Tarikh Bicara: 02.07.2020

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**

RESPONDENTS' WRITTEN SUBMISSION

(ENCLOSURE 22)

I Introduction

1. By an order dated 17.06.2020 this Honourable Court had granted the Applicant leave to commence committal proceedings against the Respondent pursuant to Order 52 rule 3(1), Rules of Court 2012[1] (the "**ROC**") (the "**Leave Order**"). The Leave Order was made on an *ex parte* basis.

2. The Respondents have applied to set aside that order by way of Enclosure 22.

3. This submission outlines the arguments of counsel for the Respondents in respect of Enclosure 22.

II Subject of committal proceedings

4. The 1st Respondent manages an on-line news portal called "Malaysiakini" which operates at www.malaysiakini.com (the "**On-Line News Portal**"). Launched in 1999, it currently has approximately 8 million unique visitors each month and 25,000 online subscribers.[2]

5. As is the common practice for such on-line news portals, third parties, readers and subscribers can leave comments on articles that are published.

6. The subject of the intended committal proceedings is certain third-party comments (the "**Comments**") that were uploaded with respect to an article the On-Line News Portal published on 09.06.2020 which was entitled "CJ order all courts to be fully operational from July 1" (the "**Article**").

7. The Comments have been identified in paragraph 7 of the Statement pursuant to Order 52 rule 3(2), (the "**O.52 Statement**").

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[1] Respondents' Bundle of Authorities ("**RBOA**"), tab 5
[2] Affidavit in Support of Enclosure 22 affirmed on 24.06.2020 ("**AIS"**), paragraph 8

8. The case against the Respondents that the Applicant has framed in the O.52 Statement is grounded on the primary contention that the Respondents had allowed and/or facilitated the publication of the Comments ("*membenarkan siaran*", paragraph 7; "*memudahkan siaran*", paragraph 10). This contention is grounded on the assertion that the Respondents could be assumed to be the publisher ("*dianggapkan menyiarkan*", paragraph 10).

9. Though denying that they are culpable for the reasons that are the basis of Enclosure 22 and their respective affidavits on the merits, the Respondents nonetheless accept that the Comments are offensive and inappropriate. They have thus tendered an unreserved apology for having unwittingly allowed for the airing of the Comments in paragraph 5 of their affidavit. That apology is stated in the following terms:

"*The Respondents regret the tone and tenor of the Comments and unreservedly apologises to this Honourable Court and the Judiciary as a whole for having unwittingly allowed for their airing. Neither of us had any intention of scandalizing or undermining the Judiciary in any manner whatsoever.*"

III The issues underlying Enclosure 22

10. There are however several threshold issues that are fundamental to the Applicant being entitled to proceed against the Respondents for contempt on the case the Applicant has framed.

A. Publication contempt

11. Central to these is the question of whether the Respondents can be said to be responsible in law for the publication of the comments.

12. This is critical as the acts said to be contemptuous fall within that type of contempt referred to as "publication contempt". Furthermore, the contemptuous acts

complained fall into the category of "scandalizing the court" contempt. This is separate and distinct from "sub-judice" contempt.[3]

13. Scandalizing the court is a species of criminal contempt. In ***PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener) [2019] 4 MLJ 747***[4], this Honourable Court, in a joint judgment by Ramly Ali, Azahar Mohamed, Rohana Yusuf, Tengku Maimun and Nallini Pathmanathan FCJJ said, at p.767:

"*[50] The common law position on contempt of court has been elaborated by Lord Morris in the Privy Council in the case of McLeod v St Aubyn [1899] AC 549 as follows:*

> *Committals for of court are ordinarily in cases where some contempt ex facie of the court has been committed, or for comments on cases pending in the courts.* ***However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke so lays down without doubt in the case of In re Read & Huggonson [1742]. He says, 'One kind of contempt is scandalising the court itself'.*** *The power summarily to commit for contempt of court is considered necessary for the proper administration of justice.*"

14. Ramly Ali, Azahar Mohamed, Rohana Yusuf, Tengku Maimun and Nallini Pathmanathan FCJJ had further stated, at paragraph 55, that the test was:

"*[W]hether, having regard to the facts and the context of the publication, the impugned statements pose a real risk of undermining public confidence in the administration of justice?*"

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[3] See ***Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors [2020] 2 MLJ 259***, paragraph 25(b) (RBOA, tab 8)
[4] RBOA, tab 7

15. The applicable standard of proof is the criminal standard of beyond reasonable doubt.

B. The elements that must be proven

16. For this type of contempt to be, the Applicant must prove:

16.1. *Actus reus* – the publication of the Comments was the act of the Respondents, or either of them; and

16.2. *Mens rea* – the Respondents intended to scandalize the court in publishing the Comments.

C. The mental element

17. With respect to *mens rea*, it appears that the Applicant does not consider it to be material. This is suggested by the way in which the two key contentions have been framed and the reliance on section 114A, Evidence Act 1950[5] ("**EA**").

18. Further, during the hearing of the application for leave (the "**Leave Application**"), learned counsel for the Applicant relied on the decision of the Court of Appeal in ***Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 321***[6] to advance the proposition that intention was immaterial. There, Ahmad Fairuz and Denis Ong JJCA said, at p.336:

"*Merits— mens rea*

As to the issue of whether mens rea is a necessary ingredient of contempt, I need only to refer to Reg v Odham Press Ltd & Ors; ex p Attorney-General [1957] 1 QB 73 at p 74 wherein Lord Goddard CJ, after examining the cases of Re William Thomas

[5] RBOA, tab 3
[6] RBOA, tab 9

Shipping Co Ltd [1930] 2 Ch 368; Roach v Garvan (1742) 2 Alk 469 and Ex parte Jones (1806) 13 Ves 237 said at p 80:

> ***<u>These cases clearly show that lack of intention or knowledge is no excuse</u>**, though it may have a great bearing on the punishment which the court will inflict and, in our opinion, they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognizance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know that the matter was defamatory and had no intention to defame.*

Obviously, therefore, the appellant's contention on this issue is without merit."

