IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 137

Suit No 1033 of 2015
(Registrar's Appeal No 212 of 2016)

Between

Ezion Holdings Ltd

… *Plaintiff*

And

Credit Suisse AG

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Striking Out]
[Tort] — [Defamation] — [Malice]

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v
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10 October 2016, 14 November 2016; 15 February 2017

2 June 2017

Hoo Sheau Peng JC:

Introduction

1 This is a defamation action brought by the plaintiff, Ezion Holdings Ltd ("Ezion"), against the defendant, Credit Suisse AG ("Credit Suisse"), in respect of an analyst report published by the Defendant on 19 May 2015 ("the Report") and an e-mail sent by Credit Suisse on 20 May 2015 referring to the Report ("the E-mail"). I shall refer to the Report and the Email collectively as "the Publications".

2 In Registrar's Appeal No 212 of 2016 ("RA 212/2016"), Ezion appealed against the decision of the learned Assistant Registrar Wong Baochen ("the AR") to strike out a plea of malice contained in para 11 of Ezion's amended reply under O 18 r 19 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC"). I upheld the AR's decision, and Ezion has appealed

against my decision. I now set out my reasons.

Background facts

The parties

3 Ezion is a company incorporated in Singapore and listed on the Singapore Exchange ("SGX"). It is in the business of owning oil rigs and vessels, and providing ship management services. Credit Suisse is a bank incorporated in Switzerland with a branch in Singapore.

The AMS suit

4 On 24 April 2015, Atlantic Marine Services BV ("AMS") commenced High Court Suit No 401 of 2015 against Ezion ("the AMS suit"), alleging, *inter alia*, that Ezion was involved in a conspiracy to induce a third party company, Maersk Olie og Gas A/S ("Maersk"), to breach its charter contracts with AMS ("the conspiracy").

5 On 18 May 2015, the AMS suit was reported by Bloomberg, the Straits Times and the Business Times. On the same day, Ezion issued a press statement through SGX stating, *inter alia*, its "strong opinion that the claims by AMS as reported by Bloomberg and The Straits Times are frivolous and without merit" ("the SGX statement").

The Publications

6 On 19 May 2015, Credit Suisse published the Report, which was titled "Ezion Holdings Ltd – Examining the details of a lawsuit by AMS". As its title suggests, the Report set out the details of the claims made by AMS against Ezion in the AMS suit. It also set out Ezion's belief that the claims

were "frivolous and without merit". In its conclusion, the Report further stated that in light of the AMS suit, Credit Suisse viewed Ezion's shares as being "expected to underperform". I shall consider the contents of the Report more closely at [34].

7 The Report was authored by the Director of Credit Suisse's Equity Research division, Mr Gerald Wong ("Mr Wong"), with the assistance of a research associate, Mr Shih Haur Hwang ("Mr Hwang").

8 The Report was published on a part of Credit Suisse's website that was accessible to Credit Suisse's market professional and institutional investor clients upon entry of user identifications and passwords. As an analyst report, the Report was also published on a website controlled by Bloomberg, which was accessible to Bloomberg's customers upon the entry of user identifications and passwords.

9 On 20 May 2015, Credit Suisse sent the E-mail to its market professional and institutional investor clients. The E-mail contained a bullet-point summary of the Report, a hyperlink to the full electronic copy of the Report on Credit Suisse's website, and hyperlinks to eight other recent analyst reports on Ezion which were also published on Credit Suisse's website.

10 On 17 June 2015, AMS discontinued the AMS suit against Ezion. The next day, Ezion's solicitors wrote a letter informing Credit Suisse that Ezion considered the Report defamatory. They demanded that Credit Suisse, *inter alia*, remove the Report from publication and circulation, provide a written apology, and compensate Ezion by way of damages. On 25 June 2015, Credit Suisse's solicitors replied by letter denying that the Report was defamatory in any way, and invited Ezion to provide more information about the AMS suit

for a subsequent analyst report. The parties' solicitors continued to exchange written correspondence in which both sides maintained their respective positions as to whether the Report was defamatory of Ezion.

Procedural history

The pleadings

11 On 9 October 2015, Ezion commenced the present action against Credit Suisse, claiming in its statement of claim ("the Statement of Claim") that the Publications were defamatory of Ezion. Ezion sought damages, an injunction to restrain Credit Suisse from further publication and costs.

