

DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO : W-02-244-2004

ANTARA

SAVANT-ASIA SDN. BHD.

... PERAYU

DAN

SUNWAY PMI-PILE CONSTRUCTION SDN. BHD.

... RESPONDEN

DALAM MAHKAMAH RAYUAN MALAYSIA

DAN

RAYUAN SIVIL NO : W-02-392-2005

ANTARA

ZAID IBRAHIM & CO.

- (a) Mohd. Zaid Ibrahim**
- (b) Chew Seng Kok**
- (c) Julian Ding**
- (d) Charon W. Mokhzani**
- (e) Loh Wei Lian**
- (f) Lee Hooi Cheng**
- (g) Lim Kar Han**
- (h) Foong Chee Meng**
- (i) Shahril Lamin**
- (j) Farah Suhanah Ahmad Sarji**
- (k) Karen Goonting**
- (l) Mimi Tahsin**
- (m) Lilian Liew**
- (n) Tee Joe Lei**
- (o) Jenny Lye**
- (p) Dr. Nik Norzul Thani**
- (q) Paul Subramaniam**

**(beramal di bawah nama dan gaya
Tetuan Zaid Ibrahim & Co.)**

... PERAYU

DAN

SUNWAY PMI-PILE CONTRUCTION SDN BHD

... RESPONDEN

**(Dalam Perkara Guaman Sivil No. S5-23-87-1999
dalam Mahkamah Tinggi Malaya di Kuala Lumpur**

ANTARA

SUNWAY PMI-PILE CONTRUCTION SDN BHD

DAN

1. SAVANT ASIA SDN BHD

2. ZAID IBRAHIM & CO.)

**CORAM : DENIS ONG JIEW FOOK, J.C.A
ABDUL AZIZ MOHAMAD, J.C.A.
TENGKU BAHARUDIN SHAH TENGKU MAHMUD, J.C.A**

GROUND OF JUDGMENT

(Majority)

By the decision of a majority (Abdul Aziz Mohamad JCA dissenting) we dismissed both these appeals with costs. Denis Ong Jiew Fook JCA, the other member of the court who endorsed the decision of the learned Judge in the court below, has unfortunately retired from office and is therefore not privy to the preparation of this majority judgment of the court. Hence, while the conclusion arrived at by the both of us are common, the grounds herein are entirely mine.

Background :

2. The common respondent in these appeals, who was the plaintiff in the High Court, sued the appellants for libel on account of the publication in the

Star newspaper, of an advertisement pertaining to a winding-up petition against the respondent. The appellant in Appeal No. W-02-392-2005 (the second appellant) acted as solicitors for the appellant in Appeal No. W-02-244-2004 (the first appellant) who initiated the petition and caused the said publication. They were both sued as the 2nd and 1st defendants respectively in the defamation action and were separately represented in the Court below. The defence put up by both appellants, apart from denying that the words in the advertisement were defamatory of the respondent, is that the said advertisement was published on an occasion of absolute and/or qualified privilege.

3. In the course of proceedings the second appellant applied under Order 14A and/or Order 33 Rules 2 and 5 of the Rules of the High Court 1980 (the RHC) for the issue of absolute/qualified privilege raised in the pleadings to be tried as a preliminary issue before the trial of other questions and for all further proceedings to be stayed. The issue was framed as follows:

“Whether upon the facts alleged and pleaded in paragraphs 6, 7 and 10 of the Statement of Claim and the defence of absolute and/or qualified privilege raised and pleaded in paragraphs 23 and 24 of the defence of the 2nd Defendant, the Plaintiffs’ claim is maintainable in law and/or in fact by reason of absolute/or qualified privilege.”

4. For ease of reference paragraphs 6, 7 and 10 of the Statement of Claim are as follows :

- “6. The First Defendant had initiated an action to wind up the Plaintiff through a petition [hereinafter referred to as the “said Winding-Up petition”] for a debt of RM141,750-00, and the Second Defendant was the solicitor who filed the said petition for the First Defendant.

7. The said petition was enclosed and forwarded to the Plaintiff by the Second Defendant through a letter from the Second Defendant dated 23rd of April 1999 which was only received by the Plaintiff only on the 27th of April 1999.

10. The Plaintiff on receipt of said Winding-Up Petition although noting that the said Winding-Up Petition was only fixed for hearing on the 3rd of September 1999, nevertheless attended to the matter immediately and expeditiously and in view of the same, was surprised and shocked when the First and Second Defendants caused the said Winding-Up Petition to be advertised and published on the 12th of May 1999 in a local daily newspaper, the Star [hereinafter referred to as the “said advertisement”] when there was seemingly no urgency to warrant the same and further compounded by the fact that the First Defendant had received and was in possession

of payment by the Plaintiff, well before the date of publication of the said advertisement.”

