CACV 240/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO 240 OF 2015

(ON APPEAL FROM HCA NO 1855 OF 2010)

BETWEEN

CHANG WA SHAN	Plaintiff
and	
ESTHER CHAN PUI KWAN（陳佩君） also known as CHAN PUI CHUN（陳佩珍）	Defendant

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Before: Hon Yuen JA, Kwan JA and Macrae JA in Court
Dates of Hearing: 5 and 6 April 2017
Dates of Further Written Submissions: 12 and 13 April 2017
Date of Judgment: 8 September 2017

JUDGMENT

Hon Yuen JA:

1. I have had the benefit of reading the judgment of Kwan JA in draft. I have written my judgment on the assumption that her ladyship's judgment (which starts at paragraph 52) would be read first as it sets out the facts and issues in detail. My views on the issues appear below.

No absolute privilege

2. For the reasons set out in Kwan JA's judgment at paras. 86-126, I agree that the defendant's communication of the subject statement to Mr Mill and Mr Midgley was not made on an occasion of absolute privilege. Consequently it falls to be decided whether the plaintiff has established either the cause of action of slander, or that of malicious falsehood, or both.

Causes of action

3. In Section I, I shall consider the claim based on slander and in Section II, the claim based on malicious falsehood.

Section I

Defamatory meaning?

4. With respect, I disagree with Kwan JA and Macrae JA on the issue whether the defendant's statement bore a defamatory meaning.

Relevant time

5.1 Before I discuss the issue, it is not disputed that in determining whether a statement is defamatory or not, the relevant time is the time when it was communicated.

5.2 In the present case that was the morning of 21 May 2009 (before the start of Day 9 of the probate trial before Lam J) prior to the resumption of cross-examination of Gilbert Leung.

Factual context

6. It is also important to bear in mind that in deciding whether a statement is defamatory or not, the court should not consider it in a vacuum. It is necessary to take into account the context and circumstances of the publication[1].

7.1 The subject statement was made in the context of preparation for court proceedings when the credibility of Gilbert Leung, an important witness, was being tested.

7.2 The day before, he had been cross-examined by Mr Mill about the piece of land which a Chinachem company had sold to his company shortly before he made his witness statement in the Probate Action. A question was based on a report in the media which said that the land was sold for $1.01m when, even on a conservative estimate, it was valued then at $10m.

7.3 In cross-examination, Gilbert Leung denied that estimate of value. He was then asked if *he* had an estimate of the profitability of the project. He answered that he had *not* attempted to estimate the value of the land in question[2].

7.4 However the Document[3] which he had prepared[4] showed (after referring to Town Planning zoning which permitted development of the land as a cinerarium) under the heading "*Property Valuation*" that there

[1] Gatley on Libel and Slander 12th ed. para. 3.30.
[2] Recorder Pow's Judgment para. 4.
[3] See annexure to the Statement of Claim.
[4] This was not disputed.

would be gross revenues after development of some $360m at a construction cost of approximately $10 million.

7.5 On its face therefore the Document appeared to contradict the evidence that Gilbert Leung had just given.

7.6 The next morning Mr Mill and Mr Midgley were told by the defendant that the provider of the Document was content to let it be used in court to cross-examine Gilbert Leung[5]. Mr Mill anticipated[6] that Lam J would ask for the name of the provider of the Document for its introduction into evidence.

7.7 It was in the context above that the subject statement was made to Mr Mill and Mr Midgley in preparation for the introduction of the Document in court to expose what appeared to be false evidence from a witness given the day before.

8. I shall now come to the plaintiff's case on slander.

The plaintiff's case at trial

9.1 The plaintiff alleged that the statement bore a defamatory meaning, whether (1) on the natural and ordinary meaning of the words, or (2) by way of "true" or "legal" innuendo. (As "false" or "popular" innuendo does not give rise to an independent cause of action[7], I shall refer hereafter only to the term "innuendo" without the adjective "true" or "legal").

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[5] Payment being at Tony Chan's discretion.
[6] Correctly, as events transpired.
[7] Gatley para. 3.20, p.130.

Recorder Pow's decision on this issue

9.2 The learned Recorder held that the statement did not bear a defamatory meaning, whether (1) on the natural and ordinary meaning of the words, or (2) by way of innuendo. In this appeal the plaintiff has only challenged the Recorder's rejection of his case of innuendo.

Conjunction with extrinsic facts necessary to create an innuendo meaning

10. It is clear law that an innuendo meaning can only be established if the plaintiff pleads and proves that an "extended"[8] (or "special" or "secondary") meaning, which is defamatory, arises *by reason of* the publishees' knowledge of certain extrinsic facts[9]. Put another way, the "extended" meaning would be created only by a conjunction of the words spoken with the extrinsic facts pleaded and proved to be known to the publishees[10], although if the facts had sufficient notoriety, an inference could be drawn that at least one of the publishees would have such knowledge[11].

Deciding whether the meaning is defamatory

11. When the court considers whether a defamatory meaning should or should not be attributed to the statement, evidence of the individual publishees' subjective understanding[12] may be admissible but is not conclusive. " ... [T]he claimant, in order to succeed, must satisfy

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[8] Extended, or special, or secondary meaning because it was not the natural and ordinary meaning of the words: Gatley, para. 3.20.

[9] Knowledge of only one recipient is sufficient but it was not suggested that in considering their state of knowledge, Mr Mill and Mr Midgley should be treated separately, and in any event, general notoriety would suffice.

[10] Gatley, para. 3.20.

[11] Duncan and Neill on Defamation 4th ed para.5.32(5).

[12] Duncan and Neill on Defamation 4th ed para.5.32(5).

the court that the [defamatory] meaning ... was one which reasonable people in their position would have derived from it"[13].

12. It is therefore crucial to examine

(1) what the plaintiff claims to be the defamatory meaning by innuendo,

(2) what were the extrinsic facts pleaded and proved to be known by the publishees (or were sufficiently notorious for their knowledge to be inferred), and

(3) whether those facts, combined with the words spoken, would have created that defamatory meaning by innuendo in the understanding of a reasonable person in the position of the publishees.

Alleged Innuendo Meanings

13. In his statement of claim, the plaintiff has alleged 3 innuendo meanings which may be summarised as follows:

(a) he had betrayed a friend and business associate viz. Gilbert Leung[14] (**"alleged Innuendo Meaning (a)"**);

(b) he had "secretly and covertly sought to assist Tony Chan and his unmeritorious challenge to Nina Kung's will in order to try to get his [Tony Chan's] hands on her fortune"[15] (**"alleged Innuendo Meaning (b)"**);

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[13] Duncan and Neill para. 5.32 (6).
[14] Para.8A (a).
[15] Para. 8A (b).

(c) he did either of or both the acts above "in order to obtain a personal advantage, possibly money from Tony Chan" [16] ("**alleged Innuendo Meaning (c)**").

Separate meanings alleged

14. The pleading was of 3 alleged Innuendo Meanings, not one meaning consisting of 3 components. Although Mr Price QC leading counsel on this appeal [17] has apparently included alleged Innuendo Meaning (c) when making submissions on alleged Innuendo Meaning (b)[18], it is clear that alleged Innuendo Meaning (b) was a stand-alone allegation. That is to be contrasted with alleged Innuendo Meaning (c) which is clearly predicated upon the plaintiff *having succeeded* in establishing either alleged Innuendo Meaning (a) or (b).

Extrinsic facts

15.1 Five extrinsic facts were pleaded. The Statement of Claim did not comply satisfactorily with Order 82 rule 3(1) RHC which requires facts and matters to be particularised when an innuendo meaning is alleged.

> "Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he must give particulars of the facts and matters on which he relies in support of such sense".

Obviously where the plaintiff alleges that there were 3 separate innuendo meanings each of which was defamatory, he should identify specifically

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[16] Para. 8A (c).
[17] Who did not appear below.
[18] " ... the ordinary reasonable Hong Kong person ... would ... understand that P was willing to assist Tony Chan in his particularly distasteful venture, *as long as* he was able to join in putting his nose in the trough of Nina Wang's fortune": see Appellant's Skeleton Argument para. 33.

which extrinsic fact or matter was intended to support each of the 3 innuendo meanings alleged.

15.2 In the present case, the plaintiff failed to do so. That was unsatisfactory as it was left to the reader to discern from the extrinsic facts pleaded *which* facts were being alleged to support *which* innuendo meaning.

15.3 The law of defamation is technical and complex, and a clearly and methodically pleaded case is essential. The RASOC here contained different causes of action (slander and malicious falsehood), and for slander, there were claims based on the natural and ordinary meaning (paragraph 8), and further or alternatively, on innuendo meanings (paragraph 8A). The RASOC is the blueprint for the case mounted by the plaintiff for each separate claim. This is important for the following reason. When evidence of a fact is adduced at trial which is relevant to one claim (eg slander based on the natural and ordinary meaning), and that fact had *not* been pleaded to support another claim (eg slander based on an innuendo meaning), it would be wrong to argue that the second claim can be established as the evidence of that fact had in any event been adduced at trial, because that was *not* a fact pleaded to support the second claim. Permitting such an argument would lead to unfairness to the opponent and confusion of the tribunal. I will come back to this later when I deal with Mr Price's argument that Mr Mill and Mr Midgley were aware of the informant's previous demands for money for the Document. First, I shall set out the 3 alleged Innuendo Meanings in order, followed by a discussion of the 5 extrinsic facts and matters pleaded in paragraph 8A.

Alleged Innuendo Meaning (a)

16.1 Alleged Innuendo Meaning (a) may be summarized as "betrayal". The following 3 extrinsic facts are pleaded in paragraph 8A.

(1) The plaintiff and Gilbert Leung were known within their circle of friends to be friends and close business associates.

(2) The basis of the cross-examination of Gilbert Leung was that he had discussed the business proposal in the Document with the plaintiff.

(3) Gilbert Leung had (incorrectly) testified that he had discussed the proposal in the Document with the plaintiff, thereby revealing that they were business associates. Accordingly the public would have understood that the plaintiff had betrayed Gilbert Leung by providing a confidential document to Tony Chan's legal team.

16.2 For the reasons set out in Kwan JA's judgment at paras. 134-136, I am also not persuaded that the judge was plainly wrong when he found that the plaintiff had failed to prove alleged Innuendo Meaning (a).

Alleged Innuendo Meaning (b)

17. The alleged Innuendo Meaning pleaded was that the plaintiff had "secretly and covertly sought to assist Tony Chan and his unmeritorious challenge to Nina Kung's will in order to try to get his [Tony Chan's] hands on her fortune".

18.1 Mr Price submits that "Mr Mill and Mr Midgley could not be supposed to have thought their client's action unmeritorious, in the sense of legally unsustainable. But reasonable people would regard Tony Chan's behaviour as distasteful ... it is in that sense that 'unmeritorious', in the RASOC, should be read"[19].

18.2 However, pleadings must be construed objectively and words construed according to their ordinary meaning in context. In my view the word "unmeritorious" in the phrase "*unmeritorious challenge to Nina Kung's will*", when used in the context of *probate court proceedings*, meant in its ordinary meaning that the challenge to the will had no merits at law[20] (and not merely that his behaviour was perceived by members of the lay public as distasteful or immoral). It is indisputable that judges decide cases on intrinsic legal rights, and not on the basis of parties' private morals[21]. It is therefore clear that the "sting" alleged in Innuendo Meaning (b) lay in the imputation that the plaintiff was assisting a party who had no legitimate rights in the action, or as Mr Price put it, that the case was legally unsustainable.

18.3 The Recorder clearly understood the words "unmeritorious challenge to Nina Kung's will" in alleged Innuendo Meaning (b) as referring to legal rights rather than moral views. Hence his reference to "rightful claimant" and the sting lying in the imputation that the case was unmeritorious, not in the allusion to "secret" or "covert" assistance:

> "72. In my view, the sting lies in the imputation that the plaintiff was helping Tony Chan in his unmeritorious

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[19] Appellant's Skeleton Argument para. 32.

[20] The Shorter Oxford Dictionary defines the word "meritorious" for Law as "Of an action or claim: likely to succeed on the merits of the case" and "merit" as "Earliest, in [plural] the intrinsic rights and wrongs of a matter, esp. a legal case, the intrinsic excellences or defects of something".

[21] The views of persons such as Dr Siu expressed after the subject statement (Appellant's Skeleton Argument para. 32) are irrelevant to this discussion.

> case in the Probate Action. The words 'secretly and covertly' add nothing. *For instance, it will not be defamatory to say that I am secretly helping a rightful claimant in his court case. No right-thinking member of society would likely think lower of me.*" (Emphasis added).

19. I shall now examine the extrinsic facts pleaded as support.

Extrinsic Facts pleaded

20. The extrinsic facts were pleaded in a long passage in sub-para. (4) of the Particulars ("**the Passage**"). My comments appear in italics in square brackets.

> "The Probate Action received a huge amount of publicity in Hong Kong. On the basis of reports of the case [*dates not specified],* the public perception of Tony Chan was that of an adventurer who had preyed upon Ms Nina Kung, a rich widow, in order to get at her money and who was willing to disclose *[dates not specified*] intimate information about her, and his relationship with her, for personal advantage. During the trial [*dates not specified*], Tony Chan, a married man with two children, made very detailed disclosures [*dates not specified*] about his sexual relationship with Ms Nina Kung, disclosures which were distasteful to the public. It was also disclosed *[dates not specified*] how he had tried to worm his way to her affections with false promises that he could find her missing husband and other underhand tactics. On 20 February 2010 [*after the subject statement]* Eastweek magazine published an article about the Probate Action headed 'The Most Despicable Man of the Century', which heading shows Tony Chan's notoriety in Hong Kong. Tony Chan ultimately lost his challenge to the 2002 will [*after the subject statement]* the Judge finding that the 2006 will relied on by Tony Chan was a forgery, thereby suggesting that Tony Chan, as well as being an unscrupulous adventurer, was also a criminal. He was arrested by the Hong Kong Police on 3 February [*after the subject statement]* on suspicion of forgery".

21. A number of points may be made on the above Passage.

21.1 First, the particulars did not comply with O.18 r.6(2) RHC[22].

21.2 Second, as indicated above, the dates when certain events allegedly occurred were lacking. It is notable that parts of the Passage repeated paragraph 4 of the RASOC but the pleader specifically did *not* include the "cut-off date" (ie before the events of 21 May 2009) which had been pleaded in paragraph 4. In addition, he *included* the result of the case as determined by Lam J, and Tony Chan's subsequent arrest for forgery. The pleader of the RASOC obviously thought that all those matters could be relied upon as extrinsic facts to support the innuendo meaning (irrespective of when they occurred). However I have referred in para 5.1 above to the principle that in determining whether a statement is defamatory or not, the relevant time is the time when it was communicated. Evidence offending this principle should not be considered at all.

21.3 Third, the inclusion of the post-statement events in the Passage, coupled with specific omission of the "cut-off date", reinforces my view that the words "unmeritorious challenge to [the] will" were intended to mean that Tony Chan's case had no merits at law. The pleading that Tony Chan was "an adventurer who had preyed upon" Mrs Wang reflects the issue of undue influence which was being run in the probate action. The pleading of Tony Chan's "false promises" that he could find the testator's lost husband "and other underhand tactics" reflects another issue being run in the probate action that the 2006 will was only a "Fung Shui will" and hence not a valid testamentary document. But finally and most importantly, the pleading of Lam J's judgment and Tony Chan's subsequent arrest on suspicion of forgery, in *one and the same passage* as

[22] Each allegation to be contained in a separate paragraph.

the above, showed that objectively what the pleading meant was that Tony Chan's case had no merits in law.

21.4 Fourth, I cannot see how the pleaded extrinsic facts would help the plaintiff to establish alleged Innuendo Meaning (b), ie that right-thinking members of the public would lower their estimation[23] of him in either scenario below:

(a) if the words are understood in the sense that he was assisting a party who had no merits at law, or even

(b) (contrary to my views in paras. 18.2 and 21.3 above) if the words are understood in the sense that he was assisting a party who the public regarded as having behaved immorally or distastefully.

22. I shall first consider scenario (a).

22.1 First, as discussed above, the post-statement events[24] in the Passage are simply irrelevant. At the time the subject statement was made, the hearing was still at a relatively early stage of the Probate Action (Day 9 of 40). The plaintiff's case had not finished. Gilbert Leung was still being cross-examined. There were a number of other witnesses expected to give evidence at the trial. It has not been suggested by the plaintiff in this case that the legal merits of either party's case in the Probate Action had been determined at that stage and, as noted above, Mr Price accepts that Mr Mill and Mr Midgley could not be supposed to have

[23] This phrase is used as shorthand for a defamatory imputation, as there are many different formulations.

[24] Starting with "On 20 February 2010 etc".

thought their client's action unmeritorious in the sense of being legally unsustainable.

