Golden Season Pte Ltd and others *v* Kairos Singapore Holdings Pte Ltd and another [2015] SGHC 38

Case Number : Suit No 888 of 2012

Decision Date : 09 February 2015

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Leo Cheng Suan and Grismond Tien (Infinitus Law Corporation) for the plaintiffs; Adrian Tan and Lim Siok Khoon (Stamford Law Corporation) for the defendants.

Parties : Golden Season Pte Ltd and others — Kairos Singapore Holdings Pte Ltd and another

TORT – Defamation – defamatory statements – fair comment – justification – qualified privilege – Malice – malicious falsehood – damages

TORT – Passing off

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George Wei JC:

Introduction

1 Suit 888 of 2012 was started by the Writ of Summons filed on 16 October 2012, and involved a claim by the Plaintiffs against the Defendants for defamation and/or malicious falsehood, and a counterclaim by the Defendants against the Plaintiffs for copyright infringement and passing off.

2 After hearing the parties and considering their arguments, I find that the Plaintiffs' action in defamation succeeds in part. The Defendants' counterclaim for copyright infringement succeeds. The Defendants' counterclaim for passing off fails.

The Facts

3 There were a large number of factual disputes and issues which the parties raised. After introducing the parties, I set out a brief summary of the events leading up to the dispute first, and only later discuss my specific findings and further details where relevant to the legal issues before the Court.

The Parties

4 Golden Season Pte Ltd ("the First Plaintiff" or "Golden Season") is a company incorporated in 1982 specialising in military and humanitarian relief products. These include ready meals, rescue and medical equipment and military battery assemblies. Designer.SG Pte Ltd ("the Second Plaintiff") is a company specialising in contemporary home décor products. Ling Yen Wu ("the Third Plaintiff" or "Tedric") is the sales director of the First Plaintiff and the design director of the Second Plaintiff (the plaintiffs collectively referred to as "the Plaintiffs").

5 Whilst Golden Season is in the business of providing (selling) military and humanitarian relief products to organisations including non-governmental organisations ("NGO") such as Mercy Relief, it is also apparent that they are active in various charitable causes. This includes donating relief products and providing services during disasters, for example, during the Szechuan Earthquake in 2007. Mercy Relief was not just a "customer" of Golden Season: it was also an NGO with whom Golden Season worked with on charitable causes connected with disaster relief. This included help with fund raising.

6 Kairos Singapore Holdings Pte Ltd ("the First Defendant" or "Kairos") was incorporated in July 2010 and provides inflatable boats, marine products and yacht charter services. The inflatable boats were suitable for activities such as fishing as well as for use in flood disaster relief work. Roy Soeigiarto ("the Second Defendant" or "Roy") is the director of the First Defendant (the defendants collectively referred to as "the Defendants").

Events leading to the dispute

7 This dispute was set against the backdrop of the 2011 monsoon season which caused severe and prolonged flooding in Thailand. This resulted in an urgent need for rescue equipment including inflatable boats and related gear to assist the disaster relief effort.

The First Order and donation to Mercy Relief

8 On 12 October 2011, Tedric contacted Roy (through a message on an internet site) expressing his interest to purchase inflatable boats and other suitable equipment for donation purposes in aid of the floods in Thailand. For convenience, the message is set out below: [note: 1]

> Hello, our company is intending to donate inflatable boats for the recent floods in Thailand. May i [*sic*] know what you have in stock for supply? We would also appreciate if you are able to quote your best prices as this is intended for disaster relief.

9 It would appear that Tedric had initially made the purchase representing the Second Plaintiff, but later decided that it would be the First Plaintiff who would be making the purchase. In any case, it is not disputed that the purpose of the boats (*ie*, for use in the Thailand floods) was made known to the Defendants. After some correspondence, Tedric placed an order on 13 October 2011 for 16 inflatable boats (comprising 10 KB 430 boats and 6 KB 528XL boats) and two outboard motors (comprising one 5.8hp motor and one 10hp motor) ("the First Order") [note: 2]. Golden Season paid S$ 23,844 to Kairos for the first order. Along with the first order, Roy also donated two additional KB 430 boats, one used generator and two used chainsaws ("the Kairos Donated Items").

10 There were two other purchases of boats from the Defendants, which will be elaborated on later, but in total, the Plaintiffs would donate 18 inflatable boats (not including the two boats that the Defendants donated) and 4 motors to Mercy Relief.

11 The Kairos Donated Items were also passed on to Mercy Relief. Mercy Relief later acknowledged these donations in a letter dated 21 October 2011 addressed to Tedric and the First Plaintiff ("the Acknowledgement Letter"). It is not disputed that the Acknowledgement Letter was not made known to the Defendants until sometime later. As will be seen, this was the cause of much unhappiness.

12 The inflatable boats stocked and sold by Kairos were sourced from a Chinese Original Equipment Manufacturer ("OEM"). The boats were sold by Kairos under the Kairos Mark comprising the name "Kairos Inflatable" set out within a fish symbol. The term "Inflatable Sampans" was also used in marketing the boats.

The meeting at the Plaintiffs' office and the Exclusive Reseller Agreement

13 The parties continued to correspond with each other primarily through email. The contents of these emails generally entailed discussions of prices and features of the various boat models that the Defendants offered.

14 In the midst of such discussions, a meeting between the Plaintiffs and the Defendants was arranged. While parties are not certain at which date this meeting occurred, it is clear that it occurred before 28 October 2011, the day a training session on how to operate the Kairos boats was held (see below at [20]).

15 During this meeting, the Plaintiffs allege that they entered into an agreement with the Defendants, whereby the Plaintiffs would become the *exclusive* reseller of the Defendants' boats, outboard motors and electrical pumps (at least to humanitarian organisations) (the "Exclusive Reseller Agreement"). It is also during this meeting that the Plaintiffs allege that the Defendants had given the Plaintiffs permission to use photos of the boats owned by the Defendants, and even allowed the Plaintiffs to remove the logo of the Defendants on such photos so that the Plaintiffs could market the goods as their own. Furthermore, the Plaintiffs also claim that the Defendants agreed to remove their prices from the Internet and not to publish their prices anymore.

16 Clearly, what was agreed upon during this meeting is an issue of dispute between the parties. This will be especially relevant for the purposes of the Defendants' counterclaim in copyright infringement and passing off.

The Second and Third Order

17 Tedric later placed a second order on 27 October 2011 for two KB 528XL boats, one 5.8HP motor, and one 10 HP motor ("the Second Order") [note: 3]. Finally, on 31 October 2011, Tedric made a final order of ten more inflatable boats (comprising eight KS 320 boats and two KS 330 boats) ("the Third Order") [note: 4]. Including the first order, Tedric purchased 28 boats and four motors from the Defendants in total:

(a) 10 KB 430 boats (all during the First Order);

(b) 8 KB 528XL boats (six during the First order and two during the Second order);

(c) 8 KS 320 boats (all during the Third Order);

(d) 2 KS 330 boats (all during the Third Order);

(e) 2 5.8hp motors (one during the First Order and another during the Second Order); and

(f) 2 10hp motors (one during the First Order and another during the Second Order).

18 Although the Plaintiffs eventually purchased a total of 28 boats from the Defendants, only 18 of these were donated to Mercy Relief as mentioned above. According to the Plaintiffs, the remaining boats were "earmarked for [Mercy Relief]'s future missions and were warehoused" [note: 5] by the Plaintiffs. The Defendants claim that they were unaware of this, and were under the impression that *all* the boats would immediately be deployed in the Thailand floods.

19 Up to this point, there is also dispute as to whether discounts were offered and provided by Roy, and if they were, the reason why these discounts were offered. What is also in dispute is whether Roy knew of the existence of Mercy Relief and that the boats were intended for use by Mercy Relief (as opposed to simply for flood relief work) *before* 28 October 2011. This will be dealt with later.

The training session on 28 October 2011

20 On 28 October 2011, the Defendants carried out a training session to demonstrate how to operate the Defendants' boats and other equipment. This training session was arranged by the Plaintiffs. However, it was attended by Mr Francis Lee ("Francis"), previously the Strategic and Partnership Director of Mercy Relief. During this training session, Francis took the following items from the Defendants:

(a) 1 portable electric pump GP80DT ("the electric pump");

(b) 1 bale of rope of 100 metres length ("the rope"); and

(c) 4 units of LED waterproof blinker lights ("the LED blinker lights").

21 According to the Defendants, it was agreed that Francis would be buying the rope "through Golden Season". This would mean that Mercy Relief would pay Golden Season, and after which, Golden Season would pay the Defendants for the price of the rope. For the remaining two items, it is in dispute as to whether or not the items were on loan to Mercy Relief, or whether the same payment arrangements as the rope had been agreed upon. Whatever it is, the Defendants claim that the Plaintiffs never paid them for any of the above items.

The chain of emails after the training session

22 After the training session, Roy sent the Plaintiffs an invoice on 31 October 2011 billing the Plaintiffs for the electric pump, the rope and the LED blinker lights. Roy followed up with an email dated 1 November 2011 mentioning that Francis had taken the electric pump to Thailand. [note: 6]

23 On 2 November 2011, a heated chain of emails was exchanged between Roy and Tedric. [note: 7] The main point Tedric wanted to convey in these emails was that the Defendants should, as far as possible, not be in direct communication with the Plaintiffs' clients. Tedric was also worried that the Defendant had disclosed the prices of certain items to Mercy Relief during the training session. This was the start of the breakdown of the relationship between the parties.

The sale to Singapore Red Cross

24 On 8 November 2011, the Singapore Red Cross ("SRC") issued a press release announcing that it was donating boats to Thailand as well. The Plaintiffs thus became aware that the Defendants had sold their boats directly to the SRC as there were photos with boats bearing the Defendants' logo. The Plaintiffs were unhappy that the Defendants had bypassed them to sell to the SRC direct and thereafter instructed one Mr Kenny Ng ("Kenny"), the purchasing manager of Golden Season, to source for alternative suppliers of inflatable boats and motors. Amongst the suppliers that Kenny found was Rongcheng Bestband Industry Co Ltd, Shandong, People's Republic China ("Rongcheng"). As it turned out, Rongcheng was also the Defendants' inflatable boat supplier.

25 It was during this period when the Plaintiffs started to distribute brochures to advertise the

sales of "Golden Season" boats. According to the Defendants, the pictures used in these brochures are unauthorised reproductions of photos owned by the Defendants and contained photos of the Defendants' boats with the Defendants' logo removed. This forms the basis of the Defendants' counterclaim in copyright infringement and passing off.

26 On 22 November 2011, Roy wrote three emails. The first at 9.55am was an email to the Defendants' suppliers, where Roy warned his suppliers that there was a "reseller" that was trying to bypass the Defendants and were going straight to the Defendants' clients and suppliers. This email included the text and body of an email that Kenny had sent to a supplier when he was sourcing for alternative suppliers, and clearly identified Golden Season. The second email at 10.56am was sent to Christopher Chua ("Chua"), Secretary-General of the SRC. This second email contained the first email with a short explanation that Roy was trying to "set things right". The third email sent at 6.47pm was a relatively cordial email addressed to Tedric, where Roy tried to re-affirm the working relationship between the parties. Roy also offered that an agreement could be signed where parties should not sell to each other's clients. Tedric did not reply to this email.

27 Chua later offered to mediate the matter between the parties, and sent an email to Tedric on 23 November 2011. In the exchange of emails on the same day [note: 8], Chua also clarified that it was him who approached the Defendants for boats for Thailand. He had found the Defendants by conducting a search on the internet. The Plaintiffs sought a number of clarifications as to how the Defendants had acted in the sale to the SRC, including whether the Defendants had asserted that they owned any intellectual property over the boats and that they could not be purchased from the Plaintiffs.

28 On 24 November 2011, Tedric sent a text message to Roy asking him how long he had been doing business with the SRC. Roy did not reply to this text message. On 25 November 2011, Roy sent an email to the SRC relating the dispute between the Defendants and the Plaintiffs which included the following:

(a) that the Plaintiffs had pressed the Defendants to give details on the business relationship between the Defendants and the SRC;

(b) that the Defendants never gave the Plaintiffs permission to use the Defendants' photos for the Plaintiffs' brochures, and that the Plaintiffs were using "other people's product to pose" as their own; and

(c) that the Plaintiffs had purchased the Defendants' boats only to resell them to Mercy Relief at "an undisclosed amount".

The emails to Mercy Relief

29 On 28 November 2011, the Defendants wrote to Mercy Relief, and received an auto-reply from Mercy Relief. The contents of this email are not known.

30 On 29 November 2011, the Defendants wrote to the Chief Executive Officer ("CEO") of Mercy Relief seeking an acknowledgment of the Donated Kairos Items, as well as the discounts that the Defendants had given the Plaintiffs, claiming that this was necessary for "stock audit, tax and accounting purposes". [note: 9] It would appear that the Defendants never received a response to this letter until sometime during mid-December 2011. In any case, the evidence shows that on 7 December 2011, the Defendants sent another email to Mercy Relief, and in turn, received a further auto-reply.

31 It was after this that the Defendants started on what the Plaintiffs call the Defendants' "defamation campaign".

An overview of the defamatory articles

32 The following is a brief summary of what the Plaintiffs assert are defamatory of them:

(a) two Facebook posts posted by Roy on 10 December 2011;

(b) eight emails sent to various recipients, including Mercy Relief, the SRC and their officers, sent in the period between 13 December 2011 and 23 February 2011; and

(c) a phone text message sent to Francis.

33 As an action in defamation is essentially fact-centric, it is important to understand the context in which this dispute arises. It is clear from the above outline that, at the very least, there was some miscommunication and unhappiness in how parties had appeared to have acted in their business relationship. The Plaintiffs were unhappy that the Defendants seemed to have bypassed them and contacted their clients (*ie*, SRC) while the 2nd Defendant appeared to be unhappy with the fact that his donations might have gone unnoticed by Mercy Relief as they had not replied to him. This is the brief background against which the alleged defamatory articles came about. In general, the two Facebook posts were posts by Roy on his personal and business page commenting on the spate of events that had occurred, and the eight emails were correspondences with authorities whom the Defendants thought were relevant to the dispute. I elaborate on this in the later paragraphs.

Issues before this court

34 The legal issues before this court are:

(a) For the Plaintiffs' action in defamation -

(i) whether the articles are defamatory of the Plaintiffs;

(ii) if they are, whether any defences are applicable; and

(iii) if applicable, the quantum of damages to be awarded.

(b) For the Defendants' counterclaim -

(i) whether the Plaintiffs had infringed on the copyright belonging to the Defendants; and

(ii) whether the Plaintiffs were liable in the tort of passing off (inverse passing off).

The applicable law – Defamation

35 The law of defamation is relatively well-settled and I set out the general principles applicable in this case. The tort of defamation is concerned with protecting a person's reputation, namely, what other people think of him. The classic elements to establish the tort of defamation are that there must be:

(a) a statement bearing a defamatory meaning;

(b) publication to a third party; and

(c) reference made to the plaintiff.

36 A statement is considered to be defamatory if it:

(a) lowers the plaintiff in the estimation of right-thinking members of society generally;

(b) causes the plaintiff to be shunned or avoided; or

(c) exposes the plaintiff to hatred, contempt or ridicule.

See Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*") at para 12.014.

37 Whether a statement is defamatory is generally determined based on the construction of the natural and ordinary meaning of the words used. As summarised by the Court of Appeal in *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 ("*Chan Cheng Wah*") at [18], the following guiding principles apply:

(a) the natural and ordinary meaning of a word is that which is conveyed to an ordinary reasonable person;

(b) as the test is objective, the meaning which the defendant intended to convey is irrelevant;

(c) the ordinary reasonable reader is not avid for scandal but can read between the lines and draw inferences;

(d) where there are a number of possible interpretations, some of which may be non-defamatory, such a reader will not seize on only the defamatory one;

(e) the ordinary reasonable reader is treated as having read the publication as a whole in determining its meaning, thus "the bane and the antidote must be taken together"; and

(f) the ordinary reasonable reader will take note of the circumstances and manner of the publication.

38 Apart from establishing that the statement is defamatory, it must also be shown that it is the plaintiff who has been defamed by the publication of the statement. There is no need for the plaintiff to be named, but it must be shown that the words would be understood by ordinary people to refer to the plaintiff. The act of publication and reference to the plaintiff are key elements of the tort.

39 Once the above are established, the defendant will be liable for defamation unless he can rely on defences such as justification, qualified privilege or fair comment. I further elaborate on the relevant legal principles specific to each article later on when necessary.

Are the elements of the tort of defamation made out?

The Facebook posts

40 On 10 December 2011 at 9.58pm, Roy posted on his personal Facebook page:

> My photos and text for my inflatable boats have been doctored and used by some companies! We don't appoint resellers and if you know of someone selling you a similar product or suing our trademark, pls [*sic*] inform me. Tks [*sic*]

Roy followed up with a comment posted on 11 December at 9.30am, stating:

> Yes….apparently some folks approached me on the pretext of donation but it was not! That's cheating so….datz [*sic*] bad.

I refer to the above post as well as the comment collectively as the "First Facebook Post".

41 On 10 December 2011 at 11.11pm, the First Defendant posted on its business Facebook page:

> Flood victims deserve the best! Donor's money should be used wisely – we supply portable rescue and supply inflatable sampans and boats.
>
> No more 3rd party nonsence [*sic*] – we learnt that recently! Read last post!

Roy then followed up with three comments. The first:

> Mercy Relief users in Thailand and Cambodia got their supplies of kairosinflatables [*sic*] at $1184. We have to inform that the 3rd party obtained that from us. We support NGOs and gave them huge discounts and donations. We hope that they will aknowledge [*sic*] and not be sold or passed off as other supplier's items at prices we do not know. Donor's money must be used wisely and we promote direct purchases to avoid any misunderstanding if any. Now it seems others are using our copyright photos and models we created to pass off as theirs!

The second:

> Copyright infringement is an offence. We also hope that these NGOs who got from 3rd parties will confirm with us that the prices are what they got it for. We own the brand and maintain our competitive prices so that donor's funds are used wisely. No markups ! [*sic*]

And the third:

> Mercy Relief used our inflatables to rescue and supply food and water.We [*sic*] supplied through a 3rd party giving them a huge corporate discount and we hope it was not resold to them instead. That's our concern.

