

**IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)  
CIVIL APPEAL NO. 02(f)-76-11/2020 (W)**

**BETWEEN**

- 1. DATO' SRI DR. MOHAMAD SALLEH BIN ISMAIL  
(NO. K/P: 480513-03-5379)**
- 2. NATIONAL FEEDLOT CORPORATION SDN BHD  
(NO. SYARIKAT: 756757-K) ... APPELLANTS**

**AND**

**MOHD RAFIZI BIN RAMLI  
(NO. K/P: 770914-115-25) ... RESPONDENT**

**Coram:** Azahar Mohamed, CJM  
Zaleha Yusof, FCJ  
Zabariah Mohd Yusof, FCJ

**SUMMARY OF JUDGMENT**

**[1]** The 1<sup>st</sup> Appellant, Datuk Seri Dr Mohamad Salleh bin Ismail was the chairman and director of the 2<sup>nd</sup> Appellant, National Feedlot Corporation Sdn Bhd. Both the Appellants sued the Respondent, Mohd Rafizi Ramli for damages for defamation. The Respondent at

all material times was the director of strategy of a political party. The Appellants claimed that the Respondent had defamed them at a press conference. The sting, as contended by the Appellants, was the allegation by the Respondent that public funds were used to purchase properties for the 1<sup>st</sup> Appellant's own personal and family gain contrary to public interest.

**[2]** The High Court decided in favour of the Appellants. The 1<sup>st</sup> Appellant was awarded with the sum of RM150,000 as damages whereas a sum of RM50,000 was awarded to the 2<sup>nd</sup> Appellant, as well as RM100,000 being the costs to be paid to the Appellant.

**[3]** The High Court concluded that the Impugned Statement made by the Respondent were defamatory of the Appellants as they had the effect of lowering the estimation of the Appellants in the eyes of the public.

**[4]** Having established that the Impugned Statement made by the Respondent was defamatory, the High Court next considered whether his pleaded defence can be sustained. The High Court held that the defence of fair comment was not available to the Respondent as the statements made by the Respondent were expressed as statement of facts and did not constitute a comment. The statements were based on the documents which the Respondent obtained.

However, there was nothing in the documents that suggested that the deposit by the 2<sup>nd</sup> Appellant had been used either as a leverage or as a security or collateral for the grant of any loan. The basic facts available to the Respondent did not support the inference that he had drawn from those facts.

**[5]** At the Court of Appeal hearing, quite unexpectedly the Court brought up the issue of section 10 of the Defamation Act 1957 (Act 286) ("**DA 1957**") which concerns the apology in mitigation of damages and linked it with the fact that the Appellants' letter of demand did not contain any mention of the fact that the loan had been withdrawn. The issue of the letter of demand and section 10 of the DA 1957 had not been raised at all in the High Court by either party, nor in the pleadings of parties, nor in the memorandum of appeal at the Court of Appeal and submissions by both parties. However, the Court of Appeal proceeded to deal with the appeal as though the letter of demand and section 10 of the DA 1957 was the entire answer to the case in favour of the Respondent. Consequently, the Respondent's appeal to the Court of Appeal was allowed and the High Court's decision was reversed.

**[6]** It was agreed by both parties at the hearing of the Appellants' application for leave to appeal to this Court that several of the

grounds of the decision of the Court of Appeal were outside the pleaded case of both parties. This approach taken by the Court of Appeal cannot be right. The Respondent therefore did not object to the application for leave, and leave to appeal was given with a condition that parties be allowed to ventilate the defence of fair comment before this Court.

**[7]** As Questions 1, 2 and 4 have no bearing on the outcome of this appeal, parties have agreed to focus their submissions on Question 6 (a) and (b). Both parties also agreed that the present appeal really turns on the question whether the Respondent had proved the defence of fair comment.

**[8]** What is important to note in this appeal is that the correctness of the High Court's ruling that the Impugned Statement made by the Respondent was defamatory of the Respondent is not disputed. Before us, the Respondent's main contention is that the High Court erred in holding that the defence of fair comment did not avail him.

**[9]** For the lack of proper reasoning in relation to the defence of fair comment in the Court of Appeal, ultimately, the focal point in this present appeal in reality, is the findings of the High Court on this issue. Flowing from the arguments raised by both sides, the

fundamental issue for our determination is whether the Respondent could rely on the defence of fair comment to defeat the Appellants' claim.

**[10]** The High Court correctly directed itself in law that in order to succeed in his defence of fair comment, the Respondent will need to establish the four (4) elements in **Joshua Benjamin Jeyaretnam v Goh Chok Tong [1989] 3 MLJ 1** (“Joshua Benjamin”):

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

**[11]** The High Court found that the Impugned Statement concerns matters of public interest, to which, I agree. Both the parties did not address the Court on this issue. Suffice for me to say that the matter was such as to affect the people at large, so that they may be legitimately interested in, or concerned at what was going on.

