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CACV 268/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 268 OF 2009
(ON APPEAL FROM CONSOLIDATED ACTIONS
HCMP4400/2001, HCA2822/2002, HCA299/2006,
HCA1405/2006 AND HCA807/2007)

———————

HCMP 4400/2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 4400 OF 2001

———————

BETWEEN

CAMPBELL RICHARD BLAKENEY-WILLIAMS	2nd Plaintiff
KENNETH GORDON CRAVER	4th Plaintiff
TERRY ANN ENGLAND as Personal Representative of the estate of GREGORY STEPHEN ENGLAND	7th Plaintiff
MICHAEL JOHN FITZ-COSTA	8th Plaintiff
QUENTIN JAMES LEE HERON	10th Plaintiff
MICHAEL STEVEN SHAW	14th Plaintiff
JOHN SIMPSON WARHAM	17th Plaintiff
BRETT ALEXANDER WILSON	18th Plaintiff
MATHEW DAVID ROGERS	22nd Plaintiff

and

CATHAY PACIFIC AIRWAYS LIMITED 1st Defendant

VETA LIMITED 2nd Defendant

———————

HCA 2822/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 2822 OF 2002

———————

AND BETWEEN

JOHN SIMPSON WARHAM AND OTHERS Plaintiffs

and

CATHAY PACIFIC AIRWAYS LIMITED 1st Defendant

VETA LIMITED 2nd Defendant

———————

(Actions HCMP4400/2001 and HCA2822/2002 consolidated by Order of Master A. Ho dated 13th September 2002)

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HCA 299/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 299 OF 2006

———————

AND BETWEEN

DAMON NEICH-BUCKLEY 1st Plaintiff

HENDRIK VAN KEULEN 2nd Plaintiff

BRIAN DAVID KEENE 3rd Plaintiff

PIERRE JOSEPH ROGER MORISSETTE 4th Plaintiff

CRAIG MICHAEL YOUNG 5th Plaintiff

and

CATHAY PACIFIC AIRWAYS LIMITED 1st Defendant

USA BASING LIMITED 2nd Defendant

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HCA 1405/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 1405 OF 2006

———————

AND BETWEEN

JOHN WALLACE DICKIE 1st Plaintiff

DOUGLAS GAGE 2nd Plaintiff

CHRISTOPHER LEO SWEENEY 3rd Plaintiff

and

CATHAY PACIFIC AIRWAYS LIMITED Defendant

———————

HCA 807/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 807 OF 2007

———————

AND BETWEEN

GEORGE CROFTS Plaintiff

and

CATHAY PACIFIC AIRWAYS LIMITED 1st Defendant

VETA LIMITED 2nd Defendant

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(Consolidated by Order of Master Levy dated 6th June 2008)

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CACV 66/2009

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 66 OF 2009

(ON APPEAL FROM CONSOLIDATED ACTIONS

HCMP 4400/2001, HCA 2822/2002, HCA 299/2006,

HCA 1405/2006 AND HCA 807/2007)

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HCMP 4400/2001

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 4400 OF 2001

_____

BETWEEN

CAMPBELL RICHARD BLAKENEY-WILLIAMS 2nd Plaintiff

KENNETH GORDON CRAVER 4th Plaintiff

TERRY ENGLAND and STEPHEN WALTER ENGLAND

as Personal Representatives of the estate of

GREGORY STEPHEN ENGLAND 7th Plaintiff

MICHAEL JOHN FITZ-COSTA 8th Plaintiff

QUENTIN JAMES LEE HERON 10th Plaintiff

MICHAEL STEVEN SHAW 14th Plaintiff

JOHN SIMPSON WARHAM 17th Plaintiff

BRETT ALEXANDER WILSON 18th Plaintiff

MATHEW DAVID ROGERS 22nd Plaintiff

and

CATHAY PACIFIC AIRWAYS LIMITED 1st Defendant

VETA LIMITED 2nd Defendant

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HCA 2822/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 2822 OF 2002

———————

AND BETWEEN

JOHN SIMPSON WARHAM AND OTHERS Plaintiffs

and

CATHAY PACIFIC AIRWAYS LIMITED 1st Defendant

VETA LIMITED 2nd Defendant

———————

(Actions HCMP4400/2001 and HCA2822/2002 consolidated by Order of Master A. Ho dated 13th September 2002)

HCA 299/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 299 OF 2006

———————

AND BETWEEN

DAMON NEICH-BUCKLEY	1st Plaintiff
HENDRIK VAN KEULEN	2nd Plaintiff
BRIAN DAVID KEENE	3rd Plaintiff
PIERRE JOSEPH ROGER MORISSETTE	4th Plaintiff
CRAIG MICHAEL YOUNG	5th Plaintiff
and	
CATHAY PACIFIC AIRWAYS LIMITED	1st Defendant
USA BASING LIMITED	2nd Defendant

———————

HCA 1405/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 1405 OF 2006

———————

AND BETWEEN

JOHN WALLACE DICKIE	1st Plaintiff
DOUGLAS GAGE	2nd Plaintiff
CHRISTOPHER LEO SWEENEY	3rd Plaintiff
and	
CATHAY PACIFIC AIRWAYS LIMITED	Defendant

———————

HCA 807/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 807 OF 2007

AND BETWEEN

GEORGE CROFTS Plaintiff

and

CATHAY PACIFIC AIRWAYS LIMITED 1st Defendant

VETA LIMITED 2nd Defendant

(Consolidated by Order of Master Levy dated 6th June 2008)

Before: Hon Stock VP, Kwan JA and Lam J in Court

Dates of Hearing: 27-29 July 2010

Date of Judgment: 24 December 2010

J U D G M E N T

Hon Stock VP, Kwan JA and Lam J:

Introduction

1. Cathay Pacific Airways Ltd (CPA) is a public company listed in Hong Kong operating the business of an airline with its operations based in Hong Kong. USA Basing Ltd is also a company incorporated in Hong Kong, is a wholly owned subsidiary of CPA and is used by CPA to employ aircrew officers who live in the United States of America. Veta Limited is another

subsidiary of CPA which employs aircrew officers who live elsewhere than in Hong Kong or the USA.

2. The plaintiffs were pilots engaged by one of these companies. In July 2001, however, their contracts of service were terminated and they subsequently instituted proceedings against whichever one of the three companies was the employer. Those proceedings were consolidated in an action, the hearing of which took place before Reyes J in October 2009. It is convenient for the purpose of this judgment to refer to the defendants collectively as "Cathay". A settlement was reached between a number of the original plaintiffs and Cathay so that the trial concerned itself with the present respondents only, numbering eighteen.

3. By his judgment dated 11 November 2009 Reyes J held that:

(1) the plaintiffs had been dismissed in breach of their contracts of employment and were entitled to one month's pay as damages;

(2) the plaintiffs were, by reason of the circumstances of their dismissal, entitled to compensation pursuant to provisions of the Employment Ordinance, Cap. 57 and he awarded each plaintiff compensation in the sum of $150,000; and

(3) Cathay was liable in defamation to the plaintiffs and he awarded each plaintiff the sum of $3,000,000 in general damages and a further sum of $300,000 as aggravated damages.

4. This is an appeal by Cathay from that judgment as well as from a judgment of Reyes J dated 2 March 2009 in respect of a preliminary issue directed at the proper construction of the contracts of service between Cathay and the plaintiffs.

Background

5. The plaintiffs were members of the Hong Kong Aircrew Officers Association ('the Association'), a trade union registered under the Trade Unions Ordinance, Cap. 332. The overwhelming majority of Cathay's pilots were members of the Association.

6. For some years prior to the turn of the century, the Association and Cathay were engaged upon negotiations in respect of rostering practices. Those negotiations were unsuccessful but recommenced in early 1999 as a result of which a three-year agreement was concluded in respect of pay and conditions of service but no agreement was reached in relation to rostering practices. Dissatisfaction with rostering as well as with benefits continued and the Association became increasingly active on behalf of its members. Each of the plaintiffs supported the Association, as did other pilots, in its activities. The Re-re-re-amended Statement of Claim asserted that these activities included attending meetings of the Association, debating and voting on resolutions at meetings and generally supporting the Association's policy.[1] In early 2001, the Labour Department of the Hong Kong Government was invited to assist but this did not resolve the dispute.

7. By a resolution to take effect from 11 July 2000, members of the Association, by a significant majority, directed the Association to continue negotiations in respect of rostering practices, and:

> " … until [an] Agreement is reached and until the Company enters into discussions on outstanding Benefits and Remuneration issues, the Membership will take action to reduce cumulative fatigue by:
>
> …
>
> (2) Complying with their contracts by :

[1] para. 7 (1)(iii)

> (a) taking maximum opportunity for rest by not working on [guaranteed days off] ..;
>
> (b) refusing to sell back or voluntary waive any leave due.
>
> (c) reducing disturbance during rest by only being contactable when contractually required i.e. during reserve duty.
>
> …
>
> Any Association Member found not to be in compliance with Association resolutions, without just cause, will be subject to [union disciplinary action]."

8. The conduct thus triggered was called "contract compliance". It seems clear enough, both as a matter of common sense and in the light of the evidence, that contract compliance caused disruption. That, no doubt, was the intention.

9. Pilots were reminded by newsletters sent out by the Association that, in pursuit of contract compliance, they were not required to be contactable on any days other than reserve days; they were not required to explain or justify using the entire 45 minutes available to them to prepare for a flight and depart from their homes after a reserve call out; or to sign on for a flight earlier than 80 minutes prior to departure; or to operate with reduced crew on long haul flights; or to carry out a host of other functions not strictly required by their contracts. They were specifically reminded to "live fatigue and stress free", meaning that if they felt unfit for duty they should advise Crew Control and if necessary consult a doctor. They were advised that if they were asked questions regarding their expected travel time to the airport after a call out, their expected arrival time, or whether they could make it in time for a scheduled sign-on, the standard answer should be: "I'll do my best."

10. It is also evident that the Association knew that contract compliance was causing extensive delays, flight cancellations, diversions and

other inconveniences.[2]

11. Later in 2000, the Association threatened further action, which they explained in a newsletter dated 30 October 2000 as follows:

> "… a more direct approach may now be required. We will have to wait for the outcome of talks in the next few weeks before we decide on 'further steps'. In the meantime we can divulge that we are going to keep chopping away for however long it takes to break through. One month? That would be good. One year? Another 5 years? **However long it takes.** We introduced Contract Compliance in 1996 but management ignored the problems and now suffers with the inefficiencies. Therefore, without progress in the near future, we have no choice but to take the next logical step. Time is running out for management." (Original emphasis).

12. The 'next logical step' transpired to be limited industrial action in the form of what was called 'Maximum Safety Strategy' (MSS).

13. The proposal to engage in the MSS was put to an Extraordinary General Meeting of the Association on 20 June 2001. In a newsletter to members dated 12 June 2001, the President of the Association referred to the fact that there had already been an information overload "as both parties attempt to put their cases to you in an effort to influence your decision." Fear was expressed that dismissals might follow as a result of the proposed action.

14. The Association issued an open letter to "Hong Kong's Travelling Public" dated 15 June 2001 by which it put its side of the dispute. It stated that "as professional aircrew of … Cathay Pacific Airways, we regret sincerely the need to take 'limited industrial action' and the inconvenience this will cause to you, our passengers." It defined the issues between the Association and Cathay as a suggested discriminatory employment regime, namely, a regime which treated pilots in certain categories differently from others; unsatisfactory rostering practices that resulted in fatigue; and mis-management by Cathay, as

[2] see for example, " Between the Leaves" 20 October 2000, page 5.

to which it was suggested that "the airline has earned one of the worst employee relations records in the industry over the last eight years." It was proposed that the limited industrial action would commence on 1 July 2001. The Association assured the public that it wanted to "continue being proud of Cathay Pacific," a refrain of comments made in some of the earlier newsletters to members, to the effect that resolution of industrial disputes would be good for the airline in general.

15. The minutes of the meeting of 20 June 2001 recorded that there was already in train a media campaign, commenced, it was suggested, by Cathay. The President said that it was necessary for the company to succeed: "we want to be partners in the business, we want to be productive and efficient, we don't want this constant battling." The President outlined the history of the negotiations and why the union was proposing this stepped-up action. 996 votes were cast in favour of the motion, 81 against and there were 35 abstentions.

