IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 02(f)-125-11/2017(W)

BETWEEN

RAUB AUSTRALIAN GOLD MINING SDN BHD
(in creditors' voluntary liquidation)
(Company No. 374745-K) .. APPELLANT

AND

HUE SHIEH LEE
(NRIC NO. 781120-14-5496) .. RESPONDENT

[In the Court of Appeal of Malaysia
(Appellate Jurisdiction)
Civil Appeal No. W-02(NCVC)(W)-996-05/2016

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CORUM

RAMLY HJ ALI, FCJ

AZAHAR MOHAMED, FCJ

BALIA YUSOF HJ WAHI, FCJ

ROHANA YUSUF, FCJ

MOHD ZAWAWI SALLEH, FCJ

JUDGMENT OF THE COURT

1. **The appellant, Raub Australian Gold Mining Sdn Bhd (also known as RAGM), filed an action against the respondent for libel and malicious falsehood. On 17.5.2016, the High Court dismissed the claim and on 21.10.2016 the Court of Appeal dismissed its appeal. Hence the present appeal before us.**

2. **Leave to appeal to this Court was granted to the appellant, on 16.10.2017, on the following questions of law:**

   (i) whether the subjective nation of 'the values of society as time progresses in interpreting the fundamental right to freedom of speech to reflect the present day values of society' as enunciated by the Court of Appeal in Raub Australian Gold Mining Sdn Bhd v Hue Shieh Lee vide Court of Appeal Civil Appeal No. 1-02(NCVC)-996-05/2016 by reference to the decision in Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd [2001] 6 MLJ 241 and Tan Teck Seng v Suruhanjaya Perkhidmatan

Pendidikan & Anor [1996] 1 MLJ 261 is the new test for determining if the words complained of are prima facie defamatory, in Malaysia? ('Question 1');

(ii) whether the criteria for determining the right of an activist or individual to freedom of speech as set out by the Court of Appeal in **Raub Australian Gold Mining Sdn Bhd v Hue Shieh Lee** vide Court of Appeal Civil Appeal No. 1-02(NCVC)-996-05/2016 by reference to the decision in **Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29** or alternatively as previously enunciated in **Lee Kuan Yew v Chin Vui Khen & Anor [1991] 3 MLJ 494** applies in Malaysia? ('Question 2');

(iii) as a matter of law in defamation cases, whether the effect of pleading the phrase 'save where expressly admitted herein, the defendant denies each and every allegation of the plaintiff as they are set out henceforth and traversed seriatim' in the absence of an express denial to publication of the defamatory words complained of in a defence is sufficient? ('Question 3'); and

(iv) if question 3 is answered in the affirmative, whether an express plea of justification and fair comment would nullify the effect of the defendant's general traverse in a defence to a plaintiff's specific claim that the defendant has published defamatory words? ('Question 4').

Facts of the case

3. At all material times, the appellant was the only gold processing company that mined and produced gold dore bars at its plant located in Bukit Koman in the District of Raub, Pahang since February 2009. The plant was located approximately one (1) kilometer away from Kampung Bukit Koman.

4. The respondent was a mother of three and a resident of Bukit Koman. She held herself out as the Vice-President of the Pahang Bau Cyanide in Gold Mining Action Committee ("BCAC"), alternatively referred to as the Anti-Cyanide Group ("ACG"), which was an activist group.

5. The appellant instituted an action against the respondent for libel and malicious falsehood in respect of two (2) statements or articles alleged to have been made by the respondent regarding the appellant. The claim was premised of the causes of action arising out of the publication of 2 articles on http://www.malaysiakini.com ("the 1st Article"), and http: //www.freemalaysiatoday.com ("the 2nd Article").

6. The 1st Article contains a link which led to a video presentation on the Malaysiakini website depicting a press conference and presentation by several individuals (including the respondent) who held themselves out as members of the BCAC.

7. As set out at paragraph (6) of the statements of claim, the 1st Article reads as follows:

> *(a) "A random survey covering households in the area was conducted in May 2012 and*

the survey done by interviewing the residents from house to house and the interview was based on a standardise questionnaire with a total of 383 residents respondent as the result were tabulated in the appendix page";

(b) "So survey results show that, 50% of the residents suffering from skin diseases and eye irritation and another 40% of the respondent has coughing, these results suggest that a possible cause is an air borne irritant affecting these respondents and there were 8 cases of cancer among the respondent"; and

(c) "As specified complaints such as giddiness and lethargy was also high and above 35% and the residents are aware of the business of the gold mine and the gold extracting facility RAGM near to their home. Persistent and strong cyanide like odour has been detected by majority of the residents since the Raub plant started operation in February 2009, such odour has been, never been present in Bukit Koman in prior times".

