Attorney-General v Hertzberg Daniel and Others
[2008] SGHC 218

Case Number : OS 1131/2008

Decision Date : 25 November 2008

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Attorney-General Walter Woon, Mavis Chionh, Hema Subramanian and Sabrina Choo (Attorney-General's Chambers) for the applicant; Philip Jeyaretnam SC and Loh Kia Meng (Rodyk & Davidson LLP) for the third respondent

Parties : Attorney-General — Hertzberg Daniel; Christine Glancey; Dow Jones Publishing Company (Asia) Inc

Constitutional Law – Fundamental liberties – Freedom of expression – Freedom of speech – Law of contempt as justifiable restriction on right to freedom of speech and expression – Acceptable limits dependent on local conditions and ideas held by courts about principles to be adhered to in administration of justice – Whether inherent tendency test for contempt of court by scandalising the court inhibited right to freedom of speech and expression to an unjustifiable degree

Contempt of Court – Criminal contempt – Scandalising the court – Rationale for law of contempt – Distinction between law of contempt and law of defamation – Test for contempt of court by scandalising the court – Defence of fair criticism – Relevant factors for determining punishment – Publications in Wall Street Journal Asia which contained passages or words that scandalised Singapore judiciary by implication – Whether inherent tendency test or real risk test should apply for contempt of court by scandalising the court – Meaning of inherent tendency – Advantages of inherent tendency test – Whether publications conveyed to reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning judge in exercise of his judicial function – Whether defence of fair criticism applied to publications – Section 7(1) Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)

25 November 2008

Tay Yong Kwang J:

Introduction

1 Words sometimes mean more than what they appear to say on the surface. This proposition is a recurring theme in the present proceedings before me, which concerns an application by the Attorney-General ("AG") for orders of committal for contempt against three respondents ("the application"). The first respondent is Daniel Hertzberg, the editor of the Wall Street Journal Asia ("WSJA"); the second respondent is Christine Glancey, the managing editor of the WSJA; and the third respondent is Dow Jones Publishing Company (Asia) Inc, the proprietor and the publisher of the WSJA.

2 The grounds for the application are set out in the Statement dated 27 August 2008 filed pursuant to O 52 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). It is the AG's complaint that the respondents have jointly and/or severally participated in acts which resulted in the publication and distribution of the following articles and letter in the WSJA ("the publications"), each of which contained passages that scandalise the Singapore judiciary:

(a) An article titled "Democracy in Singapore", published on 26 June 2008 in the WSJA ("the First Article");

(b) A letter by Dr Chee Soon Juan ("Dr Chee") titled "Produce the Transcript, Show the Truth", published on 9 July 2008 in the WSJA ("the Letter"); and

(c) An article titled "Judging Singapore's Judiciary", published on 15 July 2008 in the WSJA ("the Second Article").

The publications were all featured in the WSJA's Editorials and Opinion page, but under different sections - the two articles were published under "Review and Outlook", while the letter was published under "Letters to the Editor".

3 Besides the application, the first and second respondents took out Summons No 4563 of 2008 ("SUM 4563") to set aside the service of the amended Originating Summons of the application. On 28 October 2008, the parties appeared before me for directions at a pre-trial conference and informed me that they have agreed to proceed with the application against the third respondent only and to hold the matters in respect of the first and second respondents (including SUM 4563) in abeyance, pending the outcome of the application against the third respondent (as well as the outcome of any appeal therefrom by the AG and/or the third respondent to the Court of Appeal). I agreed with the parties on their proposed course of action. As such, the application in the instant case is only against the third respondent.

Background

The publications

4 As will be demonstrated shortly, it is not the AG's case that the publications contained passages or words that *expressly* scandalise the Singapore judiciary but that they do so by *implication*, especially when the allegedly offending passages or words of each publication are read in the context of that individual publication. It would therefore be necessary to set out in full the contents of each publication. The portions of the individual publication that are relied upon by the AG for the purposes of the present contempt proceedings are emphasised in italics below.

5 The First Article, titled "Democracy in Singapore", has the bye-line "Two court cases reveal much about the city-state's lack of freedoms", and it reads as follows:

> *Lee Kuan Yew's Singapore can rightly be proud of many achievements, but full democracy is not one of them. The city-state he founded in 1965 and led as Prime Minister until 1990 is economically prosperous and its citizens enjoy a range of freedoms. Political dissent is not among them*.
>
> Which makes a recent David vs. Goliath exchange between one of the country's few opposition politicians and Mr. Lee worth noting. The dialogue took place in a courtroom and is therefore privileged – which means we can report on it without risking a lawsuit, which Mr. Lee often files against critics.
>
> Audio files are available on the Singapore Democratic Party's Web site, www.yoursdp.org, and a partial transcript is available at www.singaporerebel.blogspot.com, an independent blog. The Straits Times reported last Thursday that the Supreme Court is "investigating the facts" of how the transcripts and audio recordings were released. A Court spokeswoman, in an emailed statement, said "in general, transcripts are provided only to parties of the case."

The setting was a hearing to assess damages against Chee Soon Juan, head of the Singapore Democratic Party, and his sister and colleague, Chee Siok Chin. In 2006, the Chees lost a defamation suit brought by Mr. Lee and his son, Prime Minister Lee Hsien Loong, over an article they published in their party newsletter that was *interpreted by the court to imply corruption on the part of the government*. In last month's hearing, the elder Mr. Lee, who holds the title of Minister Mentor, was cross-examined by Mr. Chee, who was representing himself.

Mr. Chee is no orator, and on one level the dissident was no match for the eloquent Mr. Lee. But when the subject turned to the moral underpinnings of democracy – freedoms of speech, assembly and association – the debate went game, set and match to Mr. Chee.

Mr. Chee set out his philosophy while questioning Mr. Lee: "What I'm interested in is justice, the rule of law, because ultimately it is not about you, Mr. Lee. It is not about me. It's about the people of Singapore, it is about this country and everything we stand for. You and I will pass on, but I can tell you, the practice of the rule of law, the entire concept of justice, democracy – that is going to last for all eternity."

Mr. Lee didn't respond directly to those assertions, choosing instead to cite the International Bar Association's decision to "honor" Singapore by holding its annual conference there last year and noted a letter from the association's president saying "how impressed they were by the standards they found to obtain in the judiciary."

Elsewhere in the hearing, Mr. Lee defended his string of defamation suits against opposition politicians and the press: "They know me by now," Mr. Lee said, referring to the people of Singapore, "that if anybody impugns the integrity of the government, of which I was the prime minister, I must sue."

He went on: "There are various parts of this government which do not comply with Western practices, including the law of libel. But it is a system that has worked." *Mr. Lee has never lost a libel suit. He and his son are currently suing the Far Eastern Economic Review, a sister publication of this newspaper, and its editor, Hugo Restall*.

Our reading of the Chee-Lee transcript is that the Minister Mentor sounded more than a tad defensive – no less so than in his characterization of Mr. Chee, who has been bankrupted as a result of lawsuits by Mr. Lee and other politicians. He called Mr. Chee, a "liar, a cheat and altogether an unscrupulous man." Not to mention "a near-psychopath." Mr. Chee, for his part, referred to Mr. Lee as a "pitiable figure."

It's hard to know what Singaporeans make of all this. Mr. Lee is widely revered as the father of their country, and Mr. Chee is often scorned for his aggressive tactics. But at least, thanks to the Internet, they are able to read the exchange and make up their own minds.

So, too, in the case of Gopalan Nair, which is making its way through the courts now. Mr. Nair is a former Workers' Party candidate. He is now a U.S. citizen and *online advocate for media freedom in Singapore*. He traveled to the city-state to attend Mr. Chee's hearing last month and recorded his thoughts on his blog, where he expressed his contempt for the court proceedings and challenged Mr. Lee to sue him.

On May 31, he was arrested and interrogated. On June 2, he was charged with insulting Judge Belinda Ang, who presided over the Chee hearing, by email. He was released on June 5, six days after his initial arrest, and charged on June 12 with insulting another judge in a separate, 2006

email. *Last week, the court changed the first charge and specified that the offending remarks about Judge Ang were made on a blog, not by email*. Mr. Nair says the police have also threatened him with charges under the Sedition Act.