22.2 Second, as for the rest of the Passage I shall assume in the plaintiff's favour that the matters occurred prior to the time of the subject statement. However it only sets out the public perception that Tony Chan's behaviour was immoral or distasteful. I cannot see how reasonable persons in the publishees' position would have reasonably understood such a perception to reflect the intrinsic qualities of the case in law. It cannot possibly be said that the public perception would influence the judge's judgment on the merits of the case. The case was being tried by a professional judge, not by a jury. And it is trite that the court is a court of law, not a court of morals.

22.3 Further, the subject statement cannot be considered in a vacuum. The factual context was that Gilbert Leung had given evidence the day before that he had not made any attempts to value the land. The Document which was prepared by him seemed on its face to contradict that evidence. The subject statement (albeit false[25]) was made in the context of enabling Mr Mill to answer a question from the judge, so that the Document could be deployed to expose Gilbert Leung's apparent false evidence given the day before. In my view, reasonable persons in the publishees' position would not have reasonably understood the provider of the Document to be helping in an unmeritorious case, for the subject statement was made for the purpose of introducing a document which on its face revealed to the court the possibility that an important witness had knowingly given false evidence.

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[25] For which the plaintiff had other remedies, see below.

23. I turn then to scenario (b) which is on the assumption that "unmeritorious challenge to Nina Kung's will" could be said to refer to the public perception of Tony Chan's immoral or distasteful behaviour. Given the factual context set out in the preceding paragraph, I do not think right-thinking members of the public would lower their estimation of a person (ie the plaintiff) who provides for use in court a document which on its face exposes a witness as a perjurer, whichever side the witness is on[26].

24. For the reasons set out above, I take the view that the extrinsic facts pleaded (which are essential to the creation of a separate cause of action of defamatory meaning by innuendo) did not support the alleged Innuendo Meaning (b) and the plaintiff must fail.

Alleged Innuendo Meaning (c)

25.1. The pleadings clearly show that this was predicated upon alleged Innuendo Meaning (a) and/or (b) having been established[27]. This is clear as the Innuendo Meaning in para 8A(c) specifically pleaded that "the Plaintiff had acted *as set out above* in order to obtain a personal advantage, possibly money from Tony Chan". (Emphasis added). Further, the extrinsic facts pleaded in sub-para (5) of the Particulars before the last sentence make that clear beyond doubt. In my view, on a plain and ordinary reading, alleged Innuendo Meaning (c) is not a "stand-alone" allegation. It adds an alleged innuendo meaning but *only if* alleged Innuendo Meaning (a) and/or (b) have/has been established. Therefore I

[26] It is interesting to note that in England, the allegation of being a "grass" was held, as a matter of public policy, not to bear a defamatory meaning: Gatley para.2.23 p.61. Although post-statement events are irrelevant, as a matter of completeness I would mention that in fact Gilbert Leung admitted in court that it was he who had prepared the Document, but explained that the figures in it were subject to many contingencies and subsequently found to be unrealistic; see para. 90 Judgment, Lam J.

[27] See para. 8A (c) RASOC.

do not need to deal with alleged Innuendo Meaning (c) in light of my views set out above that alleged Innuendo Meanings (a) and (b) have not been established.

25.2. I should however point out that certain matters which Mr Price has relied upon in his arguments[28] were never pleaded as extrinsic facts to support Innuendo Meaning (c), and should therefore not be considered in any event. I refer in particular to the argument that Mr Mill and Mr Midgley knew that the informant had previously required payment of $10m for the use of the Document, which requirement was withdrawn earlier that morning. That knowledge was pleaded in para. 7 of the RASOC. However para.7 was only prayed in aid in para.8 for the claim of slander on the basis of natural and ordinary meaning; and *not* in para.8A for the claim of slander on the basis of innuendo meanings. As I have discussed in para.15.3 above, a fact may be adduced as evidence in support of one claim, but that does not permit it to be used to establish another claim in the absence of it having been pleaded. This is not mere pedantry. It is essential in a complex area of the law such as defamation where all parties and the tribunal have to be acutely aware of the exact case(s) being advanced and for which adjudication is sought.

Conclusion on the slander claim

26. It follows from the above that as none of the alleged Innuendo Meanings had been made out, I would dismiss the appeal from the Recorder's finding that the plaintiff had failed in his cause of action in slander.

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[28] The knowledge of the publishees of an earlier request for payment: see para. 31 Appellant's Skeleton Arguments.

Section II

Malicious falsehood

27. With respect I do not agree with Kwan JA and Macrae JA on the dismissal of the plaintiff's claim for damages consequential to republication of the malicious falsehood.

28. I shall first consider some general points.

Elements of cause of action in malicious falsehood

29.1 First the elements of a cause of action in malicious falsehood are as follows:

(1) the defendant had communicated to a third party words which were false;

(2) the words referred to the plaintiff;

(3) the words were communicated maliciously; and

(4) special damage had followed as a direct and natural result of the communication of the words.

29.2 The Recorder found the first three elements proved[29]. There is no cross-appeal from those findings.

29.3 The only issue remaining was (4), i.e. whether special damage had followed as a direct and natural result of the publication of the words.

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[29] Para. 79, Judgment.

Statutory provisions

30.1 Section 24(1)(a) of the Defamation Ordinance Cap. 21 exempts a plaintiff from having to prove special damage if the words were published in written form. That was not the case here.

30.2 The Recorder also held that the exemption in s.24(1)(b) did not assist the plaintiff either, as he held that the subject statement (which he called "the Q&A") was not likely to cause pecuniary damage to the plaintiff in respect of his office, profession, calling, trade or business.

Losses suffered due to republications

31. However the Recorder also held that, even though the plaintiff had incurred payments for corrective media announcements and legal expenses, he had not proved special damage because those were due to republications by the media of the court proceedings on an occasion of absolute privilege. Kwan JA and Macrae JA concur with that view. With respect, I do not share their views.

Discussion

32. In summary, my views on this issue are as follows.

32.1 First, I do not see why a defendant should be absolved from responsibility for losses when it was reasonably foreseeable that he would cause such losses by his publication of a malicious falsehood, at least when he had intended (and indeed in the present case, expressly authorised) the republication. The juridical basis lies in general tortious principles of

damages, for the plaintiff's cause of action is founded on the original publication, not on the republication.

32.2 Second, there is no reason as a matter of policy why a person, who had intentionally authorized the further promotion of a statement which he knew to be false, should be able to shield behind the fact that the republication is on an occasion of absolute privilege. It is not an argument to say that this would place a restraint on republishers from speaking freely on occasions of absolute privilege. There is no diminution of that privilege, which remains intact for the republishers.

32.3 Third, the general rule at common law is that where there is a wrong there should be a remedy. It can be clearly discernible from recent authorities that as a matter of legal policy, the courts have been ready to develop the common law in the direction of reducing the application of blanket immunity from suit, so that that blunt instrument should not be wielded too easily against persons who seek access to justice.

(1) Juridical basis

33.1 On the first point, it was explicitly stated in the RASOC[30] that no separate cause of action was being asserted on the republications; the cause of action was solely based on the original publication but the damage suffered as a result included reasonably foreseeable losses flowing from that original publication. This is in accordance with general tortious principles of damages.

33.2 As the editors of Gatley said[31]:

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[30] Para. 8A.
[31] Para. 6.52.

> "Where a defendant's defamatory statement[32] is voluntarily republished by the person to whom he published it or by some other person, the question arises whether the defendant is liable for the damage caused by that further publication. In such a case the claimant may have a choice: he may (1) sue the defendant both for the original publication and for the republication as two separate causes of action, or (2) *sue the defendant in respect of the original publication only, but seek to recover as a consequence of that original publication the damage which he has suffered by reason of its repetition, so long as such damage is not too remote*". (Emphasis added).

33.3 *Cutler v McPhail*[33] and *Toomey v Mirror Newspapers Ltd*[34] provide support for the above summary.

34.1 In *Cutler*, the defendant had published a defamatory statement about the plaintiff to the editor of a journal. The statement was then republished in the journal (as the defendant intended). The plaintiff consequently had two claims, one for the original publication and one for the republication.

34.2 The journal published an apology and paid the plaintiff a sum of money. He released his claim[35] against the journal and the defendant (as joint tortfeasors) for the republication. Salmon J (as he then was) held that that claim was completely extinguished[36].

34.3 However his lordship held that the plaintiff had not released his claim for the original publication. Importantly for present purposes, it was held that since the defendant had intended the statement to be republished in the journal, the damages which flowed from his original

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[32] Which applies also to malicious falsehood.
[33] [1962] 2 QB 292, 298-299.
[34] [1985] 1 NSWLR 173, 182-183.
[35] Which included a claim against the defendant as joint tortfeasor.
[36] P.298.

publication to the editor included the damages suffered by reason of the republication. Salmon J held[37]:

> "In my judgment, however, in considering the damages to which the plaintiffs are entitled in respect of the publication to the editor of [the journal], the jury will be entitled ... to take into account the fact that the defendant, when he sent his letter to the [editor], *intended what he had stated in the letter to be repeated in the journal. It is quite clear that if the repetition of a libel is a natural and probable consequence of its publication, the plaintiff is entitled to all the damages that flow from the publication.*
>
> In my view *the damage that flows from the original publication is, amongst other things, the damage which he suffers by reason of the repetition of the libel, which repetition the defendant intended when he originally published it*". (Emphasis added)

34.4 After remarking that in most cases it did not matter whether the damages were caused by the original publication or the republication, Salmon J noted that in the case before him, "there was a very special reason, i.e. ... the release, for relying on the separate publication to the editor" (ie the original publication). In other words, the extinguishment of the cause of action arising from the republication did not affect the damages flowing from the original publication.

35. *Cutler* was followed in the NSW Court in *Toomey* where the plaintiff restricted his action to NSW, but sought damages for republications interstate.

36. I see no reason in principle for distinguishing between a cause of action that has been extinguished (as in *Cutler*) or one that has been deliberately restricted (as in *Toomey*) on the one hand, and a cause of action that is barred by absolute privilege on the other. In both situations, the

[37] P.298.

damages arose from the original publication and no extant cause of action from the republication subsists.

(2) Where republication is on an occasion of privilege

37.1 *Cutler* was followed in *Toomey* where the issue was whether the plaintiff, whose claim was deliberately restricted to the defendant's publication of a newspaper within one state (NSW), could rely on the defendant's publication of the newspaper in other states as a matter going to damages[38]. Hunt J held[39]:

> "*Cutler v McPhail*, moreover, appears to be fully in accordance with general principle. Where a defendant is responsible in law for a republication, because he intended the matter complained of to be republished, or because that republication was the natural and probable result of his own publication, or *where the original publication was made to a person who was under a moral duty to repeat the matter complained of to another (at least, it would seem where such was foreseeable)*, the damage which flows from the republication must be considered to be such as would flow from the defendant's original publication in the ordinary and usual course of things and thus be recoverable as a consequence of that original publication in accordance with the general principles relating to damages in tort ... Those damages are reasonably foreseeable". (Emphasis added)

37.2 The words emphasised above refer to a situation of republication where the defence of qualified privilege would apply, ie where the plaintiff would also (as in a case of absolute privilege) not be able to establish a separate cause of action on the republication.

38. The editors of Gatley have the following comment regarding that situation[40]:

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[38] P.175.
[39] P.183.
[40] Para.6.58.

> "If the statement by D to X was not on a privileged occasion but the republication by X was, D is obviously liable in respect of the publication to X, but what is his position in respect of the republication by X? The difficulty is that if D is to be treated as a publisher on the occasion of the republication there is simply no wrong on that occasion. There is less difficulty where D is actuated by malice because then when X republishes he has the protection of privilege but D does not".

39. As discussed above, the juridical basis is that the plaintiff is *not* making the defendant (or the republisher) liable for the *republication*, but *only the defendant* liable for the *original* publication - where he has, by his intentional acts, engendered consequential but reasonably foreseeable losses. Therefore there is no reason why the defendant should be entitled to shelter behind the defence available to the republisher, because the plaintiff is not asserting a cause of action against the republisher at all, but only against the original publisher.

40. The Recorder however rejected this approach, deriving some support from the *obiter* decision in *Belbin v McLean*[41] and the American case of *Watt v McKelvie*[42]. These cases turned essentially on policy considerations. The concern was that the original publisher and/or the republisher may thus be constrained from communicating information candidly.

41. In my view, first the court must take into account that fact that the falsehood was originally published on an occasion which was *not* protected by absolute privilege. No immunity existed. I do not see why, as a matter of policy, damages arising from an intended republication (even

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[41] [2004] QCA 181

[42] Supreme Court of Virginia, (1978) 248 SE 2d 826

in connection with court proceedings) should not be recoverable from the original publisher[43].

42. Second, in relation to the argument that making the original publisher liable for damages suffered as a result of the republication would place a restraint on the republisher's freedom to use the information[44], I do not see that is a concern when the original publisher knew that the information was false and yet had *intended* the republication. That choice was made by the original publisher and he should be responsible for the consequences of his choice of action.

43. Thus, it is said by the editors of Gatley (at para. 6.52, p.256) that:

> " ... it may be that the original publisher should only be liable as a publisher of the republished statement where he authorised or intended it ...".

44. In the present case the Recorder found that the defendant had clearly intended Mr Mill to republish the falsehood for Mr Mill had expressly asked if he was authorized to repeat the subject statement and the defendant answered in the affirmative. It was reasonably foreseeable that the victim of the falsehood would be entitled to correct it and incur expenses in so doing. The consequence if the court were to deny the plaintiff compensation for his losses (when the defendant had known the statement was false and had intended republication to take place) leads me to the third point.

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[43] Not from the republisher.
[44] *Belbin v McLean*, see para. 165 below.

(3) Policy

45.1 As Lord Dyson JSC said in *Jones v Kaney,* "the general rule that where there is a wrong there should be a remedy ["**the general rule**"] is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional"[45]. Any exception to that general rule has to be justified as necessary in the public interest and should be kept under review.

45.2 That was acknowledged by the UK Supreme Court to be the "correct starting point" for the consideration of a claim of immunity. It is true that in the present case we are not dealing with a claim for immunity in the strict sense. However, if the damages recoverable by the victim of a wrong cannot include losses due to republication because the statement was republished on an occasion of privilege, the harm done to the victim is the same as in an immunity situation. He would be denied a real remedy. The considerations of legal policy should therefore be the same.

46. In my view, it matters not whether the general rule is founded in the common law or in the Basic Law and/or the Bill of Rights. Although Mr Yu SC has made submissions to this court based on Articles 35 and 39 of the Basic Law and Article 14 of the Bill of Rights, with respect I do not see that those constitutional rights add anything in the present case. The Recorder made no reference to constitutional arguments in his lengthy and detailed Judgment. Accordingly I shall confine my discussion to the common law.

[45] *Jones v Kaney* [2011] 3 AC 398, para.113.

47.1 It can be seen from the authorities that the courts have been more ready to examine whether claims to immunity are justified, and to strike them down when the defendant has failed to justify them. Following the "sweeping away" in 2002 of the historical immunity of advocates, first for negligence in court[46] and subsequently also out of court[47], in *Jones v Kaney* the UK Supreme Court struck down a claim to immunity by expert witnesses.

47.2 I shall not reproduce here the arguments that have been put forward in these cases for maintaining immunity. They include arguments on the effect on freedom of speech, that lifting the immunity would result in reluctance to provide information and inhibit frankness, and the risk of harassment by vexatious claims.

47.3 All these are of course relevant considerations. But an exception to the general rule can be justified only if it is necessary, and the justification required must be cogent. In my view, on the issue before this court, the balance comes down clearly in favour of supporting the general rule that where a person has suffered a wrong, that person should have a remedy.

48. Freedom of speech is an important right but that right is not maintained and is (on the contrary) debased by the invention of malicious falsehoods. That abuse is exacerbated when the falsehood is, as intended, republished. Further, the concern that permitting normal recovery of losses would deter whistle-blowers is answered by the following principles in-built in the law on malicious falsehood:

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[46] *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, HL.
[47] *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, HL.

- the burden of pleading and proving falsity is on the plaintiff[48]
- where the words are capable of conveying more than one meaning, it is the defendant's subjective understanding which is the relevant one in determining whether he knew the words to be false[49],
- there is no liability in malicious falsehood for a statement published in good faith[50], and
- mere negligence is not malice[51].