8. The 2nd Article, as set out at paragraph (9) of the statement of claim, reads as follows:

> ***"The 2nd Article contains the following passages which were derived from the words spoken, uttered and/or published by the defendant to persons from Free Malaysia Today (FMT) website knowing and expecting the said words to be reported on the FMT website and are prima facie defamatory of the plaintiff in the way of its trade and business:***
>
> ***(a) According to Sherly, RAGM has even claimed that they have generated many jobs for the villagers who number a little over 1,000 people. When asked how many villagers work at the mine, Sherly said that it was less than 10 people."***

9. In the 1st Article, the appellant pleaded the following defamatory meanings concerning the appellant:

> ***"(i) the appellant has been negligent in handling sodium cyanide in its plant by allowing it to escape from the Plant causing 383 residents of Bukit Koman to suffer illnesses;***

(ii) the ill health of the 383 residents are due to the direct actions of the appellant at its CIL Plant;

(iii) the appellant is irresponsible and does not employ safe mining operations;

(iv) the appellant is an irresponsible and reckless company that prioritises profit over the health and safety of the residents of Bukit Koman;

(v) the appellant is an irresponsible and reckless company that prioritises profit over sound and/or safe mining practices; and

(vi) the appellant has caused the air in the Bukit Koman area to be polluted due directly and/or solely to presence of sodium cyanide which has escaped from the appellant's CIL Plant which in turn cause the residents to suffer from skin and eye irritation.".

10. With regard to the 2nd Article, the appellant pleaded the following defamatory meanings, concerning the appellant:

"(i) the appellant is a dishonest company who represented that it has generated many jobs for the villagers when in fact only less than 10 individuals from the village work at the defendant's Carbon in Leach Plant; and

(ii) the appellant is a company that practices deceit and always misrepresents facts."

11. The appellant decided to file the claim against the respondent for, among others, the following reasons:

(i) the Articles contain highly defamatory and utterly baseless allegations against the appellant in the way of its trade and business;

(ii) the allegations made against the appellant are unfounded and misconceived and has put the appellant under a negative light and brought it to public scandal, hatred and ridicule;

(iii) the allegation made against in the Articles also affects the appellant's business reputation; and

(iv) the allegations incite hatred against the appellant, its Board of Directors and workers.

At the High Court

12. After full trial, the High Court dismissed the appellant's claim and held, among others, as follows:

(i) in both the 1st and 2nd Articles, the alleged libel referred to the appellant; and no one else;

(ii) on the 1st Article, the respondent uttered those statements in a press conference, in the presence of third parties, who were present at the event, and therefore the respondent did publish the 1st Article to third parties;

(iii) on the 2nd Article, the words complained of are not the actual words uttered or published by the respondent to a third party; instead those statements/words were in fact a report or statement by Free Malaysia Today (FMT) and/or the reporter Aneesa Alphonsus; since the reporter was not called to testify in court, the words complained of

was based on hearsay, and unsubstantiated by direct and cogent evidence;

(iv) on the 1st Article, the mere announcement of the survey results compiled by the interviewers of the BCAC does not mean that the words complained of, in their natural and ordinary meaning, are defamatory of the appellant;

(v) what the respondent did by conveying the survey results at a press conference, with no proof by the appellant that the respondent had fabricated or concocted the survey results, or that she had uttered or published words to the effect that the health problems of the majority of the 383 residents were caused by the appellant's use of sodium cyanide in the operation of its plant, does not amount to *prima facie* defamation of the appellant's trading or business reputation;

(vi) on the 2nd Article, since the reporter was not called as a witness by the plaintiff (the appellant) to prove who had made the statement regarding the employment of villagers by the appellant in the words

complained of, the court was still left guessing as to whether the respondent did say that the appellant claimed to have generated jobs for 1,000 villagers, but in fact it only employed 10 villagers; the court held that the plaintiff (appellant) has failed to prove that the 2nd set of words complained of are defamatory of the appellant.

At the Court of Appeal

13. The appellant appealed to the Court of Appeal. On 21.10.2016, the appeal was dismissed.

14. On the 1st Article, the Court of Appeal ruled among others, as follows:

> ***"(i) In our view, she was only stating a finding of the survey and expressing her concern for the health of the residents. By expressing her concern for the residents, she was only exercising her rights as an activist to bring to the attention of the relevant authorities to allay the residents' fear. That was what happened. The Department of Health did an investigation and found that the ill health of the residents was not abnormal. But that***

does not make the statement by the respondent defamatory.

(ii) Further, looking at the press statement as a whole in a reasonable and objective manner, we, with respect, cannot see how those words had exposed the appellant to hatred, contempt or ridicule or lowered the appellant in the estimation of the society at large.

(iii) In the case at hand, the most it can be said, is that what was said may not be "music to the ear" or "irritating" but that cannot be equated to defamatory utterance. We now live in a much more liberal society where the concept of transparency and accountability are very much part and parcel of our lives. Hence the freedom of speech entrenched in our Constitution must be construed in that context …"

15. On the 2nd Article, the Court of Appeal ruled among others, as follows:

"(i) ***The 2nd Article was a document in Bundle B which contained documents that are agreed***

as to their authenticity but not as to their contents. What that means is that the existence and the genuineness of the documents are agreed upon and required no proof. As for the contents must be proved.

(ii) *Taking that in the context of a defamation action as we have here and bearing in mind that the burden of proof is on the appellant to prove publication of the exact words uttered by the respondent, the manner in which paragraph 9 of the amended statement of claim is crafted or fashioned does not in any way directly state what exactly the words uttered by the respondent. In fact, the manner it was fashioned or pleaded was in the form of hearsay evidence. Bundle B documents require proof what was heard by the reporter as was reported. Hence we agree with the learned judge."*

16. The Court of Appeal, in its judgment, concluded as follows:

"For reasons stated above, we do not find the words in the First Article to be defamatory. As for the words in the Second Article, the appellant

has failed to prove that there was publication by the respondent of the same and in any event we find those words not to be defamatory."

17. On the issue of malicious falsehood, the High Court ruled that the appellant must establish that the respondent had published about the appellant words which are false; and that they were published maliciously. On the 1st Article, the learned judge ruled that the appellant failed to prove that the survey result read by the respondent were false because the appellant did not call any of the 383 residents to prove that they did not suffer from any health problems as a result of the appellant's use of cyanide in its operation of the gold mine.

18. On the 2nd Article, the learned judge ruled that the appellant had failed to call the reporter, who had purportedly interviewed the respondent, as a witness to prove that the respondent had uttered or published those words; therefore it followed that the issue whether the words were false did not arise.

19. The Court of Appeal ruled that the appellant did not adduce any evidence to prove that in regard to the 1st Article the respondent had uttered and published the words maliciously; as the Vice-President of the BCAC, the respondent only read out the survey results based on the survey conducted by the BCAC interviewers on their concern about the health and well-being of the local residents; it did not prove that the respondent had published those results maliciously against the appellant on these grounds. The Court of Appeal affirmed the ruling made by the High Court and dismissed the appellant's claim on malicious falsehood.

<u>At the Federal Court</u>

20. The main issues for determination by this Court are as follows:

(a) whether the 1st Article and the video is prima facie defamatory of the appellant;

(b) whether the 2nd Article is *prima facie* defamatory of the appellant;

(c) whether the respondent is entitled to succeed in its defences of justification and fair comment;

(d) whether the appellant is entitled to succeed in its claim of malicious falsehood arising from the 1st and 2nd Articles and the video; and

(e) whether the appellant is entitled to the remedies prayed for in paragraph 29 of the amended statement of claim.

Submissions by counsel for the appellant

21. In relation to the 1st Article and the video, learned counsel for the appellant submitted that, in its plain and natural meaning bore and were understood to bear or is capable of bearing defamatory meanings concerning the appellant's trade and business, and has the effect of exposing the appellant to hatred, ridicule or contempt in the mind of a reasonable man

or would tend to lower the appellant in the estimation of right thinking members of society generally.

22. Learned counsel cited the following reasons to support his submissions:

(i) when the 1st Article and the video are construed and read as a whole, the statements therein bears an accusatory tone which imputes that the appellant's mining activities using cyanide had polluted the environment of Bukit Koman, and thereby caused the residents of Bukit Koman to suffer ill health which was allegedly related to cyanide;

(ii) the appellant's gold mining activities has caused cyanide to escape and thereby caused the "air borne irritant" to afflict the residents of Bukit Koman with ill health which was allegedly related to cyanide; and

(iii) as such, it follows that the words imputed that the appellant was an irresponsible, negligent and reckless company that caused the environment to be polluted with cyanide by reason of its gold mining activities which

afflicted the residents of Bukit Koman with ill health.

23. In relation to the 2nd Article, learned counsel submitted that the said Article contained statements which in their natural and/or ordinary meaning and/or alternatively by way of innuendo, bear defamatory meanings of and concerning the appellant's trade and business. The words complained of as appeared in paragraph 9(a) of the amended statement of claim bore and/or were understood to bear or is capable of bearing defamatory meanings concerning the appellant's trade and business. Learned counsel gave the following reasons for saying so:

(i) that the appellant has approximately 200 employees at the appellant's plant in Bukit Koman.

(ii) that 90% of the appellant's 200 employees were local Raub inhabitants.

(iii) that the appellant did not make the claim that it has over 1,000 employees at the appellant's plant.

24. Learned counsel further submitted that the plain reading of the words in the 2nd Article show that the respondent had misconducted herself in attributing baseless allegation to portray the appellant as an dishonest and deceitful company which misrepresent facts about the employment of the number of employees employed and worked at the appellant's plant, thus were calculated to expose the appellant to hatred, ridicule or contempt in the mind of a reasonable man or would tend, to lower the appellant in the estimation of right thinking members of the society generally.

25. In relation to malicious falsehood, learned counsel submitted that the statements made by the respondent in the 1st Article which are linked to the video are false and untrue. Learned counsel claimed that the appellant has proven that the contents of the Article perpetrated by the respondent are false; and the respondent has failed to rebut the falsehood.

Learned counsel also submitted that, taken as a whole, the Articles and the video were published by the respondent maliciously, as a result of which the appellant has suffered loss of reputation and damages following the libelous and malicious falsehood perpetrated by the respondent.

Submissions by counsel for the respondent

26. Learned counsel for the respondent submitted that the Court of Appeal, in the present case, had correctly applied the established principles of law in determining the meaning of the impugned words in both the Articles, and had not established any new test as submitted by the appellant. Learned counsel stressed that there being no error in the application of the law by the Court of Appeal, the decision of the Court of Appeal should remain.

27. Learned counsel also submitted that in determining whether the words complained of would be understood, as being defamatory to an ordinary

reasonable person within today's society, the Court of Appeal was entitled to look at the attitude of society in general at the time of the publication of the words, and not merely what a particular section of society may think of such words.

28. Learned counsel further submitted that in determining whether the impugned words were defamatory and whether a reasonable man would understand the words to be defamatory, the Court of Appeal had correctly looked at the words themselves as well as the circumstances and the context in which those words were published as well as the facts and circumstances of the case i.e. the facts that the village was next to the appellant's plant; the fear of residents; the unusual smell that was not present before; stating the findings of the survey report; expressing the health concerns of the villagers and the highlighting of the findings of the survey report to the press and the public.

