DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA

PERMOHONAN SIVIL NO.: 08(L)-4-06/2020(W)

Dalam perkara komen-komen dalam suatu artikel bertajuk *CJ orders all courts to be fully operational from July 1*

Dan

Dalam perkara suatu permohonan minta kebenaran untuk memulakan prosiding komital kerana menghina Mahkamah selaras dengan Perkara 126 Perlembagaan Persekutuan dan Aturan 52 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara mengenai Seksyen 13 Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara mengenai Kaedah 3 Kaedah-Kaedah Mahkamah Persekutuan 1995

Dan

Dalam perkara Aturan 92 Kaedah-Kaedah Mahkamah 2012

PEGUAM NEGARA MALAYSIA … PEMOHON

DAN

1. MKINI DOTCOM SDN BHD
(No Syarikat: 489718-U)

2. KETUA EDITOR, MALAYSIAKINI … RESPONDEN-RESPONDEN

CORAM:

ROHANA BINTI YUSUF, PCA

AZAHAR BIN MOHAMED, CJM

ABANG ISKANDAR BIN ABANG HASHIM, CJSS

HAJI MOHD ZAWAWI BIN SALLEH, FCJ

NALLINI PATHMANATHAN, FCJ

VERNON ONG LAM KIAT, FCJ

ABDUL RAHMAN BIN SEBLI, FCJ

JUDGMENT OF THE COURT (MAJORITY)

Introduction

[1] The Honourable Attorney General of Malaysia ('AG'), brought this contempt proceeding against an online news portal, Mkini Dotcom Sdn Bhd (Company No. 489718-U) ('Malaysiakini') as the First Respondent and its Editor-in-Chief, Gan Diong Keng ('Steven Gan') as the Second Respondent.

[2] To draw the chronological background to the Application before us, it all began when Malaysiakini published an article entitled *"Musa Aman acquitted after prosecution applies to drop all charges"* on 09.06.2020. In gist, it pertains to the acquittal of the former Sabah Chief Minister Musa Aman of 46 charges of corruption and money laundering. Coincidently on the very same day, the Office of the Chief Registrar issued a press release by the Chief Justice for all Courts to be fully operational from 01.07.2020, in line with the announcement that the country was moving into the recovery phase of the Movement Control Order. Malaysiakini republished from Bernama that press release as an article entitled *"CJ orders all courts to be fully operational from July 1"*.

[3] Following that press release, the following comments ('impugned comments') by third party online subscribers appeared on Malaysiakini's website on 09.06.2020:

(i) *Ayah Punya kata*:

The High Courts are already acquitting criminals without any trial. The country has gone to the dogs;

(ii) *GrayDeer0609:*

Kangaroo courts fully operational? Musa Aman 43 charges fully acquitted. Where is law and order in this country? Law of the Jungle? Better to defund the judiciary!

(iii) *Legit:*

This Judge is a shameless joker. The judges are out of control and the judicial system is completely broken. The crooks are being let out one by one in an expeditious manner and will running wild looting the country back again. This Chief Judge is talking about opening of the courts. Covid 19 slumber kah!

(iv) *Semua Boleh – Bodoh pun Boleh:*

Hey Chief Justice Tengku Maimun Tuan Mat - Berapa JUTA sudah sapu - 46 kes corruption - satu kali Hapus!!! Tak Malu dan Tak Takut Allah Ke? Neraka Macam Mana? Tak Takut Jugak? Lagi – Bayar balik sedikit wang sapu – lepas jugak. APA JUSTICE ini??? Penipu Rakyat ke? Sama sama sapu wang Rakyat ke???; and

(v) *Victim:*

The Judiciary in Bolihland is a laughing stock.

[4] A week after the impugned comments were published, on 15.6.2020, the AG by way of an *ex-parte* notice of motion in Enclosure 2 applied for leave to commence committal proceedings against both Respondents for publishing the impugned comments.

[5] The *ex parte* application was heard on 17.6.2020. Notwithstanding it was an *ex parte* hearing, learned counsel for the Respondents attended the Court proceeding at ex-parte hearing for two main reasons. First, to preserve the right of the Respondents to apply for striking out of the AG's *ex parte* application. Secondly, to inform the Court of

representation made on behalf of the Respondents to the AG, seeking for a withdrawal of this contempt application.

[6] Upon hearing the leave application this Court, being satisfied that a *prima facie* case had been made out, granted the AG leave to commence committal proceedings against the Respondents, pursuant to O. 52, r. 3(1) of the Rules of Court 2012 (ROC). The AG then, on 18.6.2020 proceeded with the substantive application in Enclosure 19 for committal orders against the Respondents.

The Setting Aside Application

[7] The Respondents in Enclosure 22 applied to set aside the application of the AG. Enclosure 22 was supported by an affidavit deposed by the Second Respondent (Enclosure 23) citing the grounds that the AG's application failed to disclose a *prima facie* case as well as procedural non-compliance. We heard Enclosures 19 and 22 together on 02.07.2020 and dismissed Enclosure 22.

[8] In dismissing Enclosure 22, we held that a *prima facie* case had been made out. And by virtue of section 114A of the Evidence Act 1950, the Respondents were deemed to have published the impugned comments.

[9] On procedural non-compliance, it was first alleged by the Respondents that the AG failed to adhere to the requirement of O. 52, r. 2B of the ROC in making a direct application without first giving a formal notice to show cause. Such a failure, it was submitted, rendered the application by the AG a nullity. On the facts of this case, however we held that the failure to show cause as required by O. 52, r. 2B of the ROC was not fatal or prejudicial.

[10] In this regard, we have considered the two decisions of the Court of Appeal in **Uthayakumar a/l Ponnusamy v Abdul Wahab b Abd Kassim & Ors** [2020] 2 MLJ 259 and **Tan Boon Thien & Anor v Tan Poh Lee & Ors** [2020] 3 CLJ 28 cited by the Respondents to substantiate their case.

[11] In **Uthayakumar** (supra) the Court of Appeal was merely articulating the procedure laid down in O.52, r.2B of the ROC. While in **Tan Boon Thien** (supra) the contemnor complained of the non-compliance of the same Order after leave was granted against him. There was nothing in these two cases to denote that the contemnors were in fact aware of the application made against them, before leave was obtained. On the contrary, the Respondents here were fully aware

of the application by the AG when learned counsel for the Respondents appeared on the date of the *ex parte* hearing, for reasons we have alluded to earlier. Since the Respondents were fully aware of the AG's application, in our view the failure of formal notice did not prejudice the Respondents.

[12] The Respondents further contended that commencing this contempt proceeding at the highest court would deny them of the necessary right of appeal opened to them. Having perused and considered the nature of the impugned comments which were calculated to implicate the Judiciary as a whole, and which also include the Chief Justice of the Federal Court, this Court has no hesitation in holding that it is the correct and appropriate forum to hear the AG's application. This Court in fact is duty bound to deal with such scurrilous attack in order to uphold the image, integrity and public confidence in the Judiciary.

[13] The next procedural non-compliance raised was in relation to the naming of the Second Respondent. In this Application the AG named the Second Respondent as "Ketua Editor, Malaysiakini" which was argued as a failure to name the alleged contemnor in his name, as there is no such position in Malaysiakini. Instead, what it has is 'Editor-in-Chief', a position held by one Steven Gan. In our view, this non-compliance was

a curable technicality. This Court took the same position in **Malayan Banking Berhad v Chairman of Sarawak Housing Developer's Association** [2014] 5 MLJ 169. We agree with that decision that so long as the party and the capacity in which he is being sued is identifiable, such error does not cause injustice, hence not fatal to the case. Having dismissed Enclosure 22, we then proceeded to hear the application in Enclosure 19.

The Applicable Laws on Contempt of Court

[14] Before deliberating on Enclosure 19, this would be a suitable juncture to briefly state the applicable laws on the subject of contempt. Power to punish for contempt flows from '*raison d'etre'* for a court of law to uphold the administration of justice. All courts are empowered to punish for contempt committed when the courts are in session. The superior courts are empowered to punish any contempt of itself as provided in Article 126 of the Federal Constitution read with section 13 of the Courts of Judicature Act 1964. Article 126 of the Federal Constitution provides specifically for the power to punish for contempt when it states:

> **"Power to punish for contempt**
> **126.** The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself."

[15] As Malaysia does not have any specific legislation to regulate on contempt of court, regard has to be made to the English common law principle by virtue of section 3 of the Civil Law Act 1956. It was elucidated in **R v Gray** [1900] 2 QB 3**6**, the term 'contempt of court' has always been referred to as -

> "… Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one case of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke L.C. characterised as scandalising a court or a judge."
>
> [Emphasis added]

[16] Further, Lord Diplock in **Attorney General v Times Newspaper Ltd [1974] AC 273** has observed that:

> "… 'Contempt of court' is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms".

