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28. TORT LAW

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I. Introduction

28.1 2021 turned out to be a relatively calm year for tort law. There was a noticeable increase in the economic tort claims, especially for the torts of conspiracy and fraud. This review examines the ten most significant decisions handed by the High Court and the Court of Appeal in 2021. They cover areas including negligence, fraud, conspiracy, defamation and vicarious liability.

II. Negligence

A. Duty of care

28.2 *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd*[1] ("*Tan Woo Thian*") was an appeal from the High Court judgment in *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd*,[2] which was reviewed in detail in the previous Annual Review.[3] For convenience, the summary of facts is reproduced here. The plaintiff, a former director and chief executive officer ("CEO") of SBI Offshore Limited ("SBI"), sued the defendant engaged by SBI to conduct a fact-finding review of certain impugned transactions involving the plaintiff. SBI had acquired a 35% stake in another entity, Jiangyin Neptune Marine Appliance Co Ltd ("NPT"), which was 65% owned by Jiangyin Wanjia Yacht Co Ltd ("Wanjia"). Two acquisition equity transfer agreements ("ETAs") were entered into. The first was signed by the former CEO and the second by both the former CEO and the plaintiff. Both ETAs related

1 [2021] 1 SLR 1166.
2 [2021] 3 SLR 823.
3 (2020) 21 SAL Ann Rev 824 at 824–828, paras 28.2–28.10.

to the same transaction, but there was a discrepancy: the first ETA stated that the consideration was US$1.75m while the second ETA stated that it was US$350,000.

28.3 When SBI was listed on the Singapore Stock Exchange Securities Trading Ltd ("SGX-ST"), its 35% stake in NPT was disclosed as US$1.75m in SBI's offer document. Subsequently, SBI entered into an agreement to dispose of its 35% stake in NPT. Again, two ETAs were entered into for the disposal. The first was to dispose the stake at the price of US$3.5m to Hua Hanshou ("Hua"), the father of Ollie Hua, a representative of NPT who had advised the plaintiff on SBI's acquisition of the 35% stake. The purchaser insisted that the purchase price be paid in two halves, with US$1.75m paid out of Hong Kong and US$1.75m paid out of the People's Republic of China ("PRC"). Ollie Hua then advised SBI that the PRC tax for the transaction would be calculated on the basis of a capital gain of US$1.4m, which was the difference between US$1.75m (purchase price paid out of the PRC) and US$350,000 (price stipulated in the second acquisition ETA). SBI's chief financial officer responded, stating that the correct figures were US$3.5m for the disposal and US$1.75m for the acquisition, giving a capital gain of US$1.75m to be taxed.

28.4 Subsequently, Hua proposed to the plaintiff that a second disposal ETA be executed between SBI and Wanjia for the transfer of the 35% stake in NPT to Wanjia for the sum of US$1.75m. Hua claimed that this was necessary due to Chinese laws prohibiting ownership of joint ventures and to account for the US$1.75m paid out of the PRC. The plaintiff brought this proposal to the SBI board, which rejected it. The plaintiff nevertheless went ahead and signed it on behalf of SBI. Meanwhile, SBI approved a novation agreement to replace Hua with Wanjia as the purchaser of the 35% stake.

28.5 SBI then appointed the defendant to review the acquisition and disposal of its 35% stake in NPT and to investigate allegations against another party (irrelevant to the negligence action by the plaintiff). Following its review, the defendant made several factual findings and noted that the conflicting acquisition ETAs meant SBI could have violated the Securities and Futures Act[4] ("SFA") and the SGX-ST Catalist Rules ("CR") or Chinese tax laws. The disposal ETAs were equally problematic, exposing SBI to potential violations of the SFA and CR or having ETAs that were not valid as they were not approved by the board. SBI sought legal advice and subsequently lodged a report with the Commercial Affairs Division ("CAD") of the Singapore Police Force. The CAD investigated and dismissed the matter. Based on its legal advisers' findings, SBI made

4 Cap 289, 2006 Rev Ed.

an announcement stating that it potentially faced a tax levy risk, and that the plaintiff and another individual had committed breaches of statutory duties and obligations to SBI.

28.6 The plaintiff sued the defendant in negligence, claiming for loss of employment with SBI, loss of business reputation, deterioration of the value of his shares in SBI, and emotional and psychological trauma. See Kee Oon J dismissed the action, holding that the plaintiff had failed to prove duty, breach or causation of damage. The appeal was dismissed by the Court of Appeal. Sundaresh Menon CJ, in an *ex tempore* judgment, held that the case was doomed to fail as the appellant had not provided evidence to show that that the defendant's negligence had caused the appellant loss.

28.7 Although the trial was bifurcated and restricted to the question of liability, Menon CJ emphasised that the appellant nonetheless had to establish all elements of negligence – duty, breach and causation of damage that is not too remote. While there was no need for the appellant to provide evidence as to "the quantification of the losses and injuries",[5] there had to be evidence showing that damage was caused by the defendant's negligence. The appellant had merely listed the heads of damage he intended to claim, leaving the particulars to be set out at assessment. No evidence was placed before the court to show that the appellant had indeed suffered the alleged losses or that the respondent had caused them.

28.8 Having dismissed the appeal on causation, Menon CJ went on to offer some observations on whether a duty of care ought to be found in cases where "a professional party (the 'professional fact-finder') contracting with a client to carry out an investigation or a fact-finding exercise into the actions of a third party owes that third party a duty of care".[6] Referring to the duty of care test in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[7] ("*Spandeck*"), Menon CJ noted that factual foreseeability was satisfied as the respondent would have foreseen that the appellant who was the subject of its report might suffer economic loss or reputational harm if the report were negligently prepared and made adverse findings against the appellant.

5 *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] 1 SLR 1166 at [8].

6 *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] 1 SLR 1166 at [14].

7 [2007] 4 SLR(R) 100.

28.9 The difficult questions were whether there was sufficient proximity between the parties and whether there were any policy considerations that would weigh on the existence and scope of any duty. Menon CJ set out three arguments in favour and three arguments against a duty. The main argument against a duty was the risk of conflict with the respondent's contractual duty to its client. The respondent was engaged to carry out a fact-finding exercise, which included investigating into the appellant's conduct. Thus, a tortious duty owed to the appellant could conflict with the contractual duty owed to the respondent's client. Secondly, the appellant had other avenues for redress; for example, he could bring an action in defamation for loss of reputation or lodge a professional misconduct complaint against the respondent. Thirdly, imposing a duty of care on fact-finders might have a chilling effect on, or raise the costs of, fact-finding exercises.

