Attorney-General
v
Au Wai Pang

[2015] SGHC 16

High Court — Originating Summons No 1098 of 2013 (Summons No 6209 of 2013)
Belinda Ang Saw Ean J
21 October 2014

Contempt of Court

21 January 2015 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The Attorney-General ("the AG") brought these committal proceedings against the respondent, Au Wai Pang ("the Respondent"), in connection with the publication of two articles on his blog which the AG said amounted to contempt of court in the form of scandalising the Supreme Court of Singapore ("the Supreme Court"). The alleged contempt imputed bias on the part of the Supreme Court against homosexuals.

2 The first article, titled "377 [*sic*] wheels come off Supreme Court's best-laid plans" ("the First Article"), was posted on the Internet at the Respondent's blog address http://yawningbread.wordpress.com/ ("the

Yawning Bread blog") on 5 October 2013. It concerned two parallel High Court cases on the constitutionality of s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("s 377A"), which criminalises sex between males. The issue for decision by the High Court in these two cases (hereafter referred to as "the *Tan Eng Hong* case" and "the *Lim Meng Suang* case") was whether s 377A was unconstitutional as being inconsistent with Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution").

3 The second article, titled "Church sacks employee and sues government – on one ground right, on another ground wrong" ("the Second Article"), was posted on the same blog (*ie*, the Yawning Bread blog) on 12 October 2013. It concerned two separate civil cases in the High Court brought by Lawrence Bernard Wee Kim San ("Wee"), a former employee of Robinson & Company (Singapore) Pte Ltd ("Robinson"). In the first civil case ("the Robinson Suit"), Wee claimed that he had been constructively dismissed by Robinson on the grounds of his sexual orientation or in breach of an implied term of mutual trust and confidence in his employment contract with the company. On 23 August 2013, after the Robinson Suit was struck out by the High Court and pending Wee's appeal against that decision to the Court of Appeal, Wee filed a separate set of proceedings in Originating Summons No 763 of 2013 ("Wee's Constitutional Claim") seeking a declaration that Art 12 of the Singapore Constitution prohibited discrimination against gay men in the workplace. The AG was named as the defendant in Wee's Constitutional Claim.

4 The debate in the present committal proceedings is whether the First Article and the Second Article (collectively, "the Impugned Articles") fall within the legal limits that permit the Respondent to exercise a genuine right of fair criticism, or whether they lend themselves to imputations of bias and impropriety on the part of the Supreme Court and thereby carry a real risk of undermining public confidence in the Singapore judiciary. This judgment will discuss what amounts to contempt of court in the form of scandalising the court, and what must be proved to establish this offence. One important inquiry in the present case is whether the AG has satisfied the "real risk" test for determining liability for this offence. In order to satisfy this test, the AG must prove that the facts of this case establish beyond reasonable doubt that the Impugned Articles carry a real risk of undermining public confidence in the administration of justice in Singapore. In this regard, this judgment will undertake an analysis of the Impugned Articles with the relevant legal principles in mind.

The law on contempt in the form of scandalising the court

The nature of the contempt

5 The form of contempt of court known as "scandalising the court" (also referred to hereafter as "scandalising contempt") is part of the law of Singapore. Under s 7(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), both the High Court and the Court of Appeal have the power to punish for such contempt. (The State Courts have a similar power under s 8(1) of the State Courts Act (Cap 321, 2007 Rev Ed).)

6 *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 ("*Shadrake CA*") is the leading local authority on the law of scandalising contempt. This offence

is not intended to shield judges from the publication of fair criticism of their decisions. It exists not to protect the dignity of judges, but to protect the integrity of the administration of justice by the court, whose central role in upholding the rule of law requires it to enjoy public confidence. The upholding of the rule of law is the function of the court, and the court can only effectively discharge that function if it commands the authority and respect of the public. Scandalising contempt may, depending on the facts and surrounding context, embrace conduct and/or words that undermine public confidence in the integrity, propriety and impartiality of the court, and thus, the authority of the court as a whole.

7 The fundamental purpose underlying the law of contempt of court generally, and the law of scandalising contempt in particular, can be seen from (among other cases) the Court of Appeal's judgment in *Shadrake CA*, which was delivered by Andrew Phang Boon Leong JA. At [21] of *Shadrake CA*, Phang JA cited the following passage from *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] 2 SLR(R) 518 ("*Pertamina Energy*") at [22]:

> … [T]he 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) …:
>
> > 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 unjustified 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. …*
>
> …
>
> [emphasis added by the Court of Appeal in *Pertamina Energy*]

8 In *Gallagher v Durack* (1983) 152 CLR 238, the High Court of Australia justified the continued existence of the offence of scandalising contempt as follows (at 243):

> The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of the court or judges.

9 There is significant tension between freedom of speech and the administration of justice because of the public interest in protecting both principles. The offence of scandalising contempt is viewed by Singapore law as a reasonable limit upon freedom of speech, and recognises that limitations upon freedom of speech are necessary in the public interest so as to take into account the rights of others and the interests of the whole community. As Phang JA put it in *Shadrake CA* at [17]:

> At the most general level, it should be noted that the law relating to contempt of court operates against the broader legal canvass of the right to freedom of speech that is embodied both within Art 14 of the [Singapore] Constitution … as well as the common law. The issue, in the final analysis is one of *balance*: just as the law relating to contempt of court ought not to unduly infringe the right to freedom of speech, by the same token, that right is not an absolute right, for its untrammelled abuse would be a negation of the right itself. Indeed, this last mentioned point is embodied in Art 14(2) of the [Singapore] Constitution which provides that "Parliament may by law impose … restrictions designed to … provide against contempt of court". In this regard, the Singapore parliament has in fact provided the courts with the jurisdiction to punish for contempt in s 7(1) of the Supreme Court of Judicature Act … [emphasis in original]

10 David Tan ("Mr Tan"), in his article "A 'real risk' of undermining public confidence in the administration of justice" (2011) 16 Media & Arts Law Review 191, argues (at 202) that the decision in *Shadrake CA* strikes an appropriate balance between safeguarding, on the one hand, freedom of speech and, on the other hand, the public interest in protecting public confidence in the administration of justice in Singapore. He suggests that this balance is achieved by the application of the "real risk" test for liability, coupled with the placing of the onus on the party bringing the committal proceedings (typically, the prosecuting authorities of the jurisdiction concerned ("the Prosecution")) to prove the elements of the offence based on the criminal standard of beyond reasonable doubt.

11 I agree with Mr Tan that the combination of the "real risk" test and the placing of the legal burden on the Prosecution "calibrates" appropriately the tension between freedom of speech and the public interest in protecting public confidence in the administration of justice. Notably, the "real risk" test for liability sets a higher threshold for establishing liability than the "inherent tendency" test that was previously applied in Singapore. The "real risk" test is also in line with the test applied in other common law jurisdictions such as Australia, New Zealand and Hong Kong. In addition, as just mentioned, the legal burden is on the Prosecution (in the Singapore context, the AG) to prove the elements of the offence beyond reasonable doubt. In this regard, the Court of Appeal in *Shadrake CA* (at [80]) chose to treat fair criticism as an element to be evaluated within the ambit of liability for scandalising contempt. This is different from the law of defamation (where fair criticism is a defence), and has the effect of firmly retaining the legal burden on the AG to prove that the impugned statement in question does not constitute fair criticism, but instead

poses a real risk of undermining public confidence in the administration of justice in Singapore. Therefore, the broad effect of *Shadrake CA* is that the AG must prove the absence of fair criticism within the ambit of liability for scandalising contempt. This ensures that the alleged contemnor ("the defendant") is not disadvantaged.

The applicable legal principles

12 The offence of scandalising contempt is made up of *mens rea* and *actus reus*. I set out below the applicable legal principles on these two elements of the offence.

The mens rea *for the offence of scandalising contempt*

13 The *mens rea* required for the offence of scandalising contempt is easily satisfied as all that needs to be proved is the intention on the part of the defendant to publish the article(s) complained of. There is no legal requirement to prove an intention to undermine public confidence in the administration of justice in Singapore. In other words, proof of an actual intention to interfere with the administration of justice in Singapore is not required to establish liability.

14 Quentin Loh J's enunciation of the *mens rea* required for the offence of scandalising contempt in *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 ("*Shadrake HC*") at [55] was clearly affirmed by Phang JA in *Shadrake CA* at [23], who said that the requisite *mens rea* was "well-established":

> We turn now to the test for liability for scandalising contempt, *viz*, the *actus reus* and *mens rea* for the offence. As the *mens rea* requirement is well established, this judgment focuses instead on the *actus reus*. That said, for the avoidance of

> doubt, the necessary *mens rea* was succinctly and rightly enunciated by the Judge as follows …:
>
> > There was no dispute that the only *mens rea* which is needed at common law is that *the publication is intentional*; and that it is not necessary to prove an intention to undermine public confidence in the administration of justice. If authority is needed it can be found in *Radio Avon* … at 232–234; *Ahnee* … at 307; *Attorney-General for New South Wales v Mundey* … at 911–912.
>
> [emphasis added by the Court of Appeal in *Shadrake CA*]

15 Mr Choo Zheng Xi ("Mr Choo"), who presented the Respondent's arguments on the First Article, submitted that the ruling in *Shadrake CA* on the *mens rea* required for the offence of scandalising contempt was given *per incuriam*, and that this court should revisit the issue of *mens rea* in the light of the Privy Council case of *Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening)* [2014] 3 WLR 1081 ("*Dhooharika*"), a decision which post-dates both *Shadrake HC* and *Shadrake CA*. In *Dhooharika*, the Board held that the requisite *mens rea* for the offence of scandalising contempt was "an intention to interfere with the administration of justice, and in this context that would mean the undermining of public confidence".[1]

16 I make two main points in relation to Mr Choo's submissions at [15] above. First, I do not agree with Mr Choo's assessment that Phang JA's pronouncement on the *mens rea* requirement for the offence of scandalising contempt was given *per incuriam* in *Shadrake CA*. In this regard, I agree with

---

[1] Respondent's Written Submissions dated 15 October 2014 ("Respondent's Written Submissions"), paras 48 and 55.

counsel for the AG, Mr Tai Wei Shyong ("Mr Tai"), who argued that the traditional formulation of a "*per incuriam*" decision is one which is "given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned", or which shows "a manifest slip or error" (see *Morelle Ld v Wakeling and Another* [1955] 2 QB 379 ("*Morelle*") at 406). Notably, the five-judge English Court of Appeal in *Morelle* remarked that cases of *per incuriam* decisions must be "of the rarest occurrence".

17 In *Shadrake CA*, the requisite *mens rea* for the offence of scandalising contempt was addressed by Phang JA as part of the appellate court's overall consideration of the test for liability for this offence, which (as mentioned earlier) comprises the requisite *actus reus* and the requisite *mens rea*. Since the *mens rea* for the offence was dealt with by the appellate court in its enunciation of the applicable and relevant legal principles (at [23]), Mr Choo's argument that its decision on *mens rea* in *Shadrake CA* was given *per incuriam* is untenable.

