Malayan Law Journal Reports/2010/Volume 2/Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor - [2010] 2 MLJ 492 - 8 December 2009

35 pages

[2010] 2 MLJ 492

Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR)
HARMINDAR SINGH JC
CIVIL SUIT NO S6-23-44 OF 2003
8 December 2009

Tort -- Damages -- Defamation -- Libel -- Assessment -- Rationale for awarding substantial damages -- Whether vindication of plaintiff's standing in community to be focus of remedy rather than award of large sums of money -- Whether plaintiff suffered any economic harm -- Whether aggravated and exemplary damages justified

Tort -- Defamation -- Qualified privilege -- Publication of defamatory article regarding politician in newspaper -- Whether writer had reasonable grounds for believing that imputation was true -- Whether defence of qualified privilege available

Tort -- Defamation -- Reportage -- Publication of defamatory article regarding politician in newspaper -- Whether article reporting ongoing dispute -- Whether allegations reported in fair, disinterested and neutral way -- Whether defence of reportage privilege available

The plaintiff was the former Deputy Prime Minister of Malaysia and former Minister of Finance. Currently he was a Member of Parliament and leader of the opposition in the Malaysian Parliament. The first and second defendants were the writers, printers, publishers and distributors of the *New Straits Times* newspaper ('the said newspaper'). On 2 March 2002, the defendants published in the said newspaper, an article captioned 'Anwar's link to US lobbyist' 'New Revelation by a political weekly magazine into Dato' Seri Anwar Ibrahim's ties with a controversial US lobby group surface in Washington DC'. The plaintiff claimed that the article was defamatory of him and sought general damages of RM100m as well as aggravated and exemplary damages. The defendants resisted the claim on the grounds that the article was not defamatory and that even if it was, they were entitled to the defence of qualified privilege. The impugned article referred to four 'high-powered' Pacific Dialogues organised by the Asia Pacific Policy Centre ('APPC') between US and Malaysian politicians and businessmen in Kuala Lumpur. The said article had claimed that a US magazine's investigation into Washington DC lobbyist Douglas H Paal had thrown new light on the

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American think-tank linked closely to the plaintiff. The article referred, inter alia, to the following allegations made in the magazine: (i) that the conferences were used by the plaintiff to boost his image in Washington; and (ii) that former Bank Negara assistant governor Datuk Abdul Murad Khalid had made a statutory declaration in which he made a series of allegations about financial links between the plaintiff and the APPC. The plaintiff alleged that in the plain, natural and ordinary meaning, the said article was meant to refer to him and understood and or imputed to mean that he was in the eyes of the public: a person of no integrity and dignity, a person bereft of principles and disloyal to the country, a dishonest and corrupt person, an untrustworthy leader and politician, a person who has abused his position for his personal gain and an American agent.

Held, allowing the plaintiff's claim with costs:

(1) It was safe to conclude that the effect of the article would certainly lower the plaintiff in the

estimation of ordinary, right-thinking members of Malaysian society. There would certainly be some degree of hatred, contempt or ridicule. Therefore the impugned article was indeed defamatory (see para 29).

(2) The impugned article and the imputations conveyed concerned government and political matters. There was no evidence that the writer of the impugned article had reasonable grounds for believing that the imputation was true. For the defendants to rely almost solely on the magazine without any verification was poor journalism. The defendants had also failed to seek a response from the plaintiff. The article by the defendant was therefore not a piece of responsible journalism to which the defence of qualified privilege was available (see paras 63, 65, 67 & 73).

(3) The more general privilege known as reportage would only apply in cases where there is an ongoing dispute where allegations of both sides are being reported. The allegations must be reported in a fair, disinterested and neutral way. This was therefore not a case of reportage. The article was not about a continuing dispute between parties. Even if it was, there was only the version of one side (see paras 76 & 78).

(4) The tort of defamation exposed the defendant to a monetary remedy that included both vindication of the plaintiff to the public and as consolation to him for a wrong done. Vindication of the plaintiff's standing in the community should be the focus of the remedy rather than any award of large sums of money for the plaintiff's hurt feelings (see paras 82 & 84).

(5) There was already some measure of vindication for the plaintiff in that the statutory declaration of Ahmad Murad had been discredited. The

plaintiff had achieved public vindication of the truth. However, since vindication came late, the plaintiff had to be compensated. There was no evidence that the plaintiff had experienced any economic harm. Therefore, there was no rationale for awarding substantial damages. A sum of RM100,000 was thus awarded as compensatory damages (see paras 85 & 92).

(6) There was no attempt to delay the proceedings, there was no hostile cross-examination of the plaintiff and importantly, no plea of justification was entered or pursued. It was only the failure of the defendants to verify the accuracy of the material published as well as their failure to seek a response from the plaintiff that led to the unavailability of the defence of qualified privilege. As such, aggravated damages were not in order (see para 88).

(7) In respect of exemplary damages, there was no evidence that the defendants obtained a particular financial benefit or other benefit or advantage. Therefore, the award of compensatory damages was more than adequate. There was therefore no justification for the award of exemplary damages (see para 91).

Plaintif merupakan bekas Timbalan Perdana Menteri Malaysia dan bekas Menteri Kewangan. Sekarang beliau adalah Ahli Parlimen dan ketua pembangkang di Parlimen Malaysia. Defendan-defendan pertama dan kedua adalah penulis, pencetak, penerbit dan pengedar surat khabar *New Straits Times* ('surat khabar tersebut'). Pada 2 Mac 2002, defendan-defendan menerbitkan di dalam surat khabar tersebut, satu artikel bertajuk 'Anwar's link to US lobbyist' 'New Revelation by a political weekly magazine into Dato' Seri Anwar Ibrahim's ties with a controversial US lobby group surface in Washington DC'. Plaintif mendakwa artikel tersebut berunsur memfitnah terhadapnya dan menuntut ganti rugi am berjumlah RM100 juta bersama-sama ganti rugi tambahan dan teladan. Defendan-defendan menentang permohonan tersebut atas alasan bahawa artikel tersebut tidak berunsur memfitnah dan jika pun ia mempunyai unsur memfitnah, mereka berhak kepada pembelaan perlindungan bersyarat. Artikel yang dipersoalkan tersebut merujuk kepada empat 'high-powered' Dialog Pasifik yang dianjurkan oleh Pusat Polisi Asia Pasifik ('PPAP') di antara Amerika Syarikat ('AS') dan ahli-ahli politik dan ahli-ahli perniagaan di Kuala Lumpur. Artikel tersebut menyatakan bahawa sebuah majalah penyiasatan AS mengenai pelobi Washington DC Douglas H Paal telah memberikan pendekatan baru ke atas pemikir Amerika yang mempunyai hubungan rapat dengan plaintif. Artikel tersebut merujuk, antara lain, dakwaan-dakwaan berikut yang dinyatakan di dalam majalah tersebut: (i) bahawa persidangan-persidangan tersebut digunakan oleh plaintif untuk melonjakkan perwatakannya di Washington; (ii) bahawa bekas timbalan gabenor Bank Negara Datuk Abdul

Murad Khalid telah membuat akuan statutori di mana beliau membuat beberapa siri dakwaan mengenai hubungan kewangan di antara plaintif dan PPAP. Plaintif mendakwa bahawa dalam maksud yang jelas, asal dan biasa, artikel tersebut bertujuan untuk merujuk kepadanya dan difahami dan/atau ditafsirkan untuk bermaksud bahawa beliau menjadi tumpuan awam; seorang yang tidak mempunyai integriti dan kehormatan, seorang yang tidak berprinsip dan tidak setia kepada negara, tidak jujur dan korup, seorang ketua dan ahli politik yang tidak boleh dipercayai, seorang yang menyalahgunakan kedudukannya untuk kepentingan peribadi dan ejen Amerika.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Adalah selamat untuk memutuskan bahawa kesan artikel tersebut semestinya akan menyebabkan plaintif dipandang rendah oleh masyarakat Malaysia yang biasa dan berfikiran waras. Semestinya terdapat sedikit sebanyak kebencian, hinaan dan ejekan. Oleh itu artikel yang dipersoalkan sememangnya memfitnah (lihat perenggan 29).