Our Decision:

The Law on Defamation

29. **Defamation is committed when the defendant publishes to a third person words or matters containing untrue imputation against the reputation of the plaintiff. Liability for defamation is divided into two categories, that of libel and slander. If the publication is made in a permanent form or is broadcast or is part of a theatrical performance, it is libel. If it is in some transient form or is conveyed by spoken words or gestures, it is slander (see: Gatley on Libel and Slander, 9th edn at p. 6).**

30. **In Ayob bin Saud v TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321, his Lordship Mohamed Dzaiddin J (as he then was) has clearly laid down the necessary procedure in establishing claim for libel (with which we agree) , when he said at p. 155:**

"In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show

(1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: Rajagopal v Rajan."

31. In other words, the plaintiff must prove (3) elements of the tort of defamation, which are:

(i) the plaintiff must show that the statement bears defamatory imputations;

(ii) the statement must refer to or reflect upon the plaintiff's reputation; and

(iii) the statement must have been published to a third person by the defendant.

32. What is "defamatory imputation"?

There is no precise test to be applied to determine whether or not any given words are defamatory. His Lordship Mohamed Azmi J (as he then was) in the case of Syed Husin Ali v Syarikat Percetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 at p. 58, quoting Gatley on Libel and Slander, 6th edn. P. 4, stated the following:

> ***"There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend "to lower the plaintiff in the estimation of right thinking members of society generally', 'to cut him off from society' or 'to expose him to hatred, contempt or ridicule', is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published."***

It was further quoted that:

> ***"A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that***

of right thinking person's generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency."

33. Whether the words are defamatory lies in the nature of the statement in that it must have the tendency to effect the reputation of a person. Therefore, the question arises in whose eyes the words complained of must have the tendency to affect the plaintiff's reputation. In the Law of Defamation in Singapore and Malaysia, 2nd edn by Keith R. Evans (at p. 10), it is stated that, in applying these various tests, the court must look to a particular control group that is, in whose eyes must the estimation of the plaintiff be lowered before the words are said to be defamatory. In determining the issue, the court does not look to the actual effect of the allegations on the person's reputation, or the meaning of the words actually understood or taken by the listeners (see: JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334). It is

not enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory (see: The Straits Times Press [1975] Ltd. v The Workers' Party & Anor [1987] 1 MLJ 186).

34. Assuming the plaintiff in a defamation suit has shown that the words bear some sort of defamatory imputation, he must then proceed to establish that the defamatory words in question were published of and concerning him. The words must be capable of referring to him or of identifying him.

35. On this point, the Privy Council in the case of Knupffer v London Express Newspaper Limited [1944] AC 116, had this to say:

> ***"It is an essential element of the cause of action for defamation that the words complained of should be punished "of the plaintiff", where he is not named the test of this is whether the words would reasonably lead people acquainted with***

him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him."

36. **The final element that the plaintiff must prove is that the words of which he complains have been published to any third party by the defendant. As stated by Lord Esher MR in the case of Hebditch v Macilwaine [1894] 2 QB 54 (at p. 58):**

"The material part of the cause of action in libel is not the writing, but the publication of the libel."

37. **"Publication" means making the defamatory statement known to some other person other than of whom it is written or spoken. The statement must be published to a third party (see: S Pakianathan v Jenni Ibrahim [1988] 1 CLJ 771; [1988] 1 CLJ 223). The uttering of a libel to the party libelled is no publication for the purpose of a civil action (see: Wennhak v Morgan [1888] 20 QBD 634). The fundamental principle is that the statement must be**

communicated to a third party in such manner as to be capable of conveying the defamatory imputation about the plaintiff (see: Gatley on Libel and Slander, 9th edition at p. 134).

38. **The test involved in determining whether or not the words complained of are defamatory is a two-stage process. Firstly, it must be considered what meaning the words would convey to an ordinary person; and secondly, it must be considered whether under the circumstances in which the words were published, a reasonable man would be likely to understand that in a defamatory way (see: Wong Yoke Kong & Ors. v Azmi M Anshar & Ors. [2003] 6 CLJ 559; [2003] 4 CLJ 96).**

The Law on Malicious Falsehood

39. **In order to establish a claim under malicious falsehood, it is trite law that the plaintiff bears the burden of proving the following elements:**

(i) that the defendant published about the plaintiff words which are false;

(ii) that the words were published maliciously; and

(iii) that special damage followed as the direct and natural result of the publication.

(see: Tan Chong & Son Motor Co Sdn Bhd v Borneo Motors (M) Sdn Bhd & Anor [2001] 3 MLJ 145 ; Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 539; Kaye v Robertson [1991] FIO 62 (EWCA)).

40. "Malice" has been judicially interpreted by the courts as being reckless, unreasonable, prejudice or unfair belief in the truth of the statement. "Malice" may be established by showing that the defendant did not belief in the truth of what he uttered (see: Harrocks v Lowe [1974] 1 All ER 662 and Watt v Longsdon [1930] 1 KB 130 at 154, [1929] All ER 284 at 294).

