1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 In 2008, the administrative law cases related to the scope of judicial review, the conditions under which judicial review could be ousted, when discretion is fettered and challenges against the disciplinary proceedings of professional bodies and social clubs, with a particular focus on allegations against procedural fairness.

1.2 The constitutional cases heard in 2008 clarified the scope of personal liberty in Art 9 of the Constitution of the Republic of Singapore (1999 Reprint) and discussed when the Art 9(3) constitutional guarantee of the right to counsel could be waived. There were also significant decisions pertaining to freedom of speech in relation to the restraints which contempt of court and defamation law imposed. What is worth noting is that the decisions considered developments in commonwealth jurisdictions like Australia, New Zealand, Malaysia and England which supported a more robust protection of free speech interests as integral to democratic society, while ultimately rejecting them. What emerges from the Singapore approach towards "political speech" is the primacy of local conditions and that of protecting institutional reputation as foremost considerations in shaping free speech jurisprudence.

ADMINISTRATIVE LAW

Ambit of judicial review: Jurisdictional and non-jurisdictional conditions

1.3 The issue arose as to whether the non-compliance with a statutory requirement under the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") deprived the Strata Titles Board ("STB") of the jurisdiction to hear the application for the collective sale agreement in *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597.

1.4 The relevant sales and purchase agreement failed to state the method of distributing the sale proceeds as s 84A(1) of the Land Titles

(Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") required. The Court of Appeal held that the STB did have jurisdiction to hear all collective sales agreement under the Act: ss 84A(5)–84A(7) and 84A(9)–84A(12) of the LTSA.

1.5 The appellants had argued that a distinction had to be drawn between "conditions which go to jurisdiction and conditions which do not": *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [16]. The former will affect the STB's jurisdiction while the latter will merely be a procedural irregularity which the STB may consider in deciding whether to give approval to a collective sales application. Counsel for the appellants referred to *R v Ashton* [2007] 1 WLR 181 ("*Ashton*"), where the English Court of Appeal considered that the proper question to ask when confronted by a failure to take a required procedural step before a power is exercised was "whether the intention of the legislature was that any act done following that procedural failure should be invalid" (*Ashton,* [4]–[6]): *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [16]. If not, the next question was whether there was a real possibility that either party suffered prejudice on account of this procedural failure. If so, the court was to consider if it was just to allow the proceedings to continue.

1.6 The Court of Appeal upheld the learned judge's decision that Pt VA of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) contained nothing that was "expressly jurisdictional", such that if a court acts without jurisdiction, the proceedings would be invalid: *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [19]. In contrast, in *R v Reilly* [1982] QB 1208; [1982] 3 WLR 149; [1982] 3 All ER 27 (CA) (discussed in *R v Ashton* [2007] 1 WLR 181) which concerned s 127(1) of the Magistrates' Courts Act 1980 (c43) (UK), that section was "clearly jurisdictional" in that the Magistrate's Court would lack jurisdiction to hear a complaint outside the statutory six-month time period. The Court of Appeal approved the judge's observation that to draw a distinction between conditions going to jurisdiction and those which did not would be "to resurrect the 'mandatory/directory' classification" which the Australian High Court considered had outlived its usefulness in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355. The preferred approach was not to engage in formal distinctions but to ask the question, as expressed by Lord Steyn in *R v Soneji* [2006] 1 AC 340, what the consequences of non-compliance ought to be and whether Parliament could fairly be taken to have intended total invalidity: *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [20]. This was basically a question of statutory interpretation where regard should be had to the legislative purpose, whether the legislature intended the consequences of a strict construction and the prejudice to private rights and public interests, if any.

1.7 The Court of Appeal rejected the argument that the judge had wrongly drawn an analogy between mandatory/directory classification and jurisdictional/non-jurisdictional classification: *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 ("*Ng Swee Lang*") at [23]. Rather, the judge was stating that the modern approach was to ask whether it was the intention of Parliament that any act done in breach of a statutory provision be invalidated. The Court of Appeal approved of and applied this approach in asking whether it was the intention of Parliament that the non-stipulation of the distribution method in the sales and purchase agreement would deprive the STB of jurisdiction to approve the agreement: *Ng Swee Lang*, at [23].

1.8 The Court of Appeal proceeded to discern the legislative intention by closely examining the structure of s 84A(1) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA"). Under Pt VA of the LTSA, the STB has the power to hear and approve or disapprove of collective sale applications made thereunder. It does not contain an express provision conferring jurisdiction; rather this was indirectly vested: *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 ("*Ng Swee Lang*") at [25]. Thus, "the existence of a statutory power implies the existence of jurisdiction over the subject matter in relation to which the power is exercisable": *Ng Swee Lang*, at [25]. It found that s 84A(1) was not a jurisdictional provision (this being implied from the power to hear collective sale applications in ss 84A(5)–84A(7) and 84A(9)–84A(12) of the LTSA). Rather it prescribed the basis on which the majority owners could apply to the STB for a collective sales order. It did not imply that a collective sales application cannot be made where the sales and purchase agreement does not specify the distribution method: *Ng Swee Lang*, at [31]. The correct question was to ask whether on its true construction, s 84A(1) gave the court a discretion to waive the respondents' omission to specify the distribution method in the sales and purchase agreement: *Ng Swee Lang*, at [31].

1.9 The Court of Appeal drew attention to an administrative law principle which related to that advanced by counsel in relation to jurisdictional or precedent facts. These were facts which had to be in existence before a tribunal had the jurisdiction to hear a matter where it had power to deprive persons of their rights or personal liberties. It noted that whether such an approach applied to bodies which had the power to confer rights or interest "may need further consideration." In any event, if the appellants had advanced this argument, the court would still have to be convinced that the specification of the distribution method was a jurisdictional or precedent fact: *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR 597 at [29].

Questions of law and fact

1.10 Under Singapore law, a workman who has been injured in the course of his employment has the choice of making a claim for workman's compensation under the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA") (now re-titled as Work Injury Compensation Act) or a common law action for damages. The aim of the WCA is to enhance the protection of workmen through providing for no-fault claims by injured employees against employers although nothing in it allows double recovery from the same accident.

1.11 In *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR 648, the appellant initially made a claim under the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA") and later withdrew it to pursue a common law action, which was discontinued for various reasons. He then made another workman's compensation claim, but outside the statutory limitation of one year: WCA, s 11(1). The Commissioner for Labour ("Commissioner") rejected the new claim on the basis that the workman had failed to show reasonable cause for not making the claim within the limitation period.

1.12 In examining parliamentary debates, the Court of Appeal noted that the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA") was not designed "to penalise the workman for choosing to commence a common law action in preference to workmen's compensation" which was "invariably lower than damages": *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR 648 ("*Pang Chen Suan*") at [15]. Instead, the WCA was meant to give the worker the opportunity to choose which remedy he wished to have. For a claim under the WCA, all the worker had to show was that the injury was sustained during the course of work: *Pang Chen Suan*, at [17]. Section 11 of the WCA further provides that notice of the accident should be given to the employer by the workman or on his behalf "as soon as practicable" after it occurred and that compensation claims be made within one year from the date of the accident or the date of death. Section 11(4) provides that failing to make the claim within the limitation period would not bar proceeding "if it is found that the failure was occasioned by mistake, absence from Singapore or other reasonable cause".

1.13 The situations to which s 11(4) applied had not been "the subject of judicial comment or decision": *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR 648 at [20]. In coming to the conclusion that Pang's failure to make a compensation claim within the limitation period was occasioned by a reasonable cause under s 11(4) of the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA"), the Court of Appeal adopted a broad purposive approach towards the

statutory objective of the WCA in construing s 11(4). Specifically, it considered whether a reasonable cause was a question of law or fact.

1.14 In general, where questions of fact are concerned, a reviewing or appellate court is most reluctant to interfere with a finding of fact. State counsel argued that "reasonable cause" was a question of fact and that the court should not disturb the Commissioner's finding of fact. The Court of Appeal roundly rejected this submission in determining that "other reasonable cause" was a question of law. Thus, the judicial task was first to determine the legislative meaning of these words before determining if the facts of the case fell within their meaning. Determining the legislative meaning of the relevant statutory words was a question of law: *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR 648 at [45].

1.15 As a matter of principle, the Court of Appeal noted that if it were left to the Commissioner to decide, and he did decide that the relevant facts did not amount to a reasonable cause, then *cadit quaestio*, further argument is precluded. This is because to disagree with the Commissioner would be to go into the merits of his decision. It would be "particularly ironic and unfair" to construe the section to entail that "whatever the Commissioner decides, goes": *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR 648 ("*Pang Chen Suan*") at [46]. In the present case, the Commissioner had not been able to articulate what a reasonable cause was, and was only able to indicate what it was not: *Pang Chen Suan*, at [36]. The Commissioner's legal position that he had the determinative say in what constituted a reasonable cause was "an *ipse dixit* approach" in relation to the exercise of discretionary power by an administrative body. This is an important statement of principle, as *ipse dixit* approaches (something asserted, not proven) were in nature one which "no court that is prepared to uphold the rule of law will accept": *Pang Chen Suan*, at [46].

1.16 Thus, the Court of Appeal considered it appropriate to construe s 11(4) expansively, in such manner as to vindicate the statutory objectives to provide compensation to injured workers "as a first or last resort": *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR 648 ("*Pang Chen Suan*") at [47]. Thus, a purposive approach towards construction was endorsed. In determining "reasonable cause", the approach was to examine the facts of the case "on the principle of balancing the interests of the workman and those of the employer or insurer": *Pang Chen Suan*, at [47]. Section 11(4) of the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("WCA") allowed Pang to seek a higher recovery of damages for his injuries under the common law; this was a reasonable cause, particularly since the employer and insurer suffered no prejudice and their liability under the Act had crystallised: *Pang Chen Suan*, at [50]. Furthermore, Pang's decision to

abandon his common law course of action for reasons given was a favourable factor and not to be construed as choosing to abandon his statutory remedy. This decision evinced a "desire to save legal costs and judicial time in not having to pursue a futile claim to the end," which the court commended as being "socially responsible": *Pang Chen Suan*, at [51]. Thus, the Court of Appeal concluded that the Commissioner erred in law in rejecting Pang's new claim for compensation, as this was a "grievous misapprehension of the object of the Act" and that decision "had the effect of relieving the employer and insurer from a liability which had already crystallized": *Pang Chen Suan*, at [50]. Finally, given the WCA's objective in securing no-fault workman's compensation and the rationale of s 11(4) to ensure employers are not prejudiced by the making of a delayed claim under the WCA, the Court of Appeal held that a workman who made a timely claim, and who withdrew it, "should not be held to have failed to make a claim under s 11(4)": *Pang Chen Suan*, at [53].

Fettering discretion

1.17 It is a fundamental principle of administrative law that an administrative body vested with a statutory discretion cannot fetter the discretion by automatically applying a guideline or rule. This is to ensure that each case is decided on the basis of its merits.

1.18 The issue of whether the Registrar of Vehicles (Registrar) had fettered her discretion in relation to determining the value of a motor vehicle for purposes of ascertaining the payable Additional Registration Fee ("ARF") was the primary issue on appeal in *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 ("*Komoco Motors*"). The Registrar had since 1968 adopted a practice, accepted by all motor trade dealers without protest for the last 40 years, of computing the ARF payable based on the vehicle's open market value ("OMV"). This was in line with a shift in government policy on how to compute the value of a motor vehicle for ARF assessment purposes: *Komoco Motors*, at [5]. The OMV was determined by Singapore Customs ("Customs") pursuant to regulations made under the Customs Act (Cap 70, 2004 Rev Ed). The Court of Appeal referred to this as the "Administrative Convention" (*Komoco Motors*, at [6]) observing that this was "completely open, transparent, fair and predictable to all importers and traders of motor vehicle" as well as being "subject to judicial scrutiny" (*Komoco Motors*, at [7]) under s 22B(5) of the Customs Act. It had "all the attributes of a good public administration": *Komoco Motors*, at [6].

1.19 On conducting a post-clearance audit on the respondent, Komoco Motors Pte Ltd ("Komoco"), in 2001, Customs determined that Komoco had made incorrect declarations as to the OMVs of 17,449 cars,

resulting in a shortfall in collected excise duties. Customs offered to compound the offence on payment, which Komoco accepted. Customs informed the Registrar of the OMV under-declaration by Komoco and the Registrar determined that there had been a shortfall in ARF payments for 17,448 cars (one car had yet to be registered). Komoco sought judicial review of this decision but before the application was heard, the parties reached an agreement for the Registrar to give Komoco a fair hearing. A meeting was called. The main thrust of Komoco's representations before the Registrar was that the revised Customs' OMVs of the cars were incorrect. Two months later, the Registrar informed Komoco that her previous decision in relation to the additional payable ARF stood. Komoco sought judicial review of this decision on the basis, *inter alia*, that the Registrar, in adhering to the Administrative Conventions, had fettered her discretion under r 7(3) of the Road Traffic (Motor Vehicles, Registration and Licensing) Rules (Cap 276, R 5, 2004 Rev Ed) to determine the values of cars. The Registrar appealed against the judge's granting of *certiorari* and *mandamus* against the Registrar in finding that the Registrar had failed to exercise her r 7(3) discretionary powers by "slavishly" using the revised Customs' OMVs of the cars to compute the payable ARF: *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [23].

1.20 Demonstrating a concern for administrative efficiency, the Court of Appeal pointed out that if Komoco's position on the law was correct, the Administrative Convention would be undermined as Komoco and other vehicle dealers could raise an objection to a vehicle's Customs OMV. Further, any relevant party who disagreed with Customs' OMV determination could settle the matter with Customs first (by paying the relevant duties and taxes under protest) and then attempt to prove to the Registrar why Customs was wrong in its computation of OMV, at the stage of assessing the ARF. The court considered that a rigid adherence to natural justice rules in such circumstances (where Komoco had sought judicial review on the basis that the Registrar failed to give Komoco an opportunity to be heard in relation to the car valuations, in breach of natural justice) could result "in wasteful consumption of public resources and less efficient public administration *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [11].

1.21 The Court of Appeal underscored that the "legality, propriety and reasonableness" of the 1968 Policy Directive was "not in doubt", in terms of administrative law principles. They found that the judge in setting aside the Registrar's decision had effectively treated Komoco's case as exceptional. They did not consider that Komoco's payment of the composition sum under protest was an exceptional factor because if such payment was accepted as a basis for making an exception to the

Administrative Convention, "it would destroy this Convention": *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [29].

