IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: 02(f)-61-08/2018(W)

BETWEEN

1. **MKINI DOTCOM SDN BHD**
2. **LEE WENG KEAT**
3. **WONG TECK CHI**
4. **VICTOR TM TAN** … **APPELLANTS**

AND

RAUB AUSTRALIAN GOLD MINING SDN BHD

… **RESPONDENT**

(IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: W-02(NCVC)(W)-1073-06/2016

BETWEEN

RAUB AUSTRALIAN GOLD MINING SDN BHD

… **APPELLANT**

AND

1. **MKINI DOTCOM SDN BHD**
2. **LEE WENG KEAT**
3. **WONG TECK CHI**
4. **VICTOR TM TAN** … **RESPONDENTS**

In the High Court of Malaya at Kuala Lumpur
Civil Suit No: 23NCVC-108-09/2012

Between

Raub Australian Gold Mining Sdn Bhd … Plaintiff

And

1. Mkini Dotcom Sdn Bhd
2. Lee Weng Keat
3. Wong Teck Chi
4. Victor TM Tan … Defendants)

CORAM:

VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN BIN SEBLI, FCJ
ZALEHA BINTI YUSOF, FCJ
HASNAH BINTI DATO' MOHAMED HASHIM, FCJ
HARMINDAR SINGH DHALIWAL, FCJ

SUMMARY OF MINORITY JUDGMENT

[1] This appeal raises issues concerning certain important aspects of the law of defamation. The nucleus of the arguments advanced in the appeal concern the defence of reportage in the context of qualified privilege and the *Reynolds* defence of responsible journalism (see *Reynolds v Times Newspaper Ltd and Others* [2001] 2 AC 127). Also in issue is the role of the media in invoking freedom of expression in advancing the weighty interest of the public's "right to know" and especially, in this context, the extent to which the media ought to be allowed to provide such information to the general public.

[2] This appeal arises from the reversal by the Court of Appeal on 11 January 2018 of the decision of the High Court at Kuala Lumpur delivered on 10 June 2016. After a full trial, the High Court had dismissed the respondent's claim for defamation and malicious falsehood in relation to the publication of three articles and two videos by the appellants. The articles and videos pertain to news reports of the gold-mining activities of the respondent and the risk to the health, well-being and safety of the neighbouring Bukit Koman community as a whole.

[3] This appeal was then filed pursuant to the granting of leave of the following questions:

> "1. Whether reportage is in law a separate defence from qualified privilege or the Reynolds defence of responsible journalism and whether it is to be treated as being mutually exclusive?
>
> 2. Whether the defence of reportage being an off-shoot of the Reynolds defence of responsible journalism needs to be pleaded separately from the plea of responsible journalism itself?
>
> 3. Whether a defendant is obliged to plead either reportage or responsible journalism and not plead them in the alternative?
>
> 4. Whether the defence of reportage which is in law based on an on-going matter of public concern is sufficiently pleaded if it is stated by the defendant that the publications 'were and still are matters of public interest which the defendants were under a duty to publish'?
>
> 5. Whether the proper test to determine if the defence of reportage succeeds is the test of adoption by the journalist of the publication as true and not for the journalist to establish his neutrality by independent verification?
>
> 6. In publishing video recordings of statements made by third parties in a press conference, whether the mere publication of such videos could be held to be an embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media?

7. Whether in an ongoing dispute, the impugned article or videos ought to be considered together with previous and continuing publications of the news media on the same subject matter of public concern in determining the defence of reportage?

8. Whether it is proper to award general damages for loss of goodwill and vindication of reputation to a plaintiff company that has independently been subjected to a voluntary winding up by its creditors?

9. Whether loss of goodwill can be recovered as a component of defamatory damages by a plaintiff company that has gone into insolvency?"

The Material Facts

[4] The plaintiff was a company involved in operating a gold mine located in Bukit Koman, in the district of Raub, State of Pahang. Prior to the filing of this appeal, and in fact during the hearing of the appeal in the Court of Appeal itself, the plaintiff had been voluntarily wound-up and remains in liquidation to this day. The 1st defendant ("Mkini") is a company that owns and operates an online news portal known as Malaysiakini on its website at www.malaysiakini.com. The 2nd defendant is the assistant news editor of Malaysiakini. The 3rd defendant is the senior journalist of Malaysiakini. The 4th defendant was, at the material time, an intern at Malaysiakini and was pursuing a degree in Bachelor of Arts in Journalism.

[5] The plaintiff's suit against the defendants was for defamation and malicious falsehood in respect of three articles and two videos published by the 1st defendant in 2012 on its malaysiakini portal. In essence, these articles and videos alleged that the plaintiff had used cyanide in its gold mining activities which had caused serious illness to the villagers and death of wildlife and vegetation and environmental pollution in Bukit Koman.

[6] The plaintiff claimed that the articles and videos contained defamatory material which were false and were published by the defendants maliciously with intent to injure the plaintiff's reputation, trade and business. The defendants, on the other hand, claimed that the words complained of or the impugned statements in the said articles and videos were not defamatory in nature of the plaintiff. The defendants principally relied on the defence of qualified privilege and fair comment. As for the defence of qualified privilege the defendants asserted in their arguments that they have exercised responsible journalism and/or in accordance with the defence of reportage. The defendants maintained that the said articles and videos were published pertaining to matters or issues of public interest not just in Raub but of a national scale.