[17] It can never be said enough that the purpose of the law on contempt is not to protect the dignity of individual judges but to protect the administration of justice. According to John Donaldson MR in

Attorney-General v Newspaper PLC [1998] Ch. 333, the law of contempt is based on the broadest principle that the courts cannot permit any interference with the due administration of justice. Its application is universal.

[18] Echoing this stance, this Court in **Zainur Zakaria v Public Prosecutor** [2001] 3 MLJ 604 already emphasised that:

> "the jurisdiction of the courts does not exist to protect the dignity of individual judges personally. It serves to protect the Judiciary as the third arm of government rather than individual judges."

[19] Since its purpose is to maintain public confidence in the administration of justice, it is only logical that criticisms of judges as individuals, rather than as judges, should not be the subject of contempt. The public confidence had, in no uncertain term ruled that criticisms of the Chief Justice which are not directed at him in his official capacity as a Judge, are not contempt as explained in **In the Matter of a Special Reference from the Bahama Islands** [1893] AC 138. In such cases, the Judge can of course sue for defamation or libel to remedy any damage to his personal reputation.

Liability of Media Publication

[20] Legal liabilities on publishers of contemptuous and offensive publication needs a particular mention. The law on print publication which is regarded as the traditional media before the advent of the modern media and the internet was invented, is somewhat settled.

[21] In **Borrie & Lowe: The Law of Contempt, 3rd ed., (London: Butterworths, 1996)** at p. 85, the learned authors opined that a matter can be regarded as "published" when it is made available to the general public or at any rate a section of the public which is likely to comprise those having a connection with the case. The extent of a publication's circulation may be vital. The bigger the media outlet's reach, the less likely that it can successfully argue that its publication is not likely to come to the notice of a witness, etc. In **R v Odham's Press Ltd ex p AG [1957] 1 QB 73 at 78,** Lord Goddard, in relation to a case of contempt involving the *People* newspaper said:

> "…considering the proprietors claim a circulation of over four million copies a week, there is a strong probability that it would be read by at least some of those summoned as jurors.".

[22] Hence as for the traditional media, where the contempt has been published by a newspaper or broadcasted by television or radio, the

settled law is that it is not only the author who may be held liable for the publication of contemptuous statement, but also anyone who plays a significant role in the act of publication or distribution of such statement.

Internet Posting in Other Jurisdictions

[23] The legal position is not as straight forward when it comes to the publication of the modern media, by third party internet postings. The legal liability of editors in the modern media is blurred by the fact that these postings go direct to the media platform without the usual editing process. Some jurisdictions take the view that an important consideration must be placed on whether there is an active or deliberate act in making or allowing the postings of the impugned statements by the internet content provider and its editorial team. The list of cases below discusses the varied approaches taken on this subject in some jurisdiction.

[24] In **Totalise Plc v Motley Fool Ltd** [2001] IP & T 764, the High Court of New Zealand found website operators not liable for the publication in contempt of court. The decision was justified on the basis that, unlike a journalist who is at law responsible for the material that he publishes, the website operators exercise no editorial control over what is posted on their discussion boards. Their role being merely to provide

facilities for the public at large to convey their views. In other words, the Court in **Totalise (supra)** drew a distinction between the journalists who has to take responsibility for the information that he decides to publish in a print media to that of the automated processes of a digital intermediary.

[25] In the United Kingdom case of **Bunt v Tilley & Ors** [2006] 3 All ER 336, Eady J observed at para 23:

> "Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of the relevant words. It is not enough that a person merely plays a passive instrumental role in the process. (See also in this context Emmens v Pottle (1885) 16 QBD 354 at 357 per Lord Esher MR.)"

[26] In the Australian case of **Competition and Consumer Commission v Allergy Pathway Pty Ltd** [2011] FCA 74, Finkelstein J found the respondent liable for contempt of court for breaching the undertaking by making several publications including testimonials written and posted by a third party on the respondent's Facebook wall. The respondent was held liable on the basis that it had accepted

responsibility for the publications when it knew about the comments and failed to remove them. The Judge accepted that to impose legal responsibility on a person for an offence of contempt, it was essential to demonstrate a degree of awareness of the words or an assumption of general responsibility for their publication. This case illustrates a point that knowledge, in the form of 'a degree of awareness' is sufficient to establish the *mens rea* element.

[27] In the Canada case of **Weaver v Corcoran** 2015 BCSC 165**,** the Supreme Court of British Columbia had considered the issue of liability for third-party defamatory comments in the reply section of the online edition of the *National Post* newspaper. The plaintiff was a professor at the University of Victoria and a well-known scientist in the field of climate change. He claimed that four articles published by the newspaper defamed him. He sued the *National Post*, its publisher, and the journalists who authored the articles. He also claimed that the defendants were liable for numerous reader postings made in response to each of the defaming articles.

[28] To find liability, the Canadian Court held that the plaintiff must prove an active or deliberate to constitute defamation. Until awareness occurred, either by internal review or specific complaints being brought

to the attention of the *National Post* or its columnists, the *National Post* was considered to be in a passive instrumental role as it had taken no deliberate action amounting to approval or adoption of the contents of the reader posts. Only on failure to act or take immediate action upon being aware, would they be considered publishers as of that date.

[29] Delfi AS v Estonia (Application No. 64569/09) (2015) (ECtHR)**,** is a case from Estonia which had gone up to the Grand Chamber of the European Court Human Rights ('ECtHR'). It was decided in 2015. The Grand Chamber affirmed the decision of the Supreme Court of Estonia by a majority of 15:2 in favour of the State of Estonia. It was found that the applicant company had been able to exercise a substantial degree of control over the readers' comments. Hence it was in a position to predict the nature of the comments on a particular article and was therefore liable to promptly take technical or manual measures to prevent defamatory statements from being made public.

[30] A not dissimilar approach was taken in the Australian case of **Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty v Voller** [2020] NSWCA 102**.** There, the Court of Appeal of New South Wales held that the critical issues on publication rest on whether the applicants were entitled to the defence of innocent

dissemination under section 32 of the Defamation Act 2005 (NSW). This was particularly so when the respondents were not instrumental in participating in publishing the defamatory statements. The Court in affirming the primary judge's decision applied the test of primary and subsidiary publishers. It held that the respondents were the primary publishers and the commentators were the subordinate or subsidiary publishers. The respondents were found to be primary publishers who participated and were instrumental in bringing about the publication of the defamatory statements and were liable irrespective of the degree of participation in publication.

[31] This line of cases briefly states the legal position of the various jurisdictions on the subject of internet publication. The courts in the respective jurisdictions resorted to different approaches in determining the liability of internet publication by third party online users. We are mindful of the applicability of decisions from other jurisdictions to ours, given the differences in the legal backgrounds, rules and regulations.

The Case Before Us

[32] We now come to the case before us. First, we note with significance that the contemptuous nature of the impugned comments in this Application is beyond dispute. The Respondents had admitted that

the comments are indeed offensive, inappropriate, disrespectful and contemptuous. The Respondents too regretted the publication of such impugned comments and it was not something the Respondents condoned. Given such consensus, we do not intend to deliberate further on what constitutes contempt in law.

[33] The Application by the AG as the Applicant here raises complaint that the Respondents facilitated the publication of the impugned comments. It was posited that by facilitating the publication of the impugned comments, section 114A of the Evidence Act came into play to presume that Malaysiakini and the Second Respondent are under the law the publishers of the impugned comments.

[34] With the invocation of that presumption under section 114A(1) of the Evidence Act coupled with the contemptuous nature of the impugned comments, it was submitted that the Applicant had made out a *prima facie* case for contempt of court against both Respondents. There would be no requirement for the Applicant to prove an intention to publish on the part of the Respondents.

[35] Though admitting that the said impugned comments are contemptuous and not condoned by them, the Respondents maintained

that they both played no role in publishing them. The crux of the Respondents' case is in essence; they cannot be held liable for contempt because they were not the direct author or editor of the impugned comments. They emanated from third party online subscribers, albeit on the First Respondent's cyber platform. In short, the Respondents were saying that they were not the makers or the publishers of the impugned comments, nor did they have anything to do with the publication of them.

Publisher of Impugned Comments

[36] The issue confronting this Court brings into focus the underlying conflict and tension between imposing responsibility on an internet content provider and the safeguards that it provides. This problem has been the subject of considerable debate for many years. The emphasis placed on freedom of speech is increasingly controversial in the current cyber world. One popular school of thought is that imposing liability on intermediaries to monitor content is necessary for hate speech, fake news, bullying or invasion of privacy or any area bordering on crime, such as contempt. This concern is needed to ensure and protect the social environment that we inhibit online. It must reflect certain norms of

acceptable conduct not only to preserve the rights of individual but also to preserve the social norms of any nation.

[37] One cannot insist on freedom of speech which transgresses on the rights of others in society. Such a right cannot, above all extend to a right to undermine the institution of the Judiciary, which will ultimately bring chaos in the administration of justice.