(2) Artikel yang dipersoalkan tersebut dan tohmahan-tohmahan yang dilemparkan mengaitkan kerajaan dan isu-isu politik. Tidak ada keterangan bahawa penulis artikel yang dipersoalkan mempunyai alasan-alasan yang munasabah untuk mempercayai bahawa tuduhan tersebut adalah betul. Untuk defendan-defendan menyandar hampir keseluruhannya ke atas majalah tersebut tanpa apa-apa pengesahan menunjukkan sifat kewartawanan yang lemah. Defendan-defendan juga gagal untuk mendapatkan jawapan plaintif. Artikel tersebut oleh defendan oleh itu bukanlah satu kewartawanan yang bertanggungjawab yang memberikan keistimewaan bersyarat (lihat perenggan 63, 65, 67 & 73).

(3) Keistimewaan yang lebih am yang dikenali sebagai pelaporan (reportage) akan beraplikasi di dalam kes-kes di mana terdapat pertikaian berterusan di mana dakwaan-dakwaan kedua-dua pihak dilaporkan. Dakwaan-dakwaan tersebut mesti dilaporkan dalam cara yang adil, tanpa kepentingan dan saksama. Oleh itu ia bukan kes pelaporan. Artikel tersebut bukan mengenai pertikaian yang berterusan di antara pihak-pihak. Jika pun ia adalah sedemikian, hanya terdapat versi satu pihak sahaja (lihat perenggan 76 & 78).

(4) Tort fitnah mendedahkan defendan kepada remedi kewangan yang termasuk kedua-dua justifikasi plaintif terhadap masyarakat dan bagi menyenangkan hatinya terhadap kesalahan yang dibuat. Justifikasi terhadap kedudukan plaintif di dalam masyarakat seharusnya menjadi fokus remedi melebihi apa-apa award jumlah wang yang besar untuk perasaan plaintif yang terguris (lihat perenggan 82 & 84).

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(5) Telah wujud beberapa kadar justifikasi untuk plaintif di mana akuan statutori Ahmad Murad telah diragui. Plaintif telah mendapatkan justifikasi umum tentang kebenaran. Walau bagaimanapun, oleh sebab justifikasi lambat diberikan, plaintif perlu dipampas. Tidak ada keterangan bahawa plaintif mengalami kerugian kewangan. Oleh itu, tidak rasional untuk mengawardkan jumlah yang banyak. Jumlah RM100,000 oleh itu diawardkan sebagai ganti rugi pampasan (lihat perenggan 85 & 92).

(6) Tidak ada cubaan untuk melambatkan prosiding, tidak ada pemeriksaan balas yang menentang plaintif dan lebih penting lagi, tidak ada pli justifikasi yang dimasukkan atau dikemukakan. Ia adalah kegagalan defendan-defendan semata-mata untuk mengesahkan ketepatan material yang diterbitkan dan juga kegagalan mereka untuk meminta balasan plaintif yang menjurus kepada ketiadaan perlindungan bersyarat. Oleh itu ganti rugi tambahan tidak mengikut tertib (lihat perenggan 88).

(7) Berkaitan dengan ganti rugi teladan, tiada keterangan bahawa defendan memperoleh faedah kewangan tertentu atau lain-lain faedah atau kelebihan. Oleh yang demikian, award ganti rugi pampasan adalah lebih daripada mencukupi. Justeru tidak ada justifikasi untuk award ganti rugi teladan (lihat perenggan 91).

Notes

For cases on damages for defamation, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 168-195.

For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 259-623.

For cases on qualified privilege, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 576-590.

Cases referred to

Abrams v United States (1919) 250 US 616, SC (refd)

Adam v Ward [1917] AC 309, HL (refd)

AJA Peter v OG Nio & Ors [1980] 1 MLJ 226, HC (refd)

Al-Fagih v HH Saudi Research & Marketing (UK) Ltd [2001] EMLR 13, CA (refd)

Associated Newspapers Ltd & Ors v Dingle [1964] AC 371, HL (refd)

Blackshaw v Lord & Anor [1984] QB 1, CA (refd)

Bonnick v Morris [2002] 3 WLR 820 (refd)

Carson v John Fairfax & Sons Pty Ltd (1993) 178 CLR 44, HC (refd)

Cassell & Co Ltd v Broome & Anor [1972] AC 1027, HL (refd)

Charleston & Anor v News Group Newspaper Ltd & Anor [1995] 2 AC 65, HL (refd)

Charman v Orion Publishing Group Ltd [2008] 1 All ER 750, CA (refd)

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Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Chong Siew Chiang v Chua Ching Geh & Anor [1995] 1 MLJ 551; [1995] 1 AMR 1, HC (refd)

Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad [2001] 2 MLJ 65, FC (refd)

Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58, HC (refd)

Farquhar v Bottom [1980] 2 NSWLR 374 (refd)

Galloway v Telegraph Group Ltd [2006] EWCA Civ 17 (refd)

Hepburn v TCN Channel Nine Pty Ltd [1983] 2 NSWLR 682, HC (refd)

Horrocks v Lowe [1975] AC 135, HL (refd)

Jameel (Mohammed) v Wall Street Journal Europe Sprl [2006] 3 WLR 652, HL (refd)

JB Jeyaretnam v Goh Chok Thong [1985] 1 MLJ 334, HC (refd)

Joceline Tan Poh Choo & Ors v V Muthusamy [2003] 4 MLJ 494, CA (refd)

Jones v Skelton [1963] SR (NSW) 644, PC (refd)

Karpal Singh a/l Ram Singh v DP Vijendran [2001] 4 MLJ 161, CA (refd)

Keogh v Incorporated Dental Hospital of Ireland (1910) 2 Ir R 577 (refd)

Lange v Atkinson [1998] 3 NZLR 424 (refd)

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, HC (refd)

Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390, HC (refd)

Lewis v Daily Telegraph Ltd [1964] AC 234, HL (refd)

Mark v Associated Newspapers Ltd [2002] EMLR 839, CA (refd)

Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor [2002] 4 MLJ 371; [2002] 4 AMR 4275, HC (refd)

McCarey v Associated Newspapers Ltd & Ors (No 2) [1965] 2 QB 86, CA (refd)

Morgan v Odhams Press Ltd & Anor [1971] 2 All ER 1156, HL (refd)

New York Times v Sullivan (1964) 376 US 254, SC (refd)

Peck v Tribune Co (1909) 214 US 185, SC (refd)

Plato Films Ltd & Ors v Speidel [1961] AC 1090, CA (refd)

Reynolds v Times Newspapers Ltd & Ors [2001] 2 AC 127, HL (refd)

Reynolds v Times Newspapers Ltd [1998] 3 WLR 862, CA (refd)

Roberts & Anor v Gable & Ors [2008] 2 WLR 129 (refd)

Rookes v Barnard & Ors [1964] AC 1129, HL (refd)

Rosenblatt v Baer (1966) 383 US 75, SC (refd)

Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)

Slatyer v Daily Telegraph Newspaper Co Ltd (1908) 6 CLR 1 (refd)

Slim & Ors v Daily Telegraph Ltd & Ors [1968] 2 QB 157, CA (refd)

Stuart v Bell [1891] 2 QB 341, CA (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56, HC (refd)

2 MLJ 492 at 498

Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors [1995] 1 MLJ 39, HC (refd)

Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)

United States v Associated Press (1943) 52 F Supp 362, SC (refd)

Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, HC (refd)

Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd (1934) 50 TLR 581, CA (refd)

Legislation referred to

Bill of Rights Act 1990 [NZ]

Defamation Act 1957

Defamation Act 2005 [AUS] s 30

Defamation Act 1992 [NZ] s 19(1)

Federal Constitution art 10

Official Information Act 1982 [NZ]

*Karpal Singh (**SN Nair,** Wan Anuar Shaddat and Sangeet Kaur Deo with him) (**SN Nair & Partners)** for the plaintiff.*

Nad Segaram (Soo Siew Mei with him) (Shearn Delamore & Co) for the defendants.

