Arul Chandran v Chew Chin Aik Victor JP
[2001] SGCA 3

Case Number : CA 92/2000, 93/2000

Decision Date : 16 January 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Suresh Damodara, John Thomas and K Sureshan (Colin Ng & Partners) for the appellant in CA 92/2000 and for the respondent in CA 93/2000;; Howard Cashin (instructed), Imran Hamid and Burton Chen (Tan Rajah & Cheah) for the respondent in CA 92/2000 and for the appellant in CA 93/2000.

Parties : Arul Chandran — Chew Chin Aik Victor JP

Civil Procedure – Costs – Taxation on High Court scale – Whether taxation should be on Subordinate Courts scale

Tort – Defamation – Damages – Function of general damages – Whether aggravated damages justified – Quantum of damages

Tort – Defamation – Justification – Whether truth of defamatory remarks proved -Whether judgment in prior case basis for justification – Whether finding in prior judgment overruled on appeal – Whether issue estoppel applicable – Whether abuse of process to allow plaintiff to rebut claims

Tort – Defamation – Qualified privilege – Whether defamatory remarks made on occasion of qualified privilege – Whether malice proved on defendant's own evidence

(delivering the grounds of judgment of the court): This is a cross-appeal against the decision of Chan Seng Onn JC, with respect to a defamation suit instituted by Mr C Arul against Mr Victor Chew. The judicial commissioner held that Mr Chew defamed Mr Arul and awarded the latter $150,000 in damages. In CA 92/2000, Mr Chew appealed against the judicial commissioner`s finding that he defamed Mr Arul and against the quantum of damages, which was, in his view, too high. In CA 93/2000, Mr Arul, who thought that he was entitled to more damages than the sum awarded, appealed against the judicial commissioner`s award of damages. We dismissed all the respective appeals with costs and now set out the reasons for our decision.

Background

Mr Arul, a lawyer, and Mr Chew, an architect, are both members of the Tanglin Club (hereinafter referred to as the `club`). Shortly before the annual general meeting (hereinafter referred to as the `AGM`) of the club on 25 May 1998, at which the office-bearers of the club were to be elected, Mr Chew, who was campaigning on behalf of a number of candidates including his son, circulated a flyer entitled `A Layman`s Guide to the AGM`. In it, the respondent stated as follows:

> *... Is this the Club you want? Is this the Committee you want? ...*
>
> *If you want them to stay on to lead the Club to further disrepute the following have offered their services to continue the ruin of the Club - John Rasmussen, C Arul, Kenneth Chew, KT Chan, Patrick Garez, Vince Khoo and Mok Yew Fun.*
>
> *Otherwise there are Graeme McGuire, KP Swee, Sidney Rolt, Andre Bouvron, Chew Kei Jin, Chim Hou Yan, Donald Grant, Bill Gartshore and Colin Taylor, level headed sensible people who are going to put things right and return us the Club we knew before all this acrimonious mud-slinging and racial bickering descended*

upon us.

Despite Mr Chew`s campaign, five of the seven incumbent members of the club committee were re-elected. Among them was Mr Arul, who was elected as Vice-President. One day after the AGM, Mr Arul saw a copy of the respondent`s flyer. The flyer was not signed but it bore the respondent`s club membership number, which is `C642`.

Mr Arul, who noted that the flyer contained personal attacks against him and other members of the club committee, wrote to Mr Chew on 27 May 1998 to find out whether or not the latter was the author of the flyer. He sent a reminder to the respondent on 2 June 1998.