16. The maximum safety strategy was, as its name suggests, a scheme whereby each crew member was expected to ensure that "each and every action in the manuals [was to] be carried out precisely and methodically. Each and every action must now be cross-checked thoroughly by each and every crew member to minimise the margin of error."[3] It is not necessary for present purposes to provide the extensive detail conveyed to the members about the manner in which it was expected that they would give effect to the strategy. Examples will do. It was emphasised that they needed "to scrutinise every detail of…flight preparation. … Every crew member prior to dispatch must thoroughly and methodically check every page of every weather chart, flight plan… . In flight, do not be tempted to rush the aircraft to return to schedule…. On departure and arrival, taxi at the minimum recommended safe speed listed in

[3] Letter from the President of the Association to its members dated 29th of June 2001

your fleet specific manual." But the aircrew were required, nonetheless, to "stay professional", in other words "not to sit on their hands to delay a flight after all checks have been done. … dress sharp and remain professional."[4]

17. The MSS was not in fact put into effect on 1 July but rather on 3 July 2001 "in deference", as the judge put it, "to those members of the Hong Kong public travelling during the 1 July Reunification Day long weekend."[5]

18. Evidence on the part of Cathay was to the effect that over a four-year period from mid-1997 to mid-2001, the company had witnessed an increasing trend of "a general withdrawal of enthusiasm from a number of crew members. This manifested itself in an organised behaviour among aircrew of increased absence from the workplace, uncontactability while not on duty and a generally uncooperative attitude in times of need. For example, there developed among aircrew a vague response 'I'll do my best', or words to that effect, whenever staff at Crew Control tried to ascertain from crew members the time they would be able to report for duty when called on reserve, making it impossible for [Cathay] accurately to inform passengers of the time for takeoff. Another common practice among some aircrew members was to designate a separate phoneline for [Cathay] which remained unanswered when off-duty or connected to an answering machine. … There were also periods during which large number of aircrew members were absent from work. [Cathay] believes such high number of absences was as a result of a campaign of orchestrated sickness initiated by the [Association]."[6] Advice to adopt an "I'll do my best" response is evident from the Association's newsletters to members, and Cathay's concern about the prevalence of absenteeism was reflected in the fact that in January 2001 Cathay introduced an Absence Management Programme which was designed to monitor and identify members of aircrew who had

[4] Letter dated 29 June 2001.
[5] judgment para 37.
[6] Supplemental witness statement of Nicolas Peter Rhodes, paragraphs 29 and 30.

abnormally high absence rates.

19. The testimony of Mr Rhodes, who at the material time held the position of General Manager Aircrew, was that the MSS represented a material shift in tactics by the Association and one which threatened massive disruption to Cathay's schedule, a tactic which had proved particularly successful in the USA; Mr Rhodes noting that this was unlikely to be coincidental since the Association had engaged the services of a US-based trade union consultant. He said that whilst Cathay believed that the majority of aircrew officers were diligent capable professionals, the MSS campaign was the final straw in the deteriorating relationship between Cathay and a number of employees. The MSS became, he said, the trigger that caused Cathay to rethink to what extent individual aircrew could be relied upon to work in the best interests of Cathay and, to that end, it was decided to undertake a review of all aircrew officers to ascertain their attitudes to the aims, objectives and interests of Cathay.

20. A panel was formed, numbering twenty senior managers and chaired by the Director of Flight Operations. A comprehensive review was undertaken from Thursday 5 July to Saturday 7 July 2001. The review was conducted in two stages:

(1) In the first stage, the panel identified pilots who had an attendance problem and/or had a warning letter on file in respect of previous disciplinary action and/ or were considered by Crew Control representatives to be unhelpful and uncooperative in the performance of their duties and difficult to deal with both from a crew control management perspective and in their relations with other staff. The process began by preparation of a list of all aircrew officers, numbering over 1500, recording the number of attendance letters, attendance issues and indications as to whether an officer was regarded as uncooperative or unhelpful to Crew

Control. A Master Crew List was compiled in descending order, in other words, with the person with the suggested worst track record at the top. The mere fact that an officer had been absent from duty on a large number of days was not of itself viewed as indicative of an attendance problem but a variety of factors were taken into account including the number of occasions an officer reported sick on short notice before duty, the number of occasions he reported sick whilst on standby reserve duty and his failure to reply to letters which had noted a high level of absenteeism. The team considered which officers had and which had not, a reputation of being uncooperative.

(2) Based on the result of the first stage review, a shorter list was then drawn, discussion proceeded in relation to each person listed and then, according to the evidence, a decision made whether a particular officer was, in Cathay's view, not working in its interests and could not be relied upon in future to do so. It was decided in relation to each person thus identified that his employment would be terminated. It was Mr Rhodes' evidence that "at no time during the review deliberations was a pilot's affiliation with the union or his participation in union activities discussed."[7] He did not know whether selected individuals had or had not taken part in the contract compliance scheme or the MSS. He said that the review panel were "not trying to target anybody because they were involved in contract compliance. We were just trying to address the issue of crew members either not turning up for work or not answering the phone or being particularly unhelpful with crew control. … that may have been a manifestation of the contract compliance campaign, but we just lost patience with crew not

[7] judgment para. 47

showing up for work on a regular basis or just trying to disrupt the operation."[8] Participation in the contract compliance scheme did not "per se" result in anybody's dismissal but the scheme and the possibility of MSS "was the trigger or the catalyst that caused us to conduct the review. … I had been under pressure for a long time to take action and look at the employment of these individuals."[9]

21. In a letter dated 27 June 2001, the Director of Flight Operations had sought to impart to all crew members Cathay's then current view of the dispute. The letter included the following paragraphs:

> "While we are committed to reaching a negotiated settlement, I feel I must also convey to you our determination to protect the interests of our passengers. Cathay Pacific is a customer service company. Our reputation and future success depends on how we treat our customers. If industrial action does commence we will take firm action against any staff member who deliberately acts against the interests of our passengers.
>
> "[Association] members should also clearly understand that Hong Kong labour ordinances do not permit an employee to take part in any trade union activity during his or her working hours without the consent and agreement of the employer. Appropriate action will be taken against such misconduct."

22. The dismissal letter dated 9 July 2001 was never itself produced to the court below. That said, it is common ground and sufficient for our purposes to record the fact that it purported to terminate the contract and gave no cause for the purported termination. In each case termination was effected with payment of three months' salary in lieu of notice.

23. The communications or media war, as it has understandably been labelled in these proceedings, between Cathay and the Association then reached a crescendo.

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[8] Evidence, Day 7, transcript page 62.
[9] Day 7 p. 64

24. On 9 July, the Association's General Secretary made a statement at a press conference saying, amongst other things, that there had not been any escalation in the limited industrial action which commenced on 3 July and denying any suggestions that its members had been called upon to report as unfit for duty when they were fit.

25. On the same day, in the afternoon, Mr Tyler, Director of Corporate Development issued a press statement, set out in full at the Appendix to be annexed to this judgment. We will return to its terms when we address the defamation issue. It is one of three statements upon which the plaintiffs relied in support of their defamation claim: there was another but it has fallen aside because it could not be proved that it was made by or on behalf of Cathay. It suffices for introductory purposes to say that the press statement referred to the fact of months of negotiations, suggested that the Association had engaged, in its own words, in "guerrilla-style tactics"[10], that the action had seriously affected the airline, passengers and the wider Hong Kong public, that its action was selfish and that after careful consideration the company had decided upon two courses of action: first, the implementation of a new pay, benefits and rostering package for pilots and, second, to terminate the employment of 49 pilots. It was said that Cathay had undertaken a detailed review of the employment history of all its pilots and "identified those, who, we feel, cannot be relied upon to act in the best interests of the company in the future."

26. On the same day, 9 July 2001, Mr Philip Chen, Director and Chief Operating Officer, wrote a letter to all members of Cathay's flight crew. This is the second communication upon which the plaintiffs rely in support of the defamation action. It referred to the fact that the Association had said that the industrial action would continue for months "or even longer until the company's resources have been drained", that the situation was untenable for the airline and

[10] see, for example, the President's letter in the Association's newsletter dated 12 June 2001

that "the company has chosen to act to protect its future and its people, including the majority of pilots who I know are strong supporters of the airline. Today, after a review of the employment history of all flight crew, the company has terminated the employment contracts of 49 pilots. This has been a very painful decision and one that has not been entered into lightly. However we are only prepared to take this airline forward with pilots who we believe will have the best interests of the company at heart."

27. In an additional statement issued by the Association at a press conference on 9 July 2001, the Association's General Secretary said that "the people of Hong Kong can decide who are victims and who are the villains."

28. The third statement upon which the plaintiffs have relied in support of their defamation action is an iMail entry dated 10 July 2001 attributing to Mr Chen a statement that Cathay could not allow "this group to disrupt the airline, its employees, our customers or the reputation of Hong Kong. Nor can we allow this group to let the much larger numbers of our flight crews who are showing the total professionalism we require-suffer."

29. So it is in these circumstances that proceedings were issued.

The Employment Ordinance claim

30. The Employment Ordinance, Cap 57, was enacted "to provide for the protection of the wages of employees, to regulate general conditions of employment and employment agencies, and for matters connected therewith."[11]

31. Included amongst the various forms of rights afforded by the Ordinance we find protection for pregnant employees against termination of contracts of employment, save in certain prescribed circumstances and on

[11] Long Title

certain conditions[12]; the right to sickness allowance and a provision prohibiting an employer from terminating the contract of employment on any sickness day taken by an employee in respect of which sickness allowance is payable[13]; and a provision which prohibits an employer from terminating or threatening to terminate the employment of any employee by reason of the fact that that employee has given evidence or has agreed to give evidence in any proceedings for the enforcement of the Ordinance[14].

32. The protection which is relevant to this case is that which is designed to ensure that every employee shall, as between himself and his employer, have the right to be a member of a registered trade union and to take part in the activities of the trade union. It is an offence for an employer to prevent an employee from exercising any such right or to terminate a contract of employment by reason of the exercise of any such right. This right is protected by s. 21B of the Ordinance and its terms are important:

> "21B. Rights of employees in respect of trade union membership and activities
>
> (1) Every employee shall as between himself and his employer have the following rights-
>
> (a) the right to be or to become a member or an officer of a trade union registered under the Trade Unions Ordinance (Cap 332);
>
> (b) where he is a member or an officer of any such trade union, the right, at any appropriate time, to take part in the activities of the trade union;
>
> (c) the right to associate with other persons for the purpose of forming or applying for the registration of a trade union in accordance with the provisions of the Trade Unions Ordinance (Cap 332);
>
> (2) Any employer, or any person acting on behalf of an employer, who-

[12] s. 15
[13] s. 33(4B)
[14] s. 72B

(a) prevents or deters, or does any act calculated to prevent or deter, an employee from exercising any of the rights conferred on him by subsection (1); or

(b) terminates the contract of employment of, penalizes, or otherwise discriminates against, an employee by reason of his exercising any such right,

shall be guilty of an offence and shall be liable on conviction to a fine at level 6.

(3) In this section-

"appropriate time" means, in relation to an employee taking part in any activities of a trade union, time which either-

(a) is outside his working hours; or

(b) is a time within his working hours at which, in accordance with arrangements agreed with or consent given by or on behalf of his employer, it is permissible for him to take part in those activities;

"working hours" means, in relation to an employee, any time when, in accordance with his contract with his employer, he is required to be at work."

33. A breach by an employer of an employee's rights conferred by the Ordinance may, in certain circumstances, constitute a criminal offence and may also entitle an employee to be granted a remedy against his employer under Part VIA of the Ordinance. Part VIA prescribes various forms of remedy but the one with which this case is concerned is an award of compensation under s. 32P.

34. Insofar as may be relevant to this appeal, s. 32A provides:

"(1) An employee may be granted remedies against his employer under this Part-

(a) where he has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date and he is dismissed by the employer because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance;

(b) where he is employed under a continuous contract and the employer, without his consent and, in the absence of an express term in his contract of employment which so permits, varies the terms of his contract of employment because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance; or

(c) where he is dismissed by the employer other than for a valid reason within the meaning of section 32K and in contravention of-

(i) section 15(1), 21B(2)(b), 33(4B) or 72B(1);

(ii) section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59); or

(iii) section 48 of the Employees' Compensation Ordinance (Cap 282),

whether or not the employer has been convicted of an offence in respect of the dismissal.

(2) For the purposes of subsection (1)(a), an employee who has been dismissed by the employer shall, unless a valid reason is shown for that dismissal within the meaning of section 32K, be taken to have been so dismissed because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance.

……

(4) For the purposes of subsection (1)(c)-

(a) it shall not be necessary for an employee to show in relation to-

(i) subsection (1)(c)(i), that his contract of employment was terminated by reason of his exercising any of the rights vested in an employee by or by virtue of section 21B(1) or by reason of the fact of his doing any of the things mentioned in section 72B(1);

(ii) subsection (1)(c)(ii), that his contract of employment was terminated by reason of the fact of his doing any of the things mentioned in section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59); and

(b) an employee who has been dismissed by the employer shall be taken to have been dismissed without a valid

reason unless a valid reason is shown for that dismissal within the meaning of section 32K."

35. We need therefore to ascertain what is meant by "a valid reason … within the meaning of section 32K":

> "32K. Reasons for the dismissal or the variation of the terms of the contract of employment
>
> For the purposes of this Part, it shall be a valid reason for the employer to show that the dismissal of the employee or the variation of the terms of the contract of employment with the employee was by the reason of-
>
> (a) the conduct of the employee;
>
> (b) the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
>
> (c) the redundancy of the employee or other genuine operational requirements of the business of the employer;
>
> (d) the fact that the employee or the employer or both of them would, in relation to the employment, be in contravention of the law, if the employee were to continue in the employment of the employer or, were to so continue without that variation of the terms of his contract of employment; or
>
> (e) any other reason of substance, which, in the opinion of the court or the Labour Tribunal, was sufficient cause to warrant the dismissal of the employee or the variation of the terms of that contract of employment."

