

HCA 16790/98

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO.16790 OF 1998**

BETWEEN

CHEUNG KONG (HOLDINGS) LIMITED Plaintiff

and

CHAN WAI YIP, ALBERT Defendant

Coram : Hon Waung J in Chambers

Dates of Hearing : 6, 7, 8, 9, 10 and 13 March 2000

Further Written Submissions: 16 and 20 March 2000

Date of Handing Down of Judgment : 4 August 2000

J U D G M E N T

Mr Li Ka Shing ('Li') is a household name in Hong Kong. He is Hong Kong's phenomenally successful businessman and controls a number of public companies, the best known of which are Cheung Kong (Holdings) Ltd ("Cheung Kong") and Hutchison-Whampoa Ltd. Mr Albert Chan Wai Yip ("Defendant") is also a prominent member of the Hong Kong community, being a member of the Tsuen Wan Provisional District Board,

a former member of the Legislative Council and an active member of the Democratic Party.

A subsidiary of Cheung Kong was the developer of a residential estate known as Kingswood Villa in Tin Shui Wai ("Kingswood"). From March 1997 a number of units in Maywood Court ("Maywood") of Kingswood were put on the market for presale to the public. After such sale, in late 1997 the property market went into a serious decline. In June 1998 when the completion of pre-sale units in Maywood of Kingswood was approaching, a number of purchasers could not obtain finance due to the decline of the value of their units. Some purchasers of Maywood approached the Kingswood developer or in other words Cheung Kong to discuss their difficulty. On 15 and 16 June 1998 the Maywood developer published notices in Hong Kong newspapers offering to discuss and meet with purchasers of Maywood to see if any assistance could be given to them. It was against this background that statements were made by the Defendant over a few days in June 1998 concerning Cheung Kong and these Maywood purchasers. Cheung Kong regarded these statements made by the Defendant as being defamatory of Cheung Kong. This Action was therefore brought by the Plaintiff Cheung Kong against the Defendant and extensive pleadings had been exchanged. In essence, there are alleged to be the following five defamatory statements which will be referred to respectively as the 1st, 2nd, 3rd, 4th and 5th Statement :-

Statement 1: Radio programme statement that offer by Maywood developer of 2nd mortgage at prime plus 3% for 5-8 years is like Li taking money from beggars.

Statement 2: Interview statement that Cheung Kong attempted to blacken and disparage the Maywood purchasers.

Statement 3: Press conference statement that the actions of Government and the largest property developers were to blacken the hard-pressed purchasers.

Statement 4: Demonstration Slogan statement that prime plus 3% offer of Cheung Kong was to take money from beggars and Cheung Kong was in fact taking advantage while saying it was helping.

Statement 5: Press conference statement that the actions of Government and Property developers were to blacken the hard pressed purchasers.

The defences to the five alleged Statements vary but in essence they contain some or all of the following elements:-

- (A) Statement not referable to the Plaintiff Cheung Kong;
- (B) Not alleged defamatory meaning;
- (C) Fair Comment;
- (D) Justification;
- (E) Qualified Privilege.

The Plaintiff contends that various aspects of the Defendant's pleadings are defective and therefore ought to be struck out. Application is made for the striking out of the following:-

1. Paragraph 21(4)(c) of the Defence in relation to the 3rd and 5th Statements;
2. Paragraph 25 of the Defence in relation to the 3rd and 5th Statements;
3. Paragraph 27I(e) of the Defence in relation to the 4th Statement.

The Defendant, on the other hand, applies to re-amend paragraph 25 of the Amended Defence. The attempt to strike out paragraphs 21(4)(c) and 27I(e) is really by way of skirmishes between the parties. The heart of the strike out application is the wholesale objection to Paragraph 25 of the proposed Re-Amended Defence and in particular to the eight transactions whereby it is alleged by the Defendant in justification that the Government had shown special favouritism to Li and his Cheung Kong.

The guiding principle to striking out is not in dispute and I will summarise it as the following:-

- (1) The Court should only order a pleading to be struck out in clear and obvious cases and will not do so if the defence has some chance of success or discloses some question fit to be decided by a judge or jury. *White Book* para. 18/19/6 and 10.
- (2) In defamation, a plea of justification and other substantive defences will only be struck out in a plain and obvious case, where the defendant's position is unarguable. *Gatley on Libel and Slander*, para. 27.37.
- (3) The test, when it is sought to strike out a pleading, is whether the facts there alleged are arguably capable of supporting the plea.