In his reply dated 5 June 1998, Mr Chew stated as follows:

> *There are two Arul Chandrans in the Telephone Book - one with his address at 23 Balmoral Rd, [num]14-23, and the other at Block 121 Yuan Chuan Rd [num]10-405.*
>
> *Are you the Arul referred to in the newspaper cutting reproduced below as the Singapore lawyer who was sentenced to two years jail for fraud and breach of trust against an housewife in Johore?*
>
> *I ask this because if you are the other Arul, I do not intend to reply to his letter as I do not know him ...*

Mr Chew attached a newspaper cutting to his letter of 5 June 1998. The newspaper reported that in the High Court in Johore, Abdul Razak J sentenced three lawyers, including Mr Arul, to jail for two years for contempt of court after passing judgment against them for fraud in relation to the purchase of a property in Johore. As Mr Arul`s defamation suit concerned Mr Chew`s repeated references to the judgment of Abdul Razak J in **Tara Rajaratnam v Datuk Jagindar Singh & Ors** [1983] 2 MLJ 127 , it would be appropriate at this juncture to discuss the said Malaysian proceedings in greater detail.

The Malaysian proceedings

Legal proceedings were instituted in Malaysia in 1979 by Madam Tara Rajaratnam against two lawyers, Mr Jagindar Singh and Mr P Suppiah, for defrauding her with respect to the purchase of a property in Johore. Mr Arul was subsequently named as the third defendant in the suit on the ground that he colluded with the first and second defendants to defraud the plaintiff. Abdul Razak J entered interlocutory judgment against all the defendants and sentenced them to imprisonment for two years for contempt of court. In his judgment, the judge called Mr Arul a `most vicious and dangerous fraud`.

The three defendants succeeded in their appeal against the sentence of imprisonment for contempt of court. However, their appeal against the interlocutory judgment was dismissed by the Malaysian Federal Court of Civil Appeal.

All three defendants then appealed to the Judicial Committee of the Privy Council. During the course of those proceedings, the Privy Council was informed that Madam Tara Rajaratnam had withdrawn all her allegations of fraud against Mr Arul and had consented to his appeal being allowed on the

understanding that each party was to bear his or her own costs. What is significant is that when allowing Mr Arul`s appeal on the basis of the consent order, the Privy Council offered its views on his role in the alleged fraud in the following terms:

> *As regards the third appellant, their Lordships were informed in the course of the hearing before them that his counsel and that for the respondent were agreed that his appeal should be allowed by consent, upon the terms that all allegations of fraud against the third appellant were withdrawn, and also any claim against him as allegedly a constructive trustee, and that as between him and the respondent there should be no order for costs here or in the courts below. Their Lordships consider it proper in the circumstances that the third appellant`s appeal should be allowed upon these terms.* ***It is abundantly plain that he had no hand whatever in the events of 30 March 1974, which form the basis of the respondent`s case of fraud against the other appellants****. [See [1986] 1 MLJ 105, 112; emphasis added.]*

Although the Privy Council clearly did not share Abdul Razak J`s view of Mr Arul`s role in the defrauding of Madam Tara Rajaratnam, this fact was not mentioned by Mr Chew when he referred to Abdul Razak J`s judgment in his numerous letters to Mr Arul and to the president of the club.

The first publication

After receiving Mr Chew`s letter of 5 June 1998, Mr Arul replied on 12 June 1998, saying that he was `the very same Arul Chandran referred to in the newspaper cutting enclosed` and asking Mr Chew to reply to his question.

Mr Chew did not reply to the question posed to him. Instead, on 24 June 1998, he wrote to Mr Arul as follows:

> *I was merely being meticulously careful on establishing the right identity to avoid offending the wrong person and I fail to understand why you took such exception to an address in Yuan Ching Road. I will have you know that there are many respectable, law abiding, honest citizens residing there - unless you now fancy yourself a class above these people.*
>
> *Moreover, by the vexatious tone of your letter, it would seem that you expect the answer to my enquiry to be common knowledge. Am I supposed to believe then that the Members who voted for you in the last elections knew of the report of your conviction for fraud and breach of trust against the housewife in Johore?*
>
> *A reply in due course will be much appreciated.*

For convenience, the allegedly defamatory words in the above letter are underlined. After receiving the above letter, Mr Arul replied on 26 June 1998, asking Mr Chew not to avoid the issue and to answer the simple question as to whether he was the author of the flyer.

