

**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

Originating Summons            )

No. 1131 of 2008/P            )

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

And

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

And

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

Between

**Attorney-General**

(No ID No. exists)

...Applicant

And

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

...Respondents

**ATTORNEY-GENERAL'S SKELETON SUBMISSIONS**

**I. Introduction**

1. This case is not about freedom of speech per se. It is about the Rule of Law and the vital role that the Courts and Judiciary play in its maintenance.

2. The context of this application is the ongoing argument between some segments of the Western press, as exemplified by Wall Street Journal Asia (WSJA), and the Government of Singapore as to where the limits on the freedom of speech should lie. It is of course in the interest of the press that those limits should be as loose as possible. The Courts and Judiciary of Singapore are caught in the centre of this argument.
3. In the affidavit filed by Jason Paul Conti on behalf of the 3<sup>rd</sup> Respondents (the proprietor and publisher of the WSJA) it is asserted that the three items in question did not impugn the impartiality, integrity and independence of the Singapore Judiciary and Courts. On the contrary, it is asserted that the nub of the disagreement lies in the fact that in the view of the WSJA the law of libel in Singapore “does not comport with legal standards set by courts and parliaments in other modern liberal democracies”. In paragraph 27 of Mr Conti’s affidavit it is asserted that “it should be clear that this is not an accusation of misapplication of the law of libel by the Singapore Judiciary, but rather an acknowledgement that although the Singapore Judiciary may have been accurately applying the country’s libel law, or to the extent that it is judge-made declaring it in good faith, that law is more restrictive than other Commonwealth countries and produces certain libel judgments that have had the effect of silencing dissent”. It is further claimed that the WSJA “had no desire to undermine any institution in Singapore, including the Singapore Judiciary and its individual judges”. Were that so, this application would not have been made.

4. Freedom of speech in Singapore allows a person to criticise Government policy and the decisions of the Courts. There is no fetter on public debate about policy. However, once debate strays beyond criticising policy and becomes a personal attack on the integrity of a person, the target of the attack has a right to demand that his accuser substantiate the accusations. This is the province of the law of defamation. Where discussion of a Court's judgments becomes an attack on a judge or the judiciary, then the law of contempt of court steps in. The rule is simple: debate the policies and the decisions by all means, but don't attack the personalities.
5. Singapore judges are not political. They are not subject to election, unlike in some countries. Supreme Court Judges have tenure until age 65 and their terms of service cannot be altered. This is in the Constitution. Subordinate Court judges cannot be transferred except by the Legal Service Commission, chaired by the Chief Justice. The LSC is not a political body. It has private sector members, as well as judges of the Supreme Court. No Subordinate Court judge will be "demoted" because of his political views or because his judgments do not please the Government. The LSC is there to guarantee that.
6. The WSJA has gone beyond merely disagreeing with the law of libel in Singapore. They have conflated the law with the persons who enforce the law. The Singapore Judiciary, like judges everywhere else in the Commonwealth, do not make law. They apply the law. The fact that the WSJA does not like the law of libel does not give them licence to attack the judges who apply the law. This is not the first time that the WSJA has done so. The Asian Wall

Street Journal has twice before cast aspersions on the independence, impartiality and integrity of the Courts and Judiciary in Singapore: see *Attorney-General v Wain No 1*) [1991] SLR 383 and *Attorney-General v Zimmerman* [1984-85] SLR 814. One may infer from this that the editorial attitude of the WSJA is that the Courts of Singapore are not independent.

## **II. The Issues**

1. The first issue is a legal one, viz, the scope of the law of contempt of court in Singapore and how that law should be applied in a modern context.
2. The second issue is a factual one, viz, whether the three items in question amounted to an attack on the Singapore Courts and Judiciary, or were merely a polemic against the law of libel in Singapore.
3. The third issue, which only arises if it is found that the 3<sup>rd</sup> Respondent is in contempt of court, is what penalty should be imposed.

