KNOWLEDGE & INSIGHTS

Mkini Dotcom Sdn Bhd & Ors v Raub Australian Gold Mining Sdn Bhd - The Application of the Defence of Reportage in Malaysia

September 2021

INTRODUCTION

In Malaysia, the interplay between the notion of freedom of expression, the rights of the media to publish statements as well as articles at will, and the law of defamation is very much a complex one. This is particularly exacerbated in a country of diverse political views, differing social and economic backgrounds, increasing wealth gaps between the minority urban elite and the majority rural folk as well as increasing racial polarisation. In this context, the role of online news platforms or blogs seeking to provide different perspectives by reference to the daily news, political viewpoints or perceived matters of general or public interest has become increasingly prevalent – the historical reliance on receiving news or insights from traditional broadsheets no longer being the norm.

Against this backdrop, there have been significant decisions of the courts in Malaysia in so far as the law of defamation is concerned vis-à-vis, articles or statements published by online news portals or blogs relating to the defences of justification, qualified privilege generally and fair comment. In this article, the recent decision of the Federal Court of Malaysia in ***Mkini Dotcom Sdn Bhd & Ors v Raub Australian Gold Mining Sdn Bhd*** by way of Federal Court Civil Appeal No. 02(f)-61-08/2018(W) that was delivered on 2nd July 2021 will be specifically examined ("***Mkini Dotcom v RAGM***")[1].

The decision of the Federal Court in ***Mkini Dotcom v RAGM*** is instructive in that it addresses the following principal issues, namely, (i) the application of the defence of reportage, and (ii) the distinction between the said defence of reportage and the defence of responsible journalism. The ancillary issue that the decision in ***Mkini Dotcom v RAGM*** addresses is the notion of how damages are claimed in a libel action for reputational harm or loss of goodwill to a business or company, where post the filing of the writ action, the claimant is the subject of voluntary liquidation.

[1] At the outset, disclosure is made that Tan Sri Dato' Cecil Abraham, Dato' Sunil Abraham, Ms. Noor Muzalifah Binti Shabudin and Ms. Anne Sangeetha Sebastian appeared as counsel for the successful party, Raub Australian Gold Mining Sdn Bhd.

+603-2726 3700 +6032726 3733 cecilabraham.com

THE BACKGROUND

The claimant (*Respondent in the proceedings before the Federal Court*), Raub Australian Gold Mining Sdn Bhd ("**RAGM**"), is a gold mining company that mines and produces gold dore bars at its Carbon-in-Leach ("**CIL**") plant. The plant is in Bukit Koman in the district of Raub, Pahang (the "**Plant**"). RAGM commenced its operations on or about February 2009 and has been in operations for over five and a half years.

The Plant is located approximately one (1) kilometre away and downstream from Kampung Bukit Koman. The river, Sungai Koman is located on the eastern boundary of the tenement.

Since the Plant started its operation in 2009, there had been numerous protests staged by the villagers residing near Bukit Koman in Raub, Pahang Darul Makmur. These protests organised by the Anti-Cyanide Gold mining activist group ("**ACG**") (which included its principal officer bearers Mr. Wong Kin Hoong, Mr. Hue Fui How and Ms. Hue Shieh Lee) thereafter became large scale rallies in Raub. RAGM contended that it was the recipient of negative publicity arising from the acts of the ACG.

The Dispute

RAGM contended that over a period of years, in support of the ACG, Mkini Dotcom Sdn Bhd by way of its online new portal at www.malaysiakini.com (hereinafter referred to as the "**Malaysiakini website**") published numerous articles that did not depict RAGM in a positive light.

In 2012, this culminated in the Defendants, namely, Mkini Dotcom Sdn Bhd and its journalists, Mr. Lee Weng Keat, Mr. Wong Teck Chi and Mr. Victor TM Tan[2] (*who were the Appellants in the Federal Court*), publishing the following Articles and Videos, all of which referred to RAGM on the Malaysiakini website:

(a) the 1st Article headlined "*Villagers fear for their health over cyanide pollution*" dated 19th March 2012, authored by Mr. Lee Weng Keat;

(b) the 2nd Article headlined "*78pct Bukit Koman folk have 'cyanide-related' ailments*" dated 21st June 2012, authored by Mr. Wong Teck Chi;

(c) the 1st Video entitled "*78pct Bukit Koman folk have cyanide related ailments*" dated 21st June 2012;

(d) the 3rd Article headlined "*Raub folk to rally against 'poisonous' gold*" dated 2nd August 2012, authored by Mr. Victor TM Tan; and

(e) the 2nd Video published on 2nd August 2012 bearing the following link - http://www.malaysiakini.tv/#/video/24267/raub-folks-to-rally-against-poisonous-gold-mine.html.

[2] Mkini Dotcom Sdn Bhd, Mr. Lee Weng Keat, Mr. Wong Teck Chi and Mr. Victor TM Tan may also be referred to collectively as the "**Defendants**" where appropriate.

+603-2726 3700 +6032726 3733 cecilabraham.com

RAGM took issue with the said Articles and Videos on the principal grounds that the statements contained therein were prima facie defamatory of RAGM in their plain and ordinary meaning and/or by way of innuendo.

THE HIGH COURT PROCEEDINGS

A writ action was filed before the High Court of Malaya at Kuala Lumpur on or about 3rd September 2012 by RAGM against the Defendants predicated on a cause of action in libel and for malicious falsehood. The trial before the High Court lasted eight (8) days with fifteen (15) witnesses being called.

On 23rd May 2016, Madam Justice Rosnaini Binti Saub in delivering the judgment of the High Court found the Articles and Videos to be *prima facie* defamatory. However, the learned High Court Judge dismissed RAGM's claim on the basis that Defendants had successfully raised the defence of qualified privilege and reportage. In short, the High Court held, inter-alia, as follows[3]:

(a) whilst the Articles and Videos were prima facie defamatory, the 1st Article merely reported the concerns of the residents of Bukit Koman as to their health and the suspicion that air pollution was being caused by RAGM at its CIL plant. Whilst there was no verification of the contents of the 1st Article by Mkini Dotcom Sdn Bhd and its journalist, the act of contacting the Chairman of the ACG prior to the publication was sufficient in the circumstances to constitute responsible journalism;

(b) the 2nd and 3rd Articles as well as the Videos were mere reproductions of two (2) press conferences held on 21st June 2012 and 2nd August 2012. Mkini Dotcom Sdn Bhd and its journalists did not adopt the contents of the said Articles and Videos as their own. Moreover, as the Articles and Videos were a matter of public concern, there was a moral duty to publish the same;

(c) in addition, the defence of reportage was available with regards to the 2nd and 3rd Articles as well as the videos because the public interest lay not in the truth of the contents of the said Articles and Videos but on the fact that they were made. Whilst the general principle is that a person who repeats a defamatory statement of another will also be liable for defamation, "*the Reynold's privilege of reportage appears to be the exception to the so-called general rule of repetition*";

(d) there is no need to specifically plead reportage. Reportage is one form of Reynold's privilege and it is considered part of the qualified privilege defence. As Mkini Dotcom Sdn Bhd have pleaded qualified privilege in paragraphs 33 and 55 of the Amended Defence, this is sufficient to enable Mkini Dotcom Sdn Bhd and its journalists to "*prove reportage at the trial of the action*".

The High Court went on to dismiss the claim for malicious falsehood as well[4].

COURT OF APPEAL PROCEEDINGS

[3] [2016] 12 MLJ 476 at pg. 493 to 494.
[4] [2016] 12 MLJ 476 at pg. 496.

+603-2726 3700 +6032726 3733 cecilabraham.com

On 1st June 2016, RAGM filed a notice of appeal with the Court of Appeal against part of the decision of the High Court. Critically, no appeal or cross-appeal was filed by Mkini Dotcom Sdn Bhd and its journalist against the High Court's specific finding that the Articles and Videos were *prima facie* defamatory of and concerning RAGM.

On 11th January 2018, RAGM's appeal was unanimously allowed with costs by the Court of Appeal[5]. The full written grounds of the Court of Appeal are reported by way of ***Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors*** [2018] 4 MLJ 209.