[7] At the High Court, after a trial involving 15 witnesses, the learned trial Judge found that the words complained of in all the three articles and the two videos were defamatory of the plaintiff. The learned Judge also found that although the articles and videos in question were defamatory, the defendants had successfully raised or availed themselves to the defence of qualified privilege which encompassed both the *Reynolds* privilege defence of responsible journalism and the defence of reportage.

[8] The learned Judge found that the defendants had successfully made out the defence of qualified privilege or more specifically the defence known as the *Reynolds* privilege as propounded by the House of Lords in *Reynolds v Times Newspaper Ltd and Others* [2001] 2 AC 127. The learned Judge noted that the *Reynolds* privilege has two prerequisites before the defendants can avail to it and they are firstly, that the publication concerned a matter of public interest; and secondly, that responsible and fair steps had been taken to gather, verify and publish the information.

[9] The learned Judge also went on to hold that the articles and videos were published in a fair, disinterested and neutral way and that the defendants did not adopt the allegations contained therein as their own. There was also no evidence of malice on the part of the defendants. Since

malice was not proved, the claim for malicious falsehood cannot succeed. In the event, the plaintiff's claim against all the defendants was dismissed.

[10] At the Court of Appeal, the issues for determination turned on the defence of reportage and the defence of responsible journalism or qualified privilege. The Court of Appeal affirmed the dismissal of the claim for malicious falsehood but allowed the appeal against the dismissal on the claim for defamation and awarded the appellant the sum of RM200,000.00 in general damages.

[12] In essence, the Court of Appeal agreed with the High Court's finding that the subject matter of the articles and the videos was of public interest as they concerned the health, well-being and safety of a community. The appeal was allowed on the ground of a defect in the pleadings as well as the failure on the part of the defendants to establish the defence of reportage and the defence of responsible journalism or qualified privilege.

[13] Following from the leave questions and the arguments raised by the parties, and at the risk of some oversimplification, the broad issues for our consideration and determination are as follows. The first issue is whether reportage is in law a separate defence from the *Reynolds* defence of responsible journalism and whether it is mandatory for the two defences to

be pleaded separately. Allied to this issue is whether the two defences can be pleaded in the alternative.

[14] The second issue is whether the defendants had, as a matter of law and fact, made out a case of reportage and/or qualified privilege in the *Reynolds* sense in respect of the articles and videos as affirmatively determined by the High Court but overruled by the Court of Appeal.

[15] The third issue, which does not arise from the leave questions or from the decision of the Court of Appeal, is whether the claim for defamation in respect of the 2nd Article and the 1st Video is actionable in view of the said publication being found not defamatory as eventually determined by this Court in *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720 ("*Hue Shieh Lee*").

Third Issue: whether the articles and videos are actionable

[16] For convenience, the third issue ought to be dealt with at the outset. In *Hue Shih Lee's* case, the plaintiff here filed an action against Hue Shih Lee, who was the Vice Chairperson of the Pahang Ban Cyanide in Global Mining Action Committee ("BCAC") for libel and malicious falsehood in

respect of two (2) articles that appeared in malaysiakini.com ('the First Article') and freemalaysiatoday.com ('the Second Article') websites. The First Article there is the 2nd Article sued upon in the present appeal. The First Article contained a link to a video of a press conference given by several individuals including Hue Shih Lee regarding the plaintiff. These articles were found to be not defamatory of the plaintiff by the High Court which decision was thereafter affirmed by the Court of Appeal and the Federal Court.

[17] Now, the defendants here, in relying on Hue *Shih Lee's* case, assert that in view of the findings of the Federal Court that the two (2) articles were not defamatory of the plaintiff, this Court is therefore bound by the said decision since the statements made by Hue Shih Lee are those produced in the 2nd Article and the 1st Video in the present appeal.

[18] Now, to recall, the High Court in the present case had held that the articles and the videos in question were defamatory of the plaintiff. The defendants did not appeal in respect of this part of the decision. The Court of Appeal was only concerned with the defences raised by the defendants and not with the question of whether the articles and videos were

defamatory. It must then follow, in my view, that the defendants had accepted the decision of the High Court in this respect and cannot now reassert the said issue in this Court.

[19] As defamation claims are *sui generis*, it is up to the parties to take their own respective positions as to the conduct of the litigation even if the alleged defamatory material is the same. It cannot be said that two different Courts have arrived at two different conclusions on the same factual and legal issue as the defendants in the instant case had effectively abandoned the issue which they now wish to resurrect. Put simply, the Court is now not required to decide on the issue as, because of the defendants' election, the issue is no longer before the Court. The position that obtains accords with the adversarial tradition that underpins litigation in the common law world. In the circumstances, the argument by the defendants in this respect, as persuasive as it seems, cannot be sustained.

[20] It should however be clarified, lest it be misunderstood, that if the question of whether the impugned articles and videos were defamatory was a live issue, then the application of issue estoppel or estoppel *per rem judicatum* may be relevant against the plaintiff/respondent here. Since this Court in *Hue Shih Lee* had ruled that the same articles were not defamatory

of the respondent here, it would have been legally untenable for this Court to now say otherwise.