41. **As defined in the Osborn's Concise Dictionary (7th edn.), the word "malice" means:**

> ***"Ill-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (Horrocks v Lowe [1972] 1 WLR 1625)".***

42. **In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, "malice" cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (see: Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor [2008] 3 MLJ 492, Horrock v Lowe (supra).**

Whether the 1st Article Defamatory

43. **The Court of Appeal applied the principle and approach in Jones v Skelton [1963] 3 All ER 952 and formed the view that it cannot ascribe to the 1st Article the meanings which the appellant wanted the court to do. The Court of Appeal ruled that the 1st Article was not defamatory and not capable of defamatory meaning i.e. the Article could not expose the appellant to hatred, contempt or ridicule.**

44. **In coming to that determination, the Court of Appeal relied on the three (3) tests set out in Gatley on Libel and Slander (12 Ed) at p. 7 as follows:**

> ***"(i) Would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?***
>
> ***(ii) Would the imputation tend to cause others to shun or avoid the claimant?'***
>
> ***(iii) Would the words tend to expose the claimant to hatred, contempt or ridicule?"***

45. The above test is an objective test. In essence, it is a question of law that turns upon the construction of the words published. It is whether, under the circumstances in which the words were published, reasonable men to whom the publication was made, would be likely to understand it in a defamatory or libellous sense. The same test was applied and adopted by the Court of Appeal in Allied Physics Sdn Bhd v Ketua Audit Negara (Malaysia) & Anor and Another Appeals [2016] 7 CLJ 347.

46. It is an established principle of law that in determining whether the impugned words connate a defamatory meaning, the court must consider the particular circumstance and the context in which the impugned words were used and published (see: (i) Allied Physics (supra); (ii) Tony Pua Kim Wee v Syarikat Bekalan Air Selangor Sdn Bhd [2013] 1 LNS 1433 – a decision of the Court of Appeal which was

upheld by the Federal Court; and Gatley on Libel and Slander, 9th Edn para 218 p 40).

47. The Court of Appeal in the present case alluded specifically to the context and circumstances in which the 1st Article was published – the fact that the Bukit Koman village was next to the appellant's plant; the fear of residents; the unusual smell of cyanide like odour detected since 2009 that was not present before; stating a finding of the survey report conducted by the residents, expressing the health concerns of the residents and the highlighting of the findings of the survey report to the press and the public. There was clear evidence that the issue pertaining to the concern of the residents about the operation of the appellant's gold mine and its effect on the health of the residents was clearly a matter of public interest. Thus, the press conference held by BCAC where the 1st Article was published was also a

matter of public interest at the time when the conference was conducted.

48. The Court of Appeal examined the 1st Article, having *"read and re-read those words"* in a reasonable, objective and holistic manner and came to a conclusion that it could not see how those words had exposed the appellant to hatred, contempt or ridicule or lowered the appellant in the estimation of the society at large.

49. The test adopted and adhered to by the Court of Appeal in coming to the above determination was an established existing test. It is not a new test as claimed by the appellant. It is a test as to whether under the circumstances in which the impugned words were published, a reasonable man to whom the publication was made, would be likely to understand in the libellous sense. This test has been in existence and adopted in a number of earlier authorities such as Lewis v Daily Telegraph [1963] 2

All ER 151; Capital and Countries Bank Ltd v Henty (George) & Sons [1880] 5 CPD (Common Pleas Division) 514; and **Nevill v Fine Art & General Insurance Co Ltd [1897] AC 68**. The same test was applied by the Court of Appeal in **Tony Pua's** case which was later upheld by the Federal Court. It is obviously not a new test.

50. The words complained of must be defamatory to an ordinary reasonable person within today's society (i.e. at the time the words were uttered). In applying the said test, the Court of Appeal had correctly considered the attitude of the society at the time of the publication of the 1st Article particularly on the existence of activists group which was very much part of today's society that have contributed much to the general well-being of the society at large. The Court of Appeal had also considered that "*we now live in a much more liberal society where the concept of transparency and accountability are very much*

part and parcel of our lives." **The prevailing attitude of the society at the time of the publication of the Article need to be considered by the court, without the need for pleading or proof (see: Chen Cheng & Anor v Central Christian Church and Other Appeals [1999] 1 SLR 94; Lennon v Scottish Daily Record and Sunday Mail Ltd [2004] EWHC 359 (QBD);** and **Lukoviak v Unidad Editorial SA [2001] EMLR 46).**

51. We at this stage of the appeal have perused the wordings of the 1st Article as a whole as well as all the relevant records available before us. We find that the Court of Appeal had in a reasonable and objective manner correctly applied the established "time-tested" test in determining the meaning of the impugned words in the 1st Article and concluded that it "cannot see how those words had exposed the appellant to hatred, contempt or ridicule or lowered the appellant in the estimation of the society at

large". We find no reason to disagree with the findings of the Court of Appeal in this issue.

Whether the 2nd Article Defamatory

52. Learned counsel for the appellant contended that the words in the 2nd Article contain defamatory meaning in that the appellant was a dishonest company who represented that it had generated many jobs for the villagers when in fact only less than 10 individuals from the village worked at the appellant's plant; and that the appellant was a company that practiced deceit and always misrepresented facts.

53. On this point, the Court of Appeal ruled as follows (with which we also agree):

> *"Again applying the approach of Lord Morris, we, with respect, do not find that the meaning as ascribed to by learned counsel for the appellant as a reasonable interpretation. The respondent in our view was saying that there are 1000 villagers living a Bukit Koman and the Appellant had only employed less than 10 villagers in its plant there.*

The number "1000" cannot refer to the number of jobs generated by the appellant. Hence we agree with learned counsel for the respondent that the appellant was putting words into the mouth of the respondent. Again, we must not lose sight that the respondent was protecting the welfare of the residents there and was merely expressing a view on the appellant. That view may not be accurate but it can easily be corrected by the appellant through a press release but in no way, does it turn those words into meanings as subscribed to by the appellant."

54. We agree with learned counsel for the respondent that:

"The number "1000" clearly refers to the population of the village, and not to the number of workers employed by the appellant.

It would not be possible for the said words to convey the meanings alleged by the appellant, or any meaning implying dishonesty or deceit or misrepresentation of facts. At the very most, it may imply a difference between the appellant and the villagers regarding the number of workers from the village at the appellant's plant. This cannot be construed as defamatory."

55. The issue of pleading was also raised by learned counsel for the appellant. Learned counsel contended:

> ***".. the bare minimum required of the respondent to deny an allegation of publication of defamatory words complained of is not to plead a traverse in seriatim, but to make a specific denial. This, the respondent failed to do. As such, a failure to specifically deny paragraph 9 of the Amended Statement of Claim is deemed to be an admission that the respondent published the words complained of in the 2nd Article."***

56. Assuming learned counsel for the appellant was right in his contention that the general denial as in paragraph 59 of the respondent's amended defence is insufficient to traverse the appellant's allegation on the issue, we shall now look at the relevant paragraph 9 of the amended statement claim to determine whether the said paragraph 9 is sufficient to support the appellant's claim that the 2nd Article was defamatory.

57. The said paragraph 9 of the amended statement of claim reads as follows:

"9. The 2nd Article contains the following passages which were derived from the words spoken, uttered and/or published by the defendant to persons from the Fee Malaysia Today (FMT) website knowing and expecting the said words to be reported on the FMT website and are prima facie defamatory of the plaintiff in the way of its trade and business:

(a) "According to Sherly, RAGM has even claimed that they have generated many jobs for the villagers who number a little over 1,000 people. When asked how many villagers work at the mine, Sherly said that it was less than 10 people"

58. The Court of Appeal, on this issue, ruled as follows:

"Taking that in the context of a defamation action as we have here and bearing in mind that the burden of proof is on the appellant to prove publication of the exact words uttered by the respondent, the way paragraph 9 of the amended statement of claim is crafted or fashioned does not in any way directly state what exactly the

words uttered by the respondent. In fact, the manner it was fashioned or pleaded was in the form of hearsay evidence."

59. We have perused the content of paragraph 9, of the amended statement of claim and we fully agree with the Court of Appeal on this issue. We noted that both the High Court and the Court of Appeal held that the appellant failed to plead and prove that the respondent was the one who uttered and published words in the 2nd Article. We agree with learned counsel for the respondent that the words complained of quote the respondent in the third person, i.e. the words were not the respondent's own words, but the words of the reporter of FMT, one Aneesa Alphonsus.

60. The Court of Appeal agreed with the learned High Court judge when her Ladyship said as follows:

"47. In my opinion, the 2nd set of words complained of are not the actual or uttered or published by the defendant to a third party against the plaintiff.

Instead, the 2nd set of words complained of is in fact a report or statement by FMT and/or Aneesa Alphonsus. The plaintiff failed to call Aneesa Alphonsus of FMT, the reporter or publisher of the 2nd set of word complained of, as a witness to prove that she had interviewed the defendant and the defendant, did say that RAGM/the plaintiff had even claimed that they have generated a little over 1000 jobs for the villagers, and the defendant then said that RAGM generated jobs for less than 10 people."

61. The relevant part of paragraph 9 of the amended statement of claim is reproduced as follows:

> ***"(a) According to Sherly, RAGM has even claimed that they have generated many jobs for the villagers who number a little over 1,000 people. When asked how many villagers work at the mine, Sherly said that it was less than 10 people."***

62. Clearly, paragraph 9 of the amended statement of claim does not in any way directly state what exactly the words uttered by the respondent personally during the press conference. In short, the appellant

in paragraph 9, has failed to plead the exact or actual words spoken by the respondent to the reporters who attended the press conference. Even the appellant's witness (PW2) confirmed that the appellant's claim was based on the 2nd Article written by the reporter of FMT.

63. Evidence wise, we agree with both the High Court and the Court of Appeal that the words complained of in the 2nd Article are not the actual words uttered or published by the respondent. Instead, the words in question were in fact a report or statements by FMT and/or the reporter, Aneesa Alphonsus. The appellant had failed to call the said reporter as a witness, during trial, to prove that she had interviewed the respondent and the respondent had actually uttered those words. Only the reporter can throw light on whether the respondent did actually utter the words what she is alleged to have said. Ultimately, it is the burden of the appellant to prove

that it was the respondent who had published or caused to be published the alleged words. The appellant has failed to prove that there was publication by the respondent of the same.