12 The defence filed by Credit Suisse on 3 November 2015 ("the Defence") stated that the natural and ordinary meaning of the words complained of in the Publications was not defamatory. Even if the words complained of in the Publications were found to be defamatory, it was pleaded in the Defence that:

> (a) the contents of the Publications were "true in substance and fact" ("the plea of justification"); and
>
> (b) the Publications were made "on an occasion of qualified privilege under common law" and/or "on an occasion of qualified privilege pursuant to s 12 of the Defamation Act (Cap 75, 2014 Rev Ed) [('Defamation Act')], read with Part 1 to the Schedule therein" (collectively to be referred to as "the defence of qualified privilege").

13 Ezion filed its reply on 24 November 2015, which was amended and filed again on 27 November 2015 ("the Reply"). To defeat the defence of qualified privilege, it was pleaded at para 11 of the Reply that the Publications

"were published with actual malice as [Credit Suisse]… did not have an honest belief in the allegations complained of and/or published the allegations with a dominant improper motive".

The striking out applications

14 On 5 January 2016, both parties filed striking out applications under O 18 r 19 of the ROC. Credit Suisse sought to strike out Ezion's claim in its entirety on the ground that the words complained of in the Publications were not defamatory of Ezion. In the alternative, Credit Suisse sought to strike out the plea of malice set out in para 11 of the Reply. As for Ezion, it sought to strike out the plea of justification set out in paras 9, 10, 17 and 18 of the Defence.

15 The AR heard the parties' striking out applications together. With regard to Credit Suisse's application to strike out Ezion's claim in its entirety, the AR relied on the principle in *Chase v News Group Newspapers* [2003] EMLR 218 ("*Chase*") that there are three "levels" of meaning when considering whether the words complained of are defamatory by their natural and ordinary meaning. *Chase* has been applied by the Singapore courts (see *Ng Koo Kay Benedict and another v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860 at [16]–[17]), and the parties did not dispute the legal principle. The AR found that the words in the Publications could not have meant that Ezion was indeed guilty of the conspiracy and the other allegations levelled against it in the AMS suit (the "*Chase* Level One meaning"). However, the AR disagreed with Credit Suisse's submissions that the Publications plainly did not give rise to *reasonable grounds to suspect* Ezion to be guilty of what was alleged in the AMS suit (the "*Chase* Level Two meaning") or *grounds to investigate* Ezion's guilt (the "*Chase* Level Three

meaning"). The claim was hence not liable to be struck out with respect to the *Chase* Levels Two and Three meanings. The AR thus ordered Ezion to amend the Statement of Claim to plead only the *Chase* Levels Two and Three meanings, and not the *Chase* Level One meaning.

16 Next, the AR found that paras 9, 10, 17 and 18 of the Defence disclosed a reasonable defence of justification, and noted that the legal position on this issue was not entirely settled. The AR dismissed Ezion's application to strike out the plea of justification.

17 Finally, the AR granted Credit Suisse's application to strike out Ezion's plea of malice, on the grounds that it was factually unsustainable and therefore "frivolous and vexatious" under O 18 r 19(1)(*b*) of the ROC, and that it may "embarrass or delay the fair trial of the action" under O 18 r 19(1)(*c*). On the issue of whether Credit Suisse had an "honest belief" in the truth of the allegations, the AR did not find any evidence at all giving rise to an inference that Credit Suisse was reckless as to the truth or falsity of the allegations made in the Publications. As for Credit Suisse's alleged "dominant improper motive", the AR found Ezion's evidence on this issue to be circumstantial and impermissibly speculative. Accordingly, the AR struck out the plea of malice.

The Registrar's Appeals

18 Subsequently, the parties appealed against the AR's decisions. I heard the three appeals together.

19 In RA 214/2016, Credit Suisse appealed against the AR's decision not to strike out Ezion's claim in its entirety. In this regard, Credit Suisse argued that the "antidote" – of Credit Suisse reporting Ezion's denial of the claims in the AMS suit – was sufficient to cure the "bane" (if any) of the defamatory

sting in the offending words in the Publications: see *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 at [18(e)]. In my view, it was not plain and obvious that the words in the Publications, read in context and in entirety, were incapable of conveying either of the defamatory meanings under *Chase* Levels Two or Three to an ordinary reasonable person. Accordingly, I dismissed the appeal.

