Arul Chandran v Chew Chin Aik Victor JP
[2000] SGHC 111

Case Number : Suit 1896/1998

Decision Date : 19 June 2000

Tribunal/Court : High Court

Coram : Chan Seng Onn JC

Counsel Name(s) : Suresh Damodara and John Thomas (Colin Ng & Partners) and Subhas Ananda (M P D Nair & Co) for the plaintiffs; Howard Cashin (Howard Cashin & Lim) and Imran Hamid with Burton Chen (Tan Rajah & Cheah) for the defendants

Parties : Arul Chandran — Chew Chin Aik Victor JP

JUDGMENT:

Cur Adv Vult

The Parties

1. The plaintiff ('Arul') is a practising advocate and solicitor in Singapore and a member of the Tanglin Club ('Club'). The defendant, an architect, is another member of the Club and a Justice of the Peace in Singapore. This defamation action is brought by the plaintiff as a result of several letters published by the defendant to the members of the General Committee ('GC') of the Club.

Brief Facts

2. Some time before the Annual General Meeting ('AGM') on 25 May 1998, the defendant was canvassing for several candidates who were standing for election to the GC. One of those candidates was his son, Mr Chew Kei Jin. The plaintiff, a member of the outgoing GC, was offering himself for the post of vice-president.

3. As part of his campaigning, the defendant wrote and circulated 'A Layman's Guide to the AGM' ('Layman's Guide'), where he expressed his feelings towards the then GC members in no uncertain terms. It reads as follows:

A LAYMAN'S GUIDE TO THE AGM

> Dear Fellow Members,
>
> I am not a candidate for Office, nor do I belong to any 'clique' who have ganged up to get something special for themselves (or for their wonderful children).
>
> I joined the Tanglin Club knowing full well what it was and what I liked most about it was that it was not like 'other' clubs. However we now have Rasmussen and his gang, who must have joined the club for much the same reasons as I did, suddenly turning around hell bent on making the Club like 'other' clubs – the very same clubs which we have now seen run to the ground – and the 'down with the Tanglin club as we know it' battle cry is still going on ….. but worse, it has now acquired a tint of racism.
>
> Rasmussen and his gang have consistently made Singaporeans laughing stock by their churlish rabble raising "The Tanglin Club is for Singaporeans (which he

claims to be one) because it is in Singapore and anybody who disagrees must be anti-Singapore".

Does the Chinese People's Republic Club in Copenhagen have a majority of Danes? And are Danish parents clamouring for their children to have priority of membership?

Nationality has nothing to do with it, it is he and his Committee's style of riding rough shod over us members that was the beginning of our troubles. Barely six weeks in office, the Committee tried to bulldoze a ridiculous twenty million dollar ($20,000,000) underground car park for 350 cars across the road. How irresponsible can you be? Imagine if it had gone through we would not only be broke now, as we are, we would be in serious financial straits … don't forget that!

Following this on the same agenda was a proposal to change the membership rules to take in 800 Singaporean 21 year-olds immediately …… to 'deliver' to the Singaporean members to whom he had made the promise in return for their support of him.

It was not that the membership was unwilling to consider this proposal but the very stunt of trying to push it through right under the noses of the members whom they knew would be away on their traditional holidays, especially when they had been told beforehand not to do so by a member in writing, was enough to bring on the angry scenes and shouts of 'Resign Resign!' at the SGM that followed.

Anyone with one iota of self-respect would have done so, but not these people. Thus 98 members followed up with a petition to have the Vice-President removed from office failing which there would be a requisition for a SGM to censure the Committee.

When the petition was brought to the attention of the Committee member concerned for his instructions as to what to do about it, he was heard to have replied "Ignore it, we don't have to do anything about it" …… very much the same thing expressed by another member of the Committee. "We are the committee, we have the power to expel those members …..we don't have to do what we don't wish to do".

We members had no alternative but to turn to the Courts for the right to be heard. At the appeal, the final stage of the long legal battle for the right of members to be heard, the Honourable Chief Justice said "So the Committee have sovereign immunity? …… Does this mean that if the Committee run the Club to the ground, the general Meeting can do nothing? …….. This cannot be".

This therefore is the first motion for discussion before the AGM proper.

Next, let's look at our finances. In 1996 under the old 'incompetent' management we had an operating PROFIT of $1,047,000. How, after all the bragging big talk at the beginning of their term they report a LOSS of $1,055,000 – this is a difference of $2,103,000 – and, if we throw in taxes and depreciation as well we

are in fact poorer by $1,300,000. Now, how the Committee chooses to explain this is purely academic because it isn't difficult for us to see how this has come about.

$400,000 is the cost of the man engaged as the General Manager to run our Club but who has turned out to be no more than a grossly overpaid Flunkey of the Committee. Add to this the $200,000 paid to 'Consultants' to advise us on how to 'improve' what has been described by Chefs as the 'best equipped kitchen' in Singapore. The cost of the new logo, which no one asked for nor approved by the members, $30,000 for the design and (say) $20,000 for the reprinting of letterheads, menus, etc. Then there are the Legal Fees in their futile attempts to save their faces (at our expense) including costs awarded to the "handful of trouble makers in the Tavern" (estimated) $250,000. Finally, the cost of the cigars consumed by the Committee at the dinner following the Appeal to help heal the wounds inflicted by the Honourable Chief Justice (if he only knew about this extravagance!) $465.35.

To this total of $900,465.35, we now add the loss of revenue from the Jackpot machines which some members say is due to the diminishing payouts to increase the profit margins (never thought of by the incompetent previous Committees) which have put them off.

Is this the Club you want? It this the Committee you want? ….. Think carefully! ….

If you want them to stay on to lead the Club to further disrepute the following have offered their services to continue the ruin of the Club – John Rasmussen, C. Arul, Kenneth Chew, K.T. Chan, Patrick Garez, Vince Khoo, and Mok Yew Fun.

Otherwise, there are Graeme McGuire, K.P. Swee, Sidney Rolt, Andre Bouvron, Chew Kei Jin, Chim Hou Yan, Donald Grant, Bill Gartshore and Colin Taylor, level headed sensible people who are going to put things right and return us the Club we knew before all this acrimonious mud-slinging and racial bickering descended upon us.

C 642

4. To identify himself as the author, the defendant merely typed 'C 642', his membership number, at the left bottom of the 2nd page of the Layman's Guide. He did not disclose his name nor pen his signature.

5. Despite what the defendant had said about the then GC in his Layman's Guide, five of the previous GC members were re-elected. They included Mr Rasmussen who was re-elected the president, and the plaintiff who was elected the new vice-president. Only six new members were voted in. On the next day after the AGM, a member handed a copy of the Layman's Guide to the plaintiff. The plaintiff checked the Club's records and found that 'C642' was the membership number of the defendant.

6. The plaintiff then wrote to the defendant two letters dated 27 May 1998 and 2 June 1998, which ignited the acrimonious matters leading to the chain of publications allegedly defamatory of the plaintiff. As the defendant complained that both letters were rude, I will reproduce them here:

Letter of 27 May 1998

Dear Mr Chew,

Many copies of a letter written to "Fellow Members" was circulated at the AGM of the Tanglin Club on Monday, 25th May 1998. The title is "A Layman's Guide to the AGM".

The letter shows the number "C 642" which is your Tanglin Club number. I enclose a copy of the letter, which I myself did not see at or even after the AGM on 25th May 1998, but which was sent to me on 26th May 1998.

I write to ask if you wrote that letter.

Kindly let me have a reply by return.

Yours sincerely,
(Signed)
C Arul

Letter of 2 June 1998

Dear Mr Chew,

You have still not replied to my simple and straightforward request in my letter of 27th May 1998.

Can you please let me have a reply without any further delay?

I await your reply.

Yours sincerely,
(Signed)
C Arul

7. The defendant concluded that both letters were not well-intentioned. He knew that the plaintiff was the vice-president and also the convenor of the Membership and Rules Sub-Committee ('M & R'). He was aware of an incident where a member who had demanded answers to awkward questions during a debate was hauled up the next day and made to appear before the M & R to answer for what was described as 'behaviour unbecoming of a member of the Club'.

8. The defendant suspected that the plaintiff was on a witch-hunt for members who were critical of the GC including those who had taken the previous GC members to Court. He said that the plaintiff bore a paranoid grudge against him and was witch-hunting him for having written the Layman's Guide.

9. When the plaintiff persisted in finding out the authorship of the Layman's Guide by writing the second letter, which was described by the defendant as curt and sarcastic, it began to annoy the defendant. The defendant became convinced that the plaintiff was out to cause him harm of some sort, the least of which would be to suspend his membership for personal revenge. He and the plaintiff were clearly on a collision course. He had the choice of either throwing himself at his mercy or prepare himself for a conflict with him. The defendant admitted in his evidence that if persons living in glass houses were to throw stones at him, he will throw stones back at them.

10. The defendant conceded having the above frame of mind. This will be important when determining the defendant's dominant motive actuating his chain of publications.

11. At paragraphs 37 to 38 of his affidavit of evidence-in-chief, the defendant said:

> 37. It was at this point that I recalled having seen copies of the newspaper cutting concerning the Plaintiff which had been circulated in the Club in early 1998 and which I had also received in the mail. …
>
> 38. Up to then there was **little reason** for me to go into the newspaper report but with the Plaintiff seeking excuses to have me before him i.e. the Membership and Rules Sub-Committee, this put a different complexion on the matter and awakened me to take the matter seriously.
>
> 39. I thought that if the Plaintiff had any intention to embark on a "**witch-hunt**" against me, it might **discourage him** if he was reminded that he had to first make sure that his own hands were clean before he made any plans to mete out his brand of "Club justice". I therefore wrote a letter dated 5th June 1998 reproducing therein the newspaper cutting relating to the Plaintiff's involvement in a Johore housewife case. … (Emphasis is mine.)

12. The plaintiff said that the defendant was being "cheeky" when he wrote the letter of 5th June 1998, which is reproduced below:

Letter of 5 June 1998

> Dear Mr Arul,
>
> There are two ARUL CHANDRANS in the Telephone Book – one with his address at 23 Balmoral Rd, #14-23, and the other at Block 121 Yuan Chuan Rd. #10-405.
>
> Are you the Arul referred to in the newspaper cutting reproduced below as the Singapore lawyer who was sentenced to two years jail for fraud and breach of trust against an housewife in Johore?
>
> I ask this because if you are the other Arul, I do not intend to reply to his letter as I do not know him.
>
> Yours sincerely,
>
> _____
>
> CAV CHEW JP 11 Stamford Road #03-07 Capitol Building Singapore 178884
>
> **Newspaper Cutting Attached**

:

Singapore lawyer among three jailed

Johore Bahru, Sat. –

The High Court here today sentenced three lawyers, including a Singaporean, to two years jail each for contempt after passing judgment against them in a civil suit.

Mr Justice Abdul Razak bin Datuk Abu Samah allowed Datuk Joginder Singh, Datuk P. Suppiah and Singapore lawyer Arul Chandran to give security of $100,000 each in two sureties pending execution of sentence after the disposal of the case.

The lawyers were found to have committed fraud and breach of trust against Madam Tara Rajaratnam over a two-hectare plot of land in Kulai, Johore, in 1975.

Unbecoming

Mr Justice Abdul Razak, who took five hours to read the 138-page judgment, committed the lawyers to jail for misleading and deceiving the court as well as trying to obstruct Madam Tara from seeking justice.

The judgment on damages to be awarded to Madam Tara was postponed to Sept 30.

The judge, in passing judgment, described the behaviour of the three men as unbecoming of lawyers in taking advantage of a defenceless housewife who had to raise their misdeeds from court to court and then to the Bar Council.

Mr Justice Abdul Razak said, of the three, Datuk Suppiah especially had misled the court on many important points from the Lower Court to the Federal Court and that the three must be punished for tarnishing the profession and the court of law.

Datuk Joginder Singh was present when Datuk Suppiah went to Madam Tara's house to ask her to sign some papers, without informing her they were for the transfer of her land to them instead of as a security for her brother-in-law.

He said Datuk Suppiah and the two men had also misled the bank to release to them bank statements relating to Madam Tara's land by stating they were acting for her.

As for Arul, the judge said he had also misled the court into believing he was the bona fide buyer of the land throughout the proceedings from the Lower Court to the Federal Court

until he was challenged.

The judge said Arul could not now come to court to claim he was not involved, saying he had left the matter to Datuk Suppiah and Datuk Joginder Singh. –NST.

13. The plaintiff replied on 12 June 1998 saying that he was 'the very same Arul Chandran referred to in the newspaper cutting enclosed,' and he asked the defendant to 'please give [him] a straight reply to [his] question.'

14. Instead of simply admitting to the authorship, the defendant replied on 24 June 1998 in the following terms as he felt that (a) the plaintiff had not disputed what was in the newspaper article, and (b) the contents of the newspaper article were all the more important because the plaintiff was the vice-president of the Club and the M & R chairman, which the defendant said was the Club's 'in-house judge, custodian and keeper of our Club's morality, discipline, conduct and conscience':

Letter of 24 June 1998

Dear Mr C Arul

I was merely being meticulously careful on establishing the right identity to avoid offending the wrong person and I fail to understand why you took such exception to an address in Yuan Ching Road. I will have you know that there are many respectable, law abiding, honest citizens residing there – unless you now fancy yourself a class above these people.

Moreover, by the vexatious tone of your letter, it would seem that you expect the answer to my enquiry to be common knowledge. Am I supposed to believe then that the Members who voted for you in the last elections knew of the report of your conviction for fraud and breach of trust against the housewife in Johore?

A reply in due course will be much appreciated.

Yours sincerely,
(Signature of defendant)
(**Alleged defamatory words are underlined.**)

15. The plaintiff again wrote to ask the defendant if he would please be kind enough to answer the simple question he had asked earlier. The plaintiff pressed for a 'reply by return' and requested the defendant to stop avoiding the question.

16. The defendant, on receiving the plaintiff's letter dated 26 June 1998, felt that the plaintiff was out to intimidate him because the letter was on the letterhead of his firm M/s Arul & Partners. He surmised that the plaintiff and his firm could not possibly be making persistent enquiry for an idle purpose. It confirmed to the defendant that the plaintiff intended to do him harm.

17. To prepare for battle, the defendant thought at this point that it was important for him to know more about Arul. Basically it was to dig up whatever he could discover about Arul's past and throw it at him. The defendant began to find out more about the Johore housewife's case reported in the newspaper cutting which he remembered seeing some 6 months earlier in January 1998. As his wife is a lawyer, he sought his wife's assistance and obtained the judgment of Justice Abdul Razak, reported in the Malayan Law Journal: *Tara Rajaratnam v. Datuk Jagindar Singh & Ors* [1983] 2 MLJ 127. His wife, Mdm Lim Leong Teen, is a

senior partner in M/s Tan Rajah & Cheah. His son, Mr Chew Kei Jin, is also a lawyer and a partner in the same firm.

18. According to the defendant, what the judge had to say about the plaintiff's conduct weighed down heavily on him. Having read the whole judgment including the editorial note, matters took a different complexion for him. The defendant then wrote another letter dated 10 July 1998. The alleged defamatory words are underlined:

Letter of 10 July 1998

Dear Mr C Arul

According to a newspaper report, "three lawyers, including a Singaporean, were sentenced to two year's jail each for contempt…The lawyers were found to have committed fraud and breach of trust against .. a defenseless housewife.."

In your letter dated 12 June 1998 you said "I am the very same Arul Chandran referred to in the newspaper cutting… as you no doubt already know".

I then asked whether the Members who voted for you in the last elections were aware of this, to which your solicitors, C. Arul & Partners, answered that it was irrelevant to the issue.

Are you saying that someone who has been called "a most vicious and dangerous fraud" by a High Court Judge** is now the Vice-President of the Club is something of no relevance to the Members? I wonder how you had the nerve to offer yourself for office in the first place.

Come next year you will expect to be the President and, if the Members are still in the dark about your past involvement, you might well be the President, even by default, as happens so often in this club. Are you aware what you are doing to the club? Or is all this quite irrelevant and you do not care?

Have you prepared how to deal with the situation when someone 'leaks' it out to the Press --- again a not uncommon thing with this Club?

Even now, how can all the other self respecting members sit in the committee with you; and, when the word gets down, how are you to face the staff – let alone try to tell them what to do?

In the circumstances, what would you have in mind as relevant? I shall be pleased to hear it from you.

Yours sincerely
(Signature of the defendant)

**
If
you
wish
to
know
my
source,
I
have
copies
of
the
written
judgment
by
Justice
Abdul
Razak
which
I
shall
be
pleased
to
supply
you
on
request.

19. Although the defendant knew that the plaintiff's appeal against his summary conviction and sentence for contempt was allowed, nevertheless he understood all this to be irrelevant to what he was going to tell the GC. It must be noted that a number of the descriptions given to the plaintiff by Abdul Razak J formed part of the basis for his summary conviction and sentence of imprisonment of 2 years for contempt, which was already to the knowledge of the defendant set aside by the Federal Court of Criminal Appeal. The defendant ignored all of that because he felt that it was completely irrelevant to what he had to say.

20. The defendant was disturbed by the plaintiff's dismissive attitude to his query, which he said went to the heart of the Club's integrity. He also felt that the plaintiff's persistent personal query on the authorship of the Layman's Guide made no sense to him. In his affidavit, the defendant affirmed in no uncertain terms that he had only two reasons for writing to the GC. He said:

> 48. Consequently, I felt that I should find out for sure from the General Committee whether the Plaintiff's pursuit of "A Layman's Guide To The AGC" was under their instructions. There were two reasons for this. Firstly, I wanted to be assured that I had not contravened any Club Rules and secondly, I had hoped that if the Committee was not involved in the matter, **they would at least restrain him from doing something foolish which might have repercussions on the Club**. Accordingly, I wrote a letter dated 10th July 1998 to the President and General Committee of the Club enclosing the correspondence the Plaintiff and I had exchanged so far. (Emphasis is mine.)

21. The covering letter addressed to the president and the GC, enclosing all the previous correspondence between himself and the plaintiff, also stated very clearly the purpose of his letter to them:

> What I seek from the Committee is a confirmation as to whether C. Arul is acting in his own private capacity or is he now under instructions from you to pursue the matter with me.

22. It is significant that the defendant was not asking the GC to consider whether the plaintiff was still fit to serve as the vice-president of the GC and the chairman of the M & R in view of what the learned judge had said.

23. Since the query to the GC was simply to ascertain if Arul was acting under instructions, I ask myself the question whether it is necessary to enclose all the other correspondence to his covering letter? I find it difficult to comprehend why the defendant took the trouble to enclose the entire set of correspondence when he was merely seeking to ascertain a simple fact. The covering letter itself could simply have asked if the GC had instructed the plaintiff to write to him to find out whether he had written the Layman's Guide. At the most, the Layman's Guide may be enclosed. But I cannot see any good reason to enclose all the previous correspondence unless it was done with some other improper motive or malice.

24. Where the desired purpose has been stated in the covering letter, I find it difficult to infer that by enclosing the 10 July 1998 letter (addressed to the plaintiff where he asked the plaintiff personally how he had the nerve to offer himself for office), the defendant intended to raise the issue of the plaintiff's suitability for office with the GC **at the same time**. If that was in fact his intention and motivation, I would have regarded it as a proper motive coming within a privileged occasion.

25. Since the defendant had clearly expressed in the covering letter his true intention and objective for writing to the GC members, I am not prepared to accept his oral testimony that he had some other proper dominant motive or purpose, which was somehow not expressed in the letter.

26. Furthermore his own affidavit of evidence-in-chief categorically stated that there were two reasons why he wrote to the GC. First, he wanted an assurance that he had not contravened any Club Rules. Second, he hoped that if the GC was not involved in the matter, they would at least restrain the plaintiff from doing something foolish which might have repercussions on the Club. Thus his letter to the GC, with all the attached enclosures, was not motivated by any legal, social or moral duty, or legitimate interest as a Club member to inform the GC that Arul was not a suitable person to hold office in the Club in the light of his past misdeeds. By his own mouth, he wanted the GC members to restrain the plaintiff from pursuing the matter on the authorship of the Layman's Guide if the plaintiff was not acting under their instructions. To my mind, this is the very antithesis of the kind of legitimate interest that will give rise to an occasion of qualified privilege for publication. In fact, the defendant's motivation and hope was for the GC to take sides in the personal and private dispute between him and the plaintiff, and to intervene in his favour by restraining the plaintiff (a) from witch-hunting him, and (b) from laying a complaint to the Club for having written the Layman's Guide.

27. If Arul was writing to the defendant in his personal capacity, which plainly he was, to gather sufficient evidence (a) to bring an action for civil or criminal defamation against the defendant, or (b) to lay a complaint with the GC or the M & R as an ordinary member, he will clearly be entitled to do so if he genuinely and reasonably believed that he had been libelled in the Layman's Guide. It does not mean that Arul loses all his rights simply because he happens to be the Club's vice-president and the M & R chairman. He still retains all his civil rights as an ordinary citizen including his rights as an ordinary Club member.

28. The defendant on being queried is of course entitled not to answer the plaintiff's queries if he was not minded to. The plaintiff cannot compel him to answer either. But those queries do not provide a legal justification to unleash a flood of libellous pre-emptive attacks on the plaintiff's character and reputation.

29. Neither does it seem quite proper in my judgment for the defendant to ask the GC to restrain or stop a member from complaining to the GC or the M & R, or from exercising his civil rights to sue for defamation, take out a private summons or to report to the police on what he reasonably believes to be an offence of criminal defamation committed against him. Whether the

defamation action, police report or complaint to the Club's GC or M & R is justifiable on the merits is an entirely different issue. It is for the relevant body, tribunal or committee to determine that at the appropriate stage after it is referred to their attention.

30. What seems clear to me is that prodding the GC to interfere in a private dispute strictly between two Club members cannot conceivably create an occasion of qualified privilege. What is worse is that the defendant is apparently hoping that the GC will be afraid of the embarrassment and thus restrain the defendant. If the GC were not to do so, the defendant is threatening to wash the plaintiff's 'dirty linen' in public, never mind the embarrassment it will bring to the plaintiff and to the Club. The defendant was apparently suggesting this in his affidavit when he said that 'if the GC was not involved in the matter, they would at least restrain the defendant from doing something foolish which might have repercussions on the Club.'

31. On 20 July 1998, the Club's president wrote to inform the defendant that the plaintiff was acting in his own private capacity and confirmed that the GC was not involved in the matter between them.

32. After receiving a copy of the letter dated 10 July 1998 addressed to the president and the GC together with all the enclosures, the plaintiff wrote to the defendant on 23 July 1998 to tell him that what he was obviously trying to do was to embarrass him. In this letter, the plaintiff confirmed that he was acting in his own private capacity. The plaintiff said that the defendant's several letters were irrelevant to his question on the authorship of the Layman's Guide. The plaintiff told the defendant to reply without any further delay, and later followed up with a reminder on 3 August 1998.

33. The defendant replied to the plaintiff on the next day stating:

Letter of 4 August 1998

> Dear Mr C Arul
>
> You are sadly misguided if you choose to think that I am motivated by a desire to "embarrass" you – you know very well that there is no benefit in that for me. My only concern is for our Club, and what you are doing to it.
>
> If the Club means as much to you as it does to the rest of us, you will know that, in the circumstances, there is but only one honourable thing to do – and that is for you to step down from the Committee of the Club.
>
> If you have any sense of dignity you will not wait until you no longer have the choice; resign gracefully now and let the matter end here.
>
> Yours sincerely,
> (Signed by the defendant.)

34. I considered the above letter carefully to see if indeed by this time, the defendant's dominant motive had changed and was no longer to prevent the plaintiff from witch-hunting him for the Layman's Guide but that his only concern was the welfare of the Club as he had purportedly stated in his letter. After scrutinizing the evidence, I do not think that his dominant motive had changed.

35. The defendant had previously seen the newspaper cutting on Arul in early 1998. According to the defendant, this newspaper cutting had surfaced in the Club in January 1998. He would certainly have realised its obvious implications as the plaintiff was already holding office in the Club as a GC member. Yet, he did not find it necessary out of a sense of duty or legitimate concern for the well being of the Club to bring the matter up at that time. He only chose to take the matter up after he

convinced himself that the plaintiff was witch-hunting him. As can be seen, this was at least 6 months after the newspaper cutting had surfaced in the Club. The defendant admitted that he only decided to find out more about the newspaper cutting after he received the plaintiff's letters and after realizing that the plaintiff was out to do him harm. I therefore doubt his true bona fides when he said that he was not motivated by any desire to embarrass the plaintiff because there was **no benefit** whatsoever in that for him. On the contrary, he himself admitted in his affidavit at paragraph 48 that he had written to the GC with the hope that they would restrain the plaintiff from pursuing him. Surely that was a 'benefit' he was hoping to get.

36. In my determination of the defendant's true motives, I am keenly aware that a person's dominant motive can change with time. Due to the changing circumstances, what is otherwise a lesser motive may eventually assume more importance and later become dominant. What was earlier the dominant motive may become less important subsequently. Situations can be very fluid. It is wrong in my view to conclude that once a certain motive is dominant, it always remains as that person's dominant motive throughout the remainder of his conduct and actions. A different state of mind may exist at a different point of time. What is the true dominant motive at any particular point of time is very much a question of fact.

37. On the same day, 4 August 1998, the defendant also wrote to the president of the Club questioning whether he had enquired from the plaintiff what his motives were. He said that what the plaintiff was doing would only lead him finally to seek the Court's protection of his rights.

38. This evidence revealed that what was still uppermost on the defendant's mind was the plaintiff's pursuit of him, which he obviously wanted to stop.

39. The defendant went on in the next paragraph of his letter to question the president if he still considered the plaintiff the best choice over the other nine GC members to serve as the chairman and convenor of the M & R, now that he knew of the plaintiff's 'Curriculum Vitae'. As the plaintiff had complained that this letter, copied to all the other GC members, was defamatory of him, I will set out the letter in full with the alleged offending words underlined:

Letter of 4 August 1998

> Dear Mr Rasmussen
>
> Thank you for your letter of 20th July 1998 in response to my enquiry as to whether C Arul is harassing me on the instructions of the Committee or in his own private capacity.
>
> Now that we know he is not on Club business has it occurred to you to enquire from him what his personal motives are? What Arul is doing will only lead me finally to seek the Courts for the protection of my rights and that will take us back to where we were four months ago – just when we were led to believe that all that was now behind us.
>
> <u>You can be given the benefit of the doubt that at the time when you appointed him Chairman & Convenor of the Rules and Membership Committee you were unaware of his Curriculum Vitae but then, now with the knowledge that you have, do you still consider him the best choice over the nine other members of the Committee to serve in that position?</u>

Would you say that leaving us 5,000 members at the mercy of who a High Court Judge described as "a most vicious and dangerous fraud" to administer Club Justice is your way of keeping faith with the Membership who elected you President?

