Review Publishing Co Ltd and Another v Lee Hsien Loong and Another Appeal [2009] SGCA 46

Case Number : CA 163/2008, 164/2008

Decision Date : 07 October 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Judith Prakash J

Counsel Name(s) : Peter Cuthbert Low and Han Lilin (Colin Ng & Partners LLP) for the appellants in Civil Appeals Nos 163 and 164 of 2008; Davinder Singh SC and Wilson Wong (Drew & Napier LLC) for the respondent in Civil Appeal No 163 of 2008 and the respondent in Civil Appeal No 164 of 2008

Parties : Review Publishing Co Ltd; Hugo Restall — Lee Hsien Loong

Civil Procedure

Tort

Words and Phrases

7 October 2009 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 The present two appeals before us, Civil Appeal No 163 of 2008 ("CA 163") and Civil Appeal No 164 of 2008 ("CA 164"), are against the decision of the High Court judge ("the Judge") in summary judgment applications filed in two separate defamation suits (see *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 ("the Judgment")).

2 CA 163 arises from Suit No 539 of 2006 ("Suit 539"). The plaintiff in that action, who is the respondent in CA 163, is Mr Lee Hsien Loong ("LHL"), the Prime Minister of Singapore. CA 164 stems from Suit No 540 of 2006 ("Suit 540"). The plaintiff in that action, who is the respondent in CA 164, is Mr Lee Kuan Yew ("LKY"), the Minister Mentor in the Prime Minister's Office and a senior Cabinet Minister. The defendants in Suit 539 and Suit 540 (which suits will be referred to collectively as "the Defamation Suits") are the same, namely, Review Publishing Co Ltd ("RP"), the publisher of *Far Eastern Economic Review* ("FEER"), and Mr Hugo Restall ("HR"), the editor of FEER as well as the author of the article which is the subject matter of the Defamation Suits ("the Article"). The Article, titled "Singapore's 'Martyr,' Chee Soon Juan", was published in the July/August 2006 issue (Vol 169 No 6) of FEER ("FEER (Vol 169 No 6)") at pp 24–27.

3 On 23 September 2008, the Judge granted summary judgment in favour of LHL and LKY (collectively, "the Respondents") on the grounds that the natural and ordinary meaning of the words in the Article which were alleged to be defamatory ("the Disputed Words") was the defamatory meaning pleaded and contended for by the Respondents, and that RP and HR (collectively, "the Appellants") had no defence to the Defamation Suits.

The background

The Article

4 The Appellants published the Article in FEER (Vol 169 No 6) (at pp 24–27) after an interview with Dr Chee Soon Juan ("CSJ"), the secretary-general of the Singapore Democratic Party ("SDP"). We set out below the Article in its entirety (with paragraph numbers added in square brackets for ease of reference):[note: 1]

> [1] Striding into the Chinese restaurant of Singapore's historic Fullerton Hotel, Chee Soon Juan hardly looks like a dangerous revolutionary. Casually dressed in a blue shirt with a gold pen clipped to the pocket, he could pass as just another mild-mannered, apolitical Singaporean. Smiling, he courteously apologizes for being late – even though it is only two minutes after the appointed time.
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> [2] Nevertheless, according to prosecutors, this same man is not only a criminal, but a repeat offender. The opposition party leader has just come from a pre-trial conference at the courthouse, where he faces eight counts of speaking in public without a permit. He has already served numerous prison terms for this and other political offenses, including eight days in March for denying the independence of the judiciary. He expects to go to jail again later this year.
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> [3] Mr. Chee does not seem too perturbed about this, but it drives Singaporean Prime Minister Lee Hsien Loong up the wall. Asked about his government's persecution of the opposition during a trip to New Zealand last month, Mr. Lee launched into a tirade of abuse against Mr. Chee. "He's a liar, he's a cheat, he's deceitful, he's confrontational, it's a destructive form of politics designed not to win elections in Singapore but to impress foreign supporters and make himself out to be a martyr," Mr. Lee ranted. "He's deliberately going against the rules because he says, 'I'm like Nelson Mandela and Mahatma Gandhi. I want to be a martyr.'"
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> [4] Coming at the end of a trip in which the prime minister essentially got a free ride on human rights from his hosts – New Zealand Prime Minister Helen Clark didn't even raise the issue – this outburst showed a lack of self-control and acumen. Former Prime Minister Lee Kuan Yew, the man who many believe still runs Singapore and who is the current prime minister's father, has said much the same things about Mr. Chee – "a political gangster, a liar and a cheat" – but that was at home, and in the heat of an election campaign.
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> [5] Mr. Chee smiles when it's suggested that he must be doing something right. "Every time he says something stupid like that, I think to myself, the worst thing to happen would be to be ignored. That would mean we're not making any headway," he agrees.
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> [6] But one charge made by the government does stick: Mr. Chee is not terribly concerned about election results. Which is just as well, because his Singapore Democratic Party did not do very well in the May 6 polls. It would be foolish, he suggests, for an opposition party in Singapore to pin its hopes on gaining one, or perhaps two, seats in parliament. He is aiming for a much bigger goal: bringing down the city-state's one-party system of government. His weapon is a campaign of civil disobedience against laws designed to curtail democratic freedoms.
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> [7] "You don't vote out a dictatorship," he says. "And basically that's what Singapore is, albeit a very sophisticated one. It's not possible for us to effect change just through the ballot box. They've got control of everything else around us." Instead what's needed is a coalition of civil society and political society coming together and demanding change – a color revolution for Singapore.
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> [8] So far Mr. Chee doesn't seem to be getting much, if any traction. While many Singaporeans don't particularly like the PAP's [People's Action Party's] arrogant style of government, the ruling

party has succeeded in depoliticizing the population to the extent that anybody who presses them to take action to make a change is regarded with resentment. And in a climate of fear – Mr. Chee lost his job as a psychology lecturer at the national university soon after entering opposition politics – a reluctance to get involved is hardly surprising.

[9] *Why is all this oppression necessary in a peaceful and prosperous country like Singapore where citizens otherwise enjoy so many freedoms? Mr. Chee has his own theory that the answer lies with strongman Lee Kuan Yew himself: "Why is he still so afraid? I honestly think that through the years he has accumulated enough skeletons in his closet that he knows that when he is gone, his son and the generations after him will have a price to pay. If we had parliamentary debates where the opposition could pry and ask questions, I think he is actually afraid of something like that."*

[10] *That raises the question of whether Singapore deserves its reputation for squeaky-clean government. A scandal involving the country's biggest charity, the National Kidney Foundation [("NKF")], erupted in 2004 when it turned out that its Chief Executive T. T. Durai was not only drawing a $357,000 annual salary, but the charity was paying for his first-class flights, maintenance on his Mercedes, and gold-plated fixtures in his private office bathroom*.

[11] *The scandal was a gift for the opposition, which naturally raised questions about why the government didn't do a better job of supervising the highly secretive NKF, whose patron was the wife of former Prime Minister Goh Chok Tong (she called Mr. Durai's salary "peanuts"). But it had wider implications too. The government controls huge pools of public money in the Central Provident Fund and the Government of Singapore Investment Corp., both of which are highly nontransparent. It also controls spending on the public housing most Singaporeans live in, and openly uses the funds for refurbishing apartment blocks as a bribe for districts that vote for the ruling party. Singaporeans have no way of knowing whether officials are abusing their trust as Mr. Durai did*.

[12] *It gets worse. Mr. Durai's abuses only came to light because he sued the Straits Times newspaper for libel over an article detailing some of his perks. Why was Mr. Durai so confident he could win a libel suit when the allegations against him were true? Because he had done it before. The NKF won a libel case in 1998 against defendants who alleged it had paid for first-class flights for Mr. Durai. This time, however, he was up against a major bulwark of the regime, Singapore Press Holdings; its lawyers uncovered the truth*.

[13] *Singaporean officials have a remarkable record of success in winning libel suits against their critics. The question then is, how many other libel suits have Singapore's great and good wrongly won, resulting in the cover-up of real misdeeds? And are libel suits deliberately used as a tool to suppress questioning voices?*

[14] The bottling up of dissent conceals pressures and prevents conflicts from being resolved. For instance, extreme sensitivity over the issue of race relations means that the persistence of discrimination is a taboo topic. Yet according to Mr. Chee it is a problem that should be debated so that it can be better resolved. "The harder they press now, the stronger will be the reaction when he's no longer around," he says of Lee Kuan Yew.

[15] The paternalism of the PAP also rankles, especially since foreigners get more consideration than locals. The World Bank and [the] International Monetary Fund will hold their annual meeting in Singapore this fall, and have been trying to convince the authorities to allow the usual demonstrations to take place. The likely result is that international NGO groups will be given a

designated area to scream and shout. "So we have a situation here where locals don't have the right to protest in their own country, while foreigners are able to do that," Mr. Chee marvels. Likewise, Singaporeans can't organize freely into unions to negotiate wages; instead a National Wages Council sets salaries with input from the corporate sector, including foreign chambers of commerce.

[16] All these tensions will erupt when strongman Lee Kuan Yew dies. Mr. Chee notes that the ruling party is so insecure that Singapore's founder has been unable to step back from front-line politics. The PAP still needs the fear he inspires in order to keep the population in line. Power may have officially passed to his son, Lee Hsien Loong, but even supporters privately admit that the new prime minister doesn't inspire confidence.

[17] During the election, Prime Minister Lee made what should have been a routine attack on multiparty democracy: "Suppose you had 10, 15, 20 opposition members in parliament. Instead of spending my time thinking what is the right policy for Singapore, I'm going to spend all my time thinking what's the right way to fix them, to buy my supporters [*sic*] votes, how can I solve this week's problem and forget about next year's challenges?" But of course the ominous phrases "buy votes" and "fix them" stuck out. That is the kind of mistake, Mr. Chee suggests, Lee Sr. would not make.

[18] "He's got a kind of intelligence that would serve you very well when you put a problem in front of him," he says of the prime minister. "But when it comes to administration or political leadership, when you really need to be media savvy and motivate people, I think he is very lacking in that area. And his father senses it as well."

[19] However, the elder Mr. Lee's death – he is now 82 – is a necessary but not sufficient condition for change. Another big factor is how civil society is able to use new technologies to bypass PAP control over information and free speech. The government has tried to stifle political filmmaking, blogging and podcasting. *Singapore Rebel*, a 2004 film about Mr. Chee by independent artist Martyn See, was banned but is widely available on the Internet.

[20] Meanwhile, pressure for Singapore to remain competitive in the region has sparked debate about the government's dominant role in the economy. Can a top-down approach promote creativity and independent thinking? The need for transparency and accountability also means that Singapore will have to change. That is the source of Mr. Chee's optimism in the face of all his setbacks: "I realize that Singapore is not at that level yet. But we've got to start somewhere. And I'm prepared to see this out, in the sense that in the next five, 10, 15 years, time is on our side. We need to continue to organize and educate and encourage. And it will come."

[21] He doesn't dwell on his personal tribulations, but mentions in passing selling his self-published books on the street. That is his primary source of income to feed his family, along with the occasional grant. As to the charge of wanting to be a martyr, once he started dissenting, he found it impossible to stop in good conscience. "The more you got involved, the more you found out what they're capable of, it steels you, so you say, 'No, I will not back down.' It makes you more determined."

[22] Perhaps it's in his genes. One of Mr. Chee's daughters is old enough that she had to be told that her father was going to prison. She stood up before her class and announced, "My papa is in jail, but he didn't do anything wrong. People have just been unfair to him."

[emphasis added]

5 The Disputed Words (as pleaded by the Respondents) are set out in paras 9–13 of the Article (see the italicised part of the quotation in the preceding paragraph). The question "[h]ow many libel suits have Singapore's great and good wrongly won, covering up real misdeeds?", which is essentially a reiteration of the corresponding question in para 13 of the Article, is also given especial prominence by being reproduced in enlarged font in a box printed at the top of the last page of the Article (*ie*, p 27 of FEER (Vol 169 No 6)) so as to catch the eye of the reader.

The proceedings in the High Court

6 On 22 August 2006, the Respondents commenced the Defamation Suits against the Appellants. In respect of LKY, it was pleaded that:[note: 2]

> The [Disputed] Words, in context and in their natural and ordinary meaning, meant and were understood to mean that [LKY] is unfit for office because he is corrupt and has set out to sue and suppress those who would question him as he fears such questions would expose his corruption …

7 In respect of LHL, it was originally pleaded in his statement of claim ("SOC") that:[note: 3]

> [T]he [Disputed] Words, in context … and in their natural and ordinary meaning, meant and were understood to mean that [LHL] is unfit for office because:
>
> (a) [LHL], as Prime Minister, has retained [LKY], who is corrupt, as a member of his Cabinet and Chairman of GIC [the Government of Singapore Investment Corporation Pte Ltd], and has thereby condoned [LKY's] corruption; and
>
> (b) [LHL] has set out to sue and suppress those who would question him because he fears such questions would expose the truth of such corruption or his condonation …

We shall hereafter refer to the original pleaded meaning of the Disputed Words in relation to LHL (as set out above) as "the Original Meaning".

8 In addition to relying on the natural and ordinary meaning of the Disputed Words, the Respondents also relied on their innuendo meaning (*ie*, the meaning which the Disputed Words bore by way of innuendo).

9 On 30 August 2007, the Respondents, via Summons No 3833 of 2007 where Suit 540 was concerned and Summons No 3834 of 2007 where Suit 539 was concerned, applied for summary judgment for the following reliefs (see the Judgment at [2]):

> (a) The determination of the natural and ordinary meaning of … the Disputed Words … contained in the Article pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).
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> (b) Interlocutory judgment:
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> (i) with damages to be assessed; and
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> (ii) an order that the [Appellants] be restrained from the publication, sale, offer for sale, distribution or other dissemination by any means whatsoever of the defamatory allegations, or other allegations to the same effect, in Singapore,

pursuant to O 14 r 1 of the Rules of Court on the basis that the [Appellants] have no defence.

(c) Alternatively,

(i) that substantial portions of the Amended Defences [*ie*, the first amended defence filed on 27 August 2007 for Suit 539 and the first amended defence filed on 27 August 2007 for Suit 540] ought to be struck out pursuant to O 18 r 19(*a*), (*b*), (*c*) and/or (*d*) of the Rules of Court and/or the inherent jurisdiction of the court and for interlocutory judgment with damages to be assessed; and

(ii) an order that the [Appellants] be restrained from the publication, sale, offer for sale, distribution or other dissemination by any means whatsoever of the defamatory allegations, or other allegations to the same effect, in Singapore.

It should be noted that the Respondents' applications for summary judgment ("the Summary Judgment Applications") were based on the natural and ordinary meaning of the Disputed Words, and not on their innuendo meaning. It should also be noted that the Respondents sought, as an alternative to summary judgment, the striking out of substantial portions of the Appellants' pleadings (specifically, the Appellants' first amended defence in Suit 539 and the Appellants' first amended defence in Suit 540).

10 The Summary Judgment Applications were heard by the Judge on 15 and 16 May 2008. The Appellants' main arguments before the Judge against the grant of summary judgment can be summarised as follows:

(a) the Disputed Words did not refer to the Respondents;

(b) the natural and ordinary meaning of the Disputed Words was not the defamatory meaning contended for by the Respondents; and

(c) the Appellants had substantive defences, specifically, the "substantive defences of justification …, fair comment …, qualified privilege …, public interest privilege … and neutral reportage"[note: 4] [emphasis in original omitted].

11 At the end of the hearing, the Judge reserved judgment. Subsequently, on 25 June 2008, the Judge directed the parties to address the court on the following two issues:[note: 5]

(1) [I]s the court precluded from concluding that the natural and ordinary meanings of the [D]isputed [W]ords are as defamatory of [LHL] as they are allegedly defamatory of [LKY]; and

(2) [I]f the court [is not prevented from so concluding and in fact] so concludes, what order or orders should the court make for [LHL's] application in respect of [Suit 539].

It is reasonable to assume that the Judge, in posing these two questions to the parties, was of the view that, in relation to LHL, the Disputed Words were capable of bearing the same meaning as that pleaded by LKY and not just the Original Meaning, which was the meaning that LHL relied on in his application for summary judgment.

12 On 18 July 2008, the Appellants and the Respondents filed their respective written supplemental submissions on the above two issues, and, on 25 July 2008, they filed their respective supplemental reply submissions.

13 Meanwhile, on 23 July 2008, LHL applied via Summons No 3239 of 2008 for leave to amend his SOC so as to plead an alternative meaning of the Disputed Words ("the New Meaning"). Essentially, LHL sought to include in his SOC the same meaning of the Disputed Words as that pleaded by LKY, as follows:[note: 6]

> [T]he [Disputed] Words, in context … and in their natural and ordinary meaning, meant and were understood to mean that [LHL] is unfit for office because *he is corrupt and has set out to sue and suppress those who would question him as he fears such questions would expose his corruption*, alternatively, because:
>
> (a) [LHL], as Prime Minister, has retained [LKY], who is corrupt, as a member of his Cabinet and Chairman of GIC [the Government of Singapore Investment Corporation Pte Ltd], and has thereby condoned [LKY's] corruption; and
>
> (b) [LHL] has set out to sue and suppress those who would question him because he fears such questions would expose the truth of such corruption or his condonation …
>
> [emphasis added; underlining in original omitted]

The New Meaning is set out in the italicised part of the above quotation.

14 On 18 August 2008, the Judge granted leave for LHL to amend his SOC to plead the New Meaning. LHL's amended SOC was filed on the same day. The Judge also granted the Appellants leave to make consequential amendments to their first amended defence in Suit 539 (if any) by 5.00pm on 15 September 2008. On 15 September 2008, the Appellants filed their second amended defence for Suit 539. As will be seen later, this second amended defence did not address or plead justification in respect of the New Meaning.

15 As mentioned at [3] above, on 23 September 2008, the Judge gave his decision on the Summary Judgment Applications. He entered summary judgment in favour of the Respondents on their respective applications, and subsequently made consequential costs orders on 28 November 2008.

The decision below

Reference to the Respondents and the meaning of the Disputed Words

16 The Judge, in a carefully-reasoned judgment spanning 106 pages, made the following findings in relation to whether the Disputed Words referred to the Respondents and whether they were defamatory of the Respondents in their natural and ordinary meaning:

(a) The following phrases in the Disputed Words referred to the Respondents (see the Judgment at [36]–[38] and [43]–[45]):

(i) "the government" in para 11 of the Article;

(ii) "Singaporean officials" in para 13 of the Article; and

(iii) "Singapore's great and good" in that same paragraph (*ie*, para 13 of the Article).

Further, as conceded by the Appellants' counsel, the expression "Singaporean officials" in para 13

of the Article was referable to LKY (see the Judgment at [31]).

(b) In relation to LKY, the Disputed Words bore the defamatory meaning pleaded by LKY, *viz*, that he, like Mr T T Durai ("Durai"), the former chief executive of the National Kidney Foundation ("NKF"), was "corrupt … and … [had] been using libel actions to suppress those who would question [*sic*] to avoid exposure of his corruption" (see the Judgment at [88]).

(c) In relation to LHL, the Disputed Words did not bear the Original Meaning set out at [7] above, which was pleaded as the alternative meaning after LHL amended his SOC (see the Judgment at [99]). However, the Disputed Words did bear the New Meaning, which was the same as the meaning pleaded by LKY (see the Judgment at [100]).

17 The Judge gave the following main reasons for finding that the Disputed Words bore the meaning asserted by the Respondents:

(a) The ordinary reasonable person would know that the Respondents had at various times successfully sued for defamation and would also be aware generally of the scandal surrounding the NKF and Durai ("the NKF Saga") (see the Judgment at [66]). The Appellants themselves had also admitted that the following matters were within the general knowledge of the public (see the Judgment at [64]–[65]):

(i) the NKF Saga;

(ii) the protest staged by certain members of the SDP on 11 August 2005 ("the SDP protest"); and

(iii) the various defamation suits commenced by the Respondents, including Suit No 261 of 2006 and Suit No 262 of 2006 ("the SDP proceedings"), which were proceedings by the Respondents against the SDP and eight of its members in respect of (*inter alia*) two articles published in or around February 2006 in the SDP's newsletter, *The New Democrat Issue 1* ("the *New Democrat* articles").

(The details of the NKF Saga, the SDP protest and the SDP proceedings are set out at [36]–[37] below.)

(b) The Article contained more than just a passing reference to the NKF and Durai (see the Judgment at [80]). It detailed how the NKF Saga erupted and drew a comparison (at para 11) between "the failure of the Government to supervise [the] NKF and the fact that the Government [controlled] huge pools of money in CPF [the Central Provident Fund] and GIC [the Government of Singapore Investment Corporation Pte Ltd], both of which [were] said to be 'highly nontransparent'" (see the Judgment at [84]).

(c) The association which the Article made with the NKF and Durai was "more than a mere suggestion of extravagance or abuse of power or some sort of financial impropriety and … [instead] suggest[ed] corruption on the part of LKY" (see the Judgment at [85]). This was "defamation by implication by associating institutions which the Government, *ie*, LKY (and LHL) [ran], with [the] NKF and Durai" (*ibid*).

(d) The suggestion made in paras 12 and 13 of the Article was similar to that made in the *New Democrat* articles, namely (see the Judgment at [86]):

> [A]lthough Durai knew that he had things to hide, he was confident that he could keep the truth from coming to light by suing those who alleged corruption or any kind of impropriety on his part. But his plan backfired since, in the course of his libel action against the Singapore Press Holdings, the truth about Durai's misuse of moneys surfaced.

(e) Reading para 13 of the Article in view of the immediately preceding reference in para 12 to the NKF's successful libel suit in 1998 and the manner in which the truth about Durai's and the NKF's practices subsequently came to light, the message to the ordinary reasonable person was that the Respondents, like Durai, had (as para 13 of the Article put it) "wrongly won" libel suits and had deliberately used such suits to cover up real misdeeds, *ie*, their corruption. Under such circumstances, the ordinary reasonable person would be left in no doubt that the imputation in the Article was that the Respondents were unfit for office (see the Judgment at [87] and [100]).

18 In the Judgment, the Judge also explained why he considered it appropriate to allow LHL to amend his SOC so as to plead the New Meaning (see the Judgment at [101]–[114]). The Judge was of the view that, unlike the application in *Chun Thong Ping v Soh Kok Hong* [2003] 3 SLR 204 ("*Chun Thong Ping*"), a decision relied on by the Appellants to object to the proposed amendment, LHL's application for leave to amend his SOC was filed before any decision was made on the Summary Judgment Applications and the proposed amendment was not to add a new cause of action, but to attribute an additional meaning (*ie*, the New Meaning) to the Disputed Words (see the Judgment at [105]–[106]).

19 Although he allowed LHL to amend his SOC to plead the New Meaning (which, the Appellants contended, was a more defamatory meaning) as an alternative to the Original Meaning, the Judge proceeded to give his views on what the legal position would have been if no amendment had been made to LHL's SOC. His views were as follows (see the Judgment at [118]–[144]):

(a) The approach exemplified in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 ("*Slim*"), which was followed by this court in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 ("*JJB v LKY (1992)*") at 320–321, [24]–[25] as well as *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 3 SLR 337 ("*Goh Chok Tong*") at [43] and [46], was that the court was entitled to find that the words alleged to be defamatory ("the offending words") bore a less defamatory meaning than the meaning pleaded by the plaintiff, but was *not* entitled to find that those words bore a *more* defamatory meaning. In contrast, a more flexible approach was adopted in *Chakravarti v Advertiser Newspapers Limited* (1998) 193 CLR 519 ("*Chakravarti*"), where the Australian High Court held that the court was permitted to find a meaning which was more defamatory than the pleaded meaning (see the Judgment at [135]).

(b) In determining the meaning of the offending words, the court should not be obliged to find a meaning within the perimeters of the pleadings and should not be precluded from finding a different and more defamatory meaning than that pleaded by the plaintiff (see the Judgment at [141]).

(c) The consequence of the court's determination of the meaning of the offending words was another matter. In this regard (*ibid*):

> It may be that the court should award damages on the less defamatory meaning pleaded by the plaintiff if there has been no prejudice to the defendant or the court may allow the defendant an opportunity to address it on the more defamatory meaning before reaching a conclusion.

(d) In the instant case, the New Meaning of the Disputed Words was not substantially different from the Original Meaning and would, in the first place, have been covered by LHL's original pleading. Thus, even if LHL had not amended his SOC, summary judgment could still have been granted to LHL on the basis of the New Meaning (see the Judgment at [144]).

The defences raised by the Appellants

20 After determining the natural and ordinary meaning of the Disputed Words, the Judge proceeded to consider the various defences raised by the Appellants. He eventually found that the Appellants had no viable defence that would justify granting them leave to defend. His findings may be summarised as follows:

(a) In relation to the defence of justification, the Appellants only sought to justify their own version of the meaning of the Disputed Words and not the defamatory meaning contended for by the Respondents, which was also the meaning that the Disputed Words were found to bear. As such, "the defence of justification [fell] away" (see the Judgment at [145]).

(b) The defence of fair comment was not applicable as those statements in paras 10–13 of the Article which were alleged by the Respondents to be comments ("the Relevant Statements") were statements of fact instead; and, even if those statements were comments, they were not comments based on facts (see the Judgment at [152]). The fact that some of the allegations in the Relevant Statements had been couched as questions rather than statements was irrelevant (see the Judgment at [153]).

(c) The Appellants could not rely on a derivative qualified privilege based on what we shall hereafter term the "right-of-reply privilege" of CSJ, *ie*, the right which CSJ had to reply to the Respondents' attacks on his character. This was because the allegations pertaining to corruption in the Article *exceeded* the scope of CSJ's right-of-reply privilege, which formed the basis of the derivative qualified privilege claimed by the Appellants (see the Judgment at [163]–[164]).

(d) The privilege laid down by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 ("*Reynolds (HL)*") – *ie*, "the *Reynolds* privilege" (examined at [186]–[235] below) – as well as the offshoot of this privilege (*viz*, the neutral reportage defence) were not part of the law of qualified privilege in Singapore. The position in Singapore on qualified privilege was, instead, that established by the Court of Appeal in *Aaron v Cheong Yip Seng* [1996] 1 SLR 623 ("*Aaron*") (see the Judgment at [219]–[221]).

(e) The Appellants' argument on the Disputed Words' lack of defamatory impact (*ie*, that, even if the Disputed Words were defamatory, they could not alter the Respondents' reputation in Singapore) was erroneous and should be rejected. The law of defamation was not only concerned with the depreciation in the value of the plaintiff's reputation, but also involved an "essential element of vindication" (see *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 at [111] (cited at [229] of the Judgment)). If the Appellants' contention were valid (see the Judgment at [230]):

> [I]t would mean that in Singapore, a person could continue to make defamatory remarks about a person who enjoys the highest of reputations without being liable under the law of defamation.

Such a legal position, the Judge held, was unsupportable.

21 In respect of the conclusion set out at sub-para (d) of [20] above, it should be noted that the

Judge arrived at that conclusion after reviewing the relevant cases from different common law jurisdictions. Apart from holding himself bound by higher authority (*ie*, *Aaron*) to reject the *Reynolds* privilege, the Judge made two observations relating to this defence. First, this defence was "*influenced* by" [emphasis added] (see the Judgment at [211]) Art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), but "that influence in itself [did] not necessarily mean that [*Reynolds (HL)*] should not apply in Singapore" (see the Judgment at [211]). Second, the neutral reportage defence was simply an *extension* of the *Reynolds* privilege (see the Judgment at [220]).

22 The Judge also made some additional observations on other related issues. He noted that s 12 of the Defamation Act (Cap 75, 1985 Rev Ed) ("the Defamation Act (1985 Rev Ed)") "already provide[d] for qualified privilege for a newspaper [in Singapore]" (see the Judgment at [222]). He opined that whether the scope of such privilege should be extended was a matter for Parliament to decide, and the court should be slow to extend that privilege (see the Judgment at [226]). Lastly, the Judge added that the neutral reportage defence applied only "where the publication [did] not adopt the views of the maker of the statement" (see the Judgment at [227]). In the instant case, the Article conveyed the message that the views expressed therein, especially those at paras 10–13 (which, the Judge held, constituted the part "where the sting [was] carried" (see the Judgment at [227])), were those of HR and not of CSJ (*ibid*).

The issues on appeal

23 Before us, the Appellants raised eight grounds of appeal as follows:

(a) The Judge erred in taking into account inadmissible extrinsic evidence in ascertaining the meaning of the Disputed Words, and in effect determined the innuendo meaning rather than the natural and ordinary meaning of those words.

(b) The Disputed Words did not allege that LKY was corrupt.

(c) The Disputed Words did not allege that LHL was corrupt.

(d) The Judge erred in allowing LHL to amend his SOC after the hearing of the Summary Judgment Applications was over and the parties had made their final submissions on those applications.

(e) The Judge was wrong in deciding that the defence of justification did not apply in the present case, given especially that, after accepting the Respondents' meaning of the Disputed Words, he failed to afford the Appellants an opportunity to amend their pleadings so as to justify the meaning found by the court. (It should be noted that the Appellants made this particular argument not only in relation to Suit 539 (where LHL amended his SOC to plead the New Meaning), but also in relation to Suit 540 (where LKY did not make any changes to the pleaded meaning of the Disputed Words).)

(f) The Judge mischaracterised the Relevant Statements as statements of facts when they were actually comments, and thus erred in holding that the defence of fair comment was not sustainable.

(g) The Judge was wrong in deciding that the defence of derivative qualified privilege based on CSJ's right-of-reply privilege did not apply, and mistakenly thought that the allegations made against the Respondents in the Article were more serious than the Respondents' allegations

against CSJ.

(h) The Judge erred in refusing to acknowledge that the *Reynolds* privilege and its offshoot, the neutral reportage defence, were part of the law of qualified privilege in Singapore and was wrong to exclude those defences. If, however, the Judge was right in holding that the *Reynolds* privilege and the neutral reportage defence did not form part of Singapore's common law, the Appellants could still invoke what may be called the "traditional qualified privilege defence" in view of the special facts of this case.

24 The Respondents, on their part, contended that the Judge was entirely correct in law in his findings and reasoning. In addition, in respect of the meaning of the Disputed Words in relation to him, LHL stated that he "reserve[d] the right"[note: 7] to contend that the Original Meaning was "the true meaning of the [Disputed] Words"[note: 8] in the event that this court either disagreed with the Judge's finding on the meaning of the Disputed Words or ruled that he (LHL) ought not to have been granted leave to amend his SOC.

25 We propose to deal with the Appellants' grounds of appeal (and the respective arguments of the parties in relation thereto) in the order in which they have been set out at [23] above. As we are of the view that the second and third grounds of appeal (*ie*, grounds (b) and (c)) are connected with the first ground of appeal (*ie*, ground (a)), and as these three grounds are all essentially concerned with the issue of what the natural and ordinary meaning of the Disputed Words is, we shall consider them together.

Grounds (a), (b) and (c): The meaning of the Disputed Words

Overview

26 The Appellants' argument *vis-à-vis* the meaning of the Disputed Words is that those words neither alleged nor meant that either LKY or LHL was corrupt, contrary to what the Respondents alleged and what the Judge found. Under the law of defamation, the offending words may be defamatory (broadly speaking) in two senses, namely (see Doris Chia & Rueben Mathiavaranam, *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008) ("*Evans on Defamation*") at p 12 as well as *Goh Chok Tong* ([19] *supra*) at [44]):

(a) in their natural and ordinary meaning, which includes any meaning capable of being inferred from the offending words standing on their own in addition to their literal meaning; and

(b) in their innuendo meaning, *ie*, in some other meaning (apart from the natural and ordinary meaning) which, although not defamatory from the viewpoint of the ordinary reasonable person, is nonetheless defamatory from the viewpoint of people with knowledge of the special meaning of the offending words or the relevant extrinsic facts.

As mentioned earlier (at [9] above), the Respondents relied on only the natural and ordinary meaning of the Disputed Words in the Summary Judgment Applications.

The applicable principles

27 The test for determining the natural and ordinary meaning of the offending words in a defamation action is well settled in England and, likewise, Singapore. Essentially, the court decides what meaning the words would convey to an ordinary reasonable person, not unduly suspicious or avid for scandal, using his general knowledge and common sense. It is irrelevant what meaning was

intended by the maker or publisher of the statement (*ie*, the defendant) or what meaning was actually understood by the plaintiff. In *Microsoft Corporation v SM Summit Holdings Ltd* [1999] 4 SLR 529 ("*Microsoft Corporation*"), this court summarised the test as follows (at [53]):

> The principles applicable in determining the natural and ordinary meaning of the words complained of in a defamation action are well-established. *The court decides what meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense*: *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1984-1985] SLR 516; [1985] 1 MLJ 334 and [*JJB v LKY (1992)* ([19] *supra*)]. *The test is an objective one: it is the natural and ordinary meaning as understood by an ordinary, reasonable person, not unduly suspicious or avid for scandal*. The meaning intended by the maker of the defamatory statement is irrelevant. Similarly, the sense in which the words were actually understood by the party alleged to have been defamed is also irrelevant. *Nor is extrinsic evidence admissible in construing the words*. The meaning must be gathered from the words themselves and in the context of the entire passage in which they are set out. *The court is not confined to the literal or strict meaning of the words, but takes into account what the ordinary, reasonable person may reasonably infer from the words*. The ordinary, reasonable person reads between the lines. [emphasis added]

(In this regard, reference may also be made to *Bank of China v Asiaweek Ltd* [1991] SLR 486 at 492, [16]; *JJB v LKY (1992)* ([19] *supra*) at 318–319, [19]; *Gatley on Libel and Slander* (Patrick Milmo & W V H Rogers eds) (Sweet & Maxwell, 11th Ed, 2008) ("*Gatley*") at para 3.16; and *Evans on Defamation* at pp 12–13.)

28 It is important to reiterate that the natural and ordinary meaning of the offending words is not confined to their *literal* or *strict* meaning, but includes inferences or implications that the ordinary reasonable person may draw from those words in the light of his general knowledge, common sense and experience (see *Microsoft Corporation* at [53]; see also *Gatley* at paras 3.16–3.17 and *Evans on Defamation* at p 14). In this regard, it is instructive to refer to Lord Reid's comments in *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 ("*Rubber Improvement Ltd*") at 258 (which were endorsed by this court in *Microsoft Corporation* at [54] as well as in *Goh Chok Tong* at [20]), as follows:

> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But *that expression is rather misleading in that it conceals the fact that there are two elements in it*. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But *more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning*. [emphasis added]

29 Inferences or implications which the ordinary reasonable person may draw based on his general knowledge, common sense and experience are entirely permissible. It must be appreciated that such inferences or implications are *not* the same as inferences or implications based on *extrinsic evidence*, which evidence is not admissible as a matter of law in the construction of the natural and ordinary meaning of the offending words (see *Microsoft Corporation* at [53]). The following passage by Lord Morris of Borth-y-Gest sets out the distinction between these two types of infererences or implications clearly (see *Gordon Berkeley Jones v Clement John Skelton* [1963] 1 WLR 1362 ("*Jones*") at 1370–1371):

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: *any meaning that does not require the support of*

> *extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words*. … The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. [emphasis added]

30 The characteristics of the ordinary reasonable person are also important. As pertinently noted by the Judge at [49] of the Judgment:

> [I]t is this hypothetical character's reading and understanding of the defamatory words which assume legal significance and translate into a definitive legal ruling of the status of allegedly defamatory words.

This court (in *Microsoft Corporation* at [54] and *Goh Chok Tong* at [25]) adopted the characterisation of the hypothetical ordinary reasonable person set out by the English Court of Appeal ("the English CA") in *Skuse v Granada Television Limited* [1996] EMLR 278 ("*Skuse*") at 285, which was as follows:

> The hypothetical reasonable reader … is not naive but *he is not unduly suspicious*. *He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking*. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. [emphasis added]

31 The ordinary reasonable person has also been described in many other colourful ways. For instance, he has been said to be a person:

> (a) who is "fair-minded" (see *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 at 71), "law-abiding" (see *Lau Chee Kuan v Chow Soong Seong* [1955] MLJ 21 at 22) and a "right-thinking [member] of society generally" (see *Workers' Party v Tay Boon Too* [1972-1974] SLR 621 at 628, [52]);
>
> (b) who "does not live in an ivory tower and … is not inhibited by a knowledge of the rules of [documentary] construction" (see *Rubber Improvement Ltd* at 258); and
>
> (c) who can be assumed to possess "general knowledge and experience of worldly affairs" (*ibid*).