Aspro Travel Ltd v. Owners Abroad Group [1996] 1 W.L.R. 132 at page 140E.

- (4) The court allows amendments to be made to pleadings sought to be struck out but the amendments will however only be allowed if they are able to survive the no arguable defence test in a strike-out application. *Morgan Crucible v. Hill Samuel* [1991] Ch. 295 at 313G.
- (5) The burden of striking out is on the applicant and it is a high burden.

Paragraph 21(4)(c)

Paragraph 21(4) of the Amended Defence reads:-

“(4) the Defendant avers that

- (a) it was reported in the local newspapers on 18th June 1998 that Mr Donald Tsang, the Financial Secretary, then Acting Chief Executive, had made a public statement on about 17th June 1998 to the effect that the Government would not use public funds to subsidise those property purchasers who suffered monetary loss due to the slump in the property market by giving interest-free second mortgagees loan with a buy-back guarantee (“the Acting Chief Executive’s Statement”);
- (b) in June 1988 when the Defendant, acted on behalf of the aggrieved purchasers, had numerous contacts with the officials of the Housing Branch, he only asked the Government to provide them with low-interest second mortgages but did not ask the Government for interest-free second mortgage loans with a buy back guarantee;
- (c) in the premises, the Acting Chief Executive’s Statement was false and/or misleading in substance and in fact in relation to the Defendant and the aggrieved purchasers and was defamatory of them;”

The Plaintiff complains that paragraph 21(4)(c) is irrelevant, is embarrassing, scandalous, frivolous and vexatious in that it makes a serious allegation against the Acting Chief Executive who is not a party to the proceedings. It is also complained by the Plaintiff that it is an abuse of the process for the Defendant to try to make this case a ground for the Defendant's political campaign against the Government.

It seems to me that paragraph 21(4)(c) must not be read out of context or read alone but must be read against not only paragraphs 21(4)(a) and 21(4)(b) but also the events in June which appear in the pleadings. Paragraph 21(4)(c) logically leads on from paragraph 21(4)(a) and (b) and although it made allegation against a high official of the Government, the allegation was directed at the falsity of the Acting Chief Executive's Statement and is part of the overall case of the Defendant that the Government was on the side of the large property developers and against the small purchasers.

It is also to be noted that the relevance of what is pleaded in paragraph 21(4)(c) is not confined within the narrow limit of paragraph 21(4). In other parts of the Re-Amended Defence, there are also references to paragraph 21(4) which of course includes 21(4)(c) (see paragraph 24(a), 25 Particulars (a), 25A(a), 27Q, 27R, 27S(a)). Paragraph 21(4)(c) as part of 21(4) is relied upon by the Defendant for its various defences on fair comment, justification and qualified privilege and any striking out of paragraph 21(4)(c) will therefore affect all these defences and their related paragraphs in the pleadings.

I find no good reason why paragraph 21(4)(c) should be struck out and even if there are marginal reasons, I share the sentiment of what Kay J said in *Tomlinson v. The South Eastern Rly Co. (No. 2)* (1887) L.T. 358 at 360 “I cannot say that any part of the defence in the present case is so irrelevant that the rule ought to be applied”. Therefore I do exercise my discretion by refusing to order that paragraph 21(4)(c) of the Amended Defence be struck out.

Paragraph 25

A composite paragraph 25 of the Re-Amended Defence, by re-arranging and setting out in full the internally referred to pleadings, should read as follows:-

“Further or in the alternative the said interview or alternatively the 3rd Statements meant that:

- (a) the Hong Kong Government/high-ranking Government official or officials and the Plaintiff had been acting together to advance the material interests of the Plaintiff; and/or
- (b) the Hong Kong Government/high-ranking Government official or officials and the Plaintiff had been acting together to blacken or disparage the purchasers of various properties pre-sold by or through the Plaintiff who were not able to secure adequate mortgages to complete the purchase of their properties; or
- (c) in the alternative to (a) or (b), that there were reasonable grounds to suspect that there had been such acting together as is referred to in (a) and/or (b) above;

and were true in substance and in fact.