28.10 On the other hand, there were countervailing arguments in favour of a duty. Most significantly, there was causal and circumstantial proximity. Causal proximity was established as the respondent's negligence directly affected the appellant. Circumstantial proximity existed as the respondent was privy to personal information of the appellant and knew that the appellant as an individual would be affected if the report were negligently prepared. Secondly, while there was a possibility of conflict, courts have long recognised co-existing tortious and contractual duties.[8] Thirdly, the existence of alternative causes of action does not preclude an action in negligence.

28.11 The Court of Appeal's judgment in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd*[9] provides an example of the third argument. The claimant's former employer provided a negligently prepared reference to the claimant's prospective employer, causing him reputational and economic harm. The court held that a duty in negligence could be found even when the claimant had recourse to the tort of defamation. Menon CJ noted that a failure to recognise a duty of care in some cases could create "a legal 'black hole'",[10] leaving the claimant with no remedy at all. Nonetheless, these observations were made by way of *obiter*, and Menon CJ stressed that the existence and scope of a duty in such cases remained an open question.

8 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559.

9 [2016] 4 SLR 1124.

10 *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] 1 SLR 1166 at [18(c)].

B. Medical negligence

28.12 *Foo Chee Boon Edward v Seto Wei Meng*[11] ("*Seto Wei Meng*") involved a claim by the deceased's estate and dependants against the appellant doctor. The High Court judgment in *Seto Wei Meng v Foo Chee Boon Edward*[12] was discussed in detail in the previous Annual Review.[13] The deceased died following a liposuction and fat transfer procedure in 2013. She had two prior liposuction procedures (in 2010 and 2011). Based on the evidence, the deceased had suffered a pulmonary fat embolism which resulted in her death. It was argued at trial that the deceased had suffered from fulminant fat embolism syndrome ("FFES"), which was much rarer than ordinary fat embolism and more likely to be fatal.

28.13 The respondents alleged that the appellant had negligently failed to advise the deceased on the risks and complications of the procedure, including the fact that the risks were higher in repeat procedures, which was the case with the deceased. The respondents further alleged that the appellant had been negligent in conducting the procedure by negligently injecting fat directly into the vein. Finally, the respondents alleged that the appellant was negligent in the post-operative management and care of the deceased, namely by failing to recognise the symptoms in a timely manner and calling for an ambulance urgently. The deceased exhibited symptoms at 2.05pm with her oxygen saturation level falling to dangerous levels, but the appellant did not call for an ambulance until 2.53pm, about 45 minutes later. The delay was because the appellant and other doctors who were called to assist attempted to raise her blood oxygen level while trying to diagnose the cause of the problem.

28.14 The Court of Appeal dismissed the appeal based on the third ground, namely the delay in calling for an ambulance. The court found that the appellant had not considered that the deceased was suffering from complications due to fat embolism and unnecessarily delayed calling the ambulance while trying to diagnose the deceased's condition and making futile attempts to restore her oxygen levels when the clinic did not have appropriate medical equipment to do so. Having found negligence, the court did not go on to consider the other two grounds of negligence, namely failure to advise and negligent performance of the procedure.

28.15 The critical issue was whether the appellant's negligent mismanagement had caused the death of the deceased. If there were evidence that the appellant had negligently injected fat directly into the

11 [2021] 2 SLR 1239.
12 [2020] SGHC 260.
13 (2020) 21 SAL Ann Rev 824 at 828–832, paras 28.11–28.17.

deceased's vein, the appellant would clearly be causally responsible for the death. However, that was not the question at issue. The issue was whether the delay in calling for an ambulance had caused the death. The appellant's argument was that victims of FFES nearly always died and that even if an ambulance had been called at 2.05pm, the deceased would already be doomed.[14] The court rejected the appellant's theory. Reviewing the evidence and expert testimony, the court concluded that FFES was not always fatal and that timely discovery and treatment "would have made a difference to the outcome".[15] The medical literature and the experts' testimony suggested that most patients suffering from pulmonary fat embolism would recover with timely treatment. Therefore, had the appellant called the ambulance in time, the deceased would likely have survived. Thus, causation was established.

28.16 This finding was strongly influenced by the court's rejection of the appellant's case theory on causation. However, that was not the sole basis for the court's conclusion, which was arrived at on the totality of the evidence, including the appellant's own expert who noted that "earlier access to full circulatory and respiratory support for the Deceased would have made a difference to the outcome".[16] A similar approach was seen in *O'Connor v The Pennine Acute Hospitals NHS Trust*[17] where the court upheld the trial judge's finding on causation noting that the judge "treated the absence of any other plausible explanation as supporting his conclusion, not as providing the sole basis for that conclusion".[18]

28.17 However, it bears noting that the respondents had not actually proved that the death was caused by the appellant's negligence. What could fairly be said was that the appellant's negligence had increased the risk of the adverse outcome, which in fact materialised. Menon CJ's comments on the burden of proof may give rise to questions whether the burden may be reversed in such cases:[19]

> It is normally incumbent on the plaintiff to prove causation and this may often not be difficult or even contested. But here it is Dr Foo who mounts an affirmative case that, even if he was in breach of his duty as we have found, there would be no causation because she was suffering from FFES. In short, it is his affirmative case that a patient with FFES was bound to die … We reiterate that it is incumbent on Dr Foo to make good this assertion because it is his positive case that this was so.

14 *Cf Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.
15 *Foo Chee Boon Edward v Seto Wei Meng* [2021] 2 SLR 1239 at [35].
16 *Foo Chee Boon Edward v Seto Wei Meng* [2021] 2 SLR 1239 at [37].
17 [2015] EWCA Civ 1244.
18 *O'Connor v The Pennine Acute Hospitals NHS Trust* [2015] EWCA Civ 1244 at [83].
19 *Foo Chee Boon Edward v Seto Wei Meng* [2021] 2 SLR 1239 at [25].

28.18 *Seto Wei Meng* resonates with an earlier medical negligence decision where a similar approach was taken to causation. In *Surender Singh s/o Jagdish Singh v Li Man Kay*[20] ("*Surender*"), the deceased underwent surgery to remove her kidney, which was to be donated to her husband. Post-surgery, one of the clips holding the blood vessel slipped, resulting in internal bleeding from which she died. Actions were brought against the surgeons for negligent advice and performance of the surgery, and against the National University Hospital ("NUH") for negligence in post-operative care. It was alleged that the NUH nurse had negligently failed to monitor the deceased. Lai Siu Chiu J applied s 108 of the Evidence Act,[21] which provided: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." Thus, the burden was on NUH to prove that the deceased had been properly monitored.