36. Section 32M is as follows:

> "(1) On a claim for remedies under this Part if the court or Labour Tribunal finds that the employer has not shown a valid reason as specified under section 32K, the employer is deemed to intend to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance and the dismissal or the variation is deemed to be unreasonable and the court or Labour Tribunal may make an order under section 32N or an award of terminal payments under section 32O.

(2) On a claim for remedies under this Part if, in relation to the dismissal of an employee in any of the circumstances mentioned in section 32A(1)(c), the court or Labour Tribunal finds that the employer has not shown a valid reason for that dismissal within the meaning of section 32K and, upon that finding the employer, after having been given an opportunity to do so, refuses or fails to show that the dismissal is not in contravention of-

(a) section 15(1), 21B(2)(b), 33(4B) or 72B(1);

(b) section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59); or

(c) section 48 of the Employees' Compensation Ordinance (Cap 282),

then the court or Labour Tribunal may make an order under section 32N or an award of terminal payments under section 32O and, in the case where the court or Labour Tribunal does not make an order under section 32N, the court or Labour Tribunal may, whether or not it has made an award of terminal payments under section 32O, make an award of compensation under and in accordance with section 32P to be payable to the employee by the employer as it considers just and appropriate in the circumstances."

37. Section 32P provides:

"(1) Subject to section 32M, the court or Labour Tribunal may, whether or not it has made an award of terminal payments under section 32O, make an award of compensation to be payable to the employee by the employer as it considers just and appropriate in the circumstances, if-

(a) neither order for reinstatement nor order for re-engagement under section 32N is made; and

(b) the employee is dismissed by the employer in contravention of section 15(1), 21B(2)(b), 33(4B) or 72B(1), section 6 of the Factories and Industrial Undertakings Ordinance (Cap 59), or section 48 of the Employees' Compensation Ordinance (Cap 282), whether or not the employer has been convicted of the offence in respect of the dismissal.

(2) In determining an award of compensation and the amount of the award of compensation under this section, the court or Labour Tribunal shall take into account the circumstances of the claim.

(3) Without affecting the generality of subsection (2) the circumstances of a claim include-

(a) the circumstances of the employer and the employee;

(b) the length of time that the employee has been employed under the contract of employment with the employer;

(c) the manner in which the dismissal took place;

(d) any loss sustained by the employee which is attributable to the dismissal;

(e) possibility of the employee obtaining new employment;

(f) any contributory fault borne by the employee; and

(g) any payments that the employee is entitled to receive in respect of the dismissal under this Ordinance, including any award of terminal payments under section 32O.

(4) The amount of an award of compensation under this section shall be such amount as the court or Labour Tribunal considers just and appropriate but no such award shall exceed an amount of $150,000.

(5) The Commissioner for Labour may amend the amount specified in subsection (4) by notice in the Gazette."

38. It was pleaded on behalf of each plaintiff that his employment "was terminated without any valid reason and in contravention of ss. 21B(2)(a) and/or(b)… in that [Cathay] terminated each Plaintiff's contract of employment by reason of the exercise by each Plaintiff of his right to be a member of the [Association] and/or to take part in the activities of the [Association] , a trade union registered in Hong Kong… ."[15] It was said that, accordingly, the plaintiffs were entitled to compensation pursuant to the terms of ss. 32A(1)(c)(i), 32M and 32P of the Ordinance.[16]

The effect in this case of the relevant provisions

39. It followed, by reason of the statutory provisions which we have itemised, that in order to defeat the claim by the plaintiffs for compensation

[15] Re-re-re-amended Statement of Claim, para 7.
[16] ibid para 9.

under s. 32P, a burden was placed upon Cathay[17] to show that the dismissals were for a valid reason, within the meaning of s. 32K, namely, in this case, by reason of the "conduct" of the plaintiffs[18]or "any other reason of substance" which in the court's opinion was sufficient cause to warrant their dismissal[19]. In order to establish a s. 32K reason, it was for Cathay to show that the reason advanced was in truth why the plaintiffs were discharged and not a pretext.[20]

40. However, supposing that that burden were discharged, that is not the end of the required analytical exercise, for the showing of a valid reason, as defined by s. 32K, would not avail Cathay if Cathay terminated the contracts by reason of the exercise by the plaintiffs of a protected right, which in this case was the right to be a member of the Association and to take part, at any appropriate time, as that is defined, in the activities of that Association, the burden resting on Cathay to show that termination was not for either prohibited reason[21]. Conduct which constitutes the exercise of a protected right is protected conduct.

41. We would add that the "conduct" contemplated by s. 32K(a) is not necessarily misconduct. Misconduct is referred to in s. 9 but not in s. 32K. Nor is the issue whether the employer acted reasonably or unreasonably in treating the conduct relied upon as a sufficient reason for dismissing the employee; this follows from the analysis in *Vincent*: it suffices if the reason given is the true reason, rather than a pretext, is not trifling, and is relevant to the question whether to dismiss.[22]

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[17] That the burden to show a valid reason under s. 32A (1) (c) is on the employer is evident from ss. 32A(4), 32K and 32M.
[18] sub-section(a)
[19] sub-section(e)
[20] *Thomas Vincent v South China Morning Post Publishers Ltd* [2005] 4 HKLRD 258 at para. 28
[21] ss. 32A(4)(a)(i) and 32M(2)(a)
[22] at pp. 269-270.

The judge's findings on the Employment Ordinance claim

42. It is against this statement of the relevant statutory framework, that we examine the judge's findings in respect of the plaintiff's claims under Part VI of the Ordinance. Given the nature of the attack on those findings, it is necessary to relate them in some detail.

43. Cathay's case, said the judge, was that the plaintiffs' contracts of employment were terminated by reason of their "conduct"[23] or "other reason of substance"[24]; in other words, for a "valid reason" within the meaning of s. 32K. The conduct which he said was relied upon by Cathay was the unusually high rate of calling in sick on duty or reserve days, the plaintiffs' failure to discuss with management why that was happening, and their perceived negative attitude towards Cathay and fellow employees.

44. The judge concluded that he could not accept that Cathay had a valid reason to dismiss the plaintiffs under s. 32K. It was, he said, incumbent upon him to ascertain not only the true reason for their dismissal but the predominant motive for the employer's act of dismissal.[25]

45. He went on:

> "I accept that considerations of the nature underscored by Mr Huggins [for Cathay] (namely, the suspected or supposed anti-company or anti-social tendencies of the plaintiffs) played a part in the deliberations of the review panel. Those considerations could well have been part of the reason for Cathay dismissing the plaintiffs. But I do not think that such considerations were by any means the whole (or even a predominant part) of the picture."[26]

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[23] s. 32K(a): 'the conduct of the employee'

[24] s. 32K(e): "any other reason of substance, which, in the opinion of the court… was sufficient cause to warrant the dismissal of the employee… ."

[25] judgment paras 60 – 64.

[26] Judgment para 65

46. In support of this conclusion, he referred to evidence from Mr Rhodes: first, a letter he had written to the Association in which he had said that "if industrial action does commence we will take firm action against any staff member who deliberately acts against the interests of our passengers"; and, second, his oral testimony which was to the effect that if a settlement had been reached, the 49 people who were dismissed would not have been dismissed, and that the 49 chosen were those who "during the review .. were thought the most active participants in the contract compliance … [and] … in being uncooperative and unhelpful and poor attendance. … the ones we assessed as being the most unhelpful to the company during that period."

47. From this, the judge derived that:

> "… the 49ers (including the plaintiffs) were principally dismissed because management was unable to make headway in last-minute negotiations with the union. Cathay's intention was to show union members that management was prepared to take tough action against pilots who participated in MSS.
>
> 70. The 49ers were singled out by the review panel as persons who by reason of their sickness records and ostensibly argumentative character (as reported by Crew Control to the review panel) were probably the most active supporters of the union cause. By dismissing them, Cathay hoped to send a strong signal to other union members to comply with management's line or else face a similar fate as the 49ers.
>
> 71. This appears to me to be why, repeatedly throughout their evidence, Cathay's witnesses stressed that the union's decision to engage in limited industrial action was 'the trigger' or 'the catalyst' to Cathay acting as it did. The whole point of dismissing the 49ers was, by vigorous response, to forestall the limited industrial action. The alleged conduct of the 49ers (including the plaintiffs) could not have been the predominant reason for the sackings. This is because, as Mr Rhodes accepted, if a deal had been reached with the union, no one would have been dismissed."

48. The judge noted that "Cathay could not identify a single instance where any of the plaintiffs manifested [anti-company and antisocial conduct]"; and that it was never put to any given plaintiff that he had malingered, had an

unusual sick leave record, refused to meet 'management' to discuss that record; or had in any particular instance been negative to anyone or not acted in the company's best interests[27]. The evidence as to negative attitude of particular plaintiffs was vague and unparticularised. The judge held that in truth:

> "… essentially, the 49ers seem to have been chosen because it was thought that their sickness records and their encounters with Cathay staff (especially Crew Control) were indicative. Those records and encounters were thought to show that, on the balance of probability, the 49ers were actively engaged in the contract compliance campaign and would likely be actively engaged in the MSS limited industrial action."[28]

49. The real target behind the mass dismissals was, he found, "not the individuals concerned, but the union. The sackings of the 49ers were meant to discourage the union and its members from proceeding further with MSS." Further, the judge said:

> "… given the contract compliance campaign, Cathay's reasoning appears to have been that a high degree of calling in sick, was likely to be reflective of a high level of commitment to the union cause in general and to contract compliance in particular."[29]

50. The judge noted what he referred to as Mr Chen's "grudging admission… that at least 'part' of the reason for the plaintiffs' dismissal had to do with contract compliance. By this I understand that … the review panel was singling out the 49ers as likely activists in the contract compliance campaign. In my view, this admission was an understatement. Far from playing only a small 'part', the plaintiffs' perceived involvement in union activities had a significant role in Cathay's decision."[30]

51. As for Cathay's reliance on "other reason of substance", the judge held that there was no credible evidence before the court of malingering or

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[27] judgment paras 81 and 82
[28] judgment para 89
[29] judgment para 96
[30] judgment paras 97 and 98

anti-social conduct on the part of these plaintiffs and that "if (as I have found) the plaintiffs were principally dismissed because it was thought that their records showed that they were engaging in union activities (whether within or outside of "any appropriate time"), there is equally no evidence of this in any of the plaintiffs' cases. If the plaintiffs were dismissed because they were merely active supporters of the union, they are entitled to belong to a union and take part in its lawful activities under s. 21B"[31]. He was satisfied that there was, accordingly, no basis for a defence based upon "other reason of substance".

52. In conclusion on the claim under the Employment Ordinance, the judge found:

(a) that "[t]he plaintiffs are entitled to compensation under Part VIA. They were not dismissed for a valid reason within s. 32K. The plaintiffs appear to have been dismissed predominantly (albeit not solely) for supporting the union."[32]

(b) in answer to the question "whether the termination of any plaintiffs' employment was by reason of his exercising his right to be a member of the union"[33] that "the plaintiffs were partly terminated because it was thought likely that they were committed union supporters who had actively engaged in contract compliance and who were likely to participate in the MSS action. In fact, although union supporters, there is no evidence of the plaintiffs having engaged (actively or otherwise) in the union's contract compliance or MSS campaigns."[34]

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[31] judgment paras 101 -103
[32] judgment para 106
[33] the question is at para 55
[34] judgment para 110.

(c) in answer to the important question posed for the court's determination, namely, "whether the termination of any plaintiffs' employment was by reason of his participation in the contract compliance campaign or the MSS and, if so, whether such participation constituted the taking part in the activities of a trade union at an appropriate time as protected by [the Ordinance] s. 21B(1)(b)", the judge stated as follows:

> "There is no evidence that the plaintiffs engaged in union activities otherwise than at "appropriate times" as defined in [the Ordinance] s 21B(3)"[35].

(d) in deciding the level of compensation under s. 32P, that: "The predominant reason for dismissing the plaintiffs was for their having been a member or engaged in union activities. The plaintiffs were chosen for dismissal as likely participants in the contract compliance campaign and the intended limited industrial action."[36]

The argument

53. The appellants' complaints may be summarized thus:

(a) that the judge erred in holding that the predominant reason for termination of the plaintiffs' contracts was that "they were committed union supporters who had actively engaged in contract compliance and were likely to participate in the MSS action";

(b) that the judge erred in finding that "conduct" within the meaning of s. 32K was not the predominant reason for dismissal of the plaintiffs;

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[35] judgment para 111.
[36] judgment para 112(1).

(c) that the judge erred in adopting a test of predominance: it is sufficient, says Mr Huggins, if but one of the reasons amongst several (if there are several) is an effective or operative reason for dismissal and that since the judge found that union activity was but one reason, and accepted that non-cooperation and anti-social conduct was or may well have been *a* reason, the burden upon the employer to establish a valid reason had been discharged;

(d) that insofar as the judge held that the predominant reason for dismissing each plaintiff was for his having been a member of a trade union, there was no basis for such a finding;

(e) that given that s. 21B(1)(b) excludes from protection those who take part in the activities of a trade union at times other than appropriate times as that is defined by sub-section (3), the finding that the contracts of employment were terminated because of participation in the limited industrial action must, by definition, mean that the contracts were terminated because of activity during working hours, so that the right to a remedy did not arise; and

(f) that the award of compensation in the sum of $150,000 each was excessive.