20 RA 213/2016 concerned Ezion's appeal against the AR's decision not to strike out Credit Suisse's plea of justification. I agreed with the AR that there was no reason to strike out the plea of justification, and affirmed the decision.

21 As for RA 212/2016, it involved Ezion's appeal against the AR's decision to strike out the plea of malice. Specifically, Ezion contested the striking out of the plea of malice on the basis that Credit Suisse did not have an honest belief in the truth of the Publications, as particularised in paras 11.1 to 11.6 of the Reply. Originally, in paras 11.7 to 11.15 of the Reply, Ezion also alleged that Credit Suisse had published the Publications with the "dominant improper motive" of depressing the price of Ezion's shares, so as to increase Credit Suisse's profits from short-selling Ezion's shares. However, before me, Ezion chose not to challenge the striking out of the plea of malice based on the alleged "dominant improper motive". Once again, I agreed with the AR that the plea of malice founded on Credit Suisse's lack of honest belief was factually unsustainable, as well as woefully lacking in particulars. Accordingly, I dismissed the appeal. It is against this decision that Ezion has further appealed, and my analysis follows.

The legal principles

22 I begin with the legal principles, which are largely undisputed by the parties. In the common law of defamation, the defence of qualified privilege can arise where a defendant makes a statement pursuant to a legal, social or moral duty, or in the furtherance of a legitimate interest, to a person with a corresponding duty or interest to receive it: see *Arul Chandran v Chew Chin Aik Victor* [2000] SGHC 111 at [242]. By s 12(1) of the Defamation Act read with Part I of the Schedule thereto, qualified privilege is accorded to certain reports and matters published by newspapers in prescribed circumstances.

23 However, malice, if proven, can defeat a defence of qualified privilege: see *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 ("*Lim Eng Hock Peter*") at [36], and s 12(1) of the Defamation Act. A plaintiff seeking to establish malice can prove that the defendant either (a) lacked honest belief in the truth of the statements; or (b) having a genuine or honest belief in the truth of the defamatory statements, had the dominant intention of injuring the plaintiff or some other improper motive in making the statements complained of: see *Lim Eng Hock Peter* at [38]; *The Wellness Group Pte Ltd and another v OSIM International and others and another suit* [2016] 3 SLR 729 at [271].

24 As further explained by the Court of Appeal in *Lim Eng Hock Peter* at [40] (quoting the decision of the High Court of Australia in *Roberts and another v Bass* (2002) 212 CLR 1 ("*Roberts v Bass*") at [76]), a defendant's lack of honest belief "provides a premise for inferring that the defendant was actuated by an improper motive in making the publication". Proving a lack of honest belief is therefore "a way of establishing that the defendant was acting from an improper motive and relieves the claimant from the burden of

showing what that was": see *Gatley on Libel and Slander* (Alastair Mullis & Richard Parkes QC, gen eds) (Sweet & Maxwell, 12th Ed, 2013) ("*Gatley*") at para 17.4.

25 A defendant's lack of honest belief in a statement may in turn be proven either by showing its *knowledge* as to the falsity of the statement, or that it was *recklessly indifferent* as to the truth or falsity of the statement to the point of wilful blindness: see *Lim Eng Hock Peter* at [40] citing *Roberts v Bass* at [98]. In this connection, the inquiry as to the defendant's recklessness and state of mind is a subjective rather than an objective exercise (see *Gatley* at para 17.16), and the threshold to be met is high. As stated in *ABZ v Singapore Press Holdings Ltd* [2009] 4 SLR(R) 648 at [63(c)], "carelessness, impulsiveness or even irrationality in arriving at a belief that the statements are true is *not* to be equated with recklessness" [emphasis in original].

26 A plea of malice is "a very serious allegation of intentional impropriety or bad faith": see *Gatley* at para 28.6. In that light, stringent requirements apply to raise the plea. Order 18 rule 12(1)(*b*) of the ROC requires a party alleging malice to provide particulars of the facts on which it relies. Specifically, in a defamation action, O 78 r 3(3) requires a plaintiff to "serve a reply giving particulars of the facts and matters from which the malice is to be inferred" when the defendant has pleaded that the words complained of were published upon a privileged occasion. As described in the English case of *Claire Henderson v The London Borough of Hackney and The Learning Trust* [2010] EWHC 1651 (QB) ("*Henderson*"), a plea of malice "is tantamount to one of fraud or dishonesty and must be pleaded with scrupulous care and specificity" (at [40]).

