MOHAMED APANDI ALI

v.

LIM KIT SIANG

Court of Appeal, Putrajaya
Hadhariah Syed Ismail, M Gunalan, Azmi Ariffin JJCA
[Civil Appeal No: W-02 (W)-949-05-2022]
2 November 2023

Tort: *Defamation — Libel — Action for defamation by plaintiff against defendant for words written and published by defendant in an online news portal — Whether impugned words defamatory of plaintiff — Whether impugned words capable of bearing lesser meaning — Defences of justification and qualified privilege — Malice, whether pleaded — Damages*

The appellant/plaintiff brought an action for defamation against the respondent/defendant in relation to words written and published by the defendant in an online news portal known as "Malaysiakini". The defendant had, on 6 May 2019, written and published an article entitled "Dangerous fallacy to think Malaysia's on the road to integrity" in his blog and the said article was republished in "Malaysiakini". The words complained of by the plaintiff related to the last paragraph of the publication and read: "Apandi, who was appointed Attorney General in July 2015 when Abdul Gani Patail was summarily sacked from his office when word went around that Gani was preparing to charge Najib with corruption, should explain why he aided and abetted in the 1MDB scandal" ("impugned words"). The 1 Malaysia Development Berhad ("1MDB") scandal was a financial scandal in which there were allegations that the sum of RM2.6 billion deposited into the personal bank account of the former prime minister, Najib Razak, were monies siphoned from the sovereign wealth funds of 1MDB, a public investment fund.

The plaintiff, ie Apandi, contended that the impugned words were not true, malicious and were written and published with an intention to tarnish his good name. He also contended that the defamatory article had undermined his dignity and credibility as the former Attorney General of Malaysia. The defendant, however, denied the impugned words were defamatory of the plaintiff. The defendant pleaded that the impugned words understood in the context of the publication as a whole, with or without reference to notorious events at the time of the publication of the same, would reasonably have been understood to mean (the lesser meaning): "That the plaintiff had assisted the perpetrators of the 1MDB scandal by lending himself to the cover up of wrongdoings, and had thereby abused his role as the Attorney General." The defendant also raised the defence of justification, fair comment and qualified privilege. The High Court, after a full trial, dismissed the plaintiff's claim, resulting in the present appeal in which the plaintiff raised the following grounds of appeal: (i) the

High Court Judge ("Judge") erred in law and/or fact in accepting and allowing the defendant's lesser meaning; (ii) the Judge erred in allowing the defendant's defence of justification; (iii) the Judge erred in allowing the defendant's defence of qualified privilege; and (iv) the Judge erred in failing to award the plaintiff general damages, aggravated damages and costs.

Held (dismissing the appeal with costs):

(1) An ordinary reasonable reader who read the publication casually would understand that the information the defendant wanted to convey was that there was lack of transparency in the manner in which people in prominent positions performed their duties and responsibilities. Their integrity was criticised. In the case of the plaintiff, his spectacular failure was to perform his duties as the Attorney General in handling the enormous financial scandal. It could not be seen how the impugned words, when read in the context of the publication as a whole, were capable of giving the impression that the plaintiff had assisted the offender in the commission of a criminal offence or the 1MDB scandal. It was unrealistic to think that an ordinary reasonable reader would pause and reflect on the precise dictionary meaning of the words "aided and abetted". (paras 31-32)

(2) This publication was written on 6 May 2019. From 2015 to 2019, three major events happened that would have been within the general knowledge of Malaysians. The first event was about the plaintiff's predecessor, Gani Patail, being sacked when he was preparing to charge Najib for corruption. The second event was during the plaintiff's tenure as the Attorney General, he publicly announced that Najib did not commit any criminal offence on the basis that the monies deposited into Najib's personal bank account were a donation. He then decided to close the investigation of the 1MDB scandal and cleared Najib's name. The third event was his decision to close the investigation which had caused, not only relentless publications in the media asking the plaintiff not to close the investigation, but also a court action to challenge his decision to close the investigation. The court action was dismissed and the plea to conduct further investigation fell on deaf ears. So much so, that during the plaintiff's tenure as the Attorney General, no one was charged in relation to the 1MDB scandal. These three major events revealed that it was the plaintiff himself who had used his name and his position as the then Attorney General of Malaysia to clear Najib's name. When the plaintiff hastily decided to close the investigation when he himself agreed that the investigation was not complete, that was an abuse of his position and also cemented the public's perception that he was covering up the 1MDB scandal. In short, the only reasonable meaning to be inferred from the impugned words was that the plaintiff had abused his position as the Attorney General. (paras 33-34)

(3) For the aforesaid reasons, the impugned words were capable of bearing the lesser meaning. The lesser meaning was also a reasonable meaning and was rightly accepted by the Judge. (para 35)

(4) At para 5 of his defence, the defendant pleaded the Lucas Box meaning of justification. Paragraph 5 read as follows: "The defendant avers that, on the basis of the lesser meaning, the impugned words were true in substance and in fact". The defendant gave nine particulars to justify the lesser meaning. It was settled law that justification was a complete defence, and the burden lay on the defendant to prove the truth of the particulars to justify the lesser meaning. In the present case, the defendant had, on the facts, successfully proven all the particulars of justification, which meant that the lesser meaning was substantially true, ie the plaintiff had abused his position and covered up the 1MDB scandal. The defendant had then asked the plaintiff to explain why he covered up the 1MDB scandal. Seeking an explanation for matters that truly happened was not defamatory, even though it injured the plaintiff's reputation. The right of Malaysians to know the truth must prevail over the plaintiff's right to protect his reputation. Accordingly, the Judge did not err in upholding the defence of justification. (paras 37, 38, 39, 74 & 75)

(5) As a member of parliament, the occasion of privilege had arisen by virtue of the defendant's role and duty as a representative of the people. Nothing more special than that needed to exist. The defendant also had a duty to raise matters of public interest to his electorate, especially a case of theft of public monies involving a prime minister of such a magnitude. Likewise, the readers of his blog, who included the people of Malaysia, had an inherent right to be informed of the developments of the investigations into the scandal. They were also entitled to be informed of any attempt to derail such developments. For the aforesaid reasons, the Judge was correct in holding that the impugned words were made on an occasion of qualified privilege. (paras 87-90)

(6) Failure to comply with O 78 r 3(3) of the Rules of Court 2012 would result in the plaintiff not being permitted to adduce evidence of actual malice, which was necessary in order to rebut the defence of qualified privilege. In this instance, the plaintiff did not plead malice and the particulars of malice anywhere in para 6 of his reply to the defendant's defence. Therefore, the plaintiff had failed to comply with O 78 r 3(3), and the net effect of such non-compliance was that the plaintiff was estopped from adducing evidence of malice to defeat the defence of qualified privilege. In the absence of malice, the defence of qualified privilege was not rebutted. On the facts and circumstances of this case, there was no good reason to disagree with the Judge's decision that the defendant had successfully proven his defence of qualified privilege. (paras 96-99)

(7) In the present appeal, as the impugned words were proved to be substantially true and justified, it necessarily followed that if the plaintiff's reputation was injured, it was due to his own conduct. He was the author of his own misfortune. In the event this court was wrong on the issue of liability, the plaintiff would be entitled to nominal damages in the sum of RM10,000.00. (para 108)

Case(s) referred to:

Adam v. Ward [1917] AC 309 (refd)

Ayob Saud v. TS Sambanthamurthi [1988] 1 MLRH 653 (refd)

Chin Choon v. Chua Jui Meng [2004] 2 MLRA 636 (refd)

Chok Foo Choo v. The China Press Bhd [1998] 2 MLRA 287 (refd)

Chong Chieng Jen v. Government of State of Sarawak & Anor [2019] 1 MLRA 515 (refd)

Credit Guarantee Corporation Malaysia Berhad v. SSN Medical Products Sdn Bhd [2017] 1 MLRA 541 (refd)

Dato' Sri Dr Mohamad Salleh Ismail & Anor v. Nurul Izzah Anwar & Anor [2018] 5 MLRA 509 (refd)

Dato Wan Hashim Wan Daud v. Mazlan Ibrahim & Anor [1997] 3 MLRH 350 (refd)

Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor [2017] 6 MLRA 281; [2017] 2 SSLR 433 (refd)

Datuk Seri Mohd Shafie Apdal v. Datuk Mohd Ainal Abdul Fattah [2019] 1 SSLR 388 (refd)

Dr Syed Azman Syed Ahmad Nawawi & Ors v. Dato' Seri Haji Ahmad Said [2015] 5 MLRA 206 (folld)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 1 MLRA 528 (refd)

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Ors [2015] 1 MLRA 107 (refd)

Keluarga Communication Sdn Bhd v. Normala Samsudin & Another Appeal [2006] 1 MLRA 464 (refd)

Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 2 MLRH 389 (refd)

Lucas Box v. News Group Ltd [1986] 1 WLR 147 (refd)

Mkini Dotcom Sdn Bhd & Ors v. Raub Autralian Gold Mining Sdn Bhd [2021] 5 MLRA 37 (refd)

Pang Fee Yoon v. Piong Kien Siong & Ors [1999] 3 MLRH 476 (refd)

S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 MLRA 110 (refd)

Stocker v. Stocker [2019] UKSC 17 (refd)

Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor [2010] 18 MLRH 458 (refd)

Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee [2015] 6 MLRA 63 (distd)

Legislation referred to:

Federal Constitution, art 145(3)

Mutual Assistance In Criminal Matters Act 2002, ss 16, 20(1)(i)

Rules of Court 2012, O 78 r 3(3)

Counsel:

For the appellant: Rueben Mathiavaranam (M Visvanathan, R Karnan, V Sanjay Nathan & Kathleen Samantha George with him); M/s Saibullah MV Nathan & Co

For the respondent: Sangeet Kaur Deo (Harshaan Zamani, Simranjit Kaur Daljit Singh, Pravin Mahentharan & Roshunraj Rajendran with her); M/s Karpal Singh & Co

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

[1] The appellant (plaintiff) brought an action for defamation against the respondent (defendant) in relation to words written and published by the respondent in an online news portal known as 'Malaysiakini."

[2] To succeed in his claim for defamation, the appellant had to prove three elements as follows:

(i) The words are defamatory;

(ii) It referred to him; and

(iii) It was published, that is, communicated, to a third party.

See: *Mkini Dotcom Sdn Bhd & Ors v. Raub Autralian Gold Mining Sdn Bhd* [2021] 5 MLRA 37; *Ayob Saud v. TS Sambanthamurthi* [1988] 1 MLRH 653; *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 2 MLRH 389.

[3] The respondent conceded that the words complained of refer to the appellant and that they were published to a third party. Thus, the second and third elements have been proven by the appellant. This leaves the court to decide on the first element, i.e, whether the impugned words was defamatory. The learned Judge held the words are defamatory. In this appeal, both parties have conceded that there is no challenge on this particular decision of the learned Judge and whether the words were defamatory is a non issue in this appeal.

[4] The test of whether the words complained of were defamatory of the appellant is whether the words published in their natural and ordinary meaning impute to the appellant any dishonourable or discreditable conduct or lack of integrity on his part? If the question invites an affirmative answer, then the words complained of are defamatory; see *Chok Foo Choo v. The China Press Bhd* [1998] 2 MLRA 287 CA.

[5] After a full trial, the High Court dismissed the appellant's claim with costs on four grounds as follows:

(i) The contents of the impugned words were not capable of bearing the defamatory meaning pleaded by the appellant and hence not defamatory of the appellant.

(ii) The contents of the impugned words were capable of bearing the lesser meaning pleaded by the respondent.

(iii) The respondent has successfully proven his defence of justification in that the lesser meaning were substantially true and justified.

(iv) The respondent has successfully proven his defence of qualified privilege in that he had a duty to make the impugned article to the public at large and the public had a right to receive the information given the 1MDB scandal is a case of public interest.

[6] Aggrieved by the decision of the High Court, the appellant appealed to this court.

[7] In this judgment, we shall refer to the appellant as the plaintiff and the respondent as the defendant.

Background Facts

[8] The plaintiff is an advocate and solicitor of the High Court of Malaya with over 45 years' experience in the legal field. In the said period, the plaintiff had been a Magistrate; the Director of Legal Aid Bereau Kota Bahru, Kelantan; Deputy Public Prosecutor; Legal Advisor to the Ministry of Commerce and Industry; Judicial Commissioner of the High Court; High Court Judge; Judge of Court of Appeal of Malaysia; Judge of the Federal Court of Malaysia and later appointed as the Attorney General of Malaysia. He held the position as Attorney General from 27 July 2015 until 4 June 2018.

[9] The defendant is a Member of Parliament for the Iskandar Puteri, Johor constituency. The defendant is a well known politician who holds the position of advisor to the Democratic Action Party (DAP), a major political party in Malaysia.

[10] The defendant agreed that on 6 May 2019, he had written and published an article entitled "Dangerous fallacy to think Malaysia's on the road to integrity" in his blog and the said article was republished in an online news portal known as "Malaysiakini".

[11] The full article (the publication) is about three pages long. The words complained of by the plaintiff relate to the last paragraph of the publication which is highlighted in bold and it reads as follows:

> "....I must thank Pandikar for finally identifying his role in the 1MDB scandal in his continuing attempt to whitewash the 1MDB scandal, belonging to the group referred to by the prime minister in Ipoh, who felt the Pakatan Harapan Government should not continue but that the country should go back to the corrupt Government of the past which made Malaysia a kleptocracy.

Pandikar has turned the Sandakan by-election into a touchstone about Malaysia's commitment to get to the bottom of the heinous 1MDB scandal and to transform Malaysia from a global kleptocracy to a leading nation in integrity or to go back to the old corrupt ways.

Former Attorney General Mohamed Apandi Ali said yesterday that concerns that ratifying the Rome Statute of the International Criminal Court would affect the Federal Constitution and Malay Rulers led the Attorney General Chambers during his time to reject the treaty. This was during the BN administration.

Apandi, who was appointed Attorney General in July 2015 when Abdul Gani Patail was summarily sacked from his office when word went around that Gani was preparing to charge Najib with corruption, should explain why he aided and abetted in the 1MDB scandal."

[The impugned words]

[12] 1MDB scandal is a financial scandal wherein there were allegations that the sum of RM2.6 billion deposited into the personal bank account of the former prime minister, Najib Razak were monies siphoned from the sovereign wealth funds of 1 Malaysia Development Berhad (1MDB), a public investment fund.

[13] The plaintiff, in his evidence agreed that the 1MDB scandal involves public funds. That it is a case of public interest and was widely publicized both locally and internationally.

[14] The plaintiff pleads at para 6 and 7 of his statement of claim that the impugned words in their natural and ordinary meaning and by innuendo are libelous against him and were understood to mean that he was:

(a) A person involved in, assisted and was complicit in the 1MDB scandal;

(b) A person involved in criminal activity especially in the 1MDB scandal;

(c) A person devoid of any integrity and who is immoral;

(d) A person devoid of the ethical nature of professional responsibility and other ethics which are important when holding the position as Attorney General of Malaysia at the material time;

(e) A person who has committed abuse of power and/or omissions and/or dereliction of duty and responsibility in carrying out his duties and all responsibilities as the Attorney General of Malaysia at the material time;

(f) A person practicing double standards in carrying out and/or execution of his duties and responsibilities especially in the plaintiff's position as Attorney General at the material time and generally as an individual;

(g) A person who is incompetent, devoid of the knowledge and expertise required when holding the position as the Attorney General of Malaysia at the material time.

[15] The plaintiff contended that the impugned words are not true, malicious and were written and published with an intention to tarnish his good name. He also contended that the defamatory article had undermined his dignity and credibility as the former Attorney General of Malaysia.

[16] The defendant denied the impugned words were defamatory of the plaintiff. He contended that the impugned words are incapable of bearing the meaning ascribed by the plaintiff in paras 6 and 7 of the statement of claim.

[17] The defendant pleads that the impugned words understood in the context of the publication as a whole, with or without reference to notorious events at the time of the publication of the same, would reasonably have been understood to mean (the lesser meaning):

> "That the plaintiff had assisted the perpetrators of the 1MDB scandal by lending himself to the cover up of wrongdoings, and had thereby abused his role as the Attorney General."