1.22 In distinguishing the present case from *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 2 SLR 584 ("*Lines International*"), the Court of Appeal held that this was not a situation where one administrative body took instructions from another. Here, in accepting Customs OMV valuation for the purposes of implementing the ARF scheme, the Registrar was "not taking instructions from Customs" but exercising her powers under r 7(3) of the Road Traffic (Motor Vehicles, Registration and Licensing) Rules (Cap 276, R 5, 2004 Rev Ed) for practical reasons. These included the fact that Customs had more data on which to base an accurate assessment. In addition, an aggrieved importer would have the right to object and be heard on Custom's determination of a vehicle's OMV as well as the right to appeal to the court against such determination, under the Customs Act. Here, once the Registrar decided to use the OMV valuation, no further exercise of judgment was required of the Registrar apart from an "arithmetical exercise" which did not involve the Registrar taking instructions from Customs. Thus, *Lines International* did not apply on the facts of this case as there, the relevant statutory body had to weigh competing factors to decide itself how to exercise its discretion in granting vessel berthing space, rather than taking instructions from other statutory agencies.

1.23 After considering the Registrar's affidavit, the Court of Appeal found that the judge was wrong in two respects. First, in concluding that the Registrar had failed to give genuine consideration to Komoco's representations, and, second, in finding that the reasons the Registrar gave were irrelevant in not dealing with the key issue of the correctness of the revised Customs OMVs of cars. Instead, the reasons given by the Registrar were to the effect that she was entitled to take the view that the Customs revised OMV figures were *prima facie* correct as Customs had taken two years to make the revision, which Komoco had not appealed against; further, Komoco had accepted the offer of composition which again supported the view that the revised OMV figures were *prima facie* correct. Lastly, the Registrar considered that the explanatory guide was clear enough to identify which expenses ought to be declared (*Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 ("*Komoco Motors*") at [36]). In addition, the Registrar had deposed that she was concerned as to the correctness of Custom's revised OMV figures and as to whether Komoco's new argument were sufficient to justify departure from the 40-year old Administrative Convention. Furthermore, Komoco had not challenged the sworn evidence given by the Registrar by applying to cross-examine her: *Komoco Motors*, at [38]. There was, thus, "simply no merit" in Komoco's contention that the Registrar had not

given genuine considerations to its representation: *Komoco Motors*, at [38].

1.24 Customs had spent a long time on the post-clearance audit of Komoco's records, and had extended the time frame for Komoco to accept the offer of composition four times to allow further representations to be made. After Komoco had been given the full opportunity to make its case before Customs and failed to do so, Komoco chose not to appeal Customs' decision before the High Court: *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [43]. The Court of Appeal considered these facts relevant in the Registrar's assessment of whether to depart from the revised Customs OMVs when computing the payable ARF. The Registrar's reasons were relevant to why she was not willing to doubt Custom's revised OMV assessment. Komoco would have to make a "very strong and convincing case" before a departure from the Administrative Convention was justified. As Customs' method of investigating the accuracy of information provided under DOFs was one reason why the Administrative Convention was reasonable and valid, there was nothing wrong or illogical in the Registrar's decision not to disregard the said convention.

1.25 While Komoco's acceptance of the offer of composition did not amount to an admission of guilt, its acceptance did not lack "evidentiary value" to the Registrar in her determination of the cars' values for the purposes of recomputing ARF: *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 ("*Komoco Motors*") at [45]. The Registrar was entitled to treat Komoco's acceptance as *prima face* evidence that Customs' revised OMF figures were correct, unless Komoco could produce contrary evidence. The presumption of correctness would "preserve the integrity of the Administrative Convention": at [45]. It was "reasonable" for the Registrar to evaluate Komoco's representations within "this decisional framework": *Komoco Motors*, at [45].

1.26 From the reading of the reasons in the Registrar's affidavit, the Court of Appeal found the reasons relevant as the Registrar was concerned not only with whether the revised Customs' OMVs was correct but also whether she should depart from the Administrative Convention. She had regard to Komoco's behaviour before Customs and the evidence presented to her to impugn Custom's revisions. In this context, the Registrar's reasons for rejecting Komoco's representations were relevant. Indeed, in discussing the alleged ambiguity of the explanatory guidelines, the Registrar demonstrated she had applied her mind during the March 2006 meeting with Komoco and subsequent internal staff meetings: *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [46].

1.27 Further, since the Court of Appeal found that the Registrar had genuinely considered Komoco's representation, she could not possibly have rejected these representations out of deference to Customs, which would constitute an abrogation or non-exercise of her discretion. In fact, she had exercised her r 7(3) Rules discretion (Road Traffic (Motor Vehicles, Registration and Licensing) Rules (Cap 276, R 5, 2004 Rev Ed)) in finding no merit in Komoco's representations after considering the materials from Komoco and Customs which were made available to her: *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [57].

Judicial review of disciplinary tribunals

1.28 When it comes to judicial review of the decision of disciplinary tribunals, supervisory courts are generally reluctant to examine the merits of such decisions, in recognition of the autonomy of quasi-judicial bodies. Nonetheless, as the High Court recognised in *Ho Paul v Singapore Medical Council* [2008] 2 SLR 780, an exception existed where a tribunal has failed to direct itself to the right inquiry, following *Leong Kum Fatt v AG* [1984–1985] SLR 367 at 372.

1.29 This case concerned a doctor who prescribed Subutex and was charged with 19 counts of professional misconduct on the grounds of the inappropriate management of his patients before the disciplinary committee ("DC"), under s 45(1)(*d*) of the Medical Registration Act (Cap 174, 2004 Rev Ed).

1.30 Refusing legal representation during the inquiry before the disciplinary committee of the Singapore Medical Council, Dr Ho argued that the charges contemplated only the issue of whether he had a management plan for his patients; not whether he managed them appropriately. He was found guilty of all 19 charges.

1.31 The Court of Appeal, upon a "simple perusal" (*Ho Paul v Singapore Medical Council* [2008] 2 SLR 780 ("*Ho Paul*") at [10]) of the present charges, was satisfied that Dr Ho had been mistaken in interpreting the charges restrictively to the question of the existence of a management plan, as opposed to its appropriateness. The court revised the sentence imposed on Dr Ho as being manifestly excessive as it had failed to take into account a relevant precedent: *Ho Paul*, at [16].

No especial duty of tribunal where an individual declines legal representation

1.32 The High Court also clarified in *Ho Paul v Singapore Medical Council* [2008] 2 SLR 780 ("*Ho Paul*") that where a person charged before a professional disciplinary tribunal declines legal representation,

a different standard of natural justice does not apply. A tribunal is not, by the fact someone is unrepresented, required "to warn the individual of the legal implications if he fails to cross-examine witnesses" or ensure that the individual "appreciates the importance of making a mitigation plea": *Ho Paul*, at [12]. This is because it is the function of the advocate and solicitor, not the adjudicator, to warn an individual who has been charged of "his litigation strategies and options": *Ho Paul*, at [13].

1.33 The general principle in relation to natural justice is whether the concerned individual is given a reasonable opportunity to present his case and whether the proceedings were conducted unfairly, resulting in prejudice to the charged individual. This was not present on the facts as Dr Ho had had the opportunity to make his case, cross-examine witnesses and was invited to make a mitigation plea: *Ho Paul v Singapore Medical Council* [2008] 2 SLR 780 at [13]. There was no basis for asserting that fairness had been compromised.

Judicial review of social club with valuable transferable membership

1.34 The Court of Appeal in *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 closely scrutinised the decision-making processes of an elite social club, the Singapore Island Country Club ("SICC") in relation to the suspension of a member, the appellant Kay Swee Pin ("Kay"), for a year. This was pursuant to disciplinary proceedings where the issue in question was whether Kay had made a false declaration by declaring one Ng Kong Yeam ("NKY") as her spouse to enable him to enjoy spousal privileges in relation to using SICC facilities, when she applied to become a member in 1992. The assertion in the charge against Kay was that such declaration was false because her marriage certificate showed that she had married NKY only in 2005. From this, the assumption flowed that she had declared NKY as her spouse in order to cheat the club.

1.35 On the facts of the case, for 13 years from 1992 until 2005, Kay and NKY were able to enjoy SICC facilities as principal and spousal member respectively although things "changed quickly and dramatically" when Kay decided to stand for election as lady captain of the lady golfers' sub-committee in September 2005, against the incumbent, Glenis Lee ("GL"). The Court of Appeal said it was not "an overstatement" for them to note that Kay's decision to contest these elections was considered a "hostile act" by certain club members.

1.36 Shortly thereafter, rumours about Kay's marital status surfaced. On 26 September 2005, the husband of GL, one John ("JL") e-mailed the club president to indicate he was "perturbed" by Kay's marital status, particularly since Kay was "seeking lofty office within the club". He urged the club to "investigate this complaint" urgently. Clearly, the

urgency flowed from the impending election of the lady captain. On the day of elections at the end of September, Kay was first made aware of JL's complaint against her and warned by the club general manager that there would be "negative consequences" if she was elected. She ignored this and lost the election: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 at [15].

1.37 On 12 August 2005, the club president instructed the relevant manager to ascertain whether the club had a copy of Kay's marriage certificate but none was found in Kay's membership file. The manager gave instructions to ask Kay for a copy of her marriage certificate as the club was updating its members' biodata. Kay produced a marriage certificate on 10 September 2005 dated 24 August 2005 which showed she had married Kay in Las Vegas. At the time she applied for club membership in 1992, the club did not require her to produce a marriage certificate to verify NKY was a spouse. In her defence, Kay pointed out she had been living with NKY as man and wife since 12 January 1982 after undergoing a Chinese customary marriage in Johor and had an 18-year-old daughter from her marriage.

1.38 The disciplinary committee ("DC") took this point into account, while the general committee ("GC") ignored it. Before the DC, evidence was given to the effect that Kay had been divorced from her first husband by 1992. Kay refused to furnish the relevant divorce documents and the Court of Appeal noted the GC must have obtained it from the Supreme Court registry as these were made available to the DC at the adjourned hearing, showing a divorce petition had been filed on 22 December 1982 and the decree absolute granted on 2 March 1984. Kay had produced the marriage certificate in 2005 because the club had asked her to do so; it was not for proving that she had married NKY only in 2005. DC established that Kay was divorced from Koh when she joined the club in 1992. This DC finding was leaked to JL who sent a private e-mail dated 1 April 2006 to the club president, insinuating that Kay had committed bigamy. Kay was not forwarded a copy of this e-mail: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 at [29].

1.39 When the GC met on 3 April 2006, it did not discuss the e-mail. One Mr Radakrishan who was Chair of the DC (but who disqualified himself from the DC hearing) presented the first DC report to the GC. He said first that the DC had found Kay not guilty of the charge and also, that the DC was satisfied there was a valid customary marriage between Kay and NKY. This was misleading, as the Court of Appeal noted, as the basis of the DC finding did not rest on the second assertion but on the credible explanation proffered by Kay to the effect that she had not intended to make a false declaration about her marital status to cheat the club: *Kay Swee Pin v Singapore Island Country Club*

[2008] 2 SLR 802 ("*Kay Swee Pin*") at [30]. The GC concluded that Kay had not validly married NKY in 1982 and sent the case back to the DC to further deliberate on the basis that NKY was not Kay's spouse at the material time of nomination to the club: *Kay Swee Pin*, at [31]. This was because the GC rejected that her second marriage to NKY was valid as the first marriage still existed at that time. The issue identified was "whether she had committed bigamy": *Kay Swee Pin*, at [33]. Directions were given to consider "mitigating factors".

1.40 The DC's second report noted it was disturbed that the complainant JL appeared aware of the findings of the first confidential meetings before this was placed before the GC. It eventually recommended the payment of green fees for NKY's golf games as a sufficient penalty: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 ("*Kay Swee Pin*") at [36]. The Court of Appeal was "rather perturbed" that JL had had access to DC deliberations as he was "apparently a person of some influence in the club", noting too that the GC had yet to take disciplinary proceedings against members involved in the breach of confidentiality or secrecy with respect to the DC proceedings: *Kay Swee Pin*, at [37]. At the next GC meeting, Vice President Chen ("VP Chen") rejected the DC findings and carried the meeting with him. The eventual decision was to find Kay guilty of the charge and to require her to pay green fees and to suspend her for a year. Notices of suspension were posted all over the club, eliciting shock and complaint from Kay. She received a letter informing her that the GC had established her 1982 customary marriage was invalid as she was still married to her first husband: *Kay Swee Pin*, at [41]. She wrote a further letter to the GC protesting her innocence and asked the annual general meeting to pass a resolution to revoke her membership suspension. She was told she would not be allowed on the club's premises during the AGM. She then applied for judicial review of the GC's decision.

1.41 Strictly speaking, the relationship between a recreational and social club and its members is contractual, with their rights contained in the contract or club constitution. Courts, in general, traditionally take a "hands off" approach in letting clubs manage their own affairs. The SICC allows its members to buy and sell their membership, subject to the approval of the governing body.

1.42 However, when a club expels a member, it must do so in a manner which complies with the rules of natural justice: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 ("*Kay Swee Pin*") at [2]. The Court of Appeal pointed out that the case did not merely concern the suspension of a member from enjoying club privileges. Aside from the recreational facilities, SICC membership, which was transferable, was sought after for its social cachet, it being viewed as "a symbol of social success" by many. Thus, transferable membership had not only

social value but economic value as well. In so doing, the Court of Appeal underscored the weight of the interest at stake, emphasising that "a more rigorous application of the rules of natural justice" was warranted as the club rules gave the GC "general and extensive disciplinary powers over the club's members: *Kay Swee Pin*, at [10].

1.43 It was contended that the club had generally prejudged the issue and breached natural justice in the manner in which it conducted the disciplinary proceedings.

Prejudgment

1.44 First, under the club rules, the GC "is the final decision-maker on disciplinary matters" and not bound by the findings of the DC. Nonetheless, the GC may only reject the DC findings of fact and recommendations "where it has sufficient reasons to do so": *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 at [50]. Although the issue was not raised, the Court of Appeal identified "the more important question" as being whether, after referring JL's complaint to the DC, the GC should have conducted its own investigation as opposed to leaving it to the DC. The GC initiated a search at the Registry of Marriages which indicated that Kay had been married to one Koh Ho Ping ("Koh") on 16 June 1977. This fact was relevant to the GC's state of mind in relation to the real complaint related to Kay's marital status. This was not a "desirable practice" as it could lead to "perceptions of prejudgment or the likelihood of apparent bias." This is because the decision-maker under r 34(*a*) (of the rules of the club) should not also be the investigator.

1.45 Further, had the GC rooted out any evidence, it should have brought it to the attention of the relevant member to afford an opportunity for the member to respond to it. This is fundamental to the natural justice principle of not condemning a person without hearing their side: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 at [50].

1.46 The Court of Appeal was also moved to disagree with the judge to the extent that the suggestion was that the GC's powers of punishment under r 34(*a*) of expulsion, suspension or a lesser penalty was "unrestricted by any principles of proportionality or reasonableness" and that the courts could not interfere in this respect. Had the GC expelled Kay, the court was empowered to consider "whether the punishment fits the crime": *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 at [51].