The predominant reason

54. The learned judge seems to have drawn from the Court of Final Appeal's judgment in *Vincent* that it is incumbent upon a court engaged upon a s. 32K exercise to ascertain the predominant reason for dismissal. We do not think that that necessarily follows from that judgment, for the Court of Final Appeal was not in that case concerned with the weighing of several reasons for dismissal.

55. The difficulty with the test proposed by the judge is that it may well in a particular case be difficult to discern, or for the employer honestly to specify, a predominant reason for it may be a combination of factors bearing no particular priority one as against another. Perhaps a more satisfactory approach is to ascertain whether a suggested valid reason was an effective cause of the dismissal. If the employer fails to show that, the non-valid reason(s) aside, the employee would nonetheless have been dismissed for the valid reason, then he fails to discharge the burden upon him to establish a s. 32K reason.

56. Be that as it may, there appeared to be a suggestion in the appellants' argument that so long as one valid reason is shown, it matters not if there was an additional but prohibited reason. If that was the proposition, then, applied to this case, it was a suggestion that even if trade union activities during appropriate times was a reason for dismissal, the protection afforded by s. 21B (1)(b) is of no avail to the employee in securing a remedy under Part VI, so long as there is another but non-prohibited reason. If that is the suggestion, then we reject it as being clearly contrary to a purposive construction of the Ordinance. The design is to confer a right not to be dismissed for protected conduct and if that conduct is a material and operative cause of dismissal, then, in our judgment, the employee is entitled to a remedy under Part VI, notwithstanding that there were other operative reasons. Further, it follows from such purposive construction that the protected conduct cannot be the kind of conduct offering a valid reason under Section 32K.

57. It therefore follows that, if the judge's finding that a material (he says 'predominant') reason for the dismissal was participation in activities protected by s. 21B, is a sustainable finding, it avails the appellants little to rely on the judge's apparent acceptance that "the suspected or supposed anti-company or anti-social tendencies of the plaintiffs played a part in the deliberations of the review panel [and] could well have been part of the reason

for Cathay dismissing the plaintiffs."[37]

58. There was a further argument to the effect that the judge wrongly held that there was no conduct at all within the meaning of s. 32K, that constituted a reason for dismissal[38] and that this must be an error, since even taking part in union activities is "conduct". As explained, adopting a purposive construction, we concluded that protected conduct cannot fall within the scope of conduct under Section 32K and therefore we reject this submission. The pertinent questions in this part of appeal are: whether, first, the judge erred in his conclusion as to what conduct motivated dismissal and, second, if he did not err in that regard, whether he erred in holding that it was protected conduct.

The findings of fact

59. We have been asked to say that there was no valid basis for :

(1) the judge's finding that the predominant reason for the dismissal of the plaintiffs was their engagement in contract compliance and likely participation in the MSS action;

(2) the judge's concomitant rejection of Cathay's evidence that the plaintiffs were dismissed for their poor attendance records and their unhelpful attitude to work, divorced from any role they may have played in the limited industrial actions in 2000 and 2001; and

(3) the judge's finding that the plaintiffs were dismissed for having been members of the Association.

60. We can deal readily with the third of those contentions, since it is relatively easy of resolution. The only stage at which the judge suggested in his judgment that the fact of union membership was a motivating reason for dismissal was when addressing the issue of the level of compensation, stating

[37] see para 65, judgment as well as the reference to 'partly' at para 110.
[38] Para 60 where the judge says that there was no valid reason for dismissal

that: "The predominant reason for dismissing the plaintiffs was for their having been *a member* or engaged in union activities."[39] (Emphasis added).

61. We have, with respect, some difficulty with this finding. The entire thrust of the plaintiffs' case and, indeed, the remainder of the judgment was that the plaintiffs were dismissed because they were perceived to be troublemakers, the main actors in, or in pursuit of, the limited industrial action. Each of the hundreds of pilots who took part in the industrial action was a member of the union and the vast majority retained their employment. It is, we think, incorrect, in the context of this case, to suggest that, of itself, membership of the union was an irritant or a motivating factor. Accordingly, this finding should, in our judgment, be set aside. Indeed, we note that in the judge's summary of his findings[40], he did not refer to dismissal on account of the plaintiffs being members of a trade union.

62. The first and second of the contentions, which go together, are advanced on several footings. It is said, first, that the judge has nowhere expressed disbelief in the evidence of Mr Rhodes, the effect of whose testimony was that the roles of individual plaintiffs in or towards industrial action was unknown to the review panel; that concern about the non-cooperative conduct of the plaintiffs was longstanding and that the industrial action was but a catalyst that caused Cathay to conduct the review since by that stage "enough was enough, we're not going to carry these passengers and the workforce anymore."[41] The judge appears to have been motivated materially by the concession made by Mr Rhodes that had the dispute with the union been settled, the dismissals would not then have taken place; and Mr Huggins argues, with some force we think, that it does not necessarily follow from that concession that the plaintiffs were dismissed because of their union activity. The judge's

[39] judgment para 112(1)
[40] judgment para. 198(1)(a)
[41] Day 7 of the trial; transcript p. 64

logic, it is argued, fails to take into account commercial reality, by which Mr Huggins means that any settlement was likely rapidly to unravel had longstanding dissatisfaction with the plaintiffs' attitude been allowed to result in their dismissal at that time.

63. We do not, however, consider ourselves to be in a position to second-guess the judge's finding of fact as to the predominant cause of the dismissals. The judge had the singular advantage of securing the "feel" of the matter by hearing extensive evidence and, more particularly, there are immovable facts at the centre of the relevant history which render the judge's finding one which accords with inherent probability. It is a central fact that the threat of industrial action was met with at least one warning by Cathay of possible dismissals; further, that the dismissals followed immediately upon the start of the MSS action; and the public announcement by Cathay, which is the subject of the defamation claim, by clear implication linked the two. In any event, in coming to his conclusion, the judge did not rely only upon the evidence that had there been a settlement, the dismissals would not have taken place. He pointed to the fact that Cathay had not identified a single instance where any one of the plaintiffs had manifested anti-company and anti-social conduct; indeed, he commented, it was never put to any plaintiff that he had malingered in any specific instance or that he had an unusual sick leave record or that he had refused to meet management to discuss his sick leave record or that he had in any particular instance been negative.[42] In these circumstances, there is not shown a sufficient basis for upsetting the findings under attack.

The key remaining issue

64. Mr Huggins then argues that in any event, and vitally, it is difficult to discern precisely the conduct for which, according to the judge, the plaintiffs

[42] judgment, paras 81-82

were dismissed.

65. We have seen from our recitation of passages from the judgment[43] that state or suggest the true reason for termination of the contracts, that the judge has variously referred to "pilots who *participated in MSS*"; "[those] who by reason of their sickness records and ostensibly argumentative character… were probably *the most active supporters of the union cause"*; an intention "to forestall the limited industrial action"; "those [sickness] records and [staff] encounters were thought to show that…[the plaintiffs] were *actively engaged in the contract compliance campaign* and would likely be *actively engaged in the MSS limited industrial action*"; the target "was not the individuals concerned, but the union" so that the sackings "were meant to discourage the union and its members from proceeding further with MSS"; his conclusion that "Cathay's reasoning appears to be that a high degree of calling in sick was likely to be reflective of *a high level of commitment to the union cause* in general and to contract compliance in particular"; "the plaintiffs' perceived *involvement in union activities"*" "*supporting the union*"; "*committed union supporters*".

66. What, asks Mr Huggins rhetorically, was the judge's finding? Was it that Cathay sacked the plaintiffs because they were perceived to be committed union supporters generally or because they were allegedly active in promoting industrial action or because they themselves were perceived to be the most fervent past (2000) and likely (2001) participants in the industrial action itself or, perhaps, a combination of all three?

67. We are satisfied that, ultimately, the answer was provided by the judge quite specifically. All his reasoning and the comments to which we have referred were designed to lead to specific answers to particular questions which had been posed. So it is to those answers that we must go to resolve the issue

[43] paras 47 to 52 above

posed by Mr Huggins.

68. In answer to Question 5, which asked "Whether the termination of any plaintiffs' employment was by reason of his exercising his right to be a member of the union?" the judge answered, as we have earlier seen, in terms which now bear repetition:

> "The plaintiffs were partly terminated because it was thought likely that they were committed union supporters who had *actively engaged in contract compliance and who were likely to participate in the MSS action*."[44] (Emphasis added)

That conclusion is repeated in the next but one paragraph of the judgment:

> "The predominant reason for dismissing the plaintiffs was for their having been a member or engaged in union activities. The plaintiffs were chosen for dismissal as *likely participants in the contract compliance campaign and the intended limited industrial action*."[45] (Emphasis added)

69. On the face of those answers, it seems clear that what the judge was saying was that the key reason for dismissal was Cathay's perception that the plaintiffs were themselves the most active participants in the limited industrial action which had taken place (contract compliance) and the most likely adherents to the proposed and recently invoked MSS action.

70. The crucial issue is whether participation in such limited industrial action involved exclusively activities during working hours. If the answer is affirmative, it means that such participation was effected at a time other than an "appropriate time" as defined by s. 21B(3) of the Ordinance, as such outside the scope of protected conduct. Otherwise, Cathay would fail in discharging the burden of showing that the dismissal was not in contravention of Section 21B(2)(b) reading in conjunction with Section 21B(1)(b).

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[44] judgment para 110
[45] judgment para 112(1)

71. This is an issue which was squarely raised by Question 6 which was in the following terms:

> " Whether the termination of any plaintiffs' employment was by reason of his participation in the contract compliance campaign or the MSS and, if so, whether such participation constituted the taking part in the activities of a trade union at an appropriate time as protected by [the Ordinance] s. 21B(1)(b)?"

72. The answer provided by the judge was that:

> "There is no evidence the plaintiffs engaged in *union activities* otherwise than at "appropriate times" as defined in [the Ordinance] s. 21B(3)."[46] (Emphasis added)

73. Cathay's argument is that contract compliance and MSS action could, by definition, only be carried out during working hours and therefore, not be undertaken at an "appropriate time" for the purposes of the Ordinance.

74. There is, so it seems to us, a flaw in this contention in that – certainly at least in relation to contract compliance – contract compliance included measures that could only be carried out when the plaintiffs were not, by their contracts, required to be at work. Whilst there might be something in Cathay's point in relation to MSS, which engaged application of the strict letter of operations manuals during and in preparation for flight, contract compliance, by contrast, involved, for example, ensuring non-contactability on guaranteed days off, reporting for duty at no greater an interval than that strictly permitted by contract, and not waiving the right to the prescribed number of days off after long-haul flights. In short, none of these activities which formed an integral part of contract compliance took place at a time when the plaintiffs were required to be at work. The activities were union activities and cannot be said to have been engaged by the plaintiffs at other than at an appropriate time, as defined by s. 21B(3).

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[46] judgment para 111

75. For these reasons, the appeal in relation to the Employment Ordinance claim must, subject only to the question of the amount of compensation, fail.

Compensation

76. By virtue of s. 32P of the Ordinance the court may award compensation to the employees as it considers just and appropriate in the circumstances if the employee is dismissed in contravention of, amongst other provisions, s. 21B(2)(b). Section 32P(2) directs the court to take into account the circumstances of the claim, including the circumstances specified in sub-section (3):

> "(a) the circumstances of the employer and the employee;
>
> (b) the length of time that the employee has been employed under the contract of employment with the employer;
>
> (c) the manner in which the dismissal took place;
>
> (d) any loss sustained by the employee which is attributable to the dismissal;
>
> (e) possibility of the employee obtaining new employment;
>
> (f) any contributory fault borne by the employee; and
>
> (g) any payments that the employee is entitled to receive in respect of the dismissal under this Ordinance, including any award of terminal payments under section 32O."

77. The maximum sum that can be awarded is prescribed by s. 32P(4), namely, $150,000. That was the sum awarded by the judge to each plaintiff.

78. In assessing that which he considered to be the appropriate and just compensation, the judge referred to three factors:

(1) that the predominant reason for dismissing the plaintiffs was for their membership and engagement in union activities, in particular in the contract compliance campaign and the intended MSS action;

(2) the absence of any evidence that the plaintiffs had actually so participated;

(3) the fact that they had been dismissed without the benefit of a chance to be heard.

79. There was no reference to other factors mentioned in s. 32P(3) such as the length of time that each employee had been employed but it is not incumbent upon the judge to mention each such factor: we can safely take it in this case that although the length of service varied from plaintiff to plaintiff, each had been employed for a substantial period.

80. Mr Huggins suggested that, even on the judge's findings of fact, this was hardly the worst case of its kind. The plaintiffs, on the other hand, unrealistically submitted in written submissions that it was difficult to imagine a more serious case. That was a wholly unrealistic submission. That said, we do not think that it was intended to reserve the maximum award for the worst imaginable case. It will always be possible to imagine worse cases than a case to hand. It is more a question of applying criteria such as those envisaged by s. 32P(3) to the facts of an individual case.

