Oei Hong Leong v Ban Song Long David and Others
[2005] SGCA 35

Case Number : CA 112/2004

Decision Date : 19 July 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Kan Ting Chiu J; Yong Pung How CJ

Counsel Name(s) : Michael Khoo SC, Josephine Low and Andy Chiok (Michael Khoo and Partners) for the appellant; Davinder Singh SC, Adrian Tan and Cheryl Tan (Drew and Napier LLC) for the first and second respondents; Tan Chee Meng, Doris Chia and Chang Man Phing (Harry Elias Partnership) for the third and fourth respondents

Parties : Oei Hong Leong — Ban Song Long David; 98 Holdings Pte Ltd; Singapore Press Holdings Ltd; Ong Catherine

Tort – Defamation – Defamatory statements – First respondent making various remarks regarding appellant – Comments published in newspaper article – Test for determining natural and ordinary meaning of words – Whether natural and ordinary meaning of words defamatory

Tort – Defamation – Fair comment – Whether remarks constituting comments based on facts on matter of public interest – Whether fair-minded person could honestly make same remarks on facts proved – Whether comments an expression of respondents' honest opinion of appellant's conduct

Tort – Defamation – Justification – Appellant criticised as being obstructive, oppressive and irrational – Whether appellant in fact obstructive, oppressive and irrational

Tort – Defamation – Malice – Whether test for malice for fair comment different from qualified privilege

Tort – Defamation – Qualified privilege – Whether comments proportionate response to attacks – Whether first respondent having interest or duty to make such communication to public and whether public having corresponding interest to receive it

19 July 2005

Kan Ting Chiu J (delivering the judgment of the court):

1 This action which came on appeal before us arose out of statements made in the course of a corporate takeover. The struggle was for the control of NatSteel Ltd ("NatSteel"). Two companies, Sanion Pte Ltd ("Sanion") and 98 Holdings Pte Ltd ("98 Holdings"), the second respondent, were the competing bidders.

2 Sanion was prominent businessman Mr Oei Hong Leong's vehicle for the exercise. He is the appellant in this action. 98 Holdings was associated with another prominent businessman, Mr Ong Beng Seng. The first respondent, Mr Ban Song Long David ("Mr David Ban") is a director of 98 Holdings, and was the source of the statements which led to the action. The statements were repeated in an article written by Ms Catherine Ong, the fourth respondent, which appeared in *The Business Times* ("BT") of 4 June 2003 published by Singapore Press Holdings Ltd, the third respondent.

3 In 2003, NatSteel was a company ripe for a takeover. A management buyout was proposed before 98 Holdings and Sanion moved in. 98 Holdings became involved first, then Sanion made its bid. The competition between the two companies caused 98 Holdings to increase its offer price four times, and to extend the closing date of its offer six times. Ultimately, it acquired 51.23% of NatSteel's shares, and gained control of the company while Sanion acquired 29.99% of the shares and became

NatSteel's largest minority shareholder.

4 After 98 Holdings acquired its majority interest, four of its nominees, including Mr David Ban, were appointed directors of NatSteel. On 16 March 2003, the board of directors of NatSteel announced that it would recommend a total dividend payment of $1 per share comprising a final dividend of 55¢ a share for 2002 and an interim payment of 45¢ per share for 2003. Shareholder approval was required for the 55¢ proposed payment but not for the 45¢ payment which was paid on 18 April 2003.

5 The company then convened an extraordinary general meeting ("EGM") on 28 May 2003 to consider several resolutions. Three of the resolutions were to approve:

(a) certain amendments to the Memorandum and Articles of Association, including the addition of a new article to provide for the payment of future dividends in scrip instead of cash ("the M&A resolution");

(b) *contingent upon the passing of the M&A resolution*, the payment of a special dividend of 55¢ per share ("the special dividend resolution"); and

(c) *contingent upon the passing of the M&A resolution*, a scrip dividend scheme under which shareholders could elect to receive future dividends declared in shares instead of in cash ("the scrip dividend resolution").

6 The special dividend and the scrip dividend resolutions were ordinary resolutions which could be passed on a bare majority vote. The M&A resolution, however, was a special resolution which needed to receive 75% of the votes of the shareholders present and voting to be carried out. This meant that the M&A resolution would be defeated if Sanion opposed it. As the special dividend payment was contingent on the passing of the M&A resolution, the special dividend payment could not be made.