1.47 The DC as the primary fact-finder had found credible oral evidence to the effect that Kay had not made a false declaration that

NKY was her spouse in July 1992. The GC on the basis of Kay's statements found her guilty of the charge. The Court of Appeal found the GC had for various reasons "completely misunderstood" (*Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 ("*Kay Swee Pin*") at [52]) the statements the appellant Kay made in her defence. The GC had clearly formed an opinion that Kay had made a false declaration given that the marriage certificate date in 2005 was after the date for application of membership in 1992. The GC should have asked the appellant for an explanation but "in its haste to condemn her", "rushed to judgment" (*Kay Swee Pin*, at [54]) and concluded she had made a false declaration so NKY could enjoy spousal privileges. It did not occur to the GC that Kay could have been mistaken in making the declaration or that she genuinely believed NKY was her spouse in 1992. This process was clearly flawed as "one would expect a responsible general committee of a club" to ask Kay for an explanation "before charging a member of the club" who had paid $190,000 for membership with the "serious offence" of cheating the club: *Kay Swee Pin*, at [54]). The documentary evidence showed the GC "was at no time interested in seeking an explanation from the appellant": *Kay Swee Pin*, at [55]. When Kay wrote to the club in January 2006 to offer explanation, there was "no record the GC looked at it in its deliberation", although the DC did take it into consideration: *Kay Swee Pin*, at [55]. A separate letter was written to the club president in February 2006 but it appears "rather unfortunate" that he did not give it sufficient attention. The letters contained "a very simple and credible explanation as to why she would not have wanted to cheat and deceive the club" to "save a few dollars": *Kay Swee Pin*, at [57]. The GC was "fixated" with the invalidity of Kay's customary marriage to NKY and in directing the DC to deliberate further on the charge on the basis of the invalidity of the 1982 marriage made a direction tantamount to "a finding that the appellant was guilty of the Charge". In the DC's second report, it reiterated its view that Kay had not attempted to cheat the club but the GC members "once more closed their ears and eyes to the DC's reiteration": *Kay Swee Pin*, at [58].

1.48 The 3 April 2006 minutes showed that the club president had focused on the wrong enquiry in being more interested with whether Kay had committed bigamy, such that to him, the relevant question was whether NKY was entitled to be a spousal member. The relevant question was whether Kay had made a false declaration that NKY was her spouse.

1.49 Further evidence of prejudgment or apparent bias was the "less than impartial state of mind" of VP Chen in his forceful and unfair criticism of the DC's second report: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 ("*Kay Swee Pin*") at [60]. VP Chen had unjustly declared that Kay had been uncooperative with the club when the truth was that the GC had not sought any explanation from her.

VP Chen demonstrated an inability to distinguish between an incorrect declaration and making a false one (*Kay Swee Pin*, at [60]–[61]) and had demonstrated he had "closed his mind" to the DC's findings. His mind was "clouded by his judgment" that the appellant had been, as he said, "uncooperative and dishonest": *Kay Swee Pin*, at [62].

1.50 The Court of Appeal concluded the GC "had erred in law" during its discussion by focusing on the wrong question – whether the customary marriage was valid – thereby "failing to ask itself whether the Charge was made out." The Court of Appeal also found that the GC's finding of Kay's guilt was "irrational or unreasonable" (*Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 at [64]) in so far as its reasoning was "illogical" and based on a failure to address the charge. The GC had acted *ultra vires* in asking itself the wrong question.

1.51 An issue of bias also arises in so far as Radakrishan, while disqualifying himself from DC hearings, presented the first DC report to the GC. This itself was an unobjectionable "administrative act" but he "went further and participated in the discussions" of the GC which "amounted to a procedural impropriety": *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 ("*Kay Swee Pin*") at [77]. Furthermore, Radakrishnan misrepresented the findings of the DC. He also made an irrelevant and prejudicial statement in opining that NKY, being a lawyer, "should know better". The status of NKY as a lawyer "had nothing to do with the Charge" and prejudiced Kay in relation to the GC-imposed punishment. The Court of Appeal appears to have conflated the consideration of an "irrelevant consideration" (which is usually considered a substantive head of review) with that of a procedural breach of natural justice: *Kay Swee Pin*, at [79].

Duty to act fairly

1.52 The club had breached natural justice which consists of "a duty to act fairly", the content of which varies with the case circumstances. As a disciplinary body with the power to cast a stigma by expulsion, suspension or punishment, the SICC committees were under "a duty to act fairly". What fairness requires in any case "is for the decision of the courts as a matter of law": *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 ("*Kay Swee Pin*") at [6]. This requires the decision-maker to act impartially and to give a fair hearing whereby no man is condemned unheard. Further, an accused person must be given notice of the allegation against him, a fair opportunity to be heard and notice of any evidence put before any tribunal as natural justice would be breached if evidence was received "behind the back of the party concerned", as was the case here: *Kay Swee Pin*, at [7].

1.53 One facet of the duty to act fairly is to give to the person charged material placed before the disciplinary body, specifically a copy of JL's e-mail of 1 April 2006. This would enable Kay to respond to the allegation that her customary marriage was invalid. This was crucial on the facts of this case because the DC had heard this evidence and concluded there had been no false declaration. The GC should have asked the DC why the appellant's explanation was credible but "it did not seem to be interested in that explanation": *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 ("*Kay Swee Pin*") at [71]. Further, JL's e-mail had "planted in the minds of the GC members" the impression that Kay's only defence before the DC was that of her customary marriage; JL had made a legal submission that such marriage would be void under the Women's Charter. Clearly this influenced the president's thinking that the only issue was whether Kay had committed bigamy: *Kay Swee Pin*, at [72]. In fact, the appellant had another "credible defence" before the DC which the GC ignored twice. In 1992, the appellant's customary marriage to NKY and divorce from Koh "were history" (*Kay Swee Pin*, at [73]) and she testified that having lived with NKY for 20 years "she believed in 1992 that NKY was her spouse": *Kay Swee Pin*, at [73]. The Court of Appeal considered that the GC had breached its duty to give a fair hearing to the appellant by failing to give her an opportunity to explain that JL's version of the DC hearing was incomplete or that it should have directed the DC to reconsider its finding (that she was not guilty).

1.54 In all, the disciplinary proceedings were marinated with serious breaches of the rules of natural justice. In addition, the decisions were irrational and took irrelevant considerations into account. The Court of Appeal also found that the charge was inherently defective as the appellant when applying to join the club in 1992 was not yet a member of the club – r 34(*a*) only applied to club members: *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 at [81].

1.55 In assessing damages, the AR noted that the claim was contractual. However, written into every contract are rules of natural justice and there was judicial review of the GC decision to ascertain whether it was in line with such rules for the purposes of determining whether there was a breach of contract: *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 at [33].

Ousting judicial review

1.56 An issue that arose in *Re Raffles Town Club Pte Ltd* [2008] 2 SLR 1101 was whether the terms of s 79(3) of the Income Tax Act (Cap 134, 2008 Rev Ed) precluded the applicant, Raffles Town Club ("RTC"), from appealing against various assessments made by the

Comptroller of Income Tax before the Income Tax Review Board ("Board").

1.57 Section 79 provides for a right of appeal to the Board to any person aggrieved against an assessment made against him. Section 79(3) provides that an appellant "shall not be entitled to object to the Chairman or any Deputy Chairman of the Board …". Choo Han Teck J held that these words could not be construed to immunise these two appointees from judicial review. Otherwise, their appointments would be "unimpeachable" (*Re Raffles Town Club Pte Ltd* [2008] 2 SLR 1101 ("*Raffles Town Club*") at [5]), whether by the taxpayer, executive or court. Choo J considered that Parliament could not have intended this and that another interpretation was possible: that s 79(3) served "a very clear and practical purpose" in so far as it precluded "arbitrary and spurious objections" to these two key posts: *Raffles Town Club*, at [5].

1.58 Choo Han Teck J noted that clear words were necessary to oust judicial review and thus s 79(3) did not preclude an application for judicial review (*Re Raffles Town Club Pte Ltd* [2008] 2 SLR 1101 ("*Raffles Town Club*") at [5]). Spurious applications are safeguarded against because there is a need to apply for leave for judicial review. As a matter of principle, the word "object" in s 79(3) warranted the most restrictive interpretation, given "the importance of judicial review" which required that a legislative provision attempting to oust review or any aspect of it "must be specifically stated": *Raffles Town Club*, at [5]. This is consonant with the centrality of judicial review in upholding the rule of law and examining the exercise of administrative powers.

Bias

1.59 The issue of apparent bias also arose because the chairman of the Income Tax Review Board appointed one Leslie Chew as the deputy chairman of the Board constituted to hear the applicant's appeal. This was because Mr Chew had "past connections" with RTC which could "give rise to a reasonable apprehension of bias or prejudice": *Re Raffles Town Club Pte Ltd* [2008] 2 SLR 1101 ("*Raffles Town Club*") at [1]. Mr Chew was one of the disgruntled members of RTC aggrieved against the lack of exclusivity of the club, despite the promoter's representation. He consequently participated in the arrangement scheme by which RTC paid each scheme creditor, who was a RTC member, a sum of $3,000: *Raffles Town Club*, at [2]. Mr Chew had resigned from RTC in October 2006 and, in February 2007, was asked to take over as deputy chair of the Board constituted to hear the relevant appeal.

1.60 Choo Han Teck J emphasised that a fact-oriented approach was necessary to ascertain whether the relevant circumstances would cause

reasonable people to suspect that a judicial or quasi-judicial officer might not be able to judge a matter impartially because of bias. While Mr Chew may have resigned from RTC for various reasons, the RTC's history and "disappointment and annoyance with the club" (*Re Raffles Town Club Pte Ltd* [2008] 2 SLR 1101 ("*Raffles Town Club*") at [7]) were possible reasons for his resignation. Choo J applied the "reasonable suspicion" test and stated that a judicial officer must not only be impartial but be seen to be impartial and "should not assume that his integrity or impartiality will never be questioned": *Raffles Town Club*, at [7]. A "reasonable suspicion" of bias could arise from "a mix of circumstances and unfamiliarity" with the judge's reputation. Should there be a "genuine concern" regarding his connection to a case or party, that judge should recuse himself in order to "pre-empt any cause for concern", regardless of whether his judgment was untainted by bias. On the facts of the case, the relevant circumstance that could give rise to questions about Mr Chew's impartiality was his prior connection with RTC.

Natural justice – The proscription against judicial interference

1.61 In relation to natural justice which embodies a standard of procedural fairness, the emphasis is not on the rigid application of rules but a specific, contextualised approach. While courts may evaluate statutory provisions for procedural fairness against common law standards of natural justice, they will not be quick to supplement procedure laid down in legislation, where it is not clear that the statutory procedure is insufficient to achieve justice: see generally *Chip Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 in relation to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

1.62 The Court of Appeal had occasion to delve into the principle of the proscription against judicial interference in *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 ("*Mohammed Ali bin Johari*"), within the context of a common law adversarial system where it is counsel's primary responsibility to examine witnesses. In this regard, a judge must not impugn his impartiality by being seen to descend into the arena through active intervention, giving the appearance of bias, unsettling witnesses and impeding the conduct of a fair trial in general. What was at stake in *Mohammed Ali bin Johari* was a charge of culpable homicide under the Penal Code (Cap 224, 1985 Rev Ed). An issue on appeal was whether the trial judge had engaged in excessive judicial interference by taking an active interventionist role within the context of an adversarial legal system, which seeks to get to the truth of things and thereby, to realise individual dignity: *Mohammed Ali bin Johari*, at [154].

1.63 After taking judicial notice of certain extra-legal speeches on the topic, the Court of Appeal stated that "undue judicial interference" will undermine an adversarial system (*Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 ("*Mohammed Ali bin Johari*") at [154]), although a judge does not need to remain silent but can ask questions to clarify points or issues raised but remaining obscure, or to raise overlooked issues. Interventions may serve to assist counsel to be aware of the court's concerns, provided that the judge does not prejudge an issue, by keeping an open mind: *Mohammed Ali bin Johari*, at [175].

1.64 The essential point of principle was to ensure the observance of natural justice rules to ensure a fair hearing. Within an adversarial process, issues must be approached "with an open mind" which involves listening "to the evidence for and against the offender", whatever is said in defence before coming to a final decision: observations of Yong Pung How CJ in *Wong Kok Chin v Singapore Society of Accountants* [1989] SLR 1129 at 1151–1152, cited at *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 ("*Mohammed Ali bin Johari*") at [156]–[157]. An adjudicator may seek clarification on evidential points but must "at all times avoid descending into the arena and joining in the fray": *Mohammed Ali bin Johari*, at [156].

1.65 The Court of Appeal also drew from the observations made by Sundaresh Menon JC in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85 ("*Shankar Alan*") at [160]–[162]. The essential factors are, firstly, that the proscription against judicial interference would be contravened should a judge assume an inquisitorial role by "descending into the arena in such a manner that impaired its judgment and its ability to fairly evaluate and weigh the evidence and the case as a whole": *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 ("*Mohammed Ali bin Johari*") at [124]. Secondly, it was nonetheless important to strike an "appropriate balance" within the context of contemporary litigation. He noted it could be advantageous to counsel in document-intensive litigation where the court, in taking an active role in case management, intervened in order to better understand the issues and evidence, revealing its concerns. This would give counsel "the opportunity to peek within the judicial mind" (*Shankar Alan*, at [114], cited in *Mohammed Ali bin Johari*, at [161]) to enable counsel to address these concerns. However, Menon JC identified the real mischief as a situation where "the judge takes up a position and then pursues it with the passion of the advocate", thereby entering the arena and becoming "ill-suited to the dispensation of a dispassionate justice": *Shankar Alan*, at [114], as cited in *Mohammed Ali bin Johari*, at [161].

1.66 These observations were cited with approval by the High Court in *Ng Chee Tiong Tony v PP* [2008] 1 SLR 900 ("*Ng Chee Tiong*") at [21], where the learned judge noted that "it is certainly not for the trial judge

to test the credibility of a witness by sustained questioning": *Ng Chee Tiong*, at [22]; *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 at [163].

1.67 The Court of Appeal in *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 emphasised that the doctrine proscribing judicial interference should only be invoked in "the most egregious cases" (at [164]) and should be applied after scrutinising a case in a holistic fashion: at [166]. Examples of judicial interventions in the adversarial process could include excessive interruptions in examining and cross-examining witnesses, hostile and improper cross-examination of the accused by the judge and the making of adverse judicial comments which indicated the judge had predetermined guilt before hearing all the evidence (at [167]), drawing from *Rosali bin Amat v PP* [1989] SLR 55. Reference was also made to two Malaysian Federal Court decisions for illustrative purposes (at [173]–[174]).