Particulars

- (a) The Defendant repeats the Particulars pleaded in Paragraph 8 above
- (8a) Since January 1998, the Defendant assisted those purchasers of properties who were, due to the then falling property market, unable to raise sufficient mortgage loans to complete the purchase

of their units from various property development companies in Hong Kong (“aggrieved purchasers”).

(8b) The Defendant successfully arranged a number of meetings between the aggrieved purchasers and the representatives of a number of development companies in order to help the aggrieved purchasers to resolve their difficulties.

(8c) On 8th June 1998, the Defendant arranged a meeting for those aggrieved purchasers of Maywood Court with Mr Edmund Ip Tak-chuen (葉德銓), an executive director of the Plaintiff, to meet on 11th June 1998. The date of the said meeting was re-confirmed by the Plaintiff on 10th June 1998.

(8d) On 11th June 1998, the Plaintiff unilaterally cancelled the said arranged meeting, and refused or declined to accept the Defendant’s request for another meeting with any executive director of the Plaintiff.

(8e) On or before 15th June 1998, some of the aggrieved purchasers of Maywood Court informed the Defendant saying that when they rang up the telephone hotline which the Plaintiff had established for them or attended the office of the Plaintiff to ask about the terms of a second mortgage, the Plaintiff’s representatives offered different terms for different purchasers. Some of the Plaintiff’s representatives said that the interest on the second mortgages offered by the Plaintiff would be at the rate of prime plus 2% or 3% with repayment over a period of 5 years to 8 years. Such a short repayment period would mean substantial monthly instalments and cause much economic hardship to the aggrieved purchasers.

(8f) On or about 15th June 1998, the normal interest rate charged on second mortgages by other finance institution or institutions in Hong Kong were prime plus 1% to 2% and repayment over periods ranging from 10 years to 25 years. Further, at or about that time, the Hong Kong Housing Society offered second mortgages to purchasers belonging to the Sandwich Class without interest for the first 5 years during which period the purchasers would not be required to repay any part of the loans, and starting from the 6th year, the loans under the second mortgages would be repaid by instalments over 15 years with interest at the prime rate.

(8g) If the terms of the second mortgages offered by the Plaintiff to the aggrieved purchasers of Maywood Court were that interest rates would be at prime plus 3% with repayment of principal over periods ranging from 5 years to 8 years, many aggrieved purchasers of Maywood Court would be unable to accept them.

Further, the terms on second mortgages offered by the Plaintiff as aforesaid to the aggrieved purchasers were less favourable than those offered by other finance institution or institutions and/or the Hong Kong Housing Society as pleaded above.

(8h) The discussion in the said radio programme in question contained the following statements:

1. 鄭：講番呀，另外呀陳偉業係電話旁邊。

早晨呀，陳偉業。

2. 陳：早晨早晨。

3. 鄭：係呀，陳偉業呢就嘢日呢長江呢(林：登晒報紙·啦)登晒報紙登兩段廣告。

(陳：話告我吓嘛)

第一保留法律責任，第二因為你話佢唔依個，喺賣美湖居時無依足呢個買賣樓花指引話你係錯嘅，話你通過傳媒散播消息，影響到佢，保留法律責任，無話告你，保留啫，唔使驚，究竟係你錯定係人哋錯？如果有錯就要認。

4. 陳：如果錯定啱大家攤晒啲資料出嚟，我哋隨時歡迎同長江係任何合，公開又好，閉門又好，討論呢件問題。基本上有二個嘅証據好明顯係顯示長江係錯嘅。第一，長江話佢係舊年 97 年 3 月 30 號，係當日推出全部 2200 多個單位，全部拎出嚟公開發售，但係所有買過美湖居嘅小業主，喺 97 年 3 月 30 號去揀樓嘅小業主，都好清楚指出，每一次去呢，由頭籌的頭一百籌到臨尾果幾呀個籌都好呢，每一次最多得十零廿個單位揀，小個啲呢嘅淨係比一個單位揀嘅啫。如果真係有 2200 多個單位，又喺 3 月 30 號未賣晒嘅，3 月 30 號只賣咗 700 多個單位左右，咁你無理由呢係當日有 2200 幾個單位話拎出嚟發售呢，而好多小業主淨係得幾個單位揀。

