HCA 1693/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 1693 OF 2011

BETWEEN

JIGME TSEWANG ATHOUP also known as
JIGME RINPOCHE (吉美仁波切) Plaintiff

and

BRIGHTEC LIMITED (明力有限公司) 1st Defendant

WANG YAO (王堯) 2nd Defendant

Author of the article at pages 60 and 61 of the
June 2011 issue of the FRONT-LINE MAGAZINE
(前哨雜誌) under the name "白雪姬"
(transliteration: PAK SUET KAY) 3rd Defendant

Before: Deputy High Court Judge Lok in Court
Dates of Trial: 25, 26 & 28 November 2014
Date of Judgment: 13 January 2015

JUDGMENT

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1. This is a defamation action relating to an article ("the Article") published in the June 2011 issue of a Chinese magazine known as "The Front-Line Magazine (前哨雜誌)" ("the Magazine").

2. This is a case of some importance as this is the first time that a journalist or a publisher is trying to introduce in Hong Kong a new variant of *Reynolds* privilege known as the defence of "reportage", which may have an impact on the landscape of the freedom of the press in Hong Kong.

Background

3. There is no serious dispute about the facts of the present case.

4. The Article is about Tibetan Buddhism. All the information on Tibetan Buddhism mentioned below is supplied to me by the parties.

5. The Plaintiff, Jigme Rinpoche (吉美仁波切), is a high-ranking monk in the Karma Kagyu school of Tibetan Buddhism with the title "Rinpoche" (寧波車/仁波切). It is the Plaintiff's case that he is a highly respected master, teacher and author of Karma Kagyu and he has many followers both in Hong Kong and around the world. He mainly teaches Buddhist meditation. He has been appointed as the General Secretary of Karma Kagyu since 21 December 2011. In his first witness statement, the Plaintiff has set out in some details the positions that he is now holding in various Tibetan Buddhist organisations around the world, the conferences and the activities that he had attended and the books that he had published throughout the years. He is now aged 67.

6. There are 4 main schools in Tibetan Buddhism:

(i) Karma Kagyu school (噶舉派), also known as the White Religion (白教);

(ii) Gelugpa school (格魯派), also known as the Yellow Religion (黃教);

(iii) Nyingma school (寧瑪派), also known as the Red Religion (紅教); and

(iv) Sakya school (薩迦派), also known as the Flower Religion (花教).

7. Karma Kagyu is a major school of Tibetan Buddhism. It has many followers all over the world including Hong Kong. Followers of Karma Kagyu in Hong Kong include celebrities, movie stars and singers in the entertainment business.

8. The highest figure, ie the living Buddha (活佛), of Karma Kagyu, is Karmapa, known as "噶瑪巴" or "大寶法王" in Chinese. Followers of Karma Kagyu have held the belief that the original Karmapa has, since the year 1110, been "reincarnating" in a chosen Tibetan boy and the existing one would be the 17th reincarnated Karmapa.

9. The 16th Karmapa had 4 main disciples. Amongst them, Shamarpa Rinpoche (夏瑪巴仁波切), according to the Plaintiff, was the first in rank and H E Tai Situ Rinpoche (大司徒錫度仁波切) ("Tai Situ Rinpoche") was the second in rank.

10. Karmapa and Sharmapa are both linage holders of Karma Kagyu. They are often referred to as the "Black Hat Lama" and "Red Hat Lama" respectively because of the colour of their crowns. According to the Plaintiff, Sharmapa is the second in rank in Karma Kagyu, the first being the Karmapa himself. There has been a long standing tradition that, after the death of either the Karmapa or Sharmapa, the surviving linage holder would have to look for and verify the status of the new reincarnated Karmapa or Sharmapa.

11. The Plaintiff and Shamarpa Rinpoche were brothers and the 16th Karmapa was their uncle. Shamarpa Rinpoche passed away recently in the summer of 2014.

12. After the death of the 16th Karmapa in 1981, followers of Karma Kagyu have divided into 2 rival camps because there is a dispute as to the true identity of the 17th Karmapa. The Plaintiff and his deceased brother, Shamarpa Rinpoche, belong to one camp ("the Plaintiff's Camp"). After the death of the 16th Karmapa, Shamarpa Rinpoche appointed Trinley Thaye Dorje (泰耶多傑)("Trinley"), who was then a boy, as the 17th reincarnated Karmapa. The other camp ("the Other Camp") is led by Tai Situ Rinpoche who, after the death of the 16th Karmapa, appointed Ogyen Trinley Dorje (烏金欽列多傑)("Ogyen"), another Tibetan boy at that time, as the 17th reincarnated Karmapa. Since then, there has been a long standing dispute between the 2 Camps as to who is the proper 17th Karmapa ("the Karmapa Dispute").

13. Karma Kagyu operates a charitable trust ("the Trust") which, I am given to understand, controls considerable amount of assets in various

parts of the world. The secretary of the Trust is a person known as Norden Tshering (諾殿車寧).

14. The 1st Defendant is the proprietor, publisher and printer of the Magazine. The focus of the Magazine is about politics in the Mainland.

15. The 2nd Defendant is and was at all material times the editor-in-chief of the Magazine.

16. So far as the present claim is concerned, the dispute first arose from an article with the title "大寶法王的認證問題" (The problem in recognising the Karmapa) by 賴成蔭 (transliteration: Lai Shing Yam) published in the March 2011 issue of the Hong Kong Economic Journal, which addressed various issues about the Karmapa Dispute.

17. The 1st Defendant then published in the April 2011 issue of the Magazine an article entitled "大寶法王雙胞案內幕" (The inside story of the Karmapa Twins incident) by 邱陽 (transliteration: Yau Yeung). In this article, Yau Yeung alleged that, *inter alia*, the Plaintiff and his brother sought to gain control of the assets belonging to the Trust or the Karma Kagyu school, and that was why they appointed Trinley as a puppet Karmapa.

18. On 31 March 2011, Shamarpa Rinpoche issued a letter of protest in respect of the publication of the article by Yau Yeung to the 1st Defendant through his solicitors, Kok & Ha.

19. There is some uncertainty as to whether Kok & Ha were just acting for Shamarpa Rinpoche alone or for both brothers. In any event,

Kok & Ha stated clearly in the correspondence that they acted for Shamarpa Rinpoche only.

20. On 4 April 2011, the 1st Defendant replied to the said letter by stating that the Magazine was just a forum and the stance of any particular writer of the articles therein did not represent the stance of the Magazine. The letter also invited Shamarpa Rinpoche or Trinley to send articles to put forward their views about the Karmapa Dispute for publication in the Magazine.

21. After some exchange of correspondence, Kok & Ha sent an article by Norden Tshering, secretary of the Trust, to the 1st Defendant for publication in the May 2011 issue of the Magazine.

22. On or about 22 or 23 April 2011, the 1st Defendant published the May 2011 issue of the Magazine which contained, *inter alia*, the following notice and articles in sequence relating to the Karmapa Dispute:

(i) "嚴正聲明" (Important statement) by 妙境佛學會(New Horizon Buddhist Association);

(ii) "澄清白教內鬥的一些誤傳" (Clarifying some misrepresentations in the internal disputes of the White School) by Norden Tshering;

(iii) "夏瑪巴們打壓烏金欽列多傑的手段" (The tactics of the Shamarpas to oppress Ogyen Trinley Dorje) by 白雪姬 (transliteration: Pak Suet Kay) who is the 3rd Defendant; and

(iv) "創古仁波切談大寶法王之糾紛" (Thrangu Rinpoche's views on the Karmapa dispute) by 噶瑪迦珠(香港)佛學會 (Karma Kagyu (Hong Kong) Buddhist Association).