Harmindar Singh JC

INTRODUCTION

[1] This case is about a man's reputation. What is reputation? There is no precise concept or definition. According to the *Oxford English Dictionary*, reputation means 'what is generally said or believed about a man's character or standing'. But reputation is different from character in that a person's character is what he or she in fact is whereas a person's reputation is what other people think he or she is (see *Plato Films Ltd & Ors v Speidel* [1961] AC 1090 at p 1138 per Lord Denning). In theory therefore, an unrevealed scoundrel may actually have an excellent reputation.

[2] In any discussion of reputation, there is the customary or some say obligatory reference to Shakespeare's characterisation of 'good name' as the 'immediate jewel' of the soul (see W Shakespeare, *Othello*, Act III Scene iii). The 'purse' was 'trash' when compared to the value of a 'good name'. Some believe that reputation is a form of honour (see RC Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* [1986] 74 California Law Review 691). So dishonour or loss of face is an absolute fall from grace. As Shakespeare depicted:

> Mine honour is my life, both grow in one,
>
> *2 MLJ 492 at 499*
>
> Take honour from me and my life is done.
>
> W Shakespeare, *Richard II*, Act I Scene I

[3] Reputation has also been equated with the protection of dignity. In *Rosenblatt v Baer* (1966) 383 US 75, Stewart J observed:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any system of ordered liberty.

[4] There is therefore no doubt as to the value of reputation even if articulating it or its limits with precision is complicated. In terms of its practicality and relation to modern life, Lord Nicholls in *Reynolds v Times Newspapers Ltd & Ors* [2001] 2 AC 127 at p 201 asserted:

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of his reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.

[5] This case is also about freedom of expression and the related role of the media. The most durable

argument in favour of free speech is the importance of open and free discussion to the discovery of truth which was no doubt influenced by the thesis of Milton and Mill (see E Barendt, *Freedom of Speech* (1985) 8-28). The famous pronouncement of Holmes J in *Abrams v United States* (1919) 250 US 616 at p 360 asserts that all truths are relative but 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. Similarly, the eloquent statement of Learned Hand J in *United States v Associated Press* (1943) 52 F Supp 362 at p 372: 'right conclusions are more likely to be gathered out by a multitude of tongues than through any kind of authoritative selection'. Another argument sees free speech as an integral aspect of an individual's right to self-development and fulfillment. The idea is that only free discussion will allow one to develop intellectually, spiritually and politically. But the most potent theory is the protection of the rights of all citizens to understand political issues so that they could participate effectively in the democratic

process. This freedom allows them to make an informed choice of their representatives who in turn will be expected to make informed decisions. It will be through the media that such citizens will get the information. If freedom of expression is to have any meaning or purpose, the role of the media in this regard should not be unduly inhibited or curtailed without proper justification.

[6] Finally, this case is also about the law of defamation. The law of defamation is invoked when an individual claims that a particular media publication affects his or her reputation. Paradoxically as it may seem, the law of defamation exists to protect reputations and maintain free speech. The main issue here is the approach to be adopted in reconciling the competing right of free speech of the media and the right to reputation.

THE CLAIM

[7] The plaintiff is the former Deputy Prime Minister of Malaysia and former Minister of Finance for the period 1991 to 2 September 1998. He is also a former Deputy President of the United Malays Nasional Organisation (UMNO), the dominant political party in the coalition forming the Government of Malaysia. He is currently a Member of Parliament and leader of the Opposition in the Malaysian Parliament.

[8] The first and second defendants are the writers, printers, publishers and distributors of the local Malaysia daily newspaper known as the New Straits Times ('the said newspaper').

[9] On 2 March 2002, the defendants published, printed and distributed in the said newspaper, an article and/or story captioned 'Anwar's link to US lobbyist' 'New Revelation by a political weekly magazine into Dato' Seri Anwar Ibrahim's ties with a controversial US lobby group surface in Washington DC'. The plaintiff is claiming that the article was defamatory of him and seeks general damages of RM100m as well as aggravated and exemplary damages, interest and costs. The defendants are resisting the claim on the grounds that the article was not defamatory and that even if it is, they are entitled to the defence of qualified privilege.

[10] As I see it, the broad issues in this case are therefore:

(a) whether the impugned article was defamatory;
(b) whether the defendants are entitled to rely on the defence of qualified privilege; and

(c) if the defendants are liable for defamation, what are the damages that the plaintiff is entitled to.

THE IMPUGNED ARTICLE

[11] As the article is long, it is inconvenient to reproduce it. The plaintiff has identified the particular passages of the said article in para 5 of the statement of claim as being damaging of his reputation. They are reproduced as follows:

5.1 A US magazine's investigation into Washington D.C. lobbyist Douglas H. Paal is throwing new light on

an American think-tank linked closely to former Deputy Prime Minister Datuk Seri Anwar Ibrahim.

5.2 In October of that year, local media also report allegations by former Bank Negara assistant governor Datuk Abdul Murad Khalid of financial links between Anwar and the APPC.

5.3 The article noted that within Malaysia, it was widely believed that the conferences were used by Anwar to boost his image in Washington, a perception shared by official within the US Congress itself.

5.4 A senior Senate Foreign Relation officer was quoted as saying: 'They were co-hosted by Anwar Ibrahim. It was no secret that the Government of Malaysia was funding (these events).

5.5 In October 1999, Abdul Murad made a statutory declaration in which he made a series of allegations about financial links between Anwar and the APPC. He said Anwar had insisted that the APPC manage Bank Negara's reserves of RM50 billion and the EPF. Alternatively, a fee of US $3 million was to be paid annually to the APPC for the cost of running the center.

5.6 Abdul Murad also said that he had arranged US $10 million in contributions to the APPC and Paal under Anwar's instructions, and that Anwar's business associates had also donated money to Paal and the center.

5.7 APPC and Douglas H. Paal are one of the main vehicles used by Anwar Ibrahim to promote his image in the Western countries, mainly in Washington, USA and the UK and other European nations.

5.8 APPC also lobbied strongly for Anwar Ibrahim with the international media organisations.

[12] The plaintiff is now alleging that in the plain, natural and ordinary meaning, the said article was meant to refer to him and understood and or imputed to mean that he was in the eyes of the public:

(a) a person of no integrity and dignity;
(b) a person bereft of principles and disloyal to the country;

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(c) a dishonest and corrupt person;
(d) an untrustworthy leader and politician;
(e) a person who has abused his position for his personal gain;
(f) an American agent.

IS THE IMPUGNED ARTICLE DEFAMATORY?

[13] The Defamation Act 1957 is silent on what constitutes defamatory matter. The courts have followed closely the law in England. Even then there is no single, uniform or comprehensive definition of what constitutes defamatory matter.

[14] In *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58, Mohd Azmi J (as he then was) set out the defamatory test as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[15] In *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, Richard Malanjum J (as he then was) followed *JB Jeyaretnam v Goh Chok Thong* [1985] 1 MLJ 334 and adopted the following approach:

> As to whether the words complained of in this case were capable of being, and were in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

[16] The Court of Appeal also had occasion to deal with this issue in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374. Speaking for the Court, Gopal Sri Ram JCA (as he then was) said:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

2 MLJ 492 at 503

[17] And in *Mark Ignatius Uttley @ Mark Ostyn v Wong Kam Hor & Anor* [2002] 4 MLJ 371 at p 382; [2002] 4 AMR 4275 at p 4289, Kamalanathan Ratnam J said:

> As to whether the said meaning is defamatory, the test is to see if such words tend to make reasonable people think the worse of the plaintiff or whether such words would cause him to be shunned or avoided.

