

5 **IN THE HIGH COURT IN MALAYA AT IPOH**
IN THE STATE OF PERAK DARUL RIDZUAN
CIVIL SUIT NO. AA-23CY-1-11/2018

BETWEEN

10 **AL MAARIF TRAVEL & TOURS SDN. BHD.**

(COMPANY NO: 1098794-P) ... PLAINTIFF

AND

15 **1. NUR FARHANA BINTI YEOP HUSSIN**

(NRIC NO: 910412-14-5306)

2. STAR MEDIA GROUP BERHAD

(COMPANY NO: 10894-D) ... DEFENDANTS

20 **HEARD TOGETHER WITH**
IN THE HIGH COURT IN MALAYA AT IPOH
IN THE STATE OF PERAK DARUL RIDZUAN
CIVIL SUIT NO. AA-23CY-1-01/2019

25 **BETWEEN**

AL MAARIF TRAVEL & TOURS SDN. BHD.

(COMPANY NO: 1098794-P) ... PLAINTIFF

30 **AND**

NADIYAH BINTI ADNAN

(NRIC No: 800204-14-5558) ... DEFENDANT

JUDGMENT

Introduction

[1] Two actions were consolidated to be heard one after the other. Both
40 were initiated by the Plaintiff, a private limited company. The first action, AA-23CY-1-11/2018 (“**the Nur Farhana Suit**”) and the second action, AA-23CY-1-01/2019 (“**the Nadiyah Suit**”) were grounded on defamation.

[2] In the Nur Farhana Suit, the claim against the Second Defendant, Star
45 Media Group Berhad, was settled on terms contained in a Consent Judgment dated 5 March 2019.

[3] By consent of the parties the evidence led at trial in both the Nur Farhana and the Nadiyah suits were to be used interchangeably. It was also
50 agreed that a single set of judgment will be given for both the suits with the necessary distinction drawn for the facts as found for each of the suit.

Common background facts

55 [4] The defendant in the Nur Farhana Suit (“**Farhana**”) with 28 other participants had on 6 January 2018 booked a five days four nights holiday with the plaintiff (“**AMTT**”) to Perth, Australia for the period 8 to 12 September 2018.

60 [5] Under a separate booking made on 31 December 2017, the Defendant in the Nadiyah Suit (“**Nadiyah**”) together with six other participants had booked a six days four nights holiday with AMTT to Korea for the period 23 to 28 November 2018.

65 [6] The September 2018 trip to Perth did not materialise due to visa approval issues. AMTT offered a replacement trip to Medan, Indonesia. Farhana and her group accepted and holidayed in Medan from 8 to 12 September 2018.

70 [7] However, Farhana was not satisfied. Her group prevailed upon AMTT to provide them with a similar trip to Perth. AMTT agreed and Farhana was to depart on 3 November 2018. However, again, this November 2018 trip did not materialise on the asserted ground that due to time constraints, flight tickets could not be obtained.

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[8] Farhana was upset.

[9] On 4 November 2018, she took to social media via Facebook to vent her unhappiness and what she published, AMTT claims, were defamatory
80 and amounts to malicious falsehood.

[10] AMTT claims that following the publication of Farhana’s impugned statements, Nadiyah’s group through Azma Idayu binti Abd. Shukor (DW3) cancelled their trip to South Korea on 12 November 2018 and sought a
85 refund of their booking fees which AMTT agreed on terms.

[11] On 19 November 2018, Nadiyah was said to have published defamatory statements of AMTT via Facebook. In the case of Nadiyah, in her publication she had also attached a photograph of AMTT's director (PW1) and the Operations Manager (PW2) with the word "Wanted" juxtaposed onto the photograph. She pleaded that this image was not one created by her but one already published in another WhatsApp group of dissatisfied customers of AMTT.

[12] AMTT claimed that what were published by Farhana and Nadiyah were defamatory and amounts to malicious falsehood and as a consequence, its investors pulled out, its business suffered tremendously, it had lost more than RM600,000.00 and in fact, its business collapsed.

[13] AMTT prayed for inter alia a perpetual injunction to restrain Farhana and Nadiyah from publishing the defamatory statements, a mandatory injunction to take down these defamatory statements, general and aggravated damages with interest thereon.

[14] Farhana admitted to making the impugned statements but asserted that what was published is a [true] and accurate narration of the events that took place. She asserted that the two abortive trips were as a result of AMTT's negligence. In her defence, Farhana pleads justification and fair comment in that the impugned statements were made in good faith, genuinely done for the purpose of "reminding" (I believe what is meant is 'alerting') other [prospective] participants so that they would not become victims of AMTT's fraud.

[15] Farhana asserted that AMTT had failed to prove it had suffered any loss due to what she had done. She added that AMTT had failed to produce

any documents and witness on its alleged losses or of AMTT having to refund monies.

120 **[16]** Farhana counterclaimed against AMTT for misrepresenting that it is registered with the Ministry of Tourism, Arts and Culture, negligent in managing her trip to Perth, Australia and claimed for inter alia special damages of RM2,076.00, general damages, aggravated and exemplary damages for the emotional stress, shame and trauma suffered over the two cancellations caused by AMTT to her trip to Perth.

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[17] Nadiyah denied cancelling the trip to South Korea. She asserted that it was AMTT who cancelled it and she was not privy to the communication made by one Azma Idayu binti Abd. Shukor (DW3) purporting to cancel her tour. Just like Farhana, she pleaded justification and fair comment.

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[18] Just like Farhana, Nadiyah took up the point on illegality and asserted that AMTT was not registered with the Ministry of Tourism, Arts and Culture and an unlicensed travel agency. Any profits made were gained illegally and thus, it is not reasonable to claim that its reputation has been defamed and
135 consequently, no damages ought to be allowed.

[19] In both the Farhana and Nadiyah Suits, two witnesses were called by AMTT, its director, Muhammad Faizul Kan Bin Abdullah (PW1) and its Operations Manager, Azi Hafiza Binti Mohamad (PW2). PW1 and PW2 are
140 husband and wife.

[20] In the Farhana Suit, two witnesses were called, Farhana herself (DW1) and her mother, Rudziah Binti Ismail (DW2) who was the head of their group of participants in the trip to Perth.

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[21] In the Nadiyah Suit, three witnesses were called, Nadiyah herself (DW1), Norehan Binti Md Yusof (DW2), as well as Azma Idayu binti Abd Shukor (DW3). Both DW2 and DW3 were fellow participants of the trip to South Korea and friends of Nadiyah.

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[22] Each of the witnesses provided a witness statement and were subjected to cross-examination.

Law on defamation and malicious falsehood

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[23] In **Halsbury's Law of England (4th Ed)**, a defamatory statement has been defined as follows:

"A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to his office, profession, calling, trade or business".

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[24] In **Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; 1 CLJ (Rep) 321; [1989] MLJ 315)** His Lordship, Mohamed Dzaidin J (later CJ) set out succinctly the elements of the tort of defamation as follows:

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170 *"In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published."*

[25] In *Keluarga Communication Sdn Bhd v. Normala Samsudin & Another Appeal* [2006] 2 CLJ 46 His Lordship, Zulkefli Makinudin JCA (later PCA), held:

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180 *"At the outset we would state that the test to be applied when considering whether a statement is defamatory of an Appellant is well settled in that it is an objective one in which it must be given a meaning a reasonable man would understand it and for that purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. Gatley on Libel & Slander, 10th edn on this point at pp. 108 and 110 inter alia states as follows:*

185 *It is necessary to take into consideration, not only the actual words used, but the context of the words. It follows from the fact that the context and circumstances of the publication must be taken into account, that the Appellant cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting."*

190 **[26]** The decision of the Court of Appeal in *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 is particularly relevant to our case where the Court of Appeal held:

195 *"[1] 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. This is a question of law. Having decided the question, the next step*

is to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of the case.

[2] The article when read as a whole clearly suggests that the appellant is a person who, under the guise of doing service, was in fact making false statements in order to deceive the people of Lukut. The implication is that the appellant is a man given to deception and is untrustworthy. **To say of a man that he is a cheat and a liar is a serious defamation of him. It has the effect of lowering the appellant in the estimation of right-thinking members of society generally.**

[3] It is quite apparent as a matter of pure fact that the article defames the appellant. **It literally calls him a cheat** and a liar. There can be no dispute that the appellant was in fact libelled. The learned judge was in error when he held that the words complained of were not defamatory of the appellant.”