81. The judge adopted a broad-brush approach. Though the award seems high, it is not outwith the boundaries of the range permissible on the facts found. The plaintiffs are professional men whose chances of further employment must have been affected to some extent by their dismissal and it was indeed relevant to the assessment that none was afforded the opportunity to respond to such of Cathay's misgivings about them that led to his dismissal.

82. Accordingly, we shall not interfere with the individual awards.

Claim for wrongful termination

83. Clause 35.3 of the Conditions of Service ("the Conditions") of the plaintiffs' contracts with Cathay provided as follows: "An Officer's employment may be terminated at any time after the probationary period by either party, giving to the other party not less than three (3) months' written notice or payment in lieu thereof."

84. On 9 July 2001, Cathay issued letters terminating the employment of 49 pilots. These letters were in substantially similar terms and stated: "[W]e hereby give you notice of termination of your employment … This termination will take effect from the date of this letter and will be by means of payment of 3 months wages in lieu of notice."[47] On 11 July 2001, Cathay issued a letter to Mr Keene, who was on sick leave until 10 July 2001, terminating his employment in similar terms.[48]

85. On 9 July 2001, Mr Tyler made a press statement in which he stated inter alia that Cathay had taken the decision to terminate the employment of 49 pilots, that letters of termination were issued to those pilots that day, that in accordance with the Conditions and the Employment Ordinance the pilots would receive three months wages in lieu of notice. On 10 July 2001, Mr Philip Chen made a public statement regarding the dismissal of the pilots. The public statements of Mr Tyler and Mr Chen were the subject of the plaintiffs' claim in defamation.

[47] As quoted in the Preliminary Statement of the plaintiffs in Case No. BC 259052 of Los Angeles Superior Court para 9

[48] judgment, para 49

86. The plaintiffs' claim for wrongful termination of contract was pleaded in this way.[49] On a proper construction of the Conditions and the Disciplinary and Grievance Procedures ("the DGP"; which was an appendix to the Conditions), where any misconduct or disciplinary matters were alleged against the employee or where Cathay decided to dismiss an employee for misconduct or disciplinary matters, Cathay was obliged to instigate and complete the disciplinary procedures in the DGP. Wrongfully and in breach of the DGP, Cathay openly announced that the plaintiffs were liable to be dismissed for misconduct and/or disciplinary reasons and dismissed them without first instigating and completing the disciplinary procedures.

87. In the further and better particulars of the pleading provided by the plaintiffs[50], it was stated that no misconduct or disciplinary matter had been alleged against or communicated to them before their dismissals. The only allegations of misconduct or disciplinary matter relied on by the plaintiffs were those made in the public statements after the letters of termination were issued to the 49 pilots. In the case of Mr Keene, the public statements did not refer to him strictly speaking, as he was not among the 49 pilots who had their employment terminated by letters issued on 9 July.

88. At a trial of preliminary issues, the Judge held[51], on a proper construction of the plaintiffs' contracts, clause 35.3 was not a free-standing option independent of the DGP. Where "the underlying reason for dismissal is alleged misconduct", the right for the employee to be heard under the DGP was triggered. In that situation, clause 35.3 could not be used to by-pass the procedures in the DGP. Cathay would have to invoke the DGP first. Once the disciplinary proceedings had been carried out and a final outcome announced, the right to terminate without cause under clause 35.3 could be

[49] Re-re-re-amended Statement of Claim, paras 15 and 16
[50] filed on 9 July 2009, page 7
[51] judgment on preliminary issues, paras 53, 58, 73

exercised: (*Gunton v. Richmond-upon-Thames London Borough Council*).[52]

89. At the trial, counsel on both sides framed 21 questions for the court, to assist in the determination of the issues. The first question relevant to the claim for wrongful termination was in these terms: "Whether 'any misconduct or disciplinary matters' were alleged by the Defendants against any Plaintiff or whether the Defendants had decided to dismiss any Plaintiff for misconduct or disciplinary matters?"[53]. The judge's answer was: "Despite its denials of having done so, as a matter of fact Cathay dismissed the Plaintiffs in part for misconduct."[54] The basis for this finding was in the public statement of Mr Tyler, by which Cathay accused the plaintiffs of showing a lack of professionalism in their conduct, and plainly implied that the plaintiffs had not discharged their duties in the manner in which they should.[55]

90. In accordance with the holdings in the trial of preliminary issues, the judge held Cathay was in breach of the DGP by failing to instigate and complete disciplinary procedures in relation to each plaintiff[56]. He awarded damages to each plaintiff (save for Mr Crofts, who made no claim for unfair or wrongful dismissal in these proceedings) in an amount equivalent to one month's pay, being the time within which a disciplinary process could be completed[57].

91. Mr Huggins argued the judge was in error on the law and the facts.

92. There is statutory provision which conferred a right on either party to terminate without cause on giving notice or payment in lieu, apart from the contractual right in clause 35.3 of the Conditions.

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[52] [1981] 1 Ch 448
[53] judgment, para 114
[54] judgment, para 125
[55] judgment, para 115
[56] judgment, para 117
[57] judgment, para 118

93. At the material time in 2001, section 6 of the Employment Ordinance provided that "… either party to a contract of employment may at any time terminate the contract by giving to the other party notice, orally or in writing, of his intention to do so." Section 7(1) at the material time provided that "either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party a sum equal to the wages which would have accrued to the employee during the period of notice required by section 6". It was held by the Court of Final Appeal in *Kao, Lee & Yip v Lau Wing*[58] that the mechanism provided for in section 7 is unilateral, so a termination is brought about by either party promising or undertaking to pay the necessary sum to the other without having to secure or wait for the co-operation of the other.

94. Mr Huggins submitted once termination had been effected by issuing the letters of termination, the statement made subsequently in the public statements of Mr Tyler and Mr Chen could not trigger the DGP. The power to dismiss without cause is "a power to dismiss for any cause or none" (*Reda v Flag Ltd*)[59]. No cause would need to be identified in the letters of termination and none was stated. The judge was in error in holding that the DGP would be triggered if the underlying reason for the dismissal was alleged misconduct or a disciplinary matter.

95. Mr Huggins further submitted *Gunton* in fact supported his position. The employee there was dismissed for cause, and the notice of termination referred to disciplinary grounds. The majority judgments of Buckley LJ and Brightman LJ emphasised the distinction between dismissal on some stated ground relating to conduct and dismissal without cause in these passages:

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[58] (2008) 11 HKCFAR 576 at paragraph 15
[59] [2002] IRLR 747 at paragraph 43

> "The adoption of the disciplinary regulations does not appear to me to be in any respect inconsistent with the continued power of the council to dismiss the plaintiff on a month's notice *upon grounds other than disciplinary grounds*. I am, however, myself of the opinion that the adoption of the disciplinary regulations and their consequent incorporation in the plaintiff's contract of service did disenable the council from dismissing the plaintiff *on disciplinary grounds* until the procedure prescribed by those regulations had been carried out." (at 462A to C, per Buckley LJ; emphasis supplied)
>
> "In the present case, in my view, the council could, on January 13, 1976, have determined the plaintiff's contract of service on February 14, 1976, *without assigning any reason*, or for any given reason other than a disciplinary reason. They did not, however, do so. It is common ground that the letter of January 13, 1976 purported to relate the plaintiff's dismissal to disciplinary matters. … in my opinion, the effect of the incorporation in the contract of the disciplinary regulations was to entitle the plaintiff not to be dismissed *on disciplinary grounds* until the disciplinary procedures prescribed by the regulations had been carried out." (at 470B to D, per Buckley LJ; emphasis supplied)
>
> "The result was that the council had under the contract a right to dismiss the plaintiff on one month's notice, but they could not lawfully act on a recommendation for dismissal *on a disciplinary ground* unless the disciplinary procedure had been followed; the completion of this procedure was a condition precedent to a valid recommendation for dismissal *on a disciplinary ground*." (at 473H to 474A, per Brightman LJ; emphasis supplied)

96. The judge referred to the words of Brightman LJ at 474C in which he stated that "the council were intending to dismiss on a disciplinary ground." From this, the judge would appear to have derived support for the proposition that where the underlying cause for dismissal is a disciplinary matter, the employer may not terminate without cause but must first invoke the DGP, although he recognised it was unclear if Brightman LJ was requiring "an expressed as opposed to an unexpressed (but no less actual) motive".[60]

97. We do not think there is support at law for the judge's view that if the underlying reason for dismissal was a disciplinary matter, Cathay was obliged to invoke the DGP, notwithstanding it had chosen to terminate without

[60] judgment on preliminary issues, para 80

cause by undertaking to pay the necessary sum in lieu of notice. Further, it was no part of the plaintiffs' case as pleaded. The plaintiffs put their case on the basis that the obligation to invoke the DPG would arise where Cathay had alleged misconduct or disciplinary matters against the employee or where it had decided to dismiss an employee for misconduct or disciplinary matters.

98. The judge did not appear to have considered that termination had been effected in this instance when the letters went out with the undertaking of Cathay to pay wages in lieu of notice to terminate the employment. His finding of fact that Cathay had dismissed the plaintiffs in part for misconduct cannot be supported. Whatever allegations of misconduct were made by the management subsequently in the public statements did not alter the position that the employment was terminated without cause. The redress for the plaintiffs' grievance in respect of any false allegations in the public statements would not lie in a claim for wrongful termination. Their remedy was to sue in defamation.

99. The award made by the judge under the claim for wrongful termination of contract must be set aside. His order that the defendants should pay 80% of the plaintiffs' costs in the trial of preliminary issues should likewise be set aside and substituted by an order that the plaintiffs should pay the defendants' costs of the determination of the preliminary issues.

Defamation

(1) The judge's findings

100. Under this head of claim, the judge found that the statements of Mr Tyler and Mr Chen accused the plaintiffs of being unprofessional, of being bad employees and of not caring for Cathay's best interests or those of Hong Kong. As such, they had the effect of lowering the pilots in the esteem of

right-thinking members of the public and were defamatory if false.

101. The judge rejected Cathay's plea of justification. It was not apparent, he said, that the conduct upon which Cathay relied could justify labelling someone as unprofessional or a bad employee. Voting for contract compliance or limited industrial action within the bounds of a contract did not logically mean that the pilot so voting did not care about the company or about Hong Kong and there was no evidence, the judge found, that the plaintiffs carried out their work in any particular instance with a disruptive intent. Furthermore, large numbers of pilots voted in favour of contract compliance yet, save for the plaintiffs and the rest of the 49ers, they were not dismissed; to the contrary, the others were awarded an enhanced pay benefits package.

102. As regards Cathay's plea of qualified privilege, the judge found that even if he proceeded on an assumption that it was in the interests of the public as a whole that statements should be made, an application of the principles followed in *Yaqoob v Asia Times Online Ltd*[61] meant that dissemination of information through the media was to be exercised responsibly but that Cathay had not acted responsibly so that qualified privilege as extended by those principles was not made out. This extended version of qualified privilege had been established by the decision in *Reynolds v Times Newspapers Ltd*[62]: we shall refer to it as the *Reynolds* defence.

103. The judge awarded general damages of $3 million under this head to each of the plaintiffs (except a Mr England who had passed away before trial). In addition, on account of Cathay's failed plea of justification and its refusal to apologize (thus increasing the hurt to the plaintiffs' feeling), the judge awarded each of them (except Mr England) aggravated damages in the sum of $300,000.

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[61] [2008] 4 HKLRD 911
[62] [2001] 2 AC 127

(2) The submissions

104. Mr Huggins attacked the judge's finding as to the meaning of the statements. He submitted that the judge erred in finding that the statements implicated the plaintiffs as "acting in a wholly unprofessional manner unbefitting of pilots" and displaying "a blatant lack of professionalism". Counsel accepted however that it was open to the judge to find that the statements bore a less deprecatory meaning namely, that the plaintiffs were threatening to disrupt the airline and those affected by its operations and in that respect were not showing the level of total professionalism required by Cathay, and that as such the plaintiffs did not have Cathay's best interest at heart and Cathay could not rely upon them to do so in the future.

105. Counsel argued that statements of that limited meaning were justified. In this connection, he submitted that the court should take into account not only the evidence assessed by the review team but also the evidence of the plaintiffs given at trial as to their objects and intentions and attitudes in support of the contract compliance campaign and proposed further industrial action. Two summaries as to the relevant evidence were placed before us.

106. Belatedly, Mr Huggins advanced a submission (neither advanced in the court below nor covered in any grounds of appeal or skeleton submissions) that the statements did not refer to a Mr Keene as he was not dismissed on 9 July 2001. Because of sick leave, his letter of termination was issued on 11 July 2001.

107. As for qualified privilege, Mr Huggins criticized the judge's finding that Cathay had acted irresponsibly. He submitted that the judge placed undue weight on the fact that Cathay had not attempted to ascertain the plaintiffs' side of the story in relation to the allegations against them. He

argued that Mr Tyler and Mr Chen had done all that was reasonably and realistically practicable to verify their statements, that the decision to dismiss was made after a conscientious review and that, in the circumstances, a timely statement was important. It was unrealistic to seek comments from the plaintiffs before publication of the statements and to pursue details with the review team. Further, relying on *Jameel v Wall Street Journal*[63], Mr Huggins submitted that the judge had erroneously treated the list of circumstances identified by Lord Nicholls in *Reynolds* as relevant to the issue of privilege as if they were a series of hurdles which had to be negotiated before a publisher could successfully rely on qualified privilege.

