IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Originating Summons)
No. 1131 of 2008/P)

In the matter of an application by the Attorney-General for orders of committal for contempt

And

In the matter of Section 7(1) of the Supreme Court of Judicature Act, Chapter 322 (2007 Revised Edition)

And

In the matter of Order 52 of the Rules of Court (2006 Revised Edition
Between

Attorney-General
(No ID No. exists)

…Applicant

And

1. **Daniel Hertzberg**
2. **Christine Glancey**
3. **Dow Jones Publishing Company (Asia), Inc.**

…Respondents

Attorney-General's Submissions

INTRODUCTION

1. This is an application for an order of committal for contempt of court against the 3rd Respondent, Dow Jones Publishing Company (Asia), Inc. The grounds of the application are set out in the Amended Statement.

2. The 3rd Respondent is the proprietor and publisher of The Wall Street Journal Asia ("WSJA"). The 3rd Respondent has committed contempt of court by allowing the publication and distribution of the following articles and letter in the WSJA:

(a) First Article by an unnamed author: "Democracy in Singapore – Two court cases reveal much about the city-state's lack of freedoms", published on 26 June 2008;

(b) Letter by Dr Chee Soon Juan: "Produce the Transcript, Show the Truth", published on 9 July 2008; and

(c) Second Article by an unnamed author: "Judging Singapore's Judiciary – the International Bar Association weighs in", published on 15 July 2008.

3. The two articles appeared in the WSJA's Editorials and Opinion page under the rubric "Review and Outlook". It is clear that they represent the editorial opinion of the WSJA. The letter also appears in the Editorials and Opinion page under "Letters to the Editor".

4. These three items, individually and taken together, impugn the integrity, impartiality and independence of the Singapore Judiciary. It is implied that the Singapore courts do not dispense justice fairly in cases involving political opponents and detractors of Minister Mentor Lee Kuan Yew and other senior

government figures, and that the courts facilitate the suppression of political dissent or criticism in Singapore through the award of damages in defamation actions.

ARGUMENTS

A. Laws against contempt of court are a necessary part of any democratic society and do not form an unjustifiable restriction on the freedom of speech and expression.

1. Article 14(1)(a) of the Constitution of the Republic of Singapore provides that every citizen has the right to freedom of speech and expression. This right is subject to the law of contempt of court and defamation. Non-citizens can have no greater rights than citizens in this respect.

2. Singapore is not alone amongst post-colonial democracies in providing that the freedom of speech and expression is subject to such reasonable restrictions. Article 19 of the Constitution of India (as reproduced in the judgment of Kania CJ in *Gopalan v State of Madras* AIR (37) 1950 Supreme Court 27) provides that all citizens shall have the right to freedom of speech and expression – a formulation almost identical to that in Art 14(1)(a) of our Constitution. As in Singapore, those rights in India are also subject to the law of contempt of court and defamation. Speaking of the right to freedom of speech and expression in the Indian Constitution, Kania CJ said (at page 36):

> "[Article 19 specifies] the different general rights which a free citizen in a democratic country ordinarily has. Having specified those rights, each of them is considered separately from the point of view of a similar right in the other citizens, and also after taking into consideration the principle that individual liberty must give way, to the extent it is necessary, when the good or safety of the people generally is concerned. Thus the right to freedom of speech and expression is given by Art 19(1)(a). But cl (2) provides that such right shall 'not prevent the operation of a law which relates to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. Clause (2) thus only emphasizes that while the individual citizen has a free right of speech or expression, he cannot be permitted to use the same to the detriment of a similar right in another citizen or to the detriment of the State. Thus, all laws of libel, slander, contempt of court or laws in respect of matters which offend against decency or morality are reaffirmed to be operative in spite of this individual right of the citizen to freedom of speech and expression."

3. The law of contempt of court is a justifiable restriction on the freedom of speech and expression. It is contrary to the public interest that confidence in the administration of justice should be undermined: *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 per Richmond P (Court of Appeal of New Zealand). In *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 (Privy Council on appeal from Mauritius), Lord Steyn said (at pages 305-306):

> "Counsel submitted that the offence of scandalising the court is inconsistent with the protection of freedom of expression which is guaranteed by section 12 of the Constitution. Given that freedom of expression is the lifeblood of democracy, this is an important issue. And there is no doubt that there is a tension between freedom of expression and the offence of scandalising the court. But the guarantee of freedom of expression is subject to qualification in respect of provision under any law (1) "for the purpose of . . . maintaining the authority and independence of the courts" and (2) shown to be "reasonably justifiable in a democratic society." Their Lordships have already concluded the offence of scandalising the court exists in principle to protect the administration of justice. That leaves the question whether the offence is reasonably justifiable in a democratic society. In England such proceedings are rare and none has been successfully brought for more than 60 years. But it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater."