18 Mr Choo's contention is legally flawed for another reason because even if, for the sake of argument, Phang JA's ruling on *mens rea* in *Shadrake CA* had indeed been given *per incuriam*, it is not open to this court, as a lower court, to decline to follow the decision of a superior appellate court. Two cases were cited by Mr Tai (namely, *Goh Cheng Chuan v Public Prosecutor* [1990] 1 SLR(R) 660 and *Indo Commercial Society (Pte) Ltd v Ebrahim and another* [1992] 2 SLR(R) 667) for the general proposition that the *per incuriam* rule is inapplicable *vis-à-vis* decisions of a court of superior jurisdiction because the doctrine of *stare decisis* obliges judges to adjudicate with reference to decided

cases of superior courts (see generally *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284 at [35]).

19 Secondly, *Dhooharika* is distinguishable from our Court of Appeal's decision in *Shadrake CA*, given the respective local circumstances and constitutional contexts in which these two cases were decided. This point was alluded to by Lord Clarke of Stone-cum-Ebony JSC, who delivered the decision of the Board in *Dhooharika*. His Lordship expressly stated that although the offence of scandalising contempt continued to exist in many parts of the common law world (see the cases listed in Annex 1 of *Dhooharika* ("Annex 1")), the specific ingredients of the offence might vary across different jurisdictions, and not all courts would approach the relevant issues in the same way (at [38]):

> *…Those cases [in Annex 1] show that not all courts approach the issues in the same way. The specific ingredients of the offence may vary across different jurisdictions.* It is interesting to note that, as shown in Annex 1, the offence was established in 26 of the 34 cases, albeit in varying contexts. … [emphasis added]

20 *Shadrake CA* was one of the 26 cases listed in Annex 1 where the offence of scandalising contempt was established. It bears emphasis that our Court of Appeal in *Shadrake CA* found that the offence had been established based on the ingredients of the offence which it identified as applicable under Singapore law. Hence, *Dhooharika* is not applicable in Singapore as it arguably represents the balance which the Board chose to strike between freedom of speech and the public interest in protecting public confidence in the administration of justice having regard to the Constitution of Mauritius and the circumstances prevailing there.

21 Case law on the offence of scandalising contempt provides clear illustrations of the conflicting positions in different jurisdictions on the requisite *mens rea* for this offence. For instance, in the South African case of *State v Van Niekerk* [1970] 3 SA 655 (T), the court held that an academic who had imputed racial bias to judges in the application of the death penalty had not committed contempt of court. Classen J reasoned (at 657):

> … [B]efore a conviction can result the act complained of must not only be wilful and calculated to bring into contempt but must also be made with the intention of bringing the Judges in their judicial capacity into contempt or casting suspicion on the administration of justice.

In *Dhooharika*, the Board held that the requisite *mens rea* in the context of Mauritius comprised an intention to publish the impugned material *and* an intention to undermine the administration of justice.

22 On the other hand, as noted by Loh J in *Shadrake HC* (at [55]), there are decisions in common law jurisdictions that categorically reject – once an intention to publish the impugned material is established – a further legal requirement to prove an intention to undermine the administration of justice as part of the *mens rea* for the offence of scandalising contempt. For instance, our High Court held in *Attorney-General v Lingle and others* [1995] 1 SLR(R) 199 ("*Lingle*") that the requisite *mens rea* was the intention to publish the impugned material. This position is consistent with the New Zealand Court of Appeal's decision in *Solicitor-General v Radio Avon Ltd and Another* [1978] 1 NZLR 225 as well as with the Board's decision in another appeal from the Supreme Court of Mauritius, *Gilbert Ahnee and Others v Director of Public Prosecutions* [1999] 2 AC 294 ("*Ahnee*"). However, in *Dhooharika*, the Board appeared to reinterpret *Ahnee* in a way that is inconsistent with Loh J's

treatment of the case. I thus propose to make a few observations on the Board's decision in *Dhooharika*.

23 In *Dhooharika*, the defendant, the editor of a newspaper in Mauritius, wrote an article concerning the Chief Justice of Mauritius based on serious allegations made against the latter in the media by a disbarred barrister ("H"), who was a former parliamentarian and a director of a company involved in court proceedings. Essentially, H alleged misbehaviour, including abuse of and disrespect for constitutional rights, by the Chief Justice of Mauritius, and called for a tribunal to investigate his allegations. The defendant summarised H's comments in the impugned article and pointed out the importance of judges maintaining their integrity and being publicly accountable. The Director of Public Prosecutions of Mauritius brought contempt proceedings against the defendant for scandalising the court. Before the Supreme Court of Mauritius, the defendant argued that he was not guilty of contempt because he had published the interview with H in good faith and had merely reported H's views. The Supreme Court of Mauritius rejected that argument and held that the article conveyed the message that H's allegations were justified. That article, it found, brought the Mauritian judiciary into disrepute and damaged public confidence in the administration of justice in Mauritius. The Board reversed the decision of the Supreme Court of Mauritius and acquitted the defendant, who had been denied the opportunity to give evidence in the proceedings before the Supreme Court of Mauritius. The Board also found that the conclusion of the Supreme Court of Mauritius that the defendant had been acting in bad faith was unjustified.

24 It is necessary to flag the issues that were before the Board in *Dhooharika* in the light of s 12 of the Constitution of Mauritius. That section provides that "no person shall be hindered in the enjoyment of his freedom of expression", subject to (among other limitations) anything contained in or done under any authority of law "for the purpose of … maintaining the authority and independence of the courts … except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society". The issues before the Board were: (a) whether the offence of scandalising the court still existed in Mauritius in the light of s 12 of the Constitution of Mauritius; (b) if it did, what the ingredients of the offence were; (c) whether the defendant's trial had been unfair as a result of his having been refused the right to give evidence; and (d) whether the defendant had been properly convicted.

25 In discussing the ingredients of the offence of scandalising contempt, Lord Clarke, in an apparent departure from the traditional position relating to *mens rea*, held that the Prosecution had to show that in publishing the article in question, the defendant intended to undermine public confidence in the administration of justice or was subjectively reckless as to whether he did so. In so ruling, Lord Clarke was, as pointed out at [19] above, particularly mindful that "[t]he specific ingredients of the offence may vary across different jurisdictions" (at [38] of *Dhooharika*).

26 *Dhooharika* represented a "new approach" to the law of scandalising contempt in Mauritius as a result of Lord Clarke's reconciliation (at [36]−[37]) of the following two (apparently inconsistent) passages in Lord Steyn's judgment in *Ahnee*. The first passage ("the Issue B passage"), which is at

306A–306E of *Ahnee*, discusses the sub-issue "*Freedom of expression: section 12*" [emphasis in original] and falls under the heading "*Issue B: The impact of the Constitution on the power to punish for contempt*" [emphasis in original]. The second passage ("the Issue C passage"), which is at 307D of *Ahnee*, discusses the same sub-issue of freedom of expression in relation to s 12 of the Constitution of Mauritius, but falls under the heading "*Issue C: mens rea*" [emphasis in original].

27 In relation to the Issue B passage, Lord Steyn rejected (at 305H) the submission that the offence of scandalising contempt was inconsistent with s 12 of the Constitution of Mauritius and concluded that the offence existed in principle to protect the administration of justice in Mauritius. However, he left open the question of whether the offence was "reasonably justifiable in a democratic society" within the meaning of s 12 of the Constitution of Mauritius, although he did add that it was permissible to take into account the fact that the administration of justice was more vulnerable in a small island state such as Mauritius when contrasted with the United Kingdom. Lord Steyn further pointed out at 306A–306E:

> … Moreover, it must be borne in mind that the offence is narrowly defined. … It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the 'right of criticising, in good faith, in private or public, the public act done in the seat of justice:' see *Reg v Gray* [1900] 2 QB 36, 40; *Ambard v Attorney-General for Trinidad and Tobage* [1936] AC 322, 355; and *Badry v Director of Public Prosecution* [1983] 2 AC 297. … Given the narrow scope of the offence of scandalising the court, their Lordships are satisfied that the

> constitutional criterion that it must be necessary in a democratic society is in principle made out. The contrary argument is rejected.

28 With regard to the Issue C passage, Lord Steyn said at 307D–307E of *Ahnee*:

> Counsel for the contemnors submitted that the Supreme Court [of Mauritius] was wrong to hold that mens rea was not an ingredient of the offence of scandalising the court. The publication was intentional. If the article was calculated to undermine the authority of the court, and if the defence of fair criticism in good faith was inapplicable, the offence was established. There is no additional element of mens rea. The decision of the Supreme Court [of Mauritius] on this point of law was sound.

29 As to how the above two quotations pertaining to two different issues in *Ahnee* could be reconciled, Lord Clarke said in *Dhooharika* (at [36]) that it was *at least arguable* that the term "fair criticism in good faith" used by Lord Steyn in *Ahnee* (at 307D) imported the objective question of whether the criticism was fair, with the result that a defendant could be convicted of scandalising contempt on the basis that his criticism was not objectively fair even though he had acted in good faith. However, Lord Clarke was of the opinion (at [37]) that the more detailed analysis of "good faith" given by Lord Steyn in an earlier part of his judgment in *Ahnee* (at 306) was to be preferred. According to that analysis, if the defendant had been acting in good faith, it did not matter that his criticism could not be shown to be objectively fair. The burden was therefore on the Prosecution to establish the absence of good faith beyond reasonable doubt (*per* Lord Clarke in *Dhooharika* at [37]).

30 The Board stated that the Prosecution had to prove an intention to interfere with the administration of justice in the course of establishing the

mens rea for the offence of scandalising contempt (*per* Lord Clarke at [48]–[49]):

> 48 … As Lord Steyn made clear in *Ahnee's* case, if the defendant acts in good faith, he is not liable. Since the court is here concerned with a criminal offence, the burden must be on the prosecution to establish the relevant facts beyond reasonable doubt. There can be no legal burden on the defendant. Thus, at any rate *once the defendant asserts that he acted in good faith, the prosecution must establish that he acted in bad faith. If the prosecution establish[es] that he either intended to undermine public confidence in the administration of justice or was subjectively reckless as to whether he did or not, that would in the opinion of the Board, be evidence of bad faith.* It is perhaps for this reason that Lord Steyn expressed the view that the defendant had to act otherwise than in good faith, that is in bad faith, and that there was no further element of *mens rea* required.
>
> 49 The Board has considered whether a defendant might be guilty on the basis of some more general bad faith than is comprised in the intention or recklessness referred to above. While the Board would not entirely rule it out, it appears to the Board that, once it is accepted that, as Lord Steyn put it in the context of *actus reus*, there must be a real risk of undermining public confidence in the administration of justice, the relevant *mens rea* should be related to the creation of that risk and that, while it makes sense to hold that the defendant commits the offence if he intends to undermine public confidence in the administration of justice or is subjectively reckless as to whether he did so, it is not easy to see that any other, more general, state of mind would amount to relevant bad faith sufficient to support a conviction.
>
> [emphasis added]

31 Interestingly, Lord Steyn *in Ahnee* at 307 referred to "good faith" in the context of "the defence of fair criticism" while classifying the entire discussion under the *mens rea* issue. The Board in *Dhooharika* reconciled Lord Steyn's statements and treated "good faith" not as a defence, but as giving rise to a requirement to establish bad faith *vis-à-vis* the *mens rea*. It equated such bad faith with an intention to undermine public confidence in the

administration of justice. Hence, it was for the Prosecution to establish that the defendant had either intended to undermine public confidence in the administration of justice or had been subjectively reckless as to whether he did so.