Yours sincerely
(Signed by the defendant)

cc The Committee

CAV CHEW "Stamford Road #03-07, Capitol Building Singapore 178884"

40. Given the background events leading to this letter, I have no doubt that the predominant motive of the defendant was still to throw as much mud at the plaintiff as he could lay his hands on, because he believed that the plaintiff was harassing him and was lining him up to be disciplined by the Club's disciplinary committee. The defendant said that if the plaintiff intended to lay his hands on him, then he ought to make sure that his own hands were clean in the first place. So the main motive was more of a revengeful mudslinging to show up the unsavoury past of Arul. The end result the defendant hoped for was the termination of the plaintiff's harassment of him. He clearly admitted that his letter of 4 August 1998 was to ask the GC to restrain the plaintiff. That was his objective.

41. The issue of the fitness of the plaintiff to hold office was thus a convenient cover from which to throw mud continuously at the plaintiff to achieve his own personal objectives. If the predominant motive at this time was truly and simply to highlight the unsuitability of the plaintiff to hold office as a result of what the learned judge had said, then I cannot understand why it is that the barrage of mud throwing had continued relentlessly as can be seen by the later conduct of the defendant. It is all too obvious that it had turned into a personal crusade by the defendant, who was now persecuting and attacking the plaintiff with a vengeance, far exceeding what I would expect of a person who has no spite or ill-will against Arul but who simply has the interest and welfare of the Club at heart i.e. simply to highlight for the fair consideration by the GC Arul's suitability or lack thereof to hold office in view of the findings of the Malaysian High Court Judge.

42. The language of this letter and those that followed, and the sheer determination with which the defendant was acting throughout the dispute, demonstrated convincingly to me that he was personally bent on seeing the plaintiff removed from the Club totally and not merely removed as an office holder on account of what the Malaysian High Court Judge had said of him. I do not infer this lightly but after much due consideration. I have to pierce through the camouflage of reasons offered by the defendant in his own defence to uncover the real underlying reasons.

43. On the next day, 5 August 1998, the plaintiff promptly replied to the defendant's personal letter to him dated 4 August 1998, stating that he was hurt by his letter, but he would keep his cool and 'ask for the 7th time since 27 May 1998, the same, simple question: Did you Mr Chew write the circular letter titled "A Layman's Guide to the AGC" which was circulated at the Tanglin Club AGM on the 25 May 1998.' The plaintiff kept up the pressure on the defendant with his request (emphasised by underlining and in bold) and put in this manner: 'The question is as simple as it is straightforward, and requires a direct answer, "yes" or "no". Will you **please** answer that question now?'

44. I think that this 7th 'request' in this form not only annoyed the defendant further, it must have made an angry man even angrier.

45. The plaintiff wrote another letter dated the 6 August 1998. This time it was in reply to the letter of 4 August 1998, which the defendant had written to the president and copied to all the GC members. The plaintiff in turn copied his reply to the president and the GC members. Clearly, the plaintiff was writing in his personal capacity and not on behalf of the president or the GC. It cannot be reasonably construed otherwise.

46. To my mind, it is a fair and measured response from the plaintiff. I note that the plaintiff said that he was hurt by the reference to him as a 'most vicious and dangerous fraud'. That he was indeed hurt cannot be doubted. For completeness, I shall set out the plaintiff's letter of 6 August 1998 in full:

> Dear Mr Chew,
>
> LETTER TO PRESIDENT AND GENERAL COMMITTEE MEMBERS ON 4.8.98
>
> You have sent me a copy of your letter to Mr J. Rasmussen dated 4 August, the President of the Tanglin Club.
>
> Firstly you say that I am "harassing" you because I have asked you one simple and straightforward question, to which you are yet to give me a reply.
>
> I cannot agree that the posing of such a question can amount to "harassment", if one understands the meaning of that word. The test, I believe is objective and not subjective.
>
> Secondly, you say that what I am doing "will only lead you finally to seek the courts for the protection of your rights". I contend that the posing of my question, in the light of your initials and club number appearing on the document in question, cannot in any way be said to be in breach of any of your rights, either as a member of the Tanglin Club, or as a citizen of Singapore. In my view a reasonable person may be entitled to conclude that it was written by you and those circumstances I thought it only fair that you ought to be given the opportunity of confirming or denying it. So far, you have not done so. If you feel that I have in fact violated your rights, then I invite you to do what you have just threatened, to seek the protection of the Courts, and without any delay.
>
> Thirdly, you wrote to the President of the Club that I ought not to have been appointed the Chairman of the Membership and Rules sub committee because of my "curriculum vitae". I invite you to set out what you allege is my "curriculum vitae" that makes me less of a fit person to chair the M&R sub committee. Will you let me have that by return?
>
> Fourthly, you have made a reference to a High Court Judge (you do not say in which country) who has described me as a "most vicious and dangerous fraud", a reference which is hurtful, considering the circumstances of that case.
>
> I have taken note of what you have written, will you now reply to the third point in this letter, by return?
>
> Yours sincerely,
> (Signed)
> C Arul
>
> c.c. President & GC members

47. Because the plaintiff stated that the defendant had not made clear which country the High Court Judge was from, the defendant concluded that the plaintiff was implying that he did not know who the judge was. He believed that this was frivolous

and calculated to vex him. I am fairly certain that the defendant was indeed vexed. An overly sensitive person can create conditions in his own mind, read more things into matters than one less sensitive would, and then get himself worked up unnecessarily. Thereafter, he may retaliate out of some self-generated outrage, which might well be uncalled for.

48. Continuing with the acrimonious correspondence, I believe that the defendant was waiting for some response from the president of the Club to his letter. When there was no response, the clearly infuriated defendant reminded the president that he personally owed him an answer. He wrote to the president a letter dated 18 August 1998, which was copied to all the GC members. One can sense the simmering anger in the defendant (which now extended to the president) from the tone and manner of the letter, which I will now set out in full, again with alleged the offending words underlined:

Letter of 18 August 1998

> Dear Mr Rasmussen,
>
> There is a letter I wrote to you dated 4th August which remains unanswered and unacknowledged.
>
> The letter refers to the appointment of C Arul as the Chairman and Convenor of the Rules and Membership Committee and questioning why is he still there in spite of what we now know of him.
>
> The question I put to you was <u>whether leaving us 5000 Members at the mercy of a man who has been called by a High Court Judge "a Liar"..."a wolf in lambs clothing"..."a Chameleon", ...in short...."a most vicious and dangerous fraud" to administer Club Justice</u>, your way of keeping faith with the Members who elected you President?
>
> Please do not hand it down to Arul to answer; we are not interested in what he has to say for himself. Let us hear it from you this one time.
>
> Yours sincerely
> (Signed by the defendant)
>
> c.c. The Committee
>
> CAV CHEW 11 Stamford Road #03-07 Capitol Building Singapore 178884

49. I am not able to see how the defendant concluded that the president was not replying because he had in fact handed the correspondence to the plaintiff to reply in his personal capacity. Perhaps, rationality is suppressed when a person is angry. The defendant said that he was disturbed that the important issue he placed before the Club through the president was being handed to the plaintiff to answer, with the result that the plaintiff was becoming the scribe of the Club, and a judge in his own cause. He felt that there was 'collusion' between the president and the plaintiff, and therefore, he had to point out in his 'strongly worded letter' that the president 'had broken faith with the membership to entrust the discipline of 5000 members at the mercy of the plaintiff who was of such character as the Malaysian High Court had described him to be.' He even said that the GC was bent on protecting the plaintiff and they did not even have the courtesy to reply to him. I am puzzled how he could conclude that the entire GC was bent on protecting the plaintiff when this GC had 6 new members, some of whom were members that the defendant himself had canvassed to be elected.

50. The defendant separately wrote to the plaintiff on the same day, 18 August 1998, quoting more of Justice Abdul Razak's findings against the plaintiff. As this letter was attached to the 18 August 1998 letter addressed to and circulated to the GC members, the plaintiff complained that this letter was also defamatory of him. I will now set it out, with the words complained of underlined:

Letter of 18 August 1998

Dear Mr Arul,

I can hardly believe after all the correspondence that has been exchanged between us you now ask me to "set out what I allege is (your) 'curriculum vitae' that makes (you) less of a fit person to chair the M & R sub committee".

Where do you want me to begin – shall I go back to square one and ask "are you the Arul referred to in the newspaper cutting ..the Singapore Lawyer who was sentenced to two years jail.. for contempt…together with two other lawyers found to have committed fraud and breach of trust against … a defenseless housewife"?

And shall I go on to quote the Judge ** "is he really now saying he is at last a lamb and not a wolf under the lamb's wool. To me that he is not a lamb but a fraud. He is a most vicious and dangerous fraud…"

And to be described by the same High Court Judge ** who heard the Appeal as "an imposter", "plainly dishonest", "a liar" and "a chameleon changing his colour as suits him"… what else do you want me to add to your curriculum vitae? I could go on for another three pages…

And you say that it is only my subjective opinion that you are unfit to chair the M & R sub-committee. Well then, let us put it to the General Membership. Very easily done through the Club Magazine. It could be in a very simple form of a poll – a "yes" or a "No" for Arul – I put the facts before them and you render unto them your version.

Do you agree to that?

Yours sincerely
(Signed by the defendant)

** Encl: To answer your question and to refresh your frail memory, attached herewith is an extract of the

written judgement of Justice Abdul Razak – no point for you to pretend any more, Arul.

CAV CHEW 11 Stamford Road #03-07 Capital Building Singapore 178884

51. The defendant attached extracts of the written judgment of Abdul Razak J not because he wanted to disclose what was stated in the short editorial note to the judgment: that the plaintiff's appeal against conviction and sentence for contempt of court was allowed and that the plaintiff had obtained leave to appeal to the Privy Council on the main findings of the trial judge. I am inclined to think that the extracts were attached to prove to the other GC members that he had accurately quoted what the learned judge had said of the plaintiff. As for the plaintiff, the defendant intended to 'refresh [his] frail memory' of what the judge had said of him. Clearly, it was not done out of benevolence to allow the plaintiff the convenience of checking if what he quoted was correct, but to inflict painful reminders of the long buried past on the plaintiff.

52. On 21 August 1998, the plaintiff's solicitors wrote to the defendant demanding a withdrawal and an apology for the alleged defamatory remarks, including a suitable sum as damages and costs. From the defendant's reply dated 27 August 1998, one can further gather what was his state of mind at that time and whether his view of matters had changed:

> ….Obviously your client ….is pursuing an old grudge in a new spree of Witch-hunting in wanting me to admit to a letter criticising the previous Committee which was distributed during the past elections.
>
> His manner has caused me a great deal of annoyance both in his tone of enquiry and persistence to the point of harassment. In quoting what was said of him by the Bench I hoped to remind him of what he desperately wants to forget – that if he has any ideas of revenge by administering his brand of justice, he had better not forget that his hands are not snow white clean.
>
> ….. I cannot allow him to bait me for his own amusement. He started all this and it is for him to put an end to it. Otherwise, if he wants a long struggle through the Courts and end up where we did the last time, so be it. The Chief Justice will be pleased to see him. (Emphasis is mine.)

53. So it appears that if the plaintiff were to pursue the matter of the authorship of the Layman's Guide, the defendant would be steadfast in continuing with his mudslinging. If the plaintiff stopped it, he would stop but not otherwise. An eye for an eye it would seem and the defendant was preparing himself for a long battle to the bitter end. The issue of suitability for office did not feature much. It was more a mere facade.

54. Whilst waiting to see what the plaintiff was going to do next and whether the GC would act basically to stop the plaintiff, the defendant realized that the original finding of fraud by Justice Abdul Razak as well as the sentence of 2 years jail for contempt of Court brought the plaintiff within the operation of Rule 24 of the Club's Rules. Rule 24 says:

> If any Member shall be convicted of any grave or heinous offence or adjudged bankrupt or make any composition or arrangement with his creditors he shall *ipso facto* cease to be a Member, provided always that notwithstanding anything contained in these Rules the Committee may in its absolute discretion re-admit such former Member to the class of membership to which he previously belonged upon such terms and conditions as it thinks proper, without entrance fee.

55. The defendant therefore wrote a letter dated 18 September 1998 to the president and the GC explaining his contention that the plaintiff had ceased automatically to be a member of the club with effect from 1982 by the very fact of the findings of fraud and sentence for contempt, and he remains so until he is re-admitted although the plaintiff had succeeded in his appeals. He said that an interpretation of Rule 24 should be sought from the courts by the GC.

56. On 13 October 1998, the general manager of the Club, Mr Mark Kissner, replied that his letter was tabled at the GC meeting on 12 October 1998 and the meeting did not agree with its contents. At this time, the GC had not obtained legal advice yet.

57. The defendant was dissatisfied with the reply. It is my finding that the defendant fervently wanted the plaintiff to be kicked out of the membership. The dispute between them had by this time no doubt become very bitter and personal, bearing in mind that a letter of demand from the plaintiff's solicitors had already been issued to the defendant. He felt that the GC was protecting one of their own at the expense of the Club's interest. He said he was left with no choice but to seek his fellow members' stand on whether they wanted the GC to seek a definitive interpretation of Rule 24 from the courts. This he did by preparing and circulating a "A Member's Message" on 10 November 1998 to the Club members.

58. In the message, he highlighted, *inter alia*, the newspaper clipping with the headlines "S'pore lawyer among three jailed", who was none other than the plaintiff. He stated that the plaintiff was found guilty of fraud and sentenced to two years' jail for contempt of court. Thus, the plaintiff *ipso facto* ceased to be a member according to Rule 24. He repeated and emphasized in bold lettering what Abdul Razak J had called the plaintiff. He accused the president of moving in tandem with 'this most vicious and dangerous fraud'. In the body of the member's message, the defendant never mentioned that the plaintiff's appeal against the summary conviction and sentence for contempt of court was allowed. Neither was it stated that his appeal to the Privy Council had been allowed albeit by consent 'upon terms that all allegations of fraud against [Arul] were withdrawn, and also any claim against him as allegedly a constructive trustee'. The outcomes of these appeals were material facts known to the defendant at that time, but he chose not to fully disclose them in the body of the Member's Message sent out to the 'general membership.'

59. He attached the newspaper cutting and selected extracts of the judgment of Abdul Razak J. I observe that the defendant had taken the trouble to box up and underline many passages in the extracts of that judgment. He deliberately focused the reader on the words 'fraud', 'most vicious and dangerous fraud' and 'imprisonment', which words were double underlined. For greater emphasis, he added two vertical lines against the underlined words 'the whole of Singapore, let alone the legal fraternity, would descend upon him with accusing fingers pointing at his integrity and honesty'. A substantial part of the passages underlined were areas where the learned judge, in finding that the plaintiff committed contempt, had severely criticized the plaintiff.

60. But it must be noted that the Federal Court of Criminal Appeal had already allowed the appeal by Singh, Suppiah and Arul, and set aside the order of contempt on the grounds (a) of the learned judge's failure to make plain to them the specific nature of the charges and to give them the opportunity of a fair hearing to answer them, and (b) that the learned judge had wrongly applied the principle enunciated in *Coward v Stapleton* (1953) 90 C.L.R. 573 when he held that the appellants were guilty of contempt and hence his conclusion was not justified.

61. Defence counsel submitted strenuously that there is a right vertical line running down the editorial note at p 128 of the judgment, which mentions in small print that the respondents' appeal against the conviction and sentence was allowed and that leave to appeal to the Privy Council on the main findings of Abdul Razak J was obtained. Was this intended by the defendant to draw the reader's attention to (a) the successful outcome of the plaintiff's appeal, and (b) the leave given to appeal to the Privy Council? I do not think so because the vertical line also ran across parts of the headnotes which are clearly irrelevant and immaterial e.g. the list of authorities cited in the judgment.

62. If indeed the defendant wanted to similarly highlight the quashing of the 2 years jail sentence, he could have easily boxed up the editorial note in the same manner as he had done with headnotes (4) and (6) which states (a) that '*the defendants were guilty of fraud*', (b) that they had '*committed a grave and abominable act of contempt against the courts as they had made the courts the subject of their deception and mischief and they should be punished for it*,' and (c) that they '*must be committed to*

prison for a period of 2 years.' Why box up this part of the headnote which dealt with the 'grave and abominable act of contempt', their 'deception and mischief' and the sentence of 2 years, since these are no longer relevant upon the setting aside of the order of contempt by the appellate court? Why had he also underlined parts of the judgment containing scathing remarks of the plaintiff, which were specific to the learned judge's findings of contempt, but which had been overturned by the Federal Court of Criminal Appeal?

63. His failure to mention the favourable outcomes (already known to him) of the plaintiff's appeals in the main text of the member's message, and the manner in which the defendant highlighted the various passages that were highly critical of the plaintiff in the judgment in complete disregard of the outcomes of the appeals, corroborated the other evidence that I have set out earlier of the defendant's malicious motives and intentions.

64. The explanation given by the defendant for not bringing the readers' attention to the two appeals was that those outcomes were irrelevant to the operation of the *ipso facto* rule. If indeed the defendant was so economical with emphasizing only what was relevant, then I cannot understand the necessity for the substantial emphasis given to all the learned judge's severe criticisms of the plaintiff when the issue is merely one of interpreting the *ipso facto* rule.

65. In my mind, the member's message was deliberately written in a fashion to further embarrass the plaintiff. The circulation is widened considerably beyond the 10 GC members. It was calculated to spread the defamatory material to more people so that even greater damage to the plaintiff's reputation and character could be achieved. These acts supported the inference of malice.

66. I can also discern the defendant's relentless pursuit of his goal to kick the plaintiff out of the club if he could, in revenge for the plaintiff's 'witch-hunt'. Moreover with the selective emphasis to achieve the effect he wanted, he would have misled the ordinary reader to think that the plaintiff had indeed been finally convicted of fraud and sentenced to 2 years imprisonment for contempt. An ordinary reader would obviously pay much more attention to the main body of the members' message and the parts of the judgment given emphasis, than on other parts not emphasized or not given the same degree of emphasis.

67. The defendant further enclosed in his member's message, a self-addressed stamped envelop, and a response slip for members to sign as follows:

> I share the Member's view that in the light of what we now know of Arul Chandran the Committee must act as they are required to under the Rules of the Club and appraise Members of what course of action they choose to follow.
>
> Notwithstanding, Arul Chandran must not continue as the Chairman and Convenor of the Rules and Membership Sub-Committee and his position as Vice-President is no longer valid as he is not even a Member of the Club.
>
> In the meantime, the President and the Committee will be called to answer for all of Arul Chandran's actions - including his continued trespass and enjoyment of the privileges of the Club.
>
> _____
>
> Signed

68. Initially, the defendant gave the impression that he sent the 'survey' to the entire Club membership or at least a substantial number of the members. His letter to the president and the GC dated 16 November 1998 stated that his member's message had gone out to the 'General Membership.' Later it transpired that he did not circulate to all the Club members but only to about 100 members, comprising his children, his friends, acquaintances or references from his friends. He even went on to say that one cannot expect him to go to his 'enemies for these things'. The defendant received 51 signed returns. Does this mean that the other half disagreed or were simply not interested? Besides restricting the 'survey' to the limited circle of his friends and their friends, the 'survey' was drafted in a way which did not give the opportunity for persons to register their disagreement. It was

rather one-sided. Since the outcomes of the two appeals have not been disclosed, the member's message is likely to mislead those ordinary Club members, who have no background information.

69. In the circumstances, I conclude that the exercise was not to get an independent and impartial response based on material facts fairly disclosed from a substantial and broad cross-section of the membership but it was to further embarrass and ridicule the plaintiff, and to obtain more ammunition to pressure the GC to remove the plaintiff from the Club's membership, which was what he personally wanted because of his intense spite and ill-will towards the plaintiff. This 'survey' was also in part to retaliate against the GC for not agreeing with his own views on Rule 24 and for taking no action on his letter. He admitted being frustrated when the GC 'slammed the door in [his] face.'

70. From the totality of the evidence, I do not believe that the defendant's predominant motive in sending out the member's message with all the attachments and the kind of emphasis given, was not to further embarrass the plaintiff.

71. Subsequently, the defendant received a letter dated 10 November 1998 from the general manager informing him that their lawyers, M/s Drew & Napier, had given an unequivocal opinion that his contention was incorrect and not supported in law. Hence, the Club would not be taking any further action on his letter. The defendant's replied and reiterated that the GC should seek an authoritative interpretation from the courts.

72. Sometime after 16 November 1998, the defendant followed up with another circular 'A STEP BY STEP RATIONALE OF RULE 24 FOR THOSE WHO ONLY HEARD OF IT FOR THE FIRST TIME…. '. This is the first time that the plaintiff made clear to the Club members that the plaintiff's appeal against the sentence for contempt was allowed, and his appeal to the Privy Council was allowed 'by consent and on terms agreed.' Nevertheless, the embarrassment and hurt that he intended to inflict on the plaintiff had already been inflicted.

73. The defendant cited two events in 1999 to show that the plaintiff was unfit for office in the Club. They were the sacking of the plaintiff from the GC on 31 March 1999 for having conducted himself in a matter unbecoming of a member of the GC or the Club, and the ruling by the District Court on 30 September 1999 that the M & R (of which the plaintiff was the chairman) had breached the rules of natural justice when they suspended Mr Petrie. As the outcome of these later events could not possibly have influenced the earlier actions of the defendant in publishing the offending publications in 1998, I have to disregard them when determining if the defendant was predominantly motivated at the time of publication by malice, or by his genuine interest in welfare and well being of the club and his sense of duty, which is the stand taken by the defendant.

74. If the evidence is merely to show that the plaintiff is *per se* unfit to hold office in the Club, then the plaintiff's evidence in rebuttal is that he had in fact been vindicated in his High Court suit against the 6 GC members who voted to sack him from the GC. Arul also testified on the past practice adopted by the M & R and how he had improved its disciplinary procedures after he became its chairman. I believe that he did try to improve the disciplinary procedures the way he thought best by introducing some note taking of the evidence given at disciplinary committee proceedings and by allowing lawyers to accompany members appearing before the disciplinary committee, which was prohibited previously. If the plaintiff had abided by the long established disciplinary procedures in place even before he became the M & R chairman, it does not follow that he is dishonest even if those procedures could be said to be less than fair.

75. In any event, I do not think that there is evidence that Arul had conducted himself as the M & R chairman in a manner which shows up a serious flaw in his character, leaving aside the allegation that he is a dishonest man or a most vicious and dangerous fraud. Breaching the rules of natural justice, perhaps inadvertently, during Mr Petrie's hearing by allowing different members to sit on the panel on different occasions due to expediency or convenience (as some of the panel members were unavailable on various dates) is insufficient in my view to prove that Arul had deliberately and intentionally done that to penalize or prejudice Mr Petrie such that it amounts to a serious character defect on Arul's part.

76. In the course of the trial, it was discovered that a legal opinion (P5) dated 7 January 1998 from M/s Allen & Gledhill addressed to the plaintiff was not circulated to the GC for them to consider whether the 3 resolutions proposed by some members must be tabled at a forthcoming SGM. The 1st resolution was a motion to censure Mr David Gabriel for ventilating

certain issues of the club in his two letters to the press. The 2nd resolution was to remove him from the GC and all sub-committees. The 3rd resolution was to censure the GC. M/s Allen & Gledhill advised that the SGM has no power to remove a GC member and hence, the 2nd resolution need not be tabled. But the members have the right to requisition an SGM and the GC is bound to table the 1st and 3rd resolutions.

77. It was also put to the plaintiff that another earlier legal opinion (P4) from M/s Allen & Gledhill dated 3 October 1997 addressed to the Club's president, advising that all resolutions requisitioned by the necessary number of members must be tabled, was concealed by him and the president. The plaintiff denied it. He agreed that he did not give a copy of it to the general manager for circulation to the rest of the GC but he would not know if the president himself did. In any case, he believed that the GC had discussed it although he could not explain why there was no mention of P4 in any of the minutes of the GC meetings. Mr Vince Khoo, a GC member called by the plaintiff to testify on his behalf, recalled seeing replies from lawyers and one of which was from Mr Michael Hwang. This supports the plaintiff's belief that P4 was discussed by the GC. On the other hand, the defendant called no evidence to prove his bare assertion that the president and the plaintiff had colluded to keep that legal opinion away from the rest of the GC.

78. In trying to justify with more recent evidence that the plaintiff is a fraud and hence, he is unfit for office (in contradistinction to merely justifying that he is unfit for office *per se*), defendant's counsel submitted that:

> (a) the plaintiff dishonestly concealed from the GC, a legal opinion (P5) which he obtained from M/s Allen & Gledhill advising that they were obliged to table the 3 resolutions;
>
> (b) that the committee had not followed the advice of 3 law firms that they were obliged to table the 3 resolutions;
>
> (c) that some of the opinions were not disclosed in subsequent court proceedings;
>
> (d) that the plaintiff misrepresented the effect of M/s Chor Pee's opinion to the GC, where he played a crucial role during the deliberations because the GC deferred to his opinions on matters relating to the law; and
>
> (e) that the plaintiff misrepresented the reason for not proceeding with the 3 resolutions in the notice sent out to the membership.

79. The plaintiff testified that the special GC meeting of 22 December 1997 had considered the legal opinion from M/s Chor Pee & Partners dated 17 December 1997 stating that the requisitionists were entitled to put the 3 resolutions on the agenda of the SGM but the SGM was not entitled to pass any of the 3 resolutions. After much discussion, all 7 GC members present unanimously resolved that the 3 resolutions would not be tabled at the SGM on 11 January 1998.

80. From the minutes recorded, I cannot find any evidence that the plaintiff had steered the discussion to a view that he did not honestly hold. The plaintiff gave a reasonable explanation why he held a different view from Chor Pee's. Just as any other GC member, he is entitled to state his own views before the GC so long as they are his honest views, even though those views do not accord with the legal opinions given. I observe that the 3 resolutions have nothing to do with the plaintiff personally. I do not see any benefit for him to conduct himself dishonestly or to conceal P4 for that matter when the opinion given in P4 is in any case not much different from Chor Pee's opinion, which the GC had already discussed. In any event, I am inclined to believe that P4 was disclosed based on the evidence of Mr Vince Khoo.

81. A supplementary notice was sent out by the general manager after the plaintiff had vetted it. It stated that the GC unanimously decided that the 3 proposed resolutions relating to the removal of a committee member would be ultra vires the Rules and accordingly, the 3 items would be deleted from the agenda. I am not able to conclude that this notice had

misrepresented the substance of the decision of the GC or the reasons for it.