Tedric responded to the thread of comments by commenting:

> **Tedric Ling** Dear Roy, I just read all your posts. What are you trying to imply?

The Second Defendant then replied to the thread stating:

> Dear all, by following on this thread, it seems like the some folks are feeling the heat……

I refer to the later posts and string of comments collectively as the "Second Facebook Post". It is noted that the Second Facebook Post was posted about an hour after the First Facebook Post.

42 In the statement of claim dated 16 October 2012, it is pleaded that the words contained in the Facebook Posts were defamatory in their ordinary and natural meaning in the following manner:

a. The First and Third Plaintiffs deceived, tricked and conned the Defendants into selling the Kairos boats/sampans at a discounted price whilst having no intention whatsoever to donate the same to a charitable cause.

b. The First and Third Plaintiffs did not donate the GS donations or donate used items to Mercy Relief but instead sold them to Mercy Relief for a profit.

c. In so deceiving, tricking and conning the Defendants, the First and Third Plaintiffs are crooks and cheats.

43 The Defendants argue that read in their ordinary and plain meaning, the Facebook posts are not defamatory. [note: 10] I disagree. In my view, the First Facebook Post strongly suggests that the Defendants have been cheated by "some folks" – these unnamed third parties had approached the Defendants on the "pretext" of donation but did not make any donation, suggesting that they had lied. For the Second Facebook Post, it is important to note that the thread of comments was prefaced with the original post which stated "no more 3rd party [nonsense]", which is strongly suggestive of malpractices. There are then several comments asserting that donor's monies should be used wisely. Read together, it would be reasonable for an ordinary man to surmise that the post is made in reference to the malpractices of these unnamed third parties, which caused donor's monies to be used unwisely. The continual stress on corporate discounts and the prices charged suggest some form of overcharging. Furthermore, it would be odd to mention in the abstract that "[c]opyright infringement is an offence." This clearly suggests an incident of copyright infringement.

44 In *ABZ v Singapore Press Holdings Ltd* [2009] 4 SLR(R) 648 at [31], it was held that if a statement was made suggesting that the plaintiff conducted its business in a dishonest, improper or inefficient manner, it would be defamatory of the plaintiff. The words/phrases "cheating", "should be used wisely", and "nonsense", for example, all suggest some form of dishonesty or some form of business misconduct, and therefore, I find that both the First and the Second Facebook Posts bear defamatory meaning.

45 The real challenge, however, is for the Plaintiffs (in particular the First and Third Plaintiff) to establish that the two Facebook posts refer to them.

46 Whether or not something refers to or identifies a plaintiff is an issue of mixed law and fact. As explained by Viscount Simon LC in *Knupffer v London Express Newspaper, Limited* [1944] AC 116 at 121 and cited with approval in *Mohamed Hussain v Chew How Yang Eddie* [1995] 1 SLR(R) 916 at [36]:

> The first question is a question of law – can the article having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact – Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise...

47 Ultimately, the question before the court is whether based on the Facebook posts, a reasonable person *could* identify the Plaintiffs. The Plaintiffs, essentially, rely on two arguments to establish this:

(a) First, the Plaintiffs argue that they are widely known to be associated with Mercy Relief. [note: 11] A simple search on an internet search engine or the search engine available in Facebook would allow the ordinary and sensible reader to surmise that the Defendants were referring to the Plaintiffs.

(b) Second, the Plaintiffs also argue that Tedric had commented on the Second Facebook Post, and thus had identified himself. The ordinary reader would then understand that the comments were made in reference to the Plaintiffs. The Plaintiffs also argue that the ordinary reader would associate the First Facebook Post with the Second Facebook Post, and therefore, when Tedric had identified himself in the Second Facebook Post, readers would also understand that the First Facebook Post was referring to him.

48 There are three questions to be explored in considering the Plaintiffs' arguments. First, pertaining to the Second Facebook Post, will a defendant still be liable for defamation if the defamatory article does not identify the Plaintiff but for the Plaintiff's act of self-identification? Second, can the Plaintiffs rely on its identification in the Second Facebook Post such that the Plaintiffs are also identified in the First Facebook Post? Third, can the Plaintiffs rely on the fact that they are easily associated with Mercy Relief such that an ordinary person would read the Facebook posts to be in reference to them?

The Second Facebook Post – self-identification by the Plaintiff

49 Can a plaintiff rely on his "self-identification" in alleging that a defendant's publication has defamed him? While there seems to be little case authority to give guidance on this point, it stands to reason that this cannot be the position. Starting from first principles, it is clear that it must be the *defendant's publication* that identifies the plaintiff before liability will attach (assuming that defamatory meaning is already found), and not the act of the plaintiff. A plaintiff who goes around announcing that something published by the defendant actually refers to him cannot rely on that very same act in arguing that the defendant's publication now refers to him.

50 Take, for example, a newspaper which publishes an article claiming that a certain unnamed businessman is guilty of dishonest practices. An individual thinking that the newspaper is referring to him, publishes a public refute claiming that the newspaper is defaming him. Assuming that a case of *innuendo* (reference to the individual) cannot be made out, it would be absurd if the individual could rely on his own act of publication and identification in order to claim that the newspaper article refers to him. From an objective point of view, the newspaper's publication did not refer to the plaintiff. In such a situation, unless the plaintiff can show some form of innuendo that links the defendant's publication to the plaintiff, the plaintiff's action must fail. This would be answering the first question as posed by Viscount Simon LC – as a matter of law, the article, having regard to its language, is not capable of referring to the plaintiff.

51 Applying the reasoning to this case, the fact that Tedric subsequently "identified" himself by responding to the thread of comments cannot in itself cause the Defendant's Second Facebook Post to now identify him. However, there is one significant difference between the newspaper example discussed above and the present case. After Tedric had "identified" himself, Roy went on to post a comment in the thread:

Dear all, by following on this thread, it seems like the some folks are feeling the heat……

52 I refer to this comment as "Roy's response comment". A larger question belies this inquiry – what exactly is the Defendants' publication? Given the advances in digital technology and the rising

popularity of "instant" electronic communication, a Facebook post which allows for and generates comments by means of posts under a thread, all of which are published instantly, is much more dynamic (as a publication/communication medium) than a print newspaper article.

53 In Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd Ed, 2005), the learned author at paras 5.24 to 5.25 elaborates:

> **Place and time of publication**
>
> Matter is published at the time when, and in the place where, it is received. Each copy of a book or newspaper is thus a separate publication, as is each reception of a television or radio broadcast. Each separate publication of the same matter potentially gives rise to a distinct cause of action.
>
> Arguments that different rules should apply to matter published via the Internet, having regard to its global and geographically indeterminate nature, and the spectre of Internet publishers being exposed to the risk of defamation actions in every corner of the globe, have not found judicial favour. Each receipt of a defamatory e-mail message or bulletin board posting, and *each display of a defamatory web page, is thus a separate publication*, in respect of which a distinct cause of action potentially arises.
>
> …
>
> The number of computers through which the message has passed is therefore not to the point; *it is the number of computers on which the message has been displayed and seen* that determines how many separate publications of the message have occurred.
>
> [Emphasis added]

54 In *Webb v Bloch* (1928) 41 CLR 331 at 363, Isaacs J commented that publication of a libel is "to convey by some means to the mind of another the defamatory sense embodied in the vehicle." In this sense, it has been said by the High Court of Australia in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [26] that publication is a bilateral act:

> Harm to reputation is done when a defamatory article is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.

55 It follows that every time an individual displays or views a Facebook post on his computer, it counts as a separate publication. This is important because given the ability to comment on a thread on a Facebook post means that potentially, the *content* of the publication continues to change. A newspaper article in most cases, remains in the same form as it was when originally published, editorial corrections aside. Later articles may revise or develop themes and issues discussed in the first article. The reality of Facebook and other social networking sites is that every time the author of a Facebook post comments on his own post, he is essentially "building on" the original publication. The Facebook post and the thread of comments bear a passing resemblance to a conversation. Later comments really belong to a single thread of comments originating from the same post. For this reason I am of the view that in many cases it is most probable that they will be read together and thus should be treated as a single publication. This can be likened to a newspaper who *re-publishes*

the same article (previously published), but now with a descriptive or elaborative passage in another column beside it.

56 Bringing this to the case at hand, by responding to Tedric's comment on his Second Facebook Post, Roy can be said to have "built on" his original publication in such a way as to confirm Tedric's identity. From a legal point of view, the whole string of comments now has to be read together, and, in my judgment, form a singular instance of publication. This is different from taking the perspective that the original post and Roy's response comment are two different sets of publications. This difference is critical because the Defendants rely on the case of *Grappelli v Derek Block (Holdings) Pte Ltd* [1981] 1 WLR 822 CA ("*Grappelli*") to argue that there is a general rule that a statement is to be understood in the way in which a reasonable recipient would understand it at the time it is published; subsequent knowledge which makes the recipient look back on it in a different light will not make it defamatory (See also *Gatley on Libel & Slander* (Patrick Milmo & W V H Rogers eds) (Sweet & Maxwell, 11th Ed, 2008) at para 7.4 ("*Gatley*")). Even accepting the general rule at face value, it is clear that *Grappelli* does not apply here because there is no "subsequent knowledge" – the string of comments and the original post are one singular publication. To be fair, the Defendants rely on *Grappelli* in relation to another point, but its possible applicability for this issue should be clarified.

57 Viewed from the perspective of a singular publication, the issue of self-identification then becomes less important. Applying the two questions as posed by Viscount Simon LC, the two questions before the court are therefore: considering the entire Second Facebook Post including Roy's response comment, as a question of law, can it having regard to its language, be regarded as capable of referring to Tedric, and as a question of fact, does it in fact lead reasonable people to the conclusion that it does refer to him? I had mentioned above that it must the *defendant's publication* which identifies the plaintiff. To this end, although it goes without saying that Tedric's response identifies himself, I find that Roy's response comment is *also* capable of identifying the Third Plaintiff (Tedric) given the circumstances in which it was made. By commenting immediately after Tedric's comment that "some people" were "following the post", I find that it is possible that a reasonable man would surmise that Roy's comment was referring to Tedric, who was "following the post". As a result, I find that the Plaintiffs' action of defamation on the Second Facebook Post succeeds.

58 For completeness, I note that the Plaintiffs also argued that they were highly associated with Mercy Relief, and a simple internet search would have enabled the ordinary reader to discover that the Defendants were referring to the Plaintiffs in the Second Facebook Post. Given my findings above, there is no longer a need for the Plaintiffs to rely on this, but I would state that if they were to succeed based on this, the Plaintiffs would have to prove that the ordinary reasonable reader was likely to have undertaken an internet search in order to identify the Plaintiff. To this end, little evidence was led to establish this point, but in any case, as mentioned, it was not required of me to make a finding on this issue.

The First Facebook Post – reliance on the Second Facebook Post

59 The Plaintiffs argue that since the Second Facebook Post identifies the Plaintiffs, readers would naturally understand the First Facebook Post to refer to the Plaintiffs. As explained in *The Law of Torts in Singapore* at para 12.049:

> The ordinary third party's knowledge of the particular circumstances and facts in which the publication was made would be relevant in determining whether reference was made to the plaintiff. In the case of true innuendos, the third party with special knowledge of the extrinsic facts must reasonably understand the defamatory words as referring to the plaintiff.

60 In order to succeed, the Plaintiffs would have to prove that the ordinary reasonable reader had knowledge of the Second Facebook Post. The Plaintiffs are therefore relying on another publication to establish reference. The following passage from *Gatley 2013* at para 7.4 is instructive:

> The general rule is that a statement is to be understood in the way in which a reasonable recipient would understand it at the time it is published: subsequent knowledge which makes the recipient look back on it in a different light will not make it defamatory. Exceptionally, however, a subsequent publication may be introduced in evidence to establish identification. Thus, in *Hayward v Thompson* it was held, in a case where the words in the first publication were defamatory on their face and the second publication that identified the plaintiff was published by the defendant, that reference could be made to a second publication in order to establish identification…Ultimately, whether evidence from subsequent publication should be allowed to establish identification in these cases depends on a careful consideration of the facts of each case.

61 The Plaintiffs argue that Roy's friends, who would have seen the First Facebook Post, would also have been supporters of his business, and would therefore have also seen the Second Facebook Post. [note: 12] It bears repeating that the First Facebook Post was on Roy's personal Facebook page. The Second Facebook Post was on Kairos's business Facebook page. In such circumstances, the Plaintiffs argue that this would allow them to have the necessary knowledge to conclude that the First Facebook Post refers to the Plaintiffs. On a balance of probabilities, I disagree. The fact that a number of readers might have access to both posts does not lead to the conclusion that they would have observed these two posts and then conclude that the First Facebook Post refers to the Plaintiffs. More importantly, it is noted that the reference to Tedric in the Second Facebook Post was also formed sometime later, only after Roy's response comment was posted. In those circumstances, a reader would have to be cognizant of the Second Facebook Post at this stage, and then go back to the First Facebook Post to establish the reference to the Plaintiffs. In such circumstances I hold that the general rule in *Grappelli* applies, and that the Plaintiffs should not be able to rely on the Second Facebook Post to establish reference to the Plaintiffs in the First Facebook Post. As such, the Plaintiffs' action based on the First Facebook Post fails.

Publication

62 For purposes of completeness, I also find that there is no difficulty in establishing that there is publication by means of the Facebook posts. Whether or not the publication was substantial is a matter of damages which will be considered later in the event that no defence is established. [note: 13]

The chain of emails

63 Shortly after posting the two Facebook posts, Roy sent a total of eight emails to various parties, including the Chairman of Mercy Relief, Mr T K Udairam ("Mr Udairam"), and the CEO of Mercy Relief, Mr Hassan Ahmad ("Hassan"). The content of the emails broadly relates to the spate of events described above. A summary of the emails and the dates they were sent are as follows: [note: 14]

Date	Email
13 Dec 2011	First email, sent to Mercy Relief ("Email 1")

15 Dec 2011	Second email, sent to Mr Udairam ("Email 2")
3 Jan 2012	Third email, sent to Mr Udairam ("Email 3")
13 Jan 2012	Fourth email, sent to Mr Udairam ("Email 4")
13 Jan 2012	Fifth email, sent to Mr Udairam ("Email 5")
21 Jan 2012	Sixth email, sent to Hassan ("Email 6")
21 Jan 2012	Seventh email, sent to Hassan ("Email 7")
23 Feb 2012	Eighth email, sent to Hassan ("Email 8")

I refer to these emails collectively as the "chain of emails".

64 The same legal question that must be answered is whether the content of the chain of emails is defamatory in nature. The defendants argue that the chain of emails was sent by Roy because Roy was in a "perplexing situation". As mentioned above, on 29 November 2011, Roy had written to Hassan seeking an acknowledgment of the Donated Kairos Items and the discounts that the Defendants had given the Plaintiffs, but had not received any reply from Hassan or Mercy Relief. The chain of emails from Roy was therefore in pursuit of his "legitimate interest in asking the charity he had donated to about how the donations had been received" [note: 15] (or not, as the case may be). To this end, I share some sympathy for Roy insofar as the replies from the various parties may not have been as clear as they could have been in addressing *directly* the concerns raised by Roy.

65 However, even if the replies Roy received to his email queries could be said to be unsatisfactory, it does not cure or excuse any defamatory sting in the contents of the email queries. Simply because the Defendants received an unsatisfactory reply from a third party does not give them the right to make defamatory remarks of another, especially so when this is based on personal uncorroborated suspicions. That said, the reason for sending the email queries may allow Roy to rely on the defence of qualified privilege, which will be considered later on.

66 The Plaintiffs assert that the chain of emails bears a number of defamatory imputations. As in the case of the Facebook posts, the words complained of in the eight emails were pleaded to be defamatory in their natural and ordinary meaning.

67 For convenience, the Plaintiff said to be defamed by each email [note: 16] are as follows:

(a) Email 1: First and Third Plaintiffs;

(b) Email 2: First and Third Plaintiffs;

(c) Email 3: Primarily the First and Third Plaintiffs. Second Plaintiff in respect of an allegation of having outstanding debts;

(d) Email 4: Primarily the First and Third Plaintiffs. Second Plaintiff in respect of an allegation of having outstanding debts;

(e) Email 5: First and Third Plaintiffs;

(f) Email 6: Primarily the First and Third Plaintiffs. Second Plaintiff in respect of an allegation that it gave the Defendants permission to use photographs belonging to Mercy Relief;

(g) Email 7: Primarily the First and Third Plaintiffs. Second Plaintiff in respect of an allegation that it gave the Defendants permission to use photographs belonging to Mercy Relief; and

(h) Email 8: Primarily the First and Third Plaintiffs. Second Plaintiff in respect of allegations of outstanding debts and permission to use the photographs belonging to Mercy Relief.

68 In respect of each email, the Statement of Claim sets out the particular words said to be defamatory. Detailed particulars of the defamatory meaning (on the basis of the natural and ordinary meaning) of the words were also set out in the Statement of Claim in respect of each email.

69 Since many of the statements and alleged meanings are repetitive or similar, a few examples of the alleged natural and ordinary meanings said to be defamatory will suffice to illustrate the alleged stings. To be clear, these stings or defamatory meanings are based on the particular words and statements contained in the emails and which were also set out in the Statement of Claim. The alleged defamatory stings include, for example, that [note: 17] :

(a) the First and Third Plaintiffs misled, deceived, tricked and conned the Defendants into selling Kairos boats at a discounted price whilst having no intention whatsoever to donate the same to a charitable cause; [note: 18]

(b) the First and Third Plaintiffs did not donate the Kairos boats to Mercy Relief but instead sold them at a profit, and hence are crooks and cheats; [note: 19]

(c) the First and Third Plaintiffs intended to deceive Mercy Relief into believing that all the donated items were from the Plaintiffs, thus robbing the Defendants of any credit; [note: 20]

(d) the First Plaintiff was not a trustworthy corporate citizen; [note: 21]

(e) the First and Third Plaintiffs would cause Roy and his family grave personal harm and damage to his business such that Roy had to make a police report; [note: 22]

(f) that a police report had to be made against the First Plaintiff because they conducted their business in an illegal manner; [note: 23]

(g) that the Second Plaintiff had outstanding debts with the Defendants and was in poor financial shape; [note: 24]

(h) that the First and Third Plaintiffs were in a position of conflict of interest and the Defendants had to make a report to the COC; [note: 25]

(i) the Third Plaintiff had carried out illegal fund raising on behalf of Mercy Relief; [note: 26]

(j) the Plaintiffs deliberately infringed the Defendants' registered trademarks and copyright; [note: 27] and

(k) the First and Third Plaintiffs had used Mercy Relief's photographs illegally in breach of Mercy Relief's copyright. [note: 28]

70 On the whole, while I do not agree with every single imputation of defamatory meaning as alleged (such as the imputation of illegal fund raising for Mercy Relief), I am of the view that there is some merit to the Plaintiffs' argument that the contents of the chain of emails are defamatory in nature.