32 In contrast, our Court of Appeal in *Shadrake CA* at [80] treated "good faith" as an element that goes to the issue of fair criticism, which is separate from the *mens rea* requirement. In other words, the Court of Appeal in *Shadrake CA* approached the issue of good faith in the more general context of fair criticism, where it characterised good faith as the touchstone of fair criticism. As Phang JA put it at [86] of *Shadrake CA*:

> … The court ought always to apply this concept [of fair criticism] not only in relation to *the precise facts and context but also bearing in mind the following key question throughout*: does the impugned statement constitute fair criticism, or does it go on to cross the legal line by posing a real risk of undermining public confidence in the administration of justice – in which case it would constitute contempt instead? [emphasis in original]

Phang JA's differing view on the interaction between good faith and fair criticism is, of course, consistent with Lord Clarke's observation in *Dhooharika* (at [38]) that "not all courts approach the issues [relating to the offence of scandalising contempt] in the same way".

33 There is something further to be said about the relationship between the "real risk" test and the *mens rea* requirement formulated by Lord Clarke at [49] of *Dhooharika* (quoted above at [30]). Let me elaborate. Based on the Board's formulation of the *mens rea* requirement in *Dhooharika*, fair criticism, whether as a defence or an element of liability, would be

superfluous. This same point was perhaps recognised by Lord Clarke when he referred to good faith as an absolute defence, such that (at [37]):

> … [T]he question is whether the defendant was acting in good faith. If he was, he has a defence to the allegation of contempt by scandalising the court even if his criticism cannot be shown to be objectively fair. …

Although "good faith" was sometimes described as a defence, Lord Clarke was quick to point out in the concluding sentence of [37] of *Dhooharika* that "the true position is that the burden is on the prosecution to prove absence of good faith".

34 The effect of the Board's decision of *Dhooharika* is therefore to elevate the threshold for proving the *mens rea* for the offence of scandalising contempt in Mauritius. Further, as the Board explained at [48], satisfaction of the *mens rea* element (*viz*, an intention to undermine public confidence in the administration of justice) would *ipso facto* also satisfy the requirement of bad faith. The Board opined at [49] that it could not imagine any more general form of "bad faith" other than the aforesaid "intention to undermine". Notably, Lord Clarke approved the "real risk" test and equated the relevant *mens rea* with the intention to create a real risk of undermining public confidence in the administration of justice. However, if the Prosecution is able to prove that the defendant had an intention to undermine public confidence in the administration of justice, the Prosecution would also, in all practicality, have *ipso facto* satisfied the less stringent "real risk" test. A moment's reflection will reveal that the broad effect of equating the relevant *mens rea* with an intention to bring about a real risk of undermining public confidence in the administration of justice may, in the overall scheme of things and depending on the facts of the particular case at hand, have the unintended consequence of

raising the threshold for the test for liability for scandalising contempt to the extreme end of the legal spectrum required by the "clear and present danger" test, which our Court of Appeal rejected in *Shadrake CA* at [39]. It is apposite to reiterate Phang JA's warning at [36] of *Shadrake CA* against distorting the "real risk" test in such a manner:

> … In applying [the "real risk"] test, the court must avoid either extreme on the legal spectrum, *viz*, of *either* finding that contempt has been established where there is only a remote or fanciful possibility that public confidence in the administration of justice is (or might be) undermined *or* finding that contempt has been established *only* in the *most* serious situations (which is … embodied within the "clear and present danger" test). In undertaking such an analysis, the court must not substitute its own subjective view for the view of the average reasonable person as it is clear that the inquiry must necessarily be an objective one. Much would depend, in the final analysis, on the precise facts and context in which the impugned statement is made. [emphasis in original]

35 In the final analysis, under Singapore law, the defendant in committal proceedings must deal with good faith in the context of fair criticism within the ambit of the *actus reus* of the offence of scandalising contempt (see *Shadrake CA* at [25] and [86]). This approach, which recognises the Court of Appeal's provisional view in *Shadrake CA* that there are two elements to the requisite *actus reus* (*ie*, a real risk of undermining public confidence in the administration and fair criticism), is correct, seeing that the *actus reus* of an offence, as a matter of principle, includes whatever circumstances and consequences which are recognised for the purposes of establishing liability for that offence. In the case of the offence of scandalising contempt, the burden is plainly on the Prosecution to prove the absence of fair criticism. And in the light of the matters discussed and explained at [16]–[34] above, under Singapore law, the intention to publish the material complained of is the only

ingredient that needs to be proved in order to satisfy the *mens rea* requirement for the offence of scandalising contempt.

36 Finally, for the purposes of the offence of scandalising contempt, publication occurs once the offending material is made available. The publication of material on the Internet is considered to be a continuing act so long as the defendant leaves the material available on the Internet (see *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim and Others* (2012) 293 ALR 384 at [43]).

The actus reus *of the offence of scandalising contempt*

37 Before a statement can be held to be contemptuous, the "real risk" test has to be satisfied beyond reasonable doubt. It need not be shown that the statement in question actually had the effect of undermining public confidence in the administration of justice in Singapore. As observed by the Court of Appeal of Victoria, Australia, in *News Digital Media Pty Ltd and Another v Mokbel and Another* [2010] 30 VR 248 at [65], contempt occurs when the administration of justice is exposed to risk, whether or not the risk actually materialises.

38 The "real risk" test must be applied having regard to the facts and surrounding context of the case at hand. As Phang JA put it at [30] of *Shadrake CA*:

> The basic question is this: is there, having regard to the *facts as well as surrounding context*, a "real risk" that public confidence in the administration of justice is – or would be – undermined as a result of the impugned statement? [emphasis in original]

39 This statement by Phang JA should be read with his earlier comments at [29]:

> … *Put simply, we are of the view that the "real risk" test is adequate in and of itself and, hence, does not require further elaboration*. What *is* clear is that the "real risk" test will not be satisfied in a situation where the risk of undermining public confidence in the administration of justice is remote or fanciful. And, as explained below (at [39]), where there is, at the other end of the legal spectrum, a situation that would have satisfied the *more stringent* "clear and present danger" test, that particular situation would clearly fall within the purview of the less stringent "real risk" test. However, there will be many situations that lie in between and, as already emphasised, much will depend on the particular facts and context of the case in question. [emphasis in original]

40 I earlier noted that the "real risk" test is an objective one and must be applied objectively, having regard to the facts and surrounding context of the case at hand. As each case must be decided based on its own facts, it seems to me that the court should look at each offending article separately and apply the relevant test of liability to the matters prevailing at the time each article was published. So where two or more publications are involved, it is a question of fact whether, and to what extent, the latest publication has created a further real risk of undermining public confidence in the administration of justice, given that there is, by reason of the earlier publication, already such a real risk. This question is relevant to the Second Article, which I will come to in due course.

41 As to who constitutes "the public", Phang JA explained at [32] of *Shadrake CA*:

> … In our view, "the public", must, by definition, comprise the average reasonable person. It is true that different persons might respond differently to the same impugned statement. However, the court concerned must make an objective

> decision as to whether or not that particular statement would undermine public confidence in the administration of justice, as assessed by the effect of the impugned statement on the average reasonable person. …

He continued at [34]:

> … What *is* clear, in our view, is that the concept of "the public" *cannot* differ according to different factual matrices although these matrices are the relevant backdrop against which to ascertain whether or not public confidence in the administration of justice has been – or might be – undermined. [emphasis in original]

Fair comment

42 I said earlier (at [10]–[11] above) that the legal burden is (in the context of Singapore) on the AG to prove that the impugned statement is contemptuous because it does not constitute fair criticism and has crossed the legal line so as to pose a real risk of undermining public confidence in the administration of justice in Singapore. Criticism is fair when there is a rational basis for the criticism and the rational basis is accurately stated. Criticism is not likely to be fair if it is not made in good faith. Whilst the legal burden remains throughout on the AG, the evidential burden would be on the party relying on fair criticism (see *Shadrake CA* at [78]).

43 Mr Tai invited this court to revisit the issue of fair comment as a defence, given that the Court of Appeal's view in *Shadrake CA* that fair comment was not a defence was a provisional view. He argued that if fair comment was not a defence, the AG would have to prove the absence of good faith on the part of the defendant. That would be tantamount to asking the AG to establish a negative fact beyond reasonable doubt, contrary to the general

principle that the onus should not be placed on a party to prove a matter which is within the knowledge of the other party.

44 I make three points on Mr Tai's argument. First, although reference was made in *Shadrake CA* (at [80]) to the appellate court's provisional view, it is clear from the decision that the Court of Appeal treated and applied "fair comment" as an element within the ambit of liability rather than as a defence. Secondly, the Court of Appeal stated at [79] of *Shadrake CA* that the provision of any defence to the offence of scandalising contempt should be left to Parliament to legislate since it was a policy issue.

45 Thirdly, in relation to the issue of proving a negative, Mr Tai's argument was in essence that the AG should not be required to prove a negative fact when that negative fact was the absence of a certain state of mind in a defendant. Yet, the need to prove the existence of a person's state of mind, such as his intention, knowledge, good faith and bad faith, is not unique to the law of scandalising contempt as it also appears in some statutory offences and there are rules of evidence to turn to. Generally, a person's state of mind is not incapable of proof. As Bowen LJ said in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483:

> … [T]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. …

46 In practice, the AG can evidentially show the absence of good faith not from direct evidence, but from indirect and circumstantial evidence provided by the parties. I have in mind the definition of "fact" in s 3(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") read with Illustration (*d*) thereto, as

well as the provision on facts showing the "existence of state of mind or of body or bodily feeling" in s 14 of the EA.

47 In relation to s 3(1) of the EA, good faith is a fact that must be proved or disproved. Section 3(1) defines "fact" to include:

> (*a*) any thing, state of things, or relation of things, capable of being received by the senses;
>
> (*b*) any mental condition of which any person is conscious;
>
> *Illustrations*
>
> …
>
> (*d*) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
>
> …

48 Although s 3(1) of the EA does not define an "opinion", Illustration (*d*) classifies a "fact" as including the situation where "a man holds a certain opinion". Jeffrey Pinsler SC, in *Evidence and The Litigation Process* (LexisNexis, 4th Ed, 2013) ("*Evidence and The Litigation Process*"), explains at para 8.004:

> The fact that a man has a particular opinion may be admissible if it is relevant, as when it is adduced to explain his conduct.

This explanation is consistent with the general definition of "fact" in s 3(1) of the EA as including "any thing, state of things, or relation of things, capable of being received by the senses".

49 I turn now to s 14 of the EA, which governs the admissibility of evidence showing the existence of a state of mind or of body or bodily feeling. Section 14 reads as follows:

> Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.
>
> *Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally but in reference to the particular matter in question.
>
> …

50 The above provisions of the EA show that the law provides adequate guidance on how good faith may be proved. I therefore reject Mr Tai's concerns that proving a negative fact "entails practical difficulty".[2] Good faith as a state of mind need not necessarily be directly proved as a fact; it can be inferred from other facts that have been proved. I reiterate my earlier comments on the Court of Appeal's reasons in *Shadrake CA* for treating fair comment within the ambit of liability in the context of the legal burden of proof, and the importance of striking an appropriate balance between safeguarding, on the one hand, freedom of speech and, on the other hand, the public interest in protecting public confidence in the administration of justice in Singapore (see [10]–[11] above).

---

[2] AG's Written Submissions dated 15 October 2014 ("AG's Written Submissions"), para 19(c).