23. In the Magazine, these notice and articles were grouped in a column called "特稿" (Special Features).

24. On or about 22 or 23 May 2011, the 1st Defendant published the June 2011 issue of the Magazine which contained the following articles in sequence in the "Special Features" column:

(i) "澄清《創古仁波切談大寶法王之糾紛》的謊言" (Clarifying the lies in the "Thrangu Rinpoche's views on the Karmapa dispute" article) by the Plaintiff;

(ii) "白雪姬一文的事實證據在哪裡" (Where is the factual basis for Pak Suet Kay's article) by Lai Shing Yam;

(iii) "噶瑪巴的磨練" (The Karmapa's ordeal) by Pak Suet Kay which was the Article;

(iv) "第十七世大寶法王雙胞案爭議剖析" (An analysis on the disputes over the 17th Karmapa Twins incident) by 薛浩然 (transliteration: Sit Ho Yin);

(v) "噶舉派的祖師係統（上）" (The lineage system of the Karma Kagyu school – the first article in the series) by 白青原 (transliteration: Pak Ching Yuen); and

(vi) "噶瑪噶舉黑帽系歷代活佛" (Generations of Karmapas of the Black Hat branch of the Karma Kagyu school) by Pak Ching Yuen.

25. The subject matter of the present case is the third article mentioned in the preceding paragraph. The Plaintiff claims that the following passage in the Article contained defamatory words of the Plaintiff ("the Words"):

> *"吉美仁波切又是甚麼東西？他自稱是十六世大寶法王的親侄兒，夏瑪巴的胞兄。他自以為很權威，自抬身價，究其實，眾多的白教弟子都知道，也就是這兩兄弟利用十六世大寶法王親人的身份，盤據了白教的則產寺產，製造了另一個「山寨」法王，禍亂白教，十六世大寶法王在天國也會搖頭。基於他們的私心、貪婪與偽善，他們的立場，他們兩兄弟說甚麼也是妄言，有智慧的白教弟子都會清楚。吉美與夏瑪巴意圖挑戰創古仁波切的權威是自暴其短而已。... 以親屬之便歛財，把持教派權力，破壞教派團結，只會讓教眾鄙視。所謂大寶法王親屬的身份，是負資產而已。"* (the "Words")

The English translation reads as follows:

> *"And what sort of thing is Jigme Rinpoche? He claims to be a close nephew of the Sixteenth Kamarpa and the elder brother of Shamarpa Rimpoche. He thinks he is very authoritative and has boasted of his status greatly beyond what he is worth. In fact, many Karma Kagyu followers know that it is these two brothers who abuse their identities as relatives of the Sixteenth Kamarpa to illegally seize properties and monasterial assets belonging to Karma Kagyu, and have created another 'imposter' Kamarpa, bringing about disasters and havoc in Karma Kagyu. Even the Sixteenth Kamarpa would be shaking his head with dismay in the heavenly kingdom. Because of their selfish motives, greediness, hypocrisy and their stances, everything that these two brothers say is total nonsense. Wise Karma Kagyu followers would be well aware of this. Jigme and Shamarpa's attempt to challenge Thrange Rinpoche's authority merely exposes their shortcomings... using their family relationships to make money, gain control of religious power and sabotage religious unity will only be despised by Karma Kagyu*

followers. The so-called status of being a relative of Kamarpa is merely a negative asset."

26. In essence, the Words allege that the Plaintiff and Shamarpa Rinpoche were selfish, greedy and hypocritical. They sought to gain control of the assets belonging to the Trust or the Karma Kagyu school, and that was why they appointed Trinley as a puppet Karmapa.

27. According to the Plaintiff, the allegations contained in the Words and the Article are untrue. Further, no one had ever contacted him about the matters alleged in the Article to ascertain whether was any truth in those allegations. I have no reason to doubt the evidence of the Plaintiff.

28. The Article was allegedly written by a person known as 白雪姬 (transliteration: Pak Suet Kay). According to Mr Lau Tat Man who is the 1st Defendant's manager, the 1st Defendant does not know the true identity of this Pak Suet Kay. The Article was supplied to the 1st Defendant through a "scholar", and the 1st Defendant only knew from this "scholar" that Pak Suet Kay was a knowledgeable and trustworthy person. I am given to understand that Pak Suet Kay is the name of a cartoon figure.

29. On 14 June 2011, Kok & Ha issued a letter of protest to the Defendants for and on behalf of the Plaintiff in respect of the publication of the Article. This was the first time that Kok & Ha had indicated to the Defendants that they were acting for the Plaintiff.

30. In the June 2011 issue of the Magazine, there was also an article allegedly written by the Plaintiff himself, which contained some accusations against Thrangu Rinpoche who is a supporter of the Other

Camp[1]. According to the Plaintiff, he was asked to write some history relating to Thrangu Rinpoche. By that time, he was not in Hong Kong and he did not know that the article he was writing would be published in the Magazine. He sent the article to his brother who in turn, he presumes, sent it to Kok & Ha. He wrote the article in Tibetan. He does not know Chinese and he has no idea who had translated the contents of his article into Chinese. When some of the contents of his Chinese article are translated to him, the Plaintiff maintains that he had not used those strong words in his original article in relation to the accusations against Thrangu Rinpoche. In the article, he only provided the historic facts relating to the Karmapa Dispute.

31. As I have mentioned above, there is no reason for me to doubt the credibility of the Plaintiff's evidence. Although the article was probably translated by the followers of the Plaintiff's Camp, I have great reservation as to whether the Plaintiff's article as published in the Magazine was an accurate translation of the plaintiff's original article in Tibetan.

32. On or about 22 or 23 June 2011, the 1st Defendant published the July 2011 issue of the Magazine which contained the following articles in sequence in the "Special Features" column:

(i) "噶瑪噶舉黑帽系歷代活佛系統（續）" (Generations of Kamapas of the Black Hat branch of the Karma Kagyu school (continued)) by Pak Ching Yuen;

[1] the 1st article referred to in §24 above

(ii) "關於第十世夏瑪巴的歷史回應" (A reply to the history of the 10th Shamarpa) by Norden Tshering;

(iii) "回應薛浩然先生" (A reply to Mr Sit Ho Yin) by Norden Tshering;

(iv) "給諾殿車寧先生的回應" (A reply to Mr Norden Tshering) by Pak Suet Kay;

(v) "汝安則為之" (Do what you feel is proper) by Sit Ho Yin; and

(vi) "泰耶多傑可以用大寶法王噶瑪巴身份在中國香港活動嗎" (Could Thaye Dorje carry out activities in China Hong Kong as Karmapa?) by 張無極 (transliteration: Cheung Mo Gik).

