

**COURT FILE NO.: 99-CV-171574  
DATE: 20020107**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

|                             |   |                                 |
|-----------------------------|---|---------------------------------|
| <b>B E T W E E N:</b>       | ) |                                 |
|                             | ) |                                 |
| LEE KUAN YEW                | ) | <i>Julian Porter, Q.C. and</i>  |
|                             | ) | <i>Odette S. Soriano,</i>       |
|                             | ) | Counsel for the Plaintiff       |
|                             | ) |                                 |
| Plaintiff                   | ) |                                 |
| - and -                     | ) |                                 |
|                             | ) |                                 |
| THE GLOBE AND MAIL, THOMSON | ) | <i>Sean Dewart</i>              |
| CANADA LIMITED, WILLIAM     | ) | Counsel For The Defendant, Nair |
| THORSELL, MARGARET WENTE,   | ) |                                 |
| MARCUS GEE, DEVAN NAIR,     | ) |                                 |
|                             | ) |                                 |
| Defendants                  | ) |                                 |
|                             | ) |                                 |
|                             | ) | <b>HEARD: November 28, 2001</b> |

**GREER J.**

**REASONS**

[1] The Plaintiff, Lee Kuan Yew (“Lee”) is the former Prime Minister of the Republic of Singapore and is now Senior Minister of Singapore. He took offence at the content of an article entitled “Singapore Sage”, which appeared on March 29, 1999, in the *Globe & Mail*. The article was written by Marcus Gee about Singapore, the government of Lee and included an interview with the Defendant, Devan Nair (“Nair”), a former President of Singapore from October 1981 to March of 1985. Nair is now a resident of Hamilton, Ontario. Nair had once been the head of Singapore’s most powerful trade union association, and he believes that he had been perceived by Lee as being a potential political threat. By Statement of Claim dated June 19, 1999, Lee sued the above-named Defendants, saying that he has suffered damage and “been brought into hatred, ridicule and contempt”, by reason of the libel he says is contained in the article.

[2] Nair, in his Statement of Defence and Counterclaim dated July 6, 2001, by way of Counterclaim, claims damages for the tort of abuse of process. The abuse is said to include, but is not limited to loss of income, out-of-pocket expenses, unrecoverable costs, and mental anguish, distress and anxiety associated with defending the litigation financed on Lee’s behalf with the essentially unlimited resources of the Government of the Republic of Singapore. Nair says this could prove to be financially ruinous to him.

[3] Lee moves for an Order striking out the Counterclaim in its entirety on the grounds that the Counterclaim for the tort of abuse of process, on its face, fails to plead the necessary

elements of the tort. He says that the Counterclaim discloses no reasonable cause of action and that it is scandalous, vexatious or an abuse of process of the Court. Finally he says that it constitutes, includes or directs an inflammatory attack on the integrity of the Government of Singapore, which is not a party to this action.

### **Some of the background**

[4] The article notes that Nair left Singapore in approximately 1988, and did not return, after "publicly quarrelling with Mr. Lee over the arrest of a well-known government critic. Then he dropped from sight." It sets out the earlier history between the two men, when they both fought together to prevent an attempted takeover of Singapore by the Communists and helped build their country to an "economic dynamo bristling with skyscrapers." It also sets out some of the problems Nair experienced when he and Lee began disagreeing about how Lee was governing Singapore and how Nair found himself the centre of a "rumour-mongering campaign that labelled him a drinker and a womanizer." Nair says that he was neither. The article says that Nair suspects that Lee had government doctors slip him hallucinatory drugs to make him appear befuddled in order to "begin a total demolition of his character. He's very good at that." The article then says that "Singapore doesn't lock up its critics any more; it sues them, instead", noting that a critic of the government, Mr. Jeyaretnam has faced countless libel suits from Mr. Lee and other members of his government.

[5] Nair's Factum sets out, in some detail, more of what Nair says Lee did to remove him as a political threat. This includes a white paper tabled in the parliament of Singapore before Nair left, because of Nair's public statements in opposition to what the government was doing to oppress a leading dissident in Singapore. Further, it is Nair's position that this action was commenced by Lee for the collateral and improper purpose of silencing his critics, including but not limited to Nair. In Singapore, this is done, says Nair by fostering a climate of fear and intimidation among residents.

[6] It is Nair's position in paragraph 16 of his Factum that:

Mr. Lee is indifferent to his reputation among the readership of the *Globe & Mail*, but has an established and well publicized record within the Republic of Singapore for suing his critics for defamation, and using other measures which are contrary to established international rights in respect of freedom of expression, with a view to silencing his critics.