51 Since good faith is a question of fact that can be inferred from other facts that have been proved, the following, amongst other matters (and the list is not exhaustive as the court is entitled to take into account all the circumstances of the case that go towards showing bad faith), arise for consideration in determining whether there is bad faith:

(a) the prominence of the defendant and the content of the publication, including the size of its readership – a large audience will make a finding of contempt more likely, but it is not necessarily the case that the existence of a small audience will prevent a finding of contempt; and

(b) the factors identified by Judith Prakash J in *Attorney-General v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [15]–[23], such as the rationale and basis for the criticism, as well as the tone, tenor and manner of the criticism.

52 Some guidance can also be gleaned from the following commentary on good faith in *Sarkar's Law of Evidence* (S Sarkar and V R Manohar eds) (LexisNexis Butterworths, 17th Ed, 2011) at vol 1, p 505:

> … [Good faith] does not require logical infallibility but due care and attention. Good faith must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question … or upon the information, true or false, on which a man acted.

The standard of proof

53 The court will not convict a defendant of the offence of scandalising contempt unless the facts complained of are established beyond reasonable

doubt. As the applicant, the AG has to prove all the elements of the offence beyond reasonable doubt.

The First Article

54 Bearing in mind the above legal principles, I will now examine the Impugned Articles in turn. I begin with the First Article.

The contents of the First Article

55 As mentioned earlier, the First Article is titled "377 [*sic*] wheels come off Supreme Court's best-laid plans". The First Article is reproduced in full below, with the offensive statements complained of by the AG set out in bold:

> **377 [*sic*] wheels come off Supreme Court's best-laid plans**
>
> The release of Justice Quentin Loh's judgement in the Tan Eng Hong case on 2 October 2013 came as a surprise, timing-wise. Represented by lawyer, M Ravi, Tan Eng Hong's challenge to the constitutional validity of Section 377A of the Penal Code was heard in the High Court more than six months ago, on 6 March 2013. After the hearing, the judge reserved his decision and nothing more was heard about it for months and months.
>
> Section 377A criminalises homosex [*sic*] between men, but its continued presence on the statute books casts a wide shadow over many other LGBT rights. Censorship, homophobic sexuality education, and non-existent partner rights in medical situations are some of the areas induced and sustained by this law.
>
> A parallel case, also a challenge to the constitutional validity of 377A, by plaintiffs Kenneth Chee and Gary Lim [*ie*, the *Lim Meng Suang* case mentioned at [2] above], and represented by Peter Low, had been heard before the same judge three weeks earlier than Tan Eng Hong's High Court hearing, on 14 February 2013. The judgement – rejecting the challenge, affirming the constitutional validity of 377A – was delivered on 10 April 2013. Kenneth and Gary promptly filed an appeal,

and a hearing before the Court of Appeal has been scheduled for 14 October 2013.

At first, many thought that the judgement in the Tan Eng Hong case would follow soon after Kenneth and Gary's, but as weeks turned into months, the general consensus in LGBT and legal circles was that **the delay was deliberate**.

The common view was that Chief Justice Sundaresh Menon wanted to be part of the three-judge bench that hears this constitutional challenge. He could do so in the Kenneth and Gary case, but he would have to recuse himself in the Tan Eng Hong case, since he was the Attorney-General at the time the case was going through the lower courts (2010 – 2012). **This neat theory would account for the fact that although the Tan Eng Hong case was launched earlier, in September 2010, it was given later hearing dates than the Kenneth and Gary case. This strange calendaring thus allowed the couple's case to proceed ahead, reaching the Court of Appeal first.**

The complication was that since the two cases were so similar, it would be more efficient to consolidate the two cases at the appeal stage. But consolidation would also mean that Sundaresh Menon would be obliged to recuse himself. The view from the ground therefore, was that the Tan Eng Hong case was red-lighted by a delay in delivering the judgement so that an appeal could not be filed until the Kenneth and Gary case had been heard.

M Ravi no doubt can see the whole plan as well as anyone else, and in August 2013, acting for his client Tan Eng Hong, made an application, to the High Court to be recognised as an interested party in the Court of Appeal hearing on the Kenneth and Gary case. The argument is that since the outcome of Kenneth and Gary's appeal will affect Tan's case (for which High Court judgement was still pending at the time) Tan should be permitted to intervene.

This move must have upset the best-laid of plans. From a legal point of view, it would be very difficult to deny such an application. The fact of the matter is that the two cases are very similar. Whatever ruling comes out of the Court of Appeal in Gary and Kenneth's case, it would clearly impact Tan Eng Hong's case.

I have been given to understand that phone calls were exchanged between the High Court and M Ravi's office in which the lawyer was persuaded to withdraw his

application on the understanding that the judgement for Tan Eng Hong would be released shortly. And that's why the judgement was released on 2 October, when few others were expecting it.

Just like in the other case, Justice Quentin Loh dismissed Tan Eng Hong's challenge. The reasoning used was similar in many respects.

But what happens next?

* * * * *

We can only speculate, but if M Ravi moves as deftly as he has shown himself capable of, the Supreme Court will have to dance to his tune.

I expect him to file an appeal immediately. At the same time, I expect him to apply for a consolidation of the two cases at the appeal stage. Proper procedure then would be to ask the Attorney-General's Chambers as well as the legal team for Kenneth and Gary (now led by Deborah Barker) whether they would object, and then to schedule hearings on the question of consolidation.

Once this process is started, it would seem unavoidable that the appeal hearing for the Kenneth and Gary case should be suspended until the question of consolidation is sorted out. Thus, I don't see the hearing on 14 October going ahead – for Kenneth and Gary's appeal alone.

Moreover, since I can't see any good legal grounds for rejecting an application to consolidate the two cases, I think there is a good likelihood that this will come to pass. Then again, Singapore courts are known to fly off into logic of their own.

Assuming that the two cases are consolidated, it will mean that Sundaresh Menon will have to recuse himself. The other two judges of appeal already named for the 14 October bench (V K Rajah and Andrew Phang) would not be affected. Which other judge will be chose [sic] to replace Menon? What impact will that have on the chances of success of the constitutional challenge? All that is very hard to see.

[emphasis added in bold]

The AG's case on the First Article

56 In the statement (as amended on 19 August 2014) which the AG filed pursuant to O 52 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (the AG's "O 52 Statement"), the AG's case as to the Respondent's scandalising contempt was set out as follows:

> 7. The Respondent makes the following allegations and/or insinuations in the First Article without rational basis:
>
> (a) The Honourable the Chief Justice Sundaresh Menon ("the Chief Justice") wants to hear and determine the constitutionality of s 377A.
>
> (b) As the Chief Justice was the Attorney-General at the time *Tan Eng Hong* [*ie*, the *Tan Eng Hong* case as defined at [2] above] was being dealt with in the High Court, he would not be able to hear any appeal arising from *Tan Eng Hong*.
>
> (c) There was therefore a "plan" on the part of the Supreme Court of the Republic of Singapore ("the Supreme Court") with the concurrence of the Chief Justice to deliberately manipulate the hearing dates and delay the issuing of the grounds of decision in *Tan Eng Hong*, so that even though *Lim Meng Suang* was filed later, the case would proceed on appeal to the Court of Appeal ahead of *Tan Eng Hong*. This was done to enable the Chief Justice to hear *Lim Meng Suang's* appeal and determine the constitutionality of s 377A ahead of *Tan Eng Hong's* appeal.
>
> (d) There were phone calls "exchanged between the High Court and M Ravi's office in which the lawyer was persuaded to withdraw" an application filed by Tan [Eng Hong] to intervene in *Lim Meng Suang's appeal*.
>
> 8. The allegations and insinuations made by the Respondent in the First Article are calculated to undermine the authority of the Singapore Judiciary and public confidence in the administration of justice in the Republic of Singapore. By publication of the First Article which scandalises the Singapore Judiciary, the Respondent has committed contempt of court.

57 In his submissions for the AG before this court, Mr Tai argued that a number of factors specific to this case needed to be taken into account when striking the requisite balance between, on the one hand, freedom of speech and, on the other hand, the public interest in protecting public confidence in an impartial judiciary which determined cases without extraneous influence.

58 Mr Tai pointed to the title of the First Article: "377 [*sic*] wheels come off Supreme Court's best-laid plans". He argued that this title made two points: first that the Supreme Court had "best-laid" plans, and secondly, the wheels had "come off" those plans. Mr Tai observed that according to the Respondent:

> (a) the Supreme Court's plan was to enable the Chief Justice, the Honourable Sundaresh Menon ("the Chief Justice"), to be part of the three-judge bench hearing the appeal arising from the *Lim Meng Suang* case ("the *Lim Meng Suang* appeal"); and
>
> (b) although the Chief Justice would be able to hear the *Lim Meng Suang* appeal, he would be conflicted out of hearing the appeal brought by Tan Eng Hong against the High Court's decision in the *Tan Eng Hong* case ("the *Tan Eng Hong* appeal") as, at the time of the prosecution of Tan Eng Hong under s 377A, the Chief Justice was the Attorney-General.

The Respondent wrote in the fifth paragraph of the First Article:

> The common view was that Chief Justice Sundaresh Menon wanted to be part of the three-judge bench that hears this constitutional challenge. …

59 Mr Tai further pointed out that according to the Respondent, the Supreme Court then came up with the plan for Loh J to delay the release of his judgment for the *Tan Eng Hong* case. The First Article clearly stated that this delay was deliberate, and that the *Tan Eng Hong* case had been "red-lighted" so that the *Tan Eng Hong* appeal could not proceed until the Chief Justice had presided over the *Lim Meng Suang* appeal. Mr Tai submitted that the thrust of the First Article clearly insinuated that the Chief Justice and the Supreme Court as a whole had a vested and improper interest in the outcome of cases dealing with the constitutionality of s 377A. Furthermore, Mr Tai argued that the First Article insinuated that either the Chief Justice or the Supreme Court had manipulated the timing of the release of the judgment for the *Tan Eng Hong* case, and had thereby manipulated the judicial system.

60 Mr Tai then addressed this court on that part of the First Article which related to the wheels coming off the Supreme Court's "best-laid" plans due to the efforts of Mr M Ravi ("Mr Ravi"), who represented Tan Eng Hong. Paragraph 7 of the First Article reads:

> M Ravi no doubt can see the whole plan as well as anyone else, and in August 2013, acting for his client Tan Eng Hong, made an application to the High Court to be recognised as an interested party in the Court of Appeal hearing on the Kenneth and Gary case. The argument is that since the outcome of Kenneth and Gary's appeal will affect Tan's case (for which High Court judgement was still pending at the time) Tan should be permitted to intervene.

Mr Tai noted that according to the Respondent, it was this intervention by Mr Ravi that upset the Supreme Court's "best-laid" plans as described.

61 Mr Tai also referred to that part of the First Article pertaining to the withdrawal of Mr Ravi's application for leave for Tan Eng Hong to intervene

as an interested party in the *Lim Meng Suang* appeal (Mr Ravi's "'intervention' application") following telephone calls exchanged between the High Court and Mr Ravi's office. According to the First Article, Mr Ravi was persuaded to withdraw that application on the understanding that Loh J's judgment for the *Tan Eng Hong* case would be released shortly. And that was why Loh J released that judgment on 2 October 2013. The First Article stated that the release of that judgment came as a surprise, timing-wise.