7 These resolutions caused concern amongst the regulators and the shareholders because there was no prior indication that the 55¢ dividend was conditional on the approval of the payment-by-scrip proposal. Explanations were sought by the Singapore Exchange ("SGX") and the Securities Investors Association of Singapore ("SIAS") which prompted NatSteel to issue a statement on 19 May 2003 that the M&A resolution was necessary for the company to retain cash to fund its continuing businesses and to give it flexibility to raise capital effectively.

8 Sanion issued a statement on 22 May 2003 that it opposed the scrip dividend resolution. It explained that as it held 29.99% shares of NatSteel, it would, if it elected to receive scrip, have its shareholding raised above the 30% threshold, and be obliged to make a general offer for all the NatSteel shares. On the other hand, if it elected to receive cash while other shareholders took scrip, its shareholding may be diluted to below the 25% level, and its veto power over special resolutions would be lost.

9 98 Holdings attempted to address Sanion's concern on the evening of 27 May 2003 (the eve of the EGM) when it put forward a "whitewash" resolution. The effect of the resolution was that Sanion would be granted a waiver of its obligation to make a general offer if its shareholding exceeded 30% after the share dividend. The proposal had the support of the NatSteel board.

10 The whitewash proposal did not satisfy Sanion. At the EGM of 28 May 2003, its proxy, Mr Bobby Chow, complained that it was a "last minute decision" which was unduly complicated, and

he criticised the linkage of the resolutions as being "irrational and unnecessary". He also indicated that Sanion had other concerns, but did not disclose them. 98 Holdings' representative and solicitor, Mr Dilhan Pillay, expressed his willingness to meet Sanion's solicitors to work out a solution.

11 In view of Sanion's negative reaction, the EGM was adjourned for a week to 4 June 2003 for the matters to be considered further by NatSteel, 98 Holdings and Sanion.

12 Neither the appellant nor Sanion made any attempt to seek clarification of the proposals, or to elaborate on the position taken in opposition. In fact, the appellant left Singapore for a holiday without leaving any instructions to his solicitors. He explained in the course of cross-examination later that he had made a firm decision to oppose the resolutions regardless of any whitewash resolution.

13 On 4 June 2003, when the EGM was to be reconvened, an article by Ms Catherine Ong entitled "No resolution in sight for NatSteel-Oei stalemate" was published in BT.

14 The full text of the article read:

> No compromise between NatSteel and tycoon Oei Hong Leong appears in sight as shareholders gather today for a second time to approve payment of a cash dividend and the right to scrip dividends in the future.
>
> David Ban, a NatSteel director representing hotelier Ong Beng Seng's interests, told BT that attempts by the company's legal counsel, Allen & Gledhill, to sound out Mr Oei's intentions have come to naught.
>
> "He's playing his card close to his chest. His lawyer said the client is away," Mr Ban said of Mr Oei.
>
> NatSteel wasn't the only party who couldn't contact Mr Oei. David Gerald, president of the Securities Investors Association of Singapore (Sias), said yesterday he failed to arrange a meeting between Mr Oei and NatSteel's board.
>
> Mr Oei is out of town, an Sias statement said. "Up to now, it appears that minority shareholders are inclined to vote against all resolutions currently on the table."
>
> Minority shareholders, Sias added, are "outraged" that despite an assurance by the NatSteel board at the last annual general meeting that shareholders could expect dividends of $1 a share, only 45 cents has been paid.
>
> "NatSteel is now employing a new stance when paying the balance of the remaining one dollar … Sias calls on NatSteel board to severe [*sic*] the linkage (between the resolution to amend the M&A (memorandum and articles of association) and the resolution to pay the balance of 55 cents) and keep its promise to its shareholders," the Sias statement added.
>
> Mr Ban, however, feels that Mr Gerald is "playing to the gallery".
>
> "*What you have here is the obstructive action of a minority shareholder that is disadvantaging the majority, including 98 Holdings. It is not oppression by the majority but the minority. Everyone including 98 wants the dividends. If shareholders don't get their dividends, they should be blaming him.*"
>
> Mr Oei owns 29.9 per cent of NatSteel – above the crucial 25 per cent veto power over special

resolutions including the amendment of the company's M&A to allow for future share buy-back and scrip dividend.