28.19 Next, the issue was whether the negligence had caused the death. NUH argued that the haemorrhaging in such cases would have been swift and even timely monitoring would not have prevented the death. As the evidence was inconclusive, Lai J applied *McGhee v National Coal Board*,[22] holding that as NUH's failure to monitor the deceased had increased the risk of death, that was sufficient to attribute causal responsibility to NUH.[23] Taking *Seto Wei Meng* and *Surender* together, it appears that the courts are open to a more flexible approach to causation in medical negligence cases where circumstances justify it.

C. Misrepresentation

28.20 The plaintiff in *Tonny Permana v One Tree Capital Management Pte Ltd*[24] was an investor who had dealt with the first defendant, One Tree Capital Management Pte Ltd, on an investment project in a Malaysian shopping mall project undertaken by Midas Landmark Sdn Bhd ("Midas"). The promoters of the project approached the second defendant, the director and sole shareholder of the first defendant, to raise funds for the project. The defendants then approached the plaintiff, who invested US$1.6m which was secured by a convertible loan note. Subsequently, and without the plaintiff's knowledge, the first defendant entered into an agreement with the project's promoters to purchase shares in Midas. The defendant then restructured the plaintiff's investment, converting it to a shareholder's loan with the first defendant holding the loan on trust

20 [2010] 1 SLR 428.
21 Cap 97, 1997 Rev Ed.
22 [1973] 1 WLR 1.
23 *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428 at [240].
24 [2021] 5 SLR 477.

for the plaintiff. The plaintiff signed the trust deed based on the written information that was provided, as well as on certain representations made over the phone by the first defendant. The project eventually failed, and Midas was wound up. The liquidator rejected the first defendant's proof of debt, which included the plaintiff's investment.

28.21 The plaintiff sought to recover the investment loss, alleging that the defendants' unilateral restructuring of the investment was wrongful, constituting "(a) fraudulent misrepresentation; (b) misrepresentation under the Misrepresentation Act (Cap 390, 1994 Rev Ed) ('Misrepresentation Act'); (c) a breach of fiduciary duties; (d) a breach of 'duties as agent'; (e) negligence; and/or (f) dishonest assistance".[25] The allegation of dishonest assistance was against the second defendant only. Chan Seng Onn J found against the plaintiff in a detailed judgment on agency liability, observing that it engaged the law of contract, tort, equity and trust. This review focuses on the tort aspects of the judgment.

28.22 It is axiomatic that agents owe their clients a duty to "act reasonably and to render advice diligently".[26] Duties in tort can co-exist with contractual duties as long as they are not in conflict. Here, the main document establishing the agency relationship, the "Form of Agency and Security Trust Deed" ("ASTD") clearly contemplated liability in negligence.[27] The common law duty arose when the defendants began advising the plaintiff on the project and continued through the insolvency of Midas.

28.23 The plaintiff's claims under the common law of fraudulent misrepresentation and the Misrepresentation Act[28] were dismissed as the alleged representations were not statements of fact but statements of intention or opinion.[29] The first representation was that the mall could be liquidated to repay shareholders if necessary. This was a prospective statement and, in any event, was not false. The second representation was that the second defendant had requested for a three-month extension on the maturity date of the plaintiff's investment with the assurance that interest would continue to be paid. This too was a predictive statement pertaining to a future event.

25 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [5].
26 *Tonny Pernama v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [171].
27 *Tonny Pernama v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [171].
28 Cap 390, 1994 Rev Ed.
29 Gill J referred to *Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [21]; *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [93]; and *Zuraimi bin Mohamed Dahlan v Zulkarnine B Hafiz* [2020] SGHC 219 at [51]–[52].

28.24 On the negligence claim, while there was a duty of care owed, Chan J found that it had not been breached. Referring to *The Law of Agency*,[30] citing *Bolam v Friern Hospital Management Committee*[31] ("*Bolam*"), Chan J held that "the standard of care is whether the agent made an error that no reasonably competent member of the profession would have made".[32] Chan J supported this by implicitly endorsing *Maynard v West Midlands Regional Health Authority*[33] ("*Maynard*"). This aspect of Chan J's reasoning should be read cautiously. Both the cases involve medical negligence which has idiosyncratic features affecting the standard of care. Further, *Maynard* represents the high watermark of the *Bolam* principle where even one expert could be seen as setting professional standards. Perhaps it would have been better to have referred to the Court of Appeal's decision in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong*[34] where the court explained the professional negligence standard, applying *Bolam* and *Bolitho v City and Hackney Health Authority*.[35]

D. Contributory negligence

28.25 *Ng Li Ning v Ting Jun Heng*[36] was a Court of Appeal decision on contributory negligence. While it did not involve any significant point of principle, the case is worth noting as the court provided some guidance on the use of the *Motor Accident Guide*[37] ("MAG") and "Motor Accident Claims Online" ("MACO") assessment tools.[38] It would appear that the motivation behind this appeal was to persuade the court to establish a precedent that would favour motor vehicle insurers. As the court noted, the appellant's submissions expressly stated that one of its aims was to have certainty in the application of the MAG and MACO and to reaffirm the "the established position on liability with respect to the Discretionary Right Turn Scenario",[39] which would have resulted in a lower payout.

30 Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) at para 07.014.
31 [1957] 1 WLR 582.
32 *Tonny Pernama v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [233].
33 [1984] 1 WLR 634.
34 [2007] 4 SLR(R) 460 at [49]–[53].
35 [1998] AC 232.
36 [2021] 2 SLR 1267.
37 State Courts, *Motor Accident Guide: A Guide on the Assessment of Liability in Motor Accident Cases* (Mighty Minds Publishing, 2nd Ed, 2016).
38 It is a timely decision as the new tools are currently being rolled. See Clement Yong, "How Much Can I Claim? Traffic Accident Claims Simulator Launched to Help Motorists Settle Out of Court" *The Straits Times* (21 March 2022).
39 *Ng Li Ning v Ting Jun Heng* [2021] 2 SLR 1267 at [17].

28.26 The facts were that the second respondent, who was driving a taxi, stopped at the junction of Commonwealth Avenue West and Clementi Road, waiting to turn right from Commonwealth Avenue West into Clementi Road. Although the green right arrow had not come on, the green light was on, which permitted the second respondent to make a right turn if it were safe to do so. A van on the left of the second respondent moved forward and entered the junction to turn into Clementi Road. The second respondent followed. The appellant was driving from the opposite direction on Commonwealth Avenue West at high speed. The taxi was hidden from the appellant's view as it was behind the van. Instead of slowing down, the appellant maintained his speed, judging that the van would move out of his way in time. While he narrowly missed the van, he collided head-on into the taxi, which was behind the van. Although the taxi was not visible, the court noted that "any reasonable driver in the appellant's situation would have anticipated that there could be other turning vehicles as well even if he could not see them directly".[40]

28.27 The trial judge apportioned liability at 65% against the second respondent and 35% against the appellant. Referring to the MAG and MACO, the appellant argued that he should bear only 20% to 25% of the liability. The Court of Appeal disagreed, reaffirming that the MAG and MACO were meant to provide estimates in standard situations only, and that each case had to be assessed on its own facts. Here, the appellant had driven at a reckless speed, failed to slow down even though a vehicle had substantially crossed the road in front of him, and failed to anticipate the possibility of another vehicle following it, a not unlikely scenario at a large multi-lane junction. The trial judge's apportionment was upheld.