### **III. The First Issue: the Scope of the Law of Contempt of Court**

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

1. Article 14(1)(a) of the Constitution of the Republic of Singapore provides that every citizen has the right to freedom of speech and expression. This right is subject to the law of contempt of court and defamation. Non-citizens can have no greater rights than citizens in this respect.
2. Singapore is not alone amongst post-colonial democracies in providing that the freedom of speech and expression is subject to such reasonable restrictions. For instance, India does so too: see *Gopalan v State of Madras* AIR (37) 1950 Supreme Court 27.
3. The law of contempt of court is a justifiable restriction on the freedom of speech and expression. It is contrary to the public interest that confidence in the administration of justice should be undermined: *Solicitor-General v Avon Radio Ltd* [1978] 1 NZLR 225 per Richmond P (Court of Appeal of New Zealand); *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 (Privy Council on appeal from Mauritius).

4. The limits of what is acceptable are set by the courts of the country. The fact that a statement may be acceptable in the UK today does not mean that it cannot be contempt of court elsewhere: see eg *Badry v Director of Public Prosecutions* [1983] 2 AC 297, 304 (Privy Council on appeal from Mauritius). One must not lose sight of local conditions and foreign cases are not determinative: *Attorney-General v Wain (No 1)* [1991] SLR 383.
5. Different countries guarantee the right to freedom of expression in different ways and what restrictions may be placed on that freedom. Each country adopts its own test: per Leung JA in *Wong Yeung Ng v Secretary of State for Justice* [1999] 2 HKC 24 (Court of Appeal, Hong Kong). We must ask what we consider important in Singapore: per Yong CJ in *Re Tan Khee Eng, John* [1997] 3 SLR 382.
6. The test in Singapore is whether a statement has “an inherent tendency to interfere with the administration of justice” rather than that it “constitutes a real risk of prejudicing the administration of justice”: per Sinnathuray J in *Attorney-General v Wain (No 1)* [1991] SLR 383, 397; followed in *Attorney-General v Chee Soon Juan* [2006] SLR 650, 661. There is no reason to depart from this test. Note that UK, Hong Kong, New Zealand, Australia and Canada have statutes defining the right to freedom of expression in different terms, and/or are parties to treaties that Singapore is not a party to. The issue is where the Court in Singapore is prepared to draw the line. Tempting though it may be to

adopt a liberal approach and win the applause of the WSJA and others of like-mind, the court should bear in mind where this may lead.

7. It is a common observation that in some societies, respect for the courts has been lost: see the comments of the editors of Borrie and Lowe's *The Law of Contempt* (3<sup>rd</sup> Ed, 1993) at p 343; the speech of the Rt Hon Mr Tony Blair (<http://www.number10.gov.uk/Page8898>), Prime Minister of England; the speech of the Hon Justice Michael Kirby of the High Court of Australia ([http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_mau\\_i.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_mau_i.htm)); and *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48. It is noteworthy that elder statesmen from "modern liberal democracies" in the West have called for rights to be balanced by responsibilities: see the Universal Declaration of Human Responsibilities (<http://www.interactioncouncil.org/udhr/declaration/udhr.pdf>), Arts 13 & 14. Not all the developments that have occurred in the West after Singapore's emancipation from the British Empire can be considered to be progress. The question is whether we want to go down that same road. It is submitted that it is not in our national interest to do so, whatever the 3<sup>rd</sup> Respondent may think.
8. However, if the Court is minded to depart from precedent and accept the test of "real risk" rather "inherent tendency", even there the three items complained of constitute such a risk.

**B. The law against “scandalising the court” exists to protect the administration of justice by ensuring that the authority of the court is not undermined.**

1. The fair administration of justice requires that the judiciary must be impartial. This is in the Judge’s Oath. An allegation of bias or lack of impartiality goes to the very root of a Judge’s function: *AG v Wain (No 1)* [1991] SLR 383, 394 (Sinnathuray J). Such an allegation is the “worst form of scandalising of the court, meriting the infliction of a severe penalty”: *AG v Pang Cheng Lian* [1972-74] SLR 658, 660-661. See also *Attorney-General v Zimmerman* [1984-85] SLR 814, *Attorney-General v Chee Soon Juan* [2006] SLR 650, 661.
2. It is not the intention but the effect that is important. It is sufficient that the statement has a tendency to undermine the authority of the court, even if that was not intended by the maker: *AG v Wong Hong Toy* [1982-83] SLR 398, 404; *AG v Wain (No 1)* [1991] SLR 383, 395; *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 307.
3. The suggestion that the court can be influenced by pressure from an external source amounts to a contempt: *AG v Zimmerman* [1984-85] SLR 814, 817; *AG v Wain (No 1)* [1991] SLR 383. The position is similar in Australia (*Gallagher v Durack* (1983) 57 AJLR 191 (High Court of Australia), Mauritius (*Badry v Director of Public Prosecutions* [1983] 2 AC 297 (Privy Council on appeal from

