

Preliminary Objection:

The Plaintiff submits that since the Defendant have filed an unconditional appearance, the Defendant is hereby precluded from filing this application to strike out the Plaintiff's Statement of Claim. The Plaintiff submits the defendant have failed to follow the requirement of 0 12 r 6 (1) RHC 1980. The Plaintiff referred to the case of ***Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd*** [1998] 4 MLJ 497 and ***MBF Capital Bhd v Dato' Param Kumaraswamy*** [1997] 3 MLJ 300.

I disagree with the contention of the Plaintiff's counsel as there are authorities that allows the application of 0 18 r 19 even though the Defendant have not filed a memorandum of conditional appearance. Refer to the case of ***Doreen Industries*** [2001] 6 MLJ 532 where the courts had allowed the application under 0 18 r 19 RHC although the Defendant had entered unconditional appearance and had filed a defence.

Therefore the Defendant is not precluded from proceeding with the striking out application even without filing a conditional appearance. Therefore I dismissed the preliminary objection.

Background facts

The Plaintiff in this case is the Director of AT Embassy (M) Sdn Bhd and Embassy Management Corporation Sdn Bhd. The Defendant is an individual who had bought 2 units of apartment from Embassy Management Corporation Sdn Bhd.

The Plaintiff filed a suit against the defendant for allegedly publishing defamatory statements directly or by indirect means against the Plaintiff as the director of Syarikat AT Embassy (M) Sdn Bhd.

According to the Plaintiff, these defamatory words/statements are found in a letter of notice bearing the title of "Invitation to attend Megan Embassy Owner's Pro-Tem Committee's Meeting" where the particulars of the alleged defamatory statements is reproduced below verbatim:

Page 1 item 2:

“ ILEGAL STATUS OF AMBASSY MANAGEMENT CORPORATION SDN BHD

It is noted that, in spite of us having produced a letter from The Board of Valuers, Appraisers and Estate Agents of Malaysia, confirming that, "AMBASSY MANAGEMENT CORPORATION SDN BHD", is not a member of the Board and is therefore not authorised to undertake property management practice, to-date, the Management has not furnished us with any satisfactory confirmation as to the legal status of Embassy Management Corporation Management in managing MEGAN AMBASSY...."

Regards,

Megan Embassy Owners Pro- Tem Committee"

(Hereinafter referred to as the First alleged defamatory Statement)

Further the Plaintiff alleges that the Defendant had published defamatory statements directly or indirectly of the Plaintiff as the Director of Syarikat AT Embassy (M) Sdn Bhd and Embassy Management Corporation Sdn Bhd and had distributed it to various third parties via a letter that bears the title of "Minutes of 4th meeting between Owners of Megan Embassy, 225 Jalan Ampang, Kuala Lumpur held at Meeting Room, Petroleum Training Academy, 1st Floor, Yow Chuan Plaza on 13th December 2007, 7:30 p.m." where the details of the alleged statements are reproduced verbatim as below:

At page 1 of Item No.1:

"In view of the encouraging turnout of new members, En Fazal stated the meeting by provided a brief into past and present development pertaining to the formation of the pro-tern committee and major issues that remain unresolved to date, which are as follows;

- Questionable increase of service charge
- Non transparent management of funds
- Poor management of the property as a whole
- Refusal by the developer and management committee to acknowledge complaints or hold dialogues
- Absence of audited accounts and budget"

At page 2 in Item No 4 :

"Next issue discussed was the budget that came attached with the notices, which some members are disputing due to the exorbitant charges reflected as expenditure. Mr. Pua Tat Hing (a developer by profession) would be submitting his views on the budget, while another owner has volunteered to obtain some comparison quotes. The concern is that the management corporation would attempt to garner agreement from unsuspecting owners to accept the budget and revised rates.

Another matter noteworthy is that the new budget statement received has somehow managed to magically project a surplus (due to cost cutting measures, they claim) while previous budgets shown to certain members have been reporting deficits (which the developer used as justification for the much disputed increase). The mystery is; Why was the cost cutting or even spending within means never considered in the past? Shouldn't the initial years after handover of units theoretically require least unkeep expenses?"