First Issue – the law on reportage and *Reynolds* privilege

[21] Let me come now to the first issue on the law. It has long been recognized that on the grounds of public policy and convenience, the law protects even false and defamatory statements which are made on an occasion of privilege. The privilege is not absolute but qualified. So, where privilege is abused in the case of express or actual malice in the publication, the privilege fails (see *Horrocks v Lowe* [1975] AC 135). So, in essence, where privilege is availed, the law may actually leave a person defamed with his reputation in tatters and with no compensation. A person untrained in the law may find this proposition of protecting untrue and defamatory publications quite remarkable and discomforting as most professions have duties to take reasonable care and would be accountable if they were found to be negligent.

[22] Now, of course, the limiting factor in asserting privilege as a defence is really the “occasions of privilege” which are determined mostly by case law. The widely accepted formulation of determining an occasion of privilege is

where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made had a corresponding interest or duty to receive it.

[23] This reciprocity test, as it came to be called, did not work so well in the case of mass publications such as those provided by the media. It was considered that qualified privileged ought to be confined to private communications as opposed to communications made to the whole world. Hence, the media were largely unsuccessful in persuading the courts that they had a duty to publish and the public had a duty to receive such communications even on matters of legitimate public interest. The notable exception is the case of publication of fair and accurate reports of parliamentary and judicial proceedings.

[24] A seismic shift in judicial thinking then occurred at about the same time through landmark decisions in Australia (*Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520), New Zealand (*Lange v Atkinson* [1998] 3 NZLR 424) and the United Kingdom (*Reynolds v Times Newspaper Ltd* [2001] 2 AC 127(“*Reynolds*”)) although there was some divergence in the approach to the defence of qualified privilege for mass communications. The

widest scope of protection for the media is probably that in *Reynolds* since the protection was for “matters of serious public concern”. In *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [2006] 4 All ER 1279, [2007] 1 AC 359 (“*Jameel*”), Baroness Hale of the House of Lords described the *Reynolds* defence as one that “springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information”. She concluded: “In truth, it is a defence of publication in the public interest.” (at p 685).

[25] Underpinning this shift in thinking was the appreciation that members of the community in a modern plural democracy have a legitimate interest in receiving information concerning matters of public interest or serious public concern. Such matters would include the conduct of government and the exercise of public functions as well as matters relevant to the safety, health and well-being of ordinary citizens. The welfare of the community is best served by protecting the free flow of information, ideas and vigorous discussion initiated by the media and others of matters of public interest.

[26] Not unlike Australia, New Zealand and the United Kingdom, Malaysia is also a modern pluralistic democracy with fundamental human rights

guaranteed under the Federal Constitution. Freedom of speech is provided under Article 10 of the Federal Constitution with restrictions to be provided by laws against matters such as defamation. So, for the same reasons as advanced in the three jurisdictions, and taken together with the constitutional imperative for protection of freedom of expression, matters of public interest are also deserving of protection in Malaysia.

[27] To this end, the courts in Malaysia have followed and accepted the *Reynolds* defence. In the present case, the courts below applied the *Reynolds* approach in coming to their decisions. Significantly, this Court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187 ("*Tony Pua*"), in applying the *Reynolds* privilege, went on to also hold that the public interest defence should, by no means, be synonymous with journalists or media publications and on the ground of public interest, there was a sufficient basis for the defence to be extended to anyone who publishes or discloses material of public interest in any medium to assist the public to comprehend and make an informed decision on matters of public interest that affect their lives.

[28] It must be observed at the outset that the *Reynolds* defence is not so much about "occasions of privilege" in the traditional sense but rather of the

published material itself being privileged. As will become apparent in the following discussion, the issue of malice does not arise as in the traditional sense, as it is built into the multi-factorial test devised in *Reynolds* (see *Jameel* at [46]).

[29] In *Reynolds*, a two-stage test was formulated by for determining whether the *Reynolds* defence applied. The first stage involved determining whether the subject matter of the publication was a matter of public interest. The second stage was concerned with whether the steps taken to gather and publish the information were responsible and fair.

[30] So what is a matter of public interest? It is admittedly a broad concept but for the defence to bite, it must refer to matters involving public life and the community, including important matters relating to the government and the public administration, as opposed to matters which are purely personal and private (see *Reynolds*, Court of Appeal, [2001] 2 AC 127 at 176).

[31] The second stage shifts to the question of whether the steps taken to gather and publish the information were fair and reasonable. Lord Nicholls in *Reynolds* sets out a list of ten non-exhaustive circumstances to determine if the publisher has exercised responsible journalism although, as pointed out

earlier, the defence is not confined to the press. These factors were necessary to provide the right balance between freedom of expression and reputation. The ten factors are:

"1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true;

2. The nature of the information, and the extent to which the subject matter is a matter of public concern;

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

4. The steps taken to verify the information;

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect;

6. The urgency of the matter. News is often a perishable commodity

7. Whether comment was sought from the plaintiff. The plaintiff may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary;

8. Whether the article contained the gist of the plaintiff's side of the story;

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact;

10. The circumstances of the publication, including the timing."

[32] So, how should the ten factors be assessed by the courts? As Lord Nicholls said in *Reynolds*, the list is not exhaustive but merely illustrative. A balancing operation must be carried out and the weight to be given to any of the factors will vary from case to case. They are certainly not ten hurdles or tests to be negotiated in the sense that if any one of them is not met, the defence fails. As Lord Hoffman said in *Jameel*, the indicia of 'responsible journalism' were not mandatory obstacles to be overcome. The standard of conduct required of a newspaper must be applied in a practical and flexible manner having regard to practical realities (see *Jameel* at [56]).