49. I can understand the risk of harassment by vexatious claims, and that time and costs would be expended before issues of fact (such as the defendant's knowledge of the falsity or his intention of republication) can be adjudicated upon. But there is no erosion of the immunity given to republishers (such as legislators or persons participating in court proceedings). On the contrary, holding the initial publisher of the malicious falsehood responsible for reasonably foreseeable damages would promote responsible fact-checking before publication to legislators and the court, and thereby serve the interests of the community at large. In my view where the defendant has *knowingly* given false information, *intending* its republication, in circumstances where it is reasonably foreseeable that losses would result, it is entirely proper and indeed necessary for the courts to apply the law in such a way that a claimant's pursuit of damages recoverable under general tortious principles would not be abrogated. We live in an age where information (and misinformation)

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[48] Gatley, para.21.7 p.819
[49] Gatley, para.21.8, p.822
[50] Gatley, para.21.8 p.820
[51] Gatley, para.21.8 p.820

can be speedily disseminated through social media. In my view the courts, conscious of the general rule and intent on keeping the limits of that rule under review, are capable of honing the law into a more precise instrument so that the victim's claim to losses suffered would not be unjustifiably stultified. Otherwise, victims of misinformation - known to be false by the instigator and intended to be disseminated - would be left without a real remedy.

Order

50. For the reasons set out above, I would allow the appeal but only in relation to the claim for damages for malicious falsehood.

51. As a matter of completeness, I would indicate that if I am wrong and the plaintiff's claim in defamation is made out, it follows from my views above that damages should include losses suffered due to republications.

Hon Kwan JA:

52. This is the plaintiff's appeal from the judgment of Recorder Jason Pow, SC on 24 September 2015 [2015] 5 HKLRD 389 ("the Judgment"), in which he dismissed the plaintiff's claim against the defendant in slander and malicious falsehood. The claim arose out of the widely publicised probate trial in 2009 (HCAP 8/2007), in which Chan Chun Chuen, also known as Tony Chan, sought to establish that he was the sole beneficiary of Mrs Nina Wang's vast estate in a later will (ultimately held to be a forgery), in place of Chinachem Charitable Foundation Limited ("Chinachem"), the beneficiary under an earlier will. This appeal raises the important questions of whether absolute privilege in connection with

judicial proceedings may be extended to cover a novel situation and whether damages may be recovered for the consequences of republication on occasions that are indisputably covered by absolute privilege.

Factual background

53. The relevant background matters are taken largely from the Judgment, supplemented by materials from uncontroversial documents. There is no appeal on any of the factual findings made by the judge.

(a) The persons involved

54. Tony Chan was represented in the probate trial by Haldanes. The handling solicitor was Mr Jonathan Midgley. The leading counsel who conducted the trial for him was Mr Ian Mill, QC. Ms Frances Lok was the junior counsel assisting Mr Mill. Tony Chan also engaged Mr John McDonnell, QC to advise him in the probate action.

55. Gilbert Leung Kam Ho was an important witness called by Chinachem to give evidence on the relationship between Tony Chan and Mrs Wang. He was formerly a member of the Legislative Council, a qualified land surveyor and had acted as an agent for the acquisition and development of landed properties in Hong Kong. He provided a witness statement to Chinachem in May 2007. Two months later, Chinachem sold a piece of land in Tai Po to his company at the price of $1.01 million. Tony Chan's legal team had sought to demonstrate at the trial that the sale

was an advantage given to Gilbert Leung in exchange for his giving evidence for Chinachem[52].

56. The plaintiff, whose first name is Edmund and whose surname "曾" is also commonly spelt as "Tsang" in Hong Kong, was and is a businessman and property developer. He had been a business associate of Gilbert Leung in land development.

57. The defendant was the former assistant and girlfriend of Gilbert Leung. She had signed an agreement with Tony Chan in March 2009 in which Tony Chan agreed to pay her for the information she disclosed to him concerning Gilbert Leung and his activities. She provided Tony Chan's lawyers with the papers of a previous trial in England in which she successfully sued Gilbert Leung regarding a property they bought there. She was also involved in some other issues in the probate trial and had provided various types of assistance to Mr McDonnell and Mr Mill. She issued bills to Haldanes for her services and was paid. The judge found that prior to the subject communication, she had "actively participated in the preparation of the Probate Trial as part of the legal team of Tony Chan."[53]

58. Among the issues in which the defendant was involved, she informed Tony Chan's lawyers that a third party could point to a document which would be useful in impeaching Gilbert Leung's credibility ("the Document"). The Document, which was in Chinese, was an investment proposal put forward by Gilbert Leung for the development into a

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[52] On this collateral issue relating only to Gilbert Leung's credibility, it was eventually held by the trial judge that Tony Chan did not have a solid ground for suggesting an advantage was given to Gilbert Leung, see §90 of the judgment in HCAP 8/2007, 2 February 2010.

[53] Judgment, §18(2); agreement between Tony Chan and the defendant signed in March 2009

cinerarium of the land in Tai Po that his company acquired from Chinachem and it projected a gross revenue from the development of $360 million. The defendant mentioned that the third party expected to be paid $10 million for providing the Document. It was arranged through the defendant that Mr McDonnell and Mr Mill would be given the Document to consider in order to advise their client whether the information was worth the price. When the Document was reviewed by Mr Mill, he advised his client against paying the sum asked for and the matter was shelved[54].

59. This third party mentioned by the defendant was Dr Sidney Siu Yim Kwan, a friend of hers. Dr Siu and the defendant had attended a meeting on 17 May 2009 with Mr Midgley, Tony Chan and Ms Lok in the offices of Haldanes. The meeting was to discuss a compromise of the probate action which some associates of Dr Siu were offering to finance. According to the attendance note prepared by Ms Lok, Dr Siu mentioned at the meeting that the defendant found an informant to prove that Gilbert Leung gave evidence based on some interest and that the informant was still considering whether to give evidence or to report the matter to the police. The judge found Dr Siu did not mention at the meeting that he was the informant or the provider of the Document and as of 21 May 2009, Mr Midgley did not know Dr Siu was the provider of the same[55].

60. When Mr McDonnell received the Document from the defendant, he was told by her that it was given to her by Dr Siu[56]. Mr McDonnell told Mr Mill the source of the Document was Dr Siu when

[54] Judgment, §§18(3) and 43(2)
[55] Judgment, §§43(3) and 49
[56] Judgment, §50

he gave a copy of the Document to Mr Mill in London in March 2009[57]. Notwithstanding this, the judge was of the view that at the material time on 21 May 2009, Mr Mill might not have full recollection of this piece of information given to him some two months ago, as he was then engaged in conducting very heavy litigation being the probate action[58].

(b) The publication to Mr Mill and Mr Midgley

61. On the 8th day of the probate trial, Mr Mill started to cross-examine Gilbert Leung in respect of his land transaction with Chinachem. The transcript of the proceedings that day was sent to the defendant overnight by email[59].

62. On 21 May 2009 and before the 9th day of the trial commenced, Mr Midgley and Ms Lok received a telephone call from the defendant informing them that the third party (unidentified to Mr Midgley) who had provided the Document had had a change of heart and authorized her for the first time to allow Tony Chan's lawyers to use that material without making the payment pre-condition. The third party was content to be paid in the event of Tony Chan winning the probate action, the amount was not stipulated and it was to be at Tony Chan's discretion[60].

63. Mr Midgley immediately went to see Mr Mill in his hotel room before the hearing to inform him of this. Mr Mill, who had possession of the Document, told Mr Midgley he required to speak with the defendant in the presence of Mr Midgley to be sure that the necessary authority had

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[57] Judgment, §§51 and 52
[58] Judgment, §52
[59] Judgment, §39
[60] Judgment, §§18(4) and 42; attendance note of Ms Lok dated 21 May 2009

been given, and to seek further information, before he was prepared to use the Document in his cross-examination of Gilbert Leung[61].

64. Mr Midgley telephoned the defendant with the speaker function turned on. Once she confirmed that authority had been given to the use of the material, Mr Mill asked the defendant through Mr Midgley where the Document had come from. Mr Mill wanted the answer to this question because he anticipated (correctly as it turned out) that the trial judge might ask the same question before allowing the cross-examination to proceed. The defendant's answer to that question was "Edmund Tsang" and this was heard by Mr Mill. Mr Mill then asked the defendant through Mr Midgley whether, if necessary, he could reveal the name Edmund Tsang to the court. The defendant said "yes". Again, Mr Mill heard the question Mr Midgley put and the answer the defendant gave[62].

65. The judge rejected the defendant's testimony on what was the question put to her by Mr Midgley and what she had understood his question was when she gave her answer. He had no difficulties preferring the evidence of Mr Midgley whom he found to be an honest and reliable witness[63].

66. The question put to the defendant and the answer she gave, namely, that she had obtained the Document from Edmund Tsang, formed the subject publication sued on by the plaintiff in this action for slander and malicious falsehood. The publication was made to Mr Mill and Mr Midgley. There is no dispute that the identification of the plaintiff as the provider of the Document was false.

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[61] Judgment, §42
[62] Judgment, §§42, 45, 48, 53
[63] Judgment, §48

67. The judge also found that the defendant was aware of the question put to her by Mr Midgley over the telephone and when she uttered the name "Edmund Tsang" in answer to the question, she knew that her answer was false[64].

(c) The further publications

68. When Mr Mill sought to produce the Document in court on 21 May 2009 with a view to questioning Gilbert Leung on it to impeach his credibility, this was objected to by counsel for Chinachem. Mr Mill was asked by the trial judge Lam J (as he then was) to explain the provenance of the Document. The following exchanges took place in open court:

> "His Lordship: It depends on how the questions are put. Perhaps, Mr Mill, can you tell us the provenance of these Chinese documents before I decide whether —
>
> Mr Mill: Yes, I can, my Lord. The individual who provided it to us is a Mr Edmund Tsang. He says that he was given that by Mr Gilbert Leung.
>
> His Lordship: Yes, who is this Edmund Tsang and on what occasion was he given this document?
>
> Mr Mill: My Lord, as I understand it, Mr Leung was trying to interest Mr Tsang in the investment, but that's the extent of my understanding, my Lord."

69. What Mr Mill said in court was widely reported in the local media ("the republications") the following day. The media reported that the plaintiff had tipped off or disclosed secret information to Tony Chan's camp and provided them with an investment proposal, which would appear to have the effect of discrediting the evidence of Gilbert Leung.

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[64] Judgment, §78

70. The plaintiff did not sue on the republications as a separate cause of action, as what Mr Mill said in open court was indisputably protected by absolute privilege and fair and accurate reports of court proceedings published contemporaneously were also protected by absolute privilege under section 13 of the Defamation Ordinance, Cap 21. He sued the defendant in respect of the publication to Mr Mill and Mr Midgley only, and sought to recover as a consequence of that original publication the damage which he has suffered by reason of its republications, on the basis that a reasonable person in the defendant's position would have foreseen that increased damage to the plaintiff would ensue as a result.

(d) The plaintiff's loss and damage

71. The plaintiff was astonished and taken aback by the mention of his name in the trial of the probate action and the widespread media coverage regarding his alleged involvement. He received many personal inquiries and telephone calls from clients of his securities broking firm, his business associates, family members and friends. Some queried why he had sided with Tony Chan in the probate trial, a figure widely perceived as preying on the considerable fortune of Mrs Wang. Some referred to him as a "traitor" or "backstabber". He was very upset and angry[65].

72. On 25 May 2009, he instructed his solicitors Baker & McKenzie to take such steps as necessary to protect his reputation in respect of the defamatory statements made about him in court and the resulting press reports. On 26 and 27 May 2009, his solicitors caused press releases to be published in his name in five newspapers stating that he had no knowledge of the basis of the media reports about him and that

[65] Plaintiff's witness statement, §§10 and 11; transcript of Day 1, p 133 line 6 to p 135 line 15

he had instructed his solicitors to clarify the information about him as reported and to take such steps as appropriate[66].

73. His solicitors sought clarification from Haldanes regarding the basis of the statements made by Mr Mill in court but to no avail. On 11 June 2009, the plaintiff brought a *Norwich Pharmacal* application (HCMP 1101/2009) against Tony Chan for disclosure of the identity of the person or persons who had provided information about the Document and who had communicated his name to Tony Chan's lawyers as the person who provided such information. Pursuant to the orders in that application, Mr Midgley disclosed that the defendant, acting as the representative of Dr Siu, was the one who had given the plaintiff's name to him and Mr Mill[67].

74. As a result of the above and related measures taken, the plaintiff incurred $5,354,779.26 in legal fees and fees spent on PR firms[68]. He issued the writ in this action in 2010 and the trial took place before the judge over six days in July 2014.

The holdings in the Judgment

75. The primary defence put forward was that the subject publication to Mr Mill and Mr Midgley was covered by absolute privilege so that no action in defamation could be brought against the defendant. The pleaded basis for this absolute privilege is that "the only purpose of the said conversation was to obtain documents and information for use in the trial of the Probate Action."[69]

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[66] Plaintiff's witness statement, §12
[67] Plaintiff's witness statement, §§13, 15, 17; 5th affidavit of Mr Midgley in HCMP 1101/2009, §5
[68] Re-amended statement of claim, §11(d)
[69] Re-re-amended Defence, §7

76. The judge upheld this defence. He reasoned that the use of a relevant document by an advocate in cross-examination in open court proceedings is obviously protected by absolute privilege and Mr Mill was entitled to consider the Document as a relevant document to be used in cross-examining Gilbert Leung. As for the subject conversation, in his judgment:

> "the proper administration of justice requires freedom of speech and communication between an advocate and the provider of such a document on matters directly pertinent to the contents, purport and provenance of that document. It is practically necessary for the administration of justice to ensure that an advocate be afforded with such free and uninhibited communication, otherwise he would not be in a position to properly discharge his role and duty. If the provider of the document is at risk of being sued for defamation in respect of such information he provides to the advocate, he would likely be deterred from speaking honestly and freely to the advocate. In the end, the advocate would be seriously disadvantaged in his assessment of whether or not and how he could make use of the document in cross-examination. Ultimately, the efficacy of cross-examination as a mechanism to attain justice may be seriously jeopardised."[70]

77. The judge declined to decide a more generalised question whether absolute privilege extends to all persons who profess to be able to provide information for use in cross-examination in civil proceedings, as this did not arise from the facts of the present case[71]. He decided the issue on the narrow basis that "taking instructions (regarding contents, purport and provenance) from the provider of a document is ... important and proximate to the actual use of the document in court proceedings" and "a necessary integral step in evidence collection/preparation", and hence "it is a matter of necessity that absolute privilege should be extended to the communication (pertaining to the contents, purport and provenance of that

[70] Judgment, §25
[71] Judgment, §28

document) between the provider of such document and the advocate/lawyer who was contemplating the use of that document in the cross-examination of a witness."[72]

78. He concluded that the communication between Mr Mill, Mr Midgley and the defendant on 21 May 2009 was protected by absolute privilege and dismissed this action as it should not have been instituted at all. This was his primary holding.

79. At the invitation of the plaintiff's counsel, the judge made findings of fact on the evidence and dealt with other legal issues on the assumption that the subject communication was not protected by absolute privilege.

80. As mentioned earlier, he found against the defendant on the factual issues i.e. what was the question put to her in the subject communication and her understanding of it when she gave her answer.

81. In relation to slander, the plaintiff's claim failed because he failed to prove that the utterance was defamatory. The judge held that the argument that the utterance was defamatory in its ordinary and natural meaning was misconceived and wholly devoid of merit[73]. And on the plaintiff's case of true innuendo, he held that the pleaded particulars and the evidence adduced did not support the argued innuendo meanings[74].

82. It was not necessary for the judge to rule on the defence of qualified privilege, given his finding against the plaintiff's case on the

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[72] Judgment, §32
[73] Judgment, §§66 to 68
[74] Judgment, §§69 to 77

innuendo meanings. But if he had to consider this defence, he would have ruled against it, in view of his finding that the defendant was aware of the question put to her by Mr Midgley and she knew that her answer was false. She knew of the falsity of her statement but nonetheless published the untrue statement. This constituted malice and destroyed the defence of qualified privilege[75].

83. In relation to malicious falsehood, the judge held that the defendant's utterance, though false, was not likely to cause pecuniary damage to the plaintiff in respect of his office, profession, calling, trade or business[76].

84. The judge held *obiter* that in any event, the defendant could not be held responsible for the consequences of the republications in the media of what Mr Mill said, because of the absolute privilege which attached to fair and accurate reports of court proceedings in public, published contemporaneously[77].

The issues in this appeal

85. The issues in this appeal will be considered in the order as listed below:

(1) whether the defendant's communication to Mr Mill and Mr Midgley of the statement complained of was on an occasion of absolute privilege;

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[75] Judgment, §78
[76] Judgment, §80
[77] Judgment, §89

If the answer to (1) is no and the plaintiff can sue in respect of that communication,

(2) whether the judge's decision that the statement did not bear a defamatory meaning can be upheld;

(3) whether the defendant's statement was calculated to disparage the plaintiff or to cause pecuniary damage to him in his business;

(4) whether the plaintiff can recover damages consequential upon republication in the media, on the footing that such consequences were caused by, and not too remote a consequence of, the original communication; and

(5) what would be an appropriate award of damages.

