HCA 731/2017

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 731 OF 2017

BETWEEN

KOO MING KOWN	Plaintiff
And	
THE BAPTIST CONVENTION OF HONG KONG operating as PUI CHING PRIMARY SCHOOL	Defendant

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Before: Hon Lisa Wong J in Chambers

Date of Hearing: 7 September 2017

Date of Decision: 30 October 2017

D E C I S I O N

Applications

1. There are before me 2 summonses:

(1) the plaintiff's summons dated 12 May 2017 for interlocutory and final judgment against the defendant in default of defence ("Default Judgment Summons") under Order 19 rule 7 of the Rules of the High Court (Cap 4A) ("RHC"); and

(2) the defendant's summons dated 6 September 2017 for "retrospective leave" for the filing and service of the defence that it already filed and served on the same day, which is effectively an application for an extension of time for the filing and service of the defence to 6 September 2017 ("Time Extension Summons").

Matters giving rise to the plaintiff's claim

2. Unless otherwise stated, the following facts, set out chronologically, are taken from the statement of claim ("SOC") and admitted in the defence.

3. The plaintiff is an alumnus of Pui Ching Primary School ("School") of which the defendant, a Hong Kong company limited by guarantee and a charitable institution, is the sponsoring body and operator.

4. The parties have been engaging in various litigations against each other.

5. In particular, in HCA 1339/2014 ("Action"), the plaintiff claimed against the defendant[1] for the return of HK$20 million donated by the plaintiff to the defendant on about 17 December 2007 for part of the School's redevelopment project plus interest on the grounds of misrepresentation, mistake and unjust enrichment.

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[1] The defendant and one Young Kwok Hung Clement were respectively the 1st and 2nd defendants in the Action. However, this action does not concern the latter. I will therefore omit reference to him in recounting the Action.

6. By an order made by consent by Master Chow in the Action on 3 December 2015, the defendant was ordered to file and serve further and better particulars of its defence and to produce certain specified documents for the plaintiff's inspection within 14 days ("3.12.2015 Order").

7. The defendant failed to comply with the 3.12.2015 Order. In consequence, by an order made by consent in the Action on 30 December 2015, Master Ho ordered that unless the defendant filed and served the particulars of pleading and produced the documents ordered under the 3.12.2015 Order by 4 pm on 13 January 2016, its defence in the Action should be struck out and the plaintiff should be at liberty to apply for judgment to be entered against the defendant together with interest and costs ("Unless Order").

8. Although the defendant filed and served particulars of the defence in the Action on 13 January 2016, the plaintiff took the view that they did not comply with the Unless Order and applied by a summons issued on 5 February 2016 for the entry of final judgment against the defendant.

9. The plaintiff's said summons for judgment came before Deputy High Court Judge Seagroatt on 13 July 2016. At that hearing ("13.7.2016 Hearing"), the defendant, then represented by Lui & Law ("L&L"), agreed to an order in terms of the plaintiff's summons and final judgment ("Judgment") was accordingly entered against the defendant for HK$20 million ("Judgment Debt Principal") to be paid forthwith plus interest thereon at judgment rate.

10. On 31 August 2016, the plaintiff served on the defendant a statutory demand ("Statutory Demand") in respect of the Judgment Debt Principal and up-to-date interest thereon which the plaintiff reckoned to add up to HK$14,192,572.15. Paragraph 5 of the Statutory Demand warned the defendant that the plaintiff would proceed under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) for the winding up of the defendant without further notice in the event of non-compliance by the defendant.

11. Against this background, on about 6 September 2016, the defendant published to church supervisors, teachers and pastors of various churches of the defendant a circular containing the following words ("1st Statement"):

> "...
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> 是次被判敗訴主要的原因，是程序敗訴而非事實敗訴，意思是並非因為培正小學在籌款興建大樓之事上做錯了甚麼事情，法院亦未有作出任何事實上的裁定。在訟案中，原告方要求我們提供大量資料，其中包括部份根本不存在的資料，例如按過去我們的會議常規，通常以舉手大多數贊成通過議案，但對方要求我們提交表決議案時，是以幾票對幾票通過，與及誰投贊成票，誰投反對票。基於以上原因，控方指我方未能提供足夠資料，因而被判敗訴。現時我方正在尋求法律意見，再決定下一步行動。
>
> 唯我方亦須先退還該筆捐款連利息，超過 2000 萬元，這對培正小學來說當然會帶來沉重的經濟負擔，甚至可能要考慮發動募捐以舒緩壓力。但作為辦學團體，浸聯會及培正小學管理委員會，不會將壓力轉嫁到學生及家長的身上，雖然我們正在面對困難的日子，但仍然會竭力為學生提供最優質的教學質量及良好的學習環境，讓培正小學不但保持一貫水平，更望可以不斷進步。
>
> 現時，顧明均先生仍在不同議題上與浸聯會作出多翻糾纏，故懇請各堂會為浸聯會及培正小學禱告，亦更積極給予鼓勵與支持，讓我們可以走過這艱難日子，見證主恩典的豐厚。
>
> ..."

12. The 21 days allowed for payment by the defendant under the Statutory Demand expired on 21 September 2016, on which date the defendant paid up the Judgment Debt Principal.

13. Following the payment of the Judgment Debt Principal, on 13 October 2016, the plaintiff served on the defendant a revised statutory demand ("Revised Statutory Demand") in respect of interest calculated by him up to and including 21 September 2016 in the sum of HK$14,284,627. Paragraph 6 of the Revised Statutory Demand warned the defendant that the plaintiff would proceed to wind up the defendant without further notice in the event of non-compliance by the defendant.

14. The 21 days allowed for payment by the defendant under the Revised Statutory Demand expired on 3 November 2016. On 4 and 9 November 2016, the plaintiff presented, and served on the defendant, a winding up petition against the defendant under HCCW 386/2016 ("Petition").

