Hady Hartanto *v* Yee Kit Hong and others
[2014] SGHC 40

Case Number : Suit No 679 of 2011

Decision Date : 04 March 2014

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Suresh Nair Sukumaran, Muralli Rajaram Raja (Straits Law Practice LLC) for the plaintiff; Ang Cheng Hock SC, Loong Tse Chuan, Ramesh Kumar, Michelle Yap and Eunice Chew (Allen & Gledhill LLP) for the defendants.

Parties : Hady Hartanto — Yee Kit Hong and others

Tort – defamation – publication – defamatory statements

Tort – defamation – justification

Tort – defamation – qualified privilege – malice

4 March 2014 Judgment reserved.

Woo Bih Li J:

Introduction

1 This is a claim in defamation by the plaintiff against the defendants for publishing various words ("the disputed words") in two documents on an internet portal. The documents were in relation to four transactions which took place while the plaintiff was a director of a company with the defendants. The trial before me concerns only the liability of the defendants with regard to the disputed words. [note: 1] The issues are:

(a) The meanings of the disputed words;

(b) the defence of justification;

(c) the defence of qualified privilege; and

(d) the defence of consent or leave and licence.

2 For ease of reference, a glossary containing various definitions is attached as Annexure A of this judgment.

[LawNet Admin Note: Annexure A is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

3 The plaintiff, Hady, was from 15 March 2011 to 25 October 2011 [note: 2] a director of SEH. He is suing the defendants, Yee, Chia and Ko, who were also directors of SEH at the material time for publishing the disputed words in:

(a) The Announcement: a 6-page announcement, published on 7 September 2011 by SEH on SGXNET, and

(b) The Executive Summary: an executive summary annexed to the Announcement which was prepared by SEH's special auditor, SFCA.

The background

4 SEH trades on the Catalist platform of SGX-ST.

5 SEH's subsidiaries include Scorpio East Pictures, Scorpio East Entertainment, and Scorpio East Production. SEH and its subsidiaries will hereinafter be referred to as "the Scorpio Group".

6 Hady was appointed as a director of SEH on 15 March 2011. He had acquired an indirect interest in 29.56% of SEH's shares from John Ho and his family members. [note: 3]

7 From 14 March to 21 March 2011, Shiong Jin acted as Hady's advisor and participated in the management of SEH. [note: 4]

8 From 15 March to 21 March 2011, the Scorpio Group engaged in various steps in respect of four transactions central to this case.

9 Thereafter, on 23 March 2011, the Audit Committee of SEH, which comprised the defendants, recommended the appointment of SFCA as a special auditor to investigate the steps and the four transactions. The Board of SEH accepted the recommendation on the same day. Apparently, after the defendants met Chee on the same day, SFCA was formally appointed on 25 March 2011. [note: 5]

10 After its investigation, SFCA produced the SFCA Report, which included the Executive Summary, highlighting SFCA's concerns on these steps and the four transactions with recommendations for SEH. This was the same executive summary which was later annexed to the Announcement published on SGXNET on 7 September 2011.

11 The steps and the four transactions highlighted by SFCA are stated below.

(1) The Scorpio Contracts

12 Prior to Hady's appointment as director of SEH on 15 March 2011, the Scorpio Group had entered into nine contracts for the production of Chinese language motion pictures and serials as well as some concerts, *ie*, the Scorpio Contracts. [note: 6] The Scorpio Group had paid S$4.1m to various producers in relation to the Scorpio Contracts. [note: 7]

13 As Hady was interested in acquiring shares in SEH, he instructed Adept to conduct a financial due diligence on SEH sometime in December 2010. [note: 8] Adept prepared the Adept Report which stated that the Scorpio Contracts were potentially loss-making. [note: 9]

14 Hady said he did not want the Scorpio Contracts to affect the Net Asset Value (the "NAV") of the shares he was to acquire. If the Scorpio Contracts remained, he wanted John Ho to guarantee

their profitability which John Ho was not prepared to do. He alleged that he had agreed to John Ho's proposal to terminate the Scorpio Contracts. [note: 10] The termination would cost 15% of the deposit, with the balance to be paid back by the producers of the Scorpio Contracts. Hady considered that this loss to SEH would still be lower than if the Scorpio Group were to continue with the Scorpio Contracts. [note: 11]

(2) The Alpha Contracts

15 Hady executed contracts, on behalf of Scorpio East Pictures, with Alpha for the production of motion pictures and concerts, *ie*, the Alpha Contracts. These contracts were dated 17 March 2011. They were in fact signed earlier as I will elaborate later. The Alpha Contracts totalled S$6.2m. [note: 12]

(3) The "round-tripping" transactions between SEH and Alpha

16 Between 17 and 21 March 2011, a total sum of S$3.2m was paid by the Scorpio Group to Alpha in respect of the Alpha Contracts. [note: 13] However, in the same period, Alpha then deposited sums totalling S$2.86m (from the S$3.2m) in cash into the bank accounts of companies in the Scorpio Group. [note: 14] These two transactions were referred to as "round-tripping" transactions in the Announcement and Executive Summary and I have adopted the term for the judgment.

17 Hady's position was that the deposits of cash from Alpha were to be treated as refunds to the Scorpio Group from the producers of the Scorpio Contracts (after deducting 15% of the deposits for termination costs) and thereafter, Alpha would be entitled to and be responsible for claiming the same amount from such producers.

(4) Proposed Investment

18 On 21 March 2011, Shiong Jin sent an email to, *inter alia*, Hady and KN Lim proposing that:

(a) S$3m be transferred from the Scorpio Group to a client account at JLC for unspecified purposes, and

(b) S$300,000 be transferred to Liu Woon San and Jung Jin in equal proportions, in respect of a proposed investment in Alpha. [note: 15]

(collectively, the "Proposed Investment")

19 Hady replied to Shiong Jin's e-mail with approval and instructed KN Lim to "proceed" with the proposed transfer of S$3.3m. [note: 16]

20 However, after being alerted to the proposed transfer, Yee issued instructions to stop the payments on 21 March 2011. [note: 17]

The defendants' concerns

21 The appointment of SFCA arose out of the defendants' concerns about the steps taken in respect of these four transactions. The SFCA Report and the Executive Summary reinforced their concerns. Consequently, SGX required SEH to disclose the Executive Summary, which SEH did by making the Announcement and appending the Executive Summary to it.

22 I will first set out the situation which the defendants said they found themselves in. Most of the information stated below is from Yee's affidavit of evidence-in-chief. [note: 18]

23 SEH was incorporated in Singapore on 24 November 2004. Its original shareholders were John Ho and his family members: Ms Lian Lee Lee, Ms Lian Poh Heng and Ms Lian Poh Chey. SEH was listed on SGX Sesdaq, the predecessor of the Catalist platform, on 23 March 2006. After the Initial Public Offering was completed, John Ho and his family members held a 29.56% shareholding in the company.

24 John Ho was the chief executive officer ("CEO") and executive director of the company from 24 November 2004 to 15 or 16 March 2011. Lian Lee Lee was an executive director of the company from 24 November 2004 to 15 or 16 March 2011.

25 Yee was appointed to SEH's Board on 9 December 2005. Chia was appointed to the Board on 17 January 2006 and Ko was appointed to the Board on 15 August 2007. At all material times, the defendants were non-executive directors.

26 On 14 March 2011, John Ho, Lian Lee Lee, Lian Poh Heng and Lian Poh Chey entered into an agreement to sell their 29.56% shareholding in SEH to Telemedia. Hady was the chairman and CEO of Telemedia.

27 The sale was completed on 15 March 2011. Upon completion of the sale, Telemedia became the single largest shareholder of SEH.

28 On 15 March 2011, a meeting was held by the Nominating Committee of the Board of SEH. The Nominating Committee comprised the defendants. This meeting was followed by a Board meeting which the defendants and Lian Lee Lee attended. The Board accepted the recommendation of the Nominating Committee to appoint Hady and Wong Teck Yenn as executive directors. At the same time, John Ho stepped down as CEO and executive director and Lian Lee Lee stepped down as executive director.

29 On 17 March 2011, a Board meeting was held. Hady attended and introduced himself as a new executive director of SEH. He was accompanied by Shiong Jin whom he introduced as his consultant. Shiong Jin made a number of proposals in respect of SEH. No decision was made on his proposals.

30 On 21 March 2011, Yee received a telephone call from SEH's finance manager, Aoki. She informed him that:

(a) Hady had executed five contracts between Scorpio East Pictures and Alpha, *ie*, the Alpha Contracts;

(b) $3.2m had been paid by companies in the Scorpio Group pursuant to the Alpha Contracts;

(c) Hady had approved the transfer of a separate sum of S$3.3m from the Scorpio Group on 21 March 2011 for the Proposed Investment; and

(d) the consolidated cash balances of the Scorpio Group at that time was only S$2.2m.

31 Yee was alarmed. Hady had not informed the defendants about the Alpha Contracts or the transfer or proposed transfer of funds. Yee told Aoki not to make any further payment without the defendants' approval. He telephoned Chia and Ko to update them. They agreed to convene an urgent Board meeting the next day, *ie*, 22 March 2011 and that Hady should be asked to attend and explain these transactions.

32 Yee had also learned on 21 March 2011 that Shiong Jin was an undischarged bankrupt and had in fact been blacklisted by SGX. In a public statement dated 13 April 2010, SGX stated that Shiong Jin had failed to demonstrate the qualities expected of directors and management of SGX-listed companies and SGX-listed companies should consult SGX before appointing Shiong Jin as a director or member of their management. Both Chia and Yee were extremely concerned that Hady had allowed Shiong Jin to participate in the Board meeting on 17 March 2011 despite the notice from SGX.

33 Yee also briefed Ong Hwee Li and Bernard Lim from SEH's Sponsor and invited them to attend the proposed Board meeting on 22 March 2011.

34 At the Board meeting on 22 March 2011, Hady informed the defendants of the Alpha Contracts, totalling S$6.2m, which he had already signed on behalf of Scorpio East Pictures. Copies of the Alpha Contracts were distributed to those present. KN Lim confirmed that S$3.2m had been paid by companies in the Scorpio Group to Alpha.

35 Yee commented that the amounts payable by Scorpio East Pictures under the Alpha Contracts were substantial and the Alpha Contracts were therefore material for the purpose of disclosure. Accordingly, Hady should have consulted and/or sought the approval of the other members of the Board prior to the execution of the Alpha Contracts and an announcement should have been made in respect of the Alpha Contracts.

36 Yee and Chia also queried Hady on the identity of the counterparty, Alpha, which appeared to be incorporated in the British Virgin Islands ("BVI"). Hady said that:

(a) the Alpha Contracts were inherited from SEH's previous management;

(b) the Alpha Contracts had been proposed by Alpha to John Ho, the former CEO of SEH;

(c) Hady was not involved in the negotiations with Alpha at all; and

(d) he believed that the necessary due diligence on Alpha had been conducted by John Ho.

37 During the meeting, Hady confirmed that he knew Alan Chan, the CEO of Alpha, prior to the execution of the Alpha Contracts. Hady said that he had been introduced to Alan Chan by one Jessica Teo of DMG & Partners Securities Pte Ltd, who was John Ho's broker in respect of the sale of his shares in SEH.

38 Yee said that he was also surprised to hear from Ong Hwee Li at the meeting that Alan Chan appeared to occupy a room at SEH's office premises. KN Lim said that Alan Chan was, at that time, working at SEH's office premises and had left some of his belongings there.

39 Following Hady's disclosure of the Alpha Contracts, all the Directors (including Hady) resolved to call for a trading halt in respect of SEH's shares so that the Board could consider the Alpha Contracts in greater detail.

40 Another meeting of the Board was held on 23 March 2011. At the meeting, copies of the Certificate of Incumbency of Alpha and a Certificate of Change of Name were distributed to those present. The documents indicated that Alpha was incorporated on 23 July 2010 under the name of Banden International Limited. That company changed its name to Alpha Entertainment Group Pte Ltd on 13 December 2010. The registered shareholders and directors of Alpha were Jung Jin and Liu Woon San.

41 At this meeting, Hady explained that:

(a) he had insisted that Alan Chan provide a personal guarantee in respect of the Alpha Contracts when he signed them;

(b) the Scorpio Contracts had been terminated and part of the deposits paid to the producers would be refunded to the Scorpio Group; and

(c) the Scorpio Group had paid money to Alpha as down payments for the Alpha Contracts. The money received by Alpha was paid back to the Scorpio Group, which would be treated by the Scorpio Group as the refund of deposits from the producers in the Scorpio Contracts, even though the payment had not actually been made by the producers. Alpha would then recover the amount of the refund directly from the producers, which, upon recovery, would be kept by Alpha for its own account.

42 Chia queried Hady on the identity of Jung Jin, who was, according to the Certificate of Incumbency of Alpha, a registered shareholder and director of Alpha. Hady said that he did not know who Jung Jin was. Chia suggested that Alan Chan be contacted for the identity of Jung Jin. When contacted, Alan Chan first described Jung Jin as a Korean national. Upon further questioning, Alan Chan revealed that Jung Jin was in fact Shiong Jin's wife.

43 Yee said he was shocked to learn that Shiong Jin's wife was a registered shareholder and director of Alpha. Since Shiong Jin appeared to be Hady's advisor, the Alpha Contracts were potentially interested person transactions.

44 At this juncture, Yee proposed that the Board meeting be adjourned so that the defendants could hold an urgent Audit Committee meeting. Hady, John Ho and KN Lim were asked to leave the room whilst the Audit Committee meeting was held.

45 At the Audit Committee meeting, Yee proposed the appointment of a special auditor to ascertain the validity of the transactions disclosed by Hady on 22 and 23 March 2011 (namely, the termination of the Scorpio Contracts and the execution of the Alpha Contracts) and the payments related to those transactions. Before the Board meeting had started, Yee had contacted Pricewaterhouse Coopers, Ernst & Young and SFCA to enquire on their availability to act as special auditors and to ask for fee estimates. After considering their respective fee estimates, he proposed that either Ernst & Young or SFCA be appointed.

46 Ong Hwee Li suggested that a telephone call be made to SGX to seek its views. A telephone call was then made to Charles Poon (Assistant Vice-President, Catalist Regulation) of SGX. They informed Mr Poon that the Audit Committee and the Sponsor believed that it would be necessary to appoint a special auditor to review the transactions in question. Mr Poon said that SGX agreed that a special audit be conducted. Mr Poon also said that SFCA had conducted a special audit of a listed company recently and was familiar with SGX's expectations.

47 After deliberation, the Audit Committee resolved to recommend to the Board that:

(a) SFCA be appointed as special auditor of SEH to review the transactions disclosed by Hady at the Board meetings on 22 and 23 March 2011 and the payments related to those transactions;

(b) the executive directors were not to enter into any new contracts without the approval of the Audit Committee; and

(c) no disbursement exceeding S$10,000 should be made without the approval of the Audit Committee.

48 After the conclusion of the Audit Committee meeting, the Board meeting resumed. The Board resolved to accept the recommendations of the Audit Committee. Hady did not raise any objections.

49 Following the Board meeting, the defendants met and briefed Chee of SFCA on that same day about the proposed scope of the special audit. They informed Chee that, upon the conclusion of the special audit, SFCA's findings would be referred to SEH's solicitors for legal advice. From the time they discovered the transactions under review (*ie*, from 22 March 2011 onwards), the defendants had been extremely conscious of the possibility of legal proceedings by SEH against Hady, as well as the possibility of legal and/or regulatory proceedings against SEH. They informed Chee that SEH would rely on SFCA's findings in the event of any legal proceeding involving SEH, and that SEH would also rely on SFCA's findings in considering whether to commence any legal proceedings against Hady.

50 SFCA was formally appointed as a special auditor of SEH on 25 March 2011. SFCA completed the special audit in August 2011. The signed report was received by the defendants on 24 August 2011 although they received a draft of the final version on or about 11 August 2011.

51 In the meantime, the trading halt for shares in SEH was converted into a suspension on 25 March 2011.

52 On 31 August 2011, Yee sent an email to Edward Tan to call a Board meeting on Friday, 2 September 2011 to, *inter alia*, receive the SFCA Report and consider and approve an announcement relating to SFCA's findings. Edward Tan sent the email to the other directors.

53 On 1 September 2011 at 12.54am, Hady replied to state that he was not available to attend the Board meeting on 2 September 2011 as he was abroad. He asked for a copy of the SFCA Report and requested that the meeting be held one week after the SFCA Report was circulated.

54 The defendants conferred by telephone on the morning of 1 September 2011. According to Yee, they agreed that Hady was not entitled to receive a copy of the SFCA Report because it was privileged. However, Hady would be provided a copy of the Executive Summary if the Executive Summary was released to the public.

55 The defendants decided that SFCA's findings were not to be disseminated to any individual whose conduct had been reviewed by SFCA as such conduct might give rise to potential legal proceedings by SEH against them. As Hady's conduct was one of the subjects of the SFCA Report, Hady should not be given a copy of the SFCA Report. Nevertheless, it appears that Chia did have some reservation about whether Hady should be denied a copy of the report. In an email dated 2 September 2011 to Yee, Chia said: [note: 19]

I've no problem with not circulating the [SFCA Report] in advance of the meeting but I'm not sure

if we could rightly deny Hady a copy of the report. After all, he's still a [B]oard member and the [SFCA Report] contains serious findings against him. Also, he had earlier already been provided with parts of the report that concern him during the maxwellisation process. So is it still justifiable not to extend him a copy, especially when we are going to determine his suitability to continue to serve as a director of the Group? Are we not obliged to let him know the details of the case against him so that he could have the opportunity to answer it before the [Nominating Committee] considers his suitability?