82. As the plaintiff was going to face the SGM on 11 January 1998 to explain the GC's views and answer questions on why those 3 resolutions were not tabled, Arul decided to seek another legal opinion on an urgent basis. On his own initiative, he consulted Mr Michael Hwang of M/s Allen & Gledhill. Mr Hwang replied to him on 7 January 1998 stating that the 2nd resolution should not be put to the meeting but the 1st and 3rd resolutions must be put. After considering the advice, the plaintiff's opinion did not change. So the plaintiff proceeded to face the SGM. He did not circulate Mr Hwang's advice to the GC members for them to re-consider their decision. Given the short time left, I will not fault the plaintiff for not calling another GC meeting just to discuss this latest opinion before the SGM, which was again not much different from Chor Pee's opinion considered by the GC previously. Under the circumstances, I am not able to infer any dishonest intent from the mere failure of the plaintiff to disclose this legal advice. Even if one were to consider that the plaintiff made an error of judgment for not circulating Mr Hwang's advice to the GC for re-consideration, that error of judgment does not amount to dishonesty without more.

83. In any case, I note that these recent events are not found in any of the particulars of pleading justifying why the plaintiff is unfit to hold office. Strictly then, the defendant cannot now rely on them for this purpose. As I understand it, the particulars on Arul's unsuitability for office are premised exclusively on his conduct in relation to the Tara matter, and his concealment of it from the Club members.

84. Nevertheless, I do give the defendant some leeway in respect of P5, a document not provided in discovery to the defendant, and which came to light only at the trial. However, if the defendant intends to use other more recent events to justify that the plaintiff to this day must still be regarded as a 'most vicious and dangerous fraud', then particulars must be clearly given in the pleadings if those events are already known to him. Otherwise, he must be precluded from relying on them in his justification defence as he is bound by his pleadings. I might add that in the course of the trial, I confirmed with defendant's counsel whether they were going to rely on any more recent conduct to establish that the plaintiff is dishonest and a most vicious and dangerous fraud, and hence unfit to hold office in the Club. Counsel informed me that they were relying solely on the plaintiff's past conduct in the Johore matter to establish that. Basically, the defendant decided to stand by his pleadings.

Statement of Claim

1st publication of 10 July 1998

85. The plaintiff averred in his statement of claim that the defendant had, by way of a covering letter dated 10 July 1998 enclosing *inter alia* two letters (dated 24 June 1998 and 10 July 1998), falsely and maliciously published to the president and the GC members certain words (underlined in the two letters in italics as set out above), which were defamatory of his character, and gravely injured his credit, character, reputation and feelings. For convenience, this is referred to as the 1st publication.

86. The plaintiff averred in paragraph 6 of his statement of claim that the defamatory words in the context in which they were published ordinarily meant and were understood to mean that:

> 6a) the plaintiff had been convicted and remains convicted for fraud and criminal breach of trust;
>
> b) the plaintiff has been found to have committed fraud and criminal breach of trust against a housewife in Johore;
>
> c) the plaintiff is a vicious and dangerous fraud who is not fit to hold the position of vice-president of the Club;

d) the plaintiff ought not to have stood for election for the post of vice-president (or committee member) of the Club as he is a vicious and dangerous fraud;

e) the plaintiff was keeping members of the Club in the dark about his conviction by not informing them of the same which is unsavoury; and the plaintiff is not fit to sit with other committee members in the Club's GC.

2nd publication of 4 August 1998

87. The letter dated 4 August 1998 addressed to Mr J Rasmussen ('Rasmussen'), the president of the Club, and circulated to the members of the GC, comprises the 2nd publication. The plaintiff averred in paragraph 12 of his statement of claim that the defamatory words (in italics and underlined above) in the context in which they were published ordinarily meant and were understood to mean that:

12g) the plaintiff does not deserve to hold the appointment of Convenor of the Membership and Rules Sub-Committee ('M & R');

h) the plaintiff, as the convenor of the M & R, would not administer justice fairly and impartially;

3rd publication of 18 August 1998

88. In a further two letters both dated 18 August 1998, one of which was addressed to the plaintiff and circulated to Rasmussen and members of the GC, and the other addressed to Rasmussen and circulated to the members of the GC, the defendant published certain alleged defamatory words (as underlined in the two letters in italics above) which comprise the 3rd publication. The defamatory meanings set out above in 6a to 6e, 12 g and 12h were similarly ascribed to this 3rd publication.

Aggravated Damages

89. The plaintiff prayed for aggravated damages on the following grounds:

(i) the deliberate and intended extent of the various publications;

(ii) the position and standing of the plaintiff;

(iii) a letter believed to be written by the defendant and addressed to "Fellow Members" entitled "A Layman's Guide to the AGM" containing statements discrediting the entire GC of the Club including the plaintiff;

(iv) the defendant's letter dated 27 August 1998 where he refused to comply with the following demands in the plaintiff's solicitors' letter dated 21 August 1998 for --

a. a letter of apology;

b. an assurance that the defendant would not repeat the publication of those words or similar allegations concerning the plaintiff;

c. an indemnity for the costs incurred by the plaintiff; and

d. payment of a proper and suitable sum as damages for the injury to his reputation and for the embarrassment and distress caused to him;

(v) the defendant's publications were motivated by malice, which could be seen from:

a. the selective and piecemeal representations by the defendant of the facts surrounding the judgment against the plaintiff for fraud and breach of trust and conviction for contempt along with two others by the High Court in Johore Bahru, despite being cognisant of the fact that the plaintiff was subsequently exonerated on appeal to the Federal Court in Malaysia on the contempt sentence and to the Privy Council on the civil aspect of the case.

b. the letter of the defendant dated 5 June 1998 addressed to the plaintiff attaching a newspaper article entitled "Singapore lawyer among three jailed", where the defendant wrote:

There are two ARUL CHANDRANs in the Telephone Book – one with his address at 23 Balmoral Road #14-23, and the other at Block 121 Yuan Chuan Road #10-405.

Are you the Arul referred to in the newspaper cutting reproduced below as the Singapore lawyer who was sentenced to two years jail for fraud and breach of trust against an housewife in Johore?

I ask this because if you are the other Arul, I do not intend to reply to his letter as I do not know him.

(vi) the tone of and the personal attacks on the plaintiff in the defendant's 5 letters (set out above), including those dated 5 June 1998 and 27 August 1998 referred to earlier; and

(vii) in the premises, the defendant published and/or caused to be published those words (as underlined in the 5 letters) knowing them to be false, or alternatively, recklessly, not caring whether they were true or false, and with a dominant improper motive, namely to damage the plaintiff's reputation.

90. The defendant further prayed for an injunction to restrain the defendant from further publication of the said words or such similar words defamatory of the plaintiff.

Amended Defence

91. The defendant denied in his defence that the words complained of bore the meanings alleged in the statement of claim. There was no cause of action disclosed by way of innuendo.

92. The defendant averred that those words complained of were true in substance and in fact, and their true natural and ordinary meanings, including their inferential meanings, were:

> (a) that the plaintiff was guilty of fraud and breach of trust against a Johore housewife;
>
> (b) that he wrongly withheld this information from the Club members;
>
> (c) for both of these reasons he was unfit to hold office as the vice-president and as the chairman of the Membership and Rules Committee of the Club; and
>
> (d) that the plaintiff was not suitable to serve as the chairman of the M & R as it would be unlikely that he would administer justice fairly and impartially.

93. Extensive particulars were given under each defence and it will be useful to set them out.

Justification

> Particulars were:
>
> In 1974 Tara Rajaratnam ('Rajaratnam'), a Johore housewife, entered into an agreement with Data P. Suppiah ('Suppiah'), a Malaysian advocate and solicitor, whereby she agreed to transfer land owned by her at Kulai in Malaysia as security for an advance of M$220,000. Suppiah and Datuk Jagindar Singh ('Singh'), who were both advocates and solicitors and partners in the firm of *Suppiah & Singh,* acted for Rajaratnam in preparing the necessary documents. On 30 March 1974 the Transfer and Memorandum in favour of Suppiah were signed.
>
> Suppiah and Singh fraudulently induced Rajaratnam to enter into the said agreement by falsely and unknowingly representing to her that the transaction concluded on 30 March 1974 was of the nature of a security that would enable her to redeem the property by repaying the sum of M$220,000 at any time, when the truth was that Suppiah and Singh treated the transaction as an outright sale coupled with an option to re-purchase the property for that sum within one year of the agreement. Furthermore, Suppiah and Singh falsely and knowingly represented to Rajaratnam that it was their intention to treat the transaction as a secured loan, when in fact they had no intention of allowing Rajaratnam to redeem the property at any time. By making the said representations Suppiah and Singh induced Rajaratnam into entering into the transaction.
>
> On 22 July 1975 the transfer of the land to Suppiah was registered. Nine days later, on 31 July, Singh executed a transfer of the land to the Plaintiff, purported for a sum of M$220,000. In fact, the Plaintiff never paid and never intended to pay this amount or any amount as consideration for the transfer.
>
> On 28 January 1976 the Plaintiff applied to the relevant authorities in Malaysia for sub-division of the land with a view to development. On 4 March 1976, *Suppiah & Singh,* acting on the Plaintiff's behalf, gave Rajaratnam notice to quit

the land. This was followed by an action for possession in which judgment was given in the Plaintiff's favour on 9 August 1976. In January 1977 the Plaintiff's application for sub-division was approved. In May 1978 he transferred the land to Jet Age Construction Co., a company which he knew to be controlled by Singh. The transaction falsely purported to be for a price of M$361,114. This amount was never paid, nor did the Plaintiff, Singh or Jet Age ever intend that this amount or any amount should ever be paid as consideration for the transfer. The Plaintiff, together with Suppiah and Singh, fraudulently, entered the said transfer in order to make it appear that the Plaintiff was a *bona fide* purchaser for value of the land without notice, in which event his title could not be attacked. The making of the said transfer was fraudulent in that the Plaintiff, Suppiah and Singh all knew that although the Plaintiff purported to be the registered owner of the land, he was in fact merely holding it as nominee or trustee for Singh. By entering into the said transaction the Plaintiff fraudulently conspired with Suppiah and Singh to ensure that Rajaratnam was deprived of title to her land and could not recover the same from the Plaintiff, who claimed to be (but as he and his fellow conspirators well knew) was not the bona fide purchaser of the land for value without notice of Rajaratnam's claim.

On 17 April 1978 the Plaintiff brought an action against Rajaratnam in the High Court of Malaysia to remove a caveat registered against the land at Kulai by her. It was presided over by Mr Justice Syed Othman. The Plaintiff proceeded on the basis that he had bought the land as a *bona fide* purchaser for value without notice. The Court accepted the Plaintiff's claim and found in his favour, rejecting Rajaratnam's contention that the transfer to the Plaintiff was bogus. In fact, the Plaintiff had not been a bona fide purchaser for value but had been a nominee or trustee for Singh. The Plaintiff was aware of this at the time of the hearing. By fraudulently concealing the true position from the Court the Plaintiff misled Mr Justice Syed Othman into erroneously presuming that he was a bona fide purchaser for value and finding in the Plaintiff's favour.

In support of the defendant's contention that the Plaintiff's execution of the transfer of 31 July 1975 was fraudulent and that his conduct misled Mr Justice Syed Othman, the Defendant relies upon the fact that on the 7th day of the hearing of Rajaratnam's action ("the Rajaratnam Action") against Suppiah, Singh and the Plaintiff before Mr Justice Abdul Razak the Plaintiff withdrew his pleaded case that he was a bona fide purchaser for value without notice of the land at Kulai and conceded that he had always been a mere nominee or trustee for his fellow conspirator, Singh.

94. The additional particulars relied on were that the M & R has specific responsibility for ensuring the proper conduct of its members. The plaintiff, appointed as the chairman in 1998, had an important role to play in ensuring that the members of the Club behaved in a proper manner and as such would be called upon to take appropriate action against those who did not do so.

Qualified privilege

95. Further or alternatively, the defendant averred that he had a civic, moral or social duty to publish the words complained of to the president of the Club and its GC members. It was alleged that those persons had a corresponding duty or interest to receive the publication complained of. Hence, the defence of qualified privilege applied.

96. The particulars given were:

The Defendant is a member of the Tanglin Club and thus its affairs are of legitimate and personal concern to him.

The General Committee of the Tanglin Club is responsible for the management of the Club's affairs including the conduct of the Club's finances and the conduct of its members. The rules and Membership Sub-Committee particularly is responsible for ensuring the proper conduct of its members and for determining whether applicants for membership should be permitted to join the Club.

In 1997 the Plaintiff was elected to the General Committee. In 1998 he was elected as its Vice-President. He thus had an influential role to play in not only the conduct of the Club's affairs in general but also in the management of its finances. Furthermore, due to his appointment as Chairman of the Rules and Membership Sub-Committee in 1998, he had a prominent role to play in ensuring that the members of the Club behaved in a proper manner and as such would be called upon to take appropriate action against those who did not do so. In this role he also played an important part in determining who would be suitable to join the Club. These roles were of paramount importance to the Club. Thus the Plaintiff's suitability to serve in such positions was a matter of proper and legitimate interest to the Defendant and to the President and committee members of the Club.

Fair Comment

97. Further or alternatively, it was pleaded that the said words were fair comment on a matter of public interest, viz the suitability of the plaintiff to be the vice-president of the GC and chairman of the M & R of the Club, which the defendant described as one of the most prominent and influential private members' clubs in Singapore.

98. The following comment was said to be fair:

(a) that the members of the Club should be informed by the plaintiff of his conduct pertaining to a Johore housewife's land;

(b) that the plaintiff's behaviour in respect of the Johore housewife's land showed him to be a vicious and dangerous fraud;

(c) that the plaintiff would not properly and fairly administer Club justice as chairman and convenor of the M & R; and

(d) given that the plaintiff is a most vicious and dangerous fraud he is not suitable to sit as chairman and convenor of the M & R.

99. The particulars relied on were the same particulars given under the justification defence. Further or alternatively, the words complained of comprised a fair and accurate report of the judgment of Abdul Razak J in the case of Mdm Tara Rajaratnam ('Tara') concerning Arul's conduct. Accordingly, the said words were published on an occasion of qualified privilege.

Estoppel

100. The defendant pleaded that the plaintiff was estopped from alleging that the words complained of in the letters set out above were false by virtue of the following judgments:

a. *Tara Rajaratnam v. Datuk Jagindar Singh & Ors*

[1983] 2 MLJ 127 – Civil Suit No. 284 of 1979

b. *Datuk Jagindar Singh & Ors v. Tara Rajaranam*
[1983] 2 MLJ 196 – Federal Civil Appeal Nos. 215,216. 291 and 292 of 1982

c. *Datuk Jagindar Singh & Ors v. Tara Rajaratnam*
[1986] 1 MLJ 105 – Privy Council Appeal No. 39 of 1983.

Submissions of Defendant's Counsel

101. The defendant's starting point is that the substantive alleged offending words are statements of fact from or direct quotes of the judgment of Abdul Razak J in Tara's case. In summary, counsel put forward the following 5 defences:

(a) ***Justification***

102. The underlined words complained of in their natural and ordinary meaning were true in substance and in fact in the meanings as pleaded in the defence.

(b) Qualified Privilege

103. The defendant had a civic, moral or social duty to publish those words to the Club's GC members and these persons had a corresponding duty or interest to receive the publications complained of. Accordingly, the words were published on an occasion of qualified privilege. Furthermore, the publication by the defendant was without any malice.

(c) Fair Comment

104. The words complained of were fair comment on a matter of public interest, namely the suitability of the plaintiff to be the vice-president of the GC and chairman of the M & R.

(d) Qualified Privilege

105. The said words comprised a fair and accurate report of the Abdul Razak J's judgment in Civil Suit No 284 of 1979 concerning the plaintiff's conduct. The consent order of the Privy Council based on certain agreed terms allowing the appeal of the plaintiff did not have the effect of undoing the evidential findings of the considered judgment of Abdul Razak J on the merits after a full trial, which decision was affirmed by the Federal Court after full arguments.

(e) Estoppel

106. The plaintiff is estopped from alleging that those words were false by virtue of the three judgments mentioned above. Essentially, the plaintiff cannot now deny the facts as found by Abdul Razak J concerning his character and conduct.

Are the offending words defamatory?

107. Whether the words are defamatory must be determined by an objective test: Do the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? This test set out by Lord Atkin in *Sim v Stretch* (1936) 52 TLC 669 at p 671 was adopted by the Court of Appeal in Singapore in *Aaron v Cheong Yip Seng* [1996] 1 SLR 623.

108. Clearly, those words complained of do bring the plaintiff into public odium and contempt, and they do lower him in the estimation of right-thinking members of society generally. Hence, they are defamatory in nature. This cannot be disputed. As those words are capable of several defamatory meanings (inferential meanings included), it is necessary to identify them and

then determine to what extent those meanings have been proved, before finally deciding whether the sting in each of the 3 sets of publications is sufficiently justified. A partial justification, that is one falling short of what it takes for the defendant to succeed in his defence of justification, is relevant to the quantum of damages.

Meaning of the offending words

109. I am mindful of what the Court of Appeal had said in *Aaron v Cheong Yip Seng* at p 638, 647 and 648 concerning the proper approach to take when determining the natural and ordinary meaning of the words complained of:

> In considering the natural and ordinary meaning of the words the proper approach is to consider what meaning the words would convey to an ordinary reasonable person who is neither unduly nave or suspicious, using his general knowledge and common sense. Such a meaning is not confined to the literal or strict meaning of the words but includes any inferences which can reasonably be drawn by such person: see *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at p 258; and *Jones v Skelton* [1963] 3 All ER 952 at p 958.
> …..
> …..
>
> On this issue it is necessary to consider first what precisely the respondents sought to justify. The law on this point is now quite clear. Where a defendant in a defamation action pleads justification, he must do so in such a way as to inform the plaintiff and the court precisely what meaning or meanings he seeks to justify: see *Lucas-Box v News Gropup Newspapers Ltd* [1986] 1 WLR 147, at p 153; *Viscount De L'Isle v Times Newspaper* Ltd [1988] 1 WLR 49, at p 60 and *Prager v Times Newspapers Ltd* [1988] 1 WLR 77, at p 86. ….
> ….
> The law on this is clear: the issues to be tried under the plea of justification are limited to the matters referred to in the particulars: *Yorkshire Provident Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 148, 152. Be that as it may, the crucial question is whether within the confines of their pleadings the respondents have succeeded in proving the facts averred in the particulars and, on the basis of these facts, in justifying the sting in [the] libel.

Meaning ascribed by Defendant

110. I have some difficulty establishing precisely what meaning the defendant wants to ascribe to those alleged defamatory words. The pleaded meaning in paragraph 6.1 of the amended defence, "that the Plaintiff is guilty of fraud and breach of trust against a Johore housewife", is not clear to me. Is it a bare statement of fact that the plaintiff was found guilty by Abdul Razak J. of fraud and breach of trust, without the added and wider imputation that the plaintiff must still be regarded at the time of the 3 defamatory publications as 'plainly dishonest, an imposter, a most vicious and dangerous fraud, a liar and a chameleon', which were some of the learned judge's epithets quoted by the defendant? Counsel for the defendant eventually clarified that the pleaded meaning included such an imputation.

111. Based on the clarification, I am given to understand that the plaintiff's past conduct, albeit some decades ago, had tainted the plaintiff's character to an extent that it has become a permanent scar on his reputation and character, so much so that he must still be regarded presently as being seriously flawed in his character. As such, they remain apt descriptions of him today. Therefore those descriptions remain true of the plaintiff at the time of the publications. I note that this is consistent with the meaning pleaded at 6.3 of the amended defence that the plaintiff is accordingly unfit to hold office as the vice-president of the

club because the scar has not been removed so to speak by the very long passage of time, or by any good conduct thereafter.

112. Looking at paragraphs 6 c and 6 d of the statement of claim, one can see that they include the alleged defamatory meaning that 'he is a vicious and dangerous fraud'. Those words imply that the plaintiff was and still is a 'vicious and dangerous fraud'. Basically, he is not a changed man. Under this description can be subsumed many of the other derogatory descriptions of the plaintiff.

113. Since the plaintiff's own pleaded meaning is exactly the same as the wider meaning now put forward by the defendant, I do not think it right to disallow the defendant's justification of those other meanings as clarified to me at trial although they were not made particularly clear in the defendant's amended defence. I thus gave the defendant leeway to justify everything injurious that the plaintiff had pleaded in his statement of claim, which is considerably wider than that pleaded by the defendant in his amended defence. I do not think that the plaintiff was in any way caught by surprise or prejudiced by this.

Meaning of "fraud"

114. The defendant contended that the natural and ordinary meaning of the word "fraud" is very wide and is as provided below:

> **Blacks Law Dictionary**
>
> Fraud….A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of the truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. Johnson v. McDonald, 170 Okl. 117, 39 P.2d 150. "Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc….
>
> …As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions, and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture. Fraud, as applied to contracts, is the cause of any error bearing on a material part of the contract created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.
>
> ..It is something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception. Constructive fraud consists in any act of commission or omission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another…
>
> **New Webster's Dictionary**
>
> fraud n. the use of deception for unlawful gain or unjust advantage; something that constitutes a criminal deception; someone who is not what he pretends he is.

115. The two dictionaries do give a good explanation of what fraud entails and what it generally means. However, I do not think it is a term capable of precise definition, and I shall not attempt any definition of it.

Defamatory meanings found

116. In my opinion, the ordinary, reasonable and fair-minded reader, having read each of the defendant's publications in their entirety but without any meticulous analysis of the passages or the words used in the publications, will come to understand the offending words in their context to bear the meanings defamatory of the plaintiff as set out at the paragraphs 124 to 127, 130 and 131 below. Allowance has to be made for the fact that the ordinary reader may not be thoroughly familiar with fine technical and legal distinctions. Mr Vince Khoo, a member of the GC, for instance told the court that he is not aware that there is a distinction between the criminal and civil aspect referred to in the letters published by the defendant.

117. In this regard, it is apt to observe what LP Thean J (as he then was) had said in *Lee Kuan Yew v Davies & Ors* [1989] SLR 1063 at p1080 that the rules of construction applicable in construing a contract or a will are not appropriate for the purpose of construction of the words complained of by a plaintiff in a defamation suit. The proper approach is to consider what meaning the words will convey to ordinary reasonable persons using their general knowledge and common sense. Such meaning, the learned judge said, is not confined to a literal or strict meaning of the words but includes any inferences or implications which could reasonably be drawn by such persons. The learned judge also quoted Lord Devlin's speech in *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at p 277, where it was stated that 'the layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.'

118. Alderson B in *Chalmers v Payne* (1835) 2 Cr.M & R 156 said at p 159 that if "in one part of the publication something disreputable to the plaintiff is stated, but that is removed by the conclusion, the bane and the antidote must be taken together." I am thus conscious of the need to take account of the entire context and circumstances of each publication at the time of publication, and to consider whether any other part of the same publication might have removed the sting in the words complained of in that publication.

119. But I do not think that a subsequent publication to the same persons removing the sting so to speak of an earlier publication will help the defendant if the earlier publication is already defamatory of the plaintiff. The damage has already been done. The subsequent publication diluting or erasing the sting will only be relevant to the question whether the damages suffered should be reduced. For the purpose of determining the defamatory meaning in the first publication, it will be wrong to read it together with a later publication. One must read the first publication by itself. However, for determining the defamatory meaning in the **second** publication, the information provided in the first publication to the same body of persons may be taken as background information or part of the overall context, depending on how close in time the two publications are. If it is separated by a long lapse of time, with the likely result that an ordinary reader of normal memory span, would not have recalled or remembered what was said in the earlier publication, then it may not be proper to take that earlier publication into consideration as part of the total context in which to construe the meaning in the second publication.

120. What happens if the defendant deliberately highlights the defamatory parts that he wishes to emphasize, whether by the use of large fonts, bolding, underlining or other markings, and he puts the words supplying the 'antidote' in a footnote, or in some other remote corner of the publication in small fine print for instance, or he buries them somewhere in the voluminous attachments or annexes in the same publication? One then has to consider if the ordinary reasonably diligent reader would have noticed and read the 'antidote', having regard to the manner the entire publication is set out and presented. The mere presence of the 'antidote' does not necessarily neutralize the effects of the defamatory words if the hypothetical ordinary and reasonably diligent reader would probably have missed it. I cannot see why a defendant should be given the benefit of the neutralizing effects of the antidote if he draws the attention of the ordinary reader to the sting but hides away the medicine to be beyond easy reach.

121. I observe in this case that the defendant, who has a good command of the English language, mentioned in his 1st publication a report of the plaintiff's '**conviction** for fraud and breach of trust against the housewife in Johore'. 'Conviction' is

generally used for criminal matters. But the defendant applied it to Arul as if he had been charged and later convicted of some criminal offence and sentenced to 2 years imprisonment. If the defendant had himself misread the newspaper article, what about the ordinary reader. Moreover with the highlighting and selective emphasis by the defendant, I will not be surprised if the ordinary reader, less sophisticated perhaps than the defendant, jumps to the wrong conclusion that the plaintiff had been convicted of a criminal offence of fraud and criminal breach of trust and for that, he was sentenced to 2 years imprisonment. The meanings will therefore include those that an ordinary reader will likely construe, even if erroneously, for the reasons I have stated.

122. With the above guiding principles in mind, I now set out the various defamatory meanings (including the imputations) which the underlined words can reasonably give rise to. I will leave out those meanings which are non-defamatory.

Meaning of defamatory statements in the 1st publication

123. It is not disputed that the whole series of correspondence between the plaintiff and defendant up to and including the 10 July 1998 were published on 10 July 1998 to the GC members. They constitute the 1st publication. None of the correspondence mentioned the outcome of the appeals to the Federal Court of Criminal Appeal and the Privy Council. The fact that Tara had withdrawn all her allegations against the plaintiff was also not mentioned.

124. Accordingly, I find that an ordinary fair minded GC member, in the absence of further information, will understand the offending words (as underlined) in the correspondence attached to the 1st publication to mean that:-

> (a) A High Court Judge had found the plaintiff to be a most vicious and dangerous fraud.
>
> (b) The plaintiff is in fact a most vicious and dangerous fraud.
>
> (c) The plaintiff stands guilty and convicted of fraud and breach of trust against a simple, naive housewife, Tara.
>
> (d) He, together with two others, were accordingly sentenced to 2 years imprisonment.
>
> (e) He should have been too ashamed to run for the post of vice-president after what the High Court Judge had called him. Nevertheless he offered himself for election and was elected when he should not be. What is worse is that it puts him next in line for the post of president, which he may win by default at the next election.
>
> (f) The plaintiff concealed his conviction for fraud and breach of trust from the Club members. By his dishonest non-disclosure, he had misled those members who voted for him.
>
> (g) He is totally unfit to hold any office in the Club because he is a most vicious and dangerous fraud. He is not fit to sit with other respectable members in the GC.
>
> (h) His scandalous past brings absolute disgrace to the Club. The Club will be further disgraced if the press learns of his past misconduct and makes it public.
>
> (i) He has lost all his moral authority over the staff of the Club and is unfit to tell them what to do.