E. Vicarious liability

28.28 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd*[41] ("*Munshi Mohammad Faiz*") involved a workplace incident where an employee was injured due to the negligence of a co-worker. The significance of the decision lies in its application of vicarious liability principles in cases involving multiple employers of the employee whose negligence gives rise to the claim. The main contractor of a project ("the second defendant") engaged a subcontractor ("the first defendant") to carry out general construction works. The first defendant engaged the third defendant to supply an excavator and operator. The operator was to work under the direction and supervision of the first defendant's onsite supervisor. On the day of the incident, the supervisor had instructed the claimant to direct the operator to stop excavation so the supervisor could

40 *Ng Li Ning v Ting Jun Heng* [2021] 2 SLR 1267 at [26].
41 [2021] 4 SLR 1371.

inspect the excavated pit. The supervisor then instructed the claimant to fetch a spade in order to move some of the dirt. The claimant walked near the excavator, which moved and pinned him, causing injury.

28.29 The District Court found that the supervisor had not acted negligently, and Dedar Singh Gill J upheld that finding. The excavator operator was found negligent and the District Judge found the first and second defendants vicariously liable. Gill J reviewed the law on vicarious liability, including the principles governing borrowed employees and the possibility of holding multiple employers vicariously liable for the tort of a single employee. He noted that the authoritative statement on the general principles of vicarious liability was to be found in *Ng Huat Seng v Munib Mohammad Madni*[42] ("*Ng Huat Seng*"), which set out two specific stages of inquiry: the nature of the relationship between the defendant and the tortfeasor; and the close connection between that relationship and the tort.

28.30 Referring to *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*[43] ("*Viasystems*") and *Chen Qiangshi v Hong Fei CDT Construction Pte Ltd*[44] ("*Chen Qiangshi*"), Gill J noted that there was authority for dual vicarious liability. Applying *Ng Huat Seng*, Gill J held that there was no connection between the second defendant and the tortfeasor; thus, the second defendant's appeal was successful. The first defendant was found to have considerable control over the operator as he was subject to the control and direction of the first defendant's supervisor. The third defendant was the operator's general employer and had not relinquished general control over the operator. Thus, both the first and third defendants were found vicariously liable.

28.31 The significance of *Munshi Mohammad Faiz*[45] is that, while *Chen Qiangshi* had approved of dual vicarious liability, the comments were strictly *obiter*. Thus, *Munshi Mohammad Faiz* is the authority for the application of dual vicarious liability. Gill J noted the slightly divergent views of May and Rix JJ in *Viasystems*, with the former emphasising control as the defining feature and the latter adopting a broader approach based on fairness and justice, with control merely a feature of the analysis. Gill J expressly preferred Rix J's view.[46]

42 [2017] 2 SLR 1074.
43 [2006] QB 510.
44 [2014] SGHC 177.
45 See para 28.28 above.
46 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510 at [69].

III. Conspiracy

28.32 The Court of Appeal's decision in *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd*[47] concerns, amongst others, two tort issues: firstly, whether the plaintiff must show, in a claim for unlawful means conspiracy, that the alleged conspirators possessed knowledge of the unlawfulness; and secondly, whether two or more wrongdoers who have committed different torts may be jointly and severally liable for the loss suffered by the plaintiff.

28.33 The first respondent ("IHC") was a publicly listed company on the Singapore Exchange's Catalist board and the second respondent, IHC Medical Re, was its wholly owned subsidiary. The first five appellants consisted of a fund administration company ("Crest Capital"), a fund management company ("Crest Catalyst"), and three affiliated private equity funds, EFIII, VMF3 and VMIII, managed by Crest Capital and Crest Catalyst (collectively "the Crest entities"). The other appellants were Lim, the CEO and executive director of IHC, and Fan, a substantial shareholder and group CEO of IHC.

28.34 The High Court in *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd*[48] found that the Crest Entities and Fan (together with Aathar, a substantial shareholder of IHC) conspired to cause IHC to enter into and draw down on a standby facility to purchase IHC shares due to a potential short-seller's attack on IHC shares, with the intention to injure IHC.[49] In a prior decision of the Court of Appeal,[50] the transaction in question was held to be void by virtue of s 76A(1A)(*a*)(i) of the Companies Act.[51]

28.35 On appeal before the present Court of Appeal, the knowledge of Tan, the investment director of Crest Capital, regarding IHC's purchase of its own shares in contravention of the statutory prohibition against share buyback, and the attribution of such knowledge to the Crest Entities, were points of contention. In a judgment delivered by Steven Chong JCA, the court ruled that Tan possessed knowledge of both the existence and the contravention of the statutory prohibition. On the facts, Tan knew about the prohibition and the drawdowns for the purchase of IHC's shares. He would have known that the IHC share purchase would contravene the prohibition unless the requisite approval had been procured. Since no

47 [2021] 1 SLR 1337.
48 [2020] SGHC 142.
49 Note: The High Court decision was reviewed in (2020) 21 SAL Ann Rev 824 at 840–841, paras 28.40–28.47.
50 *Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524.
51 Cap 50, 2006 Rev Ed.

approval was obtained, he must have known about the contravention of the statutory prohibition.

28.36 Furthermore, Tan's knowledge in the course of acting within the scope of his authority could be attributed to Crest Capital, Crest Catalyst and EFIII, which had authorised him to allow the drawdowns to purchase IHC shares. However, the management of the other two funds, VMF3 and VMIII, was unaware of the drawdowns for the purpose of purchasing IHC shares. As Tan was not acting within his scope of authority with respect to VMF3 and VMIII, his knowledge could not be attributed to them. Thus, VMF3 and VMIII were not liable for unlawful means conspiracy.

