Prakash a/l Maniam @ Subramaniam v Puveneswaran a/l Arumugam [2024] MLJU 2567

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HIGH COURT (SHAH ALAM)

JAMHIRAH ALI JC

CIVIL APPEAL NO BA-12B-3-01 OF 2023

30 September 2024

Maurice Scully (M Scully) for the appellant.
Justin Yap Khai Wen (with Danielle Dickman) (Lavania & Balan Chambers) for the respondent.

Jamhirah Ali JC:

GROUNDS OF JUDGMENT

INTRODUCTION

[1] This is the Appellant/Defendant's appeal against the learned Sessions Court Judge (SCJ) decision dated 20 December 2022 in allowing the Respondent/Plaintiff's claim.

[2] For ease of reference, the parties will be referred to as they were at the Court below.

[3] The Plaintiff commenced this action against the Defendant for defamatory statements uttered by the Defendant against the Plaintiff in the presence of a third party. The Plaintiff claimed that due to the defamatory statements by the Defendant, the Plaintiff had suffered damage.

[4] The Defendant refuted the Plaintiff's claim in his defence. The Defendant pleaded that he never uttered the defamatory statements. In the alternative, the Defendant raised the defences of justification and qualified privilege with respect to the defamatory statements.

[5] After a full trial, the SCJ allowed the Plaintiff's claim and *inter alia*, awarded general and exemplary damages of RM100,000.00 to the Plaintiff.

[6] Having heard the appeal, this Court dismissed the Defendant's appeal with costs.

BRIEF FACTS

[7] In 2017, the Plaintiff and the Defendant jointly established Hillstreet Edu Sdn. Bhd. (Hillstreet), with both serving as directors and shareholders.

[8] The Plaintiff, an Honorary Doctor in Social Work awarded by the University of Dayspring Theological Texas on 10 March 2018, served as the director of Hillstreet until 26 November 2019.

[9] The Defendant owns Gerbang Impian Holdings Sdn. Bhd. (Gerbang Impian), a company involved in construction-related work.

[10] Shortly after its establishment, it became clear that Hillstreet needed funding to operate. Despite its core business being in education, the Plaintiff and the Defendant mutually agreed that Hillstreet would take on construction projects to meet its financial needs at that time.

[11] The Defendant's friend, Shasindren a/l Jagaswaren (Shashi), was the managing director of Versi Syabas Sdn. Bhd. (Versi Syabas), a company with a valid G5 license for construction projects. Since Hillstreet lacked the necessary license, it was intended that Hillstreet would secure construction projects through collaboration with Versi Syabas.

[12] In January 2019, Hillstreet, through Versi Syabas, secured a project for the renovation of a double-storey house in USJ (USJ Project). Versi Syabas' role in the project was limited to receiving payments from the client, Mr. Ramesh, and then disbursing payments to Hillstreet based on the progress claims submitted.

[13] Several months into the USJ Project, around September 2019, the Plaintiff

realised that the project would not be completed within the initially expected time frame due to Hillstreet having underquoted the costs.

[14] The Plaintiff promptly informed the Defendant about the issue. In response, the Defendant requested a list of payments related to the USJ Project. Two days later, on 28 September 2019, the Defendant, via a WhatsApp message, acknowledged that Hillstreet had underquoted the project costs by RM48,000.00. In the same message, the Defendant also mentioned that he had asked Shashi to contribute additional funds for the USJ Project.

[15] On 1 October 2019, the Defendant asked the Plaintiff to meet and discuss issues concerning the USJ Project (the Meeting). However, the Meeting location was unexpectedly changed from Hillstreet's college to the shared office of the Defendant's company, Gerbang Impian, and Versi Syabas. Unbeknownst to the Plaintiff, the Defendant had also invited Shashi to attend.