1.68 At the heart of the matter was not just the quantity but qualitative impact of the judicial interventions, with the "ultimate question" being "whether or not there has been the possibility of a denial of justice to a particular party": *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 at [175]. The issue was not whether the accused had in fact been prejudiced by the intervention but whether he or a reasonable person present throughout the trial might reasonably consider he had not had a fair trial.

1.69 On the facts of the present case, the Court of Appeal found that the judge had not descended into the arena as he did not interrupt the parties in such manner to give rise to prejudice to either side. The interventions were designed to seek clarification on key issues and to ensure evidence was fairly and properly introduced during the trial as well as to let counsel know what was troubling him. Thus, no denial of justice to either party was found: *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 at [182]–[190].

Substantive review: Reasonableness

1.70 The issue as to whether two statutory bodies, the Strata Titles Boards and the Inland Revenue Authority of Singapore, had acted irrationally or unreasonably came before the courts.

1.71 In *City Developments Ltd v Chief Assessor* [2008] 4 SLR 150, CDL, an established property developer, challenged the valuation of property tax, given the change in assessment method from the "hypothetical tenancy method" to one called the "5% method", pursuant to ss 2(1) and 2(3)(*b*) respectively of the Property Tax Act (Cap 254,

1995 Rev Ed) ("PTA"). The Chief Assessor dismissed CDL's objection to this assessment method and, at the hearing before the Valuation Review Board, defended using the 5% method as a way of encouraging the use rather than hoarding of land. The VRB upheld the Chief Assessor's assessment and CDL challenged this before the High Court, arguing that the Chief Assessor had acted unfairly in exercising his discretion under s 2(3)(*b*) of the PTA and, *ultra vires*, in taking wider planning considerations into account when assessing the annual value of the subject property.

1.72 The Court of Appeal considered whether two facets of the assessment decision were irrational. First, whether adopting a policy to discourage land hoarding was irrational. It affirmed, following *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 2 SLR 584 ("*Lines International*"), that it was perfectly valid for a statutory board to adopt a general policy in exercising its statutory powers provided certain conditions were met, including that such policy not be considered unreasonable in the *Wednesbury* (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) sense: *City Developments Ltd v Chief Assessor* [2008] 4 SLR 150 ("*City Developments*") at [10]. In assessing this particular meaning of reasonableness, the court was to take heed not to substitute its own preference, that is, to confine itself to reviewing the decision-making process and not the merits of the general decision itself. It noted that in *Lines International*, Judith Prakash J considered (*Lines International*, at [80]) that the Port of Singapore Authority in exercising its statutory functions to promote the port was entitled to have regard to wider considerations such as promoting desirable businesses: *City Developments*, at [10].

1.73 On the facts of *City Developments Ltd v Chief Assessor* [2008] 4 SLR 150, the Court of Appeal found it would have been impossible to argue that the policy to discourage land hoarding was irrational, or unknown to property development. The policy was based on "a very commonsensical notion" of preventing land hoarding in Singapore, particularly given the scarcity of this commodity: at [11]. It also served the public interest. This unique factor of land scarcity had in fact received judicial recognition in various cases: at [13]–[15]. In exercising his discretion under the Property Tax Act (Cap 254, 1995 Rev Ed), the Chief Assessor merely factored in this anti-hoarding policy, which was one considered "predominantly" but not exclusively by the Chief Planner. The court would be "slow" to interfere with the Chief Assessor's decision to adopt a policy discouraging land hoarding as this was one done with regard to "a legitimate public interest and a wide range of considerations": at [17]. The Urban Redevelopment Authority ("URA") and Inland Revenue Authority ("IRA") were both government agencies charged with managing different aspects of the commodity of land and

it was only to be expected "that government agencies do not operate in isolation and would adopt a common view towards policies": at [17]. As such it was "neither irrational nor unreasonable for government agencies to adopt an integrated and holistic approach" towards formulating and implementing government policies: at [17]. Drawing from the court's observations in *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [70], the Government in the eyes of the law "is an indivisible legal entity when discharging its executive functions and powers": *City Developments Ltd v Chief Assessor* [2008] 4 SLR 150 ("*City Developments*") at [18]. Thus, there was nothing irrational about the Chief Assessor adopting a policy predominantly under the consideration of the Chief Planner: *City Developments*, at [18].

1.74 Further, there was nothing irrational in the distinction drawn by the Chief Assessor between property developers and homeowners. Section 2(3) of the Property Tax Act (Cap 254, 1995 Rev Ed) is applied to homeowners at the point of the demolition of their houses. While property developers are motivated by profit and may hold on to property for several years without developing it, homeowners redeveloped property to stay in and would probably want to move into it as soon as redevelopment was completed. The Court of Appeal considered this distinction "wholly consistent with the general policy of discouraging as well as preventing land-hoarding in land-scarce Singapore": *City Developments Ltd v Chief Assessor* [2008] 4 SLR 150 at [22].

1.75 A decision by the Strata Title Board ("STB") in fixing a hearing date to resume the hearing of an application for the *en bloc* sale of a privatised HUDC estate (Tampines Court) after its mandate had expired and after the passage of the contractual deadline for obtaining the Board's approval for a collective sale in the sale and purchase agreement in *Mir Hassan bin Abdul Rahman v AG* [2009] 1 SLR 134 was found to be irrational in the *Wednesbury* sense. The STB's decision was challenged by the applicants, the authorised representatives of the Tampines Court sales committee who applied for judicial review.

1.76 The STB's approval of the *en bloc* sale had to be obtained by 25 July 2008 under the terms of the sales and purchase agreement. The STB was constituted to hear the application for 16 to 18 June 2008 but had not completed the hearing by 18 June; it decided to resume the hearing on 7 August 2008. The sales committee applied to bring the hearing date forward but the STB's Registrar dismissed this.

1.77 Under reg 20 of the Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S 195/2005), the STB and Registrar enjoy a broad discretion to fix hearing dates. Nonetheless, the STB was to make a final order within six months from

the date it was constituted, unless the Minister extended the time under the terms of s 92(9) of the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004): *Mir Hassan bin Abdul Rahman v AG* [2009] 1 SLR 134, at [15]–[16]. This meant that the STB's mandate would have expired on 1 August 2008 and that the STB had acted *ultra vires* in fixing 7 August 2008 as the date to resume hearings. This decision was quashed as a clear case of illegality.

1.78 Tan Lee Meng J held that the STB's decision to resume hearing on 7 August 2008 was an "exercise in futility" as the hearing would come after the contractual deadline for obtaining STB sale approval. Even though the applicants could have sought approval earlier (they had waited for the outcome of the *Gillman Heights* case), in this case, the STB's own deadline of six months could have been kept to a few days before it expired. That is, the STB was in a position to complete the hearing before the deadline (*Mir Hassan bin Abdul Rahman v AG* [2009] 1 SLR 134 at [26]). Thus, on the facts of the case, the STB's decision was unreasonable in the *Wednesbury* sense, given that the function of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) was to facilitate *en bloc* sales. The STB's decision effectively would have thwarted this particular *en bloc* sale.

Leave and remedies

1.79 The High Court in *Ung Yoke Hooi v AG* [2008] SGHC 139 confirmed that declaratory orders could not be sought under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). This was based on the old English O 53 which was in force until 11 January 1978.

1.80 In seeking a mandatory order, an applicant must first gain the leave of the High Court as this is a discretionary remedy. In *Ung Yoke Hooi v AG* [2008] SGHC 139 ("*Ung Yoke Hooi*"), the applicant was a Malaysian businessman who held various bank accounts. Subsequently, the Corrupt Practices Investigation Bureau ("CPIB") seized his bank accounts pursuant to its investigations, under s 68 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"), on the basis that the source of monies in these accounts was connected with misappropriated funds. The applicant argued that the seizure of these accounts was illegal and unreasonable (as the CPIB had done nothing with the accounts since the first one was seized more than a year earlier) and that the procedure in ss 68(2) and 392(10) of the CPC had not been complied with: *Ung Yoke Hooi*, at [12].

1.81 Tay Yong Kwang J noted that the threshold for leave was a low one but exceeded a bare allegation of maladministration; there had to be an "arguable" case which was not satisfied on the facts of the immediate

case. The applicant had failed to show sufficient evidence to make out an arguable case that the seizure of the bank accounts was illegal, irrational or procedurally improper. It was not illegal under s 68 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) as alleged, because nothing in it required that the applicant be charged with an offence; all that it required was that the relevant property be alleged or suspected to be stolen or found under circumstances giving rise to such suspicion (*Ung Yoke Hooi v AG* [2008] SGHC 139 ("*Ung Yoke Hooi*") at [25]). Further, it was not irrational even if the first account was seized on 17 November 2006 and had remained frozen ever since, as the case was a "complex cross-border one involving foreign companies, foreign bank accounts and foreign financial institutions": *Ung Yoke Hooi*, at [33]. This did not constitute an inordinate delay. Lastly, the claim of procedural impropriety was not sustainable as the delay in question in reporting the seizure to the magistrate's court was "slight" and did not cause apparent prejudice to anyone: *Ung Yoke Hooi*, at [39].

CONSTITUTIONAL LAW

Article 9

1.82 Constitutional arguments were raised to challenge a decision of the Strata Titles Board ("STB") which approved the *en bloc* sale of a condominium known as the Horizon Towers in *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754.

1.83 The constitutionality of ss 84A(1) and 84B(1)(*b*) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") was challenged by the minority subsidiary proprietors ("the appellants"), as were the STB orders which allegedly violated Arts 9 and 12 of the Constitution of the Republic of Singapore (1999 Reprint). In addition, it was argued that the STB in making its decision was exercising judicial powers which it had no jurisdiction to exercise and further, that it breached natural justice, not allowing the appellants to make full submissions on the constitutional points: *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [3].

1.84 Under the relevant law, an 80% majority is required to effectuate *en bloc* sales. The majority subsidiary proprietors were able to obtain this majority and thereby entered into a collective sales agreement on 11 May 2006. An option to purchase Horizon Towers *en bloc* was given to Horizon Partners Pte Ltd ("HPPL") at a reserve price of $500m on 22 January 2007. The option was converted into the sale and purchase agreement on 12 February 2007 when HPPL signed

the option. The appellants refused to sign both the collective sales agreement and the sales and purchase agreement.

1.85 Choo Han Teck J noted that the High Court was the proper forum for raising constitutional law arguments, as counsel for the appellants were entitled to, because "the Constitution is the supreme law of the land": *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [5]. This affirms that judicial review extends to the constitutionality of legislation, not merely administrative action, and that the courts "in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of the land": *PP v Taw Cheng Kong* [1998] 2 SLR 410 at 437, [89].

1.86 The scheme of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") did not confer power on the STB to hear such arguments. Indeed, if the relevant LTSA provisions were unconstitutional, the LTSA would be unconstitutional so far as the impugned sections were concerned: *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 ("*Lo Pui Sang*") at [5]. Section 84A(1) authorises subsidiary proprietors of the lots "with not less than 80% of the share values" upon certain stipulated conditions to apply to the STB for an order for the sale of all the lots and common property in a strata title plan. This obviously would go against the wishes of the minority subsidiary proprietors who did not wish to enter a sale. Section 84B(1)(*b*) provides that when such an order is made, the lots shall be sold in accordance with the terms of the sale and purchase agreement: *Lo Pui Sang*, at [5].

1.87 Counsel for the appellants argued that ss 84A(1) and 84B(1) effectively deprived the appellants of their "personal liberty to contract." He referenced Art 9(1) of the Constitution which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law": *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [6].

1.88 Consistent with precedent, Choo Han Teck J pointed out that "personal liberty" in the Singapore context is narrowly construed "to refer only to the personal liberty of the person against unlawful incarceration or detention": *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [6]. In other words, the learned judge declined to construe personal liberty expansively, contrary to the practice of other jurisdictions where personal liberty has been linked to an open-ended conception of individual autonomy to include virtually anything under the sun: for example, see the majority judgment of Justices O'Connor, Kennedy and Souter in *Planned Parenthood of Southeastern Pennsylvania v Robert P Casey* 505 US 833 (1992), where in affirming abortion rights as a facet of liberty, "liberty" was sweepingly defined as "the right to

define one's own concept of existence, of meaning, of the universe and of the mystery of human life".

1.89 Expansive judicial interpretations of "liberty" have had the deleterious effect of importing a high degree of subjective politics into the adjudicatory process, eliciting criticisms of judicial activism, if not of judicial supremacy. A clear example would be the landmark US Supreme Court decision of *Roe v Wade* 410 US 113 (1973), where the court found an unenumerated constitutional right to privacy under the due process clause of the Fourteenth Amendment which prohibits states from depriving "any person of life, liberty or property, without due process of law". Included within this right was the right to abort an unborn foetus, which remains morally controversial in the US today. In the Malaysian context, "personal liberty" has been read narrowly to relate to physically restraining or detaining a person: *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33; *Harmenderpall Singh a/l Jagara Singh v PP* [2005] 2 MLJ 54 (FC).

1.90 Choo Han Teck J noted that counsel for the appellants had drawn from US Supreme Court decisions to support the argument that "personal liberty" in Art 9(1) included a liberty of contract. Presumably, counsel referred to the landmark decision of *Lochner v New York* 198 US 45 (1905) where the Supreme Court found a right to free contract was implicit in the Fourteenth Amendment due process clause. Choo J noted that the US cases cited were of no assistance as the terms of the Fourteenth Amendment differed from Art 9: the former related to the deprivation of liberty not in accordance with the "due process of law" while in Singapore, personal liberty could not be deprived save "in accordance with law" under Art 9 (*Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [6]).

1.91 In distinguishing cases from foreign jurisdictions, it would be helpful if judicial reasoning could go beyond indicating differences in the textual formulation of basic laws, to explaining whether this is a distinction of style or substance. Nonetheless, the court in this case was acting consistently with the conservative stance of Singapore courts that the issue of whether to broaden the scope of enumerated constitutional rights "should be addressed in the political and legislative arena" as "the sensitive issues surrounding the scope of fundamental liberties should be raised through our representatives in Parliament who are the ones chosen by us to address our concerns. This is especially so with regards to matters which concern our well-being in society, of which fundamental liberties are a part": *per* Yong Pung How CJ in *Rajeevan Edakalavan v PP* [1998] 1 SLR 815 at 823, [21]. It is evident from the case law that the judicial self-perception is that courts are not to act as sites of social reform, as that function resides primarily in Parliament.

