IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 02(f)-61-08/2018(W)

BETWEEN

1. MKINI DOTCOM SDN BHD

2. LEE WENG KIAT

3. WONG TECK CHI

4. VICTOR TM TAN … APPELLANTS

AND

RAUB AUSTRALIAN GOLD MINING SDN BHD

… RESPONDENT

CORAM

VERNON ONG LAM KIAT, FCJ

ABDUL RAHMAN SEBLI, FCJ

ZALEHA YUSOF, FCJ

HASNAH MOHAMMED HASHIM, FCJ

HARMINDAR SINGH DHALIWAL, FCJ

SUMMARY OF MAJORITY JUDGMENT

[1] Nine questions of law were posed for this court's determination and they are as follows:

(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?

(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 the video recordings of statements by third parties in a press conference, whether the mere publication of such videos could be held to be embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media?

(7) Whether in an on-going 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?

[2] Leave questions 1-7 are connected and shall be dealt with together. The issue in relation to the 7 questions is whether the Court of Appeal was right in holding that the High Court was wrong in deciding that the defence of reportage need not be pleaded and that on the evidence the defence of reportage and the *Reynolds* defence of responsible journalism had been established by the appellants.

[3] At the trial of the action, the appellants relied heavily on the unpleaded defence of reportage in their closing submissions and they succeeded. The High Court accepted the appellants' contention that since the defence of reportage forms part of the *Reynolds* defence of responsible journalism or qualified privilege, which the appellants had already pleaded in their statement of

defence, the defence need not be pleaded. The High Court had thus subscribed to the notion that the *Reynolds* defence of responsible journalism covers and includes the defence of reportage.

[4] The Court of Appeal disagreed and unanimously decided that the High Court was wrong both in law and on the facts in finding that the appellants had established the defence of reportage and the *Reynolds* defence of responsible journalism. On reportage, the Court of Appeal's view was that the defence must be specifically pleaded as it is distinct and separate from the *Reynolds* defence of responsible journalism.

[5] We agree with the Court of Appeal. A journalist who relies on reportage as a defence parts company with the *Reynolds* defence of responsible journalism, a defence which allows him to put forward the defamatory material as true, but which the defence of reportage does not allow. For this reason, he cannot have it both ways. He must decide which it is to be, reportage or the *Reynolds* defence of responsible journalism: see *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750 (CA).

[6] We accept the respondent's contention that as a matter of doctrine the defence of reportage cannot be reconciled as part of the *Reynolds* defence of responsible journalism or qualified privilege. The gulf between the two defences is too wide to be abridged as defences of the same specie.

[7] Given the material differences in the defining characteristics of reportage and the *Reynolds* defence of responsible journalism, the two defences must be treated as mutually exclusive. The Court of Appeal was therefore correct in holding that the defence of reportage must be specifically pleaded as it is distinct and separate from the *Reynolds* defence of responsible journalism.

[8] The law is trite that parties are bound by their pleaded causes of action: see *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449 FC the ratio of which in our view applies with equal force to pleaded defences. In the absence of any amendment to their statement of defence, the appellants should not have been allowed to travel outside the four corners of their pleaded defences, namely fair comment, the *Reynolds* defence of responsible journalism and freedom of expression.

[9] From the pleadings and the contents of the three articles and two videos, it is obvious that the appellants had subscribed to a belief in the truth and accuracy of the defamatory imputations. There is no averment in the statement of defence denying that they had subscribed to such belief and that they were simply reporting in a neutral fashion. A vital element of reportage is therefore missing from the pleadings to entitle the appellants to rely on the defence of reportage.

[10] By adopting the statements in the articles and the videos and making them their own and in failing to report the story in a fair,

disinterested and neutral way, the appellants had forfeited their right to the protection of reportage.

[11] Assuming for a moment and for the sake of argument that the defence of reportage may be relied on without being pleaded, the question then arises whether there was sufficient judicial appreciation of the evidence by the learned trial judge in coming to the conclusion that the defence of reportage had been established by the appellants. We think not. What is clear from the judgment is that in determining whether the defence of reportage had been established, the learned trial judge's focus was on the public interest element of the defence of reportage without addressing her mind to the relevant evidence that goes to prove or to disprove the defence of reportage.

[12] Viewed in the context of the sustained campaign by the Ban Cyanide Action Committee ("the BCAC") against the respondent, the publication of the defamatory articles and videos clearly shows that the appellants had taken a position in favour of the BCAC in their reporting, which negates their assertion that they had been fair, disinterested and had adopted a neutral approach in their reporting. The reporting by the appellants implied that the defamatory statements made by the BCAC were true and accurate when they were not.

[13] The publisher who seeks the protection of reportage as a defence must make it clear that he does not himself believe the information to be true: see *Jameel and another v Wall Street Journal Europe Sprl* [2006] 4 All ER 1279 per Baroness Hale (later

President of the UK Supreme Court). In the present case, the appellants both in their statement of defence and in their evidence in court did not make their position clear. Silence is not an option where the statements are defamatory, derogatory and accusatory of the claimant.