15. On 14 November 2016, L&L sent to the plaintiff's solicitors in the Action and the Petition, Ince & Co ("Ince"), a cheque for HK$306,011 as payment of interest under the Judgment from 14 July 2016 to 21 September 2016.

16. On around the same date, the defendant also published to members of the staff of the defendant and the School and other related and/or associated organisations of the defendant and/or the School a statement entitled "浸聯會就顧明均入稟申請浸聯會清盤一事之聲明" containing the following words ("2nd Statement"):

"浸聯會就顧明均入稟申請
浸聯會清盤一事之聲明

1. 本聯會已向顧明均先生退還 2,000 萬元捐款。
2. 連帶的利息費用，法庭判決由雙方自行協議。
3. 律師及會計師的計算下，浸聯會願意支付 30 多萬的利息，惟顧先生不願商討，堅持 1,400 萬高額利息賠償。
4. 顧在沒事先通知下入稟法院申請本聯會清盤，意在製造恐慌。
5. 浸聯會代表律師已於 11 月 3 日向法庭申請擱置追討款項，聯會亦會與律師全力處理清盤案件。
6. 律師表示堂會在浸聯會托管的資產，包括物業及現金皆不會受到任何影響。"

17. By a letter dated 18 November 2016 from Ince to L& L, the plaintiff returned the said cheque to the defendant on the ground that L&L's letter dated 14 November 2016 did not make clear whether the payment of HK$306,011 was intended to be an offer / proposal for settlement, or part payment, of the plaintiff's claim for interest totalling HK$14,284,627. Paragraph 21 of the SOC, which pleads the defendant's lack of response to Ince's 18 November 2016 letter and failure to clarify its stance in L&L's 14 November 2016 letter, is denied in paragraph 8 of the defence. The defendant has however not set up any positive case in respect of Ince's letter of 18 November 2016.

18. On around 29 December 2016, the defendant published to the publishers, reporters and editors of various local newspapers a Chinese press release containing the following words ("3rd Statement"):

"無理清盤呈請癱瘓香港浸信會聯會運作
浸聯會籲相關人士撤銷清盤

早前，培正小學顧明均先生的官司結束，培正小學已向顧明均先生全數退還 2,000 萬元捐款，並願意向顧先生支付 30 多萬的利息費用，但顧明均先生堅持索取 1,400 萬的無理高額利息賠償，浸聯會並不同意此利息計算方法並願意與對方繼續商討，惟對方拒絕[對]話之外，更在明知浸聯會有足夠資產情況下突然入稟法院，申請浸聯會清盤。

浸聯會與代表律師已馬上向法院申請撤銷該清盤案件，惟法院處理需時。銀行亦因應清盤申請，結果在 12 月 19 日自動凍結浸聯會的帳戶，一度嚴重影響甚至癱瘓了浸聯會及屬下教會、幼稚園、自修室、社福組織等機構的日常運作，各機構無法維持正常[業]務，妨礙浸聯會發放薪金及津貼予同工屬下機構，影響過萬名服務受眾外，在各單位任職的同工、宣教士、教職員學生亦無辜受害。

一年一度的聖誕節應該普天同慶，浸聯會上下卻因他人濫用司法程序而徒添不必要的煩惱憂心。

最終經過浸聯會與代表律師的艱苦努力下，法庭終於在 12 月 28 日下午頒令，正式解除銀行對浸聯會帳戶的凍結。浸聯會預計銀行帳戶將於 12 月 30 日（星期五）正式解凍，屆時浸聯會屬下機構的所有服務運作亦會馬上回復正常。

在過去數年，浸聯會面對種種衝擊，全賴各位同工緊守崗位，克盡己任，令浸聯會得以團結一心渡過難關。然而，有關人士一而再，再而三的無理入稟，實屬刻意針對及濫用司法程序，最終幾乎癱瘓浸聯會上下運作，同工、教職員與學生首當其衝，受到無辜牽連。幸蒙主佑，並得浸聯會上下齊心，以及法律團隊的努力，才得以化解危機。

為免同類事件再次發生，以及維護浸聯會上下之尊嚴莘莘學子的學習環境，浸聯會在此呼籲相關人士主動撤回清盤呈請，並停止一切有關浸聯會與培正的不利行動及言論。”

The plaintiff's claim

19. The subject matters of this action are the 1st, 2nd and 3rd Statements ("Statements" collectively), which the plaintiff considers to be defamatory of him. It is further his case that they contained statements about his conduct in the Action and the Petition that are false and were published by the defendant with malice. The plaintiff raises 2 causes of action: libel and malicious falsehood. He claims damages including aggravated and/or exemplary damages, a final injunction restraining the further publication of the Statements and an apology.

Procedural history of this action

20. According to the affirmation of Ho Man Kei Keith filed on 12 May 2017 in support of the Default Judgment Summons, the writ of summons indorsed with the SOC together with the form for acknowledgment of service was left at the defendant's registered office on 28 March 2017 by a clerk of Wilkinson & Grist ("W&G"), solicitors for the plaintiff in this action, pursuant to s 827 of the Companies Ordinance (Cap 622).

21. The writ of summons was received by the receptionist of the defendant who impressed the defendant's chop on the covering letter for service with a handwritten date of 28 March 2017. Thus, the writ of summons was actually served on the defendant on 28 March 2017.

22. Pursuant to Order 12 rule 5(a), the time limit for acknowledging service of the writ by the defendant is 14 days after service of the same (including the day of service) which, in this case, expired on 10 April 2017.

23. However, the defendant did not file the acknowledgement of service (giving notice of its intention to defend) until 26 April 2017, which it did without first obtaining the plaintiff's consent or applying to the court for an extension of time.