5. 鄭：換一句話呢講，陳偉業你堅持你嘅立場，你堅持你嘅睇法係正(係堅持正確嘅)，長江有喺賣美湖居嘅時候違反政府賣樓花嘅指引，此其一，不過你做咗一樣嘢，長江依家都讓一步啦，為美湖居，呢個海逸豪園小業主上會喎(林：有得傾吓)，有得傾。

6. 陳： 嘩，呢個呢個我哋歡迎佢哋比二按啦，但係二按個條件呢，最近小業主同我哋講呢，長江嘅工作人員同佢哋講呢，個二按嘅條件就係 P+3，另外呢就 5 至 8 年要還晒錢，如果你話 P+3，兩 (sic) 至 8 年要還晒錢，咪衰過財務公司？即係李嘉誠乞兒兜攞飯食，人哋已經夠慘啦，嘩你重要賺埋人哋嘅利息，另外呢，重要 5 至 8 年要還晒個二按嘅錢㗎，成過百萬嘅，數以百萬計嘅二按㗎有啲嘅，咁你哋嗰個嗰個條件係咪真係幫到啲小業主呢？真係，我真係唔敢講。(鄭：係嗎？)咁但係關於・個出售樓花嘅問題，我哋就建議政府一定要調查，確實咗果個法律責任係無呢，至好比呢個長實呢，啫・批佢哋嘅呢樓宇轉售嘅呀批准，如果唔係話嘅呢，一收到呢個長實嘅律師信就話可以收樓呢，你叫小業主收唔收樓㗎？
7. 鄭： 哦，依家海逸豪園話收到信收樓啦？
8. 陳： 海逸豪園嘅問題呢，至於樓花問題就，我哋唔清楚啦，但係美湖居呢，果個出售樓花果度，如果違反咗嘅話呢，政府係可以取消，如果政府證明佢係違反咗出售樓花嘅批准呢，政府係可以取消當年果個出售樓花嘅批准，意思即係話過去一年簽嘅合約呢可以係全部無效。
9. 鄭： 即係唔生效㗎。
- 呢個我哋都唔想，起碼有啲子彈擺喺啲小業主度有得傾。
10. 陳： 唔係，唔係想唔想㗎，大班係確定咗法律責任㗎嗎？如果，如果如果係長實係證明咗個樓花係違反咗話呢，你小業主又買咗層樓，小業主可能需要承擔日後嘅法律責任㗎，大班。(鄭：係嘛！)呢個問題未澄清，而政府未確保，(鄭：你有無幫小業主攞法律意見)，攞晒・啦，㗎我哋都同地政署講咗我哋嘅意見，但係地政署都，長實都比咗好大壓力呢個地政署呢，應該係今日或者聽日可能批准佢果個樓花嘅，出售樓宇嘅批准・啦，嗰個轉售嘅批准・啦。
11. 鄭： 咁小業主有無辦法控告政府？
12. 陳： 呢個唔知，地政署佢話佢哋，政府唔會被控告嘅，但係如果佢哋咁樣批法，令到啲小業主將來蒙受

呢個法律嘅責任同損失嘅話呢，政府同長實係唔可以推卸責任，大班，我諗你可以打電話比長實答我啲呢問題囉。

13. 鄭： 好啦，咁，多謝你陳偉業吓。

14. 陳： 好，唔該晒。

15. 鄭： 咁我地聽十點半新聞，拜拜。

(a) The Defendant repeats the Particulars pleaded in paragraph 15 above:

(15b) On the 17th June 1998, the Defendant and members of an ad hoc association of the aggrieved purchasers (including the purchasers of Maywood Court), called the Alliance of Hong Kong Aggrieved Home Purchasers (全港苦業主聯會), walked in a procession to the China Building, Central with a view to presenting a petition to the chairman of the Plaintiff, Mr Li Ka Shing, and informing the top management of the Plaintiff of their difficulties in completing their purchases of units in Maywood Court.

(15c) The Plaintiff sent a senior manager of Maywood Court, Mr Lau Kai Man, to accept the petition from the aggrieved purchasers. The aggrieved purchasers requested to see the executive director of the Plaintiff. The Plaintiff declined to make such an arrangement, thus causing dissatisfaction to the aggrieved purchasers.