4. It is submitted that the restrictions placed on the freedom of speech and expression by the law of contempt of court are justified not just by the smallness of a country or the vulnerability of the administration of justice, but by the emphasis that a society places on respect for the rule of law and the position of the courts as the guarantors of that vital principle. What is an

acceptable inroad into freedom of speech of expression depends on the values of a society. It is unacceptable for one person to arrogate to himself the right to dictate to other societies what may or may not be done in this regard. There is no rule of international law or morality that supports the right claimed by some people to set themselves up as the standard to which the rest of humanity must conform.

5. In the 3rd Respondent's affidavit it is claimed that the WSJA's view is that the law of libel in Singapore "does not comport with legal standards set by courts and parliaments in other modern liberal democracies". It is further claimed that the WSJA "had no intention or desire to undermine any institution in Singapore, including the Singapore Judiciary and its individual judges". Were that so, this application would not have been made. Implicit in the 3rd Respondent's affidavit is the notion that the law that obtains in "other modern liberal democracies" is the standard to which Singapore is held. This, it is submitted, amounts to cultural arrogance. Lest it be said that the law of contempt of court also does not comport with the legal standards set in "other modern liberal democracies", it should be made clear that it is for Singaporeans to decide what is acceptable in Singapore. As Yong CJ put it in *Re Tan Khee Eng, John* [1997] 3 SLR 382, 385-386:

> "The power to punish for contempt of court allows a court to deal with conduct which would adversely affect the administration of justice. Clearly, courts in different jurisdictions may hold different ideas about the principles to be adhered to in their administration of justice, and

> correspondingly about the sort of conduct which may be inimical to the effective administration of justice… In short, I do not think it would be useful or practicable in this case to adopt blindly the attitudes evinced by the English courts. We must ask ourselves what is important to us here in Singapore."

See also *Badry v Director of Public Prosecutions* [1983] 2 AC 297 (Privy Council on appeal from Mauritius), where Lord Hailsham LC accepted that it was for the local courts to determine what amounted to scandalising the court, whatever an English court may have thought about the effect of such words if uttered in England.

6. It is also implicit in the 3rd Respondent's affidavit that the law as it presently stands in "other modern liberal democracies" represents a desirable state of affairs. It should be pointed out that the law in these other jurisdictions has evolved over time. What is acceptable now in these countries may not have been acceptable in those same countries a generation or two ago. The developments that have occurred in these societies since Singapore achieved legal emancipation from the British Empire do not necessarily represent progress. The learned authors of Borrie and Lowe's The Law of Contempt (3rd Edition) have this to say of the state of the law:

> "The above cases are cited as examples of what has been held in the past to amount to 'scurrilous abuse'. It is, however, a question which will be judged by different standards according to the time and place of

> the publication – very much a matter of *autres temps, autres moeurs*… The foregoing English authorities are all over 60 years old and it cannot be assumed that what was held to amount to 'scurrilous abuse' in 1900 or 1930 would be held to amount to scurrilous abuse in the 1990s… Society is more tolerant today of strong language and has lost the habit of respect."

It is submitted that just because certain statements would be considered to be acceptable in England today does not inevitably mean that they should be deemed acceptable anywhere else in the independent Commonwealth.

7. In a speech concerning government proposals to "deter bad behaviour and invest in good behaviour" (http://www.number10.gov.uk/Page8898) delivered on 10 January 2006, the Rt Hon. Mr Tony Blair, Prime Minister of England, said:

> "All this, in the end, however, comes down to how we view our obligations to each other in the society that we live in.
>
> Respect is a way of describing the very possibility of life in a community. It is about the consideration that others are due. It is about the duty I have to respect the rights that *you* hold dear. And vice-versa. It is about our reciprocal belonging to a society, the covenant that we have with one another.