(emphasis added)

[27] As for malicious falsehood, it was held by the Federal Court in **Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee [2019] 3 CLJ 729** that:

“In a claim under malicious falsehood, the appellant must prove that (i) the respondent published about the appellant words which were false; (ii) the words were published maliciously; and (iii) special damage followed as the direct and natural result of the publication.”

[28] The re-publication of a defamatory statement amounts to defamation, see **Datuk Seri Anwar Ibrahim v Utusan Melayu (M) Bhd & Anor [2013] MLJ 534, [2013] 2 AMR 678** and **Raja Syahrir Abu Bakar & Anor v Manjeet Singh Dhillon & Other Appeals [2019] CLJ 301**.

[29] I will now deal with each of the suits in turn.

Nurfahana Suit

Liability

230 [30] On or about 4.11.2018, the Defendant published on her Facebook account the following:

BEWARE: TRAVEL AGENT MENIPU - AL MAARIF TRAVEL & TOURS SDN BHD

235 *Sepatutnya trip ke Perth pada 8 Sept 2018, dicancel last minute dengan alasan visa tak lulus. Entah betul ke propa entah. Bersangka baik, ktorang diberi pilihan untuk pilih date baru yang pihak agent sendiri listkan. So, ktorang 29 orang 1 group (ada dr Sarawak, Melaka, Kelantan, Negeri Sembilan etc) pilih 3 November 2018 untuk pergi. Flight sepatutnya pukul 8.25pagi, kami set berkumpul pukul 5.30pagi, tup agent datang (Pn Azi Hafiza, gambar kami tepek sekali sini) cakap tiket tak dibeli. Dengan*

240 *alasan 'staff kami overlook untuk beli tiket'. Kau rasa?*

Dia ingat ktorang ni baik tahap boleh redho ke macam mana. Dah mengamuk pungpang baru dia reveal yang hotel & transport dekat sana pun dia tak book. Siap boleh suggest pergi date lain pulak, ingat orang ni tak ada komitmen lain ke apa, takde keje lain ke.

245 *So ktorang mengamuk suruh dia refund semua orang full harini jugak. Boleh pulak bagi alasan tak ada duit, lagi best alasan tak reti online banking, ingat duk zaman batu ke kak?*

Ktorang bawak dia & husband dia pergi balai polis, report polis terus (report polis kami tepek sekali kat sini). Dari 5pagi sampai 5ptg duk kat balai tu dia refund RM20k je,

250 *ada lagi balance RM60k+. Janji nak bayar by 10 November ni. Kita tengok dia settlekan ke tak.*

Bukan nak tutup periuk nasi orang tapi kau buat bisnes biarla jujur, amanah. Jangan la nak menipu orang. Orang datang dari jauh2 kena macam ni kau rasa. Dah la dalam group tu majoriti orang2 tua. Tanam sikit dalam kepala tu yang rezeki ni Allah boleh

255 *tarik bila2. Harini kau tipu orang, esok lusa kau kena balik kang padan muka. Kau ingat sikit, kat dunia boleh lari, kat akhirat nanti kau nak lari mana? Sila merangkak cari orang2 yang kau makan duit dia ni.*

Yang benar,

Wakil kumpulan kena lipak 🙄

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[31] Whilst the Court can understand the unhappiness over the two abortive trips to Perth, the Court finds the impugned statements in the Facebook-posting (“**Facebook-post**”) taken as a whole to be defamatory.

265 [32] In ***S Pakiananthan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771, 1 CLJ (Rep) 233***, the Supreme Court held:-

270 *“In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the Plaintiff. By publication is meant the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written.”*

[33] From the facts and evidence, the publication of the defamatory statements to third parties is not disputed by the Farhana herself. There is
275 no doubt that the impugned statements were all posted on her Facebook Page and she admits that the Facebook Page was under her overall supervision with her as the administrator of the Facebook Profile. That the Facebook-post dated 4 November 2018 was shared by 435 other Facebook public profiles clearly show that the impugned words and or the contents of
280 the said Facebook post were published, distributed and disseminated amongst members of the public who are obviously third parties.

[34] With the posting on social media via Facebook, the publication will be wide and far ranging. In ***Dato' Seri Anwar bin Ibrahim v. Wan Muhammad Azri bin Wan Deris [2015] 2 CLJ 557; [2014] 9 MLJ 605*** the High Court
285 held that:

"[45] In our case the defamatory statements were published in the website www.papagomo.com i.e. in the internet and the people all over the world can get access to the website meaning that there was a wide publication of the defamatory statements.

[46] It is a (sic) judicial notice that the internet is used worldwide.

[47] Applying the above principles to the present case, there is no doubt that the online defamatory statements or published on the internet amounts to publication."

[35] Against the narration of events set out above, in my view, the statements do not qualify as fair comments. Even if they are, there is evidence of malice on her part which would defeat such a defence seeing at that the time of her Facebook posting on 4 November 2018, she had in hand a compromise extracted under questionable circumstances.

[36] A defence of fair comment is one provided under section 9 of the Defamation Act 1957. The burden of proof is on the Defendant to prove that he can rely on this defence.

[37] **Section 9 of the Defamation Act 1957** provides:

"9. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

315 [38] In **Christina Liew Chin Jin V. Leksun Injil [2021] 1 LNS 1157** His Lordship, Leonard David Shim JC made reference to the case of **Tan Sri Harris bin Mohd Salleh v Dr. Shaari Isa & 4 Ors [2018] 9 BLR 686** where in dealing with the nature of the defence of fair comment, the Court referred to the cases of **Joshua Benjamin Jeyaretnam v. Goh Chok Tong [1989] 1 LNS 34; [1989] 3 MLJ 1**, **Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304; [1996] 1 MLJ 393**, **Lee Kuan Yew v. Derek Gwyn Davis & Ors [1990] 3 CLJ Rep 691; [1990] 1 CLJ 583; [1990] 1 MLJ 390** and **London Artist Ltd v. Litter [1969] 2 QB 375** and held:

325 "[88] In the well-known Singapore case of **Joshua Benjamin Jeraretnam v. Goh Chok Tong [1989] 1 LNS 34; [1989] 3 MLJ 1**, the Privy Council approved the High Court judge's stipulation of the conditions necessary for the defence of fair comment which are as follows:

330 (i) the words complained of are comment, although they may consist or include inferences of fact;
(ii) the comment is on a matter of public interest;
(iii) the comment is based on facts; and
(iv) the comment is one which a fair-minded person can honestly make on the facts proved.

335 [89] In **Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304; [1996] 1 MLJ 393**, Richard Malanjum (as he then was) said as follows in respect of this defence:

340 For the defence of fair comment, in order to succeed the following basic elements must be established by the defendants, namely:
(i) that the words complained of are comments, though they may consist of or include inference of facts;
(ii) that the comments are on a matter of public interest; and

345 (iii) that the comments are **based on facts, truly stated**. They must also
be fair and which a fair- minded person can honestly make on the facts
proved.

350 [90] Thus, the essence of the defence of fair comment is that the **comment**
must be fair and must be based on facts. It must be not based on rumour or
belief.

355 [91] The test to determine whether an utterance is a comment or a statement
of fact was considered in the Singapore of **Lee Kuan Yew v. Derek Gwyn**
Davies & Ors [1990] 3 CLJ Rep 691; [1990] 1 CLJ 583; [1990] 1 MLJ 390:

360 The question whether the words are a statement of fact or a comment is
one of fact, the answer to which depends on the nature of the imputation
conveyed thereby and the context and circumstances in which the words
were published. The same words when published in one context may be
a statement of fact, yet when published in a different context may be a
comment. For example, if it is said of a member of the Bar that the unfit
to be a member of the Bar, that statement by itself is one of fact. On the
other hand, if the same statement was prefaced by a statement that the
365 member of the Bar has been convicted of cheating, then the statement
becomes a comment.

[92] In *London Artist Ltd v. Litter* [1969] 2 QB 375, Lord Denning explained the
distinction between comment and fact as follows:

370 "In order to be fair, the **commentator must get his basic facts right**.
The basic facts are those which go to the pith and substance of the
matter. They are the facts on which the comments are based or from
which the inferences are drawn – as distinct from the comments or
inferences themselves ... **in fair comment, he need only prove the**
375 **basic facts to be true.**"

Thus, to establish a defence of fair comment, the Defendant must prove:
(1) that the Words complained of are comments, though they may

380 *consist of or include inference of facts; (2) that the comments are on a
matter of public interest; and (3) that the comments are based on facts,
truly stated, and they must also be fair and which a fair-minded person
can honestly make on the facts proved.”*

385 **[39]** Just one day before her Facebook posting of 4 November 2018,
Farhana and her group had secured a promise from PW1 at the KLIA2
Airport for the refund of RM83,220.00 with RM20,000.00 paid immediately.
PW1 testified that he was forced to make this promise and refund.