71 As briefly alluded to above, the test for determining the natural and ordinary meaning of allegedly defamatory words is the meaning that the words would "convey to an ordinary reasonable person, not unduly suspicious or avid for scandal, using his general knowledge and common sense" (see *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [27]). It is also important to note that the chain of emails was published primarily to Mr Udairam and Hassan, and therefore, their interpretation of Roy's email would continue to develop with each email they received. I therefore considered the chain of emails together. (I considered those sent to Mr Udairam and those sent to Hassan separately.)

72 Reading the chain of emails both individually and together, they strongly suggest that the Plaintiffs, at the very least, are guilty of some misconduct in dealing with either the Defendants or Mercy Relief. This is especially so in the context of the donations that the Plaintiffs had provided to Mercy Relief. Throughout the chain of emails, it is clear to me that Roy is insinuating some form of malfeasance on the part of the Plaintiffs. The contents of the chain of emails, as well as the tone used, generally seek to question the Plaintiffs' actions and their honesty. I state a few example statements in the chain of emails which, in my judgment, bear some defamatory meaning:

Email	Statement
Email 1	"For the safety of my family and the good name that we have built, I have made a police report a few hours ago. I have not slept till now as the statement took a while."
Email 2	"A police report has been made by me and there could be grounds of cheating and other related matters."
Email 3	"We had to make sure that our corporate discounted prices was meant for Mercy Relief and not resold or marked up with other products that was supplied…" "Fyi, we do give corporate discounts for disaster efforts as part of our donations for corporate clients." "In that context, we feel cheated that our donations and discounts ended without any evidence and those other mentioned items will be returned back." "Our trademark and copyright was infringed (as we found out later on) and those inflatable boats we donated was not mentioned in your CEO's reply to me" "Then how did those inflatable boats turned up as 'sponsored' when the value of those are equally high? We sold quite a lot to Tedric from designer.sg." "We also have some bills still not paid by Tedric Ling from Designer SG for the pump and ropes that was used – we will not take back the pump as he has used it already."

Email 4	"In this case, Tedric Ling whom has taken on behalf of our 2 donated boats had not given to Mercy Relief or so it seems. May I know where is it? This is a breach of trust."
Email 5	"I request for an answer for my 2 missing boats." "This is not just about COC but also a impersonation that these was meant for donation and has now gone missing." "Are checks being done to ensure donor's monies are being used properly?" "We cannot stop competition BUT I am sure MR practices fair enquiries and also ensure that all supplies when sold to them does not have a conflict of interest as I just found out that Tedric also does fund raising for MR."
Emails 6 and 7	"It was never my intention to use MR as the grinding tool as MR may have been exploited too and that was my concern was bonafide"

73 Read individually and in the context of the whole chain of emails and the situation that was occurring, I am of the view that the contents of the emails are defamatory in nature. It is also not disputed that the elements of reference to the Plaintiffs and publication are also met.

The Short Message Service ("SMS") texts

74 On 5 October 2012, Roy sent three SMS texts to Francis stating the following: [note: 29]

> Dear francis, I just wanted to inform you that, I reported tedric ling to the police A few months ago. Did u know abt it? Roy soeigiarto
>
> Francis, can we meet for coffee? Btw tedric aka Golden Season wants to get $300k from me for defamation. U know abt that? Roy
>
> I only ask of you to be truthful and not be afraid. Come what may, the truth will be out abt Tedric and the way he do his business. I am sorry that you are involved. You know better, I wish it does not have to be this way and I also do not wish to be this way as I was dragged into this! Just wanted to affirm you to trust your hear. Tks for the reply. Roy

75 Reading the third SMS on its own, I am of the view that the third SMS is not defamatory in nature. While, to a certain extent, the phrase, "the truth will be out [about] Tedric and the way he do his business" might suggest that Tedric is conducting his business in an improper or illegal manner, I am not ready to find that the ordinary reader will conclusively draw this meaning from this phrase alone. The phrase could just as well mean that Tedric is a hard or aggressive businessman.

76 However, the first SMS, which states that a police report had been made against Tedric, is slightly trickier. Leaving aside the fact that Roy had indeed made a police report, the question is whether an ordinary reader would infer from the ordinary meaning of these words that Tedric had conducted his business in an illegal manner or that he had threatened some harm against Roy. On its own, I am of the view that the ordinary reader would not infer from the first SMS that harm had been threatened against Roy. This can be compared, for example, with Email 1 where Roy stated in no uncertain terms that:

> …for the safety of my family and the good name that we have built, I have made a police report

a few hours ago. I have not slept till now as the statement took a while.

77 The position, however, may be different if these three SMS texts are viewed as a whole. Whether or not the statement in the first SMS that he had made a police report against Tedric is defamatory depends on how the statement would be perceived by an ordinary person in the position of Francis. It is clear that ordinarily a statement that X is under investigation does not imply that X is guilty of an offence. As stated in *Gatley on Libel and Slander* (Alastair Mullis & Richard Parkes eds) (Sweet & Maxwell, 12th Ed, 2013) ("*Gatley 2013*") at para 3.28, if the law was otherwise, it would be almost impossible to give accurate information about anything.

78 Where the statement means nothing more than the fact that there is an investigation or that a complaint has been made, a serious question must arise as to whether the statement is defamatory. Indeed, even if it is defamatory, the statement may be justified by showing that an investigation is being conducted or that a complaint had indeed been made. The question in many cases is whether the ordinary reader would understand the words as meaning more: namely that X is guilty or that there is some reasonable basis for suspecting that an illegality or offence has been committed.

79 It is also stated in *Gatley 2013* at para 2.28 that "it may be defamatory to say that someone is suspected of an offence even where that does not imply guilt". Much will depend on the context in which the statement was made and how the statement will be perceived by an ordinary reader. Is there an implication that there is a reasonable basis for the investigation or suspicion? If so, subject to defences, liability for defamation arises.

80 For example, in *De Souza Tay & Goh (suing as a firm) v Singapore Press Holdings Ltd and another suit* [2001] 2 SLR(R) 201, an article was published in The Straits Times about a company that was being investigated by the United States Securities and Exchange Commission. The article took up almost a third of an entire page and comprised words and graphics. The words included "But a cloud has been cast over this with launch of a probe into the recent surge in its Asia sales by the US Securities and Exchange Commission" and "… possibility that [the company's] fast sales growth may not be all that it appears". Lee Seiu Kin JC (as he then was) added at [24] that these statements had to be read in the context of the emphasis in the article that two individuals who were shareholders of the company's licensees had acted as directors for 678 companies, many of which appeared to be shell companies and that the same two individuals were linked to 15 companies with the same address and which had paid US$57 million to the company for software licences. In this context, Lee Seiu Kin JC found that the ordinary, reasonable reader would interpret the article to mean that the company had used these companies to manipulate financial transactions to create the impression of a high turnover in 1999 and were guilty of fraudulent conduct. At the very least it was found that the article bore the defamatory meaning that there were reasonable grounds to suspect fraud.

81 In the present case, looking at the first SMS on its own, I am not satisfied that the ordinary, reasonable reader (in the position of Francis) would conclude that that there were reasonable grounds to suspect Tedric to be guilty of an offence.

82 The issue is whether the three SMS texts should be treated as separate and distinct messages or as part of single chain of communication to be read as a whole. On the evidence, it appears that the messages were sent at or about the same time and were essentially part of a single communication to Francis. Any reader in the position of Francis would be well aware of the business dispute between Tedric and Roy. On balance I am not satisfied that the three SMS texts, even when read as a whole is defamatory. The statement that a police report had been made was followed by the message that a defamation suit had been brought by Tedric for "300K". This was followed by the request that Francis "be truthful and not be afraid" and that "come what may, the truth will be out

abt Tedric and the way he do his business." The SMS messages as a whole conveys to the ordinary, reasonable reader that a serious legal dispute between Tedric and Roy had arisen out of business dealings. This meaning is not defamatory without any more. The SMS messages do not necessarily bear the meaning that Tedric is guilty of an offence or that there are good grounds to think that an offence had been committed.

Conclusion on the defamatory articles

83 In summary, I find that the elements of the tort of defamation has been established by the Plaintiffs for:

(a) the Second Facebook Post; and

(b) the chain of emails sent to Mr Udairam and Hassan.

Can the Defendants rely on the defences of justification, qualified privilege or fair comment?

84 I now turn to examine whether the Defendants can rely on any of the established defences in order to absolve them of liability. I start first with a brief review of the principles of law applicable to the defences, before applying it to the facts at hand. The law concerning the defences available to a defendant in a defamation action is not contentious, and in summary, I find that the Defendants can rely on the defence of fair comment for the Second Facebook Post but not on any defence for the chain of emails.

The law

Justification

85 It is an absolute defence in a civil defamation claim that the defamatory imputation is true or substantially true – something that is substantially true cannot be used by the claimant to recover damages (see Littledale J's observations in *M'Pherson v Daniels* (1829) 10 B & C 263 at 272, as cited by the High Court in *Hady Hartanto v Yee Kit Hong and others* [2014] 2 SLR 1127 ("*Hady Hartanto*") at [127]). A defamatory imputation is presumed to be false, and the burden of proof falls upon the defendant to plead and show that it is true. It is important to note that the meaning that must be proven true must be that which the relevant statement is held to bear, and the defence will not succeed if a materially less serious meaning is proved to be true. It is the imputation contained in the words which has to be justified, not the literal truth of the word (see the decision of the Court of Appeal in *Chan Cheng Wah* at [43]).

86 The defendant need only prove the "sting" of the charge, and some leeway for exaggeration and error is given. The Court of Appeal in *Chan Cheng Wah* (at [44]) accepted the following position laid down by Burrough J in *Edwards v Bell* (1824) 1 Bing 403, who stated at 409 that:

> …it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified.

87 The basis of the defence of justification is truth, and therefore, for this defence, the state of mind of the publisher is not relevant. This means that a defendant can succeed in such a defence even when he publishes the defamatory article believing it to be false, for no amount of malice, bad

faith or belief in the falsity of the statement will make it actionable when the allegation is true (see *Carter-Ruck on Libel and Privacy* (Alastair Mullis & Cameron Doley gen eds) (Lexis Nexis, 6th Ed, 2010) at para 9.1).

Qualified privilege

88 In *Chan Cheng Wah*, the Court of Appeal (at [86]) accepted the following explanation of the defence of qualified privilege as found in *Gatley* at para 14.1:

> There are circumstances in which, on grounds of public policy and convenience, less compelling than those which give rise to absolute privilege, a person may yet, without incurring liability for defamation, make statements of fact about another which are defamatory and in fact untrue. These are cases of qualified privilege ... For a very long time these cases primarily concerned communications of a "private" nature, commonly arising out of the necessities of some existing relationship between the maker of the statement and the recipient. Protection was granted if the statement was "fairly warranted by the occasion" (that is to say, fell within the scope of the purpose for which the law grants the privilege) and so long as it was not shown by the person defamed that the statement was made with malice, i.e. with some indirect or improper motive, which was typically established by proof that the defendant knew the statement to be untrue, or was recklessly indifferent as to its truth.

89 A defendant can rely on the defence of qualified privilege when it can be shown that the defendant has an interest or duty, whether legal, social or moral, to communicate the information and the recipient has the corresponding interest or duty to receive the information. In this sense, the defence attaches itself to the *occasion*. As stated by Lord Atkinson in *Adam v Ward* [1917] AC 309 at 334 ("*Adam v Ward*"), the *reciprocity* of duty (between the communicator of the defamatory article and the recipient) is essential. It is the existence, *in fact*, of this duty or interest, not merely the defendant's belief in its existence, which is relevant to the question whether the occasion was or was not privileged.

90 This approach is succinctly summarised in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193, where at [63] it was stated that:

> ... the court must consider all the circumstances and ask whether *this* publisher had a duty to publish or an interest in publishing *this* defamatory communication to *this* recipient. It does not ask whether the communication is for the common convenience and welfare of society. It does not, for example, ask whether it is for the common convenience and welfare of society to report that an employee has a criminal conviction. Instead, it asks whether this publisher had a duty to inform this recipient that the latter's employee had been convicted of a particular offence and whether this recipient had an interest in receiving this information. That will depend on all the circumstances of the case. Depending on those circumstances, for example, there may be no corresponding duty and interest where the conviction occurred many years ago or where it could not possibly affect the employment.
>
> [emphasis in original]

91 The defence protects a wide range of interests. In general, the law does not restrict the interests which the defendant may protect by reference to qualified privilege. Statements made in the protection or furtherance of a private interest are also covered (see for example *Hytech Builders Pte Ltd v Goh Teng Poh Karen* [2008] 3 SLR(R) 236 ("*Hytech Builders*"). In the majority of the cases, the interests protected have been business interests. As can be seen, it is important that the

communicator believes that the communication is true. There must also be no malice on the part of the defendant. As stated in *The Law of Torts in Singapore* at para 13.069, "where the Defendant makes a statement with a view to protecting his or her self-interests, such statements are privileged to the extent that they are published *bona fide* and are relevant and necessary for protecting such interests."

92 Malice is generally proven in two ways. The first is where it can be shown that the defendant had knowledge of falsity or where there was recklessness or lack of belief in the defamatory statement. The second is where although the defendant may have a genuine or honest belief in the truth of the defamatory statement his *dominant* intention is to injure the plaintiff or some other improper motive. As explained by the Court of Appeal in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 at [38]:

> … The dominant motive test has no relevance if the defendant has no honest belief in the truth of what he is publishing. The fact that the defendant did not have a dominant motive of injuring the plaintiff did not necessarily mean that the publication of the defamatory statements was not made with malice. The word 'malice' is used in a special sense in the law of defamation. If a defendant knows that what he is publishing is false, there is express malice in law. In the other parts of his speech, Lord Diplock referred to other instances of improper motives which would destroy the privilege, such as personal spite or the abuse of the occasion to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. In such instances, the defendant would lose the benefit of the privilege *despite his positive belief that what he said or wrote was true*. Where the defendant had no belief that what he published was true or, worse, if he knew that what he published was untrue (as in the present case), it would have been an a fortiori case that the protection of the privilege would have been lost.
>
> [emphasis in original]

Fair comment

93 In order to rely on the defence of fair comment, the defendant must prove four elements:

> (a) the words complained of are comments, though they may consist of or include inference[s] of facts;
>
> (b) the comment is on a matter of public interest;
>
> (c) the comment is based on facts; and
>
> (d) the comment is one which a fair-minded person can honestly make on the facts proved.

See *Review Publishing* at [139], citing with approval *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1983-1984] SLR(R) 745 at [18] and *Oversea-Chinese Banking Corp Ltd v Wright Norman* [1994] 3 SLR(R) 410 at [24]. I note in passing that the defence of fair comment is also defeated by malice. Malice in this context requires proof that the defendant did not genuinely believe what he has stated.

94 As identified in *Review Publishing*, the challenge is to distinguish a comment from a statement of fact, as the defence only applies to comments and not imputations of facts. The Court of Appeal in *Review Publishing* (at [140]) cited with approval the following passage from Doris Chia & Rueben Mathiavaranam, *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008) ("*Evans on*

Defamation") at p 103, where the learned authors state:

> It will often be very difficult to decide whether a given statement expresses a comment or [an] opinion, or by contrast constitutes an allegation of fact. The same words published in one context may be statement[s] of fact, yet in another may be comment[s]. Therefore, whether this element of the defence is established is one of fact, dependent upon the nature of the imputation conveyed, and the context and circumstances in which it is published. The test in deciding whether the words are fact or comment is an objective one - namely, whether an ordinary, reasonable reader on reading the whole article would understand the words as comment[s] or [as] statements of fact. The statement must be recognisable as [a] comment 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.

95 It should be borne in mind that the burden lies on the defendant to distinguish clearly between his statements which are his comments as opposed to allegations of facts. If the defendant fails to distinguish clearly between statements of facts and comments, then the statements may not attract the defence of fair comment. As explained by Fletcher Moulton LJ in *Hunt v The Star Newspaper Co Ltd* [1908] 2 KB 309 ("Hunt") at 319-320:

> The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, 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 ... 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 [a] statement of fact, cannot be protected by the plea of fair comment.
>
> [Emphasis added]

96 As helpfully suggested by the Court of Appeal in *Review Publishing*, a comment has been said to be "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark, observance, etc."

Application of the law

The Second Facebook Post

97 The defence pleaded by the Defendant for the two Facebook posts is that of justification and fair comment. It is explained in *The Law of Torts in Singapore* at para 13.012 that "the underlying rationale for the defence of fair comment is the right of free speech and promotion of open discussion." The discussion must, however, be on a matter of public interest.

98 Turning first to fair comment, in posting the Facebook posts, it was asserted that [note: 30] :

> Roy was expressing his own sincerely-held views about the manner in which a charity (Mercy Relief) accounted for donations (the Kairos Donated Boats).