(i) Summary of the Court of Appeal's Decision:

In summary, the Court of Appeal held, inter-alia, that:

(a) the defence of qualified privilege (Reynolds defence) is a separate and distinct defence from reportage[6];

(b) on a proper appreciation of the evidence, Mkini Dotcom Sdn Bhd and its journalists had failed to avail themselves of the Reynolds defence[7] and are precluded from impliedly relying on reportage by way of a plea of Reynolds privilege, as reportage was not expressly pleaded[8];

(c) there was no alternative plea of reportage and the reliance of paragraphs 33 to 35 of the Amended Defence in seeking to imply such a defence was taken by reference to the general plea of qualified privilege was incorrect. As such, Mkini Dotcom Sdn Bhd and its journalists had failed to prove a defence of reportage at trial[9];

(d) in any event, Mkini Dotcom Sdn Bhd and its journalists had failed to meet the requirements necessary for reportage as there was no fair, neutral and disinterested reporting without adoption of the statements as the truth[10]:

- Mkini Dotcom Sdn Bhd and its journalists had only reported one side of the dispute;
- no attempts at verification with independent bodies were made since the allegations were extremely serious and damaging which may lead to criminal prosecutions and civil suits being brought against RAGM if the allegations were true;
- Mkini Dotcom Sdn Bhd and its journalists had exercised a cavalier and reckless attitude. The Editor-in-Chief of Malaysiakini, Mr. Steven Gan, did not even read the Articles and watch the Videos before they were published on the Malaysiakini website;

[5] The Court of Appeal judges that deliberated on the appeal were Justice Abang Iskandar Bin Abang Hashim (now Chief Judge of Sabah & Sarawak), Justice Mary Lim Thiam Suan (as she then was) and Justice Suraya Binti Othman. The judgment of the Court of Appeal was delivered by Justice Suraya Binti Othman.
[6] [2018] 4 MLJ 209 at pg. 238 to 239 at paragraphs 56 to 63.
[7] [2018] 4 MLJ 209 at pg. 230 to 231 paragraphs 37 to 28.
[8] [2018] 4 MLJ 209 at pg. 231 to 235 at paragraphs 41 to 47.
[9] [2018] 4 MLJ 209 at pg. 239 to 241 at paragraphs 64 to 69.
[10] [2018] 4 MLJ 209 at pg. 241 to 243 at paragraphs 74 to 76.

+603-2726 3700 +6032726 3733 cecilabraham.com

- no attempts were made by Mkini Dotcom Sdn Bhd and its journalists to view any primary documents before publishing the Articles and Videos;

- at no time did Mkini Dotcom Sdn Bhd sight the so-called survey prepared by the ACG;

- the 2nd Article and the 1st Video carried allegations, which Ms. Hue Shieh Lee, the Secretary of the ACG subsequently refuted and admitted as being untrue in a Malay Mail article dated 31st July 2012. The allegations that RAGM's mining activities caused the ill-health of the villagers of Bukit Koman was also separately reported by the Malay Mail in the same article dated 31st July 2012 having obtained clarification and a statement from the Ministry of Health as being untrue;

- no attempts were made to get RAGM's response and side of the story to maintain balanced reporting of the news either prior to or post the publication of the 1st and 2nd Articles as well as the 1st Video;

- the 3rd Article carried an extremely accusatory one with imputations and odious allegations resulting in it not being fair and balanced reporting;

- no apology or retraction was made by Mkini Dotcom Sdn Bhd and its journalists, despite Mr. Wong Kim Hoong, the Chairman of the ACG, having apologised in open court and in the media for his past statements published on the Malaysiakini website which accused (i) RAGM of polluting the environment twenty-four (24) hours a day, and (ii) RAGM of having harassed those who spoke up against the company, on the basis that there was no justification for making such statements in the first instance; and

- the 2nd Video did not meet the requirements of reportage for all the same reasons set out above.

(e) the fact that RAGM was the subject of voluntary liquidation at the time of the hearing of the appeal is not a relevant consideration to preclude the granting of damages. More importantly, the attitude of Mkini Dotcom Sdn Bhd and its journalists was troubling given the absence or sheer refusal to publish a retraction or apology given (i) the subsequent apologies and admissions on the part of the officers of the ACG, (ii) the conclusion of the Ministry of Health, Malaysia that the source of illness and pollution was due to herbicide pollution and the not the use of sodium cyanide at RAGM's CIL plant, was demonstrative of unyielding, unrepentant and arrogant conduct, and (iii) RAGM has in fact offered Mkini Dotcom Sdn Bhd and its journalists the opportunity to apologies and retract the Articles and Videos since 27th July 2012, but this was refused.

Accordingly, general damages in the sum of RM200,000.00 for loss of goodwill and vindication of reputation was awarded to RAGM[11].

[11] [2018] 4 MLJ 209 at pg. 244 to 245 at paragraphs 81 to 86.

FEDERAL COURT PROCEEDINGS

Dissatisfied with the decision of the Court of Appeal, Mkini Dotcom Sdn Bhd and its journalist sought leave to appeal to the Federal Court, which was granted by reference to nine (9) questions of law.

On 2nd July 2021, the Federal Court by majority (3:2) dismissed the appeal with costs and upheld the decision of the Court of Appeal.

(i) Preliminary Issue

Before addressing the principal issues by reference to the nine (9) leave questions in the majority and minority judgments, it should be noted that Mkini Dotcom Sdn Bhd and its journalist, sought to assert before the apex court that the 1 Article and 2nd Video (and therefore by implication all the Articles and Videos) were not actionable in so far as the claims for libel were concerned, given that the Federal Court had in an earlier judgment pertaining to the same 2nd Article headlined "*78pct Bukit Koman folk have 'cyanide-related' ailments*" dated 21st June 2012, authored by Mr. Wong Teck Chi and the same 1st Video entitled "*78pct Bukit Koman folk have cyanide related ailments*" dated 21st June 2012 in the instant appeal, had been held to be not defamatory of RAGM in a claim instituted by RAGM against Ms. Hue Shieh Lee[12]. The judgment of the Federal Court in that action is reported by way of ***Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee*** [2019] 3 MLJ 720[13].

Justice Harminder Singh Dhaliwal in delivering the judgment of the minority (in respect of which Justice Vernon Ong Lam Kiat concurred), held that such an argument on the part of Mkini Dotcom Sdn Bhd and its journalist, could not be sustained, for the following reasons[14]:

> "*[121] Now, to recall, the High Court in the present case had held that the articles and the videos in question were defamatory of the plaintiff. This finding appears in paragraph [16] of the judgment:*
>
> > "*[16] It is therefore my judgment that the words complained of as stated by the plaintiff in paras. 8, 11, 17, 20 and 25 of the statement of claim are capable of being defamatory of the plaintiff in their natural and ordinary meaning. I agree with the plaintiff's learned counsel that the said articles and videos impute to the plaintiff dishonourable or discreditable conduct or motives or lack of integrity on part of the plaintiff of being unethical and greedy mining company. The plaintiff has therefore succeeded in proving, on the balance of probabilities, all the three basic elements of defamation.*"
>
> [122] ***The defendants did not appeal in respect of this part of the decision. The Court of Appeal was only concerned with the defences raised by the defendants and not with the question of whether the articles and videos were defamatory. It must then follow, in my view, that the defendants had accepted the decision of the High Court in this respect and cannot now reassert the said issue in this Court.***

[12] Ms. Hue Shieh Lee was the Vice President of the ACG.
[13] We wish to disclose that our Tan Sri Dato' Cecil Abraham and Dato' Sunil Abraham appeared for RAGM in the appeal before the Federal Court.
[14] [2021] 5 MLJ 79 at pg. 145 to 146.

+603-2726 3700 +6032726 3733 cecilabraham.com

> *[123] As defamation claims are sui generis, it is up to the parties to take their own respective positions as to the conduct of the litigation even if the alleged defamatory material is the same. It cannot be said that two different Courts have arrived at two different conclusions on the same factual and legal issue as the defendants in the instant case had effectively abandoned the issue which they now wish to resurrect. Put simply, the Court is now not required to decide on the issue as, because of the defendants' election, the issue is no longer before the Court. The position that obtains accords with the adversarial tradition that underpins litigation in the common law world. In the circumstances, the argument by the defendants in this respect, as persuasive as it seems, cannot be sustained.*
>
> *[124] It should however be clarified, lest it be misunderstood, that if the question of whether the impugned articles and videos were defamatory was a live issue, then the application of issue estoppel or estoppel per rem judicatum may be relevant against the plaintiff/respondent here. Since this Court in Hue Shih Lee had ruled that the same articles were not defamatory of the respondent here, it would have been legally untenable for this Court to now say otherwise."*

Justice Abdul Rahman Bin Sebli in delivering the judgment of the majority (in respect of which Justice Zaleha Binti Yusof and Justice Hasnah Binti Dato' Mohammed Hashim concurred), agreed with the conclusion of the minority on this issue but only endorsed the reasoning of the minority at paragraphs 20 to 26 of the minority judgment. The reasoning of the minority at paragraph 27 of its judgment was not expressly endorsed by the majority of the Federal Court. This is evident from paragraph 4 of the majority judgment which reads as follows[15]:

> *"[4] My learned brother Harminder Singh Dhaliwal FCJ in his judgment has ruled against the appellants on the issue of whether the impugned 2nd Article and 1st Video were actionable in defamation. For the reasons given by His Lordship at paragraphs [20] – [26] for the judgment, I agree."*

It is telling that the majority of the Federal Court did not endorse the dicta of the minority at paragraph 27 of the minority judgment. In the view of the authors of this article this is perhaps due to the fact that the majority of the Federal Court were cognisant of the caveat imposed by the Federal Court in ***Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee*** [2019] 3 MLJ 720[16] at paragraphs 75 to 81, which reads as follows:

> *"Other suits against other defendants*
>
> *[75] In the course of his submissions before us, learned counsel for the appellant raised issues on other defamation suits filed by the same appellant concerning the same articles (as in the present case) against other defendants namely the MKini and FMT. The respondent in the present case was not the party in those cases.*

[15] [2021 5 MLJ 79 at pg. 97.
[16] We wish to disclose that our Tan Sri Dato' Cecil Abraham and Dato' Sunil Abraham appeared for RAGM in the appeal as well as in the related FMT Suit.