Ultimately, all these descriptions seek to emphasise the point that the ordinary reasonable person is very much an average rational layperson, neither brilliant nor foolhardy, and not idiosyncratic in his behaviour or disposition. As stated by Lord Reid in *Rubber Improvement Ltd* at 259:

> Ordinary men and women have different temperaments and outlooks. *Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes* and see what is the most damaging meaning they would put on the words in question. [emphasis added]

The Appellants' arguments on the meaning of the Disputed Words

32 The Appellants' main arguments on the meaning of the Disputed Words may be summarised as follows:

(a) In attributing to the ordinary reasonable person general knowledge of certain events ("the Relevant Events") such as the NKF Saga, the SDP protest and the various defamation suits brought by the Respondents, including the SDP proceedings, the Judge took into account irrelevant extrinsic evidence, which was not admissible in determining the natural and ordinary meaning of the Disputed Words. Instead of imbuing the ordinary reasonable person with "***general knowledge***"[note: 9] [emphasis added in bold italics], which would *not* include knowledge of the Relevant Events, the Judge effectively imbued this hypothetical person with "*specific* knowledge"[note: 10] [emphasis added; underlining in original omitted] of these matters.

(b) Even if all the Relevant Events were within the general knowledge of the ordinary reasonable person, bearing in mind that this hypothetical person was not avid for scandal, he would not have come to the conclusion that the Disputed Words meant that the Respondents were corrupt.

(c) It was wrong of the Judge to take into account "masses of extrinsic evidence"[note: 11] in the form of newspaper clippings as well as the decisions of V K Rajah J in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 ("*Chee Siok Chin*"), Belinda Ang Saw Ean J in *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675 ("*Lee Hsien Loong (HC)*") and this court in *Lee Hsien Loong v Singapore Democratic Party* [2008] 1 SLR 757 ("*Lee Hsien Loong (CA)*") in determining the natural and ordinary meaning of the Disputed Words.

(d) The Disputed Words (especially the words "Singaporean officials" and "Singapore's great and good" in para 13 of the Article) did not refer to the Respondents and the Judge had relied on extrinsic evidence to find that they referred to the Respondents.

(e) The Judge was wrong to rely on the Malaysian case of *Hasnul bin Abdul Hadi v Bulat bin Mohamed* [1978] 1 MLJ 75 ("*Hasnul*") to find that the NKF and/or Durai had become symbolic of corruption and that any person mentioned in connection with either of them was similarly tainted, given especially that *Hasnul* was a case decided based on the innuendo meaning of the offending words. Although defamation by implication was possible, such implication must be derived from the offending words themselves and not from "extraneous"[note: 12] (as the Appellants put it) or extrinsic materials.

Our decision on the Appellants' arguments and the meaning of the Disputed Words

33 The Appellants' first argument *vis-à-vis* the meaning of the Disputed Words (as set out at sub-para (a) of [32] above) relates to the general knowledge of the ordinary reasonable person, while the rest of the arguments pertain essentially to the approach taken by the Judge in determining the natural and ordinary meaning of the Disputed Words. Given the established test in defamation law for determining the natural and ordinary meaning of the offending words (see [27] above), the state of the ordinary reasonable person's general knowledge plays a pivotal role in this respect. As such, we shall first address this issue.

The state of the ordinary reasonable person's general knowledge

34 The state of the general knowledge of the ordinary reasonable person will naturally be affected and shaped by what is common knowledge in the public domain and by significant (public) events which would reasonably be in the mind of the ordinary reasonable person.

35 The Judge found, on the evidence, that there was no dispute between the parties that the

ordinary reasonable person would be aware of the following matters (see the Judgment at [59]):

(a) LHL is the Prime Minister of Singapore.

(b) LKY is the Minister Mentor in the Prime Minister's Office, a Cabinet Minister and the first Prime Minister of Singapore. He is also the current chairman of the GIC [the Government of Singapore Investment Corporation Pte Ltd], a founding member of the PAP [People's Action Party] and its first secretary-general.

(c) [RP] is the publisher of FEER. [HR] is the editor of FEER and the author of the Article.

(d) In the July/August 2006 Issue of … FEER [*ie*, FEER (Vol 169 No 6)], the [Appellants] published, and/or caused to be published, the Article in respect of an interview with CSJ. CSJ is the secretary-general of the Singapore Democratic Party ("SDP").

36 It was the Respondents' case both before the Judge and in the present appeals that the Relevant Events, all of which occurred before the Article was published, were matters in the public domain. The Relevant Events consisted mainly of the following:

(a) the various defamation suits commenced over the years by the Respondents, in which they successfully obtained damages and/or apologies from the persons whom they sued;

(b) the NKF Saga, which commenced with the trial on 11 July 2005 of what we shall hereafter term "the NKF libel suit", *ie*, the libel action brought by the NKF and Durai against Singapore Press Holdings Ltd (that suit culminated in Durai withdrawing the action, subsequently being arrested by the Corrupt Practices Investigation Bureau ("CPIB") and, following investigations carried out by the police and the Inland Revenue Authority of Singapore on the NKF's former board of directors as well as an independent audit conducted by KPMG, charged under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the current PCA") (see the Judgment at [60]));

(c) the SDP protest, which took place on 11 August 2005 outside CPF Building and which involved several members of the SDP, including CSJ and his sister, Chee Siok Chin ("CSC") (see the Judgment at [62]); and

(d) the SDP proceedings (see further [37] below).

37 As alluded to at sub-para (a) of [17] above, the SDP proceedings consisted of Suit No 261 of 2006 and Suit No 262 of 2006, which were the Respondents' defamation actions against the SDP and eight of its members (including CSJ and CSC) in April 2006 in respect of the *New Democrat* articles (see the Judgment at [21] and [63]). Six of the defendants sued admitted liability for libel, agreed to pay damages and costs, and published apologies in *The Straits Times* and *Lianhe Zaobao* on 3 May 2006.[note: 13] CSJ and CSC were the only two defendants who filed defences and contested the SDP proceedings. The offending words in the *New Democrat* articles were eventually adjudged by Belinda Ang J in *Lee Hsien Loong (HC)* ([32] *supra*) to be defamatory of the Respondents (specifically, the learned judge found that the words bore, *inter alia*, the meaning that the Respondents were corrupt). CSJ's subsequent application for an extension of time to file an appeal against Belinda Ang J's decision was dismissed by this court in *Lee Hsien Loong (CA)* ([32] *supra*). It should be noted that, in the present actions (*ie*, the Defamation Suits), the Respondents contended that the Article adopted a style which was very similar (in terms of both structure and substance) to that adopted in certain passages of the *New Democrat* articles (see the relevant portions of the *New Democrat* articles as reproduced in the Judgment at [21]).

38 The Judge accepted that all the Relevant Events were in the public domain and that the ordinary reasonable person "would have been aware *generally* [of them]" [emphasis added] (see the Judgment at [66]). In contrast, the Appellants' position was that these events would not have been within the ordinary reasonable person's general knowledge, and, being instead in the nature of extrinsic evidence, were inadmissible to prove the state of the ordinary reasonable person's general knowledge. At para 16 of their written case for the present appeals, the Appellants argued:

> The [J]udge erected references to the general knowledge and common sense of the reasonable reader into a veritable library of information about current events, court cases, activities, police activity, demonstration and political invective. A mass of information about the [Respondents'] defamation actions, [the] NKF, [CSJ's] latest exploits and the mutual vituperation between him and the [Respondents] are all attributed to the reasonable reader – information he could not possibly hold in his … head.

39 The issue which we have to decide apropos the state of the ordinary reasonable person's general knowledge is simply this: was it wrong in law for the Judge to regard knowledge of the Relevant Events as part and parcel of the general knowledge of the ordinary reasonable person?

40 We are of the view that the Judge was not wrong in taking the above view (*viz*, that the Relevant Events formed part of the ordinary reasonable person's general knowledge). All these events (save for some of the defamation suits mentioned in sub-para (a) of [36] above) happened relatively shortly (*ie*, within about one year) before the publication of the Article. The NKF Saga was in the news, both offline and online, for months. The public apologies issued by six of the defendants in the SDP proceedings were also much publicised, having regard to the fact that those six defendants were members of the SDP. Their apologies were published in *The Straits Times* and *Lianhe Zaobao* on 3 May 2006, less than three months before the Article was published. Both of these newspapers have a very large readership in Singapore.

41 Indeed, the Relevant Events were all extensively reported and featured in the local press, as can be seen from the numerous media reports adduced by the Respondents.[note: 14] In fact, by the time the Article was published, most, if not all, of the Relevant Events had gained notoriety among the general public in Singapore because of the extensive coverage of and the intensive discussions about these events in the media (and on the Internet). The mass circulation of the daily newspapers published in Singapore in four languages entailed that the Relevant Events became common knowledge among the people living here. Specifically, in respect of the NKF Saga, there was huge public outrage after details of the benefits enjoyed by the NKF's former management, especially Durai, were exposed at the trial of the NKF libel suit and reported in the local press. The NKF Saga was a very traumatic event for the hundreds, if not thousands, of ordinary Singaporeans who had made cash contributions to the NKF for its charitable work. They felt betrayed by Durai, and were outraged when the truth surfaced that they had been deceived into believing that the NKF was spending the bulk of its funds for the benefit of needy kidney patients. It was thus unsurprising that Rajah J noted in *Chee Siok Chin* ([32] *supra*) that (at [121]):

> The governance and finances of the NKF were in July and early August 2005 caught in a swirl of negative and adverse publicity. Information and material that entered the *public domain* as a consequence of litigation involving its former chief executive officer [*ie*, Durai] … became the source of *widespread and grave public disquiet*. [emphasis added]

42 Here, we should remind ourselves that the finding or opinion of Rajah J in *Chee Siok Chin* on this issue of fact (*ie*, whether the NKF Saga was a matter of general knowledge) is not binding on the Judge, and the Judge did not make his finding based on the views expressed by Rajah J in *Chee Siok*

Chin but, rather, based on all the materials placed before him. Given these materials, it would indeed be surreal if we were to conclude that the ordinary reasonable person had no general knowledge of all of the Relevant Events, especially the NKF Saga. In our view, this point is unarguable.

43 In this regard, the Respondents' counsel reminded us that the Appellants, in opposing the Summary Judgment Applications, had proceeded on the mistaken basis that the Respondents' case for summary judgment was based on the innuendo meaning of the Disputed Words when it was actually the natural and ordinary meaning of those words which the Respondents relied on. In so doing, the Respondents' counsel submitted, the Appellants had in fact *unconditionally admitted* that the Relevant Events were indeed in the public domain and/or constituted public knowledge. This submission is borne out by the written submissions dated 8 May 2008 which the Appellants filed for the Summary Judgment Applications, where it was stated:[note: 15]

> 7. The [Respondents'] affidavits go into great detail … about *defamation actions that the [Respondents] have won in the past*. … The actions cannot be relevant to the innuendo meanings [of the Disputed Words], because they are *public knowledge* …
>
> 8 . *The affidavits describe the "NKF Saga" … and an SDP protest … and a libel action brought against the SDP members* [*ie*, the SDP proceedings] … The [Respondents] have refused to supply further and better particulars of the Statements of Claim paras 16–31 or to explain how the "NKF Saga", the [SDP] protest or the SDP [proceedings] can be relevant to their pleaded meaning or innuendo meaning … As *matters known to the general public*, they cannot support an "innuendo" meaning …
>
> [emphasis added; emphasis in original omitted]

44 At para 19 of the same written submissions (*ie*, the Appellants' written submissions dated 8 May 2008), the Appellants further made the following comments:[note: 16]

> [T]he [Respondents] claim that the innuendo meaning … is exactly the same as the ordinary and natural meaning … It is fundamental that a true innuendo only exists "where the extended meaning arises from facts passing beyond general knowledge" … *Indeed the facts pleaded are so well known that they constitute facts of which judicial notice may be taken, since they are court judgments such as the [Respondents'] libel victories, Mr Durai's libel case and criminal case, the SDP protest … and the independent auditor's public inquiry report into [the] NKF* … [emphasis added; emphasis in original omitted]

45 Counsel for the Respondents also reminded us that, when the Appellants realised that they should not have made the admissions outlined at [43]–[44] above, they applied unsuccessfully to withdraw those admissions on the ground that they had made a mistake in opposing a case which the Respondents had not put forward (see the Judgment at [64]–[65]). Before us, counsel for the Appellants merely reiterated the arguments which he had made to the Judge as to why the Relevant Events were extrinsic evidence and should not have been treated as being in the public domain, without reference to the Appellants' own admissions in this regard. We should add that it would not have mattered one bit even if the Appellants had not made those admissions. In our view, the evidence that, by the time the Article was published, the Relevant Events had entered the public domain and were within the general knowledge of the ordinary reasonable person is so overwhelming that the Appellants' attempt to argue to the contrary is merely forensic jousting for the sake of disputing every conceivable point.

46 For all of the above reasons, we are of the view that the Judge was fully entitled and correct

to treat knowledge of the Relevant Events as part of the general knowledge of the ordinary reasonable person. Contrary to the Appellants' contention, these events were definitely *not* extrinsic evidence. We turn now to examine, first, whether an ordinary reasonable person with general knowledge of these events would infer that the Disputed Words were referable to the Respondents and, second, what meaning those words would convey to him.

Were the Disputed Words referable to the Respondents in the mind of the ordinary reasonable person?

47 One of the Appellants' main arguments before us was that the Judge was wrong to find that the expressions "Singaporean officials" and "Singapore's great and good" in para 13 of the Article were naturally, by themselves, referable to the Respondents, and that the Judge had made this finding only with the aid of extrinsic evidence.

48 It is trite law that, to succeed in an action for defamation, the plaintiff must prove not only that the defendant published the offending words, but that those words were published *of the plaintiff* (see *Price Waterhouse Intrust Ltd v Wee Choo Keong* [1994] 3 SLR 801 ("*Price Waterhouse*") at 809, [17]; *Knupffer v London Express Newspaper, Limited* [1944] AC 116 ("*Knupffer*") at 118–119; *Lee Hsien Loong (HC)* ([32] *supra*) at [18] and [30]; *Gatley* ([27] *supra*) at para 7.1; and *Evans on Defamation* ([26] *supra*) at p 45).

49 The test is an *objective* one, and it is simply whether the ordinary reasonable person who, at the material time, was aware of the relevant circumstances or special facts (if any) would reasonably understand the plaintiff to be referred to by the offending words (see *Price Waterhouse* at 809, [18] and 811, [24] as well as *Knupffer* at 119). In *A Balakrishnan v Nirumalan K Pillay* [1999] 3 SLR 22 ("*A Balakrishnan*"), this court held that, having regard to the article which contained the offending words and the publicity given to the plaintiffs as members of an organising committee that had organised an event called "Tamil Language Week" (which was the subject matter of that article), a reasonable person who was acquainted with the plaintiffs, on reading the article, would come to the conclusion that the offending words referred to the plaintiffs even though the plaintiffs were not expressly identified in the article. It follows from the decision in *A Balakrishnan* that the plaintiff need not be expressly referred to by name in the offending words; it is also immaterial whether or not the defendant intended to refer to the plaintiff (see *Price Waterhouse* at 809, [18] and *Knupffer* at 119; see also generally *Gatley* at paras 7.2 and 7.5 as well as *Evans on Defamation* at pp 45–47).

(1) Whether the Disputed Words were referable to LKY

50 In determining whether the offending words are referable to the plaintiff, the context in which the words are used is relevant as it is in that context that the question of reference to the plaintiff is to be determined (see *A Balakrishnan* at [22]). In the present case, the Article was *ex facie* about the role of CSJ as an opposition politician and a self-proclaimed martyr in Singapore's political landscape. But, pervading the Disputed Words as well as other parts of the Article were references to LKY by name (see, *eg*, the phrase "the answer lies with strongman Lee Kuan Yew himself" at para 9 of the Article as well as the references to "Lee Sr." and "elder Mr. [Lee]" at para 17 and para 19 respectively of the Article).

51 The Appellants themselves had also accepted on two occasions that the Disputed Words referred to LKY. First, in their reply submissions dated 14 May 2008 filed for the Summary Judgment Applications, the Appellants stated the following at paras 76–77:[note: 17]

> 76 The [Respondents] seem to think that the [Appellants] dispute that the alleged defamatory

words of the Article refer to the Minister Mentor [*ie*, LKY].

7 7 *The [Appellants] do not dispute this. The words obviously and expressly refer to the Minister Mentor, whose power and influence in Singapore is known to all readers and is a matter of public interest in the region*. …

[emphasis added]

52 Second, at the hearing of the Summary Judgment Applications on 16 May 2008 before the Judge, counsel for the Appellants conceded that the words "Singaporean officials" in para 13 of the Article referred to LKY:[note: 18]

In the light of our pleadings, I *concede* that [the] ordinary man can infer that "Singaporean officials" refers to LKY but not LHL. [emphasis added]

53 As for the word "government" in paras 10 and 11 of the Article, this word ordinarily means the body of persons who govern the State. It could refer to either the Cabinet collectively or the entire apparatus of a state's system of government. The fact that the offending words refer to *a class or body of persons* (as opposed to *a specific individual*) is not, *ipso facto*, a bar to a successful claim in defamation so long as the ordinary reasonable person can conclude that "the statement about the body [of persons] is capable of being interpreted as referring to the individual" (*per* Rajah J in *Chee Siok Chin* ([32] *supra*) at [68]; see also *Knupffer* ([48] *supra*) at 119 and *Lee Hsien Loong (HC)* ([32] *supra*) at [35]). Of course, the larger the class of persons covered by the offending words, the less likely it is that the ordinary reasonable person would reach such a conclusion (see *Gatley* ([27] *supra*) at para 7.9 and *Evans on Defamation* ([26] *supra*) at pp 55–56).

54 In the present case, it would not be difficult for the ordinary reasonable person to associate the word "government" in (*inter alia*) para 10 of the Article, especially in the context of the phrase "squeaky-clean government" in that same paragraph, with LKY as he is almost universally acknowledged as the architect of Singapore's corruption-free government. As the Appellants themselves stated at para 77 of their reply submissions dated 14 May 2008, LKY's "*power and influence in Singapore is known to all readers and is a matter of public interest in the region*"[note: 19] [emphasis added]. We therefore fully agree with the Judge's reasons (at [35]–[36] of the Judgment) for holding that the term "government" in the Disputed Words was referable to LKY, bearing in mind especially that para 9 of the Article also referred to LKY specifically as "*strongman Lee Kuan Yew*" [emphasis added]. As the Judge stated in the Judgment:

35 Coming back to the Article, it must be remembered that *para 4 thereof states that many believe that LKY still runs Singapore and para 9 thereof describes him as "strongman Lee Kuan Yew"*. This description is repeated in para 16. *Accordingly, even though LKY is not the prime minister, it seems to me that the Article is saying that he is the person or at least one of the persons … holding the reigns of power in government. LKY is also the chairman of the GIC [Government of Singapore Investment Corporation Pte Ltd]*.

36 So, seen in context, *when reference is made in para 11 of the Article to the Government's control of huge pools of public money in the CPF [Central Provident Fund] and [the] GIC and its control of spending on public housing, I am of the view that LKY is being referred to*. As an aside, I note that although para 77 of the DRS [*ie*, the Appellants' reply submissions dated 14 May 2008] says that the ordinary reader would not identify LKY as "the government", *HR's own affidavit refers at para 13 to "the [Respondents] and their government"* and para 38 of the [Appellants'] Written Submissions [*ie*, the Appellants' written submissions dated 8 May 2008]…

> refers to the [Respondents] as "the two most powerful men in Singapore".
>
> [emphasis added]

(In this regard, reference may also be made to *Sykes v Fraser* (1974) 39 DLR (3d) 321 and *Christchurch Press Co Ltd v McGaveston* [1986] 1 NZLR 610, where claims for defamation succeeded in respect of statements that made an attack on a class *and* specifically referred to the plaintiffs concerned *at the same time*.)

55 As for the words "Singapore's great and good" in para 13 of the Article (which, as mentioned at [5] above, were reproduced prominently in enlarged font in a box at the top of the last page of the Article), those words were used in the context of the assertion in that same paragraph that "Singaporean officials [had] a remarkable record of success in winning libel suits against their critics". The ordinary reasonable person would know of the many defamation actions commenced by LKY against a large number of politicians and newspapers,[note: 20] which actions have been given wide media coverage in Singapore. In our view, there can be no doubt that the words "Singapore's great and good" in para 13 of the Article also (and perhaps mockingly) referred to LKY as one of these persons.

(2) Whether the Disputed Words were referable to LHL

56 Unlike LKY, who was referred to by name in the Disputed Words, LHL was not referred to by name in the Disputed Words, although he was referred to as "[LKY's] son" at para 9 of the Article (which forms part of the Disputed Words). LHL was also expressly referred to in other parts of the Article falling outside the Disputed Words either by his full name (see, *eg*, paras 3 and 16 of the Article) or as "Prime Minister Lee" (see, *eg*, para 17 of the Article).

57 As mentioned earlier, the law of defamation does not require that the offending words must expressly refer to the plaintiff by name; it is sufficient so long as the ordinary reasonable person knows or has reason to believe that the plaintiff is being referred to by those words. Lord Reid gave the following example in *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1243:

> Suppose a statement [is made] that X is illegitimate, and an action [is brought] by X's mother. It seems to me obvious … that if the statement is untrue, the law could not deny an action to the mother.

58 In Lord Reid's example, a reference to a child was accepted as a sufficient reference to the child's parent where the parent was the plaintiff. In our view, there is no reason why the converse (*ie*, a reference to a parent) cannot be a sufficient reference to the child of that parent where it is the child who is the plaintiff. In the instant case, the ordinary reasonable person would know that LKY has only one son serving in the Government, namely, LHL, the Prime Minister of Singapore. Further, para 16 of the Article expressly used the word "son" when referring to LHL by his full name (see the passage "[a]ll these tensions will erupt when strongman Lee Kuan Yew dies. … Power may have officially passed to *his son, Lee Hsien Loong* …" [emphasis added]). In the context of the Article, the reference to "son" in the phrase "his son … will have a price to pay" at para 9 of the Article (which forms part of the Disputed Words) must necessarily mean LHL.

59 As for the term "government" in the Disputed Words, it must similarly be referable to LHL in the context of the Article. It is common knowledge that LHL, as the Prime Minister of Singapore, is the head of the Government in Singapore (see *Lee Hsien Loong (HC)* ([32] *supra*), where Belinda Ang J, in holding that the *New Democrat* articles were referable to LHL, reasoned (at [39]) that "[t]he ordinary

reader would be aware that … the 'one individual' must be the person at the top, namely, the secretary-general of the [People's Action Party] and the Prime Minister of Singapore – *ie* LHL"). Furthermore, the first explicit reference to LHL in the Article was at para 3, where he was referred to as "Singaporean Prime Minister Lee Hsien Loong". This was followed by the reference in the next sentence to "*his government's* persecution of the opposition" [emphasis added]. In our view, there can be no doubt that the term "government" in the Disputed Words likewise referred to LHL.

60 Turning to the phrase "Singaporean officials" in para 13 of the Article, the Appellants, although conceding in the court below that this expression referred to *LKY*, denied that it referred to *LHL* (see the Judgment at [31]). In our view, the Appellants' position is untenable. If it is accepted that the word "officials" in the phrase "Singaporean officials" referred to LKY, that word must, as a matter of common sense, refer to LHL as well since he is the Prime Minister of Singapore and the head of the Government. As noted by the Judge, the word "officials" was used "in the plural, not the singular" (see the Judgment at [44]). LHL was the first government official referred to in the Article (see para 3 thereof), even before any reference to LKY was made, and he (LHL) was mentioned specifically in his capacity as the Prime Minister, the head of the Government. Furthermore, the word "officials" in para 13 of the Article was also used in the context of libel suits commenced by "Singaporean officials". This is significant as it is common knowledge in Singapore that LHL, like LKY, has sued many politicians and the press for defamation in Singapore.[note: 21]

61 Lastly, with regard to the words "Singapore's great and good" in para 13 of the Article, the reasons why these words were referable to LKY would equally apply in relation to LHL. For these reasons, we fully agree with the Judge's finding that the Disputed Words referred to LHL as well.

The meaning of the Disputed Words in relation to the Respondents

(1) The meaning of the Disputed Words in relation to LKY

62 Turning now to the meaning of the Disputed Words, we consider first their meaning in relation to LKY. The pleaded meaning of the Disputed Words apropos LKY is that he is unfit for office because he is corrupt and has set out to sue and suppress those who question him for fear that such questions would expose his corruption (see [6] above).

63 In their defences, the Appellants pleaded in relation to both of the Respondents that the natural and ordinary meaning of the Disputed Words was instead as follows (and this was the meaning which they sought to justify):[note: 22]

> The words [*ie*, the Disputed Words] are substantially true in their natural and ordinary meaning, viz that over the course of … half [a] century as Singapore's most powerful political leader [LKY] has taken *anti-democratic* positions and has made some mistakes and misjudgments that will return to haunt his successors, especially since *much of his governance has been non-transparent (e.g. NKF, CPF [the Central Provident Fund] and GIC [the Government of Singapore Investment Corporation Pte Ltd])* and he has responded to criticism by treating political opponents with contempt, *persecuting them* and suing them under unaltered and antiquated English libel laws that favour political plaintiffs. *This behaviour gives reason to inquire/alternatively reason to suspect, as to whether there may be other NKF-type scandals lurking below the surface in Singapore and in any event will affect his legacy*. When [LKY] dies, his son and future politicians will have had no mentoring in how to work within a genuine multi-party democracy committed to free speech, and will for that reason have difficulty when their government faces an effective opposition party. [emphasis added]

64 The Respondents disagreed that the Disputed Words conveyed to the ordinary reasonable person the meaning alleged by the Appellants as set out in the preceding paragraph. The Respondents' case was essentially that the Disputed Words meant that the Respondents were "corrupt".[note: 23] This, it was argued, was the cumulative effect of all the unfounded allegations made against the Respondents in the Disputed Words, starting with para 9 of the Article, which quoted CSJ as saying that LKY had "*accumulated enough skeletons in his closet* that he knows that when he is gone, his son and the generations after him *will have a price to pay*" [emphasis added]. The Article proceeded to question in para 10 "whether Singapore deserve[d] its reputation for *squeaky-clean* government" [emphasis added] and then seamlessly launched (in the same paragraph) into the "*scandal*" [emphasis added] involving the NKF and Durai (*ie*, the NKF Saga).

65 According to para 10 of the Article, this scandal:

> … erupted in 2004 when it turned out that … Durai was not only drawing a $357,000 annual salary, but the charity was paying for his first-class flights, maintenance on his Mercedes, and gold-plated fixtures in his private office bathroom.

The Article described (at para 11) this scandal as a "gift for the opposition" and suggested (in the same paragraph) that the scandal "had *wider implications* too" [emphasis added]. Paragraph 11 of the Article then immediately made reference to the Government's control of huge pools of public money in the Central Provident Fund ("CPF") and the Government of Singapore Investment Corporation Pte Ltd ("GIC"), both of which were described as "highly nontransparent". The same paragraph went on to refer to the Government's control over spending on public housing in Singapore and described the funds for refurbishing apartment blocks as "a *bribe* for districts that vote for the ruling party" [emphasis added]. Paragraph 11 ended with the statement that "Singaporeans have no way of knowing whether officials are *abusing* their trust as Mr. Durai did" [emphasis added]. Not satisfied with having made all these statements, HR went on to assert at para 12 of the Article that "[i]t gets *worse*" [emphasis added], and drew further parallels in paras 12–13 between the successful libel suit brought by the NKF in 1998 (before the NKF and Durai met their nemesis in the NKF libel suit (as defined at [36] above)) and the defamation suits commenced by "Singaporean officials" (see para 13 of the Article) and "Singapore's great and good" (*ibid*), who had "a *remarkable record of success* in winning libel suits against their critics" [emphasis added] (*ibid*). Paragraph 13 then concluded with two questions: "how many other libel suits have Singapore's great and good *wrongly won*, resulting in the *cover-up* of *real misdeeds*?" [emphasis added] and "are libel suits deliberately used as a tool to *suppress* questioning voices?" [emphasis added].

66 As is apparent, although the Article was *ex facie* about CSJ's role as an opposition politician in Singapore, the fulcrum of the Article was really the NKF Saga, which HR used as a basis of comparison with the way in which (according to the Disputed Words) Singapore had been governed by the Respondents. The striking feature of the Disputed Words was the deliberate *association* and/or *comparison* which they made between, on the one hand, the highly secretive way in which Durai ran the NKF and, on the other hand, the way in which (according to para 11 of the Article) "[t]he government control[led] huge pools of public money in the [CPF] and the [GIC], both of which [were] highly nontransparent". This, the Article suggested, meant that Singaporeans had no way of knowing whether government officials were abusing their trust just as Durai had abused the public's trust in the NKF. A further association and/or comparison was made between the NKF's successful libel suit in 1998 and the successful libel suits brought by "Singaporean officials" (*per* para 13 of the Article) and "Singapore's great and good" (*ibid*). Defamation by implication (through association and/or comparison) is a well-known principle in the law of defamation (see further [91] below). This is illustrated by *Chee Siok Chin* ([32] *supra*) and *Lee Hsien Loong (HC)* ([32] *supra*), both of which were not only reported by the local media, but also publicised in regular postings on the SDP's website.

67 In *Chee Siok Chin*, three of the participants in the SDP protest (including CSC) commenced proceedings for declarations that the Ministry for Home Affairs and the Commissioner of Police had acted in an unlawful or unconstitutional manner in ordering them to disperse during the SDP protest as well as in seizing the placards which they were holding and the T-shirts which they were wearing. Whether or not the declarations sought ought to be granted turned on, *inter alia*, whether the printed words on those T-shirts and placards were *prima facie* insulting or abusive for the purposes of ss 13A and/or 13B of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("the Miscellaneous Offences Act"). In relation to this point, Rajah J observed (at [121] of *Chee Siok Chin*):

> An objective view of the printed words on the T-shirts and the placards would leave no doubt that the protestors were neither affably nor gently raising queries; rather they were patently attempting to undermine the integrity of not just the CPF Board but also the GIC and the HDB [Housing and Development Board] by alleging impropriety against the persons responsible for the finances of these bodies ("the institutions") … This was a conscious and calculated effort to disparage and cast aspersions on these institutions and more crucially on how they are being managed. *I cannot but take judicial notice of the fact that any attempt to link the institutions to the NKF at that point of time, 11 August 2005 and pending further public clarification, would be tantamount to an insinuation of mismanagement and financial impropriety. The governance and finances of the NKF were in July and early August 2005 caught in a swirl of negative and adverse publicity. Information and material that entered the public domain as a consequence of litigation involving its former chief executive officer … became the source of widespread and grave public disquiet. A toxic brew of inexplicable accounting practices, corporate unaccountability, lack of financial disclosure and questionable management practices created an atmosphere cogently suggesting financial impropriety*. On 20 July 2005, the Minister of Health, Mr Khaw Boon Wan, announced in Parliament that the new NKF Board had appointed an accounting firm, KPMG, to commission a detailed review of the NKF's financial controls; see s 59(1)(d) of the Evidence Act (Cap 97, 1997 Rev Ed). *To associate or link the institutions (and in particular the CPF [Board]) with the NKF, as it was then perceived, is to tarnish them with financial impropriety and sully their standing and integrity. Such an association does not merely allege impropriety. It was a patent attempt to scandalise the institutions and their management by association*. [emphasis added]

68 In the later case of *Lee Hsien Loong (HC)*, which concerned the SDP proceedings, Belinda Ang J held that the term "NKF" had become a byword for corruption and financial impropriety, and concluded that the *New Democrat* articles, in associating the NKF and/or Durai with the Respondents (who were the plaintiffs in the SDP proceedings), were defamatory of the Respondents. At [58]–[61] of *Lee Hsien Loong (HC)*, she said:

> 58 In the present actions, at the time the [d]isputed [w]ords were published, *the NKF had, in the defendants' [*ie*, CSC's and CSJ's] own words, become*:
>
> > *… bywords for corruption, financial impropriety and the knowing abuse of unmeritorious defamation suits …*
>
> *Mention the words "NKF" and "Durai" in the same article, and the mind of the ordinary, reasonable reader, with the ordinary man's general knowledge, will naturally turn to the financial abuses and improprieties in the NKF during Durai's tenure as its chief executive officer*. …
>
> 59 The point made by the English Article [which was one of the two articles complained of in

the SDP proceedings] is that: (a) there were truly financial abuses in the NKF, including instances of "NKF officials … paying themselves obscenely high salaries and bonuses, and flying first class on business trips"; and (b) in order to suppress allegations of such abuses, which allegations he knew to be true, Durai brought defamation actions against critics of the NKF. *The English Article then invites the reader to associate the NKF's* modus operandi *with that of the PAP [People's Action Party] by posing the pointed question*: *"Doesn't this remind you of the PAP?"* Another pointed question, which linked the PAP to the NKF, this time in the context of the PAP "monopolizing power and making sure that no one has the means to challenge that hold on power", was this: "[A]re we not witnessing the NKF but on a larger and national scale?" …

60 *The Chinese Article* [which was the other article complained of in the SDP proceedings] *was likewise replete with numerous comparisons between the NKF and the PAP*. …

6 1 *In my view, the sting in the [d]isputed [w]ords lies in the way they highlight the commonality between the PAP-led Government and the NKF, namely, lack of transparency and lack of accountability*. By this, the [d]isputed [w]ords imply that the PAP and the political elite are not transparent about the finances of the Government and government institutions such as the GIC because they want to conceal their financial improprieties, just as Durai erected a shroud of secrecy around the NKF in order to hide its management's pecuniary abuses. …

[emphasis added; emphasis in original omitted]

69 As mentioned earlier (see sub-para (c) of [32] above), the Appellants argued that the Judge should not have considered *Chee Siok Chin* and *Lee Hsien Loong (HC)* (as well as *Lee Hsien Loong (CA)* ([32] *supra*), where this court refused to grant CSJ leave to file an appeal out of time against the decision made in *Lee Hsien Loong (HC)*) in determining the natural and ordinary meaning of the Disputed Words. The Appellants' complaint was that the Judge had relied on the findings in these cases even though they concerned different facts and subject matters. Counsel for the Appellants also pointed out that, in *Chee Siok Chin*, Rajah J had only referred to the NKF as being associated with financial impropriety and/or lack of integrity, but not corruption. Thus, the Appellants' counsel argued, it was wrong of Belinda Ang J in *Lee Hsien Loong (HC)* to rely on Rajah J's observations in *Chee Siok Chin* to find that the NKF and/or Durai had become "*bywords for* ***corruption***" [emphasis added in bold italics] (see *Lee Hsien Loong (HC)* at [58]). It followed that, in the court below, the Judge was wrong to rely on Rajah J's observations in *Chee Siok Chin* and Belinda Ang J's finding in *Lee Hsien Loong (HC)* to support his own finding that the Disputed Words meant that the Respondents were corrupt.

70 The Appellants' counsel further argued that, although Durai had been charged with (*inter alia*) an offence under s 6(*c*) of the current PCA, the essence of the offence charged was not corruption but deception of his principal (*ie*, the NKF), and that, in any case, Durai had not been convicted of the charge yet when the Article was published. The Appellants' counsel submitted that there was a distinction between corruption and financial impropriety, and the former did not include the latter. However, when asked by this court what he understood to be the meaning of "corruption", the Appellants' counsel merely answered that whatever meaning was ascribed to "corruption" could not possibly include financial impropriety.