99 As mentioned above, it must be shown that the Second Facebook Post is one of comment, rather than of an allegation of fact. To that end, I found the following passage as pertinently noted in Geoffrey Robertson & Andrew Nicol, *Robertson & Nicol on Media Law* (Sweet & Maxwell, 4th Ed, 2002) at p 120 instructive:

> The fair comment defence relates only to *comment* - to statements of opinion and not to statements of fact. This is the most important, and most difficult, distinction in the entire law of libel. ... Writers can help to characterise their criticisms as comment with phrases like "it seems to me", "in my judgment", "in other words", etc., although such devices will not always be conclusive. ... *Where a defamatory remark is made baldly, without reference to any fact from which the remark could be inferred, it is not likely to be defensible as comment, especially if it imputes dishonesty or dishonourable conduct.*
>
> [Emphasis added]

100 At the end of the day, a common sense approach must be taken in determining whether or not something is a comment. Much will depend on the context, and the court must consider how the statement would strike the ordinary reasonable reader, *ie* whether it would be recognisable by the ordinary reader as a comment or a statement of fact – see *Hytech Builders* at [18]. Having all this in mind, in my judgment, I find that the Defendants can rely on the defence of fair comment. As much as the Defendants' Second Facebook Post was suggestive of the Plaintiffs engaging in some form of business malpractice, that being the sting of the defamatory publication (as found in [43]), I am of the view that the post would be interpreted as Roy expressing his concerns as to what he thought might have gone wrong. Roy had stated (see above at [41]):

> We support NGOs and gave them huge discounts and donations. We hope that they will aknowledge [*sic*] and not be sold or passed off as other supplier's items at prices we do not know.
>
> …
>
> We [*sic*] supplied through a 3rd party giving them a huge corporate discount and we hope it was not resold to them instead. That's our concern.

101 While there is some difficulty interpreting whether this should be considered as a statement of fact or opinion (understandably so, as acknowledged by the authorities discussed above), the use of the words "hope" and the phrase "that's our concern" demonstrate that this was Roy's interpretation of what was going on, rather than to expressly allege a fact. In this manner, I am prepared to find that these were statements of comments rather than statements of fact.

102 I am also of the view that these comments were premised on facts such that a fair-minded person could have honestly made the comments. It must be remembered that Roy had emailed Mercy Relief on 29 November 2011 and sought an acknowledgment of the Donated Kairos Items, as well as the discounts that the Defendants had given the Plaintiffs. The Defendants never received a response to this letter until sometime during mid-December 2011. Just prior to this, Roy had also received a number of queries from the Plaintiffs questioning him on his contact with the SRC. In the context of

the situation, it is my judgment that Roy's comments attracted the defence of fair comment.

103 It is, therefore, not necessary to consider the defence of justification. Nevertheless for the sake of completeness, to the extent that the Second Facebook Post sets out defamatory statements of fact, I am not satisfied that the defence of justification has been made out. In particular, aside from copyright infringement in respect of certain photographs and brochures belonging to the Defendants, there is no proof that the Plaintiffs have engaged in any criminal or illegal business activity. As will be discussed later, whilst I have found that copyright in some photographs and brochures were infringed, no passing off has been committed by the Plaintiffs. The fact that the Plaintiffs committed some incidental acts of copyright infringement in respect of these works does not support or justify the conclusion that the Plaintiffs are guilty of wider business malpractice. To be clear, there is no doubt on the evidence that the 18 boats obtained by the Plaintiffs and supplied to Mercy Relief for flood relief use in Thailand were indeed donated without payment from Mercy Relief. There is also no doubting that Mercy Relief was aware that another two used boats had been donated by Roy.

The email chain

104 The primary defence the Defendants rely on for the email chain is the defence of qualified privilege. [note: 31] To this end, it was asserted that Roy had a legitimate interest in:

(a) seeking clarification as to whether Mercy Relief regarded Kairos as having donated two boats, and whether Golden Season received any consideration for the boats that were supposedly donated by it;

(b) expressing his view, as a donor to Mercy Relief, on the propriety of Golden Season wearing the hats of both fundraiser and supplier;

(c) expressing his view that Golden Season had passed off the boats purchased from Kairos as the boats of Golden Season;

(d) expressing his concerns about Mercy Relief, given the development of the communication between him and Mercy Relief, the relationship Tedric shared with Hassan, and Hassan's previous conviction; and

(e) alerting Mercy Relief that Golden Season (and/or Tedric) had used Mercy Relief's photographs illegally in breach of Mercy Relief's copyright.

105 In order to rely on the defence of qualified privilege, Roy must be able to prove that he has a *legitimate* interest in communicating this information to Mercy Relief, and likewise, Mercy Relief must have a corresponding interest or duty to receive it. It is generally accepted that some leeway will be given in discerning what is a *legitimate* interest and the recipient's duty or interest to receive the information. Eventually, the ultimate question is whether the disputed words were "fairly warranted by the occasion" (see *Hady Hartanto* at [174]). The legal question is, therefore, whether Roy had a duty or interest in communicating the contents of the chain of emails to Mercy Relief.

106 Considering all the circumstances of the case, I find that Roy did have a legitimate interest to communicate, and likewise, Mercy Relief did have a corresponding interest to receive the information on matters pertaining to the two Kairos boats that Roy had donated and the matter of the discounts that the Defendants gave to Golden Season but which he thought might not have been extended to Mercy Relief. It must be remembered that the two Kairos boats were donations to a charitable

organisation. If there was any reason to suspect that the donation was misused or did not make it to the intended charity, it would be reasonable to expect the donor to inquire and set out his suspicions as to what happened to the donations. As the donor of the items, Roy had a right to know what happened to his goods and whether or not Mercy Relief had received them. In that manner, I also find that Roy had the interest to know whether Kairos was being acknowledged for these donations. The confusion caused by the replies as found in the chain of emails is perhaps more understandable given that Mercy Relief had already acknowledged the Defendants' contributions in a letter dated 21 October 2011. This letter was sent to the Plaintiffs, but never made its way to the Defendants.

107 Despite this, I find that the Defendants cannot rely on the defence of qualified privilege because of malice. As stated above, malice is generally proven in two ways – first, where the defendant had knowledge of falsity, recklessness, or lack of belief in the defamatory statement, and second, where the defendant's *dominant* intention is to injure the plaintiff or some other improper motive. At the end of the day, malice in the latter sense is a matter of intention, which can only be discerned from the actions of the Defendants. To this end, three observations can be made.

108 First, while Roy had a legitimate interest to pursue the above two mentioned matters, the contents of the chain of emails clearly set out extraneous matters above and on top of Roy's legitimate interest. To this end, the introduction of extraneous matter which falls outside of this legitimate interest can be evidence of malice on the part of the Defendants. As mentioned in *Adam v Ward* at 318:

> Such malice may be inferred either from the terms of the communication itself, as if the language be unnecessarily strong, or from any facts which show that the defendant in publishing the libel was actuated by spite or some indirect motive. 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, inasmuch as the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication.
>
> [Emphasis added]

109 While I have some sympathy for Roy given the relatively slow responses given by Mercy Relief, I find that it was unnecessary for Roy to have included statements which went clearly beyond these two matters. This included for example, the insinuation that Roy's family was in danger and that he had to report the matter to the police for the safety of his family, and that all "proofs" were in the possession of Roy's elders and advisors for safe keeping. This, as Roy himself had admitted, was clearly not the case as the Plaintiffs had not conducted themselves in anyway where there could have been a reasonable apprehension of danger.

110 Second, I also considered the tone and the language of the emails. Exceptionally strong language can reveal an intention to convey a certain message that may not be expressly stated. In the emails, Roy had chosen to use phrases such as:

(a) "due to his ethics"; [note: 32]

(b) "Please be warned that righteous [*sic*] reigns and may the grace be upon him"; [note: 33]

(c) "This is a breach of trust"; [note: 34]

(d) "What would a member of the public think if this was in the media?"; [note: 35]

(e) "I also serve in a few committees and serve my country just like you so as a volunteer so I appreciate that this matter is resolved swift and fast with due diligence"; [note: 36]

(f) "But what was mentioned by Golden Seasons to clients is really misleading with such bold statement"; [note: 37]

(g) "Again he said his new stocks will arrive in December. So did MR buy any supplies from Golden Season after that? Facts are facts and cannot be lied. Perhaps you would like to report this to the police and COC if MR have been mislead"; and [note: 38]

(h) "I trust that this official email be kept to this number of people being sent to and that this email should not be seen by tedric." [note: 39]

111 I contrasted this to the case of *Hytech Builders*. In that case, the alleged defamatory statement was as follows:

> I have checked around in the industry and I am alarmed to learn that Hytech Builders is on the verge of collapse as a company!

This statement appeared in an email sent by a home owner to the developer, expressing her concerns that the contractor, Hytech Builders, was on the brink of bankruptcy. The language employed by the defendant in *Hytech Builders* can be strongly contrasted with the language used in this case. In my opinion, Roy's choice of words and language indicated that the purpose of these emails went beyond expressing his grievances, confusion, or even suspicions.

112 Finally, while Roy had a legitimate interest to pursue these two matters, I found it significant that Roy *did not contact the Plaintiffs* to clarify these matters. After the heated exchange of emails between Roy and the Plaintiffs where the Plaintiffs had told the Defendants not to contact the Plaintiffs' clients directly, Roy effectively stopped communicating with the Plaintiffs - the last email being sent on 22 November 2011. Roy then chose to directly communicate his suspicions to Mercy Relief through a barrage of emails. In fact, a number of these suspicions could have easily been verified if the parties had simply communicated with each other. For example, the Defendants' allegation that the Plaintiffs had breached Mercy Relief's copyright in using their photographs would have been verified to be untrue. In a letter from Mercy Relief's solicitors to the Defendants' solicitors, Hassan clarified that permission had been sought for the Plaintiffs to use their photographs on its website. [note: 40]

113 Apart from the Facebook posts, Roy also went on to file a police report and a commissioner of charities report. Even without considering the veracity of the content of the reports, I find that these actions, considered cumulatively, speak of some malicious intent on the part of the Defendants.

114 Considering these three points, I am of the view that the Defendants were motivated by some malicious intent in writing these emails to Mercy Relief. It may very well have been the case that certain information should have been conveyed to Roy much earlier by Mercy Relief and that Roy found himself in a perplexing and confusing situation over the donations, especially in light of miscommunications leading to Roy taking an inaccurate perspective of the whole situation. Be that as

it may, while it is understandable why Roy felt aggrieved and had to express his frustration at the situation, the law does not condone those who seek to defame others as an outlet for their frustration. It is a matter of perspective – what was the whole point of the communication of the defamatory material?

115 In this case, I find that the objective of the email was not to highlight the two matters which were of legitimate interest to Roy, which would have caused the Plaintiffs to be defamed incidentally. Instead, the point of the emails was to defame the Plaintiffs, and the two matters of legitimate interest, in addition to extraneous material were included, and were used as examples to support the point. Although not conclusive, an added layer of circumspection was appropriate given that the Defendants were essentially competing with the Plaintiffs in the area of inflatable boats and disaster relief during this period of time when these emails were being exchanged. I, therefore, find that the Defendants cannot rely on the defence of qualified privilege for the chain of emails.

116 For completeness, whether or not the defence of justification applies (to one particular sting) depends on whether the Plaintiffs have infringed upon the copyright of the Defendants. As will be seen below, the claim for copyright infringement succeeds but not the claim for passing off. Apart from this issue, it is clear that the defence of justification cannot apply to the matter of discounts and reselling of the boats from the Plaintiffs to Mercy Relief – the boats were indeed donated to Mercy Relief. To the extent that allegations were also made of conflict of interest, improper fund raising *etc*., I am not satisfied that the facts before me go anywhere close to establishing the defence.

Damages for defamation

117 I find the Defendants liable for defamation for the chain of emails sent to Mercy Relief, and now move on to consider the quantum of damages that should be awarded to the Plaintiffs. Before doing so, however, some clarification needs to be made as to exactly who has been defamed. For ease of reference, the above analysis had generally considered the Plaintiffs collectively, *ie*, Tedric, Golden Season and Designer.SG together. However, for the purposes of damages, especially in considering whether aggravated or exemplary damages should be awarded, it is necessary to consider whether it is one or all of the Plaintiffs that have been defamed. This is critical because corporations, unlike individuals, are not able to rely on "injured feelings and hurt" as a kind of damage suffered. Aggravated damages are usually awarded to compensate such losses.

Who has been defamed?

118 The answer to the question above must be derived from the plain ordinary reading of the defamatory material by a reasonable man. At the very least, it is clear that the Third Plaintiff, Tedric, has been defamed. The chain of emails constantly refers to Tedric and the emails are worded such that it is suggested that Tedric is in control of the First Plaintiff, Golden Season, as well as the Second Plaintiff, Designer.SG, and that he has been the mastermind behind the whole incident. Although both Golden Season and Designer.SG have been mentioned in the emails, the thrust of the emails and in fact, the defamatory "sting" of the email appears to be centred on how Tedric has allegedly cheated both Mercy Relief and the Defendants in his dealings with them. It is also apparent that these allegations arose in the context of Tedric being the "Entrepreneur from Designer.SG" and "the Marketing Director of Golden Season".

119 The question before me therefore, is whether as a result of this, the First and Second Plaintiff are also defamed. Taking a plain and ordinary reading of the defamatory material, would the defamatory sting reasonably refer to Golden Season and Designer.SG?

120 The point has been made earlier that it is necessary that the defamatory words are understood as referring to the Plaintiffs. It follows that a company will not be able to maintain an action for defamation if the defamatory words refer to the officers or members of a company and not the company. The case of *Duke v University of Salford* [2013] EWHC 196 (QB) is illustrative. The defendant had published a blog whereby members of the public or students of the plaintiff university were encouraged to make contributions to an ongoing discussion either anonymously or by way of pseudonyms. One of the main functions of the blog was to provide a platform for criticism of various aspects of the University's administration. Two individuals of the university administration were often singled out. The defendant applied to have the action struck out. The application was dismissed. He appealed, maintaining that the defamatory words as found in the blog were not in reference to the university, but to certain individuals, and therefore, the university could not maintain the action. The appeal was allowed, and the action struck out, the court finding that "in substance and reality, this [was] an action about allegations against individuals rather than against the University itself".

121 That is not to say that a company cannot be defamed when its officers have been defamed. Much will depend on exactly what the officer was defamed of. As stated at para 8.17 of *Gatley:*

> To take an extreme case, a trading company could clearly have no action in respect of a statement imputing sexual promiscuity to its managing director or alleging that he had murdered his wife. Where the imputation concerns a "business" matter more difficult questions of degree will arise but the extent to which the person directly defamed controls the company and can therefore be regarded as its *alter ego* will be a relevant consideration. [Emphasis in original]

122 This is also reflected in the decision of *Bargold Pty Ltd v Mirror Newspapers Ltd & Anor* [1981] 1 NSWLR 9, where Hunt J at 10 said:

> … where such matter reflects solely upon a director or an officer of a company, the company itself cannot complain of its publication, but the emphasis must be placed upon the word 'solely': *Bognor Regis Urban District Council v Campion* [1972] 2 QB 169 at p. 175. However, an imputation concerning such a director or officer may in many cases reflect also upon the company itself; whether it may or does must depend upon the part that director or officer is alleged to have played in the operations of the company and upon the extent to which the one is identified with or considered to be the alter ego of the other.

123 In *Hunt Australia Pty Ltd v Davidsons' Arnhem Land Safaris Pty Ltd* (2000) 179 ALR 738 ("*Hunt Australia*"), the Managing Director of the plaintiff company was said to be a liar. The judge at first instance held that the plaintiff company was also defamed by virtue of the fact that the Managing Director was the *alter ego* of the company – he and his company were so closely linked in the industry that they were identified as one and the same. An attack on the character and integrity of the Managing Director was therefore an attack on the character and integrity of the plaintiff company. On appeal, the court agreed with the findings of the judge at first instance, holding that it was a fair and reasonable reading of the defamatory words, such that the plaintiff company was also defamed. In so holding, the court relied on the decision in *Bargold*, where Hunt J at 10 said:

> The article identifies the plaintiff company as being the 'latest venture' of Mr Alexander Barton who, it is said, runs the company with his son, Thomas Barton. A great deal of attention is paid by the article to Mr Alexander Barton personally. It is argued by the defendants that matter disparaging of Mr Barton is irrelevant to the question of what is disparaging of the plaintiff company. I accept that where such matter reflects solely upon a director or an officer of a company, the company itself cannot complain of its publication, but the emphasis must be placed upon the word solely … However, an imputation concerning such a director or officer may in many

cases reflect also upon the company itself …"

124 Applying this to the facts before me, I am of the view that the email chain is capable of referring to Tedric as well as Golden Season, but (with a few exceptions) not to Designer.SG. Throughout the emails, it was either expressly mentioned or implied that Tedric was a cheat, had committed a breach of trust, and was dishonest. It is also accepted that Golden Season was the main vehicle through which Tedric had made his purchases from the Defendants and his donations to Mercy Relief and SRC. I am also of the view that Mercy Relief was used to seeing Tedric and Golden Season synonymously, in that they were so commonly associated with each other. This is to be contrasted with Designer.SG, which is a relatively young (new) company and which is hardly mentioned at all in the chain of emails. As a result, I am of the view that Tedric and Golden Season have been defamed by the chain of emails, insofar as the references to the character of Tedric would be imputed onto Golden Season as a company being operated by Tedric. As such, Tedric and Golden Season can claim for damages.

125 For completeness, the Court notes that Designer.SG was mentioned in some of the emails. These include Email 3 which states that Roy thought he had dealt with Tedric of Designer.SG and mentions that some bills had not been paid by Tedric of Designer.SG. Similarly in Email 4, it is again stated that Roy thought he was dealing at the outset with Tedric of Designer.SG. The crux of the passing references to Designer.SG is that when Roy first dealt with Tedric his understanding was that Tedric was acting in his position as a director of Designer.SG. It will be recalled that Designer.SG was a new company that was in the home décor business. Golden Season, on the other hand, was a much more established company dealing in military and humanitarian relief products. Tedric was the Sales Director of Golden Season.

126 It is clear that Mercy Relief and other charitable organisations dealt with Golden Season for supplies of relief products such as ready to go meals and the like. Even if the statement that Tedric of Designer.SG had outstanding bills with the Defendants is a direct reference to the Second Plaintiff, I am not satisfied that the other imputations (*ie*, cheating or improper business practices) extend beyond Tedric and Golden Season.