+603-2726 3700 +6032726 3733 cecilabraham.com

[76] The MKini suit was decided by another High Court after the present case was decided by the Kuala Lumpur High Court on 13 May 2015. On appeal, the Court of Appeal allowed the appeal on the present case on 13 April 2016. In the MKini suit, both the High Court and the Court of Appeal ruled that the impugned articles (the very same articles in the present case) were defamatory of the appellant. Learned counsel for the appellant submitted before us that the decision of the High Court and the Court of Appeal in the MKini suit on the determination that the articles were defamatory is binding on the Federal Court in the present case before us; as a matter of estoppel, not judicial precedent.

[77] In the FMT suit, there was no judicial pronouncement by the court that the words in the articles were defamatory. In that case, the defendant therein (MToday Sdn Bhd — FMT) as the publisher tendered an apology taking full responsibility for the articles.

[78] It is noted that the respondent herein was not a party in both the MKini suit as well as the FMT suit; nor did she have a say in the apology agreed upon by the parties in the FMT suit. Each case must be dealt with and decided on its own merit after hearing all parties to the respective suits. ***The plaintiff in each case must be required to prove each and every one of his claims against each defendant individually, on all the relevant elements to establish defamation, ie defamatory effect of the statements, directed at the plaintiff, and publication to third party****.*

[79] We cannot agree with learned counsel's submissions that this court is bound by the decision of the High Court in the MKini suit, especially bearing in mind that in the present case before us, both the High Court and the Court Appeal have made concurrent findings of facts entirely different from the High Court's MKini suit. Both the High Court and the Court of Appeal in the present case had ruled that both the impugned Articles and the video were not defamatory and their decisions were delivered earlier in time. In short, it must be stressed that this court is not bound to accept, nor is the respondent estopped by the finding of the High Court in the MKini case that the impugned words are defamatory as suggested by the appellant's counsel.

[80] It must also be noted that defamation claims are 'sui generis', in that multiple suits are permitted against different defendants in relation to the same publication; and therefore, the defendant in the present case, cannot be estopped by a determination in any other suit to which he was not a party. ***The ruling made by the High Court in the MKini suit, where the respondent herein, was not a party thereto, will not bind the respondent herein, who in a different proceeding may secure a different result based on the facts and circumstances of her own defence.*** *It would be a breach of natural justice rule and an abuse of the court's process for a plaintiff (the appellant) to be permitted to file multiple suits against different defendants in defamation actions, but to be relieved of the burden of proof merely because one suit is resolved in its favour. In dealing with the present appeal before us, we only need to examine the decisions of the Court of Appeal and the High Court in this case with respect to the facts and circumstances of its own.*

[81] ***We agree with learned counsel for the respondent that the meanings ascribed to those words in the impugned articles in the MKini suit by the appellant and pleaded against MKini were different from those pleaded against the respondent in this case. As such, the courts in this case***

+603-2726 3700 +6032726 3733 cecilabraham.com

were required to look at the impugned words from an entirely different perspective as compared to the court in the MKini case."

(ii) Minority Judgment of the Federal Court[17]

In this article, due regard is given to the principal aspects of the minority judgment before considering the majority of the Federal Court.

In addressing the law of reportage and Reynold's privilege in the context of the factual matrix of the appeal, Justice Harminder Singh Dhaliwal (with whom Justice Vernon Ong Lam Kiat concurred) held, inter-alia, as follows[18]:

(a) reportage is not a distinct and separate defence from responsible journalism or qualified privilege generally but rather part of the Reynold's family of public interest privilege or responsible journalism;

(b) as such, the Court of Appeal was wrong on both substantive law and on the requirements of pleadings in treating the defence of reportage separately from responsible journalism. The construction given the decision in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors*[19] was wrong;

(c) the defence of reportage is not a sui generis defence as underpinning it is the public policy of the duty to impart and receive information;

(d) the Court of Appeal misapprehended the remark of Sedley LJ in *Charman v Orion Publishing Group Ltd and others*[20], where it was observed that once a defence of reportage had been relied on it is forensically problematic to fall upon an alternative defence of responsible journalism. The approach of the Court of Appeal was regrettable as the Court of Appeal failed to note that in *Charman v Orion Publishing Group Ltd and others*[21], the approach taken by all the judges was to deal first with the defence of reportage before considering qualified privilege per se. There was thus no ruling that the specific of the defence cannot be run as alternative defences;

(e) on the facts of the present appeal, in paragraphs 33 and 35 of the Amended Defence, Mkini Dotcom Sdn Bhd and its journalists had pleaded qualified privilege by referring to "*responsible journalism*", the matter being of "*public interest*" and having a "duty to publish" the ongoing story. This is sufficient to meet the underlying defence of reportage as "the public policy demand for there to be a duty to impart the information and an interest in receiving it" was satisfied;

(f) as such, if properly advised, any plaintiff could not have been left in any doubt that the Reynold's defence of reportage was also being pleaded when the term "*public interest privilege*" or "*responsible journalism*" are used. In this respect reference was made to the decision in *Datuk Harris Salleh v Datuk Yong Teck Lee & Anor*[22]; and

[17] [2021] 5 MLJ 79 at pg. 135 to 168.
[18] [2021] 5 MLJ 79 at pg. 154 to 158 at paragraphs 153 to 164.
[19] [2012] 4 MLJ 191.
[20] [2008] 1 All ER 750.
[21] [2008] 1 All ER 750.
[22] [2017] 6 MLJ 133.

+603-2726 3700 +6032726 3733 cecilabraham.com

(g) it has never been the law of pleadings that actual legal terms be used if the facts and circumstances warranting the defence are set out. In this regard, reference was made to *Re Vandervell's Trusts (No 2)*[23]. If there is any doubt, parties are at liberty to seek further and better particulars. As such, RAGM was not in a position to claim surprise or prejudice on the pleading issue. The decision in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors*[24] is distinguishable as correctly surmised by the High Court.

In addressing the question of whether Mkini Dotcom Sdn Bhd and its journalists had made out a case of reportage or Reynold's privilege, Justice Harminder Singh Dhaliwal, on behalf of the minority, held, inter-alia, as follows[25]:

(a) the Court of Appeal erred in concluding that Mkini Dotcom Sdn Bhd and its journalists had not met the ten (10) point test as propounded in *Reynold's* and that there no proper consideration or application of Lord Nicholl's 10 points on the part of the High Court;

(b) the High Court was correct in concluding that the 1st Article was merely reporting the concerns of the residents of Bukit Koman and that the 1st Article was not about the truth of the contents but only the concerns of the residents there so as to satisfy the test of responsible journalism;

(c) in respect of the issue of verification, the High Court correctly noted that as far as the 3rd Article is concerned, Mkini Dotcom Sdn Bhd sought a comment from RAGM's representative prior to publication but the said representative declined to comment. Moreover, RAGM never availed itself of an opportunity to publish a response to the Articles and Videos on the Malaysiakini website. The failure on the part of RAGM to publish a response on the Malaysiakini website should count against RAGM and is demonstrative of responsible journalism. Moreover, the unilateral reporting in a disinterested manner is equally protected in law. In this regard, the reportage doctrine was deemed not to be confined to the reporting of reciprocal allegations;

(d) there was no requirement for Mkini Dotcom Sdn Bhd and its journalist the verify the accuracy of the contents of the Articles and Videos by reference to the defence of responsible journalism vis-à-vis the Ministry of Health and/or the Department of Environment. The Court of Appeal simply misconstrued the facts and the law;

(e) the Court of Appeal's decision is not sustainable in law. First, in cases of reportage, as long as there is no adoption and the defendant is engaged in neutral reporting there is no requirement to verify. In the present dispute, Mkini Dotcom Sdn Bhd and its journalist had sought verification from the Chairman of the ACG. Moreover, as news is perishable, the requirement to verify a story should not be burdensome. Mkini Dotcom Sdn Bhd and its journalist could not be expected to undertake a verification exercise with independent parties or experts before publishing a story of daily interest;

[23] [1974] EWCA Civ 7.
[24] [2012] 4 MLJ 191.
[25] [2021] 5 MLJ 79 at pg. 162 to 167 at paragraphs 177 to 201.

