DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA

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

BETWEEN

PEGUAM NEGARA MALAYSIA ..... APPELLANT

AND

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

2. KETUA EDITOR MALAYSIAKINI .... RESPONDENTS

CORAM:

ROHANA BINTI YUSUF, PCA

AZHAR MOHAMED, CJM

ABANG ISKANDAR ABANG HASHIM, CJSS

HAJI MOHD ZAWAWI SALLEH, FCJ

NALLINI PATHMANATHAN, FCJ

VERNON ONG LAM KIAT, FCJ

ABDUL RAHMAN SEBLI, FCJ

GROUNDS OF JUDGMENT

Introduction

[1] This matter involves a novel point. The Respondents, namely Mkini Dotcom Sdn. Bhd and the Editor of Malaysiakini operate an online news portal, which allows for the publication of comments by third parties in response to online news articles. This is done by way of online forum postings. The issue that arises for consideration is whether the Respondents are liable in contempt for those third-party comments. The species of contempt in question is that known as 'scandalising the court'. The Respondents unequivocally accept that the comments in question are contemptuous.

Salient Background Facts

[2] On 9 July 2020, the Respondents through their online news portal, Malaysiakini published an article entitled "CJ orders all courts to be fully operational from July 1". On the same day the following five third party comments were published in the online

comments section operated by Malaysiakini. The comments are as follows:

a) **Ayah Punya kata:** *The High Courts are already acquitting criminals without any trial. The country has gone to the dogs;*

b) **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!*

c) **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!*

d) **Semua Boleh – Bodoh pun Boleh:** *Hey Chief Justice Tengku Maimun Tuan Mat – Berapa JUTA sudah sapu – 46 corruption – satu kali Hapus!!! Tak Malu dan Tak Takut Allah Ke? Neraka Macam Mana? Tak Takut Jugak? Lagi – Bayar balik sedikit wang sapu – legal jugak. APA JUSTICE ini??? Penipu Rakyat ke? Sama sama sapu wang Rakyat ke???*

e) **Victim:** *The Judiciary in Bolihland is a laughing stock.*"

[3] As a consequence, the Attorney-General in the exercise of his discretion under **Article 145(3) of the Federal Constitution** applied for leave to commence contempt proceedings against Mkini Dotcom and its chief editor in this Court, which was granted on 17 June 2020.

[4] The Respondents applied to set aside the leave for contempt granted to the Attorney-General. We heard the Respondents' application on 2 July 2020, and dismissed the same. We determined that a *prima facie* case of contempt in the

form of scandalising the court had been made out.

[5] In so deciding we held, inter alia, that this Court would not venture into or purport to decide the substantive merits of the committal application, which was properly the subject matter of the second stage of adjudication.

[6] The reasons why we concluded on 2 July 2020 that a *prima facie* case had been made out was premised on the facts as we understood them then, namely that:

(a) The 1st Respondent facilitates publication;

(b) The editorial policy of allowing editing, removing and modifying comments;

(c) The fact that upon being made aware by the police, the 1st Respondent removed the comments;

(d) Evidence revealing that the editors of the 1st Respondent review postings on a daily basis.

Based on these matters, we took the view that the Respondents had published the impugned comments and that a *prima facie* case had been made out.

[7] We were further supported in our view of 'publication' by **section 114A of the Evidence Act 1950** pursuant to which the Respondents are presumed to have published the impugned comments. However, the presumption is a rebuttable one.

[8] It therefore followed that as the five statements were by admission contemptuous, there had been *prima facie* publication by Malaysiakini through the Respondents, of these five statements, notwithstanding the fact that the comments had originated from third party subscribers.

[9] We concurred with the Attorney-General that these five impugned comments clearly carried the meaning that the Judiciary had committed gross wrongdoings, was involved in corruption, did not uphold justice and had compromised its integrity as an institution.

[10] It was equally clear that these comments implicated the judiciary as a whole, including the Chief Justice of the Federal Court. Accordingly, we ordered the Respondents to respond to the *prima facie* case and fixed 13 July for the continued hearing of this matter. As we understand it, the Respondents do not dispute that these comments do indeed bear such a meaning, as they agreed that the comments were contemptuous in nature.

Hearing on 13 July 2020

[11] On 13 July 2020 we heard the substantive merits of the committal application. Prior to this hearing, the Respondents filed further affidavits. In summary, the Respondents filed two further affidavits, one from an information technology expert who examined and explained the system adopted by the 1st Respondent for its news portal, more particularly the system adopted for the posting of comments.

The Expert's Affidavit

[12] The 1st Respondent utilises two independent and different systems, one for its "stories" or articles which it determines

ought to be published, and another system called “Talk” in respect of comments by third party subscribers;

(a) The software “Talk” (‘Talk’) allows for the screening of a comment against a list of banned and suspected words by comparing the exact words typed against the words in the list. If there is a match with a banned word, users are precluded from posting content that carries the banned word.

(b) The position is different with a suspected word. The comment with the suspected word is published and automatically flagged for review by a comments administrator;

(c) However the software Talk only allows a comment administrator to approve or reject comments **after** publication. The comment with the suspected word would therefore be visible to readers. A comment which is flagged by Talk by reason of a suspected word and which

is then reviewed by the administrator and rejected, is removed;

(d) It was also explained that the software cannot detect more complex concepts involving sentences and words which are linked together. Such monitoring by software would require advances in artificial intelligence.

(e) The editors of Malaysiakini are not aware of these comments until a suspected word is detected by Talk and dealt with by an administrator;

(f) In short, there is no provision for pre-monitoring of suspected words in third party comments. Banned words are however pre-monitored and removed prior to publishing.