1.92 The learned judge adopted a highly formalistic and narrow reading of "law" in stating that Art 9(1) of the Constitution of the Republic of Singapore (1999 Reprint) authorised the deprivation of personal liberty "in accordance with law". He considered that law "must mean law passed by Parliament": *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [6]. As the provisions of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") were clearly "law" within the meaning of the Constitution, they could not be impugned. This ignores earlier decisions to the effect that references to "law", particularly in a Westminster Constitution, referred to normative principles such as fundamental rules of natural justice: *Ong Ah Chuan v PP* [1980–1981] SLR 48 at 62. Indeed, the Court of Appeal in *Nyugen Tuong Van v PP* [2005] 1 SLR 103 at 125, [82] referred to *Ong Ah Chuan* in declaring that "[i]t is well established that the phrase 'in accordance with law' in Art 9(1) connotes more than just Parliament-sanctioned legislation."

1.93 "Fundamental rules of natural justice" have not as yet attained mature development as a facet of Singapore constitutional jurisprudence and it remains unclear whether these rules import standards of fairness in relation to procedure or substance. Perhaps, in articulating the normative framework within which we understand "law" in Singapore constitutional discourse, inspiration could be drawn from *Bonham's Case* 8 Co Rep 114 (Court of Common Pleas [1610]), where Sir Edward Coke CJ famously stated (at 117–118):

> [I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.

1.94 In other words, there are principles of reason embedded in the common law as part of the fundamental law, which have been imported into our Constitution (Constitution of the Republic of Singapore (1999 Reprint)). Against these principles of reasonableness or fair dealing, legislation and executive action are to be evaluated for constitutionality.

1.95 In any event, since the learned judge in *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 did not find that Art 9(1) was breached, his comments on what "law" means in the context of Art 9(1) are strictly *obiter*. The learned judge appeared to be drawing from the stream of high legal positivism in stating that although "in accordance with law" in Art 9(1) "may incline liberally in favour of legislative power … the clear words cannot be altered by the court. That is what constitutional supremacy means. If the Legislature and the Executive must follow what it says, so must the Court. Everyone obeys it": at [6].

1.96 With respect, the matter is not so clear cut as the court interprets what the Constitution means, and this is not always self-evident. Interpretation is never value-neutral but imports in a judicial philosophy. This can be "literalist" and text-focused, or "naturalist" in seeking to ground judicial reasoning in the normative values extant in the written and unwritten Constitution, as the fundamental law of the land, in a principled fashion. A literalist approach to reading the Constitution would entail a minimal standard of judicial review and a tendency to defer to legislative assessments of whether a restrictive law appropriately balances a Part IV liberty and competing interests. The Privy Council in *Ong Ah Chuan v PP* [1980–1981] SLR 48 at 61 had advocated reading a Constitution as *sui generis,* differently from construing a statute; in particular, to give a generous interpretation to Part IV liberties "suitable to give to individuals the full measure" of these liberties. However, there have been other decisions where the court has chosen to give a liberal and generous reading to parliamentary intention in enacting laws which curtail a constitutional liberty, rather than to the liberty itself: *Chee Siok Chin v PP* [2006] 1 SLR 582 at [49]. It is hoped that in adjudicating fundamental rights, both the right and the competing good or interest may be optimally reconciled rather than giving pre-eminent or determinative weight to any one factor in the balancing process.

Articles 11 and 12

1.97 Counsel for the appellants in *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 also argued that ss 84A and 84B(1)(*b*) violated Art 12(1) of the Constitution of the Republic of Singapore (1999 Reprint), which provides: "All persons are equal before the law and entitled to the equal protection of the law." This was based on the assertion that the 80% rule was both unreasonable and arbitrary (at [7]) in discriminating against the minority subsidiary proprietors and in favour of the majority who alone had the choice as to where they wished to live. The learned judge held that Art 12(1) was not violated, resting his determination on three limbs.

1.98 First, that the guarantee of equal protection under the law which Art 12 safeguarded "must be determined from the outset … when a law is passed, it must apply to everyone equally": *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [7]. Choo Han Teck J reasoned that until the requisite number of subsidiary proprietors wished to sell, "there [was] no majority nor minority" such that the opportunity of selling a condominium *en bloc* "[was] an equal opportunity to all subsidiary proprietors": at [7]. Article 12(1), thus, protects equality of opportunity, rather than guarantees a substantive result.

1.99 Second, the 80% rule stipulated by law was "consonant with the democratic ways of condominium living": *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [7]. In this regard, it may be noted that all subsidiary proprietors knew about the rules of the game from the outset.

1.100 Lastly, the deliberate exclusion of a "fundamental right to own property" was designed to cater to the scarcity of land in Singapore and as such the courts "must recognise that there is no fundamental right under our Constitution": *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [7]. Following from this, the Government had powers to compulsorily acquire any land for specific purposes in Singapore provided due compensation (not adequate compensation) was made under the terms of the Land Acquisition Act (Cap 152, 1985 Rev Ed). The omission of a property rights clause from the Constitution has served the objectives of a developmentalist state.

1.101 Cumulatively, the learned judge concluded that the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") provisions did not infringe Art 12(1) and that Art 12(2) was not breached on the basis that the Strata Title Board had allegedly discriminated against the appellants in compelling them to sell their units, as was its statutory obligation: *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR 754 at [7].

1.102 Given the free-standing nature of Art 12 and its empty content apart from the substantive rules of a statutory regime, it is not surprising that it was invoked in argument by counsel in several other cases related to prosecutorial discretion, land use policy and drug classification policy. In the following cases discussed, what was clear was that in contesting a legislative scheme for contravening Art 12, the courts maintain "a strong presumption of constitutional validity of written law", as was the case in *Johari bin Kanadi v PP* [2008] 3 SLR 422 at [10].

1.103 In *Johari bin Kanadi v PP* [2008] 3 SLR 422, what was challenged was an amendment to s 33A of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA") which provided for enhanced punishment for those who had consumed Subutex and had drug consumption antecedents. Previously Subutex was not a controlled drug under the MDA. The District Judge sentenced Johari to seven years' imprisonment and six strokes of the cane after he pleaded guilty: at [3]. He denied a request by counsel to refer the case to the High Court to deal with the constitutional questions raised under s 56A(1) of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) ("SCA"). This was upheld by Tay Yong Kwang J in the High Court, who affirmed that subordinate courts had the discretion whether or not to stay proceedings when a s 56A SCA application has been made: at [9]. He

stated that to merit such a reference, the applicant had to show "new and difficult legal issues involving the Constitution" which superior courts had not yet to deal with, not merely to indicate a new factual situation: at [9]. It did not suffice merely to ask "whether a certain factual situation contravenes any particular article in the Constitution": at [20]. For example, in *PP v Chee Soon Juan* [2008] SGDC 131, no new constitutional issue was raised and the District Court was content to cite prior authority to the effect that the Public Entertainment and Meetings Act (Cap 257, 2001 Rev Ed) ("PEMA") was not unconstitutional in restricting the Art 14 right to assembly, citing *Chee Soon Juan v PP* [2003] 2 SLR 445.

1.104 Tay Yong Kwang J found that the law drew a distinction between individuals who consumed Subutex and who had the relevant antecedents under s 33A of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA") and those who did not have these antecedents. He found that this distinction was not arbitrary but "entirely in keeping with the social object of the MDA" which was to prevent drug abuse from "becoming a blight on society" through the means of punishing repeat drug abusers more severely: *Johari bin Kanadi v PP* [2008] 3 SLR 422 ("*Johari bin Kanadi*") at [15]. Citing the Privy Council decision of *Ong Ah Chuan v PP* [1980–81] SLR 48 at 64–65 with approval, it was noted that Art 12(1) did not guarantee treating everyone in the same manner but "assures to the individual … the right to equal treatment with other individuals in similar circumstances." It does not forbid treating individuals in different classes dissimilarly. Furthermore, the issue as to whether dissimilarity in circumstances justifies the imposition of differentiated punishment belongs to the category of "questions of social policy", which falls within the province of the legislature: *Johari bin Kanadi*, at [14].

1.105 Following from the Court of Appeal's decision in *PP v Taw Cheng Kong* [1998] 2 SLR 410 at [60], Tay Yong Kwang J found that the appellants had not adduced sufficient evidence to rebut the strong presumption of constitutional validity of written law or to show that the exercise of statutory powers was otherwise arbitrary and unsupportable. Hence, the legislative classification of Subutex as a controlled and specified drug was upheld: *Johari bin Kanadi v PP* [2008] 3 SLR 422 ("*Johari bin Kanadi*") at [10]. Indeed, Tay J took pains to detail the legislative history of this classification. In particular, he noted that it was explained in Parliament that originally Subutex was part of a scheme to help heroin abusers kick their addiction. Later, when there were reports of Subutex abuse and when administrative measures and guidelines to the medical profession (which dispensed Subutex) failed to stop this abuse, the decision was taken to classify Subutex as a controlled drug under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA"): *Johari bin Kanadi*, at [11]–[12]. Further, the Government had given due

warning of this intention such that drug users had "ample warning" and time to make adjustments. The Government also publicised a voluntary rehabilitation programme for Subutex users before commencing s 33A prosecutions.

1.106 In addition, Art 11(1) of the Constitution of the Republic of Singapore (1999 Reprint) was not violated as the new s 33A did not retrospectively create an offence or enhance punishment for offences already committed. Although this was the appellants' first conviction under s 33A, the section did not require an offender to have an antecedent relating to the same drug, *ie*, Subutex. The appellants were not punished for consuming Subutex before the drug was made illegal; further, the enhanced punishment related to consuming Subutex after it was made a controlled drug and not to any previous cases of consuming prohibited drugs: *Johari bin Kanadi v PP* [2008] 3 SLR 422 at [16].

1.107 Once again, the High Court applied the existing "rational classification" test to the issue of whether there was any discrimination in the application of the powers of prosecutorial discretion, contrary to Art 12, in prosecuting an entrapped person while not prosecuting the entrapping state agent. In *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411, the High Court found there was an "intelligible differentia" between these two classes of persons: entrapped drug traffickers and state *agents provocateurs*.

1.108 Tay Yong Kwang J distinguished between the British approach and that in Singapore in relation to entrapment evidence. The relevant English statute gave English courts the power to exclude evidence which would adversely affect the fairness of the proceedings: *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 at [13]. In contrast, in Singapore, where state entrapment was legal, the courts had no discretion under the Evidence Act (Cap 97, 1997 Rev Ed) to exclude illegally obtained evidence and, as such, a prosecution founded upon entrapment evidence was not an abuse of process: *Law Society of Singapore v Tan Guat Neo Phyllis Tan* [2008] 2 SLR 239 at [7] (cited in *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 at [19]). Second, the English common law recognised a judicial power to stay proceedings and to order the release of an accused persons where the Executive commits "a serious abuse of power", following *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 (cited in *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 at [13]). Lastly, there was a real concern that entrapment evidence would violate an accused's right of fair hearing under Art 6 of the European Convention on Human Rights ETS No 5. Tay Yong Kwang J noted that the House of Lords in *R v Loosely* [2001] 1 WLR 2969, in revisiting the law, found that an abuse of process would be committed if state power was misused to lure, incite or pressurise a person into committing a crime he otherwise

would not have committed: *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 at [14].

1.109 However, Tay Yong Kwang J also underscored that under this revised English test, the House of Lords, nonetheless, clarified that active state complicity did not necessarily entail an abuse of executive power, as much depended on the degree of state involvement: *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 ("*Mohamed Emran*")at [14]. A distinction could be drawn between the persistent request for drugs by a state agent (as on the facts of *Mohamed Emran*) as opposed to a person taking advantage of an opportunity to commit an offence presented to him by a state agent: at [15].

1.110 While entrapment was not unconstitutional in Singapore and did not afford a substantive legal defence, Tay Yong Kwang J opined that even if the *Loosely* test (*R v Loosely* [2001] 1 WLR 2969) was applied in Singapore, the sting operation targeting the appellant would be regarded as legitimate as "a persistent request for drugs by a state agent acting under the sanction of the State is not an abuse of process under English law": *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 at [21].

1.111 Following *Law Society of Singapore v Tan Guat Neo Phyllis Tan* [2008] 2 SLR 239 ("*Phyllis Tan*"), Tay Yong Kwang J noted two instances where prosecutorial discretion was subject to judicial review. First, when it is abused in bad faith for an extraneous purpose and, second, when its exercise contravened constitutional rights: *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 ("*Mohamed Emran*") at [22]. The Court of Appeal in *Phyllis Tan* at [147] (cited in *Mohamed Emran*, at [25]) considered that the Art 12 equality clause might be contravened where the Attorney-General "condones the unlawful conduct of the law enforcement officers, which is particularly egregious" by failing to prosecute them as well. If so, an executive act may fall foul of the Art 12 clause. Thus the Attorney-General's Art 35(8) discretion to institute, conduct or discontinue any proceedings for any offence "is unfettered, save for unconstitutionality": *Mohamed Emran*, at [32].

1.112 However, the concept of equality in Art 12 "meant that all persons in like situations should be treated alike", not that "all persons should be treated equally" as the prohibition against unequal protection was not absolute: *PP v Taw Cheng Kong* [1998] 2 SLR 410 at [54], cited in *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 ("*Mohamed Emran*") at [26]. What needed to be satisfied was the classification test as set out in *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 at 170 – cited in *Mohamed Emran,* at [27] – which requires that a classification be founded on an "intelligible differentia" which distinguishes groups of people and that this *differentia* "has a rational relation" to "the object sought to be achieved by the law in

question." In short, a *nexus* had to exist between the classificatory basis and the legal objective.

1.113 Tay Yong Kwang J, in concluding that the reasonable classification test in relation to the decision not to prosecute state agents while prosecuting entrapped drug traffickers was satisfied, drew guidance from the observation of Lord Nicholls in *R v Loosely* [2001] 1WLR 2969 at [2]: cited in *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 ("*Mohamed Emran*") at [28]. This was to the effect that the police were not expected merely to be "passive" observers in combating the drug trade. Otherwise (*Mohamed Emran*, at [28]):

> Detection and prosecution of consensual crimes committed in private would be extremely difficult. Trafficking in drugs is one instance. With such crimes, there is usually no victim to report the matter to the police. And sometimes victims or witnesses are unwilling to give evidence.

1.114 No privacy considerations apply as there is no constitutional right to privacy in Singapore. So too, the Court of Appeal in *How Poh Sun v PP* [1991] SLR 220 manifested a deference towards the workings of the executive branch in declaring "[i]t is not the province of the court to consider whether the CNB should have proceeded about its work in one way or the other": *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 at [29].