+603-2726 3700 +6032726 3733 cecilabraham.com

(f) the Court of Appeal erred in concluding that the Articles and Videos were "not fair and neutral" and that there were "*embellishing allegations*" couched in a "*sarcastic tone*" or "*accusatory or damaging tone*". A plain reading of the Articles and tone therein cannot justify the interpretation given by the Court of Appeal on any imagination. In any case, applying Reynold's Point No. 9, an impugned article need not be bland and arid. It may be written "*vigorously*". As such, the defence of reportage is not lost even if the defendant publisher take a perceptible pleasure in reporting controversy or sympathizes with the case put forward by one party;

(g) ultimately, it ought to be noted that the press and journalists play a crucial role in reporting matters of public interest and matters of serious public concern. In matters of public interest, so long as the press hold a reasonable belief that the publication is in the public interest or that the publication is a fair, accurate and impartial account of a dispute, the press and journalists are entitled to the protection of the law.

The minority having decided that the appeal ought to be allowed was of the view that Leave Question 8 and Leave Question 9 pertaining to the issues of damages, therefore need not be answered as the said questions of law had become redundant.

(iii) Majority Judgement of the Federal Court[26]

Justice Abdul Rahman Bin Sebli in delivering the judgment of the majority (in respect of which Justice Zaleha Binti Yusof and Justice Hasnah Binti Dato' Mohammed Hashim concurred) in addressing the law of reportage and the distinction between Reynold's privilege by reference to the notion of responsible journalism held, inter-alia, that[27]:

(a) the Court of Appeal correctly laid out the principles of law by reference to the decisions in *Jameel and another v Wall Street Journal Europe Sprl*[28], *Roberts and another v Gable and others*[29], *Charman v Orion Publishing Group Ltd and others*[30] and *Flood v Times Newspaper Ltd*[31];

(b) as a matter of law the defence of reportage does not apply to a journalist who is guilty of either adopting the report and making it his/her own, or fails to report the story in a fair, disinterested and neutral way;

(c) in this regard, a journalist who wishes to be protected by reportage parts company with the Reynold's defence of responsible journalism, which allows him/her to put forward the defamatory material as true and accurate, which the defence of reportage does not. As such, the journalist cannot have it both ways. In other words, by reference to the decision in *Charman v Orion Publishing Group Ltd and others*[32], the choice is to plead reportage or responsible journalism as it would be a contradiction in terms for the pleader to plead, on the one hand, that he believes in the truth and accuracy of the defamatory statement and on the other hand plead that he does not;

[26] [2021] 5 MLJ 79 at pg. 96 to 135.
[27] [2021] 5 MLJ 79 at pg. 100 to 105 at paragraphs 11 to 27.
[28] [2006] 4 All ER 1279.
[29] [2008] 2 WLR 129.
[30] [2008] 1 All ER 750.
[31] [2012] 2 WLR 760.
[32] [2008] 1 All ER 750.

+603-2726 3700 +6032726 3733 cecilabraham.com

(d) as such, a defendant must choose between the defence of reportage and the Reynold's defence of responsible journalism. It is not enough to merely plead the defence of reportage as 'a particular' of the Reynold's defence of responsible journalism;

(e) as a matter of doctrine, the defence of reportage cannot be reconciled as part of the Reynold's defence of responsible journalism. First of all, the gulf between the two defences is wide to be abridged as defences of the same species. In the case of Reynold's defence of responsible journalism, the focus is on ensuring that the journalist takes reasonable steps to verify the truth and accuracy of any allegation being reported. In contrast, the defence of reportage is not concerned with the truth and accuracy of the defamatory allegation but with the narrower public interest of knowing that the allegations were in fact made. It is therefore, *"entirely contradictory that a defence that is unconcerned with the truth and accuracy of the allegations can be regarded as part of the Reynolds defence of responsible journalism which is concerned with the exact opposite of the proposition, i.e. with the truth and accuracy of the imputation that is reported. They are, in that sense, at opposite ends of the pole*"; and

(f) thus, given the material differences in the characteristics of reportage and the Reynold's defence of responsible journalism and the different consequence that flow from their breaches, the two defence must be treated as mutually exclusive. Therefore the Court of Appeal was correct in finding that the defence of reportage must be specifically pleaded as it is distinct and separate from the Reynold's defence of responsible journalism.

The majority of the Federal Court then went on further to state that the defence of reportage must be expressly pleaded[33]. In so doing, the Federal Court held that the High Court was wrong to accept the unpleaded defence of reportage which in any event was only raised by Mkini Dotcom Sdn Bhd and its journalist for the first time at the closing submissions stage. In this regard, the majority of the Federal Court followed its earlier decision in *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor*[34] which settles the law that one is bound by their pleadings. The majority of the Federal Court made the following specific findings which is instructive:

> "[31] ***The defence of reportage is conspicuous in its absence. Not a word of the defence was mentioned in the statement of defence. Nor can the defence be implied from the pleadings. Yet it was relied heavily on by the appellants in their closing submissions at the trial. What the appellants did was to ride on their pleaded Reynolds defence of responsible journalism to pursue their unpleaded defence of reportage.***
>
> [35] ***The Reynolds defence of responsible journalism or qualified privilege was pleaded in the alternative in paragraphs 33 and 35 of the statement of defence. Although pleaded in the alternative, the defence formed the bedrock of the appellants' defence in answer to the defamation action. It was not, it will be noted, pleaded in the alternative to the defence of***

[33] [2021] 5 MLJ 79 at pg. 105 to 112 at paragraphs 28 to 45.
[34] [2015] 6 MLJ 449.

+603-2726 3700 +6032726 3733 cecilabraham.com

reportage, which was not part of the pleaded defence, not that the defences can be pleaded in the alternative.

[36] The appellants cited the case of Re Vandervell's Trusts (No.2) (1974) 1 Ch 269 to substantiate their argument that their failure to plead reportage is permissible in law. The following dicta by Lord Denning was quoted:

> *"Mr. Balcombe for the executors stressed that the points taken by Mr. Mills were not covered by the pleadings. He said time and again: "This way of putting the case was not pleaded." "No such trust was pleaded." And so forth. The more he argued, the more technical he became. I began to think we were back in the old days before the Common Law Procedure Acts 1852 and 1854, when pleadings had to state the legal result; and a case could be lost by the omission of a single averment: see Bullen and Leake's Precedents and Pleadings, 3rd ed. (1868), p. 147. All that has been swept away. It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. The pleadings in this case contained all the material facts. It does appear that Mr. Mills put the case before us differently from the way in which it was put before the judge: but this did not entail any difference in the facts, only a difference in stating the legal consequences. So, it was quite open to him."*

[37] But this is to be distinguished from the present case which is premised on an action in defamation where it was imperative for the appellants to sufficiently plead their defence(s). Further, the appellants only quoted the judgment of Lord Denning and omitted to highlight the dicta of Lawton LJ at page 324 which reads:

> *'As to the pleading point, it is pertinent to bear in mind what, under the Rules of the Supreme Court, should be put in pleadings. Ord. 18, r. 7, provides as follows:*
>
> > *'Subject to the provisions of this rule, and rules 7A, 10, 11 and 12" (none of which are relevant in this case), every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, ... and the statement must be as brief as the nature of the case admits.*
>
> *It follows, so it seems to me, that the question for decision in the case is whether the material facts have been set out in the pleadings, not whether Mr. Mills made submissions before this court as to legal consequences which had not been set out. Much the same kind of point was taken before this court in Lever Brothers Ltd. v. Bell [1931] 1 K.B. 557. When dealing with it Scrutton L.J. said, at pp. 582-583:*
>
> > *'In my opinion the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigation at the trial."*

> *These comments are apt to fit this case, which is not one within the exception. In my judgment* ***the pleadings did set out all the material facts sufficient to justify the legal results which Lord Denning M.R. has adjudged follow and with which I agree.***'
> (*emphasis added*)
>
> *[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.***
> ...
> ..."