127 To be clear, Email 4 states that:

> We will still extend our inflatable products to your NGO at corporate rates directly for future flood disaster relief and will not deal with *tedric ling* from Designer.Sg as he has also not paid for some of the items still owed to my company.
>
> [emphasis added]

This statement on its own and in the context of the email as a whole is directed at Tedric Ling, the Third Plaintiff.

128 Email 6 states, *inter alia*, that:

> I have never mention [*sic*] that we sold to your organization nor copied from your website. It was given by designer.sg to me by email and yet Tedric did this much later on…. (was it with your permission ??)

The Statement of Claim pleads that Email 6 is defamatory *inter alia* because it meant that Designer.SG "gave the Defendants permission to use MR photographs in breach of MR's copyright." I do not agree that this is the natural inference to be drawn. Email 6 is directed largely at the First

Plaintiff and contains the statement that Golden Season should be warned not to use the photographs taken with the Thai Prime Minister.

129 Email 7 is pleaded as containing *inter alia* the statement that Tedric had begun his discussions as a representative of his furniture company whereas it is now Golden Season. I do not agree that the implication behind this is that the Second Plaintiff gave the Defendants permission to commit copyright infringement.

130 Email 8 as pleaded contains *inter alia* statements essentially to the effect that the Defendants thought Tedric was dealing in his capacity as an officer of Designer.SG and that they will still claim from Designer.SG until they pay up. Email 8 is pleaded as defamatory of Designer.SG in that it means it owes outstanding debts. Other statements are said to be defamatory in that they suggest Designer.SG gave permission to use photographs in breach of Mercy Relief's copyright. In so far as the sting of debts is concerned, I am of the view that this statement is primarily directed towards Tedric and Golden Season. The same is true of the second sting.

131 In any case, I note in passing that even if there is a defamatory meaning directed at Designer.SG, namely that Designer.SG is not able to meet its debts or that it was experiencing some financial difficulties, there is little evidence that this has resulted in any loss or damage to Designer.SG or that its business reputation has been damaged in any manner. Indeed looking at the few references to Designer.SG and unpaid bills and photographs in the context of the emails as a whole I am not satisfied that the statement would lower the standing of Designer.SG as opposed to Tedric.

Quantum of damages

132 I now turn to the quantum of damages that is to be awarded to the First Plaintiff and the Third Plaintiff, Golden Season and Tedric respectively. For ease of reference, I refer to them as the "Plaintiffs" save where necessary to deal with their claims separately.

133 Counsel for the Plaintiffs sought to persuade me that damages awarded should not be limited to general damages but should also include aggravated and exemplary damages. General damages in libel actions are meant to vindicate the plaintiff's reputation as well as to afford compensatory redress for injury to the plaintiff's reputation and feelings.

134 As discussed above, it is clear that a company can claim for general damages for injury caused to its business reputation. Leaving aside claims for consequential damage (loss of business) it has been said that a company is unlikely to be entitled to a really substantial award of damages (see *Gatley 2013* at para 9.17). Much of course will depend on whether the defamation has injured the business goodwill of the company such that the business reputation of the company can only be vindicated by a "really substantial award". In many cases, it may be that in the absence of sufficient proof that the company has suffered loss of business the award to the company whilst more than nominal will be "small in commercial terms".

135 Counsel for the Plaintiffs, however, submitted that a company can claim for aggravated damages, in so far as the position at law was not clear, relying on the decision of the Court of the Appeal in *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110, where at [65], it was opined that:

> Only an individual can claim damages for distress. A corporate or business entity can only recover damages appropriate for vindication and (if pleaded) special damages for loss of business and

goodwill. We also note that the ability of a corporate plaintiff to recover aggravated damages for defamation has not been authoritatively settled (see, *eg*, the contrasting positions taken in the English High Court cases of *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397 and *Collins Stewart v The Financial Times Ltd* [2005] EWHC 262).

136 I am not persuaded that a corporate entity can or should be awarded aggravated damages. It is common understanding that aggravated damages are awarded for injury to feelings and pride in circumstances where the Defendant's conduct has aggravated the injury. Aggravated damages in this sense remain compensatory in nature, albeit in the nature of a more generous compensatory award. Even though the conduct of the defendant (exceptional or contumelious behaviour or motive) is an important consideration, the purpose of aggravated damages remains compensation and not punishment. Punishment falls within the domain of exemplary damages (see the English Law Commission's Report on Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997)).

137 It is hard to see how, on this basis, aggravated damages are applicable to a corporate entity. Whilst the English High Court in *Messenger Newspapers Group Ltd v National Graphical Association* [19984] 1 All ER 293 ("*Messenger Newspapers*") case awarded aggravated damages to a corporate plaintiff, the Court there was more concerned with the need to punish the defendant for his deliberate wrong doing (see also *Gatley 2013* at para 9.20). On this basis, *Messenger Newspapers* is really a decision on *exemplary* damages rather than *aggravated* damages. Indeed, the court in *Messenger Newspapers* made clear that the award was not in respect of injury to feelings.

138 In any case, as will be discussed below, in my view the losses suffered by the First Plaintiff can be adequately compensated with an award of general damages.

139 In deciding the quantum of damages, the comments of the Court of Appeal in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2009] 1 SLR(R) 642 at [72] and [73] are instructive:

> 72 … Relevant factors would include the gravity of the libel (*eg*, allegations relating to the integrity or the truthfulness of a plaintiff are amongst the most serious), the extent of the circulation of the libel and any repetition of it. The court has to take into account any mitigating features and any relevant aggravating conduct on the part of the defendant. Retraction or apology, if any, is a matter tending to mitigate damages. Malice of the defendant, in contrast, is a n aggravating factor. Also of relevance is the conduct of the plaintiff and his standing in society. Equally, the defendant's conduct of the proceedings and at the trial itself might be a basis for aggravating or increasing the damages awarded to redress the injury to the plaintiff's feelings. In that connection, the court will generally consider the chronology of the entire proceedings so as to see to what extent (if any) the defendant's conduct should impact upon the compensation to be awarded to the plaintiff.
>
> 73 Lastly, the size of the award has to be an amount that represents a fair and reasonable sum commensurate with or proportionate to the damage which the plaintiff has suffered to his reputation, standing and good name. It will also have to be a sum that sufficiently vindicates his reputation (see *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071, per Lord Hailsham of St Marylebone LC). To this end, the court will look at the corpus of past awards for comparison or guidance. Broadly appropriate comparable cases can, if used with discretion, provide some guidance on the appropriate amount of damages to award in a particular case. This approach is especially useful in promoting a rationally sustainable and coherent regime for damages for libel, and, as a corollary, in avoiding "the grossly exorbitant awards so often made by juries in other jurisdictions" (per Thean JA in *Tang Liang Hong* (CA) ([21] supra) at [158]). Notably, in making

that remark, Thean JA was not in any way suggesting that, in adopting this approach, damages should be capped. That would be quite unrealistic, given the factual diversity of defamation cases. But, the fact that the damages awarded in previous cases inevitably depend on the facts and circumstances of each individual case is not a reason for rejecting the use of case precedents as comparables. In other words, the award of damages made in a case comparable to the case at hand is not sacrosanct, but it can hardly be thought to be irrelevant. The impression gathered from a review of the past awards in local cases is that the increase in damages seen in the cases is largely linked to the nature and the number of aggravating factors present in a particular case and, to an extent, the change in the purchasing power of money over the decades.

140 The factors that can be taken into account are numerous, some of which are touched on in para 9.5 of *Gatley 2013*, and include:

> …the conduct of the claimant, his credibility, his position and standing and the subjective impact that the libel has had on him, the nature of the libel, its gravity and the mode and extent of its publication, the absence or refusal of any retraction or apology, and the conduct of the defendant from the time when the libel was published down to the verdict.

141 Although the email chain is defamatory of the Plaintiffs and, to a certain extent, touched upon the Plaintiffs' honesty (in particular Tedric), it was framed in a very particular context, this being the acquisition of the boats for flood relief and the donation of the two boats (from Kairos) in this specific episode. As for the standing of the Plaintiffs, I note that Tedric has some reputation in the business world in Singapore. I also note that Golden Season is a 30-year old company of some repute, especially given its involvement in charity work. The Plaintiffs have asserted that the email chain was published to a number of other recipients apart from Mercy Relief, given that it was addressed to "friends and clients of Kairos Inflatables" [note: 41]. However, the Plaintiffs have not produced further evidence to substantiate this, and based on the email subject title alone and my observation of the demeanour of the witnesses, I am not prepared to find that the email chain was sent *en masse* to a large number of people.

142 As found above, I am satisfied, however, that the Second Defendant had malicious intent in writing the chain of emails. That is an aggravating factor to be taken into account when deciding the quantum of damages. Although there may have been some grounds for suspicion and unhappiness over the slow responses he was receiving, the Second Defendant, a mature businessman, had chosen to pursue his suspicions relentlessly without even bothering to communicate or check with the Plaintiffs. I am of the view that his pursuit of the truth was done with the intention of hurting Tedric as one the objectives. At the very least, the emails were sent in a reckless manner. To this extent, I am of the view that the chain of emails indeed bore a semblance of a personal "witch-hunt" by the Second Defendant (see *Arul Chandran v Chew Chin Aik Victor* [2001] 1 SLR(R) 86 at [48]). I was also not impressed that in raising their defence, the Defendants chose to bring up Hassan's past, which is, in my view, exceptionally irrelevant for the purposes of this trial. I also note that no apology has been extended by the Defendants to the Plaintiffs.

143 I took into account the following cases where the award of damages ranged from $20,000 to $80,000 (*A Balakrishnan v Nirumalan K Pillay* [1999] 2 SLR(R) 462 ("*Balakrishnan*"), *Ei-Nets Ltd v Yeo Nai Meng* [2004] 1 SLR(R) 153 ("*Ei-Nets Ltd*"), *TJ System (S) Pte Ltd v Ngow Kheong Shen (No 2)* [2003] SGHC 217 ("*TJ System*"), *Oei Hong Leong v Ban Song Long David* [2005] 3 SLR(R) 608 ("*Oei Hong Leong*")). A brief summary of the material facts for these cases in tabular form is as follows:

Case	Facts	Award
Balakrishnan	There were a number plaintiffs from either the legal industry, computer industry or the education industry. A defamatory article was released in a Tamil magazine, and an estimated 8,000 copies were sold.	The award was $20,000 or $30,000 for various plaintiffs.
Ei-Nets Ltd	The plaintiff was a director and businessman who was in charge of certain financial decisions of a company. Pursuant to an audit of these decisions, three reports were released, accusing the plaintiff of fraud and dishonesty. These were circulated to a limited number of other directors and staff.	$80,000 awarded
TJ System	The defendant wrote to 15 Cisco officers about the plaintiff company's "problems". The plaintiff company and a number of its directors then sued the defendant for defamation.	$20,000 awarded to each staff. $30,000 awarded to each director. $25,000 awarded to the company.
Oei Hong Leong	Plaintiff was a prominent businessman. Article published in Business Times that the plaintiff was not "rational" in passing certain resolutions. No malice found.	Not awarded because of defences, but it was opined $60,000 might be appropriate.

144 These cases, while not on all fours with the present case, provided *broad* guidelines and were useful benchmarks upon which to base the quantum of damages to be awarded (see *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 2 SLR(R) 971 at [57]). I also considered the principles laid down by the Court of Appeal in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 357.

145 In the present case, the Third Plaintiff, while a respectable businessman, was not a "public figure". Also, the extent of publication was low. Not only was the extent of publication low – it was primarily to Mercy Relief as an organisation. Taking all this into consideration and bearing in mind that the award of damages should be commensurate to the damage suffered by a plaintiff, I was of the view that the quantum of damages to be awarded would be largely similar to the awards in the above mentioned cases. I award the First Plaintiff $15,000 for the injury done to its business reputation. In the case of Tedric, the Third Plaintiff, I award him $30,000 by way of general damages for the injury to his reputation and the consequential injury to his feelings and dignity. Considering the presence of malice as well as the manner in which the events unfolded, I further award the Third Plaintiff aggravated damages of $20,000. The total amount of damages awarded to the Plaintiffs is, therefore, $65,000.

146 For completeness, I did not find that an award for exemplary damages was appropriate for this case. Whilst exemplary damages can be awarded, they are only recoverable "where compensatory damages after taking account all the circumstances of aggravation, remain an insufficient punishment" – see *Clerk and Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 20th Ed, 2010) ("*Clerk and Lindsell on Torts*") at para 22-231. Important factors include proof that the defendant at the time of publication was aware that he was committing the tort (or was acting recklessly) and still proceeded because of his hope of material gain. Whilst the Court accepts that the

Defendants were competitors of the Plaintiffs at the time the defamatory emails were sent, I am not satisfied that an award of exemplary damages is justified or necessary to punish the Defendants over and above the award of compensatory and aggravated damages which I have discussed earlier.

Loss of sales

147 Counsel for the Plaintiffs argued that Golden Season should be awarded "general/special damages" in relation to the loss of sales that it suffered because of the defamation. To that end, a table detailing the loss in sales for Golden Season was exhibited as follows: [note: 42]

Year	Mercy Relief	SRC
2008	$225,882.44	$352,867.42
2009	$205,588.13	$87,250.00
2010	$289,421.00	$0.00
2011	$2,387,343.45	$89,676.00
2012	$457,623.48	$0.00
2013 till 15 June 2013	$0.00	$0.00

148 The above table, based on the statement of accounts to Mercy Relief and the SRC, was said to demonstrate the drop in sales between 2011 and 2012 and between 2011 and 2013. Mercy Relief and the SRC were major clients of Golden Season, and represented up to 25% of their annual sales for certain years. It was submitted that in 2013, orders from Mercy Relief and SRC had come to a "standstill", and that Golden Season had suffered a loss of approximately $330,000 in total.

149 A plaintiff must be compensated by a defendant for a (financial) loss of business resulting from the wrongful commission of a tort. This is simply the law of damages in tort law – the compensation from the defendant is to redress and to right any loss suffered by the plaintiff, and to restore him to the position as if the tort was not committed. Equally so, the normal principles of causation and remoteness apply in deciding what damage the plaintiff is to be compensated for. The damage must flow from the wrongful commission of the tort, and cannot be too remote. Although there is some academic debate as to whether financial loss should fall under "general" or "special" damages, it is largely recognised that this can be claimed by the plaintiff.

150 In this case, based on the evidence before the Court, it does appear that sales from SRC and Mercy Relief reduced/stopped after the Plaintiffs started to get involved in litigation with the Defendants. However, the Plaintiffs must show that it is *because of the defamatory publications* by the Defendants which have led to the loss of sales. Where a claimant alleges that in consequence of being defamed by the defendant he has suffered special damage, it is always open to the latter to suggest that the damage in question is attributable to other causes (see *Clerk & Lindsell on Torts* at para 22-236). While there is no need to prove that SRC and Mercy Relief believed that the defamatory publications were true (see *Lynch v Knight* (1861) 9 HLC 577 and *Slipper v BBC* [1991] QB 283), it must be proved that it was because the Plaintiffs were defamed, and not because of some other reason, such as economic conditions for example, that a loss or fall in sales occurred.

151 To this end, the evidence of SRC and Mercy Relief is critical in understanding exactly *why* orders had stopped. [note: 43] When questioned as to why there were no orders placed with Golden

Season, Hassan had answered that they wanted to be more "cautious" and to see "how this case turns out". Hassan continually stressed that he kept telling Golden Season that he did "not want to be involved in this, and especially that period of time in October/November/December of 2011 and 2012". According to Hassan, this was a very crucial and critical time for the humanitarian sector in the region. Under cross-examination, Hassan was asked whether the opinion of the Plaintiffs had changed as a result of this episode. In reply, Hassan maintained that he always has been grateful to Golden Season for all the support, but reiterated that he was not appreciative of being "dragged into this whole commercial dispute".

152 Considering the evidence, I am not convinced that the sales from the SRC and Mercy relief dropped because of the defamatory publications, whether it is because SRC and Mercy Relief believed that they were true, or because they did not want to associate themselves with the Plaintiffs who had been defamed. In my view, the SRC and Mercy Relief had chosen to stop orders from the Plaintiffs because of complications arising from the litigation and the souring of the relationship between the Plaintiffs and the Defendants, one of its former suppliers.

153 As testified by Hassan, Mercy Relief was reluctant to get involved in the whole affair. It is, therefore, understandable that the organisations might turn to other suppliers for their necessary equipment. To this end, it is also telling that for 2012, Golden Season recorded $457,623.48 of sales from Mercy Relief, which is approximately twice the amount of sales recorded for each of the years from 2008 to 2010. Given that the "defamatory campaign" of the Defendants was from end 2011 to early 2012, this further reinforces the assessment that the drop in sales was not attributable to the publication of the defamatory statements. Despite the publications, Mercy Relief still placed orders with Golden Season in 2012. I also note that in 2010, the SRC did not place any orders with Golden Season. Why this was so was not explained. Therefore, without further evidence proving otherwise, I find that the fact that the SRC did not place orders with Golden Season from 2012 and the first half of 2013 cannot be solely attributed to the defamatory publications of the Defendant. Indeed, I note in passing that the evidence on the details as to the sales figures (Tables aside) was rather thin. In this case therefore, I am not prepared to find that the loss in sales were caused by the defamatory publications of the Defendants (namely, the email chain), and therefore, do not award damages for the alleged financial loss suffered by Golden Season.

154 In reaching this decision on the claim for loss of sales, the decision of the Court of Appeal in *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 ("*Sukamto Sia*") was instructive. In that case, VK Rajah JA (as he then was) for the Court of Appeal accepted (at [94]) that as a general proposition, a plaintiff is not precluded from claiming special damages in an action for defamation on top of a claim for general damage. It did not follow, however, that all consequential pecuniary loss was recoverable. The Court of Appeal also pointed out (at [96]) that in defamation cases, the propensity was for the plaintiff to claim damage to reputation: as general damages *tout court*. This was because a claim for special damages is also limited to a claim in respect of losses referable to the damage to reputation. Further, it was held (at [98]) that where the loss resulting from publication of the words complained of is not referable to the protected interest (reputation), the loss is not claimable even if the publication was factually causative of it. In the present case, the evidence supports the view that Mercy Relief and SRC likely reduced or stopped placement of orders because of the business dispute between the Plaintiffs and Defendants and not because of the defamatory statements *per se*.