[12] The High Court further held that the Respondent failed to establish the other three (3) elements. I will now deal in turn each of these three (3) elements.

**Words must be in the form of comment/inferences**

[13] First, whether the Impugned Statement made by the Respondent is a comment? It is the Appellants' contention that the Impugned Statement was a statement of fact and did not constitute a comment or inferences of facts.

[14] In supporting this stance, learned counsel for the Appellants relied on the case of **Hunt v Star Newspaper Co. Ltd [1908] 2 KB 309; CA pages 319-20 ("Hunt")** cited in **Kemsley v Foot & Ors [1952] 1 All ER 501; HL ("Kemsley")**.

[15] Learned counsel for the Respondent also relied on **Kemsley (supra)** to support his contentions that the Impugned Statement made by the Respondent were comments and inferences of facts. Further, he also pointed out during the course of his oral submissions that in finding the Impugned Statement was a statement of facts, the High Court had overlooked the language of the Impugned Statement

which made it clear that it was the Respondent's opinion based on express references to admitted facts.

[16] It is important as the first task to ascertain whether the Impugned Statement is a statement of fact or is it the Respondent's opinion and inferences made from the facts. The necessity to decide this is a fundamental requirement in order to determine whether the defence of fair comment is available to the Respondent. This is because *"if the imputation is one of fact, the defence must be justification or privilege"* (see ***Gatley on Libel and Slander, 11<sup>th</sup> Ed., Sweet and Maxwell, 2008, page 339 ("Gatley, 11<sup>th</sup> Ed.")***) and therefore the Respondent could not rely on the defence of fair comment.

[17] It is therefore vital to refer to the Impugned Statement and assessed whether it is a statement of fact or the Respondent's opinion or inferences made from facts. It is very important now to look at closely the whole of the statements made by the Respondent.

[18] As correctly submitted by learned counsel for the Respondent, the Impugned Statement must be read and considered in the context of the entire statements made by the Respondent and not in isolation.

[19] In my view, an ordinary or reasonable man upon reading the Impugned Statement and the way it was expressed, the context in which it was set out and the content of the entire statement would regard them as the Respondent's comments and inferences made from the facts. The facts relied upon by the Respondent will be discussed in a greater detail later in this judgment. A key point to note is that the Impugned Statement did not single-out an action nor independently alleging a particular conduct of the Appellants *per se*. The more closely one looked at the entire statements, the more apparent it became that based on a series of facts namely the attachments A to E, inferences are derived upon "*kaedah*" and "*modus operandi*" that there is misappropriation of public funds which needed to be accounted for. Materially, as argued by learned counsel for the Respondent, the language of the statements - "*tampil dengan bukti kukuh*" and "*Secara jelas ... ini membuktikan bagaimana dana awam ... telah diselewengkan untuk dijadikan jaminan untuk mendapatkan pinjaman peribadi*" clearly identified the facts relied on by the Respondent to state his comment and inferences, which enable the readers to come to their own conclusions whether the Respondent's opinion was correct.



[20] Understanding the Impugned Statement in this fashion is in accordance with how **Joshua Benjamin (supra)** distinguish between a statement of fact or comment. Further, **Gatley (supra)** is instructive on examining words of an impugned statement.

[21] Another case that is instructive is the case of **Chen Cheng & Anor v Central Christian Church and Other Appeals [1999] 1 SLR 94; SGCA (“Chen Cheng”)** which discussed in length on the distinction between facts and comment.

[22] Reverting to the present appeal, in my opinion, looking objectively on how the Impugned Statement was expressed, there is no independent statements which falls within the characterization laid by the legal authorities to conclude that the statements are statements of fact *per se* and not comment or inferences of fact. In my opinion, the Impugned Statement was the Respondent’s opinion and inferences made from the facts.

**Opinion/ inferences must be based on true substratum of facts**

[23] Which then brings me to the more delicate and difficult issue whether the Impugned Statement made by the Respondent was

comment or inferences based on facts that are required by the test laid down by **Joshua Benjamin (supra)**.

**[24]** It is the nub of the Appellants' learned counsel's argument that other than the Impugned Statement made was worded as statement of fact and therefore did not constitute a comment, the Impugned Statement was also unsupported and untrue. He particularly referred to the fact that the Public Bank loan granted to the 1<sup>st</sup> Appellant had been withdrawn by the time the Impugned Statement was made. He argued that there was no basic fact to infer that public fund was used as leverage or collateral for loan to purchase the Eight (8) units.

**[25]** Learned counsel for the Appellants argued that it is important to ascertain the veracity of the basic facts. He added that even if the Respondent succeeded in arguing that the Impugned Statement was in point of fact the Respondent's opinions and inference made from the facts, that basic facts must be established to be true. To support this point, **Joshua Benjamin (supra)** again was relied by learned counsel.

**[26]** The Appellants' learned counsel also referred to the case of **Hunt (supra)** which was cited in **Kemsley (supra)** to establish the requirement that the Respondent must truly state all the basic facts in making an inference of fact. He also argued that if facts and

comments are intermingled, it has to be deemed as statement of facts.

[27] Learned counsel for the Respondent argued that the true *ratio decidendi* of **Kemsley (supra)** states that it is sufficient for the facts relied truly stated in the libel in making an inference of fact. He relied to another passage in **Kemsley (supra)** to establish about the manner relevant in distinguishing a statement of facts or a comment.

[28] In my view, the key principles that may be extracted from the above discussion are, first, in relying on the defence of fair comment the Respondent must establish a sufficient substratum of facts upon which he draws inferences. Secondly, those facts on which the comment or inferences were made must be truly stated so that the readers may form their own opinion whether the comment or inferences were well founded. This is consistent with **Joshua Benjamin (supra)** that the comments made on inference of fact must be true facts.

[29] This essentially means, to constitute a sufficient substratum of fact it is not required that all the facts on which the Respondent's comments or inferences were based on should be stated in order to admit the defence of fair comment. This makes sense as the defence

of fair comment may be contrasted with the defence of justification that requires every defamatory allegations made are true or are substantially true. However, the substratum of facts relied upon by the Respondent in making his comments must be true and existing. It is as what **Joshua Benjamin (supra)** stated, that “*a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true*”. In other words, a plea of fair comment is not available to the Respondent if the Respondent invented or created the facts he intended to rely.

**[30]** In the present case, the attachments A to E to the whole statements made by the Respondent are the print-outs of Public Bank’s record of the Appellants’ bank accounts. The attachments and their references in the statements set out the following basic facts:

- a. The 2<sup>nd</sup> Appellant’s fixed deposit of RM71,393,617;
- b. National Meat and Livestock Corporation Sdn Berhad Sdn (a company controlled by the 1<sup>st</sup> Appellant’s family) fixed deposit of RM1,872,254;
- c. Bank loan of RM197,338 to Agrosience Industries Sdn Bhd (a company controlled by the 1<sup>st</sup> Appellant’s family), and its deposit account has a credit of RM927;

- d. The 1<sup>st</sup> Appellant was given a loan of RM4,391,240 and he stood as a guarantor for a loan of RM663,743 when his deposit account with the bank only had RM421;
- e. Loan obtained by the 1<sup>st</sup> Appellant to finance purchase of Eight (8) units of real property from KL Eco City Sdn Bhd with a total forced sale value of RM9,688,866.

**[31]** It is material to point out that the truth of the facts contained in these documents are not disputed. It must be said, however, that the loan was cancelled without having been drawn down. However, this information that only the Appellants could have known was not even mentioned in the notice of demand dated 28<sup>th</sup> June 2012, which was sent by the Appellants to the Respondent. It is also noteworthy as observed by the High Court that the 2<sup>nd</sup> Appellant had deposited an amount of RM71,393,617 with Public Bank and that the Eight (8) units were recorded in the collateral system of the bank and the cumulative forced sale value of these properties was approximately RM9.69 m.

**[32]** The High Court, however, found that the inferences made by the Respondent were not supported by facts. The High Court particularly referred to the fact that the loan granted by Public Bank to the 1<sup>st</sup> Appellant had been withdrawn by the time the Impugned Statement was made by the Respondent, and concluded that the

facts relied on by the Respondent was inaccurate. But in so deciding, in my view, the High Court failed to appreciate that the withdrawal of the loan confirmed that such loan had been granted to the 1<sup>st</sup> Appellant and his son despite their lack of solid savings with Public Bank. And this, tellingly, coincided with the 2<sup>nd</sup> Appellant's enormous fixed deposit in the sum of RM71,393,617 at the same time with the said bank. It is often the case that financial standing must certainly be an important factor for any customers seeking loans from any banks. It is therefore unsurprised a reader reading the substratum of facts that I mentioned earlier will draw inferences that the RM71,393,617 deposit played a part in Public Bank's initial loan offer to the 1<sup>st</sup> Appellant for the purchase of the Eight (8) units.

**[33]** In my opinion, those basic facts that I mentioned earlier constitute sufficient substratum of facts, which are the subject matter of the Appellants' defamation against the Respondent. Based on this substratum of facts, the Respondent made the conclusions in the Impugned Statement, which in my views are his opinion and inferences from the facts referred to earlier.