62 Mr Tai submitted that there was no evidence whatsoever that Mr Ravi had been persuaded to withdraw his "intervention" application. Put another way, the Respondent had not provided any rational basis to justify his comments in the First Article that there were telephone calls between the High Court and Mr Ravi, pursuant to which the latter withdrew his "intervention" application. In this regard, Mr Tai relied on the unchallenged affidavit of Ms Arneda Jasman ("Ms Jasman"), who is Loh J's private secretary. She deposed to the following matters in her affidavit:

> 16. I wish to categorically state that during all the telephone conversations with Mr Ravi, I did not in any way, whether expressly or impliedly, "assure" him that the delivery of the GD was being expedited, or that the GD would be ready by the end of September 2013. There is no reason for me to have done so when I had no control over when the GD would be released or knowledge about this. I did not at any time attempt to persuade Mr Ravi to withdraw the application to intervene in *Lim Meng Suang's* appeal.

63 Turning to the rest of the First Article, Mr Tai observed that it talked about further derailment of the Supreme Court's "best-laid" plans by Mr Ravi, who might apply to consolidate the *Lim Meng Suang* appeal and the *Tan Eng Hong* appeal, in which case, the Chief Justice would be conflicted out of the coram hearing both appeals (collectively, "the consolidated appeals"). The

First Article ended with the Respondent opining that the chances of success of the consolidated appeals (assuming consolidation was effected) remained uncertain as much would depend on the judge "chose[n] to replace" the Chief Justice.

64 Mr Tai submitted that the Respondent had not shown any rational basis for the allegations and/or insinuations made in the First Article. He also contended that the evidence adduced showed the Respondent's lack of good faith at the time of publication of the First Article. The Respondent, Mr Tai argued, could not satisfy the requirement of good faith simply by asserting that he had merely been repeating the views of others. The statements and views of others could not constitute the cogent evidence that was required of him in order to show a rational basis for his comments in the First Article.

65 Mr Tai concluded by reasserting the AG's view that the First Article contained clear insinuations that there was some wrongdoing or malfeasance on the part of the Chief Justice or the Supreme Court in relation to the management of the *Tan Eng Hong* case and the *Lim Meng Suang* case so as to enable the Chief Justice to determine the *Lim Meng Suang* appeal in an inappropriate way.[3]

66 To this end, Mr Tai argued that the terms and phrases used by the Respondent in the First Article also hinted at judicial partiality when it came

[3] Notes of Arguments dated 21 October 2014 ("Notes of Arguments"), p6.

to cases pertaining to or touching on homosexuality. In particular, the First Article:[4]

> … as construed by the terms and phrases chosen and used by [the Respondent] in the [F]irst [A]rticle belies his attack against the impartiality of the Chief Justice and the Supreme Court as a whole, *at the very least* when it comes to cases pertaining to the issue of homosexuality. … [emphasis in original]

The Respondent's case on the First Article

67 I turn now to Mr Choo's arguments for the Respondent. Mr Choo made three broad submissions in relation to the AG's case. First, he claimed that the Respondent had at all times been acting in good faith and did not possess the requisite *mens rea* for the offence of scandalising contempt. He cited *Dhooharika* for the proposition that the *mens rea* for this offence required the AG to prove the Respondent's intention to undermine public confidence in the administration of justice in Singapore, and argued that the Respondent had no such intention. There were lengthy submissions on this topic which I need not set out or deal with as I have already explained earlier that under Singapore law, the *mens rea* for the offence of scandalising contempt consists solely of the intention to publish the offending material. On the evidence before me, the requisite *mens rea* has been made out *vis-à-vis* the First Article. In this regard, that part of the Respondent's affidavit evidence which states that he wrote the Impugned Articles "in good faith, with absolutely no intention to bring the institution of the judiciary into disrepute

[4] AG's Reply Submissions dated 21 October 2014 ("AG's Reply Submissions"), para 50.

nor to call into question its impartiality"[5] was based on the Board's ruling on *mens rea* in *Dhooharika.* That ruling was made in the context of Mauritius; it is beside the point and does not assist the Respondent.

68 Returning to Mr Choo's submissions, his second broad point was that the Respondent, who is a prominent member of the gay community in Singapore, had steadfastly maintained that the Impugned Articles were well-intentioned and reasonable writings that posed no risk of undermining public confidence in the Singapore judiciary.[6] Thirdly, the Impugned Articles constituted fair criticism. In short, the principal point in Mr Choo's submissions was that the Respondent had at all times acted in good faith, and since his comments were (so Mr Choo submitted) fair, no scandalising contempt had been committed. It was argued that what the Respondent had written could not in any way be characterised as a deliberate and provocative vilification of the Singapore courts. There was no suggestion that the Singapore courts were acting improperly; and nowhere was it suggested in the First Article that if the Chief Justice were to sit on the panel of judges hearing the *Lim Meng Suang* appeal, that would change the outcome of that appeal in any way.[7]

69 Mr Choo further argued that the Respondent had taken all reasonable steps to ensure the accuracy of the statements in each of the passages in the First Article which the AG objected to, namely, the statements set out in bold

---

[5] Respondent's Affidavit dated 15 September 2014 ("Respondent's Affidavit"), para 11.

[6] Respondent's Written Submissions, paras 7 and 8.

[7] Respondent's Written Submissions, para 63.

in the First Article as reproduced at [55] above (collectively, "the statements in bold in the First Article"). The Respondent's comments, he contended, were based on facts that were reasonable and sound.

70 Finally, Mr Choo submitted that the AG's reading of the Impugned Articles was a "most sinister interpretation", and urged this court to adopt a more favourable interpretation of the two articles to the extent that the Respondent's interpretation differed from that of the AG. This was the approach taken by the Court of Appeal in *Shadrake CA* in respect of the second and 14th statements in dispute there. On this matter, and as it is a short point, I must state here that the more accurate question is whether any difference in interpretation is the product of the AG's failure (if that be the case) to prove beyond reasonable doubt the ingredients of the offence of scandalising contempt.

Decision on the First Article

71 I am satisfied that the AG has established beyond reasonable doubt that the First Article posed – or would pose – a real risk of undermining public confidence in the administration of justice in Singapore. This entails that the Respondent's contention that he acted in good faith and that his comments in the First Article were fair fails. My reasons are as follows.

72 In my view, the statements in bold in the First Article (see [55] above) suggest that as the Chief Justice wanted to hear one case, the Supreme Court deliberately delayed the determination of another case so that the outcome of the first case would likely have an influence on the outcome of the second case. These remarks do *not* qualify as fair comment. The concluding statement

in para 8 of the First Article – *viz*, that "[w]hatever ruling comes out of the Court of Appeal in Gary and Kenneth's case, it would clearly impact Tan Eng Hong's case" – is important. These remarks do not reassure the average reasonable person that there will be a fair hearing of the *Lim Meng Suang* appeal. Indeed, what the Respondent appears to be saying is that the *Lim Meng Suang* appeal would be dismissed even if the hearing before the Court of Appeal was fair.

73 Furthermore, the title and the contents of the First Article read as a whole assume that there was a plan on the part of the Supreme Court which involved the Chief Justice and Loh J acting in a way that was contrary to the fundamental principles of judicial independence, including the principle of the independence of judges from one another. Corresponding to the principle that the Chief Justice should not have the capacity to control or influence a judge's exercise of judicial power, there is a duty upon Loh J to act independently and in accordance with his judicial oath. The Respondent's insinuation is that Loh J abused and misused his judicial power in order to delay his decision in the *Tan Eng Hong* case so that the *Lim Meng Suang* case, despite having been filed later, would proceed on appeal to the Court of Appeal ahead of the *Tan Eng Hong* appeal. According to the First Article, this was done to enable the Chief Justice to hear the *Lim Meng Suang* appeal and determine the constitutionality of s 377A ahead of the *Tan Eng Hong* appeal. A deliberate delay in the disposal of the *Tan Eng Hong* case for the aforesaid purpose implies impropriety, in that the due process of the law was deliberately withheld from Tan Eng Hong and justice was denied to him in the context of the common adage that "justice delayed is justice denied". In my view, the statements in bold in the First Article promote the impression that access to

justice in Singapore can be flouted in the sense that the authority of the Singapore legal system as a whole can be flouted. I am here referring to access to justice in terms of an effective procedure for getting a case before the court and the speedy determination of the case by the court.

74 The Respondent explained in his affidavit that he had merely been reporting the views of others and described his writing style as theory construction. In addition, Mr Choo advanced the Respondent's case on the footing that the First Article was based on the Respondent's logical deductions arising out of an objective set of facts (*ie*, the timing of the release of the judgments for the *Tan Eng Hong* case and the *Lim Meng Suang* case).[8] In my view, the Respondent's logical deductions – or rather, his theories, which are really his opinions – were not solely based on and confined to an objective set of facts. Not only did the Respondent rely on a mixture of unsubstantiated views received from unidentified persons (the Respondent was not able to identify the persons from whom he had passively received the relevant information), he also went beyond reporting the views of those persons to stating his inferences and developing his opinions. Notably, as a matter of legal principle, articles that are in the nature of an opinion can be contemptuous (see *Lingle* at [2] and [63]).

75 In this regard, Pinsler SC's commentary in *Evidence and The Litigation Process* at para 8.005 is instructive:

> The witness gives evidence of a fact if he merely testifies to the information he passively received. If he goes beyond this by

[8] Respondent's Written Submissions, para 96.

> stating his inference, or offers an interpretation based on this information, he is giving opinion evidence.

I also note that Illustration (*d*) of s 3(1) of the EA states, in relation to the definition of "fact", that a "fact" includes "a certain opinion" held by a person. Drawing together the threads of these two points, the Respondent's opinion as regards the Supreme Court's "best-laid" plans and how they operated is a relevant fact to explain his conduct and his state of mind at the time of publication of the First Article. The Respondent's opinions, in my view, patently demonstrated the absence of good faith on his part.

76 All in all, I agree with Mr Tai that the First Article was about improper manipulation of the Supreme Court's hearing calendar and coram-fixture procedure.[9] In his submissions before this court, Mr Choo pointed out that there were no allegations of judicial misconduct in the First Article. The statements in the First Article, he asserted, were true in that the Chief Justice, as the head of the Singapore judiciary, was entitled to preside over any case of his choosing, and there was nothing improper in what was said in the First Article since the Chief Justice was entitled to make the necessary scheduling arrangements to ensure that he could sit on the coram hearing the *Lim Meng Suang* appeal. After all, Mr Choo submitted, it was proper for the Chief Justice to want to preside over an important case involving a constitutional challenge. In this regard, Mr Choo referred to material in legal writings and commentaries to show that it was permissible for judges in other jurisdictions to ask to hear specific cases that were of particular interest to them. Mr Choo

[9] AG's Reply Submissions, para 33.

added that the Respondent's "theory" regarding the release of the judgments for the *Tan Eng Hong* case and the *Lim Meng Suang* case had been constructed in the honest belief that the process described in the aforesaid legal writings and commentaries was perfectly legitimate. There was thus no intention to criticise the Singapore courts and no suggestion of any impropriety on the part of the members of the Singapore judiciary. Mr Choo further stated that nowhere in the First Article was it suggested that the fact of the Chief Justice sitting on the coram hearing the *Lim Meng Suang* appeal would change the outcome of the appeal in any way.[10] On that last contention, Mr Tai's rebuttal was that the Respondent's writing style was to make insinuations without explicitly stating the conclusions that ought to be drawn; nevertheless, the message in the First Article was clear and unequivocal − "the (less than) subtle undertones in the [F]irst [A]rticle will not be missed by an average reasonable reader, and indeed that was [the Respondent's] intention".[11]

77 I find Mr Choo submissions as outlined at [76] above disingenuous, and they serve to underscore the absence of good faith on the part of the Respondent. I agree with Mr Tai that the Respondent is retreating from his previous position, and his current stance in trying to downplay or neutralise his unsupported attacks against the Singapore judiciary evidences his lack of *bona fides*. In my view, there is now a clear attempt by the Respondent to not only retract from what he wrote in the First Article, but also facetiously paper

---

[10] Respondent's Written Submissions, para 63.