He is unhappy that the board has tied the passage of a resolution to pay some $200 million in cash dividends to the M&A resolution. He is also opposed to giving the company a share buy-back mandate.

Observers believe that NatSteel board has made the payment of dividend conditional on the passage of the resolution to amend the M&A because it wants to be sure of securing Mr Oei's vote on the latter.

NatSteel has said the M&A changes are necessary to bring its M&A in line with recent changes to listing rules and, more importantly, to provide flexibility in future capital management.

To allay Mr Oei's concerns that any future scrip dividend could dilute his interest in the company, 98 proposed at last week's extraordinary general meeting an amendment to white-wash – that is, to waive shareholders' right to a general offer from Mr Oei should the scrip dividend result in his stake hitting the 30 per cent mark that triggers a mandatory offer.

Mr Ban said Mr Oei's opposition isn't rational. "He has made public the issue of dilution and we've addressed that with the white-wash, and we've asked him many, many times what are the other issues."

Mr Oei wasn't available for comment yesterday.

15 The appellant took objection to the article and sued the respondents on the ground that the words in italics ("the impugned words") were defamatory of him. Mr David Ban admitted the words were attributed to him in the article. However, he denied that the impugned words were defamatory.

16 The president of the SIAS, Mr David Gerald, took exception to being accused of playing to the gallery and instituted defamation proceedings in *Jeyasegaram David v Ban Song Long David* [2005] 2 SLR 712 ("*Jeyasegaram David*"). His action failed at trial, and met with the same result on appeal.

17 In his judgment in the appellant's action, *Oei Hong Leong v Ban Song Long David* [2005] 1 SLR 277, Tay Yong Kwang J, the trial judge, found:

> 87 To obstruct is to hinder or impede. An "obstructive action" would therefore be one that hinders or impedes progress towards an objective. The words suggest that the person guilty of the obstructive action is not very co-operative. That is not necessarily defamatory. They do not imply that that person is acting in a malicious or perverse manner. However, used in juxtaposition with "disadvantaging the majority", they do hint of unreasonable and unfair conduct. That reflects on a person's character or reputation and is defamatory.
>
> 88 Both sets of defendants submitted that "oppression" in the context of the BT article in issue did not have the legal meaning attributed to that term in s 216 of the Companies Act because it was used in a newspaper article and not in legal submissions. It was further argued that the ordinary reader of the BT would not understand it as having that legal meaning. In my view, it was clear that David Ban, an experienced company director, speaking in the context of a board-shareholder tussle, used that term in its legal sense as defined in s 216 Companies Act. Even if the meaning intended by him is irrelevant, a good number of readers of the BT would

understand what oppression in company law means even if they could not immediately recite the statutory formula. Unfairness on the part of the plaintiff and consequential prejudice suffered by those oppressed would spring to their minds upon reading the words of David Ban, especially with "oppression" used in the proximity of "disadvantaging". The fact that minority shareholders could not be guilty of oppressive conduct against the majority does not take the sting out of the word. Obviously, David Ban intended to inject a touch of critical irony.

89 Even if the word "oppression" is understood in its non-legal sense, it would still imply unfairness with consequential hardship suffered. The accusation that someone is behaving unfairly in a public matter and is thereby causing suffering to others reflects on his character or reputation and is defamatory.

90 The words "If shareholders don't get their dividends, they should be blaming him" are not defamatory in themselves. They were spoken in response to the SIAS statement reported in the same article about the outrage of shareholders in not having been paid the special dividend of 55 cents. However, they are tainted by the context in which they appear. They elaborate on the consequences of the plaintiff's alleged unreasonable and unfair conduct in his continued opposition to the resolutions and accuse him of being blameworthy as a result of being unreasonable and unfair.

91 David Ban's comment that the plaintiff's opposition was not rational must be read in the context of his earlier words. He was not accusing the plaintiff of being an irrational or mad man, contrary to what the plaintiff felt. Those words were a follow-up argument to his earlier comments about the plaintiff's obstructive action and oppressive conduct. It was as if David Ban had said, "I really do not see the logic of his continued opposition". By themselves, they are not defamatory but they are similarly tainted by the context in which they appear because they elaborate on the unreasonable and unfair conduct that the plaintiff has been accused of.