[7] It is within the framework of this background that the action was brought on, and that the Counterclaim of Nair is structured. Lee asks the Court to strike the whole Counterclaim.

### **The issues**

[8] Lee says that the issue to be determined by the Court is whether it is plain and obvious that the Counterclaim cannot succeed because the pleading does not disclose a reasonable cause of action in that Nair has failed to plead the necessary elements of the tort of abuse of process.

[9] Nair says that the issues are what is the test on a motion to strike a Counterclaim as not disclosing a cause of action; and does the Counterclaim set out the two constituent elements of the tort of abuse of process namely, that in prosecuting the action, Mr. Lee is using the process of this court for a collateral and improper purpose; and, that Mr. Lee has made an overt and definite act or threat, separate and distinct from the proceedings themselves in furtherance of this improper purpose.

### **Test on the Motion**

[10] Lee moves under rule 21.01(1)(b) of the Rules of Civil Procedure to strike out the Counterclaim on the grounds that it discloses no reasonable cause of action or defence. He says that the libel is a precise, narrow libel, and claims that Nair has invented false allegations in his Statement of Defence and Counterclaim.

[11] The court may also, under rule 25.11, strike out or expunge all or part of a pleading on the ground that the pleading is scandalous, frivolous or vexatious, or that it is an abuse of the process of the court.

[12] The test for determining whether a pleading should be struck is set out by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4<sup>th</sup>) 321. Assuming that the facts as stated in the Counterclaim can be proven, the Court said in *Hunt*, supra, one must look to see if it is "plain and obvious" that the Counterclaim discloses no reasonable cause of action. The Court also notes that if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat." In *Nash v. Ontario*, 91995), 27 O.R.(3d) 1 (C.A.), the Court of Appeal, at p.6 says:

On a motion to strike out a pleading, the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies.

Nor, should the Court dispose of matters of law that are not fully settled.

[13] The Court of Appeal in *Prete v. Ontario*, (1993) 16 O.R.(3d) 161, [1993] O.J. No.2749, Action No. C9963 at p.9 of the Quicklaw version, examines both the tests under rule 21.01(1) and rule 25.11. In that case, the Court was split on the issue of whether the Court can look beyond the pleadings and determine if the action has a chance of success. The majority found that it could not because if you consider the statement of claim to be an abuse of the process of the court, it can only be because it discloses no reasonable cause of action. Weiler, J.A, in dissent, found that the Court could look beyond the pleading. Even if one cannot look beyond the pleading, the pleading must be examined to see if it is scandalous, frivolous or vexatious, or otherwise constituting an abuse of the court's process.

### **The Tort of Abuse of Process**

[14] The two elements of the tort of abuse of process, both of which must be pleaded, are whether the plaintiff, in bringing the action, is using the court process for a collateral and improper purpose; and whether he or she has made an overt and definite act or threat, separate and distinct from the proceedings themselves, in furtherance of the improper purpose. See: *Tsiopoulos v. Commercial Union Assurance Co.* (1986), 57 O.R.(2d) 117 (Gen. Div.) at pp.119 and 120, where the Court notes that the process is very narrow in scope. Further, the Court has noted that the alleged collateral and improper purpose cannot be related to a direct or indirect purpose or to an intended or unintended purpose such as intimidation or the fact that it would impoverish the defendant. See also: *Dooley v. C.N. Weber Ltd.*, (1994), 19 O.R. (3d) 779 (Gen. Div.)

[15] The Courts have consistently held that the intention to silence through a defamation action is not a collateral or improper purpose, as this is a result, which naturally flows from the litigation itself and is a legitimate purpose. See: *Pizza Pizza Limited v. Toronto Star Newspapers Ltd.* (24 July 1996), Toronto 93-CQ-33824 (Gen. Div.), aff'd [1997] O.J. No.3891(C.A.).

[16] The second element of the tort, that is an act or threat in furtherance of the improper purpose, must be separate and distinct from the proceedings themselves. If it is not, there cannot be an abuse of process. This has been set out by Eberle, J. in *Teledata Communications Inc. v. Westburne Industrial Enterprises Ltd.* (1990) 65 D.L.R. (4<sup>th</sup>) 636 (Ont. H. Ct.). The Court has also said that there must be a nexus between any threat and the improper pleading complained of. See: *Dooley*, supra at p.791. It is Lee's position that Nair's pleading in his Counterclaim, has not met the two elements of the test.