[11] AG's Reply Submissions, para 48.

over the message conveyed in that article that something furtive was going on, with Loh J deliberately holding back his judgment on the *Tan Eng Hong* case with the sole objective of having the *Lim Meng Suang* appeal heard first by a coram which included the Chief Justice (who, as the then Attorney-General, had prosecuted Tan Eng Hong under s 377A). That the Supreme Court's "strange calendaring" (see para 5 of the First Article) was a manipulation of the judicial system to achieve the aforesaid objective was quite clearly the thrust of what was meant by the reference in the title of the First Article to the "Supreme Court's best-laid plans".

78 As noted at [76] above, the Respondent now claims that:

(a) it was not necessarily a bad thing for the Chief Justice to sit on the coram hearing the *Lim Meng Suang* appeal;

(b) it was proper for the Chief Justice to want to preside over an important case involving a challenge to the constitutionality of s 377A; and

(c) nowhere in the First Article was it suggested that the fact of the Chief Justice sitting on the coram hearing the *Lim Meng Suang* appeal (if that came to pass) would change the outcome of the appeal in any way.

These assertions are plainly untenable in the light of the barefaced statement in para 8 of the First Article that "[w]hatever ruling comes out of the Court of Appeal in Gary and Kenneth's case, it would clearly impact Tan Eng Hong's case". That statement has to be understood in the context of the fact that at the time Tan Eng Hong was prosecuted under s 377A, the Chief Justice was the

Attorney-General. Given this context, that statement insinuates that the Chief Justice has a vested and improper interest in upholding the constitutionality of s 377A.

79 The Respondent is a blogger with a following in the gay community; he is also a self-professed social activist and prominent member of the gay community in Singapore. He admits to "sharing his views of the world" with a larger readership that includes non-gay readers with an interest in gay issues.[12] In painting things in the worst possible light in the First Article, and by making that article available on the Internet, the Respondent conveyed to the average reasonable person (see the definition of "the public" at [41] above) the impression that the Supreme Court would have got away with its "best-laid" plans but for Mr Ravi.

80 The statements in bold in the First Article were unfair comments − they were made without any rational basis and in the absence of good faith. In this regard, Mr Tai said that given the quality of the Respondent's evidence as to the alleged rational basis of his comments in the First Article, that evidence should be rejected. I agree and wholly reject the Respondent's evidence as inadequate and, hence, unsatisfactory. I accept Mr Tai's contention that the Respondent has not shown any rational basis for the allegations and/or insinuations made in the First Article. The evidence adduced by the Respondent as the alleged rational basis of his comments cannot constitute the cogent evidence that is required of him because of the following factors:

---

[12] Respondent's Affidavit, paras 3 and 6.

(a) the Respondent's attribution of his "neat theory" is to an unknown/unspecified "practising lawyer";

(b) the Respondent's assertion that his "lawyer acquaintances" have expressed concurrence with that "neat theory" is too vague;

(c) the Respondent has conspicuously omitted to obtain direct evidence *vis-à-vis* the alleged telephone exchange incident between Mr Ravi and the High Court in relation to Mr Ravi's "intervention" application; and

(d) the Respondent has relied on *ex post facto* materials (*ie*, documents that came to his knowledge only after the First Article was published).

81 I have already touched on Ms Jasman's evidence at [62] above. Her evidence remains unchallenged. As for the *ex post facto* materials, they are irrelevant as the assessment of the Respondent's good faith (or the lack thereof) is based on his state of mind at the time of publication of the First Article (see [40] above). It is sufficient that at the time of publication, the First Article, assessed objectively, created a real risk of undermining public confidence in the administration of justice in Singapore. As pointed out earlier, scandalising contempt occurs when the administration of justice is exposed to a real risk of being undermined, irrespective of whether that risk becomes an actuality.

82 That said, notwithstanding my finding at [71]–[81] above that the First Article imputes partiality on the part of *the Chief Justice* in relation to the constitutional challenges of s 377A mounted in the *Tan Eng Hong* case and

the *Lim Meng Suang* case (in that the First Article insinuates that since the Chief Justice was previously the Attorney-General, he would have a vested and improper interest in upholding the constitutionality of s 377A), I am not persuaded that Mr Tai has established beyond reasonable doubt that the First Article read as a whole imputes partiality on the part of *the Supreme Court as a whole*, "*at the very least* when it comes to cases pertaining to the issue of homosexuality".[13] In my view, the First Article makes no such suggestions or hints of judicial partiality on the part of the Supreme Court as a whole as regards cases pertaining to or touching on homosexuality. I have in mind the last paragraph of the First Article, which, for ease of reference, is set out again below:

> Assuming that the two cases are consolidated, it will mean that Sundaresh Menon will have to recuse himself. The other two judges of appeal already named for the 14 October bench (V K Rajah and Andrew Phang) would not be affected. *Which other judge will be chose* [*sic*] *to replace Menon? What impact will that have on the chances of success of the constitutional challenge?* All that is very hard to see. [emphasis added]

83 In the paragraph quoted above, and in particular, in the two italicised sentences therein, the Respondent wrote that the chances of the consolidated appeals succeeding (if consolidation of the *Tan Eng Hong* appeal and the *Lim Meng Suang* appeal was effected) remained uncertain as much would depend on the third judge chosen to replace the Chief Justice (who would, in the event of consolidation, be recused from hearing the consolidated appeals). The italicised sentences presuppose that: (a) there would be a split vote between the two Judges of Appeal; and (b) a successful constitutional challenge would

---

[13] AG's Written Submissions, para 60.

be secured if the third judge chosen to replace the Chief Justice agreed with the Judge of Appeal in favour of allowing the consolidated appeals. Plainly, the assumption of a split vote between the two Judges of Appeal – which rests on the premise that at least one of the Judges of Appeal will decide in favour of the appellants in the consolidated appeals – is incompatible with Mr Tai's claim that the Supreme Court *as a whole* is biased against homosexuals or, at least, is biased in respect of cases pertaining to or touching on homosexuality. In my view, the two italicised sentences in the last paragraph of the First Article, read in the context of the whole of that paragraph, militate against Mr Tai's assertion of partiality on the part of the Singapore judiciary *as a whole* with regard to cases pertaining to or touching on homosexuality.

84 However, and to reiterate what I said earlier, I agree and accept that Mr Tai has established beyond reasonable doubt that the statements in bold in the First Article impute judicial partiality on the part of *the Chief Justice* with regards to the s 377A constitutional challenges mounted in the *Tan Eng Hong* case and the *Lim Meng Suang* case, and also impute impropriety on the part of the Chief Justice and Loh J. For the reasons stated, I am satisfied that the AG has established beyond reasonable doubt that the First Article as a whole poses or would pose a real risk of undermining public confidence in the administration of justice in Singapore. I therefore find the Respondent guilty of scandalising contempt in respect of that article.

The Second Article

The contents of the Second Article

85 I turn now to the Second Article, which is titled "Church sacks employee and sues government – on one ground right, on another ground

wrong". The Second Article is reproduced in full below, with the alleged offensive statements complained of by the AG set out in bold:

> **Church sacks employee and sues government – on one ground right, on another ground wrong**
>
> I would hate to see the suit by Faith Community Baptist Church (FCBC) succeed, for its success would mean a major expansion of the meaning of "freedom of religion". At the same time, I am quite sympathetic to the church's decision to sack an employee – which started this whole controversy. Based on the limited information revealed publicly so far, I feel it should have the right to sack her, but not on the grounds claimed in its application for judicial review. This is why I think the suit should fail.
>
> First, some bare-bones recounting of the background.
>
> It was reported on 20 August 2013 that the Ministry of Manpower had ordered the church to compensate an employee (so far not named publicly?) whom the church had sacked in September 2012. The ordered compensation amount was $7,000. The employee was alleged to be in an "adulterous" relationship – though she had apparently separated from her husband by then – and was pregnant with a child by the lover, a fellow employee of the same church, who had since resigned.
>
> The basis for ordering the compensation was apparently a technical one.
>
> > The ministry said that it looked into the complaint and found that the woman was "dismissed without sufficient cause within six months of her delivery date".
> >
> > – *Straits Times, 20 August 2013, Compensate woman fired for adultery, church told*
>
> This would be a reference to Section 84 of the Employment Act which says that if a pregnant woman with less than six months to go before delivery is sacked "without sufficient cause", she should be compensated with an amount she would otherwise be earning up to her confinement.
>
> Despite the ministry seeming to make a final judgement on it, I think the question of whether there was sufficient just cause is very much alive. *Today* newspaper had more detail, pointing out that the employee was

> … the "designated representative" to meet couples seeking to wed – and to explain what was required of them – and thus her employment "bears sufficient or close proximity" with its mission, the church added.
>
> It described her adulterous sexual relationship with the divorced male colleague as "sinful, inappropriate and unacceptable", and said she had also "misled and lied" to church managers about the affair. The church said it terminated her employment due to "sexual misconduct and her persistence on it", and her refusal to abide by the conditions the church had set after her affair was uncovered.
>
> When her colleagues and supervisors came to know that she was carrying the child of her illicit lover – while she was separated from her ex-husband – she refused to "confess and repent, to cease her sexual misconduct, and to come under the discipline of the pastors to assist her throughout the term of her pregnancy thereafter".
>
> In his affidavit, the church's former Chief Operating Officer Jonathan Ow Kim Chuan said he assured the female staff that the church was "willing to work with (her)" to help her keep her job, on condition that she showed "true repentance" and stopped the affair. She agreed to the conditions, but went back on her word, Mr Ow said. He added that he was questioned by an employee how the church could "condone such immoral behaviour, bearing in mind that (the pregnant staff) was working in the department of the church which oversaw matters relating to weddings and marriages".
>
> – *Today, 3 October 2013, Church 'seeking guidance' on what constitutes religious affairs*

However, you must read the above with care, since the news report is based on a statement issued by the church. But if this narrative of the facts [i]s more or less correct, then it indeed raises the question of just cause. It would be linked to a broader – and in terms of the public [i]nterest, a very [i]mportant – question about the extent to which one's personal life is expected to dovetail with a job.

Executive Imperium

FCBC should be able to challenge the government's order over this and [i]t would do the public a considerable service if the courts were asked to address this question.

Unfortunately, this is where we come up against the "executive [i]mperium" that is Singapore. Sections 84(3) and (4) of the Employment Act say

> 84(3) Where the Minister is satisfied that the employee has been dismissed without sufficient cause, he may, notwithstanding any rule of law or agreement to the contrary –
>
> (a) direct the employer to reinstate the employee [i]n her former employment and pay the employee an amount equal to the wages that the employee would have earned had she not been dismissed by the employer; or
>
> (b) direct the employer to pay such amount of wages as compensation as the Minister may consider just and equitable having regard to all the circumstances of the case,
>
> and the employer shall comply with the direction of the Minister.
>
> (4) The decision of the Minister under subsection (3) shall be final and conclusive and shall not be challenged in any court.