Conclusion on defamation

155 To summarise, I find that the Plaintiffs' claim in defamation with regards to the email chain succeeds. The First Plaintiff (Golden Season) is awarded $15,000 for the injury done to its business reputation. The Third Plaintiff (Tedric) is awarded $30,000 by way of general damages and $20,000 by

way of aggravated damages. The total amount of damages awarded to the Plaintiffs is, therefore, $65,000.

156 For the avoidance of doubt, I note that the defamatory email chain was authored by the 2nd Defendant. It is clear that this was done in his personal capacity *and* as the director of the 1st Defendant. In *The Law of Torts in Singapore* at [18.014], the point is made that "as an artificial entity, the acts of a corporation are performed by its employees or officers or directors. Acts of such persons may be attributed to the corporation. The act of a person regarded as the directing mind and will of the corporation would generally be regarded as the act of the corporation itself". In any case, none of the parties have drawn any distinction between the 1st and 2nd Defendants.

157 Before moving on to discuss the Defendants' counterclaim in copyright infringement and passing off, I deal with the Plaintiffs' parallel claim in malicious falsehood.

Malicious falsehood and s 6(1) of the Defamation Act

158 Apart from the claim in defamation, the Plaintiffs also raised the tort of malicious falsehood and s 6(1) of the Defamation Act (Cap 75, 2014 Rev Ed) ("DA"). Section 6(1) of the DA reads as follows:

> **Slander of title, etc.**
>
> **6.**—(1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage —
>
> (*a*) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form.

159 Under common law, to succeed in a claim in malicious falsehood, the plaintiff must prove:

(a) that the defendant published to third parties words which are false;

(b) that they refer to the claimant or his property or his business;

(c) that they were published maliciously; and

(d) that special damage has followed as a direct and natural result of their publication.

See *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd and Others* [2008] 4 SLR 727 at [68] approved by the Court of Appeal in *Sukamto Sia*.

160 The tort of malicious falsehood, while similar to that of defamation, stands as a distinct cause of action on its own. Since I have already found that the Defendants are liable for defamation for the chain of emails, there would be no need to further discuss whether they would succeed under the tort of malicious falsehood since double recovery of damages is not allowed.

161 I do not find that the Plaintiffs will succeed under s 6(1) of the DA or the tort of malicious falsehood for either the Facebook posts or the SMS texts to Francis in any event. My reasons are as follows.

The Facebook posts

162 As I have found above, the First Facebook Post does not adequately refer to the Plaintiffs. This is a requirement under both the tort of malicious falsehood and s 6(1) of the DA. Although this is not explicitly mentioned under s 6(1) of the DA, the words "calculated to cause pecuniary damage to the plaintiff" have been interpreted by the Singapore High Court in *DHKW Marketing v Nature's Farm Pte Ltd* [1998] 3 SLR(R) 774 at [39] to mean "likely to produce the result" (see also *Gatley* at para 21.13). This was approved by the Court of Appeal in *Sukamto Sia* at [112], who went on to observe that a similar interpretation was adopted by the Supreme Court of New Zealand in *Customglass Boats Ltd v Salthouse Brothers Ltd* [1976] RPC 589 at 603, where similar legislation was interpreted. Clearly, if it is "likely" to cause pecuniary damage to the plaintiff, the plaintiff must be sufficiently referred to. This is not the case for the First Facebook Post.

163 I had found that the Second Facebook Post was defamatory, but that the defence of fair comment applied. It must be remembered that the Second Facebook Post was made at a time when Roy was relatively unaware of what was going on, and he had not proceeded to write the emails nor received any clarification as to what was going on. Given the wording of the Second Facebook Post, I do not find that there was malice in writing the Facebook post. I had briefly discussed the law on malice at [92] above, and would add that the Defendant's state of mind remains relevant to a finding as to whether there is malice (see *Sukamto Sia* at [52]). As noted in *Gatley* at para 21.7:

> There is no liability in malicious falsehood for a statement published in good faith. ... *Mere negligence is not malice* ... A statement false in fact and calculated to produce actual damage will therefore not support [an action in malicious falsehood] if it was made in the belief, even a careless belief, that it was true. *The defendant may have acted stupidly in asserting a right, yet if he bona fide believed such right to exist, no action lies*.
>
> [emphasis added]

164 The words of the learned authors do well to summarise both the position of the law and the actions of the Defendants in this case. Therefore, I find that the Plaintiffs' claim under the tort of malicious falsehood as well as s 6(1) of the DA does not succeed.

The SMS texts

165 Given my findings as elaborated at [74]-[82] above, I also find that the Plaintiffs' action does not succeed under the tort of malicious falsehood as well as s 6(1) of the DA for the SMS texts.

The Defendants' counterclaim for copyright

166 From November 2011 onwards, the Plaintiffs released public brochures and/or other printed matter bearing the Golden Season's names ("the Modified Brochures").

167 The Defendants assert that the Modified Brochures contained unauthorised reproductions of a number of works the Defendants claim copyright in. These works include:

No.	Description	Published
1	Brochure for KB 528XL entitled "Inflatable Sampan" built for fishing, rescue, leisure and military use	11 Mar 2011
2	Picture for KB 528XL	12 Feb 2011
3	Brochure for "Electric Pump"	7 Sept 2011

4	Picture for KB 430	20 Jan 2011
5	Brochure for "Markara Engines"	21 Mar 2011

I refer to these collectively as "the copyrighted works".

168 A copy of the copyrighted works and the infringing items were in the evidence before the Court. The following is a brief description of the main features of each copyright work:

(a) **S/n 1 Brochure for KB 528XL entitled "Inflatable Sampan" built for fishing, rescue, leisure and military use** – The Inflatable Sampan Brochure (printed on a single page) comprised, *inter alia*, a photograph of the inflatable boat bearing the Kairos brand, a representation of the Kairos Trade Mark. The textual information was largely concerned with the specifications of the boat: its dimensions, weight, seating capacity etc. The main heading was entitled "Inflatable Sampan built for Fishing, Rescue, Leisure & Military Use." The Defendants contact details were set out at the bottom of the page.

(b) **S/n 2 Picture for KB 528XL** – The photograph of the inflatable sampan KB528XL was of the boat at sea with two seated individuals engaged in fishing. This photograph was set out also in the Inflatable Sampan Brochure referred to above.

(c) **S/n 3 Brochure for "Electric Pump"** – This comprised two photographs of the pump in use together with specifications and a brief description of what the pump could be used for by means of seven bullet points. The brochure also set out the Defendants contact details and displayed the Kairos Brand in a prominent position.

(d) **S/n 4 Picture for KB 430** – This brochure (single page) bore another photograph of the inflatable boat under the description "Crossover between a Kayak and Boat!" The brochure set out the technical specifications as well as a brief description of the boat. There was also a photograph of an outboard motor branded "Makara" with the words that the Makara 2 stroke outboard engine was recommended. The Defendants contact details were set out at the bottom of the page with the Kairos Brand.

(e) **S/n 5 Brochure for Makara Engine** – These comprised enlarged photographs of the Makara branded outboard engines (of varying power) as well the specifications in a table form. The brochure included at the top the Makara Brand as well as the Kairos Brand.

Originality and authorship

169 I deal with a preliminary issue at the outset, which is whether the Defendants can claim to be the owner of the copyright in the works. Two points arise. First, are the works original? Second, are the Defendants the copyright owners?

170 According to the Defendants, the photographs listed at S/n 2 and S/n 4 in the table above were taken by Roy himself. The brochures listed at S/n 1, S/n 3 and S/n 5 in the table above (collectively referred to as "the brochures") were said to be designed by an employee of the Defendants known as Kushastha Tharusha Peiris ("Kusha"). [note: 44] On the other hand, the Plaintiffs argued that the Defendants had copied "word for word" some of the specifications of their boats from

another company in the USA, Saturn Inflatables. [note: 45]

171 The Plaintiffs tendered samples of the marketing material of Saturn Inflatables to demonstrate the similarities with the copyright works. Some similarities alluded to include:

(a) **Between the Defendants' brochure for KB 437 Crossover between Kayak and Boat and Saturn Inflatables' and Saturn Inflatable SK 430 webpage** – the exact wording of the phrases "wide beam hull design for stability. You can stand in a "KaBoat", "Front Spray Skirt with water deflector guard and rope lacing", "Marine grade plywood transom with a one way drain plug" and "Included: hand pump, repair kit, 2 oars and carry bag".

(b) **Between S/n 1 brochure for KB 528 XL and Saturn Inflatables' SK487XL webpage** – the technical specifications are the same and the exact use of the wording of the phrase "Included: hand pump, repair kit, 2 oars and carry bag".

(c) **Between S/n 3 and Saturn Inflatables' Electrical Pump webpage** – a list of other products which the electrical pump would be perfect for, with some minor adjustments, as well as the specifications of the product.

172 For completeness, I would add that the Plaintiffs did not appear to contest the originality of the photographs, that is to say the pictures listed at S/n 2 and S/n 4 and the photographs used in S/n 1, S/n 3 and S/n 5 in the table above, thereby accepting that the Defendants had indeed taken the photographs. In any case, a perusal of the marketing material of Saturn Inflatables does not show similar photographs. Furthermore, I also note that the Plaintiffs did not seem to adduce any evidence that showed that the S/n 5 had been copied. Indeed whilst the evidence could have been clearer, the Defendants' case was that Roy had instructed his employee to produce the brochure.

173 According to the Plaintiffs, these similarities should be taken into account in considering the Defendants' claim in copyright infringement. The point behind this assertion may have been to challenge whether the brochures were original works in which copyright could subsist in the first place (although this was not clear from the pleadings). I pause here to add that the similarities might also be relevant in determining whether the Plaintiffs had copied a substantial part of the Defendants' copyright works if these were indeed found to be original.

174 To the extent that the Plaintiffs are challenging originality, I do not find merit in the Plaintiffs' argument. Whilst the Plaintiffs assert that the specifications and text material set out in the Defendants brochures' were substantially the same and copied from Saturn Inflatables, I am satisfied that the Defendants' brochures are, as a whole, original works in which copyright subsists. It is important to note that it is each brochure *as a whole* that the Defendants assert copyright in. The question is whether each brochure as a whole is an original literary work. The fact that some parts may be copied from elsewhere does not mean that the work as a whole lacks originality for copyright purposes.

175 During cross-examination, Roy was questioned on the above-mentioned similarities. He testified that all he had done was to instruct his employee Kusha to design the brochure using his original photographs – he did not tell Kusha to copy anything. [note: 46] Whilst this may be so, this does not necessarily mean that any copyright in the copied Saturn Inflatables material was not infringed. I say no more on this since there is no claim by Saturn Inflatables for infringement and there is no need for me to pronounce on this.

176 Kusha was not called to give evidence. I also note that whilst the specifications were largely

similar to those in the Saturn Inflatables material (where they were also listed in a Table), Roy had explained (during cross-examination) that the specifications were also available from his supplier Rongcheng. The point behind this appears to be that the similarities in the specifications did not necessarily mean that the Defendants had copied the information from Saturn Inflatables. Nevertheless, given the exact phrases used (as set out above), the Plaintiffs' position is that the Defendants must have copied some of the information and specifications from Saturn Inflatables' material.

177 The difficulty for the Plaintiffs, however, is that even if this was the position, it does not follow that the Defendants' brochures were lacking in originality as a whole. Whilst this information (the specifications) was available on a webpage for Saturn Inflatables, the information in the Defendants' works was presented in the form of brochures. Although the specifications might be the same, the brochures were clearly designed to promote information to consumers in a different way. Take for example the Defendants' brochure for KB528XL [note: 47] (S/n 1 in the table above) compared against Saturn Inflatables' webpage for SK487XL. [note: 48] The Defendants' brochure is a one page brochure with two tables presenting the technical specifications of the product. There is a single picture of the product, and its main features are listed in point form. On the other hand, Saturn Inflatables' webpage for SK487XL is largely in prose form, contains customer reviews and has numerous videos and photographs of the boat. It is by far more comprehensive then the Defendants' brochure. Comparing the two, I am more than satisfied that while some information is the same, it is clearly being promoted and presented in a different way.

178 The evidence was that the photographs were taken by the Defendants and the Defendants' brochures were designed (in terms of the organisation and presentation of the information) by the Defendants. While the brochures as a whole may have been simple, simplicity *per se* does not prevent a work from acquiring copyright. All that is needed is that the author created it and has not slavishly copied it from another (see *Auvi Pte Ltd v Seah Siew Tee* [1991] 2 SLR(R) 786). For completeness, I also accept the Defendants' claim that the individual photographs are original artistic works in their own right.

179 For this reason, I am satisfied that the Defendants' photographs and brochures were original works in which copyright subsisted. The works were produced by the Second Defendant and an employee (Kusha) who was acting in the course of his employment.

Infringement by the Plaintiffs

180 In order for the Defendants to succeed on the counterclaim for copyright infringement, it is necessary to demonstrate that the Plaintiffs had indeed reproduced a substantial part of the copyright work without the licence of the copyright owner. This is a two-stage inquiry. Did the Plaintiffs copy from the copyright works? If so, was the material copied a substantial part of the copyright work?

181 Turning to the question of copying, it is well established that what is required is sufficient proof of a causal connection between the copyright works and the alleged infringements. The question as to whether the alleged copyist was consciously aware of the connection is irrelevant. In the absence of an admission of copying, the beginning of proof normally lies in establishing similarity together with proof of access (opportunity to copy) (see *LB Plastics Ltd v Swish Products Ltd* [1979] RPC 551 at 619 and *Creative Technology Ltd v Aztech Systems Pte Ltd* [1997] 1 SLR 621 at 634).

182 In this case, it is clear that that there are many significant points of similarity between the copyright works and the Modified Brochures. For example, the Plaintiffs' brochure promoting its "3 – 4

Man Inflatable Rescue Boat" was almost exactly the same as the Defendants' brochure for their boat KB 430 ("Crossover between Kayak and Boat"). [note: 49] Indeed, not only are these brochures almost the same in terms of informational content and arrangement it is to be noted that the Plaintiffs' brochure sets out an almost identical reproduction of the Defendants' photograph of KB 430 (S/n 4).

183 Similarly, a comparison between the Plaintiffs' brochure for the 6-8 man inflatable boat shows a strong resemblance to the Defendants' brochure for the KB 528XL (S/n 1). Even though there are some differences in terms of the branding and addresses it is noted that the details are the same. The photograph depicted in the Plaintiffs' brochure is also very similar to the Defendants' photograph of KB 528XL (S/n 2).

184 Turning to the brochures for the electric pumps, however, I do not think that the brochures used by the Plaintiffs and the Defendants (S/n 3) are materially the same. The photographs used are different, and while the brochure for the Plaintiffs promotes the "Key Features" of the electrical pump, S/n 3 instead promotes the "Perfect product[s]" which the electrical pump can be used together with.

185 Finally, in the case of the brochure for the Makara engines "10 HP" (the Defendants' brochure being S/n 5), there is also strong similarity between the text as well as the depicted photograph of the engine.

186 From the above, it is clear that a number of the Modified Brochures clearly made use of the pictures of the Defendants' boats (S/n 2 and S/n 4 of the copyright works). These appear to have been digitally modified to suit the design of the Modified Brochures. In any case, Tedric during cross-examination had in fact admitted that the Plaintiffs had copied these from the Defendants. [note: 50]

187 Looking at the evidence as a whole, I am satisfied that the Plaintiffs had indeed copied from the Defendants' brochures and photographs. The question that remains is whether the taking was substantial such as to amount to infringement.

188 In deciding this, the Court notes the well-established principle that substantiality is generally determined on a qualitative basis. Copyright is concerned with protecting original expression and not basic facts. Further, what is in issue is whether what has been copied is a substantial part of the copyright work (as opposed to the infringing work). In determining this, the Court is entitled to bear in mind the relative simplicity of expression in the work. Copyright, after all, is about protecting original expression.

189 Although copyright subsists in the copyright works, the brochures basically set out the specifications of the products along with additional descriptions of some other features of the products and in some cases, addresses and contact details. It is apparent that in the case of the boats, much of the technical information was copied by the Defendants from Saturn Inflatables. That said, it would not be surprising if the products were generally from the same manufacturer or the same line of manufacturers that the specifications of the products would be largely similar. The copying of a part of a copyright work which is not original to the copyright work will not ordinarily be regarded as a substantial part of the copyright work. For this reason, if the question of infringement (substantiality) rested solely on the taking of the technical specifications of the boats, I doubt that a case of substantial taking would have been made out in the case of the brochures for the boats. The picture however changes, literally and metaphorically, when the photographs are taken into account. The Court has found that these were taken by Roy and were original artistic works in their own right. These photographs were clearly taken and used by the Plaintiffs. Accordingly, I find (leaving aside the question of licence) that a case of infringement has been made out in respect of the photographs for

KB 430 and KB 528 XL.

190 In the case of the brochures for the Makara engine (S/n 5), it is noted that there is no evidence that the specifications and their arrangement in simple table form and the photographs were copied by the Defendants from elsewhere. That being so, I find on the evidence before me that the material taken from these brochures amounted to a substantial part of these works. It will be recalled that Roy's evidence was that he had instructed Kusha to produce the brochures.

191 In the case of the brochures for the electric pump, as I had observed above, I did not find that there was any similarity between the brochure of the Plaintiffs and that of the Defendants. I, therefore, find that there was no copying of the brochures for the electric pump.

192 The main defence the Plaintiffs raise is to be found in their assertion that there was a verbal reseller agreement (as briefly stated above at [13] –[16]) between them and the Defendants, where it was agreed that the Plaintiffs could develop brochures of Kairos' products without their logo. [note: 51]

193 Copyright infringement only arises where the act of reproduction is done without the licence of the copyright owner. The issue that needs to be addressed is whether there was in fact a verbal reseller agreement and if so whether permission (to use the copyrighted works) was granted by the Defendants as part of this agreement. The legal burden of establishing that the act of copying was done without the licence of the copyright falls on the shoulders of the copyright owner. That said, Roy's position is that no such licence or permission was granted to the Plaintiffs. The Plaintiffs, on the other hand, assert that a licence was indeed granted as part of the terms of an oral reseller agreement. To this end, oral evidence of the alleged agreement was led by the Plaintiffs. Whether or not this was in response to an evidential burden or otherwise, I am not satisfied that there was an oral reseller agreement as alleged or that, if there was, a licence to copy had been granted.