125. Based on the meanings I have found, plainly the sting in the first publication is that the plaintiff is an extremely vicious and dangerous fraud. He has been convicted of fraud and breach of trust, and sentenced to 2 years imprisonment. He is unfit to hold any office in the Club.

Meaning of defamatory statements in the 2nd publication

126. The GC members received the 2nd publication approximately 3 weeks after the 1st publication. Presumably, they would not have forgotten what they had read in the 1st publication. I therefore construe both publications together to determine the defamatory meanings conveyed by the words complained of in the 2nd publication and I find them to be as follows:

> (a) The plaintiff's curriculum vitae includes the fact that a High Court judge had called him a most vicious and dangerous fraud.
>
> (b) As president of the Club who appointed the plaintiff as the chairman of the M & R, does Mr Rasmussen still consider the plaintiff to be the best choice over nine other possible candidates in the GC to serve in that position now that he knows the plaintiff is a most vicious and dangerous fraud? It is imputed that the plaintiff does not deserve to hold that office and is unfit to do so. There are nine other better candidates.
>
> (d) The plaintiff will not discharge his duties as chairman of the M & R honestly and fairly because he is a most vicious and dangerous fraud.
>
> (e) The president will lose the trust and confidence of the Club membership if he allows the plaintiff to stay on as chairman of the M & R.

127. On top of those in the 1st publication, the additional sting here is that the plaintiff is incapable of discharging his duties as chairman of the M & R in a fair and honest manner.

Meaning of defamatory statements in the 3rd publication

128. The 3rd publication was sent to the GC members about 2 weeks after the 2nd publication. What they had read earlier would probably remain relatively fresh in their minds. Thus, it will be wrong to construe the offending words as underlined in the 3rd publication comprising 2 letters both dated 18 August 1998 without regard to the context of the 1st and 2nd publications. Extracts from the judgment of Abdul Razak J. were attached to one of the letters.

129. Enclosing the judgment of Justice Abdul Razak containing the rather inconspicuous editorial note is not sufficient in my view to draw the reasonable reader's attention to the facts stated in that editorial note. I find that the reasonable reader will probably not pay attention to and hence, miss reading the editorial note. Even if he did glance at it cursorily, he will likely miss the significance of what is stated therein, due to the defendant's overwhelming emphasis given to Arul's conviction and sentence of 2 years and to the learned judge's other adverse findings on his character and conduct. Further, the defendant tells the reader that his purpose of attaching the judgment is to refresh the plaintiff's memory of what the learned judge had said, and to ask the plaintiff not to pretend that the judge did not give him those labels. Hence, I conclude that it is not likely for the ordinary reader of ordinary diligence to have bothered much with the editorial note (in fine print and in brackets in the judgment), but he will far more likely focus his attention on the highly derogatory descriptions of the plaintiff in the various parts of the judgment proper, which the defendant highlighted. The ordinary reader will therefore in all probability miss the significance of what is stated in the editorial note.

130. With the above in mind, I find that the underlined words in the 3rd publication are capable of bearing the following

defamatory meanings:

> (a) The plaintiff's 'curriculum vitae' includes the fact that he was sentenced to 2 years imprisonment for contempt, that he had committed fraud and breach of trust against a defenceless housewife, that he is not a lamb but a wolf in lamb's wool, that he is dishonest, a liar, an imposter, a chameleon changing his colour as it suits him, and there is still much more. In summary, he is a most vicious and dangerous fraud.
>
> (b) A High Court judge had described him as such.
>
> (c) By any objective standard, the plaintiff is totally unfit to chair the M & R.
>
> (d) He will not discharge his duties as chairman of the M & R honestly and fairly because he is a most vicious and dangerous fraud.
>
> (e) By allowing the plaintiff to continue as chairman of the M & R, Mr Rasmussen will lose the complete trust and confidence placed in him by the Club members as their elected president.

131. The stings in the defamatory words complained of in this 3rd publication are no different from that in the earlier two publications.

Defence of Justification

132. On the issue of justification, I find paragraphs 1111 and 1112 in Gatley on Libel and Slander 8th Edn at page 1108 to be instructive:

> **1111. Reasonable imputations must be covered.**
>
> The plea of justification must be not only as broad as the literal language of the libel but as broad as the inferences of fact necessarily flowing from the literal language. A plea of justification means that all the words were true, and covers not only the bare statements of fact contained in the alleged libel but also any imputation which the words in their context may be taken to convey; it affirms all that attaches to them as their natural and reasonable meaning; the inferences that would ordinarily be drawn from them.
>
> 1112 Examples. ….And where the defendant called the plaintiff a poacher it was held that a plea that the plaintiff had been convicted six years before for poaching was no justification, for the natural inference which would be drawn from the charge is that the plaintiff was a poacher at the time when the charge was made (*Brownlie v. Thompson* (1851) 21 D.480 (Ct . of Sess.).

Substantial Justification is Sufficient

133. I accept as a general proposition of law that it is the imputation contained in the words complained of, which has to be justified to be substantially true, and not the literal truth of the words, nor some other similar charges or meanings not contained in, or not capable of being reasonably borne out by the words. Where those words contain both statements of fact and comment, then the defendant must not only prove the truth of the material facts but also that his comments are true and correct based on all such relevant facts as proved, in order to succeed on a defence of justification. It is sufficient for the defendant to

justify the substance of the facts and comments complained of. It is not necessary to justify anything which adds nothing to the sting of the charge. See Gatley on Libel and Slander (9th Ed) at paras 11.5 to 11.7 and *Aaron v Cheong Yip Seng* at p 649 E. Halsbury Laws of England 4th Edn Vol 28 also states the above in broadly similar terms at para 85:

> **Substantial justification of a single charge.**
>
> A justification of the sting of a libel may be sufficient even if it does not extend to every epithet or detail in the words complained of (*Edwards v Bell* (1824) 1 Bing 403 at 409).

134. Where the defendant is unable to prove the truth of some of the charges he has made against the plaintiff, his defence of justification nevertheless still succeeds if those unproved charges have not materially injured the plaintiff's reputation any further. This is provided for in Section 8 of the Defamation Act (Cap. 75) which states that:

> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

135. Naturally, this section is of no application where the words complained of give rise to only one charge against the plaintiff. Nor will it assist the defendant when all he can prove is a charge less serious than the charges he fails to prove, or is in a different aspect of the plaintiff's reputation. For instance, if all that the defendant can prove is that the plaintiff is a chameleon, that is not enough when he has also called the plaintiff a most vicious and dangerous fraud, which has far more deleterious effects on the plaintiff's reputation.

136. Where there are several material defamatory statements of fact in the publication or several defamatory inferences of fact which can reasonably be drawn by the ordinary reader from the publication as a whole, as in this case, then the defendant must prove the substantial truth of all the different material facts and inferential facts before he can be said to have successfully justified the entire libel. In other words, if more than one sting exists in the libel, then the justification must extend to all the different stings. Otherwise, he will be held liable for the remainder of the stings not justified and for which no other defences are available.

137. Stark J. in a decision of the High Court of Australia, *Howden v "Truth" and Sportsman" Ltd and Anor* [1937] 58 C.L.R. 416, said:

> The pleas of the respondents justify the entire libel and every substantial or material statement in it must be proved true or the pleas fail. It would not be enough on the pleas now and under consideration to prove that part only of the statements were true. The libel charges that the appellant was convicted of a crime and was sentenced to imprisonment in respect of that crime. It is not true that the appellant was convicted of crime and suffered a term of imprisonment. The statement cannot be proved true by proving that he was convicted of a crime and sentenced to imprisonment but that his conviction was quashed. Such a statement has a wholly different effect (See Leyman v. Latimer (1877) 3 Ex.D. 15, at p. 21). (Emphasis is mine.)

138. Dixon J. held similar views. He said:

> The defence depends upon the substantial truth of the defamatory meaning conveyed by a libel. Every material part of the imputations upon the plaintiff contained in the words complained of must be true; otherwise the justification fails as an answer to the action. The imputation contained in a statement that a

man has been convicted of an indictable offence and sentenced to imprisonment is not, in my opinion, sustained by proof of a conviction and sentence quashed on appeal, and no finding that the imputation was true should be allowed to stand. I find it difficult to imagine any circumstances in which an unqualified statement that a man had been convicted and sentenced could be reasonably held to be substantially true, when the fact was that the conviction had been vacated, however technical the ground for setting it aside might have been. The difference in the present case between the actual facts and the imputation made appears to me to be very wide indeed and to make it quite improper to submit to the jury so much of the justification as relates to the statement that the plaintiff was convicted of conspiracy to defraud and sentenced to fifteen months' imprisonment. In the circumstances I think the pleas should be struck out. (Emphasis is mine)

Burden and Standard of Proof

139. The stings in all the libels can be broadly amalgamated into one: the plaintiff was and is a most vicious and dangerous fraud, and the defendant has to justify that. Being such a serious allegation, the defendant is required to prove it to a high degree of probability. It is obviously not the criminal standard of proof beyond reasonable doubt, but it certainly will not be on a mere balance of probability. The Court of Appeal in *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258 said:

> In *Hornal v Neuberger Products* [1957] 1 QB 247, the Court of Appeal of England adopted the latter approach but with a significant qualification. The Court of Appeal interpreted the civil standard as one which varied depending on the gravity and seriousness of the allegation. The more serious the allegation, the higher the required standard of proof. …..Hodson LJ at p 263 approved a passage from an earlier case of *Bater v Bater* [1951] P35 where Denning LJ said:
>
> > ..So also in civil cases, the case may be proved by a preponderance of probability but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.
>
> In *Nederlandsche Handel-Maatschappij NV v Koh Kim Guan* [1959] MLJ 173, … the High Court of Singapore….had this to say:
>
> > Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require **a high standard of proof** in cases where fraud is alleged. [Emphasis added.]
>
> In another case in the High Court, *Eastern Enterprises v Ong Choo Kim*

[1969] 1 MLJ 236; [1969-1971] SLR 206…..AV Winslow J applied the standard espoused by the English Court of Appeal in *Hornal's* case, namely, that the more serious the allegation made by one party, the higher the standard of proof it had to satisfy. He held…:

> ..for purposes of this action that the plaintiffs must establish their allegation against the defendant on a balance of probability as laid down by ***Doe d Devine v Wilson*** **subject to the qualification that in tilting the balance against the defendant, they must attain a higher degree of probability than is required in an ordinary case of civil negligence though not the very high standard of the criminal law**. [Emphasis added.]

and further on he said:

> The crux of the matter in deciding how high the standard of proof should be, short of proof beyond reasonable doubt, the court should act on its own good sense, having regard to the realities of the situation and apply that standard short of certainty which enables it to be reasonably satisfied that a grave allegation in the course of civil proceedings has been substantiated since there is obviously no precise mathematical formula which it can apply.

In *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 776, the cases of *Hornal* and *Nederlandsche* were cited but the following caveat was added:

> However, it should be noted that it is not the law of evidence that every step in the allegation of fraud has to be proved by calling live and admissible evidence nor is it the law that fraud cannot be inferred in the appropriate case.

Nonetheless, as regards allegations of fraud, forgery or criminal conduct, the standard of proof is to be determined according to the approach in Hornal's case. This much is clear from p 776 of that judgment where it was said:

> This is not to say that inference of this serious nature should be lightly made. The circumstantial evidence must be so compelling and convincing that **bearing in mind the high standard of proof** one is nevertheless satisfied that an inference of fraud is justified. [Emphasis added.]

Evidence Act

140. Where facts are not agreed or admitted by the parties, they must be proved by admissible evidence. Documents which are not in the bundles agreed as to authenticity must be proved in the usual way before they can be admitted into evidence. Regard must be had to the Evidence Act as to what amounts to relevant evidence that is admissible. In relation to the relevancy and

admissibility of a judgment, sections 42 to 46 of the Evidence Act are of interest. But these provisions do not help, if the defendant wishes to rely on what has been stated as undisputed facts or facts found by the Malaysian Courts or the Privy Council as evidence to prove those same facts in this trial.

141. Subject to s 42 to 45A, a previous judgment making certain findings of fact cannot be merely tendered in another trial as proof of the existence or the truth of those facts. If questions of res judicata or issue estoppel arise for determination for instance, then the previous judgment is admissible under s 42, (a) to prove the existence of that previous judicial determination as a final judgment of a competent court, and (b) to establish what the cause of action there was, who the parties were, in what capacities they were litigating, and what exactly were the issues previously determined so that the court can decide those questions. But this by no means provides the gateway for the flood of facts established in other judicial forums to be admitted as evidence or as conclusive proof of the same facts which are in dispute in another trial where all or some of the parties are different. The general rule is that the production of a previous judgment merely evidences the fact that there has been a judgment and there are certain legal consequences. But tendering the previous judgment and then quoting parts of the judgment at length in a question to which the witness refuses to accept as being undisputed will not *per se* amount to evidence proving the correctness or the truth of any of the facts mentioned therein.

142. I follow the strict approach. I am mindful of the hearsay rule. Where the evidence amounts to hearsay, it can only be admitted if the hearsay evidence comes in under the exceptions to the hearsay rule as provided for in the Evidence Act. Hence, reading out chunks of any judgment relating to certain facts (whether disputed or not) as found previously by a court to a witness at this trial, in particular to Arul, as a prelude to the questions asked of him during his cross-examination, will not turn that narration by counsel into evidence to prove those facts, if Arul does not admit or agree to them. The defendant was hoping at this trial to prove that the plaintiff is a most vicious and dangerous fraud through the plaintiff himself, without calling any other witnesses. Obviously it is going to be an uphill task, considering that the plaintiff is a lawyer with several years of experience. It was a risk they took, of which I have made known to them prior to the trial. The defendant himself has no personal knowledge of what happened in the Tara matter and hence, he was in no position to testify to anything that happened in relation to that matter. Madam Tara, who had been located by the defendant, was not called to give any evidence of what happened. The plaintiff was wise and very careful during his testimony at this trial not to admit to any facts he had no personal knowledge of, even though the courts in the Tara case had made certain findings of the background facts, which were said to be largely undisputed. That severely restricted the defendant in what he could properly adduce during the plaintiff's cross-examination as evidence in support of his own justification defence.

143. I am also mindful that I have to consider whether those facts not proved have not materially injured his reputation after taking account of those other facts and imputations that the defendant manages to prove to the requisite degree of probability commensurate with the gravity of the charges. If his reputation has not materially suffered because of those facts not proved, then the justification defence still succeeds.

144. However, in relation to what Arul had (a) testified to in evidence at the previous trial before Justice Abdul Razak (for which notes of evidence were available), (b) affirmed in any of his previous affidavits in the various court actions in Johore, or (c) said in any correspondence with the Law Society, the defendant or third parties, these are admissible in evidence before me, when the object is to discredit him, contradict his testimony, or establish the contrary facts or admissions, by proof that he had indeed said something very different on some previous occasion. The relevance and admissibility under these circumstances have been clearly provided for in other sections of the Evidence Act.

Evidence adduced for Justification Defence

145. I will now set out the material evidence adduced by the defendant to establish his defence of justification.

146. I treat the following as agreed facts. They are not disputed and parties have not asked for strict proof. I extracted them substantially from the plaintiff's own affidavit. The plaintiff cannot possibly deny them.

147. In 1979, Tara Rajaratnam ('Tara'), a housewife in Johore commenced Civil Suit No. 284 of 1979 in Johor Bahru for, *inter alia*, fraud and breach of trust against Mr Jagindar Singh ('Singh') and Dato P. Suppiah ('Suppiah'). Arul was included as the 3rd defendant in that suit on Tara's allegations that he had colluded with Singh and Supiah to defraud her. On 17 July 1982, Abdul Razak J entered interlocutory judgment on Tara's claim and also sentenced all 3 defendants to 2 years imprisonment for contempt of court.

148. The defendants appealed against the interlocutory judgment by way of Federal Court Civil Appeal Nos. 215, 216, 291 and 292 of 1982. There was a separate appeal by way of Federal Court of Criminal Appeals Nos 28 to 30 against the finding of contempt of court and the sentence of 2 years imprisonment.

149. On 24 September 1982, the Federal Court of Criminal Appeal allowed their appeal against the findings of contempt of court and set aside the decision and sentence.

150. On 21 November 1982, Abdul Razak J decided on the quantum of damages to be awarded to Tara pursuant to his interlocutory judgment.

151. On 16 May 1983, the Federal Court of Civil Appeal dismissed the appeals by Singh, Suppiah and Arul, against the interlocutory judgment.

152. All three of them appealed to the Privy Council vide Privy Council Appeal No. 39 of 1983. During the course of arguments before the Privy Council, their Lordships were informed that Tara had consented to Arul's appeal with each party bearing their own costs, and that all her allegations of fraud and constructive trusteeship were withdrawn. Their Lordships in their judgment said the following which was reported at p 112G [1986] 1 MLJ 105:

> As regards the third appellant (i.e. Arul), their Lordships were informed in the course of the hearing before them that his counsel and that for the respondent were agreed that his appeal should be allowed by consent, upon the terms that all allegations of fraud against the third appellant were withdrawn, and also any claim against him as allegedly a constructive trustee, and that as between him and the respondent (i.e. Tara) there should be no order as to costs here or in the courts below. Their Lordships consider it proper in the circumstances that the third appellant's appeal should be allowed upon these terms. **It is abundantly plain that he had no hand whatever in the events of March 30, 1974, which form the basis of the respondent's case of fraud against the other appellants. (Emphasis is mine.)**

153. It is not disputed that on 16 December 1985, the Registrar of the Privy Council in his report of the Lords of the Judicial Committee of the Privy Council to the Yang Di-Pertuan Agong stated:

> The Lords of the Committee …… report to Your Majesty as their opinion that … (3) the Appeal of the Third Appellant ought by consent to be allowed and the Judgment and Order of the Federal Court of Malaysia dated 16th May 1983 and the Judgments and Orders of the High Court of Malaysia dated 17th July 1982 and 21st November 1982 **insofar as they were adverse to the Third Appellant set aside** on the following terms (1) the Respondent withdraws all allegations of fraud (**of whatsoever nature**) against the Third Appellant (2) the Respondent withdraws all claims that the Third Appellant was acting as Constructive Trustee as alleged in the Respondent's case or at all (3) as between the Respondent and the Third Appellant there be no order as to costs in respect of these proceedings in the High Court or the Federal Court. (Emphasis is mine.)

154. I was at first concerned whether Arul had paid money to Tara to achieve that outcome. Arul assured me on oath that he had not paid Tara any monies or compensation to consent to his appeal being allowed.

155. I accept the submission of plaintiff's counsel that there is no admissible evidence adduced by the defendant that in 1974, Tara, a Johore housewife, entered into an agreement with Suppiah whereby she agreed to transfer land owned by her at Kulai in Malaysia only as security for an advance of $220,000. There is no evidence that on 30 March 1974, Suppiah and Singh went to Tara's house in Johore, where Tara signed a transfer and memorandum in favour of Suppiah. There is no evidence of what was in fact said on that occasion. Hence, no evidence was adduced that Suppiah and Singh had fraudulently induced Tara to enter into the said agreement by falsely and knowingly representing to her that the transaction on 30 March 1974 was of the nature of a security that would enable her to redeem the property by repaying the sum of M$220,000 at any time, when the truth was that Suppiah and Singh treated the transaction as an outright sale coupled with an option to re-purchase the property for that sum within a year of the agreement.

156. The other particulars under the defence of justification that Suppiah and Singh had falsely and knowingly represented to Tara that it was their intention to treat the transaction as a secured loan, when in fact they had no intention of allowing Tara to redeem the property at any time, is again not supported by admissible evidence. Thus, there is no evidence by which to conclude that Suppiah and Singh had through those representations induced Tara to enter the transaction. Tara could have given evidence on all this but the defendant chose not to call her although it is his burden to prove these facts.

157. No witness came to testify that the alleged transfer of the land from Tara to Suppiah was at a purported total consideration to Tara of MR220,000 and the transfer was later dated 5 July 1975 and then registered on 22 July 1975, although there is a Form 14 A to that effect (4 ROP770). Since both its authenticity and contents are not agreed, strict proof of that document is required.

158. To avoid misunderstanding, I directed the parties in the course of the trial to ascertain exactly what documents were agreed as to authenticity and contents, and hence, to inform me what was the extent of their agreement on each and every document. Both sides finally decided to take the fairly extreme position that there was to be strict proof of every document since no agreement whatsoever could be reached on the authenticity and contents of the documents particularly in relation to the Tara matter.

159. The significant document relied on by the defence to prove the plaintiff's dishonesty and fraud is Form 14 A under the National Land Code for transfer of land, share or lease in Malaysia, which was signed by the plaintiff (and admitted as exhibit 4 ROP 790). It states inter alia that:

> I, PAKRISAMY SUPPIAH (NRIC. No. 5571071) of No. 33, Jalan Meruing, Kebun Teh Park, Johor Bahru, proprietor of the land described in the schedule below:
>
> IN CONSIDERATION of the sum of Dollars Two hundred and Twenty thousand ($220,000.00) only the receipt of which sum I hereby acknowledge;
>
> Hereby transfer to the transferee named below, all such title or interest as is vested in me.
>
> Dated this 31st day of July, 1975
>
> t.t.
> (illegible)
>
> .....
> .....

I, ARUL CHANDRAN (NRIC. No. 4205933) care of No. 2-D, Jalan Ah Fook, Johor Barhu, accept this transfer.

t.t.
(Arul
Chandran)

160. According to Arul, Singh had asked him to be his trustee shortly before the above transfer on 31 July 1975, to which he agreed. Singh told him that he wanted to develop the land and explained that it would be easier for him to do it in the name of someone else. Arul had previously heard Singh 'constantly moaning and groaning' about his poor relationship with the authorities in Malaysia. Arul said that there was no way for him to find out if that was true. At the time he signed the Form 14A, he had minimal knowledge of the background behind the land transaction between Tara, Suppiah and Singh. At that time, he had not seen the documents including the Form 14A signed on 30 March 1974 by which Tara transferred her land to Suppiah. He knew that Suppiah eventually was not buying the property but Singh was. He did not know for a fact if Singh had already paid Suppiah the consideration. He only knew that Singh would be paying for it. He therefore assumed that Singh would settle the payment somehow with Suppiah, having regard to the fact that Singh and Suppiah were very close friends and in the same law firm in Johore together. Arul testified that he had no reason to distrust these two lawyers, who were already good friends of his at that time.

161. In my opinion, there is no reasonable cause for the plaintiff to suspect that there was anything sinister why Singh had asked him to be a trustee in view of the explanation given to him. If indeed Singh had difficulties with the authorities, it would make sense for Singh not to use his own name or even a company controlled by him, but to use the plaintiff as a front to apply for approval for sub-division of the land for development purposes. The plaintiff accepts that an application had been made in his name for sub-division of the land. After sub-division approval from the authorities is obtained, it does not really matter if Singh or a company controlled by him becomes the registered owner of the sub-divided lots. The hurdle has been crossed so to speak and the land development can proceed thereafter.

162. Further, I accept the plaintiff's evidence that he trusted Singh, a very good friend of his, and a fellow lawyer. I believe the plaintiff's evidence that he readily agreed to be Singh's trustee without questioning Singh on the details of transactions that resulted in the land being registered in Suppiah's name. I do not think that the plaintiff would be really interested in knowing about the complicated transactions unless he wanted to be involved in the land development and wanted a share in the expected profits. I am inclined to think that the plaintiff, having settled in Singapore by then, and having his own busy legal practice here, was not particularly interested in this land development in Johore. No evidence was adduced that he participated in any land development in Malaysia at all, or that he was to have a share of the profit in the development of Tara's land.

163. The plaintiff admits that he did not personally pay any part of the MR220,000 for the transfer to his name as reflected on the Form 14A. Obviously it was for Singh, his beneficiary, to settle the payment. He was merely a trustee for Singh. In that sense, the plaintiff was not the actual purchaser of the land, and neither was he a bona fide purchaser for value. Singh was the actual purchaser.

164. At this juncture, I must emphasize that payment of the MR 220,000 need not always be made by direct cash payment by the trustee on behalf of the beneficiary. A beneficiary buying the property can of course make payment through his trustee, if he wishes. He can also pay the seller directly. Alternatively, he can pay by directly discharging the debts of the seller owed to third parties at the seller's request. He can also pay by setting off other debts owed to him by the seller. There can be a combination of some or all the above modes of payment to effect that payment of MR 220,000.

165. As can be seen, payment may be made in a multitude of ways by the beneficiary. Arul said that he left the payment matters to his beneficiary, Singh, to handle. I do not find anything unusual in this nor in the fact that Arul did not enquire from Singh how he was paying for it. There is nothing suspicious in my view to cause Arul to be put on enquiry. The transfer form does not say that Arul had paid the MR220,000 in person to Suppiah or that the money came out of Arul's own pocket.

166. It is useful to set out the cross-examination on what Arul knew before he signed Form 14A in July 1975:

Q: In July 1975, you knew that you had not paid anything to Suppiah for the property?

A: Correct.

Q: You knew that Jaginder Singh had paid Tara?

A: Yes.

Q: So that when Suppiah appears on the register, as the purchaser for $220,000 from Tara, you knew that, that was not correct? I.e. Suppiah had not paid Tara, but Jaginder Singh had paid Tara?

A: Correct. Suppiah had not paid Tara but Jaginder Singh did pay.

Q: You knew that Jaginder Singh had paid for the property so that Suppiah and you were both his nominees or trustees?

A: Speaking for myself, I was a trustee or nominee for Jaginder Singh. I cannot speak for Suppiah.

Q: If Suppiah had not paid but Jaginder Singh paid Tara, and Suppiah was on the register, it could only be that Suppiah was there as an undisclosed trustee or nominee?

A: Disagree. Example, if Jaginder Singh pays Tara, but Suppiah wants to buy the property, then Suppiah goes on the register and what he will be doing is that he will owe Jaginder Singh the unpaid purchase price, in which event he would not be a trustee but a debtor to Jaginder Singh.