[33] Now, another aspect of the defence of publication in the public interest, which is relevant to the instant appeal, is the defence of reportage. Reportage is really short-hand for neutral reporting of attributed allegations. It is reminiscent of privilege accorded to fair and accurate reports of parliamentary and court proceedings. The distinction between reportage and the Reynold's defence lies in whether the public interest is concerned with the fact that the statement is made and not the truth of its contents.

[34] To complete the narrative on the law, it is also necessary to state that the law in the United Kingdom has undergone further change. The defence of publication on a matter of public interest is now a statutory defence

enacted in section 4 of the UK Defamation Act 2013. It replaces the common law defence of *Reynolds* public interest privilege. The Explanatory Notes to the UK Defamation Act 2013 suggest that this new section 4 is based on the *Reynolds* case and the law which developed in subsequent cases. The intention was to reflect the fact that the common law test contained both a subjective element – what the defendant believed at the time – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.

[35] After the statutory defence came into effect on 1 January 2014, it may be fair to say that the law in the United Kingdom has taken a significant swing in focus in that the *Reynolds* defence of responsible journalism has now shifted to a concept of reasonable belief that the publication is in the public interest. The focus is now on what the defendant publisher believed at the time rather than what a judge believes some weeks or months later with the advantage of leisure and hindsight. This new shift in focus avoids the inflexible and rather strict way in which the courts have regarded the *Reynolds* test as some kind of checklist or hurdles for the defendants to overcome which to a great extent discouraged investigative reporting. Interpreted in this fashion, it is more than likely that this statutory defence of

public interest would be a less vigorous test for the media and, in the end, a more attractive and appealing proposition all round. It is also significant that the defence of reportage of an "accurate and impartial account of a dispute" has now been statutorily confirmed. Notably, Australia has followed a similar path by recently amending its Defamation Act 2005 to include a new public interest defence in section 29A which was modelled on section 4 of the UK Defamation Act 2013 but with some differences.

[36] It is, of course, significant for us that the *Reynolds* defence is no longer followed in the country of its origin. The two-stage test in the *Reynolds* defence has been replaced by a different three requirements test as set out in section 4 of the UK Defamation Act 2013. In this new test, the defendant will have to firstly establish that the statement was on a matter of public interest, secondly, that the defendant believed that publication of it was in the public interest and thirdly, that such belief was reasonable. Considering the facts and the evidence as adduced in the present case, and as will become apparent from the discussion that follows, it is interesting to observe that the defendants here would have had no difficulty in establishing the three requirements under section 4 of the UK Defamation Act 2013.

[37] Be that as it may, none of the parties in the instant case had suggested that we follow along the same path. Indeed, they could not do so without formally inviting the Court and without putting forward full arguments as to the direction in which our law should take with regard to the public interest defence. Until that transpires in a future case, and given that the law of defamation in this regard in the United Kingdom is likely to journey along a slightly different path, we in Malaysia may have to persevere with the *Reynolds* defence. As noted earlier, our position can always be reviewed in a later suitable case with the assistance of full arguments and with fair notice to the parties as well as having the benefit of the efficacy of defamation laws in other common law jurisdictions.

[38] Having dealt with the law, it may be convenient at this juncture, to now come to the first issue raised in the appeal which is whether reportage is in law a separate defence from the *Reynolds* defence of responsible journalism and whether it is mandatory for the two defences to be pleaded separately. Allied to this issue is whether the two defences can be pleaded in the alternative.

[39] Now, the High Court considered that reportage was a form of *Reynolds* privilege and that there were two situations in which the *Reynolds* privilege

applies. The first is responsible journalism where the public interest in the allegation that is reported lies in its contents. The second is reportage where the public interest lies in the making of the allegation itself and not the contents of the allegation. On the issue of whether the defendants have specifically pleaded reportage, the High Court considered that pleading qualified privilege in paragraphs 33 and 35 of the Defence was sufficient to enable the defendants to prove reportage at the trial.

[40] The Court of Appeal, on the other hand, took the position that reportage must be treated separately from responsible journalism. In other words, it was a separate and distinct offence such that it must be specifically pleaded. The Court of Appeal held that failure to so plead precluded the defendants from relying on this defence as it will be prejudicial to the plaintiff.

[41] On this question, I would say at once, and with respect, that the Court of Appeal was wrong both on the issue of substantive law and on the requirements of pleading as was set out earlier. In my respectful view, reportage is not a distinct and separate offence from responsible journalism or qualified privilege generally. It is part of the *Reynolds* family of public interest privilege or responsible journalism. It is not a defence *sui generis* as underpinning both defences is the public policy of the duty to impart and

receive information as reflected in the leading cases on reportage such as *Jameel, Flood* and *Roberts and another v Gable and Others* [2008] 2 WLR 129 ("*Roberts*").

[42] This was essentially the thrust of Ward LJ's observation in *Roberts, supra* at [60]:

> "Once reportage is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is, as was conceded in the *Al-Fagih* case [2002] EMLR 215 a form of, or a special example of, *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. It cannot be a defence sui generis because the *Reynolds* case [2001] 2 AC 127 is clear authority that whilst the categories of privilege are not closed, the underlying rationale justifying the defence is the public policy demand for there to be a duty to impart the information and an interest in receiving it: see p 194 G. If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed."