56 The defendants also took the view that, given the urgency of the matter, the Board meeting should proceed on 2 September 2011, as originally proposed. This was conveyed to Hady who preferred to attend the meeting in person. Eventually, the defendants agreed to postpone the meeting to 6 September 2011 to accommodate Hady and he was informed accordingly.

57 Yee also sent an email dated 1 September 2011 to Hady to say that he was not entitled to receive a copy of the SFCA Report. In the meantime, the defendants appointed A&G to act for SEH on the matter. Based on the advice of A&G, the defendants considered the possibility of not releasing the Executive Summary or making an announcement about the steps and the transactions.

58 Bernard Lim arranged a meeting on 5 September 2011 between the defendants, in their capacity as members of the Audit Committee, and SGX. The purpose of the meeting was to discuss SFCA's findings and SEH's proposed course of action in response to the findings.

59 On 5 September 2011, the defendants and Bernard Lim met with June Sim and Eliza Tan of SGX. At the meeting, June Sim and Eliza Tan informed the defendants that, in compliance with SEH's obligation under Rule 703 of the Catalist Rules, SEH was required to announce:

(a) SFCA's findings by disclosing the Executive Summary and

(b) the steps SEH proposed to take in relation to the matter.

60 A Board meeting was then held on 6 September 2011 at 2.30pm. Hady was given a copy of the Executive Summary (at about 2pm) but not of the SFCA Report.

61 At this meeting, the defendants formally accepted the SFCA Report. Hady was asked to leave the room while the defendants deliberated on SFCA's findings. The defendants' position was that any individual whose conduct gave rise to potential legal proceedings by SEH against them would have to abstain from any deliberations of the Board in respect of SFCA's findings. As Hady's conduct was one of the subjects of the SFCA Report, Hady was excluded from the deliberations of the Board.

62 At the meeting, the Board recommended that a draft of the Announcement in respect of SFCA's findings be circulated for approval on the same day (6 September 2011). Edward Tan reminded the Board that the Announcement must be released promptly on SGXNET after it was cleared by the Board and SGX.

63 At this meeting, the Board also accepted the resignation of Mr Wong Teck Yenn as a director of SEH which would be effective after the Announcement.

64 On 6 September 2011 at 9.36pm, Eliza Tan of SGX sent an email to Bernard Lim stating: [note: 20]

We refer to Catalist Rule 703 which imposes a continuing obligation on [SEH] to disclose material

information. Catalist Rule 104 further states that the directors of [SEH] are responsible for its compliance with Catalist Rules.

…

We understand that [SFCA] ha[s] concluded its [special audit] and issued [the SFCA Report] on its findings. In this regard, the directors, in compliance with Rule 703, are required to disclose the Executive Summary of the Special Auditors via SGXNET. The disclosure of material information relating to [SEH] is to assure an informed market. [SEH's] announcement should also include the Board's proposed course of action arising from breaches of the listing rules and regulations.

This email was forwarded by Bernard Lim to the defendants on 6 September 2011 at 10.01pm.

65 Thereafter, at 11.53pm, an email containing a draft of the Announcement was circulated to the members of the Board (including Hady and the defendants). The Directors were asked to respond by 10am of 7 September 2011.

66 Hady protested that he did not have enough time to list out what he considered were obvious inaccuracies in the Announcement. None of the defendants or Bernard Lim or Ong Hwee Li had any such reservation. There were numerous emails that day amongst the defendants, between Ong Hwee Li and Hady, and between Yee and Hady about whether Hady should be given more time to respond. The deadline for Hady to respond by 10am was extended to 2pm and then to 5pm. In the meantime, Hady's solicitors had sent a fax on the draft of the Announcement to state *inter alia* that it was inaccurate and deficient. Hady also sent two emails which were supposed to enclose his proposed amendments to the draft announcement but there were no enclosures. I will elaborate on the various emails later.

67 Eventually, the Announcement was broadcast at about 7.11pm on SGXNET. The Announcement annexed a copy of the Executive Summary.

68 Thereafter the defendants finally received Hady's substantive proposed amendments on the draft of the Announcement at about 7.13pm. The defendants discussed his proposed amendments among themselves. Their position was that they would have rejected his proposed amendments in any event even if the amendments had been received by 5pm.

69 The defendants stressed that the Announcement had been drafted with the advice of their solicitors and with inputs from Edward Tan and Chew Lee Sian of L&P, the Sponsor and SGX.

The disputed words

70 The disputed words, as alleged by Hady, comprised numerous sections found in both the Announcement and the Executive Summary. Rather than setting them out here, I have attached:

(a) A copy of the Announcement in Annexure B. I have underlined and numbered the portions of the Announcement which contain the disputed words for ease of reference. However, Hady has withdrawn his claim in respect of one statement as elaborated below at [76], and

(b) Excerpts of the Executive Summary containing the disputed words in Annexure C.

[LawNet Admin Note: Annexure B and Annexure C are viewable only to LawNet subscribers via the PDF in the Case View Tools.]

The meanings of the disputed words

71 The Court of Appeal has said that the test for determining the natural and ordinary meaning of the offending words in a defamation action is what 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 or what meaning was actually understood by the plaintiff, *Review Publishing Co Ltd and other v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review (CA)*") at [27].

72 The Court of Appeal said at [91] that the natural and ordinary meaning of the offending words is not limited 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. As such, a judge could rely on the principle of defamation by implication in determining the natural and ordinary meaning of the disputed words.

73 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. Per the Court of Appeal in *Review (CA)* at [26], an innuendo meaning is one in some other meaning, apart from the natural and ordinary meaning, which:

> "[A]lthough 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."

The extrinsic facts are thus those that are not matters known to the general public, but are within the knowledge of the persons to whom they are addressed. If facts are so well known, then they cannot be relied on as forming an innuendo.

74 The meanings of the disputed words must be read within the context of the publication as a whole. Words which are not in themselves defamatory may, from the whole context in which they are published, convey a defamatory imputation. So, while certain sentences may be considered defamatory, other passages may take away their sting and the claimant cannot pick and choose parts of the publication which, standing alone, would be defamatory. This was affirmed in the recent Court of Appeal decision of *Chan Cheng Wah Bernard and others v Koh Sin Chong Freddie and another appeal* [2012] 1 SLR 506 ("*Chan Cheng Wah Bernard*") at [18], where the court observed that "the bane and the antidote must be taken together".

75 I am of the view that context here requires both the Announcement and the Executive Summary to be considered. The Announcement was published with the Executive Summary annexed to it and readers were informed to refer to parts of the Executive Summary for more details. [note: 21] So, both documents must be read together. In my view, the Announcement did not add much to the Executive Summary in so far as the allegation of defamation was concerned, although Hady alleged that the disputed words in the Announcement contained an even higher defamatory meaning than the Executive Summary. What the Announcement sought to do was to give some background to the trading halt, summarise the Executive Summary, state the steps which SEH was taking and to explain why trading in the shares of SEH would continue to be suspended.

76 The meanings which Hady attributed to the disputed words were set out at great length in the

Statement of Claim (Amendment No 2) ("SOC") from paras 15(1)–(18), 16(1)–(4) and 18(1)–(10), and contained numerous allegations in respect of the steps and four transactions. The meanings pleaded by Hady are set out in full in Annexure D. I note that the meaning alleged in para 15(14) was withdrawn in Hady's closing submissions. [note: 22] This was an allegation in respect of a statement in the Announcement, *inter alia*, that Hady had dishonestly represented to SEH that S$300,000 was payable to shareholders of Alpha for an acquisition of a 51% stake in Alpha.

[LawNet Admin Note: Annexure D is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

77 In their pleadings, the defendants did not admit to the meanings Hady had attributed to the disputed words in his pleadings. On the other hand, the defendants did not assert what the disputed words meant or plead any alternative meanings in their defence. In their closing submissions, the defendants disputed the meanings of some of the disputed words, and instead put forward lower meanings for certain disputed words. They also accepted that some of the disputed words had the defamatory meanings pleaded by Hady. [note: 23]

78 The defendants should have pleaded the alternative meanings that were mentioned in their submissions. This is especially important when the meanings that the defendants are seeking to put forward are relevant to their substantive defences. Since the defendants omitted alternative meanings in their pleadings, the defendants were obliged to justify the meanings pleaded by Hady, see *Review (CA)* at [133]–[135]. The consequence of this is that they can seek to justify only the meanings alleged by Hady provided that the court also concludes that the disputed words bear the meanings alleged by Hady. The defamatory imputation is also presumed to be false and the burden is upon the defendant to prove that they are substantially true (see *Gatley on Libel and Slander* (Patrick Milmo and WVH Rogers eds) (Thomson Reuters (Legal) Limited, 11th Ed, 2008) ("*Gatley*") at para 11.3). Also, I observe that there was therefore no actual need for the defendants to have disputed the meanings pleaded by Hady since they had not pleaded their own meanings.

79 To establish whether the disputed words were defamatory of Hady, and in light of the numerous disputed words and meanings pleaded, I have approached the issue in the following manner: I will first set out what I consider the meanings of the disputed words to be, followed by a comparison with the pleaded meanings. I will then conclude with the findings of what was defamatory of Hady.

Scorpio Contracts

80 The termination of the Scorpio Contracts was significant to the Scorpio Group and the intention to terminate them should have been disclosed to the Board to obtain the Board's approval, but this was not done. [note: 24] The termination of the Scorpio Contracts should also have been disclosed by SEH on SGXNET but was not. [note: 25]

81 It was implied, if not expressly stated, that John Ho (not Hady) was responsible for the failure to disclose to the Board the intention to terminate and the failure to obtain the Board's approval for the termination. It was implied that he also failed to inform the Board of the termination immediately after the termination and consequently SEH failed to promptly disclose the termination on SGXNET. [note: 26]

82 For various reasons, the termination of the Scorpio Contracts was not done in the interest of the Scorpio Group, and John Ho (not Hady) had breached his fiduciary duties as a director of various companies in the Scorpio Group in terminating them. It was implied that Hady knew that it was not in

the interest of the Scorpio Group to terminate the Scorpio Contracts. Yet, for his own interests, he caused John Ho to do so, [note: 27] as he wanted the Scorpio Group to switch to the Alpha Contracts. It was implied that he ought not to have caused John Ho to do so.

Alpha Contracts

83 Hady had signed the Alpha Contracts on behalf of Scorpio East Pictures.

84 The Alpha Contracts were for an amount which was significant to the Scorpio Group. Hady should have obtained Board approval to enter into these contracts but did not. He informed the Board about these contracts on 22 March 2011 after they had been executed. [note: 28] The Alpha Contracts should also have been disclosed by SEH under Rule 703 of the Catalist Rules which has been breached. [note: 29] It was also implied that Hady was also responsible for SEH's consequent failure to disclose the Alpha Contracts.

85 Hady did not conduct any due diligence on Alpha and was reckless in executing the Alpha Contracts. [note: 30] The Alpha Contracts were of dubious veracity and were not entered into in the interest of Scorpio East Pictures. [note: 31] It was implied that Hady executed the Alpha Contracts for his own financial interest.

86 Hady had breached his fiduciary duties as a director of SEH. [note: 32]

The "round-tripping" transactions

87 The "round-tripping" transactions were an idea conceived by Shiong Jin and approved by Hady in connection with the termination of the Scorpio Contracts and the entry into the Alpha Contracts. [note: 33] Hady was aware that the money to be returned to the Scorpio Group would be done using cash. [note: 34]

88 John Ho (not Hady) gave instructions for official receipts to be issued for S$1m and S$1.36m (totalling S$2.36m) to Long Red and Dream Movie respectively. The receipts were false as the money was not in fact received from these producers. [note: 35]

89 It was implied that John Ho also gave instructions for the accounting ledgers of the Scorpio Group to reflect that S$2.86m (which includes the S$2.36m referred to above at [88]) was received from Long Red, Dream Movie and Speedy Video. Such entries were false as the money was not in fact received from these producers. [note: 36]

90 The round-tripping transactions resulted in fictitious accounting entries being made in the books of the Scorpio Group, and were intended to mislead the external auditors that the Scorpio Group had received the money from these producers (so that the external auditors would not recommend impairment provisions). [note: 37]

91 The conduct of Hady in approving the round-tripping was dishonest. [note: 38] It was implied that Hady may have committed various offences. The round-tripping transactions may have to be disclosed to SGX. [note: 39]

The Proposed Investment

92 Hady had given instructions for the Scorpio Group to pay S$3m to an escrow account of JLC and S$300,000 to Jung Jin and Liu Woon San even though Hady was told by Shiong Jin that the Scorpio Group had only S$2.2m in its bank accounts. [note: 40]

93 The S$3m payment was actually for the acquisition of a 51% stake in Alpha. [note: 41] If the payments for the Proposed Investment had been effected, it would have potentially created serious cashflow problems for the Scorpio Group. [note: 42]

94 The S$3m formed 18% of the NAV of the Scorpio Group. It was implied that Hady ought to have known this. The Proposed Investment was a significant one and prior approval of the Board ought to have been obtained but was not. [note: 43]

95 No due diligence was carried out on the Proposed Investment which appeared highly speculative. [note: 44]

96 Hady's failure to obtain Board approval was all the more significant in the light of his role in the steps in respect of the earlier transactions. Hady had breached his fiduciary duties as a director of SEH. [note: 45] It was implied that the Proposed Investment was not in the interest of the Scorpio Group.

Other meanings

97 It was implied that SFCA did not consider Hady to be fit to remain as an executive director. [note: 46]

98 The Board was of the view that Hady might not be fit to remain even as a director of the Scorpio Group and were reviewing the findings of SFCA to decide whether Hady should continue as a director. [note: 47]

99 As the termination of the Scorpio Contracts and the execution of the Alpha Contracts involved significant amounts of money, the Board had called a trading halt of SEH's shares (on 22 March 2011) which was converted into a suspension (on 25 March 2011). [note: 48] The suspension would continue as SEH was unable to reasonably assess its affairs and financial state for various reasons including the termination of the Scorpio Contracts and the entry into the Alpha Contracts. [note: 49] This implied that the Board was concerned about the financial viability of SEH.

Allegations in the Announcement but not in the Executive Summary

100 I move on to Hady's other allegations of defamation from the Announcement. During the trial, Hady's counsel tendered a table to identify allegations in the Announcement which were not in the Executive Summary. A copy of the table was helpfully included as an annexure to the defendants' closing submissions. As mentioned above, one of the statements is no longer the subject of these proceedings (see [76]).

101 The main thrust of Hady's complaint was that parts of the Announcement referred to the "purported" termination or cancellation of the Scorpio Contracts and the "purported" entry into or formation of the Alpha Contracts.

102 Hady was suggesting that the use of the word "purported" in the Announcement had a higher

defamatory meaning than the rest of the disputed words in the Executive Summary because that word suggested that the steps taken in respect of these two transactions and the transactions themselves were dubious. [note: 50]

103 Hady also complained that the Announcement contained the following passage (at p 3):

> [Shiong Jin] was named in a regulatory action by the SGX issued on 13 April 2010, wherein SGX-listed companies are required to consult the SGX before the appointment of the named persons, including [Shiong Jin], as a director or member of its management.

This passage came after a paragraph which set out some information about Alpha and which also stated that Jung Jin, a registered shareholder and director of Alpha, is the spouse of Shiong Jin. However, Hady did not plead this passage about Shiong Jin, as part of the defamation action. Accordingly, I say no more on it.

104 As for the use of the word "purported" in the Announcement, I am of the view that it suggested that the Board was uncertain whether the termination of the Scorpio Contracts or the execution of the Alpha Contracts were valid. The use of the word "purported" did not add any higher defamatory meaning when reading the Announcement and the Executive Summary together.

Conclusion on the defamatory meanings

105 The meanings stated in the paragraphs above that were potentially defamatory of Hady were:

(a) The second, third and fourth sentences of [82];

(b) [83]–[86];

(c) [87] and [91];

(d) [92]–[96]; and

(e) [97]–[99].

I will now consider whether the meanings I have found were pleaded by Hady.

106 It must be noted that the SOC did not contain many common stings among the disputed words. Eventually, the closing submissions for Hady (contained in Annexure B of his submissions) sought to set out common stings of the disputed words with cross-references to the meanings pleaded in his SOC as follows:

The first sting

(1) [Hady] surreptitiously concealed the termination of the Scorpio Contracts and the entering into of the Alpha Contracts from the Board and the public, in breach of his duties.

The second sting

(2) [Hady] was dishonest in that he was motivated by his own financial interest in and control over Alpha and that it was because of this that he terminated the Scorpio Contracts and entered into the Alpha Contracts which were a sham/ of dubious veracity and not in the

interest of the [Scorpio Group]. For this reason he failed to conduct any form of due diligence on Alpha, failed to make reasonable efforts to collect the Scorpio Deposits [meaning deposits from the producers of the terminated Scorpio Contracts] and signed the Alpha Contracts hastily, and he concealed the transactions from the Board and the public.

The third sting

(3) [Hady] dishonestly represented that the Payment On Behalf Arrangement [meaning the "round-tripping" transactions] was connected with the termination of the Scorpio Contracts and the [formation] of the Alpha Contracts, and he falsified the accounts of the Company to misrepresent to the external auditors that the [Scorpio] Group had received the Scorpio Deposits [meaning deposits from the producers of the terminated Scorpio Contracts] so that they would not recommend impairment provisions.

The fourth sting

(4) [Hady] had approved an investment of $3million [meaning part of the Proposed Investment] without referring to [SEH's Board], in breach of his duties to [SEH].

The fifth sting

(5) [Hady's] breaches resulted in untold but substantial losses for [the Scorpio] Group that may imperil its financial viability and that justify the continued suspension of trading of [SEH's] shares.