Mr Chew replied with a letter dated 10 July 1998, which contained the following paragraphs.

> *According to a newspaper report, `three lawyers, including a Singaporean, were*

sentenced to two year`s jail each for contempt ... The lawyers were found to have committed fraud and breach of trust against ... a defenseless housewife ...`

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

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

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

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

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

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

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

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

The alleged defamatory words in the above letter are underlined. On the same day that he sent the letter to Mr Arul, Mr Chew wrote to the president and committee of the club, enclosing all the previous correspondence between Mr Arul and himself, including his own letters to Mr Arul dated 24 June 1998 and 10 July 1998. In the covering letter, Mr Chew stated as follows:

The enclosed are copies of correspondence between Mr C Arul and me to which I refer hereunder.

You will see that the earliest letter was from C Arul himself followed by one signed on his behalf and the latest now comes from the firm of C Arul and Partners and signed as such.

What I seek from the Committee is a confirmation as to whether C Arul is

acting in his own private capacity or is he now under instructions from you to pursue the matter with me.

This letter to the president and committee of the club and its enclosures will be referred to in this judgment as the `first publication`.

The second publication

The president of the club wrote to Mr Chew on 20 July 1998 to inform him that Mr Arul was acting in his own private capacity and that the committee was not involved in the matter.

On 4 August 1998, Mr Chew wrote to the president of the club and sent a copy of the letter to the members of the committee. The letter stated as follows:

Thank you for your letter of 20 July 1998 in response to my enquiry as to whether C Arul is harassing me on the instructions of the Committee or in his own private capacity.

Now that we know he is not on Club business has it occurred to you to enquire from him what his personal motives are? What Arul is doing will only lead me finally to seek the courts for the protection of my rights and that will take us back to where we were four months ago - just when we were led to believe that all that was now behind us.

You can be given the benefit of the doubt that at the time when you appointed him Chairman & Convenor of the Rules and Membership Committee you were unaware of his Curriculum Vitae but then, now with the knowledge that you have, do you still consider him the best choice over the nine other members of the Committee to serve in that position?

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

The alleged defamatory words in the above letter are underlined. This letter to the president of the club will be referred to as the `second publication` in this judgment.

The third publication

On 6 August 1998, Mr Arul responded to Mr Chew`s letter of 4 August 1998 to the president of the club. In his letter, Mr Arul said that he wanted to know what was in his curriculum vitae which made him less of a fit person to chair the membership and rules committee of the club. On 18 August 1998, Mr Chew replied as follows:

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

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

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

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

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

Do you agree to that?

[ast] Encl: To answer your question and to refresh your frail memory, attached herewith is an extract of the written judgement of Justice Abdul Razak - no point for you to pretend any more, Arul.

The alleged defamatory words in the above letter are underlined. Mr Chew also wrote to the president of the club on 18 August 1998, enclosing the letter he had written to Mr Arul on that same day. In this letter, Mr Chew stated as follows:

There is a letter I wrote to you dated 4 August which remains unanswered and unacknowledged.

The letter refers to the appointment of C Arul as the Chairman and Convenor of the Rules and Membership Committee and questioning why is he still there in spite of what we now know of him.

The question I put to you was whether leaving us 5000 Members at the mercy of a man who has been called by a High Court Judge `a Liar` ... `a wolf in lambs clothing` ... `a Chameleon`, ... in short ... `a most vicious and dangerous fraud` to administer Club Justice, your way of keeping faith with the Members who elected you President?

Please do not hand it down to Arul to answer; we are not interested in what he has to say for himself. Let us hear it from you this one time.

The alleged defamatory parts of the letter to the president of the club are underlined. This letter and

its enclosure will be referred to as the `third publication` in this judgment.

Mr Arul subsequently brought an action against Mr Chew for defamation, on the basis of the underlined words in the first, second and third publications.