[43] A similar view was expressed in *Flood,* where Lord Mance agreed that the defence of public interest privilege involved a "spectrum" which he described as follows at [158]:

> "I agree in this connection with what I understand to be Lord Phillips PSC's view that the defence of public interest privilege involves a spectrum. At one

> end is pure reportage, where the mere fact of a statement is itself of, and is reported as being of, public interest. Higher up is a case like the present, where a greater or lesser degree of suspicion is reported and the press cannot disclaim all responsibility for checking their sources as far as practicable, but, provided the report is of real and unmistakably public interest and is fairly presented, need not be in a position to produce primary evidence of the information given by such sources."

[44] In this context, the Court of Appeal may have unfortunately misapprehended the obiter remark by Sedley LJ in *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750 ("*Charman*") where it was observed that once a defendant had relied on the defence of reportage, it makes it forensically problematical to fall upon an alternative defence of responsible journalism and due to this difficulty, pleaders may need to decide which it is to be: reportage or responsible journalism. That observation, it must be said, was made in the context of "a bald retailing of libels" which could not be regarded as reportage.

[45] In the circumstances, the adoption of the obiter remark by the Court of Appeal was, with respect, regrettable as the Court failed to note that in *Charman*, the approach taken by all the Judges was to deal first with the defence of reportage before considering qualified privilege per se. Having done so, their Lordships rejected the defence of reportage but upheld the

defence of *Reynolds* privilege on account of the publication being a piece of responsible journalism.

[46] There was therefore no ruling, as the Court of Appeal appears to have accepted, that both species of the defence cannot be run as alternative defences. In fact, the case of *Charman* has been acknowledged as authority for the proposition that where a defendant fails to maintain a neutral stance and therefore loses the privilege of reportage, he/she may still be able to avail of the *Reynolds* public interest defence more generally by proving responsible journalism (see *Clerk & Lindsell on Torts*, 21st Edn., para 22-154).

[47] In the instant case, it is noted that in paragraphs 33 and 35 of the Statement of Defence, the defendants had pleaded qualified privilege by making specific references to "responsible journalism" and of the matter being of "public interest" with the defendants having a "duty to publish" the ongoing story. The elements of "public interest" and "duty to impart" are affirmed by Ward LJ's underlying rationale in *Roberts* that the defence of reportage is justified by "the public policy demand for there to be a duty to impart the information and an interest in receiving it". Any plaintiff, properly advised by its legal advisors, could not have been left in any doubt that the

Reynolds defence of reportage was also being pleaded especially when the terms “public interest privilege” or “responsible journalism” are used (see also *Datuk Harris Salleh v Datuk Yong Teck Lee & Anor* [2017] 6 MLJ 133).

[48] It has never been the law of pleadings that the actual legal term be used if the facts and circumstances warranting the defence are set out (see *Re Vandervell’s Trusts* (No 2) [1974] EWCA Civ 7; [1974] Ch 269). In other words, it is only necessary to plead the material facts and not the legal result. The legal consequences permitted by the material facts can be presented in argument. The principle of pleadings, it should be recalled, is to put the opposing party on notice as to one’s case so as to promote fair and efficient litigation. If there is any doubt, parties are at liberty to seek further and better particulars.

[49] I do not think, in the circumstances, that it is open to the plaintiff to claim surprise or prejudice on this pleading issue. In my considered view, the High Court was quite right when it held that reportage had been sufficiently pleaded. The High Court was also right to distinguish the case of *Harry Isaacs, supra* as reportage there was never pleaded and argued in the trial court but only sought to be raised at the appellate stage.

Second Issue: whether the defendants had, as a matter of law and fact, made out a case of reportage and/or the Reynolds privilege.

[50] The final issue is whether the defendants had, as a matter of law and fact, made out a case of reportage and/or qualified privilege in the *Reynolds* sense in respect of the articles and videos as affirmatively determined by the High Court but overruled by the Court of Appeal.

[51] In this respect, both the Courts below were in agreement, with regard to the first element in proving the *Reynolds* defence, - that the publications in question were on a matter of grave public concern and public interest. I do not think there can be any doubt about this as the Court of Appeal had provided cogent reasons as to why the publications were in the public interest.

[52] Having determined that the impugned articles and videos concerned a matter of public interest, the next stage would be to determine if the publications were the upshot of responsible journalism and were therefore protected under the defence of reportage or the general *Reynolds* privilege. It may be convenient to take the articles and videos together. To recap, there were three articles and two videos which were the subject matter of the

defamation action. The 1st Video was linked to the 2nd Article and the 2nd Video was linked to the 3rd Article. The Articles and the Videos were published on the 1st defendant's website www.malaysiakini.com.

[53] The 1st Article was titled **"Villagers fear for their health over cyanide pollution"** and published on 19 March 2012. The 2nd Article was titled **"78 pct Bukit Koman folk have 'cyanide-related' ailments"** and published on 21 June 2012. The 3rd Article was titled **"Raub folk to rally against 'poisonous' gold mine"** and published on 2 August 2012. It was common ground, as noted by the Courts below, that prior to the publication of these Articles and Videos in 2012, there was already extensive coverage by other news media such as Nanyang Siang Pau, The Star, Utusan Malaysia, Sin Chew Daily and China Press on the issue of the gold mining activities of the plaintiff using cyanide. The issue was also raised in the Pahang Legislative Assembly.