[14] If the journalist espouses or concurs with the defamatory statements or imputations, he loses the protection of reportage. Espousing or concurring with the defamatory statements or imputations need not be express. They can be implied, such as using headlines that promote and give prominence to the defamatory statements or imputations, given the tendency of the general public to read only the headlines.

[15] Having thus disentitled themselves of the protection of reportage, the appellants must then show that they had taken appropriate and reasonable steps to verify the truth and accuracy of the articles in order to avail themselves of the *Reynolds* defence of responsible journalism, which was their pleaded defence.

[16] The second limb of the *Reynolds* defence of responsible journalism or qualified privilege requires the appellants to satisfy the court that the steps to gather, verify and publish the information were responsible and fair. However, from the evidence of DW1, the Editor-in-Chief of the first appellant, it is clear that the appellants had failed to take steps, let alone reasonable steps, to verify the contents of the articles and videos.

[17] There were many aspects of the defamatory articles and videos that were verifiable and which needed verification but which the appellants did not bother to check for truth and accuracy. This is irresponsible rather than responsible journalism.

[18] On the proved facts therefore, the learned trial judge was wrong in finding as a matter of law that the articles and videos were published on an occasion of qualified privilege. The appellants' failed attempts to get clarification from a representative of the respondent in connection with the articles and videos is not a valid excuse in all the circumstances of the case to go ahead with the publication of the defamatory articles and videos. After all, the respondent had explained why it would not comment on the stories, and this was because of the pending judicial review application.

[19] But more importantly, it cannot be the philosophy behind *Reynolds* that if the claimant refuses to comment on the story, the journalist is thus given a free pass to publish the material in a way that is defamatory of the claimant. The burden remains with the journalist to verify the truth and accuracy of what is published.

[20] In the circumstances, the Court of Appeal was justified in interfering with the decision of the High Court in order to prevent a miscarriage of justice.

[21] The appellants criticized the judgment of the Court of Appeal for requiring them to meet all ten requirements listed by Lord Nicholls in *Reynolds*. This according to the appellants was a

misapplication of *Reynolds*. With due respect, the criticism is without basis. The Court of Appeal was clearly mindful that the ten points test laid down in *Reynolds* is illustrative and not exhaustive: see paragraph [30] of the judgment. In any case, all ten factors listed in *Reynolds* must be considered, with the necessary adjustments, for the 'special nature' of reportage: see *Roberts and another v Gable and others* [2008] 2 WLR 129.

[22] The appellants further contended that the Court of Appeal erred in holding that there was insufficient and/or no verification of the articles and videos by the appellants prior to publication. The plain truth is, there was no such verification in the true sense of the word. It would be against the totality and weight of the evidence if the Court of Appeal were to find otherwise.

[23] As for leave questions 8 and 9 (Damages), we agree with the respondent that the respondent's insolvency is inconsequential for the following reasons:

(a) damages are assessed from the date of the cause of action; and
(b) goodwill is capable of existing in an insolvent company and in addition, both damages for loss of goodwill and vindication of reputation can be awarded to the company.

[24] In any case, no argument was raised before the Court of Appeal as to the financial standing of the respondent and that it was in the process of a voluntary winding up as a basis for saying that the respondent does not have a good reputation and therefore

not entitled to general damages. It follows that the appellants ought to be precluded from taking such argument before this Court. Ultimately, it is the status of the respondent at the time of the filing of the writ that is material.

[25] For all the reasons aforementioned, our answers to the leave questions are as follows:

Leave question 1 – Affirmative, that is to say, reportage is in law a separate defence from qualified privilege or the *Reynolds* defence of responsible journalism and is to be treated as being mutually exclusive.

Leave question 2 – Affirmative, that is to say, the defence of reportage needs to be pleaded separately from the plea of responsible journalism.

Leave question 3 – Affirmative, that is to say, a defendant is obliged to plead either reportage or responsible journalism and not plead them in the alternative.

Leave question 4 – Negative, that is to say, the defence of reportage which is in law based on an on-going matter of public concern is not 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'.

Leave question 5 – Affirmative, that is to say, the proper test to determine if the defence of reportage succeeds or otherwise 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.

Leave question 6 – Affirmative, that is to say, in an on-going dispute, the impugned articles and 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 and provided always that the defendant complies with the reportage rule.

Leave question 7 – Affirmative, that is to say, the mere publication of such videos could be held to be embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media, unless the publisher makes it clear that he does not subscribe to a belief in the truth and accuracy of the defamatory statements or imputations.

Leave question 8 – Affirmative, that is to say, 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.

Leave question 9 – Affirmative, that is to say, loss of goodwill can be recovered as a component of defamatory damages by a plaintiff company that has gone into insolvency.

[26] In the circumstances, the appeal is dismissed. The decision of the Court of Appeal is affirmed. We shall now hear parties on costs.

ABDUL RAHMAN SEBLI

Judge

Federal Court of Malaysia

Dated: 2 July, 2021.