108. Apart from the *Reynolds* defence, Mr Huggins also submitted that Cathay could succeed on qualified privilege in the traditional sense, that is to say, that the statements were made in pursuance of a duty to those who had a corresponding interest to receive them.

109. As to damages, Mr Huggins contended that the award of $3 million was manifestly excessive and out of line with other defamation awards in Hong Kong, and that there was no justification for an award of aggravated damages.

110. Mr Cheung, on the other hand, submitted that by the statements in issue, the plaintiffs had been singled out as the ones who had disrupted the airline and its passengers; yet Cathay had failed to show that the plaintiffs had actually participated in the disruptive industrial actions. As to qualified privilege, Mr Cheung submitted that the issue was not whether Mr Tyler and Mr Chen had individually acted responsibly but rather whether Cathay had acted responsibly.

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[63] [2007] 1 AC 359

111. As for quantum, Mr Cheung referred to the evidence of the plaintiffs as to how their prospects of employment had been affected and referred to the judge's finding, that:

> "Here the evidence is that the world of pilots is a small one. Aspersions cast on a pilot's professionalism and employment record are bound to have a serious effect on one's career. News spreads around quickly in a small industry and one may encounter enormous difficulty finding employment due to the loss of reputation arising from defamatory statements. A pilot so defamed is likely to experience considerable distress and anxiety in relation to his job prospects. I also bear in mind that Mr. Tyler's statement remained published on Cathay's web-site until September 2009."[64]

(3) The issues

112. In the light of the submissions before us and the grounds of appeal advanced, the issues we need to consider are:

(a) the defamatory meaning of the relevant statements;

(b) whether Mr Keene was referred to in the statements;

(c) whether Cathay made good its defence of justification;

(d) whether Cathay has a defence of qualified privilege in its traditional sense;

(e) whether Cathay has a defence of *Reynolds* qualified privilege;

(f) if Cathay be liable in defamation, whether the general damages ordered by the judge are so excessive that the award warrants intervention by this Court and, if so, the amount of the appropriate award; and

[64] para. 176 of the judgment

(g) whether Cathay is liable in aggravated damages and, if so, whether this Court should interfere with the sum awarded by the judge.

(4) Meaning of the statements

113. There are three relevant statements. Upon appeal, Mr Cheung properly conceded that the letter from Mr Chen to the flight crew was published on an occasion of qualified privilege. In the absence of any plea of malice, it cannot be relied upon by the plaintiffs.

114. Therefore, two statements remain to be considered:

(a) the Tyler press statement; and

(b) the Chen statement reported in the Hong Kong iMail.

115. The judge decided that the statements bore the meaning that the 49ers (including the plaintiffs) were accused of being unprofessional, of being bad employees and of not caring for Cathay's best interests or those of Hong Kong[65].

116. The judge found that termination of the employment of the 49ers (including the plaintiffs) had been put forward by Cathay as a measure embraced in order to tackle the "selfish" AOA industrial campaign and that the plaintiffs were described as those who could not be relied upon to act in the best interests of Cathay, so that the implication was that they had played a more prominent role in the campaign than the other pilots[66].

117. The Tyler statement had said that the decision to terminate the employment of these pilots was made after a detailed and careful review of their

[65] See para. 138 of the Judgment
[66] See para. 139(4) to (6) and paras. 154 to 157 of the judgment

employment history. This led the judge to conclude that Cathay had asserted in these statements that the plaintiffs were bad employees. The judge explained this as follows:

> "Cathay did not fire the 49ers (including the Plaintiffs) lightly. It reviewed their employment history. It found that history wanting. The Plaintiffs (Cathay concluded 'after extremely careful consideration') had bad employment records. Those bad records supported Cathay's view that the Plaintiffs (among others) could not be counted on to act in Cathay's best interests and so their continued employment by Cathay was undesirable."[67]

118. The judge read the Chen statement in a similar light. Chen had said that Cathay could not allow this group (meaning those pilots who were dismissed) to disrupt the airline and contrasted them with those who had shown the total professionalism required by Cathay.

119. Mr Huggins argued that Mr Tyler's reference to disruption was directed against the Union instead of the pilots who were dismissed. As regards the reference to the review of the records of the pilots, counsel submitted that the Tyler statement did not mean that the employees were generally bad employees; they were not dismissed summarily. Neither did it mean, counsel contended, that the pilots did not care at all about the interests of Cathay or of Hong Kong.

120. There was no accusation in these statements that these pilots were unprofessional in terms of their competence. There was no suggestion anywhere that they were incompetent in the performance of their duties as pilots. The judge's finding was that pilots who were being accused of being "selfish", "holding people to ransom", "bad employees" and "disruptive" were impliedly accused of acting in a wholly unprofessional manner unbefitting of pilots[68].

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[67] para. 139(5), judgment
[68] para. 139(7) of the judgment

121. In our view, the judge's finding that there was an imputation of unprofessionalism, has to be read in context. In a nutshell, the plaintiffs had been identified as troublemakers upon whom Cathay could not rely. And the reference to the termination of their employment after a careful and detailed review of their records was likely to be understood as implying that the plaintiffs were bad employees who had little regard to the interests of Cathay and its passengers.

122. We see no basis upon which to reverse the judge's findings as to the meaning of the statements.

(5) Mr Keene

123. In the court below, no point was taken by Cathay to the effect that Mr Keene was not one of the 49ers, on the footing that his employment was terminated on 11 July and not on 9 July 2001. Mr Huggins raised the point in the course of submissions before this Court. Counsel accepted that the point had simply escaped everyone's attention. Though the statements referred to the 49 pilots dismissed on 9 July 2001, it is at least arguable that the defamatory imputation was cast against all those screened out to be dismissed by the review process that took place prior to 9 July 2001. Mr Keene was one of those selected to be dismissed in that review process. If the identification point had been taken, Mr Keene might have decided to adduce evidence to show that there were readers of the statements who identified him as one of the implicated pilots. This was a fact and evidence sensitive issue. On the principle laid down in *"The Tasmania"*[69], we will not permit the point to be taken at this late stage.

[69] (1890) 15 App Cas 223 (*Hong Kong Civil Procedure 2011*, Vol 1, para. 59/10/7)

(6) Justification

124. Given that Cathay does not seek to justify the defamatory meaning found by the judge, and from which finding this Court does not dissent, the plea of justification does not in the event avail Cathay.

(7) Qualified privilege in the traditional sense: duty and interest analysis

125. In its defence, Cathay pleaded qualified privilege. The plaintiffs did not plead malice.

126. The key question in this case is whether the plea of qualified privilege is available to Cathay in view of the fact that the statements were published through the media to the world at large.

127. In its traditional formulation, the defence of qualified privilege depends on reciprocity of duty and interest. In *Adam v Ward*[70], Lord Atkinson said,

> "A privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."[71]

128. The categories of relationship covered by this reciprocity of duty and interest tended to be limited (as Lord Nicholls pointed in *Reynolds*[72]) to publication "to one person only or to a limited group of people", primarily to communications of a private nature "commonly arising out of the necessities of some existing relationship between the maker of the statement and the recipient": *Gatley on Libel and Slander*[73]. But:

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[70] [1917] AC 309 at p. 334
[71] See also *Duncan & Neill on Defamation,* 2nd ed., para.14-01
[72] at p. 195E
[73] 11th ed., para. 14.1, page 438

> "… the public as a whole was not generally regarded as having a relevant interest or duty. The media defendant (or other defendant who caused his statement to be published in that way) was in no different position from anyone else and had to show the relevant reciprocity of duty and interest. Such a duty only arose:
>
> > 'where it is in the interests of the public that the publication should be made and will not arise simply because the information appears to be of legitimate public interest.' [*London Artists Ltd v Littler* [1968] 1 WLR 607, 619]
>
> A privilege for publication to the world at large was, in English law, the exception rather than the rule, even if the subject-matter was politics or public affairs."

129. Both the Tyler press release and the Chen statement were made to the public at large. Although Cathay ran its defence on the basis that the general public had an interest in receiving the information and that the interest of the public was to be perceived in its capacity as "potential passengers and users of the airline", the fact of the matter is that there were, necessarily, readers of newspapers who were neither potential passengers nor otherwise users of the airline. It is, in this regard, not enough that the publication was of interest to the public, for there is a distinction between publication in the public interest and publication of material in which the public is interested: if it is the latter alone, privilege is unlikely to attach. It is difficult in these circumstances to see how Cathay could justifiably pray in aid qualified privilege in its traditional reach.

130. Furthermore, whilst prior to *Reynolds* publication in the mass media would not generally lend itself to the protection of qualified privilege, the privilege might nonetheless be available to a communication which is in answer to an attack in the public press[74]. But in this case, although the statements were said to be disseminated as part of a continuing information process, there was no plea of qualified privilege on the basis that they were made to answer a public charge or to correct a mistake. Rather, Cathay's defence was that the

[74] *Gatley* para 14.50

general public had an interest to be informed.

131. Accordingly, Cathay was driven to rely on the scope of qualified privilege as extended by *Reynolds*. Even though a *Reynolds* defence had not been pleaded[75], it was advanced in the closing submissions at the trial and considered by the judge. No pleading point was taken.

(8) The Reynolds defence: the law

132. In *Reynolds*, Lord Nicholls discussed the rationale for qualified privilege and extended the concept to cover responsible journalism in respect of publication by the mass media. The nature of the *Reynolds* defence was further explained by the House of Lords in *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl*[76] and by the English Court of Appeal in *Charman v Orion Publishing Group Ltd and others*[77].

133. In *Reynolds*, Lord Nicholls explained the rationale of the underlying public interest on which qualified privilege is founded:

> "The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source."[78]

and,

> "In determining whether an occasion is regarded as privileged the court has regard to all the circumstances …"[79]

134. In the context of publication in the media, the House of Lords in *Reynolds* rejected the suggestion that there should be a new subject-matter

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[75] see *Gatley* para. 29.20 on how it should be pleaded
[76] [2007] 1 AC 359
[77] [2008] 1 All ER 750
[78] p. 195B
[79] p. 195C

category of qualified privilege. Lord Nicholls regarded that as not providing adequate protection for reputation. The balance was struck by elasticity in the application of the common law, by reference to the circumstances of the case, including a non-exhaustive list of factors.

135. Thus, his Lordship said:

> "… the common law solution is for the court to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public. Its value to the public depends upon its quality as well as its subject matter. This solution has the merit of elasticity. … The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse. An incursion into press freedom which goes no further than this would not seem to be excessive or disproportionate. The investigative journalist has adequate protection."[80]

136. He provided then a non-exhaustive list of illustrative circumstances:

> "This elasticity of the common law principle enables an interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing."[81]

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[80] at p. 202C
[81] at p. 205

137. Lord Nicholls emphasized that,

> "This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case."

138. In *Jameel*[82], Lord Hoffmann suggested a three-pronged inquiry in the application of the *Reynolds* defence:

(a) The public interest of the material: "The first question is whether the subject matter of the article was a matter of public interest. In answering this question, I think that one should consider the article as a whole and not isolate the defamatory statement."[83]

(b) Inclusion of the defamatory statement: "If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article." In this respect, "allowance must be made for editorial judgment."[84]

(c) Responsible journalism: "If the publication, including the defamatory statement, passes the public interest test, the inquiry

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[82] at paras 48 to 56

[83] Para.48 of *Jameel*. See also the comments of Lord Bingham at para.34 and Lord Hope at paras.107-108 in *Jameel*.

[84] Para. 51 of *Jameel*

> then shifts to whether the steps taken to gather and publish the information were responsible and fair."[85]

139. In *Seaga v Harper*[86], the Privy Council held that the *Reynolds* defence was available not only to the press and broadcasting media but also to anyone who published through the mass media[87]. On this basis, with which we respectfully agree, the principle falls for consideration in this case. It may be more appropriate in a case such as the present to refer to the defence as one of responsible public dissemination of information rather than that of responsible journalism. In this regard, the *Reynolds* circumstantial factors may need some adaptation to context.

140. It has since been made clear that Lord Nicholls' non-exhaustive list of factors should not be applied rigidly. In *Jameel*, Lord Bingham said[88]:

> "He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege."[89]

141. Instead of being a series of hurdles to be overcome, they should be regarded as relevant factors in a balancing exercise, hence the elasticity of the concept of responsible journalism.

142. At the same time, the liberalizing intent of the *Reynolds* defence in striking the balance between freedom of expression and protection of the reputation of individuals should be borne in mind. Thus, Lord Nicholls said:

> "Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press

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[85] Para.53 of *Jameel.* The element of fairness is implicit in the judgment of Lord Nicholls in *Reynolds*, as made clear by his speech in *Bonnick v Morris* [2003] 1 AC 300 at para. 23, see Ward LJ in *Charman* at p.773d to e.
[86] [2009] 1 AC 1
[87] To the same effect, see Lord Hoffmann at para.54 in *Jameel.*
[88] at para. 33
[89] To the same effect is the judgment of Lord Hoffmann at para. 56 in *Jameel*. Likewise, see para. 12 of *Seaga*.

> discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication."[90]

143. Reference should also be made to the observations of Lord Nicholls in *Bonnick v Morris and others*[91] as to how *Reynolds* should be applied when there are disputes about the meaning of the statement in question and when the defamatory imputation arises as a matter of implication. In that case, it was held that the single meaning principle[92] should not be applicable when dealing with the *Reynolds* defence. Lord Nicholls stressed that the focus is on the conduct of the defendant. The following passages are important for present purposes:

> "24. To be meaningful this standard of conduct must be applied in a practical and flexible manner. The court must have regard to practical realities. Their Lordships consider it would be to introduce unnecessary and undesirable legalism and rigidity if this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the 'single meaning' of the words. Rather, a journalist should not be penalized for making a wrong decision on a question of meaning on which different people might reasonably take different views. … If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.
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> 25. This should not be pressed too far. Where questions of defamation may arise ambiguity is best avoided as much as possible. It should not be a screen behind which a journalist is 'willing to wound, and yet afraid to strike'. In the normal course a responsible journalist can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to his article. Moreover, even if the words are highly susceptible of another meaning, a responsible journalist will not disregard a defamatory meaning which is obviously one possible meaning of the article in question. Questions of degree arise here.

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[90] at p. 205E to F

[91] [2003] 1 AC 300 at paras. 17 to 25

[92] The single meaning principle is the rule by which the law attributes to the words only one meaning, although different readers are likely to read the words in different senses. This rule was held to be the correct approach in deciding whether certain words were defamatory, see *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at p. 171-172; *Gatley* para.3.15 and *Bonnick* at paras.20-22.

> The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances."[93]

(9) Application of Reynolds to this case

144. The judge proceeded on an assumption that the statements were made on an occasion of privilege. The reasons given for that assumption (without necessarily accepting the validity of such reasons) were as follows:

> "In light of the threatened limited industrial action, the public and Cathay's own flight crew had a right to know how management was going to respond."[94]

145. Reading as a whole that part of the judgment devoted to qualified privilege, it is plain that the judge addressed the *Reynolds* defence[95] and the assumption made was that the first two elements in the three-pronged inquiry were satisfied. In other words, it was assumed that the subject matter of the statements was a matter of public interest and the inclusion of the defamatory statements was justifiable in the sense that the dismissals were part of the story.

146. In the course of this appeal, Mr Cheung did not challenge that assumption. We shall proceed on the same basis though, strictly speaking, the right of flight crew to know about Cathay's response is irrelevant when dealing with a publication to the general public through mass media.

147. So the question, in our judgment, is whether Cathay satisfied the test of responsible dissemination of information to the public.

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[93] These comments were endorsed by Lord Scott in *Jameel* at para.136. The same approach was adopted by Ward LJ in *Charman* (paras. 67 to 68 and 70).

[94] para. 159, judgment.

[95] Though *Reynolds* was not cited explicitly in the judgment, it was referred to in *Yaqoob* which was cited at para.160 of the judgment. Further the reference to the requirement of acting responsibly in that paragraph must be a reference to the third element in the *Reynolds* defence.

148. Cathay did not act as journalist in publishing the statements. Though the relevant public interest still lies in the free flow of information, the statements were actually made in the midst of a communications battle between Cathay and the Union. The statements were made by way of statements to the press, and editors of the media reporting would exercise their own independent professional judgment in reproducing the statements in their newspapers or other media. As shown in the iMail report and the SCMP report of 10 July 2001, the report was not one-sided and the case of the Union had also been put forward at the same time. However, the Tyler statement was posted on Cathay's website without reciting the Union's response.

149. We do not think it is necessary to traverse all the factors in Lord Nicholls's list. Instead we address the considerations most pertinent to this case.

150. Even though there was no imputation cast upon the competence of the plaintiffs, the implication that they played prominent roles in the disruption to the flights and were, according to their employment records, bad and disloyal employees meriting the termination of their services are serious allegations not lightly to be made.

151. The statements were made in the context of a campaign on the part of the Union which could have resulted in serious disruption to the general public in terms of passengers as well as cargo transport by air. We understand why Cathay deemed it necessary to provide up-to-date information through public channels and, as we say, we proceed on the assumption that the inclusion of information about the termination of the employment of these pilots in the statements was justifiable in that context.

152. The present case is different from one in which an independent journalist or writer engages in investigative journalism and publishes his result. Cathay and the Union were using the public arena to conduct a public communication campaign. But once Cathay decided to make public the underlying reason for dismissal, it had to act fairly and responsibly. The principle of responsible public dissemination of information demanded a degree of fairness: either the other side's story was also to be told or the fact that the other side was not prepared to give its story.

153. There was nothing inaccurate about the statement that the services of these pilots were terminated. However, that is not the sting of these statements. The sting arose by implication from the termination of these pilots' employment amidst Cathay's response to the MSS campaign and the reference to a detailed and careful review of their employment records before making the decision to terminate their employment. The sting is the imputation that these pilots played more prominent roles in the Union's campaign than others and that their employment records showed that they were bad employees. We take into account the *Bonnick* factor – if the words are ambiguous to an extent that they may readily convey a different meaning to an ordinary reasonable reader, the court may properly take this other meaning into account when considering whether the *Reynolds* privilege is available as a defence.

154. Mr Tyler and Mr Chen were asked in cross-examination why these pilots were singled out in the statements. Mr Tyler did not agree he was telling the aviation world they were troublemakers[96] but he relied on the judgment of the review board in stating that the behaviour of these pilots led Cathay to believe they did not have the interests of the company at heart and could not be relied upon. In respect of the disruptive behaviour of pilots, Mr Tyler said his statement was referring to all the pilots taking part in the campaign and the

[96] see Transcript of Day 7 at p. 8

49ers were amongst them. He had no specific individuals in mind when he made the statement. He agreed that the dismissal of these pilots operated effectively as a warning though the prime concern was to stop disruption[97].

155. Mr Chen said he believed there were efforts by some, including the 49ers, to disrupt the services of the airline, though he did not refer to the 49ers specifically when he made the statement about disruption[98]. As regards the termination of the services of these men and Cathay losing confidence in them, he said Cathay took into account a host of considerations and the participation in the Union campaign was part of the consideration[99].

156. Mr Rhodes was also cross-examined on this and he reiterated he had no knowledge whether the 49ers had voted for the campaign or whether they had actively participated in it[100].

157. The test of responsible dissemination of information should be applied to Cathay as an entity rather than to Mr Tyler and Mr Chen individually, and one cannot ignore the circumstances in which the statements were made. Even though Mr Tyler and Mr Chen did not personally conduct the proceedings of the review board and were not personally involved in the termination procedure, Cathay as an entity had access to the necessary information to find out how the review process had been conducted, the criteria applied in the process and to what extent an imputation that the plaintiffs played more prominent roles in the Union campaign and had not been serving Cathay faithfully could be justified.

158. We do not think the imputation in the sting was obscure. In the public announcement by Cathay that it had terminated the service of some pilots

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[97] Transcript Day 7 p. 28
[98] Transcript Day 7 p. 50
[99] Transcript Day 7 p. 58
[100] Transcript Day 7 p. 61

for loss of confidence in their commitment to the company in the midst of an industrial action, it is inevitable that these pilots would be perceived as having a greater responsibility than others for the disruption caused by the industrial action. Cathay was aware it had no concrete evidence to support any case of misconduct against these pilots, and Mr Huggins cannot refer to any specific act or conduct of these pilots in the actual participation in the campaign that led to disruption. The judge found Cathay's evidence deficient regarding its allegation of dissatisfaction with these pilots in terms of sickness records, attitude problem, anti-company and anti-social conduct. There was also evidence from the pilots accounting for their sickness records which Cathay did not even attempt to challenge.

159. The management of Cathay was entitled to form its private opinion based on whatever process it deemed appropriate that it had lost confidence in these pilots on account of their attitude and general support for the industrial action and to proceed to terminate their employment by payment in lieu of notice. But it is quite a different matter when Cathay made public statements implicating them as bad employees and troublemakers who caused disruption. As Cathay well knew it had insufficient evidence to justify invoking disciplinary procedure against the pilots for participation in the disruptive campaign[101], it could hardly be said that Cathay had acted responsibly in casting implications against them in the public statements.

160. Irrespective of the capacity in which a person makes a statement to the general public through the media, the law expects him to act responsibly and fairly before publication of a statement which may damage the reputation of others.

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[101] See Rhodes' evidence quoted by the judge at paras 87 and 88 of the judgment.

161. In the present case, the statements made against these pilots were couched in very broad terms. There was no attempt in the statements to particularise the basis upon which Cathay had concluded that these men could not be relied upon to act on the company's best interest. There was also no indication in the statements as to how the review had been conducted. Nothing was said to inform the readers that the pilots had not been given any chance to make representations before the decisions were made.

162. Having regard to all the circumstances, we agree with the judge that Cathay did not discharge the burden of showing that it had acted responsibly and fairly in making those statements. Therefore, the *Reynolds* defence also fails and Cathay is liable to the plaintiffs (except to Mr England) in defamation.

(10) General damages

163. Before we address the sums awarded, a number of general points arise.

164. First, Mr Cheung invited this court to have regard to the evidence of the plaintiffs as to actual financial loss allegedly suffered by them, notwithstanding the judge's specific rejection of the plaintiffs' submission in that regard.

165. The judge said: "I am not persuaded by Mr. Grossman's submission. There is no evidentiary basis for his conclusion, for instance, that the Plaintiffs would have earned between $7 and $17 million if they had not been defamed."[102] Mr Cheung contended, however, that the judge only rejected the calculation but not the evidence, and he relied on the following

[102] para 169 of the judgment.

passage in the judgment:

> "176. Here the evidence is that the world of pilots is a small one. Aspersions cast on a pilot's professionalism and employment record are bound to have a serious effect on one's career. News spreads around quickly in a small industry and one may encounter enormous difficulty finding employment due to the loss of reputation arising from defamatory statements. A pilot so defamed is likely to experience considerable distress and anxiety in relation to his job prospects. I also bear in mind that Mr. Tyler's statement remained published on Cathay's web-site until September 2009."

166. On the other hand, Mr Huggins submitted that that evidence was inadmissible hearsay and speculation on the part of the witnesses and told us that Cathay had shortly before the trial objected to the admission of such evidence. Instead of making a ruling, the learned judge merely indicated that he would recognize hearsay and inadmissible evidence when he saw it. That is how the matter was left. More fundamentally, Mr Huggins contended that the plaintiffs' evidence failed to establish any causal link between the defamatory statements and the subsequent loss of earnings and unsuccessful attempts to secure employment. The judge, said Mr Huggins, did not appear to act upon the evidence and had made no finding to such effect.

167. We agree with Mr Huggins that the evidence did not establish any causal link. The judge specifically rejected the plaintiffs' submission as to how damages should be quantified. We do not agree with Mr Cheung's submission that at para. 176 of the judgment, the judge in effect accepted the plaintiffs' evidence as to loss.[103] In saying what he did, the judge rejected the figures advanced by the plaintiffs and proceeded on the basis that even in the absence of evidence on a causal link, the court could adopt a common-sense approach.

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[103] See paras. 163-165 above.

168. Even so, Mr Huggins criticised the approach of the learned judge as speculative.

169. What the judge did was to echo what is said in *Gatley on Libel and Slander,* namely, that:

> "171. General damages for defamation serve 3 purposes: to console one for the distress suffered as a result of a publication; to compensate one for the loss to reputation consequent upon the publication; and to vindicate one's reputation."[104]

170. It has to be noted that in defamation cases, damages are "at large", meaning that they cannot be assessed by reference to any mechanical, arithmetical or objective formula. *Gatley*[105] explains the difficulty:

> "While actual financial loss (such as loss of business or employment) which is not too remote is clearly recoverable … it is a comparatively rare case in which evidence of such loss is given, simply because it is not available. It has been said that the most serious defamations are those that touch the 'core attributes of the plaintiff's personality', matters such as integrity, honour, courage, loyalty and achievement and in these cases it is most unlikely that he will be able to point to provable items of loss flowing from the words. Even where the libel goes to the claimant's financial credit it may be virtually impossible to prove financial loss but the damage is insidious and merits a substantial award."

171. In approaching the question of quantum, the judge said this:

> "172. I think that the safest approach would be to see what awards the Court has made in similar cases where a person's professional reputation has been defamed."

172. That is an acceptable approach so long as the Court recognises the variety of circumstances and facts attaching to such cases as are relied upon.

173. The second general point we are asked to address is whether it is permissible to cross-check against awards for damages in personal injuries cases.

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[104] at para. 9.2, 11th Edn.
[105] para 9.2.

The judge did not do so. But Mr Huggins, in order to show that the awards in the present case are manifestly excessive, invited this Court to have regard to the maximum awards for general damages in personal injuries in the most serious type of cases. He submitted that for injuries falling within the disaster category, the maximum award hitherto for pain, suffering and loss of amenities is still $2 million[106]. Counsel said that viewed in that light, the judge's award of $3 million for each plaintiff was clearly excessive.