[54] In fact, from 2006 onwards, further news emerged of the protests on a national scale by the Bukit Koman residents against the use of cyanide. There were also legal proceedings by way of a judicial review up to 2012 to challenge the Environment Impact Assessment Report pertaining to the mining of gold in Bukit Koman. A public interest group,

Ban Cyanide Action Committee ("BCAC"), was also formed by the Bukit Koman residents to advocate against the use of cyanide by the plaintiff in their mining activities.

[55] Coming now to the 1st Article, the findings of the learned High Court Judge can be summarized as follows:

(a) Prior to the publication of the Articles and Videos, there was already extensive media coverage of the gold mining activities and the threat to the health of the Bukit Koman community and that these were matters of public interest.

(b) The 1sl Article was sourced from the news which had appeared in the Sin Chew Daily and Nanyang Siang Pau websites as confirmed by the editors of these two websites at the trial.

(c) The 1st Article was also sourced from blogs which carried the same news.

(d) The 1st Article merely reported the concern of the Bukit Koman residents as to fears for their health and the suspicion that

air pollution is caused by the plaintiff's mining operation. It made no allegation or criticism against the plaintiff. There was no embellishment of the contents of Article 1 by the 1st and 2nd defendants.

(e) Verification of such news that was sought from Wong Kin Hoong, the then Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the 1st Article was sufficient to constitute responsible journalism. This is because the 1st Article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman residents regarding the air pollution suspected to have been caused by the gold mining activities.

[56] Now, the Court of Appeal in respect of the 1st Article came to a different conclusion. The Court took the view that there was no consideration of Lord Nicholls' ten points in *Reynolds*. Although there was some verification before publication, the Court held that the verification sought with Wong Kin Hoong was insufficient. The Court felt that as no attempts were made by the defendants to try and contact other experts on the matter or to get a response from the plaintiff, the defendants had failed to act fairly and responsibly.

[57] The Court also held that the tone of the 1st Article was extremely accusatory and damaging to the plaintiff. As the information was not verified, the defendants "cannot rely on the defence of responsible journalism since the respondents (defendants) had failed to meet the relevant ten (10) points test as propounded in Reynolds" (see para [40] of Court of Appeal Judgment).

[58] In respect of Articles 2 and 3 and the two Videos that accompanied them, the High Court had found that the Articles were a reproduction of two press conferences held on 21 June 2012 and 2 August 2012. The learned High Court Judge accepted that the defence of reportage was available in respect of both Articles and Videos as the public interest rested not in the truth of the contents but on the fact that that they had been made.

[59] The Court of Appeal, on the other hand, apart from the pleading point as discussed earlier, held that the defendants had failed to show that in the ongoing dispute, they had reported the allegations in a fair, disinterested and neutral manner without embracing, garnishing and embellishing the allegations. The Court also observed that since the allegations were extremely serious and damaging, attempts ought to have been made to contact independent bodies such as the Department of Environment, the Department of Minerals and Geoscience or the Ministry of Health prior to publication. The Court also noted

that the defendants should have contacted the plaintiff to get its side of the story so as to maintain balanced reporting. The Court went on to hold that the defendants were not entitled to avail themselves to the defence of reportage.

Analysis and Decision

[60] After careful consideration of the judgments of the Courts below and the arguments of the parties, it is my respectful view that the decision of the Court of Appeal cannot be sustained for a number of reasons. For convenience, I will attempt to discuss the reasons under broad points and then relate them to the impugned publications.

The *Reynolds* Ten Points

[61] I think the case law as I had set out earlier is without controversy. The cases are replete with warnings that the ten points should not be treated as compulsory requirements that will have to be met before a successful plea of responsible journalism can be accepted. As mentioned earlier, they are not "hurdles to be cleared" (per Lord Bingham in *Jameel*) but must be applied in a practical and flexible manner having regard to practical realities (per Lord Nicholls in *Bonnick v Morris, supra*). In *Tony Pua's* case, *supra*, in speaking for this Court, Azahar Mohd FCJ (now CJ Malaya) reiterated that the ten points were

explanatory only and served as guidelines with the weight to be given varying from case to case.

[62] It was therefore unfortunate for the Court of Appeal to come to a finding at para [40] of the Judgment that "the Respondents cannot rely on the defence of responsible journalism since the Respondents had failed to meet the relevant ten (10) points test as propounded in *Reynolds*." This was further compounded when the Court had earlier at para [37] accepted the plaintiff's criticism of the High Court Judgment that "there was absolutely no consideration of Lord Nicholls' 10 tests…"

[63] A perusal of the High Court Judgment, however, shows that the learned Judge was very much alive to the ten points and had considered it to be the critical issue. The learned Judge however considered, quite correctly, that the ten points were merely illustrative and a general guideline. So, it was erroneous for the Court of Appeal to accept the plaintiff's arguments in this respect.

[64] In the end, and as alluded to earlier, the learned Judge considered that the 1st Article was merely reporting the concerns of the Bukit Koman residents and their suspicion that the air pollution was caused by the plaintiff's gold mining activities. The Court also observed that the 1st Article was not about the truth of

the contents but only the concerns of the residents there. The learned Judge concluded that the defendants had satisfied the test of responsible journalism.

[65] Interestingly, although no arguments were put forward on this, given all the circumstances, a clear argument on the defence of reportage could also have been made out in respect of the 1st Article. It seemed to me, as the learned Judge found, that the 1st Article was only about the concerns of the residents and not whether their suspicions were true. Reading the Article as a whole, there certainly appeared to be no adoption or embellishment by the defendants.