71 In response, counsel for the Respondents clarified that the Respondents had cited *Chee Siok Chin* and *Lee Hsien Loong (HC)* merely to make the point that the local courts had previously found that the words "NKF" and/or "Durai" had come to mean something in Singapore, *ie*, corruption. He submitted that the Judge had reached his conclusion on the natural and ordinary meaning of the Disputed Words only after a careful consideration of the actual words used and the inferences which

the ordinary reasonable person would draw, having regard especially to that person's knowledge of the events relating to the NKF Saga that were in the public domain. In the Respondents' view, the observations and findings in *Chee Siok Chin* and *Lee Hsien Loong (HC)* merely showed what was generally known to the ordinary reasonable man in the street. The Judge did not have to rely on those two cases to reach his own conclusion on what the natural and ordinary meaning of the Disputed Words was. The Respondents' counsel also argued that the Appellants, in claiming a derivative qualified privilege based on CSJ's right-of-reply privilege – which right, the Appellants contended, entitled CSJ to make the comments stated in the Article even if those comments amounted to imputations of corruption as he had been accused by the Respondents on previous occasions of being "a liar, … a traitor to Singapore, … '*cancerous*'[,] '*lacking in integrity*' [and] '*dishonest*'"[note: 24] [emphasis in original] – had thereby accepted that corruption could encompass a host of misdeeds including financial impropriety.

72 The word "corrupt" has a broad meaning both in ordinary usage and also in law. The following meanings, among others, of "corrupt" (as an adjective) are given in *Encarta World English Dictionary* (Kathy Rooney chief ed) (Bloomsbury, 1999) at p 426:

> **1.** … immoral or dishonest, especially as shown by the exploitation of a position of power or trust for personal gain **2.** … extremely immoral or depraved …

The Shorter Oxford English Dictionary on Historical Principles (C T Onions ed) (Clarendon Press, 3rd Ed Reprint, 1991) gives the following meanings, among others (at vol 1, p 431):

> **3**. Debased in character; depraved; perverted … **4**. Influenced by bribery or the like …

And, in Anandan Krishnan, *Words, Phrases & Maxims Legally & Judicially Defined* (LexisNexis, 2008), the definition given is as follows (at vol 4C(II), p 487):

> … unlawful; dishonest, without integrity; guilty of dishonesty, involving bribery …

73 As can be seen from these definitions, the word "corrupt" covers a wide range of wrongdoings, including unlawful, immoral or dishonest acts, abuse of office for personal gain and financial impropriety. In the present case, the key question is simply how the ordinary reasonable person, with the general knowledge that he has of the Relevant Events, would read and understand the Disputed Words, given especially the association which the Disputed Words made between the Respondents on the one hand and the NKF and/or Durai on the other. What would such a person understand to be the meaning or sense of the Disputed Words in the context in which they appeared, especially when the rhetorical question "[h]ow many libel suits have Singapore's great and good wrongly won, covering up real misdeeds?" (which was essentially a reiteration of the corresponding question in para 13 of the Article) was given especial prominence by being reproduced in enlarged font in a box at the top of the last page of the Article? What was the message intended to be conveyed by those words if, contrary to the Respondents' submissions, they did not mean that the Respondents had exploited the law of defamation to cover up their "real misdeeds" (*per* para 13 of the Article)?

74 We consider first the Appellants' argument that the Disputed Words did not allege corruption in so far as Durai was not charged with corruption even though he was charged under s 6(*c*) of the current PCA. The Appellants contended that a charge under s 6(*c*) of the current PCA was in law only a charge of cheating (and not one of corruption) because L P Thean J had described a charge under s 6(*c*) of the Prevention of Corruption Act (Cap 241, 1985 Rev Ed) ("the 1985 PCA"), which is the predecessor of s 6(*c*) of the current PCA, as such in *Knight v PP* [1992] 1 SLR 720. In that case, Thean J observed (at 728, [20]) that s 6(*c*) of the 1985 PCA "[did] not imply any corruption at all",

but was "[i]n effect … an offence of cheating" (*ibid*).

75 We do not think that this argument by the Appellants has any merit for a number of reasons. First, in *Knight v PP*, the conduct of the accused in using a false invoice to obtain a larger government vehicle loan than the loan which he could actually have obtained was redolent of cheating rather than corruption. But, this does not necessarily mean that all charges under s 6(*c*) of the current PCA do not have an element of corruption in them. It is not inconceivable that some other kind of dishonest act (different from the conduct of the accused in *Knight v PP*) falling within s 6(*c*) of the current PCA may be regarded as corrupt conduct.

76 Second, the main reason why Thean J said that s 6(*c*) of the 1985 PCA did not imply corruption was that, while the word "corruptly" was used in ss 6(*a*) and 6(*b*) of that Act, it was not used in s 6(*c*) thereof (see *Knight v PP* at 728, [20]). Under the current PCA, the word "corruptly" likewise appears only in ss 6(*a*) and 6(*b*), but not s 6(*c*). It must not, however, be overlooked that dishonesty is an integral element of corruption, and, in this regard, it is pertinent that Thean J went on to say in *Knight v PP* that the offence under s 6(*c*) of the 1985 PCA "[did] imply an element of dishonesty" (*ibid*). This, in our view, is obviously correct as the conduct delineated in that subsection would not otherwise have been proscribed. We also note that Thean J added that a charge under s 6(*c*) of the 1985 PCA was *more serious* than a charge under s 417 of the Penal Code (Cap 224, 1985 Rev Ed) of cheating (*ibid*).

77 Third, if a person is reported to have been charged under the current PCA, it is certainly more likely for the ordinary reasonable person to infer that the charge which the accused faces involves an element of corruption than to infer that the charge in question "does not imply any corruption at all" (*per* Thean J in *Knight v PP* at 728, [20]).

78 Finally, we note that the heading of s 6 of the current PCA indicates that the provision is targeted at corruption. Section 6 of this Act reads:

> **Punishment for *corrupt* transactions with agents**.
>
> **6**. If —
>
> …
>
> (*c*) any person knowingly gives to an agent, or if an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal,
>
> he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.
>
> [emphasis added]

79 In our view, the Appellants' argument that a charge under s 6(*c*) of the current PCA is not a corruption charge is an academic contention that is beyond the ken of the ordinary reasonable person, and therefore has little practical relevance. For the purposes of the present appeals specifically, the question is what the ordinary reasonable person would have understood a charge under s 6(*c*) of the current PCA to connote, especially when it was widely reported that Durai was

being investigated by the CPIB and was facing two charges of corruption (see [80] below). It seems to us that the ordinary reasonable person would associate this information with corruption rather than with cheating. In any case, the question of whether the offence under s 6(*c*) of the current PCA is one of corruption or one of cheating or fraud is, in our view, less important than the question of how the ordinary reasonable person would perceive or understand the association made by the Article between, on the one hand, LKY (and LHL) and/or the other government agencies mentioned therein and, on the other hand, the NKF and/or Durai. As we mentioned earlier, the ordinary reasonable person is one who "can read in an implication more readily than a lawyer" (see *Skuse* ([30] *supra*) at 285), and he is "guided not by any *special* [for instance, the knowledge of law that a lawyer possesses] but only by *general* knowledge" [emphasis added] (see *Jones* ([29] *supra*) at 1371).

80 In support of their contention that the ordinary reasonable person with the relevant general knowledge would read and understand the association of LKY (and LHL) with the NKF and/or Durai in the Disputed Words as suggesting corruption on the part of LKY (and LHL), the Respondents cited numerous media reports published at the time of the NKF Saga which stated that Durai was being investigated for corruption. We set out the significant reports below:

(a) In an article titled "Unusual transactions prompt CAD probe on NKF: minister" published in the 20–21 August 2005 issue of *The Business Times*, it was reported, *inter alia*, that:[note: 25]

> Police were called in after "unusual transactions" surfaced at the National Kidney Foundation (NKF), Health Minister Khaw Boon Wan said yesterday.
>
> …
>
> The Corrupt Practices Investigation Bureau is also believed to be involved in the investigation. …

(b) In an article titled "Durai arrested, will face charges filed by CPIB" published on the front page of *The Straits Times* on 18 April 2006, it was reported, *inter alia*, that:[note: 26]

> The former chief of the National Kidney Foundation, Mr T. T. Durai, was arrested yesterday and is expected to be produced today in court.
>
> Sources said he will be facing charges filed by the Corrupt Practices Investigation Bureau on matters that arose during his leadership of Singapore's largest charity.

(c) In an article titled "Ex-NKF chief Durai charged with graft" published in *The Business Times* on 19 April 2006, it was reported, *inter alia*, that:[note: 27]

> Former National Kidney Foundation chief T T Durai was charged in court yesterday with two counts under the anti-graft Act of submitting false payment claims with "the intent to deceive" the Foundation when he was its CEO.
>
> …
>
> The Corrupt Practices Investigation Bureau (CPIB), which brought the charges against Durai, said that it received information in September 2005 – two months after Durai and the entire board quit, following the nationwide scandal – that the staff of the NKF "could be involved in corrupt dealings". Its investigations led to the charges against Durai and two other NKF officers.

(d) In an article titled "Former NKF chief faces two corruption charges" posted on Channel NewsAsia's website on 18 April 2006, it was reported, *inter alia*, that:[note: 28]

> The former chief executive of the National Kidney Foundation, T T Durai, has been charged with intent to mislead and deceive the organisation.
>
> …
>
> The charges come five months after a report by auditing firm KPMG, which revealed questionable practices by the old NKF.
>
> …
>
> Durai, Ragini [Vijayalingam, the former assistant manager of the NKF's purchasing department] and Chua [*ie*, Matilda Chua, a former member of the NKF's board of directors] were investigated by the Corrupt Practices Investigation Bureau.

81 The Appellants argued that all these media reports, just like the cases of (*inter alia*) *Chee Siok Chin* ([32] *supra*) and *Lee Hsien Loong (HC)* ([32] *supra*), were extrinsic evidence that could not be relied on to determine the natural and ordinary meaning of the Disputed Words. We agree that these media reports cannot *dictate* the meaning to be given to the Disputed Words, but we see no reason why they cannot be taken into account as a relevant factor in determining how the ordinary reasonable person would view the NKF Saga and, consequently, the association of the Respondents with the NKF and/or Durai in the Disputed Words. These reports could perhaps be said to be extrinsic evidence that Durai was associated with corruption at the time they were published. But, by the time *the Article* was published, the association of the NKF and/or Durai with corruption would have entered the public consciousness, given the intense publicity and extensive coverage given to the NKF Saga in the local media. In other words, by the time the Article was published, the association of the NKF and/or Durai with corruption was no longer extrinsic evidence.

82 In our view, it is significant that the NKF Saga:

(a) centred on, *inter alia*, questionable practices and transactions by the NKF's former board of directors, which was headed by Durai;

(b) involved various investigations by the police and other authorities (especially the CPIB), which eventually led to criminal charges being pressed against Durai and other former directors of the NKF; and

(c) was given extensive coverage in the local media, especially via numerous reports which stated that Durai was being investigated and would be charged with graft.

Given these factors, the ordinary reasonable person would in all probability associate the NKF and/or Durai with grave financial impropriety, abuse of power and/or dishonest practices. These are serious misdeeds which fall readily within the ambit of corruption, and they were indeed described as corruption by the press in its reports. It seems to us highly artificial to say that such misdeeds, especially financial impropriety on the part of a government minister, would mean something less than corruption to the ordinary reasonable person, especially when we have regard to the broad meaning of "corrupt" referred to at [72] above. We are therefore not surprised that Rajah J in *Chee Siok Chin* and Belinda Ang J in *Lee Hsien Loong (HC)* found that the NKF and/or Durai had, in the mind of the

ordinary reasonable person, come to symbolise financial impropriety and/or corruption.

83 We agree with counsel for the Respondents that *Chee Siok Chin* and *Lee Hsien Loong (HC)* are useful in showing that the NKF and/or Durai have come to mean something in Singapore, and we also agree with the conclusions reached by the court in these two cases. It seems to us that this was all that the Judge took notice of when he referred to these two cases (see the Judgment at [75]–[78]). Contrary to what the Appellants contended, it is clear to us that the Judge arrived at his conclusion on the natural and ordinary meaning of the Disputed Words after a careful consideration of the words themselves, and did not blindly rely on the decisions made in these two cases. We return now to the Disputed Words themselves.

84 As mentioned above, para 10 of the Article raised the NKF Saga. We agree with the Judge that the use of words such as "scandal" and "highly secretive" in paras 10 and 11 of the Article only served to reinforce the ordinary reasonable person's perception that the NKF Saga involved some serious (and clandestine) wrongdoing by Durai. It is noteworthy that the NKF Saga was mentioned in the Article (at para 10) *immediately after* the suggestion (in para 9) that LKY had "skeletons in his closet" (which expression is ordinarily used to indicate that the person concerned has done shameful acts which he wishes to hide). Further, the suggestion that LKY had "skeletons in his closet" (*per* para 9 of the Article) was immediately followed by the statement "[t]hat raises the question of whether Singapore deserves its reputation for *squeaky-clean government*" [emphasis added] in para 10 of the Article. Read together, these statements would, from the viewpoint of the ordinary reasonable person, mean that LKY had something to hide, which, if exposed, would call into question Singapore's reputation for "squeaky-clean government" (*per* para 10 of the Article). In our view, these words in paras 9–11 of the Article, when juxtaposed and read together, were a clear imputation that LKY was corrupt and that Singapore did not deserve its reputation for having (as para 10 of the Article put it) a "squeaky-clean government".

85 Further, again using the words of the Article itself, the imputation "[got] worse" (*per* para 12 of the Article) as the Article also stated (in para 11) that the NKF Saga had "wider implications too" for the Government, which controlled "huge pools of public money" (*ibid*) in different government institutions that were "highly nontransparent" (*ibid*). This suggested that, just as Durai was able to misuse the NKF's funds because of the highly secretive way in which he ran the NKF, government officials in Singapore were able to misuse public funds in view of the way in which the government led by the People's Action Party was run, leaving "Singaporeans [with] … no way of knowing whether officials [were] abusing their trust as Mr. Durai did" (*ibid*). Quite clearly, the effect of all these statements, which directly associated the NKF and/or Durai (as well as Durai's misuse of funds and the secretive nature in which the NKF was run) with (a) Singapore's government and government officials, (b) our government officials' control of huge pools of public money in different government institutions and (c) the non-transparency of such institutions, was to suggest to the ordinary reasonable person that the Respondents were guilty of the same kind of wrongdoing that the NKF and/or Durai were guilty of in the eyes of the general public. This, in our view, would be the inference that the ordinary reasonable person would draw from the Disputed Words in the light of the general knowledge which he possesses.

86 We mentioned earlier that the Disputed Words ended at para 13 of the Article with two questions posed by HR, which came immediately after the statement in the same paragraph that "Singaporean officials [had] a remarkable record of success in winning libel suits against their critics". These two questions are as follows (see para 13 of the Article):

> The question then is, how many other libel suits have Singapore's great and good wrongly won, resulting in the cover-up of real misdeeds? And are libel suits deliberately used as a tool to

suppress questioning voices?

87 The above words, in so far as they were expressed in the form of questions, could possibly be regarded as a form of inquiry. Indeed, this was the argument of the Appellants, who submitted that:[note: 29]

> This behaviour [*ie*, LKY's conduct in initiating libel suits against his political opponents] gives reason *to inquire/alternatively reason to suspect* … whether there may be other NKF-type scandals lurking below the surface in Singapore and in any event will affect his [*ie*, LKY's] legacy. [emphasis added]

However, in our view, taking into account the context in which the above questions were asked, and given that they were raised at the conclusion of a very pointed passage detailing the wrongdoings of Durai and the NKF as well as associating Durai and/or the NKF with the Respondents, these purported questions went far beyond the purpose of merely posing inquiries. As counsel for the Respondents submitted, and we agree with him on this point, it is not difficult to see that the two questions at the end of para 13 of the Article were in effect rhetorical questions which themselves contained or suggested the answers. Bearing in mind especially that the ordinary reasonable person would know of the many defamation suits commenced by the Respondents in the past, and given that para 10 of the Article expressly questioned whether Singapore deserved its reputation for having a "squeaky-clean government", the inference that the ordinary reasonable person would draw from the words used in these two questions would be that LKY (and LHL) had likewise made use of defamation suits to cover up his misdeeds (*ie*, his corruption) and had "wrongly won" (*per* para 13 of the Article) such suits, just as Durai had done in the past.

88 It is also significant that the question "[h]ow many libel suits have Singapore's great and good wrongly won, covering up real misdeeds?", which is essentially a reiteration of the first of the two questions in para 13 of the Article, was given especial prominence in the Article (see [5] above). The prominence given to headings in or any part of a publication is a relevant factor to be taken into account in determining the meaning of the offending words (see, *eg*, *English and Scottish Co-operative Properties Mortgage and Investment Society, Limited v Odhams Press, Limited* [1940] 1 KB 440 at 460 and *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [26]). In our view, the prominence given to the first of the two questions in para 13 of the Article (by reproducing that question in enlarged font in a box at the top of the last page of the Article) reinforced the inference that the ordinary reasonable person would draw from not only that question, but also the second question in para 13.

89 In this connection, it is pertinent to note that (as mentioned at [37] above), in response to the SDP proceedings, six of the SDP members who were sued issued public apologies to the Respondents in respect of the comments made in the *New Democrat* articles. The *New Democrat* articles had similarly made comparisons between, on the one hand, the NKF and, on the other hand, the Government and/or the Respondents. In the public apologies, which were published in *The Straits Times* and *Lianhe Zaobao*, the relevant defendants in the SDP proceedings expressly admitted that the allegations in the *New Democrat* articles bore the meaning that the Respondents were unfit for office because they were corrupt and that there was corruption in other government institutions such as the Housing and Development Board, the GIC and the CPF Board.[note: 30] These public apologies were published less than three months before the publication of the Article, and the ordinary reasonable person who had read them would have remembered them while reading the Article.

90 A final point which we need to consider here is the Appellants' argument (see [57] of the Judgment) that it was wrong of the Judge (as well as Belinda Ang J in *Lee Hsien Loong (HC)* ([32]

supra) at [57]) to rely on the Malaysian case of *Hasnul* ([32] *supra*) to find that the word "Durai" had become symbolic of corruption, tainting likewise any person mentioned in connection with that word, given especially that *Hasnul* was a case which concerned the innuendo meaning of the offending words. Taking this point first, we are of the view that the court in *Hasnul* did not appear to be concerned with the innuendo meaning of the offending words. As noted by the Judge, the Appellants' counsel, despite arguing that *Hasnul* involved the innuendo meaning of the offending words, also acknowledged that the court in that case did not say whether it was ruling in favour of the plaintiff based on the natural and ordinary meaning or the innuendo meaning of the offending words (see the Judgment at [57]).

91 In our view, *Hasnul* does not stand for any new or distinct approach of its own. As mentioned earlier, the natural and ordinary meaning of the offending words *includes* any implication or inference that the ordinary reasonable person would draw based on his general knowledge. An obvious example of this form of defamation (*ie*, defamation by implication) would be where a defamatory association and/or comparison is made (for instance, where the plaintiff is compared with odious or disreputable persons, whether historical or fictional (see *Gatley* ([27] *supra*) at para 3.18)). Such a comparison was made in *Hasnul*, where the plaintiff was compared to "Abu Jahal", an expression commonly used and understood by Muslims all over the world to describe a person who is an enemy of Islam, an infidel, a troublemaker and a liar. Further, the learned authors of *Gatley*, in the section of the book that discusses the interpretation of the natural and ordinary meaning of offending words, cite *Hasnul* as an example of defamation by implication through a defamatory comparison (see *Gatley* at para 3.18, fn 198). The Judge likewise referred to *Hasnul* for this same purpose (see [54]–[56] of the Judgment). In our view, given the Article's association and/or comparison of the NKF and/or Durai with the Respondents, the Judge (and, likewise, Belinda Ang J in *Lee Hsien Loong (HC)*) was merely relying on the principle of defamation by implication in determining the natural and ordinary meaning of the Disputed Words.

92 For all of the reasons above, we agree with the finding of the Judge that the natural and ordinary meaning of the Disputed Words in relation to LKY is that LKY, like Durai:

(a) is corrupt;

(b) has been running and continues to run Singapore in the same corrupt manner as Durai ran the NKF; and

(c) has been using libel actions to cover up his misdeeds.

(2) The meaning of the Disputed Words in relation to LHL

93 As mentioned earlier, following the amendment to his SOC *vis-à-vis* the meaning of the Disputed Words, LHL pleaded the Original Meaning as an alternative to the New Meaning. The meaning of the Disputed Words, as found by the Judge, was the New Meaning. The Appellants submitted as their fourth ground of appeal (*ie*, ground (d) of [23] above) that the Judge erred in allowing this late amendment to LHL's SOC. We shall address this ground later, but it suffices to say here that we are of the opinion that the Judge did not err in exercising his discretion to grant LHL leave to amend his pleadings.

94 For now, we shall focus on whether the Disputed Words did indeed bear the meaning that was found by the Judge (*ie*, the New Meaning). This can be shortly dealt with, given our finding on the meaning of the Disputed Words *vis-à-vis* LKY.

95 As explained at [59]–[61] above, the words "government", "Singaporean officials" and "Singapore's great and good" in the Disputed Words, besides referring to LKY, also referred to LHL. We are of the view that, for the same reasons as those set out above as to why the Disputed Words bore the meaning that LKY was unfit for office because he was corrupt, the Disputed Words also bore the same meaning with respect to LHL.

96 Counsel for the Appellants strenuously argued that, irrespective of whether or not the amendment of LHL's SOC should have been allowed, the fact that LHL did not initially plead the New Meaning in his SOC showed that LHL himself did not believe that the Disputed Words bore that meaning in relation to him; thus, it would be wrong of this court to uphold a meaning (*ie*, the New Meaning) that LHL himself had not contemplated in the first place. This argument is not without logic, but, under the law of defamation, what the plaintiff understands the offending words to mean is only one of the factors to be considered in determining the natural and ordinary meaning of those words in relation to the plaintiff. What the natural and ordinary meaning of the offending words is (in the absence of a jury) is for the court, and not the parties, to decide. It is established law that it is the function of the court to determine how the ordinary reasonable person would understand the offending words, and, in deciding this issue, it is irrelevant to the court what meaning was intended by the defendant or what meaning was understood by the plaintiff.

97 For this reason, and in the light of the Judge's finding on the natural and ordinary meaning of the Disputed Words *vis-à-vis* LHL (which, as stated at [95] above, we agree with), it is not necessary for us to decide whether the Disputed Words bore the Original Meaning (*ie*, that LHL had condoned LKY's corruption), which was pleaded as the alternative meaning by LHL after he amended his SOC. However, since the Respondents' counsel raised this meaning (*ie*, the Original Meaning) in CA 163 in relation to LHL as an alternative meaning of the Disputed Words in case this court should find that the Judge erred in allowing the amendment to LHL's SOC, we shall consider it briefly.

98 In the court below, the Judge found that the Disputed Words did not bear the Original Meaning. In his submissions before the Judge, counsel for the Respondents placed emphasis on the word "he" in the statement "I think *he* is actually afraid of something like that" [emphasis added] in para 9 of the Article. The word "he", the Respondents' counsel submitted, referred to LHL and not LKY (see the Judgment at [91] and [95]). The Judge rejected this argument and held that, having regard to the context of para 9 of the Article as well as the use therein of the various words "he", "his" and "him" before the word "he" in the last sentence of that paragraph, it was clear that "he" in the above-mentioned statement referred to LKY instead (see the Judgment at [96]). We agree with the Judge, for the reasons which he has given, that "he" in the last sentence of para 9 of the Article was a reference to LKY and not LHL.

99 Before us, the Respondents' counsel abandoned the argument (apropos LHL) that the word "he" in the last sentence of para 9 of the Article referred to LHL and, instead, relied on the last sentence of para 11, *viz*, "Singaporeans have no way of knowing whether officials are abusing their trust as Mr. Durai did". The Respondents' counsel argued (*vis-à-vis* LHL) that the implicit message in this statement was that, "while 'Singaporeans' i.e. members of the public … [had] no way of knowing of [LKY's] corruption, [LHL], who, as head of the Government, [had] access to all the relevant information, would and [did] know of his father's corruption"[note: 31] and also his own corruption. LHL, by retaining LKY in his Cabinet and allowing him to remain as the chairman of the GIC, had thus condoned LKY's corruption.[note: 32] The Respondents' counsel further submitted that the comparison which paras 12–13 of the Article made between the NKF's successful libel suit in 1998 and the successful libel suits brought by "Singaporean officials [and] … Singapore's great and good" (*per* para 13 of the Article) implied that LHL had used libel suits to cover up and thereby condone LKY's

corruption.[note: 33]

100 In our view, a careful reading of the last sentence of para 11 of the Article in the context of the Disputed Words (especially para 11 itself) shows that that sentence did not bear the Original Meaning. Paragraph 11 of the Article spoke of the NKF Saga having "wider implications" and went on to refer to the Government's control of large pools of public money in other public institutions. As stated above, the last sentence of para 11 would suggest to the ordinary reasonable person that the Government (which includes LHL) was guilty of the same kind of wrongdoing as that which the NKF and/or Durai had engaged in. To say that this sentence goes further and implies that LHL condoned his father's corruption would be to divorce that sentence from the context of para 11 as a whole.

101 Likewise, where the comparison in paras 12–13 of the Article between the successful libel suit brought by the NKF in 1998 and the successful libel suits brought by "Singaporean officials [and] … Singapore's great and good" (see para 13 of the Article) is concerned, the implication is that LHL, like Durai, had similarly used defamation suits to cover up his misdeeds (*ie*, his corruption) as well as to prevent others from questioning him, and had "wrongly won" (*ibid*) such suits in the past. The words in these two paragraphs (*ie*, paras 12–13 of the Article) do not suggest more than that, and it would likewise be divorcing those words from the context of the Article to say that they would suggest to the ordinary reasonable person that LHL set out to sue and suppress those who questioned him so as to prevent LKY's corruption and/or his (LHL's) condonation of LKY's corruption from being exposed.

102 We also note that it is well known that LKY would himself sue any person whom he considered had defamed him. In our view, this is another factor which shows that the ordinary reasonable person would not read the Disputed Words as implying that *LHL* would feel the need to commence libel suits to prevent *LKY*'s alleged corruption from being exposed.

103 For these reasons, we agree with the Judge's finding that, in relation to LHL, the Disputed Words bore the New Meaning but not the Original Meaning.

Ground (d): The amendment of LHL's SOC

Did the Judge err in law in allowing the amendment to LHL's SOC?

104 The Appellants' fourth ground of appeal relates to the late amendment of LHL's SOC (as can be seen from the chronology of events outlined at [10]–[13] above, LHL applied for leave to amend his SOC only after the Summary Judgment Applications had been heard and the parties' respective written submissions for those applications tendered to the court). The Appellants' case in this regard was twofold. First, the Judge was wrong to allow LHL's "eleventh hour amendment"[note: 34] after a lapse of some two years from the date on which Suit 539 was commenced, by which time the two-day hearing of the Summary Judgment Applications had already concluded and the parties had already filed their written submissions for those applications. Second, the Appellants complained (albeit in the context of arguing, in respect of their fifth ground of appeal, why the defence of justification should apply) that they were not given an opportunity to amend their defence to re-plead the defence of justification *after* the Judge ruled that the Disputed Words bore the meaning contended for by the Respondents.[note: 35]

105 With respect to the first argument, the Appellants relied on the decision of Tay Yong Kwang J in *Chun Thong Ping* ([18] *supra*). There, Tay J held that, in the circumstances of that case, the plaintiff should have withdrawn his application for summary judgment first before applying to amend his SOC and then re-applying for summary judgment. The Appellants argued that the Judge should have followed this procedure in the instant case. In our view, the Appellants' argument harks back to

a time when procedural requirements were given greater weight. In any event, Tay J's decision in *Chun Thong Ping* does not assist the Appellants' argument. As the Judge pointed out (correctly, in our view), *Chun Thong Ping* was distinguishable on two grounds. First, the amendment which the plaintiff in that case sought to make involved the addition of a new cause of action. Second, the application for leave to amend was made after an assistant registrar ("AR") had granted the defendant unconditional leave to defend and while an appeal against the AR's decision was pending. The proposed amendment to the plaintiff's SOC, if allowed, would effectively have defeated the AR's order granting the defendant unconditional leave to defend and would also have rendered the pending appeal useless.

106 The Judge, aside from distinguishing *Chun Thong Ping*, also cast doubt on Tay J's reasoning in that case (see the Judgment at [108]–[113]), but it is not necessary for us to deal with this issue in the present appeals. It is also unnecessary for us to consider whether *Chun Thong Ping* and the Judge's decision *vis-à-vis* the amendment of LHL's SOC in the present case were in line with the decision of Chao Hick Tin J in *Techmex Far East Pte Ltd v Logicraft Products Manufacturing Pte Ltd* [1998] 1 SLR 483, which the Judge referred to at [113] of the Judgment.

107 The Appellants' second argument *vis-à-vis* the Judge's decision to allow LHL to amend his SOC so as to plead the New Meaning was that the Appellants were denied due process as, *after* the Judge found the Disputed Words to bear the New Meaning, he did not give the Appellants the opportunity to amend (*inter alia*) their defence in Suit 539 to plead justification in relation to that particular meaning. To put the significance of this argument in its proper context, it may be recalled that the Judge held that, since the Appellants had pleaded justification to a different meaning of the Disputed Words and not the New Meaning (or, for that matter, the Original Meaning), their plea of justification fell by the wayside (see sub-para (a) of [20] above). In other words, the Appellants pleaded justification to a meaning that had not been put forward by LHL himself.

108 In our view, the Appellants' argument in the preceding paragraph has no merit. This argument is not only unsupportable on the ground alleged (*ie*, that the Appellants were denied due process), but also hides the fact that the Appellants were wholly responsible for their failure to plead justification to a meaning of the Disputed Words which was actually canvassed by LHL. The fact was that, when the Judge allowed LHL to amend his SOC, he also granted the Appellants leave to amend their defence in Suit 539 by 15 September 2008, which was approximately one month from the date of the filing of LHL's amended SOC (see [14] above). For reasons unknown to this court, in the amended defence which they filed pursuant to that direction (*ie*, the second amended defence in Suit 539), the Appellants failed to plead justification to the New Meaning, which was introduced by the amendment to LHL's SOC. The Appellants were remiss in this regard and they cannot now complain that the Judge should have given them another opportunity to plead justification to the New Meaning after deciding that that was the meaning which the Disputed Words bore in relation to LHL.

109 The Appellants also argued that it was improper for the Judge to allow LHL to amend his SOC to plead a more defamatory meaning than the Original Meaning as it breached the long-established common law rule laid down in *Slim* ([19] *supra*) ("the rule in *Slim*") that the court is not entitled to find a more defamatory meaning than the meaning pleaded by the plaintiff, although it may find a less defamatory meaning. In our view, this argument confuses the court's power to allow the plaintiff to amend his SOC so as to plead a more defamatory meaning with the court's power (or, to be more precise, the court's entitlement) to find a more defamatory meaning than the pleaded meaning. The Appellants, in challenging the Judge's decision to allow the amendment to LHL's SOC, cannot rely on the rule in *Slim*, which has nothing to do with the court's power to allow amendments to pleadings. The Appellants should, instead, have challenged the correctness of the Judge's decision on this particular point by relying on grounds such as estoppel and irremediable prejudice to the Appellants.

However, no such grounds were relied upon before this court.

110 We do not propose to restate the general principles applicable in such situations, except to point out that O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) gives the court a wide discretion to allow pleadings to be amended at any stage of the proceedings on such terms as may be just. Order 20 r 5(1) reads:

> Subject to Order 15, Rules 6, 6A, 7 and 8, and this Rule, the Court may *at any stage of the proceedings* allow the plaintiff to amend his writ, or any party to amend his pleading, *on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct*. [emphasis added]

111 In *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 ("*Chwee Kin Keong*"), this court said at [101]:

> Under O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), the court may grant leave to amend a pleading at *any* stage of the proceedings. *This can be before or during the trial, or after judgment or on appeal*. [emphasis added]

112 Indeed, local case law shows that our courts have allowed amendments to be made to pleadings even:

> (a) at the final stages of a trial after the parties have made their closing submissions (see *Chwee Kin Keong* at [101]–[103] and *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd* [1993] 2 SLR 297 at 323–325, [91]–[96]);
>
> (b) after summary or interlocutory judgment has been obtained (see *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc* [1990] SLR 791 at 797–798, [21]–[22]); and
>
> (c) pending an appeal or in the course of an appeal itself (see *Soon Peng Yam v Maimon bte Ahmad* [1996] 2 SLR 609 at 618, [25]–[30], *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR 173 ("*Asia Business Forum*") at [17] and *Susilawati v American Express Bank Ltd* [2009] 2 SLR 737 ("*Susilawati*") at [56]; see also O 57 r 13(1) of the Rules of Court, which states that "the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court").

In this regard, reference may also be made to *Singapore Civil Procedure 2007* (G P Selvam ed) (Sweet & Maxwell Asia, 2007) at paras 20/8/2, 20/8/8 and 20/8/12–20/8/18, as well as *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) at paras 20/5/2 and 20/5/7–20/5/9.

113 The guiding principle is that amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined (see *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513 ("*Wright Norman*") at 515–516, [6], *Chwee Kin Keong* at [102], *Asia Business Forum* at [10] and *Ketteman v Hansel Properties Ltd* [1987] AC 189 ("*Ketteman*") at 212; see also *Singapore Civil Procedure 2007* at para 20/8/8 and *Singapore Court Practice 2006* at para 20/5/3). However, an important caveat to granting leave for the amendment of pleadings is that it must be just to grant such leave, having regard to all the circumstances of the case. Thus, this court held in *Asia Business Forum* that the court, in determining whether to grant a party leave to amend his pleadings, must have regard to "the justice of the case" (at [12]) and must bear in mind (at least) two key factors, namely, whether the amendments would cause any prejudice to the other party which cannot be compensated in costs and whether the party

applying for leave to amend is "effectively asking for a second bite at the cherry" (at [18]). These two key factors were endorsed recently again by this court in *Susilawati* at [58].

114 It cannot be over-emphasised that all the relevant circumstances of the case at hand should be considered by the court in deciding whether or not to allow an amendment to pleadings, and that delay in bringing the application for leave to amend *per se* does not constitute prejudice to the other party. As this court stated in *Wright Norman* at 519–520, [24]:

> In our opinion, at the end of the day, the most important question which the court must ask itself is, are the ends of justice served by allowing the proposed amendment. Pleadings should not be used as a means to punish a party for his errors or the errors of his solicitors. All relevant issues should be investigated, provided the other party will not be prejudiced in a way which cannot be compensated by costs. All relevant circumstances should be considered by the court before it exercises its discretion [as to] whether it would allow an amendment. *While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay per se does not equal prejudice or injustice*. We do not think any rigid rule should or can be laid down on this. [emphasis added]

Similar pronouncements may also be found in *Ketteman* at 212 and 220 as well as in *Singapore Court Practice 2006* at para 20/5/10.

115 In our view, the applicable principles (as set out above) provide a complete answer to the Appellants' complaint of excessive delay on the part of LHL in applying for leave to amend his pleadings. Delay *per se* is not a valid objection to an application for leave to amend pleadings. Prejudice is, but the Appellants did not argue that they were prejudiced (in a manner which could not be compensated in costs) by the amendment to LHL's SOC. The only prejudice which they alleged was in relation to the omission by the Judge to give them an opportunity to amend their defence to plead justification *vis-à-vis* the New Meaning *after* he found that that was the natural and ordinary meaning of the Disputed Words in relation to LHL (which argument we have rejected as being wholly without merit (see [108] above)). We agree with the submission of the Respondents' counsel that the delay in the present case was only apparent but not real in the sense that it was caused to a large extent by the Appellants' own doing in:

(a) applying to challenge the court's jurisdiction and to set aside the service of the writs of summons on the Appellants (see *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR 453); and

(b) applying twice to admit Queen's Counsel as lead counsel to defend the Defamation Suits (see *Re Millar Gavin James QC* [2007] 3 SLR 349 and *Re Millar Gavin James QC* [2008] 1 SLR 297), the last of which applications was (according to the Respondents) disposed of only on 26 October 2007.[note: 36]

In the circumstances, we are of the view that the Judge was entitled to exercise and had properly exercised his discretion to allow LHL to amend his SOC.