[18] It would appear therefore that the formulations which have been accepted by our courts to determine what is defamatory are as follows:

(a) Would the words expose the plaintiff to hatred, ridicule or contempt?
(b) Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?
(c) Would the words cause the plaintiff to be shunned or avoided?

[19] I am not entirely convinced about the 'shunned or avoided' test and as I have said elsewhere it should only apply if there is some element of fault or disparagement or moral discredit on the part of the plaintiff (see HS Dhaliwal, *Test of Defamatory Matter -- New Mindset Required?* [2003] 2 MLJ i). For example, a publication that someone is HIV-positive would certainly pass the 'shun and avoided' test but it would only serve to reinforce the unreasonable and undesirable attitude of the public towards such people who are often not to blame for their misfortune. It is similarly the case with innocent victims of rape. In *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 the case that probably initiated the 'shunned and avoided' test, Lord Slesser observed: 'one may, I think, take judicial notice of the fact that a lady of whom it has been said that she has been ravished albeit against her will have suffered in social reputation and in opportunities of receiving respectful consideration from the world.' (see p 587). Whilst that may have been true in 1934, I suspect the right-thinking members of society today would only have feelings of compassion and sympathy rather than any contempt or odium. The test, however, does provide some incidental protection again unwarranted privacy invasions which in any case ought to be provided by a specific legislation on privacy rather than a reliance on defamation law. Until that happens, there is probably some justification to retain it.

[20] The defamatory nature of an imputation also cannot be judged in isolation. It has to be ascertained by reference to the moral or social standards of society generally. This is an important part of the consideration of what constitutes defamatory matter. Such societal standards are not amenable to evidentiary proof. It will be up to the judges to consider the requisite standards when determining whether a matter is either capable of being

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defamatory or is in fact defamatory. The case law suggests that the standard that is usually adopted is that of ordinary reasonable people (see *Jones v Skelton* [1963] SR (NSW) 644) who are of fair average intelligence (see *Slatyer v Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 at p 7) but who are not avid for scandal (see *Lewis v Daily Telegraph Ltd* [1964] AC 234 at p 260). This person may engage in some degree of loose thinking (see *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156 at p 1162) or reading between the lines (see *Farquhar v Bottom* [1980] 2 NSWLR 374 at p 380) but he or she should not be unduly suspicious (see *Keogh v Incorporated Dental Hospital of Ireland* (1910) 2 Ir R 577). As such, an ordinary reasonable person would presume that a man is innocent until proven guilty although the reality might sometimes be otherwise. This is necessary to protect the media who go no further than merely to report that a person is being investigated by police or has been arrested and charged with a criminal offence.

[21] Community standards should not also depend on a majority vote. In multicultural societies, persons belonging to minority communities affected by defamatory matter would be equally, if not more concerned, about their reputations amongst their own community. In the United States, in the case of *Peck v Tribune Co*

(1909) 214 US 185 at p 190, Holmes J recognised that 'liability was not a majority vote' and a plaintiff's claim should be actionable if his or her reputation is adversely affected in the eyes of 'a considerable and respectable class in the community' though it be only a minority.

[22] In similar vein, in *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682 at p 694, Glass JA opined that 'the law of defamation should recognise that there are many subjects in a pluralistic society upon which contradictory attitudes exist ... and it would be futile for the judges to arbitrate between them'. The New South Wales Court of Appeal then held that as long as the words lowered a person in the estimation of an appreciable and reputable section of the community, they would be defamatory 'even though those same words might exalt him to the level of a hero in other quarters'.

[23] In my assessment, therefore, an imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them. This is to be judged by ordinary, right-thinking members of the community or an appreciable and reputable section of the community.

[24] The plaintiff would therefore have the burden of proving that the words in question conveyed a defamatory imputation. In this regard, the first task is to ascertain the meaning of the statement or publication. This is not

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always easy as the words in question, the essence of any defamation claim, may be understood differently by different people. The plaintiff can therefore rely on the natural and ordinary meaning of the words or the innuendo meaning. The natural and ordinary meaning would involve the literal meaning as well as any inferences that could be taken based on general knowledge and experience of human affairs. An innuendo meaning would be arrived at by an additional consideration or assistance of extrinsic facts not generally known. As the analysis of the offending words involves an objective test, the meaning intended by the publisher, however noble, is irrelevant (see *Lewis v Daily Telegraph* [1964] AC 234; *Slim & Ors v Daily Telegraph Ltd & Ors* [1968] 2 QB 157; *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226; *Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors* [1995] 1 MLJ 39).

[25] The proper approach would also be to consider the words complained of in the context of the whole article (see *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390). A plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage (see *Charleston & Anor v News Group Newspaper Ltd & Anor* [1995] 2 AC 65 at p 70 per Lord Bridge citing Duncan & Neill on *Defamation* (2nd Ed) at para 4.11).

[26] Coming back to the instant case, and with these principles in mind, and considering the impugned article as a whole, I do not quite see how ordinary, right-thinking members of the community will see the plaintiff as an American agent. The impugned article referred to four 'high-powered' Pacific Dialogues organised by the Asia Pacific Policy Centre ('APPC') between the US and Malaysian politicians and businessmen in Kuala Lumpur. The purpose of the dialogues, as conceded by the plaintiff, was to build strong rapport with members of the Congress and the United States Government. Using the APPC as a vehicle does not import anything sinister, illegal or immoral. I think the community will perceive dialogues to be an excellent way to exchange ideas or even to influence the thinking of the people and the countries involved. To have dialogues to build rapport and to influence change is certainly better than waging wars as recent events will bear testimony. Looking at it in this light, I do not think members of the community will see anything wrong with the Malaysian Government funding the dialogues. There cannot be anything defamatory about this. And certainly the imputation about the plaintiff being an American agent is quite baseless.

[27] However, that is not all that the article is about. The article appears to paint Douglas Paal in a bad light by suggesting that he used his connections to lobby for the interests of his clients with important people in the congress for money all under the guise of operating a publicly subsidised, non-profit

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and educational system. This information was no doubt gathered from the US weekly political magazine known as the 'New Republic'.

[28] The article by the defendants sought to link Douglas Paal and the APPC with the statutory declaration made by Datuk Abdul Murad Khalid ('Abdul Murad'). That declaration made some rather startling revelations about financial links between the plaintiff and the APPC in that the plaintiff insisted that the APPC manage Bank Negara's reserves of RM50b and also that of the EPF. A fee of USD3m was to be paid annually to the APPC for the cost of running the centre and a further sum of RM10m was arranged by Abdul Murad to be paid to APPC and Paal on the plaintiff's instructions. The article also stated that 'APPC and Douglas Paal are one of the main vehicles used by Anwar Ibrahim to promote his image in Western countries, mainly in the Washington, USA and the UK and other European nations'.

[29] The sting of these statements was to show that the plaintiff had abused his political position for personal gain. Ordinary right-thinking members of society will think that here is a person with no integrity, dishonest, corrupt and an untrustworthy leader and politician. It is safe to conclude that the effect of the article would certainly lower the plaintiff in the estimation of ordinary, right-thinking members of Malaysian society. There would certainly be some degree of hatred, contempt or ridicule. I was therefore persuaded that the impugned article was indeed defamatory.

QUALIFIED PRIVILEGE

[30] It is noteworthy that the defendants did not try to prove the truth of the article. I can only think that they did not try to do so on account of some serious doubts as to the accuracy of the article or that they are now unable to show accuracy. In any event, the plaintiff testified that there was no truth whatsoever as to what was alleged in the impugned article. He was not challenged on this, and rightly so, as that was not the position that the defendants were taking. To prove the point, the plaintiff called Abdul Razak bin Idris ('SP2') to discredit the statutory declaration of Abdul Murad. SP2 was the former Director of Investigations of Badan Pencegah Rasuah Malaysia or the Anti-Corruption Agency of Malaysia. He told the court that he supervised investigations on the contents and allegations contained in the said statutory declaration. The investigations found that the allegations were baseless and sustainable.