[18] The defendant also raised the defence of justification, fair comment and qualified privilege.

The Appeal

[19] The plaintiff raised four (4) grounds of appeal as follows:

(i) The learned High Court Judge erred in law and or fact in accepting and allowing the defendant's lesser meaning.

(ii) The learned High Court Judge erred in allowing the defendant's defence of justification.

(iii) The learned High Court Judge erred in allowing the defendant's defence of qualified privilege.

(iv) The learned High Court Judge erred in failing to award the plaintiff general damages, aggravated damages and costs.

Meaning Of The Impugned Words

[20] In determining whether the impugned words are capable of bearing a defamatory meaning, the primary role of the court is to focus on how the ordinary reasonable reader would construe the words. Meaning was to be determined according to how it would be understood by the ordinary reasonable reader. It was not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made; see *Stocker v. Stocker* [2019] UKSC 17.

[21] On the very same issue, the learned High Court Judge relied on the case of *Chong Chieng Jen v. Government of State of Sarawak & Anor* [2019] 1 MLRA 515 wherein the Federal Court said:

"The steps of the inquiry before the court in an action for defamation was succinctly explained by Gopal Sri Ram JCA (later FCJ) in *Chok Foo Choo v. The China Press Bhd* [1998] 2 MLRA 287 (CA):

> It cannot, I think, be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph Ltd* [1963] 2 ALL ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction..".

[22] The plaintiff took offence with the words 'aided and abetted' in the article. In his evidence, the plaintiff said aided and abetted in the said article would surely mean that he had facilitated and assisted in the commission of a criminal offence which is untrue. He did no such thing. He also said he certainly did not assist anyone in the 1MDB matter nor did he cover up any wrongdoings. He further said he did not abuse his position as the Attorney General of Malaysia.

[23] Before us, learned counsel for the plaintiff submitted that the words complained of essentially are: "Apandi... should explain why he aided and abetted in the 1MDB scandal". It is submitted that this is a positive assertion. The words aid and abet are clear in what they mean. The normal dictionary meaning of aid and abet is used in conjunction with the commission of an offence even from the point of view of the ordinary reasonable man. They literally mean the plaintiff participated, encouraged or assisted the offenders in the wrongdoings or offences pertaining to the 1MDB scandal. But, there was not a single piece of evidence which showed that the plaintiff participated, encouraged or assisted in the 1MDB scandal. Therefore, the impugned statement is not true and had defamed the plaintiff.

[24] With regard to the lesser meaning, in view of the clear meaning of the words 'aided and abetted', learned counsel for the plaintiff submitted:

(i) there is no room for the lesser meaning;

(ii) the lesser meaning is not reasonable; and

(iii) the impugned words are incapable of bearing the lesser meaning.

[25] Having said all that, learned counsel for the plaintiff submitted that the learned High Court Judge had erred when she failed to find that the words complained of should be ascribed their clear natural and ordinary meaning instead of applying their lesser meaning ascribed by the defendant.

[26] On the other hand, learned counsel for the defendant submitted that in determining the meaning of the impugned words, the court must took into consideration of the following:

(i) The impugned words must be read in whole.

(ii) It is not open for the plaintiff to select words of the sentence.

(iii) The impugned words must be read in the context of the entire publication.

(iv) The relentless publications in the media criticising the plaintiff's role in the investigation of the 1MDB scandal.

[27] Our task is to determine whether the impugned words are capable of bearing the defamatory meaning ascribed by the plaintiff or the lesser meaning as understood by the defendant.

[28] We agree with the defendant's submission. In this case, the impugned words consist of 44 words in one sentence i.e "Apandi, who was appointed the attorney general in July 2015 when Abdul Gani Patail was summarily sacked from his office when word went around that Gani was preparing to charge Najib with corruption, should explain why he aided and abetted in the 1MDB scandal". It is trite law that in giving meaning to the words, the impugned words have to be considered as a whole in the context of the entire publication. The plaintiff cannot pick and choose certain phrases from the impugned words which are favourable to him (see *Keluarga Communication Sdn Bhd v. Normala Samsudin & Another Appeal* [2006] 1 MLRA 464).

[29] In this case, the plaintiff had picked and chosen the sentence 'Apandi... should explain why he aided and abetted in the 1MDB scandal' (12 words), which standing alone would fit the dictionary meaning and was defamatory of the plaintiff. In our view this approach is wrong because the court must not look at the actual words used but the context the said words is used in relation to the publication. This is especially so when the plaintiff himself agreed that with the exception of the words 'aided and abetted', the publication is not defamatory of him.

[30] Having read the publication as a whole, we find it reveals as follows:

(i) First, the denial by an exalted personality, the former Dewan Rakyat Speaker Pandikar Amin Mulia that there was or that anybody knows or cares about the 1MDB scandal when he campaigned for PBS in the Sandakan by-election.

(ii) Pandikar had been singly responsible for the subversion of the 13th Parliament in preventing it from performing its patriotic duty to save Malaysia from being condemned by the world as a global kleptocracy.

(iii) There was neither a trace of regret nor a tinge of contrition from Pandikar for what he did as the speaker of the 13th Parliament in suppressing parliamentary debate or probe into the 1MDB scandal.

(iv) Instead, he is furtively trying to pull the wool over the eyes of the Malaysian people by denying that there is such a thing as a 1MDB scandal.

[31] To our minds, an ordinary reasonable reader who reads the publication casually would understand that the information the defendant wanted to convey is there was lacked of transparency in the manner in which people in prominent positions performed their duties and responsibilities. Their integrity was criticized. In the case of the plaintiff, his spectacular failure was to perform his duties as the Attorney General in handling the enormous financial scandal.

[32] We cannot see how the impugned words, when read in the context of the publication as a whole were capable of giving the impression that the plaintiff had assisted the offender in the commission of a criminal offence or 1MDB scandal. In our view, it is unrealistic to think that an ordinary reasonable reader would pause and reflect on the precise dictionary meaning of the words aided and abetted.

[33] This publication was written on 6 May 2019. From 2015 to 2019, three (3) major events happened that would have been within the general knowledge of Malaysians. The first event was about the plaintiff's predecessor, Gani Patail being sacked when he was preparing to charge Najib for corruption. The second event was during the tenure of the plaintiff as the Attorney General, he publicly announced that Najib did not commit any criminal offence on the basis that the monies deposited into Najib's personal bank account were a donation. He then decided to close the investigation of the 1MDB scandal (SRC also included) and cleared Najib's name. The third event was, his decision to close the investigation which had caused, not only relentless publications in the media asking the plaintiff not to close the investigation but also a court action was commenced to challenge his decision to close the investigation. The court action was dismissed. The plea to conduct further investigation fell on deaf ears. So much so, that during the plaintiff's tenure as the Attorney General, no one was charged in relation to the 1MDB scandal.

[34] These three major events revealed that it was the plaintiff himself, using his name and his position as the then Attorney General of Malaysia to clear Najib's name. Isn't that not lending his name? When the plaintiff hastily decided to close the investigation when he himself agreed investigation was not complete, isn't that an abuse of his position. When he decided to abruptly close the investigation, didn't it cement the public perception that he was covering up the 1MDB scandal. In short, in our view, the only reasonable meaning to be inferred from the impugned words is the plaintiff had abused his position as the Attorney General.

[35] For the aforesaid reasons, it is our decision that the impugned words are capable of bearing the lesser meaning. The lesser meaning is also a reasonable meaning and was rightly accepted by the learned High Court Judge. Thus, we find there was no error of law or fact warranting appellate intervention.

Justification

[36] In *Lucas Box v. News Group Ltd* [1986] 1 WLR 147, the English Court of Appeal held that a defendant must set out in his/her statement of case the defamatory meaning he/she seeks to prove to be essentially or substantially true. This is known as Lucas Box meaning. The defendant must give proper particulars of the facts on which he relies to justify that meaning.

[37] At para 5 of his defence, the defendant pleaded the *Lucas Box* meaning of justification. Paragraph 5 reads as follows:

> "5. The defendant avers that, on the basis of the lesser meaning, the impugned words were true in substance and in fact."