[16] When the Plaintiff arrived at the Defendant's office, the Defendant instructed him to wait in a meeting room. Shortly after, the Defendant stormed into the room with Shashi, throwing a file across

the table. The Defendant then uttered the following defamatory statements to the Plaintiff in Shashi's presence:

a. **"You have mismanaged and misappropriated RM100,000.00 of company fund"; and**

b. **"I know that you have received money from your site projects."**

[**Collectively known as the "Defamatory Statements**"]

[17] The Defendant also insisted that the Plaintiff sign a letter resigning from his position as a director of Hillstreet.

[18] In the aftermath of the Meeting, the Plaintiff's mental and physical health, financial stability, and social standing declined due to the embarrassment and damage to his reputation, which also affected his professional image. The Plaintiff experienced major depression, resulting in memory loss and his disappearance from 3 October 2019 to 8 October 2019. Additionally, he was removed as a director and spent a night in detention following a police report filed against him on false grounds.

[19] Therefore, on 6 May 2020, the Plaintiff initiated this action against the Defendant based on the following grounds:

a. the Defendant made the Defamatory Statements;

b. the Defamatory Statements pertain to the Plaintiff;

c. the Defamatory Statements were made in the presence of a third party; and

d. the Plaintiff suffered damages as a result of the above.

[20] In his Defence dated 10 June 2020, the Defendant denied the Plaintiff's claim and argued, among other points, as follows:

a. the Defendant did not make the Defamatory Statements; and

b. alternatively, the Defendant raised the defences of justification and qualified privilege regarding the Defamatory Statements.

THE GROUNDS OF THE SCJ'S DECISION

[21] After a full trial, on 20 December 2022, the SCJ allowed the Plaintiff's claim on the following grounds:

a. The Defendant made the Defamatory Statements.

b. The statements contained defamatory imputations regarding the integrity and authority of the Plaintiff as a shareholder and director of Hillstreet.

c. Despite the Defendant's claims that Shashi was an "interested party," he was a third party to whom the Defamatory Statements were published.

d. The Defendant's denial was unsustainable, and he failed to substantiate his alleged defences.

e. The SCJ found that the Defendant acted with malice, tarnishing the Plaintiff's reputation to facilitate his removal as a director of Hillstreet.

f. In light of the above, as well as the mental distress, reputational damage, and loss of directorship suffered by the Plaintiff due to the Defendant's Defamatory Statements, the SCJ awarded general and exemplary damages to the Plaintiff in the amount of RM100,000.00.

THE LAW ON APPELLATE INTERVENTION

[22] I am reminded that an appellate court should be slow in interfering with a finding of fact by a trial court (see: *Sornaratnam & Anor v Ramalingam* [1981] 1 MLJ 24**;** *Privy Council case of Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49**;** *China Airlines Ltd. v Maltran Air Corp Sdn. Bhd. (formerly known as Maltran Air Services Corp Sdn. Bhd.) and another appeal* [1996] 2 MLJ 517**;** *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 **at 211**.

[23] The principles governing the appellate court's interference with the trial court's findings as enunciated in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 is particularly useful here. The Court of Appeal held:

> **"It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.**
>
> **In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in The 'Eurymedon' (1942) 73 Lloyd LR 217:**
>
> **The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. [Which, we hasten to add, is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view – in these mundane happenings there is no more conclusive argument than non est credendum quia impossibile. If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.**
>
> **If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed."**
>
> [emphasis added]

[24] Furthermore, the Federal Court case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 had clearly demonstrated under what circumstances an appellate court ought to warrant an intervention**: -**

> **"THE LAW IN APPELLATE INTERVENTION**
>
> **[33] 'It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong' (the Supreme Court of United Kingdom in** *McGraddie v McGraddie and another* [2013] 1 WLR 2477**).**
>
> **[34] The 'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records. The test was pioneered by the House of Lords in** *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35 **, when it adjudicated on the ability of an appellate court to reconsider the facts of a particular case, when there is already findings of fact by the lower court . In this regard, Lord Shaw's judgment is pertinent when His Lordship said:**
>
> > **'When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, , and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his**

> **judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I-who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment .**