[31] Notwithstanding this, the defendants are not obliged to prove the truth of the article. They can rely on the protection of qualified privilege. This

may seem odd to the man on the street. He would certainly ask why is it that the law provides protection for statements that are defamatory and in fact untrue.

[32] Tipping J in *Lange v Atkinson* [1998] 3 NZLR 424 at p 477 made a pertinent comment in this regard:

> It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media.

[33] Even so, this type of protection is grounded on public policy and convenience. Unlike the other defences to a defamation action, qualified privilege attaches to the occasion or circumstances to the publication of defamatory statements rather than the statement itself. Accordingly, such statements will be protected even though the statements may later turn out to be untrue. The relationship between the parties is often a determining factor in establishing a privileged occasion. A common example is the character reference provided by one employer to another when considering the employment of the former/prospective employee. The justification for recognizing privileged occasions and its parameters was restated by Lindley LJ in *Stuart v Bell* [1891] 2 QB 341 at p 346:

> The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be drawn as to mark off with precision those occasions which are privileged, and separate them from those that are not.

[34] In this regard also, Fox LJ had occasion to consider, in a case involving a newspaper report, the conflicting pressures in deciding whether an occasion of privilege is warranted in *Blackshaw v Lord & Anor* [1984] QB 1 at p 42:

> It is necessary to a satisfactory law of defamation that there should be privileged occasions. But the existence of privilege involves a balance of conflicting pressures. On the one hand there is the need that the press should be able to publish fearlessly what is necessary for the protection of the public. On the other hand there is the need to protect the individual from falsehoods.

[35] The test of determining an occasion of privilege was perhaps best explained by Lord Atkinson in *Adam v Ward* [1917] AC 309 at p 334 in the following terms:

> [A] privileged occasion is, in reference to qualified privileged, an occasion where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made had a corresponding interest or duty to receive it. This reciprocity is essential.

[36] This formulation envisaged a duty to publish and receive information by people of ordinary intelligence and moral principles as well as the reciprocity of interest.

[37] The difficulty of this formulation of reciprocity of duty and interest is that it will readily apply only to publications made to a limited range of people. It does not sit well with cases of mass publications or of wide dissemination as that provided by the media. The courts have consistently refused to recognise an interest and duty on the part of the media to report such matters to the public at large. Even in relation to matters in which the information appeared to be of legitimate public interest, the media could not successfully claim privilege.

[38] It should be noted, however, that there are exceptions, for example, the right to reply in public after being defamed by reports in parliamentary proceedings. Apart from this, there may also be exceptions in cases where due to the particular circumstances of the case, publication to the general public was held to be protected by qualified privilege. These cases mainly concern republications of reports by public officials, commissions of inquiry or foreign court reports and did not establish any firm principles as to what kind of circumstances would warrant publication to the public at large. These types of publications would now be protected by statutes in most common law jurisdictions as publication of official reports of matters of public concern. The best examples are fair and accurate reports of parliamentary and judicial proceedings. An extension of this privilege is the defence of reportage or neutral reporting which I shall deal with later in the judgment.

[39] At the turn of the last century, a sea change occurred in relation to the defence of qualified privilege for mass communications. Developments in Australia, New Zealand and the United Kingdom firmly entrenched the principle that defamatory publications to the general public on certain matters are now protected under common law qualified privilege. This type of privilege is different from the classical or traditional type of privilege I have alluded to thus far. It does not depend on whether the publication had been

made on an occasion of privilege but more so on whether it was done responsibly. For the media this means conforming to the standards of responsible journalism. This is the defence that the defendants are relying on in the present case to defeat the plaintiff's claim.

[40] Unfortunately, although the landmark decisions in Australia, (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), New Zealand (*Lange v Atkinson* [1998] 3 NZLR 424) and the United Kingdom (*Reynolds v Times Newspaper Ltd* [2001] 2 AC 127) provided for wider protection of open discussion of political issues, there was some divergence in the approach and extent of such protection.

[41] From the case authorities cited to me during submissions, it does appear that all these cases have been cited with approval in the Malaysian courts. The Federal Court in *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65 had occasion to deal with this very issue. The High Court in that case (

Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58) had considered the defence of qualified privilege and referred with approval to the cases of *Lange v ABC*, *Lange v Atkinson* and the English Court of Appeal decision in *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862. On appeal, the Court of Appeal, on the question of qualified privilege, only referred to *Lange v Atkinson*. In the Federal Court, leave was sought to refer two questions, one of which was as follows:

> Whether the Court of Appeal was right in relying on the principle in *Lange v Atkinson* [1998] 3 NZLR 424 and concluding that the decision of the learned trial judge on the issues of qualified privilege should not be disturbed having regard to the application to strike out the applicant's suit being one under O 18 and 19 of the RHC.

[42] Although leave was refused, there was a written judgment setting out the reasons for refusing leave. On the issue of qualified privilege, Mohamad Dzaiddin CJ stated as follows:

> On qualified privilege, we also find the learned trial judge had applied the correct test and law to the facts and circumstances of the case. In fact the correct authority on qualified privilege in the context of the respondents defence is *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and not *Lange v Atkinson* (see [2001] 2 MLJ 65 at p 69).

[43] In the instant case, although both parties submitted on each of the cases, I considered that it would be untenable to approve and apply all three cases as the scope of protection and the safeguards in place to preserve the balance between protection of reputation and freedom of expression are

2 MLJ 492 at 510

different in each case. With respect, this is really a matter for the apex court to settle since I think the House of Lords decision in *Reynolds* was not before the Federal Court in *Dato' Seri Anwar Ibrahim v Dato' Seri Mahathir Mohamad*.

[44] To illustrate the differences, it may perhaps be useful to set out briefly the approach adopted in each of these cases.

Lange v ABC

[45] In *Lange v ABC*, the High Court of Australia confirmed that there is implicit in the Australian Constitution a freedom to discuss government and political matters pertaining to Australia but recognised that the common law rule of reciprocity of interest or duty to a claim for qualified privilege at common law imposed an unreasonable restraint on the freedom of communication of such matters. The court was prepared to broaden the scope of the privilege due to changing conditions and elucidated as follows at p 571:

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependant on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when and why and where those functions and powers are or are not exercised are matters that are of real legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia it is difficult to contend that the exercise or failure to exercise public functions or powers at any level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally.

[46] With this reasoning in mind, the High Court was then able to declare that (see p 571):

> [E]ach member of the Australian community has an interest in dissemination and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion -- the giving and receiving of information -- about government and political matters.

[47] The court however made a distinction between publications to a limited number of recipients and those communicated to a large audience like the media. There was concern about the damage that can be done when there are thousands of recipients of a communication. In a rather cautious approach, it was decided that in the latter case, it was also necessary for the defendant to prove that his or her conduct was reasonable. The requirement of reasonableness was explained as follows at p 574:

> Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

[48] As with other occasions of qualified privilege, the defence will be defeated by proof that the publisher was actuated by malice. Malice can normally be established by showing that the defendant did not have a positive belief in the truth of what was published or that the dominant motive for publishing the material was other than that for which the qualified privilege is given (see *Horrocks v Lowe* [1975] AC 135 at p 149 per Lord Diplock). However, as the elements of reasonableness and malice overlap, the court reformulated the meaning of malice so that the protection will only be lost if the defamatory material was published for a purpose other than communicating government or political information or ideas.

Lange v Atkinson

[49] In *Lange v Atkinson*, the New Zealand Court of Appeal held that the defence of qualified privilege may be available in respect of a statement which is published generally. In this context, it was further held that the nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office (see p 468). The court appeared to be very much influenced by the general trend in comparable jurisdictions to expand the protection for political discussions. It was also observed that with the passing of such laws in New Zealand like the New Zealand Bill of Rights Act 1990 and the Official Information Act 1982, it was the people who had ultimate power in the constitutional and political context.

