

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA
PERMOHONAN SIVIL NO. 08(L)-4-06/2020(W)

Dalam perkara komen-komen dalam suatu artikel bertajuk *CJ orders all courts to be fully operational from July 1*

Dan

Dalam perkara suatu permohonan minta kebenaran untuk memulakan prosiding komital kerana menghina Mahkamah selaras dengan Perkara 126 Perlembagaan Persekutuan dan Aturan 52 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara mengenai Seksyen 13 Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara mengenai Kaedah 3 Kaedah-Kaedah Mahkamah Persekutuan 1995

Dan

Dalam perkara Aturan 92 Kaedah-Kaedah Mahkamah 2012

PEGUAM NEGARA MALAYSIA

... PEMOHON

DAN

1. MKINI DOTCOM SDN BHD (No Syarikat: 489718-U)

2. KETUA EDITOR, MALAYSIAKINI

... RESPONDEN-RESPONDEN

SUPPLEMENTARY NOTE

1. This supplementary note is intended to address the decision of the European Court of Human Rights (“ECHR”) in *Delfi AS v Estonia (Application No. 64569/09)* (“Delfi”).
2. The said decision was served by counsel for the Applicant on the counsel for the Respondents during the hearing of Enclosure 19 on 13.07.2020.
3. For ease of reference, the Respondents adopts all abbreviations and definitions used in the “Respondents’ Written Submission (Revised) (Enclosure 19)” (the “**Respondents’ Submission**”).
4. The ECHR decision in *Delfi* was focused on whether the decision of the Estonian Supreme Court was consistent with Article 10 of the European Convention of Human Rights, which guarantees the freedom of expression.¹
 - 4.1. The Estonian Supreme Court found that the Applicant, who runs the internet news portal called Delfi, was a publisher within the meaning of Section 1047(1) of the Estonian Obligations Act. That section provides:

“Section 1047 – Unlawfulness of disclosure of incorrect information

*“(1) A breach of personality rights or interference with the economic or professional activities of a person **by way of disclosure [avaldamine] of incorrect information, or by way of incomplete or misleading disclosure of information***

¹ The ECHR decision in *Delfi*, para 127

concerning the person or the person's activities, is unlawful unless the person who discloses such information proves that, at the time of such disclosure, he or she was not aware and was not required to be aware that such information was incorrect or incomplete.

4.2. The ECHR limited its consideration to whether the application of the said section was consistent with Article 10 of the European Convention of Human Rights. No issue was taken with the provisions in the Estonian Obligations Act. It is not for the ECHR to “*express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field*”.²

4.3. The Estonian Supreme Court found the Applicant to be the publisher within the meaning of section 1047(1) on the basis of the word “disclosure” in the said section.³ The court found the Applicant to be liable for **defamation**.

4.4. The majority of the ECHR concluded that the Applicant ought to have known it would be held liable under section 1047(1) and therefore there was no breach of Article 10 of the European Convention of Human Rights. The court noted, at para 129:

129. The Court accordingly finds that, as a professional publisher, the applicant company should have been familiar with the legislation and case-law, and could also have sought legal advice. The Court observes in this context that the Delfi news portal is one of the largest in Estonia. Public concern had already been expressed before the publication of the comments in

² Ibid, para 127

³ Ibid, para 31

*the present case and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages (see paragraph 15 above). **Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was “prescribed by law” within the meaning of the second paragraph of Article 10 of the Convention.***

- 4.5. The ECHR’s observation that the Applicant “*exercised a substantial degree of control over the comments published on its portal*” must be understood in light of section 1047(1).⁴
- 4.6. The ECHR found that **had** the Applicant in that case removed the comments in question without delay, it could have escaped liability under the Obligations Act. In this case, it took the Applicant 6 weeks to remove the said comments.⁵
- 4.7. In Malaysia, the relevant local law, that is the Code made under the CMA, prohibits censorship of online content. It further expressly states that there is no requirement to monitor the activities of third party users.⁶

⁴ Ibid, see paras 144-146. This was on the basis that: first, the Applicant in that case actively calls for comments on its articles; second, the Applicant in that case had an economic interest in the posting of comments; and third, the actual authors could not edit or delete their comments once posted. This is not the case with the On-Line News Portal. It does not actively call for comments. It does not have a direct economic interest in the posting of comments. The commenter can edit comments within 5 minutes of posting them and can delete them at any point in time.

⁵ Ibid, para 153. This was not the case here. The 1st Respondent removed the Comments within 3 days.

⁶ See Part II(C)(iii) of the Respondents’ Submission

5. It is respectfully submitted that the ECHR decision in *Delfi* is therefore of limited assistance.

Dated this 11th day of August 2020



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