[35] Lord Shaw's judgment was adopted by Viscount Sankey LC in *Powell v Streatham Manor Nursing Home* [1935] AC 243 **when His Lordship made the following observation at p 250:**

> **'What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not hear the witnesses. It only reads the evidence and rehears the counsel . Neither is it a reseeing Court … On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses.'**

…

[37] In much later years, the House of Lords had the occasion to consider on the same issue in *Watt (or Thomas) v Thomas* [1947] AC 484**, namely, when was it appropriate for an appellate court to set aside the judgment of the court on findings of fact at first instance, and it held that:**

> **'When a question of fact has been tried by a judge without a jury, and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witness, and should not disturb his judgment unless it is plainly unsound.**
>
> > **The appellate court is however free to reverse his conclusion if the grounds given by him therefore are unsatisfactory by reason of the material inconsistencies or inaccuracies or if it appears unmistakably from the evidence in reaching them, he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.'**

…

[60] The aforesaid cases illustrate the highly deferential attitude adopted by appellate courts in the United Kingdom towards reviewing findings of fact by the trial court. The test is not whether the higher court feels that it would have reached a different conclusion on the same facts as the trial court, but whether or not the decision by the lower court on findings of fact was reasonable. In other words, if the trial judge's decision can be reasonably explained and justified, then appellate courts should refrain from intervention.

…

[151] It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point

of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judge's findings of fact could be overturned. The task of the trial judge is hard enough, without having to deal with every single piece of evidence which may emerge in the course of the trial. If such a requirement was to be imposed on a trial judge then their task in hearing a case would be very tedious and the time taken to produce judgments would increase …"

[emphasis added]

FINDINGS OF THE COURT

[25] As discussed above, it is trite law that appellate intervention is warranted if the trial judge failed to evaluate the evidence and issue before him in its entirety and made bare findings of fact with no justifiable reason to substantiate them (*MMC Oil & Gas Engineering Sdn. Bhd. v Tan Bock Kwee & Sons Sdn. Bhd.* [2016] 2 MLJ 428). Upon perusal of the Records of Appeal and having considered the written and oral submissions by the parties, I find an appellate intervention is not warranted. My reasons are stated below.

[26] After carefully reviewing the SCJ's written Grounds of Judgment and the evidence in its entirety, I conclude that the SCJ made relevant factual findings, accurately applied the law, and there is no misdirection in her evaluation of the evidence.

[27] It is well-established law that when evaluating the credibility of the Plaintiff's and Defendant's oral evidence, their testimonies should be assessed against other evidence or contemporaneous documents.

[28] I find the SCJ had correctly made factual findings that the Defendant had made the Defamatory Statements, based on the oral testimony of the Defendant and SD2 (Shashi), as well as contemporaneous documents presented to the Court.

[29] As decided by the Federal Court in *Raub Australian Gold Mining Sdn. Bhd. (creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720, to succeed in a libel action, the Plaintiff must establish the following three (3) elements:-

a a that the words complained of refer to the Plaintiff;

b b that the words complained of are defamatory to the Plaintiff; and

c c that the words complained of must be published.

[30] The Defendant, in his testimony, admitted to accusing the Plaintiff of misappropriating funds. The evidence provided by the Defendant during his cross-examination is detailed below:

> **"S241: Then how much you've accused him of swindling?**
>
> **J241: See, I don't know the exact amount because that's why I asked for clarification from Puven on the 1st October…**
>
> **S242: So how much you've accused him of swindling ?**
>
> **J242: As I said according to the account, the figure is about RM90,000.00 at that point in time ."**
>
> [emphasis added]

[31] Additionally, in his police report dated 21 October 2019 (the 1st Police Report), the Defendant made a similar accusation, stating that:

> "Saya berasa syak… dan kami mendapati beliau telah **menyeleweng wang yang dianggarkan RM90,000.000**…"
>
> [emphasis added]

[32] Furthermore, Shashi confirmed that the accusations were directed at the Plaintiff at the Meeting. During cross-examination, his testimony stated:

> **"S149: …and you claimed Mr Puvan appeared to be shocked. Why do you think he appeared to be shocked?**
>
> **J149: Because he can't explain on the different invoices parked in the bill. It was under different address.**
>
> **S150: Is he being shocked because he's being accused**
>
> **J150: No, please repeat the question again**
>
> **S151: Is he being-appeared to be shocked because he is being accused, do you agree?**
>
> **J151: Yeah"**
>
> [emphasis added]

[33] Moreover, in a WhatsApp message dated 7 October 2019 to the Plaintiff's wife, the Defendant stated:

> **"Puven, I know you are running away with company money."**

[34] The agenda for the meeting held on 26 November 2019 also included a discussion on "the mismanagement of company funds by Mr. Puveneswaran," even though no formal audit reports had yet been completed regarding Hillstreet's accounts.

[35] I find, based on the evidence presented, that the SCJ had correctly determined that the Defendant made the Defamatory Statements during the Meeting on 1 October 2019.

[36] I agree with the SCJ's findings that the statements made by the Defendant carried defamatory implications regarding the integrity and authority of the Plaintiff as a shareholder and director of Hillstreet. These statements were intended to disparage and demean the Plaintiff in the presence of Shashi, a third party. The impugned statements conveyed that:

a. the Plaintiff is a dishonest and unethical individual;

b. the Plaintiff is an individual who is willing to swindle monies from his own company;

c. the Plaintiff is an individual who deems it acceptable to forge company documents; and

d. the Plaintiff is an individual who engages in unlawful activities.

[37] In the case of *Dato' Sri Dr Mohamad Salleh Ismail & Anor v Nurul Izzah Anwar & Anor* [2021] 4 CLJ 327, the Federal Court considered the test for determining whether a statement spoken is defamatory. In so doing, Harmindar Singh Dhaliwal FCJ, in delivering the judgment of the Court, held as follows:

> **"[19] The law in respect of what amounts to defamatory matter is well-settled. An imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of the community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them ..."**
>
> [emphasis added]

[38] It is clear that the Defamatory Statements made at the Meeting referred to the Plaintiff, as the only individuals present were the Plaintiff, Defendant and Shashi.

[39] Was there a publication to a third party? The Defendant claimed that Shashi was an interested party at the Meeting, but the SCJ rejected this argument. It was undisputed that Shashi is neither a shareholder nor a director of Hillstreet and holds no position or interest in the alleged misappropriation of its funds. Therefore, Shashi did not have the necessary standing to review or question Hillstreet's

accounts. Consequently, I concur with the SCJ's findings that Shashi is indeed a third party.

[40] It is trite that publication to just one other person is sufficient for a claim in defamation. Reference is made to the High Court case of *Sundarajan Sokalingam v Arjan Singh Bishen Singh & Anor* [2022] 1 LNS 1737, where Bhupindar Singh Gurcharan Singh Preet JC (as he then was), in referring to Halsbury's Laws of England, quoted from the following paragraphs:

> **"58. Need for publication. No action or prosecution for a libel will lie unless there has been a publication. In a civil action for libel the plaintiff must allege and prove that the defendant published, or caused to be published, "of and concerning the plaintiff", the words complained of to a third person, namely to some person other than the plaintiff', the words complained of to a third person, namely to some person other than the plaintiff. In criminal proceedings, it is sufficient if the publication is to the person defamed .**
>
> **59. Publication to a third person. There is sufficient publication to a third person if there is publication to a stranger, or to the plaintiff's wife or husband, or to the plaintiff's or defendant's employees, or indeed to any person other than the plaintiff or the defendant's wife or husband. "**
>
> [emphasis added]

[41] Thus, the publication of the Defamatory Statements to Shashi was adequate for a defamation claim, as he was a third party with no connection to Hillstreet's internal affairs.

[42] The Defendant denied making the Defamatory Statements, claiming he was merely questioning the Plaintiff. However, this Court finds that the Defendant's denial is inconsistent with both his and Shashi's oral testimonies and the contemporaneous documents presented. There is clear evidence that the Defamatory Statements were indeed made against the Plaintiff during the Meeting.