The Affidavit of the director of the 1st Respondent

[13] Premesh Chandran a/l Jeyachandran the director of the 1st Respondent filed a further affidavit. He explained the human

resource aspects and staffing of the 1st Respondent. Of significance is the fact that the editorial team comprises 65 persons. He explained how articles are edited and adapted for publication on the news portal. With respect to comments, he explained that the 1st Respondent does not tolerate profanity, vulgarity, slander, personal attacks, threats, sexually orientated comments or any communication that violates the law. He reiterated the expert's explanation on the use of software.

[14] In essence it is clear that there is no part played by the editorial room in the filtering or pre-censoring of comments, save for the banned words as contained in a list utilised by the software, Talk.

[15] Therefore the primary mode of dealing with offensive comments which fall into the 'suspected' category is the flag and take down policy. This is also in keeping with the Code under the **Communications and Multimedia Act 1998 ('CMA')**.

[16] But key to all of this is the fact that all these measures only come into play after the publication of the comments, such that they are visible to the public. The offensive comments are only taken down after notification is given by either an editorial administrator or a reader. Control is therefore limited to post-publication review, largely at the behest of readers.

My Analysis and Decision

The Law relating to Contempt – Scandalising the Court

[17] The rationale underlying this species of contempt, namely scandalising the court needs to be emphasised. In this context, I can do no better than to paraphrase the underlying philosophy enunciated by Kriegler J of the South Africa Constitutional Court in **S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001)**.

[18] In that case, the learned judge first explained why in this day and age of constitutional democracy, the offence of scandalizing the court even exists. Why are judges or the Judiciary sacrosanct? Are they holding on to this form of

contempt as a legal weapon to uphold a status and seeming untouchability that is unavailable to other persons?

[19] On the contrary, shouldn't judges who hold and wield a great deal of power be accountable to the public on whose behalf they carry out their functions and from whom their payment is received? And added to this is the fact that they are not elected, and are not easily removed, unlike the other two arms of government. In these circumstances shouldn't they come under constant public scrutiny and criticism?

[20] Kriegler J answered these questions by explaining that the constitutional position of the judiciary is fundamentally different from the other two arms, the executive and the legislature. The Judiciary is an independent arm of the state which is constitutionally mandated to exercise judicial authority without fear and impartially.

[21] It stands on an equal footing with the executive and the legislature under the doctrine of the separation of powers, but,

as this Court has previously pointed out in **Arun Kasi**, is the weakest of the three as it has no political, financial or military power in its armoury. The sole weapon in its armoury on which it must rely is its moral authority. Such moral authority is achieved by its true independence and authority.

[22] Without such morality it would be unable to carry out its important function of acting as a check and balance against the other two arms, and of being the defender of the people's rights as protected and preserved in the **Federal Constitution**, even against the state.

[23] Therefore attempts to, or acts calculated to destroy or grind down this moral authority and thereby public confidence in the institution need to be arrested. This in turn is because a loss of confidence in the institution will inevitably result in the erosion of the rule of law.

[24] In the absence of any other 'weapons' so to speak, the law of scandalising contempt is necessary to protect that moral

authority of the Judiciary to perform its crucial function of serving as a check and balance against the other pillars of government. Ultimately this is for and in the interests of the citizens of the country. Not for the dignity of individual judges, but the institution as a whole.

[25] We said as much in **PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener) [2019] 3 MLRA 429**. The reason why the contempt of scandalising the court remains relevant today, particularly in the absence of any legislation whatsoever providing for a statutory form of contempt, is "*to ensure that the right of the citizens of Malaysia to have recourse to the courts of the nation to obtain justice is not put at risk. Such a risk arises where confidence in the institution is imperilled or actively eroded to the point where the authority of the courts is no longer recognized nor adhered to. That can only lead to chaos and anarchy.*"

[26] We examined and dealt with the constitutionality of this type of contempt. This Court stated in that case that this form of contempt needed to be retained in the context of our local circumstances and conditions, when compared (as is usually done) to that of England and Wales.

[27] Secondly as stated by Lord Denning in **R v Metropolitan Police Commissioner ex parte Blackburn (No 2) [1968] 2 QB 150** judges, by the very nature of our office, cannot reply to criticism, far less verbal abuse and scurrilous allegations of corruption. We cannot enter into public controversy, far less political issues. It is our conduct that is our vindication.

[28] We have also emphasised that the jurisdiction to prosecute for contempt should **not** be utilised, as we have said on several occasions, to restrict honest criticism, no matter how bluntly or sometimes crudely put, provided it is premised on rational grounds and is calculated to provide feedback on the functioning of the courts, the administration of justice or the basis or result of a particular judgment. Any such discussion conducted bona

fide, for and in the public interest is entirely warranted. I say this to re-emphasise the fact that these cases of scandalising the court contempt should in point of fact be an extremely rare occurrence.

[29] The instant case is a clear example of third party commentators utilising their anonymity to direct unwarranted abuse, amounting to contempt, at the Judiciary.

The Issues Before Us

[30] The issues that arise for consideration are:

(a) Have the Respondents rebutted the presumption of publication under **section 114A of the Evidence Act**?

(b) Does 'publication' require the element of intention and/or knowledge to be fulfilled?

(c) Did the 1st and/or 2nd Respondents possess the requisite "intention to publish" for the purposes of scandalizing the court contempt?

Issue (a): Have the Respondents rebutted the presumption of publication under section 114A of the Evidence Act?

[31] This brings to the fore the purpose and function of **section 114A of the Evidence Act** which reads as follows:

> *"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."* (emphasis mine)

[32] The effect of **section 114A,** which is applicable to the 1st Respondent, which facilitated the publication of the comment,

establishes prima facie that the 1st Respondent did as a matter of fact publish the impugned comments.

[33] It is of equal importance to consider what the presumption does not establish:

(a) It does not establish that the 1st Respondent had actual knowledge of the existence or content of the impugned comments;

(b) It does not establish guilt on the part of the 1st Respondent in relation to such publication;

(c) The section does not affect the 2nd Respondent.