390 **[40]** The purported compromise extracted by Farhana and her group of
participants at the airport on 3 November 2018 under questionable means
followed by them going to PW2’s family home, is such that this Court cannot
and will not be a party to enforcing the same in this action much less allow
the same to be further relied upon to justify defamatory statements and
malicious falsehoods.

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 [41] As at 4 November 2018, Farhana had already enjoyed a Medan
package as a solatium for the aborted September 2018 trip and a
compromise extracted under questionable circumstances with RM20,000.00
paid to her group and a promise of another RM 63,220.00 payable in seven
400 days’ time for the November 2018 trip. It is, thus, clear that there was malice
on her part to publish the defamatory statements on 4 November 2018.

[42] The relevant time for addressing malice is at the time of the publication
of the Facebook posting which was on 4.11.2018, see ***Manikavasagam A/L***
405 ***Sundaram v Sun Media Corporation Sdn Bhd & Anor [2021] MLJU 217***
where His Lordship, Tee Geok Hock JC said:

“ [70] The relevant time for addressing malice/honesty is the state of the Defendant’s knowledge at the date the 2nd Impugned Article was published. In **Hoe Thean Sun & Anor v Lim Tee Keng [1999] 1 CLJ 187**, page 192 :

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“In the final analysis, for the purpose of determining malice at the time the report was made, it is irrelevant whether the defendant succeeded in his suit against the plaintiffs at the Penang High Court (civil suit no. 22-169-93). The fact he instituted the suit is clear evidence of bona fides on his part. The fact that the defendant has not withdrawn the police report to-date, even after he lost his case against the plaintiffs in the Penang High Court civil suit no. 22-169- 93, is totally irrelevant to the issue of malice at the time the statements were made in the police report. The plaintiffs have failed to discharge the onus to prove malice. There is neither intrinsic nor extraneous evidence of actual malice in this case. The defence of qualified privilege must succeed.” per KN Segara JC (as he then was).”

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[43] Upon a perusal of the notes of evidence, this Court finds that Farhana had failed to put her defence to the AMTT’s witnesses during cross examination.

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[44] AMTT’s director and operations manager, PW1 and PW2 gave evidence each in the form of a witness statement which were affirmed under oath and adopted as their evidence during the trial.

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[45] It is trite that a failure to cross examine or challenge a crucial part of the evidence of a witness amounts to an acceptance of such evidence, see **Browne v Dunn [1893] 6 R 67** and **Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639** CA. This Court accepts the submissions of AMTT that in this regard, the following

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averments/evidence of PW1 in his witness statement in PWS1 were not challenged nor cross examined by learned counsel for Farhana:-

- 440 i. Paragraph 14 – that the impugned statements were targeted at AMTT, him and PW2 and published with malice with the intention that it can be re-published to third parties in particular to AMTT’s existing customers, individuals and or groups of individuals who may be prospective customers of AMTT;
- 445 ii. Paragraph 15- that the impugned statements were published with malice and as at the date of the commencement of the suit (16.11.2018) the Facebook-post has been shared with 435 third parties via the Facebook media;
- iii. Paragraph 16 – that the impugned statements referred to AMTT carrying the meaning that AMTT, amongst others;
 - 450 a) was unprofessional and untrustworthy;
 - b) was unethical;
 - c) has the habit and tendency to cheat its customers and to carry out scamming;
 - 455 d) was dishonest and its business activities cannot be trusted;
 - e) it and/or its directors and/or agents and/or servants and/or representatives had committed a crime; and
 - f) AMTT’s business has problems and/or always has problems.
- iv. Paragraph 17 – that the impugned statements in the context of the Facebook-post taken in their natural and ordinary meaning would lower AMTT in the estimation of right-thinking members of society and was calculated to prejudice AMTT’s reputation and credibility as to cause harm and losses to AMTT’s business ;
- 460 v. Paragraph 18 (d), (e), (f), (g), (h) and (i) – which is a repetition of the above save that PW1 said that the impugned statements deliberately
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failed and or omitted to state material facts such as the participants having been compensated with a trip to Medan, Indonesia which they say was a free of charge trip and which they had enjoyed;

vi. Paragraph 19 – that the impugned statements carry the inuendo amongst others that abused and belittled AMTT’s reputation and integrity as an established travel agency particularly in the State of Perak and lowered its estimation as a travel agency , and

vii. Paragraph 20 - that the impugned statements were intended to excite and portray a bad and negative perception of AMTT in the eyes of the public and or its existing customers and or individuals or groups of individuals who may be prospective customers of AMTT although they may not believe the impugned statements.

[46] The above paragraphs contained evidence as to the meanings ascribed by the Plaintiff to the impugned words of the Facebook-post dated 4 November 2018 and the purpose of the Facebook post being published by the Defendant.

[47] However, with Farhana having pleaded justification and fair comment as her defence, it is, of course, not surprising that throughout the cross examination by her learned counsel, the evidence in the afore-mentioned paragraphs of PWS1 were not challenged by the Defendant and it was not even put to PW1 that these averments of cheating were not true.

[48] Learned counsel for both Farhana and Nadiyah pointed out the following during the cross-examination PW1:

“PD Baik. Seterusnya tunjukkan di Mahkamah di mana, one single application from your company yang you memang ada apply untuk

495 *VISA trip untuk bulan 9 tahun 2018? Satu cukup, application from your company.*

SP1 Yang Arif, kalau mengikuti dalam dokumen ini memang tiada.”

500 *PDWalau bagaimanapun, maklumat daripada airlines telah menyatakan bahawa tempahan tersebut telah dibatalkan kerana kecuaihan kakitangan syarikat yang tidak membuat bayaran kepada pihak penerbangan....Saya katakan trip ketiga ini yang sepatutnya yang menjadi pengganti pada trip pertama juga tidak berjaya **kerana** kecuaihan syarikat yang tidak membuat pembayaran tiket, setuju atau tidak?*

505 *SP1 Saya setuju”*

PD ...puan setuju atau tidak setuju kegagalan mendapatkan visa bukan salah Defendan mahupun peserta-peserta. Tetapi salah syarikat sendiri. Setuju atau tidak?

510 *SP2 Setuju*

PD Saya katakan bukan disebabkan kekangan masa tiket gagal diperolehi. Sebaliknya kerana kegagalan syarikat sendiri untuk membayar tiket-tiket penerbangan Australia kali kedua ini, itu puncanya tiket tidak dapat? Setuju atau tidak?

515 *SP2 Setuju*

PD Saya kata pada puan, Australia yang pertama visa punya problem. Bukan salah mereka. Australia kedua staff punya problem. Terlupa bayar. Disebabkan itu mereka-mereka tidak dapat pergi dan mereka wajar untuk rasa tak senang hati, marah terhadap pengurusan syarikat. Setuju atau tidak, dua kali gagal?

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SP2 Setuju

[49] The thrust of the Farhana's cross-examination of PW1 and PW2 was to put to AMTT's witnesses that AMTT had failed or was negligent in the management of the travel package purchased by Farhana which failed to materialise. However, this does not amount to justification. At best, as submitted by AMTT, it proves that AMTT was incompetent and there was a breach of contract but this does not come within the meaning of cheating or fraud as alleged by the Defendant in her Facebook-post dated 4 November 2018.

[50] In fact, PW1 testified that on the day Farhana's group was to fly out to Perth, Australia for their replacement trip in November 2018, another group under AMTT flew out to Perth. The inference to be drawn from this and from the fact that it had successfully arranged for Farhana's group to be compensated with a successful trip to Medan, Indonesia earlier is that AMTT was in fact carrying out a genuine business of travel agency save that its competence as one is in doubt.

[51] It was pointed out by learned counsel for AMTT that "Explanation 2" of **section 415 Penal Code** on Cheating provides that a mere breach of contract is not itself proof of an original fraudulent intent.

[52] During the cross-examination of Farhana (DW1) and her mother (DW2), it was pointed out to them that amongst the terms of the travel package they had purchased were that AMTT was entitled to cancel the reservation by giving reasonable notice prior to the date of departure with a refund limited to that returned by the service provider to be paid within 45 to 60 days. Another term was that in the event the trip is rescheduled, the customer is entitled to accept a new trip, a new package offered by AMTT or cancel the reservation and a refund of payments not made to the service

provider or that received from the service provider within 45 to 60 days. There was also a term excluding liability on the part of AMTT in the event of any delay, postponement, loss, damage or injury suffered during the trip (see
555 Bundle B pp 48 and 49, 52 and 53)

[53] Whether the exclusion clause was lawfully valid was not challenged. Without deciding whether the exclusion clause can exclude liability, I am of the view that even if a Court were to decide that the exclusion clause is too
560 wide, it does not give Farhana a lawful license to publish statements which are defamatory. In other words, two wrongs don't make a right.

