

## CASE UPDATE

29 June 2018

# HIGH COURT CLARIFIES MALICE IN DEFAMATION

***Gao Shuchao v Tan Kok Quan and others***  
[2018] SGHC 115

### SUMMARY

In a recent decision, the Singapore High Court (“**HC**”) overturned a decision of the District Court (“**DC**”), and found that the Appellant was entitled to rely on the defence of qualified privilege as the defence was not defeated by malice. This decision addresses the scope of the defence of qualified privilege, in particular, the issue of malice.

### BACKGROUND

The Respondents were members of the management council (“**MC**”) of a condominium’s Management Corporation (“**MCST**”). The Appellant was a subsidiary proprietor (“**SP**”) of the condominium. In November 2014, the MCST had commenced an action against the developer of the condominium to recover arrears of contributions to the management and sinking funds which the developer had failed to collect from 13 SPs. These arrears soon led to cashflow problems for the MCST.

To alleviate these cashflow problems, the MCST convened an extraordinary general meeting (“**EGM**”) where a special resolution was passed to impose a one-time Special Levy (“**Special Levy**”) on all SPs. This Special Levy was to be paid in three instalments. However, the Appellant failed to make payment on the first instalment, sending instead an email highlighting certain alleged procedural and substantive errors in the imposition of the Special Levy. He also refused to make payment on the second instalment.

In July 2015, judgment was granted in favour of the MCST in the action against the developer and the MCST received payment of the contribution arrears. For various reasons, including the cost of convening another EGM to revoke the Special Levy, the MC decided to withhold disclosure of the receipt of the judgment sum from the SPs.

In February 2016, the MC finally issued a report (“**MC Report**”) that, amongst other things, disclosed the receipt of the judgment sum, and indicated that there would be a resolution at the March 2016 Annual General Meeting (“**March AGM**”) to seek approval to revoke the payment of the final instalment of the Special Levy in light of the successful suit.

At the March AGM, the Appellant queried the MC on why it did not disclose the receipt of the judgment sum earlier. The Appellant further stated that he could “*only draw ... 2 possible conclusions. One conclusion is there has been **deliberate concealment**. The other conclusion is that ... [t]here was a **misrepresentation***”. (emphasis added)

After hearing explanations from the MC on the late disclosure, the Appellant withdrew his use of “*deliberate concealment* and “*misrepresentation*” (“**Defamatory Words**”) but refused to apologise. This led certain members of the MC to institute a defamation action, which the DC decided in the Respondents’ favour.

### THE HC’S DECISION

The HC allowed the appeal based on the defence of qualified privilege. In its detailed analysis of qualified privilege and malice, the HC held, amongst other things:

- (a) qualified privilege can be defeated if malice can be shown. In this regard, malice can be found where: (i) it can be shown that the defendant had knowledge of falsity or was reckless as to the truth of the defamatory statement; or (ii) where although the defendant may have a genuine or honest belief in the truth of the defamatory statement, he had a dominant intention of injuring the plaintiff or some other improper motive;

- (b) the inquiry as to the defendant's state of mind to determine if he had knowledge that a defamatory statement is false or was reckless as to its truth, is a subjective exercise, and the threshold to prove malice is high. This high threshold is justified because *"[i]n ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search"* but *"despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest'"*;
- (c) this latitude afforded to a defendant is based on the recognition that malice is not made out where he is *"merely careless, impulsive or irrational"*. Nonetheless, malice will be found where the defendant makes the statement *"recklessly"*;
- (d) whether a defendant is reckless as to the truth of a defamatory statement can turn on whether the defendant persists with the making of the statement despite being *"put on notice"*: (i) as to the lack of truthfulness or accuracy of the information upon which his defamatory statement is based on; or (ii) as to the existence of *"further information"* necessary to form a genuine belief as to the truthfulness of the defamatory statement. In reaching this conclusion, the HC relied on a trio of previous Singapore court decisions (*Lee Kuan Yew v Davies Derek Gwyn* [1989] 2 SLR(R) 544, *Price Waterhouse Intrust Ltd v Wee Choo Keong* [1994] 2 SLR(R) 1070, and *ABZ v Singapore Press Holdings Ltd* [2009] 4 SLR(R) 648); and
- (e) as to whether a defendant had a dominant intention of injuring the plaintiff or some other improper motive, the Courts should also be slow to draw the inference that a defendant was actuated by improper motives. In this regard, strong language, and an antagonistic and defiant stance taken by a defendant, do not necessarily mean he is motivated by an improper purpose. Such strong language may instead be evidence that the defendant honestly believed that what he wrote or said was true. However, if the language went beyond being merely critical to being vindictive and spiteful, a dominant motive to injure the plaintiff may be inferred.

The HC held that the Appellant had not been reckless in his use of the Defamatory Words, as they were based on the information regarding when the judgment sum was received, contained in the MC Report. The Appellant could not be said to have been put on notice as to the lack of truthfulness or accuracy of the said information.

Further, the HC also found that the paragraph in the MC Report relating to the receipt of the Judgment Sum did not cause the Appellant to be *"put on notice as to the existence of further information necessary for him to form a genuine belief as to the truthfulness of his Defamatory Words."* Accordingly, the Appellant was not reckless.

Significantly, the HC found that the Appellant's refusal to apologise did not evince recklessness and was instead underpinned by his perception that he was justified in saying the Defamatory Words. The HC observed that the Appellant's conduct was perhaps not entirely unjustified, noting that *"[r]egrettably"*, the SPs were not updated as the MC had instead adopted a *"legalistic"* position that there was no necessity for the MC to disclose the receipt of the judgment sum.

The HC also found that the Appellant had not harboured an improper purpose. Instead, the main tenor of the Appellant's actions evinced his strong belief that the Special Levy was illegal or wrongful and he had simply been attempting to persuade the MCST to correct this alleged illegality or wrong. The antagonistic and defiant tone taken in his emails and during the March AGM simply showed his firm (albeit misconceived) belief that the Special Levy was procedurally and substantially flawed. In these circumstances, the Appellant's objective was to obtain redress and explanations for the perceived wrongdoing of the MCST, and not to spite or injure the Respondents.

## COMMENT

Whilst general meetings and similar forums afford opportunities for robust dialogue, one should be careful not to be caught up in the heat of the moment and make statements recklessly. That said, this latest HC decision does throw up interesting questions as to when a statement is reckless and therefore malicious.

If the test of whether a defendant is reckless (and accordingly, malicious) is based on whether he has been “*put on notice*” either as to the lack of truthfulness or accuracy of the information upon which his defamatory statement is based, or as to the existence of “*further information*” necessary to form a genuine belief as to the truthfulness of the defamatory statement, this would make it harder to demonstrate recklessness and malice in defamation.

Whilst being placed “*on notice*” would make it clearer that a defamatory statement is malicious, it does not follow that the absence of such notice would necessarily mean that a statement is not malicious. It may also be challenging to draw the line between statements which are “*merely careless, impulsive or irrational*”, and statements that are “*reckless*”.

The above matters may require further clarification in subsequent judgments. Should one have any concerns as to whether an intended statement in a public forum would be considered malicious, it would be prudent to seek legal advice before doing so.

If you have any questions or comments on this article, please contact:



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