28.37 The Court of Appeal proceeded to address the legal question of whether actual knowledge of unlawfulness was required for a claim in unlawful means conspiracy and answered it in the negative. The court took the view that the existing requirement of intention to injure the plaintiff was a sufficient controlling mechanism for the tort without the need to add the requirement of knowledge of unlawfulness. Relatedly, the requirement of intention to injure would already address the need for a "high level of blameworthiness"[52] on the part of conspirators in such a tortious action. The argument by counsel that a parallel should be drawn with the tort of inducing breach of contract – which has a requirement that the defendant possessed knowledge of the breach of contract – was rejected by the Court of Appeal on the basis that the two torts are quite distinct. Finally, ignorance of the law should not be a defence to tortious liability under unlawful means conspiracy.

28.38 As mentioned in the previous review of the High Court decision,[53] the Singapore position of not requiring knowledge of unlawfulness is similar to the current position in the recent English Court of Appeal decision in *The Racing Partnership Ltd v Sports Information Services Ltd*[54] as well as the earlier decision in *Belmont Finance Corp v Williams Furniture Ltd (No 2)*.[55] Additionally, the Singapore Court of Appeal observed that English authorities that supported the knowledge requirement concerned violations of private rights[56] as opposed to the commission of statutory offences. With respect to Singapore, the Court of Appeal has clarified that knowledge of unlawfulness would not be a necessary element, whether for private right or statutory offence cases.

52 *Crest Capital Asia Pte Ltd v OUE Lippo Healthcare Ltd* [2021] 1 SLR 1337 at [128].
53 (2020) 21 SAL Ann Rev 824 at 840–841, para 28.45.
54 [2020] EWCA Civ 1300.
55 [1980] 1 All ER 393.
56 See, *eg, The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at [265], *per* Lewinson LJ.

28.39 Though Lim was not involved in the above-mentioned conspiracy, she was aware of the irregularities relating to the drawdown on the standby facility but did not raise any queries. The Court of Appeal agreed with the High Court's finding regarding Lim's negligence. Whilst Lim's liability was founded on negligence, the Crest Entities were liable for dishonest assistance and unlawful means conspiracy. Fan's liability was in breach of fiduciary duties and unlawful means conspiracy. Nonetheless, the Court of Appeal held that several wrongdoers may be jointly and severally liable if their separate wrongs resulted in the same indivisible loss,[57] and cited in support the decision in *Chuang Uming (Pte) Ltd v Setron Ltd*.[58] Thus, Lim, the Crest Entities and Fan would be jointly and severally liable for the damage.

28.40 The next case, *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*,[59] involved both conspiracy and deceit. Housing loans were extended by the plaintiff bank to purchasers of 38 units in a condominium located in Sentosa Cove. The first defendant was the developer, and the second and third defendants were the property agents involved in the purchase of the units. The milestone payments included a 1% option fee based on the stated purchase price, the balance 4% option fee, 15% completion fee and the remaining balance of 80%. A furniture rebate plan was agreed between Woo, the general manager of the first defendant, and the second defendant whereby the first defendant would issue furniture rebates to set off against the 4% option fee and 15% completion fee payable by the purchasers referred to by the second defendant. According to the Monetary Authority of Singapore ("MAS") Notice 632,[60] banks were only permitted to lend up to 80% of the purchase price. Due to the above-mentioned rebates which resulted in lower purchase prices paid by the purchasers, the amount of housing loans extended to these purchasers had exceeded the prescribed limit. The loan application forms submitted by the purchaser did not disclose the furniture rebates.

28.41 The purchasers had defaulted on their housing loans. The plaintiff bank alleged that the defendants collectively had together with the purchasers made fraudulent misrepresentations concerning the purchase price, identity of the purchasers, the purchasers' financial standing and the first defendant's receipt of payments for the 15% completion fee. There

57 Glanville Williams, *Joint Torts and Contributory Negligence* (Wm Gaunt & Sons, 1998 Reprint) at pp 3–4.

58 [1999] 3 SLR(R) 771 at [51]. See also *Nowlan et al v Brunswick Construction Ltd* (1973) 34 DLR (3d) 422 at 425–426.

59 [2021] SGHC 283.

60 MAS Notice 632: Residential Property Loans (13 January 2011; revised 28 June 2013; cancelled 28 August 2013).

was also a claim in unlawful means conspiracy against the defendants and the purchasers to procure financing from the plaintiff in breach of the 80% limit and in excess of the actual purchase prices of the units. The claims against the first defendant were eventually dismissed, but the claim in deceit against the second and third defendants succeeded.

28.42 With regard to the claim against the first defendant in unlawful means conspiracy, Aedit Abdullah J found that there was insufficient evidence that the first defendant had acted in combination with the other parties to use unlawful means to cause harm to the plaintiff. Although the first defendant was aware of the non-declaration of furniture rebates by the purchasers and the over-lending by the plaintiff bank, it did not enter into an agreement to conceal the furniture rebates from the plaintiff. The learned judge added that even if there were such an agreement or understanding to conceal the furniture rebates from the plaintiff, it would not amount to a combination to cause harm by unlawful means. According to his Honour, the first defendant's conduct might be explained by its "willingness to go along with the purchase arrangements, without caring how the plaintiff was affected" and amount to "sharp practice", but it would nonetheless fall short of unlawful means conspiracy.[61]

28.43 On the requirement of an intention to injure the plaintiff, the learned judge referred to the same arguments above to explain the first defendant's conduct. In ruling that the requirement was not satisfied, his Honour also highlighted the lack of evidence indicating that the first defendant knew that the plaintiff had to over-lend in order for it to sell the units to the purchasers who were in a weak financial position. Hence, his Honour was of the view that the first defendant could not have intended the injury to the plaintiff.

28.44 The plaintiff's argument that the breach of the MAS Notice 632 and contravention of s 55 of the Banking Act[62] constituted unlawful means was rejected by the judge. The breach should be treated as the unlawful act of the *plaintiff* as a result of the alleged conspiracy and not the act of the *defendants*. Moreover, the alternative argument that the defendants' furniture rebate plan was intended to effect an unlawful purpose (that is, breach of MAS Notice 632) did not pass muster as the tort, as correctly pointed out by the judge, requires the employment of unlawful means by the defendants rather than the presence of "unlawful consequences".[63]

61 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2021] SGHC 283 at [77].

62 Cap 19, 2008 Rev Ed.

63 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2021] SGHC 283 at [96].

On the other hand, the allegations of deceit on the part of the defendants would, in principle, qualify as unlawful means. However, in so far as the first defendant was concerned, Abdullah J found that it was not aware of the purchasers' false representations as to the true identity of the buyers or the transfer of moneys in the purchasers' accounts to give the impression that they had good financial standing.