Decision of the judicial commissioner

Chan JC found that the underlined words in the first, second and third publications were defamatory. The sting in the first publication was that Mr Arul is an extremely vicious and dangerous fraud. The second publication contained the same sting, as well as an additional sting that Mr Arul was incapable of discharging his duties as chairman of the Membership and Rules Sub-Committee in a fair and honest manner. The sting in the third publication was no different from that in the first two publications.

The judicial commissioner rejected the defence of justification as none of the defamatory meanings and the sting in the meanings had been justified by Mr Chew to the requisite degree of proof called for in such serious attacks on Mr Arul`s character and reputation.

The judicial commissioner also found that all three publications were predominantly motivated by malice. Consequently, Mr Chew could not rely on the defence of qualified privilege or fair comment. As for the first publication, it was held that Mr Chew was not entitled to rely on the defence of qualified privilege even in the absence of malice.

Chan JC awarded Mr Arul $100,000 as damages and $50,000 as aggravated damages. As such, Mr Arul was awarded a total of $150,000.

The appeal

Mr Chew`s appeal against the finding of Chan JC that he defamed Mr Arul will first be considered. His counsel made the following submissions:

(i) The judicial commissioner erred in finding that the defence of justification failed.

(ii) The judicial commissioner erred in finding that Mr Arul was not estopped from denying the findings of Abdul Razak J in **Tara Rajaratnam v Datuk Jagindar Singh & Ors** [1983] 2 MLJ 127 .

(iii) The judicial commissioner erred in finding that the first publication did not attract the defence of qualified privilege.

(iv) The judicial commissioner erred in finding that all three publications were actuated by malice.

Defence of justification

One of the main defences relied upon by Mr Chew was justification. The law of defamation presumes that defamatory words are false and the plaintiff need do no more than prove that the defamatory words have been published by the defendant. The burden is then on the defendant, if he wishes to rely on the defence of justification, to prove that those words are true. (See ***Gatley on Libel and Slander*** (9th Ed), at p 235.)

As has been mentioned, the judicial commissioner found that the crucial sting in all three publications is the charge that Mr Arul is an extremely vicious and dangerous fraud. Mr Chew need not prove the truth of every detail of the words published, but the justification must meet the sting of the charge

(see **Edwards v Bell** [1824] 1 Bing 403).

Mr Chew contended that the charge against Mr Arul is justified. To begin with, he relied on the fact that Abdul Razak J had found Mr Arul to be a `a most vicious and dangerous fraud` in **Tara Rajaratnam v Datuk Jagindar Singh & Ors** [1983] 2 MLJ 127 . After examining ss 42 to 45A of the Evidence Act (Cap 97), Chan JC said in [para] 141 of his grounds of decision as follows:

> *[T]he general rule is that the production of a previous judgment merely evidences the fact that there has been a judgment and there are certain legal consequences. But tendering the previous judgment and then quoting parts of the judgment at length in a question to which the witness refuses to accept as being undisputed will not per se amount to evidence proving the correctness or the truth of any of the facts mentioned therein.*

Counsel for Mr Chew did not disagree that the tendering of the judgment of Abdul Razak J, did not, by itself, amount to conclusive proof of the truth of the facts mentioned in that judgment. However, he argued that as a result of the findings made by Abdul Razak J, Mr Arul is estopped from alleging that the words complained of are false. He asserted that the consent judgment by the Privy Council in the ***Tara Rajaratnam*** case did not affect the findings of the trial judge. This assertion will be considered although it must be noted that whether or not the findings of the Privy Council affected the findings of Abdul Razak J, Mr Chew cannot, for reasons explained by Chan JC, expect to succeed in his defence of justification by relying solely on the findings of Abdul Razak J in that case.

