

DALAM MAHKAMAH RAYUAN MALAYSIA

(Bidang Kuasa Rayuan)

RAYUAN SIVIL NO. _____ - 2009

ANTARA

1. TAN SRI NGAN CHING WEN
2. TAN SRI DATO' LIM GUAN TEIK
3. DATO' TAN HUAT SHENG
4. TEOH HOCK CHAI @ TEW HOCK CHAI
5. DR. YEONG CHEONG THYE @ YEONG YUE CHAI

6. MEW JIN SENG ... PERAYU -
PERAYU

DAN

CHOW KEE KAN @ CHOW TUCK KWAN ... RESPONDEN

[Dalam perkara Mahkamah Tinggi Malaya di Kuala Lumpur
Dalam Wilayah Persekutuan, Malaysia
(Bahagian Sivil)
Guaman No : S2-23-1-2008

ANTARA

1. TAN SRI NGAN CHING WEN
2. TAN SRI DATO' LIM GUAN TEIK
3. DATO' TAN HUAT SHENG
4. TEOH HOCK CHAI @ TEW HOCK CHAI
5. DR. YEONG CHEONG THYE @ YEONG YUE CHAI
6. MEW JIN SENG ... PLAINTIF -
PLAINTIF

DAN

1. WEE CHOO KEONG
2. TAN KAI HEE
[NO. K/P : 370118-01-5231]
3. CHOW KEE KAN @ CHOW TUCK KWAN ... DEFENDAN -
DEFENDAN

Yang di putuskan oleh Yang Arif Pesuruhjaya Kahakiman Datin Zabariah bt. Mohd Yusof di Mahkamah Tinggi Kuala Lumpur (Sivil 9) pada 11 haribulan March 2009.]

GROUND OF JUDGMENT

I allowed the application by the 3rd Defendant in Enclosure 15 [under O 18 r 19 (l) (a), RHC) and Enclosure 16 (under O 18 r 19 (l)(b) & (d)] RHC and dismissed the plaintiff's action against the 3rd defendant. Both applications in Enclosure 15 and 16 are to strike out the Plaintiffs' claim. The plaintiffs appeal against the said decision. The following are my reasons.

BACKGROUND FACTS:

The Plaintiffs filed a defamation suit against all the 3 defendants based on statements published by 1st and 2nd defendants in a press conference held on 6-12-2007 .

It is pertinent to set out paragraph 10 of the Statement of Claim which is the crux of the argument pertaining to this application. This paragraph sets out 12 defamatory statements against the Plaintiffs.

Paragraph 10 of the statement of claim states as follows:

"In a press conference jointly held by the Defendants on 6.12.2007 (hereinafter referred to as "The Press Conference") and subsequent statements published and/or caused to be published by the 1st and 2nd Defendants, including press statements published and/or caused to be published by them on the 10.12.2007, the 1st and 2nd Defendants spoke to the media and journalists, whose identities were unknown to the Plaintiffs (hereinafter collectively referred to as The Press statements"), thus had published or caused to be published and/or participated, secured and/or authorized publications or caused the publications of the Plaintiffs and of the Plaintiffs in the way of their said offices and/or in relation to their conduct therein, the following defamatory remarks, to wit..."

The 3rd defendant submits that Paragraph 10 of the Statement of Claim only makes allegation against the 1st and 2nd Defendants, as only 1st and 2nd Defendant had spoken during the press conference. There is no allegation that the 3rd Defendant had spoken during the press conference.

Para 10A of the Statement of Claim alleges that the 3rd defendant had "participated, procured and/or authorized publications of the defamatory remarks uttered by the 1st and 2nd defendants in the Press Conference." The claim fail to state as to how the 3rd Defendant had in fact participated, procured and/or authorized publications, or caused or secured the 1st and 2nd defendants to publish the alleged defamatory statement. It is to be noted that paragraph 10 (i) until 10 (xii) of the Statement of Claim made references to the 1st and 2nd Defendants only. Hence it is submitted that it is undisputed that the 3rd Defendants had not spoken at the Press Conference.

However the plaintiffs alleges that the 3rd defendant had participated, procured and/or authorized publications of the defamatory remarks at the press conference. As to how the 3rd defendant participated, procured and/or authorized the publications, the plaintiffs submits that it could only be determined after full trial. Plaintiffs in its submission in reply states that none of the Plaintiffs were personally present during the press conference held by the 3 defendants, nor were the Plaintiffs privy to the going-ons between the 3 defendants, before, during and after the said press conference. What the plaintiffs do have are the various newspaper reports of the press conference. The Plaintiffs submits that what transpired before, during and after the said press conference would only be unfolded during the full trial of this matter.

With respect, I do not think this line of submission by the plaintiffs is the correct approach and is definitely incorrect. This submission by the plaintiff amounts to a fishing expedition during the trial. As plaintiffs they do not know what actually happened at the press conference as they are not privy to the same, and hence they need to go for trial to find out what happened before, during and after the press conference! The plaintiffs further submits that, it is only at the trial can one find out what is the actual relationship between the 3 defendants, what happened before the press conference, who said what, who authorized what, who procured what and so forth. I think this is misconceived and erroneous, and it is certainly a waste of the court's time.

Before a statement of claim against any defendant is filed, a plaintiff should gather his facts first in that he must know who is he claiming against and in what capacity, whether he has a cause of action against the defendant, and for what. The Plaintiffs cannot use the reasons as had been stated in his submission to go for a full trial on a discovery trip. In this case, Plaintiffs keeps repeating the fact that the 3rd defendant "participated, procured and/or authorized publications...".

How that is so, is not stated in their claims. What is clear is that in the statement of claim the plaintiff alleges:

“.....the 1st and 2nd plaintiffs spoke to the media...”

Hence it is not disputed 3rd defendant did not speak to the media.

Further, paragraph 10 of the Statement of Claim specifically pleaded as follows:

*“subsequent statements published and/or
caused to be published by the 1st and 2nd
Defendants, including press statements published
and/or caused to be published by them on the
10.12.2007...(emphasis added).”*

From the plaintiffs' own Statement of Claim, it states that it was the 1st and 2nd defendants that have caused the publication. The 3rd defendant was nowhere included in these allegations. Thus the 3rd defendant could not have published or caused to be published the defamatory statements. It is to be reminded that parties are bound by their pleadings.

The statements and extracts of the newspaper as stated in paragraph 10 of the Statement of Claim made references to the 1st and 2nd defendants only. No reference was ever made against the 3rd defendants.

Plaintiffs submits that the presence of the 3rd defendant at the Press Conference shows that he had “participated, procured, publications” of the defamatory statements made by the 1st and 2nd defendants, and that he had played a significant role in the act of publication. I cannot agree with this submission of counsel for the Plaintiffs, as plaintiff are bound by what have been pleaded in the Statement of Claim in paragraph 10 that states the 1st and 2nd defendants caused the defamatory matter to be published. The case of **Thiess v T.C.N Channel Nine Pty** (1994) 1 qd. R 156 Full Court which was cited by the plaintiffs held that “ a person who provides material for or even participates in a television programme is not necessarily a co-publisher with the television company, which does not support the contention by the plaintiffs. In the case of **Watts v Times Newspapers [1996] 1 AER 152**, the dictating of apology defamatory statements can be deemed publishing. Here there was a positive act in conveying the defamatory material. In other words there must be an act of publication to constitute “played a significant act”. In our case there was none by the 3rd defendants. He sat with the 2 defendants and did not speak to the media and reporters. How could there be “procuring” the publication, by the 3rd defendant sitting together with the other defendants at the press conference. Cases cited by the Plaintiffs involved printer and publisher of defamatory statements which is not relevant to the case as against the 3rd defendant.

The Plaintiffs states that the photographs extracted shows the 3rd defendant sitting with the other 2 defendants implies that he played a significant role in the publication of the defamatory remarks. I disagree with this contention. The photograph, especially with regard to allegation of defamation, does not “speak a thousand words “ as alleged by the Plaintiffs. It does not convey by some means to the mind of another the defamatory sense embodied in the vehicle.” (refer to the case of **Nathan v Valaitan Raman [2003] 6 CLJ 448**.

Thus, Plaintiffs failed to provide with authorities in support for his proposition that mere passive presence at a press conference, amounts to participating, procuring the publications of the defamatory statements.

Further as averred in the affidavits of the defendants the following is not disputed by the plaintiff:

- a) The press conference was called and held by the 2nd defendants;
- b) The 3rd defendant was an invitee to the 1st and 2nd defendants, in the event questions on accounts are raised. This fact was confirmed by the 2nd defendant in his affidavit;
- c) The 3rd defendant did not know the contents of the speech of the 1st and 2nd defendants at the press conference, and also that the 3rd defendant did not say a single word during the press conference. This is also confirmed by the 2nd defendant in his affidavit;
- d) The 3rd defendant, an accountant engaged by the 2nd defendant. The 2nd defendant was the 3rd defendant's principal. The 1st defendant was the lawyer acting for the 2nd defendant and has no link with the 3rd defendant.

The plaintiffs in paragraph 8 of their affidavit states thus:

“ Walaupun defendan merupakan penasihat perakaunan yang telah dijemput untuk hadir dalam sidang akhbar pada 6.12.2007 tetapi kelakuan beliau adalah lebih daripada seseorang yang hanya menghadiri sidang akhbar itu. Walaupun beliau mungkin tidak bercakap dalam sidang akhbar itu, tetapi beliau telah menunjukkan pemberian kuasa dan sokongan kepada perkataan-perkataan pemfitnahan dengan kelakuan beliau apabila menduduki bersama-sama defendan pertama dan defendan kedua di atas pentas hadapan di mana perkataan-perkataan pemfitnahan telah pun dilempar-lemparkan.”

From the above averments in the relevant affidavits and the Statement of Claim, it is not disputed that the 3rd defendant was an invitee at the press conference and he did not speak at the press conference. Therefore there is no need to determine these at a trial.

Another point which needs to be highlighted is the averments by the Plaintiffs in their affidavit, which relevant parts are reproduced below:

“.....Walaupun beliau mungkin tidak bercakap dalam sidang akhbar itu, tetapi beliau telah menunjukkan pemberian kuasa dan sokongan kepada perkataan-perkataan pemfitnahan dengan kelakuan beliau...”

The word “pemberian kuasa” as stated above connotes a situation where there is a principal and an agent/ employee where the principal could authorized his agent/employee to do a certain act. In the case of the 3rd defendant, via the affidavits it has been stated that he was engaged by the 2nd defendant as his accountant, which means that the 3rd defendant was the agent/employee of the 2nd defendant and that the 2nd defendant was the principal.

Cases have shown that a principal/employer can be vicariously liable for the tortuous acts of its agent/employee. In the case of **Citizens Life Assurance Co v Brown** [1904] AC 423(PC), where an employee in the course of his employment or it is within his scope of authority has published a libelous statement, then the employer is liable for the act of publication. The employer is also liable even when the employee has written or published a libel where he has no authority to do so. In Halsbury’s laws of Malaysia Vol 2 defamation paras 30.151-30.152 states:

“ Where something is published which is known to be untrue by the employee, his action will be deemed to be malicious and the employer/agent can be liable vicariously for the malice.”

However, that is not the situation in our case at present. It is in fact the opposite i.e. the 3rd defendant was the agent to the 2nd defendant, and the 2nd defendant was the principal. There is no law or authority that makes an agent liable for the tortious act of his principal.

Plaintiff further at paragraph 10C alleges:

“ The 3rd defendant who was an active member of the Committee and who had been actively involved with the 2nd defendant in publishing defamatory remarks of and concerned the Plaintiffs in other occasions had participated, procured and/or authorized publications of defamatory remarks of and concerning the Plaintiffs in The Blog.”

Nowhere in the pleadings had the Plaintiffs pleaded or identify the defamatory statement with regards to the publication in the said Blog. It is fundamental that the exact words as published in the said blog be reproduced verbatim in its original language with a certified translation in the language of the court. Failure to do so will result in the failure of the claim.

In libel, the words published in the said blog are the material facts and must therefore be set out in the statement of claim. It is not sufficient to merely state that the 3rd defendant had been actively involved with the 2nd defendant in publishing defamatory remarks concerning the Plaintiffs in The Blog. For the court to determine whether the publication amounts to defamatory

remarks/statements, the actual words must be set out, as the words are the facts on which the case is premised on.

Hence, in the circumstances, the court is in no position to judge whether the words /statements in the said blog would constitute a cause of action. (Refer to the case of ***Workers' Party v Tay Boon Too*** [1975] 1 MLJ 47).

Thus, what is clear from the affidavits filed between the parties is that the 3rd defendant was invited to the Press Conference, he had not spoken at all to the media and journalists. Only the 1st and the 2nd defendants spoke to the media and journalists, and the choice of words uttered by them was not within the 3rd defendant's knowledge and beyond the control of the 3rd defendant. By this, the 3rd defendant could not be said to have participated, procured and/or authorized publications of the defamatory remarks uttered by the 1st and 2nd defendants in the Press Conference.

Lastly the Plaintiff submits that the defence of the 3rd defendant which pleaded justification and fair comment impliedly mean that the 3rd defendant had admitted to the purported publication of the defamatory remarks. However this submission cannot hold, as the said defence was pleaded in the alternative and he had made a clear qualification that such defences are in the alternative.

Thus, the Plaintiff's claim is clearly a plain and obvious case of a frivolous and a vexatious case. It is an unsustainable cause of action and an abuse of the process of court. I therefore allowed the application of the 3rd defendant in enclosure 15 and 16 with costs and the action of the plaintiff against the 3rd defendant is dismissed.

t.t Y.A Datin Zabariah bt. Mohd Yusof
Tarikh : 30.3.09