28.45 The second and third defendants were liable for deceit namely for the purchase price misrepresentations, identity misrepresentations and financial standing fraud. The purchase price and identity misrepresentations were made knowingly by the second and third defendants indirectly, through the purchasers, to the plaintiff. Such communications of false representations by the defendants with the intention that they would be received by the plaintiff would be sufficient to establish the tort of deceit. The claim against the first defendant in respect of alleged payment misrepresentations failed as there was no reliance by the plaintiff even if there was such representation.

28.46 The final case for review in this part on conspiracy is *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd*.[64] This arose from a claim by the members of certain communities in the Western Province of Papua New Guinea which was affected by environmental damage caused by a particular mine. The first plaintiff was a company incorporated in Papua New Guinea whilst the second to ninth plaintiffs were individual members of the above-mentioned affected communities.[65] The first defendant ("OTML") was incorporated in Papua New Guinea to own and operate the mine. The Independent State of Papua New Guinea ("the State") and BHP Group Limited ("BHP Group") owned OTML since 1976. After a class action in 2000 against OTML and BHP Group, the latter decided to exit as a shareholder in OTML. It set up PNG Sustainable Development Program Ltd ("PNGSDP") (the second defendant), a company limited by guarantee and incorporated in Singapore, to hold shares in OTML and to receive the dividends and other money arising from the shares. The third defendant was the Prime Minister of Papua New Guinea and Chairman of PNGSDP's board of directors, Mekere. The fourth defendant was the State, and the fifth defendant, TMF Trustees Singapore Ltd, held security interests over PNGSDP's assets including the shares and distributions.

25.47 The plaintiff sued in breach of fiduciary duty, remedial constructive trust, unjust enrichment and lawful and unlawful means

64 [2021] SGHC 205.

65 This was brought as a representative proceeding under O 15 r 12 of the Rules of Court (2014 Rev Ed) on behalf of all of the members of the affected communities.

conspiracy. The second defendant's application to strike out the plaintiffs' claim was granted by the High Court. This review focuses on the claims in both lawful and unlawful means conspiracy.

28.48 With respect to the claim in lawful means conspiracy, the plaintiffs alleged that PNGSDP and Mekere conspired to prevent the implementation of the mine closure plan in breach of an implied term in the program rules (comprising PNGSDP's constitutional documents such as the memorandum of association and articles of association). The background to this was a piece of legislation enacted by the State in 2013 which resulted in PNGSDP ceasing to be a shareholder of OTML and prevented PNGSDP from receiving any distributions from 2013. The plaintiffs argued that the event imposed a duty on PNGSDP to activate the mine closure plan under the program rules.

28.49 Strictly speaking, the above pleading was misplaced since, as pointed out by Vinodh Coomaraswamy J, a breach of an implied term would be regarded as an example of unlawful means in the tort of conspiracy. In any event, there was no such implied term and the mine had not permanently ceased all mining and milling activities as explicitly defined by the program rules. The plaintiffs had not pleaded any predominant intention on the part of PNGSDP and Mekere to injure the members of the affected communities, which is a requirement under lawful means conspiracy.[66]

28.50 In addition, Mekere, acting as a director of the PNGSDP, could not be liable as a conspirator with PNGSDP with respect to his company's alleged breach of contract according to the principle in *Said v Butt*[67] unless he had acted in breach of his personal duties to the company. The scope of the principle in *Said v Butt* was enunciated in the Singapore Court of Appeal decision of *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*.[68] The fact that a director may have acted with the intention to injure the plaintiff does not disentitle him from protection under *Said v Butt*. As the plaintiffs could not prove that Mekere had breached his personal duties to the company, the claim in lawful means conspiracy was unsustainable. There would be no conspiracy if the company remained as the only alleged conspirator.

28.51 There were four claims in unlawful means conspiracy. Two of the alleged conspiracies relied on PNGSDP's breach of fiduciary duties as the

66 *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637.
67 [1920] 3 KB 497.
68 [2018] 1 SLR 818. This decision was reviewed in (2018) 19 SAL Ann Rev 756 at 785–759, paras 26.5–26.7.

unlawful means. Coomaraswamy J held that PNGSDP did not owe such a fiduciary duty, and these two claims were therefore dismissed.

28.52 One of the two remaining claims was based on the alleged conspiracy by OTML, PNGSDP, Mekere and the State to deceive the members of the affected communities so that the latter would stop litigation against OTML and other parties in respect of environmental damage caused by the mine. One issue pertained to the existence of a combination between PNGSDP and the other parties to conspire (in particular, whether PNGSDP knew about the fraudulent misrepresentations to begin with). The plaintiff's case was that PNGSDP possessed that knowledge as it was controlled by representatives of both BHP Group and the State. According to separate findings in a court decision, however, BHP Group, OTML, PNGSDP, Mekere and the State intended PNGSDP to be "independently managed and free from any undue external influence".[69] More importantly, the plaintiffs could not prove that BHP Group and the State had in fact acted contrary to such intention. Thus, there was no evidence of PNGSDP's knowledge about the alleged false misrepresentations and the common design to deceive the members of the affected communities. The final remaining claim involved the same alleged conspirators. Here, again, the learned judge found that PNGSDP's lack of knowledge of the false representations meant that there was no evidence to show PNGSDP was acting in combination with the other parties with respect to the alleged conspiracy.

IV. Deceit

28.53 In *Lou Kan v Li Hua*,[70] the plaintiff alleged fraudulent misrepresentation by the defendant, a shareholder and director of an investment fund, that the fund was principal-guaranteed, which misrepresentation the plaintiff had relied upon to his detriment. The defendant was also the managing director of the company, Sunmax Global Capital Pte Ltd, which managed the fund. The plaintiff had applied for permanent residency ("PR") in Singapore under a scheme whereby he was required to make an investment in a Global Investment Programme ("GIP")-approved fund (such as the above-mentioned fund) within six months of the receipt of in-principal approval of his PR from the authorities.

69 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 2 SLR 200 at [47].

70 [2021] SGHC 235.

28.54 The High Court, upon analysing the elements for the tort of deceit set out in *Panatron Pte Ltd v Lee Cheow Lee*,[71] allowed the claim for damages. First and foremost, the defendant had made oral representations to the plaintiff that the fund was principal-guaranteed and provided the fund's private placement memorandum, dated 1 February 2009 ("the 2009 PPM"), and the subscription forms executed by the plaintiff. The defendant had also signed on a page in the 2009 PPM that contained the representations.