27 Thus, it was observed in *Nirumalan K Pillay and others v A*

Balakrishnan and others [1996] 2 SLR(R) 650 ("*Nirumalan*") at [9]–[10] that "plaintiffs who intend to allege express malice must be in possession of facts and matters which support malice and not concoct a case by introducing irrelevant facts which embarrass the defendant". It is also clear that, when pleading the particulars of malice, "[m]ere assertion will not do": see *Henderson* at [34]. Finally, where the defendant is a company, "the claimant should give particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent, as well as pleading the facts from which malice is to be inferred": see *Gatley* at para 28.6, citing *Bray v Deutsche Bank AG* [2008] EWHC 1263 (QB) ("*Bray*") at [16].

28 A plea of malice may be struck out as being defective for not adhering to the rules of pleadings: see *Nirumalan* at [18]; *Henderson* at [41] and *Bray* at [35] and [74]. Indeed, it is uncontroversial that a pleading may be struck out on the ground that it "may prejudice, embarrass or delay the fair trial of the action" under O 18 r 19(1)(*c*) of the ROC. Such "[p]rejudice or embarrassment may result when a party fails, in a fundamental sense, to comply with the rules of pleading or other rules with the consequence that the other party is put at a disadvantage in his ability to respond": see Jeffrey Pinsler SC, *Singapore Court Practice 2017*, Vol 1 (LexisNexis, 2017) at p 810.

29 For completeness, pursuant to O 18 r 19(1)(*b*), a pleading may be struck out as being "scandalous, frivolous or vexatious". In *The Bunga Melati 5* [2012] 4 SLR 546 ("*Bunga Melati*") at [32], the Court of Appeal explained that a "frivolous or vexatious" claim is one that is plainly or obviously unsustainable, be it legally or factually. An action is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the

documents or other material on which it is based" [words in square brackets in original]: see *Bunga Melati* at [39].

The parties' cases

30 Turning to the parties' cases, Ezion alleged that Credit Suisse was recklessly indifferent to and lacked honest belief in the truth of the allegedly defamatory statements. The particulars stated in paras 11.1 to 11.6 of the Reply concerned Credit Suisse's conduct before and after the Publications, which I shall discuss below. Ezion attributed the malice to "the authors of the Report and/or those within [Credit Suisse] who gave instructions for it to be published (whose identities are to be provided on discovery)". As noted above at [21], before me, Ezion did not rely on any particular dominant improper motive on Credit Suisse's part. Nor was it pleaded or argued that Credit Suisse had actual knowledge that the contents of the Publications were false.

31 In response, Credit Suisse submitted that, based on the conduct before and after the Publications raised by Ezion, there were no grounds to allege that it had acted recklessly in making the Publications, or lacked honest belief in the truth of the statements contained therein. Further, the authors, Mr Wong and Mr Hwang, filed affidavits to explain the steps taken to verify the Publications' contents, and deposed to the fact that they honestly believed in the said contents. When writing the Report, Mr Wong and Mr Hwang relied on (a) the statement of claim filed by AMS in the AMS suit, (b) the articles on 18 May 2015 by Bloomberg, the Straits Times and the Business Times, and (c) the SGX statement as sources of information. Ezion has not been able to contradict their evidence. Credit Suisse also argued that the particulars within paras 11.1 to 11.6 were wholly inadequate and insufficient to sustain the plea of malice. The particulars of the individuals within Credit Suisse who were

alleged to have the necessary malicious intent were also not pleaded. It therefore argued that the plea of malice was properly struck out for being factually unsustainable, or for the insufficiency of particulars.

My decision

32 As a preliminary point, I note that the precise meaning and import of the words in the Publications have not been conclusively determined at this stage of the proceedings. For the purpose of this inquiry, I took Ezion's case at its highest, and assumed the defamatory character of the words complained of to be as pleaded by Ezion (without the *Chase* Level One meaning). In other words, I proceeded on the basis that, objectively, the offending words in the Publications did in fact convey to an ordinary reasonable person that there were reasonable grounds to suspect and/or grounds to investigate Ezion's guilt (on the *Chase* Levels Two and Three meanings), but that the Publications were made on occasions of qualified privilege.