At page 2 Item No 8:

“General complaints received from owners in attendance are;

- unjustified increase of service charges & sinking funds
- with-holding of deposit owing to an owner by AMC who was acting as a leasing agent
- poor maintenance and quality of finishing (wall paper & paint jobs)
- lack of pest control
- refusal to repair buildings defects and leakage in owner's lot (some owners have found themselves to be blacklisted by the maintenance department)”

(Hereinafter referred to as the Second Defamatory Statement)

Plaintiff claims that the said defamatory words read in its entirety contains defamatory words which by the natural and ordinary meaning meant and understood to mean that (as reproduced verbatim from the statement of claim at para 6:

- (a)Plaintif tidak layak untuk memegang jawatan sebagai Pengarah Syarikat AT Embassy (M) Sdn Bhd dan Embassy Management Corporation Sdn Bhd;
- (b)Plaintif seorang penipu dan tidak boleh dipercayai dan menjalankan perniagaan secara haram;

- (c)Plaintif adalah tidak berkebolehan dan tidak berkeupayaan menyandang jawatan Pengarah Urusan Syarikat AT Embassy (M) Sdn Bhd dan Embassy Management Corporation Sdn Bhd;
- (d)Plaintif telah didorongi oleh motif-motif jahat dalam menjalankan tanggungjawab beliau sebagai seorang Pengarah Urusan Syarikat AT Embassy (M) Sdn Bhd dan Embassy Management Corporation Sdn Bhd;
- (e)Plaintif tidak bersikap jujur terhadap penghuni-penghuni dan/atau pemilik-pemilik pangsapuri-pangsapuri perkhidmatan / suit-suit korporat / kedai-kedai yang dikenali secara sementara sebagai Embassy Service and Hotel Apartments (selepas ini dikenali sebagai ‘Menara Pangsapuri Perkhidmatan tersebut”);
- (f) Plaintif dengan sengaja (knowingly and willfully”) telah mengelirukan penghuni-penghuni dan/atau pemilik-pemilik di Menara pangsapuri Perkhidmatan tersebut dengan memberi informasi informasi yang salah dan dengan itu misrepresentasi dan menipu penghuni-penghuni dan/atau pemilik-pemilik di Menara Pangsapuri Perkhidmatan tersebut dan telah menyembunyikan kebenaran daripada mereka;
- (g)Plaintif telah menggunakan kuasanya secara sewenang-wenangnya;

(h)Plaintif mempunyai reputasi yang tidak harus dihormati kerana menguruskan hal-hal Syarikat AT Embassy (M) Sdn Bhd dan Embassy Management Corporation Sdn Bhd dengan cara yang amat mencurigakan dan tidak jujur dan oleh yang demikian tidak boleh dipercayai oleh penghuni-penghuni dan/atau pemilik-pemilik di Menara Dangsapuri Perkhidmatan tersebut;

(i) Plaintif tidak layak untuk memegang jawatan Pengarah Syarikat AT Embassy (M) Sdn Bhd dan Embassy Management Corporation Sdn Bhd atau menyimpan pejabatnya atas sebab-sebab telah melakukan sesuatu yang memalukan, penipuan, tidak layak, tidak boleh dipercayai dan perbuatan-perbuatan seperti yang dinyatakan di atas. “

Plaintiff also pleaded as an alternative, that the words bears the meaning as stated above by way of innuendo.

Plaintiff alleges that the publication of the alleged defamatory statements was distributed to third parties by the Defendant by depositing it at the various letter boxes at Menara Pangsapuri Perkhidmatan where third parties have access to it.

By reason of the publication of the said words the Plaintiff has been brought into public scandal, odium and contempt and has suffered serious damage.

Whether the Plaintiff have a reasonable cause of action against the Defendant

To prove whether the Plaintiff has a cause of action against the Defendant Plaintiff has to prove the following:

- a) That the words or statements are defamatory;
- b) That the words or statements refers to the Plaintiff;
- c) That the words or statements was published to third parties.

a) Whether the said letter and notices contains words that are defamatory

The first alleged defamatory statement states that Embassy Management Corporation Sdn Bhd is not a member of the Board of Valuers, Appraisers and Estate Agents of Malaysia, and is therefore, not authorised to undertake property management practice. Therefore the implication by the natural and ordinary meaning implies that Embassy Management Corporation Sdn Bhd is an illegal body carrying out the management of the service apartment.

Following from the first defamatory article, the second defamatory statements implies that the Embassy Management Corporation Sdn Bhd lacks integrity and unscrupulous in overcharging residents for its services which is not up to mark.

I am of the view that the first article does contains words which contains some negative imputations on Embassy Management Corporation Sdn Bhd. It connotes that the Corporation is an unlawful body and therefore should not be managing the Apartment.

The Plaintiff further pleads in the alternative that the words carries the meaning as pleaded in paragraph 6 of the Statement of claim by way of innuendo.

The English cases approach innuendo from the perspective of “extended meaning” – namely, that the extrinsic facts in juxtaposition with the specific words on the specific words an “extended meaning” not discernable if the words are disengaged from that special context. By necessary implication, the extrinsic facts will not be generally known. If it were otherwise, the words would carry the offensive imputation by themselves by reason of the general knowledge of the extrinsic facts. So, the extrinsic facts that set the impugned words in a different and negative light are facts that are known only to a certain group of persons. These extrinsic facts which are known to only certain groups have to be adduced at the trial.

b) Whether the statements refers to the Plaintiff.

The Defendant submits that nowhere in the alleged defamatory article was the name of the Plaintiff mentioned.

The Plaintiff is the Director and Managing Director of Syarikat AT Embassy (M) Sdn Bhd and Embassy Management Corporation Sdn Bhd. Although directors and companies are 2 separate legal entity, but an individual may be the alter ego of the company especially where he has the sole control of the company. It must be borne in mind that when any alleged misdeed is being committed by a company, it is being committed by individuals manning it. The company cannot act on its own.

Therefore, to determine whether a reference to Embassy Management Corporation Sdn Bhd would mean a reference to the Plaintiff, will have to be adduced through testimony of witnesses at the trial. Affidavit evidence alone is not sufficient to determine this issue.

c) Whether the alleged defamatory statement were published to third parties.

The Defendant in its affidavit denies that she was the one who published the so called defamatory letters. The Plaintiff, on the other hand states that at paragraph 9 of his statement of claim as follows:

“ Pernyataan-pernyataan Fitnah tersebut telah diterbitkan dan disebarikan oleh defendan ke pihak-pihak ketiga di semua peti surat di Menara Pangsapuri perkhidmatan tersebut, dimana pihak-pihak ketiga mempunyai akses yang percuma dan terbuka kepada pernyataan-pernyataan Fitnah tersebut.”

The plaintiff is claiming that the defendant is liable by distributing the alleged defamatory letters and notices, by putting it in the letter boxes of the residents of the apartments. For this, the case of ***Emmens v Pottle & Others*** [1885] AC 354 is relevant, where the English Court of Appeal have held that :

“The vendor of a newspaper in the ordinary course of business, though he is prima facie liable for a libel contained in it, is not liable, if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his part; and that he did not know, and had no ground for supposing that the newspaper was likely to contain libelous matter. If he can prove those facts he is not a publisher of the libel.”

Using the analogy in the above cited case and applying it to our present case, the fact that the letters and notices which contains the alleged libelous material were distributed by the Defendant by putting it in letter boxes of third parties needs to be proven and established via oral evidence at the trial. Once that has been proven by the Plaintiff, it is for the Defendant to prove that she does not know that the letters or the notices contains libelous material. Therefore, affidavit evidence alone is insufficient to establish this issue on publication.

Therefore the Plaintiff does have a cause of action against the Defendant. Whether he will succeed in his claim is not this court's concern at this stage. Parties did not submit on the defences, that is why these have not been addressed in my grounds, nevertheless I am of the view that this is not a case where 0 18 r 19 (1) RHC applies where it is an obvious unsustainable case that ought to be struck out.

Therefore I dismissed the application of the Defendant for striking out with costs.

t.t. Datin Zabariah Mohd Yusof
Tarikh : 28.5.2009

Bagi pihak Plaintiff : Encik Abu Yazid bin Shayutty
Tetuan Ashfar Ali & Associates

Bagi pihak Defendan : Tetuan Firdaus, Shanti Bhupin