So if there is an agreement between Suppiah and Jaginder Singh, that Suppiah buys the property then at the time of the agreement and thereafter, Suppiah is no longer a trustee. He is the real owner but he owes money, unpaid purchase price to Jaginder Singh if he had not yet paid Jaginder Singh.

So if there is no agreement of that nature, then I agree that Suppiah is necessarily a trustee although his name is on the register because Suppiah never paid, but Jaginder Singh did. So Suppiah is the trustee of Jaginder Singh.

Q: In July 1975, when you were told that Jaginder Singh had paid for the property, were you told that there was an agreement between Suppiah and Jaginder Singh for Suppiah to buy the land from Jaginder Singh?

A: I was not told that there was such an agreement but that does not mean that there was no such agreement.

…

…

Q: When did you first learn of the alleged payment of the consideration by Jaginder Singh to Tara?

A: About the time I was asked to be a trustee, I knew that Jaginder Singh was buying the land but when he paid, I don't know. He never told me when he paid for the land.

I was given in January 1977 documents, showing how the alleged payment of consideration to Tara was to be paid, which document was signed by Tara.

Q: If you were given the documents signed by Tara on 30 January 1977, it would not have shown that Jaginder Singh paid the consideration? Do you agree?

A: Of course I agree, as the document speaks for itself.

Q: When did you know that Jaginder Singh had paid the consideration to Tara?

A: I can't remember.

Put: At the time Jaginder Singh asked you to become a trustee, you knew that Jaginder Singh had paid the consideration.

A: I did not know for a fact that Jaginder Singh had paid. I knew Jaginder Singh was paying. I knew of this (i.e. Jaginder was paying) in July 1975, when Jaginder Singh asked me to be a trustee.

167. Despite the intense cross-examination by Mr Cashin over several days, the plaintiff had consistently denied any detailed knowledge of the earlier land transactions at the time when he signed Form 14 A. There is no evidence led on whether the purported sale price of MR220,000 was at a gross undervalue, and if so, whether the plaintiff was aware of that since that might give cause for some enquiry. The valuation of the land at that time is not adduced in evidence.

168. My overall impression is that Arul was simply asked by Singh to be his trustee and he readily agreed without bothering to question Singh on the complicated details. Arul was not privy to the complex transactions and payment arrangements between Tara, Suppiah and Singh. Arul said he trusted Singh. Being trusting is not being dishonest. Because Arul trusted his good friend, Singh, and had not asked him questions does not mean that Singh could never have abused that trust. It is certainly not a rarity for persons to be taken advantage of by their good friends, who sometimes regrettably abuse the trust placed in them.

169. Further, I cannot find any evidence, let alone credible evidence, that Arul had colluded in some way with Suppiah and Singh, or that he was involved with the meeting on 30 March 1974 in Tara's house where it was alleged that Suppiah or Singh fraudulently induced her to transfer her land to Suppiah for MR220,000 and where she signed some documents effecting that transfer.

170. The plaintiff did not hide his very close relationship with Singh and Suppiah. He was forthright to admit that he knew Suppiah personally for a very long time. They were in England together and did the post final law course together. As far back as 1974, Singh, Suppiah and he were already very close friends. The plaintiff said he was a member of the Royal Johore Golf Club and he used to go up fairly often both on weekdays and weekends in the late 1970s to play, meet friends and have dinners. At that time, Suppiah and Singh were his golfing partners and he would meet them 3 to 4 times a month on a regular basis. Suppiah and Singh are also members of the Singapore Island Country Club. So they do come down regularly to Singapore to play golf together with Arul at the Singapore Island Country Club. This golfing with Suppiah & Singh would have started in the late 1960s and they are still golfing partners these days. Their close relationship continues.

171. Arul admits that they would from time to time talk about the Tara matter. They had referred to the fact that she was claiming that he was not a bona fide purchaser but he did not know of Tara's stand at the time in May 1976 when she filed her defence to the possession action in Suit No. 146/1976 because he had left it entirely to Suppiah to handle. But he certainly knew of her stand after he saw Suppiah and Singh in Johore on 30 January 1977 to make enquiries on the Tara land transaction. Arul made these enquiries because there was a serious partnership dispute in M/s Rodyk & Davidson at that time, and some of his partners accused him of being involved in a scandalous land transaction in Johore. The plaintiff said in cross-examination:

> Q: But there had been an earlier meeting, when you were told about the allegations to Coomaraswamy and that he was trying to expel you from the partnership?
>
> A: On 15 January 1977, I had a meeting with Foo Yew Heng, P. Selvadurai and Tang See Chim (all partners in Rodyk). It was Selvadurai who told me that Coomaraswamy had accused me of being involved in some scandalous land transfer in Johore. That's when I told them that I would go and find out and report back to the partners of Rodyk.
>
> Q: …So after you met Jaginder Singh and Suppiah, and had been told of the history of the land transaction, I want to know whether they told you about the meeting at Tara's house in Kulai on 30 March 1974, when a document was signed by her and that was the document which she said was the security, and Suppiah and Singh said 'No, it was an outright transfer'?
>
> A: What Suppiah and Jaginder Singh told me was that there was a transfer of land and they had one year in which a transfer would not be done or there was an option to repurchase, something like that. And they had registered the land in Suppiah's name and before the transfer to my name as nominee, and since the occupants refused to vacate the land, they had to take action in Court for possession. They told me that she had put defences and there was nothing scandalous. They gave me copies of the Court Proceedings of S146/1976 for possession, which I gave to the partners.
>
> Q: Did they give you a copy of the transfer executed by Tara on 30 March 1974?
>
> A: No. I am almost certain they did not give me that.
>
> Q: You therefore saw a copy of Tara's defence in S146/76?
>
> A: I think I did.
>
> …
>
> Q: You therefore knew that she was challenging your title as being a registered proprietor and as a true owner?
>
> A: Yes.
>
> Q: At a later stage, after you got possession, Tara first of all, appealed. Did you instruct your solicitors Suppiah & Singh to oppose that appeal?
>
> A: No. But it was implicit in my earlier instructions to Suppiah in person, that he

takes instructions from my principal, Jaginder.

Q: Therefore the solicitors, Suppiah & Singh, took the stand on your behalf, to say or to deny Tara's allegations that you were not a bona fide purchaser for value?

A: That is not correct, because first they did not take it on my behalf, but on behalf of my principal. Secondly, Suppiah & Singh, did not say that I was a bona fide purchaser for value, at any stage of the proceedings either at the trial stage or at the appeal stage of this S146/76.

172. Through the cause papers given to him at that meeting in Johore, Arul came to know that the purported date of registration of Tara's transfer to Suppiah was 22 July 1975, i.e. 8 days before the transfer from Suppiah to him on 31 July 1975. But he stressed that he did not know of it at the time he signed Form 14 A. When questioned why he did not find it peculiar or odd, he said that it was a matter between Suppiah and Singh, his principal. He did not ask questions as he was just a nominee. In any event, this was in January 1977. Much water had flowed under the bridge. I cannot fault the plaintiff if he could not decide whether to believe Tara's version of events as to what had happened on 30 March 1974, or the version of Singh and Suppiah. When he enquired from them in January 1977, the plaintiff was assured by Singh and Suppiah that there was nothing scandalous. The plaintiff himself was not there in Tara's house and therefore, he would not know what exactly transpired and what representations Singh and Suppiah had made to Tara. Even if Arul in good faith believed the version rendered by his good friends over Tara's version, can one regard Arul as being dishonest? I think not.

173. Now that matters had blown up and he had found himself caught in between, Arul would have to decide what to do. The land was already registered in his name. With the much greater background information he now has, I have to ask myself the question whether he had henceforth acted honestly to extricate himself from the situation he found himself in or did he thereafter act dishonestly or fraudulently to assist his friends. I also have to bear in mind the fact that the plaintiff, as the trustee, may have to take his principal's instructions to challenge the entitlement of Tara to remain in possession of the land, and sign the authorisation for the beneficiaries' lawyers to proceed with the claim. It may not be for the plaintiff to judge whether to believe the claim of Singh or that of Tara. It may be wiser for the trustee to leave that to the court. However, under no circumstances should Arul assist Singh or Suppiah, by stating any false facts. In this case before me, I have tried but I cannot find in any affidavit or evidence on oath, that the plaintiff had personally stated that he was himself a bona fide purchaser for value without notice. Neither has any of the defendant's counsel shown me any affidavit or notes of evidence of Arul at the Johore trial, or viva voce evidence before me that he had ever asserted that fact.

174. The nearest to a denial of Tara's assertion that he was not a bona fide purchaser for value is the plaintiff's affidavit at 5 ROP 1131 filed in Motion No 46 of 1977 and affirmed by him on 21 December 1977, where he averred that 'the allegations contained in the said Statutory Declaration [of Tara] are not true to the knowledge of the deponent'. Tara's statutory declaration at 5 ROP 1126 states *inter alia* that:

2. On the 30th day of March 1974….,I entered into a written agreement with one P. Suppiah, charging the said property by way of security in order to obtain a loan of $220,000/-

3. It was agreed that the said P. Suppiah would not sell the said property within one year of the transfer of the same unto his name. It was further agreed that my consent was necessary in the event of a sale by the said P. Suppiah.

4. In beach of the aforesaid and in violation of the entire security transaction … the said P. Suppiah registered the property in his name on the 21st July 1975 and then purported to sell and transferred to one Arul Chandran on the 9th August

1975. (Emphasis is mine.)

175. I reviewed several times the plaintiff's explanation of his denial of Tara's allegations in particular her allegation that Suppiah purportedly sold and transferred the land to the plaintiff. See Notes of Evidence at pages 104 to 112 and 130 to 132. The plaintiff said that he did not direct his mind to the phrase 'purported to sell'. I note that Tara did not specifically assert that Arul was not a bona fide purchaser for value in her Statutory Declaration. The affidavit was not drafted by the plaintiff personally but by Suppiah. This affidavit of the plaintiff was affirmed in December 1977, long after he had already made known to some of his partners in M/s Rodyk & Davidson that he did not pay for the property. In the circumstances, I give the plaintiff the benefit of doubt that he did not address his mind to the imputation contained in that phrase 'purported to sell' when he was reading his affidavit before affirming it. The plaintiff's denial of Tara's allegations is akin to a general traverse but with no specific denial of each and every separate allegation contained in every sentence of Tara's Statutory Declaration. If the plaintiff meant to assert that the allegation in paragraph 4 was untrue in that there was no breach and violation of the entire security transaction by Suppiah, which was the crux of the issue in Tara's case, then I can understand why he somehow failed to address his mind to the subsequent words 'purported to sell…to Arul Chandran'. Based on what he heard from Suppiah and Singh, I cannot say that the plaintiff was dishonest when he chose to disbelieve Tara's version of the events of 30 March 1974 and to believe what Suppiah and Singh had told him instead, which was the basis for affirming that Tara's allegations were not true to his knowledge.

176. More importantly, when Arul testified at the trial in S284/79 before Justice Abdul Razak, he gave truthful evidence that he was not a bona fide purchaser for value and that he was merely a trustee for Singh. Had he lied on oath that he was a bona fide purchaser for value in order to help Singh and Suppiah, it would have been a different matter entirely.

177. Sometime in May 1978, Arul transferred the land to Jet Age Construction Sdn. Bhd. by way of another Form 14 A at the instruction of Singh, his principal, at a consideration stated therein of MR 361,114. Arul, as the trustee, cannot receive payment for his own account. Singh told Arul that Jet Age would be doing the development. Arul did not find this unusual because land development is usually not done by individuals in their own name, but by individuals forming a limited company to do it. Since Singh had told him that the company was his, Arul thus left it to Singh to handle the payment between his company and himself. Singh did not give Arul any details on the payments and the transactions. There is no evidence adduced whether the company had in fact reimbursed Singh for MR 361,114. I cannot read much into the acknowledgment of receipt of the consideration by the plaintiff when in fact he had not personally received any consideration. Again, there can be many ways by which Jet Age can make payment to Singh. For instance, if Singh allows a set off against loans taken by him from his company, one cannot say that no consideration has passed and that no payment has therefore been made. Arul as the trustee need not invariably have to accept a physical payment on behalf of his beneficiary, since the beneficiary can also choose to be paid directly in cash or in kind.

178. In the ultimate analysis, the defendant's case appears to me to rest largely on unsubstantiated assertions of fact, tenuous circumstantial evidence and inferences. Counsel appears to suggest that the plaintiff is a most dangerous and vicious fraud because he had not been forthright to admit at the outset that he was not a bona fide purchaser for value when Tara instituted various court proceedings in Johore. I will briefly set out below counsel's arguments first and then follow on with my own views in square brackets:

> (a) The plaintiff is a very close friend of Singh and Suppiah, and hence, the plaintiff would know what had taken place on 30 March 1974 in Tara's house before he signed Form 14 A on 31 July 1975. Considering their long friendship, and the fact they are all lawyers, it is hard to believe that the plaintiff was not kept in the picture constantly by Suppiah and Singh. It is submitted that this aspect of their relationship gives rise to the possibility, even probability, of collusion. Each party had to rely on the other two and the plaintiff had to adopt his stand of complete ignorance even to the extent of seeming at times to be an idiot or an imbecile.
>
> [I think one has to be cognizant of the very real possibility of Singh and Suppiah

keeping the plaintiff largely in the dark as to what was happening. It may well be rude for the plaintiff to be overly inquisitive of the personal investment matters of Singh and Suppiah. On the other hand, Singh and Suppiah might not want the plaintiff to know too many details, and this is all the more so, if Singh and Suppiah indeed had been less than honest with their own dealings with Tara. When the plaintiff went to see Singh and Suppiah on 30 January 1977, I am not surprised if they painted an honest picture of their dealing with Tara for the plaintiff's consumption.]

(b) The plaintiff as a lawyer would not have agreed to become a trustee without making full enquiry of the facts.
[This is not necessarily true especially when the other party is a close friend and a great deal of trust may already exist.]

(c) The plaintiff had knowledge of the prior transactions before he signed Form 14 A.
[This is an unsubstantiated assertion.]

(d) Counsel for the defendant further submitted that the plaintiff was intimately concerned with the whole transaction. The transfer to him was the final step to block Tara from regaining possession of her property as the plaintiff was setting himself up as a bona fide purchase for value without notice. That was why he had to keep Singh off the register and make it seem that he knew nothing of the many matters handled by Suppiah. If he knew about them, he could not claim that he had no notice. It is impossible to believe that he, a lawyer, would be so irresponsible as to allow the use of his name in so many actions without knowing about them or being told after the matter was finished what had happened.
[The fundamental premise that the plaintiff was intimately concerned with the whole transaction is not borne out by the admissible evidence. The most important transaction seems to be on 30 March 1974. If indeed the plaintiff was so involved with the rest, I wonder why he was not also present at Tara's house together with Singh and Suppiah on that day. Since there was no monetary gain whatsoever in this for the plaintiff, I am very surprised that the plaintiff would be willing to soil his hands and risk ruining his reputation purely on account of their close friendship, had he known as a fact that Singh and Suppiah had fraudulently misrepresented the true nature of the transfer to Tara.]

(e) The absence of a qualification on the land register that the plaintiff was a mere trustee meant that the plaintiff was in law the legal and beneficial owner.
[But the defendant failed to call an expert witness on Malaysian land law to testify to that. I cannot say whether a proprietor appearing on the land register must be deemed to be a bona fide purchaser for value and whether a trustee, as the bare legal owner, is prohibited under the Code from registering himself as the proprietor, unless he registers a qualification to the effect that he is a mere trustee. Consequently, it is difficult to infer any dishonesty on the plaintiff's part when he allowed himself to be the registered proprietor when in fact he was only a trustee for Singh.]

(f) By going on the land register unqualified, counsel submitted that the plaintiff had held himself out as a bona fide purchaser for value without notice although Tara had, in many of the actions, claimed repeatedly that he was not. Since

Suppiah was not paid any consideration and therefore could not have received the MR220,000 he claimed he did in the Form 14A, it was submitted that the entire transaction was a sham or a fake. The first transfer from Tara to Suppiah was also a sham or a fake because Singh had paid Tara and not Suppiah.

[As explained before, there are various ways by which payment can be made. The fact that the plaintiff, who was fronting for Singh, did not physically hand over the MR220,000 to Suppiah at the time of the land transfer to the plaintiff, does not mean that Singh could never pay for the land without first going through the trustee. There was no reason for the plaintiff to desire an involvement in the physical mechanics of the payment. Lending his name as trustee was troublesome enough. Further, there is no evidence of what the actual payment arrangements to Tara were when she purportedly sold her land, and whether the funds to pay her originated from Singh or Suppiah or both of them. Apparently, the plaintiff had understood that Suppiah initially bought the land from Tara, and later on changed his mind. It is not clear if Suppiah had borrowed money from Singh to finance his purported purchase from Tara, and later Singh agreed to take over the purchase by buying the land over from Suppiah. When exactly Singh took over the purchase was not clear to Arul. The plaintiff himself could not enlighten the court as he did not know what the arrangements between Suppiah and Singh were at that time. Whether the payment to Suppiah was through actual payments or set-offs against outstanding monies owed by him is also not clear. In any event, I do not think that it is an irresistible inference that the said transfer Form 14A must necessarily be a sham, or that it was unreasonable for the plaintiff to suppose that no consideration of MR 220,000 could possibly have passed from Singh to Suppiah, such that the plaintiff must have known at that time that he was going to be a party to a sham transaction. Let me assume for the moment that Suppiah had initially purchased the land from Tara for MR220,000. Let me further assume that Suppiah borrowed MR220,000 from Singh to finance his purchase and Suppiah paid it over to Tara. Tara then transferred the land to Suppiah. When Singh decided to buy over the land from Suppiah at the same price of MR 220,000, he asked the plaintiff to act as his trustee. The plaintiff signed the Form 14A to accept the transfer from Suppiah. The consideration stated was MR220,000. Because Suppiah owed Singh MR220,000, Singh could certainly effect payment of MR220,000 to Suppiah by way of a set-off of the unpaid loan of the same amount taken earlier from Singh by Suppiah. No physical movement of money need take place and yet it would not be incorrect to state that there was consideration of MR220,000 received by Suppiah from Singh through a set-off. The defendant here faced the hurdle of proving the basic background facts without calling any witnesses who might have some knowledge of them. The plaintiff was not going to make it any easier for him. For instance, the plaintiff was very quick to state that he had no personal knowledge when Mr Cashin tried to get the plaintiff to admit to certain 'undisputed background facts' referred to in the various judgments.]

(g) Finally, defendant's counsel submitted that the transfer by the plaintiff to Jet Age Construction Sdn. Bhd., a company controlled by Singh, was another sham or fake, as no consideration was received by the plaintiff. The transfer was to prevent Tara from recovering her land.
[I have explained before why not much significance can be attached to this

transaction. I cannot infer any dishonesty in the plaintiff if he genuinely trusted Singh to settle the payments in whatever mode he deemed fit with a company controlled by himself. Whether Singh did so or not is another matter. There is insufficient evidence to conclude that the plaintiff knew at the time he transferred the land to Jet Age Construction Sdn. Bhd. that it would be a sham transaction between Singh and his company, and that the purpose of the transfer is to defeat Tara's claim. How it would help to defeat Tara's claim is unclear to me. I would have thought that returning the land to the control of Singh would make it easier for Tara to succeed in tracing it back to the alleged perpetrator should she succeed in her claim against Singh. Equity would readily assist her to trace her land back to the constructive trustee, Jet Age, which in turn was controlled by the alleged perpetrator i.e. Singh.]

179. On the fundamental question whether Arul acted in collusion with Singh and Suppiah, and whether he had been fraudulent and dishonest when he signed the Form 14A, it is of no consequence if Arul's knowledge of the history of the transactions came from what Singh or Suppiah had told him or through documents shown to and read by him, so long as Arul believed it and/or had acted on the basis that the information was correct. A man's conduct and actions must be guided by what is known to him. He may rely on and act on hearsay information. Evidence on what Arul had been told by Suppiah and Singh prior to signing Form 14 A constitutes admissible evidence to prove the state of Arul's knowledge at the material time when he signed From 14A. His knowledge at that time is a question of fact.

180. In his submissions, defendant's counsel accepts that the plaintiff had consistently said that he had not given instructions on various matters concerning the action in his name to claim vacant possession of the land from Tara. His beneficiary, Singh, did so. Defendant's counsel also accepts that the plaintiff had consistently maintained his position that he was not informed either of the impending court actions or their results until 31 January 1977, when he had to see Suppiah and Singh in Johore to find out what was happening after some of the plaintiff's then partners in M/s Rodyk & Davidson had accused him of some scandalous land dealings in Johore. That was the 1st time that the plaintiff read and saw Tara's defence in Civil Suit 146 of 1976, where Tara contended that the transfer of the land from Suppiah to the plaintiff was not for value and that the plaintiff was not a bona fide purchaser. Besides setting out some of the history of the transaction, Tara had also in her defence put Arul to strict proof that he was a bona fide purchaser of the land for value. There was no reply filed in this action specifically to deny that Arul was a bona fide purchaser for value.

181. At best for the defendant, we have the plaintiff's admission that he learnt of some history of the land transaction from the documents and the defence shown to him in January 1977. But I cannot see how this helps the defendant when what I have to consider is the plaintiff's knowledge on 31 July 1975, and not his state of knowledge in January 1977, some 1 years later, which is totally irrelevant to the question whether the plaintiff acted dishonestly and fraudulently when he signed Form 14 A.

Replies to Law Society

182. A complaint to the Law Society was made against the plaintiff. A considerable amount of cross-examination was taken up on the plaintiff's replies in April to the Law Society to show that he had not been forthright and that he had in fact been dishonest.

183. The complaint stated, *inter alia*, that Arul was not possessed of funds that would have enabled him to buy the land for MR220,000. Arul's reply was that the complainants were not in a position to know of his financial standing and their speculation whether he was an actual purchaser was unfounded and malicious, to say the least. Does this mean that he was indeed possessed of the funds and he had used his own funds to buy the land, or does it mean that he did not in fact use his own funds, but it was merely malicious to say that he did not have the financial resources of that amount *per se*? To a question 'Looking at the transcript of the meetings with Arul it becomes clear that Arul in fact did not provide the consideration. Who did?', Arul's answer was, 'It is up to me to find the financing in any way open to me within the law.' Does it mean then that he paid for the land himself, or that he did not provide the consideration but he managed to find someone else to finance him, or

that he managed to find someone else to buy the land and pay for it but he himself never bought the land and never paid for it. Another example is the plaintiff's reply to the query why he did not view the property to which the plaintiff's answer was "I do not know how they have come to the conclusion that I did not view the property." Does it mean that he did in fact view the property when he had not in fact viewed the property, or merely that he did not know how the complainants managed to find out the truth that he did not view the property.

184. The plaintiff explained that he answered in that manner because he was going to appear before the Law Society and he would tell them clearly that he was only a trustee and that he did not pay for the land. Since he believed that a copy of his reply to the Law Society would likely be extended to the complainants, Mr S K Tan and Mr Coomaraswamy, whom he believed were conspiring to throw him out of M/s Rodyk & Davidson, and were working hand in glove with Tara, he did not want them to feed back to Tara the information that he was a mere trustee for the land and that he had not paid anything personally for the transfer of the land to him from Suppiah. As with Singh and Suppiah, Arul wanted to put Tara to strict proof of something which they already knew to be true.

185. In my opinion, the plaintiff had been slippery with his replies to the Law Society. He made no positive assertion that he was the beneficial owner of the land and that he had paid valuable consideration for it. As he had every intention to tell the Law Society the true state of affairs which the plaintiff said he did, I cannot conclude that he had intended to mislead and deceive the Law Society. I note that the plaintiff had by then also informed some of his other partners in a meeting as early as February 1997 that he did not furnish the MR220,000 for the purchase and that he was in fact holding the property 'in a manner of speaking' for a third party. This was recorded in a minutes of meeting, which minutes the plaintiff did not generally disagree with. This lends support to the plaintiff's evidence that he did disclose to the Law Society that he was not a bona fide purchaser for value just as he had disclosed the same to some of his other partners.

186. As for the complainants and Tara, he was not going to tell them that he was not a bona fide purchaser for value. As explained earlier, he believed that the complainants were his enemies who had an ulterior motive and were out to do him harm out of spite. It was in that context that he fashioned his answers in that evasive and equivocal manner because he believed that a copy of his replies would eventually be given to the complainants by the Law Society, and they would in turn pass it to Tara or her solicitors. The plaintiff said that he was not going to give them the information they were seeking in a devious and dishonest manner.

187. In the circumstances, I do not think that I can infer that the plaintiff is a vicious and dangerous fraud having regard to the bitter partnership manoeuvres he found himself in, and the restraint placed on him by joining his defence with Suppiah and Singh, where they had put Tara to strict proof that the plaintiff was not a bona fide purchaser for value. He might not have wanted to compromise their legal defence. Whether that is the proper way to defend their action is quite another question. But I do not think it would be proper to make a finding of fraud or dishonesty for these reasons alone.

188. In any event, the plaintiff's replies to the Law Society have not been included in the particulars in the defendant's plea of justification. As such, the defendant cannot rely on the same for his plea.

Effect of Pleadings

189. Generally, parties should properly admit to facts put into issue and which they are know are factually true and correct. Although a defendant is entitled to put the plaintiff to strict proof of his whole case, a party generally should not strictly put the other party to prove facts that he already knows to be true. If that practice is adhered to, then all parties including the courts will not only save a lot of time and unnecessary costs, but more importantly it will further the proper administration of justice and the just resolution of the real dispute at hand. It is quite different if the party requiring the strict proof does not know the true position, and the facts alleged are wholly within the possession and knowledge of the other party.

190. However, it cannot be said that the party requiring strict proof of a fact which he already knows to be true, has acted dishonestly or fraudulently in any way. That will be going much too far because I recognize that there can be occasions where a party puts in issue a fact where there is no real dispute (a) to force the other party to bring in a particular witness, thus opening

up an avenue to cross-examine on other matters, or (b) to force a lacuna in the proof of his opponent's case when he knows that the witness testifying to that fact is unavailable or not found.

191. There is a distinct difference between a denial and a non-admission by a defendant's traverse of the allegations of fact made by a plaintiff in his statement of claim. Generally, where the defendant denies an alleged fact, he cannot call evidence to prove facts to the contrary without first setting out in his defence what his positive case to the contrary is.

