

**DALAM MAHKAMAH TINGGI D1 KUALA LUMPUR  
DALAM WILAYAH PERSEKUTUAN, MALAYSIA  
(BAHAGIAN SIVIL)**

**GUAMAN SIVIL NO: S3-23-88-2008**

**ANTARA**

**CHAN TSE YUEN**

**.....PLAINTIF**

**DAN**

**1. NG SHAW HWA**

**2. CHAM SHIUN YAN**

**.....DEFENDAN**

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**GROUND OF JUDGMENT**

The Defendants have filed two Applications to strike out :

- a) Application enclosure 7 filed on 12.8.08 is to strike out the Writ of Summons and Statement of Claim dated 23.4.08 (hereinafter referred to as "the 1st Application")',
- b) Application enclosure 15 filed on 8.1.09 is to strike out the Amended Writ of Summons, the Amended Statement of Claim dated 15.8.08, and the Amended Reply dated 15.9.08 (hereinafter referred to as "the 2nd Application").

I allowed the application of the Defendant in Enclosure 7 and 15 with costs after reading through the written submissions filed by both parties. Dissatisfied with the decisions the Plaintiff appealed against my decision. Below are my grounds.

### **THE PLAINTIFF'S CLAIM**

Cause of action against the Defendant is for defamation purportedly on defamatory remarks allegedly made against the Plaintiff in a letter dated 1.4.08 written by the law firm Messrs Shaw & Co., whose partners are the Defendants.

### **BACKGROUND FACTS**

The Defendants are advocates and solicitors and are partners practising as Messrs. Shaw & Co..

Plaintiff is also an advocate and solicitor of the High Court of Malaya.

At all material times, Messrs. Shaw & Co were the solicitors appointed by one Siew Yen Nee ("Defendants' Client") to have conduct of a sale and purchase transaction for the sale of a half share of a unit known as "Parcel No. A-13-1, Storey 13, Building No. A, Vista Amani Condominium measuring approximately 1,101 square feet together with Accessory Parcel No. 79 held under the Master title bearing postal address A-13-1, Block A, Vista Amani Condominium, Ja/an Tasik Permaisuri 3, Bandar Tun Razak, 56000 Kuala Lumpur' ("the said Unit").

Messrs. Chan Tse Yuen & Co. were at all times appointed by one Siew Yen Mee ("Plaintiff's Client") who is the purchaser of the said half share of the said Unit owned by the Defendants' Client. It also appears from the Amended Statement of Claim that the Plaintiff's Client worked as Office Administration Manager of Messrs. Chan Tse Yuen & Co..

The Plaintiff's Client is at all times the Defendants' Client's sister and also owner of the other half share of the said Unit.

Therefore, at all material times, both Messrs. Chan Tse Yuen & Co. and Messrs. Shaw & Co. were representing their clients respectively in the sale and purchase transaction.

### **THE COURTS FINDINGS**

In Striking Out Applications, the Court has to determine whether the Plaintiff has failed to plead all necessary ingredients or material facts to establish a cause of defamation action. Refer to case of :

- ***Bandar Builder Sdn Bhd & 2 Drs v United Malayan Banking Corporation Bhd*** [1993] 4 CLJ 7 ;
- ***Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors*** [1996] 1 MLJ 309;

The plaintiff thus has to show:

- a) That the words are defamatory;
- b) That the words refers to the Plaintiff; and

c) That the words have been published to third parties.

The Plaintiff based his claim on several purported defamatory remarks allegedly made against the Plaintiff in a letter dated 1.4.08 written by the law firm Messrs Shaw & Co (of which the Defendant is a partner) set out as follows:

"you have failed to response to our request for a meeting .. we reiterate that we have proposed a meeting to be held with all parties concern .. however you have failed to accede to our request."

(The first Defamatory Words)

"..you have made serious allegations against our client in .. your letter."

(The Second Defamatory Words)

".. Your allegation does not correspond to the facts of this matter .."

(The Third Defamatory Words)

" .. you have in your letters dated 10 July 2007 and 13 August 2007 alleged that the terms of the intended sale was agreed and finalized by the parties .. our client has never agreed to the terms .. she has never agreed to the terms .. the terms of the intended sale .. was not finalized .. "

(The Fourth Defamatory Words)

Refer to Enclosure 6 Exhibit "NSH-2" for the Letter dated 1.4.08.

Whether the purported words are defamatory and whether the words refers to the Plaintiff

The purported "defamatory remarks" for the alleged "defamatory remarks" in paragraph 3(a) and 3(d) of the Statement of Claim are not set out verbatim i.e.:

- The words in paragraph 3(a) and 3(d) are a re-arranged version of several statements made in the Letter dated 1.4.08 (hereinafter referred to as "the Letter"). For example, the first Defamatory Words consists of the original para 2 (d) combine with para 5 of the said letter;
- The order of the words have been rearranged by the Plaintiff, as the purported "defamatory remarks" are taken from several statements and paragraphs and are not set out in its true sequence or correct order in which the words appeared in the letter;
- Paragraphs 3(a) to 3(d) of the Statement of Claim is also not the order in which the statements are made in the Letter.