24. Under Order 12 rule 6(2), a defendant who acknowledges service after the time limit prescribed by Order 12 rule 5 shall not be entitled to serve a defence or do any other act later than if he had acknowledged service within that time. Under Order 18 rule 2(1), a

defendant who gives notice of intention to defend an action must, unless the court gives leave to the contrary, serve a defence on every other party to the action who may be affected thereby before the expiration of 28 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him, whichever is later. The defendant therefore had 28 days from 11 April 2017 to file its defence, which expired on 8 May 2017.

25. On 9 May 2017, the plaintiff served notice of intention to enter default judgment on L&L, solicitors who filed the acknowledgment of service on behalf of the defendant in this action, pursuant to Order 19 rule 8A.

26. Despite the defendant's indication of its intention to defend in the acknowledgment of service and the plaintiff's notice under Order 19 rule 8A that he would insist on the defendant's compliance with the time limit laid down by the RHC for the defence, the defendant did not file any defence or apply for an extension of time to do so. On 12 May 2017, the plaintiff took out the Default Judgment Summons. Such summons and Mr Ho's said affirmation in support were served upon L&L on the same day.

27. The Default Judgment Summons was set down for hearing on 7 September 2017. On 4 September 2017, Mr Jason Pow SC and Mr Herbert Leung, counsel for the plaintiff, lodged a 26 page skeleton argument supported by 22 authorities, addressing mainly the issues whether Hong Kong courts have jurisdiction in equity to make an order compelling a defendant in a defamation suit to apologise and/or publish a

corrective statement and, if so, whether this is a proper case for the court to exercise such jurisdiction in favour of the plaintiff against the defendant.

28. In the meantime, **nothing** was heard from the defendant. There was no application for an extension of time for the filing and service of the defence. There was just **complete silence** on the defence side. It was not until about 4 pm on 6 September 2017 (i.e. the day before the hearing of the Default Judgment Summons) that the defendant filed with the court and served on the plaintiff's solicitors a defence (without first obtaining the plaintiff's consent or leave of the court) and the Time Extension Summons. By then, the defendant had been **121 days** out of time!

29. On 7 September 2017, at 9:05 am, the court received by fax a 6 page skeleton argument for the defendant by Mr Bosco Cheng who was instructed late in the evening on 6 September 2017.

30. The Time Extension Summons is not supported by any affidavit giving the reasons for the failure to file and serve the defence in time. However, Mr Cheng seeks to explain in paragraph 8(2)(b) of his skeleton argument and in his oral submissions that the defendant has been represented by 2 firms of solicitors in various litigations against the plaintiff namely, L&L and P T Yeung & Tang; that there was a change of the board of directors of the defendant in May 2017; that the defendant's directors disagreed among themselves as to which firm of solicitors the defendant should retain for the defence of this action; that some preferred to continue to instruct L&L after they filed and served the acknowledgment of service while some were in favour of switching to the other firm; and

that the issue was not resolved until 5 September 2017 whereupon L&L took instructions from the defendant and prepared the defence by 6 September 2017.

Approach

31. In opposition to the Default Judgment Summons, Mr Cheng refers to and relies on *Hong Kong Civil Procedure 2017*, Volume 1, paragraph 19/7/4:[2]

> "A defence served after expiration of the prescribed time but before judgment has been given cannot be disregarded, and will generally prevent the plaintiff from entering judgment, even though it is not served until after the plaintiff has served his summons or notice of motion for judgment under this rule, but the defendant may be ordered to pay the costs occasioned by his delay (*Gill v. Woodfin* (1884) 25 Ch.D. 707, CA; *Gibbings v. Strong* (1884) 26 Ch.D. 66, CA; *cf. Graves v. Terry* (1882) 9 Q.B.D. 170). In such a case, the court will have regard to the contents of the defence served out of time, and deal with the case in such a manner that justice can be done."

32. As stated above, the defendant filed and served a defence out of time just the day before the hearing of the Default Judgment Summons without first obtaining the plaintiff's consent or the court's leave. By citing the above quoted passage, I do not understand Mr Cheng to be contending that a defence so filed and served would automatically disable the Default Judgment Summons. Rather, by issuing the Time Extension Summons, the defendant acknowledges that it still requires the court's leave to file and serve the defence out of time. Otherwise, a defendant who flouts the requirement for the opposite party's consent or the court's leave before filing and serving a defence out of time in face of an application for default judgment would have been put in a more advantageous position than one abiding by such requirement. I will therefore treat the defendant as if it

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[2] Same paragraph number in *Hong Kong Civil Procedure 2018*, Volume 1.

had just taken out a cross application for the filing of a defence out of time and had, in support, placed before the court a draft defence.

33. It is unfortunately not uncommon for the court to be presented at the same time with an application by the plaintiff for default judgment and a cross application by the defendant for the filing of a defence out of time.

34. As to what the court should do in such a situation, I start with the decision of Ma J (as he then was) in *Schindler Lifts (Hong Kong) Ltd v Ocean Joy Investment Ltd* [2002] 1 HKLRD 279. In that case, the defendant failed to serve its defence within the prescribed time limit. The plaintiff served a 2 day notice under Order 19 rule 8A. The defendant made an application for an extension of time which was fixed to be heard on a date after the expiry of the 2 day notice served by the plaintiff. Before the defendant's time summons could be heard, the plaintiff applied to enter default judgment before a Master. The Master adjourned the plaintiff's application for default judgment so that it could be heard at the same time as the defendant's time summons. At the adjourned hearing, Ma J said at [17]-[19]:

> "17. ... The object of the Rules, it has often been said, is to enable the true controversy between the parties to be adjudicated upon efficiently, expeditiously and justly. Litigation and the tactics associated with it are sometimes treated by parties as a game or a series of strategic manuoeuvres. As far as the court is concerned, however, this is not the function of the Rules. Where a plaintiff enforces his strict legal rights, such as in the present case, by insisting that the defendant complies with the timetable laid down for the serving of the defence, tactics aside (and I stress I make no criticism of the plaintiff in the present case), as far as the court is concerned, this is indicative that the plaintiff intends, itself, to prosecute the action efficiently and expeditiously and this will be borne in mind when the court oversees the future progress of the action.