18 However, the judge found in favour of the respondents on the other defences of justification, qualified privilege and fair comment, and vicarious liability.

19 In his appeal before us, the appellant focused on four issues:

(a) whether the natural and ordinary meaning of the impugned words was substantially more defamatory than what the judge found;

(b) whether the respondents could succeed in the defences of justification, qualified privilege and/or fair comment;

(c) whether there was sufficient evidence of malice to disqualify the respondents from relying on the defences of qualified privilege and/or fair comment; and

(d) whether 98 Holdings was vicariously liable for Mr David Ban's words.

20 We dismissed the appeal after hearing arguments. We now explain our decision.

21 On the first issue, *ie*, the natural and ordinary meaning of the impugned words, it was contended that Mr David Ban had said that the appellant was acting in a perverse, malicious and deliberately obstructive and oppressive manner, with no concern as to the prejudice he was causing NatSteel or the massive detriment to small shareholders awaiting their dividends.

22 Is that the proper meaning of the impugned words? This court has ruled in *Microsoft Corporation v SM Summit Holdings Ltd* [1999] 4 SLR 529 at [53] that:

> The principles applicable in determining the natural and ordinary meaning of the words complained of in a defamation action are well-established. The court decides what meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense … 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.

23 The appellant has read too much into the impugned words. We agree with Tay J's findings on the meaning of the words, with one qualification. The judge found in [91] of his judgment that Mr David Ban was saying that he was not able to see the logic of the appellant's continued opposition to the proposals. Mr David Ban had gone beyond expressing incomprehension of the appellant's opposition, and was calling the opposition irrational.

Justification

24 Was that characterisation of the appellant's actions as obstructive, oppressive and irrational justified? When we examine the developments leading to the statement, we find that the appellant opposed the linkage on the ground that it might oblige him to make a general offer; or cause him to lose his veto power over special resolutions.

25 98 Holdings offered the whitewash proposal as a solution. Sanion's immediate reaction was to label it a complicated last-minute effort. No real criticism can be made against that initial response, and the decision to adjourn the EGM for a week recognised that more time was needed for the proposal to be examined, clarified and discussed, and for the other unspecified concerns of Sanion to be considered.

26 Sanion and the appellant did not do anything to try to resolve the dispute. They did not initiate, respond to, or engage in any discussion on the whitewash proposal, and the appellant placed himself out of reach to all parties concerned by his absence.

27 At the trial, the parties took different approaches on the issue of rationality. The appellant focused his arguments on the rationality of the linkage of the resolutions, while the respondents directed their arguments to the rationality of the appellant's opposition to the whitewash proposal.

28 We agreed with the latter approach. There was an active and continuing process of bids, counter-bids, proposals and responses during that period leading up to the EGM. When Mr David Ban called the appellant's position irrational, he was not referring to the entire saga but was specifically referring to the developments on the whitewash proposal and the request to the appellant to disclose his other concerns. He only had to justify his statements regarding the appellant's opposition which the appellant sued on. The rationality of the linkage of the proposals touched on another area of alleged irrationality which had no bearing on the rationality of the appellant's opposition.

29 The issue should be examined against the background of a situation where a substantial minority shareholder, Sanion, was opposing a proposal, which opposition threatened to stop a dividend payment to all the shareholders of the company. Efforts were made to modify the proposal and to deal with the opposition to the proposals, and time was given for further consultations to take place between the interested parties. Instead of making use of the opportunity to clarify matters, the objector withdrew into silence, refusing to engage in any way with any of the interested parties.

30 The appellant's conduct when so viewed, was obstructive, oppressive and irrational. He knew that he would scuttle the payment if he maintained his opposition to the proposals. While NatSteel and 98 Holdings were keen to work out a solution with him and the other shareholders were anxious to receive the special dividend, he rebuffed all efforts to seek a resolution. The defence of justification was made out.