The rule in Slim

116 Given that LHL's application for leave to amend his SOC to plead the New Meaning was allowed, the rule in *Slim* was simply not applicable. However, the Judge nonetheless decided to consider what the legal position would have been if the amendment had not been allowed and if he had then been asked to determine, on the basis of LHL's original SOC (*ie*, LHL's SOC as it stood on 22 August 2006,

the date on which Suit 539 was commenced), whether the Disputed Words bore the New Meaning, which was alleged by the Appellants to be more defamatory than the Original Meaning. In the Judge's view, the New Meaning was not substantially different from the Original Meaning and the latter was sufficient to cover both meanings; thus, even if LHL had not been granted leave to amend his SOC, the court would still have been inclined to grant him summary judgment (see the Judgment at [144]).

117 As the rule in *Slim* is an academic issue for the purposes of the present appeals, we do not intend to address it in detail. However, before moving on to the Appellants' next ground of appeal (which is ground (e) of [23] above), we think we should give our views on the status in Singapore of this rule since the Judge invited us to revisit the rule (see the Judgment at [141]). In this regard, the Judge expressed his preference for the approach taken by the High Court of Australia in *Chakravarti* ([19] *supra*), which, in his view, was a departure from the rule in *Slim* and stood for "the [opposite] proposition that a court may find a meaning more defamatory than that pleaded" (see the Judgment at [135]). The Judge came to this conclusion after considering the submissions of counsel for the Respondents on this issue.

118 As alluded to at [109] above, the rule in *Slim* is that the plaintiff may not rely on and the court may not find a meaning more defamatory than that pleaded by the plaintiff, although the plaintiff may rely on and the court may find a less defamatory meaning. At 175–176 of *Slim* ([19] *supra*), Diplock LJ said:

> The plaintiffs, as they were entitled to do, chose to set out in their statement of claim the particular defamatory meaning which they contended was the natural and ordinary meaning of the words. *Where this manner of pleading is adopted, the defamatory meaning so averred is treated at the trial as the most injurious meaning which the words are capable of bearing, and the plaintiff is, in effect, estopped from contending that the words do bear a more injurious meaning and claiming damages on that basis. But the averment does not of itself prevent the plaintiff from contending at the trial that even if the words do not bear the defamatory meaning alleged in the statement of claim to be the natural and ordinary meaning of the words, they nevertheless bear some other meaning less injurious to the plaintiff's reputation but still defamatory of him*, nor does it relieve the adjudicator of the duty of determining what is the right natural and ordinary meaning of the words, though nice questions may arise as to whether one meaning is more or less injurious than another. C'est pire qu'un crime c'est une faute.
>
> Where an action for libel is tried by [a] judge and [a] jury, it is for the parties to submit to the jury their respective contentions as to what is the natural and ordinary meaning of the words complained of, whether or not the plaintiff's contention as to the most injurious meaning has been stated in advance in his statement of claim. And it is for the judge to rule whether or not any particular defamatory meaning for which the plaintiff contends is one which the words are capable of bearing. *The only effect of an allegation in the statement of claim as to the natural and ordinary meaning of the words is that the judge must direct the jury that it is not open to them to award damages upon the basis that the natural and ordinary meaning of the words is more injurious to the plaintiff's reputation than the meaning alleged, although if they think that the words bear a meaning defamatory of the plaintiff which is either that alleged or is less injurious to the plaintiffs reputation, they must assess damages on the basis of that natural and ordinary meaning which they think is the right one*. But where a judge is sitting alone to try a libel action without a jury, the only questions he has to ask himself are: "Is the natural and ordinary meaning of the words that which is alleged in the statement of claim?" and: "If not, what, if any, less injurious defamatory meaning do they bear?"
>
> [emphasis added; emphasis in original omitted]

119 Diplock LJ's exposition above is generally considered by subsequent cases to have laid down the rule in *Slim* (see, for example, *Goh Chok Tong* ([19] *supra*) at [41]–[46] and *Chakravarti* at [53]). In the same case (*ie*, *Slim*), Salmon LJ adopted the stricter view that, without any amendment to the SOC, it was not permissible for the plaintiff to rely on a different meaning *even if* that meaning was *less* injurious than the meaning originally pleaded (at 185):

> I am inclined to think that the plaintiff is bound by his pleading – otherwise it may prove to be nothing but a snare for the defendant. *I do not mean, of course, that the plaintiff is strictly confined to the very shade or nuance of meaning which he has pleaded – but what he sets up at the trial must come broadly within the meaning he has pleaded*. ***Nor do I think that, without any amendment of his statement of claim, it would be permissible for him to set up any entirely different meaning, even if it were less injurious to the plaintiff than the meaning pleaded***. [emphasis added in italics and bold italics]

120 The last sentence in the above quotation from *Slim* (*ie*, the sentence set out in bold italics) clearly recognises that the plaintiff is able to amend his SOC to plead a different meaning, although it is not clear whether, by that statement, Salmon LJ meant to indicate that the plaintiff could amend his case to plead a more defamatory meaning. Similarly, Diplock LJ's statement in *Slim* at 175–176 (reproduced at [118] above), although providing expressly that the plaintiff may rely on a less defamatory meaning, is silent on this point. *Gatley* ([27] *supra*) at para 28.24 interprets *Slim* as having laid down the proposition that:

> Save where he is permitted to amend, the general rule is that a claimant is bound by his pleading as to meaning, at least to the extent that he is not allowed at trial to contend that the words bear a more injurious meaning than that pleaded.

121 The rule in *Slim* as formulated by Diplock LJ in *Slim* itself was applied by this court in *JJB v LKY (1992)* ([19] *supra*) at 320–321, [24]–[25] as well as in *Goh Chok Tong* at [43] and [46]. In the latter case, Yong Pung How CJ said:

> 43 Turning to the position in Singapore, this court has accepted that it is usual for the plaintiff to plead the highest defamatory meaning of the words complained of and the court may find a lesser defamatory meaning than that pleaded by the plaintiff and in such an event the claim may still succeed, unless there is some valid defence to the claim … *This court [in* JJB v LKY (1992)*], in effect, adopted Diplock LJ's view, although the case of* Slim v Daily Telegraph Ltd *… was not expressly referred to in the judgment*.
>
> …
>
> 46 *We are not saying that the plaintiff is not bound by the meaning of the offending words he has pleaded, whether it be the natural and ordinary meaning or the innuendo meaning. Certainly he is bound by the pleadings, like in all other cases*. *But the court in deciding the right meaning [which] the words convey to the ordinary man may determine, and is entitled to determine, a meaning less defamatory than that pleaded by the plaintiff. Of course, the court cannot determine a meaning more defamatory than that pleaded by the plaintiff, as that would be giving to the plaintiff more than what he has asked for*. Nor are we saying that the plaintiff is at liberty to plead a very high defamatory meaning, which is strained and unnatural and is totally unwarranted by the offending words, and then at the trial contend a lesser defamatory meaning and ask the court to find that lesser meaning. In such [a] case, the court may well compel him to amend his pleadings and allow the defendant an opportunity to consider whether he has a defence of justification for the lesser meaning and condemn the plaintiff in costs. Further, where

the plaintiff has pleaded such a high defamatory meaning and refuses to amend his pleadings but steadfastly stands by that meaning, as in the case of *Prichard v Krantz* [(1984) 37 SASR 379] the court may well hold that he is pinned precisely to the meaning he has pleaded and rule that the words are incapable of [bearing] such meaning and dismiss the claim. All these are matters within the jurisdiction of the trial judge who is in full control of the proceedings, and much depends on the circumstances of the case.

[emphasis added]

122 In *Chakravarti*, the plaintiff sued the publisher of a newspaper for publishing two articles in the newspaper which he claimed had defamed him. In respect of one of the articles ("the first article"), the plaintiff pleaded that it conveyed the specific meaning that (*id* at [47]):

(a) while he was an executive of a bank's subsidiary, he had been involved in criminal or civil misconduct in respect of loans from the subsidiary to himself; and

(b) his conduct in receiving such loans, which were in excess of the loans that he was entitled to, was such as to render him not a fit and proper person to be or remain as an executive of the subsidiary.

123 At first instance, the trial judge ruled in favour of the plaintiff on both the meaning set out in sub-para (a) of the preceding paragraph ("the first meaning") and the meaning set out in sub-para (b) of that paragraph ("the second meaning"), but, on appeal, the Full Court of the Supreme Court of South Australia ("the Full Court") reversed his decision and held that the first article did not bear either the first meaning or the second meaning. The Full Court ruled that, in relation to the first meaning, the first article merely imputed a suspicion of misconduct and not actual misconduct by the plaintiff, and, in relation to the second meaning, that article did not refer explicitly to loans in excess of the plaintiff's entitlement (*id* at [48]–[49]).

124 On further appeal, the High Court of Australia found for the plaintiff on both of the meanings pleaded in respect of the first article. In reaching its conclusion, the court considered *Slim* as well as the extent to which the plaintiff should be bound by the meaning which he had pleaded. At [20]–[21] of *Chakravarti*, Brennan CJ and McHugh J said:

20 In [*Slim*], Diplock LJ and Salmon LJ expressed views which, at least textually, appear to conflict. Salmon LJ said that a plaintiff is bound by his or her pleading – "otherwise it may prove to be nothing but a snare for the defendant". Diplock LJ said that a plaintiff could rely on any meaning which was less injurious than the pleaded meaning. In *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* [(1975) 134 CLR 1], Stephen J referred to both views, saying that the plaintiff "was not free thereafter to rely upon some quite different meaning which he might seek to read into the words complained of … at least not one more injurious".

2 1 *The proposition advanced by Salmon LJ in* Slim *is too rigorous*: it appears to sacrifice form to substance and to elevate minute differences from the meaning pleaded to the status of a substantial defence. On the other hand, a less injurious meaning than the meaning pleaded is not always without significance as Diplock LJ seem[ed] to imply. A defendant who could not justify or otherwise defend a publication having the meaning pleaded by the plaintiff might have been able to justify or otherwise defend a defamatory publication having a less injurious meaning. But *a different nuance of meaning from the meaning pleaded may go to, and be found by, the jury provided it is not unfair to the defendant to allow the plaintiff so to depart from the meaning pleaded*.

[emphasis added]

125 Similarly, at [53]–[60] of *Chakravarti*, Gaudron and Gummow JJ said:

> 53 The consequences of a plaintiff pleading a specific meaning are far from settled. In [*Slim*], Salmon LJ expressed the view that a "plaintiff is bound by his pleading – otherwise it may prove to be nothing but a snare for the defendant", while Diplock LJ took the view that a plaintiff could rely on any natural or ordinary meaning which [was] less injurious than the pleaded meaning. …
>
> …
>
> 59 … [A]lthough the majority in the Full Court held that Mr Chakravarti [the plaintiff] could not rely on the lesser meaning which the Advertiser [the defendant] asserted, namely, that he was suspected of being involved in criminal or civil misconduct, which lesser meaning it sought to justify and defend, there could have been no disadvantage to the Advertiser in allowing him to do so.
>
> 6 0 *As a general rule, there will be no disadvantage in allowing a plaintiff to rely on meanings which are comprehended in, or are less injurious than the meaning pleaded in his or her statement of claim. So, too, there will generally be no disadvantage in permitting reliance on a meaning which is simply a variant of the meaning pleaded. On the other hand, there may be disadvantage if a plaintiff is allowed to rely on a substantially different meaning or, even, a meaning which focuses on some different factual basis*. Particularly is that so if the defendant has pleaded justification or, as in this case, justification of an alternative meaning. However, the question [of] whether disadvantage will or may result is one to be answered having regard to all the circumstances of the case, including the material which is said to be defamatory and the issues in the trial, and not simply by reference to the pleadings.
>
> [emphasis added]

126 Kirby J, in a separate judgment, said (see *Chakravarti* at [139]):

> In an attempt to reconcile the desirable encouragement of particularisation of claims, the avoidance of "trial by ambush" and the consideration of the entirety of the publication in question, courts will uphold the discretion of the trial judge, including a discretion to confine parties to the imputations pleaded where that is required by considerations of fairness. *However, a more serious allegation will generally be taken to include a less serious one unless the latter is of a substantially different kind. It is true that dicta appear in decisions of this Court, other Australian courts and courts overseas which favour a strict approach: binding a plaintiff at the trial to the precise imputations pleaded. However, I do not consider that these dicta represent the law. The better view is that the rules of pleading must, in those jurisdictions governed by the common law, adapt to the fair evaluation by the tribunal of fact of the matter complained of*. If the publisher claims surprise, prejudice or other disadvantage, the trial judge may protect it. *No complaint can arise where [the] additional imputations found represent nothing more than nuances or shades of meaning of those pleaded*. [emphasis added]

127 It is clear from the above passages that the propositions enunciated by the various judges in *Chakravarti* are all consistent with Diplock LJ's statement in *Slim* that the plaintiff may not rely on a meaning which is more defamatory than that which he has pleaded (and, similarly, the court may not find that the offending words bear a more defamatory meaning than that which has been pleaded). In *Chakravarti*, the High Court of Australia was not faced with a plaintiff who was arguing for a more

defamatory meaning than that which he had originally pleaded, but, rather, with a plaintiff who was relying on a variant, shade or nuance of the pleaded meaning, which variation did not give rise to a more defamatory meaning than the meaning originally pleaded. It bears noting that the learned authors of *Gatley* cite both *Slim* and *Chakravarti* in *the same footnote* as authorities for the rule in *Slim* (see *Gatley* at para 28.24, fn 93), save that, in respect of *Chakravarti*, the authors state additionally that the High Court of Australia expressed in that case (see *Gatley* at para 28.24, fn 93):

> … the view … that there will generally be no disadvantage in permitting reliance on a meaning which is simply a variant of the pleaded meaning but that *there may be a disadvantage if a plaintiff is allowed to rely on a substantially different meaning or, even, a meaning which focuses on some different factual basis*. [emphasis added]

It seems to us that the point made by the italicised words in the above quotation is consistent with Diplock LJ's proposition in *Slim* that the plaintiff cannot rely on a more defamatory meaning than that pleaded. Contrary to what the Judge suggested at [135] of the Judgment, it is quite clear to us that *Chakravarti* does not suggest a different or more liberal approach compared to that propounded by Diplock LJ and is actually *consistent with* Diplock LJ's approach.

128 In our view, the rule in *Slim* is a sensible and fair rule in defamation cases, and this court was correct in following it in *Goh Chok Tong* ([19] *supra*), although it justified its decision on the ground that to find that the offending words bore a more defamatory meaning than the meaning pleaded by the plaintiff "*would be giving to the plaintiff more than what he [had] asked for*" [emphasis added] (*id* at [46]; *cf* the explanation given by Salmon LJ in *Slim* at 185). The general rule in an adversarial litigation system is that the plaintiff should be bound by his pleadings. There is no reason why this rule should be departed from in a defamation action, especially where the plaintiff is claiming that he has been defamed by *specific* words used by the defendant (*ie*, the offending words). In our view, the plaintiff must be the best person to know how, where and why he has been defamed by the offending words, and, therefore, it would be unfair to the defendant if the plaintiff were allowed at the trial to rely on a more defamatory meaning than that which he has pleaded. Indeed, in *Slim*, Diplock LJ went so far as to say that the plaintiff is "in effect … estopped from contending that the words do bear a *more* injurious meaning" [emphasis in original] (*id* at 175), which, in our view, was shorthand for the principle that the plaintiff is bound by his pleadings.

129 In this connection, we note that, in *Chakravarti*, Gaudron and Gummow JJ said as follows at [58]:

> Doubtless, the pressures on court time and the cost of litigation ordinarily require that, at trial, a party be held to the particulars or those parts of the pleadings which specify the case to be made if departure would occasion delay or disadvantage the other side. *The same considerations apply to defamation proceedings*. Words do not mean what the parties choose them to mean and, at least ordinarily, the defamatory material will, itself, sufficiently identify and, thus, confine the meanings on which [the parties] may rely. Moreover, as was pointed out in *National Mutual Life Association of Australasia v GTV Corporation Pty Ltd* [[1989] VR 747], "[i]t would be most unlikely that the parties would between them fail to hit upon, at least approximately, all the reasonably open meanings". [emphasis added]

In our view, although "[w]ords [may] not mean what the parties choose them to mean" (*ibid*), it accords with common sense that the plaintiff is unlikely to plead a less defamatory meaning if the offending words are capable of having a more defamatory meaning (unless, of course, he has misconstrued their meaning), especially since, in law, he is permitted at the trial to rely on a less defamatory meaning if he is unable to make out the more defamatory meaning originally pleaded.

130 For all of the above reasons, we prefer Diplock LJ's view in *Slim*, *viz*, that, where the plaintiff has chosen to set out in his SOC the particular defamatory meaning which he contends is the natural and ordinary meaning of the offending words, "the defamatory meaning so averred is treated at the trial as *the most injurious meaning* which the words are capable of bearing" [emphasis added] (*id* at 175). As we said earlier, the plaintiff must be the best person to know the sting of the alleged libel concerning him. He should thus be bound by the meaning which he has pleaded, subject to any change brought about by an amendment to his SOC so as to plead a more defamatory or variant meaning from that originally pleaded.

131 It should be noted that Diplock LJ did *not* say in *Slim* that, since the plaintiff is bound by the meaning of the words which he has pleaded, he would not be allowed to amend his pleadings to plead a more defamatory meaning. Just like in all other cases, the Rules of Court give the court the power to allow the plaintiff to amend his pleadings at any stage of the proceedings provided the defendant is not irremediably prejudiced by the amendment. This principle should apply regardless of whether the amendment which the plaintiff seeks to make is to plead a more defamatory meaning or a less defamatory meaning than that originally pleaded. Although, as Kirby J observed in *Chakravarti* at [139], a more serious allegation would usually include a less serious one, with the result that the court may find a less defamatory meaning than that originally pleaded, this principle does not apply without qualification for there may come a point where a less serious allegation amounts to a substantially different allegation from that originally pleaded; in such circumstances, the plaintiff should amend his pleadings to expressly plead the less defamatory meaning. As King CJ stated in *Prichard v Krantz* (1984) 37 SASR 379 (at 386):

> *In many cases, … the more serious allegation can be regarded as including the less serious*. In that sense, the court is free to attribute to the words a less injurious meaning than that attributed to them in the pleading. An allegation that the words used mean that the plaintiff is a rapist no doubt includes a meaning that he has been guilty of a less serious type of sexual assault. An allegation that the words mean that a person is a robber no doubt includes a meaning that he has taken property by criminally dishonest means falling short of robbery. *It seems to me, however, that it would be contrary to the purpose of pleadings and particulars if a plaintiff could obtain a judgment upon the basis of a meaning of the words used which was not merely a less serious form of the imputation pleaded, but amounted to an imputation of a substantially different kind*. [emphasis added]

132 For the above reasons, we do not agree with the Judge that *Chakravarti* departed from or modified the rule in *Slim*, which, as we stated at [128] above, is a sensible and fair rule.

Ground (e): The defence of justification

133 The Appellants' fifth ground of appeal is that the Judge was wrong to conclude that "the defence of justification [fell] away" (see the Judgment at [145]) merely because the Appellants pleaded justification to a meaning which the Respondents had not asserted to be the meaning of the Disputed Words. The principles in this area of the law are well settled. The defendant who relies on the defence of justification must plead precisely the meaning which he seeks to justify. As this court stated in *Aaron* ([20] *supra*) at 647, [68]:

> On this issue [of justification] it is necessary to consider first what precisely the [defendants] sought to justify. *The law on this point is now quite clear. Where a defendant in a defamation action pleads justification, he must do so in such a way as to inform the plaintiff and the court precisely what meaning or meanings he seeks to justify*: see *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147, at p 153; *Viscount De L'Isle v Times Newspaper Ltd* [1988]

> 1 WLR 49, at p 60 and *Prager v Times Newspapers Ltd* [1988] 1 WLR 77, at p 86. All these three cases were decided by the English Court of Appeal and the relevant passages of the judgments of various members of the court were set out and commented on in *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390 at p 403, and it is unnecessary to repeat them here. [emphasis added]

134 To succeed in a plea of justification, the defendant need only prove that the substance or gist of the offending words (as opposed to those parts of the offending words which do not add to the sting of the alleged defamation) is true (see *Aaron* at 649, [73] and *Oei Hong Leong v Ban Song Long David* [2005] 1 SLR 277 ("*Oei Hong Leong*") at [94]; see also *Gatley* ([27] *supra*) at para 11.9 and *Evans on Defamation* ([26] *supra*) at pp 88–89).

135 It should also be pointed out that the defendant is *not* obliged to justify the particular defamatory meaning put forward by the plaintiff, although, if the defendant seeks to justify a defamatory meaning *different* from the meaning propounded by the plaintiff, he must plead clearly the different meaning which he seeks to justify (see *Evans on Defamation* at p 96):

> Obviously, a defendant to a defamation action is not obliged to ascribe a meaning to the words in issue, for … the plaintiff must establish the defamatory meaning of the words. However, if a defendant pleads justification, then he must show in his pleadings the meaning which he seeks to justify. The defendant is obliged to plead justification in a way which makes it clear [what] the meaning [which] he seeks to justify [is]. *In situations where the defendant puts forth a defamatory meaning different from that pleaded by the plaintiff, and which he seeks to justify, he must clearly and unequivocally plead the meaning which he seeks to justify*. [emphasis added]

(Reference may also be made to *Gatley* at paras 11.14 and 29.7, where the relationship between a plea of justification, the case advanced by the plaintiff and the meaning of the offending words is examined.)

136 In the present case, the Appellants pleaded justification, together with a long string of particulars, in respect of a different meaning of the Disputed Words from that contended for by the Respondents (see the first amended defence in Suit 540 at para 26 and the second amended defence in Suit 539 at para 26). As a related argument, the Appellants also contended that the Judge "was unfair to deny [them] the opportunity to recast their pleadings to deal with his ruling on meaning".[note: 37] The Appellants' awareness that the Judge's ruling (*ie*, the Judge's decision to allow LHL to amend his SOC and the consequential directions given by the Judge in relation to the filing of the Appellants' amended defence) cannot be faulted in law would probably explain why the Appellants have raised the issue of the alleged denial of due process. In our view, this is the Appellants' *real* substantive ground of appeal where the defence of justification is concerned, but it is a non-starter because the defence of justification naturally fell by the wayside once the Judge found that the Disputed Words bore the meaning pleaded by the Respondents and not the meaning that the Appellants sought to justify.

137 The Appellants further submitted before this court that, since offending words could have different levels of defamatory meaning, on the facts of the present case, some of the particulars which they pleaded in para 26 of the second amended defence in Suit 539 and para 26 of the first amended defence in Suit 540 *vis-à-vis* the plea of justification "could go to justify lesser meanings contained within the meaning of corruption".[note: 38] This may well be the case since the word "corrupt", as we stated earlier (at [73] above), encompasses a variety of wrongdoings such as dishonesty, abuse of power or breach of public trust for personal gain, *etc*. However, the Appellants have not told us which lesser meaning of corruption they seek to justify. What is clear before both

the Judge and this court is that the Appellants pleaded: (a) a total denial that the Disputed Words meant that the Respondents were corrupt; and (b) a defence of justification *vis-à-vis* a meaning which, according to them, did not impute corruption. Since the Appellants based their case on the premise that the Disputed Words did not bear any connotation of corruption at all, the Appellants were misconceived in also seeking, at the same time, to justify "lesser meanings contained within the meaning of corruption".[note: 39] In any event, an allegation that a government minister is corrupt, especially if the minister concerned is the Prime Minister, a former prime minister or a senior member of the Cabinet, is *ex facie* defamatory of that minister unless the person making the allegation has a defence under the law. Since the Appellants did not in any way plead justification in respect of the allegation of corruption which the Disputed Words were found to bear, the different levels of defamatory meaning in relation to the allegation of corruption did not in any way assist the Appellants' plea of justification.

Ground (f): The defence of fair comment

138 The Appellants' sixth ground of appeal is that the Judge mischaracterised (at [152] of the Judgment) the statements in the Disputed Words as statements of facts when they were actually comments, and thus erred in holding that the defence of fair comment was not sustainable.

139 The defence of fair comment, like the defence of justification, is also well settled. To successfully invoke the defence of fair comment, the defendant must prove four elements, which were articulated by this court in *Chen Cheng v Central Christian Church* [1999] 1 SLR 94 ("*Chen Cheng*") at [33] as follows:

> There are *four* elements which the defendants must establish in order to succeed on the plea of fair comment:
>
> (i) *the words complained of are comments, though they may consist of or include inference[s] of facts*;
>
> (ii) the comment is on a matter of public interest;
>
> (iii) *the comment is based on facts*; and
>
> (iv) the comment is one which a fair-minded person can honestly make on the facts proved.
>
> See *Jeyaretnam JB v Goh Chok Tong* [1984-1985] SLR 516, 522 and *Oversea-Chinese Banking Corporation Ltd v Wright Norman & Ors* [1994] 3 SLR 760 at p 770.
>
> [emphasis added]

140 The fundamental rule is that the defence of fair comment applies only to *comments* and not imputations of facts, and the difficulty lies precisely in trying to distinguish a comment from a statement of fact. This difficulty, as well as the test for distinguishing between comments and statements of facts, has been aptly summarised by the learned authors of *Evans on Defamation* ([26] *supra*) at p 103 as follows:

> *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*. [emphasis added]

Similar pronouncements may also be found in *Chen Cheng* at [35], *Lee Kuan Yew v Davies* [1989] SLR 1063 ("*Davies*") at 1087, [53], *Jeyasegaram David v Ban Song Long David* [2005] 2 SLR 712 ("*Jeyasegaram David*") at [50] and *Gatley* ([27] *supra*) at paras 12.6 and 12.13.

141 Generally speaking, a comment is often equated with a statement of opinion (see *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd* [1996] 1 MLJ 393 at 408, where it was stated that "it is settled law that a comment is a statement of opinion on facts truly stated", and *Lee Kuan Yew v Jeyaretnam JB* [1978-1979] SLR 429 ("*Jeyaretnam JB*") at 439, [57], where it was stated that "[a] comment is a statement of opinion on facts") or a statement of conclusion (see *Mitchell v Sprott* [2002] 1 NZLR 766 at [19], where it was stated that "[t]he defence applies when the words appear to a reasonable reader to be conclusionary"). More specifically, 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." (see *Clarke v Norton* [1910] VLR 494 at 499; see also generally *Gatley* at para 12.6).

142 In the court below, the Judge rejected the defence of fair comment for three main reasons, namely (see the Judgment at [152]):

(a) the Disputed Words did not distinguish clearly between facts and comments;

(b) the Relevant Statements (as defined at sub-para (b) of [20] above), which the Appellants alleged were comments, were actually statements of facts; and

(c) the Relevant Statements, even if they were comments, were not comments based on facts.

143 The Appellants' arguments before us were basically that the Judge was wrong to find that the Relevant Statements were statements of facts and not comments, and that, even if these statements were comments, they were not based on facts.[note: 40]

144 As mentioned earlier, whether a statement is a comment or a statement of fact is "[a question] of fact, dependent upon the nature of the imputation conveyed, and the context and circumstances in which it is published" (see *Evans on Defamation* ([26] *supra*) at p 103). The Judge gave extensive reasons as to why he considered the Relevant Statements, when read in the context of the Article as a whole and taking into account the circumstances of the present case, to be statements of fact rather than comments (see the Judgment at [152]–[153]). We agree with those reasons. To avoid unnecessary repetition of these reasons here, it suffices for us to say that the context of the Article as well as the tone and language employed therein would leave the ordinary reasonable person with no doubt that the Appellants were putting across *factual* statements rather than comments. The Relevant Statements not only contain no hint of any opinion or conclusion, but also appear to be definitive statements of facts (see, *eg*, the statement "[t]hat raises the question of whether

Singapore deserves its reputation for squeaky-clean government" in para 10 of the Article; the assertion that "Singaporeans have no way of knowing whether officials are abusing their trust as Mr. Durai did" in para 11; and the two questions at the end of para 13, *viz*, "how many other libel suits have Singapore's great and good wrongly won, resulting in the cover-up of real misdeeds?" and "are libel suits deliberately used as a tool to suppress questioning voices?"). It does not matter that some of the Relevant Statements were couched in the form of questions as the test for whether these statements were statements of fact or comments is essentially whether the ordinary reasonable person, on reading the Article as a whole, would understand these statements to be comments or statements of fact (see *Evans on Defamation* at p 103).

145 At this juncture, we would like to add an observation on the defence of fair comment. The Appellants are no strangers to court actions for defamation in so far as publications in FEER have previously been the subject of defamation suits in Singapore. As a matter of prudence, all reputable publishers, especially those whose publications have an international readership, have lawyers to advise them on the law of defamation in the various jurisdictions in which they publish. We assume that RP must also have followed this salutary practice. Given the applicable legal principles on the defence of fair comment (as articulated by case law) and the difficulty of distinguishing comments from statements of fact, it is incumbent upon the media to make it clear in its editorials or opinion pieces which statements are comments and which statements are simply factual statements or imputations of fact.

146 Ultimately, if a publisher is sued for defamation, the burden would be on it to establish the defence of fair comment. It should be borne in mind that, if the publisher fails to distinguish clearly between statements of facts and comments, the statements in question would not be protected by the plea of fair comment and would be considered by the court to be statements of facts (see *Evans on Defamation* at p 103). The rationale for this approach was explained by Fletcher Moulton LJ in the English CA case of *Hunt v The Star Newspaper Company, Limited* [1908] 2 KB 309 ("*Hunt*") at 319–320, as follows:

> 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]

In a similar vein, in *London Artists Ltd v Littler Grade Organisation Ltd* [1969] 2 QB 375 at 395, Edmund Davies LJ, citing *Hunt*, stated that "[i]t behoves a writer to indicate clearly what portions of his work are fact and what [portions] are comment" (see also generally *Gatley* at para 12.13).

147 The media has a responsibility to its readers and, in particular, to the potential plaintiff whose reputation may be seriously damaged by careless words which the ordinary reasonable person may

view as statements of fact rather than comments. In this regard, the media can easily avoid the pitfall of its comments being mistaken by the ordinary reasonable person as statements of fact by making it clear that the statements concerned are comments and not statements of facts, and by identifying the facts on which the comments are based so as to ensure that there is no confusion on the reader's part as to which portions of the statements are comments and which portions are statements of facts. Of course, such measures (in cases where they are taken) would not *conclusively* denote whether the statements in question are comments or statements of fact. These measures would, however, serve as a strong indicator to the court of how the statements concerned are likely to be understood (*ie*, whether as comments or as statements of fact) by the ordinary reasonable person. As pertinently noted in Geoffrey Robertson & Andrew Nicol, *Robertson & Nicol on Media Law* (Sweet & Maxwell, 4th Ed, 2002) at p 120:

> 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 baldy, 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; emphasis in original omitted]

148 In short, a person who wishes to write anything about another person that is *prima facie* defamatory of the latter has the means to state clearly whether what is being written is meant to be a comment or a statement of fact. If the writer fails to do so, there is no reason why he (and, likewise, the publisher of the statement) should be given the benefit of the defence of fair comment.

149 With regard to the defence of fair comment in the instant case, we are unable to say that the Judge was wrong in finding (at [152] of the Judgment) that, even if the Relevant Statements were comments, they were not comments based on facts (see the third element of this defence as laid down in *Chen Cheng* ([139] *supra*) at [33]). (Indeed, it appears to us that the Relevant Statements also do not satisfy the fourth element of the defence of fair comment in so far as they are not comments which a fair-minded person could honestly make on the facts proved. F A Chua J noted in *Jeyaretnam JB* ([141] *supra*) that, to satisfy this particular element, the comments in question "*must not* contain imputations of *corrupt* or *dishonourable* motives on the person whose conduct or work is criticised, *save in so far as such imputations are warranted by the facts*" [emphasis added] (at 440, [58]).) In the present case, the allegation made by the Disputed Words is that the Respondents are corrupt. Assuming (*contra* our decision at [144] above) that this allegation is indeed a comment, it then has to be ascertained whether this comment is based on facts. In this regard, it should be stated at the outset that "it [is] unnecessary for all the facts which [form] the basis of the comment to be referred to, so long as there [is] a sufficient substratum of facts referred to or implied from the defamatory words" (see *Jeyasegaram David* ([140] *supra*) at [52]; see also *Kemsley v Foot* [1952] AC 345 at 361).

150 In the court below, the Judge examined the whole series of alleged facts raised by the Appellants in support of their claim that the Relevant Statements were based on facts (see the Judgment at [146], where the facts pleaded by the Appellants are set out in full; see also the Judge's observation on those facts at [150] of the Judgment). The Judge reached the conclusion that the Relevant Statements, even if they were comments, "were not comments based on facts" (see the Judgment at [152]). We agree with this conclusion. The main supporting facts pleaded by the Appellants related to the NKF Saga, the numerous successful libel suits brought by the Respondents in the past, the alleged non-transparency of government institutions such as the CPF Board and the GIC and the Government's control of huge pools of public money in these two institutions. These were

also the facts stated in the Article itself. To any ordinary reasonable person, these facts without more can hardly be said to warrant the imputation that the Respondents are corrupt.

151 The present case may be contrasted with *Jeyasegaram David*, where the defence of fair comment succeeded. In that case, the defendant was quoted in an article published in *The Business Times* ("the BT article") as describing the plaintiff's behaviour at an extraordinary general meeting ("EGM") of a company ("NatSteel") as "playing to the gallery" [emphasis in original omitted] (*id* at [12]). The plaintiff sued the defendant for defamation in respect of those words. This court found that the defendant's statement that the plaintiff was "playing to the gallery" was a comment which was supported by facts as the plaintiff's conduct and antics at the EGM had been widely reported in the press. The court said (*id* at [53]):

> *In this case, we found a sufficient factual basis for the [defendant's] comment from the sheer notoriety of the [plaintiff's] behaviour throughout the entire NatSteel saga*. Although there was no express reference to the [plaintiff's] conduct at the EGM in the BT article, we noted that the publicity accorded to the affair was unprecedented. Articles updating readers on the latest developments, including the rowdy EGM on 28 May 2003, appeared almost daily in all the major newspapers in Singapore (including *The Business Times*) . *Contrary to the [plaintiff's] submissions, we found ample evidence that his antics at the EGM were widely reported and quoted*. To our minds, on the day the [defendant's] remark was published in the BT article, these facts would have remained fresh in the minds of the investing public and the ordinary reasonable reader of *The Business Times*. *We were therefore satisfied that there was a sufficient substratum of facts to form a basis for the [defendant's] comment*. [emphasis added]

152 Unlike the scenario in *Jeyasegaram David*, there were no supporting facts in the present case relating to the allegation that the Respondents were corrupt and accordingly unfit to hold office. We are therefore of the view that the Judge was correct to reject the defence of fair comment.

Ground (g): The defence of derivative qualified privilege

153 In respect of the defence of derivative qualified privilege based on CSJ's right-of-reply privilege, the Appellants reiterated before us their argument in the court below, which the Judge had rejected. In essence, the contention put forth by the Appellants was that they were entitled to claim a derivative qualified privilege based on CSJ's right-of-reply privilege (*ie*, the qualified privilege applicable to CSJ as a result of his right to reply to the alleged defamatory statements made against him by the Respondents). The right to claim a derivative qualified privilege is recognised under Singapore law (see *Davies* ([140] *supra*) at 1100, [90]; *Oversea-Chinese Banking Corp Ltd v Wright Norman* [1994] 3 SLR 760 ("*OCBC*") at 782, [86]; *Oei Hong Leong* ([134] *supra*) at [103]; and *Evans on Defamation* ([26] *supra*) at p 136). As the High Court held in *Davies* (at 1100–1101, [90] and [92]):

> There is no dispute that in law a person who has been publicly defamed is entitled to reply to the defamation publicly, and such reply may be made through the press and is privileged. *This privilege extends also to protect a newspaper which publishes the reply of the person defamed*.
> …
>
> …
>
> The protection of a privileged occasion … does not [however] extend to statements which have no relevance to a reply to the attack or which are not in any way appropriate to the occasion.

