



DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)

NO. GUAMAN : S2 – 23 - 38 TAHUN 2006

dan

NO. GUAMAN : S2 – 23 - 41 TAHUN 2004

ANTARA

1. SARAWAK SHELL BHD. (71978-W)
2. SHELL MALAYSIA TRADING SENDIRIAN BERHAD (6078-M)
3. SHELL REFINING COMPANY (FEDERATION OF MALAYA) BHD. (3926-U)
4. SHELL TIMUR SDN. BHD. (113304-H)
5. SHELL EXPLORATION AND PRODUCTION MALAYSIA B.V. (993963-V)
6. SHELL OIL AND GAS (MALAYSIA) LLC (993830-X)
7. SHELL SABAH SELATAN SDN. BHD. (228504-T)
8. SABAH SHELL PETROLEUM COMPANY LTD. (993229-W)

..... PLAINTIF-PLAINTIF

DAN

HUONG YIU TUONG

..... DEFENDAN

HUJAHAN BERTULIS DEFENDAN
(INJUNKSI INTERLOKUTORI)
(DEFENDANT'S WRITTEN SUBMISSIONS)
(INTERLOCUTORY INJUNCTION)

LEE ONG & KANDIAH
ADVOCATES & SOLICITORS

PEGUAMCARA PIHAK DEFENDAN
SUITE 2.07-2.10, TINGKAT 2, WISMA MIRAMA
JALAN WISMA PUTRA
50460 KUALA LUMPUR

Rujukan: MRR/TGS(ES)/67/4/06/JH
Telepon: 03-21448336
Faksimili: 03-21447336

HUJAHAN BERTULIS DEFENDAN
(INJUNSI INTERLOKUTORI)
(DEFENDANT'S WRITTEN SUBMISSIONS)
(INTERLOCUTORY INJUNCTION)

Dengan segala hormatnya Yang Arif.

Pihak Defendan disini memohon kebenaran Yang Arif untuk meneruskan hujahan-hujahan berikut dalam Bahasa Inggeris.

May it please you my Lord.

1. These submissions are filed pursuant to your Lordship's directions given on 16.10.2006 pertaining to the Plaintiffs' applications in both suits (*Enclosure 5 in suit S2-23-38-2006*)(*Enclosure 11 in suit S2-23-41-2004*) for interlocutory injunctions against the Defendant and in this regard, the Defendant craves leave to refer to the Defendant's Bundle of Authorities ("**DBOA**") filed herein as well as the various cause-papers in both suits before this Honorable Court as follows:-

Suit No: S2-23-38-2006

Writ and Statement of Claim (" SOC ") dated 29.3.2004	<i>Enclosure</i>
Defence (" Defence ") dated 20.6.2006	<i>Enclosure</i>
Reply (" Reply ") dated 3.6.2006	<i>Enclosure</i>
Plaintiffs' Summons in Chambers dated 5.4.2006	<i>Enclosure 5</i>
Affidavit in Support of Thavakumar Kandiahpillai affirmed on 5.4.2006 (" Plaintiff's Supporting Affidavit ")	<i>Enclosure</i>
Affidavit in Reply of Huong Yiu Tuong affirmed on 5.4.2006 (" Defendant's Reply Affidavit ")	<i>Enclosure</i>
Affidavit in Reply of Alfred Ernest Donovan affirmed on 19.5.2006 (" Donovan's Reply Affidavit ")	<i>Enclosure</i>

Affidavit in Reply of **Thavakumar Kandiahpillai** affirmed on 23.6.2006 (“*Plaintiff’s Reply Affidavit*”) *Enclosure*

Affidavit in Reply (2) of **Huong Yiu Tuong** affirmed on 10.7.2006 (“*Defendant’s 2nd Reply Affidavit*”) *Enclosure*

Suit No: S2-23-41-2004

Writ and Statement of Claim (“*SOC2*”) dated 22.6.2004 *Enclosure*

Defence (“*Defence2*”) dated 25.1.2006 *Enclosure*

Reply (“*Reply2*”) dated 22.2.2006 *Enclosure*

Summons in Chambers 23.6.2004 *Enclosure 5*

Affidavit in Support of **Thavakumar Kandiahpillai** affirmed on 22.6.2004 (“*Plaintiff’s Supporting Affidavit2*”) *Enclosure*

Notice of Intention to Use Affidavits dated 18.10.2006 *Enclosure*

THE PLAINTIFFS’ CAUSE OF ACTION

2. The Plaintiffs’ cause of action against the Defendant in both suits are solely for libel:-

2.1 In Suit No:S2-23-41-2004, the complaint against the Defendant pertains to:

- (a) a circular published on **14.5.2004** titled “*Does Shell Management in Malaysia promote and support Injustice, Lies, Deception, Cover Up and Conspiracy in the country they operate*”(“*the Circular publication*”);
- (b) three (3) publications on the internet website “*Whistleblower No. 2*” on **10.6.2004, 13.6.2004** and **16.6.2004** (collectively “*the Whistleblower No.2 publications*”);