192. An allegation of fact may contain two or more allegations. For instance, paragraph 12a of Tara's statement of claim in S284/1979 states the particulars of fraud of the 3rd defendant, Arul, as follows:

> a. colluding with the First and Second Defendants [i.e. Suppiah and Singh respectively] and causing the said property to be registered into his name,
>
> > (i) with knowledge of the real arrangement between the Plaintiff [i.e. Tara] and the First and Second Defendants;
> >
> > (ii) with knowledge that under the terms of the said arrangement it was unlawful or inequitable on the part of the First and Second Defendants to have transferred and registered the said property into the name of the Second Defendant;
> >
> > (iii) with knowledge that he was not a bona fide purchaser of the said property for value; and
> >
> > (iv) with knowledge that he was accepting the transfer of the said property into his name only as the nominee or agent of the First and Second Defendants and only for the purposes of posing and projecting himself as a bona fide purchaser for value so as to attempt to defeat the Plaintiff's right to redeem and recover the said property.

193. Taking paragraph a. read with (iii) for instance. There is the allegation that the plaintiff had colluded with Suppiah and Singh. There is also the allegation that the plaintiff was not a bona fide purchaser for value and they all knew that as a fact. There can be a factual situation where Arul knows that he is not a bona fide purchaser for value but he nevertheless denies that he had colluded with Suppiah and Singh. If so, then he should not deny each and every allegation, which amounts to denying both allegations separately and also as a whole. Where the separate allegations of fact are very material, the observance of this rule becomes particularly important so that all the critical issues in dispute will be properly and correctly crystallized.

194. Counsel for the defendant places emphasis on paragraph 22 of the joint defence, where all 3 defendants, Suppiah, Singh and Arul, had denied each and every allegation contained in paragraph 12 of Tara's statement of claim. Paragraph 12 is a very long paragraph of some 5 pages with many sub-paragraphs and contains numerous allegations of fact embedded in long sentences. It seems to me to be an easy way out to use a 'catch all' traverse and denial of that long paragraph 12, which might have been done without much thought. Paragraph 22 of the joint defence simply reads as follows:

> 22. The Defendants [i.e. Suppiah, Singh and Arul]….. deny each and every allegation contained in paragraph 12 of the Statement of Claim, including the allegations of fraud, and the Defendants put the Plaintiff [i.e. Tara] to strict proof thereof.

195. A general traverse, such as that above, means that each and every separate allegation is denied. It extends to every

allegation contained in every long sentence in paragraph 12 of the claim, broken up into all its constituent parts. Generally, it does not admit of the possibility that the defendant is denying one part of the allegation of fact and admitting another. All allegations of fact embedded therein must be construed as having been being separately denied.

196. Strictly speaking therefore, the general traverse at paragraph 22 includes a denial by all three defendants, that Arul was not a bona fide purchaser for value, which must mean that he was a bona fide purchaser for value. If Arul intended to deny the other allegations but not this, then his denial of each and every separate allegation was not only inaccurate but would be regarded as misleading and evasive.

197. Arul disagreed that in paragraph 22 of the joint defence he was denying that he was not a bona fide purchaser. He maintained that he was denying the total allegation that he had colluded with Suppiah and Singh to cause the property to be registered in his name with the knowledge that he was not a bona fide purchaser for value. According to Arul, it meant that he was denying the collusion and the associated implication that one cannot register property in one's name if one is not a bona fide purchaser for value, which was tied up with the accusation of collusion.

198. I note that the plaintiff had not seen the joint defence before it was filed in court. He never drafted it. He only saw it much later in May or June 1981. Having read it when he got the bundle of pleadings when they were getting ready to go for trial, he agreed with it. He adopted it as his joint defence together with Suppiah and Singh, as it was drafted by Suppiah, an experienced lawyer with the same seniority as himself.

199. M/s Suppiah & Singh were his solicitors initially. They handled matters for all 3 defendants in S284/79. He basically left it to Suppiah who did everything for him and Singh. Arul explained that he had a busy practice in Singapore. By 1977, he was not doing any work in Malaysia because he had started a new firm in Singapore in August 1977. Some time before the trial, Suppiah appointed Mr Chin, the Senior Partner of M/s Allen & Gledhill on Arul's behalf and Mr Chin became his solicitor on record. On the 2nd day of the trial on 13 August 1981, Mr Chin informed the judge that Arul wished to act on his own behalf. On 17 October 1981, Mr Ronald Khoo took over and acted for Arul. His new solicitor was not happy with the joint defence. Mr Khoo took the view that they should make it clearer to the court that he was merely a trustee or nominee.

200. On the very next day, 18 October 1981, which was already the 7th day of the trial, an amended and separate defence was tendered before the court, with no objections from the parties including Tara. This time Arul clarified in his amended defence in no uncertain terms that:

> a. Prior to July 1975, he had not heard of the property, Tara or anything else about the transaction;
>
> b. He had made no representations to Tara and had never met her in fact;
>
> c. In July 1975, Singh requested him to be his nominee and trustee;
>
> d. Singh paid for the whole consideration for the property;
>
> e. He had never seen the property and has no beneficial interest in it.
>
> f. He only came to know of the background to the property after 15 January 1977.
>
> g. He had not assisted Singh or Suppiah in any breach of agreement, fraud, undue influence or breach of trust as pleaded or otherwise.

201. I do not find anything sinister in Arul following his solicitor's advice to amend his defence. In fact, the plaintiff frankly admitted that he was happy with the original defence as it was but it was Dato Khoo who wanted to amend it and he basically followed his counsel's advice. I believe the plaintiff's evidence that he would leave matters in his solicitor's hands when he is

comfortable with the solicitor's competency. He agreed with Dato Khoo's stand that his amended defence would shorten the trial.

202. To properly understand Arul's mental state at that time, I will set out this part of his evidence:

> *Q : It was not until the Thursday of the trial, in Johore Bahru, that you at last admitted the truth that you were not a bona fide purchase for value?*
>
> *A : I never said I was a bona fide purchaser for value at any time. In the amended defence it made no difference to that position.*
>
> *Q : Why did you amend your defence?*
>
> *A : While this case was going on, it was played up in the press in Malaysia and Ronald Khoo, a close friend of mine for a long time and a senior partner of Shearn & Delamore, telephoned me to say, that the way things were going, with that Judge and Mr Cashin, he should come down and appear on my behalf. I agreed.*
>
> *He came down. We discussed the case. And he took the view that since I was going to state all this in my evidence, we ought to amend the defence and file a separate defence on my behalf. That was why my defence was amended.*
>
> *Court : Before Ronald Khoo came down, you must have read the unamended defence?*
>
> *A : Yes.*
>
> *Court : When can you recall, you first read that unamended defence?*
>
> *A : Can't recall exactly, but it was before the trial. I might have seen it soon after it was filed.*
>
> *Court : Did you adopt that after you had seen it and you were satisfied with it?*
>
> *A : Yes. It was drafted by Suppiah, an experienced lawyer with the same seniority as myself.*
>
> *Court : So therefore, you agreed to whatever was there?*
>
> *A : Yes.*
>
> *Court : So it was when Ronald took over and upon his advice, you decided to change your earlier position taken in that earlier defence to another position taken in the amended defence?*
>
> *A : Yes but I would not take it as another position because it was merely clarifying my stand in the earlier defence.*
>
> *Court : Therefore if it was merely a clarification, then the later amended defence would not be inconsistent with the earlier defence? Is that so?*

A : That is correct.

Q : In the earlier defence, there was no mention at all that you were a trustee or nominee?

A : Yes.

Q : What there was in, in the statement of claim, was a repetition of the stand that Tara had adopted and taken from the very 1st time when you claimed possession, namely that you were not a bona fide purchase for value?

A : Yes, she took that position but as I said it was irrelevant to the issues in the case.

Q : In your original defence, you never said that you were a trustee?

A : Yes.

Q : Then, why was it not necessary now, for her to have to prove that you were not a bona fide purchaser for value in your later position taken in the amended defence?

A : I was going to give evidence on it anyway.

Q : Did Jaginder Singh and Suppiah know that you were going to give evidence that you were a trustee before the amendments?

A : Yes, from the start of the case, they knew it. From the time in 1977, when I went to the Law Society, Suppiah and Jaginder Singh knew that I was going to say that I was a trustee or a nominee.

Q : So that all 3 of you took the same stand, namely if Tara says that you were not a bona fide purchaser for value, Tara is to prove it?

A : Yes. The original defence showed it.

Q : Then why was it when Tara's statement of claim was filed on 30 August 1979, you all decided to put her to the proof, although they knew, according to what you say, you were going to admit that you were a trustee when you gave evidence?

A : I can't explain why. Suppiah drafted the defence. Suppiah on our behalf in the defence, was putting her to strict proof which is not in any way unusual in pleaded cases.

Court : Tell me, if at the time of the Law Society complaint, you, Suppiah and Jaginder Singh, knew that you were going to admit that you were a mere trustee and imply that you were not a bona fide purchaser for value, then why did you draft the answers to the complaint to the Law Society in a way, as you say, not to reveal those facts to them?

A : It was the mood and the atmosphere existing with M. Coomaraswamy and S K Tan and Mr Cashin hovering around and being hustled. It was meant not to be a public document and just my reply to my Law Society.

203. Having regard to the circumstances and after a careful analysis of the admissible evidence before me, I find it difficult to infer the existence of a fraudulent or dishonest intent on the part of the plaintiff merely from having adopted paragraph 22, which is a rather short paragraph out of 19 pages of the joint defence, although that paragraph 22 may be criticized as a bad pleading point, for which it is unclear who might be responsible and whether the solicitor-in-charge was aware of the need to be more precise in traversing a pleading after having taken proper and detailed instructions. Of course, if the defendant personally instructed his solicitor to craft it in that way to deliberately make it ambiguous and to mislead, some comment on that conduct as being somewhat devious or dishonest may be called for. But there is insufficient evidence of that before me.

204. A traverse by denial of a negative averment may simply remain as a mere denial with nothing to be implied and as a consequence, the defendant will not be allowed at the trial to call evidence and set up in his defence an affirmative case to the contrary, which has not been specifically pleaded. Essentially, the defendant by such a mere denial would be simply putting the plaintiff to strict proof. But in certain cases, the double negative contains within itself an affirmative allegation. This is the 'pregnant negative', which clearly imports a positive assertion of fact, where particulars may be ordered, if not so given. The third possibility is that the matter is left in doubt in which case the pleading may be struck out as being embarrassing unless made clearer by an amendment.

205. According to Arul, Tara's solicitors never asked for further and better particulars nor delivered any interrogatories, implying that it could have made it clearer what exactly the 3 defendants were denying. Arul then said that he nevertheless did disclose the facts that he knew by way of his amended defence. In any event, even if there was no amended defence, he maintained that if the question was asked of him in court whether he was a bona fide purchaser for value, he would state exactly the truth, although there was no obligation to disclose in his defence that he was only a trustee or nominee. He asserted that 'we must tell the court the truth under any circumstances.'

206. I am inclined to believe the plaintiff here because he had very early on in February 1977, already disclosed to some of his partners that he did not personally pay for the property when he came on the register. He had also disclosed the same to the Law Society. He had prior to his giving evidence at the trial, tendered an amended defence, to state unequivocally that he never paid for the property but was merely a trustee or nominee. I therefore conclude that tendering his amended defence on the 7th day of the trial does not *per se* indicate that he had been dishonest in his conduct of his earlier joint defence, or that he had all along intended to deceive the trial judge but somehow, had a change of heart when he was about to testify.

207. I observe that defendant's counsel had relied heavily on certain averments in Arul's pleadings in the various actions in Johore. But it must be remembered that pleadings are drafted by lawyers usually on client's instructions, and may be amended. Pleadings are not testimony on oath in court or an affirmation of facts on affidavit. It is thus difficult to pin the plaintiff down on a mere general traverse of a pregnant averment, that he had thus by way of the pleadings positively alleged a fact known to him to be false and therefore, he was dishonest and a most vicious and dangerous fraud.

208. The fact that Mr Justice Syed Othman presumed that the plaintiff was a bona fide purchaser for value and found in favour of the plaintiff in an action in the name of the plaintiff to evict Tara from the land and to remove a caveat lodged on the land by her, did not necessarily mean that the plaintiff had in fact asserted that fact in court. Did he mislead the court? I considered the fact that the matter was argued by their lawyer, Mr Suppiah of M/s Suppiah and Singh. It was not the plaintiff arguing. The plaintiff said he was not even there at the hearing. He left it to Suppiah, and to Singh, his principal who was giving instructions to Suppiah. If Suppiah in his submissions had misled the court into making that presumption, there was therefore the real possibility that he was not acting under instructions of the plaintiff. I cannot disregard the possibility of Suppiah and Singh acting on their own without the plaintiff's knowledge and consent.

209. The fact that Mr Justice Syed Othman had to presume that fact, seems to support the contention that no positive assertion of that fact had been made.

Foreign Law

210. Apart from certain exceptions, foreign law must be proved as a fact by the party relying on it. No expert witnesses appeared to tender the National Land Code and to give expert evidence on sections 342, 344 and by contrast, section 346 of the Code.

211. Therefore, no evidence is led as to whether:

> (a) a nominee/trustee of a property must be expressly registered as such;
>
> (b) a registered owner is deemed to be a bona fide purchaser for value without notice and is a representation to the world at large that he is never a nominee/trustee but he is always both a legal and beneficial owner;
>
> (c) a registration by a nominee/trustee as a transferee and as a registered owner is *per se* fraudulent;

212. Without the assistance of expert evidence, I cannot infer that the plaintiff, as a mere trustee had done anything dishonest or improper by having himself registered as the proprietor on the register. I cannot say he had misrepresented himself to the world at large that he is both the legal and beneficial owner when he is only a trustee. In the absence of any expert evidence on the National Land Code, I will assume that a registered proprietor can be a bare legal owner or a trustee for someone else.

213. The burden is on the defendant to establish with a high degree of proof that the plaintiff was then and is still a most vicious and dangerous fraud. I find that he failed to prove either. It might have helped the defendant's case if the defendant's counsel is able to adduce expert evidence that a mere trustee of land in Malaysia cannot be registered as the proprietor under the National Land Code. But counsel chose not to despite my indications to them on the need for proof of Malaysian land law and I am left with nothing much to come to any clear conclusion and to satisfy myself that he is indeed such a vicious and dangerous fraud.

Conclusion

214. In conclusion, having regard to the requisite standard of proof, I am not able to infer from very limited and tenuous circumstantial evidence, that the plaintiff had, subsequent to the events of 30 March 1974, colluded with Suppiah and Singh to put the land out of reach of Tara by agreeing to stand in as a purported bona fide purchaser for value in July 1975, and by signing the Form 14A to allow the land to be transferred into his name as the registered proprietor, and by holding himself out as the beneficial and legal owner of the land, when in truth he was merely holding the land on trust for Singh.

215. Even if one were to go further to infer that the plaintiff was negligent in being too trusting, simply careless or less than straightforward by not admitting at the outset of court proceedings in Johore that he was not a bona fide purchaser for value, in my judgment that does not amount to fraudulent conduct, let alone conduct justifying that the plaintiff is a most vicious and dangerous fraud.

216. In addition, I find that the defendant failed to prove that the plaintiff had dishonestly concealed information with regard to the Johore proceedings prior to offering himself for election to office at the Club. From the plaintiff's perspective, both his appeals were allowed. It is also not unreasonable for him to believe that the Privy Council had fully exonerated him on the merits after a review of the evidence in the Tara case when their Lordships held that 'it is **abundantly plain** that he (i.e. Arul) had no hand whatever in the events of March 30, 1974, which form the basis of the respondent's case of fraud against the other appellants.'

217. Hence, Arul would naturally conclude that he is not guilty of what Abdul Razak J said he had done. I cannot say that he is

dishonest to hold that view, which is not an unreasonable view to take. Even among lawyers, one can get different views of the consequences of an appeal allowed by consent. Whether Arul's personal view is correct in law is quite another matter. Consequently, I cannot infer any dishonest intention on his part when he did not make any disclosure to the Club or the GC members of the old Johore matter.

218. In the result, it is my judgment that none of the defamatory meanings nor the stings in the defamatory meanings have been justified by the defendant to the requisite degree of proof called for in such serious attacks on the plaintiff's character and reputation.

Public Policy against dredging up the past

219. As an additional bow to the string in the plaintiff's case, counsel for Arul submitted that even if the defendant succeeds in his justification defence, public policy dictates that the defendant should not be allowed to dredge up the plaintiff's long buried past and the defendant should still be made liable for the defamatory statements. In view of my finding above, it is strictly not necessary for me to address this point. Since there are detailed submissions on this, I will express my views.

220. In *Leyman v Latimer & Others* [1874-80] All E.R. Rep. 1264, the plaintiff, a newspaper editor, was called "a convicted felon" and "a felon editor" by the defendant, who pleaded justification. At the court below, the trial judge, Blackburn J. found that the plaintiff had in fact been convicted many years previously of felony and was sentenced to 12 months' hard labour. He had served the sentence. At the Court of Appeal, Bret L.J. with whom Cotton LJ agreed said:

> The libels set out in the pleadings are published. It is undeniable that their meaning is a question for the jury; but BLACKBURN, J., in effect, says: "Whatever they may find their meaning to be, I shall still direct a verdict for the defendants." Therefore to test the learned judge's right to so direct them, we must take the extreme possible finding of the jury. The jury might find the first libel to mean, "is a convicted felon now," and not merely that plaintiff was one at some past time. And if they had found so, then the same question would have arisen on this libel as on the second; for, on that certainly they might have found very easily that a "felon editor" implied plaintiff was a felon then, at the time the libel was published. Then supposing the jury to have found so, on both libels, how does it stand? The plaintiff does not and could not dispute the conviction. I assume the facts most strongly against the plaintiff; I assume he was rightly convicted, in all probability it was so. But still I am of opinion that, even on these facts, the plea would show no justification, if the punishment had been proved to have been served. After that, the man was no longer a "felon", and he would have an action against whomsoever called him one. For that proposition there is distinct authority.
>
> ....I agree most fully with CLEASY, B., that public policy is all against people who make such unjustifiable statements as these; but, in doing so, I wish to guard myself against being supposed to say there is anything which should prevent inquiry into a man's past conduct and character on a proper and justifiable occasion. There are many such, and in those cases, both in motive and reason, the inquiry is justifiable. But people who will rake up all that is against a man in his past history, for their private purposes, and to gratify personal or professional spite, have nothing whatever to be said on their behalf.

221. In Carter-Ruck on Libel and Slander 5th Edn at page 98, the learned authors wrote:

> Publishers may do well to remember that a plea of justification may fail where the words complained of consist in the raking up of a long buried past which 'though literally true' may suggest that a taint upon the character still subsists. It is submitted that an action would lie in these circumstances on the basis that what is at stake is a person's reputation today and not the reputation that he might have, or even perhaps ought to have, had the episode not been lived down and forgotten. Similarly, publishers must beware of portraying a person as still suffering from some disreputable or otherwise defamatory character trait or condition in their past (for example drug-taking) when they have in fact reformed or recovered.

222. In *Sutherland v. Stopes* [1924] All E.R.Rep.19, Lord Shaw in the House of Lords said at p 32:

> ....a statement of fact or opinion which consists in the raking up of a long-buried past may, without an explanation –and, in cases which are conceivable, even with an explanation—be libellous or slanderous if written or uttered in such circumstances as to suggest that a taint upon character and conduct still subsists, and that the plaintiff is accordingly held up to ridicule, reprobation, and contempt.

223. Gatley on Libel & Slander 9th Edn had commented in a footnote at p 444 that the Faulks Committee had cited the above passage of Lord Shaw as suggesting that 'muck-raking publications may well be actionable if they imply that a taint on the plaintiff's character still remains' (Cmnd. 5909, 140); though there is no case in which this has been held, it seems correct in principle, and would apply to any past wrongdoing, not merely to the subject matter of a conviction.

224. In reply to Mr Suresh Damadora's point that the defendant here had been raking up the long buried past of Arul, Mr Imran submitted that there is a distinction between merely disclosing the long buried past and 'muck-raking', thereby suggesting that where the disclosure was malicious, it may be indefensible. He seemed to lean towards the position that justification is no defence only if it amounts to muck-raking, but not otherwise.

225. However, when Mr Cashin took his turn to submit, he appeared to take the more extreme position that a plaintiff has no remedy whatsoever in defamation if what happened in the long buried past is true in fact. A plea of justification is not defeated by proof of muck-raking.

226. This is indeed a difficult public policy point. Put simply, should public policy step in to deprive a defendant of his defence of justification if dredging up of the long buried unsavoury past of a plaintiff is proved to have been actuated by malice. Is this to be an exception so to speak to the general common law position stated in Gatley on Libel & Slander (9th Edn) at p 444 para 17.1, which was cited to me by Mr Cashin:

> **The common law.**
>
> Since the common law gives an *absolute defence* in respect of the publication of matter which is true, *even if the publication was unworthy and malicious*, there is no general remedy in civil proceedings for the revelation of past wrongdoing, *however much the wrongdoer may have reformed, and for however long he has led an honest and socially valuable life.* (Italics are mine for emphasis.)

227. Mr Cashin submitted that the Civil Rights of Convicts Act of 1826, was the authority on which the Court of Appeal in *Leyman v Latimer* relied on to reinforce the argument that it was against public policy to allege when pleading justification that the plaintiff had been convicted of an offence which had taken place many years ago. The Civil Rights of Convicts Act might have reflected the public policy of England in the 1820s, and likewise, Leyman's decision might have reflected the public policy in the 1870s. But that was the public policy of another country 130 years ago. He submitted that there is no evidence or authority to suggest that the public policy in Singapore today is against justifying the truth of a matter occurring 25 years ago.

By not adopting the Rehabilitation of Offenders Act of 1974, which is the most recent English equivalent of the Civil Rights of Convicts Act, Mr Cashin submitted that the Singapore legislature is clearly saying that the public policy in Singapore does not accept that it is wrong to raise spent convictions when proving justification in libel. By analogy, the same applies to wrong doing in civil matters. Secondly, since it is not Arul's stand that what he did 25 years ago was wrong and his conduct was reprehensible but he is now an entirely new man, Mr Cashin argued that it comes ill from his mouth now to say that what the defendant did was against public policy.

228. I will deal with the second point first. The public policy issue is to my mind the plaintiff's reserve argument in the event that (a) the defendant succeeds in establishing that the defamatory meaning was merely that he had done wrong in the past, without any further insinuation that a stain remains on his character, and (b) the defendant further succeeds in proving that the plaintiff had in fact abetted the others in deceiving Tara of her land and hence, he was indeed at that time a most vicious and dangerous fraud.

229. I think the plaintiff is entitled to raise the public policy point to defeat the defendant's justification plea if there is indeed such a public policy against malicious muck-raking of the long buried past that will defeat that plea. The fact that he never admitted to any wrongdoing, and thus has never repented, is quite irrelevant.

230. In England, the Rehabilitation of Offenders Act 1974 contains special provisions, applying to defamation actions founded upon the publication of a spent conviction in relation to a person considered under the Act as having been rehabilitated. Of interest is s 8(5) of the Act which provides that the defendant shall not be entitled to rely on the defence of justification if the publication of a spent conviction record is proved to have been made with malice. We do not have a similar Act dealing with defamation arising from publication of spent convictions. But this does not mean that without the aid of an Act of Parliament, public policy against malicious muck-raking cannot gradually develop, evolve and later be established as part of the common law in Singapore.

231. In my judgment, malicious muck-raking using events of the buried past, done with the **sole** intention to injure should be prohibited by public policy even though the scandalous past is established to be true in fact. The defendant should be denied the availability of his justification defence if he is shown to have acted purely out of malice.

232. If a person has been convicted several years ago of an offence or has been involved in some misconduct or wrongdoing (whether it be civil, criminal or moral in nature) in the past, I find it hard to see any real benefit to the public in allowing a resurrection of the scandal if that person is quietly leading a private life. But there can be many special circumstances justifying the disclosure or reminder of past misdeeds. For instance, the long hidden past scandal of child molestation should rightly be disclosed if the person concerned is a school teacher, even if that disclosure is done by an enemy with a predominant malicious motive to injure that school teacher. Another example will be where a person's fitness to stand for public office is in issue. Again, disclosure of the long buried past may be justifiable and be protected by the justification defence **even if done maliciously**.

233. Hence, if there is some duty or legitimate interest to resurrect matters that rightfully belong to the long buried past, the defendant remains protected by the justification defence even if he has acted with predominantly malicious motives. The distinction here is that where malice will defeat the defences of fair comment and qualified privilege, it will not defeat the justification defence if it is made out, provided that the defendant can show that he still harbours some belief, however slight, that he has some duty or legitimate interest to disclose the long buried past, although his predominant motive is malicious in nature to injure the plaintiff's character and reputation nonetheless. It is only when his intention to injure is his sole and exclusive motive that public policy will step in to deny him his justification defence. For I see no good reason to allow a man to be continuously crucified and reminded of his long past misdeeds, whatever they may be, if it serves no other purpose than to remind him and others of what he had done in the buried past. Whether he has repented or not is to my mind quite irrelevant. Why should the law allow a continuous crucifixion of a man for the rest of his life simply because he has never repented for a long past misdeed of his?

234. On the facts of this case, I find that the defendant's dominant motive was to injure the plaintiff and to seek revenge

against him in those publications. Nevertheless, the evidence does show at least for the 2nd and 3rd publications that he also had a collateral but **subsidiary** motive to let the GC members know of Arul's long buried past conduct because he did feel that they ought to know of it and take action to remove him from holding office in the Club. His main motive was that he wanted the plaintiff sacked from his office appointments in the Club and even from the Club membership, out of spite and personal revenge for witch-hunting him in the first place.

235. I do not think that public policy should deny the defendant his defence of justification for the 2nd and 3rd publications, provided he can justify all the stings in his libels. But my finding is that he has failed in his plea of justification. However, if I am wrong in that, then it is my conclusion that on the facts, public policy will not deny him his defence of justification for these two publications for the reasons I have stated.

236. However, the 1st publication stands on a different footing. It appears to me that his intention was pure muck-raking of the long buried past. As such, even if he makes out the plea of justification, public policy will deny him that defence of justification.

Qualified Privilege

237. Being a member of the Club, its affairs will naturally be of some legitimate and personal concern to the defendant. The GC manages the Club's affairs including the Club's finances and the conduct of its members. The M & R is responsible for the proper conduct of its members and for determining whether applicants should be permitted to join the Club. The plaintiff was elected to the GC in 1997. In 1998, he became its vice-president. Understandably, he would have an influential role to play in the GC and in the management of the Club. With his appointment in 1998 as the chairman of the M & R, he had a prominent role to play in ensuring that the Club members behaved in a proper manner. As such, he would be called upon to take appropriate action against those who did not do so. He would have a large say in determining the suitability of persons joining the Club.

238. I have little difficulty accepting the defendant's contention that the plaintiff's suitability to serve in those positions was a matter of proper and legitimate interest to him, and to the president and GC members, who were the recipients of his defamatory publications.