Reference was made to the decision of the British Columbia Supreme Court in **Saskatoon Credit Union Ltd v Central Park Enterprises Ltd** (Unreported) where McEachern CJSC held that a consent judgment of the Court of Appeal did not reverse the findings of the trial judge. The facts of that case are however distinguishable. There, the consent order was granted by the Court of Appeal without any hearing or consideration of the merits and without seeing the counsel for the parties. The Court of Appeal acted on the basis of a letter from the solicitor of the defendants, enclosing the consent order. McEachern CJSC was thus able to say that the Court of Appeal had merely discharged an administrative task by disposing of a pending appeal in order to give effect to a settlement which had been disclosed to the court and that the consent order made in this administrative sense did not `undecide the issues solemnly decided` by the court. In contrast, in the case of the consent judgment allowing the appeal in **Datuk Jagindar Singh & Ors v Tara Rajaratnam** [1986] 1 MLJ 105 , the Privy Council took pains to stress that it was abundantly plain that Mr Arul `had no hand whatever in the events of 30 March 1974, which form the basis of the respondent`s case of fraud against the other appellants`. The effect of the consent judgment allowing the appeal, granted in the context of the Privy Council`s view of Mr Arul`s role in the case, must surely be to undo the trial findings of Razak J that Mr Arul was a fraud. If so, there would be nothing for Mr Chew to rest his argument of estoppel on.

For the sake of completeness, it ought to be stated that even if the consent judgment of the Privy Council did not undo Abdul Razak J`s findings, the question of issue estoppel also does not arise. In **The Sennar (No 2)** [1985] 2 All ER 104[1985] 1 WLR 490, Lord Brandon pointed out that one of the requirements of issue estoppel is that the parties in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. As Mr Chew was not one of the parties in **Tara Rajaratnam v Datuk Jagindar Singh & Ors** [1983] 2 MLJ 127 , the question of issue estoppel does not arise and Mr Arul is not prevented from challenging the findings of Abdul Razak J in Tara Rajaratnam`s case.

Admittedly, the requirement of privity may be termed the traditional approach to issue estoppel. In **Saskatoon Credit Union Ltd v Central Park Enterprises Ltd** (Unreported) , McEachern CJSC took the view that privity is not required, and that the touch stone of applicability of issue estoppel should instead be whether or not there is some overriding question of fairness that requires a rehearing. The Saskatoon approach does not appear to have much support in England. Furthermore, in **Hunter v Chief Constable of the West Midlands Police & Ors** [1982] AC 529, a decision of the House of Lords, which was relied upon in Saskatoon`s case, Lord Diplock made it clear at pp 540-541 that the use of the term `issue estoppel` should be restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies.

It may be said that in ***Hunter*** `s case, the House of Lords showed an inclination towards the use of the abuse of process doctrine. The matters to be taken into account to determine whether or not there is an abuse of process are wide ranging. These include the need to avoid re-litigation of a previously decided issue or action, the need for finality, the need to avoid inconsistent judgments on the same issues, the prevention of wastage of court resources, and also the need to ensure that injustice is not caused by shutting out the litigation of a particular issue or a cause of action. Examined in this light, there is still no basis for saying that allowing Mr Arul to rebut any allegation by Mr Chew would amount to an abuse of process. In fact, it would be absurd and unjust if Mr Chew is entitled to adduce evidence of fraud de novo and Mr Arul is restrained from rebutting such evidence.

Chan JC considered the question of issue estoppel at length. He also explained that a further obstacle which Mr Chew had to overcome was that he was relying on a civil judgment of a foreign court and noted that in **Carl Ziess Stiftung v Rayner & Keeler Ltd (No 2)** [1967] 1 AC 853, Lord Reid, Lord Guest and Lord Wilberforce had advised that considerable caution should be exercised before allowing any reliance on issue estoppel in the case of a foreign judgment.