Qualified privilege

31 Tay J set out the law in his judgment at [98] and [99]:

> The defence of qualified privilege accords a right to a person whose character or conduct has been attacked to answer such attack. Any defamatory statements he may make about the attacker will be privileged provided they are published *bona fide* and are fairly relevant to the accusations made. "The law justifies a man in repelling a libellous charge by a denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he published is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false. Mere retaliation, which cannot be described as an answer or explanation, is not protected, but the defendant is not required to be diffident in protecting himself and is allowed a considerable degree of latitude in this respect": see *Gatley on Libel and Slander* ([94] *supra*) at para 14.49.
>
> The defence is also available 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 made has a corresponding interest or duty to receive it: see *Adam v Ward* [1917] AC 309. The shareholders and the officers of a company have a common interest in the affairs of the company: see *Gatley on Libel and Slander* at para 14.44.

32 He then referred to the facts at [100]:

> The issue as at 3 June 2003 was not so much the correctness of the linkage of the resolutions but whether Sanion would accept the whitewash solution as proposed or in a modified form. The 28 May 2003 EGM, at which Sanion's proxy had criticised the linkage as irrational and unnecessary, was reported in the newspapers. Although the EGM was meant to be a closed-door matter, the proceedings had become very public. SIAS had issued a statement to Catherine Ong rehashing the issues debated on at the said EGM and that statement was going to be published in the BT article of 4 June 2003. The SIAS statement attacked the board of directors of NatSteel in public by stating that the minority shareholders were outraged by the board's failure to keep its promise of paying the remaining 55 cents in dividend. It must not be forgotten that the said attacks took place as part of an ongoing debate. David Ban, as chairman of the executive committee and a director of NatSteel, was entitled to respond to the attack, even if he was of the view that it was inspired by dramatic showmanship, by explaining why the shareholders' outrage ought to be directed at the plaintiff rather than the board.

and found, at [102]:

As NatSteel is a listed company, the public, in particular the shareholders, had an interest in its corporate governance. The defendant had a duty to respond to the criticism levelled against the board (with him as a director and the chairman of its executive committee) and the public, in particular the shareholders, had a corresponding interest in his response. The defence of qualified privilege therefore succeeds, unless malice is proved.

33 The response must be proportionate to the attack. Excessive replies made after the attack has already been answered, or as Steytler J put it in *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440 at 462, a statement which is "merely a further shot in the battle" which adds nothing to the answer given, will not be protected by qualified privilege.

34 The appellant argued that Mr David Ban's response of 3 June 2003 went beyond an answer because answers were already made and publicised, which rebutted the charge that the linkage was irrational. This argument was misdirected. It is correct that the criticisms of the resolutions had been answered. However, those were not the answers for which qualified privilege was pleaded. Qualified privilege was pleaded for Mr David Ban's response that the appellant's opposition to the whitewash resolution was irrational.

35 The statement on the appellant's rationality was not made before the interview with Ms Catherine Ong on 3 June 2003. When it was made, it was made for the first time, and it would enjoy qualified privilege if it was not made with malice.

36 The defence usually arises when a party makes a response to an attack. In exceptional cases where it is necessary in the reply to bring in a third party's name in explanation, the publication will be privileged – see *Gatley on Libel and Slander* (Sweet & Maxwell, 10th Ed, 2004) at para 14.63. If A accuses B of negligence that caused a building to collapse, and B's response is that the omissions of C caused the collapse, B can raise the defence against C.

37 In the present context, the defence may be available to Mr David Ban if he needed to refer to the appellant's conduct in responding to SIAS's statement. The SIAS statement was paraphrased in Ms Catherine Ong's article set out in [14] herein. SIAS disapproved of the resolutions on the basis that having promised to pay dividends of $1 a share, NatSteel should keep the promise without imposing the linkage to the scrip dividend proposal.

38 The complaint was that NatSteel was going back on its words. When Mr David Ban said that the appellant was being irrational, obstructive and oppressive, that had nothing to do with SIAS's attack, and he was not replying to it. We found that Mr David Ban's statement was a reply to Mr Bobby Chow's criticisms of the whitewash resolution, but it could not be regarded as a response to the SIAS statement.

39 However, the response must be proportionate to the attack in another way. When the attack is made in one forum, the response should be targeted at the same forum. As Mr Bobby Chow's criticisms were made at a company EGM, the response should be circulated to the parties at the EGM and to other parties reasonably expected to have learnt of the attack. When Mr David Ban's response was published in BT for all the readers to see, that exceeded the test of proportionality, and he could not claim qualified privilege for his right of reply.