[38] There is indeed a real need to enforce the law to maintain and uphold social norms in our society. A technological intermediary cannot be allowed to enable its wrongful behaviour to escape liability. However, common law emphasises on personal liabilities. In general term, if a person is not personally responsible for causing harm, he cannot be held accountable for the harmful act.

[39] The question is whether there should there be any differing treatment between the publication of the article by the internet content provider itself and that of the comments published or posted by third party online subscribers. We know that only third party online subscribers can post comments and not the readers at large. The question to be asked is why do platform providers around the world insist on allowing the right to comment only to registered subscribers. The

reason has to be for want of control over who and what can be posted, besides perhaps for commercial reasons.

[40] In this regard, we are mindful that there is no clear jurisprudence that has developed a precise theory to determine when an online intermediary who creates a technology, system or platform that enables wrongful behaviour will be liable. The blame has now to be considered.

[41] It falls on this Court now to determine the extent of liability of an intermediary like the First Respondent here, over the impugned comments. In all the earlier cases of pre-internet days, the liability of the publishers in law is clear. Those were days when the publishers were directly responsible and liable for whatever they published in the print media. Those materials published were subjected to editing by the editors. In the current arrangement, the First Respondent was not the one who authored the impugned comments. The authors were their third party online subscribers.

[42] Harkening to the general principle of law that one cannot be held liable for causing harm unless he committed the harmful act, the Respondents contended, they cannot be held liable for the acts of others, such as the third party online subscribers.

[43] The cases referred to earlier on online publication demonstrates the difficulties faced by the court in pinning down the role of publication on the internet content provider when the comments were made and posted by third parties.

[44] It must be to resolve this difficulty that the Malaysian Parliament enacted section 114A of the Evidence Act. The provision as the wordings suggest aims at presuming responsibility of publication on the internet platform provider by dedicating specifically section 114A to such a subject. To better appreciate the law, it is useful to reproduce here that provision *in extensor*:

> "**Presumption of fact in publication**
>
> **114A.** (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.
>
> (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

(4) For the purpose of this section—

(a) "network service" and "network service provider" have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998 [*Act 588*]; and

(b) "publication" means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer."

[45] The presumption may be invoked against any person whose name appears on the publication as either the owner, host, administrator, editor, or sub-editor. It is beyond argument that Malaysiakini as the First Respondent depicted itself as the host to the publication and by virtue of section 114A(1), Malaysiakini is presumed to have published the impugned comments. We will deal with the possible presumption against the Second Respondent later.

[46] With the presumption in place, in our view the AG had overcome the hurdle of imputing responsibility of the publication on the First Respondent. The term "presumption" properly describes the process

whereby, upon the proof of the required basic fact or facts, the existence of the presumed fact may be inferred from it (see **Alma Nudo Atenza v Public Prosecutor and another appeal** [2019] 4 MLJ 1 at 132 (FC); **Abdullah Atan v Public Prosecutor** [2020] 1 LNS 917 (FC), **C Tapper, Cross & Wilkins Outline of the Law of Evidence, 6th ed (London: Butterworths, 1986)** at 39; **M Hirst, Andrews & Hirst on Criminal Evidence, 3rd ed (London: Sweet & Maxwell, 1997)** at 115. It is an alternative mechanism to prove a fact other than by adducing direct evidence.

[47] Section 114A was legislated *via* Amendment Act A1432 in 2012. The Explanatory Statement to the Bill outlined the objective of enacting this provision. It sought to provide for the presumption of fact in the publication. This presumption will assist in identifying and in proving the identity of an anonymous person involved in the publication through the internet.

[48] The Hansard of the Dewan Rakyat during the tabling of the amendment on 18.04.2012 revealed that the objective was to alleviate problems and weaknesses that occur in cybercrime activities on the internet. One of the main aims was to tackle the issue of internet anonymity. We refer below to the excerpts of the revealing speech read

out in Parliament by the Minister to appreciate the rationale behind section 114A:

> "Perkembangan yang pantas dalam penggunaan internet dan teknologi maklumat pada masa kini telah membawa kepada berleluasanya jenayah siber dan kesalahan jenayah yang dilakukan melalui internet. Sehubungan dengan itu, kerajaan telah mengenal pasti bahawa Akta Keterangan 1950 perlu dipinda bagi menangani isu ketanpanamaan internet iaitu, dengan izin, internet anonymity.
>
> Susan W. Brenner, seorang professor undang-undang dan teknologi di University of Dayton School of Law telah menggambarkan isu internet anonymity, dengan izin, seperti yang berikut, dengan izin. "A man can be a woman, a woman can be a man. A child can be an adult, a foreigner can pass for a native. All of which makes the apprehension of cyber criminal that much more difficult". Penggunaan internet membolehkan sesiapa sahaja menyembunyikan identiti sebenar mereka dan ini menjadikan 'ketanpanamaan' pelaku kesalahan jenayah satu halangan paling besar dalam menangani aktiviti jenayah siber. Jenayah yang dilakukan melalui internet seperti menghasut, menipu, menghina mahkamah, menceroboh dan mencuri maklumat.
>
> …
>
> Walaupun dapat dikenal pasti dengan jelas lokasi, alamat IP dan pemiliknya tetapi amat sukar untuk membuktikan siapakah yang sebenarnya menghantar e-mel tersebut. Penyelesaian bagi masalah ini ialah dengan mengalihkan tumpuan kepada pihak lain yang boleh dikenal pasti seperti pemilik komputer, pemilik alamat IP, IP address, dengan izin, pemilik alamat e-mel dan pemilik kelengkapan dan peralatan yang daripadanya kesalahan jenayah dilakukan dan mengenakan anggapan liabiliti

ke atas mereka tanpa mengira bahawa penglibatan mereka adalah secara langsung atau tidak langsung.

Oleh yang demikian, kerajaan mencadangkan peruntukan sewajarnya mengenai anggapan yang berasaskan owner honest principal dimasukkan dalam Akta Keterangan 1950. Tujuan peruntukan anggapan berasaskan owner honest principal, dengan izin, adalah untuk meringankan beban pembuktian berhubung dengan fakta tertentu. Walau bagaimanapun, pihak pendakwa yang ingin bersandar kepada peruntukan anggapan mesti membuktikan terlebih dahulu kewujudan fakta-fakta tertentu sebelum anggapan boleh dibuat terhadap seseorang.

Apabila wujud keterangan yang cukup untuk dibuat anggapan terhadap seseorang dan mahkamah berpuas hati bahawa anggapan boleh dibuat, beban pembuktian untuk membuktikan atau menyangkal anggapan itu berpindah kepada orang yang terhadapnya anggapan dibuat. Beban pembuktian orang yang terhadapnya anggapan dibuat adalah atas imbangan kebarangkalian, dengan izin, balance of probabilities yang lebih ringan daripada beban pembuktian yang diletakkan ke atas pihak pendakwa."

[Emphasis added]

[49] From the above speech, it is apparent that the challenges in identifying cybercriminal trickle down to tracing the offenders who naturally can hide behind the cloak of internet anonymity. Although the email address, IP address, location, owner of the computer can be traced, the verification of the identity of the sender or commentator

remains difficult. This warranted a provision on presumption based on the ‘owner honest principal’ to ease the burden of proof in respect of certain facts. At first blush, the principal actor such as the internet owner etc. should be the first target to be imputed with liability.

[50] However, the Minister in his statement did caution that the Public Prosecutor must be able to prove the existence of the basic facts before invoking that presumption.

[51] Plainly stated, the presumption in section 114A is a rebuttable one. Rebuttal raised must be on the balance of probabilities.

Rebuttals raised by the Respondents

[52] The Respondents attempted to rebut that presumption, taking the line of defence that they are not to be held responsible simply because they have no knowledge of the impugned comments. After all, they were not originated or authored by them.

[53] The First Respondent denied having knowledge through an affidavit deposed by its Director, Premesh Chandaran s/o Jeyachandran dated 29.06.2020 (in Enclosure 32). The denial of knowledge was anchored on the following facts:

(i) there was no requirement under the law which obligates the Respondents to moderate every comment posted by the third party subscribers;

(ii) neither of them authored the impugned comments;

(iii) neither of them were involved in the posting of the impugned comments;

(iv) neither of them moderated, or played any direct role in publishing the impugned comments on the news portal unless it was flagged for containing a “suspected word” or was reported by other users;

(v) neither of them had been proven to have been actually aware that the impugned comments had been posted and that the impugned comments did not contain banned words or any “suspected word”; and

(vi) as for the Second Respondent, he denied any involvement whatsoever, since he was not the “Content Application Service Provider” within the meaning of section 6 of the Communications and Multimedia Act 1988 and he could not be viewed as being a publisher of the impugned comments. Furthermore, there is no

legal basis to hold him vicariously liable for the acts of the First Respondent.

[54] The explanation put forth above can be summed up as this. It became aware of the publication of the impugned comments only upon being alerted by the police. The First Respondent maintained ignorance of it until 12.06.2020 when the police contacted its Executive Director Mr R.K. Anand.