I observe that the stings submitted were not only summaries but also variations of the meanings pleaded in Hady's SOC.

107 According to *Review (CA)*, the plaintiff who relies on a variant of the pleaded meaning must not substantially change the meaning pleaded, nor argue a more defamatory meaning than which he had originally pleaded. The Court of Appeal in that case dealt with the issue of the plaintiff pleading the most injurious meaning which the words are capable of bearing. The plaintiff is thus bound by the meaning which he has pleaded, subject to any change brought about by an amendment to his statement of claim so as to plead a more defamatory or variant meaning from that originally pleaded (see [128]–[132]). Consequently, the court may not find a meaning more defamatory than a meaning pleaded by the plaintiff.

108 Before arriving at this conclusion, the Court of Appeal (at [125]) quoted a passage from *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 ("*Chakravarti*") which stated at [60]:

> *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 [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 in original]

The Court of Appeal went on to observe at [127] that:

> … 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, n 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, n 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. …

109 I am of the view that the observations made in *Review (CA)* are relevant to the case at hand. While Hady had pleaded many meanings, he now relies on five stings. As a case progresses, it is not unforeseeable that certain pleadings may be dropped or a lesser meaning is eventually relied upon. What is important is that the pleaded case does not change substantially and prejudices the defendant. What is interesting in this case is that Hady's stings not only summarise the common meanings in the disputed words, but also contain slight variations as will be seen below. In most cases, the plaintiff would plead the defamatory meanings and the court would find the sting of the meanings, but in light of the many meanings, Mr Suresh Nair ("Mr Nair"), counsel for Hady, had helpfully prepared a table to concisely summarise the gist of the pleadings and point out common stings. I am thus guided by counsel in using these stings as the basis of finding whether the disputed words are defamatory of Hady. Furthermore, the submissions by Mr Nair referred to the stings rather than the pleaded meanings in Hady's SOC. I also note that Hady's submissions covered only four stings although his annexure contained five, but for completeness, I will deal with all five stings in my decision. Even though I may be relying on the stings, similarly as with the pleadings, I am not bound to find that the stings are correct. However, the stings submitted are an indication of what Hady considers to be defamatory of him.

110 On the other hand, the defendants have disputed the use of the stings. On a general level, the defendants argued that the alleged defamatory meanings pleaded were specific to the Announcement and the Executive Summary and are not interchangeable. [note: 51] However, this is a flawed argument as the sting is meant to summarise the defamatory point of each transaction, of which the Announcement and Executive Summary both cover. The meanings only arise because of the words used in the documents, and having found that the reasonable reader would have read the Announcement and Executive Summary together in the light of each other, a common sting summarising the pleadings relevant to each particular transaction can be permitted. I will now consider the defendants' contentions in relation to specific stings.

111 The defendants argued that the second sting related to a common motivating factor *ie*, Hady's interest in Alpha when dealing with the Scorpio Contracts and Alpha Contracts, and that this was not

pleaded in the SOC. Hady's pleading at para 18(6) does not go so far as to say that there was a motivation of financial interest in Alpha when he participated in the transactions of the Scorpio Contracts and the Alpha Contracts. I agree with the defendants' contention and find that the sting as submitted by Hady would be tantamount to a substantial change in the thrust of the meanings pleaded. Therefore, Hady cannot rely on this correlation.

112 The defendants also pointed out the incompatibility of the alleged meanings pleaded in paras 15(8) and 18(6) of the SOC. Even so, based on the sting submitted by Hady, the two meanings convey the meaning that Hady was motivated by his own financial interest and control over Alpha and that he had entered into the Alpha Contracts recklessly and/or negligently. I therefore reject the defendants' contention.

113 The next argument raised by the defendants was that "conceal[ment]" as stated in the second sting did not mean a failure to disclose or announce the Scorpio Contracts and Alpha Contracts. Even so, Hady had pleaded in para 15(5) read with para 15(10) about the "surreptitious" nature of the Plaintiff's action which, in my view, includes concealment. Therefore, the Defendant was inaccurate in arguing that there was a distortion of the meanings pleaded by Hady.

114 The defendants also argued that Hady had not pleaded that the Alpha Contracts were a "sham". I agree that this was not pleaded in Hady's SOC and hence this part of the second sting cannot be relied upon by Hady as this would attribute a new and more injurious meaning to the meanings pleaded in his SOC. Hady's pleadings only went so far as to state that the contracts were of "dubious veracity" (see para 15(9)) *ie*, a doubtful nature, but this was certainly not the same as calling a contract false.

115 With regard to the fourth sting, the defendants argued that this was not pleaded. However, it is clear from para 18(8) of the SOC that this was expressly pleaded, and I say no more of it. I note that the other meanings pleaded in the SOC *ie*, paras 15(15), 15(16) and 18(10) contained more meanings than that of the fourth sting, hence the sting ought to be expanded to include these meanings as well.

116 With regard to the fifth sting, the defendants argued that the pleading in para 15(17) of the SOC does not result in such a meaning. In my view, the defendants are not in the position to dispute the meaning Hady ascribed to the disputed words as they had failed to plead an alternative meaning in their defence (see above at [78]). In any case, whether the meaning pleaded by Hady eventually succeeds would depend on my finding of what the meaning is.

117 Additionally, Hady had pleaded meanings by way of innuendo at para 16 and para 18 of the SOC. An innuendo meaning is another meaning which requires knowledge of the special meaning of the offending words or the relevant extrinsic facts (see above at [73]). However, no extrinsic facts or special meanings were pleaded and I note that they were not submitted upon either. Therefore, Hady is not entitled to rely on the innuendos.

118 In conclusion, I am aware that the defendants submitted on the individual meanings in their defence of justification but I do not think that the defendants have been prejudiced by my use of the stings as the point of comparison rather than the specific pleadings. As a sting is meant to summarise the meanings of the words, *a fortiori*, proving each pleading would go to show that the sting has also been proven. In fact, there may be a technical advantage on the side of the defendants by the use of the stings as will be noted below at [130]. Furthermore, other than the defendants' contentions that the stings were substantial variations of the pleaded meanings, which I have already dealt with above, there are no other reasons submitted by the defendants to show that a reliance on the stings

would prejudice their case.

119 For clarification, I will first state the meanings of the disputed words that I have found and compare them with the alleged stings. With respect to the first sting:

(a) The disputed words did not mean that Hady actively concealed the Scorpio Contracts and Alpha Contracts transactions from the Board and the public but that he failed to inform the Board about the latter transaction when he was a director of the Board, in breach of his duties to SEH.

120 With respect to the second sting:

(a) The disputed words did not mean that Hady had acted dishonestly in respect of the Scorpio Contracts and Alpha Contracts. However, they did mean that the two transactions were not in the interest of the Scorpio Group.

(b) The disputed words meant that Hady was motivated by his own financial interest in the termination of the Scorpio Contracts and the execution of the Alpha Contracts but there was no suggestion that he had done so because he had a financial interest in and control over Alpha. In any event, the latter part was not pleaded (see above at [111]).

(c) The disputed words meant that Hady had signed the Alpha Contracts without due diligence.

(d) The disputed words meant that the Alpha Contracts were dubious, but they did not mean that such contracts were in fact a sham even though that was what the defendants were thinking (in any case, the allegation of the sham was not pleaded by Hady (see above at [114])).

(e) The disputed words did not mean that Hady failed to make reasonable efforts to collect the deposits from the Scorpio producers but they did mean that he signed the Alpha Contracts which he should not have done in the circumstances.

(f) The disputed words did not mean that Hady actively concealed the Scorpio Contracts and Alpha Contracts from the Board and the public but that he had failed to inform the Board about the latter transaction when he was a director of the Board, in breach of his duties to SEH.

121 With respect to the third sting:

(a) While the disputed words did mean that Hady had acted dishonestly in the "round-tripping" transactions, they did not mean that Hady had dishonestly represented to the Board that the round-tripping transactions were connected with the Scorpio Contracts and Alpha Contracts transactions.

(b) The disputed words did not mean that Hady had personally falsified the accounts of SEH although they did mean that he had acted dishonestly in approving the "round-tripping" transactions which resulted in the falsification of accounting entries which were intended to mislead the external auditors.

122 With respect to the fourth sting:

(a) The disputed words did mean that Hady had approved the Proposed Investment without the Board's prior approval, but it was not an investment which had already been entered into. They did mean that the Proposed Investment was not in the interest of the Scorpio Group and

the omission to get the Board's approval was in breach of his duties to SEH.

123 With respect to the fifth sting:

(a) While the disputed words did mean that the Board was uncertain of the overall impact of the termination of the Scorpio Contracts and the execution of the Alpha Contracts and, hence, the financial viability of SEH, it did not mean that there were untold but substantial losses for the Scorpio Group. Aside from the specified losses in respect of the Scorpio Contracts, there was no reference to substantial losses from the Alpha Contracts.

(b) The disputed words did not mean that Hady's role in relation to the Scorpio Contracts and Alpha Contracts was the only reason that justified the continued suspension of trading SEH's shares. However, it did mean that Hady's role was one of the reasons.

124 In conclusion, the stings that were defamatory of Hady, as couched in the same language used in his submissions on the stings, stood as:

(a) First sting: Hady failed to inform the Board about the Alpha Contracts when he was a director of the Board, in breach of his duties to SEH.

(b) Second sting: Hady, motivated by his financial interest, had a role in terminating the Scorpio Contracts and had entered into the Alpha Contracts. The latter were of dubious veracity. The transactions were not in the interest of the Scorpio Group. Hady failed to conduct any form of due diligence on Alpha and signed the Alpha Contracts hastily. Hady failed to inform the Board about the Alpha Contracts when he was a director of the Board, which consequently meant a failure of SEH to disclose the Alpha Contracts.

(c) Third sting: Hady had acted dishonestly in the "round-tripping" transactions which resulted in the falsification of accounting entries and which were intended to mislead the external auditors that the Group had received the Scorpio Deposits so that they would not recommend impairment provisions.

(d) Fourth sting: Hady had approved of the Proposed Investment without referring the proposal to the Board. The Proposed Investment was not in the interest of the Scorpio Group and the omission to get the Board's approval was in breach of his duties to SEH.

(e) Fifth sting: Hady's role in relation to the Scorpio Contracts and the Alpha Contracts resulted in specified losses and unspecified potential losses for the Scorpio Group that may imperil its financial viability.

Defences

125 Aside from the non-admission of the meaning of the disputed words, the defendants relied on the following defences:

(a) Justification;

(b) Qualified Privilege; and

(c) Consent or leave and licence.

126 Before going to the defences, it is apt to consider the principles of the defences of justification and qualified privilege. In their defence, the defendants first raised the defence of qualified privilege, followed by the defence of justification. The defences do not seem to have been pleaded in the alternative but in conjunction with one another.

127 For the plea of justification, something that is substantially true cannot be used by the claimant to recover damages (see Littledale J's observations in *M'Pherson v Daniels* (1829) 10 B & C 263 at 272). Furthermore freedom of speech should not be curtailed unless the publication of the defamatory matter is a wrongful act – the publication of the truth is not a wrongful one and hence should not be curtailed (see *Duncan and Neill on Defamation* (Sir Brian Neill *et al*) (LexisNexis, 3rd Ed, 2009) ("*Duncan and Neill*") at para 12.04). For qualified privilege, publications are protected based on the principle that statements which are defamatory and untrue may be privileged on grounds of public policy and convenience (*Gatley* at para 14.1, and approved in the recent Court of Appeal decision of *Low Tuck Kwong v Sukamto Sia* [2013] SGCA 61 ("*Low Tuck Kwong*") at [58]). In such cases, the public interest in ensuring freedom of communication outweighs the competing public interest in protecting the reputation of the individual (*Duncan and Neill* at para 16.01). This also explains why malice can be used to defeat qualified privilege as express malice or using the privileged occasion for some other purpose or with the intent to injure connotes that the occasion of privilege has been misused (*Duncan and Neill* at para 18.04).

128 As the basis of the defence of justification is truth, the state of mind of the publisher is not relevant. This means that a defendant can succeed in such a defence even when he publishes the material, believing it to be false, for no amount of malice, bad faith or belief in the falsity of the statement will make it actionable when the allegation is true (*Carter-Ruck on Libel and Privacy* (Alastair Mullis and Cameron Doley gen eds) (Lexis Nexis, 6th Ed, 2010) at para 9.1; *Evans on Defamation in Singapore and Malaysia* (Doris Chia and Reuben Mathiavaranam) (Lexis Nexis, 3rd Ed, 2008) at p 85). However, if the defence of qualified privilege is relied upon in such a scenario, and where a duty-interest relationship is found to have arisen, then the lack of honest belief in the material would be a clear example of malice and the defence of qualified privilege would fail, "for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another" (*Horrocks v Lowe* [1975] AC 135 ("*Horrocks*") at 149–150, applied in *Chan Cheng Wah Bernard* at [89]–[90]). Therefore, while ill-will and spite may matter in a defence of qualified privilege, it will not for justification.

129 In most cases where the defamatory words are true in substance and fact, the defendant will succeed on a plea of justification if it has been pleaded. However, as the defamatory imputation is presumed to be false and the burden is on the defendant to show that it is substantially true, then where the defendant fails in its defence of justification, the presumption naturally remains. In that event, the defendant who also relies on a defence of qualified privilege must ensure that there was no malice in the publication, assuming that the duty-interest relationship is established. It cannot be that when the court finds the publication to be false or untrue and then not protected by qualified privilege that the defendant can then argue that the publication was true in fact and substance. When the defendant pleads justification and qualified privilege in the same defence, the latter defence operates when the former fails, as seen in the approach taken by the court in *Chan Cheng Wah Bernard* (see [85]). This means that when justification does succeed, and qualified privilege is being considered, it must be in the alternative where justification is assumed to have failed because the truth has not been proven on the balance of probabilities. In such a circumstance, the defendant's belief, or lack thereof, in the truth of the publication is relevant only in the alternative.

Justification

130 In relation to justification, it is an absolute defence that the meanings of the disputed words are true in substance and in fact. The meanings which need to be justified do not depend upon the meaning of the words complained of as pleaded by the claimant but upon the meanings which the words are reasonably capable of bearing (*Gatley* at para 11.14(4)). As it is the imputation contained in the words which has to be justified, *ie*, the sting, not every word that was in the original text needs to be justified. As stated by Borroughs J in *Edwards v Bell* (1824) 1 Bing 403 at 409, and approved in *Chan Cheng Wah Bernard* at [44]:

> … As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified.

Additionally, where there are separate allegations in the defamatory material that have a common sting, the defendant can succeed by justifying the truth of the sting, notwithstanding that each specific allegation is not met (see *ANB v ANF* [2011] 2 SLR 1 at [76], following *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000 at 1032). It is thus clear that although the defendants disputed the use of the stings, finding the sting of the charge also assists the defendants in their ability to justify them. I will now deal with the evidence for the defence of justification.

Scorpio Contracts

131 As regards the Scorpio Contracts and Alpha Contracts, it is clear to me from the evidence that SFCA was correct in asserting that it was Hady who wanted the Scorpio Contracts to be terminated when he was contemplating buying the shares from John Ho and his family members.

132 Hady argued that the Adept Report advised that the Scorpio Contracts related to movies should be written out of the Group's NAV altogether. [note: 52] I do not give much weight to the Adept Report which Hady had obtained because it was given for a different purpose, *ie*, in the context of Hady's intended purchase of the shares. Significantly, the Adept Report did not recommend that the Scorpio Contracts be terminated.

133 The fact that there was a risk that the Scorpio Contracts might not be profitable was not enough to terminate them without discussion with the Board. Obviously when John Ho caused the Scorpio Group to enter into these contracts, he must have thought that they would be profitable for the Scorpio Group. There was no evidence as to why John Ho would change his assessment except for the fact that he wanted to sell his shares and he did not want to guarantee that the Scorpio Contracts would be profitable, or at least not loss-making. The total sum which the Scorpio Group forfeited under the Scorpio Contracts was S$550,000. This was for the production contracts and there was no loss for the concert contracts. Altogether, this was a substantial loss to the Scorpio Group and the Scorpio Contracts were not terminated in the interest of the Scorpio Group.

134 Moreover, the reason for terminating the Scorpio Contracts was the intended and eventual entry into the Alpha Contracts. Hady had orchestrated the two transactions for his own financial interest. Even though Hady was not a director in the Scorpio Group when the Scorpio Contracts were terminated, he knew that it was a matter of time that he would become a director once John Ho agreed to the termination of the Scorpio Contracts. His subsequent actions as director of the Scorpio Group revealed that he had an interest in the Alpha Contracts. Therefore, Hady, motivated by his financial interest, had a role in terminating the Scorpio Contracts.

The Alpha Contracts

135 As for the Alpha Contracts, it is clear to me that they were not entered into at arm's length

and were of dubious veracity as suggested by the Executive Summary. Accordingly, the transaction was not entered in the interest of the Scorpio Group.

136 First, Jung Jin, the wife of Hady's consultant Shiong Jin, was a shareholder and director of Alpha.

137 Secondly, her relationship with Shiong Jin was only revealed hesitantly when Chia pressed to find out who she was at the Board meeting on 23 March 2011.