5. The first appellant later by another application under the same provisions of the law also sought for determination of a preliminary issue before trial but limited itself to the defence of absolute privilege. It sought for an order “*That the question of law of whether the 1st Defendant’s defence of absolute privilege is applicable in the circumstances be determined pursuant to Order 14A of the RHC*” or “*Alternatively that the issue of absolute privilege be tried before the trial of the cause*”, under Order 33 Rule 2 of the RHC.

6. When both applications came before the learned Judge, his Lordship directed the first appellant to adopt the issue as couched in the second appellant’s application “for the sake of convenience and to facilitate the proceedings.” (See the learned Judge’s Grounds of Judgment at page 17 of the Appeal Record). This is confirmed and conceded in the written submission of learned counsel for the first appellant in the court below wherein he stated:

“The 1st Defendant adopts the issue stated in the 2nd Defendant’s Summons in Chamber (Enclosure 20).”

At the end of the day after considering the written submissions of the learned counsel for the respective parties the learned Judge dismissed both applications with costs. Hence we had the aggrieved parties before us.

The Facts

7. The learned Judge summarised the facts in his judgment as follows:

“The undisputed facts are as follows. The second defendant is a firm of solicitors and represented the first defendant in a winding-up petition against the plaintiff company. The petition was filed on 22 March 1999 in respect of a debt of RM141,750 owed by the plaintiff to the first defendant. The petition was served on the plaintiff on 23 April 1999. The petition was published in the Star newspaper on 12 May 1999.

Prior to the publication of the petition in the Star newspaper, the plaintiff, on Wednesday, 4 May 1999, tendered a cheque to the first defendant for the exact amount of indebtedness i.e. RM141,750. The first defendant presented the cheque to the bank for clearance on 6 May 1999, and it was cleared on 11 May 1999. As stated earlier, the petition was published by the defendants in the Star on Wednesday 12 May 1999, despite them having knowledge that the debt had been settled on 11 May.

The Plaintiff’s cause of action against the defendant is based on libel, the subject matter of the libel being the advertising of the petition in the Star by the defendants subsequent to the settlement of the debt.

The Plaintiff alleges that there is malicious intention on the part of the defendants; since it has already settled the debt. The defendants, however, denies that there was malicious intention on their part on the grounds that there was a legal duty on their part to proceed with the advertisement of the petition notwithstanding the settlement of the debt by the Plaintiff.”

8. While the undisputed facts, as summarized above, reflect the correct position as pleaded between the respondent and the appellant except that unlike the first appellant who admitted the settlement, the second appellant denied paragraphs 8 and 9 of the respondent’s Statement of Claim which relate to these events/facts.

9. Paragraphs 8 and 9 of the Statement of Claim read as follows:

“8. On receipt of the said letter of 23rd of April 1999, and the documents enclosed thereto, the Plaintiff immediately attended to the said matter by forwarding a letter dated 29th of April 1999 to the First Defendant and enclosing a cheque for the sum of RM141,750-00 being full payment in respect of the outstanding debt.

9. By a copy of the said letter of 29th of April 1999, the First Defendant through its Director one Tony Tay Beng Kong who was the Director who executed the Affidavit in support of the Winding-Up Petition, in an endorsement to the said letter acknowledged receipt of the said cheque for RM141,750-00 and undertook to withdraw all legal

proceedings immediately thereafter. This endorsement by the said Tony Tay Beng Kong was signed off by him and dated the 4th of May 1999."

10. It is perhaps for the reason of this denial that the second appellant omitted any mention of paragraphs 8 and 9 of the Statement of Claim from the proposed issue that they framed. But these are facts which form the basis of the respondent's claim against both appellants. They concern the very actions of the appellants which the respondent took offence and alleged to be unjustifiable, malicious and reckless for being defamatory of the respondent and injurious to its reputation.

11. In this respect, it is also pertinent to note that in its defence the first appellant also averred that "*at all material times in this action*" it acted "*prudently and only upon advice from the 2nd Defendant* (second appellant)." – see paragraph 11.1 of 1st Defendant's Defence.