As you can see from the last line, the minister's decision is shielded from judicial review. This is bad law. No act of the executive should be shielded from judicial review. What if the minister's decision was imbued with bias and capriciousness?

Alas, this is far from the only example of "rule by law" in Singapore.

Appealing to religious freedom

This perhaps explains why the church has chosen to take a different route. Instead of asking for judicial review over the finding of (in)sufficient cause, it has chosen to apply for a review on the ground of religious freedom. It is now arguing that the minister's decision violates [Article] 15 of the [Singapore] Constitution:

Freedom of religion

> 15.(1) Every person has the right to profess and practise his religion and to propagate it.
>
> (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
>
> (3) Every religious group has the right –
>
> (a) to manage its own religious affairs;
>
> (b) to establish and maintain institutions for religious or charitable purposes; and
>
> (c) to acquire and own property and hold and administer it in accordance with law.
>
> (4) This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

And this is where I disagree with the church. In asking the courts to rule that as a religious group, it can choose to depart from any law [which] it claims interferes with itself merely on account of its self-definition, [the church] opens a can of worms.

I am extremely wary of any attempt to broaden the meaning of "religious freedom" beyond freedom of conscience and personal practice. We must be very careful not to allow it to mean that religious groups and leaders can exercise coercion on others in the name of its self-defined identity.

As for the right "to manage its own religious affairs", this should be narrowly construed to mean managing its doctrines, rituals and icons. I think one must be watchful not to expand the meaning to any – and everything that a religious group itself decides to call "religious". If tomorrow, a group decides that eating raw rat, whipping sinners with lashes of broken glass and starving children who misbehave are part of its "religious affairs", are the rest of us to stand by idly and do nothing?

Accordingly, I think it is wrong for any religious group to claim exemption from a law, such as the Employment Act, that does not interfere with its doctrines, rituals and [i]cons. To give such exemption broadly would be to carve out for self-styled religious leaders islets of sovereignty which are open to abuse.

In our large public [i]nterest, FCBC's suit – predicated on this ground of an expanded "religious freedom" – should fall.

Lawrence Wee and Robinsons

Lawrence Bernard Wee's application for a court declaration that Article 12 of the Singapore Constitution provides protection against discrimination on the basis of sexual orientation is equally interesting to watch. Article 12 states that "all persons are equal before the law and entitled to the equal protection of the law".

Represented by lawyer M Ravi, his High Court application seeks to anchor a ban on workplace discrimination of gay men and women.

Wee, 40, had previously brought a suit against his former employer, the Robinson's retail group, in December 2012, claiming to have been harassed into resigning because he is gay. Argued on purely contract grounds, he lost the case. More background on Wee's deteriorating relationship with a new acting CEO of Robinsons, leading up to the loss of his job, can be seen in an article in Fridae [*sic*], dated 23 August 2013.

I don't have high hopes for this new suit, mostly because my confidence in the Singapore judiciary is as limp as a flag on a windless day, but I bring this up because, like the FCBC case, it too raises the question as to where to draw the line between a job's demands and private autonomy. **In fact I think Robinsons was wrong to make life so difficult for him that he had little choice but to resign (but the court found Robinsons right)**, while the church could have been right to sack the female employee (but the minister found that the church was wrong).

Dovetail demands

To what degree an employer can impose certain demands or expectations on the private behaviour of employees is a very touchy question. In the interest of liberty, any imposition has to be as narrow as possible. This, however, is not the same as saying there can be no demand at all.

Persons who represent an employer can clearly hurt the employer's interests through misbehaviour. Some kinds of misbehaviour, the public can reasonably be expected to be able to see as within a private sphere and employers should not get too alarmed about it impacting their brand or message.

But other kinds of behaviour may be too difficult for the average outsider to tease out from the employer's interest.

Let me give you a few examples:

> Boon Tuan is hired to help the Health Promotion Board spread the no-smoking message to teens and young adults. His job involves doing roadshows and appearing on media. He is discovered smoking while clubbing when off-duty.
>
> Cynthia is a senior researcher in a cosmetics company that takes great pride in a "no animal testing" policy. She is revealed as a serial abuser of neighbourhood cats.
>
> Lesley is a teacher in a private primary school. Social media soon has pictures of her in soft-focus erotic poses, released by a jealous ex-boyfriend.

We don't have to debate the details of each of the above examples, but I think readers can sense that like it or not, there is a line somewhere. When one takes on a job, one accepts that it comes with certain implied behavioural expectations – they don't have to be written explicitly into [the] contract. Breach of these expectations would render one either unfit to do the job, or would so damage the employer's interest, brand or message, that termination would be entirely foreseeable.

Lawrence Wee's sexual orientation is completely unrelated to the job he was hired to do. **While I haven't yet seen the details of the judgement in his suit against unfair dismissal (is it out in the public realm?) I can't understand how the court arrived at the decision it did.**

But when a church hires someone to be a marriage counsellor then one's own marital life cannot be said to be unrelated. You may disagree with the Faith Community Baptist Church's teaching on marriage but that is beside the point. The employee knew what that teaching was and must have known that the job involved being credible when imparting such marriage guidance. By this measure, I am not convinced that the minister was right in saying the church had no sufficient cause.

[emphasis added in bold and bold italics]

The AG's case on the Second Article

86 The AG set out its case as to the Respondent's scandalising contempt apropos the Second Article as follows in its O 52 Statement:

> 9. The Second Article makes reference to the following matters that have been or are ongoing in the High Court:
>
> (a) *Wee Kim San Lawrence Bernard v Robinson & Company (Singapore) Pte Ltd* (Suit No. 1036 of 2012) ("the Robinson Suit") – This suit was filed by Wee Kim San Lawrence Bernard ("Wee"), whose claim was for constructive dismissal or alternatively, for breach of an implied term of mutual trust and confidence in his employment agreement with Robinson & Company (Singapore) Pte Ltd ("Robinson"). Wee alleged bias, unfair treatment and persecution by Robinson, which Robinson denied. According to Robinson, Wee had resigned on terms mutually agreed between the parties, pursuant to which Wee received four months' worth of remuneration (being two months' salary-in-lieu of notice and an additional two months' salary) together with encashment of unconsumed annual leave. Robinson applied to strike out Wee's claim, firstly, for being legally and factually unsustainable given that Wee had resigned from Robinson and was paid more than his contractual entitlement; and secondly, for being an abuse of process as it was being used to wrongfully exert pressure on Robinson to pay Wee monies that Robinson was not obliged to pay. Pursuant to Robinson's application, Wee's claim was struck out by an Assistant Registrar and this decision was upheld on appeal.
>
> (b) *Wee Kim San Lawrence Bernard v Attorney-General* (Originating Summons No. 763 of 2013) ("the OS") – This application was filed by Wee against the Attorney-General as the sole defendant, seeking a declaration that Article 12 of the [Singapore] Constitution prohibits discrimination against gay men on account of their sexual orientation in the course of employment. The matter is still pending before the High Court.
>
> 10. The Respondent makes the following allegations and insinuations in the Second Article without rational basis:

> (a) The High Court had made an erroneous determination in the Robinson Suit.
>
> (b) The High Court will also decide against Wee in the OS, regardless of the legal merits of the case, as the High Court had earlier, in the Respondent's view, erroneously dismissed Wee's claim in the Robinson Suit.
>
> (c) The Respondent stated in the Second Article that he did not have high hopes for the OS "mostly because [his] confidence in the Singapore Judiciary is as limp as a flag on a windless day", thereby insinuating that the Singapore Judiciary is incompetent and/or biased.
>
> (d) The Second Article, read individually or collectively with the First [A]rticle, suggests that the Judiciary is biased and has a vested and improper interest in the cases touching on homosexuality.
>
> 11. The allegations and insinuations made by the Respondent in the Second Article, read individually or collectively with the First [A]rticle, are calculated to undermine the authority of the Singapore Judiciary and public confidence in the administration of justice in the Republic of Singapore. By publication of the Second Article which scandalises the Singapore Judiciary, the Respondent has committed contempt of court.
>
> [underlining in original omitted]

87 In his written submissions, Mr Tai argued that the Second Article should be read individually or collectively with the First Article. In his oral submissions, however, he placed greater emphasis on a collective reading of the Impugned Articles. He pointed out that these articles were published within a space of seven days, dealt with the same issue (*viz*, cases before the Supreme Court touching on or pertaining to the issue of homosexuality) and were both tagged under the keyword "homosexuality". He explained that the sting of the Second Article lay in the statement "I don't have high hopes for this new suit [*ie*, Wee's Constitutional Claim], mostly because my confidence in the Singapore judiciary is as limp as a flag on a windless day" (see the

statement in bold italics in the Second Article as reproduced at [85] above ("the offending statement in the Second Article")), and that statement had to be read in the context of the First Article because the Respondent was repeating in the Second Article the contemptuous insinuations made in the First Article.[14] As to the effect of reading the Impugned Articles together, Mr Tai contended:[15]

> The allegations and/or insinuations conveyed by the two articles, when read together, point unmistakably to a bias against cases touching on homosexuality that permeates the Judiciary, and which has spurred improper actions on the part of the Judges. Such bias is demonstrated by the Judiciary's improper manipulation of the Court's calendar and coram-fixture of *Tan Eng Hong* and *Lim Meng Suang's* appeal, and the series of unfavourable "inexplicable" outcomes of [the] *Lim Meng Suang* [case], [the] *Tan Eng Hong* [case] and the Robinson Suit. This thus explains [the Respondent's] "limp" confidence in the Judiciary and his lack of high hopes in Wee's application [*ie*, Wee's Constitutional Claim] – it is bound to suffer as a result of the same prejudice and fail.

88 According to Mr Tai, the reference in the offending statement in the Second Article to the Respondent's lack of confidence in "the Singapore judiciary" and the use of the imagery "as limp as a flag on a windless day" (see [85] above) would create in the mind of the average reasonable person the impression that the Singapore judiciary was biased in relation to cases touching on or pertaining to homosexuality. Mr Tai argued that the Second Article expanded on the theme of the First Article that there was systemic bias within the Singapore judiciary in respect of such cases. This, he submitted, was evident from the Respondent's reference to the dismissal of the Robinson

---

[14] Notes of Arguments, p 12.

[15] AG's Written Submissions, para 103.

Suit, which decision was (according to the Respondent) inexplicable except for extraneous considerations, namely, Wee's sexual orientation. As such, the Respondent had no "high hopes" in respect of Wee's Constitutional Claim as he considered that it was bound to suffer the same fate as the Robinson Suit and fail, regardless of its merits.[16] Mr Tai further submitted that the Respondent's insinuation that the Robinson Suit had been dismissed based on extraneous grounds was not supported by any rational basis and was not made in good faith.

89 In his oral submissions, Mr Tai emphasised that the offending statement in the Second Article, read in the context of the First Article, repeated the contemptuous insinuation that the Supreme Court "has the ulterior motive and is prepared to resort to manipulations when it comes to cases involving homosexuality".[17] The terms and phrases used in the Second Article, so Mr Tai's argument ran, conveyed to the average reasonable person the impression that the Singapore judiciary was influenced by extraneous factors, including Wee's sexual orientation where the Robinson Suit was concerned, and thus could not be trusted to discharge its judicial functions in an impartial manner. In other words, the insinuation in the Second Article, according to Mr Tai, was that the High Court came to their respective decisions on the Robinson Suit based on the same extraneous consideration, namely, judicial bias against cases touching on or pertaining to homosexuality.