[43] Consequently, the Defendant's first defence that he never made the Defamatory Statements will fail.

[44] On the second defence of justification, to succeed in this defence, it is incumbent on the Defendant to show that the Defamatory Statements are indeed true.

[45] The Plaintiff referred to the Federal Court case of *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187. The Federal Court decided:

> **[58] A defendant will have sufficiently proven the defence of justification if he is able to prove the truth or the**

substantial truth of his own me a nings of the impugned words (see *Moore v News of the World Ltd and another* [1972] 1 All ER 915 **and** *Khalid Yusoff v Pertubuhan Berita Nasional Malaysia (Bernama) & Ors* [2014] 8 CLJ 337**,** *Cheah Cheng Hoc & Ors v Liew Yew Tiam & Ors* [2000] 6 MLJ 204**).**

[emphasis added]

[46] In the case of *Mirzan bin Mahathir v Star Papyrus Sdn Bhd* [2000] 6 MLJ 29, the Court held:

"The particulars of justification pleaded in support must be even with a Lucas-Box type of plea, be pleaded clearly so as to inform the plaintiff what the defendant is seeking to justify. In compliance with this requirement, the defendant must set out all the facts and matters relied upon in support of his plea of justification. It is my judgment that when a defendant by its Lucas-Box meaning or in reliance of its particulars of justification, makes a serious allegation of dishonesty or other improper conduct, even suggestive of acts of corruption, the obligations referred to, become even more compulsory and obligatory upon the defendant."

[emphasis added]

[47] The Defendant alleged that the Plaintiff had misappropriated RM100,000.00 from Hillstreet (later adjusted to RM90,000.00) and had been receiving illicit payments from his site projects.

[48] The SCJ concluded that the Defendant failed to present any credible evidence, whether documentary or otherwise, to substantiate the allegations of misappropriation of funds by the Plaintiff.

[49] The SCJ also noted that the Defendant had admitted the contract sum for the USJ Project was lower than the actual cost due to underquoting and neither the Defendant nor Hillstreet took any action against the Plaintiff for the alleged breach of trust.

[50] Moreover, the SCJ found that the documents provided to prove the misappropriation did not align with the ledger prepared by SD3, Yogeswaran a/l Valane, the accountant appointed by the Defendant. The evidence showed that after the Plaintiff submitted receipts to the Defendant, a ledger was created by SD3. However, there were discrepancies between the ledger entries and the receipts submitted by the Plaintiff. When questioned about these discrepancies, the Defendant attempted to explain them by suggesting that the accountant might have made an error.

[51] SD3, in his testimony, admitted that he could not verify whether the payments were made from Hillstreet's account for certain receipts.

[52] To support his claim that the Plaintiff had misappropriated Hillstreet's funds,

the Defendant also presented two additional ledgers covering the period from 12 October 2017 to 23 May 2019 (referred to as the "Defendant's Impugned Ledger"). However, two different versions of this ledger were produced, as shown on pages 886 to 909 and 912 to 935 of Volume 5, Enclosure 7, with no explanation provided by the Defendant regarding the discrepancies.

[53] As a result, the receipts and payment vouchers submitted as evidence failed to prove any misappropriation by the Plaintiff, as not all receipts were for payments to be made by Hillstreet, and they did not establish that the Plaintiff had wrongfully claimed money from Hillstreet for work on the USJ Project.

[54] Furthermore, the Defendant himself admitted that the ledger was not an accurate reflection of Hillstreet's finances, a fact he acknowledged during cross-examination, as detailed below:

> **S242: So, how much you accused him of swindling?**
>
> **J242: As I said, according to the account, the figure is about RM90,000.00 at that point in time.**
>
> **S243: Is this RM90,000.00 clearly shown anywhere in the ledger submitted by you?**
>
> **J243: I didn't submitted the RM90,000.00 because for me, this is a bout defamation, so I didn 't submit the document.**
>
> [emphasis added]

[55] In conclusion, the evidence clearly shows that the Defendant was unable to definitively establish the exact amount allegedly misappropriated by the Plaintiff.