[66] As apparent from the case law discussed earlier, a defendant publisher could attempt to plead and prove both reportage and the general *Reynolds* privilege. They are both "publications in the public interest" defences. However, in view of the nature of the defences, in the sense that they are part of a spectrum of the same defence, it is more convenient to establish reportage first although it is sometimes possible for a careful publisher to be able to establish both. Of course, if he establishes reportage, that would be the end of the matter.

[67] In the present case, the litigants have chosen to focus, as did the learned Judge, on the *Reynolds* privilege alone. Nevertheless, given that there was no adoption or embellishment by the defendants of the allegations in question, the finding of the High Court Judge of responsible journalism, as opposed to that of

the Court of Appeal, is unassailable. The Court of Appeal was therefore, with respect, wrong to interfere with the finding of the High Court with respect to the 1st Article.

Verification

[68] Now, the Court of Appeal was most concerned with the lack of verification of the allegations. The failure to verify was at the heart of the Court of Appeal's refusal to accord the defendants the protection of *Reynolds* privilege as well as to some extent the defence of reportage. There were two aspects to this. The first was the criticism by the Court of Appeal that no opportunity was given to the plaintiff to respond. The second is that verification of the allegations should have been sought from independent experts.

[69] With respect to the first aspect, there was a finding of fact by the High Court that as far as the 3rd Article was concerned, the 1st defendant did try to get a response from the plaintiff's representative prior to the publication but he declined comment. Further, by its solicitor's letter of 30 July 2012, the 1st defendant had offered the plaintiff a right of reply which it undertook to publish but the plaintiff did not respond and avail itself of the opportunity (see para [29] of High Court Judgment).

[70] It appeared that the plaintiff had taken the position that it would not comment on any of the stories in view of the judicial review application. It is apposite to observe that had the plaintiff given their version of the events, the defendants would have been obliged to publish the same. Even though seeking the claimant's version is not a requirement in all cases, failure to publish the same if offered would count heavily against them and would almost certainly be considered as irresponsible journalism.

[71] Now, the Court of Appeal had not adverted to any of these facts which were found by the High Court. So, in my respectful view, it was plain that the Court of Appeal's decision in this context is unsustainable as it arises from a misreading of the facts of the case and against a specific finding of fact by the trial Court. In *Jameel, supra*, it was held that a publisher would be acting reasonably when he had sought a comment but was ignored and thereafter proceeded to publish its story. It was also held in similar vein in *Charman, supra* at [91] that a unilateral libel reported disinterestedly will be equally protected. The reportage doctrine is not confined to the reporting of reciprocal allegations.

[72] The next aspect was on the insistence by the Court of Appeal on independent verification by experts. This was no doubt prompted by the plaintiff's approach in dealing with the verification issue as if it was a requirement of

establishing the truth of the complaints. The plaintiff maintained that the defendant was obliged to independently seek a scientific determination of the truth of pollution and health hazards from experts such as the Ministries of Health or Environment or the Geology Department. The Court of Appeal upheld this plea and held that this was detrimental to the defendants' case as no attempt was made to contact such experts.

[73] With respect, this aspect of the Court of Appeal's decision, as a matter of law, is unsustainable in two respects. First, in cases of reportage, as long as there is no adoption and the defendant has engaged in neutral reporting, there is no requirement of verifying the truth of the allegations of an ongoing dispute (see *Roberts*, *supra* at [53]; *Flood, supra* at [77]). As observed earlier, unlike the general *Reynolds* defence, reportage is not about the truth of the statement but only that the statement was made. The classic case of reportage is that of a publication of two conceivably defamatory accounts by opposing parties locked in a dispute. In such cases, no verification of the truth of the allegations is required. Only an accurate and a balanced report of the allegations is necessary. The only qualification is that the *Reynolds* ten points have to be applied with the necessary adjustments in view of the special nature of reportage.

[74] In the present case, the defendants had, in any case, sought verification of the concerns of the residents from Wong Kin Hoong, who was the Chairmen of the Bukit Koman Anti-Cyanide Committee, who confirmed the fears of the residents. The defendants had also sought comments from the plaintiff on several occasions which were not forthcoming. However, in the 2nd Article, there was a reference to the comment by a Federal Minister and local Parliamentarian YB Ng Yen Yen that the gold mine was safe. There was a further reference to the State Local Government, Environment and Health Committee Chairperson Mr Hoh Khai Mun who told the State Assembly that the water was cyanide-free while the toxic chemical's presence in the air is within limits. Considered as a whole, the only fair and reasonable conclusion is that the impugned Articles and Videos were an accurate, balanced and neutral account of the dispute.

[75] Secondly, if any verification exercise is required to establish that the publisher or journalist has acted responsibly, it should not be burdensome or time consuming such that the urgency of the story is lost. As news is a perishable commodity as recognized in *Reynolds*, the urgency of a story is a factor to be taken into account especially in respect of an on-going story of public interest. It would unreasonable to expect a newspaper to undertake a

verification exercise with independent experts or engage its own experts before publishing a developing story of daily interest.

[76] In the present case, the whole story about the fears arising from the plaintiff's gold mining activities was already in the public consciousness. The evidence disclosed that since 1996, there were at least 26 news articles from various news media which reported the use of cyanide by the plaintiff. So, to now impose a burden on the media to engage independent experts prior to publication would not just be an onerous undertaking but also impractical as the function of the media is to report the news as it unfolds.