138 Thirdly, Hady admitted that he did not do any due diligence on Alpha. [note: 53] While Hady said he knew Alpha's CEO, Alan Chan, who had been introduced to him by Jessica Teo, he did not say that he knew that Alan Chan (or Alpha) had any experience in producing concerts by Korean artistes. In addition, Hady confirmed with SFCA that he had no experience in the entertainment industry. [note: 54]

139 Indeed, Hady either told the defendants lies or painted an incomplete picture about the Alpha Contracts. Although he said that he was not involved in the negotiations of the Alpha Contracts which had been proposed by Alpha to John Ho, he had in fact signed the Alpha Contracts on behalf of Scorpio East Pictures, in anticipation of his becoming a shareholder and director of SEH in circumstances which he chose to lie about as I will elaborate on later (at [224]–[230]). Furthermore, as stated above, it was he, not John Ho, who wanted the Scorpio Group to enter into the Alpha Contracts.

140 Hady also told the defendants at the Board meeting on 23 March 2011 that Alan Chan had provided a personal guarantee for the Alpha Contracts but he did not disclose that in fact, Alan Chan was released from his guarantee by an undated letter, which Hady had signed on the letterhead of SEH on or about 11 February 2011. [note: 55] That letter released both Alpha and Alan Chan from a guarantee they had given. This information surfaced later and illustrated that Hady's loyalty was to Alan Chan (and Alpha) and not to the Scorpio Group.

141 Fourthly, the fact that Alpha returned S$2.86m out of the S$3.2m paid to it under the Alpha Contracts, as refund of the deposits under the Scorpio Contracts, less the S$550,000 to be forfeited, suggested that Alpha did not require the S$2.86m from the Scorpio Group in the first place.

142 Fifthly, as SFCA noted in the Executive Summary at [3.15(g)], the fact that Hady could confidently propose a variation of the Alpha Contracts so that "each show will be organised and financed sequentially, [and] so that Scorpio will not make payments for any performance of event until the previous one has been completed" did suggest a loose arrangement between Scorpio East Production and Alpha.

143 I add that Hady's attempts to show that the Alpha Contracts were not dubious contracts did not assist him. He suggested that Alpha eventually organised several concerts for Korean artistes in Singapore. His affidavit exhibited material on such concerts which appeared to have been printed from the internet. [note: 56]

144 I agree with the defendants' closing submissions that the provenance of the internet material was not properly established by Hady. In any event, the internet material merely suggested that some artistes were popular. It did not establish that Alpha was the organiser or, more importantly, that the concerts were profitable. Neither did the material identify the terms of the underlying contracts for the production of these concerts. The material was therefore a red herring.

145 Even if it could be shown that the Alpha Contracts became profitable, one must consider the disputed words at the time they were published. At that time, no one could say with certainty that they would be profitable. Furthermore, it was the manner in which they were entered into that caused concern.

146 The Board was also not informed of the existence of the Alpha Contracts which were dated 17 March 2011. The Board was apprised of the Alpha Contracts on 22 March 2011 only.

147 In light of the dubious veracity of the Alpha Contracts and my view that it was not entered in the interest of the Scorpio Group, it was unknown if the $3.2m that was transferred to Alpha would result in a loss to the Scorpio Group and imperil its financial viability.

148 In the circumstances, it seems to me that Hady was not only acting recklessly but quite deliberately to advance his own financial interest rather than those of the Scorpio Group, and had accordingly breached his fiduciary duties as a director of SEH.

The "round-tripping" transactions

149 Regarding the "round-tripping" transactions, they constituted another reason for doubting the veracity of the Alpha Contracts.

150 Leaving aside for the time being the question of whether Hady had approved expressly or implicitly the falsification of accounting documents such as receipts and ledgers, the main question to answer regarding the "round-tripping" transactions was whether they were as innocuous as Hady claimed or as misleading as suggested by SFCA. It will be remembered that Hady's explanation was that Alpha had taken upon itself the obligation to pay the Scorpio Group the refunds due from the producers of the Scorpio Contracts and the additional responsibility of collecting the refunds from the producers.

151 Mr Nair argued that there was nothing in the arrangement "not to like". [note: 57] The Scorpio Group would be paid the refunds, after deductions were made for the sums to be forfeited, and the responsibility for collecting the refunds from the producers of the Scorpio Contracts would lie with Alpha.

152 Mr Nair suggested that there was nothing wrong with one person paying off the debt of another and it did not matter how the payment was effected, whether by way of cash or otherwise. [note: 58]

153 Mr Nair also argued that there was no reason to mislead the external auditors. [note: 59]

154 Yet, for all his arguments, Mr Nair did not address an obvious and important question. If the "round-tripping" transactions were really innocuous, why did Alpha go through the trouble of withdrawing substantial amounts of cash from its bank account and then depositing them into an account or accounts of the Scorpio Group from whom Alpha had received the money in the first place? The "round-tripping" transactions were unnecessary if the motive was innocuous. Letters to confirm the arrangement which Hady was alleging so that Scorpio East Production only needed to pay the difference between S$3.2m and S$2.86m, *ie*, S$340,000 would have been sufficient. The S$2.86m which Scorpio East Production was to pay to Alpha could be treated as having been set-off against the refunds from the producers of the Scorpio Contracts. Even if it was genuinely considered preferable for Scorpio East Production to physically effect payment of the S$3.2m, the multiple

transactions of cash refunds to the Scorpio Group in these circumstances must raise a red flag. The logical inference was that the motive was to hide the identity of the source of funds coming (back) into the bank accounts of the Scorpio Group by making it look as if the Scorpio Group had attained the deposits from the producers under the Scorpio Contracts and would have the money to pay the consideration under the Alpha Contracts.

155 Furthermore, although the risk of collecting the refunds from the producers of the Scorpio Contracts would now lie with Alpha, this raised an important question which Chee mentioned while he was being cross-examined. The relevant transcript states: [note: 60]

> Q. Let me put it this way: if I owe you a million dollars, you know I'm no good for the money, or I'll take a long time to pay you …
>
> A. Yes.
>
> Q. … a much wealthier person like Mr Ang comes to you and he says to you, "Mr Chee, I will pay you the $1 million, and then I will chase Mr [Nair] for the repayment." Either way, whether I pay or Mr Ang pays, my debt is discharged, right?
>
> A. *Yes, but why are you so nice? Why do you want to do that?*
>
> Q. Does it matter?
>
> A. *Then I would like to know what is the underlying motive, what's the incentive, what's the motivation behind it.*
>
> [emphasis added]

156 In my view, Mr Chee's oral response had hit the nail on the head. If it was known that Alpha was using the Scorpio Group's own money to repay them, although it was on behalf of the producers of Scorpio Contracts, this would have aroused suspicion that the Alpha Contracts were not entered into at arm's length. Why, indeed, would Alpha be so "nice" to the Scorpio Group to take on the Scorpio Group's responsibilities? This in turn would have raised the next question, which was also mentioned in Chee's testimony: [note: 61] how was Alpha going to perform their part of the bargain under the Alpha Contracts if they were returning a large portion of what they had received? As stated by Chee, "… Alpha [will be] left with no money, they [would be] unable to fulfil the [Alpha Contracts] …".

157 I come now to SFCA's suggestion that the purpose of the cash transfers was to give the impression that the refund of the deposits was in fact received so that the external auditors would not recommend impairment provisions. I agree with Mr Nair's argument that there would be no reason for the auditors to recommend impairment provisions for the deposits if the deposits were in fact treated as having been paid pursuant to Hady's explanation. However, that explanation would in turn have raised even more questions as I elaborated above.

158 Therefore, contrary to Mr Nair's simplistic arguments, this was not just a case of one person paying the debt of another. The payer (Alpha) was using the money he had received from the payee (the Scorpio Group), pursuant to various contracts he had with the payee, to repay the payee and discharge an obligation which was not his to discharge in the first place. While that in itself need not be suspicious, the circumstances of this case made the difference.

159 Was Hady's conduct in approving the round-tripping transactions dishonest? According to SFCA, Shiong Jin had told SFCA that he (Shiong Jin) had suggested to both Hady and Alan Chan about the idea of the "round-tripping" transactions using cash. Hady was in favour of the idea. [note: 62] However, during cross-examination, when Shiong Jin was asked to go through a transcript of an interview which Rick Seah (of SFCA) had with him, he stated that much of what he had told Rick Seah regarding the termination of the Scorpio Contracts, the entry of the Alpha Contracts and the "round-tripping" transactions, was a lie. [note: 63] This was a surprising development. Shiong Jin's explanation for the lies was that when he spoke to Rick Seah, he decided to take the blame for everything because he realised or had come to learn that the defendants were targeting him because of some other past matters which I need not go into.

160 I do not accept Shiong Jin's explanation in court that he had lied to Rick Seah or as to why he had lied. If he was really going to take the blame for everything, as he was alleging at trial, why did he tell Rick Seah that Hady was aware of the "round-tripping" transactions before they were executed? He would have said that he had kept Hady in the dark. I conclude that he did tell the truth when he said to Rick Seah that he had told Hady about the "round-tripping" transactions before they were executed. However, by the time he gave oral evidence, he decided to try and help Hady in his defamation claim against the defendants by saying that what he had told Rick Seah was a lie.

161 Rather, Shiong Jin's explanation in court was the lie and there was no need for him to lie unless he knew that the "round-tripping" transactions were not as innocent as Hady was suggesting.

162 I am of the view that Hady was told and was aware of the "round-tripping" transactions before the transactions were executed. He must also have been aware that the purpose of the cash transfers was to hide the fact that the money to pay the refund came from the same money which the Scorpio Group was paying to Alpha under the Alpha Contracts. This was to avoid the questions which I have mentioned. As a consequence of the execution of the transactions, false accounting entries stating that the Scorpio Group had received cash refunds from the producers of the Scorpio Contracts were made.

163 In my view, Hady acted dishonestly in approving the "round-tripping" transactions and I agree with what was stated in the Executive Summary, *ie*, that he may have committed various offences including the breach of his duty as a director.

The Proposed Investment

164 I come now to the transfers that Hady had authorised.

165 Mr Nair argued that there was in fact no investment at all. The money was to be held in JLC's client account and would only be used properly with the necessary authority of the Scorpio Group. I am of the view that Mr Nair's argument did not assist Hady. First, if there was no investment at all, then Hady should not have authorised any payment to JLC even though it was to be held in escrow. If it was only a proposal, then he ought not to have instructed the payment to be made unless the S$3m payment was meant to be a demonstration of good faith to invest or was done without regard to the interest of the Scorpio Group. Here, Hady did not suggest that the payment of S$3m (as opposed to an intended payment of another S$300,000 to shareholders of Alpha) was to be a demonstration of good faith.

166 Secondly, one of the main issues that went unaddressed by Mr Nair was that Hady was giving instructions to pay S$3m when he knew that the Scorpio Group only had S$2.2m in its bank accounts.

There was no elaboration from Hady as to how the full payment was to be effected, but the potentially serious effect on the Scorpio Group's cashflow could not be denied.

167 Thirdly, even though the payment was supposed to be for a proposed investment, the point was that there was no discussion with the Board at all on the Proposed Investment which was a significant sum. Furthermore, as no due diligence had been done on Alpha, the Proposed Investment did appear highly speculative.

168 Fourthly, it was no comfort to the Scorpio Group to say that the S$3m would only be released by the solicitors when the necessary authority was given. This argument was an attempt to deflect a genuine concern: SFCA and the defendants did not know what the JLC solicitors believed or were told in respect of the authority to release SEH's money.

169 Furthermore, although Hady was no longer pursuing his allegation in respect of a proposed S$300,000 payment to the two shareholders of Alpha, that proposed payment is still relevant as it added to the defendants' concerns. No explanation was given as to why the S$300,000, which was supposed to be a demonstration of good faith, was to be made to the individual shareholders and not to Alpha itself when the target of the intended investment was Alpha. The fact that one of the shareholders was Jung Jin, the wife of Shiong Jin, added fuel to the fire.

170 In my view, the intended payments of S$3m and S$300,000 were also not *bona fide* in the interest of the Scorpio Group. It was fortunate that Yee had stopped the payments before they were effected.

171 It is undisputed that Hady failed to obtain Board approval for the Alpha Contracts and the Proposed Investment. In my view, he ought to have done so for the reasons given in the Executive Summary. I also agree that Hady's failure to obtain Board approval for the Proposed Investment was all the more significant in light of his role in the other three transactions. Hady's role in relation to the Scorpio Contracts and the Alpha Contracts involved significant amounts of money flowing out of the Scorpio Group, and this could have a severe impact on it and affect the financial viability of the Scorpio Group. The termination of the Scorpio Contracts meant a loss of $550,000 for the Scorpio Group. The execution of the Alpha Contracts meant that Scorpio East Pictures had already committed $3.2m and would have to commit another $3m. There were thus specified losses and unspecified potential losses for the Scorpio Group that might imperil its financial viability.

172 I am also of the view that Hady had acted in breach of his fiduciary duties as a director and was not fit to remain as a director, whether in an executive capacity or not.

173 Therefore, I am of the view that the meanings of the disputed words are justified and are substantially true.

Defence of qualified privilege

174 With reference to my earlier observations at [126]–[129], I am of the view that the pleaded defence of qualified privilege is being made in the alternative, where the defence of justification is assumed to have failed. Mr Ang Cheng Hock, SC, ("Mr Ang") counsel for the defendants, submitted that the Announcement which annexed the Executive Summary was published on an occasion of qualified privilege. In *Chan Cheng Wah Bernard*, the Court of Appeal reiterated the main principles of qualified privilege at [86]–[87]. Privilege arises where the person who makes a communication has an interest, or a legal, social or moral duty, 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.

Low Tuck Kwong also recently clarified that the recipient's duty or interest in receiving a communication is not measured strictly by the legal powers they may exercise upon receipt of the communication (at [60]), thereby illustrating the breadth of the interest or duty that a publisher and receiving party might have. Eventually, the ultimate question is whether the disputed words were "fairly warranted by the occasion" (*Gatley* at para 14.9). Hence, considering all the circumstances of the case, it is whether *this* publisher had a duty to publish or an interest in publishing this defamatory communication to *this* recipient (see *Chan Cheng Wah Bernard* at [87]).

175 Mr Ang submitted that SEH was required to publish the Executive Summary under Rule 703 of the Catalist Rules.

176 Under Rule 703(1)(b), SEH is required to announce "any information known to the issuer concerning it or any of its subsidiaries or associated companies which would be likely to materially affect the price or value of its securities".

177 The Catalist Rules are "interpreted, administered and enforced by the [SGX]" and under Rule 104(1), "The decisions of the [SGX] are conclusive and binding on the issuer".

178 Mr Ang argued that this was reinforced by the fact that at a meeting on 5 September 2011 which the defendants had attended with June Sim and Eliza Tan of SGX, SGX had expressly said that SEH was to announce (a) the findings stated in the Executive Summary and (b) the steps it proposed to take in relation to the findings. This was confirmed in writing by an email from June Sim to Bernard Lim at 9.36pm of 6 September 2011 which also stated that the Announcement was to be made on SGXNET.

179 Therefore, Mr Ang submitted that:

(a) The defendants were under a duty to publish the Announcement and the Executive Summary on SGXNET and the readers of SGXNET had a corresponding and legitimate interest in receiving the same.

(b) The defendants published the Announcement and the Executive Summary in the reasonable and necessary protection of SEH's interests to those with a like interest in receiving them.

(c) The defendants and the readers of SGXNET had a common and/or corresponding interest in the subject matter of the Announcement and the Executive Summary.

180 Mr Ang submitted that the defendants were also entitled to the defence of privilege as directors of SEH because the defendants have a general common law duty to update SEH's shareholders on the affairs of the company and this would have been done by way of an announcement through SGX. [note: 64] Mr Nair submitted that the defendants had relied on Rule 703 only for the defence of qualified privilege in their pleadings. Therefore, they were not entitled to rely on the general law. I accept that the defendants' pleading referred only to Rule 703. I will elaborate later on Mr Nair's distinction between Rule 703 and the general law.

The defendants' duty

181 Given that there is currently no reported case law in Singapore that provides for the sort of duty submitted by Mr Ang, I find that the decision of *Stuart Bray v Deutsche Bank AG* [2008] EWHC 1263 ("*Stuart Bray*") helpful. In that case, the bank had made a public announcement which the

claimant argued was defamatory. The bank applied for a summary judgment against the claimant on various grounds, one of which was that the publication was made on an occasion of qualified privilege. It was not in dispute that the bank was subject to reporting and disclosure requirements under the statute governing it as well as the listing rules. It was also not in dispute that the bank was obliged by law to make the announcement. At [85]–[87], Tugendhat J found that in such circumstances, the inaccuracy in the announcement would not defeat qualified privilege, but only went to show bad faith.

182 Mr Nair argued that *Stuart Bray* ought to be confined to a situation where the privilege arises out of general law and has no application where the privilege arose from Rule 703. I do not agree with Mr Nair's argument. *Stuart Bray* was decided on the basis that a legal duty to announce existed pursuant to the statute and the listing rules. I set out below the observations made by Tugendhat J:

> 75 The Bank's defence of qualified privilege is based on a number of facts which are not in dispute. Its shares are listed on the Frankfurt and New York Stock Exchanges. *In New York the Bank is subject to the reporting and disclosure requirements under the US Securities and Exchange Act 1934 and the New York Stock Exchange Listed Company Manual Rules ("the Rules").* The meaning and effect of these documents are matters of foreign law, and so would, if they are not agreed, have to be the subject of evidence from experts in that law. *For present purposes it is common ground that the Bank was obliged by law in New York to announce the increased legal provisions referred to in the Press Release.*
>
> 7 6 *The Rules require the release to the public of information which might reasonably be expected to materially affect the market for its securities (Rule 202.05). Rule 202.06 lays down a procedure of public release of information.* It includes release to the public press, and immediate publication to a number of news organisations, some of which are named, such as Dow Jones, Reuters and Bloomberg, and others of which are identified by description, such as newspapers in the cities where the company has major facilities.
>
> 77 The qualified privilege relied on in para 12.11 of the Defence is that which subsists at common law where a defendant is under a legal social or moral duty to publish information and the recipients have a corresponding and legitimate interest in receiving it.
>
> [emphasis added]

183 Therefore, the judge was of the view that the occasion was indeed one of qualified privilege. This is no different from what the defendants pleaded in their defence, *ie*, the defendants were under a duty, as directors of SEH, to announce the information contained in the Announcement and the Executive Summary pursuant to Rule 703 of the Catalist Rules. These rules are also enforceable by statute as will be elaborated below. Mr Nair's contention that *Stuart Bray* was inapplicable as it arose out of general law was therefore invalid.