Absolute privilege

(a) The law

86. Absolute privilege provides a complete answer to an action for defamation, even when the subject statement is completely untrue or made with malice. The underlying rationale for absolute privilege in judicial proceedings is the public interest in securing the proper and effective administration of justice. As stated by Devlin LJ in *Lincoln v Daniels* [1962] 1 QB 237 at 255, "absolute privilege is granted only as a matter of public policy and must therefore on principle be confined to matters in which the public is interested and where therefore it is of importance that the whole truth should be elicited even at the risk that an injury inflicted maliciously may be unredressed." This absolute

immunity from suit "is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say." (*Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 at 208E, per Lord Hoffmann)

87. Absolute immunity is granted to witnesses, the parties, their advocates, jurors and the judge for things said or done by them in the ordinary course of any proceeding in a court of justice (*Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 263, per Kelly CB; *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 at 445H to 446C, per Lord Hope of Craighead; at 456D to E, per Lord Clyde). The basis of the rule for granting immunity to these classes of persons is as stated by Fry LJ in *Munster v Lamb* (1883) 11 QBD 588 at 607:

> "The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."

88. In *Darker v Chief Constable of West Midlands* from 463G onwards, Lord Hutton traced the historical development from the immunity established in respect of what a party or witness said and did in court, to the extension to the proof of the witness's evidence given before trial (*Watson v M'Ewan* [1905] AC 480), the extension to protect witnesses

against an action alleging conspiracy by them to make false statements in court (*Marrinan v Vibart* [1963] 1 QB 528), and the extension to the preparation of evidence for court proceedings (*Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184 (the acts of a potential witness in collecting or considering material on which he may later be called to give evidence in criminal proceedings merely in contemplation); *Taylor v Director of the Serious Fraud Office* (out-of-court statements between investigators and persons assisting in the inquiry which could fairly be said to be part of the process of investigating a crime or possible crime with a view to prosecution).

89. In the classic statement of Devlin LJ in *Lincoln v Daniels* at 257, absolute privilege in relation to judicial proceedings is divided into three categories:

> "The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M'Ewan,* in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White*[78], the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings".

[78] (1914) 30 TLR 591

90. The crucial question here is how far the principle in *Watson v M'Ewan* should be extended, whether absolute privilege should cover a person who is not a potential witness but provides relevant information for possible use in civil proceedings. This is a novel situation in Hong Kong and it does not appear to have been the subject of detailed analysis in other jurisdictions[79].

91. In *Watson v M'Ewan* at 487, Lord Halsbury LC explained the rationale for extending the principle. He posed the question if a plaintiff could say: "I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box", and went on to reason thus:

> "If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, "I shall not tell you anything; I may have an action brought against me tomorrow if I do; therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it

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[79] Two Canadian decisions (*Web Offset Publications Ltd v Vickery* (1999) 43 OR (3d) 802; *McDaniel v McDaniel* (2009) 307 DLR (4th) 559, which applied *Web Offset Publications* without further analysis) were mentioned in the Judgment at §35. In *Web Offset Publications*, the defence of absolute privilege was held to be available for Vickery, who, although "not a 'witness' in the usual sense of that word", was sought out by solicitors for information and provided information to them. A passage in *Gatley on Libel and Slander* (9th ed) at pp 289 to 90 (the equivalent passage in the current 12th ed is §13.12, in which *Web Offset Publications* is cited at footnote 113) was cited in support. As the judge rightly observed at §35 of the Judgment, there was no detailed analysis before arriving at that decision. Further, it would appear from a subsequent passage in 804 that the Ontario Court of Appeal had regarded Vickery as a "possible witness" or "potential witness" and it was on that basis the court expressed agreement with *Gatley* that "public policy considerations strongly support extending absolute privilege to these situations".

> were impossible to administer justice, because people would be afraid to give their testimony."

92. As noted by Devlin LJ in *Lincoln v Daniels* at 260:

> "It is obvious that unless there were a category of this sort the absolute privilege granted for matters said and done coram judice might be rendered illusory."

93. Although the categories of absolute privilege are not closed, the courts have always been guarded in applying absolute privilege, as it is in principle inconsistent with the rule of law and runs counter to the policy that no wrong should be without a remedy. "The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional." (*Jones v Kaney* [2011] 2 AC 398 at §113, per Lord Dyson JSC) "The immunity is a derogation from a person's right of access to the court which requires to be justified." (*Darker v Chief Constable of West Midlands* at 446D, per Lord Hope)

94. For this reason, judges have cautioned against further extension of the principle in *Watson v M'Ewan* merely by analogy, see *Taylor v Director of the Serious Fraud Office* at 213E to G, per Lord Hoffmann, and *Darker v Chief Constable of West Midlands* at 468H to 469A, per Lord Hutton, in which both quoted from McHugh J in *Mann v O'Neill* (1997) 71 ALJR 903 at 912, where two dangers in judicial reasoning were identified. The first was "the temptation to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence". The opposite danger was "the temptation too readily to dismiss the defence as applicable in novel

circumstances because the case is not within or analogous to an existing category but without determining the matter by reference to the defence's underlying rationale."

95. In deciding whether absolute privilege should be extended, the rationale is one of necessity. In *Taylor v Director of the Serious Fraud Office* at 214B to D, Lord Hoffmann agreed with these statements in the joint judgment of Brennan CJ, Dawson, Toohey and Gaudron JJ in *Mann v O'Neill* at 907:

> "It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated.' Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged."

Lord Hoffmann went on to say at 214D to E:

> "Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle."

96. Necessity for this purpose is not one of absolute necessity, practical necessity in order to protect those who are to participate in court proceedings from a flank attack would suffice, as Devlin LJ said in *Lincoln v Daniels* at 263:

> "It is not at all easy to determine the scope and extent of the principle in *Watson v M'Ewan.* I have come to the conclusion that the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect

> those who are to participate in the proceedings from a flank attack. It is true that it is not absolutely necessary for a witness to give a proof, but it is practically necessary for him to do so, as it is practically necessary for a litigant to engage a solicitor. The sense of Lord Halsbury's speech is that the extension of the privilege to proofs and precognition is practically necessary for the administration of justice; without it, in his view, no witness could be called."

97. Where there is no previous authority which directly deals with a situation like the present, it would be helpful to consider the issues with reference to these questions posed by Lord Woolf MR in *S v Newham London Borough Council* [1998] EMLR 583 at 591:

> "a. What is the nature and importance of the interest which the [defendant] is seeking to protect? (The nature and significance of the interests);
>
> b. Whether the scale and risk of damage to that interest is sufficiently serious to create a pressing need to protect that interest? (The degree of risk);
>
> c. What is the breadth of the immunity which will have to be granted in order to provide protection for that interest? (The breadth of the immunity);
>
> d. As a matter of principle would it be appropriate to extend to this situation the immunity from suit which has been applied in other situations? (The point of principle); and
>
> e. Is the risk to the public interest which the [defendant] is seeking to protect so great that it should over-ride the public interest that a person should be entitled to have access to the courts to seek a remedy for a wrong which he alleges he has suffered? (The balance between the competing public interests)."

98. The last of the questions posed by Lord Woolf – in striking a balance between the competing public interests – meant that the court would need to consider whether the absolute privilege claimed satisfies the tests of legitimate aim and proportionality, as fundamental rights under Article 14 of the Hong Kong Bill of Rights (protection of law against unlawful attack on reputation), Articles 35 (right of access to the courts and

to judicial remedies) and 39 of the Basic Law (rights and freedoms not to be restricted unless as prescribed by law) are engaged (*Duncan and Neill on Defamation* (4th ed) at §16.07)[80].

99. Mr Kenneth Lam[81] submitted on behalf of the defendant that the fundamental rights are not engaged. This is because where absolute privilege attaches to a publication, no action will lie and a claim would be struck out as disclosing no cause of action. Where there is no cause of action, there is no right of access to the courts and to judicial remedies, nor is there unlawful attack on reputation. He contended that the argument founded on fundamental rights is a circular one and would add nothing to the debate.

100. I do not accept his submission. I agree with the view in *Duncan and Neill on Defamation* at §16.07. In *A v United Kingdom* (2003) 36 EHRR 51 at §74, the European Court of Human Rights held that the limitations to the right of access to court must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired, and a limitation will not be compatible with Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. I have quoted earlier Lord Hope's dictum in *Darker v Chief Constable of West Midlands* at 446D. ("The immunity is a derogation from a person's right of access to the court which requires to be justified.")

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[80] Article 35 of the Basic Law was mentioned in §37 of the plaintiff's closing submission, but this was not dealt with in the Judgment.

[81] Appearing with Ms Angela Mui

101. A proportionality analysis is required in this situation. It involves asking: "first, whether the infringement or restriction pursues a legitimate societal aim; secondly, whether the infringement or restriction is rationally connected with that legitimate aim; and, thirdly, whether the infringement or restriction is no more than is necessary to accomplish that legitimate aim [82] ." (*Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467 at §23, per Fok PJ and Stock NPJ). It was further decided in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 that a fourth step should be added to the proportionality test, which involves weighing the detrimental impact of the restriction against the social benefit gained. This requires the court to "examine the overall impact of the impugned measure and to decide whether a fair balance has been struck between the general interest and the individual rights intruded upon, the requirement of such a fair balance being inherent in the protection of fundamental rights." (at §76, per Ribeiro PJ). It is a "value judgment as to whether the impugned law … despite having satisfied the first three requirements, operates on particular individuals with such oppressive unfairness that it cannot be regarded as a proportionate means of achieving the legitimate aim in question." (at §78) See also §135 of the same judgment.

(b) The judge's reasoning

102. The judge was clearly mindful of the risk and hardship of depriving a claimant of access to court even in cases of false and maliciously made statements [83] and in deciding to extend absolute privilege to a novel situation, he confined it to a "fairly circumscribed"

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[82] This is a standard of reasonable necessity (*Official Receiver v Zhi Charles*, at §53; *Hysan Development Co Ltd v Town Planning Board*, at §88)

[83] Judgment, §33

scope – "it would merely protect publication by the provider of a document (which the advocate possesses and is contemplating its use in actual court proceedings) to the advocate in respect of information pertinent to the contents, purport and provenance of such a document. It may also justifiably be extended to cover such communication between such a provider to the instructing solicitors of the advocate."[84] He emphasised that the supply of the Document was not the occasion or publication in issue as the Document had already been supplied by the defendant to the legal team of Tony Chan and prior to the occasion or publication on 21 May 2009, Mr McDonnell and Mr Mill had already formed a view as to the relevance and usefulness of the Document[85].

103. Mr James Price, QC[86] submitted on behalf of the plaintiff that this very limited basis on which the judge decided the point on absolute privilege is a curious one. It is tailored to the facts of this case rather than to principle. He queried why protection should be given in respect of information pertaining to the contents, purport and provenance of a document already supplied to the lawyer but stop short of relevant information pertaining to some oral information given to the lawyer. If it is appropriate for absolute privilege to be extended to facilitate freedom of communication so as to maintain an effective cross-examination, it should be extended to protect information provided to the lawyer for use in cross-examination irrespective of whether it pertains to a document or oral information.

104. I think there is substance in this criticism. It is difficult to discern a coherent and rational principle as to the very limited basis on

[84] Judgment, §27
[85] Judgment, §28
[86] Appearing with Mr Benjamin Yu, SC and Mr Jonathan Chang

which absolute privilege was extended by the judge. Besides, for immunity to be effective so as to ensure that effective cross-examination is maintained, some degree of certainty is required. It is necessary that the person concerned should know in advance with some certainty what he says will be protected and it should be possible to predict with some confidence whether an immunity will apply. The matter cannot be left as one to be determined on each and every occasion. (*Darker v Chief Constable of West Midlands* at 457C to D, per Lord Clyde)

105. The judge based his analysis on the close proximity between the subject occasion or publication and the advocate's actual utterance in open court in the course of making use of the Document[87]. This is founded on the following statement of Devlin LJ in *Lincoln v Daniels* at 261:

> "It is a question of how far the principle in *Watson* v. *M'Ewan* is to be taken. The other authorities in which the case has been considered show that the connection between the two things—the evidence and the precognition, the document and the draft, the actuality that is undeniably privileged and the foreshadowing of it—must be reasonably close."

106. Thus, the "actuality" in this instance was what Mr Mill did and said in open court, which was undoubtedly absolutely privileged. The "foreshadowing of it" was the communication between Mr Midgley / Mr Mill and the defendant on the provenance of the Document when Mr Mill was imminently contemplating and intending to make use of the Document in his cross-examination[88]. The pertinent question as framed by the judge was this: "whether the argued 'foreshadowing' act can properly be regarded as practically necessary for the attainment of the

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[87] Judgment, §29
[88] Judgment, §19

'actuality' which unquestionably deserves the protection of absolute privilege"[89], and he went on to answer it in the affirmative[90].

107. The problem with this analysis, as submitted by Mr Price, is that Devlin LJ's statement at 261 regarding a reasonably close connection between "the actuality that is undeniably privileged and the foreshadowing of it", was not intended to extend the privilege outside the groups of people for whom the privilege has been recognised, namely, witnesses, parties, advocates, jurors and the judge. The discussion, which began at 260, was concerned with extending the immunity to the same group of persons, to prevent the immunity being by-passed. At 263, Devlin LJ came to the conclusion that "the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from a flank attack." There is no question of an informant who is not a potential witness being subject to a flank attack, as suggested by the judge[91]. It is a direct attack or nothing. As a mere informant or the middleman of an informant, the defendant has no primary protection which could be outflanked by suing her on what she said to Mr Midgley and Mr Mill.

108. The judge did not find it necessary or relevant to distinguish between the positions of a witness, a potential witness and a mere informer, as his analysis did not proceed by way of extending the absolute privilege on witnesses' evidence to the situation of a mere informer or provider of information, but proceeded from the starting point that the Document was provided to the advocate in the course of preparing for the court

[89] Judgment, §15
[90] Judgment, §32
[91] Judgment, §26

proceedings and relevant information was supplied by the document provider to the advocate. His analysis was grounded on the close proximity between the "actuality" that was absolutely privileged and the "foreshadowing of it"[92]. For the reasons I have given and further reasons to be mentioned, I do not think it correct to extend the immunity without regard to the distinction between the recognised classes of persons protected by absolute privilege and a wholly new group.

(c) Whether absolute privilege should apply

109. One should start with the role of the defendant in the subject occasion or publication. As pleaded in the defence[93], her relevant role and status is a middleman for an informant, Dr Siu. Although the judge made a finding that prior to the subject communication, the defendant had "actively participated in the preparation of the Probate Trial as part of the legal team of Tony Chan"[94], his holding that absolute privilege should apply was not founded on the basis that the subject communication was made by the defendant as part of the legal team of Tony Chan.

110. Mr Lam sought to argue on appeal that the subject conversation was one between members of the same legal team and the occasion was a supporting member of the legal team supplying information to the lead advocate. Absolute privilege should apply to the occasion in the interest of the administration of justice so that all members of the same legal team can have full and frank discussion on how to go about testing the evidence of factual witnesses without having to live in fear of being vexed by expensive defamation suits. He further submitted that the

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[92] Judgment, §§26 and 29
[93] Re-Re-Amended Defence, §§3(g), (h), (i) and 7
[94] Judgment, §18(2)

defendant was at all times a potential witness on substantive matters directly relevant to the issues in dispute in the probate action, not just on matters of credit, and she was more than just an informant or middleman.

111. But as I have mentioned, the judge did not rule absolute privilege should apply on the basis that the occasion was a discussion between members of the same legal team or that the defendant was a potential witness in respect of the subject communication. Nor was either the pleaded basis for which absolute privilege was claimed in the defence. It was not necessary for the judge to find what was the role of the defendant in the subject occasion or publication in view of the way he made his analysis. There is no respondent's notice seeking to affirm the judgment on these new bases. It would not be right for the appeal court to consider if absolute privilege should apply on these new bases.

112. In any event, quite apart from the defendant's own pleading, the evidence is quite clear that in respect of the occasion or publication in question, the defendant was in no position to give any evidence about the land transaction that Chinachem made with Gilbert Leung[95], which was the subject of Mr Mill's cross-examination, and was not a potential witness for that purpose. Although she had actively participated in the preparation of the probate trial as part of the legal team prior to the subject communication, there is no doubt that in respect of the subject occasion and publication[96], the defendant's role was not that of a member of the legal team but a middleman between the legal team and an informant.

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[95] Transcript, Day 5, p 148 lines 7 to 22

[96] A point made by the plaintiff's counsel in the court below, see Transcript, Day 5, p 143 line 15 to p 144 line 10

113. Mr Lam submitted it is completely meaningless and a 'red herring' to draw a distinction between a potential witness and a mere informer. There is no real difference between the two. Absolute privilege protects the occasion or publication and what matters is the purpose of the publication. The underlying theme is for an advocate to have full and frank discussion with someone who provided information for the purpose of conducting an effective cross-examination. In respect of such an occasion, it is pointless and esoteric to draw a fine line between various classes of persons that should be protected by the immunity.