(15d) On the 18th June 1998, the Plaintiff published in at least 8 local newspapers, namely, the Hong Kong Daily News (新報), the Hong Kong Economic Times (經濟日報), the Ming Pao Daily News (明報), the Oriental Daily News (東方日報), the Sing Tao Daily News (星島日報), the South China Morning Post, the Wen Wei Pao (文匯報) and the Hong Kong Economic Journal (信報) an open letter (“the said open letter”) addressed to, inter alia, those aggrieved purchasers of Maywood Court in which the Plaintiff alleged, inter alia, that they had offered to interview those aggrieved purchasers individually in order to answer or solve their individual problems and difficulties; that there was no response from those aggrieved purchasers present; that the Plaintiff’s offer of second mortgages was at the interest rate of prime plus 2% and repayment within 20 years; and that those present in the China Building had caused inconvenience to the users of the building and at one stage had attempted to force their way (衝進) into the lift lobby of the China Building.

- (15e) Prior to the 17th June 1998, the Plaintiff had not informed the aggrieved purchasers of Maywood Court of its alleged offer of second mortgages on such terms as set out in the said open letter.
- (15f) The said open letter was caused to be published by the Plaintiff concerning the Defendant, the contents of which in their ordinary, natural and true meaning and/or by way of innuendo, were defamatory of the Defendant as a representative and spokesman for the aggrieved purchasers who had petitioned the Plaintiff on 17th June 1998. The said open letter was defamatory of the Defendant in that in its natural, ordinary and true meaning and/or by way of innuendo, it referred to, inter alia, the Defendant and meant or was understood to mean that the Defendant had acted
- (i) irrationally and/or irresponsibly by leading or urging the aggrieved purchasers to force their way into the lift lobby of the China Building,
 - (ii) in disregard of law and order, thus causing inconvenience to the occupiers and users of the China Building, and
 - (iii) irrationally and/or irresponsibly by not responding to the Plaintiff's invitation to attend a meeting with the Plaintiff's representatives to discuss on the individual cases of the aggrieved purchasers.
- (15g) The behaviour and conduct of the Defendant and those aggrieved purchasers of Maywood Court on the 17th June 1998 in or outside the China Building were lawful, peaceful and orderly. The Defendant and the aggrieved purchasers strictly followed the instructions and directions given by the police officers present thereat. They did not cause any disturbance or disruption to the occupiers and users of the China Building and they never attempted to force their way into the China Building whether as alleged or at all.
- (15h) The 2nd Statements were immediately preceded by the following words:
- 「在周三逾二百名美湖居，海逸豪園及灝景灣準業主在周三往長江實業位於華人行總行請願後，長實昨天發出一份聲明指責遊行人士企圖衝進華人行電梯大堂，強調發展商深表關注小業主苦況，全港苦業主聯會則反擊有關聲明，更表示對聲明中的說法深感憤慨。
- 長實昨天刊登廣告，對周三發生的業主遊行請願事件發出一份聲明，發展商表示，該公司過去數次已邀請在場的美湖居及海逸豪園準業主即時個別商討，尋求協助解決按揭

不足的問題，可惜在場人士對此邀請並無反應，關於該集團既定的二按政策（優惠利率加二厘，還款期達二十年），在場所見有關二按利率的標語則被不正確地寫為加三厘，實屬遺憾。

聲明進一步指出，約下午一時半，在場人士曾企圖衝進華人行電梯大堂，因時值午膳時間，出入大廈寫字樓的人士眾多，唯有放下捲閘，以保大廈租戶的安全，在場人士情緒高漲，該公司可以理解，但此種表達意願的方式，已為其他與此事無關的人士造成不便，該集團對此事件的發生，深感遺憾，並向當時在華人行上班的人士及商場的租戶致歉。

長實發言人又表示，自遊行及刊登聲明後，發展商共接獲一百名美湖居及五十名海逸豪園業主聯絡，個別小業主約見發展商提供協助要求，全港苦業主聯會聯絡人兼民主黨成員陳偉業表示，發展商在業主遊行前，從來未有提及過二十年期的二按，個別業主只是從發展商不同職員口中，獲悉按揭年期，一些為三至五年，一些為七至八年，而利率由最優惠利率加二厘至三厘不等，今次發展商是在業主遊行到華人行後，才宣傳二按年期為二十年，利率為加二厘等條件。