[34] What is the effect in law of the presumption? As highlighted by Faizah Jamaludin JC (now J) in **Thong King Chai v Ho Khar Fun [2018] 1 LNS 374** quoting from the book **Defamation Principles and Procedure in Singapore and Malaysia by Doris Chia**:

"The applicable provision [s.114A] essentially reverses the burden of proof onto the defendant to show for example that even though the defamatory statement originated from his computer, it was not sent by him."

[35] In the instant case it means that although the impugned comments appeared on the Malaysiakini news portal, it is open to the 1st Respondent to adduce evidence to establish that the comments were neither made nor posted by it.

[36] This is actually not in dispute, as all parties accept that the comments were made by third parties. That is the extent of the application of **section 114A**. As submitted by learned counsel for the Respondents, its applicability in this matter is limited for the reason stated above.

[37] It is equally important to state that **section 114A** in no manner imputes guilt or liability on the part of the 'publisher'. It merely alters the normal course of proof such that it becomes incumbent upon the presumed publisher to explain why he is not

responsible for the content on the internet portal or site. In this context as stated by Abdul Rahman Sebli J (now FCJ) in **Tong Seak Kan v Loke Ah Kin [2014] 6 CLJ 904** warrants reassertion:

> *"[22] Clearly the legislative scheme of s.114A(2) is merely to presume or presuppose that the registered owner of the blog is the publisher of the publication and the presumption is rebuttable by proof to the contrary**. It is by no means an irrebuttable presumption and neither does it finally determine the publisher's liability or guilt. No one can be found liable in a civil claim nor guilty in a criminal prosecution on account of s.114A(2) standing alone unless of course there is total failure of rebuttal."***

[38] As further pointed out by counsel for the Respondents, **section 114A** was intended to address the mischief posed by internet anonymity. This is borne out by the Hansard where the then Minister moving the bill explained that the rapid developments in the use of the internet and information

technology at the time had given rise to cybercrime and other criminal offences through that medium. In line with this, the amendment introducing **section 114A**, was necessary to control or deal with the issue of internet anonymity.

[39] As such, with the application of the section, the only conclusion that can be drawn is that *prima facie*, the 1st Respondent is the 'publisher' of the impugned comments but is at liberty to rebut this presumption.

The Rebuttal Afforded by the Respondents

[40] The Respondents have sought to rebut the presumption by the adducing of further affidavits. This evidence all points to the fact that at the time, and until the subject impugned comments were brought to the attention of personnel of the 1st Respondent, the Respondents were not aware of the existence, nor the contents, of the impugned statements.

[41] There is no evidence put forward to refute or challenge these statements of the Respondents. In these circumstances, it

follows that as a matter of fact both the Respondents had no knowledge of, and were not aware of the existence or content of the impugned comments posted on 9 June 2020, until 12 June 2020, when they were advised of the existence of the comments by the police.

[42] The only conclusion of fact that can reasonably drawn on the record of evidence before us is that the Respondents did not know, nor were aware of the existence or contents of the impugned comments, at the point in time when they were posted by the third party commenters.

In this context, the suggestion in the majority judgment that all members of the editorial team who number 65 should each affirm affidavits is not tenable, as the single affidavit has rebutted the presumption.

[43] This brings us to the heart of the case here. If the Respondents were not aware of the existence nor the contents of

the impugned comments until 12 June 2020 notwithstanding the posting on 9 June 2020 then can it be concluded that:

(a) The 1st Respondent is a <u>publisher</u> of the impugned comments in the sense that it intentionally and knowingly did publish the third party comments appearing on the news portal; and more pertinently,

(b) Whether the 1st Respondent <u>intended to publish</u> the impugned comments, simply by reason that they are the hosts of an internet portal news site.

[44] Element (b) relating to the **intention to publish** is the key element in establishing the contempt of scandalizing the court, as we stated in **<u>Arun Kasi</u>**. Therefore the answer to these issues is determinative of two legal issues, namely whether the 1st Respondent is a 'publisher' and secondly whether the 1st and 2nd Respondents can be liable for the contempt of scandalising the court.

(The 2nd Respondent plays a considerably lesser role because he does not fall within the definition of a publisher. He is the Editor in Chief.)

[45] It must be borne in mind that here the 1st Respondent is an online intermediary which merely supplied the means for the publication of the impugned statements and is not the author of the comments. This distinction warrants an examination of the exact degree of knowledge required to attract liability on the part of an online intermediary.

[46] In answering these questions it must be borne in mind that there is a scarcity of case-law on this subject. Most of the older case-law deals with the more traditional forms of media and not the internet. To that extent the case-law is limited in its application.

[47] One should be cognizant that while analogies may be of assistance, great care must be taken in making reference to authorities involving pre-internet forms of communication.

Indeed, the advent of the internet has created novel and unprecedented methods of communication that bear little resemblance to traditional modes of communication. Rules which were made to fit a certain paradigm may not be suited to a new model: see **Harvey, DJ, *Collisions in the Digital Paradigm: Law and Rule-Making in the Internet Age*, (USA: Bloomsbury, 2017)**, pages 82-83.

[48] It was this realization that prompted Kirby J to comment in **Dow Jones & Company Inc v Gutnick (2002) 210 CLR 575 at paragraph [129]** that:

> "*[t]here are a number of difficulties that would have to be ironed out before the settled rules of defamation law ... could be modified in respect of publication of allegedly defamatory material on the Internet*."

[49] A similar sentiment was expressed in **Murray v Wishart [2014] 3 NZLR 722**, where the New Zealand Court of Appeal acknowledged that publication cases involving traditional media

require the court to employ reasoning based on “strained analogy” as they do not involve publication on the internet.

[50] There is some case-law from other jurisdictions on the liability of online news portals and other internet intermediaries for third party comments in defamation. I immediately appreciate that defamation is far removed from contempt, as it is a civil wrong attracting civil remedies, largely damages, while contempt is quasi-criminal in character and carries penal consequences.