184 This is an appropriate juncture to point out that I am of the view that Mr Nair's understanding of qualified privilege applying under the general law, as opposed to statutory law, was incorrect. [note: 65] Qualified privilege is a common law concept based on the principle that statements which are defamatory and untrue may be privileged on grounds of public policy and convenience. Whether qualified privilege succeeds depends on whether a relationship of interest and duty is made out. The duty that may give rise to such a privilege may arise from common law or statute. However, the privilege is still the same qualified privilege that arises under the common law. The bank's reliance on the listing rules in *Stuart Bray*, and similarly, the defendants' reliance on the Catalist Rules in this case, were not to establish a specific kind of privilege apart from qualified privilege. They were to

show that qualified privilege arose as a defence to defamation. As for Mr Ang's argument that the defendants were entitled to qualified privilege because the defendants had a general common law duty owed to SEH's shareholders, this may be another example to show that the defence of qualified privilege arose as well. However, as this was not pleaded, there is no need for me to decide on it.

185 It is clear to me that the defendants had a duty to publish the two documents in view of Rule 703 and what SGX had told them to do. Rule 702 requires announcements to be made through SGXNET, unless specified otherwise. According to Mr Ang, it was a "legal, social and/or moral" duty but I find this to be a bit vague. The Catalist Rules were contractual requirements that SEH were to abide by, and were to be enforced by SGX (see *Principles and Practice of Securities Regulation in Singapore* (Hans Tjio) (Lexis Nexis, 2nd Ed, 2011) ("*Principles and Practice of Securities Regulation*") at pp 248, 249, 257, 261 and 262). Much like in *Stuart Bray*, the defendants' obligation to publish the Announcement and the Executive Summary pursuant to the Catalist Rules are also reinforced by statute (see ss 24, 25, 203(2) of the Securities and Futures Act (Cap 289, 2006 Rev Ed)).

186 I thus find that a legal duty was owed by SEH in publishing the Announcement and the Executive Summary on SGXNET.

A corresponding interest

187 What then of the corresponding interest to SEH's duty? The authors of *Gatley* (at para 14.6) have broadly classified the relationship of duty and interest into two broad categories:

> … [F]irst, where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding interest to receive it; or, secondly, where the maker of the statement is acting in pursuance of an interest of his and the recipient has such a corresponding interest or duty in relation to the statement, or where he is acting in a matter in which he has a common interest with the recipient.

From what can be understood of Mr Ang's submissions (see above at [179]), the defendants argued that the relationship of duty and interest fell under both categories.

188 I am of the view that a corresponding interest arose from the facts, *ie*, the corresponding interest of the investing public to receive the information that the defendants had released on SGXNET. It is apparent from [185] that SGX's role as a regulator was to ensure that material information of a listed company (per Rule 703) was made available to the investing public which was made up of SEH's current shareholders and potential investors. SGX's role emphasises the importance of ensuring an informed market and implied that it was in the interests of the investing public that the documents were published (see also *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [22]–[24] where the court observed that the underlying objective of SGX's enforcement role was to ensure that material information was disclosed to the market).

189 In respect of SGXNET, where the document was published, the court in *Oei Hong Leong v Ban Song Long David and others* [2005] 3 SLR(R) 608 observed that proportionality was required in ensuring that only the relevant interested parties received the information, and that the publication was not made in a disproportionate manner (see [33], [39]–[42]). This ensured that the maker of the statements did not exceed its duty while still being protected by qualified privilege.

190 It seems to me that since the publication was made as required by the relevant rules, it could not be said that the parties receiving the information did not have a corresponding interest or that the publication was made to too large a class of people. The issue of proportionality should hence be

understood in this context that SGXNET was specified in the Catalist Rules.

191 Following Mr Ang's submissions above (at [179]), I am of the view that the duty and interest relationship in the circumstances is established in the following manner: the defendants were under a duty to publish the Announcement and the Executive Summary on SGXNET and the readers of SGXNET, being SEH's shareholders and potential investors, had a corresponding interest to receive the information.

192 Therefore, I find that the Announcement and the Executive Summary were published on an occasion of qualified privilege.

193 I will now turn to Hady's two allegations that the Announcement was not covered by qualified privilege and that the publication was militated by malice.

Adoption of the Executive Summary and additional allegations

194 Mr Nair argued that the Announcement containing a summary of the Executive Summary was not required by SGX, and hence not privileged as it went beyond what was required by the Catalist Rules. [note: 66] The defendants were only required to disclose the Executive Summary and not to endorse it or to add their own allegations, both of which they did.

195 Mr Nair stressed that SGX had asked SEH to disclose the Executive Summary and the steps which SEH proposed to take. In his submissions he stated: "Clearly SGX's interpretation was that there was no need to include a summary of the Executive Summary in the Announcement". [note: 67] Mr Nair said that SGX had referred the defendants to a case involving a company by the name of Medi-Flex. In that case, the company had simply disclosed the material without adoption or embellishment. This demonstrated that the defendants had gone beyond what they were required to do. Mr Nair also submitted that Rule 703(4) of the Catalist Rules also referred to the Corporate Disclosure Policy in Appendix 7A of the Catalist Rules. Under the policy, para 27(c) requires an announcement to be fair and balanced. As there were material omissions, the Announcement was not fair and balanced and hence not published in compliance with Rule 703. [note: 68] It will be seen from this part of his submission that Mr Nair was relying on omissions, and not additions, to deny the defence of privilege to the defendants.

196 Mr Ang did not accept that the defendants had adopted the contents of the Executive Summary when the Announcement was made. Even if they did, he submitted that this did not mean that the privilege was lost.

197 As regards the allegation that the defendants had made additional allegations in the Announcement, Mr Ang submitted that the defendants' duty to make the Announcement was not limited to simply reproducing the Executive Summary and stating SEH's proposed course of action. Mr Ang also submitted that there was evidence that SGX had approved the draft Announcement before it was released. [note: 69]

198 Also, after going through Hady's complaints on the additional allegations (see above at [100]), Mr Ang submitted that such allegations did not contain extraneous material and even if they did, they were closely connected to privileged material such that the defence of privilege was still not lost.

199 As regards Mr Nair's argument that the defendants were not required to do more than what SGX told them to do, it is clear to me that even if SGX had not approved the draft of the

Announcement, SGX was not restricting what the Announcement should say. While SGX had told the defendants to disclose the Executive Summary and to state the steps which SEH was taking, this did not mean that the defendants must do only those two things. It was up to them what else they wanted to do. They could do more, but not less, than what SGX had required.

200 Assuming that the Announcement had adopted the Executive Summary and additional allegations and/or certain alleged omissions (on which I will say more later) were made, that did not in themselves take the situation out of privilege. If this also made the Announcement inaccurate, that also did not take the situation out of privilege. As decided by the High Court in *Lim Eng Hock Peter v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 at [179] and approved on appeal in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 ("*Peter Lim*") at [34], and repeated in *Low Tuck Kwong* at [61], parts which are fairly and reasonably connected to the matters occasioning privilege are given protection as well, even if they are excessive or exaggerated. Such parts are only evidence of malice and do not go to the question of privilege.

201 Hady also did not plead that by virtue of certain specific additions or omissions, the defence of qualified privilege did not arise, as opposed to the point that qualified privilege would be defeated by malice in the circumstances. As already mentioned, Mr Nair's closing submissions did not raise any additional allegation for this proposition. In so far as he raised the question of omissions having this effect, this was only done in his closing submission and he did not identify which omission had that effect. [note: 70] While Mr Nair did raise certain omissions for the allegation of malice, that was a separate point which I will come to later.

202 It is clear to me that whatever endorsement or additional allegations which the defendants had made were closely connected to the substance of the privilege and that was why Mr Nair did not attempt to identify the allegations in his closing submissions which would allegedly deprive the defendants of the defence of privilege. It was only in Mr Nair's closing reply that he dealt with the specifics of the additional allegations in the Announcement. Even then, this was in the context of malice and recklessness which he treated as part of malice. On this point, I refer to paras 183 to 218 of Mr Nair's closing reply where he placed them under the heading of "(2) The Extraneous Material" rather than under "(3) Malice" where they ought to have come under. Indeed, his para 183 states, "… the fact of such inclusion of extraneous material and the adoption or endorsement of allegations in the Executive Summary would be evidence of *malice*" [emphasis added].

203 In the circumstances, I do not propose to deal with the additional allegations here. To the extent that they are found in Hady's particulars of malice in his pleadings, they will be dealt with under the subject of malice.

204 Therefore, in my view, all the disputed words were made on an occasion of privilege and it was for Hady to establish that the privilege is lost because of malice.

Malice

205 Both Mr Nair and Mr Ang relied on, *inter alia*, the decision of the Court of Appeal in *Peter Lim* for the circumstances in which the defence of privilege will be lost. In that case, the Court of Appeal applied *Horrocks* and said (at [35]–[38] and [44]) that the privilege would be lost if:

(a) the defendant has no honest belief, knew that the publication was false or was reckless to the truth of what he published, or

(b) if the defendant has an honest belief in the truth of what he published but:

(i) his dominant motive for publishing the statement was to injure the plaintiff; or

(ii) he uses the occasion (giving rise to the privilege) for an improper purpose, for example, to give vent to his personal spite towards the plaintiff or to obtain some advantage unconnected with the duty or the interest which constitutes the reason for the privilege.

206 Although Hady used the word "malice" in para 23 of the SOC and particulars were given, it is not clear to me from his pleadings whether he meant a lack of honest belief on the part of the defendants in the truth of the disputed words and/or that their dominant motive was to injure him and/or that they were using the occasion for an improper purpose or all of these three allegations.

207 At various parts of Hady's closing submissions, it was stressed that the defendants did not have an honest belief in the truth of the disputed words. [note: 71] Mr Nair also argued that where a defendant publishes a defamatory statement out of personal spite, there is no need to show that there was a dominant intention to injure the plaintiff. [note: 72]

208 It was finally "clarified" in Hady's reply submissions that he was contending that the defendants had no honest belief in the truth of the disputed words *and* that the defendants used the privileged occasion for an improper purpose to vent their personal spite against Hady and this was unconnected with the duty pursuant to which the Announcement was published. [note: 73] The last limb was not mentioned in his earlier closing submissions and it was unclear as to whether it meant that the disputed words were simply unconnected to the substance of the privilege or that the defendants had used the occasion to obtain some advantage unconnected with the duty or interest which constitutes the reason for the privilege.

209 Giving Hady the benefit of the doubt, I assume that his allegation of "malice" referred to the lack of honest belief and also publication for an improper purpose which was (a) that the defendants were acting out of spite and/or perhaps also (b) that they were using the occasion to obtain some advantage unconnected with the duty or interest which constitutes the reason for the privilege.

210 In respect of Hady's allegation of the defendants' lack of honest belief in the truth of the defamatory words, I am of the view that the defendants honestly believed in the truth of the Announcement and the Executive Summary. According to *Gatley* at para 17.3, such positive belief in the truth will usually protect the defendant unless he can be proved to have misused the occasion.

211 When the steps and four transactions occurred and were discovered by Yee (see [8]–[20] above), the defendants were quick to convene a Board meeting on 22 March 2011 to understand what had occurred. On 23 March 2011, an Audit Committee meeting was then held to appoint a special auditor to investigate these transactions. A signed report was eventually received by the defendants on 24 August 2011. Having read the Executive Summary, the defendants each came to the conclusion that the Alpha Contracts were a sham, though this was not stated in the Executive Summary. Although this is not a point of pleading, this is an example of the defendants' belief in the Executive Summary and their making of further inferences based on it.

212 The defendants also stated that it was necessary for them to publish the Announcement and the Executive Summary. In my view, this in itself did not necessarily mean that they believed in the truth of what the two documents stated. The belief however, could be seen in the defendants' concerns about the legal implications of the documents upon reading them, and when they were released on SGXNET. They also foresaw the possibility of legal proceedings by SEH against Hady, as well as the possibility of legal and/or regulatory proceedings against SEH. The defendants thus had an

honest belief that whatever was said in the SFCA Report and the Executive Summary were true and could be used in legal proceedings involving SEH. By extension, as the Announcement was a summary of the Executive Summary, the defendants honestly believed that the Announcement was true as well.

213 Furthermore, the defendants had been reluctant to disclose the SFCA Report and the Executive Summary. It was only after the meeting with SGX that they realised that they had no choice but to disclose the Executive Summary by publishing it. Having read the SFCA Report and the Executive Summary, the defendants were aware that an announcement containing a summary and an appended Executive Summary would not only be damaging to Hady but to the company. [note: 74] Such knowledge shows that the defendants believed that the Announcement and the Executive Summary were true and would have an impact on SEH.

214 Hady attempted to show that the defendants did not have an honest or genuine belief by showing that the stings he had suggested in his submissions were made out. I am of the view that this is not the correct approach to establishing the defendants' honest belief or lack thereof as the evidence required would be about what the defendants believed and the reasons for that belief. I hence reject Mr Nair's contention that the defendants did not have an honest belief in the disputed words.

215 This being the case, I will now proceed to consider the other aspects of the alleged malice. This will require me to consider the numerous allegations of malice in the SOC.

216 Para 23 SOC states:

> 23. [Hady] will rely on, *inter alia*, the following facts and matters to show malice on the part of the defendants and in support of his claim for aggravated damages:
>
> (1) The defendants' refusal to apologise;
>
> (2) The defendants' reservation of their right to prove that the findings in the Executive Summary are true in substance;
>
> (3) That the defendants have no reasonable belief in the truth of the allegations set out at paragraphs 15 and 18 above against [Hady]; and
>
> (4) The mode, extent and timing of the publication of the Words in the Announcement which incorporate and adopt the Words in the Executive Summary.
>
> **PARTICULARS**
>
> (aa) At a meeting on 24 March 2011, [Yee] acknowledged that John Ho was the one who negotiated the Alpha Contracts and [Hady] was not responsible for the same.
>
> (a) The Announcement makes no mention of a report by [Adept] dated 6 January 2011, which found that the motion pictures to be produced under the Scorpio Contracts should be fully provided for and excluded from the Company's Net Asset Value because of doubts as to their profitability;
>
> (b) The Announcement makes no reference to a letter from Alpha to the Company dated

6 September 2011 pursuant to which the Alpha Contracts were effectively cancelled;

(c) The Announcement fails to mention the Company's previous practice with respect to Board approval for the execution or cancellation of contracts;

(d) The Announcement fails to mention the Company's previous practice with respect to disclosures under the Catalist Rules in respect of the execution or cancellation of contracts;

(e) The Announcement fails to make reference to the Company's previous practice with respect to the conduct of due diligence exercises on counterparties;

(f) The defendants refused to permit the Special Auditors to inquire into the Company's previous practices referred to in (c), (d) and (e) above;

(g) The Announcement fails to make reference to the advice of the Company's solicitors to the effect that neither the termination of the Scorpio Contracts, nor the execution of the Alpha Contracts, required disclosure on SGXNET;

(h) [Hady] was given a draft of the Announcement just before midnight on 6 September 2011, and was asked to approve it by 10am on 7 September 2011. [Hady] was not given the Special Audit Report despite his request therefor and despite the fact that this was essential to any consideration of the correctness of the Announcement;

(i) The Announcement was made despite [Hady's] solicitor's letter dated 7 September 2011 to the Board which stated that the Announcement as drafted was inaccurate and deficient;

(j) [Hady's] amendments to the Announcement on 7 September 2011 were ignored;

(k) The Announcement was made without proper Board approval;

(l) The Announcement and the Executive Summary cannot be removed from SGXNet and will therefore remain on the same indefinitely.

217 As regards para 23(1) and (2) SOC, I accept Mr Ang's submission that the defendants' refusal to apologise and their reservation of the right to prove that the findings in the Executive Summary are true are not evidence of malice as they occurred after the Announcement and Executive Summary was published. They might support Hady's claim for aggravated damages only if liability is established.

218 Paras 23 (c) to (e) of the SOC refer to the omission to mention SEH's previous practices with respect to:

(i) Board approval for the execution or cancellation of contracts;

(ii) SEH's disclosure under the Catalist Rules in respect of the execution or cancellation of contracts; and

(iii) the conduct of due diligence exercise on counterparties.

These allegations of Hady assumed that this was a case of the pot calling the kettle black. He was proceeding on the basis that in the past, the defendants had knowingly allowed similar contracts to be entered into or cancelled without Board approval or disclosure under the Catalist Rules.

219 The defendants accepted that, in the past, no Board approval was required for the execution or cancellation of contracts. Neither was the execution or cancellation disclosed under the Catalist Rules. However, their point was that the termination of all the Scorpio Contracts and the entry into all of the Alpha Contracts at one go was material because of the huge sums involved. The Scorpio Group's commitment under the Scorpio Contracts was a total of US$6.795m and S$4.1m making a total of about S$12m. [note: 75] This was about 70% of the Scorpio Group's NAV. The deposit committed for these contracts was about S$5.1m which was about 30% of the Scorpio Group's NAV. [note: 76] Its commitment under the Alpha Contracts was S$6.2m. This was about 36% of the Scorpio Group's NAV. [note: 77] This made the difference to the defendants. They were not aware of any similar situation in the past which involved such huge sums at one go.