[50] In an apparent attempt to set new ground, the Court of Appeal also formed the view that there was a need to avoid the strict concept of reciprocity because of the infinitely various combinations of circumstances in which the privilege might apply. In this regard, the subject matter of a publication may by itself create the common interest between the media and the general public. This view was explained in following terms at p 472 per Tipping J in a separate but concurring judgment:

> The proper interest in the recipient to receive the communication is what justifies the immunity from suit afforded to the speaker or writer. It is the proper interest in the recipient which gives to the speaker or writer what has traditionally been described as an interest or duty to publish the statement in question. There can be little doubt that in a modern parliamentary democracy electors have a proper interest in being informed about the activities of their elected representatives when those activities are relevant to their performance as such and their fitness to hold their representative office. That being so, members of the news media and others have a proper interest, some would say duty, in informing electors as a whole of relevant activities of individual politicians.

[51] In a departure from the Australian position, the Court of Appeal, however, dismissed any argument that a requirement of reasonable care should be imposed on the defendant. The court went on to hold that like all other forms of qualified privilege, this will be defeated by malice as set out in s 19(1) of the Defamation Act 1992. In New Zealand, s 19 had replaced the common law concept of malice. By this section, qualified privilege will be defeated if the plaintiff proves that, in publishing the matter, the defendant was

predominantly motivated by ill-will towards the plaintiff or otherwise took improper advantage of the occasion of publication.

Reynolds v Times Newspapers Ltd

[52] In *Reynolds v Times Newspapers Ltd*, the House of Lords held (at the headnote):

> that the common law should not develop a new subject matter category of qualified privilege whereby the publication of all political information would attract qualified privilege whatever the circumstances, since that would fail to provide adequate protection for reputation, and it would be unsound in principle to distinguish political discussion from other matters of serious public concern; but that qualified privilege was available in respect of political information upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had an interest in receiving it, taking into account all the circumstances of the publication including the nature, status and source of the material; and that, accordingly, a claim to privilege stood or fell according to whether it passed that test.

2 MLJ 492 at 513

[53] Lord Nicholls then set out a non-exhaustive list of circumstances which would be relevant to the privilege issue in a case involving freedom of expression by the media on all matters of public concern as follows at p 205:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegation as statement of fact.
10. The circumstances of the publication, including the timing.

[54] Lord Nicholls further added at p 205:

> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up. In general, the newspaper's unwillingness to disclose the identity of its sources should not weigh against it. Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

2 MLJ 492 at 514

[55] It can be seen that the scope of protection afforded to mass communications is different in each of the jurisdictions. In *Lange v ABC*, it was decided that qualified privilege will apply to defamatory publications 'concerning government and political matters that affect the people of Australia'. Unlike the Australian position, the defence of qualified privilege in New Zealand through the Court of Appeal judgment in *Lange v*

Atkinson focused specifically on the attributes and qualities of 'those currently or formerly elected to Parliament and those with immediate aspirations to such office'. This was in contrast to *Lange v ABC* which focused on the political discussion rather than any politician. It appeared therefore that the ambit of the defence in *Lange v Atkinson* was confined to the politician. This was in fact closer to the 'public figure' type of defence advocated in the celebrated United States Supreme Court decision in *New York Times v Sullivan* (1964) 376 US 254. Interpreted as such, I would think that a debate about political matters will almost certainly be wider than one restricted to a politician.

[56] The widest scope of protection is probably that in *Reynolds* since the protection was for 'matters of serious public concern'. In *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] 3 WLR 652, Baroness Hale of the House of Lords described the *Reynolds* defence as one that 'springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information'. She concluded: 'In truth, it is a defence of publication in the public interest.' (at p 685).

[57] In terms of safeguards to preserve the balance between protection of reputation and freedom of expression, it is clear that the test of 'reasonableness' is the more onerous one for defendants to satisfy. There is no such test in *Lange v Atkinson* and in *Reynolds*, the ten relevant matters to be taken into account are not hurdles to be negotiated by a publisher but rather as pointers to be considered before a publisher can successfully rely on qualified privilege (*Jameel* at p 654 per Lord Bingham). This is unlike the situation in *Lange v ABC* where the test of reasonableness was fashioned on s 22 of the Defamation Act 1974 (NSW). The experience in Australia has shown a relative lack of success on the part of the media in establishing 'reasonableness'.

[58] It is also worth noting that in New South Wales where *Lange v ABC* originated from, the Defamation Act 1974 has now been repealed. There now exists in relation to qualified privilege s 30 of the new Defamation Act 2005 (NSW), which took effect from 1 January 2006. Section 30 reads:

> 30 Defence of qualified privilege for provision of certain information
>
> (1) There is a defence of qualified privilege for the publication of defamatory matter to a person ('the recipient') if the defendant proves that:
>
> *2 MLJ 492 at 515*
>
> (a) the recipient has an interest or apparent interest in having information on some subject, and
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
>
> (2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
> (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:
> (a) the extent to which the matter published is of public interest, and
> (b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and
> (c) the seriousness of any defamatory imputation carried by the matter published, and
> (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
> (e) whether it was the public interest in the circumstances for the matter published to be published expeditiously, and
> (f) the nature of the business environment, in which the defendant operates, and
> (g) the sources of the information in the matter published and the integrity of those sources, and
> (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
> (i) any other steps taken to verify the information in the matter published, and
> (j) any other circumstance that the court considers relevant.
>
> (4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
> (5) However, a defence of qualified privilege under subsection(1) is not defeated merely because the defamatory matter was published for reward.

[59] This means that there is now a statutory privilege which is much wider than *Lange v ABC*. I say much wider because the scope of protection is matters of public interest and without the burden on the defendants of

2 MLJ 492 at 516

satisfying a test of reasonableness that was rather rigid and inflexible. The court merely has to take into account the factors as listed which are conspicuously similar to the factors set out in *Reynolds*. It may therefore be fair to conclude that the thinking in Australia has now moved more towards the *Reynolds*' approach.

[60] To come back home, Malaysia is also a modern pluralistic democracy not unlike Australia, New Zealand and the United Kingdom. We also have art 10 of the Federal Constitution which guarantees freedom of speech with one of the restrictions being the right of Parliament to pass law to provide against defamation. There is therefore no reason why matters of public interest are not deserving of protection in Malaysia for the same reasons as advanced in the three jurisdictions.

[61] Be that as it may, and as I had indicated earlier, although, if I may say with respect, the *Reynolds*' approach or the approach as set out in s 30 of the Defamation Act 2005 (NSW) provides the best balance between the protection of reputation and freedom of expression in my view, I do recognise the constraints of binding authority. The Federal Court decision in *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad*, as submitted by learned counsel Mr Karpal Singh for the plaintiff, is binding on me. *Lange v ABC* has been declared as the authority on qualified privilege. It therefore remains for me to consider whether the defendants are protected by qualified privilege as set out in that case.

[62] In this regard, and to recap, the plaintiff will have to first prove that the defamatory material published concerns government and political matters. If the plaintiff succeeds, then the burden will be on the defendants to show reasonableness of conduct. If the defendants succeed, then the onus will be on the plaintiff to prove that the publication was actuated by malice on the part of the defendants.

[63] On the first issue, there can be little dispute that the impugned article and the imputations conveyed concern government and political matters. The plaintiff was a former Deputy Prime Minister and the allegations suggest that public funds were used for a personal purpose. These are certainly matters concerning government and politics.

[64] On the second issue, the defendants have to show that they (see (1997) 189 CLR 520 at p 574):

> had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person
>
> *2 MLJ 492 at 517*
>
> defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

[65] There was no evidence that the writer of the impugned article, Datin Rose bt Ismail (SD1), who was the Deputy Group Editor of the first defendant at the time, had reasonable grounds for believing that the imputation was true. But I think from the tenor of the article in trying to link the New Republic article with the statutory declaration of Abdul Murad, this must have been the case. As otherwise, why would she write the article in the way that she did. My impression was that she did so because she must have believed that the imputations were true.