[38] The defendant gave nine (9) particulars to justify the lesser meaning. They are:

> 5.1 The plaintiff took office as the Attorney General after the summary removal of his predecessor, Tan Sri Abdul Gani Patail.
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> 5.2 At the time of his removal, Tan Sri Abdul Gani Patail was, in his capacity as Public Prosecutor, preparing to prefer charges against the former Prime Minister, Datuk Sri Najib Razak in relation to SRC International Sdn Bhd, a company connected to 1MDB. As Prime Minister, Datuk Sri Najib Razak had been instrumental in the removal of Tan Sri Gani Patail as Attorney General, and thus Public Prosecutor, and the appointment of plaintiff as such.
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> 5.3 In his capacity as Attorney General, the plaintiff took no active steps to meaningfully pursue any line of enquiry into the 1MDB scandal. Conversely, the plaintiff sought to exonerate Datuk Sri Najib Razak and to downplay the controversy surrounding the 1MDB scandal, which by then had come to be recognized as an international affair. Amongst other things, the plaintiff had in or about January 2016 closed Malaysian investigations into the transfer of hundreds of millions of Ringgit Malaysia into Datuk Sri Najib Razak's personal bank accounts. The plaintiff publicly insisted that the said monies were a donation from the royal family of Saudi Arabia.
>
> 5.4 The plaintiff thereafter refused to meaningfully cooperate with foreign investigative agencies who were inquiring into related wrongdoings within their respective jurisdiction. In or about April 2016, the Swiss Attorney General commenced investigations and had not received cooperation from the plaintiff despite requests. The plaintiff stated in the media that he had been merely following the law strictly and had not wanted to jeopardise the Malaysian investigations.
>
> 5.5 The Department of Justice of the United States of America (the 'US DOJ') have made a request for mutual legal assistance in or about September 2017

to no avail. He had also refused requests by the Malaysian Anti Corruption Commission to seek foreign assistance to further their investigations.

5.6 In or about June 2017, the US DOJ commenced civil recovery proceedings in connection with monies said to have been siphoned off from 1MDB. The US DOJ investigation revealed a high level fraud involving a number of Malaysians connected to 1MDB. Datuk Sri Najib Razak was identified as a person of interest. The plaintiff was dismissive of the US DOJ claim.

5.7 The plaintiff was placed on garden leave in or about 14 May 2018 pending an enquiry into his role in the affair. A new federal Government under Tun Dr Mahathir Mohamad had been established on 10 May 2018.

5.8 Mr Tommy Thomas was appointed the Attorney General on 4 June 2018. Since then, charges have been preferred against a number of individuals in connection with 1MDB in Malaysia. Additionally, other persons have been made the subject of criminal proceedings in other jurisdictions due to their involvement in the 1MDB scandal, some of whom have pleaded guilty. A table setting out the details of some of these criminal proceedings is set out in Schedule 2 to this defence.

5.9 The conduct of the plaintiff described above could not reasonably be considered to have been the conduct of a responsible Attorney General.

[39] It is settled law that justification is a complete defence. The burden lies with the defendant to prove the truth of the particulars to justify the lesser meaning. If the defendant succeeds in proving the truth of the particulars pleaded, then the impugned words are not defamatory of the plaintiff because what is true cannot be defamatory. The exposure of truth must be paramount when compared to that of reputation.

Para 5.2 — Tan Sri Gani Patail Was Preparing To Charge Najib

[40] Plaintiff submits that the particulars in para 5.2 are not true because the defendant did not produce in court the said charge sheet or a statutory declaration by Tan Sri Gani Patail stating that the charges were being drafted. The plaintiff also relied on the police report lodged by PW2 stating there were no charges against Najib.

[41] In his evidence, the defendant said he had relied on a news report ie exhibit D10. In D10, it was reported by the Edge Markets that the then Prime Minister, Tun Dr Mahathir had said that 'Gani Patail was preparing to charge Najib before he was removed'. Exhibit D10 was never denied by Gani Patail. Therefore, the defendant has qualified his statement by including the words,' when words went around', to show that he was relying on what had been reported. The defendant never said that he personally knew there was a charge sheet.

[42] With regard to the existence of the charges, the defendant also relied on the oral testimony of Pengarah Bahagian Operasi Khas SPRM, Dato' Bahri Mohamad Zain (DW2). In his evidence, DW2 said that MACC was satisfied

that there was a strong case to charge Najib with two offences. But when he went to see the plaintiff to brief him on the MACC investigation, the plaintiff showed little interest in the investigation. Instead, the plaintiff focused on how the draft charges against Najib had been disclosed to the media to the extent of demanding the names of the officers involved in the drafting.

[43] In cross-examination, DW2 was asked if the charge sheet had been produced in court. His answer was:

> "Hari ini tak adalah, tak payah tanyalah soalan itu. Semua orang tahu tidak ada dan tidak boleh semana-mana orang pegang benda itu kerana dia rahsia rasmi kerajaan."

[44] In re-examination, DW2 said:

> "Draf charge itu ada dalam IP berkenaanlah dan menjadi satu kesalahan besar sekiranya draf charge itu dibawa terutama sekali oleh bukan SPRM. Saya sekarang bukan SPRM lagi."

[45] DW2's evidence was not challenged. His evidence was credible. There is no reason for him to make up a story. Based on exhibit D10 and the oral testimony of DW2, in our view, in all probability, the charges against Najib did exist despite their non production in court. If the charge sheet had been classified as 'rahsia rasmi kerajaan', it is impossible for anyone to produce it in court. We therefore, find the averment in para 5.2 substantially true.

Para 5.3 — The Plaintiff Insisted The Monies Transferred Into Najib Razak's Personal Bank Accounts Were A Donation, Exonerate Najib's Name And Closed The Malaysian Investigations

[46] On 26 January 2016, the plaintiff publicly issued a press release stating, amongst others, that he was satisfied: (i) that the RM2.6 billion which entered into Najib Razak's personal bank accounts was a donation; (ii) that Najib Razak had not committed a criminal offence. He then decided to close the investigations on the 1MDB with abbreviation NFA/KUS. NFA reads as No Further Action. KUS means Kertas Untuk Simpanan. All these facts are not denied by the plaintiff.

[47] With regard to the allegation of donation, the evidence elicited in cross-examination of the plaintiff, revealed the following facts:

(a) On 3 August 2015, MACC issued a media statement stating the result of their investigation is the RM2.6 billion entered into Najib's personal bank accounts was a donation. The plaintiff relied on this media statement to conclude it was a donation.

(b) The MACC team, headed by Datuk Seri Azam Baki, went to Riyadh from 27 November 2015 to 29 November 2015 to record statements of the donor on the plaintiff's instructions as at that time investigations into the issue of donation was not complete yet.

(c) The delegation was unable to meet the Prince and instead met with someone who represented the Prince and speaks on behalf of the Prince.

(d) There was no documentary evidence such as bank statement or remittance documents obtained to substantiate the assertion that the monies deposited was a donation.

(e) No statement was taken from the purported donor.

(f) He cannot remember the name of the donor.

(g) In his press release dated 26 January 2016, the plaintiff said 'pihak SPRM telah sendiri di dalam siasatan telah menemui dan merakamkan percakapan saksi-saksi termasuk pemberi sumbangan dana tersebut yang mengesahkan sumbangan tersebut diberikan kepada YAB PM secara peribadi'.

[48] His oral testimony in court when tested with his statement at the press release led us to ponder how could the plaintiff be satisfied it was a donation when there was not an iota of evidence to support his allegation.

[49] The plaintiff had further relied on 2 flow charts in his press release on 26 January 2016 to clear the former PM. It would appear that the flow charts clearly showed that his press release was not credible.

[50] Based on all the evidence adduced, we find the plaintiff's statement at the press release that the monies were a donation from Saudi Royal family was not true. Not only the evidence of donation was seriously lacking, but his statement also is in contradiction with the flow charts in his hand. The donation's version was to make way to clear Najib's name.

[51] We now move on to the investigation issue. In his oral testimony, the plaintiff admitted he had caused for the investigation file pertaining to 1MDB scandal (SRC included) to be marked as NFA/KUS. He agreed that in the press release dated 26 January 2016, he did not mention that the MACC can investigate further should there be any new evidence. Therefore, he gave the impression that the file is closed for good.