[55] In short, the First Respondent was utterly oblivious to the existence of such comments until being so alerted. It was only after that alert at about 12.50 pm that the First Respondent became aware and acted responsively. In promptness, the editorial team immediately reviewed the impugned comments and removed them together with other offensive comments at 12.57 pm on the same day.

[56] According to the Respondents, third party online subscribers have been allowed to post comments on news reports published on the online news portal of the First Respondent since August 2009. Currently, the First Respondent said it receives 2000 comments each day.

[57] The First Respondent explained the measures it had taken to safeguard itself from both pre and post-publication comments by third party subscribers. It mainly relies on three safeguards. The first by its Terms and Conditions ('T&C') warning subscribers that abusive posting offending any law or which create unpleasantness would be banned.

[58] Second, it installs a filter program which disallows the use of certain foul words. Failing that filter any article or comment would not get posted. This filter program also is used to review third party comments.

[59] Third is the peer reporting system. This process entails other users or readers of the online news portal to report on offensive comments. Only upon the receipt of such report, will an editor immediately examine and decide on the removal of the same. It is for this reason, the First Respondent reserves the right to remove or modify comments posted at its discretion. In this way, the First Respondent's take down policy would be effectively implemented.

[60] The Respondents contended in taking the above approach, it had indeed complied with the practice adopted by major online publishers both nationally and internationally.

[61] It was then argued that it would not be practical or possible for the First Respondent to moderate all the comments posted by third parties. Aggravated by the high volume of about 2000 comments received per day with 25,000 online subscribers, the Respondents' hands are full. The process of peer reporting is thus resorted to. Only upon the receipt of such report, will an editor immediately examine and decide on the removal of the same. It is for this reason, the First Respondent reserves the right to remove or modify comments posted at its discretion. In this way, the First Respondent's take down policy would be effectively implemented.

[62] The First Respondent asserted that its online portal has the objectives of disseminating information and generating public discussion on matters of public interest. It enables its readership to form informed views. The said twin objectives can only be achieved through a free, frank and open discussion on a particular subject. This, the Respondent contended is anchored on the protected constitutional guarantee of freedom of expression enshrined in Article 10 of our Federal Constitution.

[63] The Respondents then contended, to succeed in this Application, it is incumbent on the Applicant to demonstrate to this Court that the First

Respondent had intended to publish the impugned comments and it is evident, that this was not the case. The Respondents therefore submitted that there was no basis in law to presume such an intention on the part of the Respondents. In any event, even if there was such basis, all the facts stated above would rebut that presumption.

[64] In summary, the nub of the Respondents' defence is that of knowledge, real or inferred. In fact, at the hearing learned counsel for the Respondents too presented the position that the Respondents' case rests or falls on the issue of knowledge. Countering this legal argument, the Applicant argued that knowledge or intention of the Respondents can nevertheless be inferred from the very facts and circumstances as adduced by the Respondents themselves.

Our Finding on Knowledge

[65] Now, it is incumbent upon this Court to ascertain this contentious issue on knowledge. It is a well-settled legal principle that knowledge is purely a matter of fact. As such, knowledge can be deduced or inferred from the circumstances surrounding each particular event. Proof of knowledge is always a matter of inference (see **Leow Nghee Lim v R** [1956] MLJ 128; **Parlan bin Dadeh v Public Prosecutor** [2008] 6 MLJ 19; **Victor Chidiebere Nzomiwu & Ors v Public Prosecutor** [2013] 2

MLJ 690; **Public Prosecutor v Hoo Chee Keong** [1997] 4 MLJ 451; and **Public Prosecutor v Abdul Rahman bin Akif** [2007] 5 MLJ 1).

[66] Succinctly stated by Augustine Paul J in **Public Prosecutor v Kenneth Fook Mun Lee (No 2)** [2003] 3 MLJ 581 that "knowledge is an awareness of the consequences of an act". His Lordship held that knowledge is a mental act and must be inferred from the facts and circumstances of a particular case. His Lordship also further elaborated on the manner of ascertaining knowledge by citing learned author Sir Hari Singh Gour on **The Penal Law of India (11th Edn) Vol 3**, at page 2381 where it was observed:

> **"**Criminal knowledge, is then, in such cases demonstrated a posteriori. It takes into account not only knowledge but means of knowledge, not only the knowledge which is, but which, judging from the effect, ought to have been in the accused. A person may then truthfully declare that he did not know that his act was likely to cause death and yet he may be rightly found to have had that knowledge. The truth is that in civil cases arising out of tort as well as in criminal cases, the standard which the court fixes before itself is that of a reasonable man and the question it ultimately asks itself is, not whether the accused had the knowledge, but whether as a reasonable man he could have had that knowledge. And for this purpose, the act itself is the real test."
>
> [Emphasis added]

[67] Further at page 2387 the learned author remarked that:

> "It has been said that in inferring knowledge the court looks to the result. If it is one which could not have been arrived at without fore-knowledge, the court presumes it. Such knowledge may be legitimately presumed where the assault is committed with an axe or a dao or other deadly weapon, or where a man is hit with great force on a vital part of his body."
>
> [Emphasis added]

[68] In the same case, Augustine Paul J went on to observe that "it can be presumed that a person had knowledge of the danger of his act and every person is presumed to have some knowledge of the nature of his act." Thean J, in elaborating on the manner of inferring knowledge said in **PP v Phua Keng Tong** [1986] 2 MLJ 279 that "proof of knowledge or belief on the part of an accused is a matter of inference from facts."

[69] Thean J, went on to quote the case of **RCA Corp v Custom Cleared Sales Pty Ltd** [1978] FSR 576; 19 ALR 123**,** a decision of the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright. He said at p 478 and page 579 that "proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case." Further, he held that a court is entitled to infer knowledge of a person on the assumption that such a person

has the ordinary understanding expected of him in his line of business, unless he convinced otherwise.

[70] In the same vein, Richard Malanjum FCJ in **Emmanuel Yaw Teiku v Public Prosecutor** [2006] 5 MLJ 209 held that proof of intention or knowledge could generally be inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself. His Lordship quoted the case of **Chan Pean Leon v Public Prosecutor** [1956] MLJ 237 where Thomson J (at p 239) observed that:

> "Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case."

[71] The principle of law to be deduced from the decisions is that the Court is concerned with reasonable inferences to be drawn from a concrete situation disclosed in the evidence and how it affects the particular person whose knowledge is in issue. Therefore, in inferring knowledge the court may approach the matter in two stages. First, where opportunities for knowledge on the part of the particular person are proved. Second, where there is nothing to indicate that there are

obstacles to that person acquiring the relevant knowledge, and that there is some evidence from which the Court can conclude that such person has knowledge.

[72] The salient facts as adduced by the First Respondent in our view have a bearing on the First Respondent's knowledge. As stated, the objective of the First Respondent's website is to encourage its users to indulge and participate in the discussion on its online news portal. As the Respondents have conceived in their written submissions, a fact verified by an expert, third party online subscribers can leave comments on articles published on its website. The right and freedom to comment according to the Respondents is a significant feature of its online media as it allows for discussions about topical matters of public interest which enable the readers to develop informed views, or opinions, on such issues.

[73] Time and time again, the First Respondent fielded its defence by contending that it does not play any role in the posting of comments mainly due to the volume of such comments, it is therefore impossible for the First Respondent to moderate comments prior to them being uploaded and to monitor every comment that is published.

Whether Presumption Rebutted

[74] In determining knowledge on the part of the Respondents we too had given our utmost consideration on the rebuttals raised before against the legal presumption on the First Respondent. In our view to avoid liability, the First Respondent must have in place a system that is capable of detecting and rapidly remove offensive comments. The First Respondent cannot just wait to be alerted, because such alert may never come. Such a system if in place will go a long way in deflecting any allegation that publishers like the First Respondent have a guilty mind in posting the impugned comments. It is not enough for the First Respondent to merely rely on its T&C to online subscribers, or to say that it cannot edit a comment once posted or that they cannot monitor every comment published, due to sheer volume.

[75] The three safeguards adopted by the First Respondent have proved to fail and do not efficiently control or prevent offensive comments from being published. The First Respondent's responsibility cannot end by putting in place a T&C with such self-serving caveat for its own self-protection without regard to injury to others. The surrounding circumstances of the present case strongly suggest that the impugned comments were published without reservation and were only taken down upon being made aware of by the police.

[76] To accept such measures as a complete defence will be to allow it to unjustifiably and irresponsibly shift the entire blame on its third party online subscribers, while exonerating itself of all liabilities. The truth is the postings were made possible only because it provides the platform for the subscribers to post the impugned comments. There being no two ways about it. In short, as stated in the Application by the AG, the First Respondent facilitates the publication of the contemptuous comments by the third party subscribers. The First Respondent cannot be allowed to turn their news portal into a runaway train, destroying anything and everything in its path, only because their riders are the ones creating such havoc albeit made possible by their train.