28.55 The defendant argued that there was no statement of existing fact required to constitute a representation under the tort of deceit but only a statement of future intention. He cited *Zuraimi bin Mohamed Dahlan v Zularnine B Hafiz*[72] ("*Zuraimi*") for the proposition that a representation that "the plaintiffs would receive dividends on their investments in the Companies, which would be paid annually by electronic transfer" was not actionable as it "pertain[ed] to a future event".[73] Pang Khang Chau J found that there were two elements from the oral representations, the 2009 PPM and subscription forms: first, the fund was principal-guaranteed; and second, the plaintiff would get back at least the principal sum of the investment (less management fee) after five years. The first element in the present case was a statement of existing fact, and this could be distinguished from *Zuraimi*.

28.56 The defendant's misrepresentation to the plaintiff that the fund was principal-guaranteed was intended to assure the plaintiff and cause him to rely upon it. Indeed, the plaintiff withheld his decision to invest in the fund until he had received the representation from the defendant during their meeting that it was a principal-guaranteed fund. The requirement of reliance would be established as long as the misrepresentation played a real and substantial role in the plaintiff's decision-making,[74] and there was no need to prove it was the sole inducement for the plaintiff's decision to invest in the fund. The defendant also made the representation with knowledge at the time of the meeting that it was false (that is, that the fund was not principal-guaranteed).

28.57 The quantum of damages was assessed by reference to the position that the plaintiff would have been in if no false representation had been made.[75] Here, the plaintiff had made an investment of S$1.5m in reliance upon the defendant's fraudulent representation, received a cash

71 [2001] 2 SLR(R) 435.
72 [2020] SGHC 219.
73 *Zuraimi bin Mohamed Dahlan v Zularnine B Hafiz* [2020] SGHC 219 at [9(e)] and [51].
74 *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [23].
75 *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909.

distribution of S$224,510 under the terms of the redemption and a further entitlement to 1,500 shares in a special purpose vehicle. As the plaintiff had proved that he invested S$1.5m and received the cash distribution only, the burden fell on the defendant to show that the redemption would not give rise to any loss for the plaintiff.[76] As the defendant had not discharged his burden of proof, the quantum of damages should be the sum of S$1.5m less the cash distribution. The learned judge also made provisions to avoid double recovery should there be distributions from the fund in the future.

28.58 An interesting issue was raised as to whether the court should take into account "losses from hypothetical transactions that plaintiff would have entered into in place of fraudulently induced transaction".[77] The defendant argued that the plaintiff, if he had not invested in the fund, would have lost money through investments in some other GIP-approved funds to obtain his PR. In response, Pang J considered two approaches. First, the learned judge cited a statement from a reputable commentary on tort law that the plaintiff is entitled to claim for his losses arising from deceit "without reference to the fact that he might otherwise have invested his money in some other unprofitable way and lost it anyway".[78] The second approach was highlighted in *Yam Seng Pte Ltd v International Trade Corp Ltd*[79] in which the burden was placed on the defendant instead to "demonstrate, with a reasonable degree of certainty, that the claimant would probably have suffered a loss from an alternative transaction and the amount of that loss".[80] Without preferring either approach, Pang J held that the defendant in the present case would not in any event be able to show that the plaintiff would have suffered losses from making alternative investments.[81]

76 See *Parallel Imports (Europe) Ltd v Radivan* [2007] EWCA Civ 1373 at [29].
77 *Lou Kan v Li Hua* [2021] SGHC 235 at [87].
78 *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (London: Sweet & Maxwell, 20th Ed, 2010) at para 18-45.
79 [2013] 1 Lloyd's Rep 526.
80 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 Lloyd's Rep 526 at [217].
81 Readers may wish to take note of the similar case of *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2021] SGHC 217 involving another permanent residency applicant who had invested in the same investment fund managed by Sunmax Global Capital Pte Ltd, the first defendant company, relying upon a similar misrepresentation by Li Hua, the second defendant, that the fund was principal-guaranteed. Chua Lee Ming J allowed the claims against both defendants in misrepresentation and conspiracy to injure.

V. Defamation

28.59 *Lee Hsien Loong v Leong Sze Hian*[82] arose from a claim by a politician who was defamed in publications via Facebook. On 7 November 2018, the article, entitled "Breaking News: Singapore Lee Hsien Loong becomes 1MDB's Key Investigation Target – Najib Signed Several Unfair Agreements with Hsien Loong in Exchange for Money Laundering", was published on a website titled "The Coverage", a Malaysia-based social news network. It referred to investigations concerning Malaysia's 1Malaysia Development Berhad ("1MDB") fund "trying to find the secret deals between the two corrupted Prime Ministers of Singapore and Malaysia" and several "unfair agreements" between them.[83] On the same day, the defendant, who was a columnist, shared a hyperlink to the article in his Facebook post. The post indicated that he had shared a link and revealed a portion of the title of the article ("Breaking News: Singapore Lee Hsien Loong becomes 1MDB's Key Investigation Target – Najib Signed Several Unfair"). There were several reactions and comments to the defendant's post which had been made on the "public" setting. He received a notice on 9 November 2018 from the Info-communications Media Development Authority and removed the post on 10 November 2018. The Singapore Prime Minister subsequently sued the defendant in defamation in his personal capacity. The main legal issues included the following: defamatory meaning of the post and article, their publication and republication, the quantum of damages (including aggravated damages), whether the lawsuit amounted to an abuse of process and the relevance of the Protection from Online Falsehoods and Manipulation Act 2019[84] ("POFMA") to the scope of the tort of defamation.

28.60 Prior to and around the time of the publication of the post and article, local and foreign news sources had already reported on the misuse of 1MDB funds. This constituted evidence of the existence of general knowledge amongst members of the public concerning the criminal affairs in IMDB. Thus, both the post and the contents of the article, in their natural and ordinary meaning, imputed that the plaintiff was corrupt and implicated in the wrongdoing associated with 1MDB and was involved in criminal activities to obtain agreement on various deals with the Malaysian Prime Minister. There was no reliance on true innuendo for which extrinsic evidence would have to be specifically pleaded by the plaintiff.

82 [2021] 4 SLR 1128.
83 *Lee Hsien Loong v Leong Sze Hian* [2021] 4 SLR 1128 at [5].
84 Act 18 of 2019.