40 Qualified privilege also arises, as explained by Tay J in [99] of his judgment, to a statement made by a party with an interest or duty to make it.

41 The privilege applies to communications between parties who have "a duty, legal, social or

moral, to persons who had a corresponding duty or interest to receive it" – *per* Stephenson LJ in *Blackshaw v Lord* [1984] QB 1 at 26. While the shareholders of NatSteel have the necessary interest, it cannot be said that all BT readers have the same interest. Although the NatSteel takeover battle was a matter of public interest, "[i]t is not enough that the publication should be of general interest to the public. The public must have a legitimate interest in receiving the information contained in it, and there must be a correlative duty in the publisher to publish" – *per* Dunn LJ in *Blackshaw v Lord* at 35.

42 When Mr David Ban's views were published in BT, he was expressing his views to parties who did not have the requisite duty or interest to receive them, the publication exceeded his right of reply, and he could not claim qualified privilege.

Fair comment

43 A plea of fair comment will succeed if:

(a) the words complained of are comments, although they may consist of or include inferences of facts;

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

(c) the comment is based on facts; and

(d) the comment is one which a fair-minded person can honestly make on the facts proved.

See *Chen Cheng v Central Christian Church* ("*Chen Cheng*") [1999] 1 SLR 94 at [33].

44 The first element is the most important one to establish because statements of fact are not protected. While there are statements which can be clearly characterised as either statements of fact or comments, the distinction is not always easy to make; and (at [35] of *Chen Cheng*):

> At the end of the day much depends on how the defamatory statement is expressed, the context in which it is set out and the content of the entire article or passage in question. One should adopt a common sense approach and consider how the statement would strike the ordinary reasonable reader, ie whether it would be recognizable by the ordinary reader as a comment or a statement of fact.

45 The appellant argued that Mr David Ban's statements were out-and-out factual allegations, or were so mixed up with the facts that the reasonable reader would not be able to recognise the comments from the assertions of fact. We did not accept that.

46 A reasonable reader of the BT article would understand it to reflect Mr David Ban's thoughts and reaction to the appellant's actions. He would note that Mr David Ban thought unfavourably of the appellant's actions, but he would read those words as comments rather than statements of facts.

47 The other three elements presented no difficulties. The takeover of NatSteel was a matter of public interest. The comments were based on the developing controversy over the dividend payment, the linkage and whitewash proposal and the appellant's responses, and a fair-minded person could have shared Mr David Ban's exasperation with the appellant.

48 The elements of fair comment having been made out, the defence would succeed unless the appellant could prove that Mr David Ban did not believe in the statements he made: see *Chen Cheng*

at [52].

Malice

49 Even when the requisite elements of qualified privilege and fair comment are established, these defences will fail if a statement was made with malice.

50 This court has hitherto assumed that the test for malice in qualified privilege and fair comment is the same, see *Jeyaretnam JB v Goh Chok Tong* [1984–1985] SLR 516 at 528, [36] and *Nirumalan K Pillay v A Balakrishnan* [1997] 3 SLR 25 at [32].

51 That assumption was examined by the Hong Kong Court of Final Appeal in *Cheng Albert v Tse Wai Chun Paul* [2000] 4 HKC 1. Lord Nicholls of Birkenhead at 17 noted that the purposes for which the law had accorded the defence of qualified privilege and the defence of fair comment were not the same in that while:

> ... The rationale of the defence of qualified privilege is the law's recognition that there are circumstances when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source …
>
> The rationale of the defence of fair comment is different, and is different in a material respect. It is not based on any notion of performance of a duty or protection of an interest. As already noted, its basis is the high importance of protecting and promoting the freedom of comment by everyone at all times on matters of public interest, irrespective of their particular motives.

therefore (at 22):

> [A] comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not *of itself* defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred. Proof of motivation may also be relevant on other issues in the action, such as damages. [emphasis in original]

52 There is much force in Lord Nicholls' reasoning. When a person pleads fair comment as his defence, he is not claiming that he was driven by duty to speak out. He is exerting his right to express his views on a matter of public interest even though he is under no duty to do so. Public policy gives him the right to state his views on such matters. The defence will only hold up if he honestly believes in the views he expresses, as no one has the right to make defamatory comments on matters of public interest that he himself does not believe in.