[77] Given the fact that the First Respondent's news portal enjoys extensive readership and receives about 2000 comments per day, on top of the fact that it has editorial control over the contents posted in the comments section, the First Respondent must assume responsibility for taking the risk of facilitating a platform for such purpose. Sheer volume cannot be the basis for claiming lack of knowledge, to shirk from its responsibility.

[78] Ultimately, Malaysiakini is the owner of its website, publishes articles of public importance, allows subscribers to post comments to

generate discussions. It designs its online platform for such purpose and decides to filter foul words and rely on all the three measures it has taken. In other words, the First Respondent designs and controls its online platform in the way it chooses. It has full control of what is publishable and what is not. It must carry with it, the risks that follow from allowing the way its platform operates. Malaysiakini cannot be heard to say that its filter system failed to filter offensive comment when it deliberately chooses only to filter foul language but not offensive substance, though we remained perplexed how these comments even passed its filter, looking at the language of the impugned comments.

[79] To fortify the aforementioned argument regarding knowledge, it is equally important to note that the First Respondent is a limited company. The persons whose knowledge would be imputed to the First Respondent would be those who were entrusted with the exercise of the powers of the First Respondent (see **Yue Sang Cheong Sdn. Bhd. v Public Prosecutor** [1973] 2 MLJ 77). In this regard, it is significant to appreciate the role of the First Respondent's editorial team and process.

[80] The First Respondent said it operates three different websites; online news portal (English news), a portal for news in Bahasa Malaysia and a portal for news in Mandarin while Kinitv Sdn. Bhd. operates a

separate portal for video news. The editorial team consists of four departments for each news portal above. Each department is headed by an editor and assisted by a group of assistant editors and journalists. There is a total of 65 people working in the editorial team.

[81] For the online news portal, there is a total of 25 staff with about 10 of them being editors and assistant editors. The Second Respondent is the Editor-in-Chief of the editorial team. He is assisted by Mr R K Anand (Executive Director of the First Respondent) and Mr Ng Ling Fong (Managing Editor). The editors of each department report to Mr Ng Ling Fong and Mr R K Anand, who in turn report to the Second Respondent. As can be seen, the First Respondent has a structured, coordinated and well-organised editorial team. It is inconceivable that in such a structured system the First Respondent had no notice of the impugned comments.

[82] The comments section at the bottom which accompanies each news reports published by the First Respondent is only accessible to third party online subscribers. In this regard, the First Respondent is fully aware of its role in posting and publications. It even reserves the right to disclose the subscription profile to law enforcement agencies should they require it for valid purposes. The First Respondent no doubt has a very impressive reporting structure.

[83] With such a structure how do impugned comments such as these escape the attention of the editors? No explanation has been afforded by any of them. And none of the 10 editors denied knowledge. The person charged with that particular responsibility should be the one who can deny and explain why he was not aware of the impugned comments before being alerted on 12.6.2020. The denial instead came from its director Premesh Chandran who was not involved in the editing process. And of course the Second Respondent as the Editor-in-Chief denied knowledge on his part.

[84] The irresistible inference is that at least one of them had notice and knowledge of these impugned comments. Therefore, it is our finding that the First Respondent cannot deny notice or knowledge of the existence of the postings. On the facts before us the First Respondent cannot rely on mere denial to avail itself of the defence of ignorance.

[85] The stated objective of the First Respondent's portal is to allow public discourse on matters of public interest. This noble objective must surely include fair and balance discussion on the issues of public concern. As Lord Hobhouse observed with characteristic pungency in the case of **Reynolds v Times Newspapers Limited and Others**

[1999] 4 All ER 609 at 657 that, "No public interest is served by publishing or communicating misinformation" and certainly not offensive comments.

[86] It would be expected for the Respondents to foresee the kind of comments attracted by the publication of the article on the acquittal of Musa Aman by the Court following the withdrawal of charges, coinciding with the unfortunate timing of the press release by the Chief Justice. Members of the editorial team, in particular, must have been aware of the kind of materials published and would be able to foresee the sort of comments that it would attract given their experience in running Malaysiakini for over 20 years.

[87] It cannot be overemphasised that the impugned comments were posted on a platform which the First Respondent has complete control. The First Respondent had developed the necessary device for subscribers to post the impugned comments. It has therefore facilitated the publication of the impugned comments. And before they were removed, the glaring impugned comments were on the platform for three days and viewed by 20,000 readers daily locally and abroad.

[88] In stating so, we have further considered the following observations by Eady J in **Bunt v Tilley** (supra) at page 149, for the

proposition by learned counsel for the Respondents that for there to be legal responsibility, there must have been awareness or an assumption of responsibility so as to show knowing involvement. It was stated in that case that to determine liability for publication in the context of the law of defamation, it would be important to focus on what the person did, or failed to do, in the chain of communication and knowledge can be an important factor. That is a correct proposition. However Eady J qualified his statement when he said that if a person knowingly permits another to communicate information which is defamatory, when there should be an opportunity to prevent its publication, there would be no reason as a matter of principle why liability should not accrue. Applying that principle to the facts of this case it cannot therefore, be said that the First Respondent had no opportunity and only played a passive instrumental role in the publication process.

[89] We find the case of **Delfi** (supra) particularly instructive because the facts in that case bear semblance to the facts before us. The facts were these. The applicant company was the owner of Delfi, one of the largest internet news portals in Estonia that published up to 330 news articles a day. It allowed its readers to comment on the comments section of its news articles published on Delfi portal. An article entitled 'SLK Destroyed Planned Ice Road' was published on 24 January 2006.

This resulted in a member of the supervisory board and SLK's sole majority shareholder, L to be the subject of some 20 out of 185 comments posted. The comments contained personal threats and offensive language. L's lawyers then requested the applicant company to remove the offensive comments. Only then were these comments taken down. It was taken down on the same day of the request, but six weeks after the article was published.

[90] The applicant company refused to compensate L. At first instance, L's claim was dismissed on the basis of exclusionary clause of the applicant company's liability under the Estonian Information Society Service Act ('ISSA'). L appealed to the Court of Appeal and succeeded. The decision of the County Court was quashed and the case was referred back to the first instance court for new consideration. Upon re-examination of the case, the County Court decided that the ISSA was not applicable but the Obligations Act.

[91] The Court also decided that the disclaimer on Delfi portal could not be relied on to avoid responsibility for the content of the comments which were found to be vulgar in form, humiliating, defamatory and impairing L's dignity and reputation. The system that was put in place by the applicant company whereby users can notify the applicant company

of such comments (quite akin to peer reporting in Malaysiakini) was held to be insufficient and inadequate to protect the rights of others.

[92] The Court viewed the offensive comments as going beyond justified criticism and amounted to simple insults. The County Court held that the applicant company was the publisher of the offensive comments and it cannot therefore avoid responsibility for those comments.

[93] The decision of the County Court was upheld subsequently by the Court of Appeal as well as the Supreme Court. The applicant company then filed a complaint to the European Court of Human Rights ('ECtHR'), asserting that their freedom of expression (right to impart information) under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom ('the Convention') was impaired by the State of Estonia.

[94] In upholding the decision of the Supreme Court which had affirmed the decision of the Court of Appeal, the ECtHR recounted what transpired in the County Court and the Court of Appeal and held *inter alia*:

i. The nature of the comments was vulgar, humiliating and defamatory and had impaired, the dignity of L's honour and reputation which cannot be protected by freedom of expression and went beyond justified criticism and amounted to simple insults which cannot be said to had been done in exercise of freedom of expression;

ii. Delfi had not required the exercise of prior control over comments posted on its portal and having chosen not to do so it should have created some other effective system which would have ensured the rapid removal of defamatory comments;

iii. The measures taken were not sufficient and contrary to the principle of good faith to place the burden of monitoring comments on potential victim;

iv. Delfi was not a mere technical intermediary and that its activity was not mere technical or passive in nature but instead it invited users to post comments;

v. Delfi could have foreseen the negative reactions and should have exercised caution to avoid being held liable for damaging the reputation of others;

vi. Delfi has a substantial degree of control over readers' comments and it had been in the position to predict the nature of the comments;

vii. The fact that the online media was an unprecedented platform for the exercise of freedom of expression provided by the internet provider was fully acknowledged however, cautioned that alongside these benefits, dangers do arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online;

viii. When Delfi provided for a platform that generated user comments for economic purposes, Delfi had control over the comment section, and cannot be shielded by Article 10 § 2 of the Convention;

ix. Delfi was a large professionally managed Internet news portal that runs on a commercial basis with wide readership and there was a known public concern regarding the controversial nature of the comments it attracts; and

x. It is recognised that publishing of news and comments on an Internet portal is a journalistic activity in the nature of Internet media.

[95] Having considered the above factors, the ECtHR then concluded that there had accordingly been no violation of the right to freedom of expression in Article 10 in holding Delfi liable for defamation.