114. I do not agree with this submission. The development of the law is that for civil proceedings, absolute immunity has not been extended beyond the five recognised groups of persons. In this connection, Mr Price referred to two passages in *Gatley on Libel and Slander* (12th ed). In §13.51 (dealing with evidential privilege in communications between solicitor and client) at footnote 455, it is stated that evidential privilege (in the sense of legal professional privilege) may extend to information supplied by a third party to the solicitor and passed on to the client in advice, but absolute privilege as a defence to a claim for defamation could not apply to the statement by the third party to the solicitor. In §14.37, reference is made to the position that although it has come to be held that where a person complains to the police about a crime against him the privilege is absolute[97], for volunteered statements[98] by a mere informant not involved in the matter, there is no case holding that absolute privilege would apply.

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[97] As in *Westcott v Westcott* [2009] QB 407

[98] So a person who answers police questions is protected by absolute privilege, see *Gatley* §14.37 at footnote 261

115. Two other cases mentioned by Mr Price are of note. In *Adamson v Ede* [2007] NSWSC 829, the plaintiff sued in defamation in respect of information given by a third party to a solicitor involved in civil proceedings. Only the defence of qualified privilege was advanced. Adams J of the Supreme Court of New South Wales doubted if the communication occurred on an occasion of qualified privilege (§§15 to 17). In *Stocker v Stocker* [2016] EWHC 147 (QB), the claim for libel was in respect of information supplied by a third party for use in custody proceedings. In refusing to strike out the claim on the basis that the publication was protected by absolute privilege[99], Nicol J was inclined to agree with the submission that to attract absolute privilege, the statement maker's purpose must be to set out that which he would be prepared to testify to in evidence in court, recognising that the precise contours of this requirement are best explored at trial (§§27, 34).

116. There is good reason why absolute privilege is extended to the recognised classes of persons who participate in court proceedings. Potential harm which may result from absolute privilege and concerns for abuse would be addressed by safeguards such as the comprehensive control exercised by the trial judge whose action is reviewable on appeal, including the power to expunge or strike out irrelevant defamatory matters from the pleadings and evidence and to punish for contempt, and prosecution for perjury. See the discussion in the judgment of the Supreme Court of Florida in 2013 in *Delmonico v Traynor*, SC-10-1397, pages 20 to 24. In *Darker v Chief Constable of West Midlands* at 460D to E, Lord Clyde made a similar observation that the possibility of a witness being charged with perjury remains as a deterrent against an abuse of his position. These

[99] The claimant accepted the publication was made on a qualified privilege occasion but maintained it had been lost because of malice.

safeguards would not be available where the publication is made by a mere informer who is not a potential witness or the middleman of an informer. He remains hidden and anonymous. As noted in *Delmonico v Traynor* at page 22: "Absent safeguards, the value of the absolute privilege as a mechanism for discovering the truth decreases while the potential for damage to a person's reputation increases."

117. With regard to criminal proceedings, with the increased burden of disclosure upon the prosecution, absolute privilege has been extended beyond the five recognised groups of persons to cover investigators and persons involved in the investigation not intended to be called as witnesses, where the "statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated"[100]. But the policy underlying that extension is the public interest in the detection and punishment of crime (*Taylor v Director of the Serious Fraud Office*, at 218C, per Lord Hope; *Gatley* §13.12), and has no application to civil proceedings.

118. It is not necessary for present purpose to discuss and analyse the ambit of the extension of absolute privilege for a communication in relation to criminal proceedings. *Taylor v Director of the Serious Fraud Office* demonstrated the difficulty of finding a principled basis for extending the privilege to new groups outside the recognised classes and in defining and containing the extension. Within two years of this House of Lords decision, in *Darker v Chief Constable of West Midlands* the Law Lords had to consider whether absolute privilege should apply to things

[100] Drake J in *Evans v London Hospital Medical College*, *supra* at 192, adopted by the majority of the House of Lords (Lords Goff, Hoffmann, Hope and Hutton) in *Taylor v Director of the Serious Fraud Office*.

done by the police during the investigative process in which evidence was allegedly fabricated, and held that public policy did not require the immunity to be extended to things done by the police during the investigative process which could not fairly be said to form part of their participation in the judicial process as witnesses[101]. Australia seems to have adopted a rather different approach. In *P and W v Manny* [2010] ACTSC 50, Gray J in the Supreme Court of the ACT remarked that *Taylor v Director of the Serious Fraud Office* and *Westcott v Westcott* involved extensions of the absolute privilege in a way rejected by the High Court of Australia in *Mann v O'Neill* (§§59 to 61).

119. In light of the above, I would be wary of extending the immunity outside the recognised classes in the absence of cogent justification. I turn to consider the questions posed by Lord Woolf in *S v Newham LBC*.

120. I accept there is a public interest involved for the advocate to be able to freely obtain relevant information from an informant in order that he may be able to conduct an effective cross-examination at the trial. This goes to the proper and effective administration of justice and is clearly a public interest which can qualify for protection if this is necessary and appropriate. (The nature and significance of the interests)

121. I recognise there is some risk that the freedom to obtain such relevant information may be jeopardised if the informant should be prohibited by fear he may be subjected to litigation in so doing. It is not possible to generalise what that degree of risk may be, as there are a whole

[101] At 448C to E, 449B to E per Lord Hope; 452F, per Lord Mackay; 453H to 454A, F to G, per Lord Cooke; 460B and 461D to E, per Lord Clyde; 469E to H, per Lord Hutton.

host of reasons why third parties would choose to provide information for use in a civil trial, and depending on their reason, they may or may not be deterred from so doing by the threat of litigation. So I do not think too much weight could be attached to this. (The degree of risk)

122. As I have indicated earlier, I do not agree with the judge that immunity should be granted on the limited basis tailored to the facts of the present case, namely, that it is to protect a document provider from his publication to a lawyer (who is in possession of the document and contemplates using it in court) of information relating to the contents, purport and provenance of the document. If it is appropriate to provide protection, it should not be confined to information relating to a document or information to impeach the credit of a witness in cross-examination but should cover all relevant information provided by a third party to a lawyer for the purpose of the civil litigation. The fact that the scope of protection will need to be enlarged in this way is relevant in deciding whether protection should be extended and the wider the protection required, the greater should be the caution before granting immunity from suit (*S v Newham LBC*, at 594). (The breadth of the immunity)

123. I have discussed earlier the principles of law involved. In respect of civil proceedings, immunity from suit has been extended over time but only in respect of the recognised classes of persons who participate in court proceedings, and there are safeguards to address potential harm and concerns for abuse of granting absolute privilege to these recognised classes. There is also the principle that to grant immunity from suit is a derogation from a person's right of access to the court which requires to be justified. (The point of principle)

124. There are two competing public interests involved. The public interest in the proper administration of justice mentioned above should be balanced against the public interest in the plaintiff being able to vindicate his reputation in bringing a claim in defamation. The protection of law against unlawful attack on reputation and the right of access to the court are fundamental rights granted to Hong Kong residents under the Bill of Rights and the Basic Law. This requires a fair and reasonable balance to be struck, using the proportionality analysis and asking whether pursuit of the societal interest would result in an unacceptably harsh burden on the individual. (The balance between the competing public interests)

125. Applying the proportionality analysis, I do not think the abrogation of the fundamental rights in granting an absolute privilege can be said to be no more than is necessary to accomplish the legitimate aim of securing the proper administration of justice. I am of the view that qualified privilege would be sufficient to achieve that legitimate aim. I note the comments of Stanley Burnton LJ in *Westcott v Wescott* at §43 that the protection afforded by qualified privilege is more apparent than real in that it does not protect against the risk of being sued, with the attendant costs of litigation. But against his comments, it may be pertinent to have regard to what Lord Woolf said in *S v Newham LBC*, at 593, that the expense and hassle of litigation can and should be substantially reduced by court management of litigation. So if the court can form an assessment at an early stage of the proceedings that the plaintiff has no prospect of success in proving malice, and is also satisfied there is no other reason why the action should be allowed to proceed, the action should be dismissed.

126. In my judgment, taking all the above matters into consideration, a fair and reasonable balance should be struck in granting

qualified privilege but not absolute privilege. I am satisfied that the judge was in error in the balancing exercise he carried out when he concluded that the risk and hardship of depriving a claimant of access to court even in cases of false and maliciously made statements is outweighed by the greater risk and hardship that documents relevant to the assessment of witnesses' credibility could not be effectively deployed in cross-examination[102]. I hold that the judge was wrong to dismiss the action on the ground that the publication was protected by absolute privilege.

Defamatory meaning

127. The judge held the plaintiff failed to establish that the defendant's publication to Mr Mill and Midgley bore the defamatory meanings as pleaded, whether in the natural and ordinary meanings[103] or the innuendo meanings[104]. The plaintiff only appealed the finding regarding his case on true innuendo[105].

128. The defamatory meanings as pleaded read as follows:

> "8A. Further or in the alternative, by way of innuendo to Mr Mill and Mr Midgley (and others to whom the statement complained of would spread), who have knowledge of the facts and matters particularized hereunder, the Defendant's words bore and/or would be understood to bear the following meanings:
>
> PARTICULARS OF INNUENDO MEANINGS
>
> (a) the plaintiff had betrayed a friend and a business associate, Gilbert Leung, by covertly giving Tony Chan or his legal team one of Gilbert Leung's confidential business documents so that it could be used to discredit Gilbert Leung in a court of law;

[102] Judgment, §§33 and 34
[103] Judgment, §§66 to 68
[104] Judgment, §§69 to 77
[105] Notice of appeal, ground 2, confining the challenge to §§69 to 77 of the Judgment

(b) the plaintiff had secretly and covertly sought to assist Tony Chan and his unmeritorious challenge to Nina Kung's will in order to try to get his hands on her fortune; and

(c) that the plaintiff had acted as set out above in order to obtain a personal advantage, possibly money from Tony Chan."

129. There is no dispute as to the law. The extrinsic facts necessary to support the innuendo meanings must be shown to have been known to Mr Mill and/or Mr Midgley. "The court decides an innuendo meaning as a question of fact by attributing to the statement the meaning which the court considers it would convey to reasonable people who have the knowledge (whether of extrinsic facts or technical terms etc) which is necessary to give the statement a special meaning." Liability for publication of an innuendo is strict and does not depend on the knowledge or intention of the publisher or the understanding of the publishees, but on the meaning which the publication would have conveyed to a reasonable person having the special knowledge of the publishees. (*Duncan & Neill*, §5.32(3) and footnote 2)

130. It is the task of the judge to decide what the hypothetical reasonable person would make of the publication, informed by evidence of what the reasonable person will additionally have known. (*Baturina v Times Newspapers Ltd* [2011]1 WLR 1526 at §56) The court must look for a single meaning, which would be understood by the hypothetical reasonable person, and decide whether the words complained of in that single meaning would amount to disparagement of the plaintiff's reputation in the mind of the ordinary reasonable people of the Hong Kong society. (*Gatley*, §3.16; *Arab News Network v Jihad Al Khazen* [2001] EWCA Civ 118 at §30)

131. An appeal court will not lightly interfere with a judge's finding of fact as to the meaning of words. If it is satisfied that the judge's finding of fact is plainly wrong, it is the duty of the appeal court to reverse him. Whilst the court should be slow to differ from any conclusion of fact reached by a trial judge, that principle is less compelling where the judge's conclusion was not based on his assessment of the reliability of witnesses or on the substance of their oral evidence and where the material before the appeal court was exactly the same as it had been before the judge. (*Gatley*, §36. 24)

(a) Paragraph 8A(a) meaning

132. Of the particulars of facts and matters in support of innuendo pleaded under §8A, it is alleged in sub-paragraph (1) that "the Plaintiff and Gilbert Leung were close friends and close business associates, who had done business together and met each other socially. They were known to be such within their circle of friends[106]." The opening paragraph in §8A pleaded that Mr Mill and Mr Midgley "have knowledge of the facts and matters particularized hereunder."

133. The judge summarized the relevant evidence in this regard in §70 of the Judgment. He wrongly stated that this evidence, which is the only evidence, came from the cross-examination of Mr McDonnell, who was called as a witness for the defendant. The relevant evidence in fact came from the cross-examination of the defendant[107], otherwise the judge's summary is correct, namely that both Mr Mill and Mr Midgley were told that every time when Gilbert Leung received an investment proposal, he

[106] The judge rightly criticised this last sentence in that the pleader was not directing his mind to pleading those extraneous facts known to Mr Mill and Mr Midgley, see Judgment, §§56, 57.
[107] Transcript, Day 4, p 71 line 3 to p 72 line 21, p 78 lines 8 to 22

would let the plaintiff read it first and the plaintiff would normally invest in those projects.

134. The judge rightly took the view that the sting of the innuendo meaning in §8A(a) is in the imputation of "betrayal" which connotes disloyalty and Mr Midgley and/or Mr Mill[108] would not likely understand the subject communication as suggesting disloyalty on the plaintiff's part unless they had knowledge of a close friendship or close business association between Gilbert Leung and the plaintiff which could give rise to some sense of loyalty between them. Based on the above evidence, the judge did not find that Mr Midgley and/or Mr Mill knew that Gilbert Leung and the plaintiff were "friends". Neither did he find that they knew of the existence of a kind of business association which gave rise to an expectation on the part of Gilbert Leung of loyalty from the plaintiff. The judge remarked that "if any notion of loyalty was involved, it would likely be owed from Gilbert Leung towards the plaintiff. After all, the plaintiff was the rich investor and Gilbert Leung was a deal-broker."[109]

135. Mr Price did not seek to challenge the judge's conclusion that he could not find Mr Midgley and/or Mr Mill knew that Gilbert Leung and the plaintiff were "friends". He took issue with the other part of the conclusion and submitted that the judge should have found on the evidence Mr Midgley and/or Mr Mill knew that Gilbert Leung and the plaintiff were "close business associates" and the hypothetical reasonable person would have perceived the plaintiff's act of covertly providing confidential business documents to discredit a close business associate in court as an act of disloyalty.

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[108] This should be the hypothetical reasonable person instead of the publishees.
[109] Judgment, §70

136. I am not satisfied that the judge is plainly wrong for this court to overturn his finding that the plaintiff has failed to establish the innuendo meaning pleaded in §8A(a). I am not persuaded that the judge is clearly in error in refusing to find on the evidence that what was known to Mr Midgley and/or Mr Mill as regards the business association would have given rise to an expectation of loyalty from the plaintiff on the part of Gilbert Leung. Nor can I conclude that the single right meaning which would be understood by the hypothetical reasonable person with the knowledge of Mr Midgley and/or Mr Mill of the relevant extrinsic facts must be the innuendo meaning pleaded in §8A(a).

(b) Paragraph 8A(b) meaning

137. In respect of this innuendo meaning, the judge took the view that the sting lies in the imputation that the plaintiff was helping Tony Chan in his "unmeritorious" case in the probate action[110]. The question then became whether Mr Midgley and Mr Mill knew that Tony Chan had an unmeritorious case such that they would likely understand the subject communication as meaning that the plaintiff was helping Tony Chan in his unmeritorious case, and the judge found there is no evidence that Mr Midgley or Mr Mill knew or even believed that Tony Chan had an unmeritorious case[111].

138. The judge referred to the particulars pleaded that purported to provide the factual basis for this innuendo meaning. The relevant part of sub-paragraph (4) of the particulars read as follows:

> "The Probate Action received a huge amount of publicity in Hong Kong. On the basis of the reports of the case, the public

[110] Judgment, §72
[111] Judgment, §73

> perception of Tony Chan was that of an adventurer who had preyed upon Ms Nina Kung, a rich widow, in order to get at her money and who was willing to disclose intimate information about her, and his relationship with her, for personal advantage. During the trial[112], Tony Chan, a married man with two children, made very detailed disclosures about his sexual relationship with Ms Nina Kung, disclosures which were distasteful to the public. It was also disclosed how he had tried to worm his way to her affections with false promises that he could find her missing husband and other underhand tactics."

139. The judge took the view that the plea of "public perception" is a bare assertion and there is no reliable evidence as to what was the general public perception about Tony Chan, and "in any event, different persons may have different opinions as to whether the disclosure of his relationship with Ms Nina Kung was distasteful or not." [113] As Mr Midgley and Mr Mill would have personal knowledge as to Tony Chan's version of true facts, they would have formed their own views about the merits of their client's case. There is no evidence that they shared the alleged public perception of Tony Chan created in the media reports. At most, they were aware that the image of their client had been badly portrayed by the media.[114] The judge could not find any fact known to Mr Midgley or Mr Mill at the time of the publication which was such that "they would likely understand" the publication as meaning that the plaintiff was helping Tony Chan in pursuing an unmeritorious case in the probate action[115].