33. On or about 22 or 23 July 2011, the 1st Defendant published the August 2011 issue of the Magazine which contained the following articles in sequence in the "Special Features" column:

(i) "達賴喇嘛和噶瑪巴同訪美" (Dalai Lama and Karmapa's visit to the US) by a reporter engaged by special arrangement;

(ii) "第十七世大寶法王噶瑪巴重要記事" (The important chronicles of the 17th Karmapa) by Cheung Mo Gik;

(iii) "最後一次對白雪姬先生的回應" (The last reply to Mr Pak Suet Kay) by Norden Tshering;

(iv) "最後一次對薛浩然先生的回應" (The last reply to Mr Sit Ho Yin) by Norden Tshering; and

(v) "心中的話" (Words from my heart) by Sit Ho Yin.

34. According to Mr Lau, the staff and the editorial board did write some of the articles in the Magazine. However, all the articles mentioned above relating to the Karmapa Dispute were not authored by them[2]. Mr Lau testifies that the Plaintiff, Norden Tshering, Lai Shing Yam and New Horizon Buddhist Association are supporters of the Plaintiff's Camp, whilst Pak Suet Kay, Sit Ho Yin and Karma Kagyu (Hong Kong) Buddhist Association are supporters of the Other Camp. The authors of the other articles on the Karmapa Dispute adopted a more neutral stance. Mr Lau also testifies that the articles in support of the Plaintiff's Camp were emailed to the Magazine by Kok & Ha.

35. In Mr Lau's opinion, if a reader were to read all these articles, he or she would know that the Magazine only served as a forum for the supporters of both Camps to put forward their views on the Karmapa Dispute and the views of those authors did not represent the stance of the editorial board of the Magazine. As I will elaborate in the latter part of this judgment[3], I cannot agree with such observation.

36. In support of his claim, the Plaintiff also relies on another article published in the South China Morning Post ("SCMP") on 9 February 2011 with the headline "*Many accusations but few facts as Karmapa accused of spying*" ("the SCMP Article"). The SCMP Article

[2] despite Mr Lau's allegation, the 1st article on the Karmapa Dispute in the August 2011 issue was written by a reporter engaged by special arrangement

was about a story that Ogyen was accused of spying for the Mainland Government, and it contained a report of the following, *inter alia*:

(i) an allegation by a Tibetan political activist that Shamarpa Rinpoche was trying to demonize Ogyen who was recognised by Dalai Lama[4] as the 17th Karmapa; and

(ii) an allegation by an unnamed observer that Shamarpa Rinpoche had paid off various Indian newspapers and officials.

37. Following a complaint by Shamarpa Rinpoche, SCMP published an open apology and clarification on 27 April 2011, apologising and admitting that the allegations against Shamarpa Rinpoche were unfair and unfounded.

38. Whilst this episode has nothing to do with the merits of the Plaintiff's claim, the report in the SCMP Article, as I will demonstrate below[5], may serve as a good illustration as to how the defence of reportage can be applied in practice.

39. On 7 October 2011, the Plaintiff issued the Writ herein against the Defendants to claim for injunctive relief and damages for defamation resulting from the publication of the Words in the Article.

40. Default judgment was entered against the 3rd Defendant on 18 November 2011. However, the Plaintiff is not pursuing the claim against

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[3] see §§89-92 below
[4] the parties accept that Dalai Lama belongs to the Gelugpa school (Yellow Religion)
[5] see §93-96 below

him or her and so this trial would not serve as an assessment of damages in respect of the claim against the 3rd Defendant.

The defamatory Words referring to the Plaintiff

41. In order to succeed in a claim for defamation, a claimant has to show that defamatory matters with reference to the claimant have been published by a defendant.

42. The matters published are defamatory if they expose the claimant to contempt and ridicule by others and cause others to shun him. The matters would also be defamatory if they lower the claimant's estimation in the eyes of right-thinking members of society and adversely affect his reputation[6].

43. It is clear that the Words in the Article referred and were understood to refer to the Plaintiff.

44. In the Amended Statement of Claim, it is pleaded that the Words, in their natural and ordinary meaning, meant and were understood to mean:

(i) the Plaintiff is a low ranking religious practitioner who pretends to be authoritative when in fact he is not and does not have any such authority;

(ii) the Plaintiff is a person of low status who boasts of his status greatly beyond what he is worth;

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[6] *Gatley on Libel and Slander*, 12 ed, at §1.7

(iii) the Plaintiff abuses his identity and status as a relative of the 16th Karmarpa to gain personal benefit including making money for himself;

(iv) the Plaintiff has illegally seized and misappropriated properties and monasterial assets belonging to Karma Kagyu;

(v) the Plaintiff is responsible for stirring up unrest and conflicts within Karma Kagyu, thereby destroying religious unity;

(vi) the Plaintiff is conceited, manipulative, deceitful, dishonest, selfish, greedy, hypocritical, despicable, immoral and unbefitting of a teacher or practitioner of Karma Kagyu;

(vii) the Plaintiff is a liar whose words and actions cannot be trusted;

(viii) the Plaintiff has no integrity, and his teaching and claims are all nonsense; and

(ix) the Plaintiff has betrayed Karma Kagyu and is rightly despised by Karma Kagyu followers.

45. In my judgment, an ordinary reader of the Article would have understood the Words to carry the meanings as mentioned in the preceding paragraph and so I find that the Words are defamatory of the Plaintiff. Mr Tang, counsel for the 1st and 2nd Defendants, is not seriously suggesting otherwise.

46. Under the law of defamation, it is not to be assumed that anyone is of bad character, and so defamation of an individual is taken to be false until it is proved to be true[7].

47. In the present case, the 1st and 2nd Defendants do not seek to justify the truthfulness of the allegations. Neither do they seek to rely on the defence of fair comment. Instead, the 1st and 2nd Defendants try to justify the publication of the Words on a matter of public interest by relying on the defence of reportage, which has been described as "*a special, and relatively rare, form of Reynolds privilege*"[8]. According to Mr Tang, the legal principles about such new defence have been fully set out in the English Court of Appeal's decision in *Roberts v Gable*[9], and he is just asking the court to extend these principles to Hong Kong so that the 1st and 2nd Defendants are able to rely on such defence to justify the publication of the Words contained in the Article.

48. In determining the merits of such defence, the court has to answer the following questions:

(i) Is the defence of reportage as formulated in *Roberts v Gable*[10] part of the law in Hong Kong?

(ii) If the answer to (i) is in the affirmative, whether the 1st and 2nd Defendants can rely on such defence to defeat the Plaintiff's claim?

The development of the doctrine of reportage

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[7] *Gatley, supra,* at §11.4
[8] *Flood v Times Newspaper Ltd* [2012] 2 AC 273 at §77 *per* Lords Phillips MR
[9] [2008] QB 502

49. With the first question, since Mr Tang relies on the English Court of Appeal's decision in *Roberts v Gable*[11], I start with the jurisprudence developed in the English courts.

50. In England, the landscape relating to the defence of qualified privilege, in particular in respect of the publication on a matter of public interest by a journalist, has been "liberalised"[12] or "constitutionalised"[13] in recent years. As a result, the notion of "responsible journalism" has been developed.