220 Secondly, the Scorpio Contracts were the outstanding businesses of the Scorpio Group. At one go, they were all purportedly terminated. To the defendants, this required Board approval as well as disclosure on SGXNET.

221 I am of the view that Hady has failed to establish that in the past the defendants had knowingly allowed contracts of similar sums to be executed or cancelled at one go without Board approval or disclosure under the Catalist Rules. This was not a case of the defendants trying to find fault with Hady for omitting to do something which they themselves had allowed in the past.

222 As regards the conduct of due diligence on counterparties, Hady's point was that, similarly, no due diligence had been done by the Scorpio Group on the Scorpio producers Long Red, Dream Movie and Speedy Video. Yet the defendants had complained about the absence of due diligence by Hady on Alpha.

223 On this point, it was common ground that Hady's own position was that he did not conduct due diligence on Alpha. He said that he did not know that Alpha was a company incorporated in the BVI or that it was recently incorporated on 23 July 2010 under a different name and the name was changed to Alpha on 13 December 2010. He claimed that he did not know who one of the two shareholders was, *ie*, Jung Jin. It is undisputed that it was only upon further questioning by the defendants that Alan Chan revealed that Jung Jin was Shiong Jin's wife.

224 I would also like to mention another point which reflects on the situation that the defendants were facing and on Hady's conduct. It was undisputed that Hady had told the defendants at the meeting on 22 March 2011 that it was John Ho, and not Hady himself, who negotiated the Alpha Contracts and he had thought that John Ho had done the necessary due diligence on Alpha. [note: 78] Indeed, in a letter from Straits Law dated 4 June 2011 to Rajah & Tann LLP, lawyers for SFCA, Straits Law stated that the Alpha Contracts which were dated 17 March 2011, "were placed in front of Hady for the first time on 15 March 2011, for his signature". [note: 79] This statement, based on Hady's instruction, turned out to be false.

225 There was evidence that Hady had signed the Alpha Contracts in February 2011 but the contracts were not dated then. The evidence comprised an email dated 11 February 2011 from one Teoh Pei Yean (who was a staff of Hady's) to Robert Wong, a solicitor at Straits Law. The email forwarded attachments which were undated Alpha Contracts that Hady had signed. [note: 80]

226 When this evidence was drawn to Hady's attention in cross-examination, he lied to cover up the initial lie about having seen the documents for the first time only on 15 March 2011.

227 First, he said that the set of contracts he had signed in February 2011 was different from the

set he signed in March 2011. [note: 81]

228 Secondly, he said that the set he signed in February 2011 was not a valid set of documents as he was not yet a director of SEH then. That was why he deliberately signed the set in February 2011 by simply initialling the documents instead of appending his full signature. [note: 82] Yet, the set of documents dated 17 March 2011 appeared to me to carry similar signatures or initialling as the undated ones which were forwarded to his solicitors in February 2011 although he denied that the signatures or initialling were similar.

229 As for the alleged first set of documents signed in February 2011, Hady said that that set had been passed to Shiong Jin but that set was not produced in court by Shiong Jin or anyone else. [note: 83]

230 It is clear to me that there was only one set of Alpha Contracts. The undated ones which Hady signed in February 2011 were subsequently dated as 17 March 2011 after he became a director of SEH.

231 In any event, the point was not whether he had signed one or two sets of documents or whether they were valid or not. The point made through his solicitors' letter was that he had only seen the documents on 15 March 2011 for the first time. This was untrue.

232 Coming back to the issue of whether it was the past practice of SEH to conduct due diligence on counterparties, Mr Nair sought to show that no due diligence had been conducted by SEH on the Scorpio producers. However, the defendants' evidence was that John Ho already had dealings with the Scorpio producers before SEH became a listed company. John Ho knew them well unlike the present case.

233 Moreover, I am of the view that even if John Ho was involved in the negotiations for the Alpha Contracts to some extent, it was Hady who was the driver for these contracts. Indeed, John Ho told SFCA that he was never involved in the negotiations of the Alpha Contracts and it was Hady who had negotiated these contracts. Furthermore, if Hady, being a prospective new controlling shareholder, did not know enough about the Alpha Contracts or want them, he would not have signed them. In my view, he had signed them in anticipation of his purchase of the shares from John Ho and his family. That is why the Alpha Contracts were dated when or after that purchase was completed and Hady was appointed a director of SEH. In my view, it was Hady's intention to get the Scorpio Group to terminate the Scorpio Contracts and enter into the Alpha Contracts as part of his plan to acquire shares in SEH.

234 In the circumstances, Hady's claim that the Announcement did not disclose previous practices was not relevant and not evidence of malice on the part of the defendants. This was an entirely new set of circumstances arising from the termination of the Scorpio Contracts and the execution of the Alpha Contracts which warranted the defendants' concerns that the two transactions should have been approved, that disclosures were necessary and that due diligence should have been conducted on Alpha.

235 Para 23(f) of the SOC stated that the defendants refused to permit the SFCA to inquire into SEH's previous practices referred to in paras 23(c), (d) and (e) of the SOC. I am of the view that the defendants did not refuse SFCA permission to do this. According to the SFCA Report, the scope of its engagement under an engagement letter dated 25 March 2011 was intended to be expanded, if necessary, to review all material contracts which SEH had entered into or terminated from 1 January

2010 to 31 December 2010. However, the Audit Committee then informed SFCA on 21 April 2011 that SEH's external auditors Deloitte & Touche had been requested to cover this work and hence SFCA was not required to perform it. [note: 84] In my view, Hady had misused this development by stating that the defendants had refused permission to SFCA to do the work when this was not the case.

236 I am of the view that the defendants' decision that it was not necessary for SFCA to review earlier contracts in 2010 was not indicative of any sinister intent on the defendants' part, and was in fact quite innocent. Although reviews of earlier contracts may go to show that disclosure, due diligence and Board approval would be better for SEH's corporate governance, it would still not assist Hady's case. As mentioned earlier at [234], the defendants were more concerned about the circumstances surrounding the transactions and the two contracts than establishing problems with SEH's corporate governance structure. It is clear from the Executive Summary that SFCA had found significant lapses in relation to the Scorpio Contracts and Alpha Contracts irrespective of SEH's previous practices. For example, the Executive Summary stated at [2.13] that the Scorpio Contracts were significant investments and a main potential source of revenue. A collective termination of the Scorpio Contracts was not done in the ordinary course of business. As for the Alpha Contracts, the contracts provided too little information and Hady had little experience in the entertainment industry. [note: 85] Also, the amount paid for the contracts exceeded the amount available in SEH's bank account. Furthermore, if there was really a previous practice as Hady was alluding to, the defendants could not hope to hide it as John Ho would have been aware of the same and would have disclosed it easily enough to Hady.

237 At this point, I refer to the allegation pleaded at (aa), *ie*, that at a meeting on 24 March 2011, Yee had acknowledged that it was John Ho who negotiated the Alpha Contracts and Hady was not responsible for the same.

238 The purpose of this allegation was not clear. It appeared that Hady was alleging that Yee knew that it was John Ho, and not Hady, who had negotiated the Alpha Contracts and in suggesting in the Announcement, which incorporated the Executive Summary, that Hady was involved in the negotiations, the defendants were deliberately stating a lie. In my view, the short point is that Hady has failed to establish that Yee knew that it was John Ho and not Hady who had negotiated the Alpha Contracts. Indeed, it seems to me that Yee did not know and did not accept that only John Ho was the negotiator. [note: 86] It also seems to me that all the defendants did not accept that Hady had nothing to do with the negotiations for the Alpha Contracts. I also add that Hady appears not to have pursued para 23(aa) of the SOC in his closing submissions.

239 I come now to para 23(a) of the SOC, *ie*, that the Announcement made no mention of the Adept Report dated 6 January 2011. [note: 87]

240 Paras 5.7 to 5.12 of the Adept Report dealt with the seven movies which were still in the course of production. The accounts of SEH showed that the intangible carrying value of the seven movies still in production and of the numerous movies already released was S$5,513,000 as at 31 October 2010. Apparently, the management of SEH had informed Adept that the Scorpio Group had decided to stop producing new movies primarily because this segment of the group's business had not been profitable. Adept stated that yet to be released movies were in essence a blind bet. According to the management of the Scorpio Group, while the group typically conducted a forecast for new movies, the actual performance would more often than not fall short.

241 On the other hand, Adept did consider that contents of movies already released did command some value although in their view it was a tall order trying to assign any monetary value to such an

intangible value. Accordingly, Adept was of the view that the intangible value of S$5,513,000 should be fully provided for and excluded from the NAV of SEH as at 31 October 2010.

242 Hady relied on these parts of the Adept Report to justify the termination of the Scorpio Contracts. He suggested that the defendants had deliberately omitted to refer to the Adept Report in the Announcement so as to suggest that the termination of the Scorpio Contracts was against the interest of the Scorpio Group.

243 I should mention that the part of the Adept Report which Hady relied on covered only seven of the nine Scorpio Contracts. The seven were for the production of movies, and the report did not cover the two concerts. Yet, all nine Scorpio Contracts were terminated.

244 The defendants' position was that they considered the Adept Report irrelevant. They also did not accept it. They noted that as John Ho had allowed the Scorpio Group to enter into such contracts in the first place, he must have considered the ventures to be profitable. Yet when John Ho and his family members were trying to sell their shares to Hady, John Ho had purportedly taken a different view.

245 The defendants also said that they had taken legal advice as well as comments from SGX and the sponsor when drafting the Announcement. Moreover, the Announcement was intended to refer to and incorporate only the Executive Summary and not the entire SFCA Report. The Adept Report was not mentioned in the Executive Summary although it was dealt with in the SFCA Report.

246 However, Hady alleged that since the defendants did not restrict the Announcement to simply referring to or incorporating the Executive Summary and had actually contained additional comments, the defendants could have referred to the Adept Report and mentioned Adept's views if the defendants were minded to do so.

247 I am of the view that although it is true that the defendants could have referred to the contents of the Adept Report in the Announcement, the omission to do so was not deliberate.

248 In my view, the defendants were not intending to do much more than summarise the Executive Summary, which in itself already ran into 34 pages. The Executive Summary did not refer to the Adept Report and there was no suggestion that SFCA had deliberately left it out from the Executive Summary.

249 In so far as the Announcement included SEH's intended course of action, the defendants said, and I accept, that this was included at the direction of SGX. There was in fact an email from June Sim to that effect. As regards an inclusion in the Announcement about Shiong Jin being named in an SGX regulatory action (see pg 3 of the Announcement) which Mr Nair picked on to illustrate his point that the defendants did include material other than the Executive Summary in the Announcement, the defendants said that the information about Shiong Jin was included at SGX's suggestion. Bernard Lim had stated in an email sent on 6 September 2011 that amendments had been made to the Announcement to incorporate comments raised by SGX, the Audit Committee and A&G, and I accept that evidence. [note: 88]

250 I will also address a point here which Mr Nair was making during his cross-examination of the defendants (although it was not pleaded as part of the allegations of malice). He said that para 2.1 of the Announcement stated that it was highlighted in the Executive Summary that the "purported" termination of the Scorpio Contracts was significant to the Scorpio Group. He suggested that the use of the word "purported" was deliberately meant to suggest that the termination was not validly

executed and that the termination was not done *bona fide* even though SFCA had in fact accepted that the Scorpio Contracts were validly terminated.

251 In my view, Mr Nair was not entirely accurate. It is true that para 2.13 of the Executive Summary stated that SFCA was of the view that the Scorpio Contracts "were indeed terminated". However, para 3.14(a) of the Executive Summary also referred to the "purported" termination of the Scorpio Contracts. It seems to me that notwithstanding SFCA's view that the Scorpio Contracts had been validly terminated, SFCA itself still could not be certain about this.

252 In any event, the defendants explained that the use of the word "purported" was not to cast any aspersions about the termination of the Scorpio Contracts but rather to preserve SEH's position about the termination because the defendants were themselves uncertain as to what had truly transpired. I accept this explanation. There were so many unsatisfactory aspects about the termination of the Scorpio Contracts and the entry into the Alpha Contracts that gave rise to valid concerns on the part of the defendants. I have already mentioned some of these aspects and will elaborate later. It is sufficient to say for now that the defendants were justified in using the word "purported" to preserve the position of the Scorpio Group. Accordingly, I am of the view that the use of the word "purported" in para 2.1 of the Announcement, and also elsewhere in the Announcement, did not suggest malice on the part of the defendants.

253 I come now to para 23(b) of the SOC which made the point that the Announcement made no reference to a letter dated 6 September 2011 from Alpha which effectively cancelled the Alpha Contracts. Again, Hady was suggesting that the defendants had deliberately omitted to refer to this letter to continue to give the negative impression that the Scorpio Group was still at risk under the Alpha Contracts when in fact Alpha was cancelling such contracts.

254 The material part of that letter stated: [note: 89]

> … We do not wish to have any more dealings with [SEH].
>
> As such, we shall:
>
> 1) Treat all contracts with [SEH] as repudiated.
>
> 2) Since all the $2.86m has been refunded, we are open to discussion on how to deal with the $340,000 that we are holding as deposits for all other contracts
>
> 3) There shall not be any further claims from both sides
>
> 4) This letter is without prejudice
>
> 5) All our rights are expressly reserved

255 As can be seen, Alpha had unilaterally adopted the propositions stated in the letter. While it was prepared to treat the Alpha Contracts as having been terminated, the Scorpio Group had not yet to agree to this. It was also not entirely clear then, or even now, that the Alpha Contracts were *bona fide*.

256 I also note that this letter was sent just before the draft of the Announcement was approved and released to SGX on 7 September 2011 and it was sent on a without prejudice basis.

257 The defendants said that they considered the Alpha letter to be irrelevant. I do not think it was irrelevant. If the continual existence of the Alpha Contracts was a cause of concern to the defendants, as appeared to be the case from the Announcement, then the fact that Alpha was treating them as cancelled would be relevant.

258 Nevertheless, the defendants also said that they relied on A&G's legal advice of not mentioning the letter. A copy of that advice was shown to Mr Nair (but not to the court) who did not pursue the point in cross-examination. He did not suggest to the defendants that the defendants ought to have known that A&G's advice was incorrect and that they ought to have disregarded that advice and disclose the material part of the letter. Even if A&G's advice turned out to be incorrect, that was not the point. The fact that the defendants acted genuinely on such advice militated against any suggestion of malice.

259 Para 23(g) of SOC alleged that the Announcement failed to refer to the advice of SEH's solicitors to the effect that neither the termination of the Scorpio Contracts nor the execution of the Alpha Contracts required disclosure to SGX. This was a reference to oral advice given by Loo Choon Chiaw of L&P at the Board meeting on 23 March 2011. The relevant part of the minutes of that meeting stated: [note: 90]

> Mr. Loo explained that such contracts would have most likely been entered into by [Scorpio Group] as part of its ordinary course of business and hence, this could suggest why the previous making of similar contracts was never announced by the Group. Such agreements could also entail trade secrets which would render them not announceable. These factors would fall under the exceptions whereby such contracts are not announceable on [SGX] in accordance with the listing rules. Notwithstanding the foregoing, Mr. Loo concluded the presentation by stating that it remained the prerogative of the Board or committees of the [Scorpio] Group to announce the [Alpha Contracts] even though they were not strictly required to do so, as the listing manual merely provided a minimum requirement on which to comply with. There was nothing to stop [SEH] from announcing certain contracts without divulging its trade secrets to the public.

260 I should mention that Mr Loo's advice referred to above was in respect of the execution of the Alpha Contracts and not the termination of the Scorpio Contracts. Furthermore, his advice pertained to the question of whether an announcement was necessary and not to the question whether the entry into the Alpha Contracts should have been disclosed to the Board.

261 Mr Nair also submitted that at the Board meeting on 23 March 2011, Chia had in fact unequivocally endorsed Mr Loo's opinion. This was evidenced from a verbatim transcript of the recording of that meeting. However, Mr Ang submitted that what Chia had said had been taken out of context. The transcripts stated: [note: 91]

> "Let me say something Mr Chairman, I accept everything that has been said today by [Hady] and our legal advisors. No problem with all this (inaudible). I think the only issue I see is that *this perception issue* because new substantial holder [Hady] came in on the 14th …15th [of March 2011] and the new [Executive Director] was appointed on the 16th[.] Then we have a series of 5 contracts on the 17th. And then after that [a] massive amount of money was transferred out. Now, this could be all proper, this could be a benefit for the company. *But I think there is a perception issue that Hey, [Hady] has (inaudible) and then he has signed all those contracts.*
>
> …

> Yes, [if I] may continue, so there is a perception issue for me. Within a day we have committed ourselves to these 5 contracts and millions of dollars (inaudible) other company. So if they turn out to be [great], I think we will all pat ourselves on the back and said it's fantastic. But something goes wrong, I think we would be held responsible why we never questioned. Number 1. Number 2 is this. It's that … *I don't think this is the kind of business that [Hady] wants the company to actually go into. He doesn't see this promotion of all this artistes and motion pictures as business for the future for the company. So why are we doing it? And more fundamentally for me is this, who is [Alpha]? I don't know.* Now, sorry this (inaudible) … You can give me all the guarantees in the world but guarantees are meaningless to me unless the person behind the guarantee is substantial. So why are we …? Why are we entering into the contract with Alpha? Have they a track record? I have a problem yesterday. I was given more serious problems yesterday after looking at the (inaudible) Alpha was only acquired on 13th December 2010. There is no track record to talk about. Again I am not casting [aspersions] on anybody. But I think this raised question that I am independent director is responsible for. You know, if I am out of here and [Hady], it's not my problem. But as long as I am here, I am responsible. … I am not here to obstruct. I don't become happier with this or richer. Nobody rewards me for being difficult. So I think this raised question. *Again I emphasize if this turns out to be well, great but if this turns out to be problematic and the money don't come back for some reason, then there is a big issue.* Now Alpha is only established on 13th December 2010. Unfortunately, you know, they have got newspaper articles and all that, dated before 13th December. So all these materials that were given to us by Alan [Chan] raised more questions than answers. I also have had another question because on Alpha's website, they say they are owned by a, they are a British company, owned by a private equity fund. Ya? On their website. But from the certificate of incumbency, it is owned by two individuals, one whom I understand (inaudible) is Alan. So this is the problem. That's the problem. I think whatever we independent directors [have] got to do, I believe certainly [*sic*] not just for the benefit of us, to protect us, but also for the benefit of [Hady] because he signed the (inaudible). So if something goes wrong, somebody is going to pick the gun and shoot [Hady] because he signed the thing. He will be personally responsible. So I think I'll give it to the Chairman now unless anybody else has something to say but whatever we're [going to] do now, I think benefits everybody. It protects everybody.
>
> [emphasis added]

262 Mr Ang also submitted that at the meeting of the Audit Committee on the same day, all the defendants had decided to recommend to the Board that it should appoint SFCA as special auditor to investigate the transactions. The Board, including Hady, accepted that recommendation. The Board also agreed to suspend trading in SEH's shares. Mr Ang's point was that if Chia and the other defendants had agreed with Mr Loo's advice, they would not have decided to suspend trading in SEH's shares.