> 18. In the present case, Master Cannon adjourned the plaintiff's application for default judgment, to be heard at the same time as the defendant's application for an extension of time to serve its defence. Where there is an actual hearing of an application for default judgment, it is perfectly legitimate for the court to adjourn the matter, to be heard at the same time as an application for extension of time. This is a matter of discretion and whether the court will do so will, of course, depend on the prevailing circumstances. A defendant must not assume this will always be the case.
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> 19. Thus, it is logical to consider first, the application for extension of time, because if an extension is given, the application for default judgment falls away. On the other hand, if the application for default judgment were first to be dealt with and then granted, the defendant would have to set aside this judgment, in accordance with the usual principles, before an extension of time could be considered. This would be potentially time-consuming and inefficient."

Ma J extended time for the defendant on the grounds that it was the first application for time by the defendant; that the defendant had acted expeditiously after receipt of the notice under Order 19 rule 8A; and that no prejudice was caused to the plaintiff by the extension of time. His Lordship did not consider the merits of the case because he apparently did not have before him a draft defence or evidence as to the proposed ground(s) of defence.

35. Where the court is provided with a draft defence (or an affidavit disclosing matters supporting a ground of defence) or where, as in this case, a defence has somehow been filed out of time and without the plaintiff's consent or the court's leave before the hearing, the court should have regard to the merits of the defence or draft or proposed defence in dealing with the application for default judgment and the cross-application for extension of time. See *California Insurance Company Limited v Choung Suk Wah*, HCA 172/2002, unreported, 19 September 2002, *per* Deputy High Court Judge A Cheung (as he then was) at [20], followed in *Lee Leung Nang v Karen Lee* [2007] 3 HKLRD 615, *per* Johnson Lam J (as he then was) at [2].

36. The rationale is obvious. A default judgment being granted without consideration of merits, even obtained regularly, is liable to be set aside on demonstration of a defence on the merits. It therefore makes sense for the court to have regard to the material before it that goes to merits. In *Lee Leung Nang v Karen Lee*, Johnson Lam J gave judgment on the plaintiff's claim for declaratory relief as to his own directorship as he did not see in the defendant's evidence in support of the summons for time to file the defence and the draft defence exhibited thereto any material disclosing an arguable defence to such claim. His Lordship, however, considered the defence advanced to the plaintiff's claim regarding the 1st to 3rd defendants' appointment as directors to be at least arguable and gave leave to the defendants to file and serve a defence regarding such claim.

Parties' positions on merits at the hearing

37. Mr Cheng deals with merits in one sub-paragraph (i.e. paragraph 8(1)) of his skeleton argument as follows:

> "The Defence filed by the Defendant has disclosed arguable defence, rather than just bare denial, to the [Statements]:
> (a) Regarding the 1st [Statement], the Defendant has pleaded its case in paragraphs 12, 13 and 18 of the Defence; and
> (b) Regarding the 2nd and 3rd [Statements], the Defendant has pleaded its case in paragraphs 30 and 32 of the Defence.
> (c) After all, so long as the defence as pleaded in the Defence is not completely hopeless or without any reasonable ground, the Defendant should not be deprived of adjudication on the merits due to a procedural default unless there is prejudice to the other party which cannot be compensated by costs."

38. The defence contains 43 paragraphs pleading to the SOC paragraph by paragraph. I believe it is fair to say that all the positive averments in the defence (notably in paragraphs 4, 13, 18 and 32 thereof) are pleaded expressly as responses to paragraphs of the SOC going to the

claim based on malicious falsehood. Contrary to paragraph 8(1)(a) of Mr Cheng's skeleton argument, paragraphs 13 and 18 of the defence plead to paragraphs 25.1 and 25.8 of the SOC which concern malicious falsehood arising from the 1st Statement. And contrary to paragraph 8(1)(b) of Mr Cheng's skeleton argument, paragraph 32 of the defence plead to paragraphs 29.5 and 29.8 of the SOC which concern malicious falsehood arising from the 2nd Statement.

39. Insofar as libel is concerned, the defence is on its face consisting of just admissions and non-admissions/denials.

40. More particularly, the defendant has admitted the publication of the Statements and their reference to the plaintiff as follows:

	Paragraph of SOC pleading, and paragraph of defence admitting, publication	Paragraph of SOC pleading, and paragraph of defence admitting, reference to the plaintiff
1st Statement	SOC paragraph 22 / defence paragraph 9	SOC paragraph 23.1 / defence paragraph 10
2nd Statement	SOC paragraph 26 / defence paragraph 29	SOC paragraph 27 / defence paragraph 29
3rd Statement	SOC paragraph 30 / defence paragraph 34	SOC paragraph 31.1 / defence paragraph 35

41. As for the defamatory (ordinary and natural) meanings attributed by the plaintiff to the Statements (in SOC paragraphs 24, 28 and 32), the defendant does not admit the same and pleads that it "will rely on the plain wordings" of the Statements. See paragraphs 12, 30 and 37 of the defence. The defendant has, however, not put forward any meanings of the "plain wordings" of the Statements that are different from the ordinary and natural meanings contended for by the plaintiff in the SOC.

42. Nor has the defendant expressly raised any of the established substantive defences to libel, such as justification, in respect of any of the Statements.