Having addressed its mind to the distinction between the defences of reportage and responsible journalism as well as the proper approach to pleading a defence of reportage, the majority of the Federal Court reviewed the judicial approach of the High Court. In so doing, the Federal Court held, inter-alia, that[35]:

(a) the High Court erred in equating the defence of reportage with the Reynold's defence of responsible journalism. In so doing, the High Court failed to take cognisance of the distinction between the two defences;

(b) although the High Court cited the ten factors listed in *Reynold's*, nowhere in the judgment of the High Court was there an assessment by reference to the evidence relating to these factors in determining whether the defence of reportage had been established by Mkini Dotcom Sdn Bhd and its journalists;

(c) the principal focus of the High Court Judge was on the public interest element of the defence of reportage without sufficiently addressing Her Ladyship's mind to the relevant evidence that goes to prove the merits of the defence of reportage; and

(d) whilst the ten factors outlined by Lord Nicholls in Reynold's are not exhaustive and is merely illustrative, it was wrong for the High Court Judge to ignore the evidence in ascertaining if the ten factors had been met in part or at all.

The majority of the Federal Court went on further to judicially appreciate if the requirements of the defence of responsible journalism had in fact been met by Mkini Dotcom Sdn Bhd and its journalist. In this specific regard, the majority held, inter-alia, that[36]:

> "*[80] The second limb of the Reynolds defence of responsible journalism or qualified privilege requires the appellants to satisfy the court that the steps to gather, verify and publish the information were*

[35] [2021] 5 MLJ 79 at pg 121 to 123 at paragraphs 55 to 61.
[36] [2021] 5 MLJ 79 at pg. 129 to 131.

responsible and fair. However, from the evidence of DW1, the Editor-in-Chief of the 1st appellant, it is clear that the appellants had failed to take steps, let alone reasonable steps, to verify the contents of the articles and videos, as apparent from the following:

(a) ***No attempt was made to independently verify if the information in the articles and videos were true***;
(b) *No attempt was made to contact independent bodies such as the Department of Environment, the Department of Minerals and Geoscience or the Ministry of Health prior to publication of the articles and videos;*
(c) ***As Editor-in-Chief, DW1 did not even read the articles and watched the videos before they were published***;
(d) *No attempt was made to view any primary document before publishing the articles and videos;*
(e) ***At no time did the 1st appellant have sight of the so-called survey prepared by the BCAC***;
(f) ***No attempt was made to retract any of the articles and videos despite apologies being issued by both Wong Kin Hoong and Hue Fui How***; *and*
(g) *The appellants were selective in the contents of the articles and videos and as a result did not write balanced articles and gave prominence to the views of the BCAC only.*

[81] DW1 had also admitted in cross-examination to the following:

(a) ***his reporting on the respondent started since 2008 right up to 2012, and further agreed that the 1st appellant had ample time of 5 years to check whether the sources of the information were correct (Therefore the adage that news is a perishable commodity does not assist the appellants).***
(b) *he absolutely had no concrete scientific evidence to say that cyanide pollution was the cause of the ill health of the villagers in respect of the headline of the 2nd article.*
(c) ***there was absolutely no basis for what was stated in paragraphs 1 and 2 of the articles in so far as scientific and technical evidence is concerned.***
(d) ***he did not at any time look at the so-called survey prepared by the BCAC.***
(e) *neither he nor DW2 verified whether the unusual yellow dots emanated from the respondent's mining activities.*
(f) *that he and DW2 did not obtain the readings from the so- called monitoring devices alleged by Mr Wong King Hoong before publishing the 1st article although it was important to ascertain the readings on the alleged monitoring device.*
(g) *that in the articles in 2007-2013, he espoused essentially the views of the BCAC in particular.*

[82] DW2 on his part had admitted to the following in cross- examination:

(a) ***by writing the 1st paragraph of the 1st article, he merely accepted the unverified words of Mr Wong King Hoong, the blogs and the media reports***.
(b) *he did not ascertain if the facts contained in paragraph 5 of the 1st article that birds, lizards that have been found dead that occurred due to the commencement of the respondent's mining activities.*

+603-2726 3700 +6032726 3733 cecilabraham.com

(c) *he had no evidence of a scientific or technical nature that the deaths of the birds, lizards was due to the respondent's gold mining activities.*

(d) *he did not even visit Bukit Koman to ascertain the fact that there were birds, lizards which were found dead.*

(e) ***he was told by Mr Wong Kim Hoong that the yellow spots came from the mining operations yet he re-published what Mr Wong King Hoong said to him without verifying if what Mr Wong King Hoong told him was based on facts which were true.***

(f) *he was not in a position to contradict the statement of PW2, an expert metallurgist that the presence of the yellow powdery spots and dots measuring up to 8mm and the unbearable stench could not be scientifically attributed to cyanide or its degradation by products due to extremely low concentration of HCN gas.*

(g) *he was not in a position to tell the court what was the technical, medical, scientific evidence that he relied on to say that the unusual yellow dots were responsible for the skin, eyes, respiratory illness of the residents of Bukit Koman.*

[83] On the proved facts therefore, the learned trial judge was clearly wrong in finding as a matter of law that the articles and videos were published on an occasion of qualified privilege. The appellants' failed attempts to get clarification from a representative of the respondent in connection with the articles and videos is not a valid excuse in all the circumstances of the case to go ahead with the publication of the defamatory articles and videos. After all, the respondent had explained why it would not comment on the stories, and this was because of the pending judicial review application.

[84] But more importantly, it cannot be the philosophy behind Reynolds that if the claimant refuses to comment on the story, the journalist is thus given a free pass to publish the material in a way that is defamatory of the claimant. The burden remains with the journalist to verify the truth and accuracy of what is published although not in every detail.

*[85] **In any event, since the allegations in the articles and videos had been proved to be untruths and were defamatory of the respondent, the fact that the respondent declined comment on the stories is of no consequence. To reiterate what Lord Hobhouse said in Reynolds, no public interest is served by communicating and receiving untruths. There were many aspects of the articles and videos that were verifiable and which needed independent verification but which the appellants did not bother to check for truth and accuracy.***

[86] The learned trial judge's finding was therefore plainly wrong and the Court of Appeal was justified in interfering with the finding in order to prevent a miscarriage of justice. The Court of Appeal had given sound reasons for disagreeing with the decision of the High Court in relation to the first article, which reasoning applies equally well, in my opinion, to the second and third articles…"

Having found that the decision of the Court of Appeal ought to be upheld on the issue of liability, the majority of the Federal Court considered whether RAGM given its present insolvency was entitled to damages. To this end, Justice Abdul Rahman Bin Sebli on behalf of the majority held, inter-alia, that[37]:

[37] [2021] 5 MLJ 79 at pg. 132 to 134.

(a) applying *Jameel and another v Wall Street Journal Europe Sprl*[38] and *South Hetton Coal Co Ltd case*[39] a libel action is actionable per se at the suit of the corporation, without the need to prove any actual damage has been caused;

(b) a company such as RAGM can recover general damages for loss and goodwill without having to prove actual loss;

(c) the financial standing of RAGM before the Federal Court at the present moment is not a relevant consideration. The standing of RAGM at the time of filing of the writ action is the factor to note. At that time, RAGM was a going concern; and

(d) in any case, no argument was raised before the Court of Appeal by Mkini Dotcom Sdn Bhd and its journalist as to the financial standing of RAGM by reference to it being in the process of voluntary winding up as a basis for RAGM not having a good reputation and being disentitled to general damages. Mkini Dotcom Sdn Bhd and its journalist are therefore precluded from taking such an argument for the first time before the Federal Court. Ultimately, it is the status of RAGM at the time of the filing of the writ that is material.

(iv) Summary of the Federal Court's Decision

Ultimately, the Federal Court by majority in dismissing the appeal expressly answered the leave questions in the following manner:

1st Question:	**Whether reportage is in law a separate defence from qualified privilege or the Reynolds defence of responsible journalism and whether it is to be treated as mutually exclusive?**
Answer:	Affirmative, that is to say, reportage is in law a separate defence from qualified privilege or the Reynold's defence of responsible journalism and is to be treated as being mutually exclusive.
2nd Question:	**Whether the defence of reportage being an off-shoot of the Reynolds defence of responsible journalism needs to be pleaded separately from the plea of responsible journalism itself?**
Answer:	Affirmative, that is to say, the defence of reportage needs to be pleaded separately from the plea of responsible journalism.
3rd Question:	**Whether a defendant is obliged to plead either reportage or responsible journalism and not plead them in the alternative?**
Answer:	Affirmative, that is to say, a defendant is obliged to plead either reportage or responsible journalism and not plead them in the alternative.