[51] That notwithstanding, the legal rationale relating to whether, and if so, how and why a news portal may be liable in defamation for third party comments is relevant to some extent in the instant case relating to contempt.

[52] This is because it explains how the law of defamation has dealt with this novel medium of communication, where control of commentary is difficult, and where an onslaught of third party information results, ranging from the informative and useful, to abuse and worse. In this environment the courts in other

jurisdictions have sought to draw up guidelines to balance the freedom of speech and expression against the damage and hurt arising to victims of such abuse, again, it must be stressed, in defamation.

[53] The analogies that may be drawn are useful for comprehending the countervailing policies that subsist as well as the controls available to online news portals to control such input, particularly when it relates to violence, hate speech or religious blasphemy. Contempt of court being unlawful and encouraging the erosion of confidence in the Judiciary, falls within that class of commentary that requires vigilance. However it must equally be borne in mind that contempt requires a far higher standard of proof than does defamation.

Issue (b): Does publication require the element of intention and/or knowledge to be fulfilled?

[54] The crux of the issue is whether an online content service provider such as Malaysiakini is a publisher only if it has knowledge of the existence and content of information or

comments posted by third parties. And secondly whether the Respondents are liable in contempt for the impugned comments posted by third party subscribers only if they had actual knowledge of the existence and content of those comments.

[55] I now turn to examine some of the relevant case-law from other jurisdictions.

1) United Kingdom

Totalise plc v Motley Fool Ltd & Anor [2001] IP & T 764

[56] In this case the defendants operated websites containing discussion boards on which members of the public were able to post material. An anonymous contributor, Z, posted material about the claimant on the defendants' notice boards. The claimant contended that some of the material was defamatory and sought an order for disclosure of Z's identity from the defendants. The defendants argued that they came under the scope of section 10 of the United Kingdom Contempt of Court Act 1981 which protected persons responsible for publication

from disclosing their sources unless the court felt that such disclosure was necessary. It was held that the defendants exercised no editorial control and took no responsibility for what is posted on their discussion boards. They simply provided a facility by means of which the public at large could communicate its views.

Godfrey v Demon Internet Ltd [2001] QB 201

[57] This case concerned a statement alleged to be defamatory in a posting on an online bulletin board provided by a news provider. It could be accessed by subscribers to Demon's service. Demon was asked to remove the statement but did not do so. Demon argued that it was not a 'publisher' under the relevant UK statute, but this argument failed. However the claim itself was framed to impute liability only from the date after Demon had been notified of the existence of the statement, and not the period before such notification. Demon was found to be a publisher.

Bunt v Tilley [2006] 3 All ER 336

[58] Here it was held that an internet service provider which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law, and thus no liability for libel could attach to such a person. Eady J took the view that to impose legal responsibility upon anyone under common law for the publication of words it was essential to demonstrate a degree of awareness or at least an assumption of general responsibility; such as had long been recognised in the context of editorial responsibility. Although to be liable for defamatory publication it was not always necessary to be aware of defamatory content, still less of its legal significance, for a person to be held responsible there had to be knowing involvement in the process of publication of the relevant words. It was not enough that a person had played merely a passive instrumental role in the process.

Metropolitan International Schools Ltd v Desightechnica Corporation [2011] 1 WLR 1743 (QB)

[59] In this case a defamatory statement appeared as a small part of the result of a Google search. The Court found that Google, as operator of the search engine was not a publisher as there was no human input into the selection of search results. This is despite the fact that Google was notified of the defamatory portion of the statement when a certain search was undertaken. The Court rejected the proposition that between notification and “take down” Google became or remained liable as a publisher as there was no approval, authorization or acquiescence by Google in relation to the offending material.

Davison v Habeeb [2011] EWHC 3031

[60] This case took a different approach. There too a statement in a blog hosted by Blogger.com (a service provided by Google) was alleged to be defamatory. The Court held that Blogger.com would not be regarded as a publisher of a statement posted on the site until it had been notified that it is carrying the defamatory material. Only then could it be fairly be stated to have accepted and participated in the publication by the third party. In other words, actual knowledge was a crucial element in

determining whether a internet service content provider is a publisher. The mental element was found to be crucial in determining whether the blog was a publisher or a mere facilitator.

Tamiz v Google Inc [2013] EWCA Civ 68, [2013] 1 WLR 2151

[61] Here, the claimant sought to bring a claim in libel against the defendant in respect of eight comments posted anonymously on a blog hosted on a blogging platform operated by the defendant. The platform was provided on the defendant's own terms and the defendant could remove or block access to material failing to comply with its terms once its attention was drawn to it. The defendant was first notified of the claimant's complaint about the comments when it received the letter of claim, some two months after the comments were posted. Five weeks later the defendant forwarded the complaint to the blogger who three days later voluntarily removed the comments complained of. The English Court of Appeal held that an online intermediary cannot be a secondary publisher in respect of the time **before** notification of the impugned statement as it lacks

the requisite knowledge, but may be a secondary publisher of impugned speech if it fails to remove the offending material **after** notification of the same.

2) Hong Kong

Oriental Press Group Ltd v Fevaworks Solutions Ltd [2013] HKCFA 47

[62] The Hong Kong Court of Final Appeal had to determine whether a host of an internet discussion forum is a publisher of defamatory statements posted by users of the forum. On the issue of being a publisher the Court considered that the forum host played an active role in encouraging and facilitating the postings on its forum. They were therefore participants in the publication of postings by forum users and were therefore publishers.

3) European Court of Human Rights (ECtHR)

Delfi AS v Estonia, European Court of Human Rights (2015, Appeal No. 64569/09)

[63] Delfi is an internet news portal that publishes up to 330 news articles a day. It made provision for both registered subscribers and unregistered readers to comment. The commenters had the option of leaving their names and email addresses or not. The third party comments were uploaded automatically. The consequence was that they were not edited nor moderated by Delfi.