[emphasis added]

154 *Gatley* ([27] *supra*) explains the right-of-reply privilege as follows (at para 14.48):

> **Reply to attack**. … [A] person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made.
>
> > "The law justifies a man in repelling a libellous charge by a denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false." [citing *Brewer v Chase* 80 NW 575 at 577 (Mich, 1899)]
> >
> > "The defendant would be entitled to protect his reputation by a proportionate response which was appropriate both in terms of subject matter and scale of publication. In order for a defendant to avail himself of this form of privilege, the response should not go into irrelevant matters or, in particular, cross over into an attack on the integrity of the claimant if it is not reasonably necessary for defending his own *reputation*." [citing *Hamilton v Clifford* [2004] EWHC 1542 at [66]]
>
> *Mere retaliation, which cannot be described as an answer or explanation, is not protected, but the defendant is not required to be diffident in protecting himself* and is allowed a considerable degree of latitude in this respect and the law does not concern itself with niceties in such matters. …
>
> [emphasis added]

155 The scope of the right-of-reply privilege is further elaborated in *Gatley* at para 14.64, as follows:

> **Answers to attacks**. A person responding to an attack upon him must not make countercharges or unnecessary imputations on the private life of the person who has attacked him wholly unconnected with the attack and irrelevant to his vindication. *The privilege "extends only so far as to enable him to repel the charges brought against him – not to bring fresh accusations against his adversary."* [citing *Dwyer v Esmonde* (1878) 2 LR Ir 243 at 254]
>
> > …
> >
> > "If, for example, A should charge B with theft, a denial by B of the charge would not warrant an action for damages by A however vigorous or gross the language might be in which B's denial was couched. *But if B should go on to charge A with theft that would be actionable, and it would not be protected or privileged to any extent on account of A's previous attack*." [citing *Milne v Walker* (1898) 21 R 155 at 157]
>
> [emphasis added]

156 In short, in the words of Lord Oaksey in *Turner v Metro-Goldwyn-Mayer Pictures, Ltd* [1950] 1 All ER 449 ("*Turner*"), the defendant loses the protection afforded to him under the right-of-reply privilege if he "goes *beyond defence* and proceeds to *offence*" [emphasis added] (*id* at 470; see also

OCBC at 783, [89], where this principle was endorsed by the High Court). Lord Oaksey went on to say in *Turner* (at 470–471):

> There is, it seems to me, an analogy between the criminal law of self defence and a man's right to defend himself against written or verbal attacks. *In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence*. That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words. If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life. The law does not concern itself with niceties in such matters. If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your defence. [emphasis added]

157 The Appellants argued that, given the very serious accusations made against CSJ by LHL on the occasion of the latter's visit to New Zealand (as reported in para 3 of the Article) and also by LKY on previous occasions (as reported in para 4 of the Article), it was "entirely proportionate for [CSJ] to make the comments [which] he did, even if they amounted to imputations of corruption"[note: 41] [emphasis in original omitted]. The Appellants further argued that the Respondents were in fact accusing CSJ not only of corruption, but of much worse misconduct (*ie*, lying and cheating), and, thus, "[o]n a simple '*tit-for-tat*' basis, [CSJ] was entitled to use equally unflattering language"[note: 42] [emphasis in original].

158 As the authorities which we referred to at [153]–[156] above show, the right-of-reply privilege only enables the defendant to repel the charges made against him by the plaintiff, but not to bring fresh and irrelevant accusations against the plaintiff. In particular, the defendant may not "[go] beyond defence and [proceed] to offence" (*per* Lord Oaksey in *Turner* at 470) by attacking the plaintiff's integrity if it is not reasonably necessary for the defendant to do so for the purposes of defending his own reputation (see *Hamilton v Clifford* [2004] EWHC 1542 at [66] as well as *Gatley* at para 14.48). Thus, if a person ("Mr X") claims that a certain individual ("Mr Y") has stolen money from another, Mr Y can answer Mr X's allegation by denying it or even by saying that Mr X is a liar (see *Evans on Defamation* ([26] *supra*) at p 136). While Mr Y's statement that Mr X is a liar would *ex facie* be defamatory, that statement would be privileged provided it is made *bona fide*, as it is made by Mr Y in an effort to protect his own reputation and is clearly relevant to refuting the original accusation by Mr X (*ibid*). However, if Mr Y responds by saying that Mr X is a thief himself, Mr Y would have gone beyond defence to offence and, accordingly, would not be protected by the right-of-reply privilege (see *Gatley* at para 14.48, where it is stated that "[m]ere retaliation, which cannot be described as an answer or explanation, is not protected"; see also the factual scenario in *Davies* ([140] *supra*) by way of illustration).

159 In the present case, assuming that CSJ was indeed exercising his right of reply (which view we do not agree with (see [160] below)), it is clear that, in doing so, he had crossed the line. It was not open to him to reply to LHL's "[rant]" (see para 3 of the Article) against him or LKY's allegations against him by claiming that the Respondents were themselves corrupt. To say that LKY had "accumulated enough skeletons in his closet … [for which] his son … [would] have a price to pay" (see para 9 of the Article) and that LKY was "afraid" (*ibid*) that those skeletons might emerge from the closet through questioning during parliamentary debates clearly implied that LKY was guilty of unspecified wrongdoing that made him unfit to hold office as Minister Mentor. In our view, this allegation exceeded the latitude that the law grants to the defendant who is replying to allegations made against him (see *Oei Hong Leong* ([134] *supra*) at [98]). The law does *not* allow a free-for-all tit for tat, contrary to what the Appellants advocated. The retaliatory attack by CSJ on the

Respondents in alleging that they were corrupt was wholly unnecessary for the purposes of defending his (CSJ's) own reputation.

160 The Respondents made a further argument to rebut the Appellants' argument on the defence of derivative qualified privilege, namely, there was absolutely nothing in the Article to suggest that CSJ was exercising his right-of-reply privilege to begin with.[note: 43] We accept this argument. In our view, although the Article quoted the answers and/or remarks which CSJ gave during his interview with HR, none of those answers and/or remarks could be said to be refuting, denying or explaining any attack made by the Respondents against CSJ. Save for the quote of CSJ's response in para 9 of the Article, the rest of the statements in the other portions of the Disputed Words were, as we pointed out earlier (at [144] above), statements of facts made by the Appellants themselves. Further, whatever was said of CSJ by the Respondents was said a long time before the interview which led to the Article. If CSJ had wanted to reply to the Respondents' attacks on him, he could and should have done so at the time those attacks were made. In this connection, counsel for the Appellants accepted as valid the proposition that (using the terminology employed at [158] above) Mr Y cannot wait for an indefinite period after his character is allegedly attacked by Mr X before he (Mr Y) exercises his right of reply *vis-à-vis* Mr X. Indeed, we note that the Article said at para 21 that CSJ "*[didn't] dwell* on his personal tribulations" [emphasis added]. This further reinforces our finding that CSJ, in making the statements published in the Article, was not exercising his right-of-reply privilege. It follows that there is no derivative qualified privilege based on CSJ's alleged right of reply which the Appellants can invoke.

161 For the foregoing reasons, ground (g) of [23] above fails.

162 It is pertinent to note that this was not a case where the Article merely reported what CSJ had said in public, or where CSJ had written a reply in response to an attack by the Respondents on him and had then asked the Appellants to publish his written reply. The Article was the result of an interview of CSJ which was *initiated by the Appellants* themselves, and not by CSJ.[note: 44] Using again the terminology employed at [158] above, suppose Mr X says that Mr Y has stolen money from another person and, *in response to a query from a newspaper reporter as to what he (Mr Y) thinks of Mr X's allegations*, Mr Y says that Mr X is a liar: in such a scenario, it may still be possible for the newspaper which publishes Mr Y's response to retain its derivative qualified privilege even though it was the newspaper itself which arranged for its reporter to interview Mr Y.

163 The above situation arose in the case of *Loveday v Sun Newspapers Limited* (1938) 59 CLR 503 ("*Loveday*"). There, the High Court of Australia, in holding that a newspaper proprietor was entitled to rely on a derivative qualified privilege, did not think that it was material that the newspaper proprietor had sought Mr Y's reply to Mr X's attack on Mr Y first (in fact, this factor did not appear to trouble the court at all). In *Bass v TCN Channel Nine Pty Ltd* (2003) 60 NSWLR 251 ("*Bass*"), where *Loveday* was relied on, the New South Wales Court of Appeal held that derivative qualified privilege was not as a matter of course lost to a publisher even if it was found that it was the publisher which had instigated Mr X's attack on Mr Y in the first place; this factor could, however, go towards showing that the publisher had been motivated by malice and had abused its derivative qualified privilege.

164 *Gatley*, in citing the above two cases (*ie*, *Loveday* and *Bass*), comments at para 14.50 as follows:

> The privilege of a person whose character or conduct has been attacked in the public [p]ress to reply to such attacks extends to protect the newspaper which publishes his reply; and in the absence of proved malice neither will be held liable in damages.

…

> In the older cases the standard pattern was that A [*ie*, Mr X in the example outlined at [158] above] published an attack on B [*ie*, Mr Y in the example mentioned at [158] above] in [a] newspaper … and B then responded in kind. *However, in [*Loveday*], it was held to make no difference that the newspaper sought B's response first and published it along with A's attack*. That situation is now commoner in the broadcast media, where a programme on a controversial issue is likely to be prepared over a period of time; indeed, in such cases *the role of the media organ has changed from being a mere conduit for the transmission of the remarks of the two protagonists* and it may instigate the confrontation by approaching the person who makes the initial attack. …
>
> *Nevertheless it has been held [that] the media organ retains its derivative privilege in such cases. Inversion of the natural roles of "attacker" and "respondent", or manipulation of the content of the programme so as to produce a one-sided picture are matters which go to malice*. …
>
> [emphasis added]

165 In our opinion, the fact that the Appellants on their own accord arranged for an interview with CSJ and then published the Article, which was allegedly written based on the interview, is significant (although it is *not*, in the light of the authorities discussed at [163]–[164] above, fatal to the Appellants' attempt to rely on the defence of derivative qualified privilege). For the reasons stated at [160] above, the Disputed Words could not fairly or reasonably be said to constitute a reply by CSJ to the Respondents' attack on his character (as set out in paras 3–4 of the Article). Although the Article quoted in para 9 a particular response by CSJ, the rest of the statements in the other portions of the Disputed Words were (as mentioned at [144] and [160] above) statements of facts alleged by the Appellants themselves. Notably, the Appellants raised and alluded to the NKF Saga at para 10 of the Article; there is nothing in the Article to suggest that this topic was raised by CSJ himself. At the time of the interview, which took place approximately one year after the trial of the NKF libel suit commenced, the NKF Saga could hardly be said to be novel or hot news, except for the Appellants having resurfaced it. The association of the NKF and/or Durai with the Respondents as well as the further association of the NKF libel suit with previous libel suits commenced by the Respondents were, in our view, wholly unnecessary if the Article were, as counsel for the Appellants claimed, only meant to be about democracy (or the lack of it) in Singapore.

166 The Appellants also submitted that they were unaware of the implications of the Disputed Words and that, had they been aware of those implications, they would not have published the Disputed Words as they were familiar with the policy which the Respondents had of suing persons or publishers whom they considered had defamed them. In the light of the words used in and the tone of the Article, we doubt if the Appellants can claim that they were completely unaware of the implications of the Disputed Words and the serious imputations which they carried, especially where the two rhetorical questions at the end of para 13 of the Article was concerned (as we noted at, *inter alia*, [5] above, one of these questions was even given especial prominence in that it was reproduced in enlarged font in a box at the top of the last page of the Article).

167 Notwithstanding our foregoing observations at [165]–[166] above, however, since the Respondents did not go so far in the present appeals as to argue that there was malice on the part of the Appellants which would defeat the defence of derivative qualified privilege, it is not necessary for us to consider whether there was indeed any ulterior or collateral intention on the part of the Appellants. It would suffice for us here to reiterate the point made earlier, namely, that (using the

terminology employed at [158] above) the present case was not a typical case of a publisher seeking to rely on a derivative qualified privilege based on the right of Mr Y to reply to Mr X's attack on him (Mr Y). In other words, contrary to what the Appellants would have this court believe, the scenario before us was not one where the publisher merely published the reply by Mr Y to Mr X's attack on him.

168 For the above reasons, we agree with the Judge that, on the facts of the present appeals, the Appellants are not entitled to rely on any derivative qualified privilege based on CSJ's right-of-reply privilege. We now turn to consider the Appellants' last ground of appeal (*ie*, ground (h) of [23] above).

Ground (h): The defence of qualified privilege

Outline of the Appellants' claim of qualified privilege

169 The last ground of appeal advanced by the Appellants is that they are entitled to rely on the *Reynolds* privilege and/or its offshoot, the neutral reportage defence. We should point out that the application of this privilege, after it was laid down in *Reynolds (HL)* ([20] *supra*), was subsequently clarified (likewise by the House of Lords) in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 ("*Jameel*"). In using the expression "the *Reynolds* privilege" in this judgment, we are referring to the *Reynolds* privilege as so clarified.

170 The Appellants' case in respect of qualified privilege in the court below consisted essentially of three mutually exclusive propositions, all of which were rejected by the Judge (see the Judgment at [165]–[177] and [219]–[227]). The Appellants have refined these propositions on appeal and, to the best of our understanding, they are as follows:

(a) First, the *Reynolds* privilege is and has always been part of the common law of Singapore, and thus affords the Appellants a defence in the present case.

(b) Second, if the *Reynolds* privilege is not currently part of our common law, this court should declare it to be such; on this basis, the Appellants have a defence to the Defamation Suits.

(c) Third, if the *Reynolds* privilege is not currently part of the common law of Singapore and if this court also decides not to adopt this privilege as part of our law, the Appellants are nonetheless entitled to rely on the traditional qualified privilege defence based on "special facts", *ie*, the defence of qualified privilege as set out by this court in *Aaron* ([20] *supra*) at 651–652, [81]–[87]. In the present case, the Appellants argued, there were special facts such that there was "an interest in the public strong enough to give rise generally to a duty to communicate in the press" (*id* at 651, [81]).

171 The last of these propositions (*ie*, the "special facts" argument) can be disposed of quickly. This argument was not part of the Appellants' pleaded case, and was instead belatedly raised in the written submissions which the Appellants filed after the hearing of the present appeals. The "special facts" relied on by the Appellants concerned primarily: (a) the public standing of, respectively, HR, the Respondents and CSJ; (b) the role of FEER in the region; and (c) the importance of reforming libel law in Singapore. In our view, these matters do not fall within the "special facts" which this court had in mind in *Aaron* at 651, [81]. An example of such special facts would be (*per* Stephenson LJ in *Blackshaw v Lord* [1984] QB 1 ("*Blackshaw*") at 27):

> … [an] extreme [case] where the *urgency* of communicating a warning is so great, or the source

> of the information so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs … [emphasis added]

Taking Stephenson LJ's example as a guide, the Appellants' case must fail. In the present case, there was no urgency to publish the Article. The NKF Saga (which featured prominently in the Article) was not new. Furthermore, the Appellants had more than sufficient time to check the accuracy of the allegations contained in the Article before publishing it in FEER, which is a monthly journal.

172 Turning to the first two propositions set out at [170] above (which we shall hereafter refer to as "the First Proposition" and "the Second Proposition" respectively), before we consider their merits, we shall first examine briefly the development of the *Reynolds* privilege as well as its reception or rejection (as the case may be) in other common law jurisdictions. Such a study will give us a better appreciation and understanding of the rationale behind this privilege, which will in turn assist us in deciding whether the privilege is part of our common law, and, if not, whether it should be adopted as part of Singapore law.

173 As an aside, we should mention that the First Proposition was rejected by the Judge on the ground that the Appellants had "pre-determined what the common law of defamation in Singapore [was] or should be and then argued that only Parliament [could] abate such law" (see the Judgment at [170]). In his view, "[i]t [was] for the courts to say what the common law [was] or should be … [and] [i]t [was] up to Parliament to abate or expand that common law" (*ibid*). Although the Judge rejected the First Proposition, he nonetheless took pains to consider the *Reynolds* privilege on its merits, and held that this privilege as well as the privilege laid down in the Australian case of *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 ("*Lange v ABC*") and that laid down by the New Zealand Court of Appeal ("the New Zealand CA") in *Lange v Atkinson* [1998] 3 NZLR 424 ("*Lange v Atkinson (CA) (No 1)*") were not applicable in Singapore as each of them was based on political and social considerations different from those in Singapore. He also referred to Belinda Ang J's decision in *Lee Hsien Loong (HC)* ([32] *supra*) that the *Reynolds* privilege (among other models of qualified privilege) was inconsistent with Singapore's defamation law, and noted that that decision had been "implicitly endorsed" (see the Judgment at [219]) by this court in *Lee Hsien Loong (CA)* ([32] *supra*).

The history of the Reynolds privilege

The defence of qualified privilege before Reynolds (HL)

174 The central issue in *Reynolds (HL)* (and all the relevant cases in the different jurisdictions where that decision has been considered) is how to strike the appropriate balance between two competing interests or rights, *viz*, freedom of speech and protection of reputation. The balance that was struck between these two competing interests prior to *Reynolds (HL)* was quite different from the balance struck post-*Reynolds (HL)*. In short, *Reynolds (HL)* changed the law on qualified privilege in England.

175 In *Reynolds (HL)*, Lord Nicholls of Birkenhead stated that "[h]istorically the common law … set much store by protection of reputation" (*id* at 192), but the common law also "long recognised the 'chilling' effect of this rigorous, reputation protective principle" (*ibid*). The common law thus provided exceptions where "[i]n the wider public interest, protection of reputation must … give way to a higher priority" (see *Reynolds (HL)* at 193). These exceptions are reflected in the defences of justification, fair comment and qualified privilege.

176 In relation to the last-mentioned defence, Lord Nicholls outlined the development and the

juridical basis of the traditional qualified privilege defence as follows (*id* at 193–195):

> [T]here are circumstances, in the famous words of Parke B in *Toogood v Spyring* (1834) 1 CM & R 181, 193, when the "common convenience and welfare of society" call for frank communication on questions of fact. … There are occasions when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true. When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged.
>
> Sometimes, the need for uninhibited expression is of such a high order that the occasion attracts absolute privilege, as with statements made by judges or advocates or witnesses in the course of judicial proceedings. More usually, the privilege is qualified in that it can be defeated if the plaintiff proves the defendant was actuated by malice.
>
> …
>
> Over the years the courts have held that many common form situations are privileged. Classic instances are employment references, and complaints made or information given to the police or appropriate authorities regarding suspected crimes. The courts have always emphasised that the categories established by the authorities are not exhaustive. *The list is not closed*. *The established categories are no more than applications, in particular circumstances, of the underlying principle of public policy*. The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication. Lord Atkinson's dictum, in *Adam v Ward* [1917] AC 309, 334, is much quoted:
>
> > "*a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it*. This reciprocity is essential."
>
> The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. *The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end [which] the law is concerned to attain*. The protection afforded to the maker of … the statement is the means by which the law seeks to achieve that end. Thus the court has to assess whether, in the public interest, the publication should be protected in the absence of malice.
>
> *In determining whether an occasion is regarded as privileged the court has regard to all the circumstances*: see, for example, the explicit statement of Lord Buckmaster LC in *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, 23 ("every circumstance associated with the origin and publication of the defamatory matter"). *And circumstances must be viewed with today's eyes. The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions*. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.

[emphasis added]

177 A helpful summary of the development of the traditional qualified privilege defence can also be found in the Privy Council's decision in the Jamaican case of *Seaga v Harper* [2009] 1 AC 1 ("*Seaga*") at [5] (*per* Lord Carswell) as follows:

> The defence of qualified privilege, like so many other doctrines of the common law, developed over a period of time, commencing in the 19th century, and is still in the process of development. The history is conveniently summarised in the judgment of Dunn LJ in *Blackshaw v Lord* [1984] QB 1, 33–34 … By the time of the decision of the [English] Court of Appeal in *Purcell v Sowler* (1877) 2 CPD 215 it was assuming its recognisable modern form. *It is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say, honestly and without any indirect or improper motive*. It is the occasion on which the statement is made which carries the privilege, and *under the traditional common law doctrine there must be a reciprocity of duty and interest*: *Adam v Ward* [1917] AC 309, 334 per Lord Atkinson. The development of the law is accurately and conveniently expressed in *Duncan & Neill on Defamation*, 2nd ed (1983), para 14.04:
>
> > "From the broad general principle that certain communications should be protected by qualified privilege 'in the general interest of society', the courts have developed the concept that there must exist between the publisher and the publishee some duty or interest in the making of the communication."
>
> [emphasis added]

178 From the passages quoted at [176]–[177] above, it can be seen that whether or not the defendant in a defamation action can rely on the traditional qualified privilege defence depends on (*per* Lord Carswell in *Seaga* at [5]):

> … [whether] there is a duty, legal, social or moral, or sufficient interest on the part of the [defendant] to communicate [the offending words] to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory …

For ease of reference, we shall hereafter call this test the "duty-interest test".

179 The justification for the courts' acceptance of the defence of qualified privilege (in its traditional form) in defamation law is, as Lord Nicholls noted in *Reynolds (HL)* at 193 (citing Parke B in *Toogood v Spyring* (1834) 1 C M & R 181; 149 ER 1044 ("*Toogood*") at 193; 1050), "the 'common convenience and welfare of society'". What the common convenience and welfare of society require depends on the political, social and cultural values of the day. Society develops politically, socially and culturally, and the common law develops in tandem with such changes within the permissible limits of its own structure of fundamental norms and principles. For this reason, "[t]he established categories [of qualified privilege] are no more than applications, in particular circumstances, of the underlying principle of public policy" (*per* Lord Nicholls in *Reynolds (HL)* at 194). Furthermore, as Lord Carswell pointed out in *Seaga* (at [5]), "[t]he defence of qualified privilege … is still in the process of development". The applicable policy at a particular stage of society's development may not be the same as that at another stage. In determining whether an occasion is to be regarded as privileged, the court is to consider all the circumstances, and "circumstances must be viewed with *today's* eyes" [emphasis added] (see *Reynolds (HL)* at 195). Whether or not the defence of qualified

privilege is available in a particular case is thus essentially a question of policy to be determined by the court in accordance with any constitutional or legislative provision that may be relevant (*eg*, the European Convention and the Human Rights Act 1998 (c 42) (UK) ("the HRA") where England is concerned, and the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Singapore Constitution") in our local context).

180 Historically, where the media sought to invoke the traditional qualified privilege defence, the duty-interest test was applied with equal strictness (as compared to cases where a non-media defendant was involved). This can be seen from the leading case of *Blackshaw* ([171] *supra*), where the defendants (a journalist and a newspaper publisher) pleaded that qualified privilege attached to the publication of the article complained of as that article concerned "fair information on a matter of public interest" (*id* at 33). The English CA rejected this argument. Dunn LJ stated (*id* at 33–36):

> … I do not think there is any defence of "fair information on a matter of public interest" in defamation proceedings. …
>
> …
>
> [A] review of the authorities shows that, save where the publication is of a report which falls into one of the recognised privileged categories, the court must look at the circumstances of the case before it in order to ascertain whether the occasion of the publication was privileged. *It is not enough that the publication should be of general interest to the public. The public must have a legitimate interest in receiving the information contained in it, and there must be a correlative duty in the publisher to publish, which depends also on the status of the information which he receives, at any rate where the information is being made public for the first time*. Different considerations may arise in cases … where the matter has already been made public, and the publication in question is by way of defence to a public charge, or correction of a mistake made in a previous publication.
>
> As Cantley J. pointed out in *London Artists Ltd*. v. *Littler* [1968] 1 W.L.R. 607, if the law were otherwise, and if the wider principle on which Pearson J. decided [*Webb v Times Publishing Co Ltd* [1960] 2 QB 535] were applicable, then there would be no need for a plea of fair comment, and anyone could publish any untrue defamatory information provided only that he honestly believed it, and honestly believed that the public had an interest in receiving it.
>
> [emphasis added]

181 Similarly, Stephenson LJ stated (*id* at 26):

> No privilege attaches yet to a statement on a matter of public interest believed by the publisher to be true in relation to which he has exercised reasonable care. … *"Fair information on a matter of public interest" is not enough without a duty to publish [that information] … There must be a duty to publish to the public at large and an interest in the public at large to receive the publication*; and a section of the public is not enough.
>
> The subject matter must be of public interest; its publication must be in the public interest. [The] nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the *duty* to publish the information to the intended recipients …
>
> [emphasis added]

182 The overall effect of the decision in *Blackshaw* was that, as Lord Nicholls put it in *Reynolds (HL)* at 196:

> [T]he [English] Court of Appeal rejected a claim to generic protection for a widely stated category: "fair information on a matter of public interest". A claim to privilege must be more precisely focused. In order to be privileged publication must be in the public interest. Whether a publication is in the public interest or, in the conventional phraseology, whether there is a duty to publish to the intended recipients … depends upon the circumstances, including the nature of the matter published and its source or status.

183 Thus, prior to the decision in *Reynolds (HL)*, the English courts' approach to the traditional qualified privilege defence, *as applied to the media*, was as follows (see *Gatley* ([27] *supra*) at para 14.1):

> [U]ntil the very end of the twentieth century there was otherwise in England (and, indeed, in the rest of the Commonwealth) a strong reluctance to extend the protection of qualified privilege to publications in the news media. *The fundamental principle was that a statement was protected by privilege only if the publication of it was to persons who had a proper interest or duty in the matter with which it was concerned, and the public as a whole was not generally regarded as having a relevant interest or duty*. *The media defendant (or other defendant who caused his statement to be published in that way) was in no different position from anyone else and had to show the relevant reciprocity of duty and interest*. Such a duty only arose [*per* Cantley J in *London Artists Ltd v Littler Grade Organisation Ltd* [1968] 1 WLR 607 at 619]:
>
> > "where it is in the interests of the public that the publication should be made and will not arise simply because the information appears to be of legitimate public interest."
>
> A privilege for publication to the world at large was, in English law, the exception rather than the rule, even if the subject-matter was politics or public affairs. Nor was there any defence of "fair information upon a matter of public interest," still less of "fair attributed report" of what someone else ha[d] stated or of "neutral reportage".
>
> [emphasis added]

184 The pre-*Reynolds (HL)* position – *viz*, that the media had to satisfy the duty-interest test before it could invoke the traditional qualified privilege defence – meant that the English courts effectively gave more weight to protection of reputation than the media's role in communicating matters of public interest to the public. As will be seen later, the decision in *Reynolds (HL)* changed that position by liberalising the defence of qualified privilege for (*inter alia*) the media under certain conditions. Although the English courts have yet to reach a consensus on whether or not the *Reynolds* privilege is an entirely new form of qualified privilege (or, to paraphrase Baroness Hale of Richmond's words in *Jameel* ([169] *supra*) at [146], a new jurisprudential creature), they are in agreement that this privilege is of avail to the defendant only if the publication of the defamatory material in question satisfies the test of "responsible journalism" laid down by Lord Nicholls in *Reynolds (HL)* at 204–205 ("the 'responsible journalism' test").

185 A final point to make is that, as far as the legal position in Singapore is concerned, the courts have hitherto accepted only the traditional qualified privilege defence for media defendants. As this court stated in *Aaron* ([20] *supra*) at 651, [81] and [83] (citing, *inter alia*, *Blackshaw*):

> Generally, qualified privilege is available to newspapers as much as to any other person. Privilege

> for publication in the press of information of general public interest is limited to cases where the publisher has a legal, social or moral duty to communicate. *The law does not recognize an interest in the public strong enough to give rise generally to a duty to communicate in the press; such a duty has been held to exist on special facts, and there is no general 'media privilege at common law'*. …
>
> …
>
> Along with the duty to communicate is a corresponding interest to receive such information on the part of the public. …
>
> [emphasis added]

In *Chen Cheng* ([139] *supra*), this court, commenting on the above quotation from *Aaron*, acknowledged that "it [was] rather unclear what 'special facts' must be shown in order for a newspaper publication to succeed on the defence of qualified privilege" (see *Chen Cheng* at [63]). This court nonetheless emphasised that "the requisite standard or test for such special facts [was] an onerous one" (*ibid*), and would most likely be satisfied only in "extreme cases where the urgency of communicating a warning [was] so great, or the source of the information so reliable, that publication of a suspicion or speculation [was] justified" (*ibid*, citing *Blackshaw* at 27).

The rise of the Reynolds *privilege in England*

(1) The decision in Reynolds (HL)

186 In *Reynolds (HL)*, the plaintiff ("Mr Reynolds"), a former Prime Minister of Ireland sued the defendants (*ie*, Times Newspapers Ltd, its Irish editor and two journalists) in respect of an article in *The Sunday Times* ("the *Sunday Times* article") concerning the circumstances of his resignation as the leader of his coalition government. Mr Reynolds claimed that the offending words bore the meaning that he had deliberately and dishonestly misled the Dáil Éireann ("the Dáil") (*viz*, the Irish House of Representatives) and his cabinet colleagues. The defendants pleaded that there was a defence of qualified privilege derived from the subject matter *per se* of the *Sunday Times* article – namely, "political matters" (see *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862 ("*Reynolds (CA)*") at 893) – and, thus, malice aside, publication of "political matters" (*ibid*) should be privileged, regardless of the status and the source of the material published and the circumstances of publication.

187 The English CA held that the news media had a duty to inform the public about and engage in public discussion of "matters of public interest to the community" (see *Reynolds (CA)* at 909), and that, in modern times, the duty-interest test should be more easily satisfied, given that "the common convenience and welfare of a modern plural democracy … [were] best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community" (*ibid*). The English CA did not, however, go so far as to accept the defendants' submission that "political matters" (see *Reynolds (CA)* at 893) or "political discussion" (*ibid*), which we shall hereafter refer to as "political speech" generically, constituted a separate subject matter category of qualified privilege; *ie*, the English CA did *not* agree that qualified privilege would attach to the publication of defamatory political speech *regardless of the circumstances*, so long as there was no malice on the defendant's part. The court further held that, in applying the English common law of qualified privilege, there was, in addition to the duty-interest test, a "circumstantial test" (see *Reynolds (CA)* at 899); *ie*, the defendant had to show that "the nature, status and source of the material [published] … and the circumstances of the publication … [were] such that the publication

should in the public interest be protected in the absence of proof of express malice" (*ibid*).

188 Applying these two tests to the facts of *Reynolds (CA)*, the English CA held that the circumstances in which Mr Reynolds's government fell from power were "matters of undoubted public interest to the people of Great Britain" (*id* at 911). Thus, the duty-interest test was satisfied as "the defendants had a duty to inform the public of th[o]se matters and the public had a corresponding interest to receive that information" (*ibid*). However, the defence of qualified privilege did not apply to the *Sunday Times* article as the defendants failed to satisfy the circumstantial test (see *Reynolds (CA)* at 911–912).

189 On appeal, the House of Lords upheld the English CA's view that the press had a duty to inform the public about matters of public interest and the public had a corresponding interest to receive such information. Like the English CA, the law lords also unanimously rejected political speech as a new subject matter category of qualified privilege. In other words, qualified privilege would not attach to the publication of a defamatory article simply because the article concerned political speech. Instead, the article must still pertain to information of public interest which the press had a duty to publish and the public, an interest to receive (in short, information which the public had the right to know of).

190 Lord Nicholls (who delivered the judgment of the majority in *Reynolds (HL)*) said (at 204):

> [T]he established common law approach to misstatements of fact remains essentially sound. *The common law should not develop "political information" as a new "subject matter" category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances*. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. *The elasticity of the … common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case*. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. [emphasis added]

Two points in this passage should be noted. The first is that, in using the expression "freedom of speech" (*ibid*), Lord Nicholls was referring to freedom of speech under Art 10 of the European Convention as well as the HRA (the latter was intended to give effect to the rights set out in the European Convention and, at the time *Reynolds (HL)* was decided, was shortly to come into force). The second is that each claim of qualified privilege by the media must be decided based on "the circumstances of the case" (*id* at 204).

191 Lord Nicholls stated that, to determine whether the *Reynolds* privilege applied in a particular case, the court should apply the "responsible journalism" test; if the publication of the defamatory material in question passed this test, qualified privilege would attach to that occasion of publication. Lord Nicholls also laid down a non-exhaustive list of ten factors which the court should consider in applying the "responsible journalism" test (referred to hereafter as "the *Reynolds* factors" collectively and as a "*Reynolds* factor" individually). His Lordship was of the view that, by assessing the conduct of the media based on these ten factors (see *Reynolds (HL)* at 202):

> *The common law does not seek to set a higher standard than that of responsible journalism, a standard the media [itself] espouse[s]*. An incursion into press freedom which goes no further than this would not seem to be excessive or disproportionate. The investigative journalist has adequate protection. [emphasis added]

192 The *Reynolds* factors were set out by Lord Nicholls as follows (*id* at 205):

> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. *The nature of the information, and the extent to which the subject matter is a matter of public concern*. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information [that] others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.
>
> *This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case*. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication [is] subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.
>
> [emphasis added]

193 Applying the *Reynolds* factors to the facts of *Reynolds (HL)* itself, the House of Lords held (by a majority of 3:2) that the publication of the *Sunday Times* article was not protected by qualified privilege. A pivotal consideration in the majority's decision was the fact that the defendants, in their "hard-hitting article" (*id* at 206) which made serious allegations against Mr Reynolds, made no mention at all of the latter's explanation to the Dáil. As Lord Nicholls explained (*ibid*):

> *A most telling criticism of the article* [*ie*, the *Sunday Times* article] *is the failure to mention Mr Reynolds's own explanation to the Dáil*. Mr Ruddock [one of the defendants in *Reynolds (HL)*] omitted this from the article because he rejected Mr Reynolds's version of the events and concluded that Mr Reynolds had been deliberately misleading. It goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly. He is entitled to disbelieve and refute explanations given. *But this cannot be a good reason for omitting, from a hard-hitting article making serious allegations against a named individual, all mention of that person's own explanation*. Particularly so, when the press offices had told Mr Ruddock that Mr Reynolds was not giving interviews but would be saying all he had to say in the Dáil. His statement in the Dáil was his answer to the allegations. An article omitting all reference to this statement could not be a fair and accurate report of [the] proceedings in the Dáil. Such an article would be misleading as a report. This article is not defended as a report, but it was misleading nonetheless. By omitting Mr Reynolds's explanation English readers were left to suppose that, so far, Mr Reynolds had offered no explanation. Further, it is elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given. *An article which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported explanation proves to be true*.
>
> *Was the information in the "Sunday Times" article information [which] the public was entitled to*

know? The subject matter was undoubtedly of public concern in this country. However, these serious allegations by the newspaper, presented as statements of fact but shorn of all mention of Mr Reynolds's considered explanation, were not information [which] the public had a right to know. I agree with the [English] Court of Appeal [that] this was not a publication which should in the public interest be protected by privilege in the absence of proof of malice.

[emphasis added]

194 It should be noted that, although Lord Nicholls acknowledged that the subject matter of the *Sunday Times* article was "undoubtedly of public concern in [England]" (*ibid*), he ultimately held that the subject matter was not information which the public had a right to know about because the *Sunday Times* article was *incomplete* (or even partial) in failing to include Mr Reynolds's explanation to the Dáil. In other words, his Lordship effectively held that the public had an interest in knowing both the truth of the allegations concerning Mr Reynolds as well as the fact that Mr Reynolds had provided an explanation to the Dáil, which fact the defendants failed to communicate to the public. As will be seen (at, *inter alia*, [202]–[203] below), the "responsible journalism" test looks not only at the efforts made to investigate properly and objectively the information published, but also at whether an opportunity was afforded to the plaintiff to tell his side of the story to the public in relation to the offensive allegations that the defendant intended to publish of him.