In short, for a variety of reasons, the judgment of Abdul Razak J in ***Tara Rajaratnam*** `s case did not take Mr Chew very far in his attempt to prove that Mr Arul is a fraud. Mr Chew`s attempt to prove the truth of his words by relying on the cross-examination of Mr Arul was also not successful. The judicial commissioner noted in [para] 178 of his grounds of decision that in the ultimate analysis, Mr Chew`s case rested largely on unsubstantiated assertions of fact, tenuous circumstantial evidence and inferences. In the same paragraph, the judicial commissioner undertook a point by point rebuttal of Mr Chew`s allegations with respect to Mr Arul`s position. In our view, there is nothing to warrant the overturning of the detailed findings of fact made by the judicial commissioner, who had the opportunity to observe the credibility and veracity of the witness for 19 days, and who asked the witness innumerable questions in order to clarify matters to his satisfaction.

Raking up the past

Even if Mr Arul had been guilty of defrauding Madam Tara Rajaratnam in 1974, all that would show is that he was involved in a fraud some 25 years ago. An allegation that Mr Arul is presently a fraud is another thing altogether. A person who makes such an allegation must be prepared to justify it. In **Sutherland v Stopes** [1924] All ER 19 at 32, Lord Shaw explained:

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

It follows that even if Mr Arul had been guilty of fraudulent conduct some 25 years ago, Mr Chew had to do more than refer to Abdul Razak J`s judgment to prove that he remains a vicious and dangerous fraud to this day, which is the sting behind all three publications. Dredging up the past alone would not be sufficient. It is not a matter of whether or not there is a public policy against mud-raking which would defeat a successful justification. It is simply a question of whether there is justification in the first place, and on the evidence, there is none.

Qualified privilege

The defence of qualified privilege will next be considered. As for when such a defence may be raised, the authors of ***Gatley on Libel and Slander*** (9th Ed), explained as follows at p 329:

> *The occasions [of qualified] privilege can never be catalogued and rendered exact but most privileged occasions under the common law may be very broadly classified into one of two classes: 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 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.*

Mr Chew asserted that he had a civic, moral or social duty to publish the words complained of in the first, second and third publications to the president and committee members of the club. He also asserted that the president and committee members of the club had a corresponding duty to receive the publications complained of. Mr Arul`s suitability to serve in positions in the club was of interest to him and to the president and committee members of the club. Hence, he contended that he was entitled to rely on the defence of qualified privilege in relation to all three publications.

The judicial commissioner, who accepted that the second and third publications were made on occasions of qualified privilege, held that the question of qualified privilege did not arise in the case of the first publication. This was because Mr Chew wrote to the president of the club on 10 July 1998 to find out whether the committee of the club had instructed Mr Arul to question him on the flyer and not to ask whether Mr Arul was fit to hold office.

Mr Chew contended that his letter of 10 July 1998 must be read in the context of its enclosures, and that the thrust of the enclosed letters was to raise the issue of Mr Arul`s suitability for office. This argument had no merit because Mr Chew had clearly stated in his letter and in his own affidavit of evidence-in-chief that his letter of 10 July 1998 to the president and the committee of the club was intended to find out if Mr Arul was writing in a personal capacity. In para 48 of his affidavit of evidence-in-chief, Mr Chew said as follows:

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

We thus saw no merit in Mr Chew`s appeal against the finding of the judicial commissioner that the defence of qualified privilege did not apply in the case of the first publication.

Whether there was malice

Mr Chew had to appeal against Chan JC`s finding that all three publications were prompted by malice because it is trite law that where a publication is prompted by malice, the defence of qualified privilege cannot be relied upon. Counsel for Mr Chew argued that the judicial commissioner took into account matters not found in Mr Arul`s express plea of malice, as set out in his pleadings. At [para] 299 of his grounds of decision, the judicial commissioner noted:

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

One of the key reasons for binding parties to their pleadings is to ensure that there is no surprise at trial, allowing parties to concentrate on gathering evidence and preparing arguments in response to what is pleaded. Mr Chew cannot be said to be surprised if much of the evidence relied on by the judicial commissioner to find malice came from his own evidence.

It was also asserted that the judicial commissioner erred because his entire reasoning on malice was premised on a misplaced supposition that Mr Chew launched a pre-emptive attack against Mr Arul because he was afraid of being hauled up before the disciplinary committee. It was argued that if such a fear was indeed the motive for his actions, then the fear would have ceased when the general committee informed him through their letter of 20 July 1998 that they viewed the dispute between him and Mr Arul as a private matter. In view of this, Mr Chew`s publications must have been for the sole purpose of bringing Mr Arul`s lack of suitability for office to the committee`s attention.

It is evident that Mr Chew was also responding to what he perceived to be a witch hunt, and this perception deepened as time went by. At para 39 of his affidavit of evidence-in-chief, he said:

> *I thought that if the plaintiff had any intention to embark on a `witch-hunt` against me, it might discourage him if he was reminded that he had to first make sure that his own hands were clean before he made any plans to mete out his brand of `Club justice`.*

The judicial commissioner accepted that Mr Chew is someone who has taken a keen interest in the club and has written to the club on many occasions. However, he had no doubt that in this case, Mr Chew`s personal spite, ill-will and desire for vengeance got the better of him. In [para] 309 of his grounds of decision, the judicial commissioner said:

> *[H]is animosity towards the plaintiff was fuelled by his belief that the plaintiff was going to haul him before the Disciplinary Committee. He hoped that the plaintiff would desist from doing what he believed that the plaintiff was planning*

> *to do, by launching pre-emptive attacks against his character and reputation. He also hoped that the GC would restrain the plaintiff as he indicated that what he might want to expose and blow up would also embarrass the GC, if the plaintiff were allowed to continue to hound him. There is no question of self-defence here as Arul never attacked the defendant`s character or reputation. He merely asked if he had published the Layman`s Guide. Obsessed with the belief that Arul was witch-hunting him, he set out single-mindedly to destroy the character and reputation of Arul and to get rid of him from all office in the Club including getting rid of him as a Club member, if he could. Those were his dominant motives actuating his actions to injure the plaintiff. If that is not malice, I do not know what is.*

We could find no basis whatsoever for overturning the judicial commissioner`s finding that all three publications were prompted by malice.

Mr Chew`s appeal against the award of damages

Before considering the respective appeals with respect to the quantum of damages, it would be helpful if it is borne in mind that in **Associated Newspapers v Dingle** [1964] AC 371, Lord Radcliffe rightly observed that an appellate court will reject a trial judge`s award of damages only in `very special` or `very exceptional` cases, when he has made a wholly erroneous estimate of the damage suffered.

In CA 92/2000, Mr Chew appealed against the amount awarded as damages to Mr Arul on the ground that it was excessive. It was submitted that the judicial commissioner should have awarded Mr Arul nominal damages because there was no damage to his reputation. It was also submitted that aggravated damages should not have been awarded.

General damages serve three functions. First, they act as a consolation to the plaintiff for the distress he suffered from the publication of the statement. Secondly, they repair the harm to his reputation. Thirdly, they serve to vindicate his reputation (see ***Gatley on Libel and Slander*** (9th Ed), pp 201-202).

In **Ratcliffe v Evans** [1892] 2 QB 524, Bowen LJ pointed out that `the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation`. In this case, Mr Arul testified that he had the impression that the committee members of the club did not think that he had a stained character. Furthermore, Mr Vince Khoo Thiam Siew, the only witness for Mr Arul, testified that he and the other members of the committee accepted Mr Arul`s explanation that he had been acquitted. Admittedly, such evidence shows that Mr Arul`s reputation was not severely damaged, but this does not mean that his reputation did not suffer at all. In any case, damages should also be awarded as compensation for the distress suffered by Mr Arul. The judicial commissioner was fully aware of this. In [para] 311 of his grounds of decision, he stated as follows:

> *The plaintiff is a practising advocate and solicitor of more than 30 years and was at the time of the publications the vice-president of the Club ... The plaintiff gave evidence that he was hurt and I have no reason to disbelieve him. Compensatory damages must be given both for his hurt feelings and the reduction in his standing before his social peers in the [committee] The anxiety and uncertainty which the plaintiff is subjected to in the litigation must also be taken into account ...*

Mr Chew`s second ground of appeal in relation to damages relates to the award of aggravated damages. The authors of ***Gatley on Libel and Slander*** explained the circumstances under which aggravated damages may be awarded in the following terms at pp 212-213:

> *The conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff`s feelings so as to support a claim for `aggravated` damages includes a failure to make any or any sufficient apology and withdrawal, a repetition of the libel; conduct calculated to deter the plaintiff from proceeding, persistence by way of a prolonged or hostile cross-examination of the plaintiff ..., a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself calculated to attract wide publicity; and persecution of the plaintiff by other means.*

In this case, the award of aggravated damages was based on a number of grounds. First, the judicial commissioner pointed out that Mr Chew had put forth a reckless justification defence that was bound to fail. Secondly, his counsel had put Mr Arul through humiliating and embarrassing `put` questions during cross-examination as a result of the adoption of the defence of justification. Thirdly, an unsubstantiated allegation of bad reputation was made during mitigation. Finally, there was malice on the part of Mr Chew.

It appears that the main reason for the awarding of aggravated damages was that Mr Chew had put forth what the judicial commissioner thought was a reckless plea of justification. In our view, even if Mr Chew had not been reckless in relying on the defence of justification, the award of $50,000 for aggravated damages can be justified in view of the humiliating cross-examination, unsubstantiated allegations of bad reputation during mitigation and the presence of malice. The award of aggravated damages should therefore not be disturbed.

Mr Arul`s appeal against the award of damages

As for Mr Arul`s appeal against the award of damages, his counsel submitted that his client was not adequately compensated and should be awarded damages in the region of $750,000 to $1.25m. He said that apart from increasing the sum awarded, another 50% of the enhanced sum should be awarded as exemplary damages. In short, Mr Arul expected to be awarded a total of around $1.875m. This is a totally unrealistic figure.

In Suit 1116/96, the Senior Minister, Mr Lee Kuan Yew, was awarded $550,000 as damages for defamation by the trial judge. This was reduced to $400,000 by the Court of Appeal (see **Tang Liang Hong v Lee Kuan Yew & Anor and other appeals** [1998] 1 SLR 97). In that case, the Court of Appeal made it clear that while a cap should not be placed on the quantum of damages for defamation, grossly exorbitant awards such as those made by juries in some other jurisdictions are to be avoided. Admittedly, the amount of damages awarded for defamation depends on the circumstances of each case. All the same, in the light of the amount of damages awarded to the Senior Minister in Suit 1116/96, Mr Arul`s assertion that he should be awarded around $1.875m in damages could not be countenanced. This is especially so since his reputation had, by his own admission, not been seriously damaged as a result of the defamation. His appeal against the damages awarded by the judicial commissioner was thus dismissed.

Whether costs should be on the Subordinate Courts scale

Mr Chew`s assertion that costs should be fixed with reference to the Subordinate Courts scale of costs will next be considered.

Section 39(1)(a) of the Subordinate Courts Act (Cap 321) provides that where an action founded on tort to recover a sum of money is commenced in the High Court which could have been commenced in the Subordinate Courts, the plaintiff shall not be entitled to costs on the High Court scale if he recovers a sum not exceeding the District Court limit.

We need not consider whether this is a case which could have been commenced in the Subordinate Courts. This is because s 39(1) of the Subordinate Courts Act is subject to s 39(4) of the Act, which provides that the High Court may, if satisfied that there was sufficient reason for bringing the action in the High Court, make an order allowing the costs or any part thereof to be on the High Court scale or on the subordinate courts scale as it may direct. After taking the circumstances of the case into account, the judicial commissioner ordered that costs be taxed on the High Court scale. As such, there is no basis for the assertion that costs should be taxed as if the trial had been in the District Court.

Outcome:

Appeals dismissed.