
DEFAMATION LAW

MIRROR, MIRROR ON THE WALL, IS THIS COMMENT FAIR AT ALL?

Dated 12th October 2022

INTRODUCTION

In **Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli [2022] 3 MLJ 758**, the Federal Court discussed on whether the Respondent (i.e. the Defendant in the trial court) could rely on the defence of fair comment in a defamation claim commenced by the Appellants (i.e. the Plaintiffs in the lower court). In deciding so, the four elements in established in **Joshua Benjamin Jeyaretnam v Goh Chok Tong [1989] 3 MLJ 1** was scrutinised in detail. For convenience, parties will be referred to as they were in the High Court.

BACKGROUND FACTS

Some time in November 2007, National Feedlot Corporation Sdn Bhd ("**2nd Plaintiff**") entered into an Implementation Agreement and a Loan Facility Agreement with the Government of Malaysia ("**the Government**"), whereby the 2nd Plaintiff was appointed to implement the National Meat Policy in 2006. The project, which was funded by the Government, was intended to reduce the nation's dependency on imported meat. Under the Loan Facility Agreement, the Government provided the 2nd Plaintiff a loan facility of RM250 million to fund the project. It is pertinent to note that a covenant to this agreement was that the sole purpose of the money disbursed was only to be used for the project.

However, a sum of RM71 million out of the RM250 million was drawn down and deposited in a fixed deposit account held by the 2nd Plaintiff. The 2nd Plaintiff was then subjected to audit by the Auditor General. In November 2011, a published audit report shed light onto the failings of the project.

During a press conference on 7th March 2012, the Defendant made a number of allegations against the Plaintiff. Summarily, the sum of RM71 million that had been deposited with Public Bank was used as a leverage for personal loans that were used for the purchase of eight (8) units of commercial offices in KL Eco City, an office block under development in Kuala Lumpur ("**Eight Units**"). The Defendant relied on certain documents that he received anonymously in making the statement. Following this, the Plaintiffs commenced a defamation action, wherein the Plaintiffs claimed that the statement made by the Defendant ordinarily suggest the following imputations:-

- (a) the Plaintiffs misused public funds for their own personal gain contrary to public interest, in particular the government loan given to the second appellant for the project;
- (b) the 1st Plaintiff had abused his position as the chairman and director of the 2nd Plaintiff to misappropriate the said government loan in order to purchase the eight units; and
- (c) the 1st Plaintiff took advantage of his marital status with Datuk Seri Shahrizat Jalil, during her tenure as Member of Parliament of Lembah Pantai to acquire the eight units.

HIGH COURT'S AND COURT OF APPEAL'S FINDINGS

In deciding that the impugned statement by the Defendant was defamatory, the High Court stated that a reasonable reader reading the impugned statement would conclude that public funds had been dishonestly misappropriated by the Plaintiffs and that these funds were put at risk by the conduct of the Plaintiffs. Upon deciding that the statement was indeed defamatory, the High Court held that the defence of fair comment was not available to the Defendant as the statements made by the Defendant were expressed as **statement of facts** and **did not constitute a comment**. Further, the basic facts available to the Defendant did not support the inference that he had drawn from those facts.

Aggrieved by the decision of the High Court, the Defendant appealed to the Court of Appeal. The Court of Appeal dismissed the Defendant's appeal and affirmed the High Court's decision.

FEDERAL COURT'S DECISION

Parties agreed at the hearing of the Plaintiffs' application for leave that several grounds of the decision of the Court of Appeal were beyond the pleaded case of both parties. Thus, only the issue of the defence of fair comment was to be considered and ventilated in the Federal Court.

The Federal Court relied heavily on the four elements laid down in the case of **Joshua Benjamin Jeyaretnam v Goh Chok Tong** [\[1989\] 3 MLJ 1](#) in establishing that the Defendant was successful in his defence of fair comment. Since parties have already agreed that public interest (which is an element under *Joshua Benjamin*) is not disputed in the present case, the three elements and the reasons relied on by the Federal Court in establishing the fulfilment of the elements are as follows:-

(a) Words must be in a form of comments / inferences

It is necessary to ascertain whether the impugned statement is **a statement of fact** or is it the **Defendant's opinion and inferences made from the facts**. A comment, opinion or inferences of fact are different from a statement of fact. However, all of the aforementioned must be based on facts. The Federal Court viewed that an ordinary or reasonable man upon reading the impugned statement and the way it was expressed, the context in which it was set out and the content of the entire statement would regard them as the **Defendant's comments and inferences made from the facts**. The facts relied on by the Defendant in making his comment were also clearly identified in the publication, which allows the readers to form their own opinion as to whether the Defendant's comments were correct.

(b) Opinions / inferences must be based on true substratum of facts

In relying on the defence of fair comment, the Respondent must firstly establish a **sufficient substratum of facts upon which he draws inferences**. Secondly, **those facts on which the**

comment or inferences were made must be truly stated so that the readers may form their own opinion whether the comment or inferences were well founded. To constitute a sufficient substratum of fact, it is not required that all the facts on which the respondent's comments or inferences were based on should be stated in order to admit the defence of fair comment.

The Federal Court in this case relied on the facts that the documents that were sent to the Defendant anonymously constitute sufficient substratum of facts. Based on this substratum of facts, the Defendant made the conclusions in the impugned statement which were, in the Federal Court's views, are the Defendant's opinion and inferred from the facts referred to. The extent of the defence of fair comment only revolves around comments or inferences honestly made on existing substratum of facts that are truly stated. What is required is that the comment has to identify, at least in general terms, the matters on which it is based.

(c) Comment / inferences must be fair

In considering whether the comment / inferences made by the Defendant was fair, the Federal Court found it relevant to consider the circumstances leading to the press conference held by the Defendant on 7th March 2012. In 2011, the Auditor General audited the performance of the project. The Auditor General's report was presented to Parliament in October 2011. The **failures and the weakness of the project were highlighted in the report.** As public funds were involved, the report by the Auditor General drew public's attention. **The disclosure created grave public concern as it raised the issue of accountability, transparency and good governance in respect of those involved in the affairs of managing public funds.** It received wide media coverage and was also subject to much debate in Parliament at the material time.

As indicated earlier, there was sufficient substratum of facts to warrant the respondent making the impugned statement. Given all this, in the Federal Court's view, the Defendant's conclusion that public fund had been misused as a leverage for the Public Bank's loan was an opinion and inferences that a fair-minded person would have honestly made in the circumstances.

KEY TAKEAWAYS

Despite the growing trend of members of the public speaking out on social and political issues over social media platforms, recent decisions made by the courts in relation to defamation claims would show that there has not been a consistent ruling indicating the courts' preference or inclination. It will be on a case-by-case basis and as such, one should exercise caution in penning down his/her thoughts.

Vide this Federal Court's decision, it shows the importance of how a statement should be expressed or worded in order to ensure that a statement is a comment rather than a statement of fact as the defence of fair comment will not be made available to the latter. Having said so, it has always been an uphill task for not only the readers but also the courts hearing a defamation claim to identify and distinguish a comment from a statement of fact.

In addressing such difficulty, certain wordings may be adopted when penning down one's thoughts such as "opine", "my views", "my understanding" and "my thoughts" to clearly distinguish basic facts identified and being relied upon by an author and the author's own comments. On this note, it is also important for an author to include the basic facts relied upon in order for a reasonable or ordinary man to be able to form his/her own opinion with the facts made available.

Whether or not a comment is fair goes back to the circumstances leading to how and when the statement was made. Considering all the elements fulfilled or unfulfilled, the Courts can then decide as to whether the defence of fair comment shall stand or fall.

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