33 To prove malice, Ezion had to show that Credit Suisse was subjectively and recklessly indifferent to whether there were (a) reasonable grounds to suspect Ezion to be guilty of unlawful conspiracy and the other allegations made in the AMS suit (on the *Chase* Level Two meaning), or (b) grounds to investigate Ezion's guilt in the same regard (on the *Chase* Level Three meaning). For the reasons below, it was clear to me that there was no substance in the allegation that Credit Suisse acted with a "lack of honest belief".

The contents of the Publications

34 To begin with, I considered it appropriate to look to the actual words and contents of the Publications. I reproduce here the Report's bullet-point

introduction ("the introduction") which summarised the contents of the Report:

> - In this report, we examine the details of the lawsuit against Ezion after going through case filings from the Singapore High Court. Ezion has been sued by AMS for a 'conspiracy' to induce Maersk to breach charter contracts with AMS. According to claims by AMS, it has agreed to an inflated dayrate for three service rig units on bareboat charter with Ezion, with an expectation the difference will be used to exercise options acquiring stakes in two of the rigs.
> - In late 2014, AMS stopped receiving payments from an account held by Ezion set up for the service rigs, making it unable to pay for the bareboat charter. AMS claims that by issuing a letter of demand, Ezion was creating an impression that AMS was facing financial difficulties, inducing Maersk to terminate the contracts.
> - *According to Ezion, it has received feedback that AMS had failed to meet contractual obligations, and Ezion is looking to potentially operate the rigs for Maersk. This might have led AMS to seek an injunction to stop communication between Ezion and Maersk.*
> - We expect the lawsuit to be a near-term overhang. Maintain UNDERPERFORM.
>
> [emphasis added]

The introduction was followed by the main body of the Report, which comprised four main sections titled:

(a) "Lawsuit for alleged conspiracy to breach contracts";

(b) "Claims of payment of inflated rates";

(c) "Waterfall agreement"; and

(d) "*Ezion believes claims are frivolous and without merit*" [emphasis added].

35 In my view, the language used throughout the Report demonstrated

that the authors did not write the Report with reckless indifference. Throughout the Report, phrases such as "[a]ccording to claims by AMS," and "AMS claims that" preceded AMS's claims and allegations set out in the Report. More significantly, the last of the four sections in the Report's main body (see [34(d)] above) was devoted to setting out Ezion's views and beliefs regarding the AMS suit. These features of the Report were also true of the Email, which reproduced the introduction as a summary of the Report.

36 As I stated at [19] above, in relation to RA 214/2016, I did not find it to be plain and obvious that, on an objective basis, the offending words of the Publications could not convey any defamatory meaning whatsoever to an ordinary reasonable person, and that the "antidote" offered by reporting on Ezion's denial of the claims was obviously sufficient to cure the "bane" (if any). This was an issue to be determined at trial. However, the "antidote" seriously undermined any contention that Credit Suisse had acted with malice.

37 Indeed, Credit Suisse's efforts in reiterating that it was reporting claims and allegations made by AMS, as well as in including Ezion's response and views despite the fact that a defence had not been filed in the AMS suit, were strong indications that Credit Suisse had exercised caution when drafting the Publications. Based on the contents of the Publications, it was tenuous to allege that Credit Suisse had acted carelessly or negligently, much less in reckless disregard of the truth.

Credit Suisse's conduct prior to the Publications

38 Ezion submitted that Credit Suisse's conduct preceding the Publications was proof that it had acted in reckless indifference as to the truth. According to Ezion, Credit Suisse previously published two inaccurate reports on Ezion on 9 July 2014 and 5 February 2015 containing views contrary to

those expressed in the majority of financial reports by other banks. In meetings with Ezion's Chief Executive Officer Mr Chew Thiam Keng on 7 April 2015 and 7 May 2015, representatives of Credit Suisse including Mr Wong gave assurances that Credit Suisse would in future approach Ezion to verify facts before publishing analyst reports on it. Although Credit Suisse averred that it made multiple attempts to contact Ezion regarding a previous analyst report dated 9 July 2014, Credit Suisse did not dispute that it did not contact Ezion prior to 19 May 2015 to verify the contents of the Publications.