263 I am of the view that the first sentence of the transcript cited above, which Mr Nair relied on, was not as unequivocal as Mr Nair was alleging when it is read in context. It seems to me that what Chia was saying was that Mr Loo's advice might be correct when the transactions were considered in isolation. However, in the light of the quantum of money involved and the circumstances surrounding the Scorpio Contracts and Alpha Contracts he had concerns. It was also apparent during trial that the other two defendants also had concerns. That was why the Audit Committee recommended the appointment of a special auditor. That was why the defendants also agreed at the Board meeting to the suspension of trading in SEH shares and the eventual halt in such trading. In my view, Chia would not have agreed to the appointment of a special auditor or to the suspension of trading if he had as unequivocally accepted Mr Loo's advice as Mr Nair was asserting.

264 It is also clear to me that SFCA had reached a conclusion different from Mr Loo about the need to disclose the Alpha Contracts publicly and the defendants were accepting SFCA's view.

265 Furthermore, although SFCA was informed about Mr Loo's oral advice, the Executive Summary did not mention Mr Loo's advice.

266 Again, bearing in mind that the defendants were not intending to say much more than the Executive Summary and given that they eventually did not agree with Mr Loo's oral advice, it is unsurprising that the defendants omitted to mention that advice in the Announcement.

267 In the circumstances, I am of the view that the omission to mention Mr Loo's oral advice in the Announcement is not evidence of malice on the defendants' part.

268 I will now address the allegations in paras 23(h) to (k) of the SOC together. Para 23(h) actually made two complaints:

(a) That Hady was given a short time to comment on the draft of the Announcement from just before midnight of 6 September 2011 to 10am of 7 September 2011; and

(b) Hady was not given the SFCA Report although he requested the same and that the report was essential to any consideration of the correctness of the Announcement.

Para 23(i) alleged that the Announcement was made despite Straits Law's letter dated 7 September 2011 to the Board which stated that the Announcement was inaccurate and deficient.

Para 23(j) alleged that Hady's amendments on 7 September 2011 to the draft Announcement were ignored.

Para 23(k) alleged that the Announcement was made without proper Board approval.

269 To address these particulars, I will set out the events which transpired (a) before the Board meeting of 6 September 2011 and (b) the events on 6 and 7 September 2011.

270 The Audit Committee was given the final draft of the SFCA Report on 11 August 2011. However, that draft did not contain all the minutes of the meetings referred to in the report and SFCA was awaiting those enclosures to include them in the report. After copies of the minutes were made available, the SFCA Report was sent to the Audit Committee for their discussion. It was then signed and released to the Audit Committee on 24 August 2011.

271 On 31 August 2011, a notice was given by Edward Tan as company secretary of SEH to convene a Board meeting on 2 September 2011. The agenda for the meeting included: [note: 92]

1. To receive and consider the [report] of [SFCA] from the Audit Committee.

…

6. To consider referring the matters contained in the [report] to the relevant authorities as recommended by [SFCA].

…

9. To consider and approve the release of the announcement relating to the [report] of [SFCA].

…

…

272 Hady responded on 1 September 2011 by email to the Board members. [note: 93] He asked for the SFCA Report to be circulated immediately and for the Board meeting to be convened one week after the report had been circulated. Also, he was out of Singapore and would not be back that Friday, *ie*, 2 September 2011.

273 Yee replied on 1 September 2011 to state that in view of the urgency of the matters to be discussed, the Board meeting would proceed as scheduled. [note: 94] If Hady was unable to attend, Yee suggested telephone conferencing with Hady. Yee also said that Hady had himself complained about SFCA's delay in completing its investigation and since the SFCA Report was completed the Board must meet and decide on its next course of action without delay.

274 Hady replied to protest and asked when the SFCA Report would be circulated to all directors. [note: 95] He was of the view that the Board meeting could be delayed for a few days since they had already waited for more than five months for the SFCA Report. Teleconferencing was not convenient for him and he preferred to attend the meeting in person.

275 Yee replied to say that he had consulted the other directors and the company secretary. [note: 96] The Board meeting would be postponed to 2.30pm of 6 September 2011. Meanwhile, Yee also sent Hady an email on 1 September 2011 to say that the SFCA Report was privileged as it was prepared for the purpose of seeking legal advice and/or in contemplation of legal and/or regulatory proceedings. [note: 97] Under the terms of engagement, SFCA was to report its findings to the Audit Committee only. The Audit Committee was prepared to share the findings of SFCA with any Board member who was entitled to receive such information for the purpose of discussing any step to protect SEH's interest. However, any Board member whose conduct gave rise to potential legal proceedings against him will have to abstain from Board deliberations in respect of the report and would not be entitled to receive a copy of the report. In the circumstances, the Audit Committee would not be circulating a copy of the report before the Board meeting.

276 Yee alleged that his emails of 1 September 2011 were sent in consultation with Chia and Ko. He also alleged that all of them agreed that Hady would be provided a copy of the Executive Summary if it was to be released to the public in any event. At all material times, the Audit Committee had also acted on advice from A&G.

277 It will be remembered that in the meantime, the defendants were not keen to make any announcement at all. Hence a meeting with SGX was arranged for 5 September 2011. At this meeting, SGX said that SEH was obliged to disclose:

(a) the Executive Summary; and

(b) the steps SEH proposed to take.

This was followed by SGX's email on 6 September 2011 at 9.36pm to Bernard Lim (see [64]).

278 In the meantime, a copy of the Executive Summary was given to Hady at about 2pm of 6 September 2011.

279 The Board meeting on 6 September 2011 started at about 2.30pm. [note: 98] The Board formally accepted the SFCA Report. Hady was asked to leave the meeting while the rest of the Board deliberated on SFCA's findings. [note: 99] Thereafter, Hady apparently returned to the meeting. The Board, including Hady, recommended that the draft of the Announcement be circulated for approval on the same day. [note: 100] Edward Tan reminded the Board that, subject to clearance by the Board and SGX, the Announcement must be released promptly on SGXNET. [note: 101]

280 At 11.38pm of 6 September 2011, Yee sent a draft of the announcement to Edward Tan for his circulation to the Board for comments. Edward Tan did so by email at 11.53pm. [note: 102]

281 At 12.21am of 7 September 2011, Edward Tan sent another email to the Board to inform them that Yee had sent a short message asking the Board and the Sponsor to approve the draft by 10am of the same day. [note: 103]

282 Thereafter, there ensued a flurry of messages all dated 7 September 2011. I will mention most of them to give an accurate picture of what was happening that day.

283 At 8.12am, Hady sent an email to Edward Tan which he also copied to the defendants. [note: 104] He complained that the Board had been given a six-page announcement at 12.21am and were asked to reply by 10am on the same day. He asked why the draft was not made available at the Board meeting the day before and was being circulated at midnight. He believed that the timing was deliberate to ensure that he did not have time to review the draft. His quick comment was that the draft was factually inaccurate. He said any such announcement would be a serious breach of directors' duties on the part of any director responsible for its release. He would review the draft in detail and would reply as soon as possible.

284 At 10.24am, Chia sent an email to Yee, Ko and Bernard Lim. The email is significant on the issue of malice. It stated: [note: 105]

> Gentlemen:
>
> I think we should allow him a reasonable time to consider and comment on the draft announcement.

285 At 11.26am, Yee sent an email to Hady. [note: 106] The email said that the draft Announcement could only be prepared after the conclusion of the Board meeting (the day before). The drafting was only completed late in the night. As informed by Chew Lee Sian and Edward Tan, the Announcement had to be made promptly as required under the listing manual as it contained material information. That is why comments were sought by 10am.

286 At 12.05pm, Ong Hwee Li sent an email to Hady. [note: 107] He said he hoped that the time required to read the six-page draft was not being exaggerated. This was not the time to examine the accuracy of the report which had been prepared by SFCA. He reminded Hady that the listing manual required immediate announcement of material information or as soon as practicable. Since the report was finalised, he was of the view that SEH should finalise the Announcement no later than 2pm of the same day. Thereafter SEH should proceed to release it.

287 At 12.37pm, Chew Lee Sian sent an email in her name and Edward Tan's name to Hady, the defendants and Ong Hwee Li. [note: 108] She reiterated that material information should be disclosed promptly. However, she expressed the view that SGX does usually allow 48 hours to disclose the information. She did not say when the 48 hours was to run, *eg*, from the time the Board had approved the report the day before or from the time the draft of the Announcement was first circulated to the directors. However, she said that they would submit to the advice of SEH's legal counsel.

288 At about 2.30pm, Straits Law sent a fax to the Board. [note: 109] They stated that Hady was given the Executive Summary only and not the SFCA Report. Although the report appeared to have been ready since 24 August 2011 and the draft of the Announcement was to have been received at the Board meeting on 6 September 2011, no draft was circulated at that meeting. They also complained about the short time frame given to approve the draft. They raised various reasons for what Hady perceived as an unacceptable situation. Two of the reasons were that the Executive Summary failed to deal with the Adept Report and Alpha's letter dated 6 September 2011. They sought confirmation by 3pm that day that the Announcement would not be issued. They said that Hady would suggest amendments to the draft within 48 hours from the time that it was circulated.

289 At 3.30pm, Yee sent an email to Chew Lee Sian (which was copied to others) to state that the timing of the release of the Announcement would be that of the Board. [note: 110] SGX had requested that the Announcement be released as soon as possible. He proposed that the Announcement be released at 5pm that day.

290 Ko sent an email to various persons at 3.40pm concurring with the 5pm deadline. [note: 111]

291 At 4.44pm, Ong Hwee Li sent an email to the defendants. [note: 112] Although the heading of that email was the fax from Straits Law, the contents of Ong Hwee Li's email was to state that he had received confirmation from SGX to proceed with the Announcement. The Sponsor approved its release.

292 At 5.23pm, [note: 113] Yee sent an email to Edward Tan and Chew Lee Sian to say that he had the agreement of Chia and Ko to release the Announcement. He instructed Edward Tan to release that and the Executive Summary.

293 At 5.41pm, Chew Lee Sian sent an email (in the name of Edward Tan and herself) to Hady, the defendants and others. [note: 114] She said that they had received word from Hady that SGX had informed Hady that the Announcement may be made within 48 hours from the first circulation of the draft to all directors. She circulated Yee's earlier email instructing Edward Tan and her to release the Announcement. Edward Tan said in oral evidence that they circulated Yee's earlier email because he noted that Yee's email was not copied to Hady.

294 At 5.57pm, Ong Hwee Li sent an email to Hady, Chew Lee Sian and the defendants. [note: 115] He said that the responsibility for making the Announcement lay with the Board and that the Board had agreed to release the Announcement. Edward Tan would have to take responsibility if he failed to act on the Board's instruction which he had received.

295 At 6.03pm, Hady sent an email to Ong Hwee Li, Chew Lee Sian and the defendants. [note: 116] He said he understood that the Board was about to make the Announcement immediately in breach of their duties. In the limited time, he had made some amendments to the draft which he enclosed and reserved his rights and SEH's rights. Unfortunately, his amendments were not in fact enclosed.

296 At 6.11pm, Yee replied to Hady to state that Hady's email was received without the amendments. [note: 117] Yee also stated that he had not seen any evidence that SGX had confirmed that they may defer releasing the Announcement for 48 hours.

297 In the meantime, Ong Hwee Li sent an email at 6.15pm to June Sim (of SGX) to forward her a copy of Chew Lee Sian's email stating that Hady had said that SGX had informed him that the Announcement may be made within 48 hours from the first circulation of the draft. [note: 118] Ong Hwee Li asked June Sim for her clarification.

298 June Sim sent an email at 6.27pm to, *inter alia*, Ong Hwee Li, Chew Lee Sian, Hady and the defendants. [note: 119] She said that she had been misquoted. She did not speak to Hady. It was Aoki who had contacted her around 5pm and asked her to direct the Board and the Sponsor to delay the Announcement. June said that she would speak to the Sponsor but made it clear that it was for the Board, acting on the Sponsor's advice, to decide and that SGX would not interfere on the timing of the Announcement. She said she did not say that they should wait 48 hours before the Announcement was released.

299 At 6.33pm, Yee sent an email to June Sim which was copied to Edward Tan, Ong Hwee Li, Hady and the defendants. [note: 120] He thanked June for her clarification and instructed Edward to release the Announcement, which had been approved by the entire Audit Committee and three members of the Board, without further delay.

300 At 6.53pm, Hady sent an email to Ong Hwee Li, Chew Lee Sian and the defendants to forward the missing attachment which was supposed to contain his amendments to the draft. [note: 121] Unfortunately, the amendments were once again not attached.

301 At 7pm, Hady sent an email to Ong Hwee Li, Chew Lee Sian and the defendants to express shock that the Sponsor was forcing SEH to issue a misleading announcement. [note: 122]

302 The Announcement was eventually released at about 7.11pm and broadcast immediately thereafter on SGXNET. [note: 123]

303 At 7.12pm, Hady sent an email to, *inter alia*, the defendants, Ong Hwee Li and Chew Lee Sian to say that he understood that SGX had confirmed that no announcement had to be made until 48 hours after the event to be announced. [note: 124] The Board's rush to make a misleading announcement was very hard to understand. He had circulated very rough amendments and was waiting for the SFCA Report to review the draft.

304 At 7.13pm, Hady sent another email again to forward his earlier amendments. He was finally successful in sending the amendments this time. [note: 125]

305 At 7.16pm, Edward Tan sent an email to the defendants and Hady to forward the Announcement which had been released in SGXNET. [note: 126] With this email, Hady realised that the Announcement had been made notwithstanding his protests.

306 I will summarise Hady's main reasons for alleging that the defendants were not acting *bona fide* in issuing the Announcement. From his point of view, they did not really want to give him a genuine opportunity to vet the draft. That is why:

(a) the Executive Summary was given to him so late and even then they still did not give him a copy of the SFCA Report;

(b) the draft Announcement was not circulated at the Board meeting on 6 September 2011 when he would have had more time to consider it;

(c) the draft Announcement was given later that night and even then, he was given a very short time to vet the draft; and

(d) the defendants ignored the comments of his solicitors on the draft and his own attempts to amend the draft.

307 As regards Hady's allegation that the Announcement was made without proper Board approval, I am of the view that since three of the Board members, constituting a majority, had approved its release, the Announcement was made with proper Board approval. In any event, it is clear to me that the defendants and even Ong Hwee Li, Edward Tan and Chew Lee Sian genuinely believed that there was Board approval to release the Announcement. If, technically, there was no proper Board approval, that would be a separate matter. The defendants' willingness to go ahead with the Announcement in the face of Hady's objection was a factor which he was relying on as evidence of malice and I have included that allegation in the summary above.

308 In the course of cross-examination of the defendants, Mr Nair took the point that the defendants had plenty of time to prepare the draft Announcement before the Board meeting of 6 September 2011 since they had had the final draft of the SFCA Report from 11 August 2011. Even if one were to use the date of 24 August 2011, when the Audit Committee received the signed report with all its enclosures, there was still enough time to prepare a draft. It was not correct that the draft could only be "prepared" after the conclusion of the Board meeting as Yee had said in his email of 11.26am on 7 September 2011. Mr Nair submitted that Yee's comment was dishonest.

309 However, Yee said in oral evidence that what he had meant to say in his email was that it could only be "finalised" after the Board meeting. [note: 127] I accept Yee's oral clarification. It would have been foolish of him to assert that the draft could only be prepared after the Board meeting on 6 September 2011 and he did not come across as a foolish person to me.

310 Be that as it may, Mr Nair was suggesting during cross-examination of Yee that the defendants had enough time to prepare a draft for consideration by the time of the Board meeting on 6 September 2011.

311 Yee said that SEH was busy preparing for the filing of the audited accounts of SEH by end August 2011 as SEH was already late in doing this and end August 2011 was the deadline of an extension which SGX had granted. [note: 128] Secondly, as discussed above, Yee said that the defendants were hoping that SEH would not have to make the Announcement but SGX required them to do so. SGX had told them to do so orally on 5 September 2011, and this was reiterated by an email on 6 September 2011.