**[34]** In the most recent UK case of **Joseph and others v Spiller and another (Associated Newspaper Ltd and others intervening)** **[2011] 1 AC 852; UKSC ("Joseph")**, the law of defence of fair

comment in defamation had been extensively spelled out. **Joseph (supra)** had laid down the history and development of the law of defence of fair comment in great detail including deliberating the principles laid in **Kemsley (supra)** and **Hunt (supra)**.

**[35]** **Joseph (supra)** is a case of importance as it is a case to decide (i) whether the defendant can rely in support of their plea on fair comment on matters to which they made no reference in their comment and (ii) whether the matters to which the defendants did refer in their comment capable of sustaining a defence of fair comment.

**[36]** By parity of reasoning, it is unnecessary in the present case to prove that there is a loan existing at the time the Impugned Statement was made, or to go over and beyond to prove as what the High Court reasoned, that *“no loan would have been granted but for the fact of the deposit of the RM71.4m by the 2<sup>nd</sup> plaintiff”*. It is sufficient as **Joseph (supra)** held that based on the facts that are stated in general terms, the Respondent made the impugned opinion and inferences.

**[37]** The point that I want to make can now be concluded as follows. The breadth of the defence of fair comment only revolves around

comments or inferences honestly made based on certain existing substratum of facts that are truly stated. What is required is that the comment has to identify, at least in general terms, the matters on which it is based. This, in my view, the Respondent had made out to admit the defence of fair comment. After all, that is what defence of fair comment is, as opposed to the defence of justification. The primary reasoning for the creation of the defence of fair comment is the desirability that a person should be entitled to express his view freely about a matter of public interest.

### **Comment/inferences must be fair**

**[38]** Finally, I will deal with the issue whether the comment and inferences made by Respondent are one which a fair-minded person can honestly made.

**[39]** In **Joshua Benjamin (supra)**, the Privy Council confirmed the test of 'fair' comment **at page 4 paras C-D**, right:

**[40]** On this issue, the High Court did not explain its findings that the comment made by the Respondent was not one that a fair-minded person could have honestly made based on the facts that were available to him at the time.



**[41]** In considering this issue, it is relevant to note the circumstances leading to the press conference held by the Respondent on 7<sup>th</sup> March 2012. In 2011, the Auditor-General audited the performance of the Project. The Auditor-General's report was presented to Parliament in October 2011. The failures and the weakness of the Project were highlighted in the report. As public funds were involved the report by the Auditor-General drew public's attention. The disclosure created grave public concern as it raised the issue of accountability, transparency and good governance in respect of those involved in the affairs of managing public funds. It received wide media coverage and was also subject to much debate in Parliament at the material time.

**[42]** As I have indicated earlier there was sufficient substratum of facts to warrant the Respondent making the Impugned Statement. In this context, it is relevant to note that it was the finding of the High Court that the Respondent had an honest belief that his allegations were true and that that he was performing a public duty in agitating for greater accountability for public funds.

**[43]** Given all this, in my view, the Respondent's conclusion that public fund had been misused as a leverage for the Public Bank's

loan was an opinion and inferences that a fair-minded person would have honestly made in the circumstances.

[44] In light of all the above, all the four (4) elements of fair comment as laid down in **Joshua Benjamin (supra)** had been established. Therefore, the Respondent could not be liable for damages for defamation.

### **The issue of malice**

[45] That leaves me to deal with Questions 6 (a) and (b). As can be seen, the crux of the questions essentially relates to the issue of malice. In this regard, it must be emphasised that the High Court made an express finding that the Respondent was not motivated by malice in making the defamatory statements. In doing so, the High Court explained that “*although the Respondent did not care for the effect that his statements may have had on the [Appellants], ...he nonetheless had an honest belief firstly that his allegations were true and that secondly that he was performing a public duty in agitating for greater accountability for public funds*”, and concluded that the Appellants had failed to prove malice on the part of the Respondent. The Court of Appeal did not disturb that findings. In this regard, it is trite law that proof of malice defeats the defence of fair comment

because a comment that is made maliciously is not fair comment. Taking into account that the Impugned Statement was made without malice, the Respondent could for that reason resort to the defence of fair comment. Consequently, it is unnecessary to answer Questions 6 (a) and (b).

### **Conclusion**

**[46]** In all the above circumstances, this appeal must be dismissed. I agree with order of the Court of Appeal though on substantially different grounds.

**[47]** My learned sisters Zaleha Yusof, FCJ and Zabariah Mohd Yusof, FCJ have read my judgment in draft and have expressed their agreement with it and have agreed to adopt the same as the judgment of this Court.

Dated this day, 21<sup>st</sup> April 2022.

**(AZAHAR BIN MOHAMED)**  
Chief Judge of Malaya