> More grandly, it is the answer to the most fundamental question of all in politics, which is: how do we live together? From the theorists of the Roman state to its fullest expression in Hobbes's Leviathan, the central question of political theory was just this: how do we ensure order? And what are the respective roles of individuals, communities and the state?
>
> Legal stricture will never be enough. Respect cannot, in the end, be conjured through legislation. Government can provide resources and powers. It can do its best to ensure that wrong-doing is detected, that its powers against offenders are suitable, that its systems are expeditious and its enforcement strong. And the British system, like others in the modern world, has not been good enough against these standards.
>
> But ultimately, the change has to come from within the community, from individuals exercising a sense of responsibility. Rights have to be paired with responsibilities."

8. On 1 September 1997 the Interaction Council proposed a Universal Declaration of Human Responsibilities (http://www.interactioncouncil.org/udhr/declaration/udhr.pdf). The Interaction Council is a group of elder statesmen experienced in governance of countries. Amongst the many elder statesmen who endorsed the Universal Declaration of Human Responsibilities were several from what the 3rd Respondent would no

doubt consider “modern liberal democracies”: Mr Helmut Schmidt, the former Chancellor of the Federal Republic of Germany (Honorary Chairman); Mr Malcolm Fraser, former Prime Minister of Australia (Chairman); Lord Callaghan of Cardiff, former Prime Minister of the United Kingdom; Mr Jimmy Carter, former President of the United States of America; Mr Valery Giscard d’Estaing, former President of France; and Mr Pierre Elliott Trudeau, former Prime Minister of Canada. Among the principles formulated by the Interaction Council are the following:

> Article 13
>
> No politicians, public servants, business leaders, scientists, writers or artists are exempt from general ethical standards … Professional and other codes of ethics should reflect the priority of general standards such as those of truthfulness and fairness.
>
> Article 14
>
> The freedom of the media to inform the public and to criticise institutions of society and government actions, which is essential for a just society, must be used with responsibility and discretion. Freedom of the media carries a special responsibility for accurate and truthful reporting. Sensational reporting that degrades the human person or dignity must at all times be avoided.

9. The views set out above demonstrate that serious-minded people may legitimately differ about what is acceptable for the functioning of a modern democracy. It is submitted that it is for each society to decide what works in the context of its own societal and cultural value system. For this reason, while cases from other jurisdictions may be useful as guides, they cannot in themselves be determinative of Singapore law. Furthermore, modern cases from the so-called "Western" democracies reflect changes in the values of those societies that do not necessarily reflect the values of Singapore. Such modern cases should be treated with circumspection. See *AG v Wain (No 1)* [1991] SLR 383, 393 (Sinnathuray J); *AG v Chee Soon Juan* [2006] 2 SLR 650, 659 (Lai Siu Chiu J).

B. The offence of contempt by "scandalising the court" is not obsolete in Singapore, whatever developments may have taken place in other jurisdictions. It still has a place in a modern democracy, to protect the independence of the courts and judiciary.

1. "'Scandalising the court' is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice." Per Lord Diplock in *Chokolingo v AG of Trinidad and Tobago* [1981] 1 All ER 244, 248 (Privy Council).

2. This is an ancient jurisdiction existing at Common Law: *R v Gray* [1900] 2 QB 36, 40 (Lord Russell of Killowen CJ), cited in *AG v Pang Cheng Lian* [1972-74] SLR 658, 661-662 (Wee CJ). That jurisdiction is still not obsolete: *AG v Wong Hong Toy* [1982-83] SLR 398, 403 (Sinnathuray J), citing *Ambard v AG of Trinidad and Tobago* [1936] AC 322 (Privy Council).

3. In *Chokolingo v AG of Trinidad and Tobago* [1981] 1 All ER 244 (Privy Council), it was argued that whatever the former law in Trinidad and Tobago may have been, by the 1980s "scandalising the court" by a scurrilous attack on the judiciary as a whole impugning their probity was no longer capable of amounting to a criminal contempt of court. This argument was rejected by the courts of Trinidad and Tobago; their decision was confirmed by the Privy Council on appeal.

4. The Supreme Court of New Brunswick had rejected a similar argument in 1969: see *R v Murphy, ex parte Bernard Jean, Attorney-General of New Brunswick* (1969) 1 NBR (2d) 297. The same was held to be the case in Mauritius: *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 (Privy Council). It has also been held in New Zealand that the offence of scandalising the court is not obsolete: *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (Court of Appeal).