43. Mr Pow SC accepts that the court has to deal with the Time Extension Summons first. Counsel further accepts that the court should have regard to the defence in determining the 2 summonses. And having reviewed the defence, Mr Pow SC indicates that the plaintiff would proceed with the Default Judgment Summons only on the cause of action in libel, to which the defendant has *prima facie* not raised any arguable defence. In view of the state of the defence as analysed in paragraphs 38 to 42 above, this is an understandable assessment or position.

44. In other words, the plaintiff is prepared to let the defence relating to malicious falsehood stand. The plaintiff is also leaving the adjudication of his assertions of falsity and malice insofar as they are made also in support of his claim for aggravated and/or exemplary damages for libel[3] to the stage of assessment of damages.

45. On this basis, Mr Pow SC takes me through the SOC as it relates to libel and those parts of the defence pleading thereto with a view to showing that the defendant has not raised any arguable defence to libel.

46. However, much to the surprise of both the plaintiff and the court, after Mr Pow SC has completed his submission on the Default Judgment Summons on the libel claim, notwithstanding the absence of any

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[3] For which it is necessary to plead and prove that the defendant published the words complained of knowing they were false, or recklessly as to their truth or falsity, having calculated that the benefit to him would outweigh any compensation payable to the claimant.

express pleading of justification or fair comment, Mr Cheng's submission in court seeks to construct a case of justification and fair comment by deploying paragraphs of the defence pleaded in answer to malicious falsehood.

47. Such submission immediately gives rise to 2 concerns.

48. First, the defence of fair comment only applies to expressions of opinion, not to defamatory allegations of fact. The contents of the Statements are factual in nature. They do not contain any expression of opinion. The defence of fair comment is therefore patently inapt in any event.

49. Second, Order 82 rule 3(2) provides:

> "Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."

Focusing on justification, it would be apparent from what I have already said in paragraphs 38 to 42 above that the defence, as presently pleaded, does not identify which of the words complained of the defendant alleges are statements of fact or provide the facts or matters the defendant relies on in support of the allegation that the words are true. The defendant's breach of this rule means that Mr Pow SC had no inkling until Mr Cheng's submission in court that the defendant would seek to justify the Statements, not to mention how it would do so (though this does not prevent counsel from doing his best to assist the court).

50. I strongly disapprove of the way in which the defendant raises justification. Mr Cheng himself describes the defence as being badly drafted. However, it does not mean that the court can or should ignore the proposed defence of justification. A defendant opposing an application for default judgment and seeking time to file and serve a defence out of time or applying to set aside a default judgment may demonstrate a meritorious defence by affidavit, which may or may not include a draft defence. If justification is shown to be arguable, the defendant may apply for leave to amend the defence.

51. The question raised by Mr Cheng's submission in court is whether it is arguable that the matters pleaded by the defendant to refute malicious falsehood, as identified by Mr Cheng's oral submission, also prove the Statements to be true in substance and in fact. In this regard, Mr Pow SC has pleaded multiple defamatory (natural and ordinary) meanings in respect of each of the Statements. Mr Cheng accepts that the plaintiff is entitled to default judgment if any one such meaning is not arguably justified.

52. On this note, I turn to the questions whether each of the Statements is defamatory of the plaintiff and, if so, whether the defendant has, as developed by Mr Cheng's submission in court, shown that it has an arguable defence of justification.

Evidence

53. While I must consider the plaintiff's entitlement to default judgment with reference only to the SOC without looking at any evidence

(see RHC Order 19 rule 7(1)), with regard to the issue of justification, I can and should look at evidence, if available, particularly in assessing whether the matters relied upon by the defendant in proof of justification are credible or sustainable.

54. In this regard, although the defendant has chosen not to adduce any affidavit evidence, the plaintiff has placed before the court:

(1) the transcript of the 13.7.2016 Hearing; and

(2) the transcript of another hearing in the Action before Deputy High Court Judge Seagroatt on 2 June 2017 ("2.6.2017 Hearing") at which, upon the plaintiff's application by summons dated 17 January 2017 under Order 20 rule 11 (i.e. the slip rule), paragraph 6 of the Judgment was amended to spell out the defendant's liability to pay the plaintiff pre-judgment interest on the Judgment Debt Principal at the rate of 1% per annum above the prime rate from 17 December 2007 to 13 July 2016.

55. I have been informed by counsel for the plaintiff that the total amount of pre and post-judgment interest payable by the defendant on the Judgment Debt Principal adds up to HK$10,687,195.90.

56. It is also pertinent to note that the defendant was further ordered by High Court Judge Seagroatt to pay the plaintiff's costs of the amendment application on essentially the basis that the defendant should have agreed to the amendment. The Deputy Judge said at pages 2R-3B of the transcript of the 2.6.2017 Hearing:

> "I am informed, and [Mr] Cheng doesn't disagree with this, that efforts were made before the issue of the summons to persuade the defendant to do what they

ought to have done, which was to agree that there should have been a clear provision for simple interest, or interest, as the term is, upon the judgment sum, from that date in 2007, up to the date of judgment, and thereafter, automatically, interest would follow upon the judgment sum from that date, that being 14 July 2016."

1st Statement

57. I have already set out the 1st Statement in paragraph 11 above. It is the plaintiff's case, as pleaded in paragraph 24 of the SOC, that the 1st Statement in its ordinary and natural meaning meant and was understood to mean that:

(1) The plaintiff won the Action by reason of procedural manoeuvre and/or technicality and not because his case has merits.

(2) Alternatively, despite winning, the plaintiff's factual assertions in the Action were not true.

(3) The plaintiff has persistently been harassing a charitable and/or educational and/or religious organisation.

(4) The plaintiff's harassing conduct caused serious financial hardship to a charitable and/or educational and/or religious organisation.

(5) The plaintiff is an unreasonable, vexatiously litigious and uncharitable person.

58. I have reviewed the 1st Statement and agree with the plaintiff that it conveyed these meanings, the first and second ones directly and the others inferentially.