140. I agree with Mr Price that the judge has made several errors of law.

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[112] This was before the subject communication on 21 May 2009, see Re-amended Statement of Claim, §4
[113] Judgment, §§74 and 66
[114] Judgment, §74
[115] Judgment, §75

141. The judge was wrong to look for reliable evidence as to the general public perception about Tony Chan being an adventurer who had preyed upon Mrs Wang and to further his purpose made detailed disclosures of his intimate relationship with her which were distasteful to the public. He was wrong to look for evidence whether Mr Midgley and Mr Mill shared the public perception of Tony Chan as alleged. And he was wrong to consider whether any fact known to Mr Midgley or Mr Mill at the time of the publication was such that they would likely understand the innuendo meaning as pleaded.

142. The correct legal position is that it is for the judge to decide what the hypothetical reasonable person would make of the publication, informed by evidence of what the reasonable person will additionally have known, and liability for publication of an innuendo does not depend on what the publishee would have understood, but on the meaning which the publication would have conveyed to a reasonable person having the special knowledge of the publishee. The court must look for a single meaning which would be understood by the hypothetical reasonable person, instead of looking for evidence of how the general public would have regarded Tony Chan's behaviour or evidence of whether Mr Midgley and Mr Mill shared the public perception.

143. The judge had reasoned that Mr Mill and Mr Midgley could not be supposed to have thought their client's case in the probate action "unmeritorious", in the sense of being legally unsustainable. But that was not the factual basis pleaded in sub-paragraph (4) of the particulars I have quoted above for this innuendo meaning. In construing the words "unmeritorious challenge" used by the pleader in pleading the innuendo meaning here, and in taking into account the context against which

"unmeritorious" should be construed, it is important to have regard to the particulars pleaded in sub-paragraph (4). The matters pleaded there would point to "unmeritorious", not in the sense of legally unsustainable, but in the sense of being unworthy. Hence, the mention of Tony Chan being "an adventurer who had preyed upon ... a rich widow", and who was "willing to disclose intimate information about her, and his relationship with her, for personal advantage". It was particularly mentioned that Tony Chan was "a married man with two children" and, during the trial, he made "very detailed disclosures about his sexual relationship with Ms Nina Kung, disclosures which were distasteful to the public". Further, it was disclosed "how he had tried to worm his way to her affections" with false promises and other underhand tactics. All these matters as particularized, which formed a very important part of the context, have little to do with the merits at law of Tony Chan's challenge to the will. As the informant Dr Siu remarked in his meeting with Tony Chan's lawyers on 26 June 2009: "Although I feel that in legal terms there is nothing wrong in helping [Tony Chan], I feel it wrong morally." It is in that sense that "unmeritorious" in the innuendo meaning should be read.

144. The matters pleaded in sub-paragraph (4) of the particulars quoted above are of sufficient notoriety. They were certainly known to Mr Midgley and Mr Mill. In my judgment, the ordinary reasonable Hong Kong person, receiving the information of Mr Midgley and Mr Mill, would have understood that the plaintiff was willing to assist Tony Chan in his distasteful venture to try to get his hands on the fortune of Mrs Wang.

145. The focus of the discussion so far is on the "unmeritorious" challenge of Tony Chan to the will of Mrs Wang. One must also have regard to what the plaintiff was alleged to have done "to assist Tony Chan"

in determining whether the innuendo meaning in §8A(b) is defamatory. The assistance allegedly provided by the plaintiff was in providing the Document to Tony Chan's lawyers to discredit Gilbert Leung who had entered into a land transaction with Chinachem before he gave a witness statement in the probate action and it was suggested by Tony Chan's counsel in cross-examination that Gilbert Leung was biased and had been effectively bribed into giving evidence unhelpful to Tony Chan.

146. Since preparing this judgment, I have had the benefit of reading in draft the judgments of Yuen JA and Macrae JA. I respectfully differ from Yuen JA as to how the "unmeritorious" challenge of Tony Chan should be understood in construing the innuendo meaning. Construing "unmeritorious" in the sense of being unworthy rather than legally unsustainable, I agree with Yuen JA (scenario (b) in her analysis) and Macrae JA that the hypothetical reasonable person in Hong Kong would not have lowered his estimation of the plaintiff regarding what the plaintiff was alleged to have done in assisting Tony Chan. So I would also uphold the judge's finding that it has not been established that the innuendo meaning in §8A(b) is defamatory, by a different route.

(c) Paragraph 8A(c) meaning

147. As the judge has stated, the innuendo meaning here is expressed to be built on the imputations of "betrayal" and "helping Tony Chan in pursuing an unmeritorious case", and it further suggested a mercenary motive of the plaintiff in doing so. As the judge has rejected the innuendo meanings in §§8A(a) and (b), he held that the innuendo meaning in §8A(c) also fails[116].

[116] Judgment, §76

148. The judge also considered a possible alternative on the basis that Mr Midgley and Mr Mill knew that in providing the Document for use in the cross-examination of Gilbert Leung, the informant (they were falsely told by the defendant that this was the plaintiff) had asked to be remunerated by a substantial sum. The judge held that even with this knowledge, Mr Midgley and Mr Mill would not understand the subject communication in a defamatory sense and they would simply have understood this as a plain statement that the plaintiff asked to be substantially remunerated for providing the Document for use in the cross-examination of Gilbert Leung[117].

149. The judge has made the same error in law. Liability for publication of an innuendo does not depend on what the publishees, Mr Midgley and Mr Mill, would have likely understood, but on the meaning the publication would have conveyed to a reasonable person having the special knowledge of the publishees. And it is a matter for the judgment of the court.

150. I do not share Yuen JA's misgivings on the lack of pleading of extrinsic facts to support this innuendo meaning. I am inclined to agree with Macrae JA that the pleading is adequate. It was pleaded in §7 that prior to the defendant's publication to Mr Mill and Mr Midgley on 21 May 2009, the source of the Document "did not authorize the use of the Document in the Probate Action, pending Tony Chan's agreement with the source on the financial terms." This was not repeated in the extrinsic facts in support of innuendo in §8A, but §7 was part of the entire context upon which the defendant's publication was made and evidence was led on this at the trial, apparently without objection. The judge had considered this

[117] Judgment, §77

as a possible alternative, and I see no compelling reason why this should not be considered.

151. As the judge has found, Mr Mill knew that the informant initially asked for $10 million as remuneration for providing the Document and on 21 May 2009, Mr Midgley and Mr Mill learned that the informant would allow the Document to be used to cross-examine Gilbert Leung on the understanding that if the case was won by Tony Chan and after all appeals, and Tony Chan being in funds, a monetary compensation, the amount of which was at Tony Chan's discretion, would be paid. This is a far cry from the examples put forward by Mr Lam that there is nothing necessarily wrong with information providers asking for remuneration for the services they provided (such as a private investigator for carrying out secret surveillance work or a handwriting expert for examining a disputed document). In my judgment, a reasonable hypothetical person, having the special knowledge of Mr Midgley and Mr Mill, would have understood from the publication that the plaintiff had sought to assist Tony Chan in his distasteful venture in return for some personal gain, joining Tony Chan in putting his nose in the trough of Mrs Wang's fortune. I would reverse the judge's finding that the plaintiff has failed to establish the innuendo meaning in §8A(c).

152. To recapitulate, I would hold that the plaintiff has succeeded on his case of true innuendo in that the defamatory meaning in §8A(c) is established.

Disparagement of or likelihood of pecuniary damage in business

153. Section 23 of the Defamation Ordinance provides that in an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business. The relevant part of section 24(1)(b) provides that in an action for malicious falsehood, it shall not be necessary to allege or prove special damage if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

154. In view of the judge's ruling that the publication was not defamatory, he did not find it necessary to decide if the words were calculated to disparage the plaintiff in his business to satisfy section 23 so that it shall not be necessary to allege or prove special damage for the action for slander. The judge only considered if section 24(1)(b) was satisfied for the action in malicious falsehood. He held that the communication in its ordinary and natural meaning, although false, was not likely to cause pecuniary damage to the plaintiff in respect of his office, profession, calling, trade or business so it was necessary to allege and prove special damage[118].

155. The plaintiff appealed against the ruling in respect of malicious falsehood. He also sought to argue that the judge should have found that section 23 was satisfied for the claim in slander notwithstanding

[118] Judgment, §80

this was not a ground in the notice of appeal. Mr Price had a draft amended notice of appeal ready but we permitted him to argue this ground without an amendment. Mr Lam did not object to this.

156. "Calculated" for the purpose of sections 23 and 24(1)(b) is to be read in the broader objective sense of "likely to produce a result" rather than the subjective sense of "intended to bring about a certain result". (*Gatley*, §4. 16) As noted by Tugendhat J in *Andre v Price* [2010] EWHC 2572 (QB) at §§97 to 99, there can be degrees both of "likelihood" and "disparagement". As to likelihood, "calculated" must mean something less than "more likely than not". As to disparagement, actual damage is not required, but "liability as a result of a trivial effect on the mind of the publishee cannot be imposed consistently with Article 10" (the freedom of speech provision of the European Convention on Human Rights), and "it would be inconsistent with Article 10 to impose liability for slander when the effect upon a Claimant's reputation was below a certain threshold". Whether the statutory provision is satisfied must be considered "not only in the light of the words complained of themselves, but also in the context in which they are spoken".

157. Disparagement of a general character, equally discreditable to all persons, is not enough, unless the particular quality disparaged is peculiarly valuable in the plaintiff's business. But even if the words do not relate to qualifications peculiar to the claimant's calling and would be defamatory if published of others, they are actionable per se if they would be likely adversely to affect his professional reputation (and not merely his private character) in the eyes of reasonable people. (*Gatley*, §4.17 and footnote 103) In *Maccaba v Lichtenstein* [2004] EWHC 1580 (QB) at §9, Gray J stated that the particular claimant, the nature of his business, the

activities in which he engages in connection with his business and the kind of people with whom he regularly does business would have to be taken into account.

158. I have come to the view that the defamatory innuendo meaning in §8A(c) is established (that the plaintiff had secretly and covertly sought to assist Tony Chan and his unmeritorious challenge to Mrs Wang's will in order to try to get his hands on her fortune, and that he had acted as stated in order to obtain a personal advantage, possibly money from Tony Chan). The words were spoken in the context of the plaintiff providing information to Tony Chan's lawyers in relation to a land transaction in which he was involved with Gilbert Leung and this information was provided to assist the lawyers to discredit a business associate of the plaintiff in cross-examination.

159. I am inclined to agree with Mr Price that the subject communication would likely – in the sense of something less than more likely than not – produce a result that it would tend to undermine the trust and confidence that persons contemplating business dealings with the plaintiff would look for, such that his business reputation would be adversely affected. In the eyes of reasonable people, the plaintiff would be thought worse of in going to the side of Tony Chan for personal gain and providing information to discredit a business associate. This would meet the required level of seriousness to fall within section 23. I would hold that this provision is satisfied and it shall not be necessary to allege or prove special damage for the claim in slander.

160. As for the claim in malicious falsehood, the judge held that the subject communication was not likely to cause pecuniary damage to the

plaintiff in his business owing to the limited defamatory meaning he found on the ordinary and natural meaning of the communication (that the defendant obtained the Document from the plaintiff and this was false[119]). In the light of the defamatory meaning in §8A(c) I have found to be established, I am inclined to think that the communication would likely – in the sense of something less than more likely than not – have the tendency to put people off from doing business with the plaintiff and likely to lead to pecuniary damage to him. I would hold that section 24(1)(b) is satisfied and it is not necessary for the plaintiff to allege and prove special damage.

161. Malice for the purpose of malicious falsehood is the same as malice where it arises in a claim for defamation in relation to qualified privilege. (*Gatley* §21.8 and footnote 63) The judge has found malice established as the defendant knew that the subject communication was false[120]. The defendant did not seek to challenge the finding of malice on appeal.

Damages consequential on republication

162. On the facts found by the judge, the defendant had authorised Mr Mill to publish in court the false information she provided[121]. Where a defendant's defamatory statement is voluntarily republished by the person to whom he published it or by some other person, the general principle is that the claimant may have a choice. He may (1) sue the defendant both for the original publication and for the republication as separate causes of action; or (2) sue the defendant for the original

[119] Judgment, §79
[120] Judgment, §79
[121] Judgment, §48

publication only, but seek to recover as a consequence of that original publication the damage which he has suffered by reason of its repetition or republication, so long as such damage is not too remote. (*Gatley* §6.52; *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173 at 181G to 183G)

163. The plaintiff took the second choice. He made clear in his pleading that "the publication sued on is the publication to Mr Mill and Mr Midgley; the fact that it would (and did) inevitably spread is relied on in support of the claim for damages"[122].

164. The issue here is the question posed in *Gatley* §6.58:

> "If the statement by D to X was not on a privileged occasion but the republication by X was, D is obviously liable in respect of the publication to X, but what is his position in respect of the republication by X?"[123]

165. The judge referred to the decision of the Court of Appeal in Queensland in *Belbin v McLean* [2004] QCA 181[124], in which Muir J discussed *obiter* the issue "whether the original publisher of defamatory matter which is republished by another can rely on a defence open to the republisher if the plaintiff does not allege the republication as a separate cause of action but relies on it as a matter going only to the damages suffered as a result of the original publication". (§[3](1)) Muir J made these observations at §[39]:

> "In the case of a defence of absolute privilege ... the denial to the original publisher of the benefit of a defence open to the republisher could seriously undermine the protection of the defence. For example, if the quantum of damages able to be recovered from a publisher of defamatory information to a parliamentarian could be greatly increased by virtue of republication in Parliament, there would be an obvious practical

[122] Re-amended Statement of Claim, §8A
[123] Quoted in the Judgment at §83
[124] Judgment, §85

> restraint on the parliamentarian's freedom to use the information. Similar concerns could arise in relation to legal proceedings. Considerations such as these, and dicta of Hunt J in *Toomey v Mirror Newspapers Ltd* [at 183 and 186], support the conclusion that a defence of absolute privilege open to a republisher may be availed of by the original publisher. ..."

166. The judge agreed with Muir J and with the decision of Compton J of the Supreme Court of Virginia in *Watt v McKelvie* (1978) 248 SE 2d 826[125], and held that the defendant should not be held responsible for the pleaded special damages which arose out of the republications which were all protected by absolute privilege.

167. In *Watt v McKelvie*, it was held that the original publisher of slanderous statements was not liable to the person defamed when republication was made by third parties during the course of judicial proceedings, since immunity which attaches to participants in judicial proceedings applied to the original publisher who could thus assert the privilege as an absolute defence when sued by the person defamed. Compton J rejected the view stated in the *Restatement (Second) of Torts* §576, Comment b (1977) which was based on the following rule:

> "Harm Caused by Repetition
>
> The publication of a libel or slander is a legal cause of any special harm resulting from its repetition by a third person, if, but only if,
>
> (a) the third person was privileged to repeat it, or
>
> (b) the repetition was authorized or intended by the original defamer, or
>
> (c) the repetition was reasonably to be expected."

168. The relevant Comment read:

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[125] Judgment, §§86 to 88

> "If the person who repeats the defamation is privileged to repeat it, the repetition does not prevent the original defamation from being the legal cause of the resulting harm. In such a case, the person who repeats the defamation is not liable to the other because of the privilege. The person defamed, however, may vindicate his reputation by an action against the person who first published the defamation."

169. It was contended that the rationale for the view in the Comment was that "where there is no recovery from the republisher because of privilege, it is more reasonable to hold the originator liable than to deny a recovery altogether." (at 829) In rejecting that view, Compton J noted the significant difference was that the republication occurred in a judicial proceeding, and the ultimate consideration was one of policy. His reasoning appeared at 829:

> "The rule which we now adopt is based on the policy ... underlying the privilege which attaches to judicial proceedings generally. We believe the public interest is best served when individuals who participate in law suits are allowed to conduct the proceeding with freedom to speak fully on the issues relating to the controversy. ...
>
> And we are not persuaded by the plaintiff's argument that policy considerations should limit the privilege only to the actual participants in the proceedings. The participant often may be motivated by a desire to shield a non-participant. Manifestly, a person testifying in a judicial proceeding who believes that his statements would precipitate an action for defamation against a non-participant such as a family member, business associate, relative or friend, would tend to be less candid and forthright in his disclosures during interrogation and thus inhibit full and free investigation of the facts. ..."

170. Mr Price sought to distinguish *Watt v McKelvie* on the basis that the plaintiff in that case was constrained to sue the defendant as a joint tortfeasor in the republication, which was absolutely privileged, because the limitation period had expired in respect of the original publication. But I do not think this distinguishing feature would make a difference to the matters of principle considered by Compton J.

171. Mr Price submitted there should be no difficulty for a plaintiff to claim for loss resulting from republications on ordinary principles of causation and remoteness, provided that the damage flowing from the republications are foreseeable (it makes no difference whether the original publisher authorised or merely foresaw the republication as a reasonable person in his position would) and not too remote. He urged the court to approach the question of whether the defendant is liable for damages suffered by the plaintiff as a result of republication as a question of remoteness of damage, as there is no special rule regarding republication peculiar to defamation, citing *Slipper v BBC* [1991] 1 QB 283 at 295H to 296D, *McManus v Beckham* [2002] 1 WLR 2982 at §§34, 38 to 43. He submitted there is no rule of law that every link in the chain of causation connecting a defendant's tortious act to the damage suffered by the plaintiff must itself be tortious, still less that it should be actionable at the suit of the plaintiff.