195 It should also be noted that Lord Nicholls (with whom the other law lords in *Reynolds (HL)* concurred) disagreed with the English CA's stance that a separate circumstantial test had to be satisfied in addition to the duty-interest test before the defence of qualified privilege could be invoked. At 197 of *Reynolds (HL)*, Lord Nicholls said:

In its valuable and forward-looking analysis of the common law the [English] Court of Appeal in the present case highlighted that in deciding whether an occasion is privileged the court considers, among other matters, the nature, status and source of the material published and the circumstances of the publication. *In stressing the importance of these particular factors, the court treated them as matters going to a question ("the circumstantial test") separate from, and, additional to, the conventional duty-interest questions: see [*Reynolds (CA) *([186]* supra*) at] 899. With all respect to the [English] Court of Appeal, this formulation of three questions gives rise to conceptual and practical difficulties and is better avoided. There is no separate or additional question. These factors are to be taken into account in determining whether the duty-interest test is satisfied or, as I would prefer to say in a simpler and more direct way, whether the public was entitled to know the particular information*. The duty-interest test, or the right to know test, cannot be carried out in isolation from these factors and without regard to them. *A claim to privilege stands or falls according to whether the claim passes or fails this test. There is no further requirement*. [emphasis added]

196 As the decision in *Reynolds (HL)* marked a significant departure from the traditional qualified privilege defence, which had stood for more than 100 years, and given that *Blackshaw* ([171] *supra*), which affirmed the traditional qualified privilege defence where media defendants were concerned, was decided barely 16 years earlier, it is essential that we understand fully why the change came about. Lord Nicholls explained in *Reynolds (HL)* at 200:

My starting point is freedom of expression. … Freedom of expression will shortly be buttressed by statutory requirements. Under section 12 of the [HRA] …, [which is] expected to come into force in October 2000, the court is required, in relevant cases, to have particular regard to the importance of the right to freedom of expression. *The common law is to be developed and applied in a manner consistent with article 10 of the European Convention* … and the court must

take into account relevant decisions of the European Court of Human Rights ([see] sections 6 and 2 [of the HRA]). *To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved*. [emphasis added]

197 Similarly, Lord Steyn said (*id* at 207–208):

> It is common ground that in considering the issues before the House, and the development of English law, the House can and should act on the reality that the [HRA] … will soon be in force.
>
> The new landscape is of great importance inasmuch as it provides the taxonomy against which the question before the House must be considered. *The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation*. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, *freedom of expression is the rule and regulation of speech is the exception requiring justification*. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation.
>
> [emphasis added]

198 These two passages make it clear that the decision in *Reynolds (HL)* was based on the European Convention (specifically, Art 10 thereof) and the HRA (specifically, s 12 thereof). Article 10 of the European Convention states:

> **Article 10 – Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As for s 12 of the HRA, it provides as follows:

> **Freedom of expression**
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> …
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or

which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to —

(a) the extent to which —

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

…

199 Together, Art 10 of the European Convention and s 12 of the HRA elevated the common law right of free speech to "*a right based on a constitutional or higher legal order foundation*" [emphasis added] (*per* Lord Steyn in *Reynolds (HL)* at 208). (For convenience, we shall hereafter refer to the common law right of free speech as "common law free speech" and the right of free speech under Art 10 of the European Convention as "the Convention right of free speech".) Prior to the enactment of the HRA, common law free speech was no different from any other common law right (*ie*, any other right which could be enjoyed at common law based on the principle that whatever conduct was not proscribed by law was permitted). After the Convention right of free speech came into existence, common law free speech became a lower order legal right in England as it did not have a "constitutional" foundation. This change in the legal status of freedom of speech impelled the House of Lords to give greater weight to the Convention right of free speech as compared to protection of reputation. The law lords shifted the balance between freedom of speech and protection of reputation in favour of the former where (*inter alia*) the media was concerned because s 12(4)(a) of the HRA enjoined the English courts, where "*journalistic*, literary or artistic material (or … conduct connected with such material)" [emphasis added] was concerned, to have "*particular regard*" [emphasis added] to the extent to which such material had or was about to become available to the public as well as the extent to which it was or would be in the public interest for such material to be published.

200 It should be noted that the *Reynolds* privilege did not emerge out of the blue. *Reynolds (HL)* was decided against the backdrop of a major common law jurisdiction (*viz*, Australia) having first shifted the balance between the competing interests of freedom of speech and protection of reputation in favour of the former. In *Lange v ABC* ([173] *supra*), the High Court of Australia recognised for the first time what we shall hereafter call "the *Lange v ABC* privilege", *ie*, qualified privilege *vis-à-vis* the publication of statements on "government and political matters" (*id* at, *inter alia*, 114) specifically. The *Lange v ABC* privilege was referred to and considered by the English CA in *Reynolds (CA)* ([186] *supra*) as well as the House of Lords in *Reynolds (HL)*, but both courts declined to follow it on the ground that it was a development indigenous to Australia, whose constitutional structure was different from that of England.

(2) The decision in Jameel

201 Following the decision in *Reynolds (HL)*, there was a period of uncertainty as to how the *Reynolds* factors were to be applied to the facts of each case. In *Jameel* ([169] *supra*), the House of Lords clarified that these factors were *not* intended to operate as separate requirements, all of which must be satisfied. In the words of Lord Hoffmann (*id* at [56]), the *Reynolds* factors were "not tests which the publication ha[d] to pass [because] … [i]n the hands of a judge hostile to the spirit of *Reynolds [(HL)]*, they [could] become ten hurdles at any of which the defence [might] fail" [emphasis added]. Commenting on this point, Lord Carswell further explained in *Seaga* ([177] *supra*) at [12]:

> As Lord Hoffmann said in [*Jameel* at] para 56, in the hands of a judge hostile to the spirit of the *Reynolds [(HL)]* decision, they [*ie*, the *Reynolds* factors] can become ten hurdles at any of which the defence may fail. That is not the proper approach. The standard of conduct required of the publisher of the material must be applied in a practical manner and [must] have regard to practical realities … The material should … be looked at as a whole, not dissected or assessed piece by piece, without regard to the whole context.

202 In a separate speech in *Jameel*, Lord Hoffmann put forward (*id* at [48]–[58]) a three-step inquiry to determine whether the publication of the defamatory material in question would be protected by the *Reynolds* privilege, as follows:

> (a) First, the court had to assess whether the subject matter of the defamatory material taken as a whole was "a matter of public interest" (*id* at [48]) or a matter of legitimate public concern. To satisfy this requirement, the subject matter must be relevant to "informed public debate of significant public issues" (*id* at [28]).
>
> (b) If the subject matter of the defamatory material satisfied the above requirement, the second step was to inquire whether the inclusion of the offending words in the defamatory material was justified (*id* at [51]). The focus of this stage of the inquiry was on whether the offending words were reasonably or appropriately part of the defamatory material in terms of making "a real contribution to the public interest element in [that material]" (*ibid*).
>
> (c) If the second requirement were also met, then the third step was for the court to ascertain whether the steps taken by the defendant to gather the defamatory material were responsible and fair. In other words, the court should scrutinise the process by which the defamatory material was researched, assembled, checked and edited, and make a judgment as to whether that process, viewed in totality, demonstrated responsible journalism on the part of the defendant. In applying this test, the court should look to the *Reynolds* factors for guidance generally and not as independent requirements, each of which had to be satisfied.

203 Apropos the *Reynolds* factors, the law lords in *Jameel* emphasised the particular importance of the steps taken to verify the accuracy of the defamatory material in question and the opportunity afforded to the plaintiff to comment on that material *before* its publication (*id* at [32] *per* Lord Bingham of Cornhill, *id* at [79]–[85] *per* Lord Hoffmann, *id* at [138] *per* Lord Scott of Foscote and *id* at [149] *per* Baroness Hale). Indeed, whether the plaintiff has been given a chance to tell his version of the story has been described as "perhaps the core *Reynolds* factor" (see *Gatley* ([27] *supra*) at para 15.14) because (*ibid*):

> Not only does simple fairness require that a person who is going to publish a story without being required to show that it is true should give the subject of the story the opportunity to put [across] his side [of the story], but it is often one of the best ways to seek to verify the story.

That said, the defendant's failure to verify the defamatory material with the plaintiff before its publication is not necessarily fatal to a defence based on the *Reynolds* privilege. In the Privy Council's decision in the Jamaican case of *Bonnick v Morris* [2003] 1 AC 300 ("*Bonnick*"), for instance, the author of the defamatory article in question successfully invoked the *Reynolds* privilege even though he did not verify the truth of the allegations contained in that article before publishing it (see our discussion of this case at [234] below).

204 In *Jameel*, the law lords could not agree on whether the *Reynolds* privilege was a modified form of the traditional qualified privilege defence (for which the applicable test is the duty-interest test) or

a new type of qualified privilege. Lord Bingham (*id* at [28]–[30]), Lord Hope of Craighead (*id* at [105]) and Lord Scott (*id* at [130]) reiterated that the *Reynolds* privilege still rested essentially on the traditional duty-interest test, whereas Lord Hoffmann (*id* at [50]) and Baroness Hale (*id* at [146]) expressed the view that the *Reynolds* privilege was "a 'different jurisprudential creature'" (*ibid*). Baroness Hale viewed the *Reynolds* privilege as "[i]n truth … a defence of publication in the public interest" (*ibid*). To Lord Hoffmann (see *Jameel* at [50]):

> The *Reynolds* [privilege] was developed from the traditional form of privilege by a *generalisation* that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House [in *Reynolds (HL)*] having made this generalisation, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist. *The* Reynolds *defence is very different from the privilege discussed by the [English] Court of Appeal in* Blackshaw … It is not as narrow as traditional privilege [*ie*, the traditional qualified privilege defence] nor is there a burden upon the claimant to show malice to defeat it. [emphasis added]

However, none of the law lords in *Jameel* went so far as to hold that political speech *per se* could constitute a separate subject matter category of qualified privilege.

205 The juridical status of the *Reynolds* privilege is currently still a matter of debate. In many cases, whether this privilege is viewed as being the same as the traditional qualified privilege defence or as "a 'different jurisprudential creature'" (*per* Baroness Hale in *Jameel* at [146]) would not matter as the outcome would be the same. This can be seen from *Seaga* ([177] *supra*), where Lord Carswell commented (at [10]):

> … [In respect of] the juridical status of the extension of privilege effected in [*Reynolds (HL)*,] … [s]ome have described it as "a different jurisprudential creature from the traditional form of privilege from which it sprang": *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783, 806, para 35, per Lord Phillips of Worth Matravers MR, with whom Lord Hoffmann agreed in [*Jameel* at] para 46. Both Lord Phillips in *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783, at para 33, and Lord Hoffmann in [*Jameel* at] para 46, adopted the view that the privilege in such cases attaches to the publication itself rather than, as in traditional privilege cases, to the occasion on which it [*ie*, the article complained of] is published. Others take the view that the *Reynolds* privilege is built upon the foundation of the duty-interest privilege, an opinion adopted by Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Scott of Foscote in [*Jameel*] . *For the purposes of the present appeal the precise jurisprudential status of the* Reynolds *privilege is immaterial. What is significant is that it is plain in their Lordships' opinion that the* Reynolds [(HL)] *decision was based, as Lord Bingham of Cornhill said in [*Jameel*], at para 35, on a "liberalising intention". It was intended to give, and in their Lordships' view has given, a wider ambit of qualified privilege to certain types of communication to the public in general than would have been afforded by the traditional rules of law*. [emphasis added]

What is significant is that the *Reynolds* privilege is, as Lord Carswell pointed out in *Seaga* at [10], "based … on a 'liberalising intention'".

206 To summarise our discussion thus far:

> (a) Political speech does not in itself constitute a new and independent subject matter category of qualified privilege.

(b) Although the *Reynolds* privilege represents a liberalisation of the traditional qualified privilege defence, the traditional duty-interest test remains "an essential element in the structure of the law of qualified privilege" (*per* Lord Hope in *Jameel* at [105]). As Lord Bingham said in the same case (*ie*, *Jameel*) at [28], the House of Lords in *Reynolds (HL)* "built on the traditional foundations of qualified privilege but carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues".

(c) Under the "responsible journalism" test, the court takes into account the *Reynolds* factors in determining whether the public has the right to know of the defamatory material in question.

(d) The *Reynolds* privilege is "still in the process of development" (*per* Lord Carswell in *Seaga* at [5]).

(3) Other important features of the Reynolds privilege

207 There are a few other important aspects of the *Reynolds* privilege that should be noted before we proceed with our examination of the First Proposition. They are as follows:

(a) First, if the defendant can rely on the traditional qualified privilege defence, he need not invoke the *Reynolds* privilege. These two forms of qualified privilege can co-exist. But, where a media defendant is concerned (*ie*, where the media is sued in respect of defamatory information of public interest which it published), it will generally be easier for the media defendant to succeed in establishing the *Reynolds* privilege as "[t]he *Reynolds* test [*ie*, the 'responsible journalism' test] is more easily satisfied, being a liberalisation of the traditional rules" (*per* Lord Carswell in *Seaga* at [15]). It should also be noted that the size of the target audience or readership of the defamatory material in question is not relevant to the question of whether it is the *Reynolds* privilege or the traditional qualified privilege defence which applies. As pointed out in *Gatley* ([27] *supra*) at para 14.3:

> [T]he line between the classical and [the] *Reynolds* privileges cannot be sharply drawn. Thus it is perfectly possible that a case may fall into the category based on a relationship even though the audience to which the statement is addressed is much larger than that for some media publications. In one case [*viz*, *Kearns v General Council of the Bar* [2003] 1 WLR 1357], for example, a privilege existed on the traditional model [*ie*, the model based on the traditional duty-interest test] between the General Council of the Bar and 10,000 barristers, whereas [in *Al-Fagih v H H Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13,] a newspaper circulating among only 1,500 Saudi nationals in [England] had to satisfy the further requirements under *Reynolds [(HL)]* …

(b) Second, the *Reynolds* privilege protects the publication to the public at large of all information that is of sufficient "public interest". In this regard, it is important to bear in mind that "what engages the interest of the public may not be material which engages the public interest" (*per* Lord Bingham in *Jameel* at [31]). As Baroness Hale put it (*id* at [147]), "the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public, but no one [can] claim any real public interest in … being told all about it". Whether the defamatory material in question is of sufficient public interest is solely a matter for the court to decide. Where the defamatory material relates to political speech, given the nature of such information, it is difficult to envisage (at least in the context of a democracy) a case where the public interest requirement will not be satisfied. For instance, in *Reynolds (HL)*, the information set out in the *Sunday Times* article, although relating to political developments in *Ireland*

(specifically, Mr Reynolds's resignation as Prime Minister of Ireland in November 1994), was held by both the English CA and the House of Lords to be of public interest to the public in *England*. If the *Sunday Times* article had been about the then British Prime Minister, it would *a fortiori* have satisfied the public interest requirement.

(c) Third, the *Reynolds* privilege is not confined to defamatory statements published by the media, nor is it a defence for the media only. In *Seaga*, for example, the Privy Council held that the privilege extended to a defamatory speech made by the defendant politician at a public meeting where the press was present (see also *Gatley* at para 15.7). Indeed, in *Jameel*, Lord Hoffmann stated (at [54]) that "the defence [was] … available to anyone who publishe[d] material of public interest *in any medium*" [emphasis added], which would (so it appears) include even publication via the Internet (see further [292] below).

(d) Fourth, given that the "responsible journalism" test (which is the test for determining whether the *Reynolds* privilege is applicable) is to be applied having regard to the *Reynolds* factors, malice has effectively been rendered irrelevant as a means of defeating a defence based on this privilege. As Lord Phillips of Worth Matravers MR explained in the English CA case of *Loutchansky v Times Newspapers Ltd (Nos 4 and 5), Loutchansky v Times Newspapers Ltd (Nos 2, 3 and 5)* [2002] QB 783 ("*Loutchansky v Times Newspapers Ltd (Nos 2–5)*") at [33]:

> *[O]nce [the]* Reynolds *privilege attaches, little scope remains for any subsequent finding of malice*. Actual malice in this context has traditionally been recognised to consist either of recklessness, [*ie*,] not believing the statement to be true or being indifferent as to its truth, or of making it with the dominant motive of injuring the claimant. But *the publisher's conduct in both regards must inevitably be explored when considering [the* Reynolds*] factors, [ie,] in deciding whether the publication is covered by qualified privilege in the first place*. [emphasis added]

Similarly, in *Jameel*, Lord Hoffmann stated (at [46]):

> *There is no question of the [*Reynolds*] privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged*. The burden is upon the defendant to prove that those conditions are satisfied. [emphasis added]

Offshoot of the Reynolds privilege: The neutral reportage defence

208 The neutral reportage defence is, as we alluded to earlier, an offshoot of the *Reynolds* privilege. This defence (*ie*, the neutral reportage defence) appears to stem from the English CA's pronouncement in *Al-Fagih v H H Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13 ("*Al-Fagih*") that, if a newspaper were to report a matter of public interest neutrally, it should enjoy the defence of qualified privilege. In this connection, Simon Brown LJ said (*id* at [52]):

> [T]here will be circumstances where … in short, both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses. In this situation it seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.

209 In *Jameel*, the defendant sought to rely on the neutral reportage defence at a late stage of the proceedings before the English CA (see *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2005] QB 904). Despite the defendant's tardiness in this regard, the English CA was prepared to

accept that the ninth *Reynolds* factor (*viz*, the tone of the article complained of) suggested "the possibility that [the] *Reynolds* privilege [might] attach to the *neutral reporting* of allegations made by a third party, notwithstanding that the publisher [did] not believe that the allegations [were] true" [emphasis added] (*id* at [19]). This issue was not pursued in the House of Lords, but the doctrine was referred to by Lord Hoffmann in the context of "cases … in which the public interest [lay] simply in the fact that the statement was made, when it [might] be clear that the publisher [did] not subscribe to any belief in its truth" (see *Jameel* at [62]; see also *Gatley* ([27] *supra*) at para 15.16).

210 In *Roberts v Gable* [2008] QB 502 ("*Roberts*"), the English CA examined the neutral reportage defence in greater detail and held that it was a *form* of the *Reynolds* privilege (*per* Ward LJ at [60]):

> *Reportage and Reynolds qualified privilege*
>
> 60 *Once reportage is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is, as was conceded in [*Al-Fagih*] a form of, or a special example of, [the]* Reynolds *qualified privilege, a special kind of responsible journalism but with distinctive features of its own*. It cannot be a defence sui generis because [*Reynolds (HL)*] is clear authority that whilst the categories of privilege are not closed, the underlying rationale justifying the defence is the public policy demand for there to be a duty to impart the information and an interest in receiving it … If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed.
>
> [emphasis added]

211 The English CA also set out extensively the proper approach to the neutral reportage defence by listing nine matters that must be taken into account when considering whether or not this defence was made out (see *Roberts* at [61], which was quoted by the Judge at [218] of the Judgment). Notably, in the course of discussing these nine matters, the English CA pointed out that, although the neutral reportage defence was a form of the *Reynolds* privilege, it parted company with the latter on one material point, namely (see *Roberts* at [61] *per* Ward LJ):

> … In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.
>
> … [The defendant] is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that [the offending words have] been said without adopting the truth.

212 It should be noted that the recognition (in England) of the neutral reportage defence does not mean that a republication of the offending words is no longer actionable. It is a well-established rule at common law (known as the "repetition rule") that each republication of the offending words constitutes a new and separate instance of defamation because "repeating someone else's libellous statement is just as bad as making the statement directly" (*per* Lord Reid in *Rubber Improvement Ltd* ([28] *supra*) at 260; see also *Gatley* at paras 6.32 and 11.4). The repetition rule entails that (*per* Ward LJ in *Roberts* at [55]; see also *Cookson v Harewood* [1932] 2 KB 478 at 485, *Rubber Improvement Ltd* at 283–284 and *Gatley* at para 11.4):

> [I]f A makes a defamatory statement about B and C repeats it, C cannot succeed in the defence of justification by showing that A made the statement: C must prove [that] the charge against B is true. This is so even if C believes the statement to be true and even when C names A as his source.

213 However, the repetition rule has also "long been qualified by specific reporting privileges granted by the common law or by statute, for example in relation to fair and accurate reports of court proceedings and of public meetings" (see *Gatley* at para 15.16). With the acceptance of the neutral reportage defence as an offshoot of the *Reynolds* privilege, it appears that English law now "admits a more *general* privilege, not tied to pre-defined situations" [emphasis added] (*ibid*). It must, however, be borne in mind that, even though neutral reportage is "a more general privilege" (*ibid*), it does not provide a blanket exemption. As Ward LJ stated in *Roberts* at [59]:

> [T]he repetition rule and reportage are not in conflict with each other. The former is concerned with justification, the latter with privilege. A true case of reportage may give the journalist a complete defence of qualified privilege. If the journalist does not establish the defence [*ie*, the neutral reportage defence] then the repetition rule applies and the journalist has to prove the truth of the defamatory words.

The Reynolds privilege in other Commonwealth jurisdictions

(1) Overview

2 1 4 *Reynolds (HL)* being a decision of the House of Lords, it is not surprising that the *Reynolds* privilege has been considered and followed in some Commonwealth jurisdictions (for instance, Jamaica (see, *eg*, *Seaga* ([177] *supra*) and *Bonnick* ([203] *supra*)); Ontario (see, *eg*, *Cusson v Quan* [2007] ONCA 771 ("*Cusson*")); Samoa (see, *eg*, *Alesana v Samoa Observer Company Ltd* [1998] WSSC 1 ("*Alesana*")); and South Africa (see, *eg*, *National Media Ltd v Bogoshi* 1998 (4) SA 1196 ("*Bogoshi*")). Other jurisdictions which have applied the *Reynolds* privilege (as listed in *Gatley* at para 15.21, fn 198) include Brunei Darussalam (see, *eg*, *Rifli Bin Asli v Ahmed Kawari Isa* (10 September 2001) (unreported)); Cyprus (see, *eg*, *Alithia Publishing Co Ltd v Cyprus* Application No 17550 of 2003 (22 May 2008) (unreported)); Hong Kong (see, *eg*, *Chan Chook Tim v Wong Kwok Hung* [2003] HKCU 301 ("*Chan Chook Tim*") and *Yaqoob v Asia Times Online Ltd* [2008] 3 HKC 589 ("*Yaqoob*")); and Malaysia (see, *eg*, *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor* [2002] 4 MLJ 371 ("*Mark Ignatius Uttley*")).

215 In contrast, Australia and New Zealand have developed their own forms of qualified privilege with regard to political speech, which are closer in substance to the privilege laid down by the US Supreme Court in *The New York Times Company v L B Sullivan* 376 US 254 (1964) ("*New York Times v Sullivan*") than the *Reynolds* privilege. The privilege laid down in *New York Times v Sullivan* ("the *New York Times* privilege") was considered and rejected in *Reynolds (HL)*. There is therefore no uniformity among the Commonwealth jurisdictions on the application of the *Reynolds* privilege, which itself reflects the differences in political, social and cultural values in these jurisdictions. We shall examine briefly below (at [216]–[235]) the developments in Australia, New Zealand as well as some of the other above-mentioned jurisdictions.

(2) The position in Australia

216 As we mentioned earlier (see [200] above), in *Lange v ABC* ([173] *supra*), the High Court of Australia established the *Lange v ABC* privilege in relation to the publication of statements on "government and political matters" (*id* at 114) before *Reynolds (HL)* was decided. In *Lange v ABC*, the plaintiff, a former Prime Minister of New Zealand, sued the Australian Broadcasting Corporation ("ABC") for defamation in respect of a current affairs television programme produced by ABC which had criticised his conduct. The plaintiff contended that the programme had imputed that he was unfit to hold public office.

217 In hearing a pre-trial challenge to the availability of certain defences, the High Court of Australia held that the constitutional protection set out in the Commonwealth of Australia Constitution Act (Cth) ("the Australian Constitution") *vis-à-vis* the communication of political information justified granting protection to publishers who disseminated to the Australian public at large "information, opinions and arguments concerning government and political matters that affect[ed] the people of Australia" (*id* at 115). Delivering a single judgment, the High Court of Australia said (*id* at 115–116):

> *Because the [Australian] Constitution requires "the people" to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of ministers of State and the conduct of the executive branch of government, the common law rules concerning privileged communications … reached the point where they failed to meet that requirement*. However, the common law of defamation can and ought to be developed to take into account the varied conditions to which McHugh J referred [in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211]. *The common law rules of qualified privilege will then properly reflect the requirements of ss 7, 24, 64, 128 and related sections of the [Australian] Constitution*.
>
> *Accordingly, this court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it*. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. *Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter*. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the [Australian] Constitution. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the [Australian] Constitution or cannot throw light on the administration of federal government.
>
> [emphasis added]

218 In essence, the High Court of Australia recognised political speech as a separate subject matter category of qualified privilege. However, the court also acknowledged that "the damage that [could] be done when there [were] thousands of recipients of a communication [was] obviously so much greater than when there [were] only a few recipients" (*id* at 116). The court thus held that the defendant who sought to rely on the *Lange v ABC* privilege had to prove that his conduct in publishing the defamatory material was "reasonable" within the meaning of (the then) s 22 of the Defamation Act (1974) (NSW) ("the NSW Defamation Act"). Section 22 of that Act, which has since been repealed, read as follows:

> (1) Where, in respect of matter published to any person:
>
> (a) the recipient has an interest or apparent interest in having information on some subject,
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and

(c) the conduct of the publisher in publishing that matter is *reasonable in the circumstances*,

there is a defence of qualified privilege for that publication.

(2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest.

…

(3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is for reward.

[emphasis added]

219 At 116–117 of *Lange v ABC*, the High Court of Australia explained:

[T]he damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients. *Because the damage from the former class of publication is likely to be so much greater than [the damage] from the latter class, a requirement of reasonableness as contained in s 22 of the [NSW] Defamation Act, which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the [Australian] Constitution requires*.

Reasonableness of conduct is the basic criterion in s 22 of the [NSW] Defamation Act which gives a statutory defence of qualified privilege. It is a concept invoked in one of the defences of qualified protection under the Defamation Codes of Queensland and Tasmania. And it was the test of reasonableness that was invoked in the joint judgment in *Theophanous* [*v The Herald & Weekly Times Limited* (1994) 182 CLR 104]. *Given these considerations and given, also, that the requirement of honesty of purpose was developed in relation to more limited publications, reasonableness of conduct seems the appropriate criterion to apply when the occasion of the publication of defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government or political matters*. But reasonableness of conduct is imported as an element only when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience. For example, reasonableness of conduct is not an element of that qualified privilege which protects a member of the public who makes a complaint to a minister concerning the administration of his or her department. *Reasonableness of conduct is an element for the judge to consider only when a publication concerning a government or political matter is made in circumstances that, under the English common law, would have failed to attract a defence of qualified privilege*.

[emphasis added]

220 The passages quoted in the preceding paragraph show that the *Lange v ABC* privilege is "clearly an indigenous Australian product" (see *Gatley* ([27] *supra*) at para 15.22). For this and other reasons, the law lords in *Reynolds (HL)* rejected that privilege as being inappropriate for England. Conversely, the *Reynolds* privilege has no place in the law of defamation of Australia (see also

generally Andrew T Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006) at pp 197 and 221–222 for a comparison between the *Lange v ABC* privilege and the *Reynolds* privilege).

(3) The position in New Zealand

221 Like Australia, New Zealand has established its own model of qualified privilege to protect the publication of political speech, which we shall hereafter refer to as "the *Lange v Atkinson* privilege" based on the case that gave rise to this privilege, *ie*, *Lange v Atkinson (CA) (No 1)* ([173] *supra*). In that case, the plaintiff (who was also the plaintiff in *Lange v ABC*) sued the defendants (a political scientist-cum-journalist and his publisher) in respect of an article about him (the plaintiff) in his capacity as the Member of Parliament for Mangere, the former leader of the parliamentary Labour Party, the former leader of the Opposition and a former Prime Minister of New Zealand. The plaintiff pleaded that the article and the cartoon accompanying it, in their natural and ordinary meaning, meant and were understood to mean that he was dishonest, lazy, insincere and irresponsible. The defendants pleaded, *inter alia*, the defences of qualified privilege and "political expression" (*id* at 429). The plaintiff applied to strike out the defence of political expression (as well as the defence of qualified privilege in so far as it repeated allegations made in connection with the former defence) on the ground that the plea of "political expression" disclosed no defence and was bad in law.

222 At first instance, the New Zealand High Court dismissed the plaintiff's application (see *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 ("*Lange v Atkinson (HC)*")). On appeal, the New Zealand CA, after reviewing the traditional qualified privilege defence at common law, the nature of democracy in New Zealand and the provision on freedom of expression in s 14 of the New Zealand Bill of Rights Act 1990, dismissed the plaintiff's appeal. The New Zealand CA held (at 428 of *Lange v Atkinson (CA) (No 1)*):

> [T]he defence of qualified privilege applies to generally-published statements made about the actions and qualities of those currently or formerly elected to [the New Zealand] Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

223 The above passage sums up the essence of the *Lange v Atkinson* privilege. The New Zealand CA also set out a five-point summary of this privilege as follows (*id* at 467–468):

> Our consideration of the development of the law leads us to the following conclusions about the defence of qualified privilege as it applies to *political statements which are published generally*:
>
> (1) *The defence of qualified privilege may be available in respect of a statement which is published generally*.
>
> (2) *The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office*.
>
> (3) *In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office*, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

(4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.

(5) *The width of the identified public concern justifies the extent of the publication*.

[emphasis added]

224 *Lange v ABC* was cited to the New Zealand CA, which substantially agreed with the Australian High Court's ruling that the defence of qualified privilege should be extended to "communication[s] made to the public on a government or political matter" (see *Lange v ABC* at 115). The New Zealand CA disagreed, however, with the requirement of reasonableness laid down in that case. At 469–470 of *Lange v Atkinson (CA) (No 1)*, the New Zealand CA said (*per* Blanchard J, with whom Richardson P as well as Henry and Keith JJ agreed):

> *[N]either the cases nor the legislation incorporate any requirement of reasonable care into the defence of qualified privilege*. The very section which gives statutory protection by reference to the common law [*ie*, s 19 of the Defamation Act 1992 (NZ)] makes no reference to a duty of care and at the same time it saves the common law. *The basis of qualified privilege is that the recipient has a legitimate interest to receive information assumed to be false. How can that interest differ simply because the author has failed to take care to ensure that the information is true? … [A]ny such reasonableness requirement would essentially make the statutory restatement of malice [in s 19(1) of the Defamation Act 1992 (NZ)] redundant*. [emphasis added]

225 Tipping J, in a separate judgment, agreed with the rest of the judges that "[a] requirement of reasonableness, in the sense of taking such care with the facts as [was] reasonable in the circumstances, [could not] be introduced as a condition or element of the [*Lange v Atkinson* privilege], whether in the definition of the occasion or otherwise" (*id* at 477). He pointed out, however, that "such a reasonableness consideration could be relevant to whether the defendant ha[d] taken improper advantage of the occasion of publication" (*ibid*) for the purposes of s 19 of the Defamation Act 1992 (NZ) ("New Zealand's Defamation Act"), which reflected the common law concept of malice; if the defendant had taken improper advantage of the occasion of publication, that would defeat the defence of qualified privilege.

226 On further appeal, the Privy Council noted that the New Zealand CA had not had the benefit of considering the House of Lords' decision in *Reynolds (HL)* ([20] *supra*), and that the *Lange v Atkinson* privilege was "wider than ha[d] been held acceptable in either England or Australia" (see *Lange v Atkinson* [2000] 1 NZLR 257 ("*Lange v Atkinson (PC)*") at 263). Given the policy considerations highlighted in *Reynolds (HL)*, the Privy Council decided to remit the case to the New Zealand CA for reconsideration as the question of how the balance between freedom of speech and protection of reputation should be struck was pre-eminently a matter for the courts of each country to decide according to that country's own political and social conditions. At 261–262 of *Lange v Atkinson (PC)*, the Privy Council said:

> *Their Lordships' Board heard the present appeal a few days before Their Lordships, in their capacity as members of the Appellate Committee of the House of Lords, heard oral argument in [Reynolds (HL)]*. The House upheld the decision of the (English) Court of Appeal [in *Reynolds (CA)* ([186] *supra*)] but not its formulation of three questions. The House decided that the common law should not develop "political information" as a new subject-matter category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever its source and whatever the circumstances. Rather, the established common law

approach to publication of misstatements of fact to the general public remains essentially sound. Whether such a publication is in the public interest or, in the conventional phraseology, whether there is a duty to publish to the intended recipients, depends upon the circumstances, including the nature of the matter published and its source or status.

Against this somewhat kaleidoscopic background, one feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: the recognition that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press. … For some years *Their Lordships' Board has recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy*. The present case is a prime instance of such a case. As noted by Elias J [in *Lange v Atkinson (HC)* ([222] *supra*)] and the [New Zealand] Court of Appeal [in *Lange v Atkinson (CA) (No 1)* ([173] supra)], different countries have reached different conclusions on the issue arising on this appeal. *The Courts of New Zealand are much better placed to assess the requirements of the public interest in New Zealand than Their Lordships' Board. Accordingly, on this issue the Board does not substitute its own views, if different, for those of the New Zealand Court of Appeal*.

[emphasis added]

227 The New Zealand CA reheard the case and affirmed its earlier decision in *Lange v Atkinson (CA) (No 1)* (see *Lange v Atkinson* [2000] 3 NZLR 385) ("*Lange v Atkinson (CA) (No 2)*")). The New Zealand CA further held, in relation to the five-point summary set out in its earlier decision (see *Lange v Atkinson (CA) (No 1)* at 468), that a sixth point should be added, namely, in order to be protected by the *Lange v Atkinson* privilege, the statement in question would have to be published on a "*qualifying occasion*" [emphasis added] (see *Lange v Atkinson (CA) (No 2)* at [41]). According to the New Zealand CA (*id* at [21]):

> Any bona fide communication in the course of political discussion and within the defined subject-matter [*ie*, the subject matter set out in item (3) of the five-point summary in *Lange v Atkinson (CA) (No 1)* at 468] is very likely to be made on an occasion of qualified privilege.

There was no specific requirement that the defendant's conduct in publishing the defamatory material in question must be reasonable, although s 19 of New Zealand's Defamation Act would prevent the defendant from invoking the defence of qualified privilege if he was predominantly motivated by ill will against the plaintiff or otherwise took improper advantage of the occasion of publication.

228 As for whether or not the approach taken by the House of Lords in *Reynolds (HL)* should be adopted in New Zealand, the New Zealand CA ruled in the *negative*, as follows (see *Lange v Atkinson (CA) (No 2)* at [37]–[41]):

> [37] The task of this Court is to consider whether the decision of the House of Lords in *Reynolds [(HL)]* leads us to make a different assessment of the competing considerations of the right to freedom of expression and the right to reputation from that which we made in 1998 [in *Lange v Atkinson (CA) (No 1)*]. …
>
> [38] *For reasons which can be briefly restated we would not strike the balance differently from the way it was struck in 1998. First, the Reynolds [(HL)] decision appears to alter the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of law*. We are not persuaded that in the New Zealand situation

matters such as the steps taken to verify the information, the seeking of comment from the person defamed, and the status or source of the information, should fall within the ambit of the inquiry into whether the occasion is privileged. Traditionally such matters are not of concern to that question in the kind of setting presently under discussion. In particular, source and status may be relevant, but only in the area of reports of meetings and suchlike. For the reasons expressed in [*Lange v Atkinson (CA) (No 1)*], we do not consider it necessary, nor would it be in accord with principle, to import into this inquiry, for the limited purposes of the specific subject-matter now under discussion but not otherwise, a specific requirement of reasonableness.

[39] The full scope of s 19 of [New Zealand's] Defamation Act … and its possible application to political discussion requires separate consideration, but as will be seen it can provide a measure of protection to or safeguard for a plaintiff which ought not to attract the restrictions sometimes applied to the common law concept of malice in this context. The idea of taking improper advantage of the occasion is important when one is considering the appropriate balance between freedom of expression and protection of reputation. Its connotations are potentially wider than the traditional concept of malice which included excess of publication and improper purpose. To that extent we are able to take a more expansive approach to defining an occasion of privilege because we have the ability in s 19 to take a correspondingly more expansive approach to what constitutes misuse of the occasion. One development is therefore capable of being matched by another so that the overall balance is kept right. The idea of taking improper advantage is appropriately applied to those who are reckless and thereby do not exhibit the necessary responsibility when purporting to act under the cloak of qualified privilege.