[54] Farhana admitted that AMTT had promised her and the other participants that although AMTT has up to 60 days to make any refund, the
565 promise of a refund of a balance of RM 63,220.00 was to be paid within 7 days from 3 November 2018 i.e. 10 November 2018. She also admitted that all parties came to an agreement that in order to resolve the issues amicably, an agreement was made between the Plaintiff through PW2 and Farhana's mother, (DW2).

570
[55] However, having given AMTT an agreed seven days to make good on refunding the balance after having extracted such a concession with the participants in Farhana's group ganging up on PW1 and PW2 and dragging PW1 to the police station at the KLIA2 Airport, the Defendant published the
575 impugned Facebook-post on 4 November 2018 without allowing the 7 days to run its course. This evidences malice on her part.

[56] PW1 testified that:

580 “9. Pada 3.11.2018, Puan Azi telah hadir sendiri ke KLIA untuk bertemu dengan
kesemua peserta-peserta pakej pelancongan tersebut untuk memaklumkan
status dan keadaan sebenar berkenaan pakej pelancongan tersebut namun
Puan Azi telah diserang secara lisan (“assault”) dan fizikal (“battery”) oleh
beberapa orang daripada peserta-peserta pakej tersebut. Puan Azi telah
585 menghubungi saya selaku Pengarah Plaintiff untuk bantuan bagi menangani
masalah tersebut dan saya juga telah hadir ke KLIA bagi membantu
menyelesaikan isu tersebut. Saya telah menawarkan penyelesaian dengan
membayar sebahagian pemulangan wang (“refund”) sejumlah RM20,000.00
namun tidak dipersetujui oleh kesemua peserta-peserta pakej pelancongan
590 tersebut. Saya dan Puan Azi kemudiannya telah diheret ke balai polis KLIA.

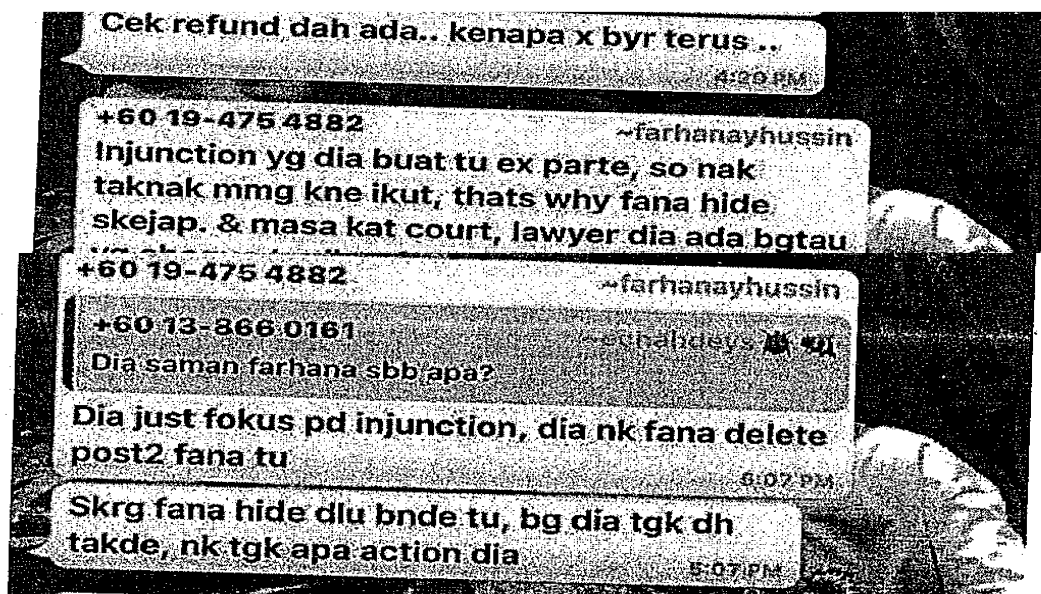
10. Peserta-peserta pakej pelancongan tersebut telah bertindak kasar dan
agresif dengan mengurung, menahan serta menyekat kami di Balai Polis KLIA
tanpa sebarang kausa dan sanksi undang-undang, sehingga lewat petang dan
kami telah disekat secara salah dan tidak sah dari beredar mengikut kehendak
kami sendiri. Kami juga tidak dibenarkan untuk bergerak ke mana-mana
mengikut kerelaan kami sehinggalah kami bersetuju untuk membayar sejumlah
RM83,220.00 sebagai pampasan kepada peserta-peserta pakej pelancongan
tersebut sedangkan pakej pelancongan tersebut telah pun dipampas dan
600 diganti dengan pakej pelancongan ke Medan, Indonesia. Bagi mengelakkan
perkara lebih buruk berlaku, saya selaku Pengarah Plaintiff telah membayar
sejumlah RM20,000.00 pada hari tersebut dan telah dipaksa dan diugut untuk
membuat bayaran baki sejumlah RM63,220.00 dalam tempoh 7 hari dari tarikh
3.11.2018 tersebut.”

605

[57] Under cross-examination (NE pp 40 - 43) that there was no physical
assault, PW1 maintained his testimony and referred to his contemporaneous
police report lodged on 4 November 2018 (Bundle B p 244) on the incident.
I accept PW1’s testimony that he was physically assaulted and put in a
610 vulnerable position that led to him agreeing to pay Farhana’s group the sum
of RM83,200.00 with RM20,00.00 being paid immediately.

[58] In her closing written submissions, Farhana adamantly maintained that the statements made by her are accurate and that she had proved that the impugned statements were true, made in good faith and to “remind” or alert participants as well as the public. This together with the evidence led show that after the Facebook-post of 4 November 2018 until the closing submissions at trial, Farhana was unapologetic and unremorseful for her action.

[59] In fact, despite having being served with the ex parte order for injunction (Bundle B pp 22 to 24) and thereafter having consented to the ad interim and inter parties order for injunction to delete and or take down the Facebook-post and that she is prohibited from posting similar comments, Farhana proceeded to hide them instead of deleting them and proceeded to discuss and made further defamatory remarks about AMTT in a WhatsApp group known as “Group Trip Tak Jadi”. Her conduct is contumacious and contemptuous. The following comments posted by her evidences her appalling conduct:



[60] AMTT led evidence showing that after the defamatory statements were widely published its customers started to cancel their reservations and sought refunds. Its investors also pulled out. Its business practically collapsed. Evidence was led to show that in paying out a total of RM679,271.05 to effect refunds to its customers and its investors after the defamatory postings went viral AMTT had borrowed money from inter alia a business entity, Wah Sin Tailor, owned by PW1's mother and, Al Maarif Sales and Services which is another of PW1's business entity.

[61] Both Farhana (as well as Nadiyah) challenged these payments as the evidence show that they were paid out principally through these other two entities, Wah Sin Tailor and Al Maarif Sales and Services and not AMTT. They asserted that; therefore, these payments cannot be relied upon as proof of losses having been suffered by AMTT.

[62] In my considered opinion, whether AMTT effected satisfaction of an obligation it has incurred or was forced to incur, by itself or through another party, the effect is the same in that it has suffered such an obligation and had made good on its obligation., see for e.g. illustration (a) to **section 41 Contracts Act 1950** which is reproduced here:

“(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.” (Emphasis added)

[63] In the circumstances, I find that the third element required for proof of malicious falsehood that of special damage having been suffered by AMTT has been proven as well as against Farhana.

[64] With AMTT having :

- i) told Farhana and her group via DW2 on 1 November 2018 of the cancellation;
- ii) both its director (PW1) and its operations manager (PW2) attending at the airport on 3 November 2018 to be given a dressing down and assaulted by Farhana and her group over the cancellation;
- iii) been forced to refund a sum of RM20,000, after its director (PW1) and operations manager was restrained and its director (PW1) assaulted at the airport on 3 November 2018 and further made to promise to pay an alleged balance due of RM63,220 in one week's time;
- iv) with several members of the Farhana's group even going to PW2's house to meet PW2's family to voice their dissatisfaction;
- v) despite the terms of the contract Farhana had with AMTT providing for an alternative trip to be provided and despite Farhana having accepted and enjoyed a compensation package to Medan, Indonesia for the September 2018 trip; and
- vi) suffered damages with its customers cancelling their travelling plans and investors pulling out,

this Court further finds that AMTT has proven its cause of action premised on malicious falsehood as well against Farhana.