59. In justification of the words "是次被判敗訴主要的原因，是程序敗訴而非事實敗訴，意思是並非因為培正小學在籌款興建大樓

之事上做錯了甚麼事情，法院亦未有作出任何事實上的裁定" in the first paragraph of the 1st Statement, Mr Cheng refers to and relies on paragraph 13.1 of the defence which pleads that no trial has taken place, and that there was no factual finding by the court, in the Action.

60. Further, in justification of the remaining words in the first paragraph "在訟案中，原告方要求我們提供大量資料，其中包括部份根本不存在的資料，例如按過去我們的會議常規，通常以舉手大多數贊成通過議案，但對方要求我們提交表決議案時，是以幾票對幾票通過，與及誰投贊成票，誰投反對票。基於以上原因，控方指我方未能提供足夠資料，因而被判敗訴", Mr Cheng refers to and relies on paragraph 18 of the defence which pleads the plaintiff's application in the Action for further and better particulars of the names and identities of the individuals and/or bodies of, *inter alia*, the defendant and/or the School that had allegedly made the decision to redevelop the then School Hall into the New Education Building and of the circumstances and occasions such individuals and/or bodies so decided.

61. It appears to me that the plaintiff derives the first and second meanings from the first paragraph of the 1st Statement. The matters pleaded in paragraphs 13.1 and 18 of the defence go to the point that the plaintiff obtained the Judgment in the Action following the procedural default by the defendant. However, as I see it, they are not sufficient to justify the further suggestions that the plaintiff's case in the Action had no merits or that the plaintiff's factual assertions in the Action were not true (conveyed by the words "意思是並非因為培正小學在籌款興建大樓之事上做錯了甚麼事情").

62. Indeed, any such suggestions are not sustainable. Notwithstanding the non-admission in paragraph 23 of the defence to paragraph 25.15 of the SOC, pages 2T-3H and 4H-I of the transcript of the 13.7.2016 Hearing clearly record the agreement by counsel then appearing for the defendant (not Mr Cheng) with the submission by counsel appearing for the plaintiff that all the pleas in the statement of claim in the Action are deemed to have been admitted by the defendant as a result of the striking out of the defence. This submission was made to justify departure from the rule of practice that the court does not generally allow declaratory relief to be granted by consent without a trial. It was accepted by the Deputy Judge who declared in paragraph 1 of the Judgment that the defendant held the plaintiff's gift of HK$20 million on constructive trust for the plaintiff.

63. This is sufficient to ground default judgment for libel in favour of the plaintiff in respect of the 1st Statement. For the sake of completeness, in justification of the words "唯我方亦須先退還該筆捐款連利息，超過 2000 萬元，這對培正小學來說當然會帶來沉重的經濟負擔，甚至可能要考慮發動募捐以舒緩壓力" in the second paragraph of the 1st Statement, Mr Cheng refers to and relies on paragraph 13.3 of the defence which simply pleads that the return of the Judgment Debt Principal (HK$20 million) had not been contemplated by the defendant in planning the budget of the School prior to the Action and has thereby caused financial hardship to the School.

64. However, the sting of this paragraph is that the plaintiff's harassing conduct caused serious financial hardship to the School (i.e. the fourth meaning contended by the plaintiff). The defendant's oversight in

budgeting for the return of the Judgment Debt Principal with interest is neither here nor there. The Judgment resulted from the Action by the plaintiff against the defendant. The defendant was ordered by the court to return the monies. The Action cannot possibly be regarded as harassment or otherwise wrong.

65. In any event, I note that, to show the falsity of the allegations that the plaintiff's harassing conduct caused serious financial hardship to the School and that the School has been placed under financial hardship for having to return the Judgment Debt principal with interest, paragraph 25.17 of the SOC pleads (1) that according to the audited financial statements subsequently disclosed by the defendant, the School had current assets worth HK$134,933,963.87 as at 31 August 2015 (and the defendant had current assets worth HK$59,265,705.73 as at 31 December 2015); (2) that the Judgment required the defendant, not the School, to repay the Judgment Debt Principal with interest; and (3) that no serious financial hardship could have been caused to the School by reason of the Judgment. Indeed, the information disclosed by the financial statements disclosed by the defendant is admitted in paragraph 25 of the defence. In such circumstances, I find the suggestion that the Action and the Judgment caused financial hardship to the School to be unarguable.

66. Lastly, in justification of the words "現時，顧明均先生仍在不同議題上與浸聯會作出多翻糾纏" in the last paragraph of the 1st Statement, Mr Cheng refers to and relies on paragraph 4 of the defence which:

(1) admits paragraph 3 of the SOC to the extent that it pleads that, apart from the Action and the Petition, the plaintiff and the

defendant have been engaging in the following litigations against each other since at least 2014:

(a) HCA 1481/2014 in which the plaintiff sues the defendant (as the 1st defendant therein) for fraudulent misrepresentation, non-disclosure, breach of contract and/or estoppel by convention regarding the unauthorised use of the name and insignia of Pui Chung by the defendant, which action is still pending;

(b) HCA 1619/2014 in which the plaintiff sues the defendant (as the 3rd defendant therein) for passing off, defamation and malicious falsehood regarding the publication of false and/or misleading statements in fundraising pamphlet by Pui Ching Academy; and

(2) further avers that the plaintiff has commenced the following litigations on the matter of the doctorial degree of the supervisor of the School, Mr Chan Chi Mong Hopkins ("Mr Chan"):

(a) HCA 2333/2016 in which the plaintiff sued Pacific Online Limited, a Hong Kong listed company, for a declaration that Mr Chan is not a fit and proper person to act as its independent non-executive director, which action was struck out on 24 February 2017;