---

[16] AG's Written Submissions, para 77.

[17] Notes of Arguments, p 12.

Mr Tai contended that in the absence of any cogent rational basis to support fair criticism, the Second Article was contemptuous.

90 Mr Tai further argued that the key mischief in the Impugned Articles, when read collectively, lay in the insinuations which they made without explicitly stating what conclusions ought to be drawn. That mischief, he submitted, "bespeaks a lack of bona fides" on the Respondent's part.[18]

The Respondent's case on the Second Article

91 The Respondent's case on the Second Article was presented by Mr Peter Low ("Mr Low"). Generally, Mr Low's submissions were that:

(a) the AG had failed to establish the requisite *mens rea* on the part of the Respondent to undermine public confidence in the Singapore judiciary;

(b) there was no real risk of the Second Article undermining public confidence in the Singapore judiciary and the administration of justice in Singapore; and

(c) the Second Article had been written in good faith and constituted fair criticism.

92 Like Mr Choo did in relation to the First Article, Mr Low relied on *Dhooharika* for the proposition that the *mens rea* for the offence of scandalising contempt required the AG to prove the Respondent's intention to

[18] AG's Written Submissions, para 106.

undermine public confidence in the administration of justice in Singapore. Mr Low's argument on this point has no merit because, as I stated earlier, under Singapore law, the *mens rea* for the offence of scandalising contempt consists solely of the intention to publish the offending article, and on the evidence before me, the requisite *mens rea* has been made out.

93 On his assertion that the Second Article amounted to fair criticism in that it had been written in good faith, the Respondent argued that his lack of confidence in the Singapore judiciary (as set out in the offending statement in the Second Article) had been expressed *vis-à-vis* Wee's Constitutional Claim. He thought that Wee's claim in the Robinson Suit had merits, and was perplexed and disappointed that the court did not seem to give weight to Wee's claim of oppressive behaviour by his superiors. The Respondent expressed his doubts about the chances of Wee's Constitutional Claim succeeding, given the Singapore courts' conservatism when it came to constitutional interpretation.

Decision on the Second Article

94 I have to consider whether the impugned statements in the Second Article (*ie*, the offending statement in the Second Article (in bold italics) and the other two statements in bold as reproduced at [85] above) were made in the context of criticising a judicial decision, namely, the Robinson Suit. In that article, the Respondent admitted to not knowing the grounds of the decision as the written judgment of the judge, Woo Bih Li J, had yet to be published. In the absence of published grounds, what was the Respondent writing about in the Second Article? Was he engaging in conjectures and speculations that, by

their very nature and characteristics, would not qualify as fair criticism of the decision in the Robinson Suit, or was he making fair criticism in good faith?

95 As mentioned earlier, in his oral submissions, Mr Tai urged this court to consider the Second Article collectively with the First Article. In this regard, it is worth repeating what I said earlier (at [40] above) about what the court has to do when it is asked to consider two or more offending publications collectively:

> … As each case must be decided based on its own facts, it seems to me that the court should look at each offending article separately and apply the relevant test of liability to the matters prevailing at the time each article was published. So where two or more publications are involved, it is a question of fact whether, and to what extent, the latest publication has created a further real risk of undermining public confidence in the administration of justice, given that there is, by reason of the earlier publication, already such a real risk. …

96 Mr Tai cited *Attorney-General v Hertzberg Daniel* [2009] 1 SLR(R) 1103 ("*Hertzberg Daniel*") as authority for the "collective reading" approach and in support of his argument that the Second Article should be considered collectively with the First Article. In *Hertzberg Daniel*, the High Court had to analyse three publications in the *Wall Street Journal Asia* to see if they were in contempt of court. As can be seen from [36]–[51] of that case, Tay Yong Kwang J analysed each publication *individually* and determined that each of them amounted to a contempt of court. His statement (at [55]) that the articles "*collectively*, contained insinuations of bias, lack of impartiality and lack of independence" [emphasis added] must be viewed in the light of his further finding (also at [55]) that the publications also individually "implied that the Judiciary is subservient to Mr Lee and/or the PAP and is a tool for silencing political dissent". Viewed as such, Tay J's finding that the publications

collectively contained the aforesaid insinuations was a logical conclusion that flowed from his detailed analysis of each publication. It is for this reason that *Hertzberg Daniel* does not really support Mr Tai's "collective reading" approach argument, which suggests that a weak article, when read collectively with a stronger article, might be strengthened and gain notoriety by virtue of the stronger article. *Hertzberg Daniel* confirms that each of the offending articles in question must be assessed independently first. In short, each article must be decided on its own facts as assessed at the time of its publication.

97 The Respondent began the Second Article with a discussion of two employment cases, the first involving a church worker and the other, an employee of Robinson. He then made the point that an employee's standard of behaviour at the workplace was dictated by his or her job requirements, with the result that an employee might have to toe the line at his or her workplace despite his or her own private views and beliefs to the contrary. In the case of the church employee, she was responsible for running the marriage counselling programme in the church concerned, and her pregnancy from an illicit relationship with a fellow divorced church worker was arguably inappropriate. At the time of the affair, the church employee was still married, albeit separated from her husband. The Respondent opined that whatever that employee's personal morals and standard of personal behaviour might be, they ought to be compatible with the job which she was hired to do, and the church's decision to sack her for her sexual indiscretions in the conduct of her personal life on an entirely private matter was, in his view, right. He commented as follows in the Second Article:

> … [W]hen a church hires someone to be a marriage counsellor then one's own marital life cannot be said to be unrelated. You may disagree with the Faith Community Baptist Church's teaching on marriage but that is beside the point. The employee knew what that teaching was and must have known that the job involved being credible when imparting such marriage guidance. By this measure, I am not convinced that the minister was right in saying the church had no sufficient cause.

98 In contrast, the Respondent wrote, Wee's sexual orientation had nothing to do with his job scope in Robinson, and he had been forced to resign because of discrimination against homosexuals in the workplace. According to Wee, the new acting Chief Executive Officer of Robinson had made his time there difficult because of his sexual orientation. The Respondent opined that "Robinsons [*sic*] was wrong to make life so difficult for [Wee] that he had little choice but to resign", and went on to remark "but the court found Robinsons [*sic*] right". The Respondent stated that he "[couldn't] understand how the court arrived at the conclusion it did", but qualified his comments by pointing out that: (a) the Robinson Suit had been argued on "purely contract grounds"; and (b) his views on the suit were expressed without the benefit of Woo J's written decision. According to the Respondent, his qualifying comments stated the basis of his knowledge and its limitations.[19]

99 In the context of the comparison outlined at [97]–[98] above, the Respondent commented on the extent to which an employee's personal life was expected to dovetail with his or her job. What the Respondent wrote about the Robinson Suit (which was struck out by Woo J) and Wee's Constitutional

[19] Respondent's Written Submissions, para 105.

Claim has to be read in the surrounding context of the "broader – and … very [i]mportant – question about the extent to which one's personal life is expected to dovetail with a job" (see the Second Article at [85] above).

100 On this particular point, I disagree with the following submissions by Mr Tai:[20]

> 81 … [The Respondent's] juxtaposition of the sentence "Lawrence Wee's sexual orientation is completely unrelated to the job he was hired to do" with the statement that he could not understand how the Court arrived at its decision suggests that it was Wee's sexual orientation which led to the Court's dismissal of the Robinson Suit.
>
> 82 The Court's partiality is evidenced by the dismissal of the Robinson Suit which was wrong and inexplicable except by reference to Wee's sexual orientation. Given the Judiciary's systemic bias, [the Respondent] has no high hopes for Wee's [Constitutional Claim].

101 In my view, the criticism made by the Respondent in the Second Article in relation to the Robinson Suit was *not* that the court wrongly struck out the suit on account of Wee's sexual orientation. Rather, his criticism was that the court did not arrive at the correct decision as it did *not* take into consideration the fact that Wee's sexual orientation was completely unrelated to the job which he was hired to do, and instead, based its decision on "unwarranted grounds" (namely, contractual grounds). I do not read that criticism in the same way as the AG, and hence do not agree that it is tantamount to an attack on the Singapore judiciary's competence or an allegation of bias on the part of the Singapore judiciary against homosexuals. I also do not read the Respondent's reference to "unwarranted grounds" as

[20] AG's Written Submissions, paras 81 and 82.

insinuating that the court took into consideration "*external influence*",[21] *viz*, some sort of systemic bias that had no bearing on the merits of the case. If anything, the Respondent was referring to the purely contractual arguments upon which the Robinson Suit was based when he referred to "unwarranted grounds".

102 It was from this perspective, and in the context of the outcome of the Robinson Suit, that the Respondent expressed his lack of confidence in the Singapore judiciary in connection with Wee's Constitutional Claim.

103 The Respondent expressed doubts that Wee's Constitutional Claim would succeed because "like the FCBC case, it too raises the question as to where to draw the line between a job's demands and private autonomy" (see the Second Article at [85] above). He further described his confidence in the Singapore judiciary as being "as limp as a flag on a windless day".

104 I disagree with Mr Tai's submissions that the Respondent's graphic description of his lack of confidence in the Singapore judiciary "stems from [the Singapore judiciary's] inadequacies, incompetence and/or partiality against cases which relate to issues of sexual orientation".[22] Plainly, Mr Tai's submissions depended very much on the court's acceptance of his reading of the First Article, which he said imputed bias on the part of the Supreme Court *as a whole* against cases touching on or pertaining to homosexuality. I have already decided earlier that this particular allegation has not been proved. At

---

[21] AG's Written Submissions, para 78.

[22] AG's Written Submissions, para 82.

best, the insinuation of bias was on the part of the Chief Justice in relation to s 377A, which criminalises sex between males.

105 Wee's Constitutional Claim was for a declaration that Art 12 of the Singapore Constitution prohibited discrimination against gay men in the workplace. To the Respondent, Wee was seeking equal protection and was calling upon the Government to pass laws that would protect people against discrimination on the basis of their sexual orientation in the workplace. The Respondent said in his affidavit that he saw the declaration sought in Wee's Constitutional Claim as a "bridge too far" because s 377A was still on the statute books, and the court saw its role in constitutional cases as being limited to interpreting (as opposed to amending) the Singapore Constitution. The Respondent explained that he saw no prospect of the court saying to the Government that it was obliged to pass anti-discrimination legislation.

106 For the reasons set out at [100]–[105] above, I find that the AG has not established beyond reasonable doubt that the Second Article posed a real risk of undermining public confidence in the administration of justice in Singapore. Accordingly, the Respondent has not scandalised the court where the Second Article is concerned and that article is not contemptuous.

Conclusion

107 In summary, the First Article is contemptuous. The statements in bold in the First Article (as reproduced at [55] above) have crossed the legal boundary and constitute scandalising contempt. I therefore find the Respondent to be in contempt of court where that article is concerned.

108 In contrast, the AG has not proved beyond reasonable doubt the charge of scandalising contempt in relation to the Second Article. I therefore find the Respondent not to be in contempt of court where that article is concerned.

109 I will decide on the issues of sentence and costs after I hear the parties' submissions on these issues on a date to be fixed by the High Court Registry.

Belinda Ang Saw Ean
Judge

Tai Wei Shyong and Elaine Liew (Attorney-General's Chambers) for the applicant;
Peter Low, Choo Zheng Xi, Christine Low and Raj Mannar (Peter Low LLC) for the respondent.