39 Ezion also took issue with the fact that Credit Suisse did not contact any third parties to ascertain the facts and parties' positions in the AMS suit prior to the publication of the Report. This was in contrast to the articles of 18 May 2015 by Bloomberg and the Straits Times on the AMS suit, which quoted third parties such as Maersk which refuted AMS's allegations against Ezion.

40 Ezion argued that, since Credit Suisse was well aware of Ezion's position that the AMS suit was frivolous, it should have contacted Ezion and/or third parties to verify the contents of the Publications. It was submitted that Credit Suisse's failure to do so was indicative of its reckless indifference to the truth. Ezion cited *Evans on Defamation in Singapore and Malaysia* (Keith R Evans QC, gen ed) (LexisNexis, 3rd Ed, 2008) ("*Evans*") at p 166 for the proposition that "purposely abstaining from inquiring into the facts or from availing oneself of means of information at hand, or deliberately stopping short of inquiries in order not to establish the truth, is malice".

41 Further, Ezion relied on *Lee Kuan Yew v Davies Derek Gwyn and others* [1989] 2 SLR(R) 544 ("*Davies Derek Gwyn*"), in which the court (at [118]–[119]), in reaching its finding of recklessness, gave weight to the fact

that the defendants had made no attempt to verify the facts provided by a source which they should have known was prejudiced against and adverse to the plaintiff and the Government. Ezion argued that Credit Suisse's failure to verify the Report's contents similarly amounted to recklessness because Credit Suisse should have known that the allegations by AMS would have been one-sided and prejudiced against Ezion.

42 From the evidence adduced by Ezion, I did not see any basis to draw any inferences of recklessness on Credit Suisse's part. I reiterate that the test for recklessness is a subjective one, and that mere carelessness or negligence will not suffice (see [25] above). The circumstantial facts relating to Credit Suisse's conduct prior to the Publications were weak, and fell far short of showing that it had "purposely" or "deliberately" abstained from making further inquiries "in order not to establish the truth" (*cf Evans* at p 166).

43 I elaborate. Although Credit Suisse did not contact Ezion prior to 19 May 2015, by then, the SGX statement had been released. The SGX statement set out Ezion's strong denial of AMS' claims. It was clear that Credit Suisse checked the SGX statement. In fact, Credit Suisse reported on Ezion's position. Even taking into consideration any previous incidents between the parties, the lack of further verification from Ezion provided scant support for the allegation of malice in this instance.

44 As for the fact that Bloomberg and the Straits Times had consulted third parties for their views on the AMS suit, this had little relevance to the question of whether Credit Suisse was *subjectively* reckless or wilfully blind to the truth. Besides, I noted that the reports in the Bloomberg and the Straits Times were published *before* the SGX statement was made available. Ezion argued that the SGX statement emanated from Ezion, and would be accorded

less weight by readers than the alternative views of the third parties relied on by Bloomberg and the Straits Times. Even so, as discussed above at [36] and [43], Credit Suisse's reliance on the SGX statement and its efforts to set out Ezion's position remain important factors which served to refute any suggestion of malice.

45 Further, I note that *Davies Derek Gwyn* was a case that involved its own distinctive set of facts which led the court to find that the defendants must have appreciated that their source of information had a "deep grievance" against the plaintiff and his Government, and that the source had sent documents containing inaccurate accounts to the defendants "with a view to their writing and publishing a counter-attack on the Government" (at [118]). This was not the case here. As stated in *Roberts v Bass* at [109], "[f]ailure to inquire is not evidence of recklessness unless the defendant had some indication that what he or she was about to publish might not be true". In my view, unlike the situation in *Davies Derek Gwyn*, it did not amount to reckless indifference for Credit Suisse to have relied on the statement of claim for the AMS suit (which was filed in court) and the SGX statement (which was released by Ezion) without verifying further for the purpose of recounting the dispute between the parties.