[96] Applying the decision in **Delfi** (supra) to the case before us, we see lots of semblance that we can compare between **Delfi** and Malaysiakini. We are however aware that **Delfi** dealt with defamation and not contempt. However, we are here looking at the responsibility of an online news portal. The same principles should therefore apply.

[97] Malaysiakini is also a commercial entity like **Delfi**. This was deposed to by the First Respondent in Enclosure 57 at paragraph 18 and as also reflected in its Financial Statement that the revenue sources of the First Respondent are derived substantially from subscription fees paid by users and revenue from advertising. Almost 70% of the First Respondent's revenue is from advertising and about 30% is derived from the subscription fees by users.

[98] The First Respondent contended that it did not derive any direct commercial benefit from the comments section. True, no direct commercial benefit may come from the comments section. However, it would not be wrong to assume that having more subscribers will enhance the revenue of the First Respondent. So there is economic justification in fact to encourage more subscribers rather than restricting them.

[99] It is to be borne in mind that **Delfi** does not concern other fora such as Facebook, Twitter, Instagram etc. on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or blog as a hobby.

[100] Echoing similar decision as **Delfi** (supra), the case of **Fairfax Media Publications** (supra) had unanimously held that the online media is liable as publisher of third-party comments. In this case, Fairfax Media Publications, Nationwide News Pty Ltd, and Australian News Channel Pty Ltd ("the applicants") published newspapers in NSW and operate

television stations. The applicants maintain Facebook pages on which they publish newspaper articles with an accompanying comment, image and headline. From December 2016 to February 2017 the applicants posted news items concerning the incarceration of the respondent, Mr Dylan Voller, in a juvenile justice detention centre in the Northern Territory. Third parties posted comments critical of the respondent. The respondent commenced defamation proceedings against the applicants claiming that particular comments posted by third parties were defamatory of him, and that the applicants were liable as publishers of the third-party comments.

[101] The trial court found the respondent liable for third-party comments. The decision was affirmed on appeal where the Court of Appeal held that a person who participates in and is instrumental in bringing about the publication of defamatory matter is potentially liable for having done so notwithstanding that others may have participated in that publication in different degrees.

[102] The Court found that they were the primary publishers and cannot rely on the defence of innocent dissemination under section 32 of the Defamation Act 2005 since they facilitated the posting of comments on articles published in their newspapers and had sufficient control over the

platform to be able to delete postings when they became aware that they were defamatory. The Court distinguished between primary and subordinate distributors of defamatory matter; it operates as a defence against liability, not a denial of publication. The meaning of publication in **Webb v Bloch** (1928) 41 CLR 331 was referred to.

[103] We also refer to the case of **Murray v Wishart** [2014] 3 NZLR 722**,** the New Zealand Court of Appeal where it applied the 'actual knowledge' test as opposed to 'constructive knowledge' test. The case concerns the determination of the question whether a Facebook host is a publisher. It was in this legal context that the court decided that the only test to be applied is whether or not the Facebook host has "actual knowledge".

[104] Further application went to the European Court of Human Rights. At the ECtHR, the case was heard by a panel of 7 judges sitting as a Chamber. It decided that in addition to what was decided in **Delfi** (supra) the ECtHR looked at the context of the comments. The Court resorted to the 'proportionality test' which includes assessment on contribution to a public interest debate, the subject of the report, the prior conduct of the person concerned, the content, the form and consequences of

publication including the gravity of the penalty imposed on the journalists or publishers.

[105] The Court found that the content of the statements in the article and comments thereof were not defamatory. The statements were of value judgments or opinions in that it is a form of denouncement of a commercial conduct that has already taken place and been publicly known; of which also contained the commenters' personal frustration of being tricked by the company.

[106] It was held that consequences of the comments must nevertheless be put into perspective. This case is of no relevance to our case as the facts differ materially.

[107] Learned Respondents' counsel had brought to our attention the latest decision by the Supreme Court of India by a letter dated 01.09.2020. The case is **Re: Prashant Bushan & Anor, Suo Motu Contempt Petition (Crl) No. 1 of 2020** which decided on the subject of contempt on Twitter account. The Supreme Court took a *suo motu* cognisance of the offending tweets and issued notices to the author of the offending tweets, a lawyer Prashant Bushan. The Twitter Inc California was also made a respondent. It was lodged on the basis that

the tweets brought disrepute to the administration of justice and undermined the dignity and authority of the Supreme Court in public eyes. The Supreme Court whilst finding the lawyer guilty of criminal contempt held the Twitter Company not guilty.

[108] At paragraph 76, the Supreme Court found the Twitter company as intermediary, has no control on what the users post on its platform. We agree with the Supreme Court that a Twitter platform is a completely uncontrolled platform. Unlike Malaysiakini, which has control over who can post comments and has installed filter on certain prohibitive comments hence it cannot be said that anything published on its portal is beyond control. Therefore, the case is distinguishable on its facts. The twitter platform is totally different from Malaysiakini platform.

[109] Having analysed the above cases, we bear in mind that in all the above decisions there are no provisions similar to section 114A of our Evidence Act that come into play. Hence, it can be seen that the approach taken by the Courts in other jurisdictions in determining the test applicable was developed through case law based on various considerations. Those approaches vary according to the facts, circumstances and peculiarity of the case. Our Parliament had resolved it by presuming who is a publisher by enacting section 114A.

[110] For all the reasons elucidated above, we are firm in our view that the explanation of the Respondents on lack of knowledge have failed to cast a reasonable doubt on the Applicant's case. The First Respondent had also failed on a balance of probabilities, to rebut the presumption of publication on the ground that it has no knowledge of the impugned comments.

The Communications and Multimedia Content Code

[111] Learned counsel for the Respondents in their revised submission had sought to rely on the Malaysian Communications and Multimedia Content Code ('the Content Code') contending that the law as it stands does not require Malaysiakini as an internet content provider to censor comments prior to their being uploaded. Reliance was placed on section 1.1, Part 5 of the Content Code which states:

> "In adhering to this and relevant parts of this Code, no action by Code subjects should, in any way contravene Section 3(3) of the Act, which states that "Nothing in this Act shall be construed as permitting the censorship of the Internet".
>
> [Emphasis added]

[112] Malaysiakini considers itself an 'Internet Content Hosting Provider ('ICH')' under section 10.0, Part 5 of the Content Code. They claimed

that the responsibility for any content of a publication primarily rests with the creator of the content. It is not required to monitor activities. Essentially, it construed the above section to say that the liability of the third party comments does not rest with them.

[113] The relevant provisions of the Communications and Multimedia Act 1998 ('CMA') and the Content Code require our close examination. The CMA is "an Act to provide for and to regulate the converging communications and multimedia industries, and for incidental matters". CMA seeks to provide a generic set of regulatory provisions based on generic definitions of market and service activities and services. The Content Code is an example of the said regulatory provisions, created pursuant to section 213(1) of CMA by the Communications and Multimedia Content Forum Malaysia ('the Forum').

[114] Section 3.1, Part 1 of the Content Code**,** states that the Code has an overriding purpose of providing guidelines relating to online contents. The regulation of online contents is made through self-regulation by the communications and multimedia industry in a practical and commercially feasible manner while fostering, promoting and encouraging the growth and development of the industry.

[115] Section 6.0, Part 1 of the Content Code stipulates that the Code shall take effect upon the registration of an online content provider with MCMC. Any non-compliance or breach of the Code entails enforcement by MCMC and may render a person liable to a fine.

Compliance of the Code a Defence

[116] Malaysiakini first argued that it is not mandatory to comply with the Content Code but yet contended that compliance with the Code is a defence against any action or prosecution in court or other forum as provided in sections 98 and 99 of CMA. It is the First Respondent's case that they are not required to monitor the activities of users and subscribers until being prompted by complaints. Hence it was contended that the First Respondent was not in breach of the Code. It was further contended that the First Respondent had complied with it, thereby affording it a defence under the law.

[117] The contention of the First Respondent above is bereft of merit and had, in our view, disregarded the overarching intent of the Content Code. The scope of the Content Code must be interpreted in the light of its general principles as provided in section 2.0. The Code declares that there are sets of general principles that must apply to all that is

displayed on or communicated and which is subject to the Act. This includes:

i. the need to balance between the desire of the viewers, listeners and users to have a wide range of Content options and access to information on the one hand, and the necessity to preserve the law, order and morality on the other;

ii. the principle of ensuring that Content shall not be indecent, obscene, false, menacing or offensive; and

iii. to ensure the content contains no abusive or discriminatory material or comment on matters of, but not limited to, race, religion, culture, ethnicity, national origin, gender, age, marital status, socio economic status, political persuasion, educational background, geographic location, sexual orientation or physical or mental ability, acknowledging that every person has a right to full and equal recognition and to enjoy certain fundamental rights and freedoms as contained in the Federal Constitution and other relevant statutes.