19. Respectfully, the proposition advanced by learned counsel for the Applicant is not correct. ***Murray Hiebert (supra)*** concerned sub-judice comments. There the contemptuous publication – an article in the Far Eastern Economic Review – concerned on-going legal proceedings. The article suggested that "*th[e] High Court was not fair and as a result, had helped the plaintiff by giving an early hearing date for the civil suit because his father is a judge of the Court of Appeal*"[7] and in the upshot "*had surreptitiously portrayed a picture that the whole proceedings in the civil suit had been short-circuited in order to accommodate a judge of the Court of Appeal*"[8].

20. The case at hand concerns scandalizing contempt. Intention must be proven.

21. This was made by clear by this Honourable Court in ***Leap Modulation (supra)***[9] where it was concluded, at p.770:

[7] ***Murray Hiebert (supra)***, p.336, RBOA, tab 9
[8] ***Murray Hiebert (supra)***, p.337, RBOA, tab 9
[9] RBOA, tab 7

"*[61]* ***The only requirement is that the publication of the impugned articles is intentional.*** *It is not necessary to prove an intention to undermine public confidence in the administration of justice or the Judiciary. It does not matter whether the author or the publishers intended the result. It follows therefore, that it is no defence for the author of such impugned statements to claim that he did not know that the statements would have the effect of undermining public confidence or that he did not intend to erode public confidence in the administration of justice.*"

22. In ***McLeod v St Aubyn [1899] AC 549***[10], which was cited with approval by this court in ***Leap Modulation (supra)***, the Privy Council made it clear that a person cannot be held liable for contempt if he had no knowledge of the contemptuous statements. Lord Morris said, at p.561:

"*The appellant was not alleged to be the writer or author of the article or letter in the Federalist of March 31. He was not the printer or publisher of the newspaper. He was a mere agent and correspondent of it at St. Vincent.* ***On the evidence it must be assumed that he innocently, and without any knowledge of the contents, handed under the circumstances he stated the copy of the newspaper to Mr. Wilson. It would be extraordinary if every person who innocently handed over a newspaper or lent one to a friend, with no knowledge of its containing anything objectionable, could be thereby constructively but necessarily guilty of a contempt of a Court because the said newspaper happened to contain scandalous matter reflecting on the Court. The respondent arrived at the conclusion that the appellant was guilty of negligence in not making himself acquainted with the contents of the newspaper before the handing of it to Mr. Wilson. This assumes there was some duty on the appellant to have so made himself acquainted. That is a proposition which cannot be upheld. A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.*** *Their Lordships are of opinion the appellant was not under the circumstances of this case guilty of a contempt of Court. Their Lordships are also of*

[10] RBOA, tab 25

opinion the apology offered by the appellant before his committal contains sufficient to have called on the respondent to stay his hand. It is an unconditional expression of regret for the act for which he was arraigned."

23. A summary of the main legal principles applicable to the determination of whether a party such as the 1st Respondent is to be treated as being legally responsible for publications of third-party comments is set out in **Annexure A** to this submission. Those principles are adopted herein.

D. Not publishers of the Comments

24. Given the principles summarised in **Annexure A**, and having regard to the factual matrix of this case, it is the Respondents' position that they could not be reasonably viewed in law as having published the Comments or having intended to publish the same.

25. These principals clearly establish the need for the Applicant to prove a direct involvement on the part of the Respondents. Mere facilitation in the sense of providing a platform for on-line comments is insufficient.

26. If this legal position is correct, then it would not be appropriate for this Honourable Court to proceed with the committal proceedings. The necessary elements could not be established.

E. Other issues

27. Additionally, there are several other issues of importance. Amongst other things, these pertain to the jurisdiction of this Honourable Court.

IV The factual matrix

A. The context

28. The freedom to comment is a significant feature of online media as it allows for discussions about topical matters of public interest. The traditional purpose of the press, which is still an important objective, has been disseminating information and generating public discussion on matters of public interest. This allows for readers to develop informed views, or opinions, on such matters.

29. These twin objectives are equally important to news presented in a digital format. Readership preference has caused a shift to such a format as is demonstrated by the fact that all major newspapers have an on-line presence.

30. These twin objectives are crucial to the freedom of expression which, in turn, is a cornerstone of any democratic society. It is for this reason that the press has come to be known as the Fourth Estate.

31. These twin objectives can only be achieved through a free and frank discussion about such matters. Such discussions are protected by the constitutional guarantee of the freedom of expression. For this reason, such discussions are as important as the news itself and is an essential dimension of any such on-line news portal.

32. The principles above have been judicially recognized by the courts in Malaysia. In ***Public Prosecutor v Pung Chen Choon [1994] 1 MLJ 566***[11], Edgar Joseph Jr SCJ said, at p.581:

"*Moreover, if counsel for the accused is correct in his contentions regarding question 4, it would be a complete answer to the charge under s 8A(1) of the Act because, in the words of Patanjali Sastri J (as he then was) in Brij Bhusan v State of Delhi24 at p 134 para 25:*

> ***There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential***

[11] RBOA, tab 10

part of the right of freedom of speech and expression declared under art 19(1)(a). [Equivalent to our art 10(1)(a).]

As pointed out by Blackstone in IV Commentaries at pp 151 and 152:

'the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the press.'"

33. The right to receive information is protected under Article 10(1)(a), Federal Constitution[12]. In ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333***[13], this Honourable Court, per Gopal Sri Ram FCJ (as he then was) said, at p.344:

"***The right to be derived from the express protection is the right to receive information, which is equally guaranteed****. See Secretary, Ministry of Information and Broadcasting, Government of India v Cricket Association of Bengal AIR 1995 SC 1236.*"

34. In ***Siti Sakinah bt Meor Omar Baki v Zamihan Mat Zin & Anor [2017] MLJU 1811***[14], the role of the press as being, in effect, the Fourth Estate was acknowledged. Relying on the decision of Zawawi Salleh J (as he then was) in ***Sivabalan all P Asapathy v The News Straits Time Press (M) Bhd [2010] MLJU 483***[15], Wan Ahmad Farid JC said:

"*[43]* ***Our society must by now learn to accept that the press, known as the fourth estate, has a role to play in democratic Malaysia. I accept that the media***