46 The threshold for proving reckless indifference amounting to wilful blindness is a high one. Credit Suisse pointed to *Price Waterhouse Intrust Ltd v Wee Choo Keong and others* [1994] 2 SLR(R) 1070, in which the Court of Appeal stated that "a failure to obtain independent verification… did not in itself demonstrate a lack of honest belief" in the unverified information, nor warrant "any inference of malice" (at [45]). Similarly, in *Hytech Builders Pte Ltd v Goh Teng Poh Karen* [2008] 3 SLR(R) 236 (at [50]), malice was not established even though the defendant had not independently verified the

plaintiff's accounts before asserting that the plaintiff was "on the verge of collapse as a company". It was evident to me that Credit Suisse's failure to further verify the Publications' contents simply did not suffice to meet the high bar for proving recklessness, even taking into account all the other facts relied upon by Ezion.

Credit Suisse's conduct after the Publications

47 Ezion also relied on Credit Suisse's conduct after the Publications were made – *ie*, the fact that Credit Suisse did not report on the withdrawal of the AMS suit on 17 June 2015 – as evidence of recklessness and malice. Cited in support of Ezion's case was *DHKW Marketing and another v Nature's Farm Pte Ltd* [1998] 3 SLR(R) 774 ("*DHKW Marketing*") which stated at [38] that malice can be inferred "if a defendant refuses to apologise even after he is aware that the statement is false". I note, however, that this proposition was made in the context of establishing the elements of the tort of malicious falsehood, and the defence of qualified privilege in response to the defamation claim had already been withdrawn: see *DHKW Marketing* at [13] and [32]. On the other hand, Credit Suisse cited *Roberts v Bass* at [103] to argue that "mere failure to make inquiries or apologise or correct the untruth when discovered is not evidence of malice".

48 While post-publication conduct may be relevant to the question of malice in certain situations, the case authorities presented by the parties illustrate that it is highly unlikely for recklessness and malice to be made out based on a defendant's unwillingness to make an apology or a retraction. For instance, in *DHKW Marketing,* many other relevant facts such as the terms of the libel itself were taken into account by the court, and the defendant's unwillingness to apologise merely confirmed the court's finding that the

defendant had the dominant improper motive of eliminating competition in the market: see *DHKW Marketing* at [33]–[37].

49 Here, the AMS suit was discontinued on 17 June 2015, nearly one month after the Publications were published. Given the time that had elapsed, Credit Suisse's omission to report on the withdrawal of the AMS suit appeared to me to be irrelevant to the issue of whether it had acted in reckless indifference to the truth. Even if relevant, little weight could be placed on this factor. Credit Suisse's post-publication conduct could not form any substantive basis for any inference to be drawn as to Credit Suisse's state of mind at the material time.

The facts in totality

50 Considering the facts as a whole, I was satisfied that there was no substance to the allegation that Credit Suisse had acted in reckless indifference to the truth of the statements made in the Publications. An examination of the Publications indicated that Credit Suisse took care to convey that it was reporting on allegations made in the AMS suit, and to include Ezion's position *vis-à-vis* the allegations. The facts concerning Credit Suisse's acts and omissions before and after the Publications were the only matters relied upon by Ezion – as pleaded in paras 11.1 to 11.6 of the Reply – to contradict Credit Suisse's case, and to refute the positions of Mr Wong and Mr Hwang. However, collectively, these matters provided a very tenuous basis for any such allegation. The plea of malice was factually unsustainable. This met the "frivolous or vexatious" threshold under O 18 r 19(1)(*b*) of the ROC. Alternatively, I agreed that the facts pleaded by Ezion were insufficient to support a plea of malice on Credit Suisse's part. While remediable by way of an amendment, individuals within Credit Suisse alleged to have malicious

intent were also not particularised. Hence, the unsupported plea of malice could also be said to "embarrass or delay the fair trial of the action" under O 18 r 19(1)(*c*) of the ROC for failing to comply with the rules of pleading.

Conclusion

51 For the above reasons, I affirmed the AR's decision to strike out the plea of malice, and dismissed the appeal. I ordered costs of the appeal to be fixed at $4,000 with reasonable disbursements to be paid by Ezion to Credit Suisse.

Hoo Sheau Peng
Judicial Commissioner

Kenneth Tan SC (instructed counsel) (Kenneth Tan Partnership), Ramachandran Doraisamy Raghunath, Lee Weiming Andrew, Joan Xue and Roshan Singh (Peter Doraisamy LLC) for the plaintiff; Harpreet Singh Nehal SC, Foo Chuan Min Jerald and Goh Rui Xian Elsa (Cavenagh Law LLP) for the defendant.