他說，小業主周三往華人行請願，仍能保持克制，絕對沒有做出長實所言般的影響公眾秩序的行為。他」

(a) The Defendant repeats paragraph 21(4) above:

21(4)(a) it was reported in the local newspapers on 18th June 1998 that Mr Donald Tsang, the Financial Secretary, then Acting Chief Executive, had made a public statement on about 17th June 1998 to the effect that the Government would not use public funds to subsidise those property purchasers who suffered monetary loss due to the slump in the property market by giving interest-free second mortgagee loans with a buy-back guarantee (“the Acting Chief Executive’s Statement”);

21(4)(b) in June 1998 when the Defendant, acted on behalf of the aggrieved purchasers, had numerous contacts with the officials of the Housing Branch, he only asked the Government to provide them with low-interest second mortgages but did not ask the Government for interest-free second mortgage loans with a buy-back guarantee;

21(4)(c) in the premises, the Acting Chief Executive's Statement was false and/or misleading in substance and in fact in relation to the Defendant and the aggrieved purchasers and was defamatory of them;

(a) The Defendant repeats the Particulars pleaded in paragraph 24 above:

24(b) The theme of the press conference held on the 19th June 198 by the Alliance of Hong Kong Aggrieved Home Purchasers was “官商聯手 抹黑苦業主 求救無門 業主被迫集體訴訟” and a 3-page document was given to the media at the press conference.

(b) The Defendant will rely on the following incidents:

- (i) In or about June to September 1998, despite the genuine complaints against the Plaintiff in relation to its failure to comply with the terms of the Consent Scheme in relation to the sale of the units in Maywood Court, the Government decided not to take any action against the Plaintiff but to proceed to issue its “Consent to Assign” to the Plaintiff to enable it to call for completion of the sale and purchase of the said units.
- (ii) In or about November 1997, the Kowloon and Canton Railway Corporation, which was and is entirely beneficially owned by the Government, invited the Plaintiff to submit a tender to develop the site adjacent to Hung Hom Railway Station by a process known as “single-tender” which was a departure from the normal practice of the government and statutory bodies in Hong Kong by using the open tender procedure.
- (iii) In or about August 1998, the Government invited three companies, including Hutchison International Terminals Ltd. which was and is a subsidiary of Hutchison-Whampoa group and a member of the Plaintiff's group, to negotiate amongst themselves to develop jointly Container Terminal No. 9, without inviting other interested operators to join in or to bid for the right of development by way of an open tender.
- (iv) In or about March 1998, the Government accepted the tender offered by the Plaintiff to purchase a piece of land in Ma On Shan to develop a hotel at a price of HK\$200.00 per square foot, which price was unreasonably low.

- (v) In or about February 1989, the Government accepted the tender from the Plaintiff for the redevelopment of a commercial site a Garden Road which was restricted to 6 or 7 storeys only; but the Plaintiff subsequently developed a 31-storey commercial building thereon.
- (vi) In or about March 1996, the Government accepted the tender of the Hutchison-Whampoa Ltd., a member of the Plaintiff's group, to develop the River Trade Terminal in Tuen Mun even though the terms of such tender were far less favourable than those offered by another competitor.
- (vii) In or about 1996, the Government granted an exclusive right to the said Hutchison-Whampoa Ltd. to redevelop the government land at Nos. 4 and 4A Queen's Road Central and the adjacent Government Carpark Building jointly with the neighbouring land formerly occupied by the Hilton Hotel and owned by the Plaintiff.
- (viii) In or about March 1999, the Government announced its plan to grant to the Pacific Century Group (the majority shareholder of which was and is Mr Richard Li who is the youngest son of Mr Li Ka Shing) the exclusive right to develop the Hong Kong Cyberport at Telegraph Bay after entering into direct negotiations with the Pacific Century Group only without inviting other interested parties to submit proposals by way of open tender or otherwise."