2.2 In Suit No: S2-23-38-2006, the complaint against the Defendant pertains to :

- (a) a publication on the Shellnews.net.website on **2.2.2006** of the Defendant's letter to Jyoti Munsiff ("*the JM Letter publication*");
 - (b) publications on the Shellnews.net.website on **7.2.2006** and **8.2.2006** (collectively "*the Shellnews.net publications*");
3. In his Defence in Suit No: S2-23-41-2004:-
- (a) the Defendant admits to the Circular and Whistleblower No. 2 publications (although the contention is that these were instead on the www.shell2004.com website) but contend that they were not defamatory;
 - (b) alternatively, if they were defamatory, that their contents are true in substance and in fact i.e the defence of justification.
 - (c) that with regards the Whistleblower No.2 publications, the website they were posted on was at all times operated by one Alfred Ernest Donovan and his son, John Alfred Donovan ("*the Donovans*").The Donovans were in sole control of the website and it was them, and not the Defendant, who published the Whistleblower No.2 publications;
 - (d) alternatively, that the Whistleblower No.2 publications constitute fair comment on matters of public interest i.e the defence of fair comment.
4. In his Defence in Suit No: S2-23-38-2006:-
- (a) the Defendant admits to sending the JM Letter but not to the JM Letter publication. This publication was done by the Donovans without the Defendant's knowledge or consent;
 - (b) the Defendant admits to sending replies which formed the substance of the Shellnews.net publications but not to the publications themselves. These

publications were done by the Donovans without the Defendant's knowledge or consent;

- (c) alternatively, if they were defamatory, that their contents are true in substance and in fact i.e the defence of justification.
- (d) alternatively, that the said publications constitute fair comment on matters of public interest i.e the defence of fair comment.

5. The Plaintiffs' have filed their respective Replies in both suits pleading, inter alia, express malice. However, it is respectfully submitted that even a cursory glance of the particulars of malice will hardly evince any strong basis for the same.

THE PLAINTIFFS' INJUNCTION APPLICATIONS

6. The Plaintiffs' present application vide Enclosures 5 and 11 are for both prohibitory and mandatory injunction orders, essentially as follows:-

- (a) that, pending trial, the Defendant, whether by himself, his servants or agents or otherwise, be restrained from publishing on the internet website "Shell Whistleblower No.2", or any statements concerning the Plaintiffs and/or "Shell Management" alleging that they are liars, cheats, dishonest, corrupted and practiced deception and conspiracy, criminal conduct and were generally evil (*"the Prohibitory Order"*);
- (b) that, pending trial, the Defendant do forthwith take all necessary steps to give notice to the persons maintaining the website "Shell Whistleblower No 2" that all existing postings made by the Defendant on 10th, 13th and 16th June 2004, be deleted and/or removed from the website (*"the Mandatory Order"*).

THE LAW ON INJUNCTIONS IN LIBEL MATTERS

7. It is established law in Malaysia that applications for prohibitory injunctions in libel matters stand on an altogether different footing from that for usual prohibitory injunctions i.e the test to be met is not the American Cyanamid test. This was amply made clear by the Supreme Court in *The New Straits Times Press v. Airasia Bhd* [1987] 1 MLJ 36 [at Tab 2 p.38] thus:-

“In accordance with the long established practice in defamation actions, the principles enunciated by the House of Lords in American Cyanamid v. Ethicon relating to interim injunctions are not applicable in action for defamation”

8. It is also established law in Malaysia that where the defence of justification is pleaded, the grant of any such injunction would be an unacceptable fetter on the freedom of speech. This was made clear by the Supreme Court in the *New Straits Times* case in words which merit reproduction as follows [at Tab 2 p.39]:-

“The principle has clearly emerged by reason of the fact that the questions of libel or no libel are eminently matters to be decided on facts at the trial and there is also the question of the proper meaning to be assigned to the words used in a particular statement. To restrain a defendant before the questions are determined would amount to fettering with free speech. Indeed it is because of the importance of leaving free speech unfettered that the Court must be slow in issuing interim injunction in a libel action.”

9. This does not mean that no injunction can be granted against a defendant in a libel case where the defence of justification has been pleaded. However, the test to be fulfilled before the grant of such an injunction is a heavy one, which, in the words of the Supreme Court in the *New Straits Times*, is stated as follows [at Tab 2 p.39]:-

“...The Court should act cautiously in granting interim injunction to restrain publication of an alleged defamatory statement. In fact it should not grant the injunction where the defendant says he is going to justify it at the trial of the action except where the statement is obviously

untruthful or where the plaintiff has satisfied the Court that the defence will fail.”