[66] On the question of whether the defendants took proper steps to verify the accuracy of the material, SD1 admitted that although the allegations were serious, she took no steps to verify the authenticity or truth of the allegations. She confirmed that she only looked at various previous articles as her source and relied on the article in the New Republic magazine as she claimed that the magazine is a credible, reputable, middle-of-the-road magazine on political and social issues in the United States. She also said that she had

not interviewed the plaintiff as he was in prison. Apart from resorting to the internet, she did not take other steps to locate Douglas Paal. She also admitted that she did not interview Abdul Murad. Her explanation for this was that the article contained matters which had already been commented upon by government officials and were also the subject matter of extensive coverage in the news media.

[67] In this regard, I should first caution the media upon relying solely and without verification on articles published in the United States. It should be noted that in the United States, with the Supreme Court decision in *New York Times v Sullivan*, public officials or public figures are often hard pressed in presenting libel actions. This is mainly because plaintiffs have to establish by clear and convincing evidence that the defendant published the statement with knowledge of its falsity. Proving actual malice here is a formidable task (see *Gatley on Libel and Slander* (10 Ed) at para 14.1, p 482). So the standard of care for journalists in the US is much lower. The media in the US are more likely to get away with publishing false news than in any other jurisdiction. I therefore think that for the defendants to rely almost solely on the New Republic magazine without any verification was poor journalism.

[68] To elucidate the point, the impugned article contained allegations which were carried in the New Republic magazine that the Pacific Dialogues 'raised eyebrows for their secretive nature'. SD1 herself admitted that the dialogues were officially opened by the then Prime Minister of Malaysia with

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a welcoming speech. Also present were various local and international figures including the former United States Secretary of State Dr Henry Kissinger. A Pacific Charter was also signed by well-known and leading personalities representing the nations of the Pacific as well as from the United States. It was clearly far from being a clandestine operation. SD1 should clearly have been alerted that something is not quite right and that she should verify the accuracy of the material in the New Republic magazine. I suspect that she did not do so as she assumed that since the magazine was a reputable one, although no evidence of this was led apart from her testimony, the accuracy would have been verified by the magazine. Her reasons for not doing so are therefore unjustifiable and unsustainable and for that reason cannot be accepted.

[69] The next requirement for the defendant was to seek a response from the person defamed and to publish the said response unless it was impracticable or unnecessary to do so. The defendants through SD1 had admitted that this was not done. The reasons for not doing so suffer from the same infirmity as when the defendant failed to verify the accuracy of the material. With respect, I agree with the contention of learned counsel for the plaintiff that SD1 could have obtained a response through various means. If seeking a response from the plaintiff who was in prison at that time was impracticable, she could have contacted his solicitors or his family members or taken any other measures to at least bring to the attention of the plaintiff that the said article was going to be published and to ascertain if he had any response to it. I think that if you are going to print something serious and discreditable about someone, it is elementary fairness that you seek a response. I don't think seeking a response was unnecessary or impracticable in this case.

[70] I do appreciate that there are often pressures on the media to meet deadlines and that in some cases, if the plaintiff is informed of the imminent publication of the material, it might give the plaintiff an opportunity to delay or prevent the publication of an otherwise justifiable publication through restraining injunctions. But I do not think that sort of situation arises here. There was no urgency in printing the article as the story about APPC and Abdul Murad's statutory declaration was already stale news. I think in the circumstances a response was necessary as there was available only one side of the story.

[71] Considering these facts and circumstances, it was fairly obvious that the defendants had failed to act reasonably within the meaning as ascribed in *Lange v ABC*. At the risk of repetition, the question of privilege cannot arise unless the publisher is acting responsibly. If journalists are to have the benefit of the privilege, they must exercise due professional skill and care like all

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professionals. As Lord Nicholls stated in *Bonnick v Morris* [2002] 3 WLR 820 at p 827, 'It can be regarded as the price journalists pay in return for the privilege'.

[72] SD1 testified that she felt that she had a duty to publish the material. With respect, I do not think that a duty to publish and a corresponding interest on the members of the public to read such material can arise if

the publisher has failed to take reasonable steps to verify the material. As Lord Hobhouse observed at p 238 in *Reynolds*, 'No public interest is served by publishing or communicating disinformation. The working of a democratic society depends on the members of that society, being informed not misinformed'.

[73] It is noteworthy that even in *Reynolds*, the defence of qualified privilege failed because the article in question in that case failed to include the plaintiff's explanation on the serious allegations by the newspapers. In most of the cases cited to me, the defence of qualified privilege succeeded because there was included in the publication some explanation by the person defamed or it was concluded that the circumstance in those cases did not call for a response. But such circumstances do not arise in the instant case. Considering all the facts and circumstances, the article by the defendant was not a piece of responsible journalism to which the defence of qualified privilege is available. Since this defence has not been made out, the question of malice, including the question of whether it was pleaded or not, does not arise.

REPORTAGE

[74] As I had indicated earlier, the law allows reporting privileges through fair and accurate reports of parliamentary and court proceedings. The defendants here are relying on a more general privilege known as reportage. According to *Gatley on Libel and Slander* (11th Ed) this doctrine first surfaced in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EMLR 13. Reportage in that case was depicted as 'a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper'. Since then reportage has been considered in a number of cases; *Mark v Associated Newspapers Ltd* [2002] EMLR 839; *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17; *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] 3 WLR 642; *Roberts & Anor v Gable & Ors* [2008] 2 WLR 129 and *Charman v Orion Publishing Group Ltd* [2008] 1 All ER 750.

[75] In *Roberts v Gale*, Ward LJ described reportage as 'the neutral reporting without adoption or embellishment or subscribing to any belief in its truth of attributed allegations of both sides of a political and possibly some other

kind of dispute'. Significantly, Ward LJ also alluded to the relationship of the repetition rule with reportage cases. The repetition rule as set out by Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234 at p 260 was that 'repeating someone else's libelous statement is just as bad as making the statement directly'. And that is what happens in reportage cases. However, Ward LJ held that the repetition rule and the reportage defence are not in conflict with each other. The former is concerned with justification, the latter with privilege. A true case of reportage may give the journalist a complete defence of qualified privilege. If the journalist does not establish the defence then the repetition rule applies and the journalist will have to prove the truth of the defamatory words (see *Roberts & Anor v Gable & Ors* at p 153).

[76] From a consideration of the cases cited, it can be safely asserted that reportage would normally apply as follows. It would only apply in cases where there is an ongoing dispute where allegations of both sides are being reported. The report, taken as a whole, must have the effect that the defamatory material is attributed to the parties in the dispute. The report must not be seen as being put forward to establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore reportage will not apply where the journalist had embraced, garnished and embellished the allegations.

[77] In the instant case, the defendants submitted that this was a classic case of reportage as SD1 was merely reporting from the New Republic article. It was a report from another report and did not carry her own views or comments on the subject-matter in question. And that was why it did not carry the name of the author.

[78] After due consideration, I am not persuaded that this was indeed a case of reportage. The article is not about a continuing dispute between parties. Even if it can be said to be a dispute, there is only the version of one side. The reason why reportage is available as a defence is because both versions of defamatory allegations as well as the responses are reported and the journalist takes no further part in putting forward

his or her view of which is the truth. This is certainly not the case here.

[79] Seen as such, the article is certainly not put forward in a fair, disinterested and neutral fashion because it does not contain the version of the other side of a dispute, if at all there is a dispute. I also do not think that this is a neutral report because what SD1 is trying to do, as she herself admits, is to explore the links between APPC, Douglas Paal, the funding by the Malaysian government and the plaintiff. Her intention, therefore, is not mere

neutral reporting but to assert something more sinister on the part of the plaintiff than what had appeared in the New Republic article. She was in a sense adding her own spice and putting 'meat on the bones' (see *Associated Newspapers Ltd & Ors v Dingle* [1964] AC 371 at p 411 per Lord Denning) and making what I considered to be independent inferences. I am therefore unable to accept her subsequent assertions that her article was a mere reproduction. In any case, this had to be decided objectively and taking the effect of the article as a whole, the impugned article is not one that is reported in a fair, disinterested and neutral way. In the circumstances, the defence of reportage is not available to the defendant.