[64] A notice-and-take-down system had however been implemented for insulting, mocking or hate messages as well as *"a system of automatic deletion of comments that included certain stems of obscene words"*, i.e. a preventive filtering system. The system adopted bears considerable similarity to the present case before us.

[65] The applicant company published an article on the Delfi portal. The article attracted 185 comments and about 20 of them included *"personal threats and offensive language"* directed against a person. It is of relevance that the comments in issue

violated Estonian laws on hate speech.

[66] The Estonian Supreme Court held that Delfi, a large online news portal registered in the Republic of Estonia, was liable in defamation for third party comments posted by unregistered users on its site in response to an article. Such liability was premised on the laws prohibiting hate speech in Estonia. Liability was affixed on the news portal for the unlawful statements and hate speech of third parties, despite Delfi having an automated filtering system and a notice and takedown procedure in place.

[67] Dissatisfied with this decision, Delfi made an application against the republic of Estonia to the European Court of Human Rights (‘ECtHR’) under **Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms**.

[68] Before the ECtHR, Delfi’s complaint was that its freedom of expression had been violated in breach of Article 10 of the Convention by the fact that it had been held liable for the third-party comments posted on its Internet news portal.

[69] Delfi sought to argue that it was a passive intermediary which was simply making it possible for third parties to exercise their freedom of speech and expression. However this contention was rejected.

[70] The ECtHR gave considerable weight to the nature and context of the third party comments. It also took into account the fact that Delfi was a professionally managed Internet news portal run on a commercial basis, which sought to attract a large number of comments on news articles published by it. It noted that Delfi had an economic interest in the posting of the comments. The authors or generators of the comment had no control over the comments after they had been posted, but Delfi did. It could delete or modify the posts.

[71] The ECtHR upheld the decision of the Estonian Supreme Court determining that Delfi was liable as a publisher for third party ‘hate’ and defamatory comments did not amount to a violation of **Article 10 of the European Convention of Human**

Rights in relation to freedom of speech.

[72] As such the ECtHR agreed with the Estonian Supreme Court that although Delfi was not the actual author of the comments, it did retain control over the comments section and by reason of it being involved in facilitating the comments in relation to its article being made public, it was not a passive technical service provider but had gone beyond that.

[73] Therefore the level of moderation retained by Delfi in controlling its third party comments allowed the ECtHR to conclude that Delfi owed a duty or responsibility to the 'victim' of the article (**Article 14**) which had to be balanced against the freedom of expression contained in **Article 10**.

[74] Although the ECtHR accepted that there was interference with freedom of expression it ultimately concluded that such interference was justified.

The Dissenting Judgments in Delfi

[75] The dissenting judgments in the judgment of the ECtHR warrant study. The dissenting judges accept that a relevant consideration for extending the liability of an active intermediary includes the fact that by creating a comments section and inviting users to participate the internet service provider or online news portal assumes some degree of responsibility. However they point out that "...the nature of the control does not imply identification with a traditional publisher." They referred to the difference between a traditional publisher such as a newspaper editor and an active intermediary. In the former case the content provider such as a journalist is an employee and the editor is in a position to know in advance the content of the article and exercises a decision making power and thereby controls the publication in advance. However these elements are missing in the case of active intermediaries who host only their own content and data, but who do not have such control in the case of third party commenters. The degree of control they have is only in the filtering system they employ.

[76] In summary, the majority judgment in Delfi identified *inter alia* the following criteria as being relevant to an assessment of an online intermediary's liability for unlawful material posted on its site:

(i) The context of the comments;

(ii) The measures applied by the intermediary to prevent or remove defamatory comments; and

(iii) The liability of the actual authors of the comments as an alternative to the intermediary's liability.

[77] The majority decision in Delfi has been criticized as stifling freedom of expression: see **Jurate Sidlauskiene and Vaidas Jurkevicius, "Website Operators' Liability for Offensive Comments: A Comparative Analysis of *Delfi AS v Estonia and MTE & Index v Hungary*" (2017) 10 *Baltic Journal of Law and Politics* 46-75** at 48.

Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, European Court of Human Rights (2016, appeal no 22947/13)

[78] A softening of the stance of the ECtHR can be seen in the subsequent case of **Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary**, **European Court of Human Rights (2016, appeal no 22947/13)** (‘**MTE**’). In **MTE**, the applicants had allowed third party comments on publications appearing on their portals. Comments could be uploaded following registration and there was no prior editing or moderation by the applicants. Readers of the sites were advised by disclaimers that comments did not reflect the portals’ own opinions and that authors of comments were responsible for the content. There was a notice and takedown procedure where readers could notify the internet portals of comments of concern and request their deletion.

[79] The ECtHR in **MTE** stressed that although internet news portals were not publishers in the traditional sense, they must in principle assume duties and responsibilities and because of the particular nature of the internet, those duties and responsibilities may differ to some degree from that of a traditional publisher notably with regard to third party comments.

[80] The ECtHR in **MTE** drew a distinction between Delfi and the instant appeal on the ground that the former involved a commercial news site where users had engaged in clearly unlawful expressions amounting to hate speech and incitement to violence. The ECtHR found that although the comments in **MTE** were vulgar and offensive, they were not hate speech or unlawful. In addition, the titular applicant was a non-profit body of internet service providers with no economic interests.

[81] The ECtHR categorized the internet portals' provision of a third-party comment platform as a "journalistic activity" and in line with existing ECtHR jurisprudence, advocated against the imposition of liability on the applicants on the ground that "*punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so*."

4) Australia

Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty v Voller [2020] NSWCA 102

[82] In the Australian case of **Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty v Voller [2020] NSWCA 102** the facts were that one Dylan Voller was imprisoned in a juvenile detention centre. Fairfax Media Publications, Nationwide News Pty Ltd, and Australian News Channel Pty Ltd ('News Outlets') reported on his detention at that facility including by way of publishing articles on Facebook.

[83] In response, Facebook users who were members of the general public left comments relating to those reports on the News Outlets Facebook pages. Voller alleged that ten of those comments were defamatory. These comments were promptly removed when the news outlets became aware of them.