5. It is submitted that the same holds true in Singapore today; scandalising the court by impugning its impartiality, integrity and independence still amounts to a criminal contempt of court.

6. In a speech entitled “Attacks on Judges – A Universal Phenomenon” (http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_maui.htm) the Hon Justice Michael Kirby of the High Court of Australia had this to say:

> “In the last decade, in many countries of the common law, the general deference formerly paid to judges, has been eroded. Attacks on judges have now become commonplace. Many are now made by politicians who see mileage in that course. But beyond politicians, the attacks have been made by the media, public commentators, academics and members of the legal profession, the last omitting to dress up their words in the respect for the judicial office which formerly obtained. …
>
> …In the United Kingdom, from whose judiciary common law countries ultimately derive their model, the deference paid to Her Majesty's judges has lately begun to decline…
>
> …In New Zealand, in recent times, the old deference has also taken something of a battering. Judges have been castigated ferociously for bail decisions which went wrong. They have been prosecuted for false travel claims. They have been attacked for failing to respond to media criticism. When the Chief Justice, in a public speech, cautioned against:

> “The increasingly strident cries of the well heeled sector of the community, pressuring Government and the judiciary as to the particular brand of justice they seek, are not a pretty sight either, nor are the supportive noises made by acolytes in the profession.”

he was denounced in the *New Zealand Law Journal*, of all places, for getting into politics, damaging the independence of the judiciary and insulting the legal profession. …

…The debates in Britain and New Zealand seem positively genteel by comparison to those which have engaged the Australian judiciary in the past year or so … The derogatory comments of politicians soon became the springboard for academic and media castigation. Recent High Court decisions, the Court and the justices were labelled "bogus", "pusillanimous and evasive", guilty of "plunging Australia into the abyss", a "pathetic ... self-appointed [group of] Kings and Queens", a group of "basket-weavers", "gripped ... in a mania for progressivism", purveyors of "intellectual dishonesty", unaware of "its place", "adventurous", needing a "good behaviour bond", needing, on the contrary, a sentence to "life on the streets", an "unfaithful servant of the Constitution", "undermining democracy", a body "packed with feral judges", "a professional labor cartel". There were many more epithets of a like character, many stronger. …

…For anyone wanting to read the catalogue of United States equivalents to the Australian list of verbal denigration recently hurled at the judiciary, a good starting point is the article by Judge Joseph W Bellacosa of the New York State Court of Appeals. "Screwballs" is the kindest of the epithets. Judge Bellacosa concludes:

> “Judges can take criticism, I am very confident, but whether the public interest can stand and absorb mal-informed, drum-beaten and heated attacks on the judicial process is worth pause and reflection.”

…In Australia, as in Britain, the law of contempt, in the form of "scandalising the court", imposed a measure of restraint on attacks on judges, particularly where it was considered that the statement was an attempt to influence specific court proceedings. However, from the outset, this power was used cautiously in Australia . It has faded in most developed common law countries during the course of this century in harmony with expanded notions of free speech. … Going back to the good old days when politicians, the media and others would show respectful obeisance to the judges, confining their criticisms to private mutterings is now an impossibility. In any case, when explored, those old days included some political and personal attacks, admittedly rather more muted than of recent times. …

> …Having acknowledged the legitimacy of public debate about cases and issues, criticism of decisions and attention to judges who are lazy, slow, incompetent or rude, it remains to be said that the current level of political and personal attacks on the judiciary is unacceptable. It has gone too far. Unless there is a measure of mutual restraint, the judicial institution will be damaged and judicial integrity undermined. When judges reverse their decisions in the wake of political or media criticism, the judiciary as an institution is presented as unacceptably supine. When judges are exposed to removal from office at the behest of politicians who dislike their decisions, they are highly vulnerable to the improper pressure that diminishes their real neutrality. When judges are submitted to unrelenting political attacks by people who should know better, there is a danger that the public will draw from the silence of the judges an implication that the criticism was justified. Yet silence is ordinarily imposed by judicial convention. Generally, judges cannot answer back…"

7. The observations of Mr Justice Kirby are salutary. It is easy for the 3rd Respondent and others of like mind to beat the drum of "freedom of expression" and cast away all restraint in the name of liberty. That road is seductive. But it is submitted that we should not embark on that journey, well knowing where the road will eventually lead. If the independence and standing of the Courts and judiciary in Singapore are to be maintained and protected, it is vital that debate about the law, human rights and human responsibilities be kept respectful and within the limits of civility. Whatever

the editorial views of the 3rd Respondent may be, the law of contempt of court still has a place in a modern democracy.