239. In my mind, the occasion for the publication will be covered by qualified privilege, provided that the publication is limited to those matters of legitimate common interest or concern to them.

240. It is common ground that if malice existed at the time of the defendant's publication and that malice had actuated his publication, it will defeat his defences of qualified privilege and fair comment. The burden however is on the plaintiff to prove on a balance of probability that the sole or dominant motive for the publication was not to raise matters of genuine legitimate common interest or concern, but to injure him.

241. I am rightly reminded by counsel for the defendant that the mere use of strong words by the defendant does not amount to malice *per se*. Further, once the occasion of qualified privilege is established, the court must be slow to draw the inference that the defendant is actuated by improper motives in making the publication to the GC, particularly when he honestly believes in the truth of his publications. The fact that the matters of genuine legitimate interest to both the publisher and publishee, will of themselves speak ill of the plaintiff in some way, does not defeat the qualified privilege, which is a defence provided as a result of the need to allow those protecting their legitimate interests to express or discuss them honestly free from any fear of the defamation laws, although what the publisher honestly believes in and said in relation to those legitimate interests may in fact be wrong, untrue or unjustifiable.

242. A qualified privilege exists at common law where the defendant makes a statement in pursuance of a legal, social or moral duty, or in the protection or furtherance of a legitimate interest, to a person with a corresponding duty or interest to receive it, thereby giving rise to this reciprocity of duty or interest (frequently common but not necessarily identical in nature), which is essential in establishing a qualified privilege defence. See *Adam v Ward* 1917 AC 309 at 334. But the publisher must not abuse

such a privileged occasion and use it as a disguise (a) to further his real predominant motive of injuring another by his slanderous or libellous statement, or (b) for some other dominant improper motive or purpose e.g. personal spite, ill-will or vengeance. Neither can he knowingly bring in matters entirely extraneous and irrelevant to the protection of the legitimate interest or the discharge of the legal, social or moral duty, which creates the privilege. Not only will that constitute evidence of malice, but it seems to me that totally extraneous and irrelevant matters will necessarily be outside the protection afforded by the privilege in the first place, even though the publisher may have subjectively believed them to be relevant.

243. In determining whether the occasions of publication are privileged and whether the publications have been made maliciously, I will respectfully follow the general approach stated by Lord Diplock in the well known case of *Horrocks v Lowe* [1975] AC 135 at 150, but subject to what I state at paragraphs 244 to 250 below.

> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.
>
> The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.
>
> Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest, the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the

conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more.

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

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

There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true.

But where, as in the instant case, conduct extraneous to the privileged occasion itself is not relied on, and the only evidence of improper motive is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. Juries should be instructed and judges should remind themselves that this burden of affirmative proof is not one that is lightly satisfied.

The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this

> were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam v. Ward* [1917] A.C. 309, 326-327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference. **(Emphasis is mine.)**

244. While I accept that irrelevant defamatory matter embedded or incorporated in a statement made on a privileged occasion can certainly be evidence from which malice may be inferred, I will most respectively hesitate to take the rather extreme position (if indeed the last paragraph in the above passage I quoted from Lord Diplock was meant to suggest) that totally irrelevant and extraneous defamatory matter, which though published on the same occasion as those other defamatory matters qualifying for the privilege, can never at the same time constitute independent defamatory matter falling completely outside the qualified privilege defence.

245. When there are lengthy defamatory passages in a statement spread over several pages, one might well find irrelevant and extraneous defamatory matters within it which must objectively be considered as standing alone and divorced from other parts of the defamatory passages covered by a qualified privilege. To allow all extraneous and unconnected defamatory matters to come within the qualified privilege defence merely because they happened to be made in one statement published on a privileged occasion, is too generous to the defendant. It will be a question of fact and degree as to which parts are fairly and reasonably connected to the matters occasioning the privilege and the consequential protection, and which parts will not be so connected as not to enjoy that protection of qualified privilege, although they are dragged in and published on the same occasion of privilege.

246. In fact that was the position taken by the House of Lords in *Adam v Ward* (1917) AC 309 on this issue. Lord Finlay L.C. stated at p 318 that:

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

247. At p 320, Earl Loreburn said:

> But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion.

248. The same view was expressed by Lord Dunedin at p 327:

> If the defamatory statement is quite unconnected with and irrelevant to the main statement which is ex hypothesi privileged, then I think it is more accurate to say that the privilege does not extend thereto that to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it [i.e. whether the occasion was a privileged occasion, and if it was, then, secondly, whether there was any evidence of malice], and under it will also range all the cases where the express malice is arguable from the too great severity or redundancy of expressions used in the privileged document itself.

249. Further at p 340, Lord Atkinson had this to say:

> Some question was raised as to whether the presiding judge was the person to decide whether any foreign and irrelevant matter had been introduced into the libel, and whether it was separable. I think it must be the judge who is to do so. He it is who must decide whether the occasion is privileged or not, and if that be so, he must necessarily decide in respect of what portion of the libel the occasion would be privileged if it stood by itself. A more difficult question, however, remains upon which the authorities cited give little, if any, assistance. It is this: What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice. In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think it is in law, the true result.

250. LP Thean J (as he then was) in *Lee Kuan Yew v Davies* [1989] SLR 1063 at p 1101 also came to the same conclusion, which I respectfully agree with, that the protection of a privileged occasion therefore does not extend to statements which have no relevance to a reply to the attack or which are not in any way appropriate to the occasion.

251. On the evidence, it is clear to me that the defendant honestly believed in the truth of what Abdul Razak J had said of the plaintiff's conduct in relation to Mdm Tara, a housewife in Johore, since the learned judge had heard the testimony of all the witnesses over 28 days of hearing and deliberated on the evidence. Furthermore, in Civil Appeal No 216 of 1982, the Federal Court, comprising 3 appellate judges Lee Hun Hoe C.J. (Borneo), Salleh Abas C.J. (Malaya) and Abdoolcader F.J., after

reviewing the evidence, found that the learned trial judge was justified in all his findings of fact. As the descriptions were given to the plaintiff, and in the defendant's words "not by a taxi driver but by a High Court Judge", the defendant said that he had no good reason at the material time to disbelieve what he read from the judgments.

252. It was submitted that the defendant had no cause to harbour any ill motive to injure the plaintiff. He had merely acted out of his sense of duty and interest as a long-standing member of the Club to bring to the attention of the president and the members of the GC in essence that the vice-president of the GC and chairman of the M & R Committee is a dangerous fraud.

253. In my mind, the 2nd and 3rd publications clearly attract the protection of qualified privilege. They purport to raise the issue of Arul's fitness to hold office in the Club having regard to what was said of him by Justice Abdul Razak. That is certainly a matter which, objectively speaking, would and should be a matter of common legitimate concern to both the GC and Club members. Even if the GC itself is not happy to hear of it, or does not want to entertain it for ulterior reasons best known to itself, the occasion of privilege can still arise as the test is objective.

254. But in my judgment, the 1st publication does not attract the privilege. A lot of irrelevant defamatory material was deliberately attached to the letter dated 10 July 1998 to the president and the GC, which was for a very specific and limited purpose. Patently, the letter to them was not to raise the issue whether Arul was a fit person to hold office but to ask whether they had instructed Arul to question him on the authorship of the layman's guide. The clear intention and thrust of this inquiry, which I have earlier alluded to, can be seen in the covering letter and in his affidavit. It was an enquiry for purely personal reasons. Since his enquiry was not made to the GC, pursuant to the exercise of any duty, or for the protection or furtherance of any legitimate interest, under circumstances where there is a corresponding duty or interest on the part of the GC to receive it, the defendant has failed to establish that his 1st publication, containing the attached irrelevant defamatory letters exchanged between himself and the plaintiff earlier, was made on an occasion of qualified privilege.

255. Plaintiff's counsel submitted that after the GC had informed the defendant that the GC was no longer involved in the matter between the plaintiff and the defendant, there was no longer any interest and duty thereafter on the part of the GC to receive further correspondence from the defendant with respect to the plaintiff. Hence, no qualified privilege can exist. I reject this submission. Whether the interest or duty on the part of the GC exists will depend on the contents of the subsequent publication. In this case, the 2nd and 3rd publications have raised new matters directly to the GC concerning the plaintiff's suitability to hold office in the Club. The occasion of privilege can still arise and in my judgment, it does.

Fair Comment

256. The defendant relies on Section 9 of the Act which provides that:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

257. An objective test must be applied to determine if the comment based on the proved facts can be expressed by a fair-minded person. Paragraph 12.14 in Gatley on Libel & Slander (9th Edn) at p 257 explains why the defendant's allegedly fair comment must first be grounded on basic facts, which must be substantially true and correct.

> **Facts upon which comment is based must be true**. If the facts stated in the publication as a basis for comment are themselves defamatory, the defendant must plead justification or privilege in relation to them, and fair comment will be no defence. But even if they are not defamatory they must subject to section 6

> of the Defamation Act 1952 be shown to be true: a writer may not suggest or invent facts, or adopt as true the untrue statements of fact made by others, and then comment on them on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. Comment based on matters of opinion only, which may or may not be true, equally affords no defence.

258. An illustration in relation to court proceedings is provided:

> ..Again, the defence of fair comment will fail if the defendant omits from the statement of facts on which the comment purports to be based some important fact which (had it been mentioned) would falsify or alter the complexion of the facts that are stated. For example, if A states that B was convicted by a jury of a serious crime and comments adversely on the fact, but omits to state that the conviction was quashed by the Court of Appeal, his words cannot be defended as fair comment. Comment on facts inaccurately reported cannot be fair comment.

259. After crossing the above basic hurdles, we come to the 3 essential elements to the defence, which must be satisfied. Very briefly, the offending words must (i) not be fact but comment which is (ii) objectively fair and (iii) on a matter of legitimate public interest or concern. An inference of fact may well qualify as comment. But it must be recognisable as such by the ordinary, reasonable and fair-minded reader having regard to the whole context of the publication. When such a reader cannot readily distinguish whether the defendant is stating a fact or making a comment, then the proper approach will be to deny the defendant the benefit of the defence of fair comment. I will adopt the following passage taken from Gatley on Libel & Slander (9th Edn) at p 255, paragraph 12.11:

> **Comment and fact confused.**
>
> If the defendant has failed to distinguish clearly in what he has published between the facts on which he is commenting and the comments he wishes to make on those facts, those to whom the words are published may regard the comments either as statements of fact or as founded upon unrevealed information in the possession of the publisher; in such circumstances the publication may stand in the same position as any ordinary allegation of fact. Where the comment is not clearly identified there is a tendency to hold the entire statement to be one of fact. "In the first place", said Fletcher-Moulton L.J. in *Hunt v. Star Newspaper* [1908] 2 K.B. 309 "comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v. Chapman* (1853) 3 C. & K. 286 at p 288. The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses…Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment.

260. It is in the nature of the defence of fair comment that the words must first be shown by the defendant to qualify as his comment, opinion or viewpoint, and not a statement or imputation of fact made by him. This defence cannot extend to any defamatory allegations of fact. With that in perspective, I would respectfully quote and apply what the Court of Appeal in Aaron's case had said is the law on fair comment:

> In order to succeed on the plea of fair comment, the subject matter of the

comments must be on a matter of legitimate public interest. What is legitimate public interest has been given a wide scope. Lord Denning MR said in *London Artists Ltd v Littler* [1969] 2QB 375, at p 391:

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.
>
> …

The next question is whether an honest and fair-minded person on the basis of the facts which the respondents have proved can honestly hold and express such opinions. We refer to the very concise and oft-quoted passage of Diplock J's direction to the jury in *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743, at p 749:

> …I will remind you of the test once more. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view--- could a fair-minded man have been capable of writing this? That is a totally different question from the question: Do you agree with what he said?

The essential thing is the honest opinion of a fair-minded person and in this connection every allowance or latitude must be given for any prejudice and exaggeration entertained by such a fair-minded person.

261. Thus, it must also be determined which of the proved substratum of facts have given rise to which of the particular comments. It will be all too easy for the defendant if he is allowed to narrowly cite just one of the many comments he did make, successfully justify it as fair comment on the basis of certain limited facts that he manages to prove as true, and then to conclude that he has therefore made out his plea of fair comment to the entire defamatory publication. To fully succeed in his defence, he must substantially justify as being fair, all the comments which can reasonably be found in the offending words complained of.

262. Defendant's counsel submitted that the defendant made the following fair comment:

> (a) The Plaintiff's conduct/behaviour pertaining to the Johore housewife's case revealed him to be a vicious and dangerous fraud;
>
> (b) For this reason, the Plaintiff would not properly and fairly administer Club justice as the Chairman and Convenor of the Rules and Membership Sub-Committee;
>
> (c) The Plaintiff is not the right man to administer Club justice; and/or
>
> (d) The Plaintiff is not suitable to sit as the Chairman and Convenor of the Rules and Membership Committee.

263. I find that there are insufficient facts disclosed in the 1st and 2nd publications with respect to the plaintiff's conduct and

behaviour in Johore, which apparently form the basis of the defendant's alleged 'comment' that the plaintiff must be regarded as a 'vicious and dangerous fraud'. In the absence of disclosure of those facts, and without the defendant making clear that what he is saying is comment, I am treating that defamatory assertion more as an assertion of fact than a comment. Hence, the defence of fair comment is unavailable.

264. As for the 3rd publication, while it can be said that the plaintiff's conduct and actions in Johore were set out in the attached judgment of Abdul Razak J., the defendant nevertheless had not sufficiently disclosed or highlighted to the ordinary reader of ordinary diligence that two appeals of the plaintiff were allowed. As explained earlier, the inconspicuous editorial note does not constitute sufficient disclosure of the plaintiff's successful appeal against the conviction and sentence for contempt. By omitting significant facts, the offending words in the 3rd publication (including those in the 1st and 2nd publications) cannot be defended as comment which is fair, because the omission does alter the fair-minded reader's impression of the character of the plaintiff. The whole complexion of the facts stated is changed. Therefore, important facts that impact on the comment must not be suppressed. Otherwise, the honest and fair-minded reader has no proper means to judge for himself if the plaintiff can still be viewed as a fraud after Tara withdrew all her allegations against Arul on the advice of her Queen's Counsel, and the Privy Council therefore allowed Arul's appeal by consent.

265. Since it is also my finding that the defendant failed to prove that the plaintiff is a vicious and dangerous fraud to the high degree of probability required for such a serious allegation, the factual foundation upon which the entire defence of fair comment rests no longer exists. The defendant cannot fairly comment on his unsuitability to hold office in the Club and his likely partiality, merely on an unproved assumption that he is a vicious and dangerous fraud. The defence of fair comment is thus not available to the defendant in any event.

266. Even if I am wrong in that the defence of fair comment is available to the defendant, my finding that there is malice will again have negated such a defence. Hence, I will not decide the question whether matters involving the suitability of a person to hold private office in an exclusive and private club of some 5000 members is a matter of sufficient legitimate **public** interest or concern, and which is therefore open to fair comment.

Qualified Privilege: Fair and accurate report of a judgment

267. At common law, a fair and accurate report of judicial proceedings is protected by qualified privilege and, if published contemporaneously, by absolute privilege. In special circumstances, where the public interest requires it, reports of proceedings in **foreign** courts will be protected by qualified privilege. See Bullen & Leake, Precedents of Pleadings (13th Ed) at page 1274.

268. Some guidance as to what constitutes a fair and accurate report can be found in paragraphs 128 and 129 of Halsbury's Laws of England Volume 28 follows:

> **128. What constitutes a fair and accurate report.**
>
> The report must be fair and impartial, although it need not be verbatim, and should convey to its readers the substance of what has taken place in court as if they had been present, since this is the reason for the privilege. … The report of a portion only of the legal proceedings may in many cases detract from its fairness and accuracy. Thus, it may be misleading to report the opening speech of counsel without the evidence on which it is founded, or the evidence of a witness without the cross-examination. However, it is not necessary as a matter of law that the report should be a report of the whole of the proceedings. The publication of a report of a separate part of the proceedings will be privileged if it is fair and accurate and published without malice.
>
> **129. Comments and headings.**
>
> A report is accurate if it truly states the result of a legal proceeding, even though it does not state the grounds. However a report must not be expanded or interspersed with comments. The heading to a

report of proceedings in court or in Parliament forms no part of the proceedings and will not be within the privilege of the occasion unless it gives a fair summary of the matter contained in the report.

269. Fry L. J in *MacDougall v Knight* (1890) 25 QBD 1 (Court of Appeal) said:

> …that a fair and accurate report of the judgment in an action, published bona fide and without malice, is privileged, although not accompanied by any report of the evidence given at the trial….Bowen, L.J., put the point clearly and precisely, and I will read what he said as embodying my own view: "I am satisfied myself that the judgment of a judge of the land is in itself an act of such a public and distinct character as to make it to the interest of the commonwealth that they should know it in toto, and provided it is either given verbatim correctly, or correctly summarised, it seems to me that the public policy requires that to be the law, and I have no hesitation in saying that I believe that to be the law at the present day.

270. In the same case, Lord Esher M. R. elucidated the law as follows:

> I take the law to be deduced from the holding of the Court in *Lewis v. Levy* 27 L. J. (Q.B.) 282, with regard to the publication of legal proceedings in a Court of law, to be that the publication without malice of an accurate report of what has been said or done in a judicial proceeding in a court of justice is a privileged publication, although what was said or done would, but for the privilege, be libellous against an individual and actionable at his suit, and that this is true although what is published purports to be, and is, a report not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice.

271. Defendant's counsel referred me to The Law of Defamation in Singapore & Malaysia (2nd Edn) by Keith Evans at p 71 and 72:

> It is in the public interest that reports of certain proceedings be made freely, without fear of legal action. Publication of such reports is privileged on the ground that the advantage of publicity to the community at large outweighs any private injury which might result. However, public advantage arises only if the report is fair and accurate - garbled or partial reports of, or detached parts of, proceedings published with intent to injure individuals, are not entitled to protection. …Such reports must be restricted to details canvassed in the place of record - if the reporter goes beyond, garnishing and embellishing the story by adding circumstantial detail, adding his own spice, the privilege will be lost and he would have to justify or otherwise defend defamatory implications arising from the embellishment.

272. Defendant's counsel submitted that although the defendant had only quoted aspects of Justice Abdul Razak's findings against the plaintiff, it is nevertheless still a fair and accurate report of the proceedings since the whole of the judgment regarding the plaintiff condemns him. The defendant had not embellished anything of what the learned judge had said of the plaintiff. After reading the judgment of Abdul Razak J., I come to the same conclusion. There is nothing in the judgment that speaks well of the plaintiff. The derogatory descriptions of the plaintiff very much captures the learned judge's opinions and findings on the plaintiff's character and conduct.

273. Whether the reporting of a judgment, which has not been overturned on appeal, is fair has to be looked at rather broadly.

The question is whether it has captured some essence of that part of the judgment reported on. I will not even say that the standard is as high as that of capturing a substantial essence of that part of the judgment reported on. Understandably, no reporting can ever capture everything except when the whole judgment is reproduced in full. Any summary has to be an abstraction of some kind. It is inappropriate to perform micro-surgery to determine whether important items have been left out, and whether each important item has been properly summarized by the publisher. I can see practical difficulties for reporters generally if the standard of fair and accurate reporting is set so high.

274. But the question before me here in this case is not whether it is a fair and accurate report *per se* of the decision of Justice Abdul Razak. The question is whether it will still be a fair and accurate report for the purpose of a defence of qualified privilege when a lower court decision has subsequently been reversed by an appellate court, be it by a consent order, after a hearing on the substantial merits, or on purely technical grounds? The failure to highlight the fact that the decision has been overturned is not only relevant to the question of malice, it also impinges on the question whether it remains a fair and accurate report of the case as decided by the trial judge. The Federal Court of Criminal Appeal had in fact allowed Suppiah, Singh and Arul's appeal and set aside the order of contempt and the sentence of 2 years imprisonment imposed by Abdul Razak J 'for the extremely grievous crime which they have committed against the court' i.e. for 'deceiving, or attempting to deceive the court.' Further, the Privy Council had allowed the whole of the civil appeal by Arul by consent. Under the circumstances, I do not regard the defendant's publications objectively as a fair and accurate report of the judgment of Abdul Razak J where the outcomes of the two appeals against his decision have not been disclosed or adequately disclosed.

275. If I am wrong in finding that it is not a fair and accurate report, then I think that reporting the fraudulent misconduct abroad of a Singapore advocate and solicitor is not reporting a matter of idle curiosity or a matter for gossip, but it is reporting a matter of sufficient legitimate and proper interest that will confer the qualified privilege of non-contemporaneous reporting of a judgment of a court. In this case, I do not think that the fact that the judgment is that of a foreign court makes any difference.

276. However, this qualified privilege defence remains unavailable to the defendant in any event because the plaintiff has succeeded in establishing that the publications were in fact actuated by malice.

(1) Whether the consent order of the Privy Council upon certain agreed terms has the effect of undoing the evidential findings of a considered judgment on the merits after a full trial.

(2) Whether the plaintiff is estopped from alleging that the words complained of are false by virtue of the judgments.

277. I will deal with the above two issues raised by the defendant together. Defendant's counsel made the following submissions:

> (a) The words complained of are findings of facts in issue made by the trial judge, whose decision was upheld by the Federal Court after a hearing of the appeal on the merits. Arul appealed to the Privy Council;
>
> (b) The consent order at the Privy Council allowing the appeal by Arul was merely to record a settlement agreement reached Arul and Tara;
>
> (c) The Privy Council had not heard or made any determination on the merits of Arul's appeal;
>
> (d) The consent order was merely an administrative process entered to reflect the agreement reached;
>
> (e) Not being a final judicial finding, the consent order had no binding effect

> except against those who were parties to that agreement and the consent order arising therefrom.

278. Consequently, it was argued that the consent order does not as a matter of law, render nugatory or overturn the final judicial findings or determinations made by Abdul Razak J with regard to Arul's behaviour and conduct in the Tara case and his character generally. Arul is further estopped from alleging that the words complained of are false. He cannot now challenge or relitigate in the proceedings before me the findings of the learned trial judge, which were affirmed by the Federal Court after a full hearing on the merits, because Arul had a full and fair opportunity of defending himself both at the trial and at the appeal before the Federal Court. Since he is estopped from alleging that the words complained of are false, he has no cause of action in defamation against the defendant.

279. Counsel relied on *Jenkins v Robertson* (1867) L.R. 117 where the Lord Chancellor Chelmsfor said:

> *Res judicata*, by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. But when an action of declarator is brought, and a verdict is obtained by the Pursuers, which is set aside, and an arrangement afterwards takes place by which, in consideration of the payment of a sum of money, an interlocutor is pronounced for the Defenders, and the Court simply registers that interlocutor, without expressing any judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that such a transaction can be treated as *res judicata*. It is admitted that it cannot be *res judicata* if it is done by collusion or by fraud. It is argued that in this case, no fraud is alleged or proved; but it is very difficult in any case of this description to prove fraud; and if this were held to be a judgment binding strangers, by reason of its being *res judicata*, it would follow that in every case, where any person had brought an action of declarator, which had been compromised, the public would be bound unless some stranger could prove that the judgment had been obtained by fraudulent collusion between the parties. I am of opinion that this is not the meaning of *res judicata* according to the law of any civilized country. I am also of opinion that it was not competent for the Court in the present proceeding to go into the question whether this was a reasonable compromise or not. It was impossible that the Court could ascertain that. In my opinion, *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter; here the Court exercised no judicial function upon the subject. It has merely exercised an administrative function by recording the interlocutor which had been agreed to between the parties.

280. The case of *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd. et al.* 47 DLR (4^{th}) 431 decided by the British Columbia Supreme Court in Canada was cited to me. Briefly, Spencer J after a trial on the merits defended by Creighton Holdings Ltd ('Holdings') and Central Park Enterprises ('Enterprises'), to whom Holdings leased a golf course and transferred a mobile home and residence, had found these transactions to be fraudulent and hence, void as against Jeanne Gaspari, the then plaintiff. The two defendants appealed and an order of the Court of Appeal was entered into by consent in the following terms: 'This Court doth order that the Appeal herein be and the same is hereby allowed without costs to either party.' The Court of Appeal file contained the notice of appeal, the consent order and a letter from the solicitor for the two defendants, enclosing the consent order and stating, *inter alia*, some of the terms of the settlement. To assist the parties to implement the settlement, the court entered the consent order without counsel's appearance and without any consideration of the merits. The plaintiff, Saskatoon Credit Union, brought the action to recover advances made to Holdings, and to have the said lease and transfers set aside as fraudulent. Holdings and Enterprises denied that the transactions were fraudulent. In deciding whether the defendants were to be prevented from relitigating the question already decided by Spencer J., the court considered the following two issues:

(1) Does a consent judgment of the Court of Appeal purporting to allow an appeal against the judgment of Spencer J. made without any hearing on the merits or otherwise preclude the application of the *res judicata* principle?; and

(2) If not, can *res judicata* apply when there are different plaintiffs but common defendants in the two proceedings?

281. McEachern C.J. S.C. said:

..I have the view that the Court of Appeal only discharged an administrative function by disposing of a pending appeal in order to give effect to a settlement which had been disclosed to the court. …

It is my view, even if estoppel was considered, that Mr Creighton could not expect to preclude its operation by a consent judgment of the Court of Appeal without some consideration of the merits. With the greatest possible deference to the Court of Appeal, I conclude that the order it made in the circumstances of this case by consent, and in the administrative sense I have described, does not "undecide" the issues solemnly decided by Spencer J. …

The principle which should govern was stated by Lord Denning M.R. in *Tebbutt v. Haynes,* [1981] 2 All E. R. 238 at p. 242, as follows:

> I ventured to suggest this principle: if there has been an issue raised and decided *against* a party in circumstances in which he has had a full and fair opportunity of dealing with the whole case, then that issue must be taken as being finally and conclusively decided *against* him. He is not at liberty to reopen it unless circumstances are such as to make it fair and just that it should be reopened.

More recently, however, a number of English authorities, particularly Lord Denning, have suggested that the principle of abuse of process prevents a party from relitigating a question which has been fairly decided against him. This received grudging approval in the House of Lords in *Hunter v. Chief Constable of West Midlands*, [1982] A.C. 529 at p. 540.

282. After reviewing some cases decided in the United States and in Canada, where the traditional approach to estoppel per *rem judicatam* which operated only between the same parties or their privies is being departed from gradually, the learned judge held:

Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has been previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.