10. Thus, the onus in law is on the Plaintiffs to prove either that the impugned statements are ‘obviously untrue’ or that the ‘defence will fail’ before any such injunction order will be granted by the Court. There can be no doubt that such cases form the exception rather than the norm, as was one such case in *Dato’ Idris bin Jusoh v. Dato’ Seri Tuan Guru Hj Abdul Hadi* [2005] 3 MLJ 344 [at Tab 7] where, in the light of clear evidence even at the interlocutory stage that showed the statements to be ‘obviously untrue’, the Court of Appeal held thus:-

“The facts showed that the words referred to were obviously untrue and therefore the intended defence of justification was not likely to succeed at the trial. The High Court judge erred in law in refusing to grant the interim injunction.”

11. The present case is, it is respectfully submitted, far removed from the *Dato Idris Jusoh* case. Here, the Defendant, in his defence, have amply provided particulars of how the various impugned statements will be true in substance and in fact and that these will be produced at the trial of the matter. Further, the Defendant has also amply shown the basis for the impugned statements to be fair comment on matters in the public interest. These particulars have met with nothing but mere denials from the Plaintiffs’ in their respective replies.

12. It is also salient to point out that the Plaintiffs’ have, in their Statement of Claim, merely set out the entire impugned publications without pleading precisely the very words and the respective meaning ascribed to each of them by the Plaintiffs. A similar defect drew strong judicial comment in *Dato’ Seri S Samy Vellu v. Penerbitan Sahabat* [2005] 5 MLJ 561 [at Tab 4, p.584] where his Lordship Abdul Malik Ishak J said:-

“There was a blatant failure on the part of the plaintiff to plead the precise defamatory words in the amended statement of claim and that would be prejudicial to the plaintiff’s case. It is trite law that a plaintiff in

a libel action must plead, inter alia, the defamatory words complained of.”

13. In the circumstances, the Defendant submits that the present case is neither one where the impugned statements are ‘obviously untrue’ nor one where the Defendant’s defence ‘will fail’ to warrant this Honorable Court in granting the Prohibitory Order. The *New Straits Times case*, which adopted and followed the English decisions in *Bonnard v. Perryman* and *Quartz Hill*, is of binding authority and have been followed in other cases such as the *Dato’ Seri S Samy Vellu case* and *China Press Bhd v. Pemandangan Sinar* [2001] 6 MLJ 68 [at Tab 3] where applications for interim injunctions were refused.

14. On the issue of the Mandatory Order being sought, the Defendant will respectfully submit that a fortiori, the burden on the Plaintiffs’ are even greater for it is only in the rarest of cases that an interim mandatory injunction order is granted. The Court of Appeal, in *ESPL v. Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 [at Tab 8 p.435], referred to and followed *Locabail* (which cited the dicta of Megarry J in *Shepherd Homes*), as follows:-

“Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and this is a higher standard than is required for a prohibitory injunction.”

15. On the facts of the instant case, the Plaintiffs have themselves admitted that the website in question are owned by the Donovans. Further, the Defendant has adduced clear evidence, both from the pleadings as well as the affidavits, that the Donovans are in sole control of the website and they alone decide what is published. The Plaintiffs’ have not, to date, brought the Donovans in as a party to the present proceedings nor have they commenced legal action against them in the United Kingdom *vis a vis* the matter.

16. Thus, as it stands, the Plaintiffs are in fact seeking to restrain the Donovans obliquely through their applications (Enclosures 5 and 11) against the Defendant. This is not permissible as the Defendant is powerless to comply with such a mandatory order, even if it were to be made, as it is effectively directed against a third party who is, by the Plaintiffs' own choosing, not a party to the present proceedings.

CONCLUSION

17. The Defendant respectfully submits, based on the above, that the Plaintiffs' have failed to meet the test in law for the granting of interlocutory injunctions in a libel case. More importantly, the evidence adduced by the Defendant goes against the grant of such an order at this stage of proceedings as what is required is a full trial for the various issues to be determined. The Defendant have, and presently still, request for trial to be fixed on an expedited basis. The present situation can best be described by borrowing the words of Abdul Malik Ishak J in the *Dato Seri S Samy Vellu* case [at Tab 4 p.598] :-

“At the end of the day, whether the defendant’s plea of justification and qualified privilege are sustainable is entirely dependant on the trial. I have nothing to say and I must keep an open mind on this point. Indeed this court on an interlocutory application will not seek to resolve or make any provisional assessment of the rival contentions of falsity and truth advanced by the parties therein. Only time will tell. And the time will be at the trial proper.”

18. The Plaintiff therefore humbly prays for the Plaintiffs' applications (Enclosures 5 and 11) be dismissed with costs.

Dated this 27th day of November 2006.

Solicitors for the Plaintiff

This **DEFENDANT'S WRITTEN SUBMISSIONS** is filed by Messrs. Lee Ong & Kandiah, Solicitors for the Plaintiff abovenamed with address for service at Suite 2.07-Suite 2.10, 2nd Floor, Wisma Mirama, Jalan Wisma Putra, 50460 Kuala Lumpur.

Reference: MRR/TGS(ES)/67/4/06/JH

Telephone: 03-21448336

Facsimile : 03-21447336