51. It first started with the principles laid down in the landmark decision of the House of Lords in *Reynolds v Times Newspaper Ltd*[14]. In that case, the House of Lords "*established a new variant of qualified privilege in which less emphasis was placed on the traditional, reciprocal duty and interest test, and more on the question of whether the publication was on a matter of public interest and whether it was the product of responsible journalism (with the issue of malice being subsumed within this latter element)*"[15]. According to the Law Lords, the duty and interest test can be satisfied if the public is entitled to know the particular information being published subject to 2 essential prerequisites. The first is that the article as a whole must be in the public interest. The second prerequisite is responsible journalism. Whether the article is of value of the public depends upon its quality as well as its subject matter and the value of the article to the public must be tested against a standard of responsible journalism. Responsible journalism is the point at which a fair

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[10] *supra*
[11] *supra*
[12] *Roberts v Gable*, *supra*, at §32 *per* Ward LJ
[13] see: *Gatley*, *supra*, footnote 8 of p 634
[14] [2001] 2 AC 127
[15] *Gatley*, *supra*, at p 634

balance can be held between freedom of expression on matters of public concern and the reputation of the individual harmed by that disclosure[16].

52. The court, not the editor, must decide whether the particular material is privileged because of its value to the public but due weight must be given to editorial judgment[17].

53. In *Reynolds*, Lord Nicholls set out a non-exhaustive list of circumstances which would be relevant to the issue of whether the standard of responsible journalism had been met in a given case. According to Lord Nicholls, the list is not exhaustive, and the weight to be given to these and any other relevant factors will vary from case to case[18].

54. The 10 listed factors are:

(i) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

(ii) The nature of the information, and the extent to which the subject matter is a matter of public concern.

(iii) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

(iv) The steps taken to verify the information.

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[16] see also: *Roberts v Gable, supra,* at §32(5) *per* Ward LJ
[17] see also: *Roberts v Gable, supra,* at §32(6) *per* Ward LJ
[18] *Reynolds v Times Newspaper Ltd, supra,* at p. 205

(v) The status of the information. The allegation may have already been the subject of an investigation which commands respect.

(vi) The urgency of the matter. News is often a perishable commodity.

(vii) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

(viii) Whether the article contained the gist of the plaintiff's side of the story.

(ix) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statement of fact.

(x) The circumstances of the publication, including the timing.

55. In *Jameel (Mohammed) v Wall Street Journal Europe SPRL*[19], the House of Lords emphasised that the "Nicholls factors" must be approached in a practical and flexible manner with due deference to editorial discretion. The list certainly does not set up a series of hurdles to be negotiated by a publisher before he can successfully rely on qualified privilege as a defence.

[19] [2007] 1 AC 359 at §53

56. One of the "Nicholls factors" is that whether the journalist has taken steps to verify the information. In subsequent cases, arguments were presented to the courts to the effect that if a journalist is just reporting in a neutral way certain allegations made by others, provided that the public interest requirement is satisfied, such journalist should be able to rely on *Reynolds* privilege even if he has not taken any steps to verify the information. This was the beginning of the reportage defence.

57. In *Roberts v Gable*[20], Ward LJ had provided a very comprehensive summary about the development of such defence. In this case, the claimants were members of a right-wing political party in the United Kingdom. A monthly magazine specialising in the exposure of fascist and racist groups published an article reporting that other members of the same party had publicly accused the claimants of stealing money collected at a party meeting. It was said that the claimants had returned the money only when told the matter would be reported to police, had threatened other party members with physical violence and could still face police investigation. The claimants brought an action for libel against the author of the article, the editor of the magazine and its publisher, who pleaded the defences of justification and qualified privilege. In the trial of preliminary issue as to whether the words complained of had been published on an occasion of qualified privilege, the judge upheld the defence of qualified privilege and dismissed the claim. The decision was affirmed upon appeal.

58. In *Roberts v Gable*, no steps were taken to verify the information, yet the English Court of Appeal held that this would not be

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[20] *supra*

fatal in a reportage case, where the fact of the allegations being made is what is important.

59. In the judgment, Ward LJ traced the development of the *Reynolds* privilege, including a variant of which known as the defence of reportage that involves the neutral reporting of attributed allegations rather their adoption by the newspaper. As pointed out by Ward LJ, such doctrine first saw the light of day in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd*[21], though the ambit of the reportage defence was still not clearly defined or confined by that case. Ward LJ then considered the other cases in which the defence of reportage was considered, including *Mark v Associated Newspaper Ltd*[22], *Galloway v Telegraph Group Ltd*[23] and the *Jameel* case[24]. Ward LJ also considered the American authorities and the human rights jurisprudence relating to such defence. Finally, Ward LJ came up with the following questions: (i) Why is the reporter of reportage free from the responsibility of verifying the information and why does the well-established repetition rule not require the journalist to justify the truth of what he is reporting? (ii) Do the *Reynolds* rules apply to reportage? (iii) What then is the proper approach to the reportage defence?[25]

60. In answering the first question, Ward LJ held that the repetition rule and reportage are not in conflict with each other. The former is concerned with justification, the latter with privilege. A true case of reportage may give the journalist a complete defence of qualified privilege. If the journalist cannot establish such defence, then the

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[21] [2002] EMLR 215
[22] [2002] EMLR 839
[23] [2006] EMLR 221
[24] *Jameel (Mohammed) v Wall Street Journal Europe SPRL. supra*
[25] at §53

repetition rule applies and the journalist has to prove the truth of the defamatory words[26].

61. In answering the second question, Ward LJ accepted that reportage is a form of, or a special example of, *Reynolds* qualified privilege, which is a special kind of responsible journalism but with distinctive features of its own[27].

62. In respect of the proper approach to the reportage defence, Ward LJ said the following[28]:

> *"61. Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of reportage.*
>
> *(1) The information must be in the public interest.*
>
> *(2) Since the public cannot have an interest in receiving misinformation which is destructive of the democratic society (see Lord Hobhouse of Woodborough in the Reynolds case, at p 238), the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published: see, also in the Reynolds case, Lord Nicholls's factor 4, at p 205B, and Lord Cooke, at p 225, and in the Jameel case [2007] 1 AC 359, Lord Bingham of Cornhill, at para 12 and Baroness Hale, at para 149. This is where reportage parts company with the Reynolds case [2001] 2 AC 127. In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.*
>
> *(3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ in the Al-Fagih case [2002] EMLR 215, paras 65, 67-68 and the speech of Lord Hoffmann in the Jameel case [2007] 1 AC 359, para 62 cited in paras 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they*

[26] at §§54-59
[27] at §60
[28] at §61

were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see Subramanian v Public Prosecutor [1956] 1 WLR 965, 969. If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.

(4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.

(5) This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report.

(6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from the Reynolds case [2001] 2 AC 127, the burden being on the defendants. In this way the balance between article 10 and article 8 can be maintained. All the circumstances of the case and the ten factors listed by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered in order to reach the necessary conclusion that this was the product of responsible journalism.