Rejection of Preliminary Issue

12. In his grounds of judgment the learned Judge gave two reasons for dismissing the appellants' applications. His first and main reason is that:

"Since there is an allegation by the plaintiff of malicious intent on the part of the defendants, which the defendants deny (hence there is a dispute on a material fact), I do not think that it is appropriate that I should consider the issue of qualified

privilege as raised by the defendants as a preliminary issue and without the need for a trial. It would have been a different matter if malicious intent is not an issue, or that the allegation of malicious intent is not disputed by the defendants.

The defence of qualified privilege was specifically pleaded by both appellants in their defence.

13. For convenience the first appellant's defence of absolute privilege and qualified privilege read as follows:

“9. The 1st Defendant will contend that the Advertisement was published on an occasion of absolute privilege in the particulars appearing at paragraphs 4.1 – 4.6 above and which may be summarized as follows:-

Summary of Particulars of Absolute Privilege

9.1 That the 1st Defendant and the Plaintiff were the Petitioner and Respondent respectively, in the Petition; and

9.2 That the Advertisement was published as part of the 1st Defendant's statutory obligation in prosecuting the Petition.

10. Further and in the alternative, the words contained in the Advertisement were published on an occasion of qualified privilege.

Particulars of Qualified Privilege

- 10.1 That the 1st Defendant will rely on the particulars provided in paragraphs 9, 9.1 and 9.2 above to support this plea; and
- 10.2 Additionally, the 1st Defendant will content that the words contained in the Advertisement were a fair and accurate report and/or copy and/or extract of a public document maintained at the Registry of the High Court of Malaya, to wit, the Petition.”

14. The second appellants’ Defence in paragraphs 23 and 24 are in the following terms:

- “23 The Second Defendant aver that the Plaintiff’s claim is misconceived and not maintainable in law and in fact.
24. Further or in the alternative, the Second Defendants aver that the publication of the said notice of advertisement was done and published on an occasion of absolute and/or qualified privilege.

PARTICULARS

- (a) The said petition was issued pursuant to a proceeding in law;

- (b) The said notice of advertisement was published in the course of judicial proceedings;
- (c) The said notice of advertisement was published pursuant to requirements in law.

15. With the state of the pleadings as it were, one can hardly fault the learned Judge for viewing the issue of malicious intent which is in dispute as crucial to the claim and can only be resolved at a full trial.

16. His second reason refers to the defence of absolute privilege which applicable law he felt had been misconceived by the appellants. To quote him:

“Further, there is another difficulty: the defendants’ application is based on a misconception of the law – the misconception being that under rule 24 of the Company (Winding-Up) Rules 1972 it was mandatory for them to advertise the petition. True, it was mandatory for them to advertise the petition within the prescribed period: but it was only mandatory *if the defendants intended to proceed with the hearing of the petition*. In the present case, however, it was clear to the defendants that they had no reason to proceed with the petition as the debts had already been settled.”

It is apparent that the learned Judge felt the need for the parties not only to address the provisions of the law but also to factually establish the events that transpired to necessitate the publication of the advertisement.

The Appellants' Case

17. Before us learned counsel for the first appellant submitted that his application only sought for a determination whether absolute privilege was applicable in respect of the advertisement. The issue is one of law and as his client only pleaded absolute privilege he relies on the second category of “absolute privilege” in *LINCOLN v DANIELS* (1962) 1 QB 238 which was applied in this country in the case of *THIRUCHELVASEGARAM A/L MANICKAVASEGAR v MAHADEVI A/P NADCHATIRAM* (2000) 5 MLJ 465. In that case the second category of absolute privilege is said to cover “*everything that is done from inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other documents which institutes the proceedings.*” He however conceded that the second category was not applied in *THIRUCHELVASEGARAM* (supra).

18. Learned counsel pointed out that the issue is whether the petitioner (the first appellant) can surreptitiously accept payment exclusively at the expense of other creditors. He referred to sections 219(2) and 223 of the

Companies Act 1965 (the Act) which provide for the winding-up of a company to commence on presentation of a winding-up petition and which render void any disposition of the property of the company after such date unless the Court otherwise orders. He also cited the decision of this court in **KREDIN SDN BHD v. DEVELOPMENT & COMMERCIAL BANK BHD** (1995) 3 MLJ 304, 309 which held that section 219 was meant to protect creditors, particularly unsecured creditors, in that equal treatment must be maintained even during the interim period between the date of the presentation of the petition for winding-up and the date when the order for winding-up is made. He concluded by saying that the respondent was the author of its own wrong as its failure to repay its debt is contrary to commercial integrity and morality.

