IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHCR 7

HC/S 898 of 2019
HC/SUM 3469 of 2020

Between

Soh Rui Yong

… *Plaintiff / Respondent*

And

Singapore Athletic Association

… *Defendant / Applicant*

JUDGMENT

[Civil Procedure – Pleadings – Striking Out]
[Tort – Defamation – Malice]

Soh Rui Yong
v
Singapore Athletic Association

[2020] SGHCR 7

High Court — Suit No 898 of 2019 (Summons No 3469 of 2020)
Justin Yeo AR
16 September 2020; 12 October 2020

12 October 2020

Justin Yeo AR:

1 This is an application brought by the Singapore Athletic Association ("the Defendant"), pursuant to O 18 r O 18 r 19(1)(*b*), (*c*) and (*d*) of the Rules of Court (Cap 322, R 5, Rev Ed 2014) ("Rules of Court"), to strike out Mr Soh Rui Yong's ("the Plaintiff") plea of malice.

Background

2 The Plaintiff is a national athlete who has represented Singapore at several international sporting events. He is the current national record holder and two-time gold medallist for the 42.195km Men's Marathon events at the

2015 and 2017 South East Asian Games ("SEA Games").[1] The Defendant is a registered society under the Societies Act (Cap 311, Rev Ed 2014), and is a National Sports Association in Singapore.

3 On 2 August 2019, the Defendant issued a public statement ("the August 2019 Statement") endorsing the Singapore National Olympic Council's decision to reject the Plaintiff's nomination for the SEA Games that were to be held in the Philippines in December 2019 ("the 2019 SEA Games"). The August 2019 Statement included certain phrases which the Plaintiff has alleged in the present suit to be defamatory, and which the parties have referred to as "the Words". The Words were reported in the online platform of *The Straits Times* on 3 August 2019, as follows (with the Words emphasised in italics):[2]

> SINGAPORE – National track and field body Singapore Athletics (SA) will not be lodging an appeal for national marathoner Soh Rui Yong, who was omitted from the 585-athlete contingent bound for the upcoming SEA Games in the Philippines.
>
> On Thursday (Aug 1), selectors from the Singapore National Olympic Council (SNOC) rejected SA's nomination for Soh for the Games, despite the athlete having met the qualifying mark for the men's marathon event.
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> The SNOC cited "numerous instances" where Soh, who won the SEA Games gold in 2015 and 2017, displayed conduct that "falls short of the standards of attitude and behaviour" it expects from its athletes.
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> In a Statement issued on Friday (Aug 2), SA said that it accepted the decision and acknowledged Soh, 27, had "*on several occasions breached SA's Athlete Code of Conduct*".

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1 Statement of Claim (Amendment No 1) dated 13 July 2020 at paragraph 1; Defence (Amendment No 2) dated 13 July 2020 at paragraph 3.

2 Defence (Amendment No 2) dated 13 July 2020 at paragraph 9; Reply (Amendment No 1) dated 27 July 2020 at paragraph 6.

> "*For his transgressions, SA had attempted to counsel and reason with him, as a part of a holistic rehabilitation process*, in dealing with a significant individual who matters to the sport," it added.
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> SA had temporarily suspended "further engagement" with Soh on the matter of his conduct due to the "development of legal actions between him and (teammate) Ashley Liew", it added."
>
> SA noted: "As the matter in dealing with his conduct has yet to conclude, SA submitted its nomination for Rui Yong for the SEA Games with the view that it can be withdrawn when justifiably appropriate. SA was ready to convene the disciplinary proceedings against Rui Yong but only after due and proper process."
>
> …
>
> The SNOC's controversial decision to leave Soh out of the SEA Games squad has divided the sports fraternity, with some supporting the former's move while others have spoken up for the athlete.
>
> The organisation noted that "since the 2017 SEA Games, there have been numerous instances where Soh has displayed conduct that falls short of the standards of attitude and behaviour that the SNOC expects of and holds its athletes to".
>
> …

4 The Plaintiff alleged that the Words were false and defamatory of him, as they suggested that the Defendant had, upon conducting proper investigations and in accordance with due process, found that the Plaintiff had acted in breach of the Athlete's Code of Conduct.[3] The Words also suggested that the Plaintiff had committed various "transgressions" which required rehabilitation and counselling from the Defendant.[4] The Plaintiff therefore filed a Writ of Summons and the accompanying Statement of Claim on 11 September 2019,

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3 Statement of Claim (Amendment No 1) dated 13 July 2020 at paragraph 9.