It will be observed that Paragraph 25 in fact contains 5 sets of particulars, namely:-

- (1) the set of particulars under paragraph 8 ("the 8 Particulars");
- (2) the set of particulars under paragraph 15 ("the 15 Particulars");
- (3) the set of particulars under paragraph 21(4) ("the 21(4) Particulars");
- (4) the set of particulars under paragraph 24 the ("the 24(b) Particulars");
- (5) the set of particulars under paragraph 25 (b)(i), (ii), (iii), (iv), (v), (vi), (vii), (viii) ("the 8 Transactions Particulars").

At the hearing it is not disputed by the parties that the core of Paragraph 25 consists of the justification defence of the meanings of four Stings, namely that:-

Sting A: Government and the Plaintiff have been acting together to advance the interest of the Plaintiff;

Sting B: Government and the Plaintiff have been acting together to blacken or disparage the purchasers;

Sting CA: There are reasonable grounds to suspect that the Government and the Plaintiff have been acting together to advance the interest of the Plaintiff;

Sting CB: There are reasonable grounds to suspect that the Government and the Plaintiff have been acting together to blacken and disparage the purchasers.

What separates the parties is the linking up of the five Sets of Particulars, (namely the 8 Particulars, the 15 Particulars, the 21(4) Particulars, the 24(b) Particulars and the 8 Transactions Particulars) with the four Stings. The Defendant says that the five Sets of Particulars are sufficient to support one or more of the four Stings whereas the Plaintiff contends that the five Sets of Particulars are inadequate to support the four Stings.

At the hearing it was not contended by Mr Tang for the Plaintiff that the 3rd Statement is incapable of bearing any of the four Stings meanings pleaded in Paragraph 25. This implicitly acknowledged the correct fundamental approach in defamation cases that it is not the role of the Judge to determine what is the meaning of the statement alleged to be defamatory. The function of the judge is only to delimit the range of meanings of which

the words are capable of bearing and rule out meanings outside the range. It is a question of fact for the jury to hold whether the words actually bear the meanings contended for by the Defendant. *Gatley on Libel and Slander* para. 34.1-4. As was said by Purchas, LJ in *Prager v. Time Newspapers* [1988] 1 W.L.R. 77 at page 88C:-

“... a defendant was entitled to plead by way of justification in support of any defamatory meaning which the words complain of could reasonably bear..... a spectrum of meanings from the most serious to other meanings not necessarily more or less serious but different from the meaning pleaded by the plaintiff, as long as that meaning was one reasonably capable of being borne by the words of which complaint is made.”

But Paragraph 25 is important to the parties not because of the four Stings meanings but because it purports to justify the 3rd Statement by reference to the four Stings meanings and in particular by reliance on the five Sets of Particulars pleaded therein. The question is therefore to what extent the five Sets of Particulars could be said to be irrelevant to or not supporting any of the four Stings.

To test the relevance of the five Sets of Particulars, I propose to consider each of the five Sets of Particular by reference to the four Stings:-

- (1) So far as the 8 Particulars are concerned, it seems to me that Particulars (a) to (g) clearly relate only to Sting B and Sting CB but Particulars (h) of Paragraph 8 is relevant to all four Stings.
- (2) The 15 Particulars are relevant to Sting B and Sting CB and not relevant to Sting A or Sting CA.
- (3) The 21(4) Particulars under sub-paragraphs (a), (b) and (c) relate to Sting B and Sting CB as well as possibly also Sting A and Sting CA.

- (4) The 24(b) Particulars relates to only Sting B and Sting CB.
- (5) Finally in relation to the 8 Transactions Particulars, it is clear that in respect of :-
 - (i) Transaction (i) - Maywood post-breach Consent to Assign,
 - (ii) Transaction (ii) - single tender KCR land,
 - (iii) Transaction (iii)- Terminal 9 non-tender,
 - (iv) Transaction (iv) - cheap sale Ma On Shan,
 - (v) Transaction (v) - Garden Road 31 storeys for 7 storeys,
 - (vi) Transaction (vi) - not competitive River Trade Terminal,
 - (vii) Transaction (vii) - Hilton site development.

each and every one of these seven Transactions relate to Sting A and Sting CA. Mr Lee for the Defendant concedes that Transaction (viii) relating to non-tender of Hong Kong Cyberport which took place after the 3rd and 5th Statements could not be relied on for justification. Therefore by consent Transaction (viii) will be deleted from the Re-Amended Defence.