[84] Mr Voller began defamation proceedings against the News Outlets, and argued that they were liable as the publishers of the

third party comments. A threshold element that had to be published was that the news outlets were in fact primary publishers. The trial judge determined this issue as a preliminary one, prior to the full trial. He found that the News Outlets were ‘publishers’. The issue went on appeal.

[85] On appeal, the News Outlets argued that they were not publishers in respect of comments third parties made on Facebook pages that they administered. They further maintained that they were not the originators of the defamatory posts. Neither had they participated in the publishing process and therefore there should be no liability in defamation against them. Finally they pointed out that as they had promptly removed the posts on being advised of the same, they could not be regarded as having adopted those comments.

[86] However the NSW Court of Appeal agreed with the trial judge and held that the News Outlets were publishers of the comments. It went on to state that in the context of an internet

platform, a party who encourages and facilitates the leaving of comments on a discussion forum is a publisher.

[87] The Court found that the News Outlets were publishers because each one of them had subscribed to a facility enabling them to have an 'official' Facebook page for the newspaper. They had expressly or impliedly allowed or encouraged discussion in the comments section; and they all had editorial control to monitor and delete user comments.

[88] The Court considered that in the context of establishing whether the News Outlets were publishers, it was immaterial that the relevant comments were promptly removed because the News Outlets had facilitated the publication of them in the first place.

5) <u>India</u>

<u>In Re Prashant Bhushan & Anor, Suo Motu Contempt Application (Crl.) No. 1 of 2020</u>

[89] In this case, the alleged contemnor no. 1, an advocate, posted on Twitter the following tweets about the Chief Justice of India and the Indian Supreme Court:

(i) *"CJI rides a 50 Lakh motorcycle belonging to a BJP leader at Raj Bhavan Nagpur, without a mask or helmet, at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access justice!"*

(ii) *"When historians in future look back at the last 6 years to see how democracy has been destroyed in India even without a formal Emergency, they will particularly mark the role of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs."*

[90] Twitter Inc as the alleged contemnor no. 2 submitted that it had not authored or published the tweets in question. Twitter also submitted that it was merely an 'intermediary' within the meaning as provided under the Information Technology Act, 2000 and was thus not the author or originator of the tweets

posted on its platform. Twitter submitted that it had no editorial control of the tweets and merely acted as a display board. Twitter pointed out that it had after the order of the Indian Supreme Court dated 22.07.2020, taken cognizance of the impugned tweets, and had blocked access to, and disabled the same. The argument by Twitter that it was an 'intermediary' found favour with the Indian Supreme Court which held that Twitter had shown "bona fides" by suspending the impugned tweets immediately after the Court took cognisance of them. Twitter was therefore absolved of liability in contempt for the statements made by the advocate. Malaysiakini is in the same position as Twitter in the instant case. In point of fact, Twitter has a wider global reach than the 1st Respondent on an international basis. Based on its first quarter earnings report for 2019, the platform boasted of 330 million monthly users and 134 million monetizable daily active users. Despite this, Twitter was absolved of contempt by the Indian Supreme Court.

[91] Here the Respondents employ a filtering system known as Talk. They have no other means of control over persons leaving

comments on their platform. As stated by way of affidavit in the instant case, a post can come in at anytime and sometimes even months or years later. The commenter is not the employee of the publisher and is not known to the publisher. Importantly the posting of the comment and thereby 'publication' on the portal is done without the knowledge of either of the Respondents. As such the level of knowledge and thereby the ability to control differ significantly in the case of traditional media as compared to the internet.

[92] In order to control these comments, it appears to me that there must be knowledge, which enables the controls to come into play. That is achieved with the flag and take down approach enacted by Parliament in the **CMA** and the **Code** which affix an internet intermediary such as Malaysiakini with liability as a publisher from the point in time when they actually know of the existence and content of the comments in question.

[93] To suggest that intermediaries such as the Respondents are bound to take steps to prevent such comments from

appearing on the site means that apart from the filtering system, the Respondents (and all other intermediaries with a comments section including Facebook users etc) will have to provide supervision throughout the day and night. This is in light of the evidence from the Respondents that comments may arise at anytime during the day or night and in the future. This would appear to be untenable. That is why Parliament in its wisdom adopted the flag and takedown approach that enables the intermediaries to respond as soon as they acquire knowledge.

Conclusion on whether publication requires the element of intention and/or knowledge to be fulfilled

[94] Having reviewed the case-law in other jurisdictions I am of the considered view that an online content service provider like the 1st Respondent that operates an online news portal and provides content in various forms including the invitation of comments from third party users **becomes liable as a publisher when it has knowledge or becomes aware of both the existence and the content of the subject material that is**

unlawful or defamatory, and fails to take down said material within a reasonable time.

[95] In other words knowledge of, and consent to, such content is necessary before an online intermediary becomes liable as a publisher for such content. Awareness of the content is a pre-requisite, to my mind.

[96] In so saying, I reject the proposition that an 'ought to know' test or a 'constructive knowledge' test is the applicable test in determining whether a news portal like the 1st Respondent is a 'publisher'. It should be noted that during the hearing on 13 July 2020 counsel for the Applicant conceded that actual knowledge is required to establish the offence of scandalising contempt.

Reasons for the rejection of the 'constructive' or 'ought to know' test

[97] I am persuaded in my reasoning by the excellent analysis of this same issue in the leading case of **Murray v Wishart [2014] 3 NZLR 722**, a decision of the Court of Appeal of New Zealand.

The Court of Appeal of New Zealand was concerned that the ‘ought to know’ or ‘constructive knowledge’ test puts an online news portal that posts third party comments in a worse position than an online news portal that actually knows of the impugned comments.