[65] The Court agrees with the submissions of AMTT that the underlying facts leading to the cancellation of the November 2018 trip to Perth do not

justify the defamatory statements being published on 4 November 2018 referring to AMTT being inter alia a cheat, has cheated people, being dishonest and deceitful. In short, ineptitude and any assertion of breach of contract does not equal to being dishonest and a cheat.

[66] The Court finds that Farhana has failed to prove her defence of justification on a balance of probabilities and in this case, the Court also finds that her defence of fair comment has not been made out because what she has posted about AMTT being dishonest and a cheat are not borne out by the evidence, which taken at its highest, show incompetence (see ***Chong Swee Huat & Anor v Lim Shian Ghee T/A L&G Consultants & Education Services [2009] 4 CLJ 113*** CA).

[67] Wherefore, that I find Farhana liable to AMTT for defamation including that of libel and malicious falsehood.

Damages

[68] This Court agrees that express defamatory averments of cheating, has cheated people, being dishonest and deceitful entitles AMTT to damages without need of proof.

[69] It is settled law, that the conduct of Farhana post-publication of the defamatory statements up until the day of the decision can and ought to be taken into account, see the Court of Appeal authority of ***Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar [2001] 3 CLJ 65***, where it was held that:

720 "In considering an award for damages for defamation, we are guided by the long established factors as set out by the Federal Court in MGG Pillai 's case as was followed by the learned judge. They are:

1. The position and standing of the plaintiff.
2. The extent of the publication.
3. The mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel.
- 725 4. **The uncertainty undergone in the litigation.**
5. **The conduct of the defendant from the time of the libel down to the very moment of the verdict.**
6. **The absence and refusal of correction, retraction or apology."**

730 See also **Ling Wah Press (M) Sdn Bhd v. Tan Sri Dato Vincent Tan Chee Yioun [2000] 3 CLJ 728; [2000] 4 MLJ 77 FC.**

[70] This Court agrees that the following matters aggravated the hurt and damages suffered by AMTT:

- 735 i) a compensatory trip to Medan, Indonesia arranged by AMTT to Farhana and her group for the earlier September 2018 trip was not mentioned by her in her 4 November 2018 posting;
- ii) she being aware that her defamatory statements may cause AMTT's business to be adversely affected or fail as her Facebook posting on 4 November 2018 said "**Bukan nak tutup periuk nasi orang..**";
- 740 iii) Her refusal to make any correction, retraction or apology right up to her final closing submissions;
- iv) In fact, her conduct in hiding the impugned statements instead of deleting them is evidence of malice and contemptuous of the Court Orders for an injunction obtained ex parte on
- 745 21 November 2018 and by consent on 5 December 2018;

- v) being involved in restraining AMTT's director and its operations manager at the airport and extracting a promise for repayment from AMTT under questionable means; and
- vi) posting the publication one day after having in hand a purported compromise extracted with undue influence.

[71] Damages are normally given as a rolled-up award comprising both general and aggravated damages.

[72] Wherefore, in the circumstances of this case, subject to the issue of illegality which will be dealt with in the concluding part of this judgment, the Court is of the view that a fair and reasonable amount on the particular facts of this case where the evidence was to the effect that its reputation was so badly tarnished that its business practically collapsed with even its investors pulling out, the Court would have granted a rolled-up award of **RM180,000.00** by way of damages - both general or compensatory and aggravated, with interest thereon at 5% p.a. from 5 November 2018 until one day before judgment and interest at 5% on the judgment debt from the date of judgment until full realisation and costs together with the prayers for injunctions in prayers 37 (1) and (2) in the AMTT's Statement of Claim in the Farhana's Suit namely

“(1) Satu perintah injunksi berterusan dan/atau kekal yang menghalang Defendan-Defendan daripada menerbitkan dan/atau menyebabkan penerbitan dan/atau menerbitkan semula dan/atau menyebabkan penerbitan semula sebarang kata-kata fitnah dan/atau artikel fitnah dan/atau laporan-laporan dan/atau komen-komen yang bersifat fitnah yang ditujukan dan/atau merujuk kepada Plaintiff dan/atau Pengarah Plaintiff dan/atau Pengurus Plaintiff dan/atau agen

Plaintif dan/atau pengkhidmat Plaintiff serta sebarang rujukan kepada perniagaan Plaintiff samada secara lisan dan/atau bertulis dan/atau atas talian ("*online*");

780 (2) Satu perintah injunksi mandatori ("*mandatory injunction*" memerintahkan Defendan-Defendan masing-masing mengeluarkan satu permohonan maaf secara bertulis, teksnya yang ditentukan dan dianggap wajar oleh Mahkamah Mulia ini serta menerbitkan yang sama masing-masing di dalam profil facebook Defendan Pertama dan
785 laman web www.mstar.com.my dan Defendan-Defendan menarik balik post facebook Defendan Pertama bertarikh 4.11.2018 yang mengandungi kata-kata fitnah dan artikel fitnah oleh Defendan kedua bertarikh 9.11.2018".

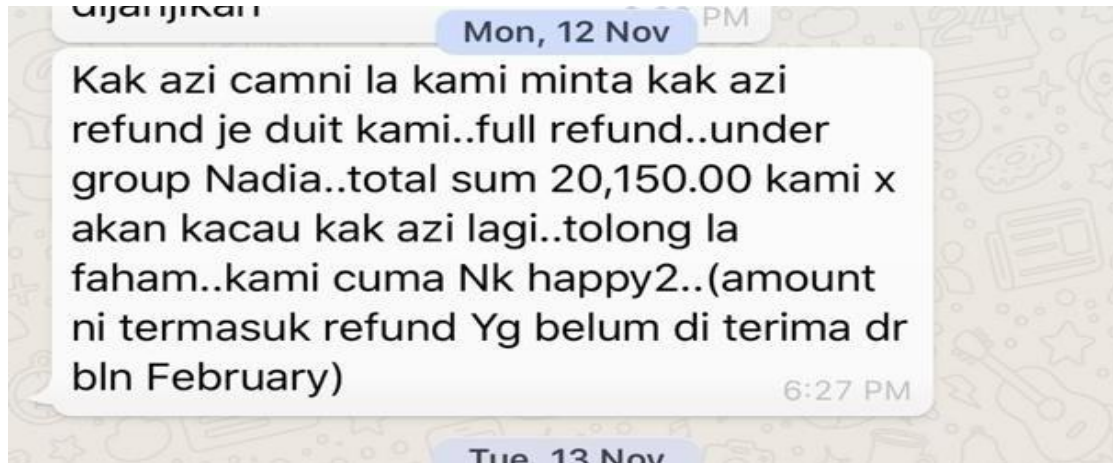
790 **[73]** With that, this Court now comes to the Nadiyah's Suit.

Nadiyah's Suit

Liability

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[74] Following from Farhana's Facebook-post, Azma Idayu binti Abd Shukor (DW3), one of the participants of the tour package taken by Nadiyah's group, contacted PW2 on 12 November 2018 seeking a full refund for their trip to South Korea. AMTT agreed to effect the refund subject to the
800 terms and conditions in respect of their reservation.

[75] A screen shot of the request made by DW3 is set out below:



805

810 [76] However, on 19 November 2018, Nadiyah posted on her Facebook account the following (“Nadiyah’s Facebook-post”):

“Berangan setahun nak ke Korea, malangnya lebur mcm tu aje. Ni namanya tiada rezeki dan ada hikmah disebalik kejadian. Wallahuallam.

815 **Sila ambil perhatian dan berhati-hati dengan Agensi ini Al Maarif Tours & Travel** dan Vista London (diuruskan oleh orang yg sama ye). Diuruskan oleh Azi Hafiza Bt Mohamad dan Suami Muhamad Faizul Kan Bin Abdullah. Trip ke Korea yang sepatutnya berlepas pada 23Nov18 ditunda ke 19Dec18 tanpa sebarang notis awal. **Rupanya MO yg sama digunakan bertahun-tahun sejak 2010. Nasib tak berapa**
 820 **baik sebelum booking dengan agency ni cari review takde pula nampak yg pernah tertipu.** Wallahuallam.

Harini pula baru terima email yang trip ke Korea cancelled. Dan sy diberitahu dalam senarai group **yg sudah terkena**, kesemua trip akan datang ke Korea,Perth dan
 825 Turkey dibatalkan. Memang tak masuk akal.