It seems to me therefore that all five Sets of the Particulars in Paragraph 25 relate in one way or another to one or more of the four Stings and therefore should not be struck out on the ground of irrelevance. The real complaint of the Plaintiff, as I understand it, is in the sufficiency of the five Sets of Particulars in support of the four Stings. As I see it, in defamation proceedings when there is a respectable plea of justification as we have here, it is not the function of the Judge to determine the extent the Particulars support the four Stings so long as the Particulars are arguably capable of supporting the plea of justification and I believe here they are.

What the Plaintiff is seeking to do by this striking out application is to say that each of the four Stings because of the allegation of “acting together” must mean an allegation of bad faith, collusion or conspiracy between Cheung Kong and the Government and that being so, the Particulars pleaded in Paragraph 25 are plainly inadequate to support such pleas in conspiracy and collusion. The four Stings pleaded are derived from the 3rd Statement which contain the crucial but well-known Hong Kong Chinese expression “官商勾結” which has shades of meaning for the jury. The “fluidity of everyday language” in the words of Litton, PJ in *Eastern Express Publisher Ltd v. Mo Man Ching* [1999] 2 HKCFAR 264 at 269H, is the prerogative of the jury and not of the judge. It is not right therefore to attribute to the said Chinese expression a conspiracy meaning and by reference to that conspiracy meaning, to suggest that the Particulars are obviously insufficient and therefore the whole Paragraph 25 justification plea should be struck out. It seems to me that the Plaintiff is demanding too much and is thereby taking away the role which ought to be properly played by the jury in a defamation case. Fundamentally with all defamation cases, it is for the jury to decide in relation to a plea of justification firstly, with their understanding of the fluidity of everyday language, what is the meaning of the statement (and in this case the 3rd Statement is capable of having a meaning within the range of the four Stings which is neither conspiracy, nor collusion, nor bad faith but nevertheless tends to lower the Plaintiff in the estimate of others) and secondly, by reference to what they found to be the true meaning of the statement as to whether the defence of justification is made out or not. The parties have cited to me a great deal of authorities and submitted elaborate arguments by dissecting Paragraph 25, its Particulars and its related pleadings in multiple ways. The Plaintiff’s side

has even referred me to much affidavit evidence in an attempt to persuade the Court that there is doubtful factual basis for the facts pleaded in the 8 Transaction Particulars. This interlocutory stage before full discovery is not the place where it is possible to say that a particular allegation is incapable of being proved. *McDonald v. Steel* [1995] 3 A.E.R. 615. Although the arguments addressed to me are of high intellectual interest, at the end of the day it seems to me that the common sense of the jury rather than the forensic skill of the advocates should determine the correctness of the defence of justification. I do not see the defence of justification so defectively pleaded in Paragraph 25 as to warrant its being struck out. I therefore decline the invitation of the Plaintiff to strike out this most important Paragraph. The Defendant should have leave to re-amend.

Paragraph 27I(e)

At the hearing the parties have agreed that in relation to this Paragraph 27I(e), only the words “and/or its solicitors” need to be deleted and on that basis there is no need to make any other order of striking out.

CONCLUSION

My conclusion on this application to strike out is that except for the deletion of the words indicated in Paragraph 27I(e) and Paragraph 25(b)(viii), the application fails and there is the corresponding order to re-amend the Defence. I make the following costs order *nisi* :-

- (1) The Defendant is to have 90% of the costs of the Summons to strike out;

- (2) In respect of the Summons to re-amend the Amended Defence, the Plaintiff is to have the usual order in relation to application to amend except in so far as it is increased by the Plaintiff's opposition to re-amend, 90% of such costs should be paid by the Plaintiff to the Defendant;
- (3) Certificate for two Counsel.

(William Waung)
Judge of the Court of First Instance,
High Court

Mr Robert Tang, SC & Mr Jat Sew Tong instructed by
Messrs Woo Kwan Lee & Lo, for the Plaintiff

Mr Martin Lee, SC, Ms Caroline Langley & Mr Po Wing Kay,
instructed by Messrs Ho Tse Wai & Partners, for the Defendant