Mr. Nair's case is scheduled to go to court in mid-July. Meanwhile, Mr. Chee was just released from jail, where he served 11 days for "scandalizing" the court during his questioning of the Minister Mentor. His sister served 10 days. *The court has yet to set the amount of monetary damages in the defamation case. When it does, we'll know the going price of political dissent these days in Lee Kuan Yew's Singapore*.

[emphasis added]

6 The Letter, which was published on 9 July 2008, was titled "Produce the Transcript, Show the Truth". It was a reply to an earlier letter (published on 2 July 2008 in the WSJA) by Minister Mentor Lee Kuan Yew's ("Mr Lee") press secretary, Ms Yeong Yoon Ying ("Ms Yeong"), who had written to respond to some of the allegations made in the First Article. Dr Chee, as Secretary-General of the Singapore Democratic Party, wrote the following in the Letter:

I refer to the letter by Lee Kuan Yew's press secretary, Yeong Yoon Ying, "Freedom of Speech and Law in Singapore" (July 2), in which she quoted me as calling, in open court, Singapore leaders "'murderers, robbers, child molesters' and 'rapists'."

Mr. Lee, or his counsel, is in possession of court transcripts and audio recordings that would show whether I had uttered those words. He must now produce the part of the transcript that quotes me saying those words or he risks destroying his own credibility.

Mr. Lee and his prime minister son, Lee Hsien Loong, sued the Singapore Democratic Party and its executive members for defamation over an article we published in our party newsletter criticizing the nontransparent and nonaccountable manner in which Singapore was run.

The Lees obtained summary judgment from the courts despite our defense, in which we cited disputes of fact and law. In other words, there were triable issues. The summary judgment meant that we were found guilty without being given the chance to call witnesses and cross-examine the plaintiffs.

Ms. Yeong also says that "Singapore upholds free speech." Yes, and Robert Mugabe has just been awarded the Nobel Peace Prize. Your readers might care to know that I have been repeatedly convicted and imprisoned for speaking in public and I face several more such charges. Seventeen of my associates have been charged for conducting a protest against the raising of prices by the Singapore government.

It is also noteworthy that Freedom House stated: "Singapore citizens cannot change their government democratically."

We are not advocating a Western- or Asian-style of democracy. We want a democracy based on universal principles as enshrined in the Singapore Constitution and United Nations Universal Declaration of Human Rights.

By the way, Mr Lee sued us in his personal capacity. Why is Ms. Yeong, a civil servant, writing the letter on his behalf?

[emphasis added]

7 About a week after the Letter was published, the Second Article dated 15 July 2008 titled "Judging Singapore's Judiciary" with the bye-line "The International Bar Association weighs in" was published in the WSJA:

> Lee Kuan Yew recently noted the International Bar Association's decision to "honor" Singapore by holding its annual conference there last year. We hope the former Prime Minister, now Minister Mentor, takes equal note of the IBA's latest assessment of the judiciary in Singapore.
>
> The IBA's human rights institute issued a report last week on "human rights, democracy and the rule of law" in the city-state. Like numerous past observers, the IBA finds that Singapore limits political speech and assembly and exercises strict controls on the media.
>
> The 72-page report also describes "concerns about the objective and subjective independence and impartiality of the judiciary". In cases involving litigants from the ruling People's Action Party or PAP interests, the IBA finds "concerns about an actual or apparent lack of impartiality and/or independence, which casts doubt on the decisions made in such cases."
>
> *The IBA report is a good primer on Singapore's use of defamation cases against opposition politicians and the foreign press. It summarizes high-profile cases over the past 25 years against J. B. Jeyaretnam, Tang Liang Hong and Chee Soon Juan. And it reviews defamation cases against foreign publications, including this newspaper and our sister publication, the Far Eastern Economic Review, which currently is fighting defamation charges brought by Mr. Lee and his son, Prime Minister Lee Hsien Loong*.
>
> In a statement last week in response to the IBA report, the Law Ministry defended Singapore's legal system. "The cases brought by PAP members usually relate to scurrilous and completely untrue allegations of corruption made against them," it said. And, "It is also absurd to suggest that honorable and upright judges in commercial cases become compliant and dishonorable when dealing with defamation cases involving government ministers."
>
> The IBA report concludes with 18 recommendations, including abolishing defamation as a criminal offense and urging government officials to "stop initiating defamation claims for criticisms made in the course of political debate." It also calls for "security of tenure" for all judges and an end to the transfer of judges between executive and judicial roles.
>
> *Singapore is unlikely to reform its political or judicial system anytime soon. But when the country is ready to join the ranks of modern democracies, the IBA's recommendations provide a good checklist of how to do so*.
>
> [emphasis added]

The AG's case and submissions

8 The gravamen of the AG's case against the third respondent is essentially this[note: 1]:

> These three items, individually and taken together, impugn the integrity, impartiality and independence of the Singapore Judiciary. It is implied that the Singapore courts do not dispense justice fairly in cases involving political opponents and detractors of Minister Mentor Lee Kuan Yew and other senior government figures, and the courts facilitate the suppression of political

dissent or criticism in Singapore through the award of damages in defamation actions.

9 In his written submissions as well as at the hearing before me, the AG opened his case by arguing that the law relating to contempt of court was a necessary part of any democratic society and did not form an unjustifiable restriction on the freedom of speech and expression. It was argued that although the right to freedom of speech and expression was guaranteed by Art 14(1) (*a*) of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution"), that right was subject to the law concerning contempt of court as well as defamation. The AG further argued that the restrictions imposed by the law of contempt, especially those relating to the offence of contempt by "scandalising the court", were justifiable on the basis of the need to protect the administration of justice and the independence of the judiciary, as well as "the emphasis that a society places on respect for the rule of law and the position of the courts as guarantors of that vital principle"[note: 2].

10 In addition, the AG submitted that "[d]ifferent countries guarantee the right to freedom of expression in different ways and [decide] what restrictions may be placed on that freedom"[note: 3]. What is an acceptable inroad into freedom of speech or expression depends on the values of a society. Thus, the fact that a statement may be acceptable in the UK today does not mean that it cannot be contempt of court elsewhere. The AG stressed that it was important not to lose sight of local conditions and that foreign cases on what constituted contempt of court were not determinative in the local context.

11 The same arguments would apply to the test for the offence of contempt by scandalising the court. According to the AG, the present test in Singapore is whether a statement has an *inherent tendency* to interfere with the administration of justice rather than whether it constitutes a *real risk* of prejudicing the administration of justice, the latter being a higher threshold test. The AG warned against following other common law jurisdictions that have adopted the more liberal "real risk" test, given that these jurisdictions have statutes defining the right to freedom of expression in terms which are different from our Constitution and/or were parties to treaties that Singapore is not a party to. The AG further pointed out that there was a common observation in some of these jurisdictions that respect for the courts has diminished. References were made to the speech of Mr Tony Blair, the former Prime Minister of England, as well as that of Justice Michael Kirby of the High Court of Australia, in which they lamented that respect for the courts has been eroded by unwarranted attacks on the judiciary. The AG also highlighted the fact that prominent elder statesmen from some of these "modern liberal democracies" in the West have, in fact, called for rights (including freedom of media to inform the public and to criticise institutions of society and government actions) to be balanced by responsibilities (see Arts 13 and 14 of the Universal Declaration of Human Responsibilities). The AG thus cautioned against Singapore going in the direction of erosion of respect for the courts. The AG further submitted that even if the court was minded to depart from precedent and to adopt the "real risk" test, the publications complained of in the present case would still satisfy the higher threshold test.

12 Returning to the publications, the AG averred that they, each by themselves as well as collectively, were aimed at attacking the Singapore courts. I will deal with the detailed complaints the AG has against the various passages or words in each publication as well as the respective insinuations they are said to convey later in this judgment when I determine whether the contents of the publications are indeed contemptuous. It would suffice for me to state here briefly the general complaints the AG has against each publication:

(a) In respect of the First Article, the AG alleged that the article insinuated that the Singapore Judiciary was a tool of Mr Lee to muzzle political dissent and suppress media freedom in Singapore

and that the judiciary was prejudiced against the opponents and detractors of Mr Lee;

(b) In respect of the Letter, it conveyed the impression that Dr Chee was not given justice in that he was not given a fair chance to defend the case and that the Judge involved was complicit in the silencing of political dissent in Singapore; and

(c) In respect of the Second Article, it insinuated that the Singapore judiciary was in need of reform given that the judiciary was not independent and has been facilitating the suppression of political dissent and criticism in Singapore through the award of damages in defamation actions.