19. Learned counsel for the second appellants adopted the submission of his learned colleague. He added that his clients were solicitors acting in the course of their duties as such when they caused the advertisement to be published. And since what they did was in the course of judicial proceedings, public policy requires them to be protected from claims for defamation for matters arising therefrom. Some English cases were cited as authority that no libel or slander lies against judges, counsel, witnesses or parties for words written or spoken in the ordinary course of judicial proceedings. As in the case of the first appellant, learned counsel for the

second appellant also claimed to rely only on the defence of absolute privilege.

The Respondent's Reply

20. On behalf of the respondent it was submitted that there was no duty on the part of the petitioner to advertise as the appellants did because Rule 24 of the Companies (Winding-Up) Rules 1972 (the Rules) clearly spells out that the petition only needs to be advertised "*seven clear days or such longer time as the Court may direct before the hearing*". Learned counsel averred that there is no requirement of the Rules for the petition to be advertised in whatever circumstances.

21. On the contrary he argued, the Rules makes provision for the petitioner to withdraw his petition at any stage. Rule 33(1)(b) in fact allows the petitioner to consent to the withdrawal of his petition or allow it to be dismissed. It was contended that as the debt in this case was extinguished by the encashment of the respondent's cheque for the full amount of the claim there was no longer reason to proceed with the petition or advertisement. Echoing the learned Judge, learned counsel emphasized that Rule 24 only makes advertisement mandatory if the petitioner intended to proceed with the hearing of the petition.

22. It was the common stand of all parties that the petition was in fact withdrawn before the date fixed for its hearing but after the publication of the advertisement.

The Finding

23. It is obvious from their applications that the appellants wanted their case to be expeditiously proceeded with under O. 14A or 0.33 r 2 of the RHC instead of the normal route of a full trial of the issues between the parties. For expedience the second appellant even framed the purported question of law as preliminary issue that was proposed to be determined. The sole issue confronting the learned trial Judge was whether to accede to such request which is an exercise of his judicial discretion.

24. It is apparent from the arguments of learned counsel before us (as also in the written submission put in before the learned Judge in the court below) that the appellants (likewise the respondent) had preempted the issue faced by the learned Judge. But to his credit, the learned Judge did not miss the wood for the trees and correctly resisted the temptation. He confined himself to matters relevant to the exercise of his discretion which was what was sought for at that stage of the proceedings and refrained from going into the merit of the proposed and adopted preliminary issue.

25. The issue before us was whether the learned trial Judge was correct in refusing to exercise his discretion under O. 14A or O. 33 r 2 of RHC. Can one fault the learned Judge for considering it inappropriate to take the issue of qualified privilege as a preliminary issue because he found a dispute on the allegation of malicious intention which can only be resolved in a trial? And on the issue of absolute privilege he saw a misconception of law by the appellant as regards the requirement of rule 24 of the Rules.

26. Learned counsel for the first appellant sought for a determination only on the issue of absolute privilege saying that was his application and also the only pleaded defence of the first appellant. In adopting the same submission the second appellant purported to be acting in the course of their duties in publishing the said advertisement. With respect, the appellants cannot resile from their pleaded position. They both pleaded the defence of absolute and qualified privileges and the question framed and adopted also state both defences.

27. O. 14A of the RHC provides for an accelerated final disposal of an action at an interlocutory stage to save time and expense which would otherwise arise if the action were to proceed to full trial. It empowers the court to make a final determination of a question of law without the need of

an application under O. 33 r 5 for the determination of a preliminary issue.

Two requirements are however prescribed for its exercise :

- (i) the question of law or construction is suitable for determination without full trial of an action, and
- (ii) such determination will be final as to the entire cause or matter or any claim or issue therein.

28. According to Malaysian High Court Practice 2001 Desk Edition page 332 :

“ The test of whether the question of law or construction is suitable to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action.”

and at page 333 :

“The issue of law, if it is discernible at all, has to be discernible from the statement of claim and defence. If there could still be a debate as to whether on slightly different facts a cause of action might or might not exist, an application under O. 14A is inappropriate.”

29. The basis of the respondents' claim is the appellants' insistence in publishing the advertisement despite having given the undertaking to withdraw the petition upon the clearance by the bank of the respondent's cheque for full payment of claim. While the second appellant denied any knowledge of the alleged settlement, the first appellant claimed to only know about the clearance of the cheque on the day the advertisement was published and at the same time claiming to act at all times on the advice of the second appellant. These are disputes of fact which can only be resolved by evidence at a full trial. Therefore as an issue of law the question posed failed the test of suitability for determination under O. 14A as earlier mentioned. It also assumes facts not discernible from the statement of claim and defence, hence inappropriate for pre-trial determination.