(7) The seriousness of the allegation (Lord Nicholls's factor 1) is obviously relevant for the harm it does to reputation if the charges are untrue. Ordinarily it makes verification all the more important. I am not sure Latham LJ meant to convey any more than that in para 68 of his judgment in Al-Fagih case [2002] EMLR 215 cited in para 39 above. There is, however, no reason in principle why reportage must be confined to scandal-mongering as Mr Tomlinson submits. Here equally serious allegations were being levelled at both sides of this dispute. In line with factor 2, the criminality of the actions bears upon the public interest which is the critical question: does the public have the right to know the fact that these allegations were being made one against the other? As Lord Hoffmann said in the Jameel case [2007] 1 AC 359, para 51:

> *'The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.'*
>
> *All the circumstances of the case are brought into play to find the answer but if it is affirmative, then reportage must be allowed to protect the journalist who, not having adopted the allegation, takes no steps to verify his story.*
>
> *(8) The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as pre-conditions for reportage on the defendant being a responsible prominent person or the claimant being a public figure as may be required in the USA.*
>
> *(9) The urgency is relevant, see factor 5, in the sense that fine editorial judgments taken as the presses are about to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time. That is not to say, as Mr Tomlinson would have us ordain, the reportage can only flourish where the story unfolds day by day as in Al-Fagih case. Public interest is circumscribed as much by events as by time and every story must be judged on its merits at the moment of publication."*

63. In England, the law on *Reynolds* privilege is now codified in s 4 of the Defamation Act 2013.

Human rights jurisprudence

64. So far as the research goes, this is the first case in which a journalist or a publisher is asking the court to apply the defence of reportage as formulated in *Roberts v Gable*[29] in Hong Kong. For myself, I have no reservation in accepting that such kind of defence is available in the Hong Kong courts.

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[29] *supra*

65. One of the main reasons is that the human rights considerations taken into account by the English courts are also applicable here.

66. As mentioned by Ward LJ in *Roberts v Gable*[30] and the learned authors in *Gatley*[31], the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), which was incorporated into English law by the Human Rights Act 1998, played a major formative role in the decisions of both the Court of Appeal and the House of Lords in *Reynolds v Times Newspaper Ltd*[32].

67. Article 10 of the European Convention provides that everyone has the right to freedom of expression. However, the exercise of such freedom may be subject to, *inter alia*, such restrictions as are prescribed by the law and are necessary in a democratic society for the protection of the reputations or rights of others.

68. Hong Kong has similar human rights legislations.

69. Article 27 of the Basic Law provides that Hong Kong residents shall have, *inter alia*, freedom of speech, of the press and of publication.

70. Article 16 of the Hong Kong Bill of Rights Ordinance (Cap 383), which is equivalent to Article 19 of the International Covenant on Civil and Political Rights, provides that, *inter alia*, everyone shall have the right to freedom of expression, including the freedom to seek, receive and

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[30] *supra*, at §§48-52
[31] *supra*, at §15.3
[32] *supra*

impart information, provided that the exercise of such right may be subject to certain restrictions as are provided by law and are necessary for respect of the rights or reputations of others.

71. Like the United Kingdom, the freedom of expression and the freedom to receive information are rights guaranteed in the constitutional legislations in Hong Kong, and so the courts in both jurisdictions should likewise adopt a liberal approach in the development of the law relating to the doctrine of *Reynolds* privilege.

72. In *Cheng & Anr v Tse Wai Chun*[33], Li CJ said the following:

> *"The freedom of speech (or the freedom of expression) is a freedom that is essential to Hong Kong's civil society. It is constitutionally guaranteed by the Basic Law (art. 27). The right of fair comment is a most important element in the freedom of speech.*
>
> *In a society which greatly values the freedom of speech and safeguards it by constitutional guarantee, it is right that the courts, when considering and developing the common law, should not adopt a narrow approach to the defence of fair comment. See Eastern Express Publisher Ltd & Anr v Mo Man Ching & Anr (1999) 2 HKCFAR 264 at p. 278. The courts should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour."*

73. Although the *dicta* of Li CJ were made in the context of the defence of fair comment, the same rationale and liberal approach should apply when the courts in Hong Kong are asked to consider the defence of reportage as a form of *Reynolds* privilege. Hence, I accept that the defence of reportage as formulated in *Roberts v Gable*[34] is available in the Hong Kong courts. Ms Lai, counsel for the Plaintiff, does not seek to argue otherwise.

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[33] (2000) 3 HKCFAR 339 at 345D

The merits of the defence of reportage

74. After answering the first question, I then have to consider whether the 1st and 2nd Defendants can rely on such defence to defeat the Plaintiff's claim.

75. In order to establish the defence of *Reynolds* privilege based on reportage, it must first be established that there is real public interest in the matter about which the material is published.

76. Although the Plaintiff may not be an official of the Trust controlling the assets of the Karma Kagyu school, he is undoubtedly a prominent and influential member of such school. Tibetan Buddhism may not be a major religion in Hong Kong, and yet there are many followers here who may be interested to know more about the Karmapa Dispute and the major players surrounding such dispute. There is no quarrel that the Plaintiff is such a major player. In my judgment, members of the public would be entitled to know the role of the Plaintiff in the Karmapa Dispute, and so the 1st and 2nd Defendants have satisfied the first prerequisite that the Article as a whole must be in the public interest.

77. I then turn to the notion of responsible journalism. Apart from asking the "scholar" who supplied the Article to confirm that Pak Suet Kay was a knowledgeable and trustworthy person, the 1st and 2nd Defendants have not taken any steps to verify the truth of the information contained in the Article. As mentioned by Ward LJ in *Roberts v Gable*[35], in a true case of reportage, no such steps need to be taken by a defendant.

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[34] *supra*
[35] *supra*, at §61(2)

78. However, the essence of reportage is that, the report, judging the trust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. It follows from that the defamatory materials are attributed to another person and are not being put forward as the truth, and the journalist is simply reporting in a neutral fashion the fact that such statements were made without adopting the truth[36].

79. As I see it, the 1st and 2nd Defendants' contention is something quite different here. They were not making a report covering the accusations made by the supporters of the 2 opposing Camps of Karma Kagyu. What they are actually saying is that the Magazine was only a neutral forum for the supporters of both Camps to put forward their allegations or views relating to the Karmapa Dispute. The readers should know that the author of the Article, Pak Suet Kay, was a supporter of the Other Camp, and the Article was no more than a report of a particular view of such supporter.

80. I agree with the submission of Ms Lai that such kind of "neutral forum" defence goes well beyond the reportage defence recognised by the law. The defence of reportage only involves the making of a report, not simply the provision of a forum for others to say whatever they wish.

81. Unlike a true case of reportage where it only involves a report of the fact that certain statements have been made and not that the contents of the statements are true, the whole Article published by the 1st and 2nd Defendants was written by someone allegedly not from the Magazine,

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[36] *Roberts v Gable, supra,* at §61(3) *per* Ward LJ

published in the Magazine, with no indication in that Article to a reader that the Magazine was only seeking to convey the fact that certain statements were made.

82. Such defining characteristic of reportage was also held to be missing in *Charman v Orion Publishing Ltd*[37]. In that case, the plaintiff was a former detective constable in the Metropolitan Police. The 3rd defendant was an investigative journalist of many years' standing and the author of a book entitled *Bent Coppers* published by the 1st and 2nd defendants.

83. The plaintiff had been the handler of an informant, B. The police set up an operation to investigate some unlawful activities, and it was the defendants' case that some part of that operation was a fabrication by B, the plaintiff and another detective inspector, R, devised in order to conceal their own involvement in criminal activity.

84. The story involved a conspiracy by B and another person to steal from 2 businessmen. The defendants contended that, having become aware of the conspiracy, the claimant and R struck a dishonest deal with B that he would pay them a sum of money in return for their protection, should he be arrested, by pretending that he was giving the police information about a money-laundering operation. A secret anti-corruption squad was subsequently set up within the police to investigate the alleged corruption against the plaintiff and R. Later, the plaintiff, R and another person were charged with conspiracy to pervert the course of justice. The charges were summarily dismissed. B finally stood trial for theft. B applied to stay the proceedings on the ground that, *inter alia*, he was a

[37] [2008] EMLR 16

police informant and he was performing all the relevant acts at the direction of the plaintiff and R. The application was refused. B was convicted after trial.

85. The book was then published which contained a detailed account of the incident, the trial of B and the alleged corruption against the plaintiff. The Court of Appeal held that a defining characteristic of reportage was missing in that the book was not written to report the fact that allegations of corruption were made against the plaintiff and the fact that he denied them and in turn accused the investigating officers of plotting against him. The whole effect of the book was, as its subtitles made plain, to tell the inside story of the police's battle against police corruption and the tale included the plaintiff's alleged corruption.

86. The report being of a fact that certain statements were made, as opposed to mere repetition of the defamatory allegations, is why the "repetition rule" is said not to apply in reportage cases. As Ward LJ explained in *Charman v Orion Publishing Ltd*[38]:

> *"In suggesting, as [the defendants' counsel] seemed to do, that no more was needed to establish the defence than that the report was attributed, was neutral and was in the public interest, [the defendants' counsel] pitched her case far too widely. No matter how overwhelming the public interest, it is not reportage simply to report with perfect and in the most neutral way the defamatory allegations A has uttered against B. As Lord Reid said in Rubber Improvement v Daily Telegraph Ltd [1964] AC 234 at 236: 'Repeating someone else's libellous statement is just as bad as making the statement directly.' Adopting the analogy of rules for admitting hearsay evidence, the effect of repeating the allegation is to make the article a report of the truth of the defamatory material as opposed to its being a report only of the fact that it was said. It will depend on the context whether the material is published to report the fact that it was said or to report what was said as a fact. That point of characterisation of the material is enough to doom this part of the*

[38] *supra*, at §50

appeal. Whether or not it could ever give rise to Reynolds privilege is, of course, a different question altogether and I deal with that later."

87. The Article plainly did not report the fact of Pak Suet Kay making various statements against the Plaintiff. It was an article by Pak Suet Kay himself or herself. In particular, the name of Pak Suet Kay is a pseudonym. An article written in the name of an unknown person cannot possibly be described as a "report" that the anonymous author has written certain statements. Hence, the defence of reportage is not available to the 1st or 2nd Defendant.

88. Furthermore, it follows from such defining characteristic of reportage that attribution is a key of such defence. As pointed out by Ward LJ in *Roberts v Gable*[39], a defendant can only rely on such defence if he has reported a fact in a neutral fashion without adopting the truth.

89. In the present case, the Article was described in the June 2011 issue of the Magazine as having been authored by Pak Suet Kay. The 1st and 2nd Defendants contend that, had the readers read all the articles in the "special features" column in the May and June issues of the Magazine carefully[40], with each issue containing the same number of articles supporting the respective views of both Camps, the readers should have realised that the Article was not written by an employee of the Magazine.

90. I do not accept such contention. It plainly cannot be assumed or expected of a reader that he or she would read not only the defamatory Article, but also all other articles in the Magazine touching upon the Karmapa Dispute. In particular, the Article did not expressly refer the

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[39] *supra*, at §§61(3) & (5)

[40] the July and the August issues would be quite irrelevant as they were published after the alleged libel

reader to other articles in the same issue of the Magazine.. Neither can one expect a reader to read the index page to find out all the articles touching upon the Karmapa Dispute, or to read all the articles in the other issues of the Magazine to ascertain the stance of a particular author. Furthermore, one cannot expect a reader to read all the related articles in the Magazine "carefully" in order to find out or deduce whether the Magazine adopted the views in the Article or not. As admitted by Mr Lau in his oral testimony, most of the readers would only have a "cursory" look at the various articles of the Magazine. In addition, most of the readers of the Magazine would only be interested in matters involving politics in the Mainland, and they might not have the background information about the Karmapa Dispute or to know that there were 2 opposing Camps to such Dispute.

91. Even if a reader were to read all the articles carefully, the most that he or she would know was that: (i) there were supporters for both Camps; (ii) whether a particular author was a supporter of the Plaintiff's Camp or the Other Camp; and (iii) Pak Suet Kay was a supporter of the Other Camp. However, as conceded by Mr Lau during cross-examination, a reader would never be able to know who this Pak Suet Kay was and whether this Pak Suet Kay was attached to or was a staff of the Magazine. In particular, as admitted by Mr Lau himself[41], most of the articles in the Magazine were written by the staff of the editorial board of the Magazine. Though Mr Lau seeks to play down the proportion of articles written by the Magazine's staff at the trial, it does not alter the fact that a reader would never be able to know whether this Pak Suet Kay was a staff of the Magazine or not. Indeed, one of the articles on the Karmapa Dispute in the August 2011 issue was written by a reporter, presumably of the Magazine,

[41] Mr Lau's witness statement, at §2

engaged by special arrangement. Neither could a reader possibly know that whether the Magazine had adopted the opinion expressed in the Article as is now alleged by the 1st and 2nd Defendants. It is perfectly possible for a reporter of a publication to take a stance on an issue. What is fatal here is that the Article did not disassociate the Magazine from the contents of the Article.

92. For the above reasons, the key element of attribution is missing in the present case and the defence of reportage is therefore not available.

93. In the earlier part of this judgment[42], I have mentioned an apology offered by SCMP to Sharmapa Rinpoche for the publication of the SCMP Article. Although such episode has no relevance on the merits of the Plaintiff's claim, the SCMP Article may serve as a good illustration as to how the defence of reportage can be applied in practice.

94. The title of the SCMP Article was "*Many accusations but few facts as Karmapa accused of spying*". The report contained a lot of queries by various experts in Tibetan affairs about the accusation that Ogyen was spying for the Mainland Government. The report also contained some materials about the Karmapa Dispute. It mentioned a comment by a named US-based commentator that Sharmapa Rinpoche had tried to demonize Ogyen because he was worried that Ogyen would get too popular and this would keep him out of the control of the affairs of Karma Kagyu. It also referred to an allegation by an unnamed observer that it was generally assumed, though not proven, that Sharmapa Rinpoche had been paying off various newspapers and officials in India to advance his cause.

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[42] §§36-38 above

95. As I see it, and Ms Lau agrees, it is arguable that (I put it no higher than that) the defence of reportage might be available to justify the publication of the SCMP Article. The defining characteristic of reportage was present as the SCMP Article was about a report on matters of public interest. Judging the thrust of it as a whole, the SCMP Article may be said to have the effect of reporting, not the truth of the statements or accusations, but the fact that there were made. The element of attribution was also present, as the report referred to accusations made by others not related to SCMP.

96. However, whether such defence is ultimately available depends on a number of other factors, such as: (i) whether the journalist was reporting in a neutral fashion; and (ii) whether the journalist had met all the other requirements of responsible journalism despite that he might not have taken any steps to verify the accusations contained in the report. The issues are certainly fact-sensitive, and the court may not know all the facts in that particular case to determine whether SCMP can rely on such defence. Whether the defence of reportage is available has to be determined according to the facts of each individual case.