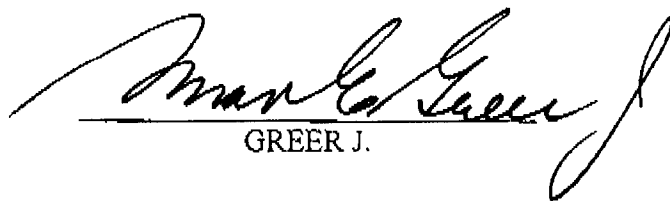
[17] Nair says that he has met the two-part test. He says that Lee commenced the libel action for the collateral and improper purpose of silencing all of Mr. Lee's critics, including Nair, but not limited to him. It must be remembered, in examining what is in the article itself, not only can the writer be considered a critic, and Nair considered a critic, but others in Singapore and elsewhere, who attempt to criticize Lee and his government's methods of trying to silence critics and opposition, are open to silencing because of what Nair says is a pattern of using the libel process to succeed in generally using whatever measures Lee considers necessary to thwart the "established international rights in respect of freedom of expression." Whether or not this can be supported at Trial is not for me to decide. It is, however, not scandalous, frivolous or vexatious. Lee's action is being brought in a country which prides itself in allowing freedom of political expression. Nair says that this is not the case in Singapore, where there is a climate of fear and intimidation among the residents.

[18] Nair says that his situation can be distinguished from that in *Pizza Pizza*, supra, where Cameron J. struck the counterclaim as having a purpose concurrent with the legitimate purpose of the plaintiff in bringing its libel action. Nair claims that there is no legitimate purpose which could save Lee's libel action since Lee is indifferent to his reputation among the readership of the *Globe & Mail*. Nair says that Lee's action, "...is a mere stalking horse intended to further foster and continue a climate of fear and intimidation." I agree with Nair's position that the issue is whether the "predominate" (as opposed to exclusive) purpose is ulterior. Given the political

and international aspect of the tenor of the article, and given that Lee has seemingly no residence/domicile or other connection to Canada, it is within the scope of the test for Nair to argue that the predominate purpose is ulterior. See: *Hilltop Group Ltd. v. Katana* [2000] OJL No.2576, Court File No. 96-CU-106768, where Campbell, Colin J. examines what Sharpe J., as he then was, set out in *Scintilore Explorations Ltd. v. Larche* (1999) 48 B.L.R.(2d) 248 . There Sharpe J. noted at p.317 that the predominate purpose must “be outside the ambit of the legal claim on which the Court is asked to adjudicate”. I am satisfied that the first element of the tort, as pleaded, has been met.

[19] Nair says that he has also met the second part of the test, in that Lee has taken an overt act or step in furtherance of his improper purpose in invoking the legal process. Nair says that he was forced to resign as President of the Republic of Singapore in March of 1985 and was falsely labeled as an alcoholic. Several years later when Nair says he first spoke out politically for the first time since resigning, Lee tabled a white paper in the Singapore’s parliament, which included extracts of a confidential nature from Nair’s personal medical records and correspondence. Nair says this was done to silence his political views and Nair says that Lee further threatened to and ultimately did arrange to have Nair’s pension withheld. Nair then left Singapore and did not speak out politically from 1988 until he granted the interview for the *Globe and Mail* article in question. Given these actions and steps taken by Lee in Singapore to create a climate of fear and intimidation of critics, Nair says that this new action is intended to be and is a threat which is on-going and pervasive. Nair says these overt acts and threats in the past by Lee against Nair only went below the surface, but remained always there even though Nair left Singapore and remained silent for over a decade. These threats have resurfaced and re-emerged in this new libel action in the country in which Nair sought freedom from political threats and overt legal actions against him. To Nair, the threat is on-going and pervasive, and in my view, it meets the second part of the test.

[20] I am therefore satisfied, in these unusual circumstances, that Nair has met the two-part test. Lee’s Motion is therefore dismissed. If the parties cannot otherwise agree on Costs, I will receive brief written submissions by them.

  
 GREER J.

Released: *January 7*, 2002

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DATE: 20020104**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

LEE KKUAN YEW

Petitioner

- and -

THE GLOBE AND MAIL, THOMSON  
CANADA LIMITED, WILLIAM  
THORSELL, MARGARET WENTE,  
MARCUS GEE, DEVAN NAIR

Respondents

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**REASONS**

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**GREER J.**

**Released: January 7, 2002**