1.115 First, Tay Yong Kwang J founded a clear intelligible *differentia* between entrapped drug traffickers and state agents. The former had both the requisite *mens rea* and *actus reus* to promote the drug trade, while the latter acted with the sanction of the state to curtail rather than promote the drug trade: *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411 ("*Mohamed Emran*") at [30]. Second, there was a "perfectly rational nexus" between entrapment operations and the socially desirable object of containing the drug trade. Sting operations were "necessary to flush out suppliers of drugs". In addition, these served as an "important deterrent" against drug trafficking as "they introduce a clear and present risk of instant arrest into the equation for drug traffickers". This affirms the social value of Singapore's strong anti-drug laws which are directed towards containing the drug trade which "remains a grave menace to our society today": *Mohamed Emran*, at [30]. Tay J considered that the degree of CNB involvement in this present case "was clearly within acceptable norms" so as not to violate any of the appellant's constitutional rights. In the Singapore context, given the broad acceptance of the "major social evil" (V K Rajah J (as he then was) in *PP v Tan Kiam Peng* [2007] 1 SLR 522 at [8]) that is the drug trade, it was "imperative" that "active involvement" by the authorities "ought to be regarded as reasonable and legitimate": *Mohamed Emran*, at [31]. It would be "absurd" to convict state agents

for abetting every entrapped drug trafficker as "illicit drug suppliers would prosper and flourish while enforcement agencies wither and perish": *Mohamed Emran*, at [31].

Articles 12 and 15

1.116 In *Eng Foong Ho v AG* [2008] 3 SLR 437, the issue was whether the acquisition of property on which the Jin Long Si Temple was located under the Land Acquisition Act (Cap 152, 1985 Rev Ed) was a violation of Art 12 of the Constitution as the Ramakrishna Mission ("the mission") and the Bartley Christian Church ("the church"), which were nearby, were not also acquired. All relevant properties were located near the new Bartley mass rapid transit station.

1.117 Tan Lee Meng J held that the Art 15 religious freedom guarantee was not violated by the Government's act in acquiring a temple, church or mosque for public purposes. Thus, in terms of *locus standi*, the more restrictive requirement was that the legal owners of the temple property alone has standing to bring legal proceedings against the authorities if they felt that their rights had been infringed *qua* legal owner. The current plaintiffs, all temple devotees who felt a "strong emotional attachment" to the temple, lacked the requisite standing as none of their constitutional rights had been violated. If this had been the case, they would have had "sufficient interest" to seek the declaration, following *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR 609 at 614, [13]: cited in *Eng Foong Ho v AG* [2008] 3 SLR 437 at [13].

1.118 Despite finding that the plaintiffs lacked standing, Tan Lee Meng J, nevertheless, for "the sake of completeness" considered the claim that Art 12 was violated.

1.119 Notably, the official government position was that "[t]he Government does not distinguish among the religious groups or types of development in deciding which parcels of land to acquire." The decision to acquire the temple land (while not acquiring that of the nearby churches or the mission) "was to allow better optimisation of land use by amalgamating with the adjoining State land for comprehensive redevelopment": *Eng Foong Ho v AG* [2008] 3 SLR 437 at [8].

1.120 The test for equality, as set out in *Ong Ah Chuan v PP* [1980–1981] SLR 48 at 64, was that like should be compared with like. The plaintiffs argued that the temple, together with the mission and church "were all members of the same class in that they were places of worship located near the Bartley MRT station and in a predominantly residential area."

They argued that there were no rational reasons for differentiating between the temple property, the mission and the church: at [20].

1.121 According to s 5(3) of the Land Acquisition Act (Cap 152, 1985 Rev Ed), the notification that land is required for a specified purpose is "conclusive evidence" to that effect. The reason the temple land was acquired was because this property together with a nearby residential development were required for "the construction of Circle Line stage 3 & comprehensive redevelopment." However, from the affidavit of the Singapore Land Authority's ("SLA's") Mr Liew, it was evident from the attached plans that the temple land was acquired for comprehensive redevelopment while the other property mentioned was for constructing Stage 3 of the circle line: *Eng Foong Ho v AG* [2008] 3 SLR 437 at [21].

1.122 The affidavit from a planner in the Urban Redevelopment Authority indicated that the Government did not take special consideration of the different religious groups in relation to its comprehensive redevelopment plan. It acted impartially and objectively where a religious site was required for purposes of comprehensive redevelopment. In the case of the Mission properties, this was under consideration for conservation and the relevant buildings were eventually gazetted for conservation in 2006. As for the church site, this did not provide a reasonable opportunity for amalgamation as the state had no land adjoining the Church or immediately surrounding land. The court was not positioned to decide whether there were better plans for redeveloping any part of Singapore (*Eng Foong Ho v AG* [2008] 3 SLR 437 at [25]) and that the notification of acquisition of gazette under s 5(3) of the Land Acquisition Act (Cap 152, 1985 Rev Ed) was conclusive as to the purposes why the temple was required. Tan Lee Meng J noted that this was consistent with the rationale of the Act and the idea that the relevant government authority was best able to determine whether or not acquired land was necessary for a purpose stipulated in s 5(1) of the Act.

1.123 In addition, Tan Lee Meng J took note of other instances when the SLA had acquired churches and temples for comprehensive redevelopment in relation to the construction of the north-east MRT line even though these were zoned as places of worship (the plaintiffs had argued that the temple should have been so zoned): *Eng Foong Ho v AG* [2008] 3 SLR 437 at [27]. This case has been appealed and the High Court decision was upheld with respect to the finding that Art 12 of the Constitution of the Republic of Singapore (1999 Reprint) had not been violated as the decision to acquire the temple was solely based on planning considerations: see *Eng Foong Ho v AG* [2009] SGCA 1 which will be reviewed in the next issue.

Waiver of constitutional right?

1.124 The issue of whether a person's Art 9(3) right to counsel may be waived arose in the case of *Tan Chor Jin v PP* [2008] 4 SLR 306. This case related to an arms offence and the raising of the defence of accident under s 80 of the Penal Code (Cap 224, 1985 Rev Ed).

1.125 On appeal, counsel for Tan argued that the trial judge had summarily dismissed Tan's request for a lawyer towards the end of the trial, after the witnesses had been called and just before closing submissions. In not suggesting to Tan that he use state-assigned counsel to assist his closing submissions, Tan's counsel argued that, together with other facets of procedural fairness (not relevant to the constitutional question), a retrial was warranted.

1.126 As V K Rajah JA noted, Tan had confirmed at various stages of the legal proceedings, including the first day of trial, that he did not wish to have legal representation: *Tan Chor Jin v PP* [2008] 4 SLR 306 at [11] and [49]. The learned judge also noted the importance of the exchange between the judge at first instance and Tan in relation to Tan's request for a lawyer which was reproduced: at [50]. While the Court of Appeal was not, on the facts of the instant case, convinced that Tan was serious or clear in his alleged request for the lawyer, they considered it an important question to examine the issue of whether there could be situations where it would be unfair to refuse an accused who was voluntarily unrepresented access to counsel, where such absence in relation to an accused charged with a capital crime would "very often be a severe handicap": at [51].

1.127 The issue of whether the right to counsel could be "validly denied to or waived by" an accused (*Tan Chor Jin v PP* [2008] 4 SLR 306 ("*Tan Chor Jin*") at [53]) had not yet been judicially canvassed as the case law related to the question of when the right to counsel becomes available: *Tan Chor Jin*, at [53]. The court embarked upon an analysis of cases from foreign jurisdiction in order to elicit guidelines to thinking through the scope of this constitutional right, drawing from decisions from Malaysia, Jamaica, Canada and the United States. The starting point for the analysis was the assertion that the right to counsel was not absolute nor was it an "unwaivable right": *Tan Chor Jin*, at [54]. Furthermore, the judgment of Yong Pung How CJ in *Soong Hee Sin v PP* [2001] 2 SLR 253 was quoted with approval to the effect that the judicial role did not "suddenly" become "more arduous" had an accused been appointed a counsel by the state, as this would be to give an "unfair advantage" to the accused who do not consult their own lawyers, creating an "incentive" for accused persons not to instruct their own lawyers by allowing them to "depend on the judge for legal advice",

opening up the doors "to easy grounds for an appeal": *Tan Chor Jin*, at [53].

1.128 V K Rajah JA appeared to indicate that, in general, denying an accused his right to counsel would "almost invariably" be considered "unduly prejudicial" to the accused and, therefore, "unconstitutional". Thus, the gravity and likelihood of prejudice to the criminally accused was a pre-eminent but not determinative factor. On the facts of the present case, the "unique factual matrix" where Tan had "persistently indicated his desire not to have legal representation" and only attempted to invoke it at the eleventh hour, warranted a "balancing" approach as the right to counsel was not absolute. Thus, the denial of the right to counsel had to be considered not only from the viewpoint of prejudice to the accused but "also from the viewpoint of prejudice to the other interested parties (*eg*, the witnesses involved, the prosecution and the court itself): *Tan Chor Jin v PP* [2008] 4 SLR 306 at [55]. Thus, it appears that the guideline laid forth was that, in the general run of cases, denying an accused his right to counsel would *prima facie* be unconstitutional but where the accused is at fault in deliberately rejecting counsel or not being serious in invoking this right, a balancing approach was apt. The character of the right to counsel is, thus, cast more as a defeasible interest, even if it is treated as a presumptive trump.

1.129 An important consideration in assessing the contours of the qualified right to counsel was whether "any real prejudice and unfairness" was caused by denying the accused the right to counsel, including the counsel of his choice: *Tan Chor Jin v PP* [2008] 4 SLR 306 ("*Tan Chor Jin*") at [59]. From a reading of three Privy Council decisions from Jamaica (*Frank Robinson v R* [1985] 1 AC 956; *Errol Dunkley v R* [1995] 1 AC 419 and *Delroy Ricketts v R* [1998] 1 WLR 1016) and the Singapore case of *Balasundaram v PP* [1996] 2 SLR 331 (discussed in *Tan Chor Jin*, at [58]), the Court of Appeal identified two relevant factors. In considering whether the constitutional right to counsel has been violated where an accused had not been able to obtain legal representation or unable to appoint the lawyer of his choice, the court should consider "whether his invocation of such right was reasonable" and "whether the absence of legal representation was prejudicial to him in all the circumstances of the case": *Tan Chor Jin*, at [63].

1.130 The question V K Rajah JA posed was whether an accused person could extinguish his right to counsel by his conduct, such as by waiving this right. In this respect, "some interesting insights" were gleaned from a survey of Canadian and American cases: *Tan Chor Jin v PP* [2008] 4 SLR 306 ("*Tan Chor Jin*") at [64]. These cases seemed to indicate that the right to counsel could be waived by choice, but that rigid conditions had to be met before a court could find such a right was

waived. In short, the accused had to truly appreciate what was being given up; if the accused asserted this right, this would be indicative of a changed mind and the burden would fall on the Crown to establish an unequivocal waiver: *R v Prosper* [1994] 3 SCR 236 at 274–275 (cited in *Tan Chor Jin*, at [66]); *Clarkson v The Queen* [1986] 1 SCR 383 at 396 (cited in *Tan Chor Jin*, at [67]) and *Von Moltke v Gillies* 332 US 708 (1948) at 724 (cited in *Tan Chor Jin*, at [67]).

1.131 After surveying these decisions and noting that the North American cases had "come up with specific parameters to define what a valid waiver of the right to counsel entails", V K Rajah JA stated it was not at present necessary in the local context "to propound a specific test" as to when the right was waived or denied by or to an accused. The preference was to have a "more broad-based fact-centric approach" to the question, rather than a rights-protective one: *Tan Chor Jin v PP* [2008] 4 SLR 306 at [68].

1.132 This is consonant with a social value approach to the law as opposed to operating from the starting point of a Millian presumption of liberty which might treat a constitutional right as a trump (for a discussion of the "social value" of the law, see Peter Cane, "Taking Law Seriously: Starting Points of the Hart/Devlin Debate" (2006) 10 The Journal of Ethics 21). This is borne out by the fact that while focusing on the "universal concept of fairness to the accused", a "holistic" approach considering all relevant factors is preferred, rather than presumptively favouring or weighting one set of interests. Thus, what must be balanced is "the competing interests (if any) of other concerned parties, while maintaining at the same time the focus of whether any undue unfairness or prejudice has been caused to the accused as a result of his lack of legal representation": *Tan Chor Jin v PP* [2008] 4 SLR 306 at [68]. Rights are not ends in themselves but designed to facilitate certain objectives, such as a fair trial and the issue appears to have been cast in terms of: did the non-enjoyment of the right to counsel unduly prejudice Tan's case?

1.133 Applying this holistic approach to the case at hand, V K Rajah JA identified several relevant factors which undermined the view that Tan's right to counsel had been violated. Firstly, Tan himself had persistently refused legal representation throughout the proceedings. Further, the judge confirmed twice with Tan on the first trial day that Tan did not want a lawyer and had taken pains to ensure that Tan understood what had to be done at each point of the trial. In so doing, the judge had gone "beyond the norm in trying to ensure that Tan could follow the proceedings": *Tan Chor Jin v PP* [2008] 4 SLR 306 ("*Tan Chor Jin*") at [69]. Second, V K Rajah JA considered that allowing Tan to bring in a lawyer at this late stage would engender confusion *sans* genuine benefits and would be unfair to the prosecution which had

presented its case: *Tan Chor Jin*, at [70]. Furthermore, in calling in counsel at this stage, counsel would have done no more than prepare closing submissions; indeed, Tan's counsel Mr Anandan said he would not have sought leave to adduce further evidence or call other experts. Thus, the practical implications of allowing Tan to call in counsel would amount to no more than "the opportunity to have counsel make closing submissions on his behalf at trial": *Tan Chor Jin*, at [71]. This would not have made a "critical difference" for Tan and, thus, Rajah JA concluded that the court was "not at all persuaded that fairness to Tan had been compromised due to his lack of legal representation in the court below." He was, nonetheless, careful to emphasise that this was not to be read as a general rule as much depended on the facts of each case: *Tan Chor Jin*, at [72].

1.134 Aside from assessing the practical worth of enjoying a right to counsel at the late stage of a trial, another relevant factor to be considered in the holistic balancing process was the conduct of the accused and whether this had caused any unfairness or prejudice. Bluntly put, if Tan had been denied his Art 9(3) right to legal representation on the facts of the case, "it would have been his fault alone": *Tan Chor Jin v PP* [2008] 4 SLR 306 at [72]. Tan had not been denied a right to counsel and, indeed, was informed of this right from the outset and given several opportunities to engage or be assigned a lawyer. Thus, there was no miscarriage of justice as Tan had had adequate opportunity to obtain counsel such that on the case facts "it could not even begin to be said that Tan's constitutional rights to counsel had been violated": at [73].

Article 14 and political defamation

1.135 The issue of limits to the Art 14 guarantee of freedom of speech arose in relation to cases dealing with the tort of defamation and contempt of court, which are expressly identified under Art 14(2) of the Constitution of the Republic of Singapore (1999 Reprint) as permissible grounds of derogation authorising Parliament to enact restrictive laws it considers "necessary or expedient" to further the objectives underlying these grounds. In the case of political defamation and contempt of court, free speech interests are balanced against reputational interests, that is, the reputation of politicians and of the judiciary.