[98] Under the ‘ought to know’ test, an online news portal is affixed with liability as a publisher as soon as the third party impugned comment appears on the portal and will be unable to avoid that consequence, even if it removes the impugned comment, because it will be caught by the test that it ought to have known and anticipated that comment before it could be posted. This means that as soon as a comment is posted, an online intermediary cannot do anything to avoid being treated as a ‘publisher’. If it is contended that the ‘ought to know’ test is tenable because it only applies where the circumstances are such that the online portal should anticipate the posting of unlawful material, that is effectively making an online intermediary liable for not taking steps to prevent unlawful

comments being made. This is not in accord with the legislation subsisting at present in this jurisdiction.

[99] Conversely, the application of the 'actual knowledge' test would not leave unlawful comments unchecked. It simply means that an online intermediary will only become a publisher from the time it had knowledge of the impugned speech. It is only from that point in time that there arises a duty on the part of the online intermediary to remove all unlawful content from its site within a reasonable time. If it fails to do so, it is likely to be liable for a variety of offences. Thus, an online news portal becomes a 'publisher' upon becoming aware of the existence and content of an impugned comment. Until then it is not a 'publisher'. This is consonant with the **CMA** which regulates the communications and multimedia industries.

[100] Central to this discussion is **The Federal Constitution** and the **CMA**. **The Federal Constitution** allows for freedom of speech and expression subject to such laws as Parliament may impose. It is no doubt true that Article 10 explicitly recognises

that the right to freedom of speech and expression may be restricted, but that curtailment may only be done by way of written legislation passed by Parliament: **Article 10(2)(a) Federal Constitution**. For the purposes of the present proceedings, it must be emphasised that there is no specific law enacted by Parliament that deals with contempt of court. It is also significant that **section 3(3) of the CMA** declares that nothing in the CMA "*shall be construed as permitting the censorship of the Internet*". A perusal of the **Malaysian Communications and Multimedia Content Code ("the Code")** prepared by the **Malaysian Communications and Multimedia Forum ("the Forum")** and registered by the **Malaysian Communications and Multimedia Commission ("MCMC")** under **section 95(2) of the CMA** discloses that:

(i) Responsibility for online content rests primarily with the content creator: **section 4.1(b) of the Code**;

(ii) An Internet content hosting provider (ICH) shall not be required to block access by its users or subscribers to

any material unless directed to do so by the Complaints Bureau acting in accordance with the complaints procedure set out in the **Code**, or be required to monitor the activities of its users and subscribers: **section 11.1(c) and (d) of the Code**;

(iii) Where an ICH is notified by the Complaints Bureau that its user or subscriber is providing prohibited content and the ICH is able to identify such user or subscriber, the ICH has 2 working days to inform said user or subscriber that it has 24 hours to take down the prohibited content, failing which the ICH shall have the right to remove such content: **section 10.2 of the Code**.

[101] More pertinently **section 98(2) of the CMA** stipulates that compliance with the Code "***shall be a defence against any prosecution, action or proceeding of any nature, whether in a court or otherwise, taken against a person (who is subject***

to the voluntary industry code) regarding a matter dealt with in that code."

[102] The enactment of the **CMA** evinces the intention of Parliament that liability will only be imposed on an online intermediary if it fails to respond to a flag and takedown process, rather than any form of pre-censorship or pre-monitoring basis. In doing so, Parliament has defined the boundaries in this area of the law with proper regard to the right of freedom of speech and the inflicting of damage on persons and institutions.

[103] Parliament has stipulated that an online news portal becomes a 'publisher' with clear duties upon becoming cognisant of any unlawful comment which needs to be taken down. It is only upon failure to do so that it can be said that the publisher has committed a wrongdoing. Therefore, the imposition of a 'ought to have known' test runs awry of the current legislation and the **Code**.

[104] To suggest that intermediaries such as the Respondents are bound to take steps to prevent such comments from appearing on the site means that apart from the filtering system, the Respondents (and all other intermediaries with a comments section including social media users) will have to provide round-the-clock supervision. This would appear to be untenable. That is why Parliament in its wisdom adopted the flag and takedown approach that enables the intermediaries to respond as soon as they acquire knowledge.

[105] The other rationale for requiring actual knowledge as a criterion to establish liability for the acts of an online intermediary is to avoid placing an undue burden on entities for the contemptuous publications of others. A risk-averse approach that demands that liability be imposed on the basis of constructive knowledge may result in the removal of non-contemptuous material which in turn dilutes the protection accorded to freedom of expression under **Article 10 of The Federal Constitution.**

[106] Furthermore, the ‘ought to know’ test gives rise to considerable uncertainty in its application. Given the widespread use of comments on the internet, particularly on social media websites, it is best that the boundaries are defined with clarity so that both online portals and citizens understand the boundaries of what is permissible and what is not with clarity, and arrange their affairs accordingly.

[107] In the context of contempt as in this case, to utilise the ‘ought to know’ test, in construing the elements of ‘publication’ as well as ‘intent to publish’, there arise several hurdles to online news portals where third party comments appear. If the ‘ought to know’ test is used to establish ‘publication’, i.e. (a) the fact of the impugned comments appearing on the portal; and secondly (b) ‘constructive knowledge’ to establish an ‘intention to publish’, then it amounts to applying a double inference or presumption against the online portal.

[108] Added to that, as liability affixes immediately upon the comment by the third party coming into existence on the portal,

there is nothing the portal can do to alleviate its position either in respect of ‘publication’ nor ‘an intention to publish’. The harshness of the rule is especially apparent when applied to the technologically inept, and to users who utilise various internet platforms in a personal capacity. There is simply no defence to be availed of, if a constructive knowledge test is to be accepted. That cannot be right.