Mauritius) and Canada (*R v Murphy, ex parte Bernard Jean, Attorney-General of New Brunswick* (1969) 1 NBR (2d) 297 (Supreme Court of New Brunswick)). Courts all over the Commonwealth have reacted strongly to any insinuation that judgment in a case is given in favour of a litigant because he is powerful and influential rather than on the merits of the case.

4. Calling into question the impartiality of the Courts undermines the public's faith in the administration of justice: *AG v Zimmerman* [1984-85] SLR 814, 817; *Gallagher v Durrack* (1983) 57 AJLR 191; *Wong Yeung Ng v Secretary of State for Justice* [1999] 2 HKC 24 (Court of Appeal, Hong Kong). This is a challenge to the Rule of Law: *Wong Yeung Ng v Secretary of State for Justice* [1999] 2 HKC 24 (Court of Appeal, Hong Kong). It impairs the administration of justice: *Re Borowski* (1971) 19 DLR (3d) 537; *R v Glanzer* [1963] 2 OR 30, 35-36 (High Court, Ontario).

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

1. It is permissible to criticise judgments of a court provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to

impair the administration of justice: Lord Atkin in *Ambard v AG for Trinidad and Tobago* [1936] AC 322, 335.

2. Tendentious reporting or misleading summaries of cases meant to put a judge in a bad light are not legitimate criticism: *AG v Wong Hong Toy* [1982-83] SLR 398, 405; *R v Fletcher* (1935) 52 CLR 248, 257-258; *Solicitor-General v Avon Radio Ltd* [1978] 1 NZLR 225 (Court of Appeal of New Zealand).
3. The right to criticise does not give licence to make irresponsible accusations against the judiciary to undermine public confidence in the administration of justice: *AG v Lingle* [1995] 1 SLR 696, 701; *Wong Yeung Ng v Secretary of State for Justice* [1999] 2 HKC 24 (Court of Appeal, Hong Kong).
4. The WSJA has previously demonstrated its prejudice against the Courts and Judiciary of Singapore: see *Attorney-General v Wain (No 1)* [1991] SLR 383 and *Attorney-General v Zimmerman* [1984-85] SLR 814. It has made a blanket criticism of the whole judicial system, despite the clear safeguards on judicial independence contained in the Constitution. The repetition of the same allegations in the three items in question takes this case out of the ambit of fair comment.

**IV. The Second Issue: are the items in question aimed at the law of libel in Singapore or against the Courts and Judiciary?**

1. It is impossible for a reasonable reader to construe the two articles and the letter as a criticism of the law of libel rather than an attack on the Courts and the Judiciary.
2. The meaning that an objective reader would draw from the three items in question is that the Courts and Judiciary in Singapore do not dispense justice when it comes to opposition politicians and the media. It is stated that Singaporeans do not enjoy the right to dissent in “Lee Kuan Yew’s Singapore” and that the damages to be ordered by the court in the defamation suit against Dr Chee Soon Juan and Ms Chee Siok Chin are “the going price of political dissent”. The clear implication is that the courts are part of the means by which dissent is suppressed.
3. The clear implication in the first article is that the Minister Mentor has never lost a libel suit because the Courts and Judiciary are biased in his favour. It is implied *sotto voce* that the Far Eastern Economic Review will also lose in the suit brought against it.
4. The characterisation of Gopalan Nair as merely an “online advocate for media freedom in Singapore” is a gross caricature. Anyone reading his blog would see how skewed this characterisation is. Similarly, the implication in the first article that Dr Chee Soon Juan was jailed for scandalizing the court during his

cross-examination of the Minister Mentor is a distortion of the true situation. A perusal of the reasons for his committal by Belinda Ang J will show how unbalanced the statements in the first article are.