[40] *Secondly, there are significant differences between the constitutional and political context in New Zealand and in the United Kingdom in which this body of law operates*. They reflect societal differences. *Thirdly, the position of the press in the two countries does appear to be significantly distinct*. And, fourthly, this is an area of law in which Parliament has essentially left it to the Courts to develop the governing principles and apply them to the evolving political, social and economic conditions.

[41] *Our decision is to adhere to our previous conclusions and, in particular, to confirm the five-point summary* … which we gave in [*Lange v Atkinson (CA) (No 1)*]. *A sixth point should be added to the summary to reflect what was previously implicit, but can be made explicit*:

(6) To attract privilege the statement must be published on a qualifying occasion.

[emphasis added]

229 To complete our examination of the jurisprudence in New Zealand, we set out s 19(1) of New Zealand's Defamation Act, which reads as follows:

19 Rebuttal of qualified privilege

(1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

(4) The position in Canada

230 In Canada, the Ontario Court of Appeal held in *Cusson* ([214] *supra*) that the *Reynolds* privilege

was applicable in Ontario. The court rejected the Australian and the New Zealand approaches on the ground that they were "driven by constitutional limitations not present in Canada" (*id* at [141]). The Supreme Court of Canada has reserved its judgment in the appeal against this decision.

(5) The position in Hong Kong

231 *Reynolds (HL)* was cited without disapproval by the Hong Kong Court of Final Appeal in *Cheng Albert v Tse Wai Chun Paul* [2004] 4 HKC 1, albeit in the context of explaining the difference between the defences of, respectively, qualified privilege and fair comment. In contrast, the Hong Kong Court of First Instance applied the *Reynolds* privilege in *Chan Chook Tim* ([214] *supra*) and *Yaqoob* ([214] *supra*), but without much discussion as to whether it was appropriate to adopt the privilege in Hong Kong, given the political and social conditions there. It bears mention that, in June 1991, Hong Kong enacted the Hong Kong Bill of Rights Ordinance (Cap 383), which incorporates the provisions of the International Covenant on Civil and Political Rights ("ICCPR"). Furthermore, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Cap 2101) ("Hong Kong's Basic Law") also provides for fundamental rights and freedoms. The ICCPR has yet to be signed or ratified by the People's Republic of China, but Hong Kong's Basic Law provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force (see generally *Halsbury's Laws of Hong Kong* vol 14 (LexisNexis, 2009 Reissue) at paras 210.010, 210.048 and 210.051).

(6) The position in Malaysia

232 The legal status of the *Reynolds* privilege in Malaysia is unclear. *Reynolds (HL)* was considered by the Malaysian High Court in *Mark Ignatius Uttley* ([214] *supra*). There, Kamalanathan Ratnam J referred approvingly (at 384) to *Reynolds (HL)* at 206, where Lord Nicholls criticised the defendants' failure to mention in the *Sunday Times* article the explanation given by Mr Reynolds in the Dáil. In contrast, in the earlier case of *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58 at 70–71, the Malaysian High Court referred to *Reynolds (CA)* ([186] *supra*) and applied the three-step test set out therein at 899. Other Malaysian High Court cases in which *Reynolds (CA)* was approved include *Halim bin Arsyat v Sistem Televisyen Malaysia Bhd* [2001] 6 MLJ 353 and *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd (No 3)* [2005] 5 MLJ 561.

233 Yet another different position has been taken by the Federal Court of Malaysia. It held in *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65 at 69, without any elaboration or explanation, that "the correct authority on qualified privilege … [was *Lange v ABC* ([173] *supra*)] and not [*Lange v Atkinson (CA) (No 1)* ([173] *supra*)]". In the light of these conflicting authorities, *Evans on Defamation* ([26] *supra*) takes the view (at p 135) that the position in Malaysia on the defence of qualified privilege as applied to the publication of matters of public interest remains open.

(7) The position in other Commonwealth jurisdictions

234 We earlier mentioned that the *Reynolds* privilege has been adopted in Jamaica. The Privy Council stated in *Bonnick* ([203] *supra*) at [16] that the privilege was "consistent with section 22 of the [Jamaican] Constitution". On the facts of that case, it was held that the author of the defamatory article in question could rely on the *Reynolds* privilege as the "responsible journalism" test had been satisfied even though the author had relied on an anonymous source for the information published and had not made further inquiries (*id* at [17]). The Privy Council, however, also acknowledged that that case was "near the borderline" (*id* at [28]). In contrast, in a later Jamaican case, *viz*, *Seaga* ([177] *supra*), the Privy Council held that the *Reynolds* privilege could not be relied on as the defendant had not taken sufficient care to check the reliability of the defamatory

information published. The different outcomes in these two cases can, in our view, be explained on the basis of the Privy Council's finding in *Bonnick* that (*id* at [27]):

> The defamatory imputation [of the offending words], while a matter of importance, cannot be regarded as approaching anywhere near the top end of a scale of gravity. … The defamatory meaning of the words used was not so glaringly obvious that any responsible journalist would be bound to realise this was how the words would be understood by ordinary, reasonable readers. The failure to make further inquiry … and the omission of [the plaintiff's] explanation of his dismissal, although unfortunate, have to be evaluated, and their compatibility with responsible journalism considered, against this background.

235 In South Africa, the decision of the Supreme Court of Appeal of South Africa in *Bogoshi* ([214] *supra*) "recast the common law of South Africa in respect of media publications in terms which [were] rather similar to *Reynolds [(HL)]*" (see *Gatley* ([27] *supra*) at para 15.26). The *Reynolds* privilege has also been held to be the law in Ireland (see *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223) as well as Samoa (see *Alesana* ([214] *supra*)).

The First Proposition

Outline of the Appellants' submissions

236 To recapitulate, the First Proposition is that the *Reynolds* privilege is and has always been part of Singapore's common law, and, thus, the Appellants are entitled to a trial of the Defamation Suits in view of the merits of their defences to these suits. As our examination of this argument will require us to consider the interrelationship in our local context between freedom of speech *qua* constitutional right ("constitutional free speech") and the law of defamation, it is necessary that we first set out briefly the constitutional history of Singapore.

237 When Singapore became part of Malaysia on 16 September 1963, both the Constitution of the State of Singapore set out in Schedule 3 of the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN No S 1 of 1963) ("the 1963 State Constitution") and the Constitution of Malaysia (1962 Reprint) ("the 1963 Federal Constitution"), which we shall refer to collectively as "the 1963 Singapore Constitution", came into force here (the Singapore Constitution is the current equivalent of the 1963 Singapore Constitution). Subsequently, when Singapore became an independent and sovereign republic on 9 August 1965, certain provisions of the 1963 Federal Constitution (including the fundamental liberties set out in Arts 5–12 thereof) continued in force pursuant to s 6 of the Republic of Singapore Independence Act 1965 (Act 9 of 1965) ("the RSIA"), and the 1963 State Constitution likewise continued in force pursuant to s 13 of the RSIA. For present purposes, the pertinent point to note is that freedom of speech became a constitutional right in Singapore on 16 September 1963 when (*inter alia*) Art 10(1)(*a*) of the 1963 Federal Constitution (the then equivalent of Art 14(1)(*a*) of the Singapore Constitution), which formed part of the 1963 Singapore Constitution, came into operation here. We should also point out that these two provisions (*ie*, Art 10(1)(*a*) of the 1963 Federal Constitution and Art 14(1)(*a*) of the Singapore Constitution) are worded in substantially the same way.

238 The First Proposition consists essentially of the following submissions:

(a) Under the declaratory theory of the common law ("the Declaratory Theory"), "the common law is [regarded as] an immutable body of doctrine existing from time immemorial, to be perceived by a judicial wisdom which proves to be ever more penetrating with the passing of the years" (*per* Brennan J in the Australian High Court case of *Giannarelli v Wraith* (1988) 165 CLR 543

("*Giannarelli*") at 584–585). In other words (*per* Lord Browne-Wilkinson in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 ("*Kleinwort Benson*") at 358):

> [J]udges do not make or change law: they discover and declare the law which is throughout the same. … [W]hen an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along.

(b) In view of the Declaratory Theory, the *Reynolds* privilege (although first formulated in 1999 in *Reynolds (HL)* ([20] *supra*)) is and has always been part of the traditional qualified privilege defence at common law first enunciated in 1834 in *Toogood* ([179] *supra*) for "the common convenience and welfare of society" (*id* at 193; 1050). The "*Toogood* privilege" (as the Appellants call it) was subsequently developed and eventually took the form of the *Reynolds* privilege. Hence, the *Reynolds* privilege is "not directly the result of Article 10 [of the European Convention]"[note: 45] or the HRA, but was instead "borne [*sic*] out of the common law's historic [*Toogood*] privilege which protect[ed] communications made in the interests and convenience of modern society and particularly in the interests of [a] modern democratic society".[note: 46] The English and Commonwealth decisions show that the *Reynolds* privilege "is inherent in the common law principle stated by *Toogood* in 1834".[note: 47] For this reason, the *Reynolds* privilege was "a defence which was available at the time the Singapore Constitution [*ie*, the 1963 Singapore Constitution] came into operation and was part of the pre-existing right to free speech which was protected by that Constitution",[note: 48] and likewise remains part of our law today.

(c) In common law jurisdictions which have a written Constitution, the Constitution is "the ultimate source of legal authority … and any legal rule must conform with it[;] … the common law is subject to the Constitution and must adjust where necessary to achieve consistency with its rules".[note: 49] Such adjustment "takes place at [the] inception [of the Constitution] whether it was perceived as such or not at the time".[note: 50] Because of such adjustment, the *Reynolds* privilege has become part of our common law of defamation and is consistent with Art 14 of the Singapore Constitution.

(d) Under Art 14(1)(*a*) of the Singapore Constitution, "every citizen of Singapore has the right to freedom of speech and expression", but, under Art 14(2)(*a*), Parliament may by law impose on this right restrictions to provide against (*inter alia*) defamation. This effectively entails that:[note: 51]

> … *Parliament and only Parliament may impose, explicitly, restrictions by the law of defamation on free speech. There is no power under Article 14 of the [Singapore] Constitution for the courts to restrict freedom of speech by common law methods in usurpation of Parliament's legislative function*. … [The] *Reynolds* … privilege is an emanation of the traditional common law[;] the courts have no power either to abolish it or [to] refuse to acknowledge it because it now conforms with the Constitutional guarantee [of freedom of speech]. Only Parliament may by legislation abolish any aspect of the common law of defamation, including public interest privilege [in the present context, the *Reynolds* privilege]. *Under [the Singapore] Constitution, restrictions on free speech must be made by Parliament and not the courts*. [emphasis added]

(e) Should Parliament seek to derogate from the constitutional right of free speech set out in Art 14(1)(*a*) of the Singapore Constitution, Parliament must do so "by an enactment … [made] *at the time the right is in existence* … and the enactment must do so *expressly or by necessary*

implication"[note: 52] [emphasis added]. This is because it is a fundamental principle of statutory construction that "courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language" (*per* Gleeson CJ in *Plaintiff S 157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at 492).

(f) In this regard, when freedom of speech became a constitutional right in Singapore on 16 September 1963, Parliament did not enact the requisite legislation to restrict constitutional free speech. The Defamation Ordinance 1960 (No 7 of 1960) ("the Defamation Ordinance 1960"), which was the defamation statute in force in Singapore at that time, did not amount to restrictive legislation of this nature as it "preceded the Constitution [*ie*, the 1963 Singapore Constitution]"[note: 53] and, moreover, was "largely procedural". [note: 54] Although this court held in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] SLR 38 ("*JJB v LKY (1990)*") that "[t]he constitutional right of freedom of speech and expression [was] unarguably restricted by the laws of defamation" (*id* at 39, [5]), that decision is questionable in view of the subsequent ruling in *JJB v LKY (1992)* ([19] *supra*) that "the Defamation Act [*ie*, the Defamation Act (1985 Rev Ed)] was an existing law within Article 162 [of the Constitution of the Republic of Singapore (1985 Rev Ed)]"[note: 55] [emphasis in original omitted] (for ease of reference, the Constitution of the Republic of Singapore (1985 Rev Ed) will hereafter be termed "the Constitution of Singapore (1985 Rev Ed)"). This is because:[note: 56]

> [T]he Defamation Act [*ie*, the Defamation Act (1985 Rev Ed)] … cannot be both an existing law (amended to take account of the Constitution [*ie*, the Constitution of Singapore (1985 Rev Ed)]) and a new law made expressly so as to derogate from a constitutional right.

Further, the decision in *JJB v LKY (1992)* is flawed in so far as this court held that "it [was] implicit that the right of free speech under art 14 [of the Constitution of Singapore (1985 Rev Ed) was] subject to the common law of defamation as modified by … the Defamation Act [(1985 Rev Ed)]" (*id* at 331, [58]). In so ruling, the court "invert[ed] the constitutional rule of recognition in Article 162 [of the Constitution of Singapore (1985 Rev Ed)]"[note: 57] (*ie*, the court subjected constitutional free speech to the common law of defamation when it should have done the converse instead), contrary to the Privy Council's approach in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] AC 322.

Our decision on the First Proposition

239 In our view, the First Proposition is completely wrong in law as each of the Appellants' submissions in support of it is misconceived and unsound. First, this proposition is based on the erroneous premise that the Declaratory Theory is a principle of the common law. Second, quite apart from the fact that the Declaratory Theory is not a principle of the common law, this theory is also, to all intents and purposes, no longer part of the current orthodoxy. Third, given that *Reynolds (HL)* was decided *after* 12 November 1993 (the date of commencement of the Application of English Law Act 1993 (Act 35 of 1993) ("Act 35 of 1993")), the *Reynolds* privilege did not fall within the body of English common law which continued, pursuant to s 3(1) of that Act, to be part of the law of Singapore after the commencement of that Act. Fourth, contrary to the Appellants' stance as outlined at sub-para (f) of [238] above, Parliament did enact legislation to expressly restrict constitutional free speech when that constitutional right came into existence in Singapore. Fifth, in so far as the First Proposition turns on the principle of constitutional supremacy (specifically, on the contention that "the courts have no power either to abolish [the *Reynolds* privilege] or [to] refuse to acknowledge it because it now conforms with the [c]onstitutional guarantee [of freedom of speech]

… [and] restrictions on free speech must be made by Parliament and not the courts"),[note: 58] the Appellants do not have the requisite *locus standi* to invoke this principle as they are not citizens of Singapore. We shall elaborate on each of these reasons *seriatim* below.

(1) The Declaratory Theory is not a principle of the common law

240 Our first reason for rejecting the First Proposition can be stated briefly. Basically, the Declaratory Theory is not a principle of the common law in the same way that the doctrine of *stare decisis* and the doctrine of *res judicata* are principles of the common law. Instead, it is merely a theory or an explanation as to how the common law develops. It is a juridical method of expressing the idea that the common law has the capacity to provide the right answer (in the sense of doing justice) at any point in time *vis-à-vis* any legal issue by applying established principles (whether narrow or broad) as changing or changed social conditions require. In short, the Declaratory Theory lacks legal force, and is therefore neither a sufficient nor a satisfactory ground for contending that the *Reynolds* privilege is and has always been part of the traditional qualified privilege defence at common law.

(2) The Declaratory Theory no longer holds sway today

241 Our second reason for rejecting the First Proposition, in so far as it is premised on the Declaratory Theory, is that this theory not only has no legal force (because it is not a principle of the common law), but is also a fiction. The current orthodoxy (which we agree with) is that the Declaratory Theory is, as Lord Browne-Wilkinson said in *Kleinwort Benson* ([238] *supra*) at 358 (citing Lord Reid's extrajudicial lecture, "The Judge as Law Maker" (1972–1973) 12 JSPTL (NS) 22 at 22):

> … *a fairy tale in which no one any longer believes*. In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world. [emphasis added]

In the above lecture, Lord Reid had said (see "The Judge as Law Maker" at 22):

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.

242 It is not necessary for us to refer, by way of illustration, to the numerous cases in which the House of Lords reversed long-standing common law principles on the ground that they were inconsistent with prevailing social conditions. The basic flaw of the Declaratory Theory, as aptly summed up by Prof Brian Simpson in his essay, "The Reflections of a Craftsman" in *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Mads Andenas & Duncan Fairgrieve eds) (Oxford University Press, 2009) Part 1, ch 14, is that it rests on (*id* at pp 199–200):

> … a double and inconsistent set of ideas. When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or any distinctions but such as have long been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience,

knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision *has* modified the law [citing H S Maine, *Ancient Law* (Everyman Library, 1972) at pp 18–19]. [emphasis in original]

243 In particular, the Declaratory Theory is inapt to explain the evolution of common law principles that are based on policy considerations which change over time. The defence of qualified privilege is a paradigm of such a common law principle since it is based, as noted in *Reynolds (HL)* ([20] *supra*) at 195 and *Lange v Atkinson (PC)* ([226] *supra*) at 261–262, on a *contemporary* consideration of what the common convenience and welfare of society require. The political, social and cultural conditions prevailing in ancient England or in 1834 (when *Toogood* ([179] *supra*) was decided) or even 1983 (when *Blackshaw* ([171] *supra*) was decided) had by 1999 (the year in which *Reynolds (HL)* was decided) changed to such an extent that the law lords (in *Reynolds (HL)*) considered it necessary to liberalise the scope of the defence of qualified privilege *vis-à-vis* the communication of matters of public interest by the media. Significantly, in *Jameel* ([169] *supra*) at [146], Baroness Hale described the *Reynolds* privilege as "a '*different* jurisprudential creature' from the law of privilege" [emphasis added] (see also similar pronouncements by Lord Hoffmann (*id* at [50]) and Lord Phillips in *Loutchansky v Times Newspapers Ltd (Nos 2–5)* ([207] *supra*) at [35]). If (as the Appellants contend) the *Reynolds* privilege is "inherent in the common law principle stated by *Toogood* in 1834"[note: 59] by virtue of the Declaratory Theory, this privilege should be part of the law of Australia and the law of New Zealand as well – that is *not*, however, the case, as can be seen from, respectively, [220] and [228] above.

244 In addition, as we pointed out earlier, the decision in *Reynolds (HL)* was based on Art 10 of the European Convention and the HRA, which collectively elevated freedom of speech from being merely a common law right to being "a right based on a constitutional or higher legal order foundation" (*id* at 208 *per* Lord Steyn) – *ie*, the *Reynolds* privilege was the result of, specifically, this legislative development in the UK. It follows that the *Reynolds* privilege cannot possibly be said to have existed "from time immemorial" (*per* Brennan J in *Giannarelli* ([238] *supra*) at 585), and it certainly could not have been part of our defamation law on 16 September 1963 when freedom of speech became a constitutional right in Singapore.

(3) Reynolds (HL) was decided after the cut-off date of 12 November 1993

245 Our third reason for rejecting the First Proposition relates to the reception of English common law in Singapore. The common law of England was received in Singapore as the general law under the Second Charter of Justice of 1826, but it was to apply only (in the words of the Second Charter of Justice itself) "as far as [c]ircumstances [would] admit". In *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381, the Privy Council interpreted this phrase to mean "so far as [English common law was] applicable to the circumstances of the place, and modified in its application by these circumstances" (*id* at 393).

246 In 1993, Parliament decided that the common law of Singapore should make a clean break with the common law of England (especially *vis-à-vis* the law administered in England on mercantile issues), and enacted Act 35 of 1993 (now the Application of English Law Act (Cap 7A, 1994 Rev Ed) ("the AELA")). Section 3 of the AELA, which is substantially the same as s 3 of Act 35 of 1993, provides as follows:

Application of common law and equity.

3.—(1) The common law of England (including the principles and rules of equity), *so far as it*

was part of the law of Singapore immediately before 12th November 1993 [*ie*, the date of commencement of Act 35 of 1993], shall continue to be part of the law of Singapore.

(2) The common law shall continue to be in force in Singapore, as provided in subsection (1), *so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require*.

[emphasis added]

247 Implicit in s 3(1) of the AELA is the principle that the body of English common law which was part of the law of Singapore immediately before the cut-off date of 12 November 1993 ("pre-AELA English common law") continues to be the law of Singapore, *but not otherwise*. After that cut-off date, the common law of Singapore would be the common law as declared and developed by our courts. Furthermore, it should be noted that, although pre-AELA English common law continues to be part of our law today by virtue of s 3(1) of the AELA, it continues to be in force here only "[in] so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require" (see s 3(2) of the AELA). In other words, the application of pre-AELA English common law in Singapore *both before and after* the cut-off date of 12 November 1993 is subject to local circumstances (see the Second Charter of Justice *vis-à-vis* the position prior to 12 November 1993 and s 3(2) of the AELA *vis-à-vis* the position after that date).

248 Given that *Reynolds (HL)* was decided after 12 November 1993, the *Reynolds* privilege obviously falls outside the ambit of pre-AELA English common law. Of course, if the Declaratory Theory were applicable to the *Reynolds* privilege (*ie*, if the *Reynolds* privilege were regarded as forming part of English law "from time immemorial" (*per* Brennan J in *Giannarelli* ([238] *supra*) at 585)), this privilege would be part of pre-AELA English common law. This court would then have to determine whether this privilege is applicable to the circumstances of Singapore and its inhabitants, bearing in mind (*inter alia*) that the House of Lords in *Reynolds (HL)* changed the law of defamation where the defence of qualified privilege was concerned. But, for the reasons given earlier, the Declaratory Theory has no place in modern jurisprudence.

(4) Parliament did enact legislation to restrict constitutional free speech

249 Another central tenet of the First Proposition is that Parliament did not enact any law to impose restrictions on constitutional free speech when this right came into existence in Singapore (see sub-para (f) of [238] above). This argument is untenable as it stems from a fundamental misunderstanding of the effect of Art 105(1) of the 1963 State Constitution (now Art 162 of the Singapore Constitution). Article 105(1) of the 1963 State Constitution read as follows:

105. (1) Subject to the provisions of this Article and to any provision made on or after Malaysia Day [*ie*, 16 September 1963] by or under Federal law or State law, all existing laws shall continue in force on and after the coming into operation of this Constitution and all laws which have not been brought into force by the coming into operation of this Constitution may, subject as aforesaid, be brought into force on or after its coming into operation, but all such laws shall, subject to the provisions of this Article, be construed as from the coming into operation of this Constitution *with such modifications, adaptations, qualifications and exceptions as may be necessary* to bring them into conformity with this Constitution and the Malaysia Act [*ie*, the Malaysia Act 1963 (No 26 of 1963) (M'sia), which was the statute providing for (*inter alia*) Singapore to become part of Malaysia]. [emphasis added]

From the Appellants' point of view, this provision entailed that all existing laws as at 16 September

1963 (including the then existing common law of defamation) had to be "*adjusted* … to the Constitution [*ie*, the 1963 Singapore Constitution]"[note: 60] [emphasis added] (see also sub-para (c) of [238] above).

250 In our view, contrary to the Appellants' submission, Art 105(1) of the 1963 State Constitution was not simply an "adjustment" provision. By mandating that "all existing laws shall continue in force on and after the coming into operation of this Constitution", Art 105(1) in itself served as a law-enacting provision – *ie*, it had the effect of an enactment which expressly restricted the constitutional free speech enshrined in Art 10(1)(*a*) of the 1963 Federal Constitution by continuing in force the then existing law of defamation (defamation law being, by its very nature, a restriction on freedom of speech). To adopt the words used by the Appellants, Art 105(1) of the 1963 State Constitution was the "new law made expressly … to derogate from a constitutional right".[note: 61] The imposition via Art 105(1) of this restriction on constitutional free speech was permitted by and also consistent with Art 10(2)(*a*) of the 1963 Federal Constitution (now Art 14(2)(*a*) of the Singapore Constitution). In our view, this is the correct interpretation of Art 105 of the 1963 State Constitution. It follows that the Appellants' contention that Parliament did not enact any law which derogated from the constitutional right in Art 10(1)(*a*) of the 1963 Federal Constitution is simply wrong.

251 If the Appellants' contention on this point were correct, it would mean that, at the inception of the 1963 Singapore Constitution on 16 September 1963, those of the then existing laws (whether derived from the common law or from statute) which restricted constitutional free speech or the right of peaceful assembly in Art 10(1)(*b*) of the 1963 Federal Constitution (now Art 14(1)(*b*) of the Singapore Constitution) or the right to form associations in Art 10(1)(*c*) of the 1963 Federal Constitution (now Art 14(1)(*c*) of the Singapore Constitution) would have become unconstitutional, and would have remained unconstitutional until and unless *fresh* legislation was *expressly* enacted to restrict the constitutional right in question pursuant to, respectively, Art 10(2)(*a*), Art 10(2)(*b*) or Art 10(2)(*c*) (as the case might be) of the 1963 Federal Constitution (or their corresponding provisions in, *inter alia*, the Singapore Constitution). Such existing laws would include the following:

(a) s 3 of the Public Entertainments Ordinance 1958 (No 40 of 1958) *vis-à-vis* the provision of public entertainment, which would have been unconstitutional until it was re-enacted as s 3 of the Public Entertainments Act (Cap 259, 1970 Ed) (now s 3 of the Public Entertainments and Meetings Act (Cap 257, 2001 Rev Ed));

(b) s 6 of the Minor Offences Ordinance 1906 (No 13 of 1906) *vis-à-vis* the conduct of public assemblies and processions, which would have been unconstitutional until it was re-enacted as s 5 of the Minor Offences Act (Cap 102, 1970 Ed) (now s 5 of the Miscellaneous Offences Act (as defined at [67] above));

(c) the law on contempt of court, which would have been unconstitutional until (*vis-à-vis* the High Court's power to punish for contempt) 1 July 1993, when s 8 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed, 1993 Reprint) (now s 7 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)) came into force, and (*vis-à-vis* the Subordinate Courts' power to punish for contempt) 26 January 1996, when s 8 of the Subordinate Courts Act (Cap 321, 1985 Rev Ed, 1993 Reprint) (now s 8 of the Subordinate Courts Act (Cap 321, 2007 Rev Ed)) came into force; and

(d) various provisions of the Penal Code (Cap 119, 1955 Ed) such as ss 191 and 193 (*vis-à-vis* giving false evidence in judicial proceedings), s 298 (*vis-à-vis* uttering words with the deliberate intention of wounding the religious feelings of any person), ch XXI (*vis-à-vis* criminal defamation) and s 504 (*vis-à-vis* intentional insult with the intention of provoking a breach of the peace),

which would have been unconstitutional until they were re-enacted in the Penal Code (Cap 103, 1970 Ed) as, respectively, ss 191 and 193, s 298, ch XXI and s 504 thereof (now ss 191 and 193, s 298, ch XXI and s 504, respectively, of the Penal Code (Cap 224, 2008 Rev Ed)).

252 The Appellants' argument, if it were correct, would lead to such an astonishing conclusion that the First Proposition would simply be "too good" to be true from the viewpoint of the defendant in a defamation suit. It would mean that all civil actions (under the common law) and criminal prosecutions (under the relevant statutes) for defamation since 16 September 1963 were unconstitutional and thus unlawful.

(5) The Appellants have no locus standi to invoke the concept of constitutional supremacy

253 As part of the First Proposition, counsel for the Appellants submitted that the *Reynolds* privilege, having adjusted itself to the 1963 Singapore Constitution at the latter's commencement, is consistent with the Singapore Constitution (see sub-para (c) of [238] above). Thus, "the courts have no power either to abolish [the *Reynolds* privilege] or [to] refuse to acknowledge it because it now conforms with the [c]onstitutional guarantee [of freedom of speech]"[note: 62] (see also sub-para (d) of [238] above).

254 We have already pointed out at [249]–[252] above the fallacy of this submission. Quite apart from that, in so far as this aspect of the First Proposition turns on the principle of the constitutional supremacy of constitutional free speech over protection of reputation under defamation law, it is a non-starter because constitutional free speech in Singapore is conferred on *Singapore citizens* only (see Art 14(1)(*a*) of the Singapore Constitution). The Appellants cannot invoke the argument set out in the preceding paragraph as Art 14(1)(*a*) does not apply to non-citizens (see *Davies* ([140] *supra*) at 1106, [110] and *Dow Jones Publishing Co (Asia) Inc v A-G* [1989] SLR 70 at 93, [52] *vis-à-vis* Art 14(1)(*a*) of the Constitution of Singapore (1985 Rev Ed)).

255 The Appellants sought to overcome this hurdle by submitting that, in the present case, the distinction between citizens and non-citizens is of little significance for two reasons, namely:

(a) First, the Disputed Words came from an interview with CSJ, who, as a citizen of Singapore, is entitled to invoke constitutional free speech under Art 14(1)(*a*) of the Singapore Constitution. Since the Article merely "fully, fairly and disinterestedly reported [what CSJ and the Respondents said] in their respective allegations and responses" (*per* Simon Brown LJ in *Al-Fagih* ([208] *supra*) at [52]), the neutral reportage defence (which, as mentioned earlier, is an offshoot of the *Reynolds* privilege) applies to the publication of the Article. To hold otherwise would be tantamount to denying CSJ his entitlement to exercise constitutional free speech.

(b) Second, "the common law of defamation knows [of] no discriminatory rule which shifts only for citizens".[note: 63]

256 In our view, both of the above submissions have no merit. With regard to the first submission, our ruling that the *Reynolds* privilege is not currently part of our common law makes it impossible for the Appellants to invoke the neutral reportage defence as it is an offshoot of that privilege. In any case, even if the neutral reportage defence were part of our common law, it is questionable whether the Appellants can avail themselves of this defence in the present case. This is because the protection afforded by the neutral reportage defence "will be lost if the [defendant] adopts the report and makes it his own" (*per* Ward LJ in *Roberts* ([210] *supra*) at [61]). In this regard, it is significant that the Judge found that "[t]he Article convey[ed] the message that the views expressed [were] those of *HR*" [emphasis added] (see the Judgment at [227]).

257 As for the second submission, it is irrelevant because, as just mentioned at [254] above, Art 14(1)(*a*) of the Singapore Constitution expressly provides that only Singapore citizens are entitled to enjoy constitutional free speech. As non-citizens, the Appellants enjoy only common law free speech. In Singapore, this common law right *does not* presently include the *Reynolds* privilege (unless this court decides to adopt it as part of our law) for the reasons given earlier (see [240]–[248] above).

258 For all of the above reasons, the First Proposition is rejected. We should add as an aside that, even if the First Proposition were accepted, the Appellants are (so it appears to us) unlikely to be able to successfully invoke the *Reynolds* privilege as a defence because it does not seem that they would satisfy the "responsible journalism" test. To mention just a few of the *Reynolds* factors by way of illustration:

(a) the allegations of (*inter alia*) corruption and abuse of power made against the Respondents in the Article were extremely serious (see the first *Reynolds* factor);

(b) there was, as we pointed out earlier at [171] above, no urgency to publish the Article (see the sixth *Reynolds* factor); and

(c) the Appellants did not seek the Respondents' comments on the NKF Saga, which formed the fulcrum of the Article, before publishing the Article and, naturally, the Article (especially paras 10–13 thereof, which constituted the part where "the sting [was] carried" (see the Judgment at [227])) did not contain the gist of the Respondents' side of the story *vis-à-vis* that issue (see the seventh and eighth *Reynolds* factors).

We should add that, in relation to the last-mentioned point, the Appellants argued that they had acted responsibly in giving the Respondents a right of reply *after* the publication of the Article. With respect, this argument is a non-starter in the circumstances of this case: if it were accepted, it would undermine the "responsible journalism" test completely. We now turn to the Second Proposition.

The Second Proposition

Outline of the Appellants' submissions

259 The Second Proposition is that, if the *Reynolds* privilege (and its offshoot, the neutral reportage defence) is not currently part of our common law, this court should declare it to be such; on this basis, the Appellants have a defence to the Defamation Suits. The Appellants have advanced the following arguments in relation to this proposition:

(a) First, the *Reynolds* privilege is a natural development of the traditional qualified privilege defence first enunciated in *Toogood* ([179] *supra*) in 1834. It does not stem from the growth of human rights jurisprudence in the European Union or England.

(b) Second, freedom of speech is guaranteed by Art 14(1)(*a*) of the Singapore Constitution. If this right is not given effect by recognising the *Reynolds* privilege as part of our law, that will diminish Singapore's democratic credentials and make a mockery of Art 14(1)(*a*).

(c) Third, the Government has accepted that there should be more accountability and transparency in the political system by taking steps to, *inter alia*:

(i) increase the number of Non-Constituency Members of Parliament and institutionalise the Nominated Member of Parliament scheme; and

(ii) amend the Films Act (Cap 107, 1998 Rev Ed) by lifting a blanket ban on party political films (see the Films (Amendment) Act 2009 (Act 13 of 2009)).

These changes are intended to encourage democratic participation in the political affairs of Singapore, and the courts should follow suit by adopting the *Reynolds* privilege.

(d) Fourth, the *Reynolds* privilege should be adopted for the "modern convenience and welfare of Singapore society"[note: 64] because:[note: 65]

> [Singapore's] place in the world and the region as a centre for international business and tourism makes its governance a matter of public interest to the local and regional media, which have a professional duty and responsibility to their readers, in Singapore and elsewhere in Asia, to cover political developments in this country *inter alia* by the normal methods of interviewing politicians – opposition politicians as well as government politicians. Readers in Singapore and elsewhere are legitimately interested in such interviews.

(e) Fifth, if the *Reynolds* privilege, which is "acknowledged in every leading court in the [C]ommonwealth",[note: 66] is not recognised by the Singapore courts, it:[note: 67]

> … could well lead foreign courts to refuse to enforce Singapore libel judgments, because they would be reached on a basis that is antipathetic to free speech as protected by the common law elsewhere. This would hardly be in the interest of defamed Singaporeans.

Our decision on the Second Proposition

260 Although the Appellants cited Art 14(1)(*a*) of the Singapore Constitution in support of their case on the Second Proposition, it is implicit (so it appears from their other arguments above) that they realise the basic flaw in their argument that the *Reynolds* privilege should be adopted as part of Singapore's defamation law. The flaw, which we dealt with earlier at [198]–[199] above, is that the *Reynolds* privilege was developed to give effect to the Convention right of free speech as a higher legal order right (compared to protection of reputation). Presumably because they recognise this flaw, the Appellants have pitched their case on the premise that the *Reynolds* privilege is a natural development of the traditional qualified privilege defence at common law, unaffected and uninfluenced by the European Convention and the HRA.

261 This premise is misconceived. It is clear that the *Reynolds* privilege is not a natural common law development, but was instead brought about by the European Convention (specifically, Art 10 thereof) and the HRA (specifically, s 12 thereof). This can be seen from the judgment of Lord Nicholls in *Reynolds (HL)* ([20] *supra*) at 200 (reproduced at [196] above), where he stated:

> My starting point is freedom of expression. … *Under section 12 of the [HRA] … the court is required, in relevant cases, to have particular regard to the importance of the right to freedom of expression. The common law is to be developed and applied in a manner consistent with article 10 of the European Convention … and the court must take into account relevant decisions of the European Court of Human Rights ([see] sections 6 and 2 [of the HRA])*. To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved. [emphasis added]

262 Similarly, Lord Steyn said in his judgment (*id* at 207–208):

> [T]he [HRA], which will incorporate the [European] Convention into [England's] legal order, is on the statute book. And the Government has announced that it will come into force on 2 October 2000. The constitutional dimension of freedom of expression is reinforced. This is the backcloth against which the present appeal must be considered. It is common ground that in considering the issues before the House, and the development of English law, the House can and should act on the reality that the [HRA] will soon be in force.
>
> The new landscape is of great importance inasmuch as it provides the taxonomy against which the question before the House must be considered. *The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification*. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation.
>
> [emphasis added]

263 The Appellants' argument flies in the face of the above statements by Lord Nicholls and Lord Steyn. It is evident that *Reynolds (HL)* was decided against the backdrop of "[t]he new landscape" (*id* at 208 *per* Lord Steyn) of a new legal order that transformed common law free speech as it stood prior to *Reynolds (HL)* into "a right based on a constitutional or higher legal order foundation" (*id* at 208), with the result that (*ibid*):

> *The starting point is now the right of freedom of expression* … Exceptions to freedom of expression must be justified as being necessary in a democracy. … *[F]reedom of expression is the rule and regulation of speech is the exception requiring justification*. [emphasis added]

This development impelled the English courts to strike a new balance between the competing interests of freedom of speech (or, to be more precise, the Convention right of free speech) and protection of reputation. The solution conceived by the House of Lords in *Reynolds (HL)*, which was "based … on a 'liberalising intention'" (*per* Lord Carswell in *Seaga* ([177] *supra*) at [10]), was to attach qualified privilege to the publication of matters of public interest (by the media in the case of *Reynolds (HL)*) which the public had the right to know of, provided that the "responsible journalism" test was satisfied.