C. The law against "scandalising the court" exists to protect the administration of justice by ensuring that the authority of the court is not undermined.

1. The fair administration of justice requires that the judiciary must be impartial. This is in the Judge's Oath: Constitution of the Republic of Singapore, First Schedule. An allegation of bias or lack of impartiality goes to the very root of a Judge's function: *AG v Wain (No 1)* [1991] SLR 383, 394 (Sinnathuray J). Such an allegation is the "worst form of scandalising of the court, meriting the infliction of a severe penalty": *AG v Pang Cheng Lian* [1972-74] SLR 658, 660-661 (Wee CJ).

2. It is not the intention but the effect that is important: *AG v Wong Hong Toy* [1982-83] SLR 398, 404 (Sinnathuray J); *AG v Wain (No 1)* [1991] SLR 383, 395 (Sinnathuray J). It matters not that the person responsible for the statement did not mean to be disrespectful to the court, if the effect of the statement is to lower the respect in which the court is held. In *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 counsel for the contemnors submitted that the Supreme Court of Mauritius was wrong to hold that *mens rea* was not an ingredient of the offence of scandalising the court. Lord Steyn, delivering the judgment of the Privy Council, held (at page 307):

> "The publication was intentional. If the article was calculated to undermine the authority of the court, and if the defence of fair criticism in good faith was inapplicable, the offence was established. There is no additional element of mens rea. The decision of the Supreme Court on this point of law was sound."

See also *R v Murphy, ex parte Bernard Jean, Attorney-General of New Brunswick* (1969) 1 NBR (2d) 297 (Supreme Court of New Brunswick).

3. The suggestion that the court can be influenced by pressure from an external source amounts to a contempt: *AG v Zimmerman* [1984-85] SLR 814, 817; *AG v Wain (No 1)* [1991] SLR 383. The position is similar in Australia (*Gallagher v Durack* (1983) 57 AJLR 191 (High Court of Australia), Mauritius (*Badry v Director of Public Prosecutions* [1983] 2 AC 297 (Privy Council)**)** and Canada (*R v Murphy, ex parte Bernard Jean, Attorney-General of New Brunswick* (1969) 1 NBR (2d) 297 (Supreme Court of New Brunswick)). It is submitted that this is because such a suggestion amounts to an implication that the judge lacks integrity and independence. Thus, any insinuation that judgment in a case is given in favour of a litigant because he is powerful and influential amounts to contempt of court.

4. When a person deliberately calls into question a judge's impartiality and independence, he is attempting to undermine public faith in the courts' ability to dispense justice: *AG v Zimmerman* [1984-85] SLR 814, 817 (Sinnathuray J). In *Gallagher v Durrack* (1983) 57 AJLR 191, the majority in the High

Court of Australia (Gibbs CJ, Mason, Wilson and Brennan JJ**)** stated (at page 192):

> "The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon courts of justice which, if continued, are likely to impair their authority": per Dixon J in *R v Dunbabin, ex parte Williams*. The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges."

5. Respect for the independence, impartiality and integrity of the courts is absolutely fundamental to the rule of law. See the judgment of Nitikman J in *Re Borowski* (1971) 19 DLR (3d) 537, 545, 547 (Manitoba Queen's Bench):

> "Fundamental to our judicial process and inextricably interwoven in our legal system is the certainty that justice will be dispensed without fear or favour, that proceedings will be conducted and

> decisions rendered in accordance with the rule of law and will never be improperly motivated. An indispensible condition to that certainty is the independence of the judiciary.
>
> It would be idle to suggest that Judges are so perfect as to be without fault. Admittedly there are instances when there is displayed by some a lack of judicial temperament, occasions when there is exhibited impatience or intolerance, Judges may err in their decisions – that is why there are appellate Courts – but any suggestion that they are guilty of improper motives in the discharge of their judicial duties can only be described as scandalizing the Court and calculated to bring it into contempt. …
>
> The importance of the traditional respect that has always been accorded the dignity and majesty of the Courts cannot be over-emphasised. Any act contributing to loss of that respect is bound to adversely affect the orderly operation of our judicial processes and impair the due administration of justice."