"Neutral forum" defence as a new variant of Reynolds privilege?

97. Since the 1st and 2nd Defendants are only relying on the defence of reportage as formulated in *Roberts v Gable*[43], the aforesaid reasons are already sufficient to doom the defence. However, since the application of *Reynolds* privilege is an open-textured issue, is that possible for the 1st and 2nd Defendants to raise a new variant of *Reynolds* privilege based on the contention that they were just offering the Magazine as a

[43] *supra*

forum for the supporters of both Camps to put forward their views about the Karmapa Dispute?

98. As the development of the doctrine of reportage shows, it is always possible for the court to develop a new variant of *Reynolds* privilege for the protection of the freedom of the press. However, since Mr Tang confirms at the trial that the 1st and 2nd Defendants are not seeking to rely on a new variant of *Reynolds* privilege, this matter should be left for further argument in the future.

99. Despite that, I would give my preliminary thoughts on the issue. Unlike a true case of reportage, the 1st and 2nd Defendants seem to suggest that the Article was protected by *Reynolds* privilege because the Magazine was just a forum for the supporters of the opposite Camps of the Karmapa Dispute to put forward their respective views. Since the Karmapa Dispute was a matter of public interest, the materials in the forum were covered by *Reynolds* privilege.

100. I have great reservation with this "neutral forum" defence.

101. Firstly, although the Karmapa Dispute may be a matter of public interest, the Magazine was, in essence, just letting the authors of the articles to say whatever they wished. As shown by the facts of the present case, the Magazine did not know the true identity of this Pak Suet Kay. The editorial board and the readers would not be able to know the background of such person in order to assess the creditability of his or her allegations, and they did not know whether this Pak Suet Kay had other motives behind in making such allegations.

102. Even worse, the 1st and 2nd Defendants had not taken any steps to verify that the contents in the articles did originate from the alleged authors. As in the Plaintiff's case, he wrote the article in the June 2011 issue of the Magazine in Tibetan, but the Chinese translation of the article as appeared in the Magazine might not be an accurate translation of his original article[44]. The so-called forum, therefore, became a potential source of disinformation, and the 1st and 2nd Defendants simply did nothing to fulfil their duties under the notion of responsible journalism. Hence, I do not accept that they can escape liability by simply relying on such "neutral forum" defence.

103. Secondly, in the recent decision of *Oriental Press Group v Fevaworks Solutions Ltd*[45], the Court of Final Appeal had to consider whether the providers, administrators and managers of a website which hosted an internet discussion forum were liable for defamatory statements posted by certain users of that forum. Although the defamatory materials might touch on matter of public interest, the defendants in that case, which were represented by counsel of considerable experience, did not seek to run this sort of "neutral forum" defence against the plaintiffs. Neither did the Court of Final Appeal mention the availability of such defence in its judgment. To a great extent, this shows that this sort of "neutral forum" defence is not available in law. Although the court has to adopt a liberal approach in the application of *Reynolds* privilege, I do not accept that the law has gone so far as to offer privilege to cover the publication of defamatory materials under such circumstances.

Other defences averred in the pleading

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[44] see §§30-31 above
[45] (2013) 16 HKCFAR 366

104. In his submission, it is clear that Mr Tang is just relying on the defence of reportage. However, the 1st and 2nd Defendants have also pleaded other defences in the Re-Re-Amended Defence ("the Defence"). For the sake of completeness, I would briefly address these defences.

105. In §6A of the Defence, the 1st and 2nd Defendants have sought to run a case that the defamatory Article was merely a reply to the Plaintiff's article published in the same issue of the Magazine.

106. For such qualified privilege to apply, a defendant must be replying to an attack on himself or his opinions. There must be something in the nature of a charge against, or assault on, the character, integrity, good faith or reputation of the defendant for the defence to apply. Thus, where the plaintiff was merely provoking general controversy or "holding forth" about matters of public interest without targeting the defendant, this defence cannot assist. Mere retaliation, which cannot be described as an answer or explanation, is also not protected[46].

107. As pointed out to Mr Lau in cross-examination, since both the defamatory Article and the Plaintiff's article were published in the same June 2011 issue of the Magazine, the defamatory Article could not possibly be a reply to the Plaintiff's article unless the defamatory Article was written by a staff of the Magazine who had access to the Plaintiff's yet-to-be-published article. There is no evidence before the court to show that this Pak Suet Kay could have gained access to the Plaintiff's article by other means, and so the defamatory Article, factually, could not have been such a reply to the Plaintiff's article. Indeed, no factual evidence has been put forward before the court to substantiate this defence.

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[46] *Gatley, supra*, at §14.51

108. Furthermore, the Plaintiff's Article, at the most, contained some accusations against Thrangu Rinpoche. There was no attack on Pak Suet Kay himself or herself. Although the privilege has been held to extend to action taken by the defendant to defend his family, friends or even employees[47], without knowing the identity and the background of this Pak Suet Kay, there is no basis for the court to say that Thrangu Rinpoche was a person which fell within such category. In addition, it cannot be said that the Words contained in the Article were published in specific reply to the "allegations" made by the Plaintiff in his article. As mentioned above, mere retaliation, which cannot be described as an answer or explanation, is not protected by such privilege. Hence, the 1st and 2nd Defendants cannot rely on such defence.

109. In §5(e) of the Defence, the 1st and 2nd Defendants also seem to suggest that they had verified the information contained in the Article with the "scholar" who supplied the same, and so they had discharged the duty as a responsible journalist.

110. Firstly, the evidence of the present case clearly shows the 1st and 2nd Defendants did not verify the information contained in the Article with the author or the "scholar" who supplied the Article. At most, they only asked the "scholar" whether Pak Suet Kay was a knowledgeable and trustworthy person. This is quite different from verifying the actual contents of the Article. Further, without knowing the true identity of this Pak Suet Kay, how could the 1st and 2nd Defendants know that the contents of the Article were reliable? This Pak Suet Kay might have an axe to grind against the Plaintiff, and the 1st and 2nd Defendants' effort simply fell far below the standard of responsible journalism.

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[47] *Gatley, supra,* at §14.54

111. Secondly, such defence does not sit well with the defence of reportage or neutral forum defence relied heavily by the 1st and 2nd Defendants. One of the features of the doctrine of reportage is that such defence is available even if the journalist has not taken any steps to verify the contents of the defamatory material. Further, if the Magazine was truly a neutral forum which allowed different supporters to express their views, it is difficult to understand why they might be concerned about finding out whether Pak Suet Kay was knowledgeable or trustworthy or whether the contents of the Article were accurate. The defence's case therefore runs into conceptual difficulty. Hence, such defence is also not available to the 1st and 2nd Defendants.

112. For the above reasons, I find that the 1st and 2nd Defendants are liable to the Plaintiff for defamation in publishing the Words in the Article. Since the Plaintiff is no longer interested in seeking any injunctive relief, the remaining issue is only one of quantum.

Quantum of damages

113. The Plaintiff is seeking for general compensatory damages and aggravated damages against the 1st and 2nd Defendants.

114. General compensatory damages serve 3 functions: to console the plaintiff for hurt and distress suffered, to repair the harm that has been done to his reputation and to vindicate his reputation[48].

115. A plaintiff can also ask the court to award aggravated damages in addition to general damages based on the conduct and the state of mind

[48] *Chu Siu Kuk Yuen v Apple Daily Ltd & Ors* [2002] 1 HKLRD 1 at §62

of the defendant. Some of the relevant principles relating to the award of aggravated damages can be listed out as follows:

(i) aggravated damages are compensatory in nature[49];

(ii) the court may award aggravated damages if the defendant published the defamatory material with a malice[50];

(iii) it is necessary to consider the conduct and circumstances of the defendant from the time when the defamatory material was published down to the time when the verdict was given[51];

(iv) the failure of the defendant to apologise or his persistence with a plea of justification may aggravate the damages[52]; and

(v) a plea of justification which is not made good at the trial may form the basis of an award of aggravated damages[53].

116. On the issue of quantum, Ms Lau has referred me to the following cases.

117. In *Yu Kwong Chiu v Consolidated Newspapers Ltd*[54], the plaintiffs brought an action for defamation against the defendant in respect of publications in 4 district newspapers which alleged that the plaintiffs were, in effect, pretending that they worked for good and that they had proper beliefs, and that, in fact, they were evil men running an evil

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[49] *Lee Ching* v *Lau May Ming* [2007] 3 HKLRD 623 at §208
[50] *Gatley, supra,* at §32.34
[51] *Boulter v Stanley* [2006] 4 HKC 563 at §12
[52] *Lee Ching v Lay May Ming, supra,* at §209
[53] *Mak Shiu Tong v Yue Kwok Ying & Anr* (2004) 7 HKCFAR 228, *per* Riberio PJ at §44

organisation, materialistic, teaching sexual immorality, encouraging suicide and rebellion both against parents and schools, coercing their members, brainwashing them and obtaining money from them by deception; and that, in consequence upon that, they were said to be attacking society and established religions. The 1st plaintiff, being founder of the church, was awarded $120,000 and the 2nd and 3rd plaintiffs, being other elders in the church, were each awarded $70,000.

118. In *Tuet Kazim v Ma Nurudeen & Anr*[55], a religious newspaper alleged that the plaintiff was a brazen hypocrite who, while affecting to be motivated by highly commendable religious considerations, was in truth actuated by personal ambition and material greed, and that in pursuit of those selfish interests, had made and continued to make false claims as to his status in the Muslim community. Damages were awarded in the sum of $50,000.

119. In *Li Wei v Brightec Ltd*[56], the defendants published an article in a monthly magazine which suggested that the plaintiff was a corrupt person who engaged in nefarious activities, including money laundering. The plaintiff held a high position in a company which engaged in the provision of financial securities services. There was no apology or retraction of the article. The plaintiff was awarded $150,000 by way of compensatory and exemplary damages.

120. In determining quantum, Ms Lai has urged me to take into account, *inter alia*, the Plaintiff's senior position in the Karma Kagyu school and the number of followers of such school around the world.

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[54] [1987] 2 HKC 351
[55] [1987] 3 HKC 382
[56] unreported, HCA 4430/2001 (decision of Master de Souza on 12 January 2001)

Further, the first two of the abovementioned cases, which concerned defamation in a religious context, are very old cases in the 1980s. The same sum of money was clearly worth much more in the 1980s than in the present day. The Magazine also had a wider circulation than the district and religious newspapers in those cases.

121. Since the Magazine was published in Chinese, the Article would mainly affect the reputation of the Plaintiff in the local community and perhaps some Chinese-speaking communities around the world. The damaging effect is therefore not worldwide. On the other hand, I agree that the quantum of the claim needs to be adjusted upwards to take into account the effect of inflation since the 1980s. Balancing all the factors of the present case, I award $150,000 as compensatory damages.

122. Although the 1st and 2nd Defendants did not offer an apology or retract the Article, they agreed for the Magazine to serve as a forum for the supporters of the 2 opposing Camps of Karma Kagyu to put forward their views about the Karmapa Dispute. They had expressly invited the supporters of the Plaintiff's Camp to do so, and the Plaintiff in fact wrote an article about the Karmapa Dispute for publication in the Magazine. Such step might not be sufficient to exonerate the 1st and 2nd Defendants from liability for libel, but it showed that the 1st and 2nd Defendants were trying to adopt a neutral stance and were willing to let the Plaintiff and the supporters of the Plaintiff's Camp to defend their reputations in the Magazine. There was no malice involved. In my judgment, this is not an appropriate case for the award of aggravated damages and so no award is made in this regard.

The late discovery of documents

123. Before leaving this judgment, I have not forgotten a decision I made at the beginning of the trial relating to the late discovery of documents on the part of the 1st and 2nd Defendants.

124. Shortly before the trial, the 1st and 2nd Defendants made a late application for the filing of the 2nd supplemental list of documents ("the Supplemental List"). However, the solicitors for the 1st and 2nd Defendants filed the 2nd listing questionnaire dated 4 November 2013, confirming that discovery had been completed, there was no outstanding interlocutory application and they did not intend to take out any other interlocutory applications. It was upon such confirmation that Mr Registrar Lung granted leave for this action to be set down for trial on 13 November 2013.

125. After the implementation of CJR, the courts have repeatedly emphasised that late applications and discovery should be avoided, and the court expects the case to be ready when the case is set down for trial.

126. Despite that, I allowed the 1st and 2nd Defendants to rely on the first 10 documents referred to in the Supplemental List because they are all related to the articles on the Karmapa Dispute published in the May to August 2011 issues of the Magazine and the March 2011 issue of the Hong Kong Economic Journal. The Plaintiff has all along been aware of these articles and so the late discovery of such documents should not disrupt the trial or cause any prejudice to the Plaintiff.

127. However, I disallowed the 1st and 2nd Defendants to rely on the remaining documents in the Supplemental List. Those documents are downloaded from the website pages of New Horizon Buddhist Association and other related organisations and the company and business search

records of the said Association. According to Mr Tang, the 1st and 2nd Defendants seek to rely on these documents to show that the said Association and Lai Shing Yum were supporters of the Plaintiff's Camp. I have no problem in accepting such contention. However, there are many other materials in these downloaded and search documents. If the 1st and 2nd Defendants were to rely on these materials to establish other facts, the Plaintiff is entitled to seek for an adjournment to deal with the new contentions. The late discovery of these other documents may seriously disrupt the trial and so I refused the 1st and 2nd Defendants to rely on these documents. In any event, based on my reasoning above, it seems that these downloaded and search materials cannot take their case any further.

128. For the above reasons, I grant judgment in favour of the Plaintiff against the 1st and 2nd Defendants in the sum of $150,000. If the Plaintiff is seeking for interest on the award of damages, he has to make such application within 14 days from the date of the handing down of this judgment.

129. The final matter is costs. Since the Plaintiff succeeds in the claim, I make an order *nisi* that, vis-à-vis the Plaintiff and the 1st and 2nd Defendants, the costs of the action be paid by the latter two. The order *nisi* shall be made absolute 14 days after the date of the handing down of this judgment.

(David Lok)
Deputy High Court Judge

Ms Queenie Lau, instructed by Kok & Ha, for the Plaintiff

Mr Ronald Tang and Ms Carmen Kei, instructed by Francis Kong & Co, for the 1st and 2nd Defendants