4 Statement of Claim (Amendment No 1) dated 13 July 2020 at paragraph 9.

seeking – amongst other things – a declaration that the Words were false and defamatory of him.[5]

5 The Defence was originally filed on 3 October 2019. The Defendant subsequently filed an amended Defence on 13 July 2020, amending and elaborating on its defence of "fair comment" as well as adding a new defence of "qualified privilege". For present purposes, the relevant part of the amended Defence is the Defendant's pleading that:

(a) the Words constituted "fair comment on a matter of public interest, namely the explanation as to why a top track athlete in the Plaintiff was not selected to represent Singapore on a regional stage";[6] and

(b) alternatively, if the Words were defamatory of the Plaintiff (which the Defendant denies), the Words were published "on an occasion of qualified privilege".[7]

6 The Reply was originally filed on 28 October 2019. The Plaintiff subsequently filed an amended Reply on 27 July 2020 ("the Amended Reply"), pleading that the Defendant was not entitled to rely on the defences of "fair comment" or "qualified privilege" because the Defendant "had no genuine

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5 Statement of Claim (Amendment No 1) dated 13 July 2020 at page 9.

6 Defence (Amendment No 2) dated 13 July 2020 at paragraph 16.

7 Defence (Amendment No 2) dated 13 July 2020 at paragraph 16E.

belief in the truth of the Words and had acted with malice in publishing and/or causing the Words to be published".[8] In particular, the Plaintiff referred to:

(a) a post published on the Defendant's Facebook page on 27 February 2020, captioned "The Women World Marathon Record is faster than our Singapore Men's National Record by 9 minutes" ("the Facebook Post"); and

(b) the Defendant's alleged breach of confidentiality by providing the Plaintiff's confidential documents and information to one Mr Malik Aljunied, an executive director of the Defendant, for the purposes of another suit between the Plaintiff and Mr Malik in HC/S 851/2019 ("S 851") ("the Alleged Breach of Confidence").

7 Paragraph 25 of the Amended Reply and its accompanying sub-paragraphs are set out in full as follows:

> 25. Further and in any event, the Defendant is not entitled to rely on the defences of fair comment and/or qualified privilege as the Defendant had no genuine belief in the truth of the Words and had acted with malice in publishing and/or causing the Words to be published. Such malice may be inferred from the facts set out below.
>
> **Particulars**
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> ii.[*sic*] On or around 27 February 2020, the Defendant published a post on its Facebook page captioned "The Women World Marathon Record is faster than our Singapore Men's National Record by 9 minutes".
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> iii. This Facebook post was clearly targeted at the Plaintiff, the current national record holder in Singapore, and

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[8] Reply (Amendment No 1) dated 27 July 2020 at paragraph 25.

was made with the malicious intention to insult the Plaintiff and undermine his reputation.

iv. The Facebook post was eventually taken down with an admission from the Defendant's president Tang Weng Fei that it was a "lapse in judgment" after the Defendant received severe backlash from the public.

v. The Defendant also acted in breach of its duty of confidentiality by providing the Plaintiff's confidential documents and information to Mr Malik Aljunied, an executive director of the Defendant, without the Plaintiff's knowledge and/or consent, and further permitted the unauthorized misuse of the Plaintiff's confidential information by Mr Malik Aljunied for his own purposes, in Mr Malik's suit in his private capacity against the Plaintiff in HC/S 851/2019 ("Suit 851"). These confidential documents and/or information include:

a. SAA's Code of Conduct dated 23 November 2018 signed between the Plaintiff and SAA (the "COC");

b. The Singapore National Olympic Council's ("SNOC") Team Membership Agreement signed between the Plaintiff and SNOC ("SNOC TMA");

c. The spexCarding Agreement dated 23 November 2018 signed between the Plaintiff and SAA; and

d. A letter regarding the Plaintiff's alleged non-compliance with the SNOC TMA dated on or before 14 August 2017 from Yip Ren Kai, Team Manager, SNOC, MGPC Athletics (the "TMA Letter").