[52] However, now, we are told that he never prevented the MACC from investigating further if new evidence surfaced. We find his evidence could not be believed and must be rejected for the following reasons:

(a) PW3 who was formerly a Deputy Public Prosecutor was one of the members of a task force formed by the plaintiff to conduct investigations and report to him. In his evidence, PW3 said towards the early part of January 2016, the task force had recommended further investigations. But, he does not know whether the recommendations were carried out or not.

(b) Pengarah Bahagian Operasi Khas in MACC, Dato' Bahri (DW2) told the court that he was involved in both the 1MDB and SRC investigations initially but then focused solely on the SRC investigations. It is his evidence that the MACC had a meeting with the Attorney General and the MACC had recommended two charges against the former PM as they were satisfied there is a *prima facie* case on the recommended charges. He, together with the investigating officer and Ketua Siasatan Bahagian Operasi Khas went to see the plaintiff to give a briefing. The briefing took about 20 minutes and the plaintiff seemed to be more interested to know how the draft charges were leaked to the public. The plaintiff told them to leave the file and asked them to go back. The plaintiff returned the file with instruction to close the matter. Dissappointed upon the case being closed, DW2 tendered his resignation.

(c) The Star Online article dated 16 May 2018, titled 'MACC wanted to probe 1MDB Najib link but the AG said 'No'. In the said article, Dato' Lim Chee Wee (DW6) who was a panel member of the MACC review panel was quoted as saying "The MACC found evidence in late 2015 that RM42 million was transferred from a former subsidiary of 1MDB into an account of former Prime Minister Datuk Sri Najib Razak. However, the MACC's recommendation for further investigation was rejected by the Attorney General". In his oral testimony, DW6 confirmed that he did make those statements as published in the Star Online.

(d) The Malaysian Bar had filed a Notice of Motion at the Kuala Lumpur High Court, challenging the decision by the plaintiff to close the investigation papers, seeking a declaration that it was unlawful for the Attorney General (plaintiff) to impede the investigations by the MACC and an order of *Mandamus* directing the Attorney General to reconsider the requests by the MACC for mutual legal assistance. The Motion was dismissed by the High Court on 8 November 2016 on a point of law that the Attorney General's discretion could not be challenged in court. The High Court's decision was affirmed by the Court of Appeal and Federal Court.

[53] The evidence thus far presented to the court appears to suggest that despite having the evidence in his own hand to charge Najib, the plaintiff chose to close his eyes. Despite the requests and recommendations by the MACC which were directly under the Attorney General to charge Najib and conduct further investigations, the requests fell on deaf ears. The plaintiff did not take any meaningful steps to investigate. He was content to summarily close the investigations.

[54] Therefore, we find the particulars in para 5.3 are true.

Para 5.4 — Plaintiff Refused To Cooperate With Foreign Jurisdiction

[55] In an article published by Free Malaysia Today dated 17 April 2019 entitled "Our offer to help in 1MDB probe turned down, says Swiss envoy" (exhibit D6). The Swiss envoy, Michael Winzep said his Government had asked for Malaysia's cooperation in its own investigations into the scandal. But Winzep said the Malaysian Government had then claimed that cooperating with Swiss authorities over the 1MDB investigations could have a negative effect on local investigations.

[56] When the article (D6) was referred to him, the plaintiff said the article did not specifically mention his name or the Attorney General and that the defendant had not adduced any evidence to prove that the Swiss Government had indeed offered assistance.

[57] In cross-examination, the plaintiff was asked to confirm whether the Swiss Government had in fact offered assistance. His answer was 'they did not offer assistance'. He was then asked with the following question:

> Q: So, you indeed refused cooperation?
>
> A: I refused cooperation and I gave my reason and I corrected the perception by the Swiss AG that I did not cooperate, that's all.

[58] Whatever may be his reasons to refuse cooperation with the Swiss Government, his answer proved that he refused to cooperate with a foreign jurisdiction. Thus, the defendant's averment in para 5.4 is true.

Para 5.5 — Plaintiff Refused To Make A Request For Mutual Legal Assistance (MLA) From Foreign Jurisdiction

[59] In an article published by The Edge dated 24 May 2018 entitled "FBI, DOJ to give full cooperation to 1MDB special task force" (exhibit D8), the said article revealed:

> (i) On 13 November 2016, the FBI had sent an application letter to the then chief commissioner of the MACC, Tan Sri Dzulkifli Ahmad, but the application has yet to receive a reply until now.
>
> (ii) On 22 September 2017, the DOJ had made a request through a MLA to the Attorney General, Tan Sri Mohamad Apandi Ali. This request was not fulfilled and delayed, the reason given was that it would affect ongoing investigations by Malaysian enforcement authorities.

[60] In his evidence, the plaintiff said he was aware that the money from 1MDB had been taken outside the country. He agreed that confining investigations to the 4 corners of Malaysia would be insufficient. He knew that seeking or providing legal assistance to foreign investigating agencies was imperative to bolster local investigation by the police or the MACC. He also agreed that neither the MACC nor the PDRM have the power to seek mutual legal

assistance from other foreign jurisdictions. He further agreed that only he, in his capacity as the Attorney General, had the power to seek mutual legal assistance from foreign jurisdictions.

[61] In this case, there was evidence of requests being made by the MACC to the plaintiff to get mutual legal assistance from foreign countries. The MACC, had in fact asked a panel member of the MACC Review Panel, Dato' Lim Chee Wee (DW6) to write a letter to the plaintiff, requesting the plaintiff to get mutual legal assistance from foreign countries.

[62] Despite there being compelling reasons for him to seek or provide mutual legal assistance (MLA), the plaintiff agreed he refused to do both. The only explanation he gave for refusing MLA is a mutual legal assistance from a foreign Government or agency would prejudice the local investigation. He relied on s 20(1)(i) of the Mutual Assistance In Criminal Matters Act 2002 which provides as follows:

> "Refusal Of Assistance
>
> 20.(1) A request by a prescribed foreign State for assistance under this Part shall be refused if, in the opinion of the Attorney General:
>
> (a) ...
>
> (l) the provision of the assistance could prejudice a criminal matter in Malaysia;"

[63] The plaintiff was also quick to say "if anybody is not happy with his decision, they can always challenge it in court". But, we all now know that his decision (in exercising his discretionary power) is not justiciable nor reviewable. But, that does not mean his decision cannot be criticized.

[64] In our view, his oral testimony is to be tested with his press statement on 26 January 2016 where he said:

> "I am satisfied that as no criminal offence has been committed, there is no necessity for Malaysia to make a mutual legal assistance in criminal matters request to any foreign States for the purpose of completing the criminal investigation conducted by the MACC in relation to the said RM2.08 billion donation."

[65] So, on 26 January 2016, the reason he gave for refusing MLA is because there was no criminal offence committed. Not because it would prejudice the local investigations. What prejudice is caused if at the same time investigations were also closed. Noticing the plaintiff's tendency to give contradictory answers, the learned High Court Judge made the following remark at para 114-115 of the judgment:

> "So the plaintiff himself cannot make sense of his own mind whether the mutual legal assistance is imperative or is it a hindrance. This tenacious insistence to adopt confusing and contradictory stances further blemishes the

> plaintiff's credibility as witness. The plaintiff was evasive until he could no longer evade the inevitable conclusion that he could not explain his reluctance to offer or accept mutual legal assistance. In fact, the plaintiff's purported concern of prejudicing local investigation is contradictory to his own eager insistence to close local investigation."

[66] We agree with the conclusion reached by the learned High Court Judge on the credibility of the plaintiff. His contradictory answers only go to show that the real reason behind his refusal to offer or to get mutual legal assistance from foreign countries was simply because he had made up his mind that there was no criminal offence committed by the former Prime Minister. He was satisfied that investigation is not required and hence, he closed the investigation. Closed investigation means no more investigation. This being the case, his answer that MLA would prejudice local investigation could not be true.

[67] For the aforesaid reasons, we find the defendant's averment in para 5.5 is true.