1.136 Singapore jurisprudence, thus far, does not recognise "political speech" as a special category nor has there been a sustained judicial examination of the value of political speech to a democratic society, which is a facet of the common good.

1.137 In *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642, the defendants were held to have defamed the plaintiffs, the Prime Minister Lee Hsien Loong ("LHL") and Minister Mentor Lee Kuan Yew ("LKY"), in an article published in their political party newsletter comparing them to the management of the National Kidney Foundation ("NKF"). This alleged that the plaintiffs were dishonest and unfit for office. The defendants were the Singapore Democratic Party ("SDP"); Chee Siok Chin ("CSC"), member of SDP Central Executive Committee; and Chee Soon Juan ("CSJ"), SDP Secretary-General. Summary judgment was allowed against CSC and CSJ, with damages to be assessed.

1.138 In assessing damages, a relevant factor was the gravity of the allegations made against the plaintiffs who were both "prominent public figures": *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [82]. Although Singapore defamation law treats both public and private figures alike in terms of protecting their reputational interests, instead of requiring public figures and politicians to be "thicker-skinned" in the interests of democratic debate, the "public figure" doctrine appears to apply in relation to assessing damages. That is, the fact that the defamed person is a public figure may eventuate in larger damages as a facet of publicly vindicating the said person.

1.139 In this case, Belinda Ang Saw Ean J in awarding damages noted that the libel entailed allegations against the plaintiffs which were "the gravest imaginable", touching the core of their "integrity, honour, courage, loyalty and achievements" (*Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [86]), as both plaintiffs were "prominent public figures". Thus, they had to be publicly vindicated to prevent the false allegations from causing enduring harm to their political reputation and moral authority as leaders: at [103]. In addition, malice was evident and the libel had been spread abroad through the SDP's website, reaching a very large segment of the English-speaking public and certainly the Internet-savvy community: at [108]. In addition, the manner in which CSJ and CSC conducted their "unbridled and offensive cross-examination" of the plaintiffs, bringing in political questions irrelevant to damage assessment, amounted to a using of the court "for the ulterior purpose of indicting the present political system in Singapore": at [140]. These were aggravating factors designed to humiliate and embarrass the plaintiffs.

1.140 In elaborating upon the importance of reputational interests, which placed limits on freedom of expression, Belinda Ang Saw Ean J noted that defamation law "presumes the good reputation of the plaintiff" which could be rebutted: *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [102]. She noted that every

individual has "a right to reputation" (at [102]) protected by defamation law:

> [T]he good reputation of an individual (meaning, his character), is of utmost importance to one's personal and professional life for human proclivity is such that people are apt to listen to those whom they trust.

1.141 Notably, more attention was given to expanding on the rationale behind reputational interests, which is a non-constitutional interest, as opposed to the constitutional guarantee of free expression. The learned judge even quoted Isocrates, a Greek rhetorician, who noted that "the stronger a man's desire to persuade his hearers, the more zealously will he strive to be honourable and to have the esteem of his fellow-citizens": *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [102].

1.142 Belinda Ang Saw Ean J identified the "gravity of the libel" as the most important factor in assessing injury to reputation and that the more serious the allegations against the plaintiffs, "the more the public is misinformed and the plaintiffs harmed since the allegations are not true": *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [148]. Thus, Belinda Ang J took into account "the position, standing and reputation of LHL and LKY" (at [149]) in deciding what quantum of damages was needed to vindicate their reputations. Damages were to serve the twin objectives of vindication for an injured reputation and consolation for the wrong done: at [150]. Eventually, LHL was granted $330,000 and LKY, $280,000: at [154].

1.143 In *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177, an article published in the *Far Eastern Economic Review* ("FEER") was allegedly defamatory of the Prime Minister Lee Hsien Loong ("LHL") and Minister Mentor Lee Kuan Yew ("LKY"). Woo Bih Li J found that the words in question did refer to LHL and LKY on the facts of the case, even if it was not possible to state definitively when a politician may sue for defamation when he is not expressly identified by the defamatory words: at [34]. Further, that the words were defamatory in meaning, both in their ordinary meanings and by implication, in so far as associations were drawn between LKY and the National Kidney Foundation (which had been revealed to be engaged in a financial scandal and had become a byword for corruption): at [85]. Both the defence of justification and fair comment were held to have failed.

1.144 The pleading of the two defences of public interest privilege and neutral reportage is of interest to the balance struck between the Art 14 guarantee of freedom of expression and the reputational interests protected by the law of defamation. Had the court recognised these defences, this would have entailed a shift towards according more weight

to the free speech side of the balancing equation, drawing from the theory that free speech promotes democracy.

1.145 The defendants pleaded the defence of public interest privilege on the basis that the article "was privileged because it served the public interest as a serious contribution to discussion of Singapore governance and politics, published reasonably and with editorial and journalistic responsibility": *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 at [166]. The article was written in the form of a "Profile" designed to introduce readers to a public figure using their own words. In this, the publication does not vouch for the truth of the interviewee nor is it an occasion for a right of reply, since this would be offered through the means of a letter to the editor in subsequent editions, pursuant to responsible journalism: at [166]. Public interest was engaged in relation to the issue of transparency in government, the role of libel suits in Singapore politics, *etc*.

1.146 It was further argued that free speech in Art 14(1)(*a*) of the Constitution of the Republic of Singapore (1999 Reprint) could only be limited by law and not by judge-made law or the common law. The defendants argued that the common law had in many advanced Commonwealth countries developed the public interest defence for responsible journalism, as developed in the House of Lords decision of *Jameel v Wall Street Journal Europe* [2007] AC 359: *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 at [167]. Thus, it was asserted that Parliament alone had the power to abolish any aspect of the common law of defamation but that the courts lack power to abolish or refuse "the public interest or neutral reportage privilege": at [168].

1.147 Woo Bih Li J found that this submission contradicted itself in so far as it stated that only Parliament could abate the common law on defamation. Article 14(2)(a) accepted that there were judge-made common law rules on defamation which would restrict freedom of speech as well. That is, the common law on defamation could be modified by either Parliament or later judicial decisions. Woo J stated it was for the courts "to say what the common law is or should be", rather than accept the defendant's pre-determination on this point. Further, Parliament could "abate or expand that common law": *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 at [170]. The defendants had urged that Singapore's common law should "follow that in other jurisdictions" (at [169]), presumably where a more rights-oriented approach accords greater weight to free speech rights.

1.148 The High Court did not revisit nor revise the common law of defamation as applicable in Singapore, stating this was settled by the Court of Appeal in *Joshua Benjamin Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310 where it stated that the Art 14 guarantee of free speech was

subject to the common law of defamation as modified by the Defamation Act (Cap 75, 1965 Ed). This Act was enacted on the understanding that it would be read against "the matrix of the common law". This reasoning assumes that the common law is static.

1.149 The defendants cited cases from other commonwealth jurisdictions, that is Australia (*Lange v Australian Broadcasting Corp* (1997) 145 ALR 96); England (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127) and New Zealand (*Lange v Atkinson* [2000] 3 NZLR 385). They urged Woo Bih Li J not to follow the decision of Belinda Ang Saw Ean J in *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 (13 October 2008) where she declined to follow *Reynolds* and the two *Lange* cases. Had these cases been considered, perhaps the Singapore courts would have given more attention to the role of free speech in sustaining a democratic society, which may have translated into the recognition of the need to accord free speech more protection to serve the common interest, through the recognition of new applications of the defence of qualified privilege. This is a route that the courts had, thus far, refused to travel, in implicitly valorising or prioritising the weight of reputational interests.

1.150 The Australian approach in *Lange v ABC* (1997) 145 ALR 96, discussed in *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [182]–[183], entailed adjusting the common law rules of defamation to conform to the requirements of the Commonwealth Constitution. From the constitutional system of representative government, an implied freedom to political communication was found, considered to be an indispensable part of the system. Unlike Art 14 of the Singapore Constitution which guarantees free speech, the Commonwealth Constitution has no bill of rights. In inferring an implied freedom to political communication from the structure of the Australian Constitution, the Australian High Court was affirming the importance of free speech to a system of representative democracy. Pursuant to the elevated protection of freedom of political communication in *Lange*, the defence of qualified privilege (which may not be available under the English common law) might be enjoyed by a publisher if the publisher had acted reasonably.

1.151 Counsel for the plaintiffs argued that *Lange v Australian Broadcasting Corp* (1997) 145 ALR 96 was influenced by s 22 of the Australian Defamation Act which required the publisher to act reasonably in publishing the material (which would include taking proper steps to ensure the accuracy of the material, seeking a response from the person defamed, *etc*) and the "Australian political and social model which Singapore has not adopted": *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 at [196]. Further, the requirements of the Australian and Singapore constitutions differed, especially since

Art 14(2) authorised Parliament to place limits on freedom of speech. With respect, counsel's arguments are hardly convincing. First, Singapore has an express guarantee of free speech; the Australian courts had to imply a freedom of political communication as this was integral to a system of representative government. Second, Singapore has adopted a system of representative democracy and the normative force of free speech as integral to the functioning of democracy is as compelling in Australia as it is in Singapore, regardless of their different conditions since their governments rest on the same democratic principles. That Art 14(2) authorises free speech to be limited is neither here nor there, as free speech is not absolute in the Australian context either.

1.152 The attempt to argue for a new generic category of qualified privilege based on subject matter, that is, political information, failed before the House of Lords in *Reynolds v Times Newspaper* [2001] 2 AC 127. The House of Lords preferred to adhere to the established common law test (the duty-interest analytical framework) of there being a duty to publish the material for the intended recipients and an interest in their receiving it. In deciding this, all relevant factors and circumstances were to be considered, including the nature, status and source of the material. This test, Lord Nicholls noted, was reasonably elastic to allow the court to give due weight to the importance of free expression by the media on all matters of public concern (not merely political information): *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 ("*Review Publishing*") at [185]. Lord Nicholls referred to the standard of responsible journalism and identified ten illustrative factors to be taken into account within the circumstances enquiry: *Review Publishing*, at [186]. The *Reynolds* defence appears to be that where the media behaved responsibly in relation to a defamatory publication whose content was "of importance and interest to the public, it will be protected *Review Publishing Co Ltd*, at [187]. Counsel for the plaintiffs noted that *Reynolds* was influenced by the jurisprudence of Art 10 of the European Convention of Human Rights and, following *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, which declined to follow a decision premised on Art 10, this sufficed to dispose of the *Reynolds* defence of responsible journalism in Singapore. Counsel also relied on Belinda Ang Saw Ean J's decision in *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675 to this effect. Without deciding the issue, Woo Bih Li J noted that whether or not *Reynolds* was influenced by Art 10 jurisprudence was not determinative of whether *Reynolds* should or should not apply in Singapore: *Review Publishing*, at [211]. This is correct as one should go beyond mere textual differences to the substantive idea behind the text. Furthermore, some consideration should go into the chilling effect of defamation law, particularly with "balancing" tests which produce some degree of uncertainty.

1.153 As far as the New Zealand approach was concerned, in *Lange v Atkinson* [1998] 3 NZLR 424 (CA); [2000] 3 NZLR 385 (PC), the Court of Appeal held that qualified privilege might avail with respect to a statement published generally where a "proper interest" existed in respect of statements concerning the actions or qualities of current or former or potential parliamentarians, in so far as these implicated their ability to discharge their public responsibilities: *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 ("*Review Publishing*") at [189]. The New Zealand Court of Appeal stated that there was no specific requirement of reasonableness and was influenced by the prevailing electoral system and s 19 of the Defamation Act 1992 (NZ) which prevented reliance on qualified privilege where the defendant was motivated by ill-will or took improper advantage of the occasion of publication: *Review Publishing*, at [190].

1.154 Counsel for the plaintiffs noted that the New Zealand Court of Appeal in *Lange v Atkinson* [1998] 3 NZLR 424 (CA); [2000] 3 NZLR 385 (PC) had pointed out the differences between the New Zealand electoral system and that of the English and Australian. Indeed, the Privy Council had pointed out the significance of local political and social conditions in *Lange v Atkinson* [2000] 3 NZLR 385 at 388, such as "the responsibility and vulnerability of the press". That is, the striking of a balance between free expression and reputation entails a value judgment.

1.155 However, there are certain facets with respect to New Zealand which might make the test it evolved suitable in the Singapore context, which were not discussed. Certain factors are worth identifying, even if in cursory fashion, as they may merit further study given the analogies that may be drawn with the local context in Singapore. First, New Zealand practises a form of parliamentary democracy based on universal suffrage which is responsible to Parliament and the electorate. Second, its electoral system "enables each voter to vote on an equal nationwide basis" for the party which the voter wishes to see in the legislature. So too, our Group Representation Constituency system is party-oriented (as opposed to general elections in the United Kingdoms which is still on a constituency by constituency basis). Third, New Zealand is a "small country" and the Government has a pervasive involvement in everyday national life; Singapore's social support system is heavily reliant on the central government, even if welfare schemes are mediated at the local level. Fourth, in relation to the media, the New Zealand Court of Appeal noted that "New Zealand has not encountered the worst excesses and irresponsibilities of the English national daily tabloids"; the responsibility and vulnerability of the press is contingent on press ethics, ownership structures and independence of the editorial function. There are differences, to be sure, such as the fact that New Zealand has freedom of information legislation. However, perhaps the

point of principle worth considering is that, in a small country which espouses representative democracy, what is central and warrants attention as a weighty factor is the constitutional right to participate in discussing and evaluating one's own political leaders (in *Reynolds v Times Newspaper* [2001] 2 AC 127 and *Lange v Australian Broadcasting Corp* (1997) 145 ALR 96, the plaintiffs were foreign politicians).

1.156 After discussing these cases from Australia, England and New Zealand (as well as the confusing Malaysian position), Woo Bih Li J noted that the differing circumstances in Australia and Zealand, their different legislation, *etc*, did not necessarily mean the tests there adopted should not apply in Singapore in and of itself. This is an important statement as what is central is the reasoning underlying the formulation of any judicial or legislative balance, as this may be transferable. However, he concluded that the doctrine of precedence bound him to adopt the same position as Belinda Ang Saw Ean J (in *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675) which the Court of Appeal endorsed: *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 at [221].

1.157 Woo Bih Li J considered the defence of "neutral reportage" where the publisher asserts that an article is a neutral report, merely articulating the political assertions of the defendant without endorsing or approving them: *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 ("*Review Publishing*") at [212]. This was articulated in various English cases, including *Jameel v Wall Street Journal Europe* [2007] AC 359 ("*Jameel*"): *Review Publishing*, at [214]. Rather than characterising neutral reportage as a qualified privilege, Lord Hoffman termed it a public interest defence: *Jameel v Wall Street Journal Europe* [2007] AC 359 at 381–383, cited in *Review Publishing*, at [216]. Two questions followed from this: first, whether the subject matter of the relevant article "is a matter of public interest", whereupon the duty-interest test was met. Second, whether the inclusion of a defamatory statement was justifiable. This imported in the responsible journalism test where the enquiry shifted to ascertaining "whether the steps taken to gather and publish the information were responsible and fair": *Review Publishing*, at [216]. Baronness Hale referred to the *Reynolds* defence (*Reynolds v Times Newspaper* [2001] 2 AC 127) as "a defence of publication in the public interest" (*Jameel*, at 408): *Review Publishing*, at [217]. To her mind, two conditions had to be met. First, there had to be a "real public interest in communicating and receiving the information." Second, the publisher must have acted like a responsible publisher in taking the steps to verify the information published.

1.158 In *Roberts v Gable* [2008] QB 502, Ward LJ said at [60]–[61] that the basis for justifying the *Reynolds* (*Reynolds v Times Newspaper* [2001] 2 AC 127) defence "is the public policy demand for there to be a

duty to impart the information and an interest in receiving it"; since the creation of a generic qualified privilege for political speech was rejected, so too the case for a generic qualified privilege for reportage had to be dismissed: *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 ("*Review Publishing*") at [218]). While the *Reynolds* test requires a publisher to take reasonable steps to verify the truth and accuracy of the publication, the reportage test has "no need" of taking steps to ensure the accuracy of published information: *Review Publishing*, at [218]. Reportage does not relate to the truth of a statement but the fact the statement was made (without adopting the truth of it).

1.159 Woo Bih Li J noted that the pre-*Reynolds* position was not to accord the media a special media common law privilege or more protection; media defendants like all other defendants had to show the relevant reciprocity of duty and interest which requires that it is in the public's interest that the publication be made; that qualified privilege did not arise merely because the information appeared to be of legitimate public interest: *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 ("*Review Publishing*") at [178]. The learned judge did recognise that there were occasions where special facts could give rise to a qualified privilege where the publisher has a legal, social or moral duty to communicate. However, the law "does not recognize an interest in the public strong enough to give rise generally to a duty to communicate in the press": *Aaron v Cheong Yip Seng* [1996] 1 SLR 623 at 651–652, quoted in *Review Publishing*, at [179]. This test to be satisfied was an "onerous one" as L P Thean JA noted in *Chen Cheng v Central Christian Church* [1999] 1 SLR 94 at 147, [63]. The types of cases where a defence of qualified privilege was established for newspaper publications on the basis of "special facts" generally related to extreme cases where the need to communicate a warning to the public was great, such as danger from suspected terrorists or the distribution of contaminated food or drugs: *Review Publishing*, at [180].

1.160 Prior to *Lange v Atkinson* [1998] 3 NZLR 424; [2000] 3 NZLR 385, a case not cited in *Chen Cheng v Central Christian Church* [1999] 1 SLR 94, the position in Singapore was that the defendant, in not alleging special facts, would not have succeeded on the defence of qualified privilege: *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 at [181].

1.161 Woo Bih Li J noted in closing that s 12 of Singapore's Defamation Act (Cap 75, 1985 Rev Ed) provided a qualified privilege for a newspaper in the absence of malice. Even if the scope of privilege should be extended, Woo J said courts should be "slow to extend such a privilege" as this "should be done by Parliament": *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR 177 at [226]. From this, it is unlikely that the courts will construe qualified privilege to give pre-

emptive weight to the duty to speak or publish and thereby to "read up" the importance of a constitutional free speech guarantee. Courts are likely to take the cue from Parliament in this context, where public reputation enjoys and is accorded primary value, both in terms of the degree of judicial protection it attracts and the size of damages awarded to compensate for injury to reputation. That is, legislative development rather than judicial resolution remains the preferred route.

Article 14 and contempt of court

1.162 There were also important decisions upholding Singapore's distinctive approach towards contempt of court as a limit to free expression, or more specifically, the common law offence of scandalising the court.

1.163 The particular brand of contempt that the defendants were charged with in *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 was contempt in the face of the court. The facts giving rise to the contempt were dealt with in great detail in the judgment of Belinda Ang Saw Ean J but the central point is that contrary to the judge's order, particularly in relation to putting irrelevant questions in cross-examining during the damage assessment hearing, the defendants had used the court "as a convenient theatre to air their political grievances and arouse political controversy and, under the guise of cross-examination, persisted in raising wide-ranging questions of high political content": at [156]. Further, in closing submissions, they had launched "a frontal attack against the Bench and Judiciary in general by accusing the court of bias and of prejudging the quantum of damages to be awarded to the Plaintiffs": at [157].

1.164 While a right of fair criticism (fair, temperate, made in good faith and not directed at the personal character of the judge or impartiality of the court: *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 ("*LHL v SDP*") at [173]) is recognised by Singapore law as being a public good (*per* Evatt J in *The King v Fletcher* (1935) 52 CLR 248 at 257–259, cited in *LHL v SDP*, at [173]). In this case, the defendants' "contemptuous disregard" for the judicial process and conduct in scandalising the court got them cited for contempt in the face of the court: *LHL v SDP*, at [167]). This exceeded a "fair criticism of a judge's decision made in good faith": *LHL v SDP*, at [211]). Belinda Ang Saw Ean J underscored that, if left unchecked, knowledge by the public of such behaviour as that of the defendants would undermine public confidence in the judiciary and the administration of justice. This would diminish the authority of the court and lead to "would-be contemnors flouting court orders with impunity": *LHL v SDP*, at [219]. Furthermore, such attacks "in a small country like Singapore has the

inevitable effect of undermining the confidence of the public in the Judiciary, and, if confidence in the Judiciary is shattered, the due administration of justice inevitably suffers": *LHL v SDP*, at [219].

1.165 The "inherent tendency" test in relation to the words complained of in undermining the impartial administration of justice was affirmed (*Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [174]) and the conditions for summary process for contempt clarified.

1.166 The summary process, initiated by the court, was not limited to cases where it was necessary to preserve the integrity of an ongoing trial or a trial which was about to begin: *Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR 642 at [186]–[193]. In addition, "following incidents of intemperate and obstreperous behaviour by a person in court" (at [194]), a judge is entitled to defer till a later date the issue of whether there has been contempt and the appropriate punishment warranted. There is also no requirement to give a "prior warning to the contemnor" before invoking power to punish for contempt of court (at [197]). Imprisonment sentences were imposed (at [222]–[223]) given the gravity of the defendants' conduct.

1.167 Indeed, in the case of *AG v Hertzberg Daniel* [2008] SGHC 218 ("*Hertzberg*"), the High Court upheld the requirement that the words complained of merely had to have the "inherent tendency" of undermining public confidence in the administration of justice. What was at issue in *Hertzberg* were articles and letters published by the Wall Street Journal Asia ("WSJA") containing passages that scandalised the Singapore judiciary. Here, although the more liberal "real risk" test was rejected, Tay Yong Kwang J was of the opinion that, applied to the facts of the case, it would have been satisfied. It had been argued that the real risk formulation "was clearer and would strike a more appropriate balance between protecting the institution of an independent judiciary and the right of freedom of expression." Further, that the tendency test was "imprecise and unclear, as well as too broad", as observed by the New South Wales Law Reform Commission Report on Contempt by Publication (Report No 100): at [17]. This could have the deleterious effect of "chilling" speech critical of the judiciary, which plays an important role in a democratic society in relation to public debate of matters relating to public officials.

1.168 Tay Yong Kwang J, noting the ancient origins of contempt of court, emphasises that its function was not to protect the dignity of courts or judges but the administration of justice (*AG v Hertzberg Daniel* [2008] SGHC 218 at [19]), which was integral to "the maintenance of law and order in any civilised society": at [20]. To the extent that this purpose is served, the law of contempt was considered

"a justifiable restriction on the right to freedom of speech" in various jurisdictions: at [21].

1.169 This, of course, does not speak to where to strike the balance between free speech and contempt law, although Singapore courts have consistently upheld the constitutionality of the common law of contempt, which is a permissible ground of derogation under Art 14(2) of the Constitution of the Republic of Singapore (1999 Reprint), following *AG v Wain* [1991] SLR 383. In not departing from prior cases, Tay Yong Kwang J stated that care had to be taken to distinguish the law of contempt (protecting the public interest in the administration of justice) and the law of defamation (protecting a private individual's reputation) which served disparate purposes and "be circumspect" between drawing parallels between them, particularly in attempting to import defamation defences like fair comment and justification into the law of contempt: *AG v Hertzberg Daniel* [2008] SGHC 218 ("*Hertzberg*") at [23]. Effectively, to import defamation associated defences like fair comment was thought to provide too little protection for judicial integrity. Fair comment as a defence to contemptuous remarks would "expose the integrity of the courts to unwarranted attacks, bearing in mind that a belief published in good faith and not for an ulterior motive can amount to 'fair comment' even though the belief in question was not reasonable": see *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, cited by Lai Siu Chiu J in *AG v Chee Soon Juan* [2006] 2 SLR 650 at [45]–[47], cited in *Hertzberg*, at [23].

1.170 In Singapore the offence of "scandalizing the court" is one of strict liability, such that any publication alleging bias, impartiality, impropriety or wrongdoing concerning a judge in exercising his judicial function *ipso facto* falls within the offence: *AG v Hertzberg Daniel* [2008] SGHC 218 ("*Hertzberg*") at [27]. Tay Yong Kwang J rejected the real risk test and affirmed the inherent tendency test. He further rejected counsel's submission that "inherent tendency" should be read to mean not just the presence of a real risk of interference, but "a real and grave one", following the case of *Re Application of Lau Swee Soong* [1965–1968] SLR 661. This is because this case dealt not with scandalising the court but with another form of contempt known as *sub judice* contempt: *Hertzberg*, at [29].

1.171 Tay Yong Kwang J described "inherent tendency" to interfere with the administration of justice as "simply one that conveys to an average reasonable reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function": *AG v Hertzberg Daniel* [2008] SGHC 218 at [31].

1.172 While noting that the "real risk" test was one preferred by many common law countries, Tay Yong Kwang J did not consider that

Singapore should depart from the "inherent tendency" test. He identified the "main reason" for adopting the "real risk" test as "the need to protect the right to freedom of speech and expression", as the "inherent tendency" test was considered to inhibit free speech "to an unjustifiable degree": *AG v Hertzberg Daniel* [2008] SGHC 218 at [32]. This is an important point meriting sustained examination.

1.173 The learned judge distinguished the Singapore approach by placing primacy on the idea of local conditions, agreeing with the Attorney-General that the balance struck between contempt law and free speech varied from place to place and depended on "the local conditions" (citing *McLeod v St Aubyn* [1899] AC 549, without going into the rationale for allowing contempt on small islands which may be more than a little offensive): *AG v Hertzberg Daniel* [2008] SGHC 218 ("*Hertzberg*") at [33]. Two central local conditions were "conditions unique to Singapore" as Lai Siu Chiu J in *AG v Chee Soon Juan* [2006] 2 SLR 650 at [25]–[27] (cited in *Hertzberg*, at [33]) pointed out. First, the small geographical size of Singapore and second, that judges in Singapore are both triers of fact and law. Presumably, these two factors are to be read conjunctively. These factors necessitated that "we deal more firmly with attacks on the integrity and impartiality of our courts": *Hertzberg*, at [33].

1.174 However, the fact that judges are charged with greater responsibility as triers of law and fact may also equally entail that they should be held to greater account and that greater protection should be accorded to free expression and the defence of fair criticism to serve this end, in the interests of judicial accountability which is also a common good. It is also not self-evident why the small geographical size of an island should affect contempt law and it is hoped that future cases will provide insight into this point. Indeed, the Mauritian case of *Ahnee v DPP* [1999] 2 AC 294 was cited by Lai Siu Chiu J in *AG v Chee Soon Juan* [2006] 2 SLR 650 at [25] to support the view that:

> Conditions unique to Singapore necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts. To begin with, the geographical size of Singapore renders its courts more susceptible to unjustified attacks.

1.175 The words of the Privy Council in *Ahnee v DPP* [1999] 2 AC 294 at 305–306 were cited with approval:

> In England [proceedings for scandalising the court] are rare and none has been successfully brought for more than 60 years. But it is permissible to take into account that on a small island such as Mauritius, the administration of justice is more vulnerable than in the United Kingdom. *The need for the offence of scandalising the court on a small island is greater* … [emphasis added]

1.176 Notably, Mauritius still has jury trials.

1.177 However, while *Ahnee v DPP* [1999] 2 AC 294 may be cited as a proposition for arguing that there is a greater need for the offence of scandalising the court on small islands, what is worthy of note is that even in a small island like Mauritius, the applicable test was that of "real risk", as Tay Yong Kwang J noted in *AG v Hertzberg Daniel* [2008] SGHC 218 at [32]. This appreciates the value of free speech in democratic societies as being a factor appropriate to a small island. It may be noted for present purposes that if insufficient protection is given to free speech by broad contempt laws, speech critical of the judiciary may be chilled, which would be a loss to the public good. Much depends on the scope of the defence of fair criticism, though it is urged that the "inherent tendency" test be re-examined to ensure that a generous interpretation is given to ensure that citizens fully enjoy the constitutional guarantee of free speech, which is integral to any representative democracy.

1.178 For now, the courts seem to place primary social value on the importance of judicial reputation in the interests of the administration of justice, independent of the question of whether the public is liable to believe a potentially contemptuous statement or the ability of the judiciary to withstand criticism, given its sterling reputation. The prioritisation of institutional reputation is particularly evident in the continued championing of the "inherent tendency" test, particularly, the argument that it has the advantage that it "does not call for detailed proof" of what is often beyond proof, that is, that words will undermine public confidence in the administration of justice. The "real risk" test would require some evidence, more than "a remote possibility of harm": *AG v Hertzberg Daniel* [2008] SGHC 218 at [34]. Second, the "inherent tendency" test enables the court "to step in before the damage" is done: at [33]. The danger of a court acting pre-emptively on a speculative basis, however, warrants careful evaluation, particularly in relation to how this test bears the potential of chilling speech unduly.

1.179 Tay Yong Kwang J preferred to confine the issue of whether there was a "real risk" that words would impair public confidence in the administration of justice not to the question of liability, but in relation to "mitigation or aggravation of the punishment (or even whether the punishment should be imposed in a particular case at all)": *AG v Hertzberg Daniel* [2008] SGHC 218 at [34].

1.180 What is clear from the case law is that in Singapore, "respect for established institutions remains an important social value" and often appears to be given determinative weight in the constitutional balancing process.