172. Mr Price placed particular reliance on *Slipper v BBC*, in which Bingham LJ considered the question of principle at 299G to H, and concluded the fact that the defendant could not have been successfully sued did not, in principle, prevent recovery by the injured party against the party whose conduct had led to the causing of this damage by the third party as a natural and probable consequence. Mr Price acknowledged this statement was not made in relation to a privileged occasion but submitted that the principle should be the same. He prayed in aid another passage in the judgment of Bingham LJ at 300C:

> "... the law would part company with the realities of life if it held that the damage caused by the publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity

> to percolate through underground channels and contaminate hidden springs."

173. He emphasised that the bulk of the loss suffered by the plaintiff arose out of the republications and his recompense would be slight if the major loss from republications is not recoverable.

174. *Cutler v McPhail* [1962] 2 QB 292 at 298 to 299 was cited by Mr Price to demonstrate that it should make no difference that the defendant could not have been sued for the republication. In that case, notwithstanding that the plaintiff had released the joint tortfeasors including the defendant from liability for the republication, the plaintiff was permitted to recover damages flowing from the republication against the defendant based on the original publication.

175. I do not agree this question should be approached solely on the basis of the principles of causation and remoteness. That was the route taken by the authors of the *Restatement* as quoted in *Watt v McKelvie.* As was noted in that case, this would be to lose sight of the significant difference that the republications occurred in a judicial proceeding and the contemporaneous reports of a judicial proceeding. I think the ultimate consideration should be one of policy.

176. In that regard, Mr Price submitted the question of policy should be answered by balancing the competing public interest considerations. If the defendant has committed an actionable wrong, he contended there are powerful reasons of principle why damages should be assessed on the ordinary rules of causation and remoteness, so that the plaintiff's injury is properly compensated. As regards the requirements of the administration of justice, he submitted it is fanciful to suppose that

persons in the position of Mr Mill and Mr Midgley would be inhibited from informing the court of matters which the court needs to know, by the consideration that the consequent publicity may increase the damage for which an informant would be liable. And if there were any inhibition, the court has ample powers to ensure that the name of the person who is the subject of the information or the name of the informant is provided to the court privately.

177. I am not persuaded that in striking a fair balance between the competing public interests, the balance should come down in favour of allowing a plaintiff to recover damages in respect of a republication which is protected by absolute privilege in judicial proceedings. The immunity from suit granted to the participants in judicial proceedings is of vital importance to the proper administration of justice, and should not be undermined or affected in any way. I do not think any distinction should be drawn between the participants recognised by law to enjoy the protection of immunity – whether they be witnesses, parties, lawyers, jurors or judges. All participants in law suits must be allowed to conduct the proceedings with freedom to speak fully on the issues relating to the controversy, without inhibition or restraint that may arise out of any concern that their statements in court may precipitate an action for defamation against a non-participant or increase the damages for which a non-participant may be held liable.

178. The conclusion I reach is supported by principle, such that it would not be unjust to hold that the defendant should not be responsible for the damage which has been occasioned by the republications. I take comfort from this passage in *Gatley*, §6.52:

> "As Eady J pointed out in *Baturina v Times Newspapers* ([2010] EWHC 696 (QB) at §60), the juridical basis of the proposition that a claimant can recover damages flowing from a publication in respect of which he could not establish primary liability on the part of the defendant is difficult to ascertain. It is submitted therefore that the correct view is that where no claim would lie against the defendant in respect of the later publication, the claimant should not as a matter of principle be allowed to recover damages in respect of that publication. If the later publication is not actionable then, even if it was caused by the original publication, it would be unjust to make the defendant liable for any harm caused by that publication. If that is right, then regardless of whether a claimant relies on a republication as a cause of action or in aggravation of damages, a defendant would be entitled to meet the claim in respect of that publication with any relevant defence."

179. Mr Price criticised the above as wrong, not supported by direct authority and inconsistent with the cases he cited – *Cutler v McPhail* and *Slipper v BBC*. But as noted in *Toomey v Mirror Newspapers Ltd* at 182, Salmon J did not give an elaborate judgment in *Cutler v McPhail*, no doubt because it was given in the course of a jury trial and his lordship remarked there was singularly little authority for the view he expressed. As for the causal relation mentioned by Bingham LJ in *Slipper v BBC* at 299G to H, I am inclined to think this should be read with the subsequent judgment of Laws LJ in *McManus v Beckham* at §§38 to 42, in which he explained that the issue before the court is not purely one of factual causation in that the ascertainment of a causal relation (in deciding whether the defendant should be responsible to the claimant for the effects of what was done or omitted by a third agency) is not value-free, and the root question is whether the defendant, who has slandered the claimant, should justly be held responsible for the damage occasioned by further publication by a third agency.

180. On the facts of this case, in view of the absolute privilege that protects the republication in judicial proceedings, I think it is just to hold

that the defendant should not be responsible for the loss arising from republication. I would uphold the judge on disallowing the damages consequential upon republication in court and the media reports. The special damages of $5,354,779.26 as pleaded should not be recoverable, subject to another argument of the plaintiff which will be dealt with below.

Award of damages

181. The judge did not make any award of general damages as he dismissed the claim on the basis that the defence of absolute privilege applied and in any event he found that the plaintiff failed to prove defamatory meaning. As I have overturned his findings in those respects, it is necessary to consider general damages. The plaintiff sought an order for general and aggravated damages in his notice of appeal. We have received written submissions from the parties after the hearing on this issue. It was not suggested by either that the matter should be remitted to the court below for damages to be assessed or that further evidence would be required for that purpose. As this court is in as good a position as the court below to carry out this exercise, I will proceed with the assessment of damages.

182. The plaintiff seeks an award of $200,000 for general and aggravated damages and special damages of $4,674,758.66 being his legal fees incurred in the Norwich Pharmacal application[126].

183. The defendant's position is that only a nominal award should be made, certainly less than $4,000, and no special damages should be awarded.

[126] Re-amended statement of claim, §11(d)(i) to (iii)

(a) General damages

184. I will first deal with general damages.

185. The principles are well established. Such damages are at large because the assessment necessarily involves a substantial amount of subjectivity and there is a wide bracket within which any sum could be regarded by the assessor as not unreasonable. General damages are compensatory, and the award serves a threefold function: to compensate the plaintiff for the damage to his reputation; to vindicate his good name; and to take account of the distress, hurt and humiliation which the defamatory publication has caused. In performing the assessment, the court must take into account all relevant circumstances of the case. (*Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* (2012) 15 HKCFAR 299, §§35 to 38)

186. I have taken the following matters into consideration.

187. First, the gravity of the slander. The slander touched on the plaintiff's personal integrity and would adversely affect his business reputation. Although the imputations of betrayal and disloyalty are not made out, the plaintiff would be seen as an opportunistic person who sided with Tony Chan and demanded a massive sum for providing information to discredit a business associate in court. The slander is a serious one. I do not think it can be regarded as petty or of marginal seriousness.

188. Second, the extent of the publication. The slander was published to two persons, Mr Mill and Mr Midgley, neither of whom knew the plaintiff. The publication was transient.

189. Mr Price submitted the compensatory award should take into account the plaintiff's concern that the slander would spread. He prayed in aid the dicta of Bingham LJ in *Slipper v BBC* at 300C mentioned earlier.

190. In my view, any percolating effect of the slander in this case would be minimal and ought to be disregarded. This is because the slander communicated in private was overtaken by the disclosure in open court shortly afterwards. The spreading of the falsehood was attributable to the statement in open court and the media reports of it. The distress, shock and anger suffered by the plaintiff, as described in his evidence, was substantially, if not entirely, on account of the subsequent publicity given to the falsehood[127].

191. Third, the conduct of the defendant. Malice was found by the judge in that she knew the communication was false. Further, she knew that her falsehood would mislead Tony Chan's lawyers and the court and expose the name of the plaintiff, an innocent party, in a high profile case in open court.

192. Mr Price submitted the court should take into account the defendant's conduct at trial. Instead of admitting the truth and making an apology, thereby reducing the injury to the plaintiff, the defendant maintained her lie throughout the trial and the plaintiff had to incur substantial expenses and to endure the effort and anxiety of a trial to vindicate his reputation.

193. I do not think it appropriate to take into account the defendant's conduct at trial. She did not dispute that the plaintiff did not

[127] Transcript of Day 1, p 133 line 13 to p 135 line 3

provide the Document to Tony Chan's lawyers or what she had said in response to Mr Midgley over the telephone. The case she maintained at the trial was a miscommunication between her and Mr Midgley. It is pertinent to note that Mr Midgley accepted in cross-examination that the whole incident could be one of miscommunication and he took the view it was an "honest mistake" of the defendant[128]. This case was rejected by the judge only after considering all the evidence.

194. Mr Price further submitted that the effort, anxiety and expense of the Norwich Pharmacal application should also be laid at the defendant's door. He contended that if the defendant had been willing for her identity to be revealed, such injury to the plaintiff would have been greatly limited.

195. I do not agree this should be taken into consideration. The Norwich Pharmacal application was brought by the plaintiff against Tony Chan after Baker & McKenzie had written to Haldanes on 26 and 27 May 2009 seeking information on the source of Mr Mill's statement in court and relevant documents. Haldanes refused to comply and proposed instead if the plaintiff would be prepared to be interviewed by them and be called as a witness in the probate action. In the Norwich Pharmacal application, Tony Chan offered to make a joint statement with the plaintiff to clarify the mistake in Mr Mill's statement in court and the media reports[129], and an apology was tendered to the plaintiff by Tony Chan, Mr Midgley and Mr Mill[130]. On legal advice, Tony Chan took the stance that the informant had rendered assistance to him in the probate action on the understanding and expectation that his or her involvement would be kept confidential and he would not provide the name of the informant unless

[128] Judgment, §§38 and 44
[129] Judgment of Poon J in HCMP 1101/2009 on 9 October 2009, §23
[130] 1st affidavit of Mr Midgley in HCMP 1101/2009, §11

ordered by the court[131]. I do not think it right that the defendant should be held responsible for the measures taken by Tony Chan on legal advice.

196. I have considered the awards mentioned in the cases cited by the plaintiff (*Yu Ming Investment Ltd v Peng Ru Chuan Richard*, HCA 814/2002, 5 May 2005; *Golden Field Glass Works Co Ltd v Yeung Chun Keung*, DCCJ 1942/2012, 31 March 2017) and the defendant (*Lee Man Kin v Wang Mei Chun*, HCA 2876/2003, 19 August 2005; *Shiu Hon Po v Tam Siu Ping*, DCCJ 31/2016, 10 May 2013). I do not consider them helpful as the circumstances in those cases are not comparable.

197. I do not think there is evidential basis for awarding aggravated damages in respect of additional injury caused to the plaintiff's feelings by the defendant's conduct.

198. This is not a case for a nominal award. Taking all the relevant circumstances into account, I would award $30,000 as general damages to the plaintiff.

(b) Special damages

199. Mr Price contended that the expenses incurred in the Norwich Pharmacal application should be recoverable as special damages. He submitted it was a necessary step to enable the plaintiff to take action to clear his name and the expenses were incurred in a reasonable attempt to mitigate the damages potentially flowing from the slander and malicious falsehood, and so are recoverable to counteract the damage to the plaintiff's reputation. He further submitted that the court has to deal with a

[131] Judgment of Poon J in HCMP 1101/2009, §8

hypothetical situation in which causation of the expenses in that application is considered on the assumption that only the original publication to Mr Mill and Mr Midgley occurred and it is unrealistic to have expected the plaintiff to advance his claim on a hypothetical basis. Besides, the original publication by the defendant was a cause of the costs incurred in the Norwich Pharmacal application, and the just result is that she should pay those costs resulting from her attempt to hide her identity.

200. I do not agree with his submissions. The court does not have regard to hypothetical assumptions where there is evidence of what actually happened. The reality of the situation, as amply demonstrated in the plaintiff's evidence that I have mentioned, was that he was driven to take action because of the statement in open court and the publicity given to it. There is no sufficient causal connection between the expenses incurred and the original publication. I reject the claim for special damages.

Costs

201. I would direct the parties to provide written submissions limited to ten pages on the costs below and on appeal, within 14 days of the handing down of this judgment.

Hon Macrae JA:

202. I have had the advantage of reading the judgments of Yuen and Kwan JJA in draft. In view of their divergence of opinion, I shall set out my views on the issues raised in this appeal. The background to this action, the findings of fact by the judge and the issues in this appeal have been fully set out in the judgment of Kwan JA which I need not repeat.

Whether Original Publication was made on an Occasion of Absolute Privilege

203. I agree with Yuen and Kwan JJA, for the reasons set out in Kwan JA's judgment, that the occasion on which the defendant communicated the statement in question to Mr Mill QC and Mr Midgley in the morning of 21 May 2009, before the commencement of Day 9 of the trial of the probate action concerning the estate of the late Nina Wang, was not one of absolute privilege. However, if I may add these comments concerning *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, it seems clear that the extension of absolute immunity to the out of court statements of witnesses, potential witnesses and informants considered by the House of Lords was necessitated by the "broadening" (*per* Lord Hoffmann, at 214A-B) or "widening" (*per* Lord Hope of Craighead, at 217H) of the disclosure obligations of the prosecution in criminal cases in recent years. As Lord Hope explained, at 218B-D:

> "... the administration of justice is not all about fairness to the defendant. It is also about the interests of those individuals who may be affected by dissemination of the material. There is a public interest also, in the detection and punishment of crime. If that interest is put at risk because of the consequences of the disclosure rules, the balance between the public interest and the interests of the individual is disturbed. It needs to be adjusted in favour of the public interest. This cannot be done by reducing the scope of the disclosure rules. That would prejudice the right of the defendant to a fair trial, which is always paramount. What can be done is to increase the protection to those who may be affected by the disclosure rules against the collateral use of such material - that is to say, against its use for purposes other than to ensure that the defendant has a fair trial."

204. Both Lord Hoffmann[132] (with whom Lord Goff of Chieveley agreed) and Lord Hutton[133] endorsed the test for absolute immunity in

[132] *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, at 215A-B.
[133] *ibid.*, at 221E-F.

respect of witnesses and possible witnesses proposed by Drake J in *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184, at 192C-D, that

> "the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."

As Lord Hoffmann went on to explain, such a formulation would exclude irrelevant and gratuitous libels, which were wholly extraneous to the investigation, but include statements made by persons assisting the inquiry to investigators and by investigators to those persons and to each other.

205. In my judgment, the extension of absolute liability discussed in the speeches in *Taylor v Director of the Serious Fraud Office* was plainly confined to statements made or information exchanged during criminal investigations and has no application to the present case.

206. Accordingly, I shall proceed to consider whether the causes of action in slander and malicious falsehood have been established by the plaintiff.

Slander

Defamatory Meanings

207. The judge held that the statement was not defamatory either in its ordinary and natural meaning, or by way of innuendo. In the present appeal, the plaintiff's challenge was only against the judge's decision in relation to innuendo.

208. The innuendo meanings relied on by the plaintiff are pleaded in paragraph 8A of the Re-Amended Statement of Claim as follows:

(a) the Plaintiff had betrayed a friend and a business associate, Gilbert Leung, by covertly giving Tony Chan or his legal team one of Gilbert Leung's confidential business documents so that it could be used to discredit Gilbert Leung in a court of law;

(b) the Plaintiff had secretly and covertly sought to assist Tony Chan and his unmeritorious challenge to Nina Kung's will in order to try to get his hands on her fortune; and

(c) the Plaintiff had acted as set out above in order to obtain a personal advantage, possibly money from Tony Chan.

Paragraph 8A(a) Meaning

209. In respect of the innuendo meaning in paragraph 8A(a), I agree with Yuen and Kwan JJA that we should not disturb the judge's finding that the plaintiff has failed to establish this innuendo meaning and I have nothing further to add on this issue.

Paragraph 8A(b) Meaning

"Unmeritorious Challenge"

210. Arguments have been advanced before us as to whether the judge was right in construing the word "unmeritorious" in paragraph 8A(b) as meaning "without merit in law" or "legally unsustainable", or whether it should mean "unworthy" given the perceived distasteful nature of

Tony Chan's claim. The word is capable of both meanings and the choice of the word "unmeritorious" in the context of a legal document such as a pleading was particularly unfortunate.