See also the judgment of McRuer CJ HC in *R v Glanzer* [1963] 2 OR 30, 35-36 (High Court, Ontario):

> "For at least 200 years it has been the law of England, as it is today the law of Canada, that scandalous and scurrilous abuse of a Judge in his judicial work is a contempt of Court, not because of the injury done to

> the Judge, nor for the purpose of vindicating his character, nor for the purpose of taking vengeance on the perpetrator of the scandal, but for the purpose of preserving respect for the administration of justice in the Queen's Courts…"

6. It is submitted that once that respect for the authority of the courts and judges is lost, the rule of law will start to break down. Therefore it is imperative that the court should enforce this respect by suitable sanctions where there has been an unwarranted attack on its integrity, independence and impartiality. In this regard, a foreigner should not be given more indulgence than a citizen, especially in view of the fact that the foreigner will not suffer the consequences if the rule of law in Singapore is compromised.

D. The law of contempt of court does not preclude criticism of a judgment provided that no imputation of impropriety is made against the judge, explicitly or implicitly.

1. It is permissible to criticise judgments of a court. Academics and lawyers do it all the time. See the judgment of Lord Atkin in *Ambard v AG for Trinidad and Tobago* [1936] AC 322, 335:

> "But [where] the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of

> criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune."

2. Tendentious reporting or misleading summaries of cases meant to put a judge in a bad light are not legitimate criticism: *AG v Wong Hong Toy* [1982-83] SLR 398, 405 (Sinnathuray J) citing *R v Fletcher* (1935) 52 CLR 248, 257-258. See also *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (Court of Appeal of New Zealand).

3. The right to criticise is exceeded if the statement impugns the integrity and impartiality of the court, even if that is not intended: *AG v Lingle* [1995] 1 SLR 696, 701 (Goh Joon Seng J).

4. Though it has been suggested in some jurisdictions that a defence of fair comment exists, Sinnathuray J held in *AG v Wain (No 1)* [1991] SLR 383, 398 that such a defence is not available in Singapore. Even if such a defence is held to exist, it is submitted that it cannot be available to an alleged contemnor if the statements made are misrepresentations of the facts or actuated by malice or other improper motives. In this connection, it should be noted that the 3rd Respondent has been held guilty of contempt on two previous

occasions in Singapore: see *AG v Wain (No 1)* [1991] SLR 383 and *AG v Zimmerman* [1984-85] SLR 814. In both these previous cases, imputations were made that the judiciary in Singapore was not independent and impartial. Furthermore, the Asian Wall Street Journal had its circulation restricted in 1987 under the Newspaper and Printing Presses Act (Cap 206) on the ground that it was "engaging in the domestic politics of Singapore": see *Dow Jones Publishing Co (Asia) Inc v AG* [1989] SLR 70.

E. The two articles and the letter published by Wall Street Journal Asia constitute an attack not on the law of libel as asserted on behalf of the 3rd Respondent but on the courts and judges of Singapore.

1. The thrust of the affidavit sworn on behalf of the 3rd Respondent by Jason Paul Conti ("Mr Conti's affidavit') is that the 3rd Respondent did not undermine the Singapore Judiciary and its individual judges. It is implied that the 3rd Respondent's grievance was with the law of libel in Singapore, which it asserts "does not comport with legal standards set by courts and parliaments in other modern liberal democracies".

2. It should be noted that nowhere in Mr Conti's affidavit is it stated clearly and unequivocally that the 3rd Respondent accepts that the courts of Singapore are independent and impartial. All that is said is that the articles and letter did not state or imply that the courts are not independent and impartial.

3. Nowhere in the articles or letter that form the subject matter of this application is there any hint of criticism of the law of libel in Singapore. On the contrary, the said articles and letter are meant to and do give the impression that the courts in Singapore are not impartial when it comes to defamation actions involving senior government figures, in particular Minister Mentor Lee Kuan Yew. The tenor of the three items is that the courts in Singapore do not dispense justice when it comes to opponents of the Government.

4. In evaluating whether the three items were a polemic against the law of libel in Singapore or an attack on the integrity, independence and impartiality of the courts and judges, the following points should be noted:

<u>First article: "Democracy in Singapore – Two court cases reveal much about the city-state's lack of freedoms"</u>

(1) Singapore is characterised as "Lee Kuan Yew's Singapore" (first and last paragraphs) where the right to dissent is not one of the freedoms enjoyed by citizens, and the damages to be awarded in the defamation case against Chee Soon Juan are characterised as "the going price of political dissent" (last paragraph). The clear implication is that the suppression of political dissent is achieved through the damages awarded in defamation suits.