194 As briefly described above, according to the Plaintiffs, the verbal reseller agreement was reached at a meeting between the Plaintiffs and the Defendants that occurred after the Plaintiffs placed their second and third order with the Defendants and before 28 October 2011 (the date of the training session conducted by Francis). It was asserted that it was "verbally agreed that the marketing department of Golden Season could develop brochures of Kairos' products", and also that the Defendants had promised the Plaintiffs to remove their prices from the Internet to protect its resellers and not to post their prices on the Internet. In support of the existence of this agreement, the Plaintiffs argue that in a number of emails exchanged between the Defendants and them, the Defendants had used the term "reseller" in describing them. [note: 52]

195 Apart from the bare assertions made by the Plaintiffs, the only evidence that supports the Plaintiffs' case is these emails. At the very best, some inferences might be drawn from how the business relationship between the Plaintiffs and the Defendants developed. As submitted by the Plaintiffs, the Plaintiffs were the Defendants' "biggest customer at that time" and therefore according to the Plaintiffs an inference should be drawn that the Defendants would have agreed largely with their suggestion to allow the Plaintiffs to use the copyrighted works. The Plaintiffs also submit that it was only logical that the Defendants would have allowed this, if not, potential clients would go straight to the Defendants.

196 It might also be true that the Defendants had, to some extent, indicated their willingness to work with the Plaintiffs and to develop a formal reseller arrangement (exclusive or otherwise). To this end, some discussions may have taken place. However, there is no sufficient corroborating evidence

suggesting such an agreement was made. Tedric himself could not remember exactly when this meeting occurred. Given that this was an agreement between two corporate entities conducted by two businessmen, both having some experience in the business world, it would only be reasonable to expect some documentary proof, be it in the form of emails, contemporaneous notes, call logs, or messages evidencing the existence of such an agreement. There, however, remains none of this.

197 Even then, as pointed out by the Defendants, an agreement to appoint the Plaintiffs as reseller is distinct and different from an agreement allowing the use of the copyrighted works. Taking the Plaintiffs' case at its highest, the emails suggest that the Plaintiffs and Defendants *may* have struck some form of agreement *vis-à-vis* reselling the Defendants' products. However, even if I am willing to find that there was an oral reseller agreement between the parties, that in itself lends little weight to the Plaintiffs' arguments that there was an express agreement allowing them to use the copyrighted works. To be sure, an implied licence or an implied term granting such a licence would safeguard the Plaintiffs. That being said, however, there is little basis for such a finding.

198 I, therefore, find that the use and copying of the copyright works as discussed above were without the licence of the Defendant copyright owner and that the Defendants' counterclaim in copyright infringement succeeds save in the case of the brochure for the pumps.

199 For purposes of completeness, and by way of passing comment, this would also mean that the Defendants can rely on the defence of justification in so far as the defamatory statements relate to the Plaintiffs infringing on their copyrights.

The Defendants' counterclaim in trademark infringement

200 Apart from a counterclaim in copyright infringement, the Defendants have also counterclaimed against the Plaintiffs for passing off.

201 It is noted that from the pleadings and submissions, it is not entirely clear exactly what the Defendants are asserting in respect of passing off. In their defence and counterclaim (Amendment No. 2) dated 30 August 2013, the Defendants plead that "the Plaintiffs misrepresented and/or passed off Kairos Boats [(Model No. KB 430 and KB 528XL)] as being associated with the *First Defendant*, when that was not the case." [note: 53] The Defendants conclude by asking for an injunction against the Plaintiffs from "passing off the Passed Off Kairos Boats as being associated with the *First Plaintiff*". [note: 54]

202 Nevertheless, it appears that the Defendants' counterclaim is founded on the assertion that the Plaintiffs were "misrepresenting to the public that the Kairos boats were in fact Golden Season boats." This can be discerned from the numerous examples raised by the Defendants, such as how the Plaintiffs had represented to the SRC that the boats used in the Thailand floods were boats of Golden Season, how the Plaintiffs had referenced a photo of Kairos boats with the Thai Prime Minister Yingluck as Golden Season Boats, and how the Plaintiffs had replaced Kairos' trademarks in their brochures. In summary, as submitted by the Defendants, the Plaintiffs wanted to "pass off the Kairos business as being that of Golden Season." [note: 55]

203 As an observation, I note that the Defendants' pleadings (and submissions) rely only on the common law tort of passing off – there is no mention of or reliance on the Trade Marks Act (Cap 332, 2005 Rev Ed). The subsequent analysis therefore proceeds solely in respect of an action in passing off.

204 After considering the arguments of the parties, I find that the Plaintiffs are not liable for passing off.

The law

205 It is trite that in order to succeed in an action under the tort of passing off, a plaintiff must establish the "classical trinity" of goodwill, misrepresentation and damage (see *Novelty Pte Ltd v Amanresorts Ltd and another* [2009] 3 SLR(R) 216 ("*Amanresorts*") at [37]). Passing off in its classic form occurs when one trader represents his goods to be those of another trader. As summarised by Lord Oliver in *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 at 880:

> The law of passing off can be summarised in one short general proposition: no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff…Thirdly, he must demonstrate that he suffers or, in a *quia timet* action that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.

206 In this case, however, it appears that the Defendants do not claim that the Plaintiffs have represented the Plaintiffs' goods as those of the Defendants. It is, in fact, the converse – the Defendants claim that the Plaintiffs are representing *the Defendants'* goods as those of the Plaintiffs. This is, therefore, not a classic case of passing off, but instead, a case of "inverse passing off".

207 There have not been many cases on inverse passing off in Singapore, though the doctrine is clearly part of our law, as affirmed by the Singapore Court of Appeal in *Tessensohn Denyse Bernadette (trading as Clea Professional Image Consultants) v John Robert Powers School Inc and others* [1994] 3 SLR 308 ("*John Robert Powers School*").

208 To this end, I start with the observation that while "inverse passing off is not a nominate tort in its own right but is an example of an actionable misrepresentation to which the normal principles of passing off apply" (see *QB Net Co Ltd v Earnson Management (S) Pte Ltd and others* [2007] 1 SLR(R) 1 at [16]), the boundaries and scope of inverse passing off are not as well developed as classic passing off.

209 I begin with the decision of the Court of Appeal in *John Robert Powers School*, which affirmed the doctrine of inverse passing off. At [25], the Court of Appeal held that:

> It is clear to us that not only is it passing-off to misrepresent that one's goods or services were those of another, but *it is also passing-off to misrepresent the inverse: that another person's goods or services are one's own*. The three essential elements of passing off equally apply to such passing-off as well. Therefore, to succeed in an action for inverse passing-off, a plaintiff must prove that there is goodwill attached to their goods or services; that the defendants misrepresented themselves as the commercial source of the goods or services in question; and

that the plaintiff's goodwill was damaged as a consequence.

[Emphasis added]

210 In *John Robert Powers School*, the first respondent, John Robert Powers School Inc ("JRP"), was a well-known American company which operated the John Robert Powers School in the US providing courses on social development and self-improvement. The appellant obtained a franchisee license and operated a JRP school in Singapore. This franchise agreement was terminated on 14 February 1988. Thereafter, the appellant set up her own school under the name Clea Professional Image Consultants. The respondents later alleged, *inter alia*, that the appellant had passed off her school as JRP and her courses as JRP courses.

211 One of the issues that arose was whether, by using material previously owned by JRP, in terms of allowing access to students and teachers to the materials, the appellant was liable for "inverse passing off". At [26], the Court of Appeal affirmed the decision of the High Court, finding that:

> Copies of the JRP notes had been left on shelves for all to take without the notes containing any acknowledgement of their source. Anyone who took them would naturally have thought that they were the work of the appellant. Although the appellant did not distribute these notes to the students, they were left on the open shelves and were easily accessible to the students. The inference was that they were left there deliberately for certain purpose, *ie* to render them accessible to the students. Thus, by making the notes available in that manner, she was in fact holding out to her students and customers that the notes were the product of her own efforts.

212 At the High Court (see *John Robert Powers School Inc v Tessensohn Denyse Bernadette* [1993] 2 SLR(R) 798 ("*John Robert Powers School (HC)*"), the trial judge had cited the decisions of *Bristol Conservatories Ltd v Conservatories Custom Built Ltd* [1989] RPC 455 ("*Bristol Conservatories*") and *John Henderson & Sons v Alexander Munro* [1905] 7 F 636 ("*John Henderson*") in explaining the concept of inverse passing off. These decisions, in turn, are based on a number of English decisions which merit closer scrutiny.

213 A useful starting point is the decision of the English Court of Appeal in *Samuelson v Producers Distributing Co Ltd* (1931) 48 RPC 580 and at [1932] 1 Ch 201 ("*Samuelson*"). In *Samuelson*, the plaintiff wrote a theatrical sketch that was performed before the King and Queen and received good (laudatory) press notices. The defendants made a film said to be similar in some respects to the plaintiffs' sketch. It was admitted, however, that as a whole, it was different and did not constitute copyright infringement. The defendants advertised their film referencing the press notices (which had been deliberately modified) so as to make them appear to refer to the film. There was no reference to the plaintiff in the advertisement. It was submitted for the defendants that the claim could not lie in passing off because that form of action required a representation whereby other persons are induced to believe that the goods or the production of the defendants are the goods or production of the plaintiff.

214 The Court of Appeal rejected the defendant's argument, finding them liable for passing off. Although it was a unanimous decision, there are slight differences in the reasoning employed.

215 Lord Hanworth at 588 stated:

> It is a passing off action and the ground on which I think the plaintiff is entitled to complain is that, as I have said, in substance he remains the author of this sketch .... and, *if he was entitled to the authorship and the copyright and to the reproduction of his sketch, then the defendants*

have attempted to pass off and to make use of the atmosphere which belonged to the plaintiff, in favour of their production; and therefore it was right for the plaintiff to take proceedings.

[Emphasis added]

I note in passing that in the *Chancery Division Report* of the case, the equivalent passage from Lord Hanworth's judgment at 208 refers to "use of the reputation which belonged to the plaintiff's sketch" as opposed to the "atmosphere". No matter, the core of Lord Hanworth's reasoning appears to be founded on unfair competition or appropriation.

216 Lawrence LJ, on the other hand, framed the matter in a way which is perhaps closer to the classic form of passing off. At 592, he stated:

The plaintiff and his licensees had the exclusive right of making a film version of the sketch, and the defendant company, in effect, by the advertisement, said that their production was a film version of the plaintiff's sketch, *thereby misleading the public concerned into the belief that the defendants' production was a production which was one which the plaintiff alone could have produced*; *in other words, that it was the plaintiff's production*. To put it in other words, they were passing off on to the public their film production as being a film production of the plaintiff's sketch.

[Emphasis added]

In this way, it could be argued that this was a classic case of passing off instead of reverse passing off. As can be seen, Lawrence LJ held that the public would have thought that the defendant's production was produced by the plaintiff.

217 Romer LJ whilst acknowledging that this was not a classic case of passing went on to hold (at 593) that:

But the cases in which the court has restrained passing off in the popular and usual sense, are merely instances of the application by the court of a much wider principle, the principle being that the court will always interfere by injunction to restrain irreparable injury being done to the plaintiff's property. In the present case if, as we hold to be the case, the plaintiff was entitled to his copyright in 'The New Car', [his sketch) he was, by virtue of the Copyright Act, entitled to the sole right of producing the sketch in film form. That was an item of his property, and how it can be said that these advertisements might not cause irreparable damage to that property of the plaintiff passes my comprehension.

What is clear is that all three judges agreed that, even though the facts did not fall squarely within a classic case of passing off, the defendant was liable.

218 I turn next to the case of *Plomien Fuel Economiser Co Ltd v National School of Salesmanship Ltd* (1943) 60 RPC 209 ("*Plomein*"), which is another decision of the English Court of Appeal. In *Plomein*, the plaintiffs were manufacturers of a fuel economiser marketed under the name "Plomien". The defendants, who at one time acted as sale agents for the plaintiffs, broke that relationship and started themselves to market an economiser which was manufactured for them. It was alleged that the defendants engaged in a deliberate attempt to deceive their clients by putting forward their economiser as being the same as the plaintiffs. Specifically, it was alleged that they represented that certain tests which had been made were tests made in connection with the defendants' economiser. In fact, they were tests in respect of the plaintiffs' economiser. They represented that certain

economisers which had been fitted for a number of purchasers, and which were in fact the plaintiffs' economiser, were the defendants' economiser.

219 The Court of Appeal, likewise, found the defendants liable for passing off. It was argued there that no confusion had arisen. The fact being that none of the customers who purchased the goods from the defendants knew the plaintiffs. Lord Greene, however, disagreed and at 214, explained why the action would still succeed:

> It is perfectly true that there is no evidence that a single person who purchased an economiser from the defendants had ever heard of the plaintiffs; but in passing off there is no necessity that the person who is deceived should have known the name of the person who complains of the passing off. In many cases the name is not known at all. It is quite sufficient, in my opinion, to constitute passing off in fact, if a person being minded to obtain goods which are identified in his mind with a definite commercial source is led by false statements to accept goods coming from a different commercial source
>
> …
>
> Having got them in their shop, what do they do? *They do not sell those customers the goods which those customers have come to buy; they sell them goods of their own manufacture, which are quite different, in the sense that they are not the required manufacture.* If that is not passing off, I really do not know what is. It is perfectly true, and I am willing to assume, that not one single customer who went to the shop (I use the word 'shop' of course metaphorically, it was not a shop at all; it was done by orders by post and by travellers and so forth) had ever heard of the plaintiffs or ever heard that they put on the market an economiser. *That, to my mind, matters not one bit when it is realised that those customers were coming with the intention of getting goods from a particular source, namely, the same source as those from which the satisfied customers had got their goods.*
>
> [Emphasis added]

220 As can be seen, the reasoning employed in *Plomein* is not far removed from that of Lawrence LJ in *Samuelson* – at the end of the day, the consumer on the particular facts is made to believe that the product he purchases is from a *particular source* (*ie*, the plaintiff), when in fact it came from the defendant. To that end, this still fits within the classic conception of the tort of passing off, as the consumer is still misled to believe that the defendant's goods are those of the plaintiff (the particular source the consumer had in mind). It does not matter if the consumer does not know the actual identity of the plaintiff.

221 Both *Samuelson* and *Plomein* were considered by the Court of Appeal in *Bristol Conservatories* (which was, in turn, considered by the Singapore High Court in *John Robert Powers School (HC)*). In *Bristol Conservatories*, the defendants' salesmen showed prospective customers a portfolio of photographs of ornamental conservatories as if these constituted a sample of the defendants' goods and workmanship. In fact, these were photographs of the plaintiff's ornamental conservatories. This was held to amount to passing off as the defendants had misrepresented that they were the commercial source of those conservatories. As stated by Ralph Gibson LJ at 462:

> In this case the substance of the misrepresentation by the defendants, as alleged by the plaintiffs, is fairly capable of being expressed thus: "If you order a conservatory from us you will be getting a conservatory designed, manufactured and constructed by the people who have earned the goodwill and reputation that properly belongs to the party which secured the orders

and designed, manufactured and constructed the conservatories shown in these photographs. The conservatories shown in the photographs indicate the skill, the experience and the reputation of the party who designed and made them. That party is Custom Built." But, of course, it was not.

222 By showing the photographs to prospective customers, goodwill arose towards the supplier of those conservatories and was simultaneously misappropriated by the defendants. The Court of Appeal found that there was likewise no need for the public to have been "confused" – "he is told simply and untruthfully that Custom Built designed and constructed the conservatories which provide the evidence for the experience skill and reputation of the Plaintiffs." This was sufficient to sustain an action in passing off. As can be seen, the focus still concerns the *source* of the product. The public is misled to think that they are purchasing a product from a manufacturer with a certain amount of goodwill, while in fact, they are purchasing a product from the defendants.

223 In coming to this view, I agree with the comment by the learned authors of David Kitchin *et al, Kerly's Law of Trade Marks and Trade Names* (Sweet & Maxwell, 15th Ed, 2011) ("*Kerly's*") at para 18-132 that the reason why liability was found was because customers were deceived into believing that the defendant was the company that produced the conservatory depicted in the photographs. To this end, the learned authors' comment bears repeating:

> Although it was open to the defendant to use photographs of the claimant's product to indicate that it could make products like it, it went further and made an actionable misrepresentation which could have caused damage to the claimant in the form of lost sales (in the sense that all the defendant's potential customers could have been customers of the claimant had not the representation been made).

224 The important point, as the learned authors of *Kerly's* stress at para 18-132, is that the tort of passing off is not a tort providing a remedy in *all* cases of deception. Passing off is not about deceptive statements *in vacuo*. Neither is passing off a tort that covers product mis-description *per se*. The learned authors quite rightly stress that there must be an actionable misrepresentation which harms the claimant's goodwill in a name or get-up. Mere appropriation is insufficient.

225 I return to the decision in *John Robert Powers School*. Comparing the cases discussed above and the situation in *John Robert Powers School*, the High Court observed that the only difference between the two was that in the former, the misappropriation was done in the course of advertisement whereas in the latter, the misappropriation was done in the course of the trade itself. It was reasoned that that should make no difference to the plaintiffs' entitlement to a remedy. This was accepted by the Court of Appeal, who affirmed that a defendant can be liable for "inverse passing off" and that the trinity of goodwill, misrepresentation and confusion still applied. What is meant by "confusion" is that the consumer is deceived as to the trade origin of the products.

226 As a result of the decision in *John Robert Powers School*, whatever view is taken of the facts of the case, a defendant, in Singapore, can be liable when he passes off the goods of someone else as his own under what is known as "inverse passing off". I would further observe that given the discussion in the paragraph above, there is clearly room to develop this concept in Singapore law. Given the relative lack of case authority on inverse passing off, a few observations on the rationale for inverse passing off may be helpful before turning to an application to the facts at hand.