Collectively, the AG argued that the meaning that an objective reader would draw from the publications was that the courts in Singapore lacked independence and did not dispense justice where opposition politicians and the foreign press were involved. The AG further contended that the readership of the WSJA consisted mainly of opinion-shapers and that these sophisticated readers would know of the oft-ventilated criticisms of Singapore's courts and judges by some segments of the Western press, in particular the WSJA, and they would have understood the insinuations made in the publications.

13 The AG also urged the court to view this application in the context of the ongoing debate between some segments of the Western press, as exemplified by WSJA, and the Singapore government over the past two decades as to where the limits on the freedom of speech should be drawn (particularly in respect of the scope of the law of defamation in Singapore). The AG contended that the non-political Singapore judges, who merely apply and enforce the law, have unfortunately been dragged into this debate and attacked along the way. The AG submitted that the previous two convictions of WSJA for contempt of court (see *Attorney-General v Zimmerman* [1984-85] SLR 814 ("*Zimmerman*") and *Attorney-General v Wain (No 1)* [1991] SLR 383 ("*Wain*")) demonstrated the prejudice and/or "editorial slant" WSJA had against the Singapore courts and that this has surfaced again in the publications in the instant case. In fact, the AG submitted, the publications "represent a campaign of attacks designed to denigrate the Singapore judiciary by calling into question the integrity and impartiality of the judges"[note: 4].

The third respondent's case and submissions

14 The third respondent did not dispute that the law of contempt, including the offence of "scandalising the court", was a necessary and justifiable restriction on freedom of speech and expression. However, the third respondent took issue with the scope of the law of contempt in Singapore.

15 Counsel for the third respondent, Mr Philip Jeyaretnam SC ("Mr Jeyaretnam"), submitted that under the present law in Singapore, the offence of "scandalising the court" was established by proof beyond reasonable doubt of two elements, namely:

(a) an allegation of bias or lack of impartiality, of impropriety or any wrongdoing concerning a judge in exercise of his judicial function; and

(b) an inherent tendency to interfere with the administration of justice.

16 It was Mr Jeyaretnam's primary submission that the publications did not constitute contempt of court under the present test established in Singapore. The thrust of Mr Jeyaretnam's arguments in this respect was that the publications were only aimed at criticising the law of libel in Singapore and that a totally innocent interpretation could be given to the allegedly offending passages or words

identified by the AG in the publications. He submitted that the readership of the WSJA was a sophisticated and discerning one and its readers would understand that the WSJA (in respect of the publications) was only criticising the law of libel in Singapore and suggesting that a report of an international legal institute, *i.e.*, the International Bar Association Human Rights Institute's report on "human rights, democracy and the rule of law" in Singapore ("the IBA report"), should be considered in Singapore. As with the detailed complaints the AG has against the various passages or words in each publication, I propose to deal with the detailed alternative meanings put forward by Mr Jeyaretnam for these passages or words later. I set out here the overall arguments made by Mr Jeyaretnam for each publication:

(a) In respect of the First Article, Mr Jeyaretnam submitted that this publication merely made the point that the law of libel in Singapore did not comport with legal standards in other modern democracies and, consequently, political speech that would elsewhere be protected may in Singapore be the subject of a libel action and an award of damages. Mr Jeyaretnam also referred to an academic article written by Associate Professor Tey Tsun Hang ("Assoc Prof Tey") titled "Singapore's Jurisprudence of Political Defamation and its Triple-Whammy Impact on Political Speech" (UKPL 2008, Aut, 452-462) which, it was submitted, made similar criticisms as those in the First Article without anyone complaining that the academic article was in contempt of court;

(b) In respect of the Letter (which was a response to Ms Yeong's letter), Mr Jeyaretnam argued that WSJA had merely published the Letter in full, on the same basis that it published Ms Yeong's letter, *i.e.*, without endorsing its content. Mr Jeyaretnam stressed that but for Ms Yeong's letter, the Letter would not have been written and published. He also highlighted the fact that on 16 July 2008, WSJA published in full a second letter from Ms Yeong, which was in response to the Letter; and

(c) In respect of the Second Article, Mr Jeyaretnam argued that it merely provided a report on the IBA report and made recommendations concerning libel law and how the Singapore judicial system could be improved. It did not cast any aspersion on the judges or the judiciary. Mr Jeyaretnam submitted that the suggested improvements on how to safeguard judicial independence did not imply as a matter of logic that the judiciary was currently not independent as "[a] recommendation looks forwards, not backwards"[note: 5]. Moreover, on 23 July 2008, WSJA published in full a letter from the Ministry of Law of Singapore sent in response to the Second Article.

17 Mr Jeyaretnam's secondary submission was that, even if the two elements mentioned above were satisfied, the court should nonetheless consider (1) whether there was a real risk that the publications would undermine public confidence in the administration of justice and (2) whether the publications were nonetheless protected by the defence of fair criticism. In respect of (1), Mr Jeyaretnam pointed out that what was meant by an "inherent tendency" was not well explained by the local courts, although a decision of the Singapore High Court in *Re Application of Lau Swee Soong* [1965-68] SLR 661 ("*Lau Swee Soong*") had explained (at p 671) the term to mean the presence not just of a real risk of interference but "a real and grave one". However, implicit in the more recent decisions such as *Wain* and the summary of the law in this area provided in *Attorney General v Chee Soon Juan* [2006] 2 SLR 650 ("*Chee Soon Juan*") at [31], "inherent tendency" was referred to as something less than a "real risk". Mr Jeyaretnam submitted that I should equate "inherent tendency" with "real risk" as was done in *Lau Swee Soong* and/or adopt the real risk test like other jurisdictions such as England, Australia, New Zealand and Hong Kong, given that the real risk formulation was clearer and would strike a more appropriate balance between protecting the institution of an independent judiciary and the right of freedom of expression. In his written submissions, reference was made to the New South Wales Law Reform Commission Report on Contempt by Publication

(Report No 100) which noted that the tendency test had been widely criticised as being "imprecise and unclear, as well as too broad" (at para 4.8).

The issues

18 Following from the parties' submissions, there are essentially two main issues for my consideration in the present case:

(a) Firstly, what is the appropriate test for contempt of court by "scandalising the court"; and

(b) Secondly, in applying the proper test for contempt of court, whether the publications, either individually or collectively, are in contempt in the manner claimed by the AG.

The first issue

The law of contempt in general

19 The law of contempt has an ancient origin that stretches back to the twelfth century in England (see Sir David Eady & Prof A T H Smith, *Arlidge, Eady & Smoth on Contempt* (Sweet & Maxwell, 3rd Ed, 2005) at paras 1-1 – 1-4; and C J Miller, *Contempt of Court* (Oxford University Press, 3rd Ed, 2000) at para 1.02). Interestingly, the term "contempt of court", which has withstood the test of time, has been considered by many judges and commentators to be misleading as it gives the erroneous impression that the law of contempt exists for the protection of the dignity of the courts or judges. As lamented by Lord Salmon in *Attorney General v British Broadcasting Corporation* [1981] AC 303 ("*British Broadcasting Corporation*") at 344:

> The description 'contempt of court' no doubt has an historical basis but it is nonetheless *most misleading*. Its object is *not to protect the dignity of the courts but to protect the administration of justice*. [emphasis added]

(see also *Attorney-General v Times Newspapers Ltd* [1974] AC 273 ("*Times Newspapers Ltd*") at 322 where Lord Cross said it was "unfortunate" that the offence should be known by "a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court"; *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and Others* [2007] 2 SLR 518 ("*Pertamina Energy Trading Ltd*") at [22] which cited with approval Lord Cross's comments; *You Xin v Public Prosecutor and another appeal* [2007] 4 SLR 17 ("*You Xin*") at [14] where V K Rajah JA called the term a "misnomer"; and *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 ("*Radio Avon Ltd*") at 229 where Richmond P described the term as "inaccurate and misleading").