[38] [2006] 4 All ER 1279 at paragraphs 119 to 122.
[39] [1894] 1 QB 133.

4th Question: **Whether the defence of reportage which is in law based on an on-going matter of public concern is sufficiently pleaded if it is stated by the defendant that the publications "*were and still are matters of public interest which the defendants were under a duty to publish*"?**

Answer: Negative, that is to say, the defence of reportage which is in law based on an on-going matter of public concern is not sufficiently pleaded if it is stated by the defendant that the publications 'were and still are matters of public interest which the defendants were under a duty to publish'.

5th Question: **Whether the proper test to determine if the defence of reportage succeeds is the test of adoption by the journalist of the publication as true and not if the publication is fair and balanced or for the journalist to establish his neutrality by independent verification?**

Answer: Affirmative, that is to say, the proper test to determine if the defence of reportage succeeds or otherwise is the test of adoption by the journalist of the publication as true and not for the journalist to establish his neutrality by independent verification.

6th Question: **In publishing video recordings of statements made by third parties in a press conference, whether the mere publication of such videos could be held to be an embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media?**

Answer: Affirmative, that is to say, in an on-going dispute, the impugned articles or videos ought to be considered together with previous and continuing publications of the news media on the same subject matter of public concern in determining the defence of reportage and provided always that the defendant complies with the reportage rule.

7th Question: **Whether in an ongoing dispute, the impugned articles or videos ought to be considered together with previous and continuing publications of the news media on the same subject matter of public concern in determining the defence of reportage?**

Answer: Affirmative, that is to say, the mere publication of such videos could be held to be embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media, unless the publisher makes it clear that he does not subscribe to a belief in the truth and accuracy of the defamatory statements or imputations.

8th Question:	**Whether it is proper to award general damages for loss of goodwill and vindication of reputation to a plaintiff company that has independently been subjected to a voluntary winding up by its creditors?**
Answer:	Affirmative, that is to say, it is proper to award general damages for loss of goodwill and vindication of reputation to a plaintiff company that has independently been subjected to a voluntary winding up by its creditors.
9th Question:	**Whether loss of goodwill can be recovered as a component of defamatory damages by a plaintiff company that has gone into insolvency?**
Answer:	Affirmative, that is to say, loss of goodwill can be recovered as a component of defamatory damages by a plaintiff company that has gone into insolvency.

COMMENTARY[40]

The majority decision of the Federal Court is significant in that for the first time the following issues have been addressed by the apex court in Malaysia:

(a) the distinction between the defence of reportage and the defence of responsible journalism;

(b) the requirement in law for a party seeking to rely on the defence of reportage to expressly plead such a defence; and

(c) the right of a company to be able to claim damages for an act of libel, notwithstanding post the filing of the claim, the said company may no longer be a going concern.

(i) The distinction between the defence of reportage and the defence of responsible journalism

The majority judgment of the Federal Court by referring to the decision in *Roberts and another v Gable and others*[41] in particular, is emphatic in its judicial pronouncement that the defence of reportage will not apply where the journalist (i) adopts the truth of the statements made and makes it his/her own, and (ii) fails to report the story in a fair, disinterested and neutral way. The approach of the majority of the Federal Court is consistent with the position in England.

[40] The authors of this article have not commented on the passing remarks of the minority of the Federal Court on the application of Section 4 of the Defamation Act 2013 in the United Kingdom in so far as the Reynold's defence and the notion of having to act responsibly on the part of a journalist is concerned, in Malaysia, as this was not an issue raised by the parties to the appeal or in respect of which submissions were specifically sought by the Federal Court.
[41] [2008] 2 WLR 129.

In this regard, the majority of the Federal Court went on further to hold that defence of reportage is at odds with the Reynold's defence of responsible journalism, such that a journalist cannot have it both way by reference to the dicta of Sedley J in *Charman v Orion Publishing Group Ltd and others*[42]. In this respect, the two defences were held to be mutually exclusive.

The minority judgment of the Federal Court also refers to the very same decisions cited above, save that the minority takes the view that both the Court of Appeal and by implication the majority of the Federal Court appear to have "*misapprehended*"[43] the remarks of Sedley LJ in *Charman v Orion Publishing Group Ltd and others*[44].

In the view of the authors, the majority judgment of the Federal Court appears to have properly taken cognisance of the analytical and doctrinal differences between the two defences. From an analysis of the case law, the defence of reportage and Reynolds privilege involve different analytical processes. This is evident when one considers the following authorities:

(a) *Jameel and another v Wall Street Journal Europe Sprl*[45], where the House of Lords averted to the two defences being separate:

> "[62] *The fact that the defamatory statement is not established at the trial to have been true is not relevant to the Reynolds defence. It is a neutral circumstance. The elements of that defence are the public interest of the material and the conduct of the journalists at the time. In most cases the Reynolds defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true* ***but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth****. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial.*"

(b) Sedley LJ's judgment in *Charman v Orion Publishing Group Ltd and others*, in which His Lordship held that a defendant is to elect between pleading the defence of reportage, or pleading the defence of qualified privilege:

> "[91] *The reportage doctrine developed in Al-Fagih v HH Saudi Research & Marketing (UK) Ltd [2001] EWCA Civ 1634, [2002] EMLR 215 cannot logically be confined to the reporting of reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected. Although no reference was made in the case to the decision of the Second Circuit Court of Appeals in Edwards v National Audubon Society Inc (1977) 556 F 2nd 113, Al-Fagih's case reflects this now classic limb of First Amendment jurisprudence. But the present case bears no substantive resemblance to either of those cases, nor to the case recently decided by this court of Roberts v Gable [2007] EWCA Civ 721, (2007) 151 Sol Jo LB 988. These were all cases of a self-contained account of a dispute, libellous in its content but reported without adoption or more than*

[42] [2008] 1 All ER 750.
[43] See paragraph 63 of the minority judgment of the Federal Court.
[44] [2008] 1 All ER 750.
[45] [2006] 4 All ER 1279.

> *marginal embellishment. It is* ***the very dependence of a reportage defence on the bald retailing of libels which makes it forensically problematical to fall back upon an alternative defence of responsible journalism. Pleaders may need to decide which it is to be***."

(c) Ward LJ's dicta in *Roberts and another v Gable and others*[46], which has been set out in extenso in paragraph 12 of the majority judgment of the Federal Court.

Therefore as a matter of process, the Reynolds privilege defence and the reportage defence are to be treated as distinct defences, with each involving a separate and distinct analysis. It may be surmised that there is a different analysis involved for each defence, by reference to the following:

(a) in cases of *Reynolds Privilege*, the factors considered in deciding whether a journalist took reasonable steps towards establishing the truth of the claims, i.e. the ten (10) pre-requisites of Lord Nicholls' dicta in the said decision; and

(b) in cases of reportage, the main relevant requirements out of Lord Nicholls' ten (10) pre-requisites are the tone of the article, and the extent to which the contents of the publication itself, inherent within the article itself, is of a matter of public concern.

The analytical distinction lies in the fact that the protection afforded by the defence of Reynolds privilege arises from the circumstances and occasion leading up to the publication of a news article; whereas the protection accorded by the defence of reportage is based on the publication of the article itself.

As a matter of doctrine, reportage is unable to be reconciled as a particular application or species of the *Reynolds Privilege*. This is because reportage and *Reynolds Privilege* afford protection to a defendant for distinct reasons, in the sense that the public interest as it relates to published allegations is given a very different focus in each defence.

For *Reynolds Privilege*, the "*responsible journalism*" standard is focused on ensuring that journalists take reasonable steps in relation to the truth of any allegations which they report, as explained by Lord Bingham in *Jameel and another v Wall Street Journal Europe Sprl*[47]:

> *"[32] … the rationale of [the responsible journalism] test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify… [T]he publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication."*

Conversely, the doctrine of reportage is not concerned with the truth of what the allegations say about the Respondent, but is instead focused on the much narrower public interest in knowing that the allegations have been made[48]:

[46] [2008] 2 WLR 129.
[47] [2006] 4 All ER 1279.
[48] *Jameel and another v Wall Street Journal Europe Sprl* [2006] 4 All ER 1279.

> "*[62] ...there are cases ("reportage") in which the public interest lies simply in the fact that the statement was made.*"

Therefore the doctrine of reportage pursues two goals which are diametrically different from the goals of a Reynolds defence: (i) public interest in the attributed speaker; and (ii) public interest in the nature of the dispute.