Doakan urusan kami dipermudahkan untuk dapatkan kembali full refund. In shaa allah..Aamiin..

Senarai refund group :

1. Sabrina (S'wak) RM15,500

830 (stlh dibyr rm27,300-

2. Norlaila (selangor) RM22,800

3. Asmah (Kedah) RM8,300

4. Asiah (kedah) RM12,000
5. Cikgu Hani (KL) RM54,800 (setelah dibayar 102k)
- 835 6. Cikgu nani RM2,790 (Perak)
7. Ghazali (Johor) RM14,970
8. Nad RM20,195(KL)
9. Azah RM12,580
10. Azlina RM17,700(Selangor)
- 840 11. Cg Shukor (Johor) RM100,300
12. Pn Rudziah baki RM60,430 (setelah dibayar RM20,000)
13. **Azran (nearly RM400,000)**
14. Liana (RM 3,720)
15. Noja - RM10,770-00
- 845 16. faridah-RM 10,200
17. Sal RM5,500
18. Maria (Penang) RM13,500
19. Hanizah (Johor) Rm2,200.00
20. Hayati (Johor) RM2,200.00
- 850 21. Noraini (Selangor) *RM12,550
22. Padma RM5980 (Selangor)
23. Muhamad Nor RM5980(Johor)
24. Norfazura 4pax (Rm11960.00)
25. **Rozita RM117,000**
- 855 26. Wan Harinawati RM9,500

Saya rasa bertanggungjawab untuk share perkara ni kerana terlalu ramai yg dah terkena. Dan saya serta kawan2 trip saya menjadi mangsa. So berhati-hati memilih agensi pelancongan.

Mohon pertolongan share post ni **supaya tiada lagi mangsa yang baru sebab dua makhluk Allah ni sangat licik dan masih bebas seolah-olah takde apa yang berlaku.**

#seriknakfollowagensi#owntravelnexttime#1standlast#sabaristiqomah#dugaan#Allah swtknowsthebest

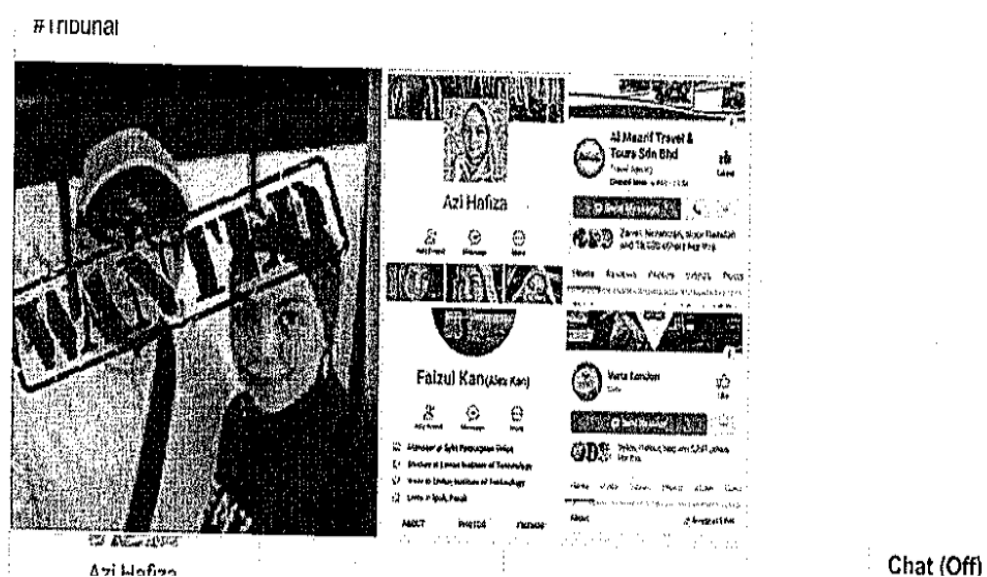
#PDRM

865 #Motac

#KPDNKK

#Tribunal”

870 [77] Against Nadiyah’s Facebook-post of 19 November 2018 was a photograph of a director of AMTT (PW1) and the operations manager of AMTT (PW2) juxtaposed with the word “WANTED”.



875

[78] In Nadiyah’s Facebook-post was a list containing the names of two individuals said to have lost RM400,000.00 and RM117,000.00 but who were actually investors by the name of Azran and Rozita.

880 [79] AMTT submits that the impugned statements in Nadiyah’s Facebook-post were made to portray to the public at large that AMTT was cheating Nadiyah and all the other participants of their tour package and that AMTT was running an illegitimate or illegal business. Added to this, Nadiyah’s Facebook-post imputes that the AMTT and or its officers are wanted
885 criminals.

[80] AMTT asserts that its business reputation and goodwill as a known travel agency in Ipoh was seriously injured and brought into disrepute and it suffered considerable damage and general loss of business, business profits and opportunities brought about by the clear statements and allegations of mismanagement, fraud, dishonesty, misconduct, lack of integrity, and even imputation of a criminal offence against the Plaintiff in Nadiyah's Facebook-post.

[81] Just like Farhana, Nadiyah asserts that the failure of the trip to South Korea was solely caused by AMTT's negligence. And, that her real intention in establishing the Facebook page is to share knowledge with the public so that the same fate will not befall them and that she owed a public duty to inform the public at large.

[82] Under cross examination, Nadiyah admitted that the names on the list in her Facebook-post were obtained from the participants of a WhatsApp Group called "Group Trip Tak Jadi" (the same WhatsApp group of Farhana in Farhana's Suit) and she (Nadiyah) had no personal knowledge of the truth whether or not the individuals listed were actually customers of AMTT and whether any of them had been cheated of any money by AMTT.

[83] Learned counsel for AMTT submitted that none of the individuals whose names were listed in the purported list in Nadiyah's Facebook-post who were called as a witness by the Nadiyah to prove that they had been cheated and sought for the Court to invoke an adverse inference against Nadiyah pursuant to section 114 (g) of the Evidence Act 1950.

[84] However, it has to be borne in mind that the parties have agreed that the evidence led in both the Farhana Suit and the Nadiyah Suit can be used interchangeably. In the Farhana suit, both Farhana (DW1) and Rudziah Binti Ismail (DW2) whose names are on the list in Nadiyah's Facebook-post were in fact called to testify.

[85] Therefore, contrary to AMTT's submissions, there were two persons whose names were on the list of names of victims in Nadiyah's Facebook-post who were called to testify and the Court will not draw an adverse inference against Nadiyah. However, this list of the individuals turned out to be a "copy and paste" job with the list taken from another WhatsApp group and Nadiyah admitted under cross examination that she did not communicate with anyone in the list to verify its contents.

[86] On the cancellation of the trip, this Court finds that it was Azma Idayu (DW3) who cancelled their tour package. She admitted this under cross-examination when she was shown her WhatsApp message mentioned above. She said:

PP1 – Baik, tadi Puan Idayu tak setuju yang sebenarnya Puan Idayu yang membatalkan melalui Whatsapp.

DW3 – Benar Yang Arif

PP1 – Tadi tak setuju, betul ya?

935 *DW3 – Betul*

PP 1 Baik. Soalan saya, kalau tak batalkan kalau Plaintiff dah refund duit puan ataupun duit group puan, adakah puan akan pegi ke Korea?

SD 3 Tidak Yang Arif.

PP 1 Jadi kalau refund itu dah batal lah kan?

940 *SD 3 Tapi saya dah ... (PP 1 mencelah)*

PP 1 Betul atau tidak? Kalau dah refund tu, kira dah batal lah. Sebab puan cakap tadi setuju tak akan pergi ke Korea. Betul?

SD 3 Betul.

PP 1 Jadi kalau dah refund, full refund, maksudnya batalkan sahajalah. Betul atau
945 tidak? Kalau dah full refund seperti mana yang puan cakap ni, maksudnya kamu tak
pergi Korea lah. Maksudnya di batalkan lah. Betul atau tidak?

SD 3 Betul Yang Arif.”

[87] Nadiyah attempted to show that the cancellation was in fact made by
950 AMTT by referring to AMTT’s e-mail dated 19 November 2018 purportedly
cancelling the trip arbitrarily without consulting Nadiyah and the other
participants. This, as pointed out by learned counsel for AMMTT, however,
is far from the truth. It is clear from the WhatsApp text message from DW3
to PW2 that the cancellation was done earlier by DW3 i.e. 12 November 2018
955 and the e-mail was merely a follow-up to the said WhatsApp conversation
between DW3 and PW2.