(b) HCA 2334/2016 in which the plaintiff sued Mr Eddie Ng Hak-kim, the then Secretary of Education, for a declaration that Mr Chan is not a fit and proper person to act as the supervisor of the School, which action was struck out on 22 June 2017;

(c) HCA 2335/2016 in which the plaintiff sued Talent Property Group Limited, a Hong Kong listed company, for a declaration that Mr Chan is not a fit and proper person to act as its independent non-executive director, which action was struck out on 18 August 2017;

(d) HCA 2336/2016 in which the plaintiff sued Mrs Carrie Lam Cheng Yuet-ngor, the then Chief Secretary of Administration, for a declaration that Mr Chan is not a fit and proper person to be appointed as a Justice of Peace, which action was struck out on 22 June 2017;

(e) HCA 2337/2016 in which the plaintiff sued Reverend Mok Kong Ting, the defendant's Chairman, Reverend Lam Sau Kwong, the defendant's General Secretary, Mr Chan and the defendant for a declaration that Mr Chan is not a fit and proper person to act as the supervisor of the School; and

(f) HCA 2338/2016 in which the plaintiff sued the Securities and Futures Commission for a declaration that Mr Chan is not a fit and proper person to be appointed as an independent non-executive director by the said Pacific Online Limited and Talent Property Group Limited, which action was struck out on 21 July 2017.

67. It appears to me that the third and fifth meanings of the 1st Statement pleaded by the plaintiff are derived from the words "現時，顧明均先生仍在不同議題上與浸聯會作出多翻糾纏". I have given serious attention to Mr Pow SC's observations that the proceedings

mentioned in paragraph 4.2 of the defence were taken by the plaintiff against parties other than the defendant (with the exception of HCA 2337/2016 to which the defendant is joined as a defendant) and that the fact that those proceedings were struck off does not necessarily mean that they were an abuse of process which would depend on the ground upon which the orders for striking out were made. However, given the pendency of HCA 1481/2014, HCA 1619/2014 and HCA 2337/2016 against the defendant and that the defendant's burden at this stage is not to prove justification, I find on balance the proposed defence of justification to be arguable insofar as the third and fifth meanings of the 1st Statement are concerned.

2nd Statement

68. I have already set out the 2nd Statement in paragraph 16 above. It is the plaintiff's case, as pleaded in paragraph 28 of the SOC, that the 2nd Statement in its ordinary and natural meaning meant and was understood to mean that:

(1) Despite the court's order obliging the plaintiff to negotiate with the defendant regarding the amount of interest that should be repaid to him, the plaintiff unreasonably refused to engage in such negotiation.

(2) The plaintiff unreasonably demanded for an exorbitant amount of interest in the sum of HK$14 million.

(3) The plaintiff acted unreasonably and/or unjustifiably in applying for the winding-up of the defendant without giving prior notice and/or warning to the defendant.

(4) The plaintiff applied for the winding-up of the defendant *mala fide* with the motive of generating fears and chaos.

(5) Alternatively, the plaintiff brought a wholly unmeritorious application for winding up with the view to harassing the defendant.

(6) The plaintiff deliberately abused the court's process.

(7) The plaintiff is a despicable, vexatiously litigious, uncharitable, malicious and greedy person.

69. I have reviewed the 2nd Statement and agree that paragraphs 2 to 4 thereof conveyed these meanings.

70. In justification of the words "連帶的利息費用，法庭判決由雙方自行協議" (paragraph 2) and "律師及會計師的計算下，浸聯會願意支付 30 多萬的利息，惟顧先生不願商討，堅持 1,400 萬高額利息賠償" (paragraph 3), Mr Cheng refers to and relies on paragraph 32 of the defence which avers that:

(1) the Judgment made no provision for pre-judgment interest on the Judgment Debt Principal;

(2) neither the plaintiff nor Ince specified in the Revised Statutory Demand the basis on which the sum of HK$14,284,627 was due and owing, how it was arrived at or that it was pre-judgment interest payable under the Judgment;

(3) it was not in the defendant's reasonable contemplation at the time of publication of the 2nd Statement that it is obliged to pay pre-judgment interest on the Judgment Debt Principal; and

(4) it was fair and reasonable to an ordinary person to suggest at the time of publication of the 2nd Statement that the defendant

is not obliged to pay pre-judgment interest on the Judgment Debt Principal.

71. In justification of the words "顧在沒事先通知下入稟法院申請本聯會清盤，意在製造恐慌" (paragraph 4), Mr Cheng refers to and relies paragraph 25 of the defence which admits part of paragraph 25.17 of the SOC, as set out in paragraph 65 above.

72. It is clear to me that the defendant cannot possibly justify the first, third, fourth, fifth and sixth meanings of the 2nd Statement pleaded by the plaintiff with reference to the matters set out in paragraph 25 and 32 of the defence.

73. First, the Judgment (set out in full in paragraph 6 of the SOC and admitted in paragraph 5 of the defence) plainly did not order the parties to negotiate the amount of interest payable by the defendant to the plaintiff. Nor did the defendant raise any facts from which it can be concluded that the plaintiff unreasonably refused to engage in such negotiation. Indeed, the extract from the transcript of the 2.6.2017 Hearing quoted in paragraph 56 above suggests the contrary to be closer to the truth.

74. As for the plaintiff's use of the winding-up procedure, the intended resort to which the plaintiff had plainly given advance notice to the defendant (see paragraphs 10 and 13 above), Mr Pow SC has drawn my attention to *Re Yueshou Environmental Holdings Limited*, HCCW 142/2013, unreported, 16 July 2014, in which Mr Justice Harrise held at [11]-[12] that a creditor is entitled to serve a statutory demand in respect of a debt to which he believes there is no defence; that if the debt is not

satisfied he has locus to present a petition to wind up the company and that it is acceptable for a creditor who has an unanswerable debt to petition to wind up a company known to be solvent as a means to recover his debt.