[56] Accordingly, I find no error in the SCJ's decision regarding the rejection of the justification defence.

[57] The Defendant invoked the defence of qualified privilege, arguing that Shashi's presence at the Meeting was justified as he had a legitimate interest in the matters being discussed.

[58] The law on qualified privilege is well established: the Defendant must prove that he had a duty or interest in communicating the Defamatory Statements to Shashi, and that Shashi had a corresponding interest in receiving that information.

[59] In the case of *Hisham bin Tan Sri Halim v Teh Faridah bt Ahmad Norizan & Anor* [2021] 10 MLJ 683, the Court held as follows**:**

"[45] A privileged occasion is one where the individual who makes a communication has an interest or duty (legal, social or moral) to make it to the person to whom it is made. And the person to whom it was made has a corresponding interest or duty to receive it. This reciprocity is essential.

...

Elements of qualified privilege

There are three elements necessary to establish the defence of qualified privilege: **(1) the occasion must be fit, (2) the matter must have reference to the occasion, and (3) it must be published 'from right and honest motives'**.

[47] Qualified privilege is afforded to those who make defamatory statements in the discharge of some public or private duty, whether legal or moral, or in the conduct of their own affairs, in matters where their interest is concerned. **But only if the publication derived from right and honest motives .** In *Dato' Dr Low Bin Tick v Datuk Chong Tho Chin and other appeals* [2017] 5 MLJ 413, the Federal Court held that **the defence is not available if the defendant has used the occasion for the wrong motive**".

[emphasis added]

[60] As discussed earlier, Shashi was a third party. Therefore, the fact that the Defamatory Statements were made to, or in the presence of Shashi constitutes sufficient publication for a defamation claim. The SCJ referenced the undisputed facts that Shashi had no connection to Hillstreet, held no position within the company, and had no interest in the alleged misappropriation of its funds. As such, Shashi lacked the requisite standing to inspect or question Hillstreet's accounts.

[61] Additionally, I agree with the Plaintiff's assertion that Shashi was a director of Versi Syabas, an entirely separate entity from Hillstreet. Although the USJ Project was awarded to Versi Syabas, Shashi's involvement was limited to the payment mechanism. Notably, Versi Syabas and/or Shashi did not fund the USJ Project.

[62] Furthermore, in his witness statement, Shashi admitted that after the meeting, he informed both parties that "this is something they have to sort out, and there is nothing I could do to assist," underscoring his lack of interest in Hillstreet's finances.

[63] Despite the Defendant's claim that meetings involving Shashi were contractually required, no documentary evidence was provided to support this assertion. It was proven that Shashi was not even included in the WhatsApp group created to keep all parties informed about the USJ Project.

[64] Based on this evidence, the Defendant failed to meet the burden of proof.

Consequently, the defence of qualified privilege is invalidated by the SCJ's express finding that the Defendant acted with malice.

[65] The Supreme Court in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 provided a detailed explanation of what constitutes express or actual malice, as outlined below:

> **"The protection afforded by the law to a publication made on an occasion of qualified privilege is not an absolute protection but depends on the honesty of purpose of the person who makes the publication. If he is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege . If the publication takes place under circumstances which create a qualified privilege, in order to succeed the plaintiff has to prove express malice on the part of the defendant. Broadly speaking, express malice means malice in the popular sense of or desire to injure the person who is defamed. To destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication. Knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests. The mere proof that the words are false is not evidence of malice, but proof that the defendant knew that the statement was false or that he had no genuine belief in its truth when he made it would usually be conclusive evidence of malice. If the defendant publishes untrue defamatory matter recklessly without considering whether it be true or not, he is treated as if he knew it to be false . In ordinary cases, what is required on the part of the defamer to entitle him to the protection of the privilege is honest belief in the truth of what he published. But if he was moved by hatred or a desire to injure and used the occasion for that purpose, the publication would be maliciously made even though he believed the defamatory statement to be true. Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred:** *Lee v Ritchie* (1904) 6 F (Ct of Sess) 642**".**
>
> [emphasis added]

[66] The SCJ correctly concluded that the Defendant acted with malice when making the defamatory statements against the Plaintiff. This was evidenced by the fact that the Defendant arranged for a meeting at his office, Gerbang Impian, despite knowing it was shared with another company, Versi Syabas. Additionally, the Defendant's premeditated efforts to remove the Plaintiff as a director were evident through an email sent before the meeting, containing resignation documents for the Plaintiff, which the Defendant later forced the Plaintiff to sign in front of a third party, Shashi.

[67] The Defendant further demonstrated malice by lodging two false police reports. The first report, made on 21 October 2019, accused the Plaintiff of breaching trust, despite the lack of proper audited accounts to support the claim. The second report, also filed on the same day, falsely alleged that the Plaintiff was in possession of the USJ Project's master key and intended to sabotage the Defendant's business. However, evidence from a WhatsApp conversation indicated that the Plaintiff's wife had already offered to return the key, showing the report's malicious intent.

[68] Moreover, a subsequent police report filed by Nurul, the second director of Hillstreet, on 21 November 2019 referred to the Plaintiff as an "ex-director," despite the fact that he had not yet been removed. This false statement led to the Plaintiff's wrongful arrest and exclusion from Hillstreet's business. The Defendant then convened a director's meeting to remove the Plaintiff while he was detained, further demonstrating a prior intention to oust the Plaintiff without verified accounts.

[69] The SCJ's finding of malice on the Defendant's part is further supported by several factors. Despite the Defendant's claim during re-examination that no allegations were made against the Plaintiff during the Meeting and that the purpose was merely to provide documentation to justify the USJ Project's financial shortfall, this is contradicted by the fact that resignation documents for the Plaintiff were prepared in advance of the Meeting. Additionally, the Defendant's WhatsApp message to the Plaintiff on 2 October 2019, stating "I only tarnish your name if you act professionally," further suggests malicious intent. Moreover, the Defendant took deliberate steps to remove the Plaintiff as a director of Hillstreet, as evidenced by an email circulated on 23 October 2019, before any accounts had been prepared.

[70] The Defendant's conduct clearly indicates that he was driven by actual malice, with the primary intention of removing the Plaintiff as a director of Hillstreet when making the Defamatory Statements. Therefore, the allegations regarding the misappropriation of funds appeared to be nothing more than an afterthought.

[71] The SCJ awarded RM100,000.00 in general and exemplary damages to the Plaintiff, rightly relying on section 5 of the Defamation Act 1957. This section establishes that defamatory statements that damage the reputation of a person in their profession, office, trade, or business are actionable without needing to prove special damage. In this case, the Defamatory Statements were clearly intended to harm the Plaintiff's reputation in his professional capacity as a director of Hillstreet. Furthermore, the law recognises that where defamatory words imply the commission of a criminal offence punishable by imprisonment, as in this case where the Plaintiff was accused of misappropriating funds, proof of special damages is unnecessary (see: *Francis Kimsai v Judip bin Kini* [2012] MLJU 55).

[72] The Learned Judge also correctly identified the mental injury suffered by the Plaintiff due to the defamation. On 3 October 2019, the Plaintiff was found in a confused state and was admitted to Johor Bahru Hospital, where he was treated for major depressive disorder and acute dissociative reactions. Medical reports

confirm that the Plaintiff continues to suffer emotional distress and is receiving ongoing treatment. Dr. Norasikin binti Khairuddin testified that the Plaintiff's mental condition was not related to his prior medical history but was directly triggered by the Defamatory Statements, further justifying the damages awarded.