(2) It is asserted in paragraph 4 that the statements made by the Chees were "interpreted by the Court to imply corruption on the part of the

government". This barbed formulation was employed rather than a simple factual statement that the Chees had defamed the plaintiffs.

(3) The juxtaposition in paragraph 9 of the fact that "Mr Lee has never lost a libel suit" with the sentence immediately following that "he and his son are currently suing the Far Eastern Economic Review" subtly implies that the plaintiffs will not lose this libel suit either. This insinuation is repeated in paragraph 4 of the second article, after a statement that defamation suits are used in Singapore to silence the press and opposition figures.

(4) Gopalan Nair is characterised as an "online advocate for media freedom in Singapore", who recorded his "contempt for the court proceedings" in his blog and "challenged Mr Lee to sue him" (paragraph 12). Such a characterisation is a caricature of the nature of Gopalan Nair's offence and the nature of his blog. Gopalan Nair's blog is reproduced in exhibit HS-1 annexed to the affidavit of Hema Subramanian filed on 28 October 2008.

(5) The subtle insinuation in paragraph 13 is that the courts are responsible for the charge against Gopalan Nair: "the court changed the first charge and specified that the offending remarks about Judge Ang were made on a blog, not by email".

(6) The impression is given in paragraph 14 that Dr Chee Soon Juan was sent to jail for scandalizing the court during his cross-examination of the Minister Mentor. The term "scandalizing the court" is not familiar to laymen and conveys the impression that the court was merely offended at the cross-examination of the Minister Mentor. The truth that Dr Chee and his sister were jailed for disrespectful behaviour towards the judge and disobedience to the orders of the court was suppressed. The facts of the matter are set out in exhibits HS-11 and HS-12 annexed to the affidavit of Hema Subramanian filed on 27 August 2008.

The Letter: "Produce the Transcript, Show the Truth"

(7) In the letter Dr Chee Soon Juan asserts that "the Lees" obtained summary judgment despite the fact that there were disputes of facts and law. It is further contended that Dr Chee and his sister were "found guilty" without being given the chance to call witnesses and cross-examine the plaintiffs. The main thrust of the letter is that Dr Chee was not treated fairly by the court. This is a misrepresentation of the true events. The Notes of Arguments and media reports pertaining to that case are set out in exhibits HS-9 and HS-10 annexed to the affidavit of Hema Subramanian filed on 27 August 2008. The judgment of Belinda Ang J is reported in *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675. Further information about the

behaviour of Dr Chee and his sister is to be found in *Chee Siok Chin v AG* [2006] 4 SLR 541.

(8) No mention was made of the fact that Dr Chee had in fact filed an appeal, seven months out of time. The Court of Appeal declined to give leave for an extension of time to appeal and set out the details of Dr Chee's behaviour in *Lee Hsien Loong v Singapore Democratic Party* [2007] SGCA 51.

(9) An inadequate and unfair summary of the judgment of the court may amount to contempt if the motive of the writer is undermine the standing of the court: see eg *R v Fletcher* (1935) 52 CLR 248 (High Court of Australia). This was not the outburst of a disappointed litigant but a considered statement to put the court in a bad light: *AG v Wain (No 1)* [1991] SLR 383, 399. The publisher of a newspaper which runs a series of articles critical of the judiciary and who gives the author of such a distorted report the opportunity to air his views is guilty of contempt as well: *R v Fletcher* (1935) 52 CLR 248 (High Court of Australia).

<u>Second article: "Judging Singapore's Judiciary – the International Bar Association weighs in"</u>

(10) The title of the article itself indicates that the target is the Singapore Judiciary, not the law of libel in Singapore.

(11) In the 3rd paragraph the writer states that the International Bar Association's human rights institute report expressed concerns about the "objective and subjective independence and impartiality" of the judiciary and repeats that in cases involving the PAP there is an actual or apparent lack of impartiality and/or independence, which casts doubt on the decisions made in such cases". This clearly impugns the integrity of the judiciary. Had this been mere reportage, it might have been protected by a defence of fair comment (assuming one to exist in Singapore: see D4 above). However, it appears not as a report but as an editorial on the WSJA's Editorials and Opinion page. Given the demonstrated intention of the 3rd Respondent to denigrate the Singapore judiciary and undermine respect for the courts, such a defence must fail: see *R v Brett* [1950] VLR 226, 229 (Supreme Court of Victoria).