264 Against this backdrop, the short and simple rebuttal to the Second Proposition is that the *Reynolds* privilege cannot be declared to be part of our common law on the specific ground advanced by the Appellants, *viz*, that it is a purely common law development. As we have just mentioned, this privilege is based on a legal order which is peculiar to England. If the *Reynolds* privilege is to be adopted as part of our law, it will have to be adopted on the basis that the freedom of speech enshrined in Art 14(1)(*a*) of the Singapore Constitution is likewise "a right based on a constitutional or higher legal order foundation" (*per* Lord Steyn in *Reynolds (HL)* at 208). The Appellants cannot, however, make such an argument because, as we pointed out at (*inter alia*) [254] above, constitutional free speech in Singapore is limited to Singapore citizens only. The Second Proposition is therefore rejected in so far as *the Appellants* are concerned.

Whether the rationale behind the Reynolds privilege applies to Singapore citizens

265 The above conclusion is not, however, the end of the matter for *Singapore citizens*. The *rationale* behind the *Reynolds* privilege ("the *Reynolds* rationale") – *viz*, that freedom of speech is "a right based on a constitutional or higher legal order foundation" (*per* Lord Steyn in *Reynolds (HL)* at 208) and, thus, "freedom of expression is the rule and regulation of speech is the exception requiring justification" (*ibid*) – is equally relevant to our citizens because of Art 14(1)(*a*) of the Singapore Constitution (in jurisprudential theory, the right of free speech set out in Art 14(1)(*a*) is of a higher legal order than the Convention right of free speech in England as the Singapore Constitution is expressly declared (in Art 4) to be the supreme law of the land).

(1) The key question

266 The crucial question *vis-à-vis* Singapore citizens (which we shall hereafter refer to as "the key question") is whether or not, in the context of publication of matters of public interest, the *Reynolds* rationale ought to apply so that (to paraphrase Lord Steyn's words in *Reynolds (HL)* at 208) constitutional free speech becomes the rule and restrictions on this right become the exception. This question has not hitherto been decided by this court. In this regard, we should point out that this court's decisions in *JJB v LKY (1992)* ([19] *supra*) and *Aaron* ([20] *supra*) do not amount to a rejection of the *Reynolds* rationale as the *Reynolds* privilege had yet to come into existence then. Further, although Belinda Ang J rejected the *Reynolds* privilege in *Lee Hsien Loong (HC)* ([32] *supra*), this court did not rule on that particular point when deciding (in *Lee Hsien Loong (CA)* ([32] *supra*)) whether to grant CSJ an extension of time to appeal against Belinda Ang J's decision.

267 The key question is not a live issue in the present appeals as far as the Appellants are concerned because, as non-citizens, they are not entitled to enjoy constitutional free speech in Singapore. Be that as it may, we think it is desirable for us to outline some of the considerations that may be relevant for our courts should they be called on to determine this question in future. Indeed, this question is likely to be raised again in a future case (just as it has been raised, albeit inappropriately, in the present case). Further (and more importantly), freedom of speech is one of the fundamental liberties that the Singapore Constitution guarantees our citizens so as to enable them to express their views on matters of public interest. To reiterate, the key question is, in essence, this: should our courts shift the existing balance between constitutional free speech and protection of reputation in favour of the former where the publication of matters of public interest is concerned? If the answer is "yes", the next question is: how should this change be effected? Should the prevailing balance be altered by adopting the "responsible journalism" test prescribed in *Reynolds (HL)* or a variation of it, or by adopting some other method that does not necessarily exempt the defendant from liability for defamation (see, *eg*, [297] below)?

268 We should at this juncture emphasise three points. First, the considerations which we shall discuss below (at [273]–[285]) are *not* an exhaustive list of the factors which our courts should take into account in the event that they are called on to decide the key question; there may be other factors that ought to be considered as well, depending on the facts and circumstances of the case at hand. Second, the key question concerns the specific context of publication of matters of public interest, especially matters concerning public figures and political issues. Third, the key question affects *Singapore citizens* only. It has no relevance to *non-citizens* (such as the Appellants) because the makers of our Constitution did not think it proper or wise to confer constitutional free speech on non-citizens, who have no stake in our country. Non-citizens do, however, enjoy common law free speech in Singapore, and they are entitled to express themselves freely subject only to the ordinary laws of the land, including the law of defamation. Any development of our common law of defamation based on "a 'liberalising intention'" (*per* Lord Carswell in *Seaga* ([177] *supra*) at [10]) will only affect Singapore citizens.

(2) Some considerations relevant to the key question

269 In determining whether the key question should be answered in the affirmative or the negative, our courts in essence have to decide how the balance between constitutional free speech and protection of reputation should be struck in this country. In this regard, they should bear in mind two salient points.

270 First, our courts must be mindful of the extent to which they can decide whether constitutional free speech should prevail over protection of reputation. Although there is nothing in Art 14(2)(*a*) of the Singapore Constitution and the Defamation Act (1985 Rev Ed) which precludes our courts from developing the common law of defamation for "the common convenience and welfare of society" (*per* Parke B in *Toogood* ([179] *supra*) at 193; 1050) in keeping with Singapore's prevailing political, social and cultural values (save for those provisions in these two statutes which impose such a restriction), Art 14(2)(*a*) also expressly provides that it is Parliament which has the final say on how the balance between constitutional free speech and protection of reputation should be struck.

271 Second, our courts must remember that "striking [the] balance between freedom of expression and protection of reputation calls for *a value judgment which depends upon local political and social conditions*" [emphasis added] (see *Lange v Atkinson (PC)* ([226] *supra*) at 261). In making this value judgment (in the context of publication of matters of public interest), some of the questions which our courts will have to consider are the following:

(a) How should our courts go about deciding whether constitutional free speech should prevail over protection of reputation, and, if so, the extent to which the former should take precedence over the latter? (In this regard, the point which we have just mentioned in the preceding paragraph is relevant as well.)

(b) How are our courts to determine which are the "local political and social conditions" (*ibid*) that can tell them whether or not Singaporeans should have greater latitude to exercise constitutional free speech and less legal protection for their reputations?

(c) What kind of evidence should our courts take into account in making a value judgment on this issue? (*Eg*, do they need the equivalent of a Brandeis brief to assist them in making an informed decision on the issue?)

272 We would suggest that the following considerations are particularly pertinent to how the key question may be answered by our courts, namely:

(a) The balance in Singapore between constitutional free speech and protection of reputation has remained unchanged since it was struck on 16 September 1963 when freedom of speech became a constitutional right here.

(b) Our common law of defamation has all along been held, implicitly, in numerous decisions of this court to strike the appropriate balance between constitutional free speech and protection of reputation.

(c) Unlike the legislative policy in England (as expressed in s 12 of the HRA), Singapore does not have any law recognising journalistic material as being of special importance in the context of publishing matters of public interest. Instead, as stated at [251] above, Parliament has enacted laws to restrict the constitutional free speech conferred by Art 14(1)(*a*) of the Singapore Constitution (and its predecessor provisions), and there is no room in our political context for the

media to engage in investigative journalism which carries with it a political agenda.

(d) Our local political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the governance of this country.

We shall now elaborate on these considerations.

(A) THE EXISTING BALANCE BETWEEN CONSTITUTIONAL FREE SPEECH AND PROTECTION OF REPUTATION IS APPROPRIATE

273 With regard to factors (a) and (b) of the preceding paragraph, the *Reynolds* privilege is a recent development in defamation law. It was developed with the "liberalising intention" (*per* Lord Carswell in *Seaga* ([177] *supra*) at [10]) of giving the Convention right of free speech preference over protection of reputation in view of s 12 of the HRA (reproduced at [198] above), which specifically requires the English courts to have, *vis-à-vis* journalistic material, "particular regard to … the extent to which … it is, or would be, in the public interest for the material to be published" (see s 12(4)(a)(ii) of the HRA). In contrast, constitutional free speech under Art 14(1)(*a*) of the Singapore Constitution (and its predecessor provisions) has existed in Singapore since 16 September 1963 (see [237] above). The balance between constitutional free speech and protection of reputation was struck on that date and, in the intervening years, our courts have consistently held that our common law of defamation is not incompatible with constitutional free speech even though it is a restriction on the latter (see, *inter alia*, *JJB v LKY (1990)* ([238] *supra*) and *JJB v LKY (1992)* ([19] *supra*); see also *Lee Hsien Loong (HC)* ([32] *supra*), which was decided after *Reynolds (HL)*). This suggests that our courts regard the balance struck on 16 September 1963 between constitutional free speech and protection of reputation as still being appropriate in the prevailing circumstances in Singapore today. Proponents of change must produce evidence of a change in our political, social and cultural values in order to satisfy the court that change is necessary so as to provide greater protection against the existing law of defamation for defendants where the publication of matters of public interest is concerned.

274 In this connection, as mentioned at sub-para (c) of [259] above, the Appellants have argued that the recent moves announced by the Government to increase the number of Non-Constituency Members of Parliament, institutionalise the Nominated Members of Parliament scheme and relax certain restrictions under the Films Act are political developments designed to provide greater accountability and transparency in the political system as well as to encourage democratic participation in the political affairs of Singapore, and the courts should follow suit by adopting the *Reynolds* privilege (or, at least, the *Reynolds* rationale). Our courts will have to determine whether these developments are sufficient evidence of a change in our political, social and cultural values that will support deciding the key question in the affirmative (*ie*, that will support applying the *Reynolds* rationale to our citizens in the context of publication of matters of public interest).

(B) THE MEDIA'S ROLE IN OUR SOCIETY

275 With regard to factor (c) of [272] above, s 12(4) of the HRA reflects the especial importance which British society places on "the role discharged by the media in the expression and communication of information and comment on political matters" (*per* Lord Nicholls in *Reynolds (HL)* ([20] *supra*) at 200). As Lord Nicholls elaborated (*id* at 205):

[T]he court should have particular regard to the importance of freedom of expression. *The press*

> *discharges vital functions as a bloodhound as well as a watchdog*. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication. [emphasis added]

Similarly, Lord Cooke of Thorndon observed that s 12 of the HRA as a whole (*id* at 224):

> … is inspired by the purpose of ensuring a due measure of media freedom. What are significant in the present context are the references to ***journalistic*** *material* and especially to *the extent to which it is, or would be, in the public interest for the material to be published*. … The common law of qualified privilege should evolve in harmony with that legislative approach. [emphasis added in bold italics]

In a similar vein, Lord Bingham stated in *Jameel* ([169] *supra*) at [18] that "[f]reedom to publish free of unjustifiable restraint must indeed be recognised as a distinguishing feature of the sort of society which the [European] Convention seeks to promote".

276 It is also important to note that, in England, media freedom includes freedom for the media to engage in "investigative journalism" (see *Reynolds (HL)* at 200). This can be seen from Lord Nicholls' comment that (*ibid*):

> [O]ne of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.

277 In contrast, we do not have a law directing the courts to have special regard, where journalistic materials are concerned, to the extent to which it is or would be in the public interest for the materials in question to be published (*cf* s 12(4)(a)(ii) of the HRA). Furthermore, as counsel for the Respondents pointed out to us, in our political context, the notion that "[t]he press discharges vital functions as … a watchdog" (*per* Lord Nicholls in *Reynolds (HL)* at 205) is not accepted. The media has no special role beyond reporting the news and giving its views on matters of public interest fairly and accurately. This can be seen from the following extract (cited by the Respondents' counsel) of a remark made by the then Prime Minister, Mr Goh Chok Tong ("Mr Goh"), in *Asiaweek* (3 December 1999):[note: 68]

> *If things are wrong, the media can report it*. *But the watchdog – meaning that [the media] can investigate every matter, espousing [its] own views and setting [its] own agenda – I would not agree with that*. If you want to set up a political agenda, then you have to be in the political arena. Otherwise you don't have the accountability and responsibility of looking after the place. We have got to face the people. If we misgovern, they will chase after us. Our head will be on the chopping block. The media's head is not on the chopping block. [emphasis added; emphasis in original omitted]

In this regard, we also note the following comments on the role of the local media by Dr Lee Boon Yang (the then Minister for Information, Communications and the Arts) at a lunch gathering of the Singapore Press Club on 12 November 2003 (see <http://app.mica.gov.sg/Default.aspx?tabid=79&ctl=Details&mid=540&ItemID=586> (accessed 17 September 2009)):

> The local media's role is to report the news *accurately, factually and objectively* for Singaporeans. …

…

… [It is] inappropriate … for the media to editorialise in its reporting of the news or to report the news with a twist just to be different. Doing so will confound readers as to the intent and impact of the issues being reported upon.

[emphasis added]

278 In short, the media's role in Singapore has hitherto been and continues to be limited to what Lord Nicholls referred to in *Reynolds (HL)* as "the traditional activities of reporting and commenting" (*id* at 200). Our political context therefore militates *against* applying the *Reynolds* rationale to extend the scope of the traditional qualified privilege defence where the publication of matters of public interest is concerned. The media can, however, as Mr Goh acknowledged, report on "things [that] are wrong" (for instance, where there is corruption in the Government). When "things are wrong" in relation to matters that affect the way in which the State is governed, citizens obviously have a right to know about what has gone wrong. It also goes without saying that Mr Goh's statement that the media can report on "things [that] are wrong" does not mean that the media is free to publish defamatory statements.

(C) OUR LOCAL EMPHASIS ON HONESTY AND INTEGRITY IN PUBLIC DISCOURSE

279 With regard to factor (d) of [272] above, in *Reynolds (HL)*, the House of Lords accepted that qualified privilege should not attach to the publication of defamatory statements which, *because they are false*, have no political, social or cultural value. Lord Nicholls explained that this was because (*id* at 201):

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being … [I]t should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. *Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased* ***falsely***. [emphasis added in italics and bold italics]

280 In American jurisprudence on freedom of speech, one of the strongest arguments for tolerating defamation is the "marketplace of ideas rationale" (see Marin Roger Scordato, "The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law" (2007) 40 Conn L Rev 165 ("Scordato's article") at 186), *viz*, the theory that all ideas, opinions and views must be allowed to compete in the marketplace, where truth will ultimately prevail to the eventual benefit of society (*id* at pp 186–189). This is a very powerful argument in favour of allowing a great degree of latitude *vis-à-vis* freedom of speech, but it has not been accepted in England, Australia, New Zealand or other Commonwealth jurisdictions as a sufficient legal basis for allowing the publication of defamatory views or opinions.

281 In *Reynolds (HL)*, Lord Cooke discussed the "marketplace of ideas" rationale (at 218) in these words:

> [I]t was eloquently said by Judge Learned Hand in *United States v Associated Press* (1943) 52 F Supp 362, 372 that the First Amendment [which prohibits the US legislature from enacting any law which forbids or abridges the free exercise of (*inter alia*) freedom of speech]
>
> > "presupposes that right conclusions are more likely to be gathered out of a multitude of

> tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

In like vein was the pronouncement of Holmes J, dissenting but with the concurrence of Brandeis J, in *Abrams v United States* (1919) 250 US 616, 630, "the best test of truth is the power of the thought to get itself accepted in the competition of the market".

Lord Cooke went on to caution against a wholesale embrace of the marketplace of ideas rationale in the area of defamation law. He said (*ibid*):

> Such observations are most naturally apposite … to freedom to express ideas and convey news. *Neither of the cases in which they were made was a defamation case. It would be dangerous to stretch them out of context*. As to defamatory allegations of fact, even in the United States the opinions of jurists differ on the extent to which the collectively cherished right of free speech is to be preferred to the individually cherished right to personal reputation; and it is certain that neither in the United Kingdom nor anywhere else in the Commonwealth could it be maintained that the people have knowingly staked their all on unfettered freedom to publish falsehoods of fact about political matters, provided only that the writer or speaker is not actuated by malice. *It would be a mistake to assume that commitment to the cause of human rights must lead to a major abandonment of established common law limitations on political allegations of fact*. [emphasis added]

282 It seems to us that, while the competition of ideas in the marketplace can lead to advances in science and knowledge to the benefit of mankind (which would justify allowing the fullest scope for exercising freedom of speech), this applies largely in the sphere of statements relating to *ideas or beliefs which cannot or have yet to be proved with scientific certainty to be either true or false* (*eg*, the belief that socialism is superior to capitalism as a way of organising society, or that dinosaurs became extinct as a result of a large asteroid striking the earth). Where there exist divergent ideas or beliefs whose truth or falsity cannot or has yet to be determined with scientific certainty, it is usually the case that one of these ideas or beliefs will eventually come to be accepted by society as "true" in the sense of being the most accurate or the most rational, with the others either being discarded or falling into disfavour. Taking one of the examples which we have just mentioned, it is possible, by comparing the economic growth of capitalist countries and that of socialist countries over time, to ascertain whether capitalism or socialism is the better way of organising society. From this perspective, it is possible, and indeed necessary, for "the competition of the market" (*per* Holmes J in *Abrams v United States* 250 US 616 (1919) at 630) to sieve out the idea or belief which society deems to be "true" (*ie*, the most accurate or the most rational), and society derives value from this process.

283 In contrast, it is questionable whether the marketplace of ideas rationale is applicable to false statements. Such statements are (by definition) inaccurate and society does not derive any value from their publication as "there is no interest in being misinformed" (*per* Lord Hobhouse of Woodborough in *Reynolds (HL)* at 238; see also [284] below). This is *a fortiori* the case where the false statement in question is also one which is defamatory because (*id* at 201 *per* Lord Nicholls):

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being …

It is one thing to falsely claim that an UFO has been spotted over the skies of Singapore; it is quite another to falsely assert that a person is a crook or a charlatan, especially if that person is also a holder of public office.

284 In this regard, Lord Hobhouse's observation in *Reynolds (HL)* as to why the publication of defamatory falsehood should not be condoned is pertinent. In commenting on the importance of the "liberty to communicate (and receive) information" (*id* at 238), he said (*ibid*):

> [I]t is important always to remember that *it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation*. The working of a democratic society depends on the members of that society … being informed not misinformed. Misleading people and … purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. *There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations*. [emphasis added]

285 Lord Hobhouse's observation resonates with our local political context. In Singapore, there is no place in our political culture for making false defamatory statements which damage the reputation of a person (especially a holder of public office) for the purposes of scoring political points. Our political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the governance of the country. This can be seen from the reply by the then Minister for Law and Minister for Foreign Affairs, Prof S Jayakumar ("Prof Jayakumar"), to a query in Parliament on whether the Government had responded to the allegations made in the US State Department Singapore Country Report on Human Rights Practices 1997. Prof Jayakumar said, "Singapore's political culture … seeks to maintain a high standard of truth and honesty in politics" (see *Singapore Parliamentary Debates*, *Official Report* (20 April 1998) vol 68 at cols 1973–1974), and, therefore (*ibid*):

> If the integrity of [Singapore's] political leaders or key institutions is questioned, Singapore leaders will not hesitate to clear their names and protect these institutions through due process of law.

This is another important factor which our courts must bear in mind should they be called on to decide the key question.

(3) A consequential consideration if the key question is answered in the affirmative

286 If our courts answer the key question in the affirmative (*ie*, if they rule in favour of applying the *Reynolds* rationale to the publication of matters of public interest such that greater latitude is given to constitutional free speech at the expense of protection of reputation in this specific context), they will have to go on to consider how the new balance between these two competing interests should be struck. In this regard, it would, in our view, be helpful for our courts to bear in mind the different approaches which other common law jurisdictions have taken in order to give freedom of speech precedence over protection of reputation (*cf* the current approach reflected in the Singapore Constitution, which may be regarded as a "subsidiary right" approach in that Art 14(2)(*a*) expressly allows Parliament to impose restrictions on constitutional free speech so as to (*inter alia*) provide against defamation). Broadly speaking, two main approaches can be discerned.

287 First, there is the "preferential right" approach, under which preference is given to freedom of speech over protection of reputation. The *Reynolds* privilege and the *Lange v ABC* privilege (both of which were rejected by Belinda Ang J in *Lee Hsien Loong (HC)* ([32] *supra*) and the Judge in the court below) are examples of this approach. Under the *Reynolds* privilege, freedom of speech takes precedence where the "responsible journalism" test is satisfied. Under the *Lange v ABC* privilege, freedom of speech is preferred if the subject matter of the defamatory statement in question relates

to "government and political matters" (see *Lange v ABC* ([173] *supra*) at, *inter alia*, 114) and the defendant's conduct in publishing that statement is reasonable within the meaning of s 22 of the NSW Defamation Act.

288 Second, there is the "fundamental right" approach, as exemplified by the *New York Times* privilege (which was rejected by this court in *JJB v LKY (1992)* ([19] *supra*)) and the *Lange v Atkinson* privilege (which was rejected by Belinda Ang J in *Lee Hsien Loong (HC)* as well as by the Judge in the present case). Under this approach, freedom of speech is treated as a fundamental right that trumps protection of reputation unless it is proved that the defendant published the defamatory statement in question with malice (see *New York Times v Sullivan* ([215] *supra*) at 279–280 *vis-à-vis* the *New York Times* privilege, and s 19(1) of New Zealand's Defamation Act *vis-à-vis* the *Lange v Atkinson* privilege).

289 For completeness, we should add that there appears to be a third approach under which freedom of speech may be preferred over protection of reputation, namely, the "co-equal rights" approach, as exemplified by *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 ("*Mosley*"), a decision of the English High Court, and *Galloway v Telegraph Group Ltd* [2006] EMLR 11 ("*Galloway*"), a decision of the English CA. This approach differs from both the "preferential right" approach and the "fundamental right" approach in that it treats protection of reputation (as an aspect of the right to privacy under Art 8 of the European Convention) and freedom of speech (specifically, the Convention right of free speech) as co-equal rights such that the former does not automatically take precedence over the latter. Freedom of speech may, however, still prevail over protection of reputation in a particular case if such an outcome is justified under the "ultimate balancing test" (*per* Eady J in *Mosley* at [14]).

(4) Summary of our observations on the key question

290 To summarise our observations on the key question:

(a) A Singapore court which is called on to decide the key question must in essence determine whether the existing balance between constitutional free speech and protection of reputation should be shifted in favour of the former. In considering this, the court has to make "a value judgment" (see *Lange v Atkinson (PC)* ([226] *supra*) at 261) as to whether the contemporary political, social and cultural values in this country support such a development.

(b) If the court rules on the key question in the affirmative (*ie*, if it rules in favour of giving constitutional free speech precedence over protection of reputation where the publication of matters of public interest is concerned), it will have to go on to decide how the new balance between these two competing interests should be struck. In this regard, the court should note the divergent approaches adopted by other common law courts on this issue and decide whether any of the existing approaches is relevant to our local conditions and circumstances.

(5) Observations on some practical difficulties in applying the Reynolds privilege and the "responsible journalism" test

291 Before we conclude this judgment, we think it desirable to highlight, as an integral part of our observations on the *Reynolds* rationale, three main practical difficulties in the application of the *Reynolds* privilege and the "responsible journalism" test upon which it turns. These difficulties have surfaced since the decision in *Reynolds (HL)*. In this connection, we note that the *Reynolds* privilege is currently "still in the process of development" (*per* Lord Carswell in *Seaga* ([177] *supra*) at [5]) and has yet to reach its final stage of metamorphosis.

292 First, in *Jameel* ([169] *supra*), Lord Hoffmann stated at [54] that the *Reynolds* privilege was "available to anyone who publishe[d] material of public interest *in any medium*" [emphasis added]. Presumably, his Lordship meant that the privilege and the "responsible journalism" test would apply to the publication of defamatory materials on the Internet as well. The problem here is that there are two aspects of the Internet which are inimical to protection of reputation. First, the universal reach of the Internet means that information published via this medium may be accessed by a potentially limitless audience, leading in turn to potentially greater harm to the plaintiff's reputation. Second, information published via the Internet is bound to be accessed by at least some sections of the public for whom the information in question is not a matter of public interest (see Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2nd Ed, 2005) ("Collins") at para 11.21). Taken together, these two aspects of the Internet entail that, where defamatory material is published via this medium (as opposed to the traditional mediums of communication), there may be greater damage to the plaintiff's reputation and, yet, less reasons to allow publication of the defamatory material concerned. The fact that information published via the Internet is invariably accessed by at least some persons for whom the information in question is not a matter of public interest also complicates the court's task of ascertaining whether the defamatory material in question is a matter that the public in the *particular* case at hand has the right to know of, which requirement is an essential element of the *Reynolds* privilege. As noted in Collins (*ibid*):

> [P]ublishing material on a web page, or on a general-purpose bulletin board with an extensive global readership, may militate against the availability of the [*Reynolds* privilege], because the offending material will have been published to persons who do not have a 'right to know', or an interest in receiving the information.

293 Second, *Reynolds (HL)* was decided on the basis that the Convention right of free speech should take precedence over protection of reputation. There is, however, a discernable incipient recognition in England that these two rights may in fact be *co-equal* rights (see, *eg*, *Mosley* ([289] *supra*) at [10] *per* Eady J and *Galloway* ([289] *supra*) at [80] *per* Sir Anthony Clarke MR). It remains to be seen whether the House of Lords too will recognise protection of reputation as a right co-equal to the Convention right of free speech. If the House of Lords does adopt this view as well, this is likely to affect the evolution (and, perhaps, even the existence) of the *Reynolds* privilege as well as the *Reynolds* rationale, although the "responsible journalism" test will (in our view) most likely remain relevant as a general guide for the English courts in deciding whether the Convention right of free speech or protection of reputation should prevail in a particular case.

294 Third, the decision in *Reynolds (HL)* has moved defamation law in the direction of the law of negligence in that the concept of reasonable care permeates the "responsible journalism" test (see, *eg*, the third and fourth *Reynolds* factors; see also *Jameel* at [55], where Lord Hoffmann drew an analogy between the standard of responsible journalism and that of reasonable care). For the publication of a defamatory article to satisfy the "responsible journalism" test, the defendant must prove that he took "such steps as a responsible journalist would take to try and ensure that what [was] published [was] accurate and fit for publication" (*per* Lord Bingham in *Jameel* at [32]). The degree of care that is required of the defendant is necessarily imprecise since it depends on the facts of the particular case concerned.

295 Notwithstanding Lord Hoffmann's assertion in *Jameel* at [55] that "the standard of responsible journalism is as objective and no more vague than standards such as 'reasonable care' which are regularly used in other branches of law", it appears to us that what ultimately passes as responsible journalism can be said to be *subjectively* decided by the court based on the *Reynolds* factors (which are objective). As pointed out in Scordato's article ([280] *supra*), what the court effectively has to do when it applies the "responsible journalism" test is to "engage in a content-based, value-laden

examination of the complained of speech and … ultimately determine its social value" (*id* at p 194). Such an approach is unsatisfactory because (*id* at p 195):

> *The court must inevitably and profoundly reference the subject of the speech against its own personal sense of social interest, priorities and serious newsworthiness. Such a task is … less objective and neutral*. …
>
> Hand in hand with the greater subjectivity and indeterminacy of the nature of the speech test comes a greater variability in the behaviour of courts in their application of the test. *Given its nature, one could expect very significant variability in the judgments of different courts as to just what is and [what] is not a matter of legitimate public interest*.
>
> [emphasis added]

In this regard, we note that, in *Lange v Atkinson (CA) (No 2)* ([227] *supra*), the New Zealand CA rejected the *Reynolds* privilege for the very reason that it "appear[ed] to alter the structure of the law of qualified privilege in a way which add[ed] to the *uncertainty* and chilling effect almost inevitably present in this area of law" [emphasis added] (*id* at [38]).

296 It is also pertinent to note that the impact of the *Reynolds* privilege (as well as the concept of responsible journalism upon which it rests) on the structure of defamation law has yet to be fully understood. We mentioned earlier that the application of the "responsible journalism" test effectively makes malice irrelevant as a means of defeating a plea of qualified privilege (see *Loutchanksy v Times Newspapers Ltd (Nos 2–5)* ([207] *supra*) at [33] *per* Lord Phillips and *Jameel* at [46] *per* Lord Hoffmann). The defences of justification and fair comment may also become redundant in that, although these defences can co-exist with a defence based on the *Reynolds* privilege, it will generally be easier for a defendant who publishes defamatory material of public interest to satisfy the "responsible journalism" test than to successfully establish a defence of justification and/or fair comment; thus, over time, the latter two defences may not need to be relied on at all *vis-à-vis* the publication of defamatory information of public interest. This may in turn spawn more cases of *irresponsible* journalism being passed off as responsible journalism in the *Reynolds (HL)* sense.

297 A further observation which we wish to make is that, if the *Reynolds* rationale were to be applied in Singapore in the context of publication of matters of public interest, the new balance which has to be struck between constitutional free speech and protection of reputation so as to give effect to this rationale does not necessarily entail excusing or immunising the defendant from liability where the conditions for giving constitutional free speech precedence over protection of reputation are satisfied. The *Reynolds* rationale can equally be given effect by holding the defendant liable for defamation but adjusting the quantum of damages payable, with the exact amount to be paid in each case being calibrated by the court in proportion to the degree of care which the defendant has taken (or failed to take) to ensure that what he publishes is "accurate and fit for publication" (*per* Lord Bingham in *Jameel* at [32]). Such an approach has the merit of deterring irresponsible journalism. There is no reason why a defendant who has published a defamatory statement should be allowed to get off scot-free for injuring the plaintiff's reputation simply because he has satisfied the "responsible journalism" test.

Conclusion

298 Reverting to the issues which this court needs to decide in the present appeals, we agree with and affirm the Judge's ruling on the natural and ordinary meaning of the Disputed Words in relation to the Respondents. We also uphold the Judge's decision to allow LHL to amend his SOC and to reject

the Appellants' pleaded defences. Accordingly, we dismiss both appeals with costs and the usual consequential orders.

[note: 1] See the Appellants' Core Bundle ("ACB") at vol 2(A), pp 119–122.

[note: 2] See para 23 of the statement of claim ("SOC") filed on 22 August 2006 for Suit 540 (at ACB vol 2(A), pp 170–171).

[note: 3] See para 23 of the SOC filed on 22 August 2006 for Suit 539 (at ACB vol 2(A), pp 139–140).

[note: 4] See para 3 of the Appellants' written submissions dated 8 May 2008 in respect of Summons No 3833 of 2007 (at ACB vol 2(D), pp 1312–1313).

[note: 5] See para 1 of the Appellants' written submissions dated 18 July 2008 in respect of Summons No 3834 of 2007 (at ACB vol 2(D), p 1409).

[note: 6] See pp 15–16 of Summons No 3239 of 2008 (at ACB vol 2(D), pp 1272–1273).

[note: 7] See para 43 of the Respondents' Case.

[note: 8] *Ibid*.

[note: 9] See para 15 of the Appellants' skeletal arguments filed on 14 May 2009 ("the Appellants' Skeletal Arguments").

[note: 10] *Ibid*.

[note: 11] See the Appellants' Skeletal Arguments at para 13.

[note: 12] *Id* at para 14.

[note: 13] See the Respondents' Case at paras 181–182.

[note: 14] See, for example, the Respondents' Case at para 227, which sets out some newspaper articles and reports on the NKF Saga.

[note: 15] See ACB vol 2(D) at pp 1314–1316.

[note: 16] *Id* at p 1325.

[note: 17] *Id* at p 1385.

[note: 18] See p 4 of the certified transcript of the notes of evidence of the hearing before the Judge on 16 May 2008 (at p 14 of the Respondents' Core Bundle).

[note: 19] See ACB vol 2(D) at p 1385.

[note: 20] See Annex A to LKY's SOC filed on 22 August 2006, which sets out a list of the defamation actions previously brought by LKY (at ACB vol 2(A), pp 180–183).

[note: 21] See Annex A to LHL's amended SOC filed on 18 August 2008, which sets out a list of the defamation actions brought by LHL (at ACB vol 2(A), pp 212–213).

[note: 22] See para 26 of the first amended defence in Suit 540 (at ACB vol 2(A), p 295) and para 26 of the second amended defence in Suit 539 (at ACB vol 2(A), p 350).

[note: 23] See para 23 of LHL's amended SOC filed on 18 August 2008 (at ACB vol 2(A), p 204) and para 23 of LKY's SOC filed on 22 August 2006 (at ACB vol 2(A), p 171).

[note: 24] See the Appellants' Case at para 66.

[note: 25] See Exhibit "LHL-7" of LHL's affidavit affirmed on 30 August 2007 ("LHL's 30 August 2007 affidavit") (at ACB vol 2(B), p 535).

[note: 26] See Exhibit "LHL-7" of LHL's 30 August 2007 affidavit (at ACB vol 2(B), p 547).

[note: 27] See Exhibit "LHL-7" of LHL's 30 August 2007 affidavit (at ACB vol 2(B), at p 552).

[note: 28] See Exhibit "LHL-7" of LHL's 30 August 2007 affidavit (at ACB vol 2(B), p 555).

[note: 29] See para 26 of the first amended defence in Suit 540 (at ACB vol 2(A), p 295) and para 26 of the second amended defence in Suit 539 (at ACB vol 2(A), p 350).

[note: 30] See the Respondents' Case at para 182, where the terms of the public apologies are set out in full.

[note: 31] *Id* at para 216.

[note: 32] *Id* at paras 216–217.

[note: 33] *Id* at paras 220–221.

[note: 34] See the Appellants' Case at para 48.

[note: 35] *Id* at para 57.

[note: 36] See the Respondents' Case at paras 53–54.

[note: 37] See the Appellants' Case at para 57.

[note: 38] *Id* at para 50.

[note: 39] *Ibid*.

[note: 40] See the Appellants' Case at paras 59–62.

[note: 41] *Id* at para 66.

[note: 42] *Id* at para 68.

[note: 43] See the Respondents' Case at para 354.

[note: 44] See para 29 of the second amended defence in Suit 539 (at ACB vol 2(A), pp 380–384) and para 29 of the first amended defence in Suit 540 (at ACB vol 2(A), pp 333–339).

[note: 45] See the Appellants' Case at para 73.

[note: 46] *Ibid*.

[note: 47] See the Appellants' Case at para 74.

[note: 48] See the Appellants' further written submissions filed on 2 June 2009 ("the Appellants' 2 June 2009 submissions") at para 24.

[note: 49] See the Appellants' Case at paras 78–79.

[note: 50] *Id* at para 81.

[note: 51] *Id* at para 77.

[note: 52] See the Appellants' 2 June 2009 submissions at para 32.

[note: 53] *Ibid*.

[note: 54] See the Appellants' Case at para 83.

[note: 55] See the Appellants' 2 June 2009 submissions at para 31.

[note: 56] *Id* at para 33.

[note: 57] *Ibid*.

[note: 58] See the Appellants' Case at para 77.

[note: 59] *Id* at para 74.

[note: 60] *Id* at para 83.

[note: 61] See the Appellants' 2 June 2009 submissions at para 33.

[note: 62] See the Appellants' Case at para 77.

[note: 63] See para 29 of the Appellants' 2 June 2009 submissions.

[note: 64] *Id* at para 15.

[note: 65] *Ibid*.

[note: 66] See the Appellants' 2 June 2009 submissions at para 42(19).

[note: 67] *Ibid*.

[note: 68] See the Respondents' Case at para 407(g).