[12] RBOA, tab 1
[13] RBOA, tab 11
[14] RBOA, tab 12
[15] RBOA, tab 13

has a role and even duty in the dissemination of news that is of public interest and concern*, for so long as it is exercised responsibly, as in the instant case. In Sivabalan all P Asapathy v The News Straits Time Press (M) Bhd [2010] MLJU 483 Mohd Zawawi Salleh J (now JCA) had made the following remarks:*

> *The Reynold's privilege represents a reasonable and proportionate response to the need to p rated reputation* ***while sustaining the public exchange of information that is vital to modern Malaysian society****."*

35. Both the Respondents take the role of the press seriously and are committed to the ideals of the same. This commitment has been acknowledged by the awards they have been given.[16]

B. The posting of comments

36. Having regard to the foregoing, third-party online subscribers have been allowed to publish comments on news reports posted on the On-line News Portal since August 2009.[17]

37. It currently receives about 2000 comments each day.[18]

38. It is critical that the neither of the Respondents play a role in the posting of comments.

39. Only third-party online subscribers who are registered are permitted to post comments. They are cautioned at the time of the posting and comments and must agree to terms and conditions for posting before they can comment. This is achieved by the display of a caution on the On-line News Portal which briefly

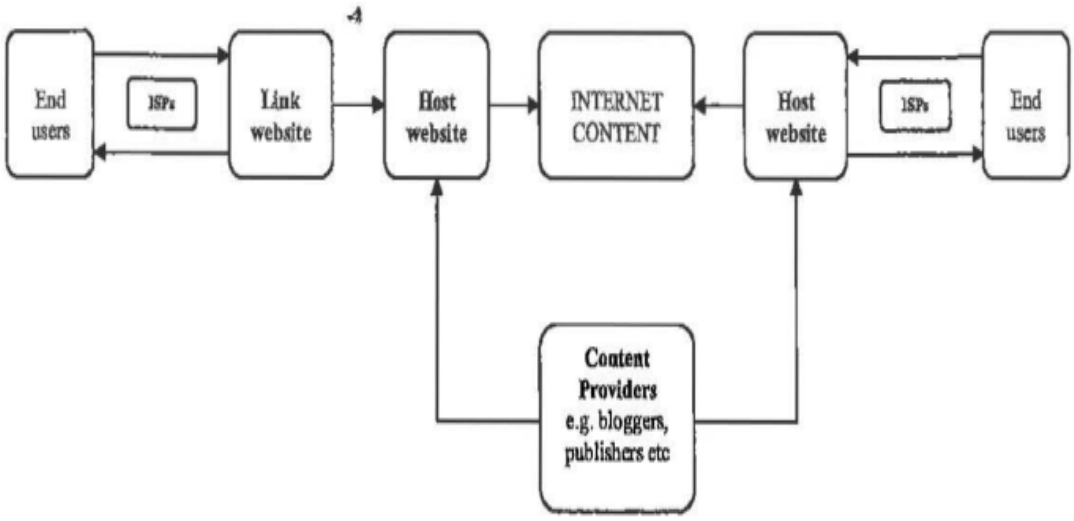
[16] See Exhibit SG-2 of the AIS
[17] AIS, paragraph 9
[18] AIS, paragraph 14

summarizes the applicable terms and conditions. It also provides a link to the full terms and conditions.[19] One of the terms provide[20]:

"*We do not assume responsibility for materials contained in postings, but we do reserve the right to remove or modify such materials at our sole discretion for any reason.*"

40. The Applicant has not shown that the Respondents, or either of them, were directly involved in the posting of the Comments.

41. The flow of information on electronic media (generally) can be usefully summarized in the following manner[21]:



C. The take down policy

42. Due to the volume of such comments, it is not possible for the 1st Respondent to directly moderate comments. A peer reporting process is thus relied on. This entails other users or readers of the On-line News Portal reporting offending

[19] AIS, paragraph 15
[20] AIS, Exhibit SG-3
[21] Professor Ian Cram, *Borrie & Lowe: The Law of Contempt* (4th edn, 2010), p.615, RBOA, tab 36

comments. Upon the receipt of such a report, an editor will immediately examine the report and determine if the said comment should be removed. This is why the term stated above reserves the 1st Respondent's right to remove or modify at its discretion. This ensures that the 1st Respondent's take down policy can be implemented.[22]

43. The On-line News Portal also has a filter program which disallows the use of certain foul words. If such words are used, the commentator would not be allowed to post the comment.

44. Most of the major publishers internationally and nationally adopt the approach outlined above.

D. Moderation not required by law

45. **Annexure A** explains why mere facilitation is insufficient to find hosts of on-line platforms culpable for third-party comments.

46. Furthermore, there is no requirement in law for the On-Line News Portal to moderate comments prior to their being posted. News portals cannot be expected to moderate all contents published by third parties. Furthermore, this allows for on-line news portals to protect themselves from liability. In ***Tamiz v Google Inc [2013] 1 WLR 2151***[23], Richards LJ said, at pp.2161-2162:

"*24 By the Blogger service Google Inc provides a platform for blogs, together with design tools and, if required, a URL; it also provides a related service to enable the display of remunerative advertisements on a blog.* ***It makes the Blogger service available on terms of its own choice and it can readily remove or block access to any blog that does not comply with those terms (a point of distinction with the search engine under consideration in the Metropolitan International Schools Ltd case [2011] 1 WLR 1743, as the judge himself noted in that case).***

[22] AIS, paragraph 16
[23] RBOA, tab 26

<u>As a matter of corporate policy and no doubt also for reasons of practicality, it does not seek to exercise prior control over the content of blogs or comments posted on them, but it defines the limits of permitted content and it has the power and capability to remove or block access to offending material to which its attention is drawn.</u>"

E. The Article

47. The Article was published on 09.06.2020. It concerned a statement by the Chief Justice on courts being fully operational from 01.07.2020. It essentially reproduced parts of the statement made by the Chief Justice.[24]

48. On 12.06.2020, the police contacted the Executive Director of the 1st Respondent, Mr R.K. Anand, at about 12.45pm and informed him that the police are investigating certain comments on the Article on the On-line News Portal.[25]

49. This prompted the editorial team to immediately review the comments on the Article at about 12.50pm on the same day. Prior to this, it had not been aware of any offensive comments having been made as no report had been made by a user or reader. It was only then that the editorial team became aware of the Comments[26].