The exceptions to the foregoing include fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence…

> I decline to decide whether the foregoing conclusion represents the application of a species of estoppel by *res judicata* or abuse of process as the result is the same. The fact that the plaintiff in this action was not a party to the earlier proceedings is of no consequence. With the defendants participating fully, it was judicially determined at trial by Spencer J. that the lease and transfers between the defendants were fraudulent and that is the end of that issue. The defendants are stopped from saying otherwise.

283. Counsel for the plaintiffs did not take a firm position that *Saskatoon* should not be followed. Instead, he argued that *Saskatoon* could be distinguished on the facts. But I could not see sufficiently strong distinguishing factors. Should I then depart from the traditional approach and adopt the wider approach taken instead by Spencer J.?

284. It is not disputed that parties to proceedings will be bound by a final judgment pronounced by a court of competent jurisdiction after hearing the merits in those proceedings. Subject to certain exceptions like fraud or collusion, that judgment so obtained will be conclusive as between the parties (and their privies) not only as to the results and conclusions, but as well as the grounds and the findings made on the various issues of fact in the action. As between themselves, they will be estopped from relitigating or raising those same issues again in another court. The same applies in the case of a consent judgment, where the parties will similarly be bound by its terms. As such, a consent order allowing the appeal at the Privy Council does 'undo' the findings of the trial judge inter se the parties.

285. Where it is a matter involving an external party to the consent order, the position is less clear. I will prefer to approach it from this perspective: whether in such a case, the party whose appeal has been allowed by consent, nevertheless remains estopped from relitigating those issues decided against that party at the trial below, and as such, an appeal allowed by consent does not 'undecide' the issues 'solemnly decided' against that party by the trial judge.

286. I will examine this question by taking it first from the defendant's position. The defendant is clearly not a party to the settlement which gave rise to the consent judgment at the Privy Council allowing Arul's appeal. That settlement was exclusively between Arul and Tara. As such, there is no good reason why the defendant, a total stranger, should be precluded from proving or justifying afresh that Arul had indeed committed fraud and breach of trust against Tara, despite the consent judgment where Tara agreed to withdraw all allegations of fraud against Arul, including any claim against him as a constructive trustee.

287. On the other hand, should Arul himself be estopped vis a vis a stranger from subsequently challenging before me the findings of fact made against him by Abdul Razak J., bearing in mind that the consent judgment allowing the appeal cannot be binding on the stranger, who is never a party to any of the court proceedings on the Tara matter? Defendant's counsel argues that the learned trial judge had condemned Arul in no uncertain terms and the Federal Court, who heard the appeal on the merits, had upheld the trial judge's findings and dismissed Arul's appeal. Further, Arul had the full opportunity of defending himself both at the trial and at the Federal Court appeal but he failed in both. The present defendant simply relies on the totality of these judicial determinations on the merits, and the fact that the Privy Council consent judgment had not 'undone' these judicially determined findings to found an estoppel against Arul, thereby preventing him from alleging or bringing any evidence to prove that those findings of facts were wrong or to contradict them in any way. Put simply, the doctrine of issue estoppel applies according to defendant's counsel, and Arul cannot now argue that the judicial findings of Abdul Razak J are wrong.

288. However, I will refer to Cross and Tapper on Evidence (1995 Edn) at page 85, which I find to be very instructive:

> Issue estoppel is a branch of the law which has been developed recently and gradually. The basic principles were first clearly stated by Diplock LJ in *Mills v Cooper* [1967] 2 QB 459 at 468, and subsequently endorsed by the House of Lords in *Hunter v Chief Constable of West Midlands* [1982] AC 529 at 541. The House of Lords rejected an attempt by Lord Denning MR in the Court of Appeal to eliminate the requirements of privity and mutuality on the basis that it is unjust that a party against whom an issue has been determined after a full opportunity

to contest it, should be permitted to raise precisely the same issue again in subsequent proceedings involving another. The House of Lords preferred to decide the case upon an issue upon which the Court of Appeal had been unanimous; that it amounted to an abuse of the process of the court to launch a collateral attack upon a decision of a court of competent jurisdiction, by raising an issue for a second time. The House noted that this involved recognising a difference between the operation of the doctrine in England and in North America. The conditions were subsequently and concisely reformulated by Lord Brandon in *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar* [1985] 1WLR 490 at 499.

> In order to create an estoppel of that kind, [issue estoppel per rem judicatam] three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel and those in the later action in which that estoppel is raised as a bar must be the same. The third requirement is that the issue in the later action in which the estoppel is raised as a bar must be the same issue as that decided by the judgment in the earlier action.

In addition to these requirements it should be noted that in relation to issue estoppel an earlier judgment may not raise an estoppel if fresh matter has become available showing that the earlier decision was wrong. It seems that for these purposes the fresh material showing the previous decision to have been wrong can consist either of new factual material conclusively showing it to be wrong, or even of a subsequent change in the interpretation of the law giving at the least a very substantial chance that the earlier decision would be held to be wrong. (Emphasis is mine)

289. Firstly I observe that there are three fairly strict requirements to be satisfied before the estoppel can arise. On occasions, these requirements have been narrowly construed, where for instance the estoppel principle may be held inapplicable when the same party acts in a different capacity. A fortiori, where either party to the subsequent proceeding is a stranger, no issue estoppel against either party should operate because the second requirement stated by Lord Brandon in *The Sennar* is not met. Even if all the strict requirements are satisfied and the estoppel has arisen, it does not appear to me that the estoppel doctrine, even as between parties, is necessarily applied very rigidly without considering the factual circumstances in each case, since fresh matters, new factual materials, subsequent substantial changes in the interpretation of the law showing that the earlier decision to have been wrong, and differences in the standard of proof even where the issues are identical, may well preclude an issue estoppel from operating.

290. I will therefore respectfully adopt the approach taken by Sir Nicolas Browne-Wilkinson, VC in *Arnold & Others v National Westminster Bank plc* [1988] 3 All ER 977, Ch D, where he held that:

> Res judicata, whether cause of action estoppel or issue estoppel, is based on the fundamental principle that it is unjust for a man to be vexed twice with litigation on the same subject matter coupled with the public interest in seeing an end to litigation. So far as cause of action estoppel is concerned, the rule is absolute: You cannot sue twice for the same relief based on the same cause of

> action even if new facts or law have subsequently come to light. But it is clear that the rule as to issue estoppel is different as the authorities which I have quoted demonstrate; there are circumstances in issue estoppel where the injustice of not allowing the matter to be relitigated outweighs the hardship to the successful party in the first action in having to relitigate the point.
>
> The rules applicable to issue estoppel and the proper exceptions to it are in the course of development: see *Carl-Ziess-Stiftung v Rayner & Keeler Ltd* (No 2) [1966] 2 All ER 536 at 554, [1967] 1 AC 853 at 917. The authorities show that the exception applying to 'special circumstances' is designed to ensure that where justice requires the non-application of issue estoppel, it shall not apply: see *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590; [1975] 2 WLR 690 at 696-697. In the *Carl-Zeiss* case [1966] 2 All ER 536 at 573, [1967] 1 AC 853 at 947 Lord Upjohn said:
>
> > 'All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.'

291. A further obstacle in the way of the defendant is that the decision of Abdul Razak J is a civil judgment in a foreign court. Although no issue is taken up whether an estoppel can be raised on a foreign judgment, I note that Lord Reid, Lord Guest and Lord Wilberforce in *Carl-Zeiss-Stiftung* had advised considerable caution before allowing an issue estoppel to arise from a foreign judgment. Among the reasons stated were the unfamiliarity with the procedures in many foreign countries, the problem of deciding whether the issues determined abroad were merely collateral, incidental or obiter, whether the foreign judgment was a final judgment on the merits and whether a party perhaps had not expended full resources to defend an issue on a trivial matter abroad or might even have abandoned arguing an issue, with the result that the issue becomes decided against him.

292. I will not go so far to say that an issue estoppel can never arise out of a foreign judgment, particularly if the necessary ingredients for an issue estoppel to arise are present and the reasons stated for the caution do not exist. Although the issue estoppel relied on by the defendant is based on a Malaysian judgment, and the said reasons for taking a careful approach may not be applicable in the particular circumstances of this case, nevertheless I am still faced with the question of the admissibility of the facts found by Justice Abdul Razak as evidence to prove those same facts in issue before me.

293. The evidence of findings in other jurisdictions in relation to foreign convictions remains subject to the rule in *Hollington v Hewthorn Ltd & Anor* [1943] K.B. 587, and is, as such, inadmissible as evidence of the underlying facts: Cross on Evidence 7th Edn p108; *Union Carbide Corpn v Naturin Ltd* [1987] FSR 538 at p 551. Plaintiff's counsel referred me to the 15th Report of the Law Reform Committee (Cmnd.3391) which dealt with the Rule in Hollington v. Hewthorn and in particular to the passage at p 12 where it states:

> In defamation, if all that is said that the plaintiff was convicted of the offence, proof of the conviction establishes the defence of justification; but if, as is likely to be the case, the statement imputes that he was guilty of the offence of which he was convicted, the defendant must prove the plaintiff's guilt de novo in the civil action for defamation. The conviction is not admissible evidence of guilt. Conversely, a defendant may justify a statement that the plaintiff was guilty of a criminal offence of which he was acquitted by proving his guilt de novo in the civil action.

294. On the assumption that the standard of proof of a conviction for fraud and criminal breach of trust in Malaysia is higher

than the civil standard of proof for the same issues of facts in a civil trial in Malaysia, it is all the more so on principle that those findings of fact of fraud and breach of trust in a civil action in a Malaysian court similarly ought to be inadmissible as evidence in Singapore of the underlying facts which are in dispute. As such, Arul should not be estopped from denying the correctness of the findings of Abdul Razak J., which were made in a foreign jurisdiction. Neither should he be estopped from adducing any evidence in a civil trial in Singapore to prove that he is not guilty of those matters held against him by Abdul Razak J.

295. I thus allowed the Arul to rebut any evidence adduced by the defendant in relation to the defendant's defence of justification that he was guilty of fraud and breach of trust against the Johore housewife. Taking all the various factors together, I am satisfied that the justice of this case demands that no issue estoppel raised by a stranger, should arise against Arul, who should be entitled to defend his reputation and what he did in Johore as against the defendant**.** There is no countervailing hardship in having the defendant, a stranger, prove the facts he alleges that Arul is guilty of fraud and breach of trust. It is after all part of his justification defence. Arul should be entitled to rebut it. I do not see the applicability of the broader principle of res judicata that the same party in the interest of justice should not be harassed twice for the same cause as there has to be an end to litigation. For a start, the defendant is a stranger and he has not been harassed twice by Arul on the same matter in a court action. It is Arul, having obtained a consent order allowing his appeal to the Privy Council against the decision of Abdul Razak J., who is trying to vindicate his reputation again, but this time against a stranger. It will be against the interest of justice to prevent Arul from doing so simply on the basis of an issue estoppel on a foreign decision, which decision is in any event allowed albeit by consent on appeal and settled in favour of Arul. Arul might well have succeeded in challenging Abdul Razak J's decision on the merits at the Privy Council hearing had Tara not agreed to compromise and let Arul's appeal be allowed with her consent, whatever might be her reasons. I had checked with Arul that it was not upon payment of money by Arul to Tara that she compromised her position.

296. This leads to the other position that Tara's counsel might himself have arrived at the conclusion that Arul's appeal had merits and therefore, they decided to let Arul's appeal be allowed by consent. Tara herself was advised by Gavin Lightman Q.C. to withdraw all allegations of fraud of whatever nature and all allegations that Arul was a constructive trustee. Surely Gavin Lightman Q.C. would have thoroughly considered the strength of Arul's appeal before advising Tara. At this stage, Collin Ross Munro Q.C. acting for the plaintiff had not even begun his arguments before the Privy Council. There must have been very good reasons why Gavin Lightman Q.C. had advised Tara not to challenge the plaintiff's appeal on the merits after having considered all the cause papers including the written arguments submitted by Collin Ross Munro Q.C. To some extent, I am speculating. But these plausible situations show that it is difficult to pin an abuse of process label in this case to preclude Arul from challenging before me the correctness of the material facts as found previously by Abdul Razak J.

297. For these reasons, it also cannot be said that Arul is mounting any collateral attack on the previous decision of Abdul Razak J if one takes the view that the learned judge's decision is in a sense 'overturned' and Arul is simply re-defending his reputation on the basis that he is not in fact guilty of any fraud or breach of trust against Tara, and he is now putting the defendant to strict proof that he is in fact guilty.

Abuse of Process Doctrine

298. Thus, even on the wider and more flexible doctrine of abuse of process, which application may extend beyond the parties to the previous litigation and is based more on general public policy than on any strict and narrow res judicata principle, I can see no abuse of the process in this court in the particular course of action taken by the plaintiff as it is also in the public interest that the courts give a fair hearing to all non-frivolous claims and defences. The need to stop relitigation of the same issues decided previously, the importance of finality, the need to avoid inconsistent court decisions on the same issues and a recognition of the difficulties of retrying events that had taken place long ago, are not the only public interest considerations that I have to contend with. As Auld L.J. had said in *Bradford and Bingley B.S. v Seddon* [1999] 1 W.L.R. 1482 at p 1490, the court must, when applying the abuse of process doctrine which does not qualify as res judicata, 'draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter'. The party alleging an abuse of process bears the onus to establish why the relitigation of the same issue is an abuse. In my judgment, the defendant has not discharged his burden.

Proof of Malice

299. Much of the evidence relied on to prove malice is extracted from the defendant's own affidavit of evidence-in-chief. They amounted to admissions. Although some may not have been included earlier as specific particulars in the plaintiff's reply to the defendant's defence of privilege and fair comment, I do not think however that the plaintiff is precluded by the rules of pleadings from relying on them to prove that the defendant's publications were motivated by actual or express malice.

300. A party that unexpectedly brings evidence detrimental to itself to the trial, and essentially serves those admissions on a silver platter on the other party, cannot later prevent their use on the ground that the other party has not specifically pleaded those admissions which that other party has now found useful to rely on in support of issues that it has the burden of proving. I do not think that the often quoted general rule that 'a party is bound by its pleadings' applies in such instances.

301. It is trite law that malice, once established, will defeat the defences of fair comment and qualified privilege, even if they are made out. This is where I find that the plaintiff has succeeded substantially. The evidence of malice as reviewed earlier in this judgment is fairly overwhelming. Evidence of the defendant's conduct and action prior to the publication, at the time of the publication and after the publication including the entire surrounding circumstances, must be viewed in totality.

302. On the whole, I am satisfied that the plaintiff has succeeded in establishing on a balance of probability that malice was the predominant actuating force behind all the three publications complained of. Although I accept that the defendant is someone who has taken a keen interest in the affairs of the Club, and has written to the Club on many issues, but I think his personal spite, ill-will and vengeance towards the plaintiff had got the better of him on this occasion because of the plaintiff's repeated queries on the Layman's Guide, which the defendant perceived to be a relentless witch-hunt by the plaintiff. He must have been irritated and angry with the plaintiff for repeatedly asking him whether he was the author. He wanted to retaliate and that was what he did. The learned judge's harsh words in the Johore case were exactly what he needed for the retaliation. From the torrent of letters he wrote on the same subject, it is clear to me that he wanted to teach Arul a lesson. The letters were written in a manner deliberately to provoke and taunt Arul.

303. I am keenly aware of what Lord Atkinson had said in *Adam v Ward* [1917] AC 309 at 339:

> …a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true…..

304. But that does not mean that in considering what a person's dominant motive is and whether there is any ill-will, spite and anger, it is totally irrelevant to consider the kind of language used, the way the issues have been presented, whether the person has been deliberately provocative, sarcastic, antagonistic and unduly personal. One can be extremely critical and yet honest and objective in the criticism. But there is a point beyond which it will smack of ill-will and spite.

305. From the totality of the evidence, I conclude that in all his three publications, the predominant motive was to injure the plaintiff, which was more the result of his desire to hit out at the plaintiff, rather than anything else. Raising his concern to the president and GC that the plaintiff ought not to hold any office in the Club because of what a Malaysian High Court judge had said of the plaintiff, clearly was not his main motive although he had tried to present that as his only motive, which I do not accept. I am prepared to accept that his concern for the welfare of the Club was part of his motive, but it certainly was no more than a subsidiary motive. I find as a fact that it is not the predominant motive.

306. The fact that the defendant believes the trial judge's findings on Arul to be correct and true because it was the considered conclusion of a High Court Judge (and not that of 'a taxi driver' in his words) may well negative any contention that his malice might have been actuated by his non-belief of the truth of his statements or that he had made the statements recklessly without caring whether they were true or not. But the malice I have inferred comes from other evidence and not from any deduction that he had not believed in the truth of what he had published. A person may still be actuated by malice although he honestly believes what he is saying. The key question is what is his real and significant motive? Has it played a significant part in actuating his publications?

307. Since the defendant had in good faith believed that Arul was a vicious and dangerous fraud, no doubt I have to be slow before drawing an inference of express malice that the defendant had misused the privileged occasion and that his main desire was to smear the plaintiff's character and reputation before the president and the GC.

308. But taking advantage of the opportunity of a privileged occasion to give vent to or gratify his private spite, anger, personal vengeance against Arul, and to throw 'stones' and whatever he had at Arul to ensure that Arul's so called 'glass house' is totally shattered to pieces, is clearly express malice under the law. That private spite and desire for vengeance is the antithesis of the legitimate duty or interest which will have afforded him the privilege or which constitutes the reason for the privilege.

309. The defendant went beyond merely doing his duty or protecting his own interest as a club member. I find that his intention was to abuse the occasion to defame the plaintiff. His animosity towards the plaintiff was fueled by his belief that the plaintiff was going to haul him before the Disciplinary Committee. He hoped that the plaintiff would desist from doing what he believed that the plaintiff was planning to do, by launching pre-emptive attacks against his character and reputation. He also hoped that the GC would restrain the plaintiff as he indicated that what he might want to expose and blow up would also embarrass the GC, if the plaintiff were allowed to continue to hound him. There is no question of self-defence here as Arul never attacked the defendant's character or reputation. He merely asked if he had published the Layman's Guide. Obsessed with the belief that Arul was witch-hunting him, he set out single-mindedly to destroy the character and reputation of Arul and to get rid of him from all office in the Club including getting rid of him as a Club member, if he could. Those were his dominant motives actuating his actions to injure the plaintiff. If that is not malice, I do not know what is.

Damages and Consequential Orders

310. Plaintiff's counsel submitted that the damages should be between $750,000 at the lower end and $1,250,000 at the higher end. He asked for another 50% to be added to the higher figure because exemplary damages should be awarded in the particular circumstances of this case. Hence, the total damages prayed for is $1,875,000. Defendant's counsel submitted however that nominal damages should be awarded.

311. The defendant published grave libels casting serious imputations on the plaintiff. I have to take account of the plaintiff's standing and how significantly that standing has been lowered by the defamatory publications. The plaintiff is a practising advocate and solicitor of more than 30 years and was at the time of the publications the vice-president of the Club and the M & R chairman. The plaintiff gave evidence that he was hurt and I have no reason to disbelieve him. Compensatory damages must be given both for his hurt feelings and the reduction in his standing before his social peers in the GC. The anxiety and uncertainty which the plaintiff is subjected to in the litigation must also be taken into account: *Jeyaretnam JB v Lee Kuan Yew* [1982] 1 MLJ 239.

312. The plaintiff also claimed damages for physical injury arising from a back disc problem that was both painful and inconvenient. He attributed that to the 4 weeks he spent sitting on a 'somewhat less than ergonomic seat in the witness stand'. However, the plaintiff did not testify on his injury. Neither did he call a doctor to testify on the actual cause of his problem. The plaintiff later dropped this head of claim.

313. Consideration must be given to the fact that the defendant had limited the circulation of the offending publications only to the Club's president and nine other GC members. This means that the amount of damages will be correspondingly reduced as the 'damage' to his reputation is also contained so to speak. Balanced against this is the repetition of the defamatory remarks in 3 separate publications to them which naturally increased the plaintiff's grief and distress.

314. If the defendant's publications are to persons who have previously read the judgment of Abdul Razak J., there is a question whether the plaintiff's standing has been affected at all by the republication. This is separate from the hurt caused to the plaintiff, which I imagine will be greater if the circulation is wider. As most of the then GC members are not lawyers, it is not likely that they would know of the judgment although it is reported in the Malayan Law Journal. Accordingly, I will not grant any reduction on account of the defendant's republication.

315. Absence of an apology does not aggravate damages. An apology if tendered is a mitigating factor and goes to reduce the damages which would otherwise be given. Since there is no apology and the defence is one of justification, there is again no reason for me to consider any reduction.

316. A defence of justification put forward recklessly or with knowledge that it is unsustainable may be further evidence of malice, justifying aggravated damages: Gatley on Libel and Slander 9th Edn. at para 32.41. A partial justification will reduce the damages to the extent to which the words complained of have been partly justified.

317. In this case, the entire justification failed. Having regard to the requisite degree of proof required for such serious allegations, I think the defendant was reckless to put forward a defence of justification, relying on what appears to be largely circumstantial evidence and mere inferences. The defendant was hoping to establish the plaintiff's fraudulent conduct through the plaintiff himself without calling a single witness to testify on the Johore matter. This is ambitious to say the least. Although Tara was located by the defendant, yet he did not call her to testify in support of his justification defence. No evidence was called to substantiate the numerous factual questions put to the plaintiff during his cross-examination. Questions were also asked which assumed that a trustee may not be on the land register as a proprietor under the National Land Code. Yet, the defendant called no expert witness on Malaysian land law to testify in support of that assumption. Under these circumstances, I have to award aggravated damages for the defendant's reckless plea of justification.

318. In mitigation of damage, defendant's counsel submitted 18 reasons and cited numerous events demonstrating why the plaintiff must be regarded as a person with a bad reputation generally. Since his bad reputation cannot be damaged any further by the defendant's publications, only nominal damages should be granted.

319. I find this submission to be without merit. I have in the course of my judgment dealt with a number of those reasons and I shall not repeat them here. I will now deal with those that I have not covered.

320. The defendant cited the incident on 12 October 1998, where the plaintiff was alleged to have wrongfully represented the workings of Rule 2 (ii) of the Club rules despite being cognisant of JC Lee Seiu Kin's judgment: see *Graeme McGuire v John Rasmussen* [1998] 3 SLR 180. Even if that were true, the misrepresentation was made **after** the date of the last publication complained of. Consequently, it is not relevant in mitigation of damage to prove that the plaintiff was viewed at the time of publication as having a poor reputation because the wrongful representation had not yet been made.

321. Similarly, his veracity in giving evidence in the present proceedings before me cannot be used to prove his general bad reputation, as it is an event long after the defamatory publications. As for his veracity in giving evidence in Johore, there is no evidence before me that any of the GC members had regarded the plaintiff as a man of poor reputation because they knew of his alleged dishonest conduct before the courts in Johore.

322. The defendant also alleged that the plaintiff had improperly claimed against the Club insurance for his personal liability on costs in Suit 23/88 and had misrepresented to the general membership issues relating to the personal liability of GC members and the D & O policy. The insurance policy was not put in evidence and I do not know what its terms are. I cannot come to any conclusion whether he had made any improper claims, or whether he had misrepresented to the insurance company and the GC

on any material facts or on the effect of those terms.

323. Despite the fact that the plaintiff has obtained a consent judgment against the 6 GC members for removing him on 31 March 1999 as their vice-president (see the judgment of GP Selvam J reported in *Arul Chandran v Gartshore* [2000] 2 SLR 446 which was delivered on 10 March 2000), the defendant continued to cite the plaintiff's removal to show the low esteem that the GC members had of him. The plaintiff's removal took place well after the defamatory publications. I am not prepared to infer that they must have viewed the plaintiff in a similar light at the time of the publications the year before.

324. In any case, the defendant failed to call any GC member to testify that the GC members had generally viewed the plaintiff as a man with a flawed character and a bad reputation at that time such that the publications by the defendant had not further lowered the plaintiff in their estimation in any way.

325. Instead of mitigating the damage as was intended, I think that bringing an unsubstantiated allegation that the plaintiff generally had a bad reputation is itself an aggravation of damage.

326. Express malice is another ground to claim aggravated damages. Evidence of matters tending to establish malice is as a general rule relevant to support such a claim. The evidence is not limited to the conduct of the defendant at the time of the libel but it extends to conduct up to the conclusion of the trial. In view of my finding of express malice, the plaintiff is clearly entitled to aggravated damages.

327. The defendant's failure to make out the plea of justification also calls for increased damages as the plaintiff had to be and was subjected to humiliating and embarrassing 'put' questions in cross-examination arising from the justification defence adopted.

328. The manner the defendant has through his counsel conducted the cross-examination of the plaintiff is also relevant. Leaving aside the embarrassing and humiliating questions, I do not think that both defence counsel in this case have stepped so far outside the accepted boundaries in cross-examination, that it calls for additional aggravated damages to be awarded. The extent of the plaintiff's participation in the Tara transactions must be severely tested by cross-examination in order to discover the truth. Sufficient leeway to do this must be given to counsel. Though there may be several questions repeated from time to time, this is inevitable having regard to the length of the cross-examination, the numerous complicated factual issues at the trial, the voluminous documents to be dealt with and the usual lapses of memory as to what had already been asked. However, this by no means justifies increasing the aggravated damages on account of the counsel's lengthy and sometimes repetitive and convoluted cross-examination.

329. In conclusion, the main mitigating factor is the very small circulation of the defamatory publications to only 10 persons. I cannot award damages on account of other defamatory publications circulated extensively to other Club members, which are not the subject matter of this defamation suit though they were adduced in evidence to prove malice for which a separate award for aggravated damages has been made. I am not awarding any exemplary damages because the defendant believed what the learned judge said of the plaintiff. Had he not believed what he read in the judgment, I may well award some exemplary damages to punish him for what he did.

330. After considering all the aggravating and mitigating factors, I think that a fair and reasonable amount to award is $100,000 as damages and $50,000 as aggravated damages, making a total award of $150,000. Interest on the judgment sum will be at 6% p.a. from the date of the service of the writ on the defendant.

331. I further order an injunction preventing the defendant from further publishing any of the words and imputations that I have found to be defamatory of the plaintiff. Being a prolific letter writer, a term used by Mr Cashin of his own client, it behoves me to grant the injunction prayed for by the plaintiff.

332. Finally, I order the defendant to pay costs to the plaintiff to be taxed on a standard basis on the High Court scale although the amount of damages recovered is less than $250,000. The plaintiff in my view has succeeded on almost all the issues. I certify

that the costs be assessed on the basis of two counsel because this is a fairly complex case, which is difficult for one counsel to handle alone.

Chan Seng Onn

Judicial Commissioner

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