In the light of the very different focus pursued by each defence, it is perhaps contradictory that a defence which is unconcerned with the truth could be seen as a species of Reynolds privilege, which is entirely concerned with the steps taken by a journalist regarding the truth of the allegations reported. Such a form of journalism is a significant departure from the focus of Reynolds' "responsible journalism", which required adherence to a process of verification by reporters. Indeed, Lord Hobhouse's dicta in *Reynolds v Times Newspaper Ltd and others*[49] appears to lend credence to the rationale:

> "*No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed.*"

In summation, the distinction between the Reynolds privilege defence and reportage defence warrant a separate pleading and proof of each defence:

(a) analytically, different requirements are to be satisfied for the defence of reportage and the defence of Reynolds privilege. Therefore, they are distinctly different defences; and

(b) doctrinally, each defence is focused on different policies. Therefore, their focus and goals are distinct from each other.

The two defences may rightly be said to be mutually exclusive.

If one were to objectively examine the evidence at trial by reference to the witness statements of the Editor-in-chief of Mkini Dotcom Sdn Bhd and its journalist, the evidence under cross-examination and the contemporaneous documents, it would be evident that the conduct of the entire trial on the part of Mkini Dotcom Sdn Bhd and its journalist was premised on a defence of responsible journalism.

This is particularly telling when one were to, for instance, consider the cross-examination at the trial before the High Court of Mr. Steven Gan, Editor-in-Chief of Mkini Dotcom Sdn Bhd ("**DW-1**"), where the following admissions and/or concessions were made:

(a) a concession that no attempts were made to independently verify if the information in the Articles and Videos were true;

[49] [2001] 2 AC 127.

+603-2726 3700 +6032726 3733 cecilabraham.com

(b) a concession that no attempts were made to contact independent bodies such as the Department of Environment, the Department of Minerals and Geoscience or the Ministry of Health prior to publication of the Articles and Videos;

(c) an admission that as Editor-in-Chief, DW1 did not read the Articles and Videos before they were published;

(d) an admission that no attempts were made by Mkini Dotcom Sdn Bhd and its journalist to view any primary documents before publishing the Articles and Videos;

(e) an admission that at no time did by Mkini Dotcom Sdn Bhd and its journalist sight the so-called survey prepared by the ACG;

(f) an admission that Mkini Dotcom Sdn Bhd and its journalist did not direct their minds and have knowledge of what is true or not true in its Articles, as can be seen by reference to the 1st Article as an example;

(g) an admission that no attempts have been made to retract any of the Articles and Videos despite apologies being issued by both Wong Kin Hoong and Hue Fui How of the ACG; and

(h) an admission that Mkini Dotcom Sdn Bhd and its journalist were selective in the contents of the Articles and Videos, and as a result did not write balanced articles and gave prominence to the views of the ACG only.

Admissions of a similar nature were also obtained from the other journalists by way of cross-examination at trial.

As such, one can surmise that the foundation or pillar in support of the defence of reportage was not laid from an analytical and/or doctrinal perspective at trial by Mkini Dotcom Sdn Bhd and its journalist, whilst the premise for a successful defence of "responsible journalism" was simply not met on the facts and given the specific admissions made under cross-examination by Mkini Dotcom Sdn Bhd and its journalists.

Given the above, the conclusion of minority of the Federal Court that both the defence of reportage and responsible journalism had been properly made out is to be viewed with caution. Support for this is to be found if one were to compare the judicial analysis of the evidence undertaken in the majority judgment of the Federal Court at paragraphs 34 to 38, paragraphs 49 to 73 and paragraphs 77 to 89 with that of the minority judgment of the Federal Court at paragraphs 79 to 101.

(ii) <u>The need to expressly plead the defence of reportage</u>

On the requirement to have to expressly plead the defence of reportage, the majority of the Federal Court by reference to an earlier decision of the Federal Court in *<u>Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor</u>*[50] was of the view that parties are bound by their pleadings which applies

[50] [2015] 6 MLJ 449.

+603-2726 3700 +6032726 3733 cecilabraham.com

equally to pleading a cause of action in a claim or a defence. In fact, critically, the majority of the Federal Court went on to specifically state the following:

> *"[40] This is not to say that the appellants could not avail themselves of the defence of reportage. They could, but they must plead it: see also Lord McAlpine v Bercow [2013] EWHC 1342 (QB); [2013] All ER (D) 301 (May) where Tugendhat J said:*
>
> > *"[89] If the Defendant wished to avail herself of a public interest defence, such as Reynolds privilege or reportage, she would have had to plead it.*
> > *She has not done so."*
>
> *[41] No authority was cited by the appellants to support their contention that the defence of reportage is covered by the Reynolds defence of responsible journalism and therefore need not be pleaded. What is clear from the authorities cited by the appellants is that reportage is a special kind of responsible journalism but with 'distinctive features' of its own: see for example Al-Fagih v HH Saudi Research & Marketing (UK) Ltd [2001] EWCA Civ 1634; [2002] EMLR 215. In Gable, Ward LJ said that 'If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed'."*

To this end, the majority of the Federal Court held that the failure to expressly plead a defence of reportage was fatal.

The minority judgement of the Federal Court in contrast held that the general plea of qualified privilege as well as the general references to "*responsible journalism*", "*public interest*" and "*duty to publish the ongoing story*" were sufficient such that RAGM "*properly advised by its legal advisors, could not have been left in any doubt that the Reynold's defence of reportage was being pleaded especially when the terms 'public interest privilege' or 'responsible journalism' are used…*".[51]

Added to this, the attempt by the minority of the Federal Court to distinguish the decision of the Court of Appeal in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors*[52] is difficult to reconcile. In that case, the plea of reportage was not reflected in the defence filed before the High Court very much like in this instant appeal before the Federal Court. There was only a general plea of qualified privilege[53]. The relevant dicta of the Court of Appeal in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors*[54], is to be found in paragraph 15 of the judgment, which provides as follows:

> *"[15] With respect, in our judgment, the aforesaid pronouncements of Ward LJ are not an authority for the proposition contended by counsel for the respondents. We opine to this effect because the pronouncements of Ward LJ has its origins in the pronouncements of Lord Nicholls in the celebrated House of Lord's case of Reynolds v Times Newspapers Ltd and others where Lord Nicholls cited ten grounds which had to be taken into consideration when considering the defence of 'reportage', (see p 626 of the reported judgment of the court). That Ward LJ did not intend to depart from the*

[51] See paragraph 66 of the minority judgment of the Federal Court.
[52] [2012] 4 MLJ 191.
[53] [2012] 4 MLJ 191 at pg. 199 at paragraph 6.
[54] [2012] 4 MLJ 191 at pg. 202 to 203.

pronouncements of Lord Nicholls is evident from a careful examination of the passage concluding with the words 'Consequently responsible journalism did not require verification of the truth' (cited in para 14 above).

In other words, on the particular facts of this case, Ward LJ concluded that the ten grounds pronounced by Lord Nicholls had been satisfied notwithstanding that no verification had taken place. In this respect, it must be borne in mind that applying the criteria pronounced by Lord Nicholls, verification may not be necessary in cases of urgency and/or when no part of the article is adopted by the author and publisher of the article. ***On the particular facts of this case, with respect, we do not see the relevance of this submission of learned counsel for the respondents since the defence of 'reportage' was neither pleaded nor relied upon by the respondents. Furthermore, it was the finding of the learned trial judge that the defamatory article included allegation of facts without any source and this, in our judgment, amounted to an adoption of those facts by the respondents, a ground for denying the defence of 'reportage'."***

It appears that the minority in the Federal Court may not have properly appreciated the reasoning in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors*[55].

In the view of the authors, the decision of the majority of the Federal Court correctly sets out the law. Regard must be had to the manner in which Mkini Dotcom Sdn Bhd and its journalists, pleaded their defence of qualified privilege. Paragraphs 33 to 35 of the Amended Defence reads as follows:

"*F. Qualified Privilege*
33. Further and/or in the alternative, the Defendants contend that the impugned words and depictions in each of the Articles and Videos were published on occasion of qualified privilege. ***The Defendants contend that they honestly and reasonably believed the statements reported and published the impugned Articles and Videos to be true****.*

Particulars

33.1 *The* ***Defendants repeat paragraphs 2.1 to 33 above*** *including sub-paragraphs thereto.*

33.2 *The Articles and Videos published by the Defendants concern aspects of public interest as explained above.*

33.3 *The Defendants were under a duty to publish the Articles and Videos to its readership and subscribers which had a corresponding interest in receiving the same.*

34. *Further to the above, for the 3rd Article and 2nd Video, at no time did the Plaintiff seek to make any press statements through the Defendants. The Defendants contend that the Plaintiff[s] would have been afforded an opportunity to have their version of events published. The 1st and 4th Defendants had further sought the comment of one of the Plaintiff's directors, Andrew Kam, to no avail.*

[55] [2012] 4 MLJ 191 at pg. 202 to 203.

+603-2726 3700 +6032726 3733 cecilabraham.com

35. *Further and/or in the alternative,* ***the Defendants contend that the publication of the Articles and Videos was in furtherance of responsible journalism on the part of the Defendants****. In this regard, the subject of the Articles and the Videos were and still are matters of public interest which the Defendants were under a duty to publish.*"

Arising from the above, the following is to be noted:

(a) firstly, there is no express plea of reportage in the Amended Defence. This is not in dispute;

(b) secondly, is that the plea of common law qualified privilege in the Amended Defence is that Mkini Dotcom Sdn Bhd and its journalists, expressly state that they "*honestly and reasonably believe the statements in the Articles and Videos to be true*". As such, Mkini Dotcom Sdn Bhd and its journalists cannot dispute that they subscribed to the views of the ACG in publishing the said Articles and Videos. In this regard, a defence of reportage could not prevail;

(c) thirdly, is the reference in paragraphs 2.1 to 33 of the Defence with particular regard to paragraphs 11, 11.1 to 11.5, 16, 16.1 to 16.5. 22, 22.1 to 22. 2, 26, 26.1 to 26.3, 31 and 31.1 of the said Amended Defence, which relate specifically to the particulars of fair comment which is a defence predicated on the truth of facts relied on in the publication of an article. This again does not support and conflicts with a defence of reportage; and

(d) lastly, is that Mkini Dotcom Sdn Bhd was cognisant of the need to expressly plead the defence of reportage having done sone in another libel claim by way of Kuala Lumpur High Court Civil Suit No. 23NCVC-53-06/2013 involving *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli & Anor*. At paragraphs 7.6 to 7.9 of the defence filed in that action, Mkini Dotcom Sdn Bhd expressly pleaded the defence of reportage in contrast to the position in the dispute with RAGM.

Simply put, the majority of the Federal Court properly appreciated (i) the law, (ii) the pleadings, (iii) the conduct of Mkini Dotcom Sdn Bhd and its journalists, and (iv) the evidence in this instant dispute. In contrast, the reasoning of the minority of the Federal Court in support of its conclusion that the defence of reportage is properly pleaded is difficult to appreciate. The minority judgment appears to have failed to properly appreciate the critical factors listed above and in the view of the authors seek to place an unfair burden on RAGM in having to "*guess*" or "*predict*" the pleaded defence of Mkini Dotcom Sdn Bhd and its journalist, given (i) the wording of paragraphs 33 to 36 of the Amended Defence, and (ii) that the arguments relating to the alleged defence of reportage were only raised for the very first time in closing written submissions after the conclusion of the evidential aspects of the trial before the High Court.

In the context of an adversarial legal system, the reasoning of the minority of the Federal Court at paragraphs 66 to 68 of its judgment is of concern. In an adversarial common law system, the onus is not on the opposing party to address arguments or defences that a party has elected not to plead. This notion or practice to adopt the words of the minority judgment of the Federal Court is a "*position that obtains accords with the adversarial tradition that underpins litigation in the common law world.*"[56] In the

[56] See paragraph 26 of the minority judgment of the Federal Court.

+603-2726 3700 +6032726 3733 cecilabraham.com

respectful view of the authors the minority of the Federal Court's reasoning in finding that the failure to expressly plead the defence of reportage is plainly wrong and at odds with established law[57].

(iii) The right of a company in liquidation to claim damages

In the view of the authors, the judicial pronouncement of the majority of the Federal Court at is not uncontroversial[58]. The majority judgment of the Federal Court followed established jurisprudence in that it recognised that the fact that:

(a) firstly, damages are assessed from the date of cause of action; and

(b) secondly, goodwill is capable of existing in an insolvent company and in addition, both damages for loss of goodwill and vindication of reputation can be awarded to the company.

In this regard, the majority of the Federal Court corresponds with the decisions in *Harry Isaacs & Ors v Berita Harian Sdn Bhd*[59] [2012] 4 MLJ, *South Hetton Coal Co Ltd v North-Eastern News Association Ltd*[60] [1894] 1 QB and *Jameel and another v Wall Street Journal Europe Sprl*[61].

CONCLUSION

In conclusion, in the context of defamation claims, the significance of the decision of the Federal Court as a whole, in ***Mkini Dotcom v RAGM*** is threefold:

(a) the importance of understanding one's claim and likely defences by reference to a libel claim from the very outset is paramount. It is critical that the possible pleas by way of a defence to claim in libel are properly ascertained at the initial stages before taking active steps to run a defence of (i) justification, (ii) qualified privilege by reference to responsible journalism or alternatively a distinct plea of reportage, and (iii) fair comment, in so far as media publications are concerned;

(b) the importance of properly pleading a claim and an appropriate defence cannot be over emphasised. Despite the considerable judicial analysis undertaken at all three levels, namely, the High Court, Court of Appeal and Federal Court, the essence of the dispute in ***Mkini Dotcom v RAGM*** was simply one of pleadings, more so the defective nature of the pleaded defence filed by Mkini Dotcom Sdn Bhd and its journalist; and

(c) in an ever-evolving world where much of the aspects of daily life and in this instant the need to have news made available at an immediate instance, the Courts in Malaysia will not permit inaccurate news, falsehoods and untruths to be published to feed to the modern-day public frenzy for sensationalism. In this regard, the majority of the Federal Court and the Court of Appeal have sent

[57] See the decisions of the Federal Court in *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; *RHB Bank Bhd v Kwan Chew Holdings* [2010] 1 CLJ 665; *Tan Ah Tong v Parveen Kaur* [2011] 5 MLJ 428; *Dato Tan Chin Woh v Dato Yalumallai v Muthusamy* [2016] 8 CLJ 293.
[58] See paragraphs 93 to 95 of the majority judgment of the Federal Court.
[59] [2012] 4 MLJ 191.
[60] [1894] 1 QB 133 at pg. 145.
[61] [2006] 4 All ER 1279 at paragraphs 119 to 122.

+603-2726 3700 +6032726 3733 cecilabraham.com

a clear message that in modern day Malaysia, notwithstanding that the country is a plural democracy the public duty imposed on the media in communicating accurate and truthful news is paramount.

In the view of the authors, Baroness Hale of Richmond in *Jameel and another v Wall Street Journal Europe Sprl*[62] stated it best, when Her Ladyship held that:

> "[147] ***This does not mean a free-for-all to publish without being damned. The public only have a right to be told if two conditions are fulfilled. First, there must [be] a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information which interests the public—the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it. It is also different from the test suggested by Mr Robertson QC, on behalf of the Wall Street Journal Europe, of whether the information is 'newsworthy'. That is too subjective a test, based on the target audience, inclinations and interests of the particular publication. There must be some real public interest in having this information in the public domain. But this is less than a test that the public 'need to know', which would be far too limited.***
>
> …
>
> …
>
> *[149] Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. But one would normally expect that the source or sources were ones which the publisher had good reason to think reliable, that the publisher himself believed the information to be true, and that he had done what he could to check it.* ***We are frequently told that 'fact checking' has gone out of fashion with the media. But a publisher who is to avoid the risk of liability if the information cannot later be proved to be true would be well advised to do it. Part of this is, of course, taking reasonable steps to contact the people named for their comments. The requirements in 'reportage' cases, where the publisher is simply reporting what others have said, may be rather different, but if the publisher does not himself believe the information to be true, he would be well advised to make this clear.*** *In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on.*"

Ultimately, it is imperative that a balanced and objective approach to the publication of news, be it online or in the broadsheets, is adopted for the right of freedom of expression as truly envisaged under Article 10 of the Malaysian Federal Constitution to be properly preserved for all.

[62] [2006] 4 All ER 1279 at pg. 1321 to 1322.

+603-2726 3700 +6032726 3733 cecilabraham.com

CONTACTS

Tan Sri Dato' Cecil W. M. Abraham

SENIOR PARTNER
cecil@cecilabraham.com

Dato' Sunil Abraham

PARTNER
sunil@cecilabraham.com

Noor Muzalifah Binti Shabudin

ASSOCIATE
muzalifah@cecilabraham.com

Anne Sangeetha Sebastian

ASSOCIATE
sangeetha@cecilabraham.com