5. The intent of Dr Chee's letter is to imply that he was not given justice. The true state of affairs is otherwise, as shown in the reported judgments in *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR 675; *Chee Siok Chin v AG* [2006] 4 SLR 541; *Lee Hsien Loong v Singapore Democratic Party* [2007] SGCA 51. The paragraphs of the letter attacking the court are not necessary to his response to the letter from Ms Yeong Yoon Ying exhibited as JPC-2 in Mr Conti's affidavit. He does not address the statement that he was jailed for contempt because he "rebuked the judge, ignored her orders and shouted her down". The WSJA did not have to publish the letter with the paragraphs containing the gratuitous attack on the court; leaving out the paragraphs would still leave his response comprehensible.
6. The second article clearly implies that the WSJA's view is that the Courts and Judiciary of Singapore are not independent. It is impossible to construe the article as a criticism of the law of libel rather than an attack on the Courts and Judiciary. The article ends on a triumphalist note: when Singapore is ready to join the ranks of modern democracies, it should reform its judicial system.
7. The readership of the WSJA consists of opinion-shapers. The clear intent of the three items is to influence the opinion of the readers of the WSJA against the Courts and Judiciary of Singapore. These sophisticated readers would

know of the oft-ventilated criticisms of Singapore's Courts and judges by some segments of the Western press, the WSJA in particular. They would have understood what the insinuations of the WSJA were.

**V. The Third Issue: what is the appropriate sanction if it is found that the 3<sup>rd</sup> Respondent is in contempt?**

1. The rule of law is taken very seriously in Singapore. In a multi-ethnic, multi-cultural, multi-religious crowded society, the only way that order and liberty can be maintained is if there is strict adherence to the law by all. The rule of law is essential for the protection of the rights of citizens and non-citizens alike, their liberty and their freedom to pursue happiness. The courts are the ultimate arbiters when the rights of one person clash with those of another. To undermine the authority of the courts and the respect due to the judges is to strike at the very foundation of a modern democracy.
2. The fact that the 3<sup>rd</sup> Respondents disagree with the laws of Singapore pertaining to freedom of speech and expression does not give them licence to undermine the institutions which uphold the rule of law. It is for each society to decide on the limits to be placed on freedom of speech and expression, in order to maintain harmony amongst the people. The balance that is struck in the home country of the 3<sup>rd</sup> Respondents does not apply universally as the standard for the rest of humanity.

3. The 3<sup>rd</sup> Respondents have not apologised nor stated explicitly that they accept that the courts of Singapore apply the law of Singapore without fear or favour. Nor have they undertaken not to make any further imputations against the integrity, impartiality and independence of the courts and judges of Singapore in future.
4. In assessing the proper sanction to be imposed on the 3<sup>rd</sup> Respondents, it is submitted that an analogy may be drawn to the usual principles of sentencing. In the instant case, it is submitted that the principles to be applied are denunciation (to drive home the point that such behaviour is unacceptable), specific deterrence (to prevent a recurrence of such behaviour) and general deterrence (to signal to others that such behaviour will be dealt with severely). Aggravating factors are: firstly, the fact that the 3<sup>rd</sup> Respondent has been guilty of contempt of court on two previous occasions; and, secondly, that the 3<sup>rd</sup> Respondent is a foreign company. A citizen or resident of Singapore will suffer the economic and physical consequences if by his behaviour the rule of law is compromised; a non-resident whose economic well-being is not tied up with the fate of Singapore as a country does not suffer such consequences. It is immoral for such persons to attempt to change our society to reflect their prejudices on the pretext that they know better what is good for us.
5. For the above reasons, it is submitted that a substantial fine be imposed on the 3<sup>rd</sup> Respondent, sufficient to hurt but not to cripple. It is not the intention of the Applicant to destroy the 3<sup>rd</sup> Respondent financially. It will suffice if the 3<sup>rd</sup> Respondent is brought to realise the consequences of its behaviour and is

induced to refrain from further attempts to undermine the courts and judges of Singapore.

Dated this 4th day of November 2008

PROFESSOR WALTER WOON  
ATTORNEY-GENERAL