[118] Section 5.0 prohibits content that contains hate propaganda, which advocates or promotes genocide or hatred against an identifiable group. Such material is considered menacing in nature and is not permitted. Information which may be a threat to national security or public health and safety is also not permitted.

[119] Section 6.0 prohibits bad language. Under section 7.0, it is stated that content which contains false material and is likely to mislead due to incomplete information is to be avoided**.** Content providers must observe measures outlined in specific parts of the Code to limit the likelihood of perpetuating untruths via the communication of false content.

[120] Apart from this, it must also be noted that under section 10.1, Part 5 of the Code, Malaysiakini must ensure that its users or subscribers are aware of the requirement to comply with Malaysian law including, but not limited to the Code. No prohibited content nor any content in contravention Malaysian laws are condoned.

[121] With respect, the Respondents had misconstrued the true position of the law found both in CMA and the Code. We are of the considered view that the First Respondent was in fact not in compliance with the Code and shield its liabilities by their piecemeal reading of its provisions.

[122] The overriding general principles and the underlying purpose of the Content Code should be viewed holistically. Far from complying with the Content Code, Malaysiakini may have breached the real objective of the Content Code. Viewed in this way, we are unable to accept that this Code can act as an armour to protect the Respondents or any publisher being an ICH from any liability in the event where contemptuous comments were made by a third party subscribers that were published by the said ICH.

Finding of Liability of the First Respondent

[123] The law is trite and settled that the burden of proving contempt of court lies throughout with the party who makes the allegation, in this case the AG as the Applicant. The standard of proof required is the criminal standard of proof of beyond any reasonable doubt (see **Wee Choo Keong v MBF Holdings Bhd & Another appeal** [1995] 3 MLJ 549).

[124] We have not overlooked that it being criminal in character, there is a need to proceed cautiously before making a finding of guilt in this case. For, ultimately a person who is held in contempt is liable to be imprisoned or fined. This Court in **PCP Construction Sdn Bhd v Leap**

Modulation Sdn Bhd [2019] 4 MLJ 747 held that the test to be applied is the objective test and not the *mens rea* test. It is stated at paragraph 61 that the only requirement is that the publication of the impugned articles is intentional. Hence there is no necessity to prove an intention to undermine public confidence in the administration of justice or the Judiciary.

[125] A subjective intention of the alleged contemnor is difficult to establish since it entails an inquiry into the inner workings of the alleged contemnor's mind. Thus it would not matter whether the publisher intends the result. It therefore is no defence for the publisher to claim that he did not know if the statements would have the effect of undermining or erode public in the administration of justice.

.

[126] The facts before us are that the First Respondent having designed its own internet platform cannot rely on the failure of its self-designed safeguards both at pre and post publication stage as its defence. Its well-structured reporting had also failed to alert them of the danger and failed in exonerating it from being guilty of publishing contemptuous comments. There was nothing else to suggest of any other effort on the part of the First Respondent except to remain oblivious to such danger

with the hope of passing that responsibility to its own third party subscribers.

[127] The Content Code in section 2.0 of Part 1 imposes a duty on the First Respondent as an ICH to ensure to the best of its ability that its content and comments contain no abusive or discriminatory material. The act of relying on its luck that others will alert it, cannot be the best that the First Respondent can do. The precautionary measures taken by the First Respondent are obviously inadequate to shield itself from liability. The First Respondent must take responsibility for the impugned comments published in its platform.

[128] The First Respondent also cannot invoke section 3(3) of CMA to say that they are not allowed internet censorship in order to absolve their responsibilities. Both CMA and the Content Code viewed wholly have the overriding purpose of not only promoting self-regulation by internet service or content providers, but also to regulate and censure that communications that take place on each information platform do not violate the fundamental rights enjoyed by others.

[129] The First Respondent cannot insist on exercising its fundamental right and at the same time violate the right of others. A proper balance

must be struck between the freedom of speech and expression enunciated and guaranteed in Article 10 of the Federal Constitution and the need to protect the dignity and integrity of the courts and the judiciary. Case laws are replete with this entrenched principle of law that the exercise of this right is never absolute given the phrase 'subject to' provision appearing at the forefront of Article 10.

[130] We acknowledge that the First Respondent, Malaysiakini is recognised to have published matters of public interest. It had succeeded in promoting and cultivating the culture of expressing one's thought on the subject of the articles published in line with its twin objectives of encouraging readership and generating public discussion for the purpose of giving its readers to form informed views.

[131] The First Respondent ought to have known that by allowing so, it is exposed to the real risk of the nature and content of comments on the articles that it published. The First Respondent agreed that the nature of the impugned comments are so offensive and not something that it condones.

[132] On the facts before us and for all the reasons we have elucidated above, we are satisfied that a case of contempt beyond reasonable

doubt had been made out against the First Respondent. In this, we reiterate that the explanations put forth by the First Respondent that it had no knowledge, had failed to rebut the presumption against it, and hence failed to cast any reasonable doubt on the Applicant's case.

[133] We find the charge for facilitating the publication of the impugned comments against the First Respondent proved. We therefore hold the First Respondent guilty of contempt of court.

The Second Respondent

[134] Having found the First Respondent guilty of contempt, we will now deal with the case against the Second Respondent. The Application by the Applicant lodges similar complaint against both the First and the Second Respondents. To recapitulate, the complaint is that both of them facilitated the publication of the impugned comments. Whilst section 114A of the Evidence Act has been invoked against the First Respondent, we do not find this similar invocation may be made against the Second Respondent.

[135] Section 114A of the Evidence Act provides three types of presumptions of fact in publication of contents on the internet. The

wordings in section 114A(1) clearly establishes the following requirements:

i. A person's name, photograph or pseudonym ('identity');

ii. The identity must appear on any publication depicting the said person to have some connection with the publication either as the owner, host, administrator, editor or sub-editor of the publication; and

iii. The said person will be presumed to have facilitated in publishing or re-publishing the contents of the publication unless and until the contrary is proved.

(See: **YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad** [2015] 3 MLJ 364 at para [26]; **Ahmad Abd Jalil v PP** [2015] 5 CLJ 480 at para [40]-[42]; **Stanislaus a/l J. Vincent Cross v Ganesan a/l Vyramutoo & Anor** [2020] MLJU 1013 at para [10]; and **Yusof Holmes bin Abdullah v Public Prosecutor and another appeal** [2020] 10 MLJ 269**)**.

[136] The issue to be determined is whether the Applicant has established any of the above three requirements of section 114A(1) against the Second Respondent. No fact or evidence was adduced that

the name of the Second Respondent had appeared on Malaysiakini in such a way that can be attributed to **facilitating** the publication of the contemptuous comments. There was no evidence tendered that the Second Respondent's name appears on the publication of the impugned comments to attract a presumption under section 114A.

[137] The wordings of section 114A(1) are very clear and unambiguous to warrant other interpretations. It is also settled that when the language of the statute is clear and unambiguous, the Court must give effect to its plain meaning. It is not competent for a judge to modify the language of an Act in order to bring it in accordance with his views of what is right or reasonable. (See: **Abel v Lee** (1871) LR 6 CP 365 at p 371; and **Navaradnam v Suppiah Chettiar** [1973] 1 MLJ 173 at p 175, 178).

[138] There was no evidence before us that the Second Respondent was at all material times named as the owner or the host or the editor on the online news portal owned by the First Respondent; and that there was no evidence before us that he is the person who reserves the sole discretion to edit or completely remove any comments by a third party. In our view therefore, section 114A(1) could not be extended to the Second Respondent.

[139] In his affidavit, the Second Respondent contended that he is not a Content Application Service Provider within section 6 of the Content Code and cannot be viewed as a publisher in relation to the impugned comments.

[140] We are therefore not satisfied that a case of beyond reasonable doubt had been made out against the Second Respondent. The Second Respondent in our view is not guilty of contempt as alleged by the Applicant.

Conclusion

[141] We are certain that this case attracts worldwide attention and is under the watchful eyes of various news and media portals and organisations as well as social media platforms throughout the world. The media has demonstrated their agitation and concern that this case will shackle the media freedom and the chilling impact, this case may have that will eventually lead to a clampdown on freedom of the press. Seemingly, this case has also been alleged to have intimidated and threatened media independence especially so when online news portals allow for free discussion and robust debate and comments by users on various issues and public interest matters.

[142] Nevertheless, this unfortunate incident should serve as a reminder to the general public that in expressing one's view especially by making unwarranted and demeaning attacks on the judiciary should not be made at one's whims and fancies as which can tantamount to scandalising the Court. Whilst freedom of opinion and expression is guaranteed and protected by our Federal Constitution, it must be done within the bounds permissible by the law.

[143] That said, we are not here objecting to public disclosure on judicial decision, nor are we saying that the judiciary is beyond reprieve. Constructive comments and criticisms are often made and it is not the policy of this Court to jump into the foray and move a contempt proceeding against those criticism.