[73] The SCJ also considered the Plaintiff's claim for exemplary damages, acknowledging that the Defendant acted with malice and a "contumelious disregard" for the Plaintiff's rights. The Defendant's Defamatory Statements were clearly made with the intent to damage the Plaintiff's reputation and remove him from his role as a director of Hillstreet, further justifying an award of exemplary damages.

[74] In assessing the quantum of damages, the SCJ referred to several legal precedents, including **Hisham bin Tan Sri Halim v Faridah bt Ahmad Norizan** (supra) and *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] MLJU 769, which highlight the key factors in awarding damages: the seriousness of the allegations, the extent of publication, the impact on the Plaintiff's reputation, and the behaviour of both parties. The SCJ correctly applied these principles, awarding RM100,000.00 in damages to the Plaintiff, considering the mental distress, reputational harm, and loss of his directorship caused by the Defendant's Defamatory Statements.

[75] Regarding the declaration that the Plaintiff's removal as a director of Hillstreet is null and void, I agree with the Plaintiff's argument that the relief granted by the SCJ was merely a declaratory relief which is consequential from the Court's findings of fact.

[76] Based on the SCJ's assessment of the facts and circumstances leading to the Plaintiff's removal, she concluded that the removal was wrongful as it was grounded on the Defamatory Statements.

Consequently, the SCJ granted the Plaintiff's request for declaratory relief.

[77] It is important to emphasise that the declaratory relief was not a request for the Plaintiff's reinstatement as director, nor did it require Hillstreet to take any specific action to enforce the declaration. The declaratory reliefs are non-coercive by nature.

[78] The Federal Court case of *Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Splendour'* [1999] 6 MLJ 652 held that:

"a declaratory judgment merely states the rights or legal position of the parties as they stand, without changing them in any way... A declaratory order has no coercive force at all."

[79] Furthermore, in the Federal Court case of *Kamil Azman bin Abdul Razak & Ors v Amanah Raya Bhd & Ors* [2019] 4 MLJ 726**,** Rohana Yusuf FCJ (delivering judgment of the court) held at paragraph 45 that:

[45] … Learned respondents' counsel elucidated the point that the prayer of the respondents in its counterclaim merely sought for a declaration by the court for ARD to be released of its obligation to enter the JV agreement but never seeking for that relevant clause to be set aside. The difference being that, a declaratory order merely pronounces the legal state of affairs. This differs from a coercive judgment. A coercive judgment is enforceable by the court but not a declaratory order.

[80] In the of *Datin Seri Rosmah bt Mansor v Public Prosecutor and another appeal* [2022] 3 MLJ 601**,** Hanipah Farikullah JCA (as she then was) elaborated on what declaratory reliefs are in paragraph 70:

[70] Declaratory order or declaratory judgment is defined as follows:

(a) in Halsbury's Laws of England (5th Ed, Vol 61A, 2018), it attempted to define declaratory judgment in the context of judicial review at p 275, para 107 as follows:

… A declaratory judgment is a judicial decision which involves the declaration of the law in relation to a particular matter, such as that a decision of a public body is ultra vires, or a declaration of the rights of a party without any reference to their enforcement…

[81] As the trial judge, the SCJ found the Plaintiff's version to be more probable based on the evidence presented. The SCJ also had clearly explained how she reached her decision, and I find no error in her reasoning.

[82] Given the trial judge's advantage of first-hand observation of the witnesses' demeanour, credibility, and the overall presentation of evidence, her factual findings should not be disturbed unless there is a clear misdirection. After reviewing the SCJ's grounds and the evidence, I find no such misdirection in her evaluation.

[83] Furthermore, considering the facts of the case, I find the damages awarded by the SCJ to be appropriate and not excessive. Her justification for awarding RM100,000.00 as a global sum for general and exemplary damages was well-founded.

[84] Upon reviewing the entire evidence, I conclude that the SCJ did not err in her

findings of fact or law. There are no substantial and compelling reasons to disagree with her conclusions. For the reasons above, I ordered that the Appellant/Defendant's appeal be dismissed, with costs of RM12,000.00.

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