28.61 On the question of publication, the defendant conceded that he had published the post but not the article on the basis that there was no evidence of anyone having clicked on the link to the article. In response, Aedit Abdullah J observed that the article (and its content), since it was part of the post, would also be regarded as having been published. The learned judge also pointed out that, where there was a single statement and one hyperlink given, as in the present scenario, the "irresistible inference" was that the ordinary reasonable reader would follow the hyperlink,[85] citing Nicklin J in *Daniel Poulter MP v Times Newspapers Ltd*.[86]

28.62 The learned judge proceeded to consider specific case precedents on the publication requirement including the majority decision in *Crookes v Newton*[87] ("*Crookes*") that "the use of a hyperlink cannot, by itself, amount to publication even if the hyperlink is followed and the defamatory content is accessed".[88] Abdullah J did not follow the majority decision in *Crookes*. According to his Honour, *Crookes* was not sensitive to factual circumstances; instead, his Honour preferred decisions from Australia[89] and England.[90] Finally, the judge held that the article was indeed part of the post on the grounds that the link to the article was the "only substantive content" of the post and the defendant appeared to be "supporting or endorsing the content in the link".[91] This seemed to imply that an individual might be regarded as supporting or endorsing the defamatory content in a hyperlink based on appropriate factual circumstances even if there was no express support or endorsement. Be that as it may, what was important for proving publication lay in the reactions, comments and shares of the post and the use of the "public" setting" such that it could be inferred that the article had been accessed by third parties through the link. In this regard, the learned judge applied the established legal principles[92] on the twin requirements of publication, namely the defendant's conduct in making available the defamatory material and the third party's receipt of the defamatory material in an intelligible form.

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85 This would be consistent with the rule that the ordinary reader would read the material in totality: *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65.

86 [2018] EWHC 3900 (QB) at [21], citing *Falter v Altzmon* [2018] EWHC 1728 (QB).

87 [2011] 3 SCR 269.

88 *Lee Hsien Loong v Leong Sze Hian* [2021] 4 SLR 1128 at [41], citing *Crookes v Newton* [2011] 3 SCR 269 at [44].

89 See, *eg*, *Bailey v Bottrill (No 2)* [2019] ACTSC 167 at [54] (publication via the sharing on Facebook post a hyperlink to a YouTube video).

90 See, *eg*, *Caine v Advertiser and Times Ltd* [2019] EWHC 2278 (QB) at [61].

91 *Lee Hsien Loong v Leong Sze Hian* [2021] 4 SLR 1128 at [42].

92 See *Qingdao Bohai Construction Group Co, Ltd v Goh Teck Beng* [2016] 4 SLR 977 at [62] and *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751 at [54].

28.63 The defendant contended that the plaintiff should not have been permitted, through the defamation action, to circumvent the operation of the POFMA with its built-in protections for citizens' free speech under Art 14 of the Constitution of the Republic of Singapore.[93] Abdullah J disagreed, holding that the enactment of the POFMA did not affect the law of defamation in Singapore. The objective of the POFMA to combat online falsehoods is distinct from that of defamation to protect reputations, and this was supported by reference to statutory language and ministerial speeches made during parliamentary debates pertaining to the Protection from Online Falsehoods and Manipulation Bill 2019.[94] Criminal liabilities under the POFMA for falsehoods that are contrary to public interest must be distinguished from private law infringements in the tort of defamation. Furthermore, there was no amendment to the Defamation Act[95] in connection with the enactment of the POFMA and the present lawsuit in defamation was in fact commenced before such enactment. As a final point, the judge observed that the balance struck between constitutional free speech in Art 14 and the law of defamation remained unaffected by the POFMA.[96]

28.64 On the quantum of damages, the defendant argued that the harm allegedly caused by the defamatory statements had been "neutralised" or "ameliorated" by the responses from the various government agencies and ministers against the allegations in the defamatory article. Such responses by third parties, according to Abdullah J, did not negate or reduce the effects of the defamatory publication on the plaintiff's reputation. After all, reputational loss flowing from a libel such as in the present context would be presumed as long as the statement is defamatory in nature without the need to prove actual damage. The judge added that the position would be the same even if the defamatory imputation were incredulous or outrageous.[97]

28.65 In addition, the defendant alleged that the present claim initiated by the plaintiff was an abuse of process and did not disclose a real and substantial tort ("the *Jameel* doctrine").[98] Abdullah J referred to the different bases in the UK that prompted the *Jameel* doctrine, namely the Civil Procedure Rules 1998[99] of England and Wales and the UK Human Rights Act 1998,[100] which do not apply to Singapore, as well as the English

93 1999 Reprint.
94 Bill 10 of 2019.
95 Cap 75, 2014 Rev Ed.
96 See *The Online Citizen v Attorney-General* [2021] 2 SLR 1358.
97 *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1997] 3 SLR(R) 46 at [50].
98 *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946.
99 SI 1998 No 3132.
100 c 42.

court's objective to prevent forum shopping. His Honour also noted the concern raised in the Court of Appeal decision of *Yan Jun v Attorney-General*[101] to apply the doctrine based on a "fact-centric" approach.[102] In the decision in *Qingdao Bohai Construction Group Co, Ltd v Goh Teck Beng*[103] cited by the defendant, the *Jameel* doctrine was not the central but only a secondary basis for dismissing the claim in defamation. The judge eventually decided that the *Jameel* doctrine did not apply to the facts in the present case due to the serious allegations of corruption and criminal conduct against the Prime Minister.

28.66 The next argument by the defendant was based on the rule in *Derbyshire v Times Newspapers Ltd*[104] ("*Derbyshire*") that a government cannot bring an action in libel. First, the contention that the lawsuit had, in effect, been brought by the government in circumvention of the rule, was rejected by the learned judge. Furthermore, the *Derbyshire* rule did not prevent an official including a politician[105] from suing in his own name in respect of injury to his reputation. Here the plaintiff had brought the present suit to vindicate his reputation.[106]

28.67 The High Court awarded S$100,000 in general damages and S$33,000 aggravated damages to the plaintiff giving a total quantum of S$133,000. This assessment was based on various factors including the plaintiff's reputation, the defendant's standing, the extent of publication, and the defendant's conduct and malice. With respect to the extent of publication, the judge found that the defamatory words had been published to at most 400 persons who were based in Singapore. This estimate was computed from the following figures: 22 reactions, five comments, and 18 shares of the defamatory post, about 5,000 of the defendant's friends and followers on Facebook, and the expert's opinion that 10% to 20% of this group would have accessed the post in an "intelligible form". Furthermore, with regard to the award of aggravated damages, the court found that the defendant had refused to apologise to

101 [2015] 1 SLR 752.

102 Nonetheless, the doctrine did constitute one ground for dismissing the claim in defamation in the same case.

103 [2016] 4 SLR 977. The relevance of the English decision of *Lait v Evening Standard* [2011] 1 WLR 2973 on the applicability of the *Jameel* doctrine in Singapore was also doubted: see *Lee Hsien Loong v Leong Sze* [2021] 4 SLR 1128 at [72]–[75].

104 [1993] AC 534.

105 See *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 at [116]–[119].

106 *Broome v Cassell and Co Ltd* [1972] AC 1027 at 1071B–1071E.

the plaintiff even though he knew that the defamatory words were false, and was also reckless as to the truth of the article.