312 Although I agree that the defendants had other things on their plate including the filing of the audited accounts of SEH by end August 2011, I accept Mr Nair's suggestion that they had enough time to prepare a draft before the Board meeting on 6 September 2011 if they really wanted to. They had also asked Edward Tan and/or Chew Lee Sian for a template in August 2011.

313 However, as already mentioned, the defendants were reluctant for SEH to make any announcement. It is also not clear to me when they started to draft the announcement or how many drafts they went through. Nevertheless, for all the insinuations that Mr Nair was making, he stopped short of suggesting that the defendants did in fact have a draft ready before the Board meeting on 6 September 2011 and that they deliberately withheld the draft until later in the night of 6 September 2011. Furthermore, if the defendants had really planned to give Hady as little time as possible to vet the draft, they could still have presented the draft at the Board meeting and insist that he vet it there and then, or give him a very short deadline to respond that same evening. They need not have waited to give him the draft later that night. In addition, Chia's email (see [284] above) where he suggested to the other defendants and Bernard Lim that Hady should be allowed a reasonable time to vet the draft also militated against the suggestion that there was a concerted effort to give Hady as little time as possible.

314 Nevertheless, I am of the view that Hady was not given a reasonable time to vet the draft Announcement whether the deadline was 10am, 2pm or 5pm of 7 September 2011. The draft was only sent to the Board near midnight of 6 September 2011. Hady had received the Executive Summary at 2pm earlier. The Executive Summary and the draft were making adverse allegations about him even though the draft was only a six-page document as Ong Hwee Li had alleged. Although an announcement should be made promptly, it seems to me that Hady should have been given at least 48 hours from midnight of 6 September 2011 to respond especially since (a) there was already a lapse of a few months while the defendants awaited the SFCA Report and (b) SGX was not insisting that the Announcement be made specifically on 7 September 2011.

315 However, although I am of the view that the defendants did not give Hady a reasonable time to respond, this does not mean that the defendants were acting out of malice. The defendants may have acted wrongly but they were not malicious as there was neither an improper motive on the defendants' part to injure Hady nor an improper purpose that they were seeking to achieve. It must be remembered that the defendants were acting out of their duty to SGX, SEH's shareholders and the investing public. There was no evidence that the directors had done so out of personal spite or to obtain an advantage unconnected with their duty.

316 The defendants stressed that they had acted on advice from A&G while Mr Nair submitted that this was not pleaded. In my view, it is for Hady to establish malice and it is unnecessary for the defendants to specifically plead that they had relied on legal advice. Nevertheless, the defendants did not specify what the advice was. Did A&G advise only that the Announcement be promptly made or did they actually specify that 10am or 2pm or 5pm of 7 September 2011 was a reasonable deadline to give to Hady?

317 Aside from the point about the defendants having relied on A&G's advice, I note that the defendants were under a lot of pressure at the material time. They must have been very concerned, if not shocked, about the steps taken in respect of the four transactions upon the arrival of a new shareholder. Their misgivings were later reinforced by the SFCA Report and the Executive Summary. They were of the view that SEH was already in breach of its responsibility to make the Announcement earlier and they were still uncertain, as at 7 September 2011, of the impact of the termination of the Scorpio Contracts and the entry into the Alpha Contracts notwithstanding the 6 September 2011 letter from Alpha. They must have perceived Hady as the prime actor or one of the main actors in the unsatisfactory state of affairs.

318 The fact that Hady had claimed that first, June Sim had spoken to him about the timing of the release of the announcement when she had in fact spoken to Aoki, and second that June Sim said that she did not tell Aoki that SEH should wait 48 hours before releasing the Announcement, probably

made the defendants suspicious as to whether Hady was deliberately trying to delay the announcement.

319 The fact that Hady's proposed amendments did not get through to the defendants the first two times would also have added to the tension then, although there was no suggestion that Hady had deliberately withheld his proposed amendments.

320 Furthermore, Ong Hwee Li was also pressing for the release of the Announcement without delay. It will be remembered that it was he who suggested in his email sent at 12.05pm of 7 September 2011 that the draft be finalised by 2pm. In that email, Ong Hwee Li had also said that "I hope we are not exaggerating the time required to read a six-page announcement" and he also made the rather startling comment that "[t]he report has been finalised and this is not the time to examine the accuracy of the report". It will be remembered that the report was not given to Hady then but, even if Ong Hwee Li meant to refer to the accuracy of the Executive Summary instead, it seems to me that the accuracy of the Executive Summary was material. It would also not be fair to suggest to Hady that he should accept the Executive Summary just because it had been finalised by SFCA, especially when adverse comments were being made against him.

321 Interestingly, no allegation or suggestion was made that Ong Hwee Li was also acting maliciously when he sought to press Hady to respond by 2pm or when he even said that this was not the time to be concerned about accuracy.

322 I am of the view that Ong Hwee Li's email illustrates the tremendous pressure that the Sponsor and the defendants were feeling at the time.

323 In the circumstances, while I am of the view that the defendants ought to have given Hady more time to respond to the draft Announcement, I am also of the view that the defendants had acted *bona fide* when not doing so.

324 As for the defendants' refusal to give Hady a copy of the SFCA Report, I accept the evidence from the defendants that this was based on legal advice of A&G (see [57] above). Indeed, an Assistant Registrar did rule against Hady's application for discovery of the report. On the other hand, Chia himself had some reservation whether Hady should be denied the SFCA Report (see [55] above).

325 It seems to me that since the Executive Summary is a summary of the SFCA Report, it may be incongruous for the defendants to claim privilege of the report when the contents of the Executive Summary were being disclosed. If the SFCA Report was privileged, then one would argue that the Executive Summary ought to be privileged too. If SEH was nevertheless obliged under the Catalist Rules to disclose the contents of the Executive Summary and did do so, then it is arguable that it had waived whatever privilege that might have attached to both documents. If, after reading the Announcement, a shareholder had asked for a copy of the SFCA Report, SEH might have been hard put to deny him a copy of the report, and Hady was a shareholder and director at that point in time.

326 The point as to how the defendants could still rely on privilege for the SFCA Report when the contents of the Executive Summary were disclosed was not fully explored during the trial. Nevertheless, even if the legal advice was incorrect, I accept that the defendants were acting on such advice then and continued to do so until the SFCA Report was eventually disclosed in the circumstances mentioned above. I am of the view that they were acting *bona fide* in the protection of SEH's interest especially when a claim against Hady was not ruled out.

327 I come to another point. The defendants were of the view that Hady was in a position of

conflict and so was required to excuse himself from any discussion on the SFCA Report. Even so, he was asked to comment on the draft Announcement about the Executive Summary. It seems to me that the defendants ought to have similarly excluded him from any discussion about the draft Announcement. Otherwise, he was in a situation where he was being asked to vet an announcement about the Executive Summary when he had not been given a copy of the report. Nevertheless, I accept that the defendants were not trying to trap him into endorsing the report by seeking his views on the draft Announcement and there is no suggestion of such a trap. Hady himself did not take the point then that he would prefer not to comment on the draft because he was not given a copy of the report. Presumably, he thought it was in his own interest to give his comments on the draft rather than to stay silent. It seems to me that the defendants thought that since the Announcement was going to be made by the Board, Hady should be given the chance to comment on the draft. There was also no suggestion by Mr Nair that they ought not to have asked Hady to comment on the draft since he was not given a copy of the report.

328 Ironically, if the defendants had decided to exclude Hady from vetting the draft Announcement, they would have spared him and themselves all the aggravation on 7 September 2013.

329 I come now to the last two points in this category of complaints in para 23(i) and (j) of the SOC, *ie*, that the defendants ignored the comments of Hady's solicitors on the draft Announcement and they also ignored his proposed amendments and proceeded to release the Announcement even though they knew he was objecting to its terms.

330 Straits Law's letter sent at about 2.30pm of 7 September 2011 (see [288] above) stated that the draft was inaccurate and deficient. The main points raised by Straits Law were that the Executive Summary failed to deal with the Adept Report and the 6 September 2011 letter from Alpha. What Straits Law meant was that those two documents should have been dealt with in the draft Announcement. As I have already dealt with the omission to refer to these two documents in the Announcement itself above, it is unnecessary for me to say more about them.

331 As for the allegation that the defendants ignored Hady's proposed amendments, this was not entirely accurate for the defendants had not received his proposed amendments before the Announcement was published. All that they knew was that Hady had said he had sent them but the defendants had not received them and Hady was informed that they had not received them. In the circumstances, I am of the view that the defendants did not deliberately ignore his proposed amendments. As I have mentioned, they were under tremendous pressure not to delay the release of the Announcement any further.

332 In the circumstances, I am of the view that these last two points are also not evidence of malice on the defendants' part.

333 Para 23(l) of the SOC alleged that the Announcement and the Executive Summary cannot be removed from SGXNET and will therefore remain on the same indefinitely. In my view, this allegation does not help Hady to establish malice. The defendants were hoping they would not have to make the Announcement and it was SGX who directed that the Announcement be made in SGXNET.

334 It seems to me that although Hady was suggesting that the defendants were using the occasion to obtain some advantage unconnected with the duty or interest which constitutes the privilege, Hady did not specify what the unconnected advantage was. What he was suggesting was that the defendants had acted out of spite. Having considered his many allegations of malice in totality I conclude that he has failed to establish this. Given the foregoing, the defendants succeed on the defence of qualified privilege as well.

Consent or leave and licence

335 As regards the defence of consent or leave and licence, Mr Ang submitted that according to *Gatley* at para 19.10:

> It is a defence to an action for defamation that the claimant consented to the publication of which he now complains by participating in or authorising it. …

Mr Ang submitted that Hady did not object to the publication of the Executive Summary even though Hady did object to the publication of the Announcement. Therefore, Hady had consented to the publication of the disputed words in the Executive Summary and in the Announcement in so far as the latter conveyed the same defamatory meaning in the Executive Summary.

336 Mr Nair submitted that *Gatley* went on to state that "the proof of consent must be clear and unequivocal".

337 Mr Nair submitted that Hady's consent to the publication of the Executive Summary was subject to the publication being made without SEH endorsing the summary. Hady's consent was not unequivocal as the Announcement did endorse the summary.

338 It seems to me that after the SFCA Report was issued, Hady knew that SEH was required to publish the Executive Summary under the Catalist Rules. His "consent" to the publication thereof should be seen in that context. If, as the defendants alleged and I accept, the defendants were not keen to publish the Executive Summary and did so only because SGX directed them to do so, I am quite certain that Hady was even less keen for the Executive Summary to be published since adverse allegations were made about him.

339 Paragraph 19.11 of *Gatley* also states that:

> **Limits of doctrine.** … While republication by the claimant himself would not usually ground an action, it has been held otherwise where the claimant was under a duty to republish the matter of which he complained. …

340 It seems to me that the consent must be voluntary and since Hady knew that SEH was required to publish it, it was no answer to say that he, as a director of SEH, consented to its publication. I reject the defence of consent (or leave and licence).

Conclusion

341 In the circumstances, I dismiss Hady's claims against the defendants on the grounds of justification and qualified privilege. In my view, he had only himself to blame for the Executive Summary and the Announcement, which were largely derived from the SFCA Report that was issued because of, *inter alia*, his actions.

342 Parties are to tender written submissions on costs of the action, which I am inclined to fix, within 14 days from the date of this judgment.

[note: 1] Notes of Evidence ("NE"), 8/1/13, p 9.

[note: 2] Bundle of Pleadings ("BP"), Tab 9, para 3.

[note: 3] BP, Tab 8, para 4.

[note: 4] BP, Tab 9, para 9.

[note: 5] Defendants' Bundle of Affidavits of Evidence-in-Chief ("DBA"), Tab 1, para 47-49.

[note: 6] BP, Tab 9, para 11.

[note: 7] BP, Tab 8, p 32.

[note: 8] Agreed Bundle ("AB"), p 208.

[note: 9] AB, p 216.

[note: 10] BP, Tab 9, para 12; BP, Tab 6, para 5; NE, 11/1/13, p 56.

[note: 11] BP, Tab 6, para 5.

[note: 12] BP, Tab 9, para 14.

[note: 13] BP, Tab 9, para 16.

[note: 14] BP, Tab 9, para 17.

[note: 15] BP, Tab 9, para 19.

[note: 16] NE, 10/1/13, p 74-76.

[note: 17] DBA, Tab 1, para 25.

[note: 18] DBA, Tab 1.

[note: 19] Supplementary Agreed Bundle ("SAB"), vol 4, p 62.

[note: 20] AB, p 1577.

[note: 21] Announcement at [2], [5], [9], [11] and [13].

[note: 22] Plaintiff's Closing Submissions ("PCS"), paras 164-169.

[note: 23] Defendants' Closing Submissions ("DCS"), para 98.

[note: 24] Executive Summary at [2.13(a)].

[note: 25] Executive Summary at [2.12].

[note: 26] Executive Summary at [2.13(a)] and [2.13(b)].

[note: 27] Executive Summary at [2.14] and [2.15].

[note: 28] Executive Summary at [3.10].

[note: 29] Executive Summary at [3.13].

[note: 30] Executive Summary at [3.11] and [3.15(e)]; Announcement at [7].

[note: 31] Executive Summary at [3.14] and [3.15].

[note: 32] Executive Summary at [3.14] and [3.16].

[note: 33] Executive Summary at [4.2]-[4.4].

[note: 34] Executive Summary at [4.2].

[note: 35] Executive Summary at [4.9].

[note: 36] Executive Summary at [4.8] and [4.9].

[note: 37] Executive Summary at [4.8], [4.9] and [4.11].

[note: 38] Executive Summary at [4.11].

[note: 39] Executive Summary at [4.14] and [4.15].

[note: 40] Executive Summary at [5.1], [5.4], [5.8].

[note: 41] Executive Summary at [5.7].

[note: 42] Executive Summary at [5.11] and [5.13].

[note: 43] Executive Summary at [5.9].

[note: 44] Executive Summary at [5.9], [5.10] and [5.13].

[note: 45] Executive Summary at [5.17].

[note: 46] Executive Summary at [5.17].

[note: 47] Announcement at [16].

[note: 48] Announcement at [1].

[note: 49] Announcement at [17].

[note: 50] Plaintiff's Reply Closing Submissions ("PR"), paras 187-191.

[note: 51] Defendants' Reply Submissions, para 47.

[note: 52] PCS, para 199.

[note: 53] NE, 10/1/13, p 113.

[note: 54] Executive Summary at [3.15(d)].

[note: 55] AB, pp 296, 290.

[note: 56] Plaintiff's Bundle of Affidavits of Evidence-in-Chief, Vol 5, pp 1569-1644.

[note: 57] PCS, para 226.

[note: 58] PCS, para 234.

[note: 59] PCS, para 232.

[note: 60] NE, 4/4/2013, pp 41-42.

[note: 61] NE, 4/4/2013, p 44.

[note: 62] Executive Summary at [4.2] and [4.3].

[note: 63] NE, 16/1/2013, pp 25-37.

[note: 64] DCS, paras 111-113.

[note: 65] PR, paras 178-180.

[note: 66] PCS, paras 260 and 263.

[note: 67] PCS, para 260.

[note: 68] PCS, para 266.

[note: 69] DCS, para 138(10).

[note: 70] PR, para 182.

[note: 71] PCS, paras 269, 292, 294 and 299.

[note: 72] PCS, paras 302 and 310.

[note: 73] PR, para 223.

[note: 74] NE, 4/4/13, p 99.

[note: 75] Executive Summary at [2.1].

[note: 76] Executive Summary at [2.11].

[note: 77] Executive Summary at [3.10].

[note: 78] AB, p 674; NE, 8/1/13, p 98.

[note: 79] AB, p 1035.

[note: 80] AB, pp 290-334.

[note: 81] NE, 8/1/13, p 105.

[note: 82] NE, 10/1/13, p 34.

[note: 83] NE, 8/1/13, p 106.

[note: 84] NE, 3/4/13, pp 5-6.

[note: 85] Executive Summary at [3.6]-[3.8].

[note: 86] NE, 9/4/13, p 110.

[note: 87] AB, pp 208-221.

[note: 88] SAB, vol 2, p 61.

[note: 89] AB, p 1576.

[note: 90] AB, p 714.

[note: 91] AB, pp 735-736.

[note: 92] AB, p 1539.

[note: 93] AB, p 1566.

[note: 94] AB, p 1565.

[note: 95] AB, p 1565.

[note: 96] AB, p 1565.

[note: 97] AB, p 1564.

[note: 98] AB, p 1571.

[note: 99] AB, p 1572.

[note: 100] AB, p 1574.

[note: 101] AB, p 1574.

[note: 102] AB, p 1580.

[note: 103] AB, p 1666.

[note: 104] AB, p 1667.

[note: 105] SAB, vol 4, p 108.

[note: 106] AB, p 1668.

[note: 107] AB, p 1669.

[note: 108] AB, p 1670.

[note: 109] AB, p 1662.

[note: 110] AB, p 1674.

[note: 111] AB, p 1675.

[note: 112] AB, p 1680.

[note: 113] AB, p 1681.

[note: 114] AB, p 1722.

[note: 115] AB, p 1741.

[note: 116] AB, p 1749.

[note: 117] AB, p 1765.

[note: 118] AB, p 1783.

[note: 119] AB, p 1783.

[note: 120] AB, p 1792.

[note: 121] AB, p 1814.

[note: 122] AB, p 1847.

[note: 123] AB, p 1621.

[note: 124] AB, p 1867.

[note: 125] AB, p 1868.

[note: 126] AB, p 1881.

[note: 127] NE, 9/4/13, p 49.

[note: 128] NE, 9/4/13, pp 26-28.