Para 5.6 — The US DOJ Investigation Revealed A High Level Fraud Involving A Number Of Malaysians Connected To 1MDB. The Plaintiff Was Dismissive Of The US DOJ Claim

[68] It is an undisputed fact that during his tenure as AG, the Department of Justice in United States had also initiated civil recovery proceedings relating to monies and assets siphoned from 1MDB. The plaintiff agreed he was aware of this fact.

[69] The US DOJ civil proceedings revealed the involvement of Malaysian personalities in the 1MDB scandal. The plaintiff said he was aware of this fact. Despite the obvious, the plaintiff admitted he did not communicate with the DOJ. His reason for not communicating with the DOJ was because local investigations were going on at that material time.

[70] For the same reasons we have stated earlier, we find the plaintiff's conduct in refusing to communicate with the US DOJ solely because local investigation was going on at the material time is unreasonable. Instead, his refusal had impeded the MACC's investigation.

[71] So, again, we find the defendant's averment in para 5.6 was substantially true.

Para 5.9 — The Conduct Of The Plaintiff Could Not Reasonably Be Considered To Have Been The Conduct Of A Responsible Attorney General

[72] In his oral testimony, the defendant said the plaintiff had practically not taken any meaningful steps to get to the bottom of the 1MDB scandal. It was also his evidence that the plaintiff practically had done nothing at all.

[73] We fully agree with the defendant. The plaintiff's actions or inactions in handling the 1MDB scandal gives the impression to the Malaysian public that he had covered up the 1MDB scandal for reasons best known to himself. His conduct showed he had failed to discharge his duties and responsibilities as the Attorney General as reasonably expected by the Malaysians i.e, honestly and without fear or favour. For these reasons, we find the particulars in para 5.9 is also true.

[74] The defendant had successfully proven all the 9 particulars of justification. It means the lesser meaning was substantially true i.e the plaintiff had abused his position and cover up the 1MDB scandal. Now, the defendant had asked the plaintiff to explain why did he cover up the 1MDB scandal. Asking for explanation for matters that truly happened, in our considered view is not defamatory even though it injures the plaintiff's reputation. The right of the Malaysians to know the truth must prevail over the plaintiff's right to protect his reputation.

[75] Accordingly, we find the learned trial judge did not err in upholding the defence of justification.

Qualified Privilege

[76] The defendant's plea of qualified privilege is pleaded in para 7 of his statement of defence as follows:

> "7. Further and/or in the alternative, if and insofar as the impugned words bear the meanings in para 6 and 7, which is denied, or the lesser meaning, the defendant avers that the impugned words were published on an occasion of qualified privilege.
>
> Particulars
>
> 7.1 ...
>
> 7.2. The defendant was under a moral and social duty to communicate his views on the subject to Malaysians. The defendant has been a Member of Parliament for the present term since 10 May 2018 and for the previous term since 6 May 2013. He was,at the time of the publication of the impugned words, the Member of Parliament for Iskandar Puteri, Johor. As a Member of Parliament, the defendant had sworn to preserve, protect and defend the Federal Constitution.
>
> 7.3 The Publication contained views that Malaysians had an interest in given that it pertained to matters of national importance."

[77] An often-quoted definition of qualified privilege is to be found in the speech of Lord Atkinson in *Adam v. Ward* [1917] AC 309:

> "A privileged occasion is, in reference to qualified privilege, an occasion 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 has a corresponding interest or duty to receive it. This reciprocity is essential."

[78] Qualified privilege operates only to protect statements which are made without malice i.e spitefully, or with ill will or recklessness as to whether it was true or false. Therefore, the defence of qualified privilege can be defeated by the presence of malice on the part of the defendant. The burden of proving malice is on the plaintiff (see *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 MLRA 110; *Pang Fee Yoon v. Piong Kien Siong & Ors* [1999] 3 MLRH 476.

[79] In *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v. Nurul Izzah bt Anwar & Anor* [2018] 5 MLRA 509, a case involving a politician, the Court of Appeal held:

"[55] A defence of qualified privilege is founded on the need or duty on the part of the alleged defamer to impart information to the public at large and that there is a duty on the part of the public to receive that information. In a defence of qualified privilege, unlike justification, truth is not a pre-requisite but it can only succeed if there is no malice in such publication. If untrue defamatory allegations are published on an occasion of privilege, they will be protected from a claim for defamation. Although the law of defamation exists to protect reputations, it is recognized that in situations it is to the benefit of society generally for people to be able to communicate without the fear of being sued for defamation.This is so despite the risk that a person's reputation will be damaged and they will not be able to restore it by bringing a claim for defamation. Its resides in the wider consideration that a general public good in such exercise overrides the need to protect individual reputation."

[80] In dealing with the defence of qualified privilege, what the learned trial Judge did was first to determine whether the defendant had acted reasonably in publishing the impugned statement to the media. She then found as a fact that complaints for further investigations into the 1MDB scandal through the proper channels have for years fallen on deaf ears until the Barisan Nasional Government fell in the 14th General Election. She was satisfied that all reasonable and forseeable channels have been exhausted and thus the defendant is well within his rights to voice out his thought to the public at large.

[81] For the aforesaid reasons, the learned trial judge held that the defendant had a duty, legal, social or moral to publish the impugned statement in his blog.

[82] Before us, learned counsel for the defendant submitted that this additional hurdle placed over the defendant was not required within the principles of the traditional qualified privilege. We agree with the defendant's submission. The concept of 'reasonableness of conduct' has no relevance or application to the traditional defence of qualified privilege. All the defendant needs to prove in his defence of qualified privilege is he has a duty to convey the information to the public; the public had a duty to receive the information conveyed and there was no malice on the part of the defendant. In this case, the learned trial judge had erred when she put an unnecessary extra burden on the defendant to prove his reasonable conduct in publishing the article. However, this error did not

prejudice the defendant because subsequently the trial judge was satisfied that the defendant had a right to communicate his thoughts to the public.

[83] The plaintiff complains that the learned trial judge had conflated the *Reynold*'s privilege and the traditional qualified privilege. According to the plaintiff, the law did not recognize an interest in the public strong enough to give rise generally to a duty to communicate in the press and such a duty can only arise on 'special facts'. Further, it is submitted that the defendant had failed on this score because he had not pleaded such 'special facts' and therefore it is argued that the defence of qualified privilege must fail. The plaintiff further submitted that, what ought to have been pleaded is *Reynold*'s privilege. As this was not done, that defence also fails.

[84] We are not inclined to agree with the plaintiff's line of argument. The case of *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* [2015] 6 MLRA 63, relied upon the plaintiff is a case where the defendant pleaded *Reynold*'s privilege. In the case before us, the defendant did not plead *Reynold*'s privilege. Therefore, the case of *Syarikat Bekalan Air Selangor* is not applicable to the case before us. The defendant in this case only pleaded traditional qualified privilege which he is entitled to do so. At this juncture, it is instructive for us to refer to the case of *Dr Syed Azman bin Syed Ahmad Nawawi & Ors v. Dato' Seri Haji Ahmad bin Said* [2015] 5 MLRA 206. In that case, the Court of Appeal explained that the *Reynold*'s privilege is a separate and distinct defence from the traditional defence of qualified privilege as follows:

> "[51] The controversy has however lingered on whether the *Reynold*'s privilege was a new substantive defence or merely a specie of defence under the conventional defence of qualified privilege. In *Grant v. Torstar* [2009] 3 SCR 640, the Supreme Court of Canada termed it a new defence of 'responsible communication' (*Reynolds*'s factors for analysis) and went on to observe that it produced an uneasy fit with the traditional qualified privilege defence. Lord Phillips MR (as he then was) in *Loutchansky v. Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002]1 ALL ER 652 commented that *Reynold*'s privilege was 'a different jurisprudential creature'; it is not the occasion which is protected but the material itself. Lord Hoffman and Baroness Hale in *Jameel* took the position that 'responsible journalism' could not be assimilated to traditional qualified privilege.
>
> [52] The argument has been that 'responsible' or 'reasonable' journalism, whether as a new defence or otherwise, obviates any further enquiry into the issue whether the impugned statements were tainted with actual or express 'malice' when made. It is pertinent to note here that in the United Kingdom, by s 4 of the recently introduced Defamation Act 2013, the so called *Reynolds*' common law defence has been abolished and replaced by a new 'public interest' defence (the explanatory notes to the bill states that it was nevertheless to reflect the principles established in the *Reynolds*'s case and subsequent case law). This statutory defence requires the publisher to show that he or she 'reasonably believed that publishing the statements complained of was in the public interest' (a shift, as it would appear from tests of responsible journalism to reasonableness of belief).

> [53] The above discussion was to place in perspective the *Reynold*'s privilege. The developments surrounding that area of law show that the '*Reynold*'s privilege' as a defence was always treated and recognized as a separate and distinct defence in contrast to the conventional common law defence of qualified privilege.
>
> [54] In the instant case before us however, the *Reynold*'s privilege was not raised as a separate or even as a specie of the defence of qualified privilege; what was pleaded was the defence of qualified privilege *per se*. Both parties conducted the trial on that basis. Save that in their submissions, the plaintiffs had made reference to the decision in *Reynolds*'s case to show that the writer of Harakah itself had a duty to verify the material published, both parties accepted that the principal defence of the defendants was the traditional common law defence of qualified privilege and the plaintiff had the obligation to establish express 'malice' to defeat that defence if found in favour of the plaintiffs. This was the position all along even in this appeal; see the supplementary submissions of both parties."

[85] In this case, the plaintiff agreed that the public has a right to know how this financial scandal was being managed and investigated by the authorities. He also agreed that as a Member of Parliament, the defendant had a duty to inquire into what was going on with regards to the investigation in relation to this 1MDB scandal. He further agreed that there were many other writers who have been writing and criticizing the manner he handled the investigation process in the 1MDB scandal. But, he had no complaints with the other articles because they never mentioned that he aided and abetted. In short, the plaintiff had no issue with criticism from the public. But he took offence with the words 'aided and abetted'.

[86] At the risk of repeating ourselves, the 1MDB scandal is a phenomenal financial scandal involving public funds where the former Prime Minister himself was involved. It is considered as the biggest financial scandal that the country has faced. As a Member of Parliament who was concerned with integrity, transparency and accountability, the defendant had a moral duty to convey his thoughts that the plaintiff, being the Attorney General entrusted with power to direct investigations to get to the bottom of the case and charge the perpetrators without fear or favour, but instead he tried to impede and obstructed the investigations of the 1MDB scandal. His actions and inactions were indeed unreasonable and fell short of public expectation.

[87] We agree with the defendant that as a member of parliament, the occasion of privilege had arisen by virtue of the defendant's role and duty as a representative of the people. Nothing more special than that needs to exist.

[88] As a member of parliament also, the defendant had a duty to raise matters of public interest to his electorate. Especially a case of theft of public monies involving a prime minister of such a magnitude.

[89] Likewise, the readers of his blog, who included the people of Malaysia had an inherent right to be informed of the developments of the investigations

into the scandal. They were also entitled to be informed of any attempt to derail such developments.

[90] For the aforesaid reasons, we find the learned trial judge was correct in holding the impugned words were made on an occasion of qualified privilege.

Malice

[91] In answer to Q & A No 32 in his witness statement, the plaintiff says "To maliciously say that I had aided and abetted Datuk Seri Najib Razak merely because I had exercised my discretion under art 145(3) of the Federal Constitution based on the available evidence then, is totally mischievous and a malicious attack not only on me, but the Federal Constitution. The defendant, to date has yet to show an iota of evidence that I had aided and abetted Datuk Seri Najib Razak in the 1MDB scandal". This answer received strong objection from learned counsel for the defendant on the ground 'malice' was not specifically pleaded.

[92] During the trial, learned counsel for the defendant did make a request to the learned trial judge to expunge the plaintiff's answer on the ground the plaintiff had failed to comply with the requirements of O 78 r 3(3) of the Rules of Court 2012 in that particulars of malice were not pleaded. The learned trial judge did not expunge the answer but directed the parties to submit at the end of the case. Unfortunately, the trial judge did not deal with this issue at all in her judgment.

[93] Order 78 r 3(3) of the Rules of Court 2012 sets out the following mandatory provisions relating to pleading particulars of malice:

> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

[94] The word 'must' in O 78 r 3(3) ROC meant strict compliance is required. There is no room for discretion as far as the compliance with the prerequisites is concerned (see *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah bin Mohd Noor & Another Appeal* [2009] 1 MLRA 528 FC.)

[95] The rationale behind O 78 r 3(3) ROC 2012 is to provide an opportunity to the defendant to verify the truth and accuracy to those particulars as well as to rebut the allegations if required (see *Subramaniam a/l Paramasivam v. Courts Mammoth Bhd & Anor* [2010] 18 MLRH 458; *Credit Guarantee Corporation Malaysia Berhad v. SSN Medical Products Sdn Bhd* [2017] 1 MLRA 541 (CA)).

[96] Failure to comply with O 78 r 3(3) of the ROC 2012 would result in the plaintiff not being permitted to adduce evidence of actual malice which is necessary in order to rebut the defence of qualified privilege and cannot succeed in establishing malice as an answer to the defence of qualified privilege (see *Dato Wan Hashim Wan Daud v. Mazlan Ibrahim & Anor* [1997] 3 MLRH 350; *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Ors* [2015] 1 MLRA 107.

[97] At para 6 of his reply to the defendant's defence,the plaintiff pleaded as follows:

> "6. Regarding paras 7 and 7.1 of the said defence, the plaintiff pleads that the defence of qualified privilege is not applicable in relation to the defendant's impugned words against the plaintiff. The defendant is put to strict proof to prove all of his allegations. Further, the plaintiff states as follows:
>
> > (a) With regards to paras 7.2 and 7.3 of the said defence, the plaintiff states that whatever position held by the defendant does not grant him any excuse and/or reason todefame the plaintiff inany way. All ofthe defendant's allegations therein amount to bare assertions and the defendant is put to strict proof to prove the said allegations. Further and in the alternative, the plaintiff pleads that whatever views by the general public in relation to any public interest issue also does not give the defendant any justification to defame and damage the good name of the plaintiff in any way.

[98] Nowhere in para 6 of his reply, did the plaintiff plead malice and particulars of malice. Therefore,the plaintiff had failed to comply with O 78 r 3(3) of the Rules of Court 2012. The net effect of the non-compliance with the specific provisions of the rules is the plaintiff is estopped from adducing evidence of malice to defeat the defence of qualified privilege. Consequently, we find merit in the defendant's objection and expunged the plaintiff's answer in his Q & A No 32 in his witness statement.

[99] In the absence of malice, the defence of qualified privilege is not rebutted. On the facts and circumstances of this case, we see no good reason to disagree with the decision of the trial judge that the defendant had successfully proven his defence of qualified privilege.

Damages

[100] Damages are awarded to compensate a person for harm to his or her reputation. The learned trial judge had not considered this issue and did not make an award of damages. In assessing the general damages, the most common factors taken into account by the court are: the gravity of the allegation; the size and influence of the circulation; the effect of the publication; the extent and nature of the claimant's reputation; the behavior of the defendant and the behavior of the claimant (see *Chin Choon v. Chua Jui Meng* [2004] 2 MLRA 636 CA).

[101] Before us, learned counsel for the plaintiff submitted the allegations made against the plaintiff is extremely serious. It is submitted that the online publication is accessible through the Internet and would have reached a large spectrum of audience. It is further submitted that the plaintiff has held numerous important and high position in society. Taking into account all these factors, learned counsel for the plaintiff submitted a sum of RM600,000.00 for general damages. Reliance was placed on the case of *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor* [2017] 6 MLRA 281; [2017] 2 SSLR 433, wherein the Federal Court awarded the plaintiff, a former Chief Minister of Sabah a general and aggravated damages in a global sum of RM600,000.00.

[102] With regard to aggravated damages, learned counsel for the plaintiff submitted that the court should take into account the following two factors. Firstly, the defendant had failed to apologise. Secondly, the defendant had written and published in his blog on 20 August 2019 an article entitled 'A MACC report had been lodged by a former anticorruption agency officer in January 2016 against Apandi as the then Attorney-General for clearing the then Prime Minister Najib for corruption charges but to date, no action has been taken.' It is submitted that in the said article, the defendant had labelled the plaintiff as a criminal when he used the words: "Among other criminal acts both Najib and Apandi had committed was the offence under s 16 MACC Act as Najib offering the post of AG to Apandi, and Apandi accepting the post of AG, as an inducement to clear Najib of corruption charges and stop further investigations against him." It is submitted that the use of the highly vitriolic words shows the defendant was intent and persisted with his attacks on the plaintiff's reputation with impunity. Taking these two factors into account, it is submitted that a sum of RM200,000.00 be awarded as aggravated damages, making the total sum of damages proposed as RM800,000.00.

[103] Learned counsel for the defendant submits that the proposed sum of RM800,000.00 is excessive given the facts and circumstances of this case.

[104] First and foremost, the defendant objected to the plaintiff's attempt to prove malice by making reference to a further article written by the defendant when this is not the plaintiff's pleaded case. In addition to this, the plaintiff also failed to plead malice. Therefore, it is submitted that the plaintiff is not entitled to rely on the new article to prove malice.

[105] In her submission, learned counsel for the defendant urged the court to take into account the defendant's evidence that the purpose of his publication was only for the good of the country and not to harm anyone. The defendant said "I have no malice, no spite, nothing to attack the AG but I want an open accountability on the principle of good governance".

[106] It is further submitted that the plaintiff's tenure as Attorney General of Malaysia was a less than illustrious one. Not only did the defendant take issue with the plaintiff's failures as AG, in the face of the 1MDB scandal, but numerous others did too.

[107] With regard to quantum, learned counsel for the defendant had referred us to the case of *Datuk Seri Mohd Shafie Apdal v. Datuk Mohd Ainal Abdul Fattah* [2019] 1 SSLR 388, where the High Court sets out the trend of award in cases involving politicians is between RM50,000.00 and RM200,000.00. However, given the facts and circumstances of this case, learned counsel for the defendant submitted that if the court is not with the defendant on the issue of liability, the plaintiff is entitled to an award of nominal damages only.

[108] In this case, the impugned words was proved to be substantially true and justified. It must necessarily follow that if the plaintiff's reputation is injured, it was due to his own conduct. He is the author of his own misfortune. In the event we are wrong on the issue of liability, our considered view is the plaintiff would be entitled to nominal damages in the sum of RM10,000.00.

Our Decision

[109] For the aforesaid reasons, we find no merit in the appeal. The appeal is dismissed with costs. The decision of the High Court is affirmed. The appellant is ordered to pay costs of RM100,000.00 to the respondent subject to allocator.

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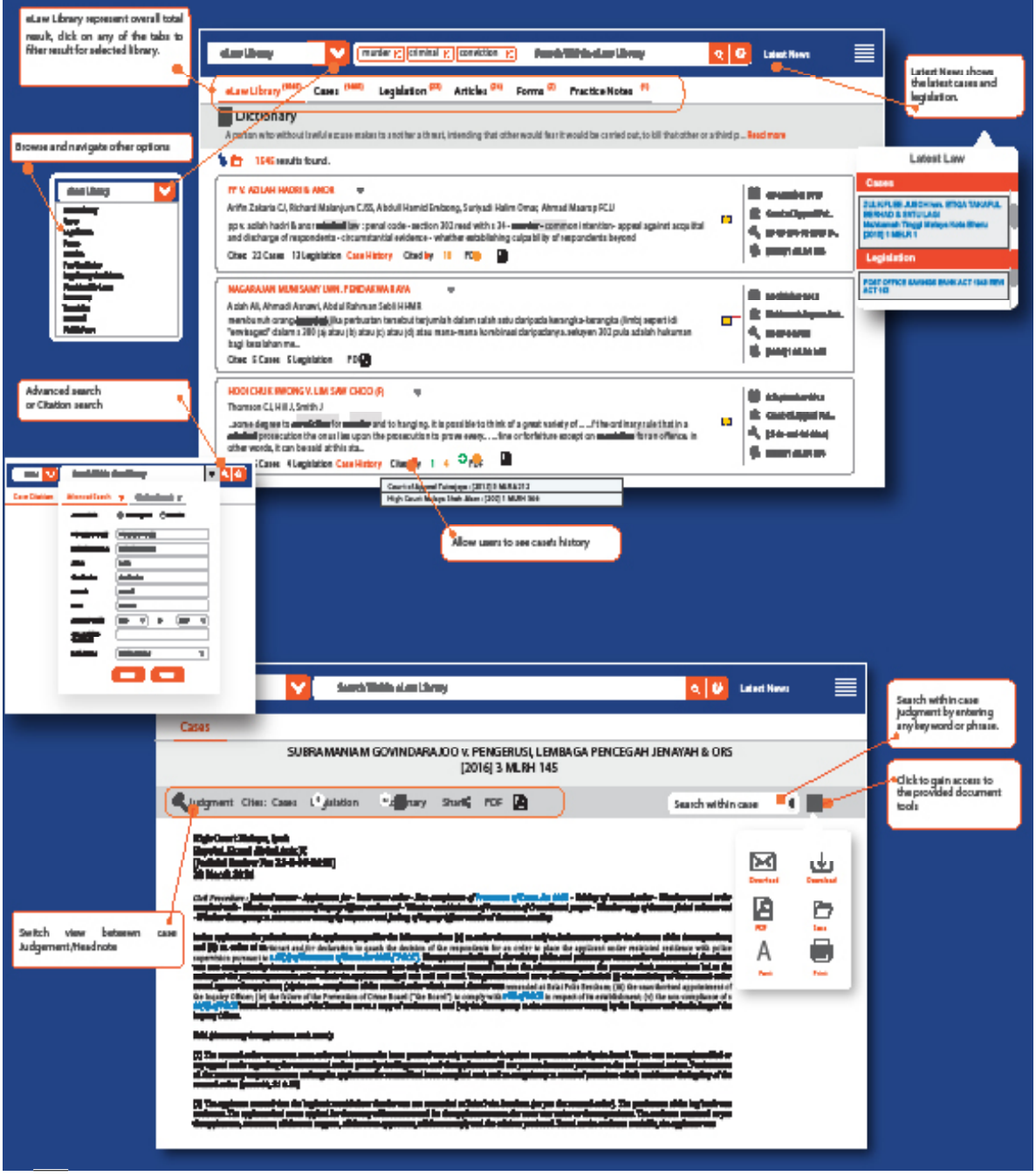

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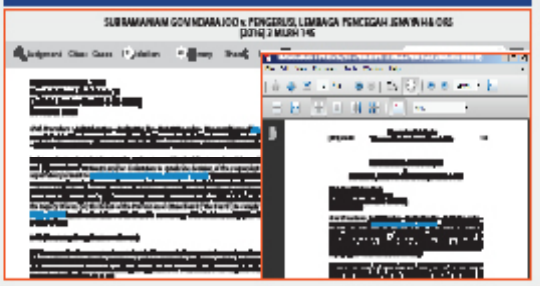

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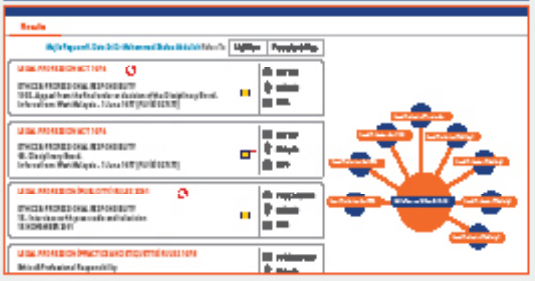

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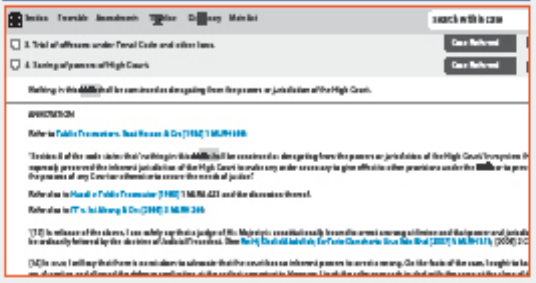

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