30. On the issue of absolute privilege there is not only factual dispute but also misconception of the law. The first appellant claimed to cause the publication as part of his statutory obligation i.e. "partial fulfillment" of the requirement of rule 24. The second appellant purported to publish the advertisement "pursuant to requirements in law". The respondent's stand is that the petition is not required to be advertised unless the appellant is definitely proceeding with it and even then the publication may only be made within the period prescribed by rule 24 i.e. seven clear days before the hearing date. Here the publication was done on the 12th of May 1999, well

before the hearing date fixed on the 3rd of September 1999 and despite the undertaking and settlement. Thus, whether there was any necessity to publish and whether such publication was done pursuant to the requirement of the law were neither proven nor admitted.

31. Further more, the line of defence taken gave the learned Judge the impression that there was a misconception of the law on the part of the appellant that advertisement is mandatory once a petition is filed when the law appears to view publication outside the prescribed period as a breach of the Rules and an irregularity – see *GKM AMAL BHD v. BANK UTAMA (MALAYSIA) BHD* (2004) 1 CLJ 769 CA. The proposed issue is therefore obscure and not discernible from the pleadings. Particularly so when the pivotal averments in paragraphs 9 and 10 of the statement of claim are still in dispute. In any event, section 221(2) of the Companies Act 1965 provides for the withdrawal of a winding-up petition by the petitioner at any time.

32. For the aforesaid reasons, the issue as framed is neither suitable nor possible for determination under O. 14A.

33. O. 33 r 2 of the RHC is apparently wider in scope as it encompasses

“any question or issue arising in a case or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise”.

The general rule as applied by the Singapore Court of Appeal in *FEDERAL INSURANCE CO. v. NAKANO SINGAPORE (PTE) LTD* (1992) 1 SLR 390, 394 is that the Court will not exercise its power under O.33 r. 2 to order a preliminary point of law to be tried unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action.

34. Malaysian High Court Practice 2001 Desk Edition states – “Ordinarily an order for the hearing before trial of a point of law raised by a pleading will be made only when the objection raises a serious question of law, which if decided in favour of the party applying for a preliminary trial, would dispense with the need for further trial of the remaining issues in the matter, or otherwise would substantially dispose of the cause or matter.” Indeed in delivering the judgment of the Federal Court in *CHAN KUM LOONG v. HII SUI ENG* (1980) 1 MLJ 313, 314 Chang Min Tat FJ said that a preliminary point of law which does not decide the matter between the parties one way or the other is an unjustified waste of time on occasions an equally unjustified increase in costs.

35. To quote the dicta of Roche J in ISAACS & SONS LTD v. COOK (1925) 2 kb 391, “ A preliminary trial should not be ordered on matters where there is obscurity of facts or Law or both, or where the application of the principles of law are wholly dependent on facts which have yet to be determined. It should only be ordered in respect of matters on which no further light would be thrown at the trial.”

36. On the state of the pleadings as it were, the question framed, as adverted to earlier, ignored the bone of contention between the parties in favour of some erroneous assumption of fact and law that the publication was made pursuant to law. This obscurity of fact and law must first be determined before the question can be answered.

37. In any event, the issue as framed incorporates both defences of absolute privilege and qualified privilege, hence two issues. Assuming that the facts are undisputed or admitted (when they are not) the answers would not dispose of the entire cause or matter unless held in the appellant’s favour. It is not therefore a question that is appropriate for preliminary determination under O. 33 as it would neither save time nor cost.

38. To reiterate, there is in this case an obscurity of fact and law which further light can only be thrown at the trial. Therefore to entertain the application would be, to use the words of Chang Min Tat FJ, an unjustified waste of time and occasion an unjustified increase in costs.

Conclusion

39. There is no doubt that the learned Judge was exercising his judicial discretion when he refused the appellants' application under O. 14A or O. 33 r 2 of the RHC. Such decision is generally not interfered with by the appellate court unless it is 'plainly wrong' - see dicta of Lord Templeman in *ASHMORE & ORS v. CORP OF LLOYDS* (1992) 1 WLR 446 at 454. We did not find any cause to intervene.

40. The appeal was accordingly dismissed with costs. Deposit to the respondent to account of taxed costs.

Dated : 3.10.2007.

TENGGU DATO' BAHARUDIN SHAH BIN TENGGU MAHMUD
Hakim Mahkamah Rayuan
PUTRAJAYA.

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