[88] PW1 admitted under cross-examination that AMTT did not buy [flight]
tickets and did not reserve hotel accommodation for Nadiyah’s group. To my
960 mind, this is consistent with the cancellation of the trip made by DW3 and no
adverse inference ought to be drawn against AMTT that it was cheating
Nadiyah.

[89] This Court accepts the explanation of PW1 and PW2 that the contents
965 of the email sent by AMTT was as though the cancellation was seemingly
made by the AMTT when in fact it was cancelled by DW3 because the email
sent by AMTT was one using the standard template for the cancellation of
trips or bookings initiated by AMTT. As asserted by learned counsel for
AMTT that at best this shows “lousiness” in the way AMTT manages its
970 operation but it does not detract from the fact that it was DW3 who cancelled
the tour.

[90] In any event, for Nadiyah to publish her Facebook-post on 19 November 2018, the same day as the cancellation of her tour package would in any event, lead to the inference that she was reckless, not caring whether the statements were true or not.

[91] Nadiyah's Facebook-post had clearly referred to AMTT, a fact which was also admitted by Nadiyah during her testimony.

[92] That it was published to third parties was also proven with Nadiyah admitting that the Facebook account under which her Facebook-post was made being under her supervision and control with her as the administrator.

[93] Evidence led shows that her Facebook-post was shared by 817 other Facebook public profiles which proves that the impugned statements were published and disseminated to third parties.

[94] In the circumstances, AMTT has satisfied the three elements required to establish defamation as required under the law with Nadiyah's Facebook-post referring to and portraying the Plaintiff as cheating her and the other persons named in her list, that the director and operations manager of AMTT are wanted criminals and publishing the impugned statements. This Court accepts that Nadiyah's Facebook post as a whole, imputes that AMTT and or its officers are wanted criminals and is defamatory in their natural and ordinary meaning and by implication or innuendo as pleaded by the Plaintiff, and consequently, has lowered AMTT's reputation in the estimation of right-thinking members of the society generally. This injures the reputation of the AMTT as a business entity.

1000 **[95]** A careful perusal of the evidence led by Nadiyah and as well as the
evidence elicited by both her learned counsel from the cross examination of
PW1 and PW2 show that there were no charges of cheating against the
AMTT and its officers. AMTT had a travel agency licence for the years 2015
to 2017 but it expired in 2018 and it was in the process of renewing the same.
1005 PW1 testified that he was informed that he could continue to operate
because he was only doing so as an agent in marshalling the participants
and would pay a local operator overseas. This Court understood him as
saying that the overseas part of the tour will be managed by local operators
with the necessary licenses to do so.

1010

[96] Nadiyah was unable to prove on a balance of probabilities that the
defamatory statements published by her were true or substantially true, the
sting of the defamation being that AMTT having cheated her, her fellow
participants as well as a large group of 26 other individuals of hundreds of
1015 thousands of Ringgits.

[97] Wherefore, the defence of justification and fair comment fails.

Damages

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[98] The Court notes that no apology was tendered. Indeed, up until the
trial, Nadiyah, sought to maintain her defence of justification. No evidence
was led to justify the truth of the defamatory statements made.

1025 **[99]** Just as in Farhana's case, conduct post-publication of the defamatory
statements up until the decision is made would be taken into account.

[100] However, unlike Farhana's case, save for the lack of apology and failure to lead evidence to prove the defence of justification, this Court finds there are less aggravating factors and subject to the issue of illegality which this Court will come to next, the Court would award general and aggravated damages to the sum of **RM120,000.00** together with interest thereon at 5% p.a. from 5 November 2018 until one day before judgment and interest at 5% on the judgment debt from the date of judgment until full realisation and costs together with the prayers for injunctions in prayers 27 (a) and (b) in AMTT's Statement of Claim in the Nadiyah's Suit namely:

"a) Satu perintah injunksi mandatori ("*mandatory injunction*") memerintahkan Defendan menarik balik dan/atau memadamkan *post facebook* Defendan bertarikh 19.11.2018 yang mengandungi kata-kata fitnah dan kepalsuan berniat jahat terhadap Plaintiff dan selanjutnya Defendan menerbitkan satu permohonan maaf secara bertulis, teks yang ditentukan dan dianggap wajar oleh Mahkamah Mulia ini serta menerbitkan yang sama di dalam profil facebook Defendan;

b) Satu perintah injunksi berterusan dan/atau kekal ("*perpetual injunction*") yang menghalang Defendan daripada menerbitkan dan/atau menyebabkan penerbitan dan/atau menerbitkan semula dan/atau menyebabkan penerbitan semula sebarang kata-kata fitnah dan kepalsuan berniat jahat dan/atau komen-komen yang bersifat fitnah dan kepalsuan berniat jahat yang ditujukan dan/atau merujuk secara spesifik atau sebaliknya kepada Plaintiff dan/atau Pengarah Plaintiff dan/atau Pengurus Plaintiff dan/atau agen Plaintiff dan/atau pengkhidmat Plaintiff serta sebarang rujukan langsung atau tidak langsung kepada Plaintiff dan/atau perniagaan Plaintiff samada secara lisan dan/atau bertulis dan/atau atas talian ("*online*")."

[101] The Court now deals with the issue raised by both Farhana and Nadiyah on AMTT not being registered with the Ministry of Tourism, Arts and Culture.

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Illegality

[102] Under **Part II of Licensing of Tourism Enterprises**,

i. **Subsection 5 (2) Tourism Industry Act 1992 Act 482** provides that:

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“No person shall carry on or operate, or hold himself out as carrying on or operating-

(a) a tour operating business; or

(b) a travel agency business,

unless it is a company and holds a valid licence granted under this Part;

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ii. **Subsection 5 (3)** provides that:

“Any person who contravenes subsection (1) or (2) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both, and in the case of a continuing offence, shall in addition, be liable to a daily fine not exceeding five thousand ringgit for each day the offence continues to be committed.”

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[103] Section 2 defines “travel agency business” as follows:

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“means any business of providing all or any of the following services:

(a) selling, arranging or making available for commission, tickets entitling a person to travel on any conveyance either by land, sea or air;

(b) selling, arranging or making available for commission, accommodation places within Malaysia or outside Malaysia;

1085

(c) any other services incidental to any of the services enumerated above”

[104] However, during the two abortive trips to Perth in 2018, AMTT operated a travel agency business without a license as well as the proposed trip to South Korea in November 2018.

1090 [105] This was admitted by its director, Muhammad Faizul Kan Bin Abdullah (PW1) under cross-examination on 12 March 2021 (see NE p 23). To a question under cross-examination, he admitted that for the 2018 trip to Perth and the 2018 trip to Korea, AMTT did not have a license to operate a travel agency business.

1095

[106] It is undisputable and in any event, this Court holds that the defamatory statements on AMTT were made and published arising from its operations as a travel agency business.

1100 [107] It is also undisputable that AMTT's claim in both the Farhana and Nadiyah Suits for defamation originates from its business activities which are tainted with illegality in 2018.

[108] In ***Mok Shook Mooi (Aka Sherene Mok) v Perbadanan Pengurusan Prisma Perdana & Ors* [2016] MLJU 1570** HC (a decision which was affirmed by the CA, see ***Able Ridge Sdn Bhd v Sam Weng Yi (Trading As The Sole Proprietor Of Sam Max Enterprise)* [2018] MLJU 2109** at paragraph [311]) Her Ladyship, Su Geok Yiam J dismissed the Plaintiff's claim for damages for the tort of defamation on the ground of public policy because the claim for damages arises from business activities of the plaintiff which were tainted with illegality, which in that case was the carrying out an estate agency business in contravention of the Valuers, Appraisers & Estate Agents Act 1981 (Act 242), viz s. 22(1)(aa), s. 22B(1a) and s. 22C, the Strata

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Titles Act 1985 (Act 318), the in-house rules of the Prisma Perdana
1115 Condominiums, and the by-laws of Dewan Bandaraya Kuala Lumpur by
carrying out a business in a residential unit.