64. **Pleading wise, the actual words of the respondent during the press conference must specifically be pleaded to support the appellant's claim. The appellant failed to do so. As clearly stated in Harris v Warre [1879] 4 CPD 125,** ***"In libel or slander, the very words complained of are the facts on which the action is grounded. The law on this issue is clear – that it is necessary for the plaintiff to plead or allege verbatim the exact words which he complains of."*** **Other authorities on this issue are: Lim Kit Siang v Dr Ling Kiong Sik & Ors [1997] 5 MLJ 523; Collins & Jones [1955] 2 All ER 145 and more recently, Michael Frederick Bode v Carole Mundell [2016] EWHC 2533.**

65. **The law requires the very words in the libel to be set out in the statement of claim in order that the court**

may judge whether they constitute a ground of action. It would be hard for the court to judge and to determine whether the words as found in the statement of claim, constitute a ground of action for libel – since those words in the report (in this case the 2nd Article) are reported in the third person and are the product of a reporter's or journalist's creative skills and reporting. This is in line with the decision of the Court of Appeal in Mak Khuin Weng v Melawangi Sdn Bhd [2016] 5 MLJ 314 where it was stated:

> ***"What is important to note in defamation is that all the required elements to prove the elements of the tort which must be pleaded, must be established at the stage of plaintiff's case itself to have a viable cause of action in defamation. Only upon the elements having been established and/or proven that the defendant's obligation to demonstrate the viable defence to defamation action will arise."***

66. It is essential for the appellant in the present case to first plead a cause of action against the respondent

in relation to the 2nd Article. On the above reasons, the appellant has failed to do so, which resulted in its claim relating to the 2nd Article not supported by a valid cause of action in defamation. On this ground alone, we can safely conclude that the appellant's claim under the 2nd Article must fall.

Claim on Malicious Falsehood

67. The first element to be proved by the appellant on this claim is that the statements in the Articles complained of were false. On the 1st Article, we agree with the learned High Court judge that evidence wise the appellant did not prove that the survey results read out by the respondent during the press conference were false. The appellant had failed to call any, or all the 383 residents of Bukit Koman to prove that they did not suffer from any health problems as a result of the appellant's use of cyanide in its operation of the gold mine.

68. The appellant has also failed to adduce evidence to prove that the respondent had uttered and published the words in the 1st Article maliciously i.e. without just cause of excuse. The learned High Court judge had correctly reasoned out her findings that:

> ***"The defendant only read out the survey results based on the survey conducted by the BGAG interviewers. The BGAG is an interest group concerned about the health and well-being of the Bukit Koman residents. The defendant is the Vice President of the BCAC. The defendant must have read out the survey results by virtue of the membership and position in the BGAG. By the defendant's act of reading out the survey results at the press conference, it does not prove that the defendant had published those results maliciously against the plaintiff."***

69. The appellant, in order to prove that the contents of the 1st Article as uttered by the respondent were false has to adduce evidence to show either there was no such survey conducted by the residents of Bukit Koman or that the results read by the

respondent were not as reported in the survey. None of the residents involved in the survey were called as witnesses to show that the results conveyed by the respondent were not true.

70. As regard to the 2nd Article, as stated earlier in this judgement, the appellant had failed to prove that the respondent was the one responsible for the publication of those words complained of. The appellant had also failed to prove that the statement that "*less than 10 villagers were employed by the appellant in its operation",* was false.

71. In a claim for malicious falsehood, the appellant must prove the words complained of were made maliciously i.e. without just cause or excuse. In the first place, the appellant has not pleaded any particulars supporting its claim of malice. This must be done (see: Bullen & Leake & Jacobs Precedents of Pleadings, 15th edn. V.1, p.544, para 29-05; p 545); but was not done.

72. In the present case, the respondent merely read out the survey results and expressed concerns of the residents. She merely reported the information that was obtained from the survey carried out by the residents. In relation to the 2nd Article, we are satisfied that "malice" cannot be imputed to the respondent, merely because there was difference with the appellant on the number of villagers working at the appellant's plant.

73. Malicious falsehood claim is not found on injury to reputation per se. The claim must establish the required proof of damage. The appellant has failed to show that it suffered any special damage as a result of the publication of both the Articles in question. (see: Duncan and Neill on Defamation, p.312 para 26.12)

74. Therefore, we are of the view that appellant's claim for malicious falsehood based on both the 1st Article and the 2nd Article must also fall.

Other Suits against Other Defendants

75. In the course of his submissions before us, learned counsel for the appellant raised issues on other defamation suits filed by the same appellant concerning the same Articles (as in the present case) against other defendants namely the MKini and FMT. The respondent in the present case was not the party in those cases.

76. The MKini suit was decided by another High Court after the present case was decided by the Kuala Lumpur High Court on 13.5.2015. On appeal, the Court of Appeal allowed the appeal on the present case on 13.4.2016. In the MKini suit, both the High Court and the Court of Appeal ruled that the impugned Articles (the very same Articles in the

present case) were defamatory of the appellant. Learned counsel for the appellant submitted before us that the decision of the High Court and the Court of Appeal in the MKini suit on the determination that the Articles were defamatory is binding on the Federal Court in the present case before us; as a matter of estoppel, not judicial precedent.

77. In the FMT suit, there was no judicial pronouncement by the court that the words in the Articles were defamatory. In that case, the defendant therein (MToday Sdn Bhd – FMT) as the publisher tendered an apology taking full responsibility for the Articles.

78. It is noted that the respondent herein was not a party in both the MKini suit as well as the FMT suit; nor did she has a say in the apology agreed upon by the parties in the FMT suit. Each case must be dealt with and decided on its own merit after hearing all parties to the respective suits. The plaintiff in each case must be required to prove each and every one of his

claims against each defendant individually, on all the relevant elements to establish defamation, i.e. defamatory effect of the statements, directed at the plaintiff, and publication to third party.