The policy reasons of passing off and the goodwill

227 At first blush, it is perhaps understandable if the concept of inverse passing off, as recognised

in *John Robert Powers School*, is regarded as not sitting nicely within the framework and policy reasons justifying the existence of the law of passing off. As observed by the author in Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell Asia, Rev Ed, 2014) ("*Ng-Loy on IP Law*") at para 18.1.15:

> Given that there was nothing in the defendant's course notes which expressly referred to the plaintiff, it is difficult to see how there could be passing off in the sense that the students would connect the defendant's school with the plaintiff (albeit in the reverse way). Where is the confusion when the defendant shows a customer the plaintiff's product as an example of his (the defendant's) work when the customer who buys from the defendant knows he is buying from the defendant? Strictly speaking, reverse passing off just does not fit nicely within the boundaries of passing off.

The author, however, goes on (also at para 18.1.15) to provide a possible way of interpreting the decision:

> One way of understanding this concept of inverse or reverse passing off is to recognise that it is really an extension of the classic form of passing off to prevent what the court sees as free riding. This analysis of inverse passing off is offered by Prof Gerald Dworkin. In his study comparing the ways in which different countries prevent unfair competition, he found that in common law countries where there is no general tort of unfair competition, the courts cope to a large extent by expanding the action for passing off. The High Court's judgment in *John Robert Powers* case certainly contains suggestions that would support Prof Dworkin's analysis. In finding for the plaintiff, the court used terms such as the defendant 'robbing' the plaintiff's goodwill, and how this goodwill was 'misappropriated' by the defendant to build her own reputation.

228 That said, Hazel Carty in *An Analysis of the Economic Torts*, (Oxford University Press, 2nd Ed, 2010) comments at p 290 that cases such as *Bristol Conservatories* are best seen as examples falling within the classic trinity. Goodwill lies at the heart of the classic trinity. In cases of true inverse passing off, the allegation (or misrepresentation) is that a quality misrepresentation has taken place resulting in damage to goodwill. Whilst there is merit in this view (that inverse passing off derives from and is consistent with the classic trinity), it should be noted that a loose application of the elements runs the risk of turning the tort into misappropriation *simpliciter*: a tort based on some broad notion of unfairness. For this reason, it is important to apply the elements (goodwill, misrepresentation and likelihood of deception) with care. Whether the common law in Singapore should go further and develop a true tort of unfair competition is not a matter which must be decided in the case at hand. The development of a general tort of misappropriation or unfair competition involves broad-based policy concerns involving aspects of intellectual property law as well as competition law.

229 Moving on, I note that the tort of passing off exists primarily to protect the interest of a trader in his trade mark and indicia of origin. By doing this, consumer interests are also safeguarded. As stated in *Ng-Loy on IP Law* at para 15.2.1, a trader's indicia of origin saves the consumer search time and costs and results in a better allocation of resources. The learned author continues:

> From this perspective, traders should be encouraged to differentiate their goods or services from those of other traders, and to invest time, effort and money to create and develop a trade mark to act as the badge of origin and/or of quality for their goods or services. Protecting the trader's trade mark is an incentive for him to make these investments. Trade mark protection is justified on this economic and utilitarian basis.
>
> The other justification lies in the 'just desserts' theory: the trader deserves protection for the

time and effort he spent in building up a particular sign as his trade mark, and he should be protected against unfair competition from traders who are out to take a free ride on the goodwill or reputation he has acquired for his goods or services.

230 One can see how these justifications are addressed in the case of *Bristol Conservatories*, *Samuelson* and *Plomein*. From the perspective of the consumer, a mistake is made as to the attributes (workmanship, quality etc) of the product (the conservatory, the film, the economiser) that he is acquiring from the defendant. The consumer is induced to believe that the defendant is also the manufacturer of or associated with certain similar products or services which enjoy goodwill in the market place. The consumer is, thereby, induced to acquire the defendant's goods or services in the belief that the defendant's goods or services enjoy or share that same goodwill when in fact the goodwill in those other goods or services belongs to a third party (the plaintiff). The fact that the consumer does not know of the third party is irrelevant.

231 In *Bristol Conservatories*, the photographs of the plaintiffs' product suggested a certain level of skill and competence of the origin. In *Samuelson*, the positive press notices likewise suggested some form of skill or quality since it was positively received by others. In *Plomein*, the test results likewise suggested quality. In all three cases, the defendant could be said to exploit the goodwill of the plaintiff in order to mislead the consumer into buying the defendant's product. In this way the goodwill which the plaintiff enjoyed in his business and the goods and services marketed under his business is damaged. The defendant/seller/provider has wrongly appropriated the goodwill of the plaintiff by false attribution to the defendant. In a sense, the defendant is "high-jacking" the goodwill of the plaintiff.

232 It follows that notwithstanding the recognition of inverse passing off, the core interest protected is still goodwill. The reasoning of Lord Diplock in *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 740 (commonly known as "The *Advocaat* case") bears repeating:

> Unfair trading as a wrong actionable at the suit of other traders who thereby suffer loss of business or goodwill may take a variety of forms, to some of which separate labels have become attached in English law. Conspiracy to injure a person in his trade or business is one, slander of goods another, but most protean is that which is generally and nowadays, perhaps misleadingly, described as passing off. The forms that unfair trading takes will alter with the ways in which trade is carried on and business reputation and goodwill acquired.

233 In a classic case of passing off, the goodwill in a business is connected with the trade mark of (an indicator of origin) the plaintiff. In deciding whether the element of goodwill is present, the court generally looks at whether the plaintiff's trade mark has acquired a reputation. As accepted in *The Singapore Professional Golfers' Association v Chen Eng Waye and others* [2013] 2 SLR 495 ("*SPGA*"):

> Goodwill has been described as "the attractive force which brings in custom": *The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] AC 217 at 224. It connotes the magnetic quality of the product and its association with the claimant such that customers return and patronise the same business, or purchase the same product or other products from the same brand: *Bently & Sherman* ([16]supra) at p 729. The goodwill in question is the integral feature of the relationship between a trader and his customers that the tort of passing off seeks to protect. The action for passing off is not directly concerned with the protection of a mark, logo or get-up of a business. That is more the province of the law of trade marks. Rather, passing off is concerned with protecting the goodwill between a trader and his customers: *CDL Hotels* ([12] supra) at [45].

234 In the classic case of passing off, the goodwill is associated with the brand represented by the badge of origin. It is therefore (as stated by the Court of Appeal in *SPGA* at [36]):

> essential for the claimant to establish that its goodwill is sufficiently associated with its name or brand such that its name or brand is distinctive, *in that it denotes the goods and services of the claimant to the exclusion of those of other traders.*
>
> [Emphasis added]

235 In a case of inverse passing off, the defendant is essentially trying to ride on the reputation (goodwill) of the plaintiff so as to market his own goods or services.

236 Thus in *Bristol Conservatories*, it could be said that some form of goodwill is generated upon the consumer recognising the quality of the plaintiff's product, as represented by photographs set out in the Defendant's brochure. In *Bristol Conservatories*, the court at 465 explained:

> Lastly, the judge was wrong, I think, to proceed on the basis that the plaintiffs were not alleging that they have a goodwill which was affected by the use of the photographs. In truth, as Mr. Presctott submitted, *the goodwill was asserted and demonstrated as the photographs were shown and was at the same moment misappropriated by Custom Built*.
>
> [Emphasis added]

237 Similarly the good press notices of the plaintiff's theatrical sketch (and goodwill) was used to cloak the defendant's film in *Samuelson*.

238 Finally, I note that the *Advocaat* case was itself concerned with developing classic passing off to cover a form of unfair trading which resulted in damage to "shared" goodwill in the trade name "Advocaat." Classic passing off is concerned with a case where the goodwill in a trade name belongs to a single proprietor. Shared goodwill looks to a scenario where a type of product with particular and identifiable characteristics is known to the public under a particular trade name such as "Advocaat" or "Champagne." The public (or relevant sector of the public) is aware that goods carrying that trade name refer to goods with those characteristics. In such cases, time, effort and expense will usually have been expended, often over some time, by traders to develop the reputation and goodwill in the trade name.

239 In the *Advocaat* case, the trade name was properly used in respect of a Dutch drink made from eggs, sugar and a type of spirit. The "spurious" product marketed as "Old English Advocaat" was made from eggs, sugar and sherry. Sherry is a type of fortified wine (not a spirit) and at that time attracted lower custom duties. The spurious product was accordingly sold at a cheaper price. This was the context in which Lord Diplock on the back of strong policy considerations (unfair trading) found passing off had been committed.

240 To be sure, the tort of passing off has not yet been developed in Singapore into a general tort of unfair competition. Not all instances of "unfair trading" constitute passing off or indeed any tort. Nevertheless, within the established principles of passing off – the protection of goodwill in a "trade mark" from misrepresentations likely to cause damage, the general policy of providing a level playing field has proven helpful in developing the tort. In this way, classic passing off has expanded over the years to cover misrepresentations as to the quality of the plaintiff's product (selling second hand goods or discontinued models as if they were new or current for example) as well as to cover cases of shared goodwill. Inverse passing off is best seen as part of the evolutionary and principled

development of the tort.

Application of the law

241 The test for goodwill, the requirement of business aside, focuses on the public's awareness of the plaintiff's mark and association of the mark with the goods or services as an indicator of origin. Proof that the trade mark has acquired a reputation can come in the form of evidence showing sales volume, and/or the extent and amount of advertisement and media coverage of the business conducted under that mark (see *Ng-Loy on IP Law* at para 17.2.2). As stated by the High Court in *Doctor's Associates Inc v Lim Eng Wah (trading as SUBWAY NICHE)* [2012] 3 SLR 193 ("*Subway Niche*") at [21] and accepted by the Court of Appeal in *Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd and another and another appeal* [2013] 2 SLR 941 at [34], example of factors that should be taken into consideration include:

(a) the market share held by the registered mark;

(b) the nature of its use (whether or not it was intensive, widespread and long-standing);

(c) the amount invested in promoting the mark;

(d) the proportion of the relevant class of individuals who identified goods sold under the mark as emanating from a particular source; and

(e) any statements from trade associations and chambers.

242 The First Defendant is a company established in 2010 (although its name was later changed on 25 January 2012). I accept that on the evidence the name "Kairos" is not a descriptive name insofar as it does not describe boats. I also accept that the Defendants have used the trade name Kairos in relation to the boats together with the term "inflatable sampan". Whilst inflatable sampan is to a degree descriptive, the Defendants have asserted that the term "inflatable sampan" is also distinctive of Kairos and that they have spent substantial efforts in promoting Kairos boats on the internet and through brochures. Furthermore, it is also asserted that Kairos Boats are "supplied to, among others, NGOs, disaster units, rescue teams, Government contractors, yacht charter operators and private yacht owners in Singapore as well as in the region" [note: 56]. Whilst there is little evidence supporting the claim for widespread sales, I note that there are a number of brochures promoting the Defendants and their products. Even if there is insufficient evidence to support the assertion of goodwill in the term "inflatable sampan", I am satisfied that the Defendants have acquired a reputation under the Kairos brand such as to generate goodwill.

243 This does not mean, however, that the counterclaim for inverse passing off succeeds. To do so, it is necessary to establish that the Plaintiffs, by inclusion of photographs of Kairos boats and informational material into its modified brochures *etc*, is responsible for a misrepresentation that is likely to damage the goodwill. To be clear, there is no evidence that the Defendants have acquired any goodwill in the get-up of the inflatable boats. The position is the same in respect of the use by the Plaintiffs of photographs of the Kairos boats in operation in Thailand in its communications with SRC. Damage, in this sense, broadly means appropriating the reputation of the Defendants for products of a certain quality.

244 As noted above, in *Bristol Conservatories*, the plaintiffs' conservatories were designed and manufactured by the plaintiffs. At 463, Ralph Gibson LJ held that the defendants, by using a portfolio of photographs of the plaintiffs' conservatories, was misrepresenting the position such as to induce

consumers to purchase conservatories from the defendants in order to get a conservatory from the commercial source which had designed, constructed the conservatories shown in the photographs. In this way, the prospective purchaser was said (at 465) to have been told untruthfully that the defendants had designed and built those conservatories (made by the plaintiffs). Those conservatories were of course evidence of the experience, skill and reputation of the plaintiffs.

245 In the present case,it is clear that the Defendants are not the manufacturers of the boats in question (or indeed the electrical pumps and engines). The boats (both the Plaintiffs and Defendants boats) were sourced from the same Chinese manufacturer. Indeed, when cross-examined, Tedric stated that the Plaintiffs' boats were obtained from the same factory in China which supplied the Defendants. Tedric also asserted that the design was taken by the Chinese factory from Saturn Inflatables. [note: 57] Whilst there was suggestion that the Defendants asked for some modifications, the evidence on this was thin. No witness from the Chinese manufacturer gave evidence. Further whilst the Plaintiffs may have used photographs of Kairos boats in use during the Thai floods in some communications, it is to be borne in mind that aside from the two donated Kairos boats, Golden Season had indeed purchased (albeit at an alleged discount) Kairos boats for use in the Thai floods.

246 On the evidence before me (including the brochures produced by the Plaintiffs), I am not satisfied that the Plaintiffs had thereby represented that they were Kairos or that they were passing themselves off as being Kairos such as to damage the Kairos goodwill. Inverse passing off is predicated on harm to goodwill arising from a misrepresentation. In deciding whether a case has been made out the Court must examine the strength of the goodwill and reputation, the nature of the goods and the extent to which any indicia of origin is actually used in determining whether there is a misrepresentation to the ordinary consumer (not moron shopping in a hurry) such as to harm the goodwill. In the present case, is it likely that customers for the inflatable boats will be deceived into thinking that when they buy such a boat from the Plaintiffs, they are getting boats from the Defendants? Looking at the evidence as a whole, I am not satisfied that the Defendants have established a case of inverse passing off.

Conclusion

247 By way of conclusion, the Court recognises that the breakdown of the business relationship between the Third Plaintiff and the Second Defendant resulted in a bitter and emotionally charged dispute. The Court accepts that defamation actions will often be stressful: perhaps especially so where motives and intentions are called into question in the context of defences such as qualified privilege and indeed damages. For this reason, it is important that the evidence be confined to matters relevant to the dispute. Whilst some of the issues raised (such as the past history of Hassan of Mercy Relief) were unnecessary and indeed irrelevant to the case at hand, I acknowledge the professionalism, candour and courtesy counsel extended to each other during the hearings. While counsel robustly sought to establish their opposing legal positions, parties were generally cordial and there was no unnecessary delay in the proceedings.

248 The First Plaintiff succeeds in the action of defamation with regards to the email chain and is awarded S$15,000 in damages. The Third Plaintiff succeeds in the defamation action in respect of the email chain and is awarded in total S$50,000 in damages.

249 The Defendants' counterclaim in copyright infringement (save for the pump brochure) succeeds, and the Plaintiffs are to surrender or to file and serve an affidavit affirming the destruction of the Modified Brochures within [ten] days from the date of my decision.

250 Damages to be awarded to the Defendants for copyright infringement are to be assessed.

251 I will hear parties on costs at a later date.

[note: 1] 1 AB pp 58-59

[note: 2] 1 AB p 61

[note: 3] See AB Vol 1 p83

[note: 4] See AB Vol 1 p 95

[note: 5] SOC para 9

[note: 6] ABD 103

[note: 7] ABD 99 to 102

[note: 8] ABD 127 to 131

[note: 9] 1 ABD 142 to 143

[note: 10] Df closing submissions para 241

[note: 11] SOC para 19

[note: 12] Pf closing submissions p 203

[note: 13] See df submissions closing at p112. See also p 212 of the pf closing submissions

[note: 14] See 1 AB Index, starting from item 75 onwards

[note: 15] See Df closing submissions at para 255

[note: 16] See the pleaded particulars of the defamatory remarks in the Statement of Claim

[note: 17] See the table found at Pf closing submissions p 194 to p 198

[note: 18] In respect of email 1, 2, 3

[note: 19] In respect of email 1, 2, 3

[note: 20] In respect of email 1,2, 3

[note: 21] In respect of Email 1,

[note: 22] In respect of Email 1

[note: 23] In respect of Email 2

[note: 24] In respect of Email 3, 4, 8

[note: 25] In respect of Email 5, 6, 8

[note: 26] Email 5.

[note: 27] In respect of Email 1.

[note: 28] Email 6, 7 and 8.

[note: 29] 2 AB 319

[note: 30] See Df closing submissions at para 319 and 320

[note: 31] Defendants submissions at [301]

[note: 32] Email to Mr Udairam dated 13 Dec 2011 at AB 161

[note: 33] Email to Mr Udairam dated 13 Dec 2011 at AB 162

[note: 34] Email to Mr Udairam dated 13 January 2012 at AB 186

[note: 35] Email to Mr Udairam dated 13 January 2012 at 10.31 am.

[note: 36] Email to Mr Udairam dated 13 January 2012 at 10.31 am.

[note: 37] Email to Hassan dated 21 January 2012 at AB 204

[note: 38] Email to Hassan dated 23 February 2012.

[note: 39] Email to Hassan dated 23 February 2012.

[note: 40] See DBD Vol 3 at p 73

[note: 41] Pf closing subs at p255

[note: 42] Pf closing subs p280-281, AEIC of Tedric para 132 and ABD Vol II p 424-535

[note: 43] See NE of Day 7, 27 Sept 2013 at p 134-136 and p 140

[note: 44] See AEIC of Roy at para 20 and para 62 of the Df closing submissions

[note: 45] See Pf closing subs at para 292 and AEIC of Tedric at para 135 to 139

[note: 46] See NE, 27 Sep 2013, p 36 lines 2 – 22

[note: 47] See 3 AB 823

[note: 48] See 3 AB 744 – 745

[note: 49] See ABOD 821 and the Defence and Counterclaim at Appendix C.

[note: 50] See Df closing submissions at para 125

[note: 51] See AEIC of Tedric dated 19 June 2013 at para 26

[note: 52] See AEIC of Tedric dated 19 June 2013 at para 27

[note: 53] Para 26(aa)

[note: 54] Para 35(a)

[note: 55] Df closing submissions para 140

[note: 56] See AEIC of Roy dated 19 June 2013 at para 17

[note: 57] NOE, Day 1 at p.158-159.

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