50. These, and other comments, were then removed at about 12.57pm on the same day.[27]

51. The Comments were thus taken down within approximately 12 minutes from the time Mr R.K. Anand was alerted by the police.

[24] AIS, paragraph 20
[25] AIS, paragraph 21
[26] AIS, paragraph 22
[27] AIS, paragraph 23

52. On 25.06.2020, the 1st Respondent provided the details of the commenters (who published the Comments) to both the Malaysian Communications and Multimedia Commission and the police.

F. The committal proceedings

53. On 16.06.2020, the Respondents became aware that the Applicant had filed the Leave Application.[28]

54. The Respondents instructed their solicitors to write a letter to the Applicant requesting that the Applicant reconsider initiating contempt proceedings given the facts stated above. The said letter was sent via e-mail at around 6pm on 16.06.2020. In brief, it explained that the Respondents were not aware of the Comments and removed them as soon as it came to their attention.[29]

55. The Applicant had received and considered the contents of the said letter. Notwithstanding, the Applicant had pursued the Leave Application. This Honourable Court was not made aware of the contents of the said letter.[30]

56. The Leave Order was then made.

57. The Respondents were served (by hand) with the Notice of Motion dated 18.06.2020, the Leave Order, the O.52 Statement and the Affidavit pursuant to Order 52, Rule 3(2), ROC (collectively the "**Committal Application**") on 23.06.2020.[31]

G. Necessary factual conclusions

[28] AIS, paragraph 26
[29] AIS, Exhibit SG-6
[30] AIS, paragraph 26.2
[31] AIS, Exhibit SG-7

58. It is respectfully submitted that having regard to the material before this Honourable Court, it is beyond dispute that:

58.1. Neither of the Respondents authored the Comments;

58.2. Neither of the Respondents were involved in the posting of the Comments;

58.3. Neither of the Respondents have been shown to have been actually aware that the Comments had been posted;

58.4. The 1st Respondent was made aware of the Comments at about 12.45pm on 12.06.2020 through its Executive Director, Mr R.K. Anand;

58.5. The Comments were taken down at on the same day at 12.57pm. From the time the 1st Respondent became aware of the Comments, it took only about 12 minutes for the Comments to be taken down; and

58.6. The 2nd Respondent was not involved in this process.

V The publication issue

59. It is respectfully submitted that having regard to the factual conclusions above, the Applicant is unable to establish the elements of the alleged contempt.

VI Basis to set aside the Leave Order

A. No prima facie case disclosed

(i) The legal principles applicable to statements under Order 52 rule 3(2), ROC

60. It was necessary for the Applicant to show a prima facie case for contempt based on the O.52 Statement during the Leave Application.[32]

61. The O.52 Statement plays a critical role in the determination of whether leave should be granted.[33]

62. The statement must be made with sufficiently particularity to enable the person alleged to be in contempt to meet the charge. In ***Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112***[34], K C Vohrah J said, at p.114:

"*In a recent Court of Appeal case Harmsworth v Harmsworth [1987] 3 All ER 816 Nicholls LJ at p 821 referred to the above passage and* ***stressed the need for certain basic information, enough information with sufficiently particularly, to appear within the notice of motion (including any addendum forming part of the notice) to enable the person alleged to be in contempt to meet the charge****. His Lordship also underscored the principle that deficiencies in the notice of motion cannot be regarded as cured by reason of references in the notice of motion to affidavits attached to or accompanying the notice. His Lordship said:*

> *So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. As I read the rules of court and as I understand the decision in the Chiltern case the rules require that the*

[32] See ***Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors [2015] MLJU 1144***, paragraph 24, RBOA, tab 14
[33] Ibid, paragraph 30
[34] RBOA, tab 15

notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. ***From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A fortiori, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from a historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place****.*

I do not think, therefore, that if there are deficiencies in the notice issued on 22 June, these deficiencies should be regarded as having been cured by reason of the references in para 1 to the affidavit attached to the notice and in para 2, to the affidavit accompanying the notice."

63. The alleged act of contempt must be adequately described and particularized in detail in the O.52 Statement. In ***Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458***[35], Arifin Zakaria CJ said, at p.470:

"*[37]* ***We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it****. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself.*"

64. Thus, the O.52 Statement must set out all relevant facts, including facts that are likely to be raised by the proposed alleged contemnor in objecting to the

[35] RBOA, tab 16

application if it were an *inter partes* application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. In ***Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang [2013] 5 MLJ 541***, Abdul Wahab Patail JCA said:

"*[15] It must also be borne in mind that the application for leave to commence committal proceedings is made ex parte.* ***To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an ex parte application, it means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemner in objecting to the application if it were an interparte application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for after all only the applicant has the opportunity to be heard upon it in the ex parte application. It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily becomes a tool exploited for oppression.***"

(ii) *The O.52 Statement does not disclose a prima facie case of contempt*

65. It is respectfully submitted that the O.52 Statement does not disclose a prima facie case. In this regard, the Applicant's pleaded case is that the Respondents are to be treated in law as being culpable merely for the fact that the Comments appeared on the On-Line News Portal.

66. For the reasons explained above, and in **Annexure A**, this is not sufficient basis in law and fact for a charge of scandalizing the court.

67. To succeed, the Applicant must have stated that the Respondents had intentionally allowed for the publication of the Comments or having maintained the Comments

on the On-Line News Portal despite being aware of them, thereby having assumed responsibility for the same.

68. This is however not the case the Applicant has mounted. This is apparent from the O.52 Statement.

69. On this ground alone, the Leave Order should be set aside.

(iii) <u>*Reliance on s.114A, EA 1950 is misconceived*</u>

70. The Applicant seeks to rely on s. 114A, EA 1950. It is respectfully submitted that such reliance is misconceived.

71. That section provides:[36]

"(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved."

72. As noted above, the Applicant contends that the Respondents had facilitated the publication of the Comments. In the sense used, it suggests that the Respondents

[36] RBOA, tab 3

had intentionally aided or assisted in the posting of the Comments, which is wholly unsupported. In ***R v Mahendra [2011] NTSC 57***[37], Blokland J said:

"*[20] Argument was also directed to the meaning of "facilitates". Counsel for the accused argued that the broad meaning given to the expression "facilitates", particularly when that occurred prior to arriving in Australia would mean there was no work to do for an offence of "attempt" to facilitate the bringing of persons to Australia. It is not unheard of that some offences are defined in a way that would exclude any possibility of charging "attempts".11* ***I was referred to previous directions given in this court12 stating "facilitated" means "made easy, aided or assisted". "Facilitate" may be constituted by a broad range of aiding or assistance. An example is given in R v Singh13 albeit in a different context, where the "facilitating" occurred by assistance given to the prohibited persons after the point of entry into the United Kingdom. The opposite point was taken in that case to the issue here; that acts of assistance could not constitute the offending when they took place after entry. The Macquarie Dictionary definition of "facilitate" accords with meaning given in previous cases discussed:14 "to make easier or less difficult; help forward (an action, a process, etc); to assist the progress (of a person)***"

73. No particulars have been given of how the Respondents had facilitated the publishing of the Comments other than the fact that the Comments appeared on the On-Line News Portal. As explained above, this is insufficient in law.

(iv) *The objective facts undermine any suggestion of contempt*

74. It is not in dispute that the Respondents did not author the Comments. The Applicant does not contend that the Respondents had knowledge of the Comments but chose to not take them down within a reasonable period of time.

[37] RBOA, tab 27

75. The objective facts show otherwise, the 1st Respondent moved speedily to remove the Comments when made aware of the same. The Applicant was made aware of this by way of the Respondents' solicitors' letter dated 16.06.2020 which was received prior to the hearing of the Leave Application.

B. Order 52, rule 2B, ROC not complied with

76. Order 52 is framed to allow for a proposed contemnor to explain itself prior to an application for leave is made. The relevant rules make this a mandatory pre-requisite for contempt proceedings other than those pertaining to contempt in the face of the court (for which, provision is made in Order 52 rule 2A).

77. Order 52, rule 2B, ROC provides:[38]

"*2B. Other cases of contempt (O. 52 r. 2B)*

In all other cases of contempt of Court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally."

78. The Leave Application was not made with respect to a contempt in the face of the court. The Applicant had sought leave pursuant to Order 52 rule 3.

79. Thus, the issuance of a formal show cause notice was required. This question has been settled by two decisions of the Court of Appeal. In ***Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors [2020] 2 MLJ 259***[39], Vazeer Alam JCA said:

"*[26] Having regard to the above, since the present motion for contempt by the appellant was party initiated, whether it be categorised as civil or criminal contempt,* ***it was entirely correct for the learned High Court judge to have held***

[38] RBOA, tab 5
[39] RBOA, tab 8

that the procedural requirements under O 52 of the Rules of Court 2012 must be strictly adhered to*. This was also the finding of the Court of Appeal in CA No 1, which was subsequently affirmed by the Federal Court.* ***The appellant argued that O 52 of the Rules of Court 2012 has no application to his application for reasons discussed earlier. However, the fact that the appellant had applied for ex parte leave to commence committal proceedings is in itself an acknowledgment by the appellant that the applicable procedure is that which is stipulated in O 52 of the Rules of Court 2012. Further, when queried as to what other procedures were available in law to handle an application for contempt, other than that provided in O 52 of the Rules of Court 2012, learned counsel for the appellant was unable to show us any. Hence, the applicable procedure when the court is moved for contempt by the attorney general or an interested party is that which is found in O 52 of the Rules of Court 2012. The process has to start with a formal show cause notice under O 52 r 2B of the Rules of Court 2012 and continue therefrom.***"

80. In ***Tan Boon Thien & Anor v Tan Poh Lee & Ors [2020] 3 CLJ 28***[40], Has Zanah Mehat JCA said, at p.40:

"*[34] Based on the foregoing reasons,* ***we are of the considered view that r. 2B requires mandatory compliance and its failure will render the subsequent proceedings invalid. We are of the view that the Rules Committee in its wisdom enacted r. 2B with the purpose that the proposed contemnor be given the first opportunity of answering to the notice to show cause before any application for leave is made. The leave application should be made only after the expiry of the period that the answer should be given and it is only when and where there is no reply or no satisfactory explanation given that any ensuing action is taken.*** *Further, we say that as the result of contempt proceedings being criminal in nature involving the liberty of the proposed contemnor (see the Federal Court decision in Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849; [2012] 2 AMR 429), any ambiguity and uncertainty must be resolved in*

[40] RBOA, tab 18

favour of the alleged contemnor (see the Supreme Court decision in Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals [1995] 4 CLJ 427). Thus, r. 2B should be read in favour of the proposed contemnor. We therefore disagree with the High Court in Tang Hak Ju (supra) and prefer the view and approach in 101 Pelita Plantation Sdn Bhd v. Lah Anyue Ngau & Ors (supra)."

81. It is respectfully submitted that, having regard to mandatory nature of Order 52 rule 2B, which uses the word "shall", a failure to issue a show cause notice is fatal. The quasi-criminal nature of contempt proceedings requires strict adherence to the rule.

82. It is also submitted that the Order 52 rule 2B is a pre-condition to the power of a court to permit the commencement of contempt proceedings. Thus, it is only when such a show cause notice is issued that a court has such power.

83. In support of this proposition, this Honourable Court had occasion to interpret Order 6 rule 7(2A), Rules of the High Court 1980 in ***Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329***[41], which subjects the discretion of the High Court to pre-requisites. That rule provides:[42]

"*An application for renewal must be made before the expiry of the writ, ex parte by summons,* ***supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service***." (emphasis added)

84. This Honourable Court concluded that the pre-requisites contained therein were mandatory pre-requisites to the exercise of that discretion. Emphasis was placed on the word "must" which the court considered to be of stronger effect than "shall". Be that as it may, the word "shall" itself has been understood as entailing

[41] RBOA, tab 19
[42] RBOA, tab 5

a mandatory obligation unless the context suggests otherwise. No such context exists here.

C. Applying for committal directly in the Federal Court

85. The Leave Application was moved pursuant to Article 126, Federal Constitution, section 13, Courts of Judicature Act 1964[43] ("**CJA**") and Order 52, ROC[44].

86. Article 126, Federal Constitution provides:[45]

"The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself."

87. Section 13, CJA mirrors the said Article.

88. It is pertinent that both provisions speak of the power of each of the superior courts to punish for contempt of each of those respective courts. This necessarily means the contempt sought to be addressed must be a contempt which directly concerns that particular court.

89. Where the Federal Court is concerned, the contempt complained of must have some direct bearing on that court.

90. This is suggested by a comparison with Article 129 of the Indian Constitution which provides:[46]

"*Supreme Court to be a court of record.*

[43] RBOA, tab 2
[44] RBOA, tab 5
[45] RBOA, tab 1
[46] RBOA, tab 6

The Supreme Court shall be a court of record and shall have all the powers of such a court ***including the power to punish for contempt of itself****."* (emphasis added)

91. The word "including", which is absent from Article 126, FC is significant. In the decision of the Supreme Court of India in ***D.J Service Association Tis Hazari Court v. State of Gujarat, 1991 AIR 2176***[47], K Singh J said:

"*Article 129 declares the Supreme Court a court of record and it further provides that the Supreme Court shall have all the powers of such a court including the power to punish for contempt of itself (emphasis supplied). The expression used in Article 129 is not restrictive instead it is extensive in nature.* ***If the Framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity for inserting the expression "including the power to punish for contempt of itself'. The Article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression '*including". The expression "including" has been interpreted by courts, to extend and widen the scope of power. The plain language of Article clearly indi- cates that this Court as a court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a court of record****. In interpreting the Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The courts ought not accept any such construction.* ***While construing Article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since, the Supreme Court is designed by the Constitution as a court of record and as the Founding Fathers were aware that a superior court of record had inherent power to indict a person for the contempt of itself as well as of courts inferior to it, the expression "including" was deliberately inserted in the Article. Article 129 recognised the existing inherent power of a court of record in its full plenitude including the power to punish for the contempt of inferior courts. If Article 129***

[47] RBOA, tab 28

is susceptible to two interpretations, we would prefer to accept the interpretation which would preserve the inherent jurisdiction of this Court being the superior court of record, to safeguard and protect the subordinate judiciary, which forms the very back bone of administration of justice."

92. The absence of the word "including" in Article 126, Federal Constitution and section 13, CJA must have a bearing. As such, the Federal Court's power of contempt is directed at contempt of itself. ***Leap Modulation (supra)*** [48] concerned such a contempt as the impugned comments were made about specific proceedings in the Federal Court.

93. The Applicant has stated that the effect of the Comments is to undermine confidence in the Judiciary as a whole. This is apparent from paragraphs 8 and 9 of the O.52 Statement. Thus, there is no direct nexus between the Comments and the Federal Court.

94. In such an instance, it would then be necessary to consider the entitlement of the Respondents to appeal a decision made against them. The right of appeal has been recognised by this Honourable Court as a guaranteed statutory right.[49] This cannot be altered by the ROC or any other Rules. In ***Sia Cheng Soon & Anor v Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201***[50], Arifin Zakaria FCJ (as he then was) said, at p.218:

"*[46] … The RFC of course have the force of law as they are made pursuant to a power conferred by a statute.* ***But as a subsidiary legislation it cannot exceed the powers conferred by the statute pursuant to which it is made, therefore, it cannot purports to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights.*** *(See dissenting judgment of Seah SCJ in Dato' Mohamed Hashim Shamsuddin v. The Attorney General, Hong Kong [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 quoting Lord Davey in*

[48] RBOA, tab 7
[49] See ***Auto Dunia Sdn Bhd v Wong Sai Fatt [1995] 2 MLJ 549***, p.553, RBOA, tab 21
[50] RBOA, tab 20

Barraaclough v. Brown [1897] AC 615). In Attorney General v. Sillem [1864] 11 ER 1200 also quoted by Seah SCJ Lord Wrenbury LC said at p. 1208:

> ***A power to regulate the practice of a court does not involve or imply any power to alter the extent or nature of the jurisdiction.***"

95. In light of this, the application for leave ought to have been filed in the High Court. The filing of the Leave Application in this Honourable Court had, without justifiable basis in law, deprived the Respondents of their right of appeal. This is also a violation of the Respondents' guarantee of due process under Article 8, Federal Constitution.[51]

D. 2nd Respondent not properly named

96. The Respondents reiterate paragraphs 60 to 64 above on the requirement for strict adherence to procedure and the need for particularity in contempt proceedings. Such proceedings are quasi-criminal in nature.[52]

97. The 2nd Respondent was merely referred to as "Ketua Editor". There is no such position in the 1st Respondent. There is only the position of Editor-in-chief, which is held by Gan Diong Keng.

98. This was insufficient to comply with Order 52 rule 3(2)[53] which requires an applicant for leave to commence committal proceedings to state "*the **name**, description and address of the person sought to be committed*".

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[51] See ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333***, paragraph 22, RBOA, tab 11; See also ***Alma Nudo Atenza v Public Prosecutor and another appeal [2019] 4 MLJ 1***, paragraph 104, RBOA, tab 22

[52] See ***Attorney General of Malaysia v Dato' See Teow Chuan & Ors [2018] 3 CLJ 283***, p.290, para 21, RBOA, tab 23; ***Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. S.M. Idris & Anor [1990] 1 CLJ Rep 293***, p.298 RBOA, tab 24

[53] RBOA, tab 5

VII Conclusion

99. In view of the foregoing, the Respondents respectfully pray that Enclosure 22 be allowed with costs.

Dated this 29th day of June 2020

Surendra Ananth

.....

Counsel for the Respondents
Malik Imtiaz Sarwar
Surendra Ananth
Khoo Suk Chyi

This **RESPONDENTS' WRITTEN SUBMISSION (ENCLOSURE 22)** is filed by Messrs Surendra Ananth, solicitors for the Respondents named above with its address for service at No.4, Dalaman Tunku, Bukit Tunku, 50480 Kuala Lumpur.

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ANNEXURE A

I General principles

1. The defamation cases from around the Commonwealth provide a useful guide in discerning whether a party can be treated in law as a publisher responsible for third party comments. It must be borne in mind that these cases are not determined on the criminal standards, and the principles would apply with even more force where contempt proceedings are concerned.

2. The learned authors of '*Alridge, Eady & Smith on Contempt*' (5th edn, 2017) cautioned, at p.326:[1]

   "*Although in some ways it is illuminating to compare the law of defamation with that of contempt, in the context of responsibility for publication,* ***it has to be remembered that there are important distinctions in the nature of the respective wrongs, not least because liability for publication contempt is criminal in character***."

3. As a general rule, the fact that a party provides a facility for members of the public to comment on material published does not in itself impose legal responsibility on that party for third party comments.

4. In ***Totalise plc v Motley Fool Ltd and another [2001] IP & T 764***[2], the Defendant managed a discussion board that allowed members to upload comments. The Plaintiff claimed that it had been defamed by third party comments. Owen J said, at p.769:

   "*The journalist is responsible at law for the material which he publishes.* ***The defendants take no such responsibility. They exercise no editorial control. They take no responsibility for what is posted on their discussion boards. It is***

[1] RBOA, tab 36
[2] RBOA, tab 29

noteworthy in this context that the postings on the second defendant's boards carry the statement on behalf of the second defendant:

> *'This content above represents the opinions of the author and does not represent the opinions of Interactive Investor International plc or its affiliates. You should be aware that the other participants of this discussion group are strangers to you and may make statements which may be misleading, deceptive or wrong.'*

The defendants simply provide a facility by means of which the public at large is able publicly to communicate its views. In my judgment, they are not responsible for the publication of such material within the meaning of the section."

5. Were it otherwise, even internet service providers – who provided access to the internet – would be legally responsible. In ***Bunt v Tilley and others [2007] 1 WLR 1243***[3] such a claim was rejected. Eady J said, at p.1246:

> "*9 When considering the Internet, it is so often necessary to resort to analogies which, in the nature of things, are unlikely to be complete. That is because the Internet is a new phenomenon. Nevertheless, an analogy has been drawn in this case with the postal services. That is to say, ISPs do not participate in the process of publication as such, but merely act as facilitators in a similar way to the postal services. They provide a means of transmitting communications without in any way participating in that process.*"

6. For there to be legal responsibility, there must have been awareness or an assumption of responsibility such as to show knowing involvement. Knowledge is key to responsibility. Eady J said, at p.1249:

[3] RBOA, tab 30

"*21 In determining responsibility for publication in the context of the law of defamation,* ***it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the claimant's words) responsible for "corporate sponsorship and approval of their illegal activities****".*

22 ***I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility.*** *As Lord Morris commented in McLeod v St Aubyn [1899] AC 549, 562: "A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish." In that case the relevant publication consisted in handing over an unread copy of a newspaper for return the following day.* ***It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that "publication".***

23 Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. ***On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of the relevant words . It is not enough that a person merely plays a passive instrumental role in the process****. (See also in this context Emmens v Pottle (1885) 16 QBD 354, 357, per Lord Esher MR.)*"

7. As explained by the New Zealand Court of Appeal in ***Murray v Wishart [2014] 3 NZLR 722***[4], it is necessary to show actual knowledge, as opposed to constructive knowledge. O'Regan P and Hellen France J said, at p.752:

"*[144]* ***These concerns lead us to conclude that the actual knowledge test should be the only test to determine whether a Facebook page host is a publisher.*** *That is consistent with at least some of the authorities to which we have referred, (Sadiq v Baycorp (NZ) Ltd,95 A v Google New Zealand Ltd96 and Davison v Habeeb97) and with the Law Commission's analysis.98 It conforms with the approach in Byrne v Deane, which is, we believe, the most appropriate analogy and with the decision in Urbanchich v Drummoyne Municipal Council. It makes the liability risk of a Facebook page host no greater than that of an organiser of a public meeting – another appropriate analogy, in our view.* ***It is consistent with the right of freedom expression in the Bill of Rights, bearing in mind the unavailability of the innocent dissemination defence. And it provides a situation where liability for defamation is not imposed on the basis of negligence***."

8. The importance of knowledge was underscored by Eady J in ***Metropolitan International Schools Ltd (trading as SkillsTrain and/or Train2Game) v Designtechnica Corp (trading as Digital Trends) and others [2010] 3 All ER 548***[5] ***("UK Google Case")***, where he said, at p.562:

"*[54] The next question is whether the legal position is, or should be, any different once the third defendant has been informed of the defamatory content of a 'snippet' thrown up by the search engine. In the circumstances before Morland J, in Godfrey v Demon Internet Ltd [1999] IP & T 232, [1999] 4 All ER 342, [2001] QB 201,* ***the acquisition of knowledge was clearly regarded as critical. That is largely because the law recognises that a person can become liable for the publication of a libel by acquiescence; that is to say, by permitting publication to continue when he or she has the power to prevent it. As I have said, someone hosting a website will generally be able to remove material that is legally objectionable.***

[4] RBOA, tab 31
[5] RBOA, tab 32

<u>If this is not done, then there may be liability on the basis of authorisation or acquiescence.</u>"

9. Pertinently, Eady J took into consideration Google Inc's 'notice and take down' procedure in determining whether there had been knowing involvement. Eady J said, at p.563:

"*[58] It may well be that the third defendant's 'notice and take down' procedure has not operated as rapidly as Mr Browne and his client would wish, but it does not follow as a matter of law that between notification and 'take down' the third defendant becomes or remains liable as a publisher of the offending material. While efforts are being made to achieve a 'take down' in relation a particular URL, it is hardly possible to fix the third defendant with liability on the basis of authorisation, approval or acquiescence."*

<u>II Cases with similar fact patterns</u>

10. The following decisions offer some insights into how to look at the issue of imposing responsibility for publication, although they are decisions on claims for defamation.

A. Tamiz v Google Inc

11. In ***Tamiz v Google Inc [2013] 1 WLR 2151***[6], a claim for defamation was made against the defendant which hosts blogs provides the tool for the creation of blogs. It also permits the use of its URL if required. The defendant was notified of defamatory statements in an anonymous blog hosted by it. The defendant forwarded the complaint to the blogger, who removed the comments three days later.

[6] RBOA, tab 26

12. The central question that arose for determination was whether the defendant could be regarded as a publisher in law. Like the On-Line News Portal, the defendant has a policy for its users. It makes clear that is not involved in the creation of blog contents and *does not vet the same*. It has a report feature. It will remove comments which have been adjudicated by a court to be defamatory. In this case, it went one step further than its own policy by having determined on its own accord that the comments were defamatory. It then asked the blogger to remove the comments (see paragraph 13).

13. The court ultimately concluded that the defendant could not be regarded as a primary or secondary publisher. Richard LJ said, at p.2162:

"25 By the provision of that service Google Inc plainly facilitates publication of the blogs (including the comments posted on them). ***Its involvement is not such, however, as to make it a primary publisher of the blogs. It does not create the blogs or have any prior knowledge of, or effective control over, their content. It is not in a position comparable to that of the author or editor of a defamatory article. Nor is it in a position comparable to that of the corporate proprietor of a newspaper in which a defamatory article is printed. Such a corporation may be liable as a primary publisher by reason of the involvement of its employees or agents in the publication****. But there is no relationship of employment or agency between Google Inc and the bloggers or those posting comments on the blogs: such people are plainly independent of Google Inc and do not act in any sense on its behalf or in its name. The claimant's reliance on principles of vicarious liability or agency in this context is misplaced.*

26 ***I am also very doubtful about the argument that Google Inc's role is that of a secondary publisher, facilitating publication in a manner analogous to a distributor. In any event it seems to me that such an argument can get nowhere in relation to the period prior to notification of the complaint. There is a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely***

to be defamatory*: Emmens v Pottle (1885) 16 QBD 354, 357–358; Vizetelly v Mudie's Select Library Ltd [1900] 2 QB 170, 177–180; Bottomley v FW Woolworth & Co Ltd (1932) 48 TLR 521. There are differences in the reasoning in support of that conclusion but the conclusion itself is clear enough. The principle operated in Bottomley's case to absolve Woolworth from liability for publication of a defamatory article in a consignment of remaindered American magazines that it distributed: the company did not check every magazine for defamatory content, there was nothing in the nature of the individual magazine which should have led it to suppose that the magazine contained a libel, and it had not been negligent in failing to carry out a periodical examination of specimen magazines****. Since it cannot be said that Google Inc either knew or ought reasonably to have known of the defamatory comments prior to notification of the claimant's complaint, that line of authority tells against viewing Google Inc as a secondary publisher prior to such notification. Moreover, even if it were to be so regarded, it would have an unassailable defence during that period under section 1 of the 1996 Act, considered below.***"

14. The court however concluded that knowing involvement could give rise to legal responsibility. The court cited with approval its earlier decision in ***Byrne v Deane [1937] 1 KB 818***[7]. In that case, the plaintiff brought an action against the proprietor of a golf club for defamatory postings on the wall of the club by a third party. Although the court held that the postings were not defamatory, it decided that the golf club can be regarded as a publisher if it knew about the posting and made no attempt to remove it. Slesser LJ said, at pp.834-835:

*"****There are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication****… She said: "I read it. It seemed to me somebody was rather annoyed with somebody****." I think having read it, and having dominion over the walls of the club as far as the posting of notices was concerned, it***

[7] RBOA, tab 33

could properly be said that there was some evidence that she did promote and associate herself with the continuance of the publication in the circumstances after the date when she knew that the publication had been made.*"*

15. On that basis, Richard LJ said, at p.2165:

"34 Those features bring the case in my view within the scope of the reasoning in Byrne v Deane [1937] 1 KB 818. ***Thus, if Google Inc allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material****."*

B. Oriental Press v Fevaworks

16. In ***Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd [2013] 5 HKC 253***[8], the respondent was a provider, administrator and manager of a website which hosts one of the most popular internet discussion forums in Hong Kong. It was sued in respect of defamatory statements posted by third-party users.

17. It must be said that the Respondents in the case at hand do not host an internet discussion forum, nor can the On-Line News Portal be treated as being akin to an internet discussion forum. Nonetheless, the decision offers some guidance.

18. Due to the very large volume of traffic on the forum, the respondent had no realistic means of acquiring such knowledge or of exercising editorial control over third party content before it was posted. The respondent however removed the defamatory comments in a reasonable time frame upon being notified of the same.

19. The Court of Appeal found the respondent not liable for defamation on the basis that it was an innocent disseminator although it concluded that the respondent

[8] RBOA, tab 34

was a subordinate publisher. This was because the respondent played an active role in encouraging and facilitating the multitude of internet postings by members of their forum, and in that regard employed administrators whose job was to monitor discussions and to delete postings which broke the rules. Ribeiro PJ said, at pp.271-272:

"*[47] As analysed above, the innocent dissemination defence is a common law doctrine developed to mitigate the harshness of the strict publication rule.* ***While it does not avail the first or main publishers it brings relief to subordinate publishers who have knowingly participated in the process of disseminating the article concerned. The defence is therefore applicable to persons who are admittedly publishers, although playing a subordinate role, allowing them to be exonerated from liability if they discharge the burden of showing that they did not know that the article which they had helped to disseminate contained the offending content and that such lack of knowledge was not due to any lack of reasonable care on their part****.*

…

[51] ***The respondents plainly played an active role in encouraging and facilitating the multitude of internet postings by members of their forum****. As described in Section B of this judgment,* ***they designed the forum with its various channels catering for their users' different interests; they laid down conditions for becoming a member and being permitted to make postings; they provided users browsing their website access to the discussion threads developed on their forum; they employed administrators whose job was to monitor discussions and to delete postings which broke the rules; and they derived income from advertisements placed on their website, a business model which obviously benefits from attracting as many users as possible to the forum.***

[52] ***The respondents were therefore, in my view, plainly participants in the publication of postings by the forum's users and in that sense they were***

publishers from the outset, it being in issue whether they were first or main publishers or merely subordinate publishers*. I accept Mr Thomas SC's submission that they were in a substantively different position from the occupiers in the notice board and graffiti cases.* ***The relevant question in the present case is whether, as publishers, the respondents are entitled to rely on, and have established, the