[109] However, ***Mok Shook Mooi (Aka Sherene Mok) v Perbadanan
Pengurusan Prisma Perdana & Ors (supra)*** was decided in 2016. Since
1120 then, there is the UK Supreme Court case of ***Patel v Mirza [2017] 1 All ER***
191 which was applied to claims in contract, see ***Malayan Banking Bhd v***
Neway Development Sdn Bhd & Ors [2017] 5 MLJ 180 FC. The ratio
formulated by Lord Toulson SCJ in *Patel v Mirza* ('the **Patel v Mirza test**')
is as follows:

1125 *"The essential rationale of the illegality doctrine is that it would be contrary to the
public interest to enforce a claim if to do so would be harmful to the integrity of the
legal system (or, possibly, certain aspects of public morality, the boundaries of
which have never been made entirely clear and which do not arise for consideration
in this case). In assessing whether the public interest would be harmed in that way,
1130 it is necessary (a) to consider the underlying purpose of the prohibition which has
been transgressed and whether that purpose will be enhanced by denial of the
claim, (b) to consider any other relevant public policy on which denial of the claim
may have an impact and (c) to consider whether denial of the claim would be a
proportionate response to the illegality, bearing in mind that punishment is a matter
1135 for the criminal courts."* (Emphasis added)

[110] In a running down case, this Court applied the proportionality test laid
in ***Patel v Mirza (supra)***, see ***Mohd Shahril bin Abdul Rahman v Ahmad***
Zulfendi bin Anuar [2021] 12 MLJ 36 HC where the plaintiff who met with
1140 an accident had his damages reduced by 30% as he was riding even though
he had no road tax, no motor license (commonly called "road tax") and no
insurance. In that case, I had opined that a denial of the claim in whole or in
part will serve the underlying purpose of ensuring only qualified drivers and

1145 who have in force a policy of insurance against any third party risks before
they drive. Secondly, I had also opined that a denial of the claim in whole or
in part would serve the public policy that there will be no “free lunch” and will
instil a sense of responsibility that all drivers must be armed with a mentality
that laws are to be obeyed at all times. There is also the third consideration,
whether a denial of the claim would be a proportionate response to the
1150 illegality bearing in mind that punishment is a matter for the criminal courts.”

[111] In this case, whilst it is undeniable that the law demands that AMTT
ought to be duly licensed under the Tourism Industry Act 1992 Act 482, in
my view to dismiss AMTT’s claim in defamation in whole for both the Farhana
1155 and Nadiyah’s Suits would not be a proportionate response to the tortious
acts committed by both Farhana and Nadiyah.

[112] As was held in *Patel v Mirza (supra)*, any punishment against AMTT
for its lack of a license is a matter for the Criminal Courts, especially in this
1160 case seeing that AMTT did have a license from 2015 to 2017 save that there
were some alleged documentary issues in 2018. The Court also note that
Nadiyah’s trip was booked on 31.12.2017 (E7 para 3 SOC), at a time when
AMTT had a license.

1165 [113] However, the Court has to balance such infraction of the licensing
requirements with the need for all who come before the Court for justice for
any grievance they have suffered and the law ought to provide a remedy in
proportion to the infraction, and if need be, to deny the remedy in whole or
in part, as to strongly discourage any who seek to take the law in their own
1170 hands, like what Farhana and Nadiyah had done, for no one is above the
law.

[114] Take another example, should a purchaser who is of the view he has been sold some alleged stale food by Madam A who is hawking by the roadside be at liberty to post her picture and label her as “Wanted”, a cheat and a fraudster and Madam A would be helpless and without remedy because her application for a renewal of her license from the local authority has not been processed? And, what if Madam A is further assaulted for not providing any replacement food sought by this purchaser? Should Madam A be entitled to any civil relief at all? In my view, the answer ought to be a yes. There has to be order and peace in our society and any remedy for any infractions of any perceived rights should be pursued in accordance with the law.

[115] On AMTT’s lack of license, under re-examination (Notes of Evidence pp 24 and 63 line 15) PW1 said:

“....sebenarnya syarikat Al Maarif pada tahun 2015 sehingga 2017 memangnya kita ada lesen untuk pelancongan. Tapi bila sampai tahun 2018...lesen sudah expire, tidak sengaja dan saya dimaklumkan oleh puan Azi dan dia telah renew tentang lesen ini. Oleh sebab ada dua tiga dokumen rasmi yang belum dihantar kepada Matta di Ipoh. Pada masa itu kita dimaklumkan kita boleh beroperasi sebab operasi kita pada masa 2018 itu oleh sebab permintaan yang banyak kita cuma sebagai agen, ia bermaksud kita berkumpul peserta dan membuat bayaran kepada local operator di luar negara.”

“....macam tadi saya cakap, pada 2015 sehingga 2017 memang kita ada lesen untuk pelancongan. Oleh sebab ada masalah sedikit tentang expiry lesen itu, saya dimaklumkan oleh puan Azi, dia sedang berusaha untuk renew balik lesen itu dan pada masa itu permintaan daripada MATTA Perak, perlu beberapa dokumen yang sah untuk

submit together dengan lesen itu dan pada masa itu kita masih boleh beroperasi pada tahun 2018 sebab kita buka..er... how to say..err..kita bukan complete keseluruhan trip. Kita macam agen orang tengah. Kita buat iklan kat sini untuk mengumpulkan peserta-peserta dan syarikat kita akan bayar kepada local operators untuk membawa peserta dari....Kita cuma buat bayaran kepada local operators dan hantar peserta dari ...ke negara-negara tersebut.”

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1210 **[116]** The inference to be drawn is that AMTT is conscious of the need for a license. It was in the process of having its license renewed. The trips organised have to be completed. They act as middlemen to engage overseas local operators who are presumably duly licensed to manage the trip.

1215 **[117]** However, no evidence was led by AMTT to prove that it was permitted to operate without a license pending its renewal application, see section 106 Evidence Act 1950 and in particular illustration (b) which is reproduced hereunder:

1220 “ *When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

ILLUSTRATIONS

(a) *When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.*

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(b) ***A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.***” (emphasis added)

[118] Be that as it may, in the circumstances of both the Farhana and Nadiyah suits, while the Court takes note that at the material time in 2018,

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AMTT did not have a license, a dismissal of the AMTT's claims in full would be disproportionate to the infraction of the need for a license. Instead, in my view a reduction of the damages that AMTT would have been entitled to would serve to instil into members of the public of the need to comply with the law as well as not to take the law into their own hands and towards this end, I am of the view that a 20% reduction in the damages AMTT would have been entitled to, would serve to meet the ends of justice.

Conclusion

[119] In the upshot, AMTT's claims in both the Farhana and Nadiyah Suits are allowed but with damages reduced by 20% (RM180,000.00 less by 20%) so AMTT would be awarded a sum of RM 144,000.00 in the Farhana Suit and a sum of RM96,000.00 (RM120,000.00 less by 20%) in the Nadiyah Suit with interest in both the suits to run at 5% p.a. on each of the award at 5% p.a. from date of the filing of the respective claims until one day before the date of judgment and thereafter on the respective judgment debts at 5% pa from the date of judgment until full realization together with an order for the prayers for injunctions sought.

Farhana' Counterclaim

[120] As for Farhana's Counterclaim, her counterclaim is allowed with judgment to be entered in her favour to the sum of RM2, 076.00 being the balance to be repaid to her for the unsuccessful September 2018 trip together with interest at 5% p a from 4 November 2018 until one day before

the date of judgement and 5% pa on the judgment debt from the date of judgment until full realization.

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[121] By way of clarification and repetition, this Court did not take into account the alleged sum of RM63,220.00 said to be payable as a result of the compromise extracted from AMTT on 3 November 2018 at the KLIA2 Airport in allowing this sum of RM2,076.00 that is ordered to be paid.

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[122] Although AMTT had succeeded in part in its claims but with Farhana and Nadiyah having succeeded in part on the issue of the licensing requirement despite their tortious acts, in the circumstances, the Court orders that each party are to bear their own costs in both the Farhana and Nadiyah Suits as well as Farhana's Counterclaim.

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Dated: 21 January 2022

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**(SU TIANG JOO)
Judicial Commissioner
High Court in Malaya
Ipoh, Perak**

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For Plaintiff : Amir Faliq Mohamad Jamil
(together with Siti Nor Syahidah binti Ismail &
Ahmad Radzmin bin Mohd Razi Rajinder
[Tetuan AmirFaliq and Syahidah]

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For Defendant : Muhammad Hasanuddin bin Mohd Yusoff
(together with Mohamad Ghazali bin Mazri)
[Tetuan Hasanuddin Shafarin & Ghazali]

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1305 *[Notice: This Grounds of Decision is subject to official editorial revision]*

Headnotes

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Defamation - a business entity who was duly licensed prior to the act of defamation but was without a license at the time of the defamation is still entitled to claim in defamation

Damages - application of the Patel v. Mirza test to reduce the award for of

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damages for defamation by 20%

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