(collectively, the "Confidential Documents")

vi. These Confidential Documents contained a significant amount of confidential information. For instance, at pages 8 to 10 of the COC, athletes such as the Plaintiff were required to submit to the Defendant highly confidential and personal information, including *inter alia* their NRIC and passport information, as well as details of their personalized training regimes, as below:

a. A scanned copy of their NRIC and Passport;

b. The Name and Accreditation of their coach;

c. Their Annual Performance Goals; and/or

d. Their Annual Training Plan.

vii. On or around 26 August 2019, the Plaintiff filed a suit in HC/S 851/2019 ("Suit 851") against Mr Malik Aljunied for defamatory remarks published on his Facebook Profile page.

viii. However, on 23 September 2019, Mr Malik Aljunied filed his Defence in Suit 851 relying on the existence and contents of the Confidential Documents in various parts of his pleadings. In particular, the Confidential Documents and/or their contents were referred to in the following paragraphs of the Defence:

a. The SNOC TMA – at paragraphs 14.1.1, 14.3, 14.5 and 14.6 of the Defence;

b. The COC and the SCA – at paragraphs 14.1.2, 14.3.2, 14.4, 14.5 and 14.6 of the Defence; and

c. The TMA Letter – at paragraph 14.6.2 of the Defence.

ix. Subsequently, the Plaintiff's solicitors issued a Notice to Produce Documents Referred to in Pleadings dated 27 December 2019 requesting the production of documents referred to in the Defence. Through his solicitors, on 28 January 2020, Malik Aljunied provided copies of the documents requested, which contained scanned copies of the Confidential Documents enumerated at paragraphs 5A(iv)(a) to (d) above.

x. In light of the foregoing, the Defendant acted in breach of its duty of confidentiality by permitting and/or allowing the unauthorized use and/or disclosure of the Confidential Documents by Mr Malik Aljunied in Suit 851. This was done without the Plaintiff's knowledge and at no point did the Defendant seek the Plaintiff's consent for the Confidential Documents to be used by Mr Malik Aljunied in the aforesaid manner.

xi. Despite the Plaintiff's solicitors' letters dated 24 March 2020 and 15 April 2020 outlining the Defendant's breaches of confidence and seeking *inter alia* an undertaking that the Defendant take the necessary steps to remedy its breaches of confidence and refrain from misusing or disclosing any further confidential information, the Defendant's solicitors wrote back on 20 April 2020 refusing to provide any of the undertakings sought and denying that the Defendant was in breach of its duty of confidentiality.

> xii. Notwithstanding, Mr Malik Aljunied filed garnishee proceedings in HC/SUM 1733/2020, in which he sought to garnish the Plaintiff's POSB Bank Account. As the Plaintiff has never circulated his POSB bank account details to Mr Malik Aljunied personally, and had only disclosed his POSB Bank Account details to the Defendant in strict confidence on 30 January 2020, the Defendant has unlawfully disclosed the Plaintiff's POSB bank account details to Mr Malik Aljunied and/or permitted the unauthorized misuse of such confidential information by Mr Malik Aljunied in breach of its duty of confidentiality towards the Plaintiff.
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> xiii. In the circumstances, it is abundantly clear that Words which the Defendant had published and/or caused to be published were actuated by malice and that the Defendant had no honest belief in the truth of the same. The Words were published with the sole intent or purpose of publicly embarrassing the Plaintiff and/or tarnishing his reputation in the sporting community, and do not constitute fair comment on a matter of public interest.

The Application

8 The Defendant took out the present application, seeking to strike out paragraph 25 of the Amended Reply and its accompanying sub-paragraphs on the basis that these:

(a) are scandalous, frivolous or vexatious (under O 18 r 19(1)(*b*) of the Rules of Court);

(b) may prejudice, embarrass or delay the fair trial of the action (under O 18 r 19(1)(*c*) of the Rules of Court); and/or

(c) are otherwise an abuse of the process of the Court (under O 18 r 19(1)(*d*) of the Rules of Court).

9 I heard the application on 16 September 2020. On 21 September 2020, I requested Defendant's counsel, Mr Mahmood Gaznavi, to provide written

clarifications on specific issues arising from his submissions. I permitted Plaintiff's counsel, Mr Darius Lee, a written response to those clarifications. These were respectively filed on 24 and 30 September 2020.

Parties' Arguments

10 Mr Gaznavi argued that the particulars pleaded in paragraph 25 of the Amended Reply were insufficient to support the Plaintiff's plea of malice.

11 In relation to the Facebook Post, Mr Gaznavi contended that:

(a) First, the Facebook Post was published about six months after the August 2019 Statement. It therefore cannot be the basis for any malice allegedly present prior to or at the time of the publication of the August 2019 Statement. The facts pleaded to support the Plaintiff's contention of malice demonstrate neither that the August 2019 Statement was "actuated" by an improper or ulterior motive (citing *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 ("*Lim Eng Hock Peter*") at [38]), nor that the Defendant did not believe the August 2019 Statement to be true or was reckless as to the truth of the statement (citing *Lee Kuan Yew v Davies Derek Gwyn and others* [1989] 2 SLR(R) 544 at [118]–[119]).

(b) Second, further or alternatively, given that an amendment is retrospective to the original date that a pleading is filed (citing *Saga Foodstuffs Manufacturing (Pte) Ltd v Best Food Pte Ltd* [1994] 1 SLR(R) 505 ("*Saga Foodstuffs*")), it is "impermissible" for the Plaintiff

to plead the Facebook Post given that the Facebook Post occurred after the original Reply.[9]

(c) Third, the individuals within the Defendant who were alleged to have malicious intent have not been particularised (citing *Ezion Holdings Ltd v Credit Suisse AG* [2018] 3 SLR 356 ("*Ezion*") at [27]–[28] and [50]).

(d) Fourth, the Facebook Post cannot be the basis of malice because the post is itself factually correct – *ie*, the Women's World Marathon Record is, as a matter of fact, nine minutes faster than the Singapore Men's National Record.

12 In relation to the Alleged Breach of Confidence, Mr Gaznavi's contentions were:

(a) First, the Alleged Breach of Confidence took place only on or after 17 August 2019. As such, any alleged malice concerning the Alleged Breach of Confidence must have post-dated the August 2019 Statement. The Alleged Breach of Confidence therefore cannot provide any basis for pleading malice in relation to the August 2019 Statement.

(b) Second, further or alternatively, the Alleged Breach of Confidence is the subject matter of HC/OS 432/2020 ("OS 432"). The issues in OS 432 have been canvassed before a High Court Judge and adjourned to a date after judgment is rendered in S 851. In raising issues

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9 Defendant's written submissions dated 11 September 2020, at paragraph 44.

in the present suit concerning the Alleged Breach of Confidence, the Plaintiff is effectively asking the High Court to determine whether the Alleged Breach of Confidence had taken place. This is an abuse of the court process and is "effectively asking for a second bite at the cherry in respect of [the Plaintiff's] case in OS 432".[10] This may "result in an inconsistent decision being rendered" by the High Court.[11]

13 Mr Lee counterargued as follows:

(a) First, paragraph 25 of the Amended Reply is legally sustainable. O 18 r 9 of the Rules of Court permits a party to plead any matter which has arisen at any time, whether before or since the issue of the writ; this was also the approach taken in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1 ("*DyStar*"). In this regard, paragraph 25 of the Amended Reply does not plead a new cause of action; instead, it simply pleads facts in support of an existing cause of action. Furthermore, post-publication conduct, including conduct after the commencement of proceedings, can be considered as evidence of malice in the context of a defamation suit (citing *DHKW Marketing and another v Nature's Farm Pte Ltd* [1998] 3 SLR(R) 774 ("*DHKW Marketing*")).

(b) Second, there is no issue of abuse of process. At present, there is no final and conclusive judgment on the merits in OS 432. While there is an overlap between OS 432 and the present suit, the issue in OS 432

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10 Defendant's written submissions dated 11 September 2020, at paragraph 58.

11 Defendant's written submissions dated 11 September 2020, at paragraph 60.

concerns restraining the use of the confidential documents, whereas paragraph 25 of the Amended Reply "is wider and concerns *malice* arising out of, *inter alia*, the use of the Confidential Documents" (emphasis in original).[12]

The Law

Striking out

14 In determining an application under O 18 r 19(1) of the Rules of Court, the Court does not embark on a minute and protracted examination of the documents and facts (see, *eg*, *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 at [50]). The Court will exercise the power to strike out a pleading only in plain and obvious cases.

15 The present application is premised on O 18 r 19(1)(*b*), (*c*) and (*d*) of the Rules of Court (see [8] above). As a prefatory observation, in *The "Bunga Melati 5"* [2012] 4 SLR 546 at [30] ("*The Bunga Melati 5*"), three out of four limbs of O 18 r 19(1) of the Rules of Court were listed as possible grounds for striking out, and the party's submissions did not make it clear exactly which limb in O 18 r 19(1) of the Rules of Court it was relying on. A similar criticism may be levelled in the present application, and indeed this partly necessitated seeking the further written clarifications mentioned in [9] above. As exhorted in *The Bunga Melati 5*, it is good practice for an applicant seeking a striking out order to "precisely correlate the arguments it advances to the *exact limb* under O 18 r 19(1)" (*The Bunga Melati 5* at [31] (emphasis in original)).

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[12] Plaintiff's written submissions dated 14 September 2020, at paragraph 39(b).

16 The main thrust of Mr Gaznavi's arguments appeared to be based on alleged factual or legal unsustainability (see the arguments at [11(a)], [11(b)], [11(d)] and [12(a)] above).[13] It may thus be inferred that he was relying largely upon O 18 r 19(1)(*b*) of the Rules of Court as elaborated upon in *The Bunga Melati 5*, although he did not expressly cite the case. In *The Bunga Melati 5*, the Court explained the distinction between a legally and factually unsustainable action, as follows:

> (a) A *legally unsustainable* action is one in which it is "clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks" (*The Bunga Melati 5* at [39(a)]).
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> (b) In contrast, a *factually unsustainable* action is one in which 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 instance, that it is "clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based" (*The Bunga Melati 5* at [39(b)]).

17 Mr Gaznavi also appeared to allude to paragraph 25 of the Amended Reply being prejudicial or embarrassing under O 18 r 19(1)(*c*) of the Rules of Court (by virtue of the argument at [11(c)] above) and an abuse of process under O 18 r 19(1)(*d*) of the Rules of Court (by virtue of the argument at [12(b)] above).

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[13] See, also, Defendant's written submissions dated 11 September 2020, at paragraph 56.

Malice in defamation proceedings

18 In defamation proceedings, a defamer's malice may be relied upon to defeat the defences of qualified privilege and fair comment. There is a distinction between the types of malice that will defeat these defences (*Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 ("*Basil Anthony Herman*") at [60]). To briefly elaborate:

(a) The defence of qualified privilege is grounded on the law's recognition that there are circumstances where a party has a duty or interest to pass on information to another party who has a duty or interest in receiving it (*Basil Anthony Herman* at [61]). In other words, motive (rather than honesty of belief) is the "essential indicator" of malice that defeats a defence of qualified privilege (*Basil Anthony Herman* at [60]). Such malice may be proven in two ways, *ie*, (i) the defendant's knowledge of falsity, recklessness, or lack of belief in the defamatory statement; and (ii) where the defendant has a genuine or honest belief in the truth of the defamatory statement, but his *dominant* motive is to injure the defendant or some other improper motive (*Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 ("*Chan Cheng Wah Bernard*") at [90], citing *Lim Eng Hock Peter* at [38]).

(b) In contrast, the defence of fair comment is not based on a notion of performing a duty or protecting an interest. It is, instead, meant to protect and promote the freedom of comment on matters of public interest, irrespective of particular motives for such comment (*Basil Anthony Herman* at [61]). As such, honesty of belief (rather than motive) is the essential indicator of malice that defeats a defence of fair

comment. It follows that the defence of fair comment is not available if the defamer did not honestly believe in the truth of the defamatory comment (*Basil Anthony Herman* at [60]). The fact that the defamer was acting with ulterior purposes is by itself immaterial for the purposes of the defence of fair comment, although it can – depending on the facts – give rise to an inference that the defamer did not honestly believe in the truth of the comment he or she made (*Basil Anthony Herman* at [60]).

19 To succeed in a plea of malice to defeat the defences of qualified privilege or fair comment, the Plaintiff must show that the defamatory act was *actuated* by the Defendant's malice (see, *eg*, *Chan Cheng Wah Bernard* at [88] (defence of qualified privilege) and *Nirumalan K Pillay and others v A Balakrishnan and others* [1997] 1 SLR(R) 953 at [12] (defence of fair comment)).

20 A party alleging malice must provide particulars of the facts on which it relies to support its claim (see O 12 r 12(1)(*b*) of the Rules of Court), and give particulars of the facts and matters from which the malice is to be inferred (see O 78 r 3(3) of the Rules of Court). These constitute "stringent requirements" to raise a plea of malice, because such a plea is "a very serious allegation of intentional impropriety or bad faith" (*Ezion* at [26], citing *Gatley on Libel and Slander* (9th Ed, 1997) at paragraph 28.6). It follows that mere assertion is insufficient when pleading particulars of malice (*Ezion* at [27], citing *Claire Henderson v The London Borough of Hackney and The Learning Trust* [2010] EWHC 1651 (QB) at [34]). A party alleging 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" (*Nirumalan K Pillay v A Balakrishnan* [1996] 2 SLR(R) 650 at [9]–[10]).

Pleading facts occurring after the commencement of the action

21 One of the major issues on which Mr Gaznavi and Mr Lee crossed swords was whether the Plaintiff may plead particulars (in paragraph 25 of the Amended Reply) which occurred after the commencement of the action. However, they did not appear to dispute the applicable principles, which are as follows:

(a) First, a cause of action must be established as at the date when proceedings are instituted. A new cause of action may not be introduced if it arises after the date of the writ (*The "Jarguh Sawit"* [1997] 3 SLR(R) 829 ("*The Jarguh Sawit*") at [58], referring to *Saga Foodstuffs*). An amendment to the pleadings is retrospective to the original date that the pleading was filed (*Saga Foodstuffs* at [9]).

(b) Second, the above does not preclude the pleading of matters (which are not causes of action) that post-date the pleadings in question. As observed by the Singapore International Commercial Court in *DyStar* at [137], the principle in *The Jarguh Sawit* does not mean that facts occurring after the issue of the writ cannot be relied on in support of a cause of action existing at the date of the writ. The Court further pointed out that O 18 r 9(1) of the Rules of Court allows a party to plead "any matter which has arisen at any time, whether before or since the issue of the writ". On the facts of *DyStar*, the court found that the plaintiff had successfully made out its allegations of pre-writ minority oppression; in the circumstances, the Court held that post-writ conduct could be relied on as evidence of oppressive conduct continuing beyond the date of the writ, in determining whether (and, if so, what) relief the Court should order. For completeness, the Court in *DyStar* did not have

to deal with a scenario where none of the allegations of pre-writ oppressive conduct were made out (see "Civil Procedure", (2018) 19 Singapore Academy of Law Annual Review of Singapore Cases 2018 at paragraph 8.7).

Decision

22 On the face of paragraph 25 of the Amended Reply, the Plaintiff is contending that there was pre-existing malice on the part of the Defendant which actuated the August 2019 Statement – "the Defendant *had no genuine belief in the truth of the Words* and *had acted with malice in publishing and/or causing the Words to be published*" (emphasis added. If the Plaintiff can substantiate and establish this plea, he will presumably be able to defeat the defences of fair comment and qualified privilege. While Mr Gaznavi attempted to distinguish *DyStar* on the basis that post-writ conduct was taken into consideration in that case because there was pre-writ oppressive conduct, the point remains that as a matter of pleading, paragraph 25 of the Amended Reply purports – on its face, at least – to plead pre-existing malice. The situation would have been different had the Plaintiff pleaded, for example, that "the Defendant had acted with malice *after* the Words were published".

23 At this juncture, I do acknowledge that the particulars pleaded in support of paragraph 25 of the Amended Reply entirely post-date the writ. However, as a matter of pleading, such particulars may be pleaded if they are meant to support an allegation of pre-existing malice. Indeed, in the specific context of defamation proceedings, courts have taken post-publication conduct into account as evidence of pre-existing malice. For instance, in *DHKW Marketing*, the court held that "[t]he defendants' conduct after litigation had been commenced was further evidence of malice" (*DHKW Marketing* at [37]), while

in *Ezion*, the Court noted that "post-publication conduct may be relevant to the question of malice in certain situations" (*Ezion* at [48]). Both *DHKW Marketing* and *Ezion* were also referred to in *Gao Shuchao v Tan Kok Quan an others* [2018] SGHC 115 at [53].

24 The *real* difficulty with paragraph 25 of the Amended Reply is not the mere fact that the particulars post-date the publication of the August 2019 Statement, but that the particulars do not sustain the Plaintiff's plea of malice.

25 In this regard, I find that the Plaintiff's plea of malice is factually unsustainable. The supporting particulars entirely post-date the August 2019 Statement. Of the two sets of post-publication conduct pleaded by the Plaintiff, the first (*ie* the Facebook Post) took place more than six months *after* the August 2019 Statement, and there are no particulars to show how the Facebook Post demonstrated malice at the time of the August 2019 Statement. The second set of post-publication conduct (*ie* the Alleged Breach of Confidence) was closer in time to the August 2019 Statement, but again the Plaintiff did not provide any basis for contending that this demonstrated malice actuating the August 2019 Statement.

26 While post-publication conduct may constitute "further evidence of malice" (see, *eg*, *DHKW Marketing* at [37]), the Plaintiff has not pleaded *any* material fact linking such post-publication conduct to the August 2019 Statement. Despite ample opportunity for Mr Lee to explain how the pleaded post-publication conduct related to pre-existing malice, he could only assert generally that it provided some basis for inferring pre-existing malice. He was unable to point to any other pleaded material fact (or, indeed, any affidavit evidence) to support the assertion that there was pre-existing malice which

caused the making of the August 2019 Statement. I further note that in the Plaintiff's further written submissions, it was somewhat confusingly contended on the one hand that "*... malice need not have existed prior to the writ* and been continually operating, before the Court could take into account post-writ matters towards determining the issue of malice" (emphasis added),[14] and on the other that the Court could "[draw] the relevant inferences as to whether such malice had actually *existed at the time of the publication*, in the light of those post-publication facts" (emphasis added).[15]

27 The Plaintiff is obliged to plead matters which support his allegation of malice which, as observed above, is a very serious allegation of intentional impropriety or bad faith (see [20] above). However, the present pleading simply asserts a tenuous link between the Facebook Post, the Alleged Breach of Confidence and the supposed malice which actuated the August 2019 Statement. In my view, this assertion is insufficient to support a plea of malice. I would also add for completeness that no request or attempt was made, whether in oral or written submissions, to amend paragraph 25 of the Amended Reply to rectify the deficiencies or to clarify the Plaintiff's position. I therefore order that paragraph 25 of the Amended Reply and its accompanying particulars be struck out under O 18 r 19(1)(*b*) of the Rules of Court.

28 In addition to being struck out under O 18 r 19(1)(*b*) of the Rules of Court, paragraph 25 of the Amended Reply may also be struck out under O 18 r 19(1)(*c*) of the Rules of Court for failing to comply with the rules of pleading.

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14 Plaintiff's further written submissions dated 30 September 2020, at paragraph 24.

15 Plaintiff's further written submissions dated 30 September 2020, at paragraph 29.

This is because the Plaintiff has failed to plead "particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent" (*Ezion* at [27]). It bears noting that in *Ezion*, the High Court concluded that (*Ezion* at [50]):

> While remediable by way of an amendment, *individuals within [the Defendant] 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*. (Emphasis added)

29 I pause to note, parenthetically, that the parties did not dispute the applicability of this principle to the Defendant (being a registered society). In oral submissions, Mr Lee acknowledged the need to identify the individual to whom malice may be imputed, and submitted that the individual in the present case was the Defendant's president Mr Tang Weng Fei. To this end, Mr Lee pointed to one of the pleaded particulars[16] where Mr Tang was mentioned by name.

30 However, it is difficult to see how that reference to Mr Tang demonstrates any malice on Mr Tang's part, or that he is the "person … through whom it is intended to fix the [Defendant] with the necessary malicious intent". This is so, for two reasons.

(a) First, the pleaded reference simply states that Mr Tang had admitted a "lapse in judgment" resulting in the Facebook Post. It does not actually state that Mr Tang is the person with the necessary

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16 Reply (Amendment No 1) dated 27 July 2020 at paragraph 25(iv), reproduced at [7] of the main text.

malicious intent. It is also unclear, without more, how a "lapse of judgment" suggests malice on Mr Tang's part – indeed, the material that the Plaintiff himself relies on in relation to the "lapse of judgment" suggests that the "lapse of judgment" was on the part of a staff member.[17] Furthermore, the same *Straits Times* article cited by the Plaintiff reported Mr Tang's comment that "[t]his should never have happened", that "[t]he staff involved has been counselled" and that "[m]oving forward, a media commission will be formed to ensure that such errors will not be repeated".[18] The Plaintiff also separately exhibited in his affidavit a message from Mr Tang as follows, which does not appear to demonstrate malice on Mr Tang's part: [19]

> Morning Rui Yong. Just a note on recent FB postings. Apologies and reiterating SA is always proud of all our Athletes. Have a nice weekend.

While this striking out application is not the proper forum for assessing or weighing evidence in detail, the point is that the material relied upon by the Plaintiff does not support Mr Lee's submission that Mr Tang is the person to be fixed with the alleged malicious intent.

(b) Second, the pleaded reference to Mr Tang in any event appears limited to the Facebook Post. There is no similar mention of Mr Tang in relation to the Alleged Breach of Confidence. When queried about this at the hearing, Mr Lee simply confirmed that the Plaintiff was imputing

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17 Affidavit of Soh Rui Yong dated 26 August 2020, at page 7.

18 Affidavit of Soh Rui Yong dated 26 August 2020, at page 7.

19 Affidavit of Soh Rui Yong dated 26 August 2020, at paragraph 7 and page 8.

malice to Mr Tang for the Alleged Breach of Confidence, but did not identify any pleading or particulars to that effect.

31 I further observe that at no point in written or oral submissions did Mr Lee seek an opportunity to amend the pleadings to clarify or restate the Plaintiff's position in relation to the individual within the Defendant who had the necessary malicious intent. In the light of the matters in [30] above, and keeping in view the decision of *Ezion* (particularly at [27], [28] and [50]), I find that paragraph 25 of the Amended Reply would "embarrass or delay the fair trial of the action". Paragraph 25 of the Amended Reply and its accompanying particulars should therefore be struck out under O 18 r 19(1)(*c*) of the Rules of Court.

32 Finally, for completeness, I would add that I am not with Mr Gaznavi in relation to his argument on abuse of process. Even though the Alleged Breach of Confidence is a live issue in OS 432, OS 432 has yet to be judicially determined. Mr Gaznavi has not provided any legal basis for his submission that raising an issue which has yet to be judicially determined in another proceeding amounts to an abuse of process. While there is a possibility that allowing the Plaintiff to canvass the Alleged Breach of Confidence in the present matter "may result in an inconsistent decision" with OS 432,[20] there are practical and legal mechanisms which can guard against any such concerns.

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[20] Defendant's written submissions dated 11 September 2020, at paragraph 60.

Conclusion

33 I therefore order that paragraph 25 of the Amended Reply and its accompanying particulars be struck out under O 18 rr 19(1)(*b*) and 19(1)(*c*) of the Rules of Court. I further order that the Plaintiff file an amended Reply within seven days of the date of this decision. I will hear the parties on costs.

Justin Yeo
Assistant Registrar

Mr Darius Lee and Mr Leng Ting Kun (Foxwood LLC)
for the Plaintiff;
Mr Mahmood Gaznavi (Mahmood Gaznavi & Partners)
for the Defendant.