[77] In this context, it is pertinent to recall what was stated earlier - "in deciding whether or not the criterion of responsible journalism has been met, the court should apply the standard of conduct expected of a journalist in a practical and flexible manner" (see *Jameel* at [140]). Further, the *Reynolds* ten points were not intended to present an onerous obstacle to the media in the discharge of their functions (see *Charman*, at [66]).

[78] In my judgment, the Court of Appeal's decision in rejecting the *Reynolds* privilege and defence of reportage on the ground that independent verification from experts should have been sought to verify the truth of the Bukit Koman residents' complaints before publishing the story was, with

respect, inimical to the spirit of the *Reynolds* ten points. It is worth repeating that the ten points ought not to be treated as ten hurdles to be surmounted failing which the defence will fail. In the circumstances, the Court of Appeal, with respect, was wrong to interfere with the findings of the High Court with respect to the 2nd and 3rd Articles together with the related Videos.

Tone and adoption of the Articles and Videos

[79] The Court of Appeal came to the view that the articles in question were "not fair and neutral" with the defendants "garnishing and embellishing the allegations" and that it was couched in a "sarcastic" or "in an accusatory and damaging tone". The Court then concluded that the defendants have "embraced and adopted" the complaints as the truth.

[80] However, upon a plain reading of the impugned Articles themselves and the tone adopted therein, not even the most magnanimous exercise of the imagination can justify the interpretation given by the Court of Appeal. The Court probably fell into error by adopting the plaintiff's description and interpretation of how the Articles were injurious to them. It is trite law that allegedly defamatory words are to be objectively assessed and not through

the eyes of the complaining plaintiff or the meaning the plaintiff gives to the words.

[81] In any case, as a matter of law, the tone of an impugned publication (as per *Reynolds* Point No. 9) need not be "bland and arid" but that it could be written "vigorously" (see *Roberts, supra* at [74]). A reportage defence is not lost even if a defendant publisher takes a perceptible pleasure in reporting the controversy or appears to sympathize with the case put forward by one party. The reportage defence is only lost by embellishment by the journalist adding his own comments to give truth to the story.

[82] The Court of Appeal, in arriving at its decision, also commented on the impugned Articles asserting something sinister and also being biased against the plaintiff. On this score, the trial Court had found no malice on the part of the defendants. There appeared to be no reversal of this finding. In any case, it is doubtful whether a sinister motive or malice is relevant in the case of the defence of reportage (see *Loutchansky v Times Newpapers Ltd (Nos 2-5)* [2002] QB 783 at [34]). So, with respect, the Court of Appeal's conclusion in this respect is unsustainable both in law and fact.

Conclusion

[83] For all the cumulative reasons mentioned in the analysis above, the Court of Appeal plainly erred in its approach and in the reasons it gave for differing from the trial Judge and in setting aside the High Court decision. In my judgment, the High Court was entitled to come to the finding that in respect of the 1st Article, responsible journalism had been established and in respect of the 2nd and 3rd Articles and the related Videos, the defendants were entitled to avail themselves to the defence of reportage. The impugned Articles and Videos, although damaging to the plaintiff, were on a matter of great public concern, were balanced in content and tone, and critically, did not assert the truth of the allegations reported.

[84] It is apposite to reflect that the High Court had a considerable advantage of having heard all the evidence through various witnesses over a period of time compared to the Court of Appeal which only had the benefit of the cold print of the Appeal Records. In such a case, an appellate court ought to only disagree with the trial judge's assessment unless he/she has misunderstood the evidence, taken into account irrelevant factors or failed to take into account relevant factors or reached a conclusion no reasonable judge would have reached (see *Jameel, supra* at [36]). The upshot in the

present case, based on the preceding analysis, is that there were really no grounds for appellate intervention both in law and fact.

[85] As a parting rejoinder, it must be said, and this is beyond dispute, that the press and the journalists play a crucial role in reporting matters of public interest and matters of serious public concern. In its role as a watchdog for the people, the awareness created by such media reports will by and large lead to greater protection of society as a whole. In carrying out this duty, the press may at times get the facts wrong. However, in matters of public interest, so long as the press hold a reasonable belief that the publication is in the public interest or that the publication is a fair, accurate and impartial account of a dispute, the press and journalists are entitled to the protection of the law.

[86] A more emphatic pronouncement in this respect was made by Lord Nicholls in *Reynolds* which is worth repeating (*supra* at p 205):

> "Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog.

> The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication."

[87] Applying the legal issues as adumbrated above to the established facts, the leave questions as set out at the outset should be answered as follows:

Question 1: No

Question 2: No

Question 3: No

Question 4: Yes

Question 5: Yes

Question 6: No

Question 7: Yes

Questions 8 and 9 need not be answered as they have become redundant in view of the answers to Questions 1-7.

[88] My learned brother Vernon Ong Lam Kiat FCJ has read this judgment in draft and has expressed agreement with it. In the result, the appeal is allowed with costs to the appellants. The orders of the Court of Appeal are hereby set aside and the orders of the High Court restored.

Dated: 02 July 2021

Signed
(HARMINDAR SINGH DHALIWAL)
Judge
Federal Court of Malaysia

Note: This Summary is prepared for the purpose of understanding the Judgment only. In the event of any discrepancy, the Judgment itself will form the authoritative text.