Authorities as in ***Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors*** [1997] 5 MLJ 523 quoted English case like ***Harris v Warre*** [1879] 4 CPD 125 and ***Workers Party v Tay Boon Too*** [1975] 1 MLJ 47 succinctly reiterates the importance of the actual words uttered to be stated in the pleadings. In our case, the words and statements have been rearranged according to the

whims of the Plaintiff, which gave the effect that the author of the purported words are the Plaintiff.

Even for a moment, if I am to go on the basis and presumption that the words and statements are not being re arranged as what the Plaintiff had done, I still cannot tag a defamatory connotation to the statements as contained in the said letter. It is seen that the words in the said Letter, when read as a whole, cannot by any stretch of imagination, be said to be insulting or defamatory, or being capable of bearing the meanings the Plaintiff purports to assign to them.

The purported "defamatory remarks" also does not make any reference to the Plaintiff. Refer to the case of:

- ***Atip Bin Ali v Josephine Doris Nunis & Anor*** [1987]1 MLJ 8;
- ***Halim bin Arsyat v Sistem Televisyen Malaysia Bhd*** [2001] 6 MLJ 353

The Letter was written in response to Messrs Chan Tse Yuen & Co.'s letter dated 24.3.08 (see enclosure 6 Exhibit "NSH-4"), and the Letter contained no stronger words than those used by Messrs Chan Tse Yuen & Co. and/or the Plaintiff himself and hence cannot be said to be defamatory.

As for the allegations of innuendos arising from the purported "defamatory remarks" it also fails, as upon reading of the purported "defamatory remarks" in the Letter, no innuendo as alleged can be ascribed.

Further, the Letter was written in accordance with the Defendant's client's instructions. This is contained in a statutory declaration affirmed by the Defendant's Client's on 27.5.2008.

( Refer to enclosure 6, Exhibit "NSH-3")

Whether there is publication of the alleged defamatory remarks to third parties

If one is to refer to the said letter in exhibit "NSH-2" in Enclosure 6, one would notice that the Letter was specifically addressed to Mr P E Chong. The Defendant cannot be made responsible if the said letter was opened and read by those other than the addressee. Thus, the said publication which was mentioned in the Statement of Claim was by the Plaintiff or his own staff or employee which was beyond the control of the Defendant. Such purported circulation within Messrs. Chan Tse Yuen & Co. amounts to further publication and/or re-publication and/or accidental publication and the Defendants cannot be made responsible for the same or at all.

Therefore I find that the Defendants did not publish the alleged "defamatory remarks".

Thus based on the above, there is obviously no cause of action against the Defendant and the court can strike out the Plaintiff's claim at this stage, however for completeness, I venture to consider the defences raised by the Defendant in the event the purported defamatory remarks are defamatory.

For the defence of qualified privilege, even if there was "publication", I find that the said Letter is protected by ancillary

qualified privilege. These purported remarks in the said letter were words in the course of communication between counsels for the Plaintiff's Clients and the Defendant's client and is in the ordinary course of business and therefore the obligation to the Plaintiff's staff would come within ancillary qualified privilege or privileged publication or non-actionable. Refer to the case of ***Mahadevi Nadchatiram v Thiruchelvasegaram*** [2001] 3 CLJ 65.

As for the Defendant's defence of qualified privilege, I find that it has not been rebutted by the Plaintiff. The Plaintiff merely states that there are triable issues and there must be a full trial. This is not sufficient as the plaintiff must provide particulars in response to the defence of the Defendant of qualified privilege. The plaintiff must show that either the Defendant has failed the reciprocity test or that there is no social, moral or legal duty for the Defendant to reply to the said Messrs. Chan Tse Yuen & Co's letter. But none of this was shown in the affidavit of the Plaintiff.

Similarly for the defence of absolute privilege and justification invoked by the Defendant; the Plaintiff has not responded in its Affidavit to the Defendant's statements with regard to absolute privilege in paragraph 31 of the Defendants' Affidavit enclosure 6 and the Defendants' averments on justification in paragraph 18 of the Defendants' Affidavit enclosure 6.

The Defendant has thus failed to reply and has not raised any issues or rebuttal to the Defendants' averments of defences.

Therefore all material facts not denied by the Plaintiff are deemed to be admitted.

A final point to take note that the Plaintiff had not raised malice in its affidavit of reply in response to the defence of qualified privilege.

Therefore for the reasons stated above, I find that there is no cause of action against the Defendant in that the purported defamatory remarks:

- are not defamatory;
- does not refer to the Plaintiff;
- was not published by the Defendant.

Therefore, it is clear that there is no cause of action on the Plaintiffs' claim whether in its original or in its amended form, and the Claim and Amended Reply, is clearly scandalous, frivolous and/or vexatious and/or abuse of process. I therefore allowed the application of the Defendant in Enclosure 7 and 15 with costs.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 29.5.2009

Bagi pihak Plaintif : Encik Chew Biman  
Tetuan Chew Biman & Co

Bagi pihak Defendan : Encik Low Chi Cheng  
Tetuan Lim Kian Leong & Co