53 In *Jeyasegaram David* ([16] *supra*), this court held that it was not necessary to decide whether the test for malice was the same for qualified privilege and fair comment. In that case, the issue was not fully dealt with as Mr David Ban did not enter his defence at the trial, and was not examined on the issue of his malice. In the present case, he gave evidence in his defence, and the issue was raised in examination. In the circumstances, it was appropriate to deal with the issue, and we agreed with Lord Nicholls' exposition.

54 The appellant contended that Mr David Ban did not make the statements honestly because:

(a) he knew that the linkage in the resolutions was unnecessary and irrational and that it was designed to dilute [the appellant's] shareholding in NatSteel;

(b) he knew that the NatSteel board had sought to conceal the linkage from the company's shareholders;

(c) he knew that the whitewash proposal had failed to resolve the problems created by the linkage; and

(d) he resented [the appellant] for forcing 98 Holdings to pay considerably more than it had intended to secure a controlling interest in NatSteel.

55 The appellant was entitled to look at all the circumstances relating to the takeover fight for proof of Mr David Ban's good faith or the lack of it. There is no doubt that Mr David Ban did not think well of the appellant's entry into the takeover contest and of his objection to the dividend proposals.

56 However, it does not follow that when one person is ill-disposed towards another, whatever he says about the other person does not reflect his honest belief, or is infected with malice. It was still necessary for the appellant to show that the impugned words were not spoken honestly, but were actuated by malice. In making a finding on the issue, the unhappiness towards the other person is a factor to be taken into account, but only in conjunction with all other relevant facts.

57 We have found that when Mr David Ban was interviewed by Ms Catherine Ong on the eve of the reconvening of the adjourned EGM and called the appellant's conduct obstructive and irrational, his words were justified as a response to the charge that the proposed resolutions were irrational. It could not be said that he was acting out of malice or that he did not believe what he said.

58 The appellant also complained that Ms Catherine Ong's authorship of the article was infected with malice because the appellant had accused her and her employers of defamation in two earlier articles she had written in BT for which he obtained a published apology as well as $20,000 damages and costs.

59 Ms Catherine Ong's situation was not unlike Mr David Ban's situation. She might be upset by those events and might not regard the appellant with fondness. But that did not mean that whatever she wrote of him was infected with ill will. Their past run-in would be a factor to be taken into account with all the other facts.

60 Ms Catherine Ong had been covering and reporting the takeover of NatSteel from the start. An important milestone was to be reached on 4 June 2003. The shareholders were to vote to accept or reject the payment-by-scrip and whitewash resolutions. It was reasonable and natural for her to report on the positions of the principal players on the eve of the meeting. The appellant was not accessible, so she spoke to Mr David Ban for an update on the progress since the adjournment the previous week. She then went on to report Mr David Ban's views on the appellant's actions.

61 She was doing what any journalist would have done. We did not see any evidence that Ms Catherine Ong wrote the article out of malice.

Vicarious liability

62 This was not a critical issue as there can be no vicarious liability without primary liability. As the parties took different positions on this, we will deal with the issue whether Mr David Ban was

speaking as a director of 98 Holdings when he made his statements.

63 When the scrip dividend proposal was made by NatSteel, 98 Holdings supported it, and NatSteel in turn supported the whitewash proposal put forward by 98 Holdings.

64 When Mr David Ban gave the interview, he spoke in support of the proposals and he expressed his disapproval of the appellant's opposition. He did not specify, and indeed, he did not have to specify, whether he was speaking as a director of 98 Holdings or NatSteel, or both. It is unlikely that if he had addressed his mind to the issue, he would have prefaced his comments with "Speaking on behalf of 98 Holdings" or "Speaking on behalf of NatSteel" because there was no need for the distinction to be drawn – what he said reflected the positions of both the companies he was director of.

65 We could not agree with his defence that he was speaking on behalf of NatSteel but not of 98 Holdings, but ultimately nothing turned on this in view of our findings on justification and fair comment.

66 As the appellant was unable to show that the trial judge's judgment should be disturbed, the appeal was dismissed with costs.

Appeal dismissed.