75. For the sake of completeness, I leave open the justification of the second and seventh meanings of the 2nd Statement pleaded by the plaintiff because the amount of interest demanded by the plaintiff did exceed the amount of interest payable under the Judgment as amended on 2 June 2017. See paragraph 55 above.

3rd Statement

76. I have already set out the 3rd Statement in paragraph 18 above. It is the plaintiff's case as pleaded in paragraph 32 of the SOC that the 3rd Statement in its ordinary and natural meaning meant and was understood to mean that:

(1) The plaintiff acted unreasonably in applying for the winding-up of the defendant.

(2) The plaintiff unreasonably demanded for unjustifiably high amount of interest in the sum of HK$14 million.

(3) The plaintiff deliberately and maliciously abused the court's process in different court cases.

(4) The plaintiff deliberately and maliciously abused the court's process by commencing the winding up of the defendant.

(5) The plaintiff deliberately incapacitated a charitable organisation causing hardship to peoples in need and to the defendant's staff and students.

(6) Alternative to sub-paragraph (5) hereof, hardship on people in need and the defendant's staff and students were caused by

the deliberate, unreasonable and unjustifiable behaviour of the plaintiff.

(7) The plaintiff's pursuit of the Petition is inappropriate, which also causes the legal representatives of the defendant to deploy great effort in making the validation order in respect of the defendant's transactions.

(8) The plaintiff had launched a sustained campaign of unreasonably interference with the peaceful operation of the defendant.

(9) The plaintiff's previous claims against the defendant were unreasonable and amounted to deliberate and malicious abuse of the court's process.

(10) The plaintiff is a despicable, vexatiously litigious, uncharitable, malicious and greedy person.

77. I have reviewed the 3rd Statement and agree with the plaintiff that it conveyed these meanings.

78. In justification of the words "但顧明均先生堅持索取 1,400 萬的無理高額利息賠償，浸聯會並不同意此利息計算方法並願意與對方繼續商討，惟對方拒絕[對]話之外，更在明知浸聯會有足夠資產情況下突然入稟法院，申請浸聯會清盤" in the first paragraph of the 3rd Statement, Mr Cheng refers to and relies on:

(1) paragraph 32 of the defence which I have already summarised in paragraph 70 above; and

(2) paragraph 4.2 of the defence which I have already summarised in paragraph 66(2) above.

79. In justification of the words "他人濫用司法程序" in the third paragraph of the 3rd Statement and the words "有關人士一而再，再而三的無理入稟，實屬刻意針對及濫用司法程序，最終幾乎癱瘓浸聯會上下運作，同工、教職員與學生首當其衝，受到無辜牽連" in the fifth paragraph, Mr Cheng again refers to and relies on paragraph 4.2 of the defence.

80. For the reason stated in paragraphs 64, 65 and 74 above, I find the defence of justification to be unarguable in respect of the first, fourth, fifth, sixth and seventh meanings of the 3rd Statement pleaded by the plaintiff.

81. For the sake of completeness:

(1) As explained in paragraph 75 above, I leave open the justification of the second and tenth meanings of the 3rd Statement pleaded by the plaintiff.

(2) For the reasons stated in paragraph 67 above, I further leave open the justification of the third, eighth and ninth meanings of the 3rd Statement pleaded by the plaintiff.

Disposition

82. For the above-mentioned reasons:

(1) I order judgment in favour of the plaintiff against the defendant for libel in respect of all the Statements with damages including, if appropriate, aggravated and/or exemplary damages, to be assessed; and

(2) extend the time for the defendant to file and serve the defence regarding the plaintiff's claim in malicious falsehood to 6 September 2017.

83. The plaintiff also claims a final injunction restraining the further publication of the Statements. Given my conclusion on the claim for libel, there is no reason why the plaintiff should not be granted such an injunction in some form. However, given that I have found some of the meanings attributed by the plaintiff to the Statements to be potentially justifiable, I would like to hear from the parties as to the precise terms of the injunction. The plaintiff shall have 14 days from today to lodge and serve written submissions on the injunction, after which the defendant shall have 14 days to reply.

84. As for the claim for an apology, the plaintiff has reserved his position pending this decision. I hereby direct the plaintiff to inform the court and the defendant within 14 days from today whether he wishes to press the claim for such relief at this stage.

85. On costs, I do not see why the defendant should not pay the plaintiff's costs of both the Default Judgment Summons and the Time Extension Summons. Indeed, Mr Cheng has in the course of the hearing acknowledged that, even if wholly successful, the defendant should pay the plaintiff's costs of both applications. And I so order.

86. I also direct, on a *nisi* basis, that such costs should be taxed on an indemnity basis with certificate for two counsel. Without pre-empting the defendant's argument to the contrary:

(1) It would be apparent that I find the defendant's conduct of its defence in this Action to be an abuse of process.

(2) In the absence of any response from the defendant, the plaintiff cannot be criticised for assuming that the hearing on 7 September 2017 would be used for hearing and determining only the Default Judgment Summons. As stated in paragraph 27 above, Mr Jason Pow SC and Mr Herbert Leung lodged a 26 page skeleton argument supported by 22 authorities, addressing mainly the issues whether Hong Kong courts have jurisdiction in equity to make an order compelling a defendant in a defamation suit to apologise and/or publish a corrective statement and, if so, whether this is a proper case for the court to exercise such jurisdiction in favour of the plaintiff against the defendant. Having read the plaintiff's skeleton argument and authorities, these issues (in particular, that of jurisdiction) seem to me to warrant two counsel.

(Lisa Wong)
Judge of the Court of First Instance
High Court

Mr Jason Pow SC and Mr Herbert Leung, instructed by Wilkinson & Grist for the plaintiff

Mr Bosco Cheng, instructed by Lui & Law, for the defendant