211. The apparent ambiguity was further compounded by the extrinsic facts and matters pleaded in subparagraph 8A(4) in support of this particular innuendo. The first part of this subparagraph (for which, see paragraph 138 of Kwan JA's judgment), ending with the sentence "It was also disclosed how he had tried to worm his way to her affections with false promises that he could find her missing husband and other underhand tactics," refers to facts and matters concerning the public perception of the distasteful nature of Tony Chan's claim or the distasteful manner in which the claim was pursued and presented, which had little, if anything, to do with the legal merits of the probate action. Yet the remaining part of this subparagraph (as Yuen JA rightly points out in paragraph 21.3 of her judgment) deals with matters such as the rejection of his claim and the finding of forgery against him by the judge in the probate action, which lend themselves to a suggestion of lack of legal merits in Tony Chan's claim.

212. In the end, two considerations have persuaded me that the word "unmeritorious" in paragraph 8A(b) refers to, and more importantly that the plaintiff's case at trial in this regard related to, the unworthy or undeserving nature of Tony Chan's claim and the public perception thereof. Firstly, all of the matters in the second part of subparagraph 8A(4) took place after the publication of the statement and cannot as a matter of law be relied upon in support of an innuendo and must be ignored. That leaves the first part of subparagraph 8A(4) which could only refer to the unworthy nature of the claim. I am however aware that this may have

been the (unintended) result of the inclusion of irrelevant matters in the pleading by the plaintiff but not the meaning which the plaintiff originally intended to convey, which brings me to the second consideration.

213. On 9 July 2014, Day 2 of the trial below, counsel for the plaintiff introduced draft re-amendments to the Statement of Claim. These draft re-amendments related to the framing of the plaintiff's case on the "natural and ordinary meaning" (hitherto unpleaded) of the statement in question, following an exchange between the judge and counsel for the plaintiff on Day 1 of the trial. Leave to re-amend the Statement of Claim was granted (with no objection from the defendant's counsel) on 9 July 2014 and the Re-Amended Statement of Claim was filed on 11 July 2014.

214. The claim in slander based on the natural and ordinary meaning of the statement is now to be found in the re-amended paragraph 8, which reproduces in identical terms (in subparagraphs a to c) the 3 limbs of the innuendo meanings in the now re-numbered paragraph 8A, such natural and ordinary meaning to be derived from "the entire context upon which [the statement was] uttered as set out in paragraphs 4 to 7 [of the Re-Amended Statement of Claim]".

215. The re-amended paragraph 4, the contents of which form part of the "entire context" in which the statement was uttered, reproduces the first part of subparagraph 8A(4) in almost identical terms. The only difference is the addition, after the words "During the trial", of the words "(and before the events pleaded in paragraph 7 below)". Paragraph 7 deals with the circumstances in which the statement was made.

216. It can be seen that at least as from the time of the re-amendments, the plaintiff's case on the natural and ordinary meaning in subparagraph 8(b) (in identical terms to the innuendo meaning in subparagraph 8A(b), ie the plaintiff assisting in Tony Chan's "unmeritorious challenge"), has been founded on the same matters as are contained in the first part of subparagraph 8A(4). It is also clear that the plaintiff is not relying on post-statement events which have been left out of paragraph 4. And in so far as the distasteful disclosures by Tony Chan "during the trial" are concerned, such disclosures had been made before the making of the statement in question. These facts and matters had nothing to do with the legal merits of Tony Chan's claim but related to the distasteful nature of his claim, or the distasteful manner in which his claim was pursued and presented, and the public perception of those matters. I would therefore understand, without difficulty, the plaintiff's case on natural and ordinary meaning (b) to refer to the unworthy or undeserving nature of Tony Chan's claim.

217. I hasten to add that while the post-statement events have been rightly left out of the re-amended paragraph 4, the averments of such events have been left intact in subparagraph 8A(4). This is another unsatisfactory aspect of the plaintiff's pleadings in this case, other examples of which have been alluded to by Yuen JA in paragraphs 15.1, 15.2 and 21.1 to 21.3 of her judgment, whose sentiments I share even though our ultimate conclusions on some of the issues may differ. Although it is quite possible in cases of defamation for a party to rely on different facts or matters to support a natural and ordinary meaning on the one hand (eg matters of general knowledge), and an innuendo meaning on the other (eg matters known only to the publishees), I do not believe that in the particular case before us, it could fairly be said that the plaintiff had

intended to run different cases, relying on different facts, in support of natural and ordinary meaning (b) and innuendo meaning (b), when those meanings are pleaded in identical terms, and in circumstances where it is abundantly clear that the plaintiff was aware, by the time the re-amendments were presented, that post-statement events cannot be relied on to support a particular meaning.

218. For these reasons, and despite the unsatisfactory way in which the plaintiff's case has been pleaded, I agree with the conclusion reached by Kwan JA in paragraphs 143 and 144 of her judgment that the word "unmeritorious" refers to the unworthy nature of Tony Chan's claim and that the innuendo meaning in paragraph 8A(b) is established.

Is Paragraph 8A(b) Meaning Defamatory?

219. I am, however, not satisfied that the innuendo meaning in paragraph 8A(b), on its own, is defamatory. However distasteful or unworthy the public may have perceived his claim to be, Tony Chan was entitled to his day in court, for his claim to be fairly adjudicated upon under the due process of law, and for the evidence adduced by either party to be duly tested and evaluated. Where a person has "assisted" in Tony Chan's claim by providing relevant information to his legal team which might potentially expose a witness as a biased witness or a perjurer, I do not think that *right-thinking* members of the public would think any less of him, or lower their estimation of him, for providing such assistance. In this regard, I would agree with Yuen JA that the innuendo meaning 8A(b) is not defamatory.

Paragraph 8A(c) Meaning

220. The question here is whether the plaintiff has established that the statement meant that the plaintiff had assisted in Tony Chan's unworthy claim in order for Tony Chan to get his hands on Nina Wang's fortune, "in order to obtain a personal advantage, possibly money from Tony Chan."

221. As pleaded, the only extrinsic fact or matter being relied on can be distilled from subparagraph 8A(5); the last sentence therein reads as follows: "Given the huge amounts of money that were at stake in the Probate Action, the ready inference to be drawn from the allegation was that the Plaintiff had acted in this way for some kind of personal advantage, very likely for money." Effectively one is asked to infer, on the sole basis of the sheer amount of money at stake in the probate action and nothing else, that the plaintiff must have provided assistance to Tony Chan in exchange for some personal advantage. I could think of other possible motives for the plaintiff or other people "assisting" in Tony Chan's claim for doing so. Personal advantage is but one of them, and not necessarily a likely one.

222. Here I come to yet another unsatisfactory aspect of the pleadings. Not only was evidence received to the effect that the provider of the Document had asked for a very substantial sum of money in exchange for use of the Document, but this prior demand for money was in fact pleaded in paragraph 7 (being one of the re-amendments introduced on Day 2 of the trial). The averment in the re-amended paragraph 7 is to the effect that prior to 21 May 2009, "the source of the Document (whose identity was not known to Mr Mill and Mr Midgley) did not authorise the use of the Document in the Probate Action, pending Tony Chan's

agreement with the source on the financial terms for its use." So the plaintiff had a pleaded positive case on the financial or mercenary motive on the part of the provider of the Document, but failed to include it in the facts and matters relied on in support of innuendo meaning (c) in paragraph 8A(5), as Yuen JA rightly points out in paragraph 25 of her judgment. I would add that even the pleading in paragraph 7 stopped short of expressly averring that the financial motive of the provider of the Document was known to Mr Mill or Mr Midgley.

223. As it happened, the evidence at trial showed, and the judge found, that there was a prior demand for $10 million, that this demand was known to Mr Mill, and that on 21 May 2009 both Mr Mill and Mr Midgley learned that the provider of the Document would allow the Document to be used only on condition that if Tony Chan won the case and all appeals, and Tony Chan being in funds, monetary compensation would be paid at Tony Chan's discretion.

224. Since this mercenary motive on the part of the provider of the Document was at least pleaded in paragraph 7, evidence of such motive (and Mr Mill's and Mr Midgley's knowledge thereof) was received and evaluated by the judge, and relevant findings of fact were made, I would reluctantly allow the plaintiff to rely on such findings in support of innuendo meaning (c), despite the lack of relevant pleading in paragraph 8A(5). On this basis, I would agree with Kwan JA's conclusion in paragraph 151 of her judgment that the plaintiff has established the innuendo meaning in paragraph 8A(c), ie that the plaintiff, in order to obtain a personal advantage for himself, namely money, had secretly and covertly sought to assist Tony Chan and his unworthy

challenge to Nina Wang's will in order for Tony Chan to get his hands on her fortune.

Is 8A(c) Meaning Defamatory?

225. The demand by the provider of the Document for money from Tony Chan in exchange for use of the Document was not for reasonable recompense for time and effort spent, but for a very substantial amount of $10 million. The motive for providing relevant information on the witness Gilbert Leung to Tony Chan (and ultimately to the court) was a purely mercenary one of the most egregious kind. The statement of the defendant, when understood as pleaded in paragraph 8A(c), would in my view lower the plaintiff in his estimation by right-thinking members of the public and was therefore defamatory.

Defamation Ordinance Section 23

226. For the reasons given by Kwan JA, I agree that the statement in question, when understood as innuendo meaning 8A(c), was likely to undermine the trust and confidence which persons contemplating business dealings with the plaintiff might have in the plaintiff. I would add that the sheer greed of the demand for $10 million, which motivated the assistance to Tony Chan, would also likely cause potential business partners to hesitate in going into business with the plaintiff. I am therefore of the view that the requirements of section 23 of the Defamation Ordinance are satisfied and it is therefore not necessary for the plaintiff to allege or prove special damage in his claim in slander. In my judgment, the plaintiff's cause of action in slander has therefore been established.

Malicious Falsehood

227. The only issues in this appeal regarding the cause of action in malicious falsehood relate to the question of special damage.

228. I have held that both innuendo meanings 8A(b) and (c) have been established, although only meaning (c) is defamatory. In an action for malicious falsehood, there is no requirement for the statement to be defamatory in meaning. It is sufficient that the defendant has maliciously communicated a statement about the plaintiff which is false, subject to the issue of the need to allege and prove special damage.

Defamation Ordinance Section 24(1)(b)

229. On this issue, I agree with Kwan JA for the reasons she has given and for the additional reason I have given in paragraph 226 above that section 24(1)(b) of the Defamation Ordinance is satisfied in this case and that there is no need for the plaintiff to prove special damage. The plaintiff has succeeded in establishing the cause of action in malicious falsehood.

Damages Consequential on Republications on Occasions of Absolute Privilege

230. The plaintiff's causes of action in slander and malicious falsehood are founded solely on the original publication to Mr Mill and Mr Midgley, and not upon the republication by Mr Mill in open court or by the media in contemporaneous reports of the court proceedings. He is, however, suing for damages for losses suffered by him as a result of the republications, on the basis that the republications were either authorised or foreseeable by the defendant.

231. To decide whether the plaintiff can recover those losses in this case, two questions need to be answered. Firstly, under what circumstances can a defendant in an action for defamation or malicious falsehood be held liable for losses suffered as a result of republication by a third party? Secondly, can such losses be recovered where the republication was made on an occasion of absolute privilege?

Responsibility for Republication

232. On the first question, it has been decided in *Slipper v BBC* [1991] 1 QB 283 that the liability of a defendant in defamation for losses caused by a republication by a third party should be determined in accordance with ordinary principles in tort, of causation and remoteness. In the present case, the judge found that the defendant expressly authorised Mr Mill to repeat her statement in court. Given the high profile nature of the trial of the probate action, it was clearly reasonably foreseeable, if not a virtual certainty, that the media would repeat the statement in their reports. Therefore, on the facts of this case but for the issue of absolute privilege, which was attached to the occasions on which the republications took place, I would without hesitation hold the defendant liable for the damage caused by the republications.

233. Before leaving this topic, I should add that while *Slipper v BBC* may appear to have rationalised the law of defamation in relation to a defendant's liability for republications or repetitions, it is important to bear in mind the caveats about this approach subsequently expressed in *McManus v Beckham* [2002] 1 WLR 2982 by both Waller and Laws LLJ, with whom Clarke LJ (as Lord Clarke of Stone-cum-Ebony then was) agreed.

234. Waller LJ, at paragraph 33, while not expressly disavowing the use of the test of "reasonable foreseeability" that a republication would take place, warned of the danger in the use of that language alone. He emphasised, at paragraph 34, that what the law is striving to achieve is "a just and reasonable result by reference to the position of a reasonable person in the position of the defendant". In his suggested directions to the jury, Waller LJ avoided the use of term "foreseeable" and framed the relevant questions as whether a defendant is aware that his words are likely to be repeated or reported, and whether a reasonable person in the position of the defendant should have appreciated that there was "a significant risk" of repetition by others and that such repetition would increase the damage caused by the defamation.

235. In Laws LJ's view, at paragraph 39, the ascertainment of a causal relation between a defendant's act (such as the original defamatory statement) and the act or omission of a third agency (such as a republication or repetition) is not purely an exercise in ascertaining facts, and is certainly not always value-free. He found, at paragraphs 42-44, that the "old formula" of "natural and probable cause" is inapt to describe the necessary causal connection between the original publication and the republication. As a matter of principle, what is required is that the damage flowing from the republication by a third party be foreseen or foreseeable by the defendant or a reasonable person in the defendant's position. The root question is whether the defendant should justly be held responsible for damage which has been occasioned or directly occasioned by a further publication by a third party.

236. Yuen JA in her judgment has alluded to the speed at which, and the extent to which, information may be disseminated in the age of the

internet and social media, where, I would venture to add, instant or spontaneous publication and republication (sometimes with little forethought or insufficient fact-checking) of information, views and reactions has become commonplace. The potential damage to someone's reputation, and the corresponding responsibility for loss, could be far more extensive than previously, which suggests to me that it is all the more vital to bear in mind the dicta in *McManus v Beckham* that ultimately the court should strive to achieve a just and reasonable outcome for the parties concerned, ie both the injured and the injurer.

Where Republication was made on an Occasion of Absolute Privilege

237. On the second question, the arguments for and against preventing a plaintiff from suing for damages for loss suffered as a result of a republication on an occasion of absolute privilege have been extensively rehearsed in counsel's submissions and in the respective judgments of Yuen and Kwan JJA. I acknowledge the force of many of Yuen JA's arguments in favour of allowing normal recovery, although I am of the view that, while the "principles in-built in the law on malicious falsehood" (at paragraph 48 of Yuen JA's judgment) provide some protection against abuse or undue restriction of freedom of speech, they would not apply to a claim in defamation, where the burden of pleading and proving justification is on the defendant, and where the meaning attributed to a statement is to be decided objectively by the court as to what a reasonable person in the position of the publishee would have understood the statement to mean.

238. I also acknowledge that where the original publication was not made on an occasion of absolute privilege, the maker of the statement

would in any event be open to harassment by a vexatious claim in regard to the original publication, irrespective of the issue of recoverability of the losses caused by the republication on an occasion of absolute privilege.

239. The ultimate question for me is whether, as a matter of policy, there are reasons compelling enough to make it necessary to deny the recovery of damages caused by a republication where the republication was made on an occasion of absolute privilege: *Jones v Kaney* [2011] 3 AC 398.

240. In this regard, I would agree with the dicta (albeit *obiter*) of Muir J in the Queensland Court of Appeal in *Belbin v McLean* [2004] QCA 181, and of Compton J in the Supreme Court of Virginia in *Watt v McKelvie* (1978) 248 SE 2d 826 (notwithstanding that the defendant in that case was being sued as a joint tortfeasor in the republication). If damages are recoverable for loss caused by a republication on an occasion of absolute privilege, whether as reasonably foreseeable damages flowing from the original publication or where the cause of action is grounded on the republication itself, there is a real risk that it would impose a practical restraint on participants in judicial or parliamentary proceedings in his testimony or communications, thereby undermining the integrity of absolute privilege, which is considered necessary for the proper administration of justice or proper functioning of a parliamentary institution.

241. Accordingly, I agree with Kwan JA and the judge below in disallowing the damages caused by the republications in court and in the media reports.

Conclusion

242. I would allow the appeal to the extent that I find that the plaintiff has succeeded in his causes of action in slander and malicious falsehood and is entitled to general damages. In respect of such damages, I agree with the award of $30,000 for general damages, for the reasons set out by Kwan JA.

Hon Yuen JA:

243. By a majority, the appeal is allowed to the extent that the plaintiff is awarded general damages of $30,000 for slander and malicious falsehood. We direct the parties to provide written submissions on costs here and below (limited to 10 pages) within 14 days of this Judgment.

(Maria Yuen)	(Susan Kwan)	(Andrew Macrae)
Justice of Appeal	Justice of Appeal	Justice of Appeal

Mr James Price QC, Mr Benjamin Yu SC and Mr Jonathan Chang, instructed by Baker & McKenzie, for the Plaintiff (Appellant)

Mr Kenneth Lam K Y and Ms Angela Mui, instructed by Lui & Law, for the Defendant (Respondent)