[144] The Malaysian public must use their discretion rationally and wisely especially when it comes to posting on the internet as it will remain in posterity in the virtual world. The Malaysian public is not known to be rude, discourteous, disrespectful or ill-mannered. This social norm is to be treasured and preserved at all costs. Let not the social media change the social landscape of this nation. The Respondents too owe that duty to ensure the preservation of this social

behaviours. It will go a long way to earn Malaysiakini as a responsible portal, for the purpose of public discourse.

[145] In this vein, we underscore the importance of maintaining public confidence in the Judiciary, the need to protect the dignity and integrity of the courts and the Judiciary as a whole, considering the nature of the office which is defenceless to criticism. As succinctly put by Lord Denning in **Ex parte Blackburn (No. 2)** (1968) 2 QB 150 that—

> "All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political. We must rely on our conduct itself to be its own vindication."

[146] After weighing the submissions and hearing the oral submissions made before this Court, we find the charge for facilitating the publication of the impugned comments against the First Respondent had been proved, hence we find the First Respondent guilty of contempt of court. The Second Respondent in our view, cannot be held guilty for facilitating the publication of the impugned comments. The application by the AG against the Second Respondent is dismissed. We then invite parties to submit on sentence.

Sentence

[147] Learned counsel for the Respondents urged upon us to consider the apology extended on behalf of the First Respondent by its Director. The apology was extended in his affidavit in Enclosure 57 at paragraph 21. The Respondents' counsel explained that despite apologizing the Respondents wanted to continue with the hearing in order for this Court to set out the law in this area. Again in the open Court after this Court made a finding of guilt against the First Respondent, Mr Anand tendered his apology in the open Court on behalf of the First Respondent. It was further urged upon us to also give due regards to the cooperation extended by the Respondents both to the police and to the Court. Learned counsel suggested a fine of RM30,000.00 would therefore suffice. Learned Senior Federal Counsel then submitted that a fine of RM200,000.00 would be appropriate.

[148] Sentencing is always a prerogative of Court to be exercised upon settled principles. In meting out an appropriate sentence the Court is bound to consider the general principles involved which may be categorised as the extent and seriousness of the offence committed, the guilty person's antecedent conduct and the public interest factor.

[149] In sentencing for contempt cases, it falls back to the facts and context of each case. The Singapore case of **Shadrake Alan v Attorney General** [2011] SGCA 26 merits attention. There, the Court of Appeal of Singapore outlined factors to be considered in the context of contempt proceedings, which include the culpability of the contemnor, the nature and gravity of the contempt, the seriousness of the occasion on which the contempt was committed, the type and extent of dissemination of the contemptuous statements and the importance of dettering would-be contemnors from following suit. The Court of Appeal also put emphasis that those categories of guidelines or factors would not be closed but depend on the facts and context concerned.

[150] We then re-examine the impugned comments once again. The comments as we see it are simply scurrilous and irreprehensible. The unwarranted attack are incendiary which expose the Judiciary to embarrassment, public scandal, contempt and to the point of belittling the Judiciary. Not only that, it had tarnished the Judiciary as being guilty of corrupt activity and had compromised its integrity in carrying out judicial functions. As submitted by the Applicant, the comments were not made within the limit of reasonable courtesy or decency and far from good faith. Such impugned comments if allowed to continue would

undermine public confidence in the Judiciary. It will ridicule, scandalise and offend the integrity of this institution.

[151] There is no maximum or minimum sentence to be imposed for a person who commits contempt of court. In deciding an appropriate sentence on the facts of this case, foremost is public interest. In **Chung On v Wee Tian Peng** [1996] 5 MLJ 521, Low Hop Bing J (later JCA) held that under Article 126 of the Federal Constitution and section 13 of the Courts of Judicature Act 1964, there is no statutory limit on fine. In assessing the appropriate fine, what must be taken into account would be the damage done to public interest, in addition to the seriousness of the contempt. His Lordship also went on to observe that the offence of the contempt of court is an interference with the administration of justice and the punishment to be meted out is not for the purpose of vindicating the dignity of the court, but to prevent the improper interference.

[152] In our view an appropriate sentence serves public interest in two ways. It may deter others from the temptation to commit such crime where the punishment is negligible, or it may deter that particular criminal from repeating the same crime. Not only regarding each crime, but in regard to each criminal the Court always has the right and duty to decide whether to be lenient or severe.

[153] In **Attorney General of Malaysia v Dato' See Teow Chuan & Ors** [2018] 3 CLJ 283, two lawyers Mr. V.K. Lingam, Mr. Thisinayagam plus 20 company contributories were committed for contempt of court. In a review application before this Court, the contributories (about 20 of them) through their lawyers V.K. Lingam and Thisinayagam cited the basis for review was anchored on alleged plagiarism and substantially a reproduction without attribution to the liquidators' written submission. The complaint against the contemnors being that the relevant affidavits filed was affirmed on the advice of their lawyers contained statements in contempt of the Federal Court, which would scandalise the Federal Court and subvert the administration of justice. After various postponements, lawyer Thisinayagam and all the contributories except three conceded to the contempt charges.

[154] After hearing the mitigation in that case, this Court ordered all the contributories present be fined with RM100,000.00 each and in default 8 months imprisonment. Lawyer V.K. Lingam and three other contributories were absent. Relying on decided authority this Court proceeded to impose sentence in absentia to the absent contemnors the similar sentence of RM100,000.00 or in default 8 months imprisonment.

Against V.K. Lingam a sentence of 6 months imprisonment was imposed.

[155] Reference is also made to the cases of **Hoslan Hussin v Majlis Agama Islam Wilayah Persekutuan** [2011] 4 CLJ 193. This was a conviction for contempt in the face of the Court when the contemnor had thrown a pair of shoes towards the bench in the course of hearing, to express displeasure on the decision against him. He was convicted and sentenced to one year imprisonment. In passing such a sentence, the Court held that the stiff custodial sentence meted out would redeem the dignity of the apex court. And mere apology would not lessen the gravity of the offence. The sentence was to protect and preserve the power, respect and dignity of the apex court.

[156] In **PCP Construction** (supra), the contemnor published two contemptuous articles on Aliran Website, alleging misconduct, improprieties including corruption against this Court in the hearing of an application to expunge part of dissenting judgment. He was given an imprisonment sentence of 30 days with a fine of RM40,000.00 or 30 days imprisonment in default.

[157] The gravity of the contempt committed here is very much more severe than the above cases, including the baseless allegation of corruption. The language used and the allegation made is beyond any bound of decency. It was targeted at the Judiciary as a whole and the wild suggestion of the Chief Justice being corrupt. The impugned comments which were facilitated to be published by the First Respondent have besmirched the good name of the Judiciary as a whole and have subverted the course of administration of justice, undermined public confidence, offended the dignity, integrity and impartiality of the Judiciary.

[158] Having weighed the mitigating factors as submitted by the Respondents against the seriousness of the offence committed, it is only right that the sentence must not be too lenient. Public interest demands a deterrent sentence be meted out against the First Respondent. We therefore hold, a fine of RM500, 000.00 is appropriate. We accordingly make an order for the fine to be paid within three days from Monday, 22 February 2021.

[159] My learned brothers Justice Azahar Mohamed (CJM), Justice Abang Iskandar Abang Hashim (CJSS), Justice Mohd Zawawi Salleh, Justice Vernon Ong Lam Kiat and Justice Abdul Rahman Sebli have

read my judgment in draft and have expressed their agreement and have agreed to adopt the same as the majority judgment of this Court.

sgd

ROHANA YUSUF
President of the Court of Appeal

Dated: **19th February 2021**

Counsel for the Applicant:
Puan Suzana bt Atan (SFC),
(Puan Narkunavathy Sundareson (SFC) and
Puan Noor Atiqah binti Zainal Abidin (SFC) with her)
Attorney General's Chambers
45, Persiaran Perdana, Presint 4
62100 Putrajaya

Counsel for the Respondents:
Malik Imtiaz Sarwar
(Surendra Ananth and Khoo Suk Chyi with him)
Messrs. Surendra Ananth
4, Dalaman Tunku
Taman Tunku
50480 Kuala Lumpur

Counsel Watching Brief for Bar Council:
Datuk Joy Wilson Appukuttan
Messrs. KH Lim & Co.
Unit 10-5-5 & 10-5-6, 5th Floor
Block 10, Queen's Avenue
Jalan Bayam
55100 Kuala Lumpur

International Federation of Journalist (IFJ) and National Journalist Union of Malaysia (NJUM):
Encik New Sin Yew
Messrs. Amerson
B2-2-13A, Solaris Dutamas
50480 Kuala Lumpur

Centre for Independent Journalism and Gerakan Media Merdeka:
YB Senator Yusmadi Yusoff
Messrs. Fahda Nur Yusmadi
5-05-03A, Jalan Utara,
PJS 52
46200 Petaling Jaya
Selangor