[80] In the result, the defendants are liable to plaintiff for damages for defamation.

DAMAGES

[81] Going by the pleadings, the plaintiff claims the sum of RM100m as general damages as well as aggravated and exemplary damages. I think by all accounts, the claim of RM100m is a gross exaggeration. The principle in damages is that it is compensatory and not a path to untold riches. Even in the most serious cases of defamation in respect of integrity and honour, I cannot imagine general damages to exceed the quantum that is usually awarded in personal injury claims to a claimant who is fully disabled. For a man who has been defamed cannot be said to be in a worse position than one who has lost the use of vital parts of his or her anatomy. In *McCarey v Associated Newspapers Ltd & Ors (No 2)* [1965] 2 QB 86 at p 109, Diplock LJ said: 'I do not believe that the law today is more jealous of a man's reputation than of his life and limb.'

[82] However, compensation in defamation is not quite the same as in other torts. Compensation for a successful plaintiff in most areas of the law involves the intention to place such plaintiff, as far as money is capable of doing so, in the position the plaintiff would have been but for the defendant's wrongdoing. The tort of defamation, however, exposes the defendant to a monetary remedy that includes both vindication of the plaintiff to the public and as consolation to him for a wrong done (see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at p 150). Compensation in this sense might also include an element of social disapproval of the defendant's conduct not unlike punishment in criminal cases. This is probably why although the law presumes harm to reputation, there will invariably be lengthy accounts in defamation trials of the plaintiff's hurt, outrage, distress, dignity and the like rather than proof of any actual damage to reputation. Lord Diplock in *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027 at p 1125 lent credence to this idea in a seminal passage where he said: 'The harm caused to the plaintiff by

the publication of a libel upon him often lies in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him.'

[83] To muddy the waters further, although there can be no action in defamation for a publication merely because it injures a person's feelings, damages can be awarded for the plaintiff's injured feelings including the hurt, anxiety, loss of self-esteem, the sense of indignity and the outrage felt by the plaintiff once it is established that such person's reputation has been harmed. Of course, such damages are awarded because these are consequences that flow naturally from the publication of the defamatory matter (see *Carson v John Fairfax & Sons Pty Ltd* (1993) 178 CLR 44 at p 71).

[84] The question that arises is therefore this. Should the primary aim of a remedy in defamation be in satisfying the plaintiff's hurt feelings etc or should it be in vindicating his or her standing in the community? In my respectful view, if we concern ourselves primarily with putting the plaintiff in the position he or she was before the defendant's wrongdoing, vindication of his or her standing in the community should be the focus of the remedy rather than any award of large sums of money for the plaintiff's hurt feelings. Plaintiff may

however also feel that only substantial damages may vindicate or restore their reputation and good name. But I think that vindication of reputation can also be achieved through non-monetary means. For example, the best vindication would be an almost immediate and prominent apology, correction or retraction by the defendant after publication of defamatory material. In that situation, there would be minimal damages. It should also follow that a court-ordered correction on a defendant after a trial would serve just as well if not better in the vindication or restoration of a damaged reputation than large money damages.

[85] In the instant case, there is already some measure of vindication for the plaintiff in that the statutory declaration of Ahmad Murad has now been discredited. The natural effect of this is that the impugned article loses all credibility. Even though the truth or falsity of the impugned article was never the issue as the defendants relied on privilege, as it turned out, the evidence revealed in the trial shows the falsity of the article itself and the imputations that arise from it. The net effect is that the plaintiff has achieved public vindication of the truth. Vindication has however come late and for that the plaintiff must be compensated. There was no evidence that the plaintiff has experienced any economic harm. So all things considered, I do not see any rationale for awarding substantial damages. The law of defamation, as I see it, must be more about truth and reputation than money. Much of the disaffection and criticism in this regard stems from the common law's passion and preoccupation in reducing disputes to money damages. I think, with

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respect, the compensation principle in tort defamation should focus primarily on vindication through both monetary and non-monetary means.

[86] Seen in this light, and with respect, earlier cases awarding considerable damages for reputational harm do not offer any guidance in determining the quantum of damages. In any event, these cases cannot serve as precedents for quantum like the case for personal injury claims. There are far too many variables in the damage to a reputation when compared to damaged parts of the anatomy in personal injury claims. This much was also asserted by Abdul Hamid Mohamad JCA (as he then was) in *Karpal Singh a/l Ram Singh v DP Vijendran* [2001] 4 MLJ 161 at p 185 when he said:

> This court is bound by the decisions of the Federal Court. But what is binding is the principle laid down by the Federal Court in assessing damages in libel cases, not the amount. The amount to be awarded in each case depends on the facts and circumstances of the case. Indeed, how much is too much, how much is too little and how much is reasonable is quite subjective. No scale can be fixed.

[87] In other words, damages are 'at large' -- they are awarded on a case by case basis and not according to a scale of damages. Nevertheless, there are factors which the court can take into account in assessing damages. In this regard, *Gatley on Libel and Slander* (11th Ed), states that factors that can be taken into account when assessing damages are the conduct of the claimant, his position and standing, the nature of the libel, the mode and extent of the publication, the absence or refusal of any retraction or apology and the conduct of the defendant from the time the libel was published down to the verdict.

[88] The plaintiff in the instant case is also seeking aggravated damages. In the same edition, *Gatley on Libel and Slander*, states that the conduct of the defendant, his conduct of the case and his state of mind are all matters which the claimant may rely on as aggravating the damages. In the instant case, I noted that there was no attempt to delay the proceedings, there was no hostile cross-examination of the plaintiff and importantly, no plea of justification was entered or pursued. It was only the failure of the defendants to verify the accuracy of the material published as well as their failure to seek a response from the plaintiff that led to the unavailability of the defence of qualified privilege. On the question of apology or rather its absence, in *Joceline Tan Poh Choo & Ors v V Muthusamy* [2003] 4 MLJ 494, in delivering the judgment of the Court of Appeal, Arifin Zakaria JCA (as he then was) cited with approval the Australian High Court decision in *Carson v John Fairfax & Sons Pty Ltd* (1993) 178 CLR 44 at p 66 and ruled that 'the want of apology alone could not be said to have aggravated the plaintiff's injury'. For these reasons, I do not think that aggravated damages are in order.

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[89] In respect of exemplary damages, the arguments in favour of it are the least persuasive. In *Roshairee*

bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, James Foong J (as he then was) applied the decision in *Rookes v Barnard & Ors* [1964] AC 1129 and noted that exemplary damages 'must be restricted to situations where there are oppressive, arbitrary or unconstitutional actions by servants of the government or where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'.

[90] Similar sentiments were expressed by Richard Malanjum J (as he then was) in *Chong Siew Chiang v Chua Ching Geh & Anor* [1995] 1 MLJ 551 at p 558; [1995] 1 AMR 1 at p 7 where he said: 'Before considering any exemplary damages it must be considered first whether the sum in mind for compensatory damages would be adequate. If it is not, in view of the outrageous conduct of the defendant and to indicate disapproval of such conduct and as a deterrence, an additional sum may be added to bring the sum sufficient as punishment.'

[91] In the instant case, there was no evidence that the defendants obtained a particular financial benefit or other benefit or advantage. Considering all the facts and circumstances in this case, the award of compensatory damages would be more than adequate. There was therefore no justification for the award of exemplary damages.

[92] Taking into account all these factors and bearing in mind that the plaintiff had already succeeded in some measure of vindicating his standing when the statutory declaration of Ahmad Murad was discredited, I would therefore award a sum RM100,000 as compensatory damages. I would also allow interest at the rate of 8%pa on the said sum from the date of judgment until settlement. The plaintiff is also awarded costs which I assess at RM20,000.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum