LIM GUAN ENG

v.

DATUK TAN TEIK CHENG & ANOR

High Court Malaya, Penang
Quay Chew Soon J
[Civil Suit No: PA-23NCVC-5-05-2022]
21 June 2023

Tort: *Defamation — Publication by 2nd defendant of article authored by 1st defendant in the 'Letters to the Editor' section and behind paywall of The Star Online — Whether impugned statement was defamatory of the plaintiff — Whether 2nd defendant could rely on defence of reportage and fair comment — Whether plaintiff may call witnesses to prove defamatory meaning of impugned statement — Whether article and impugned statement were matters of public interest and were published in a fair, disinterested and neutral manner — Whether readers of the article were misled in any way — Whether malice may be inferred from the fact that the plaintiff and the 1st defendant were political adversaries — Whether 1st defendant was entitled to rely on the defence of fair comment and justification — Whether quantum of damages sought was excessive and divorced from reality — Whether apology sought and manner of publication of the apology was disproportionate in the circumstances*

The plaintiff had filed a defamation action against the defendants following the publication of an article titled 'Guan Eng's bullying of TAR UC a contributory factor to Pakatan's demise' (article) in The Star Online. The article was authored by the 1st defendant in the form of a letter to the 2nd defendant and was published in the 'Letters to Editor' section of The Star Online behind a paywall. The article related to a dispute, public controversy and uncertainty over the change of name of a local Chinese school (school) and the plaintiff's approval/allocation of funding of RM4 million as requested by the then Deputy Minister for Education. The plaintiff at the material time was the Finance Minister and also the Chairman of the Democratic Action Party and the 1st defendant was the Vice President of the Malaysian Chinese Association. The controversy of the change of name of the school surfaced during the Johor State Election and attracted a lot of attention amongst the members of the Chinese community and voters in Johor. Prior to the publication of the article, the 1st defendant had in a Facebook posting criticised the plaintiff for claiming that he had allocated the said sum of RM4 million while he was the Finance Minister, and the said posting was reported in two local Chinese dailies. The plaintiff in response issued a press statement claiming that the impugned statements were lies and demanded that the defendants remove the same and apologise.

By way of instant action, the plaintiff sought compensatory damages in the sum of RM5 million. The plaintiff contended *inter alia* that the 2nd defendant had failed to exercise responsible journalism and was reckless for not taking steps to ascertain the truth of the article. It was also asserted that the article was

not published in a fair, neutral and disinterested manner as the 2nd defendant had republished the defamatory words authored by the 1st defendant, and that the 2nd defendant could not avail itself to the defence of fair comment as such defence was negated by the existence of malice. The plaintiff sought to rely on the evidence of witnesses who purportedly conceded on the meaning of the impugned statement. The plaintiff also objected to the admissibility of the analytics data found at p 61 of the Common Bundle of Documents marked as Bundle B1, despite the production of a certificate under s 90A of the Evidence Act 1950 (EA 1950) by the 2nd defendant's witness (D2W-3) in his witness statement, on the basis that the document was an Internet print-out produced by a third-party i.e. Google, and was not produced by D2W-3's computer in the course of its ordinary use, as it was not part of the 2nd defendant's business. The 2nd defendant relied on the defence of reportage although the word 'reportage' was not specified in its defence. The 1st defendant in turn relied on the defence of justification and fair comment, and claimed *inter alia* that the school was given the RM4 million funding only after it was forced to change its name.

Held (dismissing the plaintiff's claim with costs):

(1). There was no necessity nor was it permissible for the plaintiff to call witnesses to prove the defamatory meaning of the impugned statement. The determination of the meaning of the impugned statement and whether or not the same amounted to defamation was the function of the judge. It was not permissible for the plaintiff to find support in opinion evidence given by witnesses in order to prove the legal concept of defamation. (para 38)

(2) On the facts and in the circumstances, the impugned statement was not defamatory for the reasons *inter alia* that the same when read as a whole, was merely a call for the plaintiff to explain the allegations that had arisen in the course of the Johor State Election and which he had not denied; as it was never alleged that it was the plaintiff who had imposed the condition regarding the change of name of the school; and as a reasonable man seeing that the article was placed in the 'Letters to the Editor' section would accept that a reply might be forthcoming from the plaintiff on the issue in the same section and would therefore not have the tendency to pass any judgment on him yet; and as the impugned statement were based on true facts. Additionally, it was not defamatory to allege that a Finance Minister had imposed a condition to the allocation of funds as the imposition of conditions by public authorities to their approvals was commonplace. In the premises the impugned statement was an opinion and inference that a fair-minded person would have honestly made in the circumstances and as the issues raised in the impugned statement were matters of public interest. (paras 40, 41, 57, 59-60, 63 & 66)

(3) The article including the impugned statement was a matter of public interest and were published by the 2nd defendant to report the fact that the impugned statement was made by the 1st defendant, calling for the plaintiff to explain

his non-denial that the condition imposed for the approval of the RM4 million allocation to the School was for the school to change its name. In doing so, the 2nd defendant was protecting the public interest, and the publishing was done so in a fair, disinterested and neutral manner. (paras 75 & 77)

(4) The repetition rule was concerned with justification, not reportage. Once reportage was established, privilege was invoked and the repetition rule had no application where privilege was concerned. Hence, the repetition rule did not apply to the 2nd defendant which had relied on the defence of reportage and fair comment. (para 86)

(5) It was irrelevant that the article was sent to the 2nd defendant as a press statement and it was immaterial that the article was published in the Letters to the Editor section. Regardless of the header it bore, the article was attributed to the 1st defendant offering his opinion without any embellishment or adoption by the 2nd defendant, and readers of the article were not misled in any way as alleged by the plaintiff. (paras 90-91)

(6) The effect of the publication remained the same regardless if it was titled press statement or letter to the editor and the question of whether there was malice should be looked at, at the point of publication. Malice could not in any way be inferred from the fact that the plaintiff and the 1st defendant were political adversaries, much less the 2nd defendant. (paras 95-97)

(7) The desire to injure must be the dominant motive. Mere dislike of the plaintiff would not constitute malice as long as the defendants spoke honestly. Even if malice was proven against the 1st defendant in this regard, it was illogical to find the 2nd defendant malicious simply on the basis that the plaintiff and the 1st defendant were political adversaries. None of the ingredients of malice had been proven against the 2nd defendant and no malice could be inferred for the publication of the article. (paras 98-99)

(8) The finding in relation to the 2nd defendant, that the impugned statement was not defamatory of the plaintiff applied to the 1st defendant as well. The 2nd defendant was entitled to rely on the defence of fair comment. For similar reasons, the 1st defendant was entitled to rely on the defence of fair comment and which defence was not defeated by malice. (paras 101-103)

(9) The 1st defendant's plea of justification however failed due to the 1st defendant's failure to prove that the plaintiff had demanded that the name of the school be changed as a condition for the RM4 million funding. (para 106)

(10) The sum of RM5 million in compensatory damages sought by the plaintiff against both the 1st and 2nd defendants for general, aggravated, and exemplary damages, was excessive, divorced from reality and bucked the trend on award of damages for defamation. (paras 107-114)

(11) 'In the course of ordinary use' did not require the computer producing the document to be used in the course of the business concerned i.e. the ordinary use of the computer was not affected by the nature of the 2nd defendant's business. There was no additional requirement under s 90A of the EA 1950 for the computer to also be a dedicated computer kept in the 2nd defendant's organisation. (paras 118 & 120)

(12) The analytics data was a document that showed actual, if not closest to actual viewership of the very article in issue over a specified period of time, and by virtue of s 90A of the EA 1950, was admissible. (paras 124-125)

(14) Even if the plaintiff was to succeed in his claim for defamation, the apology sought ought not to be granted where the defendants were unwilling to apologise. An apology was a matter of the heart and should not be compelled against an unwilling defendant. In this regard, the plaintiff's request for an apology to be printed and published on a conspicuous page of The Star newspaper, both printed and in the online version, was disproportionate given that the impugned statement could only be seen after going behind the paywall and was tucked away in the final two paragraphs of the article. (paras 126-127)

Case(s) referred to:

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

Credit Guarantee Corporation Malaysia Bhd v. SSN Medical Products Sdn Bhd [2017] 1 MLRA 541 (refd)

Dato Low Tick v. Chong Tho Chin & Other Appeals [2017] 5 MLRA 361 (refd)

Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2009] 4 MLRH 48 (folld)

Dato' Sri Mohamad Salleh Ismail & Anor v. Mohd Rafizi Ramli [2022] 4 MLRA 718 (folld)

Datuk Harris Mohd Salleh v. Yong Teck Lee & Anor [2017] 2 SSLR 433 ; [2017] 6 MLRA 281 (folld)

Government of State of Sarawak v. Wong Soon Koh [2022] 3 MLRH 235 (refd)

Joseph And Others v. Spiiler And Another (Associated Newspaper Ltd And Others Intervening [2011] 1 AC 852 (refd)

Keluarga Communication Sdn Bhd v. Normala Samsudin & Another Appeal [2006] 1 MLRA 464 (refd)

Kemsley v. Foot And Others [1952] 1 All ER 501; [1951] 1 All ER 331; [1951] 2 KB 34 (refd)

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

Lim Guan Eng v. Ruslan Kassim & Another Appeal [2021] 3 MLRA 207 (folld)

London Artists Ltd v. Littler [1969] 2 QB 375 (refd)

Microsoft Corporation v. Conquest Computer Centre Sdn Bhd [2014] 2 MLRH 578 (refd)

Mkini Dotcom Sdn Bhd & Ors v. Raub Australian Gold Mining Sdn Bhd [2021] 5 MLRA 37 (refd)

Tun Patinggi Abdul Rahman Ya'kub v. BRE Sdn Bhd & Ors [1995] 4 MLRH 877 (refd)

Raja Syahrir Abu Bakar & Anor v. Manjeet Singh Dhillon & Other Appeals [2019] 4 MLRA 218 (folld)

Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors [2018] 6 MLRA 388 (folld)

Roberts And Another v. Gable And Others [2008] QB 52; [2008] 2 WLR 129 (refd)

Syed Nadri Syed Harun & Anor v. Lim Guan Eng & Other Appeals [2019] 2 MLRA 387 (folld)

Silkin v. Beaverbrook Newspapers Ltd [1958] 1 WLR 743 (refd)

Utusan Melayu (Malaysia) Bhd v. Othman Omar [2017] 1 MLRA 234 (refd)

Wing Fah Enterprise Sdn Bhd v. Matsushita Electronic Components (M) Sdn Bhd [2017] 1 MLRH 168 (distd)

Legislation referred to:

Defamation Act 1957, s 9

Evidence Act 1950, s 90A, 90B, 114(g)

Other(s) referred to:

Gatley on Libel and Slander, 7th edn, p 47

Counsel:

For the plaintiff: Simon Murali (Kok Yuen Lin with him); M/s Simon Murali & Co

For the 1st defendant: Ng Kian Nam (Tham Joe Ping, Tan Paik Hong & Koay Li Xian with him); M/s Ng Kian Nam & Partners

For the 2nd defendant: Abdullah Abdul Rahman (Deanna Terrisha with him); M/s Cheang & Ariff

JUDGMENT

Quay Chew Soon J:

Introduction

[1] The Plaintiff ("P") is the Chairman of the Democratic Action Party (DAP). The 1st Defendant ("D1") is the Vice President of the Malaysian Chinese Association (MCA). The 2nd Defendant ("D2") is in the business of media publication, better known as The Star, with an online version known as The Star Online. The instant suit is a defamation action brought by P against the Defendants. After a full trial, I dismissed P's claim. Here are the grounds of my judgment.

The Trial

[2] The trial took place over the course of 3 consecutive days on 20 February 2023, 21 February 2023 and 22 February 2023. The witnesses who testified at the trial were:

Witness	Name	Description
For the Plaintiff		
PW-1	YB Teo Nie Ching	Deputy Minister of Communication and Digital
PW-2	YB Lim Guan Eng	The Plaintiff
For the 1st Defendant		
D1W-1	Ang Boon Heng	Chairman of the Construction Committee of SJKC Kuek Ho Yao
D1W-2	Datuk Tan Teik Cheng	The 1st Defendant
For the 2nd Defendant		
D2W-1	Yee Xiang Yun	Journalist at the 2nd Defendant (Johor bureau)
D2W-2	Esther Ng Sek Yee	Chief Content Officer of the 2nd Defendant
D2W-3	Seng Sheng Yeow	General Manager for Technology at SMG Business Services Sdn Bhd

Background Facts

[3] The dispute herein emanates from the change of name of Sekolah Jenis Kebangsaan Cina (SJKC) Kuek Ho Yao ("School"). The public controversy and uncertainty on whether the name of the School was going to be changed had started in March 2019, due to the need to replace the developer of the School after the 2018 General Election. The media reported on several occasions that the issue on the naming of the School was to be left to the new developer.

[4] At a meeting on 10 November 2019, the name of the School was agreed to be changed to 'SJKC Kuek Ho Yao @ Eco Spring'. After that, on 29 November 2019, PW-1 (who was then the Deputy Minister for Education) issued a letter requesting P (in his capacity as the Finance Minister), to approve a 'sumbangan' of RM4 million to the School. PW-1 was involved in the change of name of the School.

[5] There is no media report in evidence on the agreement to change the name of the School reached during the meeting on 10 November 2019. It could be inferred that the public was not aware. This continued until the campaigning period for the Johor State Election at the end of February 2022 until 11 March

2022. The issue of the change of name of the School surfaced again during the Johor State Election where a challenge for a debate on that issue was made on 25 February 2022 by the President of MCA against PW-1. PW-1 was a senior DAP leader from Johor and DAP's Campaign Director for the Johor State Election. She was also the former Deputy Minister for Education who had been involved in the events surrounding the School.

[6] D1 then issued a Facebook post questioning whether the allocation of RM4 million to the School by P had been made with a request by PW-1 that the School changes its name. Two Chinese newspapers reported on the Facebook post. The controversy attracted a lot of attention amongst members of the Chinese community and the voters in Johor. There was no explanation by P on the issue before 7 March 2022.

[7] On 7 March 2022, D1 sent an Article (labelled 'press statement') to D2 to be published in The Star. D2 published the Article in the Letters section of The Star Online, behind a paywall. In this action, P has sued for defamation over the final two paragraphs of the Article ("Impugned Statement").

Findings In Relation To The 2nd Defendant

[8] Here are my findings. I will deal first with D2, although my reasons with regard to D2 will substantially apply to D1 as well. I find that the Impugned Statement is not defamatory of P for the following reasons:

(a) The facts show that P did politicise the School by making political speeches during the Johor State Election on the allocation of the RM4 million in particular, and on Chinese primary schools in general. Further, as a politician, it was to be expected by the public that P would politicise the issue and therefore there was nothing defamatory about it;

(b) There is no allegation in the Impugned Statement that it was P who had imposed the condition on the change of name of the School;

(c) P had not denied the allegations on the same issue made earlier through various other media outlets; and

(d) The Impugned Statement, when read as a whole, is merely a call for P to explain the allegations which had arisen in the course of the Johor State Election and which he had not denied.

[9] If I am wrong on the above, I further find that D2 is entitled to rely on the defence of fair comment and reportage, in my opinion, the Impugned Statement is a fair comment based on true facts set out in the Impugned Statement itself or those true facts that emerged during trial, on matters of public interest. I am also of the opinion that D2 is entitled to rely on the defence of reportage. As D2 had merely reported the fact that the D1 had issued the Article in a fair, neutral

and disinterested manner without D2 adopting the same as it own. Which is shown by the fact that the Article is published in the letter to the editor section and conspicuously showing DTs name as the author of the Article together with his position in MCA.

[10] It is useful to narrate the facts set out below, as they are relevant to my findings.

Undisputed Facts

[11] On 7 March 2022, D2 published in The Star Online' an article in the form of a letter to the editor bearing the caption:- "Guan Eng's bullying of TAR UC a contributory factor to Pakatan's demise" ("Article"). The Article was authored by D1, where the last two paragraphs of the Article (ie the Impugned Statement) reads:

> "In addition to dealing with TAR UC, Guan Eng also politicised a Chinese primary school. During the Johor state election, he dared to claim that he had allocated RM4 million to SJKC Kuek Ho Yao.
>
> However, he still did not dare deny that the condition for allocating that sum was to change the name of the school. When will he come out to explain this matter?"

[12] At the time the Article was published, P was a member of DAP, in which he held the position of Secretary General. P held this position until 20 March 2022, after which he held the position of Chairman of DAP until now. P had been appointed as the Finance Minister of the Federal Government of Malaysia after the 14th General Election in May 2018, and held this position until February 2020.

[13] At the time the Article was published, D1 held the position of Vice President of MCA. MCA is a component in a political coalition known as Barisan National (BN) and was a known political adversary of DAP. DAP is a component of a political coalition known as Pakatan Harapan (PH).

[14] On 22 January 2022, the State Legislature Assembly of Johor Darul Takzim was dissolved to pave way for the general election in that state. The nomination day was on 26 February 2022. The Johor State Election took place on 12 March 2023. Various political parties participated in the election campaign, where among them were DAP and MCA. DAP was part of the political coalition of PH, whose candidates contested against those who stood for the political coalition of BN. MCA was part of the latter coalition.

[15] In the run-up to the Johor State Election, P stated that during his tenure as the Finance Minister, he as the Finance Minister and the Federal Government had allocated RM4 million to the School. The Article was published on 7 March 2022, during a period of intensive election campaign that preceded the Johor State Election.

Further Facts Established During The Trial

The Public Controversy Over The Name Of The School Prior To The Campaigning Period

[16] There was a ground breaking ceremony for the construction of the School on its site in March 2018, prior to the 14th General Election which took place in May 2018. The School was to be constructed by a developer called UM Land. At that time, the name of the School was SJKC Kuek Ho Yao, without any addition to that name. The School was named after a respected Chinese community leader in Johor, the late Kuek Ho Yao.

[17] Under the PH Government (which came to power at the 14th General Election), PW-1 was the Deputy Minister of Education in charge of the construction of the School. However, as at July 2018, when PW-1 was appointed as Deputy Minister, there was no progress on the construction of the School. The office of the Deputy Minister of Education was unable to contact UM Land between September 2018 and 25 February 2019 to proceed with the construction of the School. Therefore, the Ministry of Education under PW-1 considered a proposal from another developer, Eco World to construct the School on another site about 2 kilometres away from the original site.

[18] On 30 March 2019, China Press online news published an article titled:- "SJKC Kuek Ho Yao to Switch School Land, The Retention of School Name to be Decided by the Developer". In this news article, it was reported that:

(a) PW-1 as Deputy Minister and several individuals visited the School's site to listen to the briefing of the construction of the School;

(b) The School would be constructed on a different site namely, on a land held by a new developer who was going to construct the School;

(c) The new developer had announced that they were willing to pay for the construction of the School and therefore, the question of whether the name SJKC Kuek Ho Yao would be retained depended on the developer;

(d) PW-Ts political secretary had been interviewed by China Press and informed that:

(i) The construction of the School was to be funded by a new developer but the amount was still under discussion;

(ii) The School would be on a new site belonging to the new developer;

(iii) At that stage, it was inconvenient to disclose the name of the developer;

(iv) The Ministry of Education had agreed to the erection of the School on the new site and the developer was willing to provide for the costs. But whether the original name of the School would remain was up to the developer; and

(v) The Board of Directors of the new developer would discuss the name of the School and the amount they were funding. "All will be decided by the Developer and later announced by the Ministry of Education".

[19] On 15 April 2019, Sin Chew Daily News published an article titled:- Teo Nie Ching: Eco World and Ministry of Education Pays 50% each". In this news article, it was reported that:

(a) PW-1 disclosed that Tebrau will have a new SJKC funded equally by Eco World and the Ministry of Education;

(b) The naming of the school (the new SJKC) needed further discussion;

(c) SJKC Cheah Fah situated in Iskandar Puteri would be fully funded by the Sunway Group and the school's name will be retained; and

(d) PW-1 hoped SJKC Pei Chai, SJKC Cheah Fah and 'the agreed new Tebrau's SJKC' could be operational in 2021.

[20] The existence of these news reports is not in dispute. Notably, while there was news that the name of SJKC Cheah Fah would be retained, SJKC Kuek Ho Yao was referred to as "the agreed new Tebrau's SJKC" in Sin Chew Daily News' article dated 15 April 2019. The name of the School was in limbo. During the trial, PW-1 agreed that these news reports (China Press dated 3 March 2019 and Sin Chew Daily News dated 15 April 2019) created uncertainty amongst members of the public as to whether the name of the School would be retained, amended or changed. PW-1 agreed that this was something that needed clarification

[21] On 2 April 2019, Sin Chew online news published an article titled:- "SJKC Kuek Ho Yao renamed? Wee Ka Siong: The Chinese Community in Johor Bahru is Embarrassed". In this news article, it was reported that:

(a) The MCA President (Dato' Seri Wee Ka Siong) had expressed that SJKC Kuek Ho Yao had already been named. But it was now up to the developer to decide whether to rename the School; and

(b) The MCA President asked why the naming of the School was to be decided by the developer. And why the Ministry of Education had given the authority to rename the School to the developer.

[22] The above Sin Chew online news dated 2 April 2019 reflected the anxiety amongst members of the public over the uncertainty as to the eventual name of the School. On 28 April 2019, Sin Chew online news published an article titled:- "Teo Nie Ching: Building SJKC Eco Flora instead of SJKC Kuek Ho Yao was not an attempt at making things difficult". In this news article, it was reported that PW-1 had reiterated that the Ministry of Education had chosen 'to cooperate with the developer Eco World to build SJKC Eco Flora (temporary name) instead of SJKC Kuek Ho Yao'. Again, the existence of the aforesaid Sin Chew online news dated 28 April 2019 is not disputed. This

would have caused the public angst since the School was already being referred to by the name 'Eco Flora' without any reference to 'Kuek Ho Yao' at all.

The Change Of Name Of The School Decided At The Meeting In November 2019 And The Subsequent Request For Disbursement Of The RM4 Million

[23] PW-1 gave evidence that there was a meeting held on 10 November 2019 chaired by PW-1 attended by: (i) the representative of Eco World, (ii) the representative of the School's administrative body and (iii) the daughter and heiress of the late Kuek Ho Yao. At this meeting, it was agreed that the name of the School in Bahasa Malaysia or in Roman spelling would be SJKC Kuek Ho Yao with the addition of Eco Spring'. This change of name was then reflected in various internal documents of the Ministry of Education and in correspondences involving the Government. For instance, there was a letter dated 29 November 2019 from the office of the Deputy Minister of Education to P as the Minister of Finance.

[24] It was only pursuant to the above letter dated 29 November 2019, which was after the change of name of the School that was agreed at the meeting on 10 November 2019, that PW-1 (as the Deputy Minister of Education) requested from P (as the Minister of Finance) to approve the 'sumbangan' of RM4 million as the construction fund for the School. It must however be highlighted that the agreement and the approval of the change of name of the School from 'SJKC Kuek Ho Yao' to 'SJKC Kuek Ho Yao @ Eco Spring' by PW-1 (as the Deputy Minister of Education) was not known to the public because there is no evidence of any media report on the same. Therefore, as far as the public was concerned there was still uncertainty whether the name of the School was going to be SJKC Kuek Ho Yao or some other name.

The Public Controversy Over The Name Of The School During The Campaigning Period

[25] During the Johor State Election, BN candidates from MCA mostly contested against PH candidates from DAP. The campaign and the contest were heated. This was confirmed by PW-1, who was DAP's Campaign Director during the Johor State Election. There had been a challenge on 25 February 2022 by the MCA President against PW-1 on the issues of Chinese education and SJKC Kuek Ho Yao. This is referred to in P's media statement dated 8 March 2022. PW-1 too confirmed that the issue with regard to the name of the School was supposed to be a subject matter of the debate.

[26] On 28 February 2022, D1 posted a Facebook post. This was about one week before the publication of the Article. In the Facebook post, D1 publicly criticised P for claiming that while he was the Finance Minister, he had allocated RM4 million to the School. When there was an issue as to whether this allocation was coupled with a request by PW-1 that the name of the School should be changed. According to D1, the initial attempt was to change the name of the School to the name of a developer. Subsequently, in the face of

opposition by the School, by adding the name of the developer to the name of the School. D1 also asked PW-1 and P whether the allegations were true.

[27] On 28 February 2022, Guang Ming Daily Online and Sin Chew Daily Online published newspaper articles. These Chinese newspaper articles reported on D1's Facebook post referred to above. These articles in the Chinese newspapers were also published about one week before the publication of the Article. All these allegations during the campaigning period relating to the School were regarded as serious allegations by DAP, because it was a matter that attracted a lot of interest among the Chinese community in Johor and the voters. It was a big controversy at that time. This is shown from the following testimony of PW-1 and P.

(a) On the subject matter of the debate proposed by the MCA President:

(i) PW-1: a serious allegation'; 'attracted a lot of interest among the Chinese community'; 'big controversy'.

(ii) P: 'serious allegation'; 'attracted a lot of interest among the Chinese community'; 'not only amongst the Chinese community, but also voters'; 'big controversy'.

(b) On DTs Facebook post:

(i) PW-1: 'serious question'; 'a heated issue... and definitely Tan's FB post also added to that'; 'very controversial among the Chinese community in Johor'.

(ii) P: 'Serious allegations'; 'against me'; 'serious allegations against DAP'; 'big election issue during the Johor state election'.

(c) On the reports by Guang Ming Daily Online and Sin Chew Daily Online concerning DTs Facebook post:

(i) PW-1:- 'very controversial among the Chinese community in Johor'.

[28] There is no evidence of any public written statement by P or PW-1 in response to DT's Facebook post and the reports on the same in the two Chinese dailies, prior to D2 publishing the Article on 7 March 2022. No documentary evidence of any such public written statement was adduced. P confirmed that he did not make any public written statement concerning D1's Facebook post. P could not recall whether he made any public written statement concerning the reports in the two Chinese newspapers regarding D1's Facebook post.

[29] On 7 March 2022, D1 issued the Article. This Article was received by D2 *via* an email labelled 'Press Statement'. The particular D2 officer who received the Article was D2W-2, who was D2's Chief Content Officer. D2W-2 received the email from MCA's Publicity Bureau on behalf of D1. On the same day, ie 7 March 2022, D2 published the Article as it is in the Letter to the Editor section of The Star Online. D1's name and his position as the Vice-President of MCA were conspicuously stated at the bottom of the Article.

[30] The entire Article reads:

> "Guan Eng's bullying of TAR UC a contributory factor to Pakatan's demise
>
> LIM Guan Eng must be taken to task for not owning up to his interference in funding for Tunku Abdul Rahman University College (TAR UC) when he was finance minister.
>
> Instead, the Bagan MP finds it more apt to mislead. These are among the contributory factors leading to the downfall of the Pakatan Harapan Government.
>
> During the 22 months in which Pakatan held office, not only did it fail to accomplish anything concrete in terms of policy and economic development, it also destroyed existing goodwill earned by the previous Government.
>
> A classic example is the cancellation of the RM30mil annual matching grant for TAR UC. Due to Guan Eng's oppression against TAR UC, MCA immediately initiated a fundraising campaign.
>
> Malaysians from all ethnic groups gathered to assist this institution by expressing their dissatisfaction with the Pakatan Government.
>
> At the Tanjung Piai by-election, more than 15,000 voters made their disappointment known by selecting Barisan Nasional on the ballot slip which returned MCA's Seri Wee Jeck Seng to Parliament.
>
> After Tanjung Piai, Guan Eng randomly allocated funds to an unrepresentative alumni association whose members were alleged to have close ties with him as his so-called allocation to TAR UC
>
> However, even as professional accountants are able to distinguish between an official TAR UC alumni association and an unrepresentative one, Guan Eng remained in the dark — whose fault is it? Education is an issue that cannot be compromised or politicised.
>
> In addition to dealing with TAR UC, Guan Eng also politicised a Chinese primary school. During the Johor state election, he dared to claim that he had allocated RM4mil to SJKC Kuek Ho Yao.
>
> However, he still did not dare deny that the condition for allocating that sum was to change the name of the school. When will he come out to explain this matter?
>
> DATUK TAN TEIK CHENG
>
> MCA vice-president"

[31] According to D1 however, the Article was distributed to D2 through a WhatsApp Group titled 'MCA Media Group', whose members include media practitioners from various organisations. But D2W-2 gave evidence that she was not familiar with the WhatsApp group and did not receive anything from that WhatsApp group. In this regard, it should be highlighted that D1 also gave evidence that the distribution of the Article in the WhatsApp group

was done by administrators of the WhatsApp group. The inference that could be drawn is that D1 did not have personal knowledge with regard to the WhatsApp group. In fact, under cross-examination by the counsel for D2, D1 confirmed that he was not a member of the WhatsApp group and that any statement in the WhatsApp group would be posted by 'the employee from the HQ'. D1 agreed that there were a few methods deployed by the employees for distribution including by email and other methods. D1 was unsure whether there was any distribution by email to D2. The upshot is that it is possible that D2 received the Article only by email.

[32] The next day, on 8 March 2022, P issued a press statement claiming that the statements in the Article to wit, 'During the Johor state election, he (Guan Eng) dared to claim that he had allocated RM4 million to SJKC Kuek Ho Yao. However, he still did not dare deny that the condition for allocating that sum was to change the name of the schoolwere lies. P demanded that D1 and D2 withdraw the Article within 24 hours and apologise.

The 2nd Defendant's Knowledge About The Events During The Campaigning Period

[33] D2W-1 is a journalist with D2, based at their Johor Bahru office. In the course of her work, she covered the reporting of the events that took place in relation to the State Election. Her witness statement, WS-D2W- 1, shows that she was aware of the events that took place during the campaigning period for the Johor State Election as described above. She also communicated these facts to D2's Johor Bureau Chief.

[34] D2W-2 is D2's Chief Content Officer based in Petaling Jaya. She led D2's Editorial Department. She was responsible for making the decision to publish the Article in the Letter to the Editor section of The Star Online. D2W-2 was briefed by D2's 'News Desk' and the issue with regard to the School was also talked about with D2's counterparts from the Chinese press. The News Desk is a term referring to a group of D2's senior editors covering news.

[35] According to D2W-2, in order to have a letter or opinion published in The Star Online, one would have to write to the editor of The Star, typically to editor@thestar.com.my or the email addresses of any of the senior editors of The Star including D2W-2. Further, the types of documents received by D2 that may be published in the Letters section include personal opinions from members of the public and press statements. The factors usually considered in placing a document in the Letters section are whether the issue is relevant and in the case of a press statement, whether D2 had the time to process it. Processing refers to the process of reading through and writing a story out of the press statement. The constraints that D2 had in processing a press statement would usually be lack of manpower and lack of time to meet the deadline. In the present case, D2 placed the Article in the Letter to the Editor section due to the said two constraints. Namely, lack of manpower and time as it was late in the day and past their deadline.

[36] As to the contents of the Article, D2 thought that the Article touched on an election issue which had been raised and reported and had therefore become a public controversy on a matter of public interest. D2W-2 considered that the Article in substance merely questioned whether the allocation of RM4 million to the School was conditional upon a change of name imposed by DAP or P and therefore decided in her capacity as D2's Chief Content Officer that it was in public interest that the Article should be published as it was, bearing D1's name and position in MCA to make clear that the contents were not D2's position. According to D2W-2, the publication of the Article in this manner also ensured that the fact that the Impugned Statement had been made by D1 was reported in a fair and neutral way. Finally, D2W-2 gave evidence that the publication of the Article in the Letter to the Editor section meant that it was open to P to also send a letter in reply to the said section to be considered for publication.

The Impugned Statement Is Not Defamatory

[37] Based on the facts narrated above, it is my finding that the Impugned Statement is not capable of bearing any defamatory meaning as pleaded by P. The following principles are applicable in determining this issue.

(a) 'The first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.' (See the Court of Appeal case of *Chok Foo Choo @ Chok Ke Lian v. The China Press Bhd* [1998] 2 MLRA 287 ("*Chok Foo Choo*")).

(b) The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words... The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.'

(c) '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.' (See the High Court case of *Tun Patinggi Abdul Rahman Ya'kub v. BRE Sdn Bhd & Ors* [1995] 4 MLRH 877, which decision was approved by the Court of Appeal in Chok Foo Choo)

(d) 'In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question. So let me suppose a number of ordinary people discussing one of these paragraphs which they had read in the newspaper. No doubt one of them might say — 'Oh, if the fraud squad are after these people you can take it they are guilty'. But I would expect the others to turn on him, if he did say that, with such remarks as — 'Be fair. This is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier has been very stupid or careless. We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it another thing to condemn him unheard'. (See the House of Lords case of *Lewis v. Daily Telegraph Ltd* [1964] AC 234 at 259 — 260).

(e) The test when considering whether a statement is defamatory 'is an objective one in which it must be given a meaning a reasonable man would understand it'. (See the Court of Appeal case of *Keluarga Communication Sdn Bhd v. Normala Samsudin & Another Appeal* [2006] 1 MLRA 464 at 708).

(f) 'It is necessary to consider the whole article'.

(g) 'It is necessary to take into consideration, not only the actual words used, but the context of the words'.

(h) The publication may contain defamatory parts. However, other parts which 'take away the sting' must be taken into account.

[38] P sought to rely on the evidence of witnesses who purportedly conceded on the meaning of the impugned statement. But there is no necessity, indeed it is not permissible, to call witnesses to prove the defamatory meaning of the words. The determination of the meaning of the impugned statement and whether or not it amounts to defamation is the function of the judge. It is not permissible for P to find support in opinion evidence given by witnesses in order to prove the legal concept of defamation.

[39] Further, it is not necessary for the defendant to plead the meaning of the impugned statement that he contends. As stated in *Gatley on Libel and Slander*, 7th edn at p 47:

> "In the case of words defamatory in their ordinary sense, the plaintiff has to prove no more than that they were published; he cannot call witnesses to prove what they understood by the words, nor will it avail the defendant to call any number of witnesses to say that they did not believe the imputation. The only question is, might reasonable people understand it in a defamatory sense?... Conversely, even where the only people to whom words were published did not understand them in a defamatory sense, it is probably the law that the words would be held defamatory if reasonable men would have understood them in such a sense. For it is unnecessary to prove that anyone did understand the words in a defamatory sense as long as it is proved that there are people who might so understand them."

[40] In my opinion, the Impugned Statement is not defamatory for the following reasons:

(a) P was a politician and a senior leader of a political party (ie DAP), which was participating in the Johor State Election when the Impugned Statement was made. DAP was known to be the political adversary of MCA. A reasonable man would accept that politicising a Chinese primary school is what a politician such as P and from DAP (because it was an adversary of MCA, a Chinese based party) may do under the circumstances. In fact, P agreed that he gave political speeches about DAP's contribution for Chinese primary schools. It is also an agreed fact that P, in the run-up to the Johor State Election, stated that during his tenure as the Finance Minister, he had allocated RM4 million to the School. These, to my mind, are acts of politicising. There is nothing therefore in the allegation of 'politicising' that had the tendency to expose P to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower P in the estimation of right-thinking members of society generally;

(b) There is no allegation in the Impugned Statement that it was P who had imposed the condition regarding the change of name of the School. Contextually, the allegations in the week before the publication of the Article had been that it was PW-1 who had imposed the condition on the change of name of the School before the RM4 million was allocated. What the Impugned Statement does is to allege that P had not denied that there was such a condition imposed. The Impugned Statement does not allege that P had imposed the said condition;

(c) The Impugned Statement, when read as a whole, is merely a call for P to explain the allegations which had arisen in the course of the Johor State Election and which he had not denied;

(d) In any event, the final sentence in the Article takes away any sting in the Impugned Statement. A person who is making an unequivocal allegation would not ask for explanation. A reasonable man reading the final sentence in the Impugned Statement would accept that an explanation might be forthcoming from P on the issue. And would therefore not have the tendency to pass any judgment on him yet; and

(e) Moreover, a reasonable man seeing that the Article is placed in the Letter to the Editor section would accept that a reply might be forthcoming from P on the issue to the same section. And would therefore not have the tendency to pass any judgment on him yet.

[41] Further, I am of the view that the Impugned Statement is not defamatory for the following additional reasons:

(a) It is not defamatory to allege that a Finance Minister had imposed a condition to its allocation of fund. The imposition of conditions by public authorities to their approvals is commonplace; and

(b) The imposition of a condition for the School to change its name before any fund could be allocated for its construction is also not defamatory because a reasonable man would accept that the change of name could be for innocuous reasons due to changed or changing circumstances. Even if the name of a proposed school is changed, the old name could still be used for another new school to be built. Indeed, this was aliuded to by PW-1 as shown in her following evidence:

> "So my line of thinking at that point of time is, if indeed Eco World agree to fund 100%, then we can consider to let them build a SJKC Eco World. But at the same time we find another location in JB area to build a SJKC Kuek Ho Yao because the demand for SJKC in JB area is very high."

[42] I am guided by the Federal Court case of *Lim Guan Eng v. Ruslan Kassim & Another Appeal* [2021] 3 MLRA 207 ("*Ruslan Kassim*") which described what amounts to a defamatory matter as follows:

> "[28] The law in respect of what amounts to defamatory matter is well settled. An imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of the 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...
>
> [29] The defamatory nature of the imputation is to be judged by the ordinary and reasonable members of the community or an appreciable and reputable section of the community... The ordinary reasonable person has been held to be one of fair average intelligence... who is not avid for scandal... but who may

engage in some degree of loose thinking... and reading between the lines... but who, at the same time, should not be unduly suspicious.

[30] To ascertain the meaning of the statement or publication, the plaintiff can rely on the natural and ordinary meaning or the innuendo meaning. The consideration of the meaning of the offending words involves an objective test... The offending words must be considered in the context of the whole article and not simply on isolated passages...In order to prove his claim in defamation, it is also essential that the offending words are not only defamatory and that they are published but also that they identify him as the person defamed."

Defence Of Fair Comment

[43] If I am wrong and the Impugned Statement is considered defamatory, I find that D2 is entitled to rely on the defence of fair comment. The Federal Court in *Dato' Sri Mohamad Salleh Ismail & Anor v. Mohd Rafizi Ramli* [2022] 4 MLRA 718 ("*Rafizi*") held that to establish the defence of fair comment the defendant will need to establish four elements as follows:

(a) The words complained of are comment, although they may consist or include inferences of fact;.

(b) The comment is on a matter of public interest;

(c) The comment is based on facts; and

(d) The comment is one which a fair-minded person can honestly make on the facts proved.

[44] On the meaning of 'fair' in the defence of fair comment, the Court of Appeal in *Chok Foo Choo* explained that "'Fair' in the defence of fair comment does not mean 'not lopsided'. It means 'honest'."

What Is A Comment Or An Inference Of Fact

[45] Dealing with the first element referred to above, what is a comment or an inference of fact? The following principles distilled from the Federal Court's decision in *Rafizi* and the authorities cited therein are applicable in determining this question:

(a) 'If a statement appears to be one of opinion or conclusion, it is capable of being comment' (See paragraph [31] of the judgment).

(b) 'An inference of fact may also be a comment' (See paragraph [31] of the judgment).

(c) 'More accurately it has been said that the sense of comment is 'something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc' (See paragraph [35] of the judgment).

(d) 'A comment, opinion or inferences of fact... must be based on facts' (See paragraph [32] of the judgment).

(e) 'If a defamatory allegation is to be defended as fair comment it must be recognisable by the ordinary, reasonable reader as comment and the key to this is whether it is supported by facts, stated or indicated, upon which, as comment, it may be based' (See paragraph [36] of the judgment).

(f) 'At the end of the day much depends on how the defamatory statement is expressed, the context in which it is set out and the content of the entire article or passage in question. One should adopt a common sense approach and consider how the statement would strike the ordinary reasonable reader ie whether it would be recognizable by the ordinary reader as a comment or a statement of fact' (See paragraph [36] of the judgment).

[46] A question has arisen as to how much true facts need to be stated in the comment. P insists that the comments must be based on facts 'truly stated'. I would make three observations in this regard.

[47] The first observation is this. The true facts on which the comments are based need not be fully stated in the impugned statement. It is sufficient if the true facts are set out in the particulars namely, in the statement of claim. The House of Lords in *Kemsley v. Foot And Others* [1952] 1 All ER 501 held:

> "In the present case, for instance, the substratum of fact on which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that Press is a low one. As I hold, any facts sufficient to justify that statement would entitle the respondents to succeed on a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact was sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the respondents' plea.
>
> The forms in which a comment on a matter of public importance may be framed are almost infinitely various and, in my opinion, it is unnecessary that all the facts on which the comment is based should be stated in the libel in order to admit the defence of fair comment."

[48] The second observation is this. In the impugned statement, the true facts need only be indicated in general terms The Federal Court in *Rafizi* held:

> "[45] 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.
>
> ...

> [54] 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."

[49] *Rafizi* is a case where the defendant / respondent set out the supporting facts extensively in the defamatory statement being defended as a fair comment. (See paragraphs [32], [46] and [49] of the judgment). The defendant / respondent alleged that the plaintiff / appellant had used public funds as collateral for a personal loan. However, the plaintiff / appellant took the position that the defamatory statement had no basic facts for any inference to be made because it was untrue due to the personal loan having been withdrawn by the time the defamatory statement was made. (See paragraph [40] of the judgment). The plaintiff / appellant also submitted that the defendant / respondent must truly state all the basic facts in making the comment. The Federal Court disagreed and held that the basic facts set out by the defendant / respondent constituted sufficient substratum of facts which are the 'subject matter' of the defamation action. (See paragraph [49] of the judgment).

[50] The third observation is this. In cases involving a public man whose actions had been under vigorous discussion, it is sufficient for the impugned statement to merely refer to the subject matter of the comment. The following cases illustrate that a minimal reference to the subject matter would be sufficient:- (i) the UK Court of Appeal case of *Kemsley v. Foot And Others* [1951] 1 All ER 331; [1951] 2 KB 34 ("*Kemsley*"); (ii) the House of Lords case of *Kemsley v. Foot And Others (supra)*; and (iii) the UK Supreme Court case of *Joseph And Others v. Spiiler And Another (Associated Newspaper Ltd And Others Intervening)* [2011] 1 AC 852 ("*Joseph v. Spiiler*").

[51] The facts and issue in *Kemsley* are summarised at paragraphs 44 and 45 of *Joseph v. Spiiler*, *inter alia*, as follows:

> [44] The publication that was the subject of the claim in *Kemsley v. Foot* was an article by Michael Foot in the Tribune that made a virulent attack on an article in the Evening Standard, a newspaper controlled by Lord Beaverbrook. The plaintiff was not, however, Lord Beaverbrook, but Viscount Kemsley, a rival newspaper proprietor. His claim was founded on three words that provided the heading to Michael Foot's article. The words were 'Lower than Kemsley'. The plaintiff pleaded that the meaning of these words, in their context, was that he used his position as a newspaper proprietor to procure the publication of statements that he knew to be false. The defence included a plea of fair comment on a matter of public interest, said to be the "control by the plaintiff" of the newspapers of which he was proprietor...

> [45] The issue was whether the plea of fair comment should be allowed to stand in circumstances where the article itself set out no facts at all that related to the plaintiff or his newspapers. The judge held that it should not, and struck out the plea of fair comment and the particulars pleaded in support of it. The Court of Appeal reversed his decision and the House of Lords affirmed the decision of the Court of Appeal."

[52] The headnotes of the UK Court of Appeal's decision in *Kemsley* states the principle laid down in that case as follows:

> "Criticism of a newspaper proprietor directed to the manner in which news is presented in papers controlled by him is to be treated on the same lines as criticism of a book or a play or other matter submitted to the judgment and taste of the public, and the critic is not to be shut out from the plea of fair comment because in his criticism he had not given or referred to examples of the conduct criticized, so long as the subject-matter of the comment is plainly stated."

[53] The UK Court of Appeal held as follows in *Kemsley* (as summarised by the Supreme Court in *Joseph v. Spiller*:

> "[47] Somervell LJ, at p 42, identified two situations in which there was no need for a publication to set out details of the facts upon which the comment was based in order to found a defence of fair comment. The first was where the comment was on a play, a book or a work of art, put before the public for its approval or disapproval. The second was where the comment was on the actions of a public man that had been under such vigorous discussion that a bare comment would be taken by the reader as plainly referable to them."

[54] In *Kemsley*, the impugned statement was a mere 3-word expression:- 'Lower than Kemsley'. The defendant pleaded fair comment and provided particulars of the specific facts on which the words 'Lower than Kemsley' are a fair comment. The plaintiff applied to strike out the defence of fair comment on the ground that the facts, or some of them, on which the comment was made was not contained or specifically referred to in the impugned statement. In dismissing the striking-out application, the House of Lords decided as set out below. This illustrates that the requirement that the comment must be based on facts referred to in the impugned statement was satisfied by the reference to the one word ie '*Kemsley*', which was held to be the subject matter of the comment.

> "In the present case the word which indicates the subject is "Kemsley" and it must be read in its context and in that context it must, I think, mean the newspapers controlled by Lord Kemsely. That is the subject-matter of the comment. The comment is that those newspapers are nearly as low as Lord Beaverbrook's newspapers, about which many defamatory statements are made in the alleged libel. It is not, in my opinion, a statement of fact that a newspaper is low. It is a comment. It may be a statement of fact to say that a man is fraudulent for there is a legal sanction for fraud, but there is no legal sanction for publishing low newspapers. I think, therefore, that the words "lower than" are words of comment and that the particulars which are sought to be struck out were alleged for the purpose of supporting the comment, and,

> if it is proved to the satisfaction of the jury that an honest man might have made such a comment on Lord Kemsley's newspapers, the defence of fair comment will have been established. It is one thing to publish a defamatory statement of fact, it is quite another to allege a defamatory statement of fact in a pleading in order to show that a published comment was fair. A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and, in order to do so, must be entitled to allege and attempt to prove facts which he contends justify the comment."

[55] The UK Supreme Court made a similar decision in *Joseph v. Spiller* as follows:

> "[104] Such considerations are, I believe, what Mr Caldecott had in mind when submitting that a defendant's comments must have identified the subject matter of his criticism if he is to be able to advance a defence of fair comment. If so, it is a submission that I would endorse. I do not consider that Lord Nicholls was correct to require that the comment must identify the matters on which it is based with sufficient particularity to enable the reader to judge for himself whether it was well founded. The comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism. "

[56] Finally on this point, s 9 of the Defamation Act 1957 provides that a defence of fair comment can succeed even if the truth of every allegation of fact is not proved. It reads:

> "9. Fair comment
>
> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

The Fair Comment And The Supporting Facts In The Present Case

[57] On that note, I now address the comment and the supporting facts in the present case. It is my finding that the Impugned Statement is based on the following true facts:

(a) The sentence in the Impugned Statement which states 'During the Johor state election, he dared to claim that he had allocated RM4mil to SJKC Kuek Ho Yao', is true in substance. It is based on the true fact that P had, in the run-up to the Johor State Election, claimed that during his

tenure as the Finance Minister, P as the Finance Minister had approved the allocation RM4 million to the School;

(b) P had, in the run-up to the Johor State Election, raised the issue of Chinese primary schools in his political campaign; and

(c) The sentence in the Impugned Statement stating 'However, he still did not dare deny that the condition for allocating that sum was to change the name of the school', is true. That P had not issued any denial could be inferred from the true fact that P had not made any public written statement on the public controversy that had arisen since the dissolution of the Johor State Assembly. Including on DTs Facebook post and the reports on the same in the Chinese newspapers issued more than one week before the publication of the Impugned Statement.

[58] The following further true facts have also emerged at the trial, which support the comments in the Impugned Statement:

(a) PW-1, who was a senior leader of DAP and the Deputy Minister of Education, had been involved in the process of replacing the developer for the construction of the School since 25 February 2019. Which then entailed the possibility of changing the name of the School;

(b) There were various newspaper reports involving PW-1 or her officer since March 2019, reporting that the naming of the School would be left to the new developer;

(c) The name of the School was changed from SJKC Kuek Ho Yao to SJKC Kuek Ho Yao @ Eco Spring, as agreed at the meeting on 10 November 2019 attended by PW-1;

(d) After the change of name of the School was agreed upon, on 29 November 2019, PW-1 requested from P as the Finance Minister for the disbursement of the RM4 million; and

(e) The fact of the change of name of the School was however not public knowledge as there is no evidence of any news report on the same.

[59] Having regard to the circumstances prevailing at the time the Article was published, my opinion is that the true facts above constitute sufficient substratum of facts for the comments in the Impugned Statement.

Fair

[60] I am also of the opinion that the comments made by D1 are one which a fair-minded person can honestly make. Rafizi makes reference to the following statement from the UK case of *Silkin v. Beaverbrook Newspapers Ltd* [1958] 1 WLR 743 at 749:- "I will remind you of the test once more. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudicial view — could a fair-minded man have been capable of writing this?"

[61] In considering this issue, it is pertinent to note the circumstances leading to the publication of the Article on 7 March 2022.

(a) On 3 March 2019, China Press Online News published an article titled:- "SJKC Kuek Ho Yao to Switch School Land, The Retention of School Name to be Decided by the Developer";

(b) On 2 April 2019, Sin Chew Online News published an article titled:- "SJKC Kuek Ho Yao renamed? Wee Ka Siong: The Chinese Community in Johor Bahru is Embarrassed";

(c) On 15 April 2019, Sin Chew Daily News published an article titled:- "Teo Nie Ching: Eco World and Ministry of Education Pays 50% each";

(d) On 28 April 2019, Sin Chew Online News published an article titled:- "Teo Nie Ching: Building SJKC Eco Flora Instead of SJKC Kuek Ho Yao was not an attempt at making things difficult";

(e) On 25 February 2022, the debate challenge was issued by the MCA President against PW-1 on the issues of Chinese education and SJKC Kuek Ho Yao;

(f) On 28 February 2022, D1's Facebook post was posted;

(g) On 28 February 2022, Guang Ming Daily Online and Sin Chew Daily Online published newspaper articles reporting on D1's Facebook post;

(h) There was an absence of denial or explanation by P and PW-1; and

(i) On 7 March 2022, the Letter to the Editor was published on The Star Online (which contained the Impugned Statement).

[62] As PW-1 herself agreed during the trial, there was uncertainty amongst members of the public as to whether the name of the School, SJKC Kuek Ho Yao, would be retained or changed. PW-1 agreed that this was something that needed clarification. The campaigning period during the Johor State Election was therefore an opportune moment for this issue to be clarified. D2 played its part in making sure that the issue continued to be raised, in view of P and DAP not explaining the issue directly.

[63] My opinion is this. The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report on such matters. It springs from the general obligation of the press to communicate important information upon matters of public interest, and the general right of the public to receive such information. The public acts of public men are certainly matters of public interest. D2 held an honest belief that the opinion and the issue in the Impugned Statement should be disseminated for public information. In light of the above, I find that the Impugned Statement was an opinion and inference that a fair-minded person would have honestly made in the circumstances.

Public Interest

[64] The public interest element in this case is evident. In *London Artists Ltd v. Littler* [1969] 2 QB 375 at 391, the UK Court of Appeal remarked that public interest is not to be confined within narrow limits — "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment."

[65] In the present case, there was a serious allegation because the issue of SJKC Kuek Ho Yao was a matter that attracted a lot of interest among the Chinese community, and the voters in Johor that needed clarification. The Impugned Statement made reference to the Johor State Election and this issue was an obvious election issue. The parties at the opposite ends of the allegations were P, PW-1 and D1. They were senior leaders of their political parties who participated in the Johor State Election. Therefore, the public had an additional interest to be informed not only on the position with regard to the School, but also the position and conduct of these leaders who are representatives of their political parties.

[66] It has been shown that prior to the publication of the Article, there was already extensive coverage by other media on the issue of the RM4 million allocation to the School and the change in name of the School. I am driven to the conclusion that the issues raised in the Impugned Statement were clearly matters of public interest.

Defence Of Reportage

[67] D2 also relies on the defence of reportage. This is pleaded at paras 43 to 47.3 of the Amended Defence. P argued that this defence was not pleaded as the word 'reportage' is not mentioned. I disagree. Whilst the word 'reportage' was not specified, the gist of the defence was specifically pleaded.

[68] Paragraphs 43 to 47.3 of the Amended Defence reads:

> "Part E: D2 reported the statements of public interest in a fair, disinterested and neutral wav without adopting as its own
>
> 43. D2 is not liable as D2 has published the Letter to the Editor (including the Impugned Statements) which is a matter of public interest in a fair, disinterested and neutral manner to report the fact that the Impugned Statements have been made by D1, in particular the call for the Plaintiff to explain his non-denial that the condition imposed for the approval of the allocation of the RM4 million to the School was for the School to change its name, without D2 adopting the Impugned Statements as its own. In doing so D2 is protecting the public interest of knowing that the Impugned Statements had been made by D1.

44. The Impugned Statements are on matters of public interest. D2 repeats paras 40 and 41 above.

45. D2 published the Impugned Statements to report that the Impugned Statements have been made by D1.

46. D2 did not, by publishing the Impugned Statements, adopt the same as its own. D2 made this clear by stating the name of D2 and his position in MCA under the Letter to the Editor (which includes the Impugned Statements) and by publishing the Letter to the Editor in the section in The Star Online for letters to the editor which is a section for the publication of materials produced by third party members of the public and not by D2.

47. D2 has published the Impugned Statements in a fair, disinterested and neutral manner. In this regard:

47.1 D2 has published the Impugned Statements in full without embracing, garnishing, embellishing or reducing the same in substance;

47.2 D2 has published the Impugned Statements in the section of The Star Online for letters to the editor which means that it was open to the Plaintiff to also send a letter in reply to the said section to be considered for publication; and

47.3 The Impugned Statements itself ultimately called for the Plaintiff to explain the Public Controversy and/or the Plaintiff's non-denial that the condition imposed for the approval of the allocation of the RM4 million to the School was for the School to change its name."

[69] It is the material facts in relation to the defence of reportage which must be pleaded. The material facts should contain the elements of public interest, neutrality and not subscribing to the truth of the imputations set out in the impugned statement. As propounded by the Federal Court in *Mkini Dotcom Sdn Bhd & Ors v. Raub Australian Gold Mining Sdn Bhd* [2021] 5 MLRA 37 ("*MKini*"):

"[38] It is thus clear that in that case the material facts were set out in the pleadings. In the context of the present case, what the appellants needed to do was to set out all the material facts relating to the defence of reportage, which they did not. Obviously, the appellants' reliance on *Re Vandervell's Trust* was to support their argument that only material facts need to be pleaded. The argument must fall because in this case the material facts relating to the defence of reportage were not pleaded at all.

...

[43] A close look at the appellants' statement of defence will reveal that other than the element of public interest, none of the other characteristics of reportage were pleaded, in particular the element of neutrality and the element of not subscribing to a belief in the truth of the imputations. These are material facts which the appellants ought to have set out in the pleadings if they wanted to rely on reportage as a defence."

[70] Here, the characteristics of reportage were indeed pleaded by D2. In particular, (i) the element of public interest, (ii) the element of neutrality and (iii) the element of not subscribing to a belief in the truth of the Impugned Statement. The heading preceding paras 43 to 47.3 of the Amended Defence speaks for itself. To wit "D2 reported the statements of public interest in a fair, disinterested and neutral way without adopting as its own".

The 2nd Defendant Is Not Required To Verify The Truth Of The Article Before Publishing The Same

[71] P complained that D2 did not exercise responsible journalism and was reckless in its publication, as no steps were taken to ascertain the truth of the Article. However D2 is not relying on the defence of justification, but fair comment and reportage. For the defence of reportage, no steps need to be taken to verify information prior to publication. As reportage is not concerned with the truth of the allegations, but with the narrower public interest of knowing that the allegations were in fact made.

[72] The above rules were set out by the UK Court of Appeal in *Roberts And Another v. Gable And Others* [2008] QB 502 at 527 ("*Roberts*") as follows:

> "The proper approach to the reportage defence
>
> [61] Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of reportage.
>
> ...
>
> (2)... In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.
>
> (3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ... and the speech of Lord Hoffmann... cited in paras 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made.
>
> ...
>
> If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.
>
> (4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning."

[73] Moreover, it seems to me redundant to make inquiries on the Article, when the Article itself calls for an explanation from P. The defence of reportage and

responsible journalism are mutually exclusive. The two defences are separate and distinct. The Federal Court in *Mkini* held:

> [27] Thus, having regard to the material differences in the defining characteristics of reportage and the Reynolds defence of responsible journalism and the different consequences that flow from their breaches, the two defences must be treated as mutually exclusive.

[74] D2 is not relying on the defence of responsible journalism. The focus of the two defences is different. Unlike responsible journalism, the defence of reportage is not concerned with the truth of the defamatory allegations. But with the narrower public interest of knowing that the allegations were in fact made. The elements of the defence of reportage and its differences from the defence of responsible journalism was explained by the Federal Court in *Mkini* as follows:

> "[24] It is therefore of crucial importance to appreciate that reportage as a form of journalism is a substantial departure from the Reynolds defence of responsible journalism or qualified privilege, which is the process of verification by reporters of the truth and accuracy of the defamatory statements whereas reportage is to report the defamatory statements in a fair, disinterested and neutral manner."

[75] Consequently, under the defence of reportage, there is no need for the journalist to take steps to ensure the accuracy of the published information, which is a requirement of the Reynolds defence of responsible journalism. D2 published the Article (including the Impugned Statement), which is a matter of public interest, to report the fact that the Impugned Statement has been made by D1. In particular, the call for P to explain his non-denial that the condition imposed for the approval of the RM4 million allocation to the School was for the School to change its name, without D2 adopting the Impugned Statement as its own. In doing so, D2 is protecting the public interest of knowing that the Impugned Statement had been made by D1.

[76] D2 did not, by publishing the Impugned Statement, adopt the same as its own. D2 made this dear by stating the name of D1 and his position in MCA under the Article (which contained the Impugned Statement). And by publishing the Article as it was in the section in The Star Online for letters to the editor, which is a section for the publication of materials produced by third party members of the public and not by D2. On this, P was cross-examined as to whether he had sent any letter to be published in the letter to the editor section of The Star in response to DTs Article. P's answer appears to be no.

[77] I am satisfied that D2 has published the impugned Statement in a fair, disinterested and neutral manner. In this regard:

(a) D2 has published the Impugned Statement in full without embracing, garnishing, embellishing or reducing the same in substance;

(b) D2 has published the impugned Statement in the section of The Star Online for letters to the editor. Which means that it was open to P to also send a letter in reply to the said section to be considered for publication; and

(c) The Impugned Statement itself ultimately called for P to explain his non-denial that the condition imposed for the approval of the allocation of the RM4 million to the School was for the School to change its name.

[78] With regard to the element of public interest, this had already been discussed earlier under the defence of fair comment. In the premises, I conclude that D2 is entitled to seek refuge under the defence of reportage. I think it would be impossible for any news organisation to run the letter to the editor section if they are expected to verify the truth of every material they receive and intend to publish in that section.

There Was An Ongoing Public Controversy Over The Name Of The School

[79] Subsequently in his submission in reply, P acknowledged that the defence of reportage would entitle a journalist an adequate protection from libel action, even though responsible journalism has not been undertaken. In the sense that a journalist may publish something deemed libellous without verifying the truth of its contents, and yet escape liability in a defamation suit. P submitted that the defence of reportage can only be relied upon if the publication relates to an ongoing dispute and the published statements are attributed to their original maker. An ongoing dispute may generate a war of words between rival personalities or factions resulting in an exchange of allegations. Where under those circumstances, a journalist covering the dispute is at liberty to publish the allegations without having any trepidation of a potential lawsuit in defamation. The rationale behind the defence of reportage is that a journalist would have neither the time nor the resources to indulge in any process of verification as to the truth of the statements that are uttered by parties in an ongoing dispute. A journalist would have to endure competing press statements that are issued on hourly basis or within short period of time by the parties at dispute, to the extent that there is no means for him to confirm the veracity of each allegation.

[80] I do not disagree with the above submission by P. Where we part ways however is with regards to P's contention that there was no ongoing dispute between D1 and P prior to the publication of the Article (which contained the Impugned Statement). On the contrary, it is evident that there was an ongoing public controversy surrounding the change of name of the School. The controversy continued to simmer and existed in the backdrop of intense campaigning during the State Election, where DTs politicial party (MCA) was pitted against P's political party (DAP). Clearly, there was an ongoing dispute between D1 and P.

[81] On this point, the following authorities are instructive. In *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2009] 4 MLRH 48, upon consideration of the leading authorities from the United Kingdom, *viz Al-Fagih v. HH Saudi Research & Marketing (UK) Ltd* [2001] EMLR 13 and *Roberts v. Gable* [2008] 2 WLR 129, the High Court posited:

> "[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."

[82] In *Raja Syahrir Abu Bakar & Anor v. Manjeet Singh Dhillon & Other Appeals* [2019] 4 MLRA 218, the Court of Appeal rejected the contention of the appellants in support of defence of reportage, because there was no ongoing dispute between the appellants and the respondents to entitle the former to raise such defence. The Court of Appeal said:

> "[83] However, we agree with the learned judge that on the facts, this was not a case of true reportage. No dispute or controversy between the 1st defendant and the plaintiff, or between any entities for that matter, which dispute was also one of public interest at that material time, was identified by the defendants. In fact, the learned judge found this "basic requirement" not met as "there was never an existing controversy which required reporting to the public at large due to its importance. In fact, the 1st defendant gave the statement to the 2nd defendant unilaterally over the telephone and this was published almost verbatim by the second and 3rd defendants."

[83] Lastly, in *Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors* [2018] 6 MLRA 388 (which decision was affirmed by the Federal Court upon appeal in Mkini), the Court of Appeal explained the defence of reportage as follows:

> "[42] The doctrine of reportage emerged from the case of *Al-Fagih v. HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634; [2000] EMLR 215 where the Court of Appeal held that neutral reporting without adopting or endorsing the report is protected as long as both sides of the dispute have been fairly reported in a disinterested manner by a newspaper. It goes further to state that failure to attempt verification will not vitiate the defendant's plea of qualified privilege."

The Repetition Rule Does Not Apply To The 2nd Defendant

[84] P asserts that the Article was not published in a fair, neutral and disinterested manner as D2 had republished the defamatory words authored

by D1. P relied on a passage in the Federal Court case of *Dato Low Tick v. Chong Tho Chin & Other Appeals* [2017] 5 MLRA 361 which states as follows:

> "[36]... it is trite that a person who repeats another's defamatory statement without privilege may be held liable for republishing the same libel or slander."

[85] The operative words in the above passage are the words "without privilege". In answering the question: 'Why is the reporter free from the responsibility of verifying the information and why does the well- established repetition rule not require the journalist to justify the truth of what he is reporting?', the UK Court of Appeal in *Roberts* held:

> "[59] So the answer to the first question is that the repetition rule and reportage 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 has to prove the truth of the defamatory words."

[86] Accordingly, the repetition rule is concerned with justification, not reportage. Once reportage is established, privilege is invoked and the repetition rule has no application where privilege is concerned. Therefore, the repetition rule does not apply to D2 who relies on the defence of reportage and fair comment.

[87] Further, as propounded by Jason Bosland in '*Republication of Defamation under the Doctrine of Reportage — The Evolution of Common Law Qualified Privilege in England and Wales*', published in Oxford Journal of Legal Studies, Vol 31, No 1 (2011), p 89 -110 at pp 91, 94, 96, there is no conflict between the repetition rule and the doctrine of reportage under qualified privilege:

> "The 'doctrine of reportage' — the term by which this particular application of Reynolds privilege has since become known essentially provides a defence for the republication of allegations originally made by a participant to a dispute or controversy of public interest. Repeating a defamatory allegation, subject to any other defence, would usually give rise to liability on the part of the republisher. Under the reportage defence, however, liability will be avoided where the republisher does not adopt or present the repeated defamatory allegation as fact, but instead simply republishes the allegation as part of a story that has the effect of reporting, in the public interest, the fact that the allegation has been made...
>
> ...
>
> For the defence to apply, the allegation must be made (1) in the context of a 'raging controversy', (2) about a public figure, (3) by a responsible, prominent organisation, and (4) reported in an accurate and disinterested manner. It is the newsworthiness that the accusations have been made which attracts the protection and, consequently, the defence is not defeated if the publisher has serious doubts regarding the truth of the allegations (or indeed, even if there is actual knowledge of their falsity).

...

Arguments have been made that adoption or non-adoption is a crude criterion upon which to limit the application of the repetition rule and that 'reportage and the policy underlying [the] repetition rule appear to be fundamentally incompatible.

...

... the repetition rule is not concerned with the law of qualified privilege. In fact the defence of privilege presupposes the existence of the repetition rule because without it there would be no need for the privilege in the first place. On this view, the courts have been well within established principles to find no doctrinal conflict between the repetition rule and the protection of neutral reporting under qualified privilege."

Whether The Article Is A 'press Statement' Or A 'letter To The Editor' Is Not Determinative

[88] In its defence, D2 pleaded that it received a letter to the editor by D1 to be published in The Star or The Star Online. P argued that D2 has deviated from its pleadings as facts unfolded during the trial that D2 received a press statement from D1. As opposed to a letter to the editor, as was pleaded in D2's Amended Defence. However, my view is that nothing turns on the description of D1 's document received by D2. To wit, whether titled 'press statement' or 'letter to the editor'. In fact, in the Agreed Facts (at para 9), the parties referred to the document as an 'article in the form of a letter to the editor'.

[89] Ultimately, the effect of the publication of the Article remains the same. Whether originally the Article received by D2 had been titled a 'press statement' or a 'letter to the editor', the Article when published in the Letter to the Editor section of The Star Online represents to readers the following:

(a) The Article is authored by D1;

(b) The Article is not a product of D2's write-up;

(c) The Article is D1 's opinion;

(d) The Article does not offer D2's viewpoint on the matter;

(e) D2 did not attest to the truth of the contents stated in the Article; and

(f) D2 did not adopt the Article as its own.

[90] What is relevant and would advance D2's case, for the purpose of the defence of reportage here, is that the document was published in the Letter to the Editor section of The Star Online. It is irrelevant that it was sent to D2 as a press statement. Similarly, the distinction made by P is irrelevant for the purpose of establishing whether the document was defamatory and for the purpose of the defence of fair comment. It is immaterial for these purposes

that the Article was published in the Letter to the Editor section, much less the description of DTs document when received by D2.

[91] Regardless of the header it bore, the Article was attributed to D1 offering his opinion without any embellishment nor adoption by D2. Readers of the Article were not misled in any way as alleged by P. The fact that the Article was labelled 'Press Statement' in the email to D2, does not change the fact that it was published in the Letters to the Editor section of The Star Online. Even if assuming the Article was published as a 'Press Statement', it would remain to have the same effect. As D2W-2 testified in the trial, "I don't think people will care. It's an opinion by Tan. That's all they will care".

The 2nd Defendant Was Not Malicious In Publishing The Article

[92] P claims that D2 cannot avail itself to the defence of fair comment as such defence is negated by the existence of malice. P's indication of D2's malice can be summarised as follows:

(a) During cross-examination, D2W-2 gave evidence that more likely than not she received the document via an email from D1 labelled 'press statement'. This change in narrative and departure from D2's pleadings demonstrate lack of honesty and therefore constitutes malice of publication ("1st Point");

(b) D2W-2 was reckless as she published the Article deceptively projecting it as a Letter and not a press statement ("2nd Point"); and

(c) D2 should have known the Impugned Statement could be untrue due to it being tainted by political flavour, as P and D1 belong to political parties that are fiercely opposed to each other ("3rd Point").

[93] At the outset, it is worth noting that it is not established law that malice is relevant to the defence of reportage. As the Federal Court observed in *Mkini*:

> "[198]... In any case, it is doubtful whether a sinister motive or malice is relevant in the case of the defence of reportage (see *Loutchansky v. Times Newspapers Ltd and others (Nos 4 and 5)*; *Loutchansky v. Times Newspapers Ltd (Nos 2, 3 and 5)* [2002] QB 783 at [34])."

[94] As regards malice with reference to fair comment, it is not malicious for D2 to publish D1 's Article of opinion even if D2 may not agree with the view stated therein. *Gatley on Libel and Slander*, 9th edn, para 16.24 states as follows:

> "It is clearly established that where a comment originated by A is published by B, then the defence of fair comment is available to B even though the comment does not represent B's opinion: it is not malicious in a newspaper editor to publish a comment with which he does not agree.
>
> ...
>
> It is submitted that the better view is that in such a case B may take advantage of the defence of fair comment (unless he is aware of A's malice or is

> vicariously liable for A) for two reasons. First, because otherwise the news media would be placed in an intolerable position in publishing letters and opinions on matters of public concern. Secondly, the contrary view seems inconsistent with the modern view of fair comment as a 'two stage' issue in which the defendant establishes the defence by showing that the words are capable, considered objectively, of being fair comment and loses its protection only if he is actuated by malice."

[95] Moving on now to deal with the points raised by P above. Concerning the 1st Point, the so called 'shift in narration' and alleged 'departure in pleadings', if at all material, took place well after the cause of action arose. P cannot draw on this point to establish malice for the publication of the Article which took place a year earlier. Put another way, the question of whether there was malice should be looked at the point of publication.

[96] Concerning the 2nd Point, as discussed earlier, the effect of the publication remains the same regardless if it was titled press statement or letter to the editor. There is no deception here as alleged by P. So long as the readers were made aware that the Article was an opinion of D1, they could not have possibly been misled by D2.

[97] Concerning the 3rd Point, P and D1 may be political adversaries. However, this in no way should infer malice from either party, much less from D2. In *Government of State of Sarawak v. Wong Soon Koh* [2022] 3 MLRH 235, the High Court said:

> "[59]... There were no derogatory, foul or demeaning words used against the plaintiff. Facts were stated and questions asked based on the facts. There is no doubt that the words may have been slanted with the intention of putting the plaintiff in a certain bad light but this is expected, even by the ordinary reasonable man, as between politicians on different sides of the political divide and well within the limits of the constitutional right to freedom of speech.
>
> [60]... Hint of political rivalry clearly yes but certainly not malice. One can safely say that the general public perception of the reputation of politicians in Malaysia as a whole is such that the threshold to defame a politician, especially by another politician is, in the eyes of the reasonable man, high.
>
> ...
>
> [62] I find that the impugned words are not only what an ordinary man would hear from politicians, but would expect to hear from a member (in this case the leader) of the opposition. I find no malice in the impugned words on the part of the defendant.'

[98] In other words, the desire to injure must be the dominant motive. Mere dislike of P does not constitute malice as long as the defendant spoke honestly. Even if malice is proven against D1 in this regard, it is illogical to find D2 malicious simply on the basis that P and D1 are political adversaries.

[99] Thus, it is my finding that none of the ingredients of malice have been proven against D2. And no malice can be inferred for the publication of the Article. D2's defences are not defeated.

Findings In Relation To The 1st Defendant

[100] Next, I will deal with D1.

The Impugned Statement Is Not Defamatory

[101] As discussed earlier pertaining to D2, I find that the Impugned Statement is not defamatory of P. The same finding would apply in relation to D1. It bears reiterating that the main focus of the Article was the issue of TAR UC (the first 8 paragraphs of the Article). While the issue of the School was a relatively minor part (the last 2 paragraphs of the Article). Furthermore, the Impugned Statement was seeking clarification from P rather than demeaning his reputation. A reasonable man ora right thinking member of society reading the Impugned Statement as a whole together with the Article, and in the context and circumstances of the publication of the same, would have understood that D1 was trying to raise concerns on the issue of the School and seek clarification from P. I do not think it caused P to be 'shunned or avoided or to expose him to hatred, contempt or ridicule'. As such, the Impugned Statement cannot be said to have defamatory imputations against P.

Defence Of Fair Comment

[102] As discussed earlier pertaining to D2, I found that D2 is entitled to rely on the defence of fair comment. For similar reasons, I likewise find that D1 is entitled to rely on the defence of fair comment. D1 has succeeded in establishing that:- (a) the Impugned Statement is a comment, although it may consist of or include inferences of fact; (b) the Impugned Statement is on a matter of public interest; (c) the Impugned Statement is based on facts; and (d) the Impugned Statement is one which a fair-minded person can honestly make on the facts proved.

No Malice

[103] Further, I am of the opinion that DTs defence of fair comment is not defeated by malice. This is not a case where D1 made the Impugned Statement while knowing it to be false, or without any belief that it is true, or was reckless in making the Impugned Statement. D1 testified that he had made enquiries with a member of the Building Committee of the School before making the Impugned Statement. I am satisfied that D1 had an honest belief in the Impugned Statement.

Defence Of Justification

[104] D1 bears the burden of proof to establish the defence of justification that he has pleaded. However, D1 attempted to shift the burden of proof to

P. During the trial, P steadfastly maintained that he had never imposed any condition in connection with the approval of the RM4 million funding for the School. When cross-examined on why he did not produce the funding allocation letter to the School, P replied that he had no access to the funding letter since he is no longer the Finance Minister. To this, D1 invited me to draw an adverse inference against P under s 114(g) of the Evidence Act 1950 for failing to produce the said funding letter. According to D1, that no condition had been imposed for the RM4 million funding to the School is a fact which is asserted by P. Thus, P has the burden of proof that this allegation is true. I disagree.

[105] The law presumes a defamatory statement to be false unless proven to the contrary by the defendant. There is no burden on the claimant to prove the falsity of the impugned statement. It is not for the claimant to prove that the words published of him were untrue, but for the defendant to prove that the words were true. Be that as it may, P testified that:- (a) a sum of RM4 million was allocated by the Federal Government to the School as financial assistance for the construction of its new building; (b) there was no condition imposed by him or anyone else in consideration of the financial assistance; and (c) the sum of RM4 million was disbursed to the School's Building Committee. P's evidence remains uncontroverted. Furthermore, PW-1 confirmed that P was never involved in the discussion or meeting concerning the name of the School.

[106] D1 and D1W-1 claims that the School was given the RM4 million funding only after it was forced to change its name. But the evidence shows that the change of name of the School had been agreed at the 10 November 2019 meeting. Only after that was the letter dated 29 November 2019 written by PW-1 (as the Deputy Minister of Education) requesting from P (as the Finance Minister) to approve the 'sumbangan' of RM4 million for the construction fund of the School. D1 did not prove that the Impugned Statement is true in substance and in fact there is no evidence that P had demanded the School to change its name as a condition for the RM4 million funding. It is my finding that D1 has failed to discharge the burden of proof. His plea of justification fails.

Damages

[107] In case my finding on liability is wrong, I will deal with the issue of damages. P requested a sum of RM5 million in compensatory damages against both the Defendants for general damages, aggravated damages and exemplary damages. I consider the amount requested by P to be excessive and divorced from reality. It bucks the trend on award of damages for defamation. I am guided by the following authorities.

[108] The Federal Court in *Ruslan Kassim* elucidated the principles governing the award of damages in a libel action as follows:

"[127] Be that as it may, it is trite that damages for defamation are "at large" in the sense that there is no accepted scale or formula and they are awarded on the merits of each case based on accepted guidelines. In assessing damages, the nature and gravity of the libel is the most important factor. The "more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be" (see *John v. MGN, supra*).

[128] The next important factor is the mode and extent of the publication. A libel published to millions has a greater potential to cause damage than a libel published to a few. Also, unlike traditional media which may have a temporary effect, Internet publications may remain in circulation for the indefinite future (see *Barrick Gold Corp v. Lopehandia* [2004] 71 QR (3d) 416 Ont CA).

[129] Other factors would include the conduct of the claimant, his credibility, his position and standing and the subjective impact the libel has had on him, the absence or refusal of any retraction or apology and the conduct of the defendant from the time when the libel was published down to the verdict (see *Gatley, supra* at para 9.5). An award of damages maybe higher in a case where the defendant asserts the truth of the libel and refuses any retraction or apology. This may be compounded when the cross examination at the trial is conducted in an insulting fashion. On the other hand, damages may be reduced where the defendant publicly admits the falsity and expresses regret of what was published."

[109] In *Datuk Harris Mohd Salleh v. Yong Teck Lee & Anor* [2017] 2 SSLR 433; [2017] 6 MLRA 281 ("*Harris Salleh*"), the Federal Court set out the factors to be taken into account in assessing damages as follows:

"(1) The gravity of the allegation.

(2) The size and influence of the circulation.

(3) The effect of the publication.

(4) The extent and nature of the claimant's reputation.

(5) The behaviour of the defendant,

(6) The behaviour of the claimant.

This list is most helpful. But it must be borne in mind that this is not by any means exhaustive of the matters which the court may take into account when making an assessment."

[110] In the Court of Appeal case of *Syed Nadri Syed Harun & Anor v. Lim Guan Eng & Other Appeals* [2019] 2 MLRA 387 ("*Syed Nadri*"), RM150,000.00 was awarded (incidentally to the same P here) as a global sum for general and aggravated damages;

"[33] Having given our due consideration, we agreed with learned defendants' counsel that the global award made by the learned trial judge was also excessive and not in line with the trend of cases. In *Lim Guan*

Eng v. Utusan Melayu (M) Bhd [2012] 3 MLRH 124 despite the plaintiff being a Chief Minister of Penang and a finding of malice in that case, the award made was RM200,000.

[34] In the circumstances, we find the appropriate damages to be allowed is only for an award for general damages. We then make the following order in respect of damages:

(a) RM50,000.00 against the first to 3rd defendants;

(b) RM50,000.00 against the fourth and 5th defendants; and

(c) RM50,000.00 against the sixth and 7th defendants. '

[111] It is germane to note that in *Syed Nadri*, the damages ordered against each media house or website owner (together with their respective editors) was only RM50,000. This is because:- (i) the damages in relation to the first to 3rd defendants concerned the publication in the 3rd defendant's (Pertubuhan Pribumi Perkasa Malaysia's) website; (ii) the damages against the fourth and 5th defendants concerned the publication in the New Straits Times and Berita Minggu (under The New Straits Times Press (M) Sdn Bhd); and (iii) the damages against the sixth and 7th defendants concerned the publication in Mingguan Malaysia (under Utusan Melayu (M) Bhd).

[112] The Federal Court in *Harris Salleh* provided a list as set out below, which reinforces my view that the sum requested by P is excessive and unsupported by authorities:

(i) *Dato' Ahmad Rejal Arbee & Anor v. Mahfuz Omar* [2015] 3 MLRA 529. This case involved defamation against a politician. The Court of Appeal only granted RM110,000;

(ii) *Chin Choon @ Chin Tee Fut v. Chua Jui Meng* [2004] 2 MLRA 636. The Court of Appeal only allowed an award of RM200,000.00 by way of global award of damages. And reversed the High Court decision in granting RM1.5 million as damages;

(iii) *Dato' Musa Hitam v. SH Al Attas & Ors* [1990] 3 MLRH 268. The court only granted RM100,000.00 as damages for defamation;

(iv) *Dato' Hassan Mohamed AH v. Tengku Putra Tengku Awang & Yang Lain* [2009] 4 MLRH 421. The court only granted the sum of RM50,000.00 despite the fact that the plaintiff was an Exco (politician);

(v) *Datuk Harris Mohd Salleh v. Abdul Jalil Ahmad & Anor* [1983] 1 MLRH 92. At the material time the plaintiff was still the then Chief Minister of Sabah but the court only allowed RM100,000.00 in damages to the plaintiff, and

(vi) *Lim Guan Eng v. Utusan Meiayu (M) Bhd* [2012] 3 MLRH 124. The above mentioned involved a politician and also the Chief Minister of Penang. The court observed that global damages should be awarded to ensure that awards of monetary damages are not excessive and to avoid any double

counting on the damages awarded. Despite this case involving a person of high ranking, the court decided to award RM200,000.00 as general and aggravated damages and costs of RM25,000.00 only.

[113] Similar to *Harris Salleh*, the Court of Appeal in *Utusan Melayu (Malaysia) Bhd v. Othman Omar* [2017] 1 MLRA 234 ("*Othman Omar*"), in considering the material facts before reducing the award to RM100,000, took into account the factors set out below. The trial judge had awarded general damages in the amount of RM250,000.00 and another RM50,000.00 as aggravated damages.

> "[30] After considering the material facts in the case at hand, we agree with learned counsel for the appellant that the damages awarded by the learned trial judge ought to be varied. We have considered the following material facts before reducing the award to a global award of RM100,000.00 as damages to the respondent:
>
> (a) the nature of what was stated in the said article cannot be seen as something exceptionally grave. The respondent was never said to be a person guilty of any wrongdoing in the said article. The article merely posed the questions whether his contract would be extended and mentioned several 'controversies' during his tenure;
>
> (b) the appellant reported as the matter unfolded. As stated above, as soon as the appellant knew that the respondent's contract might be extended, it published articles entitled 'Keputusan Kedudukan Pengurus Besar PKNS Sudah Ada' and 'Othman Masih Lagi Pengurus Besar PKNS — MB Selangor';
>
> (c) this is not a case that the appellant reported something which might be inaccurate and refused to clarify;
>
> (d) the conduct of the trial was not oppressive in any sense towards the respondent. The respondent was treated well during cross-examination and the trial itself was not unduly postponed;
>
> (e) it was never suggested or portrayed that the respondent is a person of poor character. There was no character assassination and the appellant's case remain focused on the issues at hand. Neither was there a personal attack on the respondent's character;
>
> (f) the appellant never pleaded the defence of justification and dropped it later; and
>
> (g) the said article was not published in the front page of the newspaper or given special prominence. In fact, it was published at p 24 of the newspaper. "

[114] Having regard to the above-mentioned authorities and applying the factors set out by the Federal Court in *Harris Salleh* and the Court of Appeal in *Othman Omar*, my view is that damages (if any) against both the Defendants should not exceed RM150,000.00 for the following reasons:

(i) The allegations are not grave based on, among others, the following reasons:

(a) Similar allegations had been made in D1 's Facebook posts and in the Chinese newspapers without any action by P. This would appear to suggest that P himself did not see the allegations as being grave. Otherwise, P would have taken action against all;

(b) No interim injunction had been applied for in this case to immediately stop the publication of the Impugned Statement. If it was serious, P would have applied to stop and remove the publication of the Impugned Statement pending trial;

(c) P filed the instant suit only two months after the publication of the Impugned Statement;

(d) There is a query at the end of the Article asking P to provide an explanation. So, in any event the Impugned Statement does not amount to any unqualified and unequivocal allegations;

(e) There is no direct allegation that it was P who had imposed the condition on the change of name of the School; and

(f) There had been no denial by P to similar allegations made about a week earlier in DTs Facebook posts and in the Chinese newspapers.

(ii) The size of the circulation is small and its influence is limited based on, among others, the following reasons:

(a) The Impugned Statement was published only in The Star Online behind a paywall where the Impugned Statement could only be seen after going behind the paywall tucked away in the final two paragraphs of the Article on TAR UC; and

(b) D2 has led evidence that the Impugned Statement had been seen using only 3,460 unique devices online. Although P rejects this evidence, P has not led any evidence that anybody has accessed the Impugned Statement by unlocking the paywall.

(iii) The publication does not appear to have had an adverse effect on P as seen from the fact that P continued to win a Parliamentary seat at the November 2022 General Election and was elected to the position of the Chairman of DAP on 20 March 2022, which was a mere 13 days after the publication of the impugned Statement;

(iv) On the extent and nature of P's reputation, it is that of a senior Federal level politician. It was never suggested or portrayed

during the trial that P is a person of poor character. There was no character assassination;

(v) On the other hand, P's behaviour should reduce any damages that he might be entitled to. Firstly, he has not pursued any legal action on similar earlier allegations in DTs Facebook post and in the Chinese newspapers. Secondly, he had not denied these earlier allegations despite sufficient time to do so. Thirdly, by not denying, it could be said that he was encouraging uncertainty in the community as to the truth behind the issue; and

(vi) In the case of D2, D2 did not plead justification. Further, the behaviour of D2 should be a mitigating factor in the assessment of damages. D2 made it clear that it was only providing D1 with a platform to raise an issue which was a matter of public interest to the voters during an election. Further, D2 made it clear that the Impugned Statement was not its own views but the views of D1. Finally, D2 published the Article (including the Impugned Statement) in the Letter to the Editor section. This means that it was open to P to issue a counter statement which could be published in the section, if he had availed himself of that opportunity.

[115] In a defamation action, the practice is to award a single award of damages. In *Othman Omar*, the Court of Appeal said:

> "[28] We agree with learned counsel for the appellant that the learned trial judge erred in fact and in law when His Lordship made a separate award for general and aggravated damages which amount of damages awarded was duly excessive. We observe that the learned trial judge did not follow the judicial trend in granting damages, which is the global award. We found support from the decision in *Chin Choon @ Chin Tee Fut v. Chua Jui Meng* [2004] 2 MLRA 636, where the respondent, a Deputy Minister was awarded RM200,000.00 as a global award of damages....
>
> [29]... This is to ensure that awards are not excessive and to avoid 'double counting' as the circumstances giving rise to exemplary/ aggravated and general damages are usually inextricably intertwined."

Admissibility Of The Document On Analytics Data Through Section 90A Of The Evidence Act 1950 Despite The 2nd Defendant Not Being The Maker Of The Document

[116] Section 90A(1) of the Evidence Act 1950 ("Section 90A") allows documents to be tendered whether or not the person tendering the same is the maker of the document. It reads:

> "In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the

course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement."

[117] P had objected to the admissibility of the Analytics Data found at p 61 of the Common Bundle of Documents marked as Bundle B1, despite the production of a s 90A certificate by D2W-3 in his witness statement, WS-D2W-3. The grounds of objection was on the basis that the document is an Internet print-out produced by a third-party ie Google. P further submitted that the Internet print-out is not produced by D2W-3's computer in the course of its ordinary use, as it was not part of D2's business.

[118] My view is that in the course of ordinary use does not require the computer producing the document to be used in the course of the business concerned. In other words, the ordinary use of the computer is not affected by the nature of D2's business. I concur with the High Court in *Microsoft Corporation v. Conquest Computer Centre Sdn Bhd* [2014] 2 MLRH 578, which admitted Internet print-outs in evidence under s 90A:

"[37]... Subsections 90A(1) and (2) make reference to the document being produced by a computer 'in the course of its ordinary use'; these subsections did not require the computer producing the document to be used in the course of the business concerned. I therefore accept the defendant's contention that the Internet print-outs were produced by SD1's computer 'in the course of its ordinary use', and by virtue of SD1's certificate issued under s 90A(2), the Internet print-outs are admissible."

[119] In objecting to the admissibility of the Analytics Data document, P relied on the High Court case of *Wing Fah Enterprise Sdn Bhd v. Matsushita Electronic Components (M) Sdn Bhd* [2017] 1 MLRH 168 ("*Wing Fah*") which said:

"[17] It is clear from the above provision that the computer producing the document must be a computer in the course of its ordinary use. This refers to dedicated computers kept in organisations to do a certain function of general purport. This provision would cover for instance computers producing receipts on payments. In the present case the plaintiff's computers keeping details of accounts for instance would be covered by this provision. The production of the account sheets of the company from this computer would therefore be admissible under this provision. However information downloaded from the Internet in no way form the ordinary use for the plaintiff's computers. Anyone can download information from the Internet including on personal computers. It would be illogical to suggest that the above provision was enacted to allow admissibility of documents downloaded from the Internet."

[120] *Wing Fah* held that the computer producing the document refers to dedicated computers kept in organisations to do certain function of general purport. With respect however, nowhere in s 90A does it stipulate that the computers have to be dedicated computes kept in organisations. All s 90A states is that the document has to be produced by the computer in the course of its ordinary use, and this can be proven by tendering to the court a certificate signed by a person responsible for the management of the operation of that

computer. Therefore, guided by s 90A, there is no additional requirement for the computer to also be dedicated computers kept in D2's organisation.

[121] Further, *Wing Fah* is distinguishable from the facts of the present case as the Analytics Data consist of data which only Google possessed and was made available exclusively to D2 as the owner of The Star Online. Unlike in *Wing Fah*, it is not the case here that anyone could have access to this data and derive the same from the Internet. In fact, no one else can access this analytic data other than Google.

[122] What is more in *Wing Fah*, in ruling the document inadmissible, the learned judge gave the reason that there were other means and methods the plaintiff could employ to prove the matter in issue. Distinctly, in our case there is no other way to prove the viewership of the Article other than by reference to the Analytics Data, especially bearing in mind that the Article sits behind a paywall.

[123] Evidence on the Analytics Data was adduced in the witness statement of D2W-3. D2W-3 gave evidence that the Analytics Data document shows:

(a) that between 7 March 2022 and 21 November 2022, the Article was viewed 3,897 times through 3,460 unique devices; and

(b) the trend of the daily number of views between 7 March 2022 and 21 November 2022 where it could be seen that after the first few days following the publication of the Article in The Star Online on 7 November 2022, the number of views per day dropped to almost zero.

[124] The Analytics Data is a document showing actual, if not closest to actual viewership of the very Article in issue over a specified period of time. P's evidence of The Star Online ratecard on the other hand, projects general viewership of general publication over an unspecified period. According to The Star Online ratecard, the viewership of The Star Online' is over 77 million while its users are over 8 million. P is leaning on this general projected evidence to prove actual viewership of a particular publication (ie the Article) on a particular date (ie 7 March 2022). Between the Analytics Data and The Star Online's ratecard, I think the Analytics Data is a better indication of viewership of the Article in question.

[125] I accept that by virtue of s 90A, the Analytics Data document and the contents therein are admissible. In any event, this goes to the question of damages regarding the extent of the publication. Which is not in issue given my finding on liability. I must point out that the weight to be given to the admissible evidence is an entirely different matter. In fact, s 90B of the Evidence Act stipulates so. Whilst the document itself may be admissible, the contents therein must still be evaluated as to its truth and value. This perhaps alleviates the concern that the Internet is deluged with dubious materials.

Apology

[126] P has asked for an apology from the Defendants. Even if P were to succeed in his claim for defamation, my opinion is that this relief ought not to be granted where the defendant is unwilling to do so. An apology is a matter of the heart and should not be compelled against an unwilling defendant. In *Credit Guarantee Corporation Malaysia Bhd v. SSN Medical Products Sdn Bhd* [2017] 1 MLRA 541 ("*Credit Guarantee Corp*"), the Court of Appeal held:

> "[70] In this regard, we think it is important to distinguish between an order forcing a defendant to apologise from an order compelling a withdrawal or correction of an offending statement On this question, we find ourselves in agreement with the views expressed by the Singapore Court of Appeal in *Chin Bay Ching v. Merchant Ventures Pte Ltd* [2005] SGCA 29 where it was held at para 25:
>
> > We recognise the force of the argument that a defendant should not be compelled to apologise against his will as the very spirit of an apology is that it must come from the heart, something which the defendant wishes to do on account of the wrong he has done to the plaintiff. On the other hand, an order compelling a defendant to merely withdraw, or correct, an offending statement after a trial, seems to be of a different character or genre from that of an apology....
>
> [71] In the instant appeal, we note that the apology was ordered by the court despite the defendant's unwillingness to do so. Such an apology is really useless. An order for apology ought to have been considered only in the case where the offending party was willing. In such a case, the award of damages can then be reduced as an incentive for agreeing to either retraction of the offending material, which is not relevant to the present appeal, or an apology for publishing the said material. For the reasons we have stated, we take the view that the order for an apology ought not to have been granted by the learned JC."

[127] The Defendants here have not stated their willingness to apologise. Therefore, I am of the opinion that the order for an apology should not be granted. Further, in *Credit Guarantee Corp*, the Court of Appeal observed that the apology ordered was disproportionate to the extent of publication of the defamatory statement. An apology was sought to be published in a local newspaper to the world at large, when the defamatory statement was made in the CCRIS reports which were only read by certain financial institutions and not accessible to the general public. If at all an apology is to be issued, the Court of Appeal said it should be published solely to readers of the CCRIS reports. Likewise, here the Impugned Statement could only be seen after going behind the paywall and then tucked away in the final two paragraphs of the Article on TAR UC. However, P has sought for an apology that is to be 'printed and published in a conspicuous page of The Star newspaper, both the printed as well as the online version'. That, in my view, is disproportionate.

Conclusion

[128] For the reasons above, I find that P has not succeeded in proving his case against the Defendants on a balance of probabilities. I therefore dismissed P's claim. I ordered P to pay costs of RM20,000.00 to D1 and RM30,000.00 to D2.

[129] This order for costs takes into account a previous interlocutory application where I had ordered costs to be in the cause. Namely encl 19, which was an application by D2 for the suit herein to be transferred to the Johor Bahru High Court. I had dismissed encl 19 on 25 October 2022 with costs in the cause.