79. We cannot agree with learned counsel's submissions that this Court is bound by the decision of the High Court in the MKini suit, especially bearing in mind that in the present case before us, both the High Court and the Court Appeal have made concurrent findings of facts entirely different from the High Court's MKini suit. Both the High Court and the Court of Appeal in the present case had ruled that both the impugned Articles and the video were not defamatory and their decisions were delivered earlier in time. In short, it must be stressed that this Court is not bound to accept, nor is the respondent estopped by the finding of the High Court in the MKini case that the impugned words are defamatory as suggested by the appellant's counsel.

80. It must also be noted that defamation claims are 'sui generis', in that multiple suits are permitted against different defendants in relation to the same publication; and therefore, the defendant in the present case, cannot be estopped by a determination in any other suit to which he was not a party. The ruling made by the High Court in the MKini suit, where the respondent herein, was not a party thereto, will not bind the respondent herein, who in a different proceeding may secure a different result based on the facts and circumstances of her own defence. It would be a breach of natural justice rule and an abuse of the court's process for a plaintiff (the appellant) to be permitted to file multiple suits against different defendants in defamation actions, but to be relieved of the burden of proof merely because one suit is resolved in its favour. In dealing with the present appeal before us, we only need to examine the decisions of the Court of Appeal and the

High Court in this case with respect to the facts and circumstances of its own.

81. We agree with learned counsel for the respondent that the meanings ascribed to those words in the impugned Articles in the MKini suit by the appellant and pleaded against MKini were different from those pleaded against the respondent in this case. As such, the courts in this case were required to look at the impugned words from an entirely different perspective as compared to the court in the MKini case.

Conclusion

82. Based on the above considerations, we would answer the questions posed in the following manner:

(i) Question 1 – the Court of Appeal, in coming to its decision had applied and adopted an objective test by considering the particular circumstances and the context in which the

impugned Articles were used and published which includes the prevailing attitude and values of the society. It was an established and settled "time-tested" test, which has been in existence and adopted in a number of earlier authorities. It is not a new test as suggested by the appellant;

(ii) Questions 2 – there was no specific criteria as suggested by the appellant, established or applied by the Court of Appeal in its determination of the issue in this case. The test or criteria adopted by the Court of Appeal was whether under the circumstances in which the impugned words were published, a reasonable man to whom the publication was made would be likely to understand it in the libellous sense;

(iii) Questions 3 – we need not answer this question specifically as posed before us on

the grounds that the appellant had failed to plead and prove a *prima facie* case against the respondent and the appellant had failed to plead the actual words uttered by the respondent (if any) during the press conference which were later published by FMT; thus no complete cause of action in defamation against the respondent pleaded; and

(iv) Question 4 – in view of the above answer to Question 3, it is not necessary to specifically answer this question. The fact that justification and fair comments are pleaded as defences does not excuse the appellant from having to plead a complete cause of action in defamation.

83. In the upshot, we dismiss the appeal with costs. We affirm the decisions of the courts below.

Dated: 13th February 2019

sgd

RAMLY HJ ALI
FEDERAL COURT JUDGE
MALAYSIA

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Cases Referred to:

1. **Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd [2001] 6 MLJ 241**

2. **Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261**

3. **Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29**

4. **Lee Kuan Yew v Chin Vui Khen & Anor [1991] 3 MLJ 494**
5. **Ayob bin Saud v TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321**

6. **Syed Husin Ali v Syarikat Percetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 at p. 58**

7. **JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334**

8. **The Straits Times Press [1975] Ltd. v The Workers' Party & Anor [1987] 1 MLJ 186**

9. **Knupffer v London Express Newspaper Limited [1944] AC 116**

10. **Wong Yoke Kong & Ors. v Azmi M Anshar & Ors. [2003] 6 CLJ 559; [2003] 4 CLJ 96**

11. **S Pakianathan v Jenni Ibrahim [1988] 1 CLJ 771; [1988] 1 CLJ 223)**

12. **Wennhak v Morgan [1888] 20 QBD 634**

13. Lewis v Daily Telegraph [1963] 2 All ER 151

14. Capital and Countries Bank Ltd v Henty (George) & Sons [1880] 5 CPD (Common Pleas Division) 514

15. Nevill v Fine Art & General Insurance Co Ltd [1897] AC 68

16. Chen Cheng & Anor v Central Christian Church and Other Appeals [1999] 1 SLR 94

17. Lennon v Scottish Daily Record and Sunday Mail Ltd [2004] EWHC 359 (QBD)

18. Lukoviak v Unidad Editorial SA [2001] EMLR 46

19. Harris v Warre [1879] 4 CPD 125

20. Lim Kit Siang v Dr Ling Kiong Sik & Ors [1997] 5 MLJ 523

21. Collins & Jones [1955] 2 All ER 145

22. Michael Frederick Bode v Carole Mundell [2016] EWHC 2533.

23. Mak Khuin Weng v Melawangi Sdn Bhd [2016] 5 MLJ 314

Legislations Referred to:

1. **Defamation Act 1957**

Other References:

1. **Gatley on Libel and Slander: 6th edn. p.4 and 9th edn. at p. 6**
2. **Law of Defamation in Singapore and Malaysia, 2nd edn. by Keith R. Evans (at p. 10)**
3. **Osborn's Concise Dictionary (7th edn.)**
4. **Bullen & Leake & Jacobs Precedents of Pleadings, 15th edn. V.1, p.544, para 29-05; p 545.**