(12) The 3rd Respondent's ulterior motive in publication is confirmed by the triumphalist tone in the last paragraph when it is declared: "Singapore is unlikely to reform its political or judicial system any time soon. But when the country is ready to join the ranks of modern democracies the IBA's recommendations provide a good checklist of how to do so."

5. In assessing the weight to be placed on the assertions in Mr Conti's affidavit that the 3rd Respondent was not targeting the Singapore judiciary but rather the law of libel in Singapore, it should be noted that the Asian Wall Street Journal has on two previous occasions made imputations against the integrity,

impartiality and independence of the judiciary in Singapore. In *AG v Zimmerman* [1984-85] SLR 814, the article in question, titled "Jeyaratnam's Challenge", alleged that libel suits have been used to silence the opposition in Singapore and that the magistrate (sic) who originally found Mr Jeyaratnam innocent was demoted. This mirrors the allegations made in the First and Second Articles. In *AG v Wain (No 1)* [1991] SLR 383 the Asian Wall Street Journal ran an article that implied that judgment in a libel action had been granted in favour of the Minister Mentor (then Prime Minister) because of who he was rather than on the merits of the action. It was an allegation that the judge was not impartial. These are materially similar to the allegations made in the First Article. The 3rd Respondent as publishers of the Asian Wall Street Journal was held to have been guilty of contempt of court in both cases. It is submitted that one may clearly draw the inference that the consistent editorial slant of the Asian Wall Street Journal (now the Wall Street Journal Asia) is that the courts of Singapore are not independent and that they are complicit in the suppression of dissent in Singapore through the use of defamation cases.

F. It is necessary that a severe sanction be imposed on the 3rd Respondent to deter any further attempts to undermine the courts as a vital institution underpinning the rule of law in Singapore.

1. The rule of law is taken very seriously in Singapore. In a multi-ethnic, multi-cultural, multi-religious crowded society, the only way that order and liberty can be maintained is if there is strict adherence to the law by all. The rule of

law is essential for the protection of the rights of citizens and non-citizens alike, their liberty and their freedom to pursue happiness. The courts are the ultimate arbiters when the rights of one person clash with those of another. To undermine the authority of the courts and the respect due to the judges is to strike at the very foundation of a modern democracy.

2. The fact that the 3rd Respondent disagrees with the laws of Singapore pertaining to freedom of speech and expression does not give it licence to undermine the institutions which uphold the rule of law. It is for each society to decide on the limits to be placed on freedom of speech and expression, in order to maintain harmony amongst the people. The balance that is struck in the home country of the 3rd Respondent does not apply universally as the standard for the rest of humanity.

3. The 3rd Respondent has not apologised nor stated explicitly that it accepts that the courts of Singapore apply the law of Singapore without fear or favour. Nor has it undertaken not to make any further imputations against the integrity, impartiality and independence of the courts and judges of Singapore in future.

4. In assessing the proper sanction to be imposed on the 3rd Respondent, it is submitted that an analogy may be drawn to the usual principles of sentencing. In the instant case, it is submitted that the principles to be applied are denunciation (to drive home the point that such behaviour is unacceptable), specific deterrence (to prevent a recurrence of such behaviour) and general

deterrence (to signal to others that such behaviour will be dealt with severely). Aggravating factors are: firstly, the fact that the 3rd Respondent has been guilty of contempt of court on two previous occasions; and, secondly, that the 3rd Respondent is a foreign company. A citizen or resident of Singapore will suffer the economic and physical consequences if by his behaviour the rule of law is compromised; a non-resident whose economic well-being is not tied up with the fate of Singapore as a country does not suffer such consequences. It is immoral for such persons to attempt to change our society to reflect their prejudices on the pretext that they know better what is good for us.

5. For the above reasons, it is submitted that a substantial fine be imposed on the 3rd Respondent, sufficient to hurt but not to cripple. It is not the intention of the Applicant to destroy the 3rd Respondent financially. It will suffice if the 3rd Respondent is brought to realize the consequences of its behaviour and is induced to refrain from further attempts to undermine the courts and judges of Singapore.

Dated this 31st October 2008

PROFESSOR WALTER WOON

ATTORNEY-GENERAL