20 Indeed, the rationale for the law of contempt is rooted firmly in the public interest in that it aims to protect the administration of justice as well as public confidence in it, which is crucial for the rule of law and the maintenance of law and order in any civilised society. It is not in anyway intended to protect the dignity of the courts or judges. In *Pertamina Energy Trading Ltd*, Andrew Phang Boon Leong JA ("Phang JA"), who delivered the judgment of the Court of Appeal, pointed out pertinently (at [22]):

> It is imperative to note, at the outset, that the doctrine of contempt of court is not intended, in any manner or fashion whatsoever, to protect the dignity of the judges as such; its purpose is more objective and is (more importantly) rooted in the public interest. As Lord Morris of Borth-y-Gest put it in the House of Lords decision of *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (at 302) ("Times Newspapers"):

> In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: *it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted and their authority wanes and is supplanted*.
>
> [original emphasis in italics]

Similarly, Lord Diplock in *Times Newspapers Ltd* stated the rationale behind the law of contempt in the following terms (at 307):

> My Lords, in any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another.

21 Given the public importance of protecting the administration of justice, the law of contempt has been considered, not just in Singapore, but in other jurisdictions as well, to be a justifiable restriction on the right to freedom of speech (see for instance the decision of the Supreme Court of India in *Gopalan v State of Madras* (1950) 37 AIR 27 at 36; the decision of the Privy Council in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 ("*Ahnee*") at 305-306; the decision of the majority in the Australian High Court decision of *Gallagher v Durack* (1983) 45 ALR 53 at 55; and the decision of the Hong Kong Court of Appeal in *Wong Yeung Ng v Secretary of State for Justice* [1999] 2 HKC 24 ("*Wong Yeung Ng*") at 59-60). The Singapore High Court has consistently upheld the constitutionality of the law of contempt (see *Wain* at [35]; *Attorney-General v Lingle & Ors* [1995] 1 SLR 696 ("*Lingle*") at 701; *Chee Soon Juan* at [28]-[29]; and Art 14(2)(*a*) of the Constitution) on the basis that that the right to freedom of speech and expression guaranteed under Art 14(1)(*a*) of the Constitution is not absolute and no one is entitled "under the guise of freedom of speech and expression" to make irresponsible accusations against the judiciary so as to undermine public confidence in the administration of justice (*Wain* at [35]). Mr Jeyaretnam is also not contending to the contrary in the instant case before me.

22 The doctrine of contempt of court is traditionally divided into the criminal and the civil spheres, but the dichotomy is not always clear (see generally *Arlidge, Eady & Smoth on Contempt* at paras 3-1 – 3-11). Phang JA has discussed comprehensively the debate over the nature of contempt of court in *Pertamina Energy Trading Ltd* at [24]-[27] and I need not repeat his learned views here. The key thing to note is that regardless of the nature of the contempt of court in each case, the standard of proof in all contempt proceedings is that of the criminal standard, *i.e.*, proof beyond a reasonable doubt (*Pertamina Energy Trading Ltd* at [31]-[35]; *Summit Holdings Ltd v Business Software Alliance* [1999] 3 SLR 197 at [25]; *In re Bramblevale Ltd* [1970] Ch 128 at 137). Indeed, the Court of Appeal in *Pertamina Energy Trading Ltd* took the opportunity in that case to "*confirm* that the *criminal* standard of proof applies to *all* contempt proceedings" [emphasis added] (at [35]).

23 One should be circumspect about drawing parallels between the law of contempt (especially that relating to the offence of "scandalising the court") and the law of defamation. Both impose restrictions on the right to freedom of speech and expression. For the conflict between defamation

and the right to freedom of speech and expression, see Doris Chia & Rueben Mathiavaranam, *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008) ("*Evans on Defamation*") at p 1. "Scurrilous" allegations made against judges (which fall within the ambit of "scandalising the court") may be both contemptuous and defamatory (of the individual judge) (see *Contempt of Court* at para 12.06). As noted by the learned author of *Contempt of Court*, the points of similarity between the law of defamation and "scandalising the court" prompt one to inquire whether the defences one associates with defamation, such as justification and fair comment, are similarly available in a case of contempt (at para 12.31). In my view, it is clear that parallels should not be drawn between the two branches of law despite the similarities that they seem to share, given that they exist essentially for different purposes; the law of contempt (as already seen above) is concerned with the protection of the administration of justice and is grounded in public interest but the law of defamation is concerned with the protection of a private individual's reputation (see generally Patrick Milmo QC & WVH Rogers (gen eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 10th Ed, 2004) at para 1.1 and *Evans on Defamation* at p 1). I agree with both T S Sinnathuray J ("Sinnathuray J") and Lai Siu Chiu J ("Lai J") that defences in defamation have no application in the realm of contempt of court (see *Wain* at 397-398 and *Chee Soon Juan* at [44]-[47]). The reasons given by Lai J in this respect are note-worthy (*Chee Soon Juan* at [45]-[47]):

> 45 It is imperative that the integrity of our judges is not impugned without cause. The overriding interest in protecting the public's confidence in the administration of justice *necessitates* a rejection of the defences at law for defamation, particularly where accusations against a judge's impartiality are mounted. In the words of the authors of Borrie & Lowe ([21] supra) at p 351, "[a]llegations of partiality are treated seriously because they tend to undermine confidence in the basic function of a judge" [emphasis added].
>
> 46 Allowing the defence of fair comment would expose the integrity of the courts to unwarranted attacks, bearing in mind that a belief published in good faith and not for an ulterior motive can amount to "fair comment" even though the belief in question was not reasonable (see *Slim v Daily Telegraph Ltd* [1968] 2 QB 157). …
>
> 47 In a similar vein, admitting the defence of justification would, in effect, allow the court hearing the allegation of contempt to "sit to try the conduct of the Judge": (see *Attorney-General v Blomfield* (1914) 33 NZLR 545 at 563). Recognising the defence of justification would give malicious parties an added opportunity to subject the dignity of the courts to more bouts of attacks; that is unacceptable.
>
> [emphasis in original]

The law of defamation and the law of contempt are distinct in principle and in purpose. They should not be regarded as though they were one and the same.

The test for the offence of "scandalising the court"

24 The forms that contempt of court can take are varied and perhaps infinite, given the unpredictable and varied nature of human conduct (*You Xin* at [15]). A useful list of the principal types of conduct which may constitute contempt has been set out by the Australian Law Reform Commission ("ALRC") in its report on Contempt (Report No 35) ("the ALRC report") at para 3. The present application is concerned with the type of contempt known as "scandalising the court". In the oft-cited words of Lord Russel of Killowen CJ in *R v Gray* [1900] 2 QB 36, "scandalising the court" refers to "[a]ny act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority" (at 40). The ALRC described this form of contempt in the

following way (the ALRC report at para 3):

> *Publishing allegations tending to undermine public confidence in the administration of justice by the courts*. It may be a contempt to publish an allegation relating to a particular judge, magistrate or court, or to the judiciary or magistracy in general terms, where the allegation is such as to undermine public confidence in the administration of justice. The types of allegation covered are those which:
>
> - impute bias, prejudice or a serious lack of integrity;
>
> - suggest that the relevant judge, magistrate or court is significantly influenced by the dictates of an outside interest-group or individual; or
>
> - are of a scurrilous nature.
>
> This type of publication is treated as contempt because the courts perform such an important role in determining legal disputes and imposing legal remedies (in particular, remedies such as imprisonment and fines in criminal cases) that public confidence in their work is essential, and it is virtually impossible in practice for judges and magistrates to protect their reputation against unfounded allegations of misconduct or impropriety by resorting to the law of defamation. The label for this branch of contempt is 'scandalising'.
>
> [original emphasis in italics]

25 Recently, Lai J summarised the law governing this area in the following terms (*Chee Soon Juan* at [30]-[31]):

> 30 The position in Singapore regarding the offence of scandalising the court is well settled. Any publication which alleges bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function falls within the offence of scandalising the court: *Wain*'s case at 397, [49]. A number of local cases including *AG v Pang Cheng Lian* [1972-1974] SLR 658, *AG v Wong Hong Toy* and *AG v Zimmerman* have established that mounting unfounded attacks on the integrity of the Judiciary or making allegations of bias and lack of impartiality, is contempt of court.
>
> 31 Liability for scandalising the court does not depend on proof that the allegedly contemptuous publication creates a "real risk" of prejudicing the administration of justice; it is sufficient to prove that the words complained of have the "inherent tendency to interfere with the administration of justice" (per Sinnathuray J in *Wain*'s case at 397, [50]). In addition, the offence is also one of strict liability; the right to fair criticism is exceeded and a contempt of court is committed so long as the statement in question impugns the integrity and impartiality of the court, even if it is not so intended (see *AG v Lingle* [1995] 1 SLR 696 at 701, [13]).

Lai J's summary of the law was endorsed by Belinda Ang J ("Belinda Ang J") in the most recent local decision on this topic in *Lee Hsien Loong v Singapore Democratic Party and Others and Another Suit* [2008] SGHC 173 (at [174]):

> Recently, Lai Siu Chiu J in *AG v Chee Soon Juan* ([168] *supra*) reaffirmed two propositions. First, once fair criticism is exceeded, contempt of court is committed. Second, liability for scandalising the court does not depend on proof that the allegedly contemptuous publication creates a "real risk" (*id* at [31]) of prejudicing the administration of justice. …

26 Based on Lai J's summary of the law in *Chee Soon Juan*, Mr Jeyaretnam submitted that the present test in Singapore for the offence of scandalising the court required two elements to be fulfilled, namely, (1) an allegation of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in exercise of his judicial function or the judiciary (*Chee Soon Juan* at [30]) and (2) an inherent tendency to interfere with the administration of justice (*Chee Soon Juan* at [31]) (see [15] above). It is also Mr Jeyaretnam's secondary submission that the Singapore courts should consider adopting the real risk formulation instead of the present inherent tendency formulation, given, *inter alia*, the vagueness and broadness of the latter formulation (see [17] above).

27 I do not think Lai J's summary of the law or the other local decisions have laid down what was said to be a two-stage test (or two-element test), as contended by Mr Jeyaretnam. Lai J's summary of law relied mainly upon the following passage by Sinnathuray J in *Wain* (at p 397):

> (c) The law in Singapore:
>
> On the legal submissions made in this case, having carefully considered the law of contempt of court, I am of the view that since the case of *A-G v Pang Cheng Lian* [1975] 1 MLJ 69, it is settled law that any publication which alleges bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function which has terminated is a contempt of court.
>
> Next, it is not a requirement in our law, as was submitted by Mr Robertson, that in contempt proceedings it must be proved that the publication constitutes a real risk of prejudicing the administration of justice. In my judgment, it is sufficient to prove that the words complained of have the inherent tendency to interfere with the administration of justice. But, of course, this must be proved beyond a reasonable doubt.

The first paragraph of Lai J's summary of the law as well as the first paragraph in Sinnathuray J's passage above merely state the general proposition that any publication which alleges bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function would fall within the offence of "scandalising the court" ("the general proposition"). The test of liability for the offence, as rightly pointed out by the AG, is simply that of inherent tendency. In other words, a publication which alleges bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function would necessarily contain words that have the inherent tendency to interfere with the administration of justice. As borne out in the analysis of the cases of *Chee Soon Juan* and *Wain* themselves, the court in each case did not embark on a two-stage approach to determine if contempt was made out but merely proceeded to find if the words complained of did make allegations of bias, lack of impartiality, impropriety or any wrongdoing.

28 What then is the meaning of "inherent tendency"? Mr Jeyaretnam submitted that the previous decisions unfortunately did not elaborate much on this term, though they make it clear that "inherent tendency" is of a lower threshold than a "real risk". However, Mr Jeyaretnam referred to the much earlier case of *Lau Swee Soong* which appeared to have explained (at p 671) the term to mean the presence not just of a real risk of interference but "a real and grave one". The relevant passage relied upon by the third respondent in *Lau Swee Soong* reads as follows (at 671):

> These are decisions of the greatest weight and authority and establish that the jurisdiction which this court possesses to punish for criminal contempt should only be exercised when the risk of interference with the proper administration of justice is a real and grave one.

29 I do not think Choor Singh J equated "inherent tendency" with "a real and grave" risk in *Lau*

Swee Soong. To begin with, the case was not about contempt by "scandalising the court" but another form of contempt known as *sub judice* contempt. A publication which tends to prejudice the fair trial of a case by virtue of influence exerted on the judge (or the jury) would fall under such form of contempt. In *Lau Swee Soong*, the complaint was that certain press statements issued by two ministers about a demonstration had prejudiced the fair trial of the applicant, who was one of the rioters in the demonstration. The above cited passage must therefore be read in the context of the case. Indeed, Choor Singh J went on to elaborate later on in his judgment at p 672:

> A minister of the Government is not above the law and if a statement made by him is calculated to prejudice the fair trial of an accused person, and if the risk of interference with the proper administration of justice is a real and grave one, such a contempt will be met with the necessary punishment in order to restrain such conduct.

The above passage and the passage cited earlier on, when read together, appear to suggest that punishment would be imposed only if the risk was a real and grave one. However, whether a statement in question would constitute *sub judice* contempt would depend on whether the statement was "calculated to prejudice the fair trial of an accused person". Indeed, Choor Singh J had (at 665) cited the passage in *R v Odhams Press Ltd & Ors* [1957] 1 QB 73 which stated that the "[t]he test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result …".

30 In any event, nowhere in the judgment was it expressly stated that the two concepts of inherent tendency and real risk were the same. In fact, the term "inherent tendency" was not used at all.

31 Returning to the test of liability for contempt by "scandalising the court", what meaning should be ascribed to "inherent tendency"? According to the ALRC, an "inherent tendency" to interfere with the administration of justice means the same thing as "calculated" (in an objective sense) to interfere with the administration of justice (see the ALRC report at paras 427 and 431). The word "calculated" is in fact the terminology employed by Lord Russell of Killowen CJ in his famous passage in *R v Gray* (see [24] above). Thus, in my view, a statement which is said to have an "inherent tendency" to interfere with the administration of justice is simply one that conveys to an average reasonable reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function.

32 The next question to ask then is whether Singapore should depart from the "inherent tendency" test and adopt the "real risk" test. Indeed, the "real risk" test appears to be the test presently preferred by many common law countries (see generally *Contempt of Court* at para 12.06; see also *Time Newspapers Ltd* at 299; *Ahnee* at 306; *Radio Avon Ltd* at 234; and *Wong Yeung Ng* at 59). The main reason for the adoption of the "real risk" test in these jurisdictions is essentially the need to protect the right to freedom of speech and expression and the broader test based on "inherent tendency" is considered to inhibit the right to freedom of speech and expression to an unjustifiable degree (see also the ALRC's report at paras 428 and 429). The "inherent tendency" test is also criticised for its vagueness and is said to impose liability without the offence being defined in sufficiently precise terms (the ALRC's report at paras 428 and 431).

33 I agree with the AG that what are acceptable limits to the right to freedom of speech and expression imposed by the law of contempt vary from place to place and would depend on the local conditions (*McLeod v St Aubyn* [1989] AC 549; *Wain* at 393-394), as well as the ideas held by the courts about the principles to be adhered to in the administration of justice (*Re Tan Khee Eng John* [1997] 3 SLR 382 at [13]). As pointed out by Lai J in *Chee Soon Juan* (at [25]-[27]), conditions

unique to Singapore (*i.e.*, our small geographical size and the fact that in Singapore, judges decide both questions of fact and law) necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts. Indeed, the ALRC has also recognised the "inherent tendency" test has two clear advantages (the ALRC report at para 427). First, it does not call for detailed proof of what in many instances will be unprovable, namely, that public confidence in the administration of justice really was impaired by the relevant publication (*cf* the "real risk" test which would require some evidence to show that there is more than a remote possibility of harm). Secondly, it enables the court to step in before the damage, *i.e.*, the impairment of public confidence in the administration of justice, actually occurs.

34 In the light of our local conditions and the advantages that the "inherent tendency" test has, I agree that the "inherent tendency" test should continue to govern liability for contempt of court committed by "scandalising the court" in Singapore. If we need to ask in each case whether there is a real risk that public confidence in the administration of justice has been impaired by contemptuous remarks, it may lead to an absurd situation where a person at a dinner party who keeps shouting to all present that the judiciary is completely biased will not be held in contempt of court simply because no one at the party bothers about his ranting or is affected by his remarks. It would be more logical in such a situation to hold that contempt of court has been committed and then go on to consider whether there is a real risk that public confidence in the administration of justice has been impaired in deciding whether or not to punish the contemnor and, if so, to what extent. In other words, the issue of the said real risk has no bearing on liability but is relevant only for mitigation or aggravation of the punishment (or even whether or not punishment should be imposed in a particular case at all).

35 I now proceed to consider whether the publications, either individually or collectively, are in contempt of court in that they have an inherent tendency to interfere with the administration of justice.

The second issue

The First Article

36 The main complaints the AG has against the First Article are found in the first and last paragraphs thereof. This article begins and ends with "Lee Kuan Yew's Singapore". The first paragraph states that Singaporeans enjoy a range of freedoms, but "*[p]olitical dissent* is not among them" [emphasis added], and the last paragraph goes on to characterise the damages to be awarded in the defamation case against Dr Chee as "the *going price of political dissent* these days in Lee Kuan Yew's Singapore" [emphasis added]. The AG submitted that the clear implication from a reading of these two paragraphs is that the suppression of political dissent in Singapore is achieved through damages awarded by the courts in defamation suits and that the judiciary is therefore a tool of Mr Lee to muzzle political dissent and is prejudiced against opposition politicians. The AG contended that the carefully chosen words in these two paragraphs and the effort made by the author to start and end the article with the same words show that the author has a "sharpened quill" which is clearly directed at the judiciary, not the law of libel, and that he has "sharpened his quill to a very clear point".

37 The AG also took issue with some other paragraphs. One of them is the statement "*interpreted* by the court to imply corruption on the part of the government" found in paragraph 4, which the AG claimed was a "barbed formulation" which could have been replaced by a simple factual statement that Mr Chee had defamed the plaintiffs. The AG also claimed that the juxtaposition of the statement "Mr Lee has never lost a libel suit" with the immediate next sentence that "[h]e and his son are currently suing the Far Eastern Economic Review" in paragraph 9 subtly implied that the plaintiffs will

not lose this libel suit either and that the courts are prejudiced against the foreign press. The characterisation of Gopalan Nair as an "online advocate for media freedom in Singapore" in paragraph 12 was said to be "a caricature of the nature of Gopalan Nair's offence and the nature of his blog". The AG also took offence with the use of the word "interrogated" in paragraph 13 which he submitted was suggestive of some wrongdoing. The AG further contended that the statement that "the court changed the first charge" in paragraph 13 was a subtle insinuation that the courts were responsible for the change of the charge against Gopalan Nair when in fact it was the prosecution which applied for the amendment to be made.

38 In respect of the allegedly offending statements in the first and last paragraphs, Mr Jeyaretnam first submitted that the words "Lee Kuan Yew's Singapore" may be somewhat offensive to some readers, but it was not uncommon usage in that others have mentioned "Bush's America" or "Blair's Britain". He submitted that the words may be a mischaracterisation but that they certainly did not mean that Mr Lee controlled everything, including the courts, in Singapore. As for the words "going price of political dissent", these words merely suggested that political dissent may be subject to an action for libel and ultimately an award of damages. It was mere "snappy language" and it would be wrong to impute to it the insinuation alleged by the AG. As for the other material statements in the other paragraphs, Mr Jeyaretnam submitted that they were simply statements of facts and nothing more. Although the statement in paragraph 13, *i.e.*, "the court changed the first charge" was erroneous in that it was the prosecution which applied for amendment of the charge, Mr Jeyaretnam submitted that this was a simple mistake which should not be elevated to the meaning that the courts were biased.

39 Mr Jeyaretnam repeatedly emphasised that the First Article was meant only to criticise the law of libel in Singapore in that the law of libel in Singapore did not comport with the legal standards set by courts in other modern liberal democracies and nothing more. He made comparisons with the academic article by Assoc Prof Tey (see [16] above), who he claimed had made similar criticisms.

40 In the context of the First Article, I agree with the AG that the relevant statements in the first and last paragraphs do give rise to the implication, subtle though it may be, that the suppression of political dissent is achieved by way of damages awarded by the courts in defamation suits and that the judiciary is therefore a tool to muzzle political dissent and lacks impartiality and independence where opposition politicians are concerned. The sophisticated and well-informed readership of the WSJA will not miss the significance of "Lee Kuan Yew's Singapore" as the opening and closing words of the article encapsulating everything written in between. It may be argued that these words are in fact laudatory of Mr Lee as he is "widely revered [by Singaporeans] as the father of their country" (see paragraph 11 of the First Article). However, read with the other contents in the article as a whole, effectively, they intend to convey the message that everything in this country, including the judiciary, is controlled by one man.

41 The focus of this editorial piece is the libel suit between Mr Lee and Dr Chee. In the last paragraph, the article states "[t]he court has yet to set the amount of monetary damages in the defamation case" and this is followed immediately by the statement "[w]hen it does, we'll know the going price of political dissent" The formula is glaringly straightforward – in Singapore, the price of political dissent equals the monetary damages payable in defamation actions commenced by Mr Lee and his son. The "price of political dissent" is therefore determined by the courts here. Coupled with the bye-line - "Two court cases reveal much about the city-state's *lack of freedoms*" [emphasis added] – printed prominently in the centre of the First Article and the juxtaposition of the statements in paragraph 9 that "Mr. Lee has never lost a libel suit" and "[h]e and his son are currently suing the Far Eastern Economic Review", the inescapable message to the sophisticated readership of the WSJA must be that the judiciary here is biased towards Mr Lee and his son and assists them in the

suppression of political dissent among opposition politicians by means of damages awarded in defamation actions. The implication of course is that defamation actions are not decided on their merits but for the ulterior purpose of penalising political dissent. After all, the article concludes, somewhat cynically, it is "Lee Kuan Yew's Singapore".

42 I therefore disagree with Mr Jeyaretnam that the First Article was only aimed at criticising the law of libel in Singapore. The title of the First Article - "Democracy in Singapore" - is already telling of its contents and focus. The First Article is far removed from the academic article written by Assoc Prof Tey which is essentially about "Singapore's *Jurisprudence* of Political Defamation" [emphasis added] although it does contain some rather strong statements about the legal reasoning in defamation cases. Political dissent does not equal defamation. It is axiomatic that political dissent need not descend to the level of defaming one's political opponents as some opposition politicians in Singapore have demonstrated for many years.

43 It is settled law that any allegation that the courts can be influenced by pressure from an external source, are subservient to others or lack independence or integrity amounts to contempt of court by "scandalising the court" (*Zimmerman* at 817; *Lingle* at 699-700; *Gallagher* at 55-56). So too an allegation that the judge is biased (politically or otherwise) or lacks impartiality (*Wain* at 399-400; *R v Editor of New Statesman Ex p v DPP* (1928) 44 TLR 301). There can therefore be no doubt that the above mentioned allegations, implying what they obviously do to the sophisticated readership, constitute contempt of court.

44 Insofar as the impugned statements and words in the other paragraphs in the First Article (*i.e.*, paragraphs 4, 12 and 13) are concerned, I agree with Mr Jeyaretnam that they are essentially innocuous and do not amount to contempt of court, even when read with the other paragraphs in the article. The words "interpreted by the court" in paragraph 4, without any other qualifying word, do not imply that the court was deliberately straining language in order to find defamation. The words are no less innocuous than, say, "the court interpreted this provision of law to mean …". The word "interrogated" in paragraph 13 may sometimes connote rather rigorous questioning but that does not necessarily mean that the questioning was unfair or unlawful. Even if it does suggest some degree of wrongdoing, and I do not think it does in the context here, such an allegation would be against the police and not the courts. Likewise, the statement that the court "changed" the charge is just a non-legalistic way of saying "amended" and amendment of charges is a common occurrence in criminal proceedings. It does not impute any improper motive on the part of the court even though the statement does not go on to elaborate that the "change" was brought about by the application of the prosecution. It does not necessarily imply that the judiciary is responsible for the prosecution of Mr Gopalan Nair. In paragraph 12 of the First Article, Mr Gopalan Nair is described as an "online advocate for media freedom in Singapore". Some, including the sophisticated readership of WSJA, may disagree with this description. However, the choice of words, whether accurate or not, has no bearing on the Singapore judiciary in the context of the article.

The Letter

45 In respect of the Letter, the AG took issue with the entire paragraph 4, which, he submitted, alleged that Belinda Ang J ignored disputes of fact and law in the defamation action between Mr Lee and the Chees and entered summary judgment in favour of Mr Lee and his son without giving the Chees a fair chance to defend the case. In other words, the thrust of the Letter was that Dr Chee was not treated fairly by the court and the Judge was complicit in silencing political dissent in Singapore. The AG submitted that this was a misrepresentation of the truth and that the Letter also omitted to mention that Dr Chee failed to file an appeal within the prescribed time and the Court of Appeal subsequently declined to give leave for an extension of time to appeal.

46 Mr Jeyaretnam submitted that paragraph 4 meant literally what it said; a summary judgment against the Chees meant that they did not have the "chance to call witnesses and cross-examine the plaintiffs" (last sentence of paragraph 4). Mr Jeyaretnam also pointed out that the Letter was in response to the earlier letter by Ms Yeong and but for Ms Yeong's letter, the Letter would never have been published. Further, he argued that the WSJA merely published the Letter in full in the same way that it did for Ms Yeong's earlier letter as well as her subsequent letter sent in response to the Letter by Dr Chee. Mr Jeyaretnam submitted that all these letters were published without any endorsement on the part of the WSJA and that the Letter was clearly not an editorial containing the WSJA's considered views.

47 After inheriting the law on civil procedure from England, the O14 or summary judgment procedure is now a common feature in our judicial landscape. Such a procedure is available in Singapore even for defamation cases and that is why the procedure could be invoked in Dr Chee's case. It is a well-established principle that summary judgment should not be granted if there are triable issues. The words "despite our defense" and "we were found guilty without being given the chance to call witnesses and cross-examine the plaintiffs" in paragraph 4 of the Letter suggest to the reader that the Judge granted summary judgment although there were "disputes of fact and law" or "triable issues". The necessary implication is that the Judge gave summary judgment although it was unjustified in the circumstances and the only explanation for this must be that the Judge was not deciding the case on its merits but was compliant to Mr Lee and/or was prejudiced against Dr Chee. In addition, the Letter left out the fact that Dr Chee had chosen to walk out of the summary judgment hearing and that he subsequently failed to file an appeal in time against the Judge's decision as well. The failure to publish "a fair or adequate summary of the reasons of the Court" and/or the omission of crucial facts may result in a publication amounting to contempt of court (see *R v Fletcher* (1935) 52 CLR 248 ("*Fletcher*") at 258-259). Even though this was a letter written by a reader, rather than an article generated by the WSJA, the third respondent had a duty to ensure that it did not contain matters that are in contempt of court. Otherwise, any publisher would have an unbridled right to disseminate contemptuous matters simply be getting someone to express such by way of letters to the editor. The AG is therefore correct in his contention that the said paragraph 4 is in contempt of court.

48 The fact that the Letter was a reply to Ms Yeong's letter did not give the third respondent a licence to publish it if it was in contempt of court. It is not open to the third respondent to argue that it should be exonerated from any blame for any contemptuous material that the Letter contained, given that it had merely published in full the views of a third party, without endorsing it. Printers and distributors who have no knowledge of the existence of an offending article are still liable if what is printed is in fact in contempt of court (see *Wain* at 395-397 and *Lingle* at 712). As pointed out by the AG, knowing that the Letter could be potentially contemptuous, the third respondent could have refused to publish the Letter. Alternatively, it could have decided to publish it after editing out the offending paragraph 4 which would not have affected the essence of the Letter.

The Second Article

49 The AG submitted that the title of the Second Article – "Judging Singapore's Judiciary" – by itself would indicate clearly that this editorial piece was aimed at the Singapore judiciary and not the law of libel in Singapore as contended by the third respondent. For the Second Article, the AG's focus was on paragraphs 4 and 7. Paragraph 4 begins with the statement that "[t]he IBA report is a good primer on Singapore's use of defamation cases against opposition politicians and the foreign press". The AG stressed that this statement came right after paragraph 3 which covered parts of the IBA report and quoted its findings, *i.e.*, that the IBA described "concerns about the objective and subjective independence and impartiality" of the Singapore judiciary and that in cases involving

litigants from the ruling People's Action Party ("PAP") or its interests, found "concerns about an actual or apparent lack of impartiality and/or independence, which casts doubt on the decision made in such cases". The article states in its concluding paragraph (paragraph 7) that "Singapore is unlikely to reform its political or judicial system anytime soon", after referring to some of the 18 recommendations made by the IBA report for Singapore. It then ends, the AG submitted, with the "triumphalist note" that "when the country is ready to join the ranks of modern democracies, the IBA's recommendations provide a good checklist of how to do so". The AG submitted that the overall effect of all this was the imputation that the Singapore judiciary is in need of reform, not because of incompetence or corruption, but in the areas of independence and impartiality.

50 Mr Jeyaretnam argued that "primer" merely meant a textbook or something one could look at for a quick introduction to a certain topic and thus its use in paragraph 4 did not mean that the WSJA had endorsed the IBA report or had taken the position that the IBA report was the last word on the discussion. Mr Jeyaretnam further submitted that the Second Article did not cast any aspersions on the independence of the judiciary. The suggestion in paragraph 7 that Singapore consider improvements to its judicial system (as set out by the recommendations in the IBA report) which would operate to safeguard judicial independence did not imply as a matter of logic that the Singapore judiciary is currently not independent, for "[a] recommendation looks forwards, not backwards". As for the words "when the country is ready to join the ranks of modern democracies" Mr Jeyaretnam submitted that while one may find such language "patronising", the words did not impute a lack of independence to the judiciary. Mr Jeyaretnam also referred to an article in a local newspaper, the Straits Times, published on 10 July 2008, which he claimed also reported on the IBA report along the same lines as the Second Article. He further contended that the WSJA subsequently also published in full a letter from the Ministry of Law which was in response to the Second Article.

51 Indeed, both the Second Article and the Straits Times report mentioned the concerns the IBA had about an actual and/or apparent lack of impartiality and/or independence of the judiciary. Both also included the statement issued by the Ministry of Law in response to the IBA report (see paragraph 5 of the Second Article). However, the manner of reporting was clearly different. The Second Article assumed a somewhat "mocking" stance which culminated in the "triumphalist note", as described by the AG. In my opinion, the Second Article was an editorial piece carefully crafted to appear on the surface as a mere report of the IBA report but was in fact insinuating insidiously that the Singapore judiciary is not independent and impartial in cases involving the ruling party or its interests. Hence, the need for reform of the "judicial system" as stated in the last paragraph, which, read in context particularly with the subject title and paragraph 3 of the Second Article, must include reform in relation to its alleged lack of impartiality and/or independence. I do not think the subtle message would be lost to an ordinary reader, much less the sophisticated and well-informed readership of the WSJA. Clearly therefore, the Second Article is also in contempt of court.

Fair criticism

52 The defence of fair criticism is well-established in the law of contempt. As the second half of the famous passage of Lord Russel of Killowen CJ in *R v Gray* [1900] 2 QB 36 states (endorsed in *Wain* at 394 and *Chee Soon Juan* at [41]-[42]):

> Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published…

Another statement of this defence is found in *Ambard v Attorney-General for Trinidad and Tobago*

[1936] AC 322 at 335 (endorsed in *Attorney-General v Wong Hong Toy* [1982-1983] SLR 398 ("*Wong Hong Toy*") at 404-405, *Wain* at 395, *Chee Soon Juan* at [42] and *Lee Hsien Loong* at [172]) where Lord Atkin said:

> But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

53 More recently, Belinda Ang J summarised the defence of fair criticism as follows in *Lee Hsien Loong* at [173]:

> The criticism of a judge's conduct or the conduct of the court does not constitute contempt of court so long as fair criticism is not exceeded, i.e., so long as the criticism is fair, temperate, made in good faith and not directed at the personal character of a judge or at the impartiality of a judge or a court (see *Halsbury's Laws of England* vol 9(1) (Butterworths, 4th Ed Reissue, 2003) at para 433). It follows that the facts forming the basis of the criticism must be accurately stated. On the subject of what qualified as fair criticism, Sinnathuray J in *Wong Hong Toy* ([168] *supra*), citing and adopting the reasoning in the Australian High Court's decision in *The King v Fletcher* (1935) 52 CLR 248, held that an untruthful statement of facts upon which the comment was based might vitiate a comment which might otherwise be considered "fair". He also agreed with O'Bryan J in *R v Brett* [1950] Vict LR 226 at 229 that the motive of the writer was an important element in determining whether the criticism was fair (*per* Sinnathuray J in *Wong Hong Toy* at 405–406, [37]).

54 What can be observed from the above passages is that so long as the criticism is within the boundaries of "reasonable argument or expostulation", is made in good faith and is not directed at the impartiality of the courts or seeks to impute improper motives to the judges, it will not constitute contempt of court. For the reasons already discussed above, the publications here can hardly be said to contain "reasonable argument or expostulation" since they attacked the impartiality of the Singapore judiciary and sought to impute improper purposes to the decisions of our judges. As demonstrated, they were not at all aimed at criticising the law of libel in Singapore. In addition, in respect of the Letter, there was also no full disclosure of the facts surrounding the summary judgment application and it cannot be said that the comments made there were "fair". As the High Court of Australia has pointed out in *Fletcher* (at 257-258):

> Fair criticism of the decisions of the Court is not only lawful, but regarded as being for the public good; *but the facts forming the basis of the criticism must be accurately stated*, and the criticism must be fair and not distorted by malice… [emphasis added]

The defence of fair criticism in this case must therefore fail.

Summary of findings

55 In my opinion, all three publications, individually as well as collectively, contained insinuations of bias, lack of impartiality and lack of independence and implied that the judiciary is subservient to

Mr Lee and/or the PAP and is a tool for silencing political dissent. The three publications also appeared within a relatively short span of under 3 weeks at a time when the defamation case involving Mr Lee and Dr Chee was ongoing and when the case of Mr Gopalan Nair was also making its way through the courts. The imputations made were serious ones coming from a serious publication. The three publications, read individually or collectively, are in contempt of court because the allegations by way of insinuations clearly possess the inherent tendency to interfere with the administration of justice.

56 Even if I were to accept the arguments made by Mr Jeyaretnam regarding the need to satisfy the "real risk" test, there can be no doubt that allegations of the nature mentioned above would immediately cast doubts about the judiciary in Singapore and undermine public confidence, among the WSJA's foreign or local readership, in the even-handed administration of justice by our courts. A judiciary which is not impartial and independent is as good as salt that has lost its flavour.

The appropriate sanction

57 The AG submitted that in assessing the proper sanction to be imposed on the third respondent, the following principles of sentencing would apply in the instant case[note: 6]:

> … denunciation (to drive home the point that such behaviour is unacceptable), specific deterrence (to prevent a recurrence of such behaviour) and general deterrence (to signal to others that such behaviour will be dealt with severely).

The AG pointed out that the third respondent is a repeat offender, having been fined $6,000 in *Zimmerman* and $4,000 in *Wain*. The AG, suggesting that the previous fines were derisory in amount, submitted that a substantial fine, one that is sufficient to hurt but not to cripple, should be imposed. Mr Jeyaretnam, on the other hand, pointed out that our courts have been imposing fines in the region of a few thousand dollars with the highest amount ever awarded for the present form of contempt of court being $10,000 in *Lingle* (see 711). He submitted that if the third respondent was found liable for contempt of court, the fine imposed should not depart from the existing scale as laid down in the earlier cases. Anything more, he argued, would have an unnecessary "chilling effect" on speech and would not be needed to vindicate the honour and reputation of the courts.

58 I agree that the general sentencing principles referred to above are appropriate in determining the appropriate punishment for the criminal forms of contempt of court such as the present one of "scandalising the court" in the instant case. The factors that the court should have regard to in deciding the appropriate punishment are the nature of the contempt, who the contemnor is, the degree of his culpability, how the contempt was published, the kind of publication and the extent of the publication (see *Zimmerman* at 824). Other relevant considerations would be whether the respondent argued against culpability, expressed regret over his conduct or made an apology for his contempt of court (see also *Wong Hong Toy* at 407 and *Attorney-General v Pang Cheng Lian and others* [1972-1973] SLR 658). As mentioned above (at [34]), whether the statements in question merely pose a remote possibility or present a real risk of harm to the administration of justice can also be taken into account in determining the sentence. The considerations are not exhaustive and what are of particular relevance would depend ultimately on the facts of each case. While the fines imposed in the earlier cases provide useful guides, each case should of course be dealt with on its own merits.

59 The following are the aggravating factors in this case. Firstly, the third respondent is a repeat offender. Even though the earlier instances of contempt of court were committed about two decades ago (*Zimmerman* in October 1985 and *Wain* in December 1989), that is not a very long period of time in the context of corporate history. Secondly, there were three offending publications in the span of

three weeks (unlike cases such as *Wain* and *Lingle* which concerned only one offending article) appearing in a respectable journal with a wide and sophisticated readership. As stated in paragraph 6 of the affidavit of Jason Paul Conti filed on behalf of the third respondent, "[t]he journal is now international in its circulation" with an "international readership" comprising "an informed and discerning audience of business leaders and government decision-makers". Thirdly, the constant refrain of the imputations in the publications is very serious in nature. As mentioned earlier, impartiality and independence are the judiciary's crucial cornerstones. Putting these qualities into question destabilizes the edifice of the rule of law and, consequently, threatens to bring down the reputation of our country. Fourthly, the third respondent has not offered any apology but has maintained throughout the proceedings that the publications were not in contempt.

60 However, there are also mitigating factors here. Firstly, to the third respondent's credit, it has published in full the letters from Ms Yeong and the Ministry of Law, which responded to the publications. I note, however, the AG's comment about the utility, or perhaps I should say futility, of making contemptuous remarks, publishing a letter sent in response and then repeating the cycle. This is because the damage from the first contempt may already have been done and is in fact being reinforced by further contempt. Secondly, in respect of the First Article, not all the words relied on by the AG have been determined to be in contempt of court but the matters found not to be in contempt of court are nowhere as significant in content as those found to be so.

61 Mr Jeyaretnam has also drawn to my attention the fact that the AG's position all along was that the alleged contempt in this case was by way of implication and insinuations rather than express assertions. Arguably, the fact that the allegations were not express could result in less harm being caused to public confidence in the administration of justice because the insinuations may be lost on less astute readers or those who read the publications cursorily. However, sarcasm and insinuations can be as harmful as express assertions and this is particularly so in a serious-minded, international publication like the WSJA with its sophisticated and intelligent readership who would certainly not miss the subtle undertones of the published words. To this extent, the averment made by the third respondent that it has no intention of undermining the judiciary (or any other institution) here does not appear to be consonant with its conduct in publishing the two articles and the Letter.

62 Section 7(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) provides:

> The High Court and the Court of Appeal shall have power to punish for contempt of court.

Unlike s 8 of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) ("SCA"), this section does not prescribe the type of sanctions. Although it is accepted that imprisonment and fine are two of the permissible sanctions (see O 52), no limit has been set for either one (again compare this with s 8(2) of the SCA where a subordinate court is allowed to impose imprisonment for up to 6 months or a fine not exceeding $2,000 or both). Nonetheless, it is clear that the power to punish for contempt of court should be exercised reasonably.

63 For the reasons stated above, the present case does warrant the imposition of a fine which will serve the twin functions of being a denunciation of the third respondent's present conduct (especially with two past infractions) and, hopefully, of being a deterrence against future transgressions. Accordingly, I order the third respondent to pay a fine of $25,000, which is to be paid within 7 days from today.

Costs

64 The parties have been informed earlier that I will hear submissions on the issue of costs

immediately after delivering this judgment. I now invite the parties to make their submissions on this issue.

[note: 1]The AG's Submissions at p 2, para 4.

[note: 2]The AG's Submissions at p 6, para 4.

[note: 3]The AG's Skeletal Submissions at p 6, para 5.

[note: 4]Statement pursuant to O 52 r 2(2) dated 27 August 2008 at para 18.

[note: 5]Third respondent's Skeletal Arguments at para 33.

[note: 6]The AG's Submissions at p 31, para 4.