowed the appeal of the members and increased the compensation payable to $3,000 per member.

38 From the sequence of events set out above, it is obvious that the financial position of the Company quickly deteriorated from a starting healthy position of $206 million in current assets as at April 2001 ([15] above), which *but for* the subsequent massive dividend payouts (after the defendants had come into the picture) would have been more than ample to pay up in full all the damages assessed to its members in cash, to a relatively unhealthy current position of only $7.5 million in assets and cash reserves of about $1.8 million as at 31 December 2003. The position later in July 2005 was not much better with cash reserves of about $1 million, receivables of $7 million and payment into court of $5.8 million. The Company obviously did not have sufficient funds to meet the claim for damages from members, later ascertained by the Court of Appeal to be at $3,000 per member. If the defendants really intended to have the Company provide a contingency sum to meet the contingent claim of the 4,895 members and to pay the same compensation to the rest of the members to avoid more lawsuits, then the current asset position of $7.5 million plus $1.8 million in cash reserves would have, if fully utilised, catered for a compensation payment of a derisory figure of

only **$489** damages for each of the 19,000 members (based on the financials for 31 December 2003) or only **$726** damages for each of the 19,000 members (based on the financials for July 2005). Even if the number of Scheme creditors of 17,374 was to be used (see [64]), the compensation amounts that the Company could pay out of its current assets and cash holdings would still be the absurdly low figures of **$535** and **$794** respectively as at 31 December 2003 and July 2005 respectively.

39 From these numbers that I have computed in the above paragraph (underlined and in bold), it seems to me that the defendants were bent on draining out as much of the available current assets in the Company as they could, which originated principally from the members' entrance fees, **before** the finalisation of the assessment of damages by the court, despite knowing that the Court of Appeal had decided against them on liability as early as August 2003. These amounts were way below even the $1,000 assessed in the first instance by the High Court in February 2005.

40 This severe deterioration in the Company's financial position was further compounded by the dismantling of the Deferred Accounting Policy in order to be able to declare dividends out of the entrance fees, which resulted in upfront payment of the taxes on the entrance fees without any amortisation. Obviously, to entitle the defendants to pay out the huge dividends (upfront and not on a deferred basis) to themselves as soon as was practicable out of the entrance fees in view of the pending members' suit and the assessment of damages that was going to follow, there was not much choice but to scrap the Deferred Accounting Policy which prevented them from doing so. Since the defendants were so eager to have the dividends for themselves without delay, then the entrance fees would have to be recognised immediately as upfront income upon collection, and accordingly tax would immediately be payable on them. The deferred basis for treatment of the members' entrance fees could no longer apply. The defendants were well aware that they could not have their cake and eat it. The decision taken was to dismantle the whole Deferred Accounting Policy and accept instead the upfront tax incidence on the entrance fees so that the declaration of dividends from the entrance fees collected could be proceeded with.

41 Further, the defendants engaged in the following questionable transactions after taking over the Company. In 2003, the Company paid out $3 million in consultation fees. The following year in 2004, a second sum of $3 million was again paid out for the same purpose. Finally, a third sum of $1.7 million was paid out for feasibility studies conducted to explore expansion opportunities in China.. The defendants offered no evidence here as to who were the consultants, what exactly were their terms of reference, where were the supporting documents to show the consultants' contract of engagement and what were the deliverables of their consultancy. For consultancy services (costing a total of approximately $7.7 million) which were unsupported by any credible evidence of a genuine arm's length transaction being shown to me by the defendants, who adopted the position of "no case to answer", I was far from satisfied that the $7.7 million consultancy was indeed a genuine arm's length transaction entered into by the directors of the Company in good faith for the benefit of the Company.

42 A second more telling questionable expenditure was the $8.75 million that the defendants had spent using the Company's funds to purchase antique Qilin figurines to be placed at the entrance of the Club only to turn around later and sell them to the 2nd defendant at 35% of the cost. If this is not a shameful raiding of the Company's funds by the defendants whilst they clearly knew that the Company was exposed to substantial damages to be assessed, I do not know what is. If the Scheme members had known of this when they were requested to vote in favour of the Scheme, they would have been infuriated.

43 In totality, the systematic dividend payouts plus the associated tax incidence coupled with the questionable expenditures resulted in an almost total depletion of the Company's cash reserves

(amassed from the entrance fees collected). All this took place within a relatively short space of time. By the time the Court of Appeal quantified the damages at $3,000 per member on 23 August 2005, the Company was not able to pay the damages awarded to the members. The Company in that sense was intentionally rendered "judgment proof" by the defendants who had unabashedly and systematically bled the Company dry.

44 It is obvious to me from the defendants' conduct that they had declared as much dividends as they could to benefit themselves and entered into questionable transactions, which substantially reduced the cash position of the Company to a very low level with little regard (if any) as to whether or not the Company would be able to meet its judgment debt obligations to the Club's members after the completion of the assessment of damages. Effectively, the questionable expenditures together with the systematic payouts of huge dividends prior to the finalisation of the assessment of damages was to turn the Company almost into a shell company even before the assessment of damages could be completed before the court. I thus accept the submissions of counsel for the plaintiff that by consciously expediting the rate of outflow of cash from the Company, the defendants had put their own interests above that of the Company's, the Club's and the members', as they knew that substantial damages might soon become payable to the members. What the 2nd defendant had written in his letter dated 28 August 2003 to the Club members after the Company lost on the issue of liability in August 2003 before the Court of Appeal would have sounded extremely hollow, were their true conduct with respect to the funds in the Company made known and fully disclosed to the Club members. In that letter, the 2nd defendant had the duplicity to state:

> As you are aware, we have invested tens of millions into RTC to help resolve the dispute between the previous shareholders. We invested because we appreciate RTC as the premier Town Club in Singapore and we aim to make it even better. We are committed to RTC and we trust, with your complementary support we will succeed.
>
> Objectively, RTC has excellent hardware and the right membership base and profile
>
> …
>
> In its short history, RTC has undergone an unusual bout of bad publicity. This has affected our image and hindered our determined efforts to do well. We will redouble our efforts to raise RTC's image and the morale and discipline expected of RTC as a premier club. This is essential even as we take steps to further improve RTC as the Town Club that we should all be proud to be a member of.
>
> It is our common interest that RTC remain viable and vibrant. We have the will and means to succeed…. .

45 For convenience, I have set out below the dividends declared from 11 May 2001 to March 2004.

Dividends declared[note: 5]

Date	Amount of dividends declared	Recipient
11 May 2001	$65 million	Mr Ang and Mr Tan

12 May 2001	$5 million	Mr Ang and Mr Tan
12 May 2001	$5 million	The defendants
1 October 2001	$6.5 million	The defendants
1 October 2001	$24.5 million	The first defendant, his wife and the second defendant
23 April 2002	$4.7 million	The first defendant, his wife and the second defendant
3 June 2002	$2.4 million	The first defendant, his wife and the second defendant
1 July 2002	$7 million **NOTE: 22 November 2002, members suit dismissed by High Court.**	The first defendant, his wife and the second defendant
28 December 2002	$0.5 million	The first defendant, his wife and the second defendant
31 January 2003	$0.5 million	The first defendant, his wife and the second defendant
8 March 2003	$0.5 million **NOTE: 11 August 2003 - Court of Appeal reversed the decision of the High court and ordered damages to be assessed.**	The first defendant, his wife and the second defendant
21 November 2003	$2.5 million	The first defendant, his wife and the second defendant
29 March 2004	$1 million	The first defendant, his wife and the second defendant
23 February 2005	**Damages assessed to be $1,000 per member before the High Court**	

23 August 2005	**Court of Appeal awarded damages to be $3,000 per member**	

46 Accordingly, as of 29 March 2004, the defendants had declared a total of $55.1 million to themselves and $70 million to Mr Ang and Mr Tan even **before** the quantum of damages to the members could be assessed by the High Court. I accept the submission of plaintiff's counsel that from the 1st EFA, 2nd EFA and S & P agreement for the Company (see [14]), it would appear that all the funding for Mr Ang's and Mr Tan's settlement with the plaintiff and the other parties were being provided by the defendants. The reality however was that the defendants planned to and did use the Company's own monies to pay for the shares in the Company which they were buying from Mr Ang and Mr Tan! They essentially got their shares in the Company for 'free' and extracted millions more (at least $14 million more in dividends) over and above that, which directly caused or contributed to the Company's financial difficulties.

47 At this juncture, it may be pertinent also to note that when the Court of Appeal's decision on the assessment of damages was finally made ([37] above), it was **well after** almost all the remaining funds in the cash-rich Company as at April 2001 had been depleted by the defendants, which depletion was systematically effected between 11 May 2001 and 29 March 2004.

48 After depleting the Company's funds, the directors of the Company professed that it did not have sufficient funds to compensate the members of the Club. If the compensation (at $3,000 per member) were only payable to the 4,895 members in the suit, then the compensation required would be $14,685,000. If the compensation were to be extended to all the eligible members (*i.e*. ordinary members as at March 2001 who paid the $28,000 entrance fee) to avoid subsequent litigation from the rest who did not join in the representative action, then the Company needed to pay out approximately $48,000,000. (Note: Based on 17,374 members (see [64]) it would have been approximately $52,122,000.)

49 Given the financial circumstances the Company was in, the Company proposed the Scheme under s 210 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") to the members of the Club. Under the terms of the Scheme, Scheme creditors were defined to be those who were members at any time in March 2001 and who were required to pay the $28,000 entrance fee. Scheme creditors would recover the sum of $3,000 in kind, by way of food and beverage vouchers for use in the Club, cash instalments or reduction of transfer fees of membership of the Club or alternatively, a combination of these options.

50 Understandably, the Raffles5000 were very unhappy with this move by the Company. They must have been extremely surprised and bewildered as well, wondering what had happened to the Club's assets, since it was widely reported that the Club had collected over half a billion dollars in entrance fees (that is, about 19,000 x $28,000) and had an annual income stream of about $20.4 million in subscription fees.

51 On 31 August 2005, the Company obtained approval of the Court in OS No. 1164 of 2005/Q to convene a Scheme creditors' meeting for the purpose of approving the Scheme.

52 The Raffles5000 questioned the Company's motives behind the Scheme, and asked their lawyers to apply on 6 September 2005 for a suspension of any approval of the Scheme and the appointment of a special receiver and manager to look into the Club's accounts. The Chairman of the Raffles5000, Mr Alan Lee, filed an affidavit in support of this application. Mr Lee attested that the collection of

entrance fees, subscription fees together with the payment of dividends, and the reported state of the Club's 's financials (as set out in the pro-forma unaudited balance sheets as at 31 July 2005) suggested a dissipation of the Club 's assets.

53 Despite the demands from the Raffles5000 for greater transparency in the Club's financials, counsel for the plaintiff submitted that the 1st defendant did not answer the queries and instead wrote to the Club members on the following day (*i.e.* 7 September 2005) appealing for their support for the Scheme, claiming that all the breaches took place before the defendants bought into the Club, thus carrying on the theme that the blame **all** laid with the former group that was involved with the Club, and that the defendants were themselves, totally blameless. As this letter shows the frame of mind of the 1st defendant, I have set it out in full below:

> I am writing to you as the Chairman and shareholder of the proprietor of Raffles Town Club.
>
> You may have heard last week that the Court of Appeal ordered S$3,000 damages to be paid by the proprietor to 4895 ordinary club members who had sued. The damages were awarded on the basis of breaches of contract by the proprietor that occurred in March 2001 of failing to provide a premier and exclusive club to club members who had purchased memberships directly from the proprietor at S$28,000 each. This judgment, which represents a three-fold increase from the earlier award of the High Court of S$1,000 each, carries with it serious financial implications to the club.
>
> Although the breaches took place well before our becoming shareholders and directors, we intend to deal as we must with this inherited problem in a fair and reasonable way.
>
> Based on advice from the proprietor's legal and financial advisers, it has been decided that a scheme of arrangement and compromise provides the best solution. A scheme is a process that enables a binding arrangement to be reached between the proprietor and those having claims, if the arrangement is supported by a sufficient majority of claimants and the court approves of the scheme.
>
> Lets us share with you some insights behind the choice of a scheme as the solution.
>
> First, any solution should treat all persons having similar claims similarly. The proposed scheme would do exactly that as the "scheme creditors" to which the proposed scheme will apply to and bind are all of the persons who had bought their members directly from the proprietor at S$28,000 each and who were club members in March 2001 (which was when the breaches according to the Court of Appeal took place).
>
> Second, a scheme would provide a long term solution, and it would not be satisfactory if some of the persons having claims of the nature recognised by the Court of Appeal could continue to sue or bring action afresh. This is compounded by the fact that there are a huge number of potential claimants having similar claims, and the estimate is that about 17,600 persons will be able to pursue claims given the decisions of the courts. A scheme, if approved, will bind all scheme creditors and provide a long term solution.
>
> Third, there may be a need for the proprietor to sell the land and building on which the club sits if the proprietor were required to immediately meet the claims of all Scheme creditors. This may mean that in trying to seek recovery of a sum up to about S$3,000, one may stand to effectively lose the entire membership, as there would be no more building or club premises. In the worst case, the loss of the club may even affect the ability of the proprietor to meet fully the current

claims. The proposed scheme seeks to avoid this and provides Scheme creditors a solution for repayment of their claims over time while preserving the club and memberships in it.

These are some of the reasons why the scheme has been proposed. The scheme that has been proposed allows for scheme creditors to realize the value of their established claim in one of two ways. If you qualify as a scheme creditor, you can opt for vouchers (to the value of your established claim) to use the facilities of the club for the next 21 years of club's tenure. Alternatively, a scheme creditor can opt to sell his or her membership, and in these circumstances, the club will reduce its transfer fee by a sum equivalent to his or her established claim. In this regards, members wishing to transfer their membership can register with the club who will assist to match willing buyers.

On 31 August 2005, our lawyers, Allen & Gledhill obtained an Order of Court to convene a meeting of creditors by not later than 26 October 2005. To give the proposed scheme a chance for approval, the Court has also ordered that all legal proceedings by any scheme creditor in respect of their claims may not proceed without the permission of the Court.

In due course, notice of meeting, the terms of the scheme and detailed information relating to the scheme will be sent to scheme creditors. In this respect, the court has ordered the documents be sent to scheme creditors by 28 September 2005.

We very much hope that you will lend your support to the proposed scheme. If the scheme is accepted, then the club will be able to better meet its obligations and continue to be of service. We make the further appeal that we should all put the past behind us and look forward to the next 21 years of the club's tenure, availability of the club's many facilities and the receipt of the benefits under the scheme. With your support, we will weather the difficult situation together.

We assure you that the directors, shareholders and staff of the proprietor are committed to providing quality facilities and services. We want to thank the many who have sent in words of encouragement and praise and constructive feedback.

We wish you well.

Signed

Lim Jian Wei

Chairman

Raffles Town Club Pte Ltd.

54 It is appropriate at this juncture for me to comment that the submission of counsel for the plaintiff at [53] above is not borne out on a proper reading of the entire letter from the 1st defendant to the Scheme creditors. The breaches referred to in the letter were the breaches of contract that occurred in March 2001 for the misrepresentation and the failure to provide a premier and exclusive club and it is factually correct that these breaches took place well *before* the defendants became shareholders. Counsel for the plaintiff is therefore wrong to suggest that the 1st defendant had in this letter placed all blame for the financial plight of the Company, in particular, the depletion of the Company's funds, on the former shareholders and directors. Apart from stating a fact which was entirely justified, I find that the main thrust and the predominant motive of the author of the letter was to obtain support for the Scheme and not to injure the reputation of the plaintiff. I cannot infer

any evidence of express malice from the above letter.

55 On 9 September 2005, the update on the Rafflesmembers website included the following questions which were pressing in the minds of the Raffles5000:

> 6. We have asked our lawyers to proceed with our application to request for information on the true financial position of [the Club]. Right now, [the Club]. has not produced any verified or audited accounts which will show that it is unable to pay our debt or is insolvent.
>
> 7. In an unaudited accounts produced by [the Club]., [the Club] did not give:
>
> …
>
> (h) information as regards dividends paid totalling $124,213,169.46, to whom and when paid
>
> …
>
> 8. Our object is to get the necessary information which will give us a true picture of the present financial position [the Club]. is in and to inquire where the monies which [the Club]. has received from members in the form of the entrance fees and subscriptions had gone to. The investigation shows that monies are owing by others to [the Club]., those monies could be recovered to pay off the judgment due to us. If, as a result of our litigation against [the Club]., monies have been dissipated, that would be a fraud on creditors and those monies could be traced.

56 Another letter was posted on 12 September 2005 by the Raffles5000 setting out their queries as to the financials of the Club:

> 12. [the Club] has also failed to provide critical financial information or explained various anomalies such as:
>
> a. [the Club] should be in a position to meet its liability for damages since on its evidence, it still has a balance of about $13.6 million and since March 2000, [the Club] had collected at least further monthly subscriptions of $53 million from March 2000 to September 2002 and thereafter yearly subscriptions of $19 million;
>
> b. [the Club] had not disclosed how all monies collected were expended or the terms of purchase of [the Club] by the new shareholders whether they were with recourse against the former shareholders since the claims by the 4895 participating members were made known as at the date of the purchase;
>
> c. [the Club] disclosed that it made a profit of about $6 million a year but no information is given as to how they are dealt with;
>
> d. dividends of $124,213,169.46 were paid but no information is given as to when, to whom and the basis for such payment;
>
> e. the club building is valued at $55 million to $60 million on a forced sale basis and there is no mortgage or other encumbrance; can't [the Club] get financing using the club building to pay on the judgment sum? Can't [the Club] sell the club as a going concern with its membership base so that it can pay on the judgment sum?

57 The application to appoint a special receiver and manager for the Club on the basis that the

litigant-members did not have information on the true financial position of the Club except for an unaudited *pro forma* balance sheet was however, dismissed by the Court on 22 September 2005. Kan Ting Chiu J ("Kan J") in his judgment *Re Raffles Town Club Pte Ltd* [2005] SGHC 178 said:

> 4 The basis of the applications was that the litigant-members do not have information on the true financial position of the Club except for an unaudited *pro forma* balance sheet.
>
> 5 The litigant-members complained they had no information about, *inter alia*:
>
> (a) the balance of $13.6m left from the $515m collected in entrance fees;
>
> (b) the loans made by the Club to its previous directors and other parties;
>
> (c) the profits made by the Club over the years; and
>
> (d) the dividends of $124,213,169.46 paid by the Club.
>
> 6 Counsel for the litigant-members argued that in order for them to make an informed decision on any proposed scheme that the Club might put forward, they needed information on those matters. Counsel argued that the appointment of a special receiver and manager would benefit all the parties, and gave an assurance that the litigant-members would not take any steps to enforce or execute the judgment pending the completion of the investigation of the special receiver and manager.
>
> 7 Although the litigant-members claim that they need to have the information, it transpired that they had not asked for the information from the Club after the Court of Appeal delivered its decision on 23 August 2005.
>
> 8 Counsel for the Club stated that if there was a request, the Club would supply what information it could, and that in any event, when the scheme was proposed, the financial state of the Club would be dealt with in the explanatory statement to the scheme.
>
> 9 I found that the litigant-members have not made out a case for the appointment of the special receiver and manager and the other applications. I also found, in view of the timelines that I have given on 31 August 2005 with regard to the circulation of the scheme by 28 September 2005 and the convening of the meeting by 26 October 2005, the appointment of a special receiver and manager and the examination of the Club's officers and directors would:
>
> (a) interfere with the management of the Club at a time when the management should be focusing its attention on the formulation and presentation of the scheme; and
>
> (b) set back the timelines set on 31 August 2005.

58 I note that the Company's counsel had assured Kan J that information on the financial state of the Club would be dealt with in the ES to the Scheme.

59 Dissatisfied with the decision of Kan J, the Raffles5000 appealed without success to the Court of Appeal for the appointment of a special receiver and manager. Before the Court of Appeal, when faced with the Raffles5000's demands for greater transparency on the financial accounts of the Company, the Company's counsel reiterated that they would provide the relevant financial information in a detailed explanatory statement, which would be circulated to the Scheme creditors, prior to the

creditors' meeting.

60 Counsel for the plaintiff therefore rightly submitted that the significance of these queries raised by the Raffles5000 and the assurances given by the Company to the High Court and the Court of Appeal which were reported back then, is that many members were asking questions about where the Club's monies had gone to and why the Club was unable to pay $48 million in November 2005, and were being told to look for the answers in the ES. Plaintiff's counsel is also correct to point out that this is part of the context that this court must keep in mind in construing the alleged defamatory statements complained of.

61 At this juncture, it is appropriate to point out that with these assurances made by counsel to provide the relevant financial information, it meant that the ES would justifiably not be limited to explaining only the effects of the Scheme but would contain, as promised by counsel to the court, information on how the Company landed up in this financial plight. This background information (containing in part of the defamatory statements complained of) in my view is therefore not extraneous and outside the qualified privilege defence, but is covered by the defence of qualified privilege. I cannot see how the inclusion of background information as promised by counsel to the Court pursuant to the demands for financial information from the litigant members on how the Company ended up with the financial situation it found itself in, will aid the plaintiff in showing any malice on the part of the defendants.

62 On 30 November 2005, over 90% of the Scheme creditors voted in favour of the Scheme. The Scheme was approved by the court on 6 January 2006.

63 The Act provides for certain mandatory procedures as follows:

> **Information as to compromise with creditors and members**
>
> **211**. —(1) Where a meeting is summoned under section 210, there shall —
>
> (a) with every notice summoning the meeting which is sent to a creditor or member, ***be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons***; and
>
> (b) in every notice summoning the meeting which is given by advertisement, be included either such a statement or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.
>
> (2) Where the compromise or arrangement affects the rights of debenture holders, the statement shall give the like explanation with respect to the trustee for the debenture holders as, under subsection (1), a statement is required to give with respect to the directors.
>
> (3) Where a notice given by advertisement includes a notification that copies of such a statement can be obtained, every creditor or member entitled to attend the meeting shall on making application in the manner indicated by the notice be furnished by the company free of charge with a copy of the statement.
>
> (4) Each director and each trustee for debenture holders shall give notice to the company of

such matters relating to himself as may be necessary for the purposes of this section within 7 days of the receipt of a request in writing for information as to such matters.

(5) Where default is made in complying with any requirement of this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months.

(6) For the purpose of subsection (5), the liquidator of the company and any trustee for debenture holders shall be deemed to be an officer of the company.

(7) Notwithstanding subsection (5), a person shall not be liable under that subsection if he shows that the default was due to the refusal of any other person, being a director or trustee for debenture holders, to supply the necessary particulars as to his interests.

[emphasis added]

64 Around 7 November 2005, the Company published and dispatched to the **17,374 Scheme creditors** a copy of the 391-page ES. It is not disputed that the defendants, being the sole shareholders and directors of the Company, caused the ES to be published and circulated to all the Scheme creditors.

65 In the Scheme, "Scheme Creditors" were defined as individuals who were ordinary members of the Club at any time in March 2001 (the date the Court of Appeal had found was the date of breach of contract) and were required to pay the $28,000 entrance fee, *i.e.*, individuals who could have made a claim in the members' action.

The explanatory statement

66 The alleged defamatory words are contained in various parts of the ES. The ES gives a description of the present shareholders of the Company and also the persons who were running the Company prior to April 2001 as follows:

1.3 THE COMPANY

…

The present shareholders of the Company are Lin Jianwei (as holder of 800,000 shares in the Company) and Tung Yu-Lien Margaret (as holder of 200,000 shares in the Company), and they acquired their shareholding in April and June 2001, following the settlement of litigation among former shareholders of the Company.

…

Prior to April 2001, the Company was run by, inter alia, Mr Lawrence Ang Yee Lim, Mr William Tan Leong Ko, Mr Dennis Foo Jong Long, Mr Tan Buck Chye and Mr Lim Eng Hock, Peter.

67 It is not disputed that the plaintiff was included in the ES as one of the persons involved in running the company together with the former shareholders prior to April 2001. In fact, the defendants have pleaded that "*at all material times from about September 1996 until April 2001, the plaintiff was a beneficial shareholder in [the Company] and was its de facto managing director and/or director*". Hence the defendants clearly intended that reference to "director" and "shareholder" to refer to the plaintiff. The plaintiff was therefore named as one of the persons responsible for the

acts done which led to the financial difficulties of the Company as described in the following extracts, which the plaintiff alleges were defamatory of him.

68 The first of the extracts ("**Extract 1**") complained of is found at the beginning of the 391-page document, under a section entitled "*Background to Company's Current Financial Difficulties*" at p. 15 of the document[note: 6]. The full text of the section is reproduced below. I have highlighted (in italics and in bold) the alleged defamatory words:

> **1.4.4 Background to Company's Current Financial Difficulties**
>
> ***All the original promoters, directors and shareholders of the Company have left. At the time the new shareholders assumed control, a substantial portion of the monies collected in entrance fees had already been spent***. An explanation of some of the more sizable expenses follows.
>
> High start up costs
>
> The 30-year- leasehold site at the junction of Dunearn Road and Whitley Road on which the Club is erected was leased from the URA at a high price of $108,140,542.00, which reflected the robustness of the economy pre-Asian Financial Crisis. The sum of $108,140,542.00 includes stamp duty, property tax as well as interest levied for late completion. The costs of constructing the Club added another $107,574,209.00 to the bill. ***The unit cost of constructing the Club was $6,204.70 per square meter. Seah Choo Meng, a chartered quantity surveyor and Executive Chairman of Davis Langdon & Seah gave evidence of this number during the hearing before the Honourable Justice Belinda Ang in September 2004. He noted that this figure was the highest in his 37 years of experience.***
>
> Additionally, a sizeable portion of the entrance fees collected went towards pre-operating costs for the Club, which came up to $115,558,751.00. This included $79,535,510.00, the bulk of which were sales and marketing commissions paid to Europa Holdings Pte Ltd a company managed by former directors of the Company, Lawrence Ang Yee Lim, Dennis Foo Jong Long and William Tan Leong Ko. Sales and marketing commissions were paid to banks involved in the membership launches. Also included is the cost of processing the application forms received by members, which totalled $1,126,211.00. The Company believes that a bulk of the $1,126,211.00 was paid to Ms Chan Lay Hoon of JS Corporate Services and an Indonesian company, both engaged by Lim Eng Hock, Peter to assist in the processing of approximately 24,000 application forms. Ms Chan Lay Hoon was a director of the Company from July 1998 to April 2001.
>
> Other expenditure include directors' remuneration of $9,682,512.00 paid out between 1997 and March 2000, and staff and other payroll costs of $10,753,846.00. ***Moreover, approximately $70 million has been paid out to the Company's former registered shareholders, namely Lawrence Ang Yee Lim, William Tan Leong Ko and Dennis Foo Jong Long by way of, inter alia, loans that were subsequently off set against dividends from the Company.***
>
> Loss making Food & Beverage outlets
>
> The income from the monthly subscription is used to subsidise the loss making Food & Beverage operations of the club. Generally, the Food & Beverage outlets in the club have been under-utilised. The usage levels of all the Food & Beverage outlets in the past 2 years based on 1 seating per meal period on weekdays and 1.5 seating per meal period on weekends) are summarised below.

69 The second of the extracts ("**Extract 2**") complained of by the plaintiff as being defamatory begins at p. 21 of the ES:

Litigation involving the Company and ex-shareholders of the Company

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

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

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

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

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

70 The third and final set of extracts ("**Extract 3**") being complained of by the plaintiff is somewhere in an Appendix in the middle of the ES, at pg. 190:

Shareholders Equity

1.50 The components of Shareholders Equity is set out as follows:

a. Share capital

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

b. Retained Earnings

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

c. Dividends Paid

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

d. Profit for the Year

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

Conclusion

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

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

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

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

The plaintiff's case

71 The plaintiff averred that the typical reader of the ES would be a member of the Club with a direct financial interest in the outcome of the Scheme. He contended vigorously that the ordinary reader would be keen to get to the root of the problem and find out why exactly the Company had gone into financial difficulties, including the issue of whether, and to whom, dividends had been paid.

72 The plaintiff's case was that the defendants sought in the ES to place *all* the responsibility for the Company's financial woes at the door step of the former shareholders and directors entirely, and in the course of which, the above alleged defamatory paragraphs in the ES, both in their natural and ordinary meaning as well as by way of innuendo, were published. There were allegedly numerous gratuitous and defamatory statements in the ES (set out in bold italics above) deflecting the blame for the Company's dismal financial situation onto the former shareholders and directors, thus giving the impression that they were the ones, not the defendants, who had almost bankrupted the Company by siphoning out huge sums of money out of the Company.

73 In the statement of claim, the plaintiff averred that the natural and ordinary meaning of the portions complained of meant and were understood to mean in their proper context within the ES as a whole that:

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

(b) [Peter Lim] negligently approved, condoned or otherwise failed to prevent [the Company] from paying an excessive or unreasonable construction cost for the Club;

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

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

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

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

(collectively referred to as "Defamatory Imputations").

74 Further or in the alternative, the plaintiff pleaded that the passages that were complained of in the ES bore the above meanings by way of innuendo, for which the knowledge of extrinsic facts relied on by the plaintiff were the following:

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

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

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

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

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

75 The plaintiff argued that these imputations must be construed in the context of the Raffles Town Club saga. Further, the plaintiff alleged that the defendants sought to deliberately omit the following[note: 7]:

(a) On taking over the Company, the defendants had declared dividends of $70 million to Mr Ang and Mr Tan, as part of the purchase consideration for the shares (*i.e.*, they had used the Company's monies to pay for the shares in the Company which they were buying from Mr Ang and Mr Tan);

(b) The $124 million in dividends were paid out **after** the defendants had become directors and/or shareholders of the Company, and further that they themselves approved and distributed more than $54 million worth of these dividends to themselves from May 2001 to March 2004. But for these cash payments to themselves, the Company would have been in a position to pay the potential damages claim to the Scheme creditors and thus render the Scheme unnecessary;

(c) The plaintiff did not receive any dividends from the Company as the defendants knew or could readily have ascertained;

(d) The fact that when the plaintiff ceased his involvement with the Company in April 2001 and the defendants had assumed control of the Company, the Company had assets of approximately $206 million that consisted of considerable cash reserves of about $114 million, short term investments of $27 million and receivables of $65 million in directors' and /or shareholders loans;

(e) The defendants' actions in declaring dividends had required a change in accounting policy from amortising the entrance fees received to the profit and loss account over the length of the lease period to recognising the entrance fees due as revenue in full; and

(f) That although the ES had highlighted (at [1.5.2]) that the cash component under the Scheme was only possible due to the support of a loan by the defendants of about $24 million (after the Company was allegedly unable to get funding from the financial institutions), the loan was in fact extended to the Company in return for a mortgage of the land parcel on which the Club was situated (valued on a forced sale basis of $56 million) as well as an assignment of the Company's proceeds to the defendants as security for repayment of the loan. By such omission to state that the loan of $24 million by the defendants to increase the cash payment component was in fact collateralised on the Company's own assets, the defendants attempted to portray themselves favourably and in a good light, while omitting to mention that they had received in all some $60 million from the Company (which included the $54 million dividends paid to them between May 2001 and March 2004), which was more than double the amount of the secured loan they gave to the Company.

76 The plaintiff contended that an ordinary reasonable reader of the ES would assume that first, the issue of advance loans which were set off against dividends was authorised by the former directors and/or shareholders (including the plaintiff); and second, that only the former directors/shareholders had approved and benefited from all the dividends, but not the defendants. In other words, readers of the ES would assume that the defendants had not paid any or any substantial dividends to themselves unless the contrary was stated (which it was not) having regard to their portrayal of the Company as being in financial difficulty before they took over and the adverse references in the ES to dividends paid by their predecessors.

The defendants' case

77 On the other hand, the defendants submitted that:

(a) The alleged meanings were not borne out by the words in the ES. There was no suggestion that the Company's financial difficulties were attributed to the plaintiff's mismanagement. The

alleged defamatory meanings were the result of some strained or forced or utterly unreasonable interpretation and must therefore be rejected.

(b) The ES only referred to the figures for the Company's construction costs and dividends but did not mention any involvement by the plaintiff;

(c) The plaintiff was reading the passages in isolation and out of context. A reasonable reader would not read isolated passages of the document and the ES should be considered as a whole; and

(d) The ES was in line with its statutory purpose. Its focus was to explain the effects of the Scheme so that Scheme creditors could have information reasonably necessary to consider and make an informed decision on the proposed Scheme. This was evident from the opening sentence of the ES (Page 3/391 of ES):

> This Document is being distributed to potential Scheme Creditors… of Raffles Town Club Pte Ltd… **solely** for the purposes of the Scheme of Compromise and Arrangement. (emphasis added)

78 The defendants further pleaded the defences of justification, absolute privilege and qualified privilege and denied harbouring any malice against the plaintiff.

79 The defendants emphasised that it was not the plaintiff's pleaded case that any part of the contents of the ES was untrue; nor that any of the financial figures contained within the ES were inaccurate. The defendants asserted that all the statements in the ES of which the plaintiff complains are true in their natural and ordinary meaning and the plaintiff has no basis to allege that the statements are defamatory in the natural and ordinary sense of the words used.

Protection of the Right to Reputation

80 As Dario Milo in *Defamation and Freedom of Speech* (Oxford University Press, 2008) observes (at p 42), many fundamental rules of defamation law facilitate the protection of the reputation of private individuals. Reputation has a twofold aspect; a private and a public aspect where the court has to consider not just an individual's sense of self-worth, but also society's interest in ensuring that the rules of civility among individuals are respected.

Whether the statements in the ES are defamatory of the plaintiff in their natural and ordinary meaning

81 The first issue that the court has to decide is whether the statements in the ES are defamatory of the plaintiff in their *natural and ordinary meaning*. A defamatory statement is essentially one which injures the reputation of another by exposing him to hatred, contempt or ridicule, or which tends to lower him in the esteem of right-thinking members of society (*per* Parke J in *Parmiter v Coupland and Another* (1840) 6M & W 105 and *per* Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32, *Macquarie Corporate Telecommunications Pte Ltd v Phoenix Communications Pte Ltd & Anor* [2004] 1 SLR 463). This causes him to be shunned or avoided (*Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581). An action therefore lies for any "false, malicious, or personal imputation effected by such means and tending to alter the party's situation in society for the worse" (*Cargill v Carmichael & Anor* (1883) 1 Ky 603) and for any imputation that disparages a person in his employment, profession or office.

82 This prompts the next question: who are the right-thinking members of society; does this refer to the right-thinking members of society *in general* or right-thinking members belonging to the class to which the statement is published (*i.e.*, the Scheme creditors in the present case)? The answer to this is that the test of whether a statement is defamatory in its natural and ordinary meaning is based on the objective reasonable man test (as opposed to innuendo, where the question turns on whether there are any extrinsic facts which are known to the ordinary reader such that he would put a meaning on the words in the ES that goes beyond the natural and ordinary meaning of the words, and if so, what such meaning might be and whether the meaning is defamatory). In *Byrne v Deane* [1937] 1 K 818, automatic gambling machines were removed by the police from the club premises. Someone then stuck on the notice boards of the club a typewritten paper containing a verse which ended with the lines: '*But he who gave the game away may he burn in hell and rue the day*'. However, burn was spelt as 'byrnn'. The issue before the English Court of Appeal was whether the plaintiff's claim that this was defamatory of him by implying that he had been disloyal to the club should succeed. The court held that this was not defamatory because a "*good and worthy subject of the King*" would not regard such an allegation to be defamatory.

83 Whether the words in the ES are defamatory in their natural and ordinary meaning is a matter of construction to be interpreted objectively under the circumstances and in the context in which the ES is published. Three elements must be proved by the plaintiff. *First*, the statement must be defamatory; *second*, it must refer to the plaintiff; and *third,* it must be published and communicated to at least one person other than the plaintiff.

84 In *Microsoft Corp v SM Summit Holdings Ltd* [1999] 4 SLR 529 (cited subsequently in *Oei Hong Leong v Ban Song Long David* [2005] 1 SLR 277 ("*the Natsteel case*") at [85]), the Court of Appeal summarised succinctly the principles applicable in determining the natural and ordinary meaning of allegedly defamatory words:

> 53 ….The court decides what meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense: *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1984-1985] SLR 516, [1985] 1 MLJ 334 and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1993] 2 SLR 310. **The test is an objective one: it is the natural and ordinary meaning as understood by an ordinary, reasonable person, not unduly suspicious or avid for scandal. The meaning intended by the maker of the defamatory statement is irrelevant.** Similarly, the sense in which the words were actually understood by the party alleged to have been defamed is also irrelevant. Nor is extrinsic evidence admissible in construing the words. **The meaning must be gathered from the words themselves and in the context of the entire passage in which they are set out. The court** is not confined to the literal or strict meaning of the words, but **takes into account what the ordinary, reasonable person may reasonably infer from the words. The ordinary, reasonable person reads between the lines.** [Emphasis mine]

85 It is therefore for the court to decide what meaning the words would have conveyed to an ordinary reasonable person using his general knowledge and common sense: *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1984-1985] SLR 516. For instance, in *Capital Counties Bank v Henty* (1880) 5 CPD 514, Brett LJ in the English Court of Appeal emphasised that where a number of good interpretations can be put upon words, it is not reasonable to seize upon the only bad one to give the words a defamatory meaning.

86 In *Hartt v Newspaper Publishing* (1989) The Times, 9 November, the English Court of Appeal stated that:

> The hypothetical reasonable reader [or viewer] is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

87 The court is not restricted to looking at a literal or strict meaning of the words, but may take into consideration any inferential meaning that can reasonably be drawn by such a person of ordinary intelligence, using his common sense and with his general knowledge and experience of worldly affairs, and having regard to the context in which those words are spoken. In *Rubber Improvements Ltd v Daily Telegraph Ltd* [1964] AC 234 at 285, Lord Devlin emphasised that the test was the effect on an 'ordinary' man. This man neither lives in an ivory tower nor is the 'logical' man but is the man on the Clapham omnibus. As the authors of *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed) observe (at p 13), "*the ordinary reasonable person reads between the lines in light of his knowledge and experience of worldly affairs*".

88 Sinnathuray J explained that well-known facts given press coverage may well constitute part of the common or general knowledge of ordinary men and women which the court is required to take into account in deciding what the natural and ordinary meaning of the words are -- *Chiam See Tong v Ling How Doong* [1997] 1 SLR 648 at [46] to [48]:

> 46 In the well-known case of *Lewis v Daily Telegraph Ltd* [1964] AC 234, Lord Reid succinctly stated the test at p 259:
>
> > Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between those two extremes and see what is the most damaging meaning they would put on the words in question.
>
> 47 In deciding what the natural and ordinary meaning of the words are, the court is required to take into account an ordinary man's general knowledge of worldly affairs. As was stated by Lord Reid at p 258:
>
> > There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and is not inhibited by knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs …
> >
> > What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning.
>
> 48 In the present case, it was not disputed that the facts leading to the publication of the 6 November press statement were so well known amongst ordinary persons in Singapore as to constitute common knowledge. Chiam said as much in his pleadings, in the particulars in support of innuendo, though for the same reason, these facts cannot be 'special facts' which go to support an innuendo. Accordingly, the claim by Chiam of innuendo must fail.

89 Given that the Raffles Town Club saga has been in the media spotlight on numerous occasions, it is evident that the ordinary and reasonable person could well be familiar with the key players and events in the Raffles Town Club saga and that would form part of the context and the circumstances in which the general ambit and scope of the ordinary reasonable person's general knowledge and experience of worldly affairs would be examined. It is thus reasonable to expect that the ordinary reasonable person receives and does read newsworthy information disseminated through the printed media and other modes of mass communication, and perhaps in today's interconnected and internet world also, through the e-media. The more widely the dissemination of the newsworthy item is and the more repeatedly it is broadcast, the more likely will the ordinary reasonable person be attributed the common knowledge and awareness of that newsworthy item that then constitutes a part of his general knowledge, which is thus apart from those 'special facts' not commonly or generally known which support an innuendo. Consequently, the natural and ordinary meaning should be derived objectively from the words used as understood by that hypothetical ordinary and reasonable person having whatever common knowledge and awareness that he is objectively determined to have, absent any specific extrinsic facts passing beyond the general knowledge of that hypothetical person reading or hearing it. The evidence of the plaintiff as to what he himself understood the words complained of to mean (whether in their natural and ordinary sense, or by way of innuendo) is therefore wholly irrelevant.

90 On this, I would respectfully adopt what Tan Lee Meng J said in *Lim Eng Hock Peter v Lin Jian Wei and Another* [2008] 4 SLR 444 when he heard the defendants' application to strike out the plaintiff's claim in this suit:

> 43 Apart from the fact that a preliminary ruling in this case will not save time, the history of the profuse litigation regarding the company must be taken into account. **While the objective test is relevant for determining the natural and ordinary meaning of allegedly defamatory words, the court must consider the extent of the knowledge of an ordinary reasonable person to determine what he would, using his general knowledge and common sense, understand from the Explanatory Statement. Just as the ordinary reasonable person in *Oei Hong Leong v Ban Song Long David* [2005] 3 SLR 608, where the issue was whether or not the words "playing to the gallery" are defamatory, is expected to be familiar with the "Natsteel saga", the ordinary reasonable person in this case is expected to be familiar with the "Raffles Town Club saga" ("RTC saga").**
>
> 44 **To determine the extent of the ordinary reasonable person's familiarity with the "RTC saga", reference may**, in view of the fact that the addressees of the Explanatory Statement include members of Raffles5000, **have to be made to the copious media reports on the "RTC saga" and the communications between the Raffles5000 Committee and members of Raffles5000**. The same exercise will be required when the question of defamation by way of innuendo is considered at the trial. On balance, in the circumstances of this case, all the arguments as to what an ordinary reasonable person might be presumed to know for the purpose of determining the natural and ordinary meaning of words and whether or not there are innuendos should be considered by the same judge at the trial, which is just around the corner as it is presently scheduled for August 2008. (Emphasis added.)

91 The manner and the surrounding circumstances are crucial considerations that the court has to bear in mind: *Markesinis and Deakin's Tort Law* (Clarendon Press, Oxford, 6th Ed) ("Markesinis and Deakin") (at pp 759-760). While the words may be innocuous in themselves, the general picture they paint of a claimant can be detrimental to his reputation.

92 The Court of Appeal in *Jeyasegaram David (alias David Gerald Jeyasegaram) v Ban Song Long David* [2005] 2 SLR 712 ("*David Gerald*") aptly summarised at [27] that in determining the meaning of the words alleged to be defamatory, a holistic approach had to be adopted, as it was the broad impression conveyed by the alleged libel that fell to be considered, and not the meaning of each word or sentence under analysis. I accept the defendant's submission that if there is any portion of the publication that may, of itself, be considered defamatory, the court must go on to consider whether there is anything elsewhere in the same publication that would put the article in such a perspective that a reasonable reader would not reach the conclusion that it is defamatory. In other words, "the bane" and "the antidote" must be taken together. However in my view, whether the antidote is going to be effective in turn depends whether objectively it is of sufficient strength to act as an antidote. If the bane is given very strong emphasis whereas the antidote is hidden elsewhere or is played down to such an extent that its effect as an antidote is not particularly effective in the circumstances when viewed holistically, then the court can still construe the bane as not having been sufficiently neutralised by the antidote in the sense that the ordinary reasonable reader would nevertheless still have reached the same conclusion that the words are defamatory of the plaintiff by having lowered his esteem or injured his reputation. As was stated in *Charleston and Anor v News Group Newspapers Ltd and Anor* [1995] 2 AC 65 at 70F-H:

> The *locus classicus* is a passage from the judgment of Alderson B. in *Chalmers v Payne* (1835) 2 C.M. & R. 156, 159, who said:
>
> 'But the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together.'
>
> This passage has been so often quoted that it has become almost conventional jargon among libel lawyers to speak of the bane and the antidote. **It is often a debatable question which the jury must resolve whether the antidote is effective to neutralise the bane and in determining this question the jury may certainly consider the mode of publication and the relative prominence given to different parts of it**. (emphasis added)

Meaning of the offending statements

93 The plaintiff has complained of several passages in the ES as being defamatory. However, as has been held in *Soh Chun Seng v CTOS-EMR Sdn Bhd* [2003] 4 MLJ 180, the publication must be considered *as a whole*, including the *circumstances* in which the words are used, the *prominence* given to any headings and the *nature* of the publication.

94 In *Wu CA v Wang Look Fung & Ors* [1981] 1 MLJ 178, the defendant newspaper printed a front page story with a large headline entitled 'Big probe on lawyers'. Immediately beneath it was a photo of the plaintiff with a caption 'Mr Wu'. The article involved a client who had lodged a complaint with the Law Society after being dissatisfied with his lawyer. The article further indicated that the Chief Justice had ordered the Law Society to conduct an investigation into the conduct of the lawyer. The article then stated that the client had also filed a similar action against Mr Wu. Although there was a pending action against Mr Wu, there was no inquiry into Mr Wu's professional conduct by the Chief Justice. The court held that taking the article as a whole, what was crucial was that the plaintiff's photograph had been juxtaposed *immediately* under the headline, which created the impression that the plaintiff was the principal subject of the probe.

95 Upon reading **Extract 1**, the word 'Background' means the circumstances leading up to the event that explains its cause or information that helps to explain why something has happened. To title a particular section "Background to [the] Company's Current Financial Difficulties" is therefore essentially to suggest that any information that follows will explain why the Company is *now* in financial difficulties. As an explanation of this, the ES offers the nugget of information that "at the time the **new shareholders** assumed control, *a substantial portion of the monies collected in entrance fees had already been spent*". By putting this statement under the heading "Background to [the] Company's Current Financial Difficulties", the juxtaposition of the heading with the offending paragraph immediately underneath would convey to the ordinary reader of the ES that the monies from the entrance fees were substantially gone even ***before*** the defendants came on board, and having not much of the monies from the entrance fees left behind, the Company is ***now*** or is ***currently*** experiencing financial difficulties. The blame therefore is entirely with "*all the original promoters, directors and shareholders of the Company [who] have [since] left*." Basically, the current financial difficulties have nothing to do with the defendants who later became "the new shareholders" of the Company. The ES thus kicks off with its attention- grabbing introduction to the "Background to [the] Company's Current Financial Difficulties" at **Extract 1** (p 15 of the 391 page document) by conveying the defamatory meaning that *even before* the defendants came on board, the funds of the Company had already been substantially dissipated by the former promoters, shareholders and/or directors who had since left, and the new shareholders have nothing to do with the present financial plight of the Company.

96 Further, while the ES should be read as a whole, Callinan J stated in *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50 (at [26]) that:

> If "[i]n one part of [the] publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together". But this does not mean that the reasonable reader does or must give equal weight to every part of the publication. ***The emphasis that the publisher supplies by inserting conspicuous headlines, headings and captions is a legitimate matter that readers do and are entitled to take into account. Contrary statements in an article do not automatically negate the effect of other defamatory statements in the article.***

97 He further noted (at [187]) that:

> It is true that an article has to be read as a whole. But that does not mean that matters that have been emphasised should be treated as if they have only the same impact or significance as matters are treated differently**. *A headline, for example, expressed pithily and necessarily incompletely, but designed to catch the eye and give the reader a predisposition about what follows may well assume more importance than the latter***… The ***order*** in which matters are dealt with can be significant…The ***language*** employed is also of relevance… ***The intrusion of irrelevant information may raise questions as to the meaning intended to be, and actually conveyed***… True it may be that readers may take an article or articles on impression, but the fact that they may do so is likely to have the consequence that ideas and meanings conveyed by graphic language will create the strongest impressions.
>
> [emphasis added]

98 In *English and Scottish Co-operative Properties Mortgage and Investment Society Limited v Oldhams Press Limited* [1940] 1 KB 440, the Court of Appeal stated that (at p 460):

> Any ordinary man, reading these passages from the newspaper, would, I think, inevitably consider

that a charge involving moral obliquity on the part of the directors was being made against the society. **If a further explanation had been given, if entirely different language had been used, the position would have been altered**. It would have been quite possible for the newspaper merely to announce the fact that a charge under the particular section had been preferred. **But having regard to the way in which this article was set out, and especially to the headlines, and the language used, the inevitable result, I think, would be to lead anybody who read it to think that a charge of dishonesty was being preferred**. [Emphasis added]

99 It is evident from the preceding discussion that by juxtaposing the headlines '***Background to*** **[**the] Company's ***Current*** **Financial Difficulties** [emphasis mine]' and 'High start up costs', the impression conjured in the ordinary and reasonable reader's mind is that first, it was the original promoters, directors and shareholders of the Company who had authorised the Company to incur these high and extravagant start up costs. The ES then proceeds to set out in some detail to explain why "*a substantial portion of the monies collected in entrance fees had already been spent*" by the time the defendants came on board and the reasons included the following:

(1) A high price was paid for the land leased from URA at $108 million;

(2) The cost of constructing the Club was $6,200 per square meter, the highest paid according to Seah Choo Meng, a chartered quantity surveyor, in his 37 years of experience. The total construction cost amounted to $107.6 million;

(3) A "*sizeable portion of the entrance fees went towards pre-operating costs for the Club*", the bulk of which were the sales and marketing commissions amounting to some $79.5 million paid to Europa Holdings, which was managed by the former directors of the Company, Mr Ang, Mr Foo and Mr Tan;

(4) The previous management had further drained the Company of its funds by, *inter alia*, giving large loans of approximately $70 million to the Companies' former registered shareholders, namely Mr Ang, Mr Tan and Mr Foo. These loans were later off set against dividends declared. Notably no mention was made of the over $54 million in dividends that the defendants declared to themselves out of the Company's funds;

(5) Directors' remuneration of some $9.7 million was paid out between 1997 and March 2000. Notably again nothing was stated about the directors' remuneration paid to the defendants themselves from the time they took over the Company up to the date of the ES.

100 I accept the submissions of plaintiff's counsel that the reference to "*a substantial portion of the monies*", without clarifying the amount that is alleged, is deliberately suggestive that no other expenditure or disbursement is relevant, beyond what is set out in already a fair amount of detail in the section that follows. When something is set out with a fair amount of detail (in particular, down to small items of expenditure of $1.126 million and $9.6 million and without using such words like "*inter alia*"), one would reasonably expect that *all* the important details would have been included and nothing significant would be omitted. What is very clear here is that this entire section, which appears on its face to set out comprehensively all the relevant and important events that led to the Company's current financial difficulties, makes no reference to the very significant dividends of over $54 million paid to the defendants themselves and the 1st defendant's spouse, nor the other large questionable expenditures spent after the defendants had taken over the Company, for instance, the consultancy fees of $7.7 million and the purchase of the Qilin antiques for $8.75 million. These omissions in my view were deliberate and calculated to mask their own role and to cast substantially

all the blame for the Company's current financial difficulties and mismanagement entirely on the former shareholders and directors, which included the plaintiff.

101 Having regard to the principles set out in the authorities that I have cited and taking the holistic approach as stated by the Court of Appeal in *David Gerald* where it was the broad impression conveyed by the alleged libel that fell to be considered, and not the meaning of each word or sentence under analysis, it is my opinion that the ordinary, reasonable and fair-minded reader would regard the statements in **Extract 1** as bearing the defamatory meanings as pleaded by the plaintiff at [73] (a), (b) and (c). If the "omitted" facts had been set out in full side by side in Extract 1 giving the history all the way up to the date of the publication of the ES to explain in full the reasons why the financial situation of the Company ended up the way it was, then the entire impression and perspective of the ordinary reasonable reader would have been very different. Had all the facts been fully disclosed in the ES, the ordinary reasonable reader is not likely in my view to be misled to attribute almost all of the culpability for the dire financial situation of the Company and the mismanagement to the plaintiff and the former directors and shareholders, but will probably take the view that it was instead the defendants who had systematically stripped the valuable assets of the Company to the bone and the defendants were truly the ones primarily responsible for the Company's financial difficulties and the need for the Scheme. The aim of the defendants was clearly to mislead the Scheme creditors into accepting the Scheme by attributing blame entirely to the plaintiff and the former shareholders and directors, and to distance themselves completely from any blame by cleverly keeping secret their own culpable acts from being disclosed in the ES. If what the defendants submit is correct, that the "*ES only set out matter-of-factly historical expenditure on major items prior to the Scheme*" and "*[h]ence, no issue even arises as to what facts ought not to have been "omitted" from the ES*", then this is patently wrong because a **very major and recent contributory expenditure** of over $54 million dividends paid out to the defendants themselves surely must be matter-of-factly part of the historical expenditure and should never have been left out of **Extract 1** so as not to mislead anyone reading the ES. Not only should the payment amount be stated but who it had been paid to should also have been stated as well since the historical expenditure on the other items mentioned in the ES had attributed those disclosed expenditures to the plaintiff and the former shareholders and directors. Burying the information that "..***the Company, since its inception, paid dividends to shareholders of $124,213,168***" some 150 pages away in another **Extract 3**, which is an Appendix H to the ES attaching the "Independent Financial Advisor's Report" does not in my view provide an effective antidote to the defamatory meanings in **Extract 1**. I further note that the words "***since its inception***" carries on the deceptive impression that the former shareholders and directors and the plaintiff had also taken the entire $124 million. As an antidote, it is also rather ineffective if it was intended to correct the wrong impression given in **Extract 1**. The defendants' argument that there is no omission because the reader can mathematically deduce from the facts set out in **Extract 1** that $70 million dividends had been paid to the Company's former registered shareholders, and therefore one can take the figure buried 150 pages away of $124 million, and subtract $70 million from it to get $54 million, which then constitutes the amount of dividends that ought to have been taken by the present shareholders *i.e.* the defendants. I think it is very ambitious to expect the ordinary reasonable reader to perform this rather bothersome task and mental linkage between the widely separated **Extract 1** and **Extract 3.** Although I accept the principle of reading the document as a whole, I also have to consider the practical reality of the reasonable reader to normally associate matters closely linked together within the same section in a long document and he would not likely expect to find matters concerning the same issues or matters to be dispersed all over the long document. It is too much to expect an ordinary reasonable reader to put a story together on a particular issue from jigsaw pieces randomly spread out throughout a voluminous document. Applying the standard of the ordinary reasonable reader, that reader, I believe is not likely to perform this convoluted deductive process based on figures set out in two very disparate parts of the ES. In my judgment, the ordinary reasonable reader will still be left with the impressions as he would have

obtained upon reading **Extract 1** in the ES alone. Furthermore, I believe that the ordinary reasonable reader would not likely have bothered to read beyond the main text which ends at pg 65/391 of the ES, let alone **Extract 3** at pg 190/391. See also [117] below for an in-depth legal analysis on the effectiveness of mentioning the $124 million dividend payout in **Extract 3** as an antidote to the defamatory meanings in **Extract 1**.

102 Turning to look at **Extract 2**, which is still within the main text at pg 21/391, this concerns a short write-up on the history of litigation that has dogged the Raffles Town Club saga. Words or meanings will not be found to be defamatory if a court determines they would not be so construed by the ordinary reasonable person, even though some actual readers may have taken the words in a defamatory sense. The sense or meaning in which the words were actually understood by the plaintiff is irrelevant (*Jeyaretnam JB v Lee Kuan Yew* [1992] 2 SLR 310, *De Souza Tay Goh v Singapore Press Holdings Ltd* [2001] 3 SLR 380, *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32, *Icadam Technologies Sdn Bhd & Ors v CAD-IT Consultants (Asia) Pte Ltd & Ors* [2005] SGHC 130). Given that the details are more factual in nature, it is my opinion that the ordinary reasonable reader will not likely view **Extract 2** as defamatory of the plaintiff. The plaintiff has failed to prove that **Extract 2** is capable of bearing the defamatory meanings as pleaded at [73] (e) and (f).

103 On the assumption that the ordinary reasonable reader has the patience (which in my view is not likely) to read all the various Appendices totalling 11 in all in the ES from Appendix A to Appendix K, and in particular, Appendix H at pg 190/391 where **Extract 3** can be found, then he would have read that a total of $124 million had been paid out in dividends. However, **Extract 3** does not mention *to whom* these were paid. A later portion of **Extract 3** sets out the financial position of the Company as at 31 July 2005, stating that the Company's current cash balance is insufficient to pay the potential damages estimated at approximately $48 million before set-offs. On its natural and ordinary meaning, the words simply describe the dire financial straits of the Company currently, but make no mention of who is responsible for it. The ordinary and reasonable reader therefore, is left to draw their own inferences. The *context* in which the ES was circulated is however, relevant to the ordinary reader's impression of the events. By stating that "*the Company's current cash balance is not sufficient to pay the potential damages claim of all Scheme Creditors*" after mentioning that a total of $124 million in dividends has been paid out, it is my view, after taking the holistic approach again, that the ordinary reasonable person having the patience to read until **Extract 3** will likely draw a linkage with **Extract 1** which he would have read as it is in the main text; and that this ordinary reasonable reader would likely conclude that the cause of the current financial difficulties is attributable (at least in part, if not significantly) to the payment of these huge amounts of dividends of some $124 million to the Company's previous shareholders out of the membership entrance fees collected. I therefore regard **Extract 3** as defamatory of the plaintiff with the meanings as at [73] (a) and (d), premised on the assumption that the reader would have continued reading the Appendices and **Extract 3** after finishing reading the main text of the ES.

104 Since I have found that the plaintiff has proved that the statements complained of in **Extracts 1 and 3** of the ES are defamatory of him in their ordinary and natural meanings, there is no need for me to consider whether or not these statements are also defamatory by way of innuendo. However, in the event that I am wrong on my finding on this point, I will for completeness consider also the latter question.

Whether the statements are also defamatory by way of innuendo

105 Looking past the ordinary and natural meaning of the extracts, the next issue to be decided is whether there is some *other* meaning in the statements which is not defamatory to the ordinary man, but which is defamatory to people with knowledge of the special meaning of the words or of extrinsic

facts. As Markesinis and Deakin had noted (at 761), this depends on factors known to the recipient of the statement "at the time of publication" and is something which the "claimant must plead and prove". For instance, in *Tolley v J.S. Fry & Sons Ltd* [1931] AC 333, the plaintiff was pictured on a poster with a slab of the defendants' chocolate protruding from his pocket. He was an amateur golfer and the accompanying caddy compared the excellence of the chocolate with the excellent of the plaintiff's stroke. The plaintiff alleged an innuendo by the defendants that he had agreed to the advertisement for gain and thus prostituted his reputation as an amateur golfer. The court agreed that it was defamatory. In *Jones v Skelton* [1963] 1 WLR 1362, Lord Morris observed (at 1370-1371) that:

> The ordinary and natural meaning may… include any implication or inference which a reasonable reader guided not by any special but only by general knowledge, and not fettered by any strict legal rules of construction would draw from the words.

106 As the authors of *Winfield and Jolowicz Tort* (Sweet & Maxwell, 17th Ed) had noted (at 530-531), each innuendo is a separate cause of action and the claimant must identify the persons with knowledge of the special facts to whom he alleges the words were published and prove their knowledge and publication to them. To establish this claim, the plaintiff bears the burden of proving *first***,** that there are facts extrinsic to the words, where such facts give rise to a defamatory imputation; *second*, that those facts were known to one or more of the persons to whom the words were published; and *third,* that knowledge of those extrinsic facts could cause the words to convey the defamatory imputation on which the plaintiff relies, to a reasonable person possessing knowledge of those extrinsic facts.

107 In *R Murugason v The Straits Times Press* (1975) Ltd [1984] 2 MLJ 10, the plaintiff was an unsuccessful Workers' Party candidate in the 1980 general election in Singapore. Following the election, he acted as the lawyer in a contested election proceeding involving the constituency in which Mr JB Jeyaretnam had been an unsuccessful candidate. A woman had filed the contested election petition. The defendants published an article concerning the petition. In the article, the defendants purportedly asked the woman's relatives whether she had acted on her own accord to file the claim. The reply was that reporters should consider whether she acted of her own accord and that they should direct their questions to Mr Jeyaretnam and Mr Murugason, for "after all, she is only a washerwoman and they are lawyers". The plaintiff alleged that this was defamatory of him by way of innuendo. The extrinsic fact required was that an advocate and solicitor is required to have a brief from a client before he can institute proceedings. Therefore, a reasonable person knowing this fact would draw the defamatory imputation that the plaintiff had acted improperly, unethically, and in a manner unbecoming of an advocate and solicitor.

108 In this respect, I noted that the press articles had referred to Peter Lim as a "shadow director" and "shareholder" of the Club and the High Court judgment [2002] SGHC 278 dated 22 November 2002 by Rajendran J in Suit No. 1441 of 2001, which was publicly reported, had stated that the plaintiff was "one of the original shareholders" of the Club. It is not disputed that the ES was published to the Club members eligible for the Scheme. These Club members would be especially interested in press coverage of the Raffles Town Club saga and hence, would likely follow closely how the saga was going to unfold.

109 Members of the Club with knowledge of these extrinsic facts obtained from press reports would clearly identify Peter Lim as one of the former directors and shareholders of the Company, even though it was not explicitly mentioned in the ES what exactly was the role that he had played in the Company. Linking these extrinsic facts to what was stated in the ES meant that the Club members would have reasonably imputed to Peter Lim that he was in fact one of the directing minds of the

Company before the defendants took over and accordingly, the smear of corporate irresponsibility for causing the Company to be in such a poor financial state to the detriment of the members of the Club had rubbed on to Peter Lim in no uncertain terms with him being a shadow/*de facto* director and shareholder of the Company at that relevant time.

110 After the Scheme was allowed to proceed, the Raffles5000 members made an application in OS 1164/2006/Q for a suspension of any approval of the Scheme and wanted to appoint a receiver and a manager to look into the Company's accounts[note: 8]. In *Re Raffles Town Club Pte Ltd* [2005] SGHC 178[note: 9], the basis of that application was that "the litigant-members do not have information on the true financial position of the Club except for an unaudited *pro forma* balance sheet" (at [4]). In fact, as I have mentioned earlier Kan J had noted (at [5] and [8]):

> [5] The litigant-members complained they had no information about, *inter alia:*
>
> (a) the balance of $13.6m left from the $515m collected in entrance fees;
>
> (b) the loans made by the Club to its pervious directors and other parties;
>
> (c) the profits made by the Club over the years; and
>
> (d) the dividends of $124,213,169.46 paid by the Club.
>
> [8] Counsel for the Club stated that if there was a request, the Club would supply what information it could, and that in any event, when the scheme was proposed, **the financial state of the Club would be dealt with in the explanatory statement to the scheme.**
>
> [emphasis added]

111 The application was disallowed but what could be drawn from the application was that the members of the Club were anxious and wanted to know where and to whom the monies (profits, loans, cash reserves and dividends) had gone to. The "special facts" or information contained in that OS application would have confounded the members: how did the $515 million collected as entrance fees end up as a meagre balance of only $13.6 million as stated in the unaudited *pro forma* balance sheet? Counsel for the Company reassured the court at that point that this information would be contained within the confines of the ES. Taken to its logical conclusion, an ordinary reasonable Club member upon receiving the ES would be keen to read it to find the answers that they were looking for. It would not take a stretch of the imagination for such a Club member, after having read the ES and with knowledge of the special facts, to conclude that the former shareholders and/or directors of the Company, including the plaintiff, were responsible for mismanaging the Company's finances and had caused the current financial predicament by allowing almost all of the total collection from the members' entrance fee payments *i.e.* $501.4 million to be spent wastefully or siphoned out of the Company without due regard for any provision for capital reserves for major maintenance works of the Club in the future and other contingencies. The defamatory imputation is that Peter Lim had not undertaken his director's duties diligently and in good faith. In fact, he had failed miserably as a shadow/*de facto* director of the Company.

112 The defendant submitted that a reasonable reader would not have considered the sentences and passages complained of in isolation from other parts of the ES. In my view, the sting in the passages is *precisely* the deliberate omission of the role played by the defendants, effectively whitewashing their own culpability for the financial plight of the Company, while casting the former counterparts of the Company, which included the plaintiff, in a very poor light. In *Lee Kuan Yew v Jeyaretnam*

[1979] 1 MLJ 281, during an election rally, the defendant spoke about the performance of the then Prime Minister thus:

> I'm not very good in the management of my own personal fortunes but Mr Lee Kuan Yew has managed his personal fortunes very well. He is the Prime Minister of Singapore. His wife is the senior partner of Lee & Lee and his brother is the Director of several companies, including Tat Lee Bank in Market Street; the bank which was given a permit with alacrity, banking permit licence when other banks were having difficulty getting their licence. So Mr Lee Kuan Yew is very adept in managing his own personal fortunes but I am not… if I become Prime Minister there will be no firm of JB Jeyaretnam & Company in Singapore because I wouldn't know how to mange my own personal fortunes.

113 The court held that it considered the *context* in which the statements were made (at an election rally) and the way an ordinary man hearing the statement would take them. The words were found to be defamatory *by innuendo* by suggesting that the then Prime Minister had procured preferential treatment for his relatives, even though on a literal reading of the speech, it does not go so far to say that.

114 What becomes clear from reading **Extract 1** is that the ordinary reasonable reader, particularly those anxious Scheme creditors familiar with the Raffles Town Club saga who were eager to know specific bits of information about the sums of monies, would be led to believe that the current financial plight of the Company was entirely attributable to the plaintiff as the shadow/*de facto* director and beneficial shareholder, and the other former shareholders and/or directors. The defendants did not appear to think it was relevant to mention clearly upfront in the ES especially in the main text under "*Background to [the] Company's Current Financial Difficulties*" any part of *their* role in the events leading up to the Company's financial plight, which I have highlighted in [18] to [46] and in particular those dividends amounting to over $54 million which the defendants had declared to themselves after they took over control of the Company. Also, no mention was made of the questionable transactions involving the $7.7 million consultancy fees paid by the Company and the purchase of the Qilin antiques for $8.75 million and its subsequent sale at a massive price discount to the Company's own director, *i.e.* the 2nd defendant. Neither was it mentioned that there was a change of the Deferred Accounting Policy undertaken by the defendants on taking over the Company which also had a significant tax implication on the financials of the Company ([18] above). One would have thought that had the intention been to give a full, honest, uninhibited, detailed and balanced background of the events leading up to the Company's current financial position, these would have been important and significant background facts to be included in the main text of the ES under the "*Background to [the] Company's Current Financial Difficulties*". It is therefore, my opinion that the extracts complained of are clearly defamatory by innuendo with the meanings set out in [73] (a) to (c).

115 If it is further assumed that the ordinary reasonable reader would also have read **Extract 3**, then **Extract 3** would have been defamatory by innuendo with the meanings set out in [73] (a) and (d).

116 Given the nature of the extrinsic facts relied upon and how information of the extrinsic facts were generally made known to the members of the Club, there is in my view no necessity for the plaintiff to call a few specific members of the Club to testify in order to demonstrate that there were indeed one or more persons who in fact had knowledge of the extrinsic facts relied on. I have sufficient evidence from which to reasonably infer that there would be some members who had such knowledge of those extrinsic facts. Accordingly, I do not think that the defendants will succeed in negating the defamatory imputations by way of innuendo merely on the basis (a) that the plaintiff had not identified and called as witnesses the persons with knowledge of the special facts to whom he

alleges the words were published and to prove their knowledge and publication to them; or (b) that those special facts had not been shown to be known to one or more of the persons to whom the words were published.

Mention made in ES of $124 million in dividends paid

117 In *De Souza Tay & Goh v Singapore Press Holdings Ltd* [2001] 3 SLR 380 (at 392), it was held that it is necessary to examine the allegedly defamatory article *as a whole* and the context in which the words were used. Where there is anything that is defamatory, it is necessary to consider if there is anything elsewhere that would put the article in "*such perspective that a reasonable reader would not reach the conclusion that it is defamatory of them*".

118 Accordingly, I have considered carefully whether the mention in the **Extract 3** that the Company had in fact paid up to $124 million in dividends since its "inception" would put the ES in such a perspective that it would have negated the defamatory meanings in the offending passages. I do not believe that it could have for the following reasons.

119 First, **Extract 3** is not even in the main text at pages 6 to 65 of the ES where **Extract 1** is, but is instead buried somewhere in the middle of the very voluminous 391 page document. Since **Extract 1** deals with the "Background to [the] Company's Current Financial Difficulties" which comes very early on in the main text at page 15, an ordinary reasonable reader would not expect to thumb through a considerable number of pages to find another very important piece of information (*i.e.* the $124 million dividend), which is indeed very relevant to the Company's current financial troubles, in another obscure part of the ES at page 190. In fact **Extract 3** is in the Independent Financial Advisor's Report which is attached as an **Appendix H** of the ES. It is one out of the 11 Appendices from A to K in the ES. If it is to have the effect of negating the defamatory meanings in the passages in **Extract 1**, which have been given prominent coverage in the main text, then at the very least, mention of the $124 million dividend should have been in the main text to give the reader a chance to immediately see a balanced view of the background to the Company's current financial difficulties (assuming it is capable of putting the defamatory passages in **Extract 1** in their proper perspective). However, in giving prominence to a set of defamatory passages, and by hiding its antidote in some obscure place where it is not easily retrievable, the antidote may not work to negate the defamatory meanings and protect the defendants from the consequences arising from making those defamatory statements. In this case, the antidote is certainly ineffective.

120 Second, it states that "the Company, **since its inception**, paid dividends to shareholders of $124,213,169." This phrase "since its inception" is also used in **Extract 3** to define the retained earnings as representing the accumulated profits of the Company "since its inception". It is not clear if "inception" meant from the time the Company was incorporated in July 1996 or from the time the Club opened in the year 2000 or from January 2001 which that passage in **Extract 3** appears to suggest. If the ordinary reasonable person has been led to believe that "inception" meant from the time the Company was first incorporated, I would not fault him for doing so. Without further clarification, I believe that is a likely and reasonable interpretation that an ordinary reader will readily come to. If so, it then suggests that the former promoters, directors and shareholders, including the plaintiff, have also received some part of the $124 million in additional dividends not mentioned in **Extract 1.** Instead of being an antidote, it in fact contributes to the defamatory meanings attributed to **Extract 1**, which is why the plaintiff has included **Extract 3** in his complaints.

121 It is no answer that there is no need to make clearer who exactly benefitted from the $124 million dividends since it is one of many items in the Independent Financial Advisor's Report enclosed as an appendix to the ES and not in the main text of the report. It is no answer that this is a very

minor or insignificant item that needs no further clarification.

122 In fact, there was a deafening silence in the whole ES as to the identity of the persons who had in fact benefited from these dividends. The Club members were keen to know about the $124 million dividends mentioned in the unaudited *pro forma* balance sheet which became the subject matter of an OS application (110] and [111] above). Yet there was no explanation of it in the ES which was supposed to fully explain *where* and *to whom* the monies collected from the members as entrance fees had gone and why the Scheme was needed. I note that counsel for the Company even assured the court that all the information and the answers sought in the application would be provided in the ES. That was obviously not done with respect to the $124 million in dividends highlighted in the OS application.

123 The defendants therefore cannot rely on **Extract 3** to say that the mere mention in the ES at p 190 in an Appendix H that approximately $124 million was paid out in dividends since the inception of the Company without any further elucidation on who had in fact received those dividends was sufficient to remove one of the stings in the defamatory statements that "there were strong, reasonable or some grounds for suspecting that some of this sum was received by Peter Lim" referred to in [73] at (d). If it had been clarified that the defendants received $54 million and the balance of $70 million of the $124 million dividends went to Mr Ang and Mr Tan, then perhaps there will be insufficient basis for the plaintiff to say that there would be grounds to suspect that the plaintiff took part of it.

124 It seems to me that the defendants wanted to avoid mentioning the fact that they had a hand in getting the $124 million dividends paid out, of which they had themselves received over $54 million for their own benefit, and had effectively used the balance of the cash in the Company to purchase all the shares of the Company from Mr Ang and Mr Tan by declaring $70 million in dividends to them as part of the defendants' purchase consideration for Mr Ang's and Mr Tan's shares of the Company, and allowing them to use the proceeds of the dividends to off set their existing loans from the Company. The defendants effectively purchased the whole Company without having to pay a cent for it.

125 If the defendants had made these facts clear in the ES, the Company might not have succeeded in getting the Scheme approved by the Scheme creditors because they might view the defendants in a very different light. Seeking approval of the Scheme creditors for the Scheme, when the defendants had ensured that they themselves had pocketed over $54 million first and well before the outcome of the assessment of damages is known, does not seem at all palatable and may even infuriate the Club members enough to vote against the Scheme. I infer that the risk of full and open disclosure of the real recipients of the $124 million dividends was much too high a risk for the defendants to undertake or the consequences flowing from the non-approval of the Scheme was much too high a price for them to pay. The defendants' clever way round it was to bury that fact in the financial accounts rendered in the Independent Financial Advisor's report in an appendix and not breathe a word of it in the main text of the ES nor clarify that they themselves had siphoned over $54 million for their own purposes and used the balance of $70 million basically to pay for their purchase of the Company from Mr Ang and Mr Tan, never mind how relevant it might be on how the $124 million dividend payout to themselves including Mr Ang and Mr Tan, had significantly contributed to the financial plight of the Company.

126 Having found the statements complained of to be defamatory and the antidote ineffective, it is apposite at this juncture, to turn to consider if the defendants were successful in pleading their defences. I shall only be concerned with the justification defences in relation to those Defamatory Imputations proved by the plaintiff *i.e.* [73] (a) to (d), but not those in [73] (e) and (f) which were not proved.

Defences

Justification

127 The rationale behind such a defence is that "the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to possess". The defendant must *first,* establish the truth of the precise charge that has been made and *second*, must also plead his justification with sufficient particularity to enable the claimant to know what case he has to meet (*Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147, *Prager v Times Newspapers Ltd* [1988] 1 WLR 77). The defendants need not prove the truth of every detail of the words published but the justification must meet the sting of the charge.

128 In *Aaron v Cheong Yip Seng* [1996] 1 SLR 623, the Straits Times carried three articles about and photographs of*, inter alia*, the plaintiffs. The first two articles reported on the nature, structure and religious practices of the plaintiffs and the House of Israel, a name coined by a group of families, including the plaintiffs' families who lived communally in two adjoining houses. The House of Israel was referred to as a sect and the first plaintiff as its dominant leader in the first two articles. In the third article, a warning was given by a 'cult-buster' of the potential dangers of belonging to a sect with a leader who controlled the members. The plaintiffs alleged that the articles were defamatory but the court found that the defendants had succeeded in justifying the first two articles and had proven that the plaintiffs were a deviant sect controlled by the first plaintiff. With regard to the third article, the court found that while the defendants did not plead or justify the statements that the control exercised by a leader of a sect could be dangerous, the statements were just a warning of the results that could occur and the *substance* and *extent* of the libel contained in the article had been proven. The court further emphasised that the courts should not "*engage in a meticulous examination of every word in question or every detail of fact*".

129 The defendants argued before me that first, the words complained of were capable of lesser defamatory meanings and these meanings were all true on the facts; second, that even if the words complained of were capable of bearing the meanings as alleged by the plaintiff, they were substantially true. They pleaded that the lesser defamatory meanings were that *first,* the plaintiff mismanaged the Company, and that the mismanagement caused some of the financial difficulties of the Company; and *second*, that the plaintiff allowed loans to be taken out by Mr Ang, Mr Tan and Mr Foo without repayment and that the plaintiff may have received the benefit of some of the loans taken out by Mr Ang.

130 Turning to look at the words complained of, the crucial sting in the alleged libels is the charge that the plaintiff (along with the rest of the previous shareholders and/or directors) is ***primarily*** responsible (with the previous shareholders and directors) for the financial plight of the Company by incurring unreasonably high construction costs and by paying out large amounts of dividends to themselves out of the entrance fees collected from the Club members without any regard to the Company's contingent liability to its members in the pending law suit and without sufficient regard to the future long term needs for capital reserves to cater for expenditure on major maintenance work in the future, thereby depleting the funds in the Company to such an extraordinarily low level that after damages of $3,000 per member were awarded against the Company, a Scheme became immediately necessary in order to settle with the members who had sued and also with the rest of the members who had not joined as plaintiffs in the Raffles5000 suit.

Evidence adduced for Justification defence

131 I will now set out the material evidence adduced by the defendants to establish their defence of

justification**.** First, the defendants alleged that the plaintiff and his associates mismanaged the Company by taking in 19,000 members and this culminated in the Raffles5000 suit where the Company was exposed to claims amounting to almost $50 million. As evidence of this, the plaintiff was cross-examined as to whether there was deliberate concealment by the former directors and/or shareholders that this premier club had taken on 19,000 members. The defendants argued that it was deliberate and that *but for* the acceptance of 19,000 members, the Raffles5000 suit would not have been commenced.

132 Second, the defendants pointed to the fact that the plaintiff and his associates caused the Company to enter into an agreement with Europa Holdings to pay out more than $70 million to Europa Holdings in terms of commission. They alleged that Europa Holdings shared the same directors and shareholders as the Company so there was in reality no commercial basis for entering into such an arrangement.

133 Third, the defendants emphasised that the plaintiff allowed almost $65 million to be loaned to Mr Ang, Mr Tan and Mr Foo which remained unpaid at the time of his exit. This was done through his proxy, Ms Chan Lay Hoon, one of two authorised signatories who could sign off on the loans.

134 Fourth, the defendants averred that half of the $52 million borrowed by Mr Ang from the Company was applied for the plaintiff's benefit. As evidence of this, the defendants cited several agreements that the plaintiff had allegedly asked Mr Ang to sign. These included (1) loan agreements documenting Mr Ang as owing the Company $51 million in loans; (2) an Option Agreement pursuant to which the Company granted the plaintiff an option over 765,100 shares in the Company for a mere $1; (3) a Novation Agreement by which the plaintiff would assume about half of Mr Ang's loans from the Company.

135 With regards to the management fees of $78 million paid by the Company to Europa Holdings, the defendants had put in no evidence to suggest that the Management Agreement was a sham. In any case, the defendants were also fully aware of the management fees that had been paid to Europa Holdings at the time of their purchase of the Company's shares from Mr Ang and Mr Tan. These management fees were fully reflected in the accounts of the Company, upon which the defendants had conducted their due diligence. Both defendants would have known that sums paid out to Europa Holdings were consented to by all directors and shareholders. The defendants raised no objections to this since April 2001, until Suit 46 was commenced in January 2006.

136 Indeed in 2002, more than one year after they had acquired the Company, when queried by IRAS on the payment of management fees of $78 million to Europa holdings, the Company (under the control of the defendants) had sent various letters to IRAS justifying the management fees paid to Europa Holdings as being legitimately and properly expended and therefore not taxable by IRAS, based on, *inter alia*, the level of services which were provided and the expertise and excellent track record of Europa Holdings:

> …Our client confirms that the fee paid to Europa Holdings Pte Ltd is reflective of the open market value in view of its previous successful membership launch in the same industry and the readily available experienced supporting staff.
>
> Our client confirms that the above fees were charged at arm's length basis"
>
> "The fees paid to Europa are based on the level of services to be provided and the expertise and excellent track record of Europa.

…

[The Company] and Europa came to the agreement of 15% of entrance fees as the total commission payable based on the value of the services provided by Europa.

…

The fees at arm's length as Europa had to provide valuable resources to [the Company]. Resources and proven knowhow were committed to [the Company].

137 This carried on into 2003. In a further letter dated 18 September 2003, the defendants had caused the Company to confirm its position to IRAS that the management fees to Europa Holdings were "charged at arm's length basis", and that:

Efforts put in by Europa Holdings resulted in overwhelming response from the public and in particular the well known members of the society. This is indicative of the level of skill and expertise. We had also in our letter of 2 August 2002 detailed the skill and expertise which Europa Holdings Pte Ltd had developed throughout the many years. These expertise were not with RTC which was launching the new club.

138 Clearly the view that the Company (under the control of the defendants) took of the propriety of the management fees is not something they rushed through without proper study. In addition to due diligence of the accounts and documents (which reflected the management fees fully) in 2001, their auditors had justified these expenses as having been properly incurred in the several years that followed.

139 Counsel for the plaintiff accordingly submitted that based on this position taken by the Company to IRAS, the Company obtained and was able to enjoy tax deductibles for all the management fees paid to Europa Holdings. After causing the Company to adopt this position to IRAS and enjoying the tax deductions for the same, it would be wholly unjust for the defendants to now, in justification, say that the plaintiff had mismanaged the Company by allowing a hefty payment of $78 million to Europa Holdings for its management of the Club project.

140 From the unrebutted evidence produced by the plaintiff, it would appear therefore that the defendants' own belief and position is that the management fees paid to Europa Holdings were proper and justified. On top of that, a tax deduction has been enjoyed for these expenses said by them to have been properly incurred. Justifying a contrary position in response to the defendants' own preferred lesser alleged defamatory meanings in relation to the $78 million management fees therefore fails in my view.

141 I further noted that the defendants' first pleaded meaning was that the plaintiff mismanaged the Company and that mismanagement caused *some* of the financial difficulties. However, the phrase "*substantial portion of monies had already been spent*" does not suggest that only *some* of the financial difficulties can be attributed to the previous shareholders and/or directors. Instead, the innuendo raised is that *all* the financial difficulties were caused by the previous shareholders/ directors "who had all left". That is where the main sting has to be justified *i.e.* not some, but all or substantially all the financial difficulties were caused by the plaintiff and the previous shareholders/directors who had all left.

142 In my view, the totality of the evidence points more to the fact that the financial difficulties were caused substantially by the defendants themselves and not the plaintiff. In fact, the plaintiff

appeared to me to have strategic corporate plans for the Company. He was working towards an eventual public listing of the Company. He arranged for independent directors to sit on the board of directors, not only to institute a system of good corporate governance, but also to give an appearance of good corporate governance to support a public listing. He arranged for a Deferred Accounting Policy to distribute and recognise the income from the accumulated entrance fees of members over the term of the lease in order to show a much higher net profit per year for the Company so as to enhance the Company's overall valuation for the purpose of a public listing. Not only would the Deferred Accounting Policy secure an overall tax savings for the Company, but through boosting its net profit per year, the plaintiff hoped to attain a better listing price because of the resulting higher valuation of the Company. By going for a public listing, he felt that much more money could be made for the shareholders. The clearest supporting evidence of his plans was his effort to protect the very sizable cash reserves of $114 million (in fixed deposits and cash and bank balances) and short-term investments of $27 million, which still remained in the Company at the time when he settled his law suits with the other shareholders and directors of the Company. On the face of it, I accept plaintiff's evidence of his strategic plans for the Company. Furthermore, with the adoption by the defendants of the position that there was "no case to answer", there was hardly any rebuttal evidence adduced to weaken the above assertions of the plaintiff that I have set out in this paragraph.

143 I accordingly accept the submission of plaintiff's counsel that as of April 2001 (before the defendants took over), the Company was still going strong financially with assets of $206 million ([15] above), comprising of cash reserves of $114 million, short term investments of $27 million and receivables of $65 million in directors' and/or shareholders' loans (if viewed on the basis that they were on the face of it repayable with no agreement that they were to be set-off later *via* dividends). These loans were recorded in the Company's accounts as being current assets, "Amounts owing by directors", and "unsecured, interest free and without fixed term of repayment". This evidence has not been challenged by the defendants. However, the defendants submitted that the Company incurred $100 million in tax liability as IRAS had rejected the accounting and tax policy implemented *before* the plaintiff stopped working with the Company. It is evident from the accounts of the Company however, that the *real* reason why there was a sudden tax liability of over $130 million incurred was because the defendants were instrumental in instituting a change in the accounting policy after coming on board.

144 While the defendants alleged that the construction cost of the Company was exorbitant, I do not think that they could support this allegation when they had previously relied on this very fact in the Company's defence during the proceedings of the Raffles5000 suit that the Club was a premier club with first class facilities with a high standard of finishes for the building, and this fact was evidenced by the high construction costs. This to me is an admission on the part of the defendants that the construction costs, though high, were neither excessive nor unreasonable given that they had to deliver a premier club. Further, it does not appear on the evidence that the plaintiff was at all directly involved in the construction process which was the responsibility of Mr Lawrence Ang. All the plaintiff did according to his evidence was to appoint M/s Ernst & Young to audit the tendering process as part of corporate governance.

145 As to the amount of loans, I do not think that the defendants had in this trial adduced sufficient admissible evidence to show that the loans were redirected to the plaintiff *via* Mr Ang as the defendants chose to call no evidence. I was left largely with the plaintiff's evidence during cross-examination that all loans granted to Mr Ang, Mr Tan or Mr Foo would eventually have to be repaid. On the face of the accounts as they stood, these Company loans were to be repaid. There was nothing in the accounts to qualify that these loans were not repayable because dividends would be declared to set off these loans. The plaintiff further denied receiving any share of the proceeds of

these loans. Having adopted the position of "no case to answer", the defendants called no witnesses to refute the evidence of the plaintiff on these points. As such, for the purpose of this trial, my finding has to be that ***before*** the plaintiff finally exited from the Company, the status was that all the loans granted would have to be repaid and there was no prior arrangement or agreement that there was no repayment needed because it had been already agreed that they were to be later set off against dividends to be declared by the Company.

146 Having regard to the crucial sting in the defamatory statements (set out in [130] above), it struck me as disingenuous that the defendants should seek to raise a defence of justification when the facts set out above at [18] to [46] show a disturbingly continuous and prevalent trend of dividends being paid out to the defendants themselves, as well as to Mr Ang and Mr Tan, after they had altered the accounting policy to allow these large amounts of dividends to be declared out of the members' entrance fees collected, which eventually depleted almost completely the funds in the Company. Again this evidence stood unrebutted given that the defendants called no evidence in their own defence.

147 Since the facts set out at [18] to [46] show that the current financial plight of the Company was largely contributed by the defendants themselves, in conjunction with Mr Ang and Mr Tan, the defendants in my view failed to justify the sting in the defamatory statements in **Extract 1** and **Extract 3,** to the extent that it had attributed the financial difficulties to the plaintiff. In so far as the defendants had tried to deflect their own responsibility for the financial plight of the Company to the others, and in particular the plaintiff, the defendants had not succeeded in justifying the truth of the defamatory meanings in the statements complained of in **Extracts 1 and 3.**

148 Further, it is notable that the ES is silent on the key role played by the defendants in the current financial plight of the Company. No mention of $124 million in dividends was inserted in the *main text* of the ES. The mention that was made was in fact buried at p.190 of the ES in an appendix. Yet where it was mentioned, the ES remained vague as to whom the dividends were paid out to. Seeking to rely on the defence of justification, where many skeletons are kept hidden in the closet and much of what is not disclosed in fact distorts whatever may have been disclosed, was reproachable. If full disclosure gives quite a different picture, then the non-disclosure will be regarded as material and significant to the extent that the justification based merely on what has been disclosed must necessarily fail.

149 The sting in the defamatory meaning (c) in Extract 1 - "Peter Lim culpably or negligently approved, condone or otherwise failed to prevent an improper preferment of Lawrence Ang, William Tan and Dennis Foo, whereby very substantial loans made to them… by [the Company] in the sum of $70 million were not repaid by them as they should have been but later set off against dividends" - is not so much the fact that the $70 million loan had been made but the fact that they were not repayable because there was an agreement to later set off those loans against at least $70 million dividends to be subsequently declared. These loans in effect were moneys taken out of the Company for the directors' own use actually without any need for repayment but they only appear to be repayable on the account books.

150 The defendants only managed to justify that loans totalling $70 million had been taken out by Lawrence Ang, William Tan and Dennis Foo with the knowledge and apparent concurrence of the plaintiff. Under cross-examination, the plaintiff had in fact admitted without qualification that he was aware of and had concurred in the making of the loans.

151 However, the defendants failed to justify the truth of the more important second part (*i.e.* the main sting in the defamatory remarks) that the plaintiff had further agreed that the loans were not in

fact repayable to the Company because they would be later set off against large dividends of at least $70 million to be subsequently declared. It is not so much the loans *per se* that is the sting but the fact that the plaintiff had negligently approved, condoned or otherwise failed to prevent large loans taken from the Company that never need to be repaid by the borrowers. The plaintiff had given evidence that he wanted very much to protect the Deferred Accounting Policy and allowing the declaration of some $70 million to off set those loans taken, would in my view be contrary to the Deferred Accounting Policy and would derail it. Thus the inference that the plaintiff would not have agreed to the non-repayability of the loans stands unrebutted in my view, although he might have consented and agreed to the loans *per se*.

152 Accordingly in my judgment, the justification also fails with respect to defamatory statement in **Extract 1** concerning the $70 million loan to be subsequently set off against dividends from the Company.

153 Finally, the plaintiff had produced in evidence the admissions made by the defendants that:

a. the construction cost was neither excessive nor unreasonable[note: 10];

b. all the dividends were approved and declared by the defendants[note: 11];

c. the defendants agreed to allow the loans to be set off against dividends[note: 12];

d. the plaintiff did not receive any part of the dividends[note: 13].

154 With these admissions by the defendants, I do not see how the defendants can justify the Defamatory Imputations in [73] (a) to (d), which the plaintiff has managed to prove. Accordingly, I dismiss the entire defence of justification for the reasons I have stated.

Privilege

155 There are two kinds of privilege – (a) absolute privilege which is limited in scope but offers complete protection; and (b) qualified privilege which is wider in ambit but can be defeated if the plaintiff is able to prove malice on the part of the defendants.

Absolute privilege

156 The main thrust of the defendant's defence of absolute privilege was that the words complained of were published on an occasion of absolute privilege, *i.e.,* the ES was a document required to be sent out to the Scheme creditors under s 210 and 211 of the Act. At common law, as noted in *Evans on Defamation* (at 149), occasions of absolute privilege arise in documents made during the occasions of *first,* judicial or quasi-judicial proceedings; *second,* parliamentary proceedings; and *third,* official state proceedings. However, *Gatley on Libel and Slander* (Sweet & Maxwell, 10th Ed, 2004) ("*Gatley on Libel and Slander*") states that the categories of absolute privilege are not closed.

157 At the outset, I note that there does not appear to be any direct authority on explanatory statements being protected by absolute privilege. In *S v Newham London Borough Council* [1998] EMLR 583, the English Court of Appeal suggested that in the absence of previous authority, several factors should be considered in deciding if a communication would be protected by absolute privilege:

(a) The *nature* and *importance* of the interest the defendant seeks to protect;

(b) Whether the *scale* and *risk of damage* to that interest is sufficiently serious to create a pressing need to protect that interest;

(c) What is the *breadth of the immunity* that must be granted to provide protection for that interest;

(d) Would it be appropriate as a *matter of principle* to extend to this situation the immunity from suit which has been applied in other cases; and

(e) Is the risk to the *public interest* which the defendant seeks to protect so great that it should override the public interest that a person should have access to the courts to seek a remedy for a wrong he has suffered? (Essentially this is the balance between the competing public interests.)

158 The defendants appeared to aver that *all* explanatory statements should be subject to absolute privilege. After considering the five factors elucidated in [157], I do not consider that the ES should be given any absolute privilege under the law as it does not fall within any of the above established categories where absolute privilege attaches. Had all explanatory statements been protected by absolute privilege, this would have led to the undesirable situation where *anything* and *everything* that was said within it, no matter how ludicrous or defamatory the content, could be published without any consequences. On the contrary, the absence of any absolute privilege in fact promotes responsible crafting of an ES to ensure that it is factually true as a whole, not misleading to creditors in any way or which can seriously misrepresent in any way the effect of the compromise or scheme (*e.g.* the benefits and disadvantages to the directors and debenture holders) and not defamatory as there will be no immunity from suits. *A fortiori,* if absolute privilege were to be extended to cover explanatory statements, there would be a real risk of abuse as proposers of the scheme might use the explanatory statement to advance serious unjustified criticisms of previous management under the guise of giving background to the scheme and make various misrepresentations and untruths as to the facts contained therein.

159 Further, the Act has not expressly provided for explanatory statements to be covered by absolute privilege. As matters stand, there is no monitoring or supervision by the Court over the contents of an explanatory statement, and there is no reason why there should be any such monitoring or supervision by the Court. The responsibility must rest with the company concerned and those involved in crafting the ES. There is nothing in the Act which excludes a civil remedy, whether based on the tort of misrepresentation or defamation. I agree with the contention of counsel for the plaintiff that it is not likely that professional scheme managers (or even proposers), aware of their statutory duties, should feel inhibited by the threat of litigation if the protection were merely qualified rather than absolute, particularly where the main task here is simply to explain the effect of the compromise or scheme. There is no reason why anyone has to be defamed in that process.

160 In *Gatley on Libel and Slander*, it was cautioned (at [13.1]) that:

Parliament has provided for absolute privilege in numerous modern activities; where an activity is carried on under a statutory scheme and it has not done so, that is a reason for caution in extending the common law.

161 That caution resonates with the dicta of the English Court of Appeal in *Waple v Surrey County Council* [1998] 1 WLR 860 where Brooke LJ had opined as follows (at p 868):

Parliament has been willing in recent years to extend the defence of absolute privilege in certain

respects in Acts creating new statutory schemes… If Parliament had wished to extend absolute privilege to communications made by council officers acting in Children Act matters it would have been able to do so during the passage of the Bill. It appears to me that the balancing of the need to protect people's reputation from being harmed by malicious communications and the need to protect council officers from the worry of any form of litigation is very much a matter for Parliament and not for the courts.

162 I thus agree with the submissions of counsel for the plaintiff that if parliament had intended that an explanatory statement explaining the effect of the statutory compromise or arrangement to be circulated under s 211(1)(a) of the Act was to attract absolute privilege, it would have expressly provided for this in the Act. There is however no mention of this in the Act. I would be most hesitant to expand the category of absolute privilege to an explanatory statement governed by a statutory scheme, which I believe should properly be left to Parliament to consider and decide when it enacted s 211(1)(a), whether or not to grant absolute privilege due to various policy considerations involved as well as the wide-ranging repercussions which would follow if absolute privilege were to be extended to explanatory statements under the statutory scheme.

Qualified privilege

163 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 608). The authors of *Gatley on Libel and Slander* explain the rationale (at p.382, para 14.4) 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 mine]

164 The categories enjoying qualified privilege include the following:

(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.

165 More recently, the English courts have canvassed a possible fifth category of publication of matters of public interest by the media in *Reynolds v Times Newspapers* [2001] 2 AC 127. The privilege is said to be qualified as the defence can be defeated where the plaintiff can show that the defendant was actuated by malice or has exceeded the privilege the law has granted.

166 One of the first considerations the courts will take into account is that the common interest shared between both parties must be *reciprocal* where both the speaker and the recipient have an interest in the communication. In *Aloysius Tan Ting Kai v Ng Hong Kheng & Ors* [1982] 1 CLJ 122, the plaintiff alleged that he was defamed on certain issues in his job *via* a communication that was sent to the president of the union representing employees of his company. However, the union was not concerned with the affairs of senior offices of the company such as the plaintiff's and the court found that it followed that there had been no reciprocity of interest. Second, even if both interests are different, it does not need to be the same, as long as both interests exist *at the time* the communication is made. Third, the interest does not need to be substantial (*Price Waterhouse Intrust Ltd v Wee Choo Keong & Ors* [1994] 3 SLR 801). Fourth, general interest in the information will not be sufficient to support common interest qualified privilege.

167 The defendants submitted that they were entitled to rely on the defence of qualified privilege under the first and second categories ([164] above). First, the defendants argued that the Scheme creditors held a corresponding interest in receiving the information from the defendants about the Scheme. Given that the defendants were responsible for instituting the Scheme, they had an interest (a) in ensuring that the Scheme creditors were informed about the Scheme arrangement; and (b) in fulfilling their obligation under s 211 of the Act. The Scheme creditors also wanted to find out about the Scheme at the same time the document was released. There was not a general interest from the public in the mechanics of the Scheme but rather a specific group of Scheme creditors. As noted by the authors of *Evans on Defamation* (at 121):

> Commonly cited examples of such privileged occasions include the ***exchange of information between shareholders and directors of a company on matters relating to the company's customers or employees***; ***communication between a shareholder and a new company chairman complaining about non-compliance with local laws and possible misuse of company funds by other shareholders and thus calling for an investigation***; and ***a statement made by one creditor to another concerning the financial status of a common debtor.***
>
> [emphasis added]

168 In my view, on the first category, the defendants and the Company had an interest in explaining the Scheme to the Scheme creditors given the post-Raffles5000 suit climate, in which the member litigants in that suit were anxious to find out about the finer details of their compensation. There was a clear corresponding interest from the Scheme creditors to have the information conveyed to them.

169 With regard to the second category, this defence is also available where the maker of the

statement is under a legal, social or moral duty to make it and where the recipient of the statement has a corresponding interest or duty to receive it. For instance, in *Oversea-Chinese Banking Corporation Limited v Wright Norman* [1994] 3 SLR 760, the Business Times in Singapore had published an apology in favour of a third party in respect of defamatory statements made by a person whose letter was previously published by the newspaper. The letter was found to be privileged when the letter writer alleged that the apology was defamatory of him. The court held that the Business Times had a moral, if not legal duty, to correct the original defamatory statements of the letter writer and its readers would be interested in knowing about the correction. This reciprocity between the maker and recipient of the statement is of fundamental importance. As Lord Atkinson noted in *Adam v Ward* [1917] AC 309 ("*Adam v Ward*") (at 334), "this reciprocity is essential":

> … a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

170 The plaintiff averred that the defendants were not entitled to rely on the defence of qualified privilege because while he acknowledged that the defendants were under a duty to publish the ES, there is no duty to publish extraneous information[note: 14]. In causing the ES to be published, the scope of the duty vested in the defendants (and correspondingly the interest of the Scheme creditors in receiving such information) is restricted to the statutory purpose of the ES under s 211(1) (a) of the Act, that is, to explain:

> …the effect of the compromise or arrangement and in particular stating any material interests of the directors, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons.

171 The plaintiff thus submitted that any privilege (if at all) will only attach to statements which explain the effect of the compromise or arrangement, and state any material interests of the directors and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons. Essentially, the plaintiff's contention turned on the argument that *irrelevant* matters fell outside the ambit of qualified privilege, and correspondingly, the Scheme creditors do not have any interest in receiving such information. In support of this proposition, my attention was drawn to *Adam v Ward* where Lord Loreburn observed thus (at 320-321):

> ..But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or exercise of the right or the safeguarding of the interest which creates the privilege will not be protected… the judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion. For a man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact publishes it.

172 Lord Shaw further added later in the judgment (at 348):

> If, accordingly, and in so far as the communication deals with matter not in any reasonable sense germane to the subject-matter of the occasion, the protection is gone: the occasion with its privilege does not reach a communication upon this foreign and totally unconnected matter.

173 And this was not to be the last word on the matter, with Lord Finlay stating that (at 318):

> The privilege extends only to a communication upon which the subject matter which respect to which privilege exists, and it does not extend to a communication upon which any other extraneous matter which the defendant may have made at the same time. The introduction of such extraneous matter may afford evidence of malice which will take away protection on the subject to which privilege attaches, and the communication on the extraneous matter is not made upon a privileged occasion at all, inasmuch as the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication.

174 In *Gatley on Libel and Slander* (at p 433), the authors suggest that while the *occasion* is privileged, the protection is conferred only upon those *portions* of the statement which relate to the occasion. This issue of distinguishing between conferring privilege only on matters relevant to the occasion raises the interesting question of how *wide* or *narrow* the ambit of the privilege is designed to cover. For purposes of clarifying this issue, it will be useful to look at *Horrocks v Lowe* [1975] AC 135("*Horrocks v Lowe*") as well as Lord Dunedin's comments in *Adam v Ward.*

175 Lord Dunedin noted the tension between whether irrelevant material should be considered as falling outside the privilege or only evidence of malice, and suggested that (at p 327 and 328):

> If the defamatory statement is quite unconnected with and irrelevant to the main statement which is *ex hypothesi* privileged, then I think it is more accurate to say that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it, and under it will also range all the cases where the express malice is arguable from the too great severity or redundancy of the expressions used in the privileged document itself. In short, I adopt the law as laid down by Lord Esher M.R. in the case of *Nevill v. Fine Arts and General Insurance Co.* (3) The learned judge there says: ".... in this case there was no evidence of such malice. That being so, the defendants have proved that the occasion was privileged, and there was no evidence of malice in the mind of anybody to rebut that privilege, and the defence stands good. But then the jury were asked to find, and have found, that the privilege was exceeded. **There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it.** Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion." (A good illustration of this will be found in the case of *Warren v. Warren*. (1)) "But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice." ……
>
> … Strictly speaking**, it is the occasion on which a statement is made that is privileged**, and the phrase that such and such a statement is privileged would be more accurately, though perhaps, more clumsily, expressed by saying that, the statement having been made on a privileged occasion**, malice cannot be implied from defamatory expressions therein, but must be proved as a real fact. The malice to be proved must be real malice, and is generally called "express malice" to distinguish it from the malice which is implied from the defamatory words themselves.** (Emphasis added.)

176 Lord Diplock's comments in the former case of *Adam v Ward*, also bears quoting *in extenso* (at 151):

> Logically it might be said that matter [which is irrelevant] falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam v Ward* ***the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privilege occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn.*** **As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive.**
>
> [emphasis added]

177 As can been, *Horrocks v Lowe* suggests that the issue of irrelevant defamatory matter is more appropriately addressed as one of the factors in considering if the defendant was actuated by *express malice* by making those statements. More recently, in *Bashford v Information Australia (Newsletters) Pty ltd* [2001] NSWCA 47, Hodgson JA tried to reconcile both approaches in *Adam v Ward* and *Horrocks v Lowe* (at [43]):

> I think the cumulative effect of the passages… from *Adam v Ward* and *Horrocks v Lowe* do indicate that, **unless malice is inferred, material communicated on the privileged occasion will have the protection of the privilege unless it is truly unconnected with the subject matter of the occasion.** [emphasis mine]

178 I think this is the more measured and appropriate response to this issue. As I decided previously in *Arul Chandran v Chew Chin Aik Victor* [2000] SGHC 111 ("*Arul Chandran*") (at [244] to [250]), while irrelevant defamatory matter incorporated in a statement made on a privileged occasion may be evidence from which malice can be inferred, *totally* irrelevant and extraneous matter, which though published on the same occasion as those defamatory matters qualifying for the privilege, can constitute independent defamatory matter falling completely outside the ambit of the defence. To allow *all* extraneous and clearly unconnected defamatory matters to be protected just because they were published on a privileged occasion would widen the ambit of the defence too far and tread into dangerous waters.

179 At the same time, I agree with the authors of *Gatley on Libel and Slander* that too restrictive an approach should be cautioned for the whole premise of this defence is sculpted on the basis that a "*person speaking on a privileged occasion should not be regarded as a tightrope walker without a safety net, with the judge waiting underneath with bated breath hoping for a tumble*" (per Eady J in *Birchwood Homes Ltd v Robinson* [2003] EWHC 293 at [73]). I think that a middle ground can be found: *first,* there is a distinction between *irrelevance* and *excess* or *exaggeration* (*Gatley on Libel*

and Slander, at p 436) and *second*, it is a question of *fact* and *degree* in each case where privilege is raised as a defence, as to which parts are *fairly* and *reasonably connected* to the matters occasioning the privilege and thus given consequential protection, and which parts are not so connected such that they cannot enjoy the protection of qualified privilege. Where the issue is not of irrelevance but simply of *excess* or *exaggeration* and the statement still has reference to the subject-matter of the privilege, or is in any way pertinent or germane to it, it is material only as evidence of malice and *not* to the question of privilege.

180 Casting an eye over the statements complained of, I found that the issues discussed (though going into a fair amount of detail before the Scheme was instituted) were fairly connected to the Scheme and at best, could only be said to be *in excess* of the defendants' prescribed duty under s 211 of the Act. Much as the plaintiff would like to submit that the "*Background to [the] Company's Current Financial Difficulties*" as presented was entirely extraneous and irrelevant to explain the effect of the scheme, I cannot however regard them as totally extraneous, irrelevant and unconnected material to the ES as a whole as the material helps to explain in part how the Company's financial situation landed up in the state it was in at that time, which information it must be stressed was demanded by the member litigants, who even filed an application to court to obtain the information, though without success. Furthermore, counsel for the Company at that time had assured the court that the information asked for by the member litigants would be provided in the ES. Under the circumstances, I therefore found that the defendants could rely on the defence of qualified privilege.

Malice

181 I turn now to consider the plaintiff's allegation that *even* if qualified privilege applies, the publication of the statements complained of was actuated by malice. In proving malice, mere proof that the words are false is insufficient. Instead, the courts will look into the *motive* with which the statements were made. *Horrocks v Lowe* has been applied by our courts numerous times. As Lord Diplock said (at 150):

> For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit — the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.
>
> **So the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial.** The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. **'Express malice'** is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. *But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests*.
>
> The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own

legitimate interests can justify a man in telling deliberate or injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

……

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

Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. *It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.*

[emphasis added]

182 Most recently, *Horrocks v Lowe* was applied *in Hytech Builders Pte Ltd v Goh Teng Poh Karen* [2008] 3 SLR 236 where Prakash J noted that "motive rather than honesty of belief was the essential indicator of the existence of express malice". The question is whether the plaintiff has been able to establish that these statements were made with the predominant intention of injuring the plaintiff or was motivated by spite or some other improper motive. Where the predominant intention was to advance or protect their own interest, then the defendants will be able to claim the protection of the privilege. The desire to injure must be the dominant motive for the publication of the statements; knowledge that it will have that effect is insufficient if the defendants are nevertheless acting out of a sense of duty or in bona fide protection of their own legitimate interests.

183 In *Yeo Nai Meng v Ei-Nets Ltd* [2004] 1 SLR 73, the court considered if the defendants' forwarding of three reports to a Board of Directors, containing allegedly defamatory material, prevented the plaintiff from relying on the defence of qualified privilege. S Rajendran J held (at 112) that:

On a careful review of the evidence, it seemed to me, on balance, that the dominant reason by LBC distributed the three reports to the Board of Directors was because, as CEO of Ei-Nets, he was duty-

bound to bring to the attention of the Board the very disturbing conclusions reached in the Medora and Chor Pee Reports. *The fact that by so doing he would be furthering his private agenda against Yeo was, in my view, incidental. Accordingly, I find that the communication by LBC of the three reports to the directors of Ei-Nets was covered by qualified privilege.*

[emphasis added]

184 In *Tan Chor Chuan v Tan Yeow Hiang Kenneth* [2006] 1 SLR 16, the plaintiffs who were all members of the Singapore Chess Federation ("SCF") brought a libel action against 11 members of the Executive Council ("the Exco"). The libel arose from statements published by the defendants in an appeal addressed to members and this was posted on the SCF website, in response to a requisition for an extraordinary general meeting ("EOGM"). Among the matters mentioned were allegations of conflict of interest, lack of transparency and mismanagement of the Exco. The words were defamatory in nature but the issue before the court was whether the plaintiffs were entitled to rely on the defence of qualified privilege. Andrew Ang J held that while the appeal to the members served two purposes, the dominant and improper motive was not to garner support for the EOGM but to answer the attack mounted by the requisitionists.

185 As proof that the defendants were actuated by indirect motives, the plaintiff vigorously contended that the real or collateral purpose in publishing the ES was to "*deflect blame for [the Company's] financial difficulties in 2005 to the former directors/shareholders of [the Company]*[note: 15]". The plaintiff averred that the main aim was to present themselves as the 'saviours' and 'white knights' of the Company, so that for instance, the amount of dividends paid out were mentioned as amounting to $124 million, *without* stating that they had received over $54 million themselves or that there had been a change in accounting policy leading to the Company incurring an immediate $100 million tax liability.

186 As alluded to earlier, I agree that the defendants sought to make it seem that the financial plight of the Company was not caused by them at all but by a host of other factors. In using the phrase "*a substantial portion of the monies collected in entrance fees has already been spent*", they might have intended to insinuate that all the money has "gone with" the former directors/shareholders. No mention was made that the $100 million tax liability incurred was principally due to the defendants' deliberate change in accounting policy so as to enable dividends to be declared for their own benefit, or that they had caused the Company to pay dividends to themselves for their own benefit, or that the figure of close to $70 million described as "shareholders' costs" was part of the deal they struck to buy their shares in the Company. However, this personal agenda on their part to suppress important information in relation to what they had themselves done to damage the Company's financial health *vis a vis* the judgment creditors and other members, who could potentially commence similar suits against the Company following the lead from the judgment creditors, really in my view, is *incidental* to the main reason for the publication of the ES, and certainly, does not taint the matter with malice. That malice must be a *causative* factor, leading to the publication, has been emphasised by the courts on numerous occasions. The threshold for proving malice is therefore, high. As Tay J emphasised in the *Natsteel case* (at [114]):

> In considering this question [of malice], we should not be hasty in imputing malice simply because two persons have stood at opposing ends of an idea. A spirited debate, occasionally with righteous anger expressed by one or both of the contending parties, even over a period of time, need not mean that enmity and animosity will rule their relationship for the rest of their lives.

187 In *Maidstone Pte Ltd v Takendaka Corp* [1992] 1 SLR 772, the plaintiffs had been wrongly described as being 'under receivership' in a letter sent by the defendant. In considering the ambit of

the defence of qualified privilege, Yong CJ cautioned (at 52) that:

> Ill-will or spite may also be found in the defamatory publication itself if it contains defamatory matter not really necessary to the fulfilment of the particular duty or interest upon which the privilege is founded. It should be borne in mind that the test of relevance is not one of logical analysis and that the inclusion of irrelevant defamatory material is to be treated as one of the factors to be taken into account in deciding whether, in all the circumstances, an inference of malice can be drawn against the defendant. **Again, a court should be slow to draw such an inference. [emphasis mine]**

188 The defendants argued that the plaintiff had not adduced any evidence providing that the words complained of were actuated by malice, beyond making the bare assertion that it was "his belief" that the defendants were motivated by malice. During cross-examination, the plaintiff admitted that he was not aware that "for a fact… the defendant had a motive"[note: 16]. Further, the ES was prepared and published with the help of professionals, including the independent financial advisers Ernst & Young. To construe the evidence that the professional advisers to the defendants who were helping to prepare the ES were in conspiracy with the defendants to maliciously injure the reputation of the plaintiff would, I think, be rather far-fetched.

189 Turning to the issue of irrelevant extraneous matters being included within the ambit of the ES, the defendants drew my attention to *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR 629 where the Court of Appeal considered what was required to be published under s 211 of the Act. As the court noted (at [24]):

> Quite apart from statutory authority, it is an independent principle of law that the **creditors should be put in possession of such information as is necessary to make a meaningful choice.** As Selvam J held in *Re Halley's Departmental Store:*
>
> > Since s 210 does not lay down any matters on which the application must be based, it is of extreme importance that the company furnishes **full information to the creditors** and the court before they can give their approval.
>
> This point was stated by Maugham J in *Re Dorman, Long & Co Ltd* [1934] Ch 635 at 657 as follows:
>
> …it is essential to see that the explanatory circulars sent out by the board of the company are perfectly fair, and, as far as possible, **give all the information reasonably necessary to enable the recipients to determine how to vote**. I am assuming, of course, that, following the usual procedure, explanatory circulars are sent out, because, I may observe, there is nothing in the Act to render them essential.
>
> [emphasis added]

190 The defendants submitted that they did not go beyond stating what was reasonably necessary in the ES and therefore the inclusion of the information complained of in the ES does not show any malice on the part of the defendants. The following contention of counsel for the defendants is persuasive in my view:

> First, the historical background information provided in the ES (including information related to the "old group") was reasonably necessary. It would be unreasonable to present the Scheme Creditors with an explanatory statement that had no head or tail but comprised simply the terms

of the proposed Scheme and financial statistics. The circumstances giving rise to the proposal for the Scheme had to be explained. This involves explaining the subject matter of the Members' Action and how it arose - as a result of the revelation, made in lawsuits involving the "old group", that 19,000 members had been accepted. This explanation could not be sensibly provided without also briefly describing what the lawsuits involving the "old group" concerned.

The Plaintiff himself has also pointed out that the Scheme Creditors were interested in knowing how [the Company] had spent the entrance fee monies. The largest components of [the Company's] expenditure - cost of the lease for the Land and construction costs - could not be ignored when explaining expenditure in the ES. The acquisition of the Land and construction of the Club goes back all the way to 1996, when the "old group" were at the helm. It would be incomplete to explain the acquisition of the Land without also explaining how [the Company] had first been set up and by whom it had been run at the start.

Therefore, the information provided in the ES in relation to the "old group" by way of background was both necessary and reasonable to include, in order for the Scheme Creditors to be better equipped to make a meaningful choice on whether to vote for the Scheme.

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

192 In fact, counsel for the Company had informed the court that the requisite information demanded by the Raffles5000 in their application to the court would be provided in the ES and this could well have in some way influenced the court's decision in not granting them their application for the appointment of a special receiver and manager to look into the Company's accounts. To this extent, the defendants were obliged, as their counsel had indicated to the Court, that the information requested specifically by the Raffles5000 members would be in the ES.

193 Thus, it was not *simpliciter* an ES as the defendants had to incorporate the requisite information requested by the Raffles5000 in the ES itself. The ES had taken on a *wider* purpose. However, at the same time, the defendants did not want to mention the role they had played in depleting the Company's financial assets for their own benefit, which was from April 2001 onwards. The section on "Background to [the] Company's **Current** Financial Difficulties" in the ES focuses on events up to April 2001 only, and the more current financial history of the Company from April 2001 to November 2005 involving the defendants themselves was conspicuously not to be found. One would have imagined

that all the events of leading up to the financial plight of the Company in November 2005 ought to be a necessary part of the background. To omit any mention of the consultancy fees, payments, remuneration, income, expenses, or dividends taken by the defendant themselves after April 2001, is to deceive the members into believing that no expenditures after April 2001 were material to the Company's financial plight in November 2005. This was clearly done to turn the readers' minds only to what the former directors/shareholders did (or was alleged to have done), and not what the defendants themselves had done upon assuming control of the Company.

194 I can envisage that if the defendants' acts of raiding the Companies' funds were made known to the members, a wall of vehement opposition may develop to vote against the Scheme. If the members knew that they too had drawn out large amounts of dividends from the Company amounting to over $54 million, which also nearly depleted the remaining cash available from the membership fees collected with nothing left to pay the damages, the risk of an uproar from the members would be high. How would the defendants explain that their entry into the Company was paid for entirely using the funds within the Company and that they had to dismantle the entire Deferred Accounting Policy meant to cater, *inter alia*, for future expenditure to operate, maintain and upgrade the Club for the benefit of the members, so that they could lay their hands on over $54 million of the entrance fees collected and allow Mr Ang and Mr Tan to set off their $65 million loans from the Company *via* a dividend declaration to them of $75 million as part of the deal for the defendants' entry into the Company? It would put the defendants in a very bad light in the eyes of the members of the Club and they would have an uphill task trying to win and garner the trust and confidence of the Club members in them as the "new investors" in the Company.

195 I can therefore envisage that the Scheme may well be strongly opposed by members disgruntled and unhappy with the unbecoming conduct and greed of the defendants as the new shareholders. To these members, it may well appear that the defendants have no real concern for the members' interest at all and their main consideration was their own selfish objective to enrich themselves out of the membership fees received by the Company. I infer that the defendants must have known these very real risks, and they have accordingly chosen information- suppression in the ES to minimise those risks to the success of the Scheme. I find that the predominant motive in their conduct was to ensure the success of the Scheme and not so much as to injure the reputation of the plaintiff. While the defendants' main intention and dominant motive might have been to mislead the investors into accepting the Scheme by highlighting only the role of the plaintiff and the other former shareholders and directors on the one hand and by suppressing on the other hand their own role in depleting the Company's funds, it was nevertheless *not* the defendants' dominant motive to defame the plaintiff.

196 The defendants obviously could not plainly reveal the whole story and tell it as it is in the ES. They told as much as they could with the exception of those facts that implicated themselves in drawing down the Company's cash reserves. As much as they could, they therefore avoided setting out clearly in the ES any part of their culpable role in depleting the cash reserves of the Company. Where it was unavoidable, they had to be very economical with what had to be said and to keep it vague in the ES but not tell a positive lie. Being economical with the truth is insufficient evidence of express malice on the facts of this case. A good example was the $124 million dividend buried somewhere in the middle of the ES at p 190. In the course of their information-suppression on their own role, the consequential effect is a deflection of the blame for the Company's dire financial straits to the former directors and shareholders including the plaintiff.

197 It did not appear to me that the defendants had much room to manoeuvre here. If the Company's ES were to set out the defendants' full involvement, there could be a fiasco. The defendants' predominant motive was to have a smooth passage for its proposed scheme of arrangement. Hence, the defendants' main motive was to suppress from the main text any information concerning the payment of $55.1 million in

dividends to themselves so as to get the Scheme approved by the members, although they had the knowledge that it would cast the plaintiff in a bad light and gain sympathy from members who would think the defendants were white knights in shining armour rescuing the Club from what had happened before the defendants came in.198 Surprisingly, plaintiff's counsel appears to have conceded in his submission that one of the real and collateral purposes in publishing the ES was to convince as many Scheme creditors as possible to compromise their rights and accept the compensation in vouchers, and to mislead them into voting in favour of the Scheme, and if so, then the predominant motive in the publication of the defamatory statements does not seem to be to injure the plaintiff as such, but rather to get the Scheme approved by the Scheme creditors (by resorting to some deliberate non-disclosure and clever concealment of the defendants' own role). Plaintiff's counsel submitted that:

> The real or collateral purpose in publishing the ES was to deflect blame for [the Company's] financial difficulties in 2005 to the former directors/shareholders of [the Company] (of which Peter Lim is alleged to be one), and to **paint themselves in the best possible light so as to convince as many Scheme Creditors as possible to compromise their rights and accept compensation in vouchers.**
>
> This guiding aim and motivation colours the manner in which Margaret Tung and Lin Jian Wei intentionally and deliberately caused the information in the ES to be presented, while at the same time, seeking to present the facade of them being the 'saviours' and 'white knights' of [the Compnay], **in order to mislead the Scheme Creditors to vote in favour of the Scheme.**
>
> If not for the manner in which the ES was presented, the Scheme Creditors would not have supported the Scheme. It is unbelievable and incredible that any Scheme Creditor would agree to compromise the overall liability claim of $48 million whilst knowing that Margaret Tung and Lin Jian Wei pocketed over $54 million dividends themselves. This meant they had received their shares in [the Company] for free, caused [the Company] to wipe out directors'/shareholders' loans of $65 million and to incur a tax liability of over $100 million, and obtained an additional $14 million ($54 million - $40 million) in cash from [the Company].
>
> …..
>
> As there was already a suspicion of dissipation of [the Company's] assets, Margaret Tung and Lin Jian Wei would have been extremely mindful not to provide any information which might have suggested any blame on their part. **Otherwise, the Scheme Creditors would not only have rejected the Scheme, but would have been fortified to place** [the Company] **in liquidation such that** [the Company's] **accounts would have been open for inspection, so that any wrongful payments by** [the Company] **can be recovered by the liquidators (for the benefit of creditors). This was something Margaret Tung and Lin Jian Wei wished to desperately avoid, as evident from the terms of Lin Jian Wei's letter to the members of the Club appealing for support for the Scheme.**
>
> In the backdrop of the mounting discontent of the Raffles5000, Margaret Tung and Lin Jian Wei had to find scapegoats - this they achieved in the ES by the manner in which they sought to deflect blame to the former directors/shareholders.
>
> …….
>
> The theme of deflecting blame to the former shareholders/directors permeates the ES. In fact, this theme to deflect blame to the former shareholders/directors had been in place since Margaret Tung and Lin Jian Wei assumed control of [the Company] in April 2001 to fend off the prospect of

> legal action from the members of the Club. Since the time they assumed control of [the Company], all Margaret Tung and Lin Jian Wei have done is to consistently push the blame to the former directors/shareholders of [the Company] (of which Peter Lim is alleged to be one), and constantly paint a misleading picture of [the Company's] financial position. This was the position taken by [the Company] (at Margaret Tung's and Lin Jian Wei's directions) throughout the Raffles5000 Suit. (Emphasis added.)

199 What is plain to me is that the defendants did not set out with the intention to injure or defame the plaintiff in the ES. It bears stressing that it was the plaintiff's own evidence under cross-examination at the trial that (i) he did not know the defendants personally; (ii) he had never spoken to them before; and (iii) the first time he had ever even seen the defendants was at the trial of this action. On the plaintiff's own evidence, I am prepared to draw the reasonable inference that the defendants had no reason to be spiteful or vindictive in relation to the plaintiff.

200 Neither can I discern a predominant motive in their actions and conduct in relation to the publication of the ES to injure or defame the plaintiff. The ES was targeted at the members to persuade them though I must add, in a rather devious way by not telling them the whole truth but only half truths. I accept that it was not an entirely satisfactory ES as it did not explain everything that was needed to be explained as was indicated by counsel to the court. The result is a pushing of substantially all the blame to the former shareholders including the plaintiff. The defendants should have been honest with the Club members to disclose their own substantial part in laying their hands quickly on as much as they could from the cash collected from the membership fees, which total a staggering $515 million. Instead, they camouflaged their own involvement so that the Scheme creditors would not be angered to vote against the Scheme proposed by the "perpetrators" themselves so to speak. Their predominant motive for their action was therefore to influence the Scheme creditors and win their support for the Scheme and not to deliberately or maliciously injure the reputation of the plaintiff.

201 From the totality of the evidence, I am not able to find sufficient evidence to form a conclusion where I can infer express malice in this case on a balance of probability, though I accept that from the deliberately vague and suggestive manner in which 'information' was presented, coupled with the omission of material facts, the ordinary reasonable reader would assume that the dividends and the off setting of loans from dividends were all the result of the wrongful acts and/or omissions of the former directors/shareholders of the Company (of which the plaintiff was alleged to be one), which was the reason why I had found the statements to be defamatory. But something more must be found beyond the defamatory statements before I would be prepared in this case to find that there was express malice on the part of the defendants.

202 The present proprietors of the Club were only too eager to lay their hands on this large cash hoard. Whether they had any concerns for the future well-being of the Club and its contingencies would be another matter. Obviously, that would not be in their minds as can be seen from the manner in which the defendants dismantled the Deferred Accounting System and the amounts of dividends they decided to withdraw for themselves leaving barely enough cash in the Company such that the Company could not even meet the damages awarded to the members.

203 The issue is whether it can be said that in the publication of those defamatory statements, the need to injure the plaintiff had been the defendants' *dominant* motive. In *Horrocks v Lowe,* Lord Diplock's words bear mention (at 151):

> Qualified privilege would be illusory, and the public interest it is meant to serve defeated, if the protection it affords were lost merely because a person, although acting in compliance with a

duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it.

204 In *Carter-Ruck on Libel and Slander* (Butterworths, 5th Ed, 1997), the authors emphasise (at 158) that "the vehemence or exaggeration of the language used, if wholly disproportionate to the requirements of the situation, may constitute some evidence of malice" and this is something the courts may take into consideration. As I noted in *Arul Chandran* (at [304]), in considering what a person's dominant motive is and whether there is any ill-will, spite or anger, the court can consider the kind of language used, the way the issues have been presented, whether the person has been deliberately provocative, sarcastic antagonistic and unduly personal. In fact, the language used in the statements complained of is neither vehement nor spiteful but subtle and restrained. In all the circumstances of the case, it is my view that the predominant motive of the defendants in sending out the ES was to fulfil their legal duty under s 211 of the Act as well as allay the concerns of the Scheme creditors and not to injure the plaintiff's reputation. While the defendants may have concealed the role they played in causing the Company to land in dire financial straits to make it easier for them to persuade the Scheme creditors to approve the Scheme, I would not go so far as to say that it was their dominant motive to smear and damage the plaintiff's reputation. Therefore, the plaintiffs have not made out their case that the defendants were actuated by express malice in publishing the statements. The relatively high threshold for proving express malice on the part of the defendants has not been satisfied by the plaintiff. It has not been shown on a balance of probability that the defendants' desire to use the ES for its proper purpose played no significant part in his motives and that his dominant purpose was to injure the plaintiff's reputation by way of the statements complained (*i.e.* **Extracts 1 and 3**) of in the ES, the publication of which was a legal requirement under statute before seeking the necessary approvals from the Scheme creditors and the court for the Scheme.

Submission of no case to answer

205 In the adversarial system of justice, every party is entitled to conduct his case as he deems fit. In *Central Bank of India v Hemant Govindprasad Bansal* [2002] 3 SLR 190, S Rajendran J noted (at [21]) that:

> A decision by a defendant not to adduce evidence in his defence is a decision that ought not to be lightly taken. Where a defendant makes such an election, the result will be that the court is left with only the plaintiff's version of the story**. So long as there is some prima facie evidence that supports the essential limbs of the plaintiff's claim(s), then the failure by the defendant to adduce evidence on his own behalf would be fatal to the defendant. (**Emphasis added.)

206 On appeal, Chao Hick Tin JA in *Bansal Hermant Govindprasad v Central Bank of India* [2003] 2 SLR 33 ("*Bansal Hermant Govindprasad*") referred to the English Court of Appeal decision in *Storey v Storey* [1960] 3 All ER 279 where the Court emphasised that there were essentially two situations in which a submission of no case to answer may be made by a defendant; first, where even if the plaintiff's evidence is accepted on the face of it, no case has been made out against the defendant; and second, where the plaintiff's evidence is so unsatisfactory or unreliable that the plaintiff's burden of proof has not been discharged: *Sukhpreet Kaur Bajaj D/O Manjit Singh and another vs Paramjit Singh Bajaj and ors* [2008] SGHC 207 ("*Sukhpreet Kaur*") at [10].

207 At the close of the case, the plaintiff averred that there were legal implications following from the defendants' submission of no case to answer[note: 17]. First, the plaintiff argued that the burden

falls on him merely to prove a *prima facie* case, instead of a case based on a balance of probabilities, and such a burden is not difficult to discharge: *Lim Swee Khiang v Borden Co (Pte) Ltd and ors* [2006] 4 SLR 745 at [84] ("*Lim Swee Khiang*"). Second, the plaintiff contended that a *prima facie* case would be determined by assuming that all the evidence led by the plaintiff was true, unless it was inherently incredible or out of common sense. Third, where circumstantial evidence was relied on, it did not have to give rise to an irresistible inference as long as the desired inference was one of the possible inferences: *Relfo Limited (in liquidation) v Bhimji Velji Jadva Varsani* [2008] SGHC 105 at [20].

208 The defendants, on the other hand, submitted that they elected to call no evidence on their own because even accepting the plaintiff's evidence on the face of it, there was no legal case to answer in the first place. Further, the evidence led by the plaintiff was *so* unsatisfactory that the court should find that the burden of proof in making out his claim has not been discharged[note: 18]. They argued that no adverse inference should be drawn against them for failing to call evidence.

209 I agree with the defendants that the test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes no case in law or whether the evidence led by the plaintiff is so unsatisfactory or unreliable that its burden of proof has not been discharged (*Bansal Hermant Govindprasad*; *Lim Swee Khiang* and *Sukhpreet Kaur*). However, this does not mean that an adverse inference will be drawn immediately against the defendants simply because they chose to submit on a "no case to answer". In *Halsbury's Laws of Singapore* (2006 Re-issue) vol 10, para 120.025, the position of the courts on accepting evidence in the event a party submits no case to answer, is set out succinctly as follows (at p 39):

> The evidence is subjected to a **minimal evaluation** as opposed to a maximal evaluation… If, however, there is no evidence in support of any fact in issue, or any evidence is manifestly unreliable and should be excluded from that score, a submission of no case to answer will succeed. [emphasis mine]

210 On the facts of this case, much of the evidence is documentary in nature and is not disputed. Just as the plaintiff is able to rely on them, so can the defendants although they may have embarked on a course of "no case to answer". In reaching my decision that **Extracts 1 and 3** were defamatory, I have considered all the admissible evidence placed before me including the evidence that counsel from the defendants had elicited from the plaintiff in the course of his cross-examination that was or was not in favour of the defendants. Applying the principles that I have set out on a "no case to answer", the defendants have been able to come within the defence of "qualified privilege". However, the plaintiff was not able to show malice on the part of the defendants to defeat their defence of "qualified privilege", despite the defendants adopting a position of "no case to answer". A position of "no case to answer" does not diminish the usual burden remaining on the plaintiff to establish there was malice on a balance of probability on the totality of the evidence.

Conclusion

211 For the aforementioned reasons, while the statements complained of were defamatory, the plaintiff's action was accordingly dismissed as the defendants were able to rely on the defence of qualified privilege. The usual costs order will follow if the parties do not wish to be heard on costs.

[LawNet Admin Note: Annex A is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

[note: 1]2 PB 501-577.

[note: 2]2 PB 578-592.

[note: 3]2 PB 593-601.

[note: 4]Directors' Resolution dated 11 May 2001, 7 PB 2277.

[note: 5]Chronology of Events, Annexure A, Plf's Closing Submissions.

[note: 6]At p 15/391 of the ES.

[note: 7]*ibid,* at p.9.

[note: 8]3PB992-998.

[note: 9]3 PB 794.

[note: 10]3 PB 804-806.

[note: 11]Para 11(d) of the Defence; 7 PB 2277-2279; 2 PB 613, 630, 649, 667,669,690, 693, 713.

[note: 12]5 PB 1814-1821; 1st EFA dated 23 April 2001 (2 PB 501-509); 2nd EFA dated 11 May 2001(2 PB 578-582).

[note: 13]2 PB 425-426, *ibid.* 11.

[note: 14]Plf's Closing Submissions, p. 93-98.

[note: 15]Plf's closing submissions, at p.101

[note: 16]Notes of Evidence, 13 August 2008, 17:14 – 19:11.

[note: 17]Plf's Closing Submissions, at p. 18-21.

[note: 18]Appendix I, Dfs' Closing Submissions.

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Annex A

Yearly Expenditure on Directors' Remuneration [Note 1], Dividends, Professional & Consultancy Fees and Sales & Marketing Commissions

	1996/1997	1998	1999	2000	Total	2001	2002	2003	2004	Up to July 2005	Total
Directors' remuneration											
Lawrence Ang	4,335,200	614,400	286,200	505,200	5,741,000						
William Tan	704,000	312,000	-	-	1,016,000						
Dennis Foo	704,000	374,400	43,500	49,488	1,171,388						
Note 2	**5,743,200**	**1,300,800**	**329,700**	**554,688**	Note 3 **7,928,388**	Note 4 **936,514**	**504,848**	**482,478**	**590,991**	**306,110**	**2,820,941**
Expenses Note 5											
Lawrence Ang					1,286,546						
William Tan					71,499						
Dennis Foo					46,078						
Peter Lim					665,479						
					2,069,602						
Professional & Consultancy Fees											
Peter Lim	840,000	400,000	960,000	2,840,000	5,040,000	0	0	0	0	0	0
Others	1,254,328	512,145	442,814	271,977	2,481,264	4,055,844	3,568,249	Note 6 3,454,340	Note 7 5,541,454	Note 8 2,859,650	19,479,537
	2,094,328	**912,145**	**1,402,814**	**3,111,977**	**7,521,264**	**4,055,844**	**3,568,249**	**3,454,340**	**5,541,454**	**2,859,650**	**19,479,537**
Sales and Marketing Commission to Europa H	**32,960,000**	**38,831,000**	**6,476,724**	**-**	**78,267,724**	**0**	**0**	**0**	**0**	**0**	**0**
Dividends	**0**	**0**	**0**	**0**	**0**	**105,643,169**	**14,070,000**	**3,500,000**	**1,000,000**	**0**	**124,213,169**
Total	**40,797,528**	**41,043,945**	**8,209,238**	**3,666,665**	**95,786,978**	**110,635,527**	**18,143,097**	**7,436,818**	**7,132,445**	**3,165,760**	**146,513,647**

Note: -

1 Figures are compiled from: Raffles Town Club Pte Ltd's Audited Financial Statements for the years ending 1997 (PB Vol 2, p. 610), 1998 (PB Vol 2, p. 627), 2001 (PB Vol. 2, p. 688) and 2004 (PB Vol. 1, p. 367); Annual Reports of 1999 (PB Vol 2, p. 646) and 2000 (PB Vol 2, p. 665), 2001 (PB Vol 2, p. 688); the Explanatory Statement (PB Vol 1, p. 223); invoices rendered by Peter Lim to Raffles Town Club Pte Ltd and the letter dated 2 August 2002 from TeoFoongWongLCLoong to the Comptroller of Income Tax

2 This subtotal excludes other directors' remuneration

3 There is a disparity of $173,700 between this subtotal and the claim by Raffles Town Club Pte Ltd against Lawrence Ang, William Tan and Dennis Foo in Suit 46 of 2006/J

4 This figure includes some remuneration paid to Lawrence Ang

5 These figures are as set out in Raffles Town Club Pte Ltd's Statement of Claim in Suit 46, such being the subject of dispute in the same

6 It has been admitted by the Defendants that $3,000,000 was expended as consultancy fees

7 It has been admitted by the Defendants that $3,000,000 was expended as consultancy fees

8 It has been admitted by the Defendants that $1,700,000 was expended on feasibility studies in China