[109] As can be seen above, the identification of when an online intermediary that is not directly responsible for a wrong is expected to rectify it, is an issue that has long beleaguered courts around the world. Because complex policy questions are involved, it has been argued that courts are not able to adequately deal with the same as we have to act within the constraints of existing doctrine: see **Pappalardo, Kylie and Nicolas Suzor, “The Liability of Australian Online Intermediaries” (2018) 40 *Sydney Law Review* 469-498** at 498. It is therefore my considered opinion that any attempt to introduce a criterion of imputed knowledge for the purposes of imposition of liability on internet intermediaries in the field of the

law of contempt more properly belongs to the domain of the legislature. Thus, in the absence of a statutory yardstick for cases involving internet intermediaries, it is the ‘actual knowledge’ test that should apply. There must be actual knowledge of the impugned material before liability can to attach to an online content provider in respect of contemptuous speech.

[110] It therefore follows that the 1st Respondent was not a ‘publisher’ when the impugned comments first appeared on 9 June 2020 because it did not have any knowledge of the impugned third party comments. It was only affixed with knowledge of those comments on 12 June 2020. Those comments were taken down within a timeframe of 12 minutes, falling well within the purview of ‘a reasonable time’. As such the 1st Respondent was not a ‘publisher’ of those impugned comments.

[111] The 2nd Respondent as the chief editor is further removed as **section 114A** does not apply to him. Neither does the factual matrix of the case implicate him in such fashion.

Contempt

[112] The essential elements of contempt as we have stated in **Arun Kasi** include:

(i) The *actus reus* of the fact of publishing or making available the impugned comments on their portal;

(ii) The *mens rea* element of an 'intention to publish'.

[113] It follows from the analysis above that as the Respondents are not 'publishers' of the impugned comments, they do not fulfill either of the elements for the purposes of 'scandalising the court' contempt. The *actus reus* element requires not only the mere appearance of the impugned comments on the portal but also the knowledge of the existence of those comments. The Respondents had no such cognisance of the same because they were unaware of the existence and content of those impugned comments until 12 June 2020. They promptly removed the comments thereby taking themselves outside of the purview of being 'publishers' of the impugned comments.

[114] As they are not publishers, they did not publish the impugned comments. Far less then can it be said that they had the requisite ‘intention to publish’ which is the foundational element for the quasi-criminal offence of scandalising the court contempt. The standard of proof required moreover is beyond reasonable doubt. That standard cannot be met on the material before us on record. The Respondents have rebutted and clarified how the impugned comments remained on their portal for 3 days prior to removal.

Is the doctrine of constructive knowledge sufficient to establish liability for contempt?

[115] Even if I am wrong in concluding that the Respondents are not ‘publishers’ and that the ‘ought to know’ test suffices to affix them with liability as publishers, the question of whether they had the requisite ‘intention to publish’ for the purposes of fulfilling the elements of scandalising the court contempt needs consideration.

[116] It may well be argued that intent to publish may be inferred from the surrounding circumstances. In this regard, analogies such as the doctrine of ‘wilful blindness’ and ‘constructive knowledge’ which feature in other areas of criminal law may sought to be utilised in determining liability for contempt. I am of the view that these doctrines have no place in the law of contempt.

[117] The foundational element to establish contempt is an actual intent to publish. The doctrine of wilful blindness or constructive knowledge is often applied in drug cases where the accused, who is himself charged with possession or trafficking of drugs, is inferred to have the requisite *mens rea* element because he willfully turns a blind eye to clearly suspicious circumstances under which he personally carries or retains possession of unlawful substances. This Court has recognised that the willful blindness doctrine is invocable in very limited circumstances where the obvious facts are such that the accused must be imputed with a greater mental state of knowledge and therefore must be taken to have actual knowledge, if not for his

or her deliberate refusal to make inquiries: see ***Maria Elvira Pinto Exposto v PP*** **[2020] 5 CLJ 1 at paragraphs [41] to [44].** The facts of the present proceedings do not support such an inference.

[118] In the instant case, the notion of constructive knowledge or willful blindness is sought to be applied **against a party once removed from the main perpetrator**, and not the party or person who committed the primary offence. This is because the 1st Respondent is not the primary perpetrator. The individual who posted the comment is the primary perpetrator and so the doctrine is, by analogy, applicable to him, rather than the online intermediary. In my view, the imposition of the constructive knowledge doctrine to an online intermediary is comparable to making an airline and airport operator complicit in the offence of drug trafficking, just because a certain drug mule chose to fly to an airport managed by a particular airport operator, using a specific airline. That to my mind is not tenable.

[119] I am of the view that actual knowledge meaning actual awareness of the existence and content of the impugned statements is necessary, and that constructive knowledge inferred from the surrounding circumstances is insufficient to establish intent to publish on the part of the Respondents, for the purposes of liability under 'scandalising the court' contempt.

[120] The repercussions of extending the law of contempt from actual knowledge to constructive knowledge is that there would be a chilling effect on freedom of expression in the media in that even articles or statements expressing valid criticism may be excised or precluded from being published online. There is a grave likelihood that user comments would simply be disabled. That would be detrimental and anathema to **Article 10 of the Federal Constitution**.

[121] Moreover, imposing liability for a portal's negligence rather than because it intentionally allowed an unlawful comment to subsist after becoming aware of it, is contrary to the **CMA** as

well as the law of contempt, which requires a clear intention to publish.

[122] Since the Respondents have established that they did not know of the existence of the admittedly contemptuous comments until notification of the same, and because the impugned comments were removed within a reasonable timeframe as discussed above, it follows that the Applicant has not demonstrated beyond reasonable doubt that the Respondents possessed the requisite intention to publish the impugned material.

[123] That having been said, contempt of court is a serious offence and all online portals ought to be vigilant of, and act to prohibit any attempts to erode the confidence of the public in this august institution, as soon as any such attempts are brought to their notice. The Respondents have established that this is what they did. The Respondents also unreservedly delivered their apologies for indirectly being involved in the airing of these contemptuous statements. In these circumstances, I find that the

Respondents are not liable in contempt and dismiss the application for committal against them.

Signed

NALLINI PATHMANATHAN
Judge
Federal Court
Malaysia

Dated: 19 February 2021

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