174. In *Cheung Ng Sheong Steven v Eastweek Publisher Ltd & Anor*[107] the Court of Appeal, following the then prevalent English practice[108], held that a jury should not be referred to awards in personal injury cases. That was a case where a jury award of $2.4 million for defamation was set aside on appeal. However, it should be noted at the same time that the court did not regard it as objectionable for the appellate court to have regard to such awards. Mayo JA said it was instructive to do so but with the following rider:

> "The purpose of citing these injuries is not to suggest that they should be included in directions given to a jury. It is to illustrate the enormity of the award made by the jury in the present case."[109]

175. Subsequently, in July 1996, Le Pichon J (as she then was) decided in *Hung Yuen Chan Robert v Hong Kong Standard Newspapers Ltd & Ors*[110] that even in a case tried by a judge alone, the use of personal injury awards was impermissible. Her Ladyship rejected the submission of counsel that personal injuries awards could be used as some cap or ceiling for defamation awards.

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[106] Mr Huggins cited *Cham Cheung Sing v Yung Pak Wa and others* [2007] 3 HKLRD 33 and *Ta Xuong v Incorporated Owners of Sun Hing Building* [1997] 4 HKC 171.
[107] [1995] 3 HKC 601.
[108] See *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 and *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670.
[109] at p. 626B
[110] [1996] 4 HKC 519.

176. Since then, there have been significant changes in England. In *John v MGN Ltd*[111], the English Court of Appeal reconsidered the matter in the light of several developments, two of which are also relevant in Hong Kong. First, in *Carson v John Fairfax & Sons Ltd*[112], the majority of the High Court of Australia decided that reference to personal injury awards was permissible, departing from the majority in *Coyne v Citizen Finance Ltd*[113]. Second, in *Tolstoy Miloslavsky v United Kingdom*[114], the European Court of Human Rights held that an excessive defamation award coupled with the lack of adequate and effective safeguards against a disproportionately large award constituted a violation of the defendant's rights of freedom of expression under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

177. The English Court of Appeal held that whilst one should not equiparate damages for personal injuries and damages for defamation, reference to the former for cross-checking the reasonableness of a proposed award for the latter is permissible.

> "… it is one thing to say (and we agree) that there can be no precise equiparation between a serious libel and (say) serious brain damage; but it is another to point out a jury considering the award of damages for a serious libel that the maximum conventional award for pain and suffering and loss of amenity to a plaintiff suffering from very severe brain damage is about £125,000 and that this is something of which the jury may take account."[115]

178. The Master of the Rolls came to the following conclusion,

> "It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time

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[111] [1997] QB 586 (12 December 1995)
[112] (1993) 67 ALJR 634
[113] (1991) 172 CLR 211
[114] (1995) 20 EHRR 442
[115] *John v MGN* at p.614B

> has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons."[116]

179. The same observation can be made in respect of Hong Kong[117]. We do not regard *Cheung Ng Sheong Steven* as deciding that it would not be right to adopt the same approach here. In fact Mayo JA adopted a very similar approach when considering the correctness of the award. We see no reason why the reasonableness of an award in defamation case should not be "cross-checked" against the prevalent guidelines for personal injury awards. We suggest that it is appropriate for the courts in Hong Kong to apply the approach adopted in *John v MGN*.

180. In *Cheung Ng Sheong Steven*, the Court of Appeal also held by reference to Article 16 of the Hong Kong Bill of Rights[118] that similar human rights consideration applied in Hong Kong as in England. The Vice-President concurred with and adopted[119] the view of Lord Donaldson in *Rantzen v Mirror Group Newspapers Ltd*[120] as to the human rights implication for the threshold for intervention by appellate court. As illustrated by *Tolstoy Miloslavsky v United Kingdom*[121], disproportionate and excessive award of general damages for defamation can constitute an impermissible incursion upon the freedom of expression. The relevant question is "could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation?"

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[116] *John v MGN* at p.614H. See also the current practice in England as set out in *Duncan & Neill on Defamation* (2009) 3rd Edn Paras. 23.05 and 23.30(c); *Gatley* para.9.6

[117] In both *Cheung Ng Sheong Steven* (at p.612A) and *Hung Yuen Chan Robert* (p.533G), judges described the situation of the disparity between enormous awards for relatively inconsequential and ephemeral defamation and modest awards for damaging personal injuries as scandalous.

[118] Article 16 is the same as Article 19 of the International Covenant on Civil and Political Rights. Since 1997, the rights are guaranteed under Article 39 of the Basic Law.

[119] At p.608-610

[120] [1994] QB 670

[121] (1995) 20 EHRR 442

181. The learned judge referred to two cases in his assessment on quantum for general damages: *Yaqoob v Asia Times Online Ltd*[122] where $1 million was awarded and *Chu Siu Kuk Yuen v Apple Daily Ltd and others*[123] where the award was $3 million.

182. The judge said that he did not regard *Yaqoob* as setting a maximum because counsel had there been content to ask for only $1 million. Mr Huggins took this Court to the transcript of the trial in *Yaqoob* which shows that in the closing submissions, the judge was initially of the view that the sum contended for might be too high. The judge was of course entitled, in *Yaqoob*, to depart from his initial view. We were provided with a summary of all defamation awards in Hong Kong from 1959 to 2009. It is unnecessary to reproduce that summary here. It is safe to say that on the basis of that summary, the award of $1 million in *Yaqoob* does not appear to us to be out of line with what was warranted by the facts of that case.

183. However, the judge's use of *Chu Siu Kuk Yuen v Apple Daily Ltd and others* is, in our respectful opinion, problematic. That was a case in which general damages were awarded in the sum of $3 million, the same amount as awarded in favour of each plaintiff in the present case. In awarding the sum in the present case, the judge expressly followed the award in *Chu*. He referred to *Chu* and its facts and then to the "considerable distress and anxiety in relation to his job prospects" likely to be experienced by a pilot defamed in the way each plaintiff was defamed by Mr Tyler's statement and then said that: "taking such factors in the round, I think that on balance I should follow the *Chu* case and award each plaintiff (with the exception of Mr England) general damages of $3 million. … In *Chu* there was medical evidence that the accusations against the solicitor brought about depression. There was no such evidence here.

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[122] [2008] 4 HKLRD 911
[123] [2002] 1 HKLRD 1

But I think that it can be safely assumed that pilots who are said to be unprofessional are bound to experience considerable emotional distress as a result."[124]

184. *Chu* was a far, far more serious case than the present in terms of the nature of allegation, the loss of reputation consequent upon publication, the distress suffered as a result of publication and the amount appropriate to vindicate that reputation. In that case an allegation was made in a newspaper against a wholly innocent female solicitor. There was not a scintilla of truth in the allegation made against the solicitor that she had absconded with $2 million worth of clients' funds. Even when an apology was published by the newspaper, it did not state that the plaintiff was not the person for whom the police were looking, but simply stated that the solicitor for whom the police were looking was not named "Siu", which happened to be the plaintiff's surname. As we see from the headnote to that report:

> "As a result of the article [the plaintiff] suffered depression and the depression materially contributed to her child being born almost 13 weeks premature and remained in a life-threatening condition for some time thereafter." ….

The depression was continuing and it was only after the passage of some considerable time that the plaintiff was able to resume work and even then only half-days at a firm and, only some months after that, full-time. It is noteworthy as well that included in the award of general damages was a proven loss of business profits in the sum of $470,000.

185. The award in *Chu* was one of the highest hitherto in defamation awards in Hong Kong. Given the facts, that was not surprising.

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[124] judgment, paras 177, 179

186. Whilst we recognise that no two cases are alike, we fail, with respect, to see how the judge came to draw an analogy in terms of damages between *Chu* and the present case. If in the circumstances of that case $3 million was an appropriate award – and we do not suggest it was inappropriate – an award of the same amount in the present case was, in our judgment, manifestly inappropriate.

187. As stated in *Gatley*[125] general damages in defamation cases serve three functions: to act as a consolation to the claimant for the distress he suffers from the publication of the statement; to repair the harm to his reputation; and as a vindication of his reputation. The relevant considerations are succinctly set out in the judgment of the Master of the Rolls in *John v MGN* at p.607F to 608A, in particular in the following passage,

> "In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place."

188. Though we find the statements in the present case contained imputations as to the plaintiffs' professionalism, we do not regard them as serious as the statements considered in *Chu* and in *Yaqoob*. The extent of publication in the present case was wider, but it is relevant to note that the statements were reported as one side of the story and at the same time the response of the Union was also reported. Readers of the newspaper articles would have appreciated that these statements were made in the context of a

[125] para 9.2.

communication campaign. Whilst we agree with the judge that it is likely that the plaintiffs experienced distress and anxiety, we are satisfied that their cases are not nearly as serious as *Chu* or *Yaqoob*.

189. Further, having regard to the awards in personal injury cases, the award of $3 million for each plaintiff is, for that reason too, manifestly excessive.

190. Taking into account the seriousness of the defamatory allegations, the wide scope of circulation and the duration for which the statement remained on the website and the hurt suffered by the plaintiffs, we judge that an appropriate award for each plaintiff was one in the sum of $700,000.

(11) Aggravated damages

191. The judge justified an award of aggravated damages on the following basis:

> "183. First, aggravated damages are sometimes awarded where a defendant has raised a plea of justification, but has failed. See *Gatley* §9.14.
>
> 184. I do not regard Cathay's justification plea as having been meritorious. Cathay has not adduced any evidence of misconduct on the part of a single Plaintiff. Nonetheless, Cathay attempted to justify its statements (which amounted to accusations of misconduct against the Plaintiffs) simply by reference to how they voted at union meetings.
>
> 185. Second, aggravated damages may be awarded where a defendant has refused to apologise. See *Gatley* §9.14. I think the absence of an apology from Cathay, despite the lack of evidence to back its statements about the Plaintiffs, is bound to have increased the Plaintiffs' hurt at being accused of disloyalty.
>
> 186. I would therefore award aggravated damages of $300,000 (that is, 10% of $3 million) to each Plaintiff (with the exception of Mr. England)."

192. Though a plea of justification was advanced, it was advanced in respect of a meaning other than the one for which the court ultimately held Cathay liable. At no stage was there an attempt to justify the wider meaning for which Cathay was held liable.

193. In some cases, absence of apology can increase the injury to a plaintiff's feelings and lead to aggravation of damages. But the crux of the dispute in the present case is as to the meaning of the statement. It is akin to the situation in *Morgan v Odhams Press Ltd*[126], where the defendants disputed whether the article could reasonably have been understood to have referred to the plaintiff. As it was the defendants' case that they never said anything at all about the plaintiff, there was no scope for an apology. Here, Cathay's contention was that the statements complained of could not reasonably be understood to have the defamatory meaning alleged by the plaintiffs. In the given circumstances, the absence of an apology ought not to have founded an award of aggravated damages.

Results and orders

194. We allow the appeal in respect of the appeal numbered CACV 66 of 2009 and make the following orders:

(1) the order of the judge dated 2 March 2009 on the trial of preliminary issues be set aside; and

(2) issues (1)(a) and (2)(a) of the preliminary issues be answered in the affirmative.

[126] [1971] 1 WLR 1239

195. For the appeal numbered CACV 268 of 2009, we allow the appeal to the extent as indicated below:

(1) the claim for wrongful termination of contract be dismissed and the award of a month's pay to each plaintiff (with the exception of the plaintiff in HCA 807 of 2007) as damages for wrongful termination of their contracts be set aside; and

(2) the award of general damages of $3,000,000 and aggravated damages of $300,000 for defamation to each plaintiff (with the exception of the 7th plaintiff in HCMP 4400 of 2001 and HCA 2822 of 2002) be set aside and be substituted by an award of general damages of $700,000 to each plaintiff (with the exception of the 7th plaintiff in HCMP 4400 of 2001 and HCA 2822 of 2002).

196. We have not heard submissions on costs so the orders we are going to make as to costs are orders *nisi*. We will first deal with the costs orders made by the judge.

197. For the trial of preliminary issues, the judge ordered that the plaintiffs be awarded 80% of the costs of that application. We set aside that order and make an order that the plaintiffs do pay the defendants' costs of that application.

198. For the trial, the judge ordered the defendants to pay the plaintiffs' costs with certificate for two counsel. We set aside the order to the extent that in respect of the claim for wrongful termination of contract, which we have dismissed, the plaintiffs are to pay the defendants' costs in connection with this claim.

199. We propose to take a broad-brush approach as to the costs of the two appeals which were heard together and not make a separate order for each. Taking into account the extent to which the defendants have succeeded in the issues they raised on appeal, we award half of the costs of the appeals to the defendants.

(Frank Stock)	(Susan Kwan)	(M. H. Lam)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

Mr Kam Cheung and Ms Priscilla Leung, instructed by Messrs Chiu, Szeto & Cheng, for the Plaintiffs

Mr Adrian Huggins, SC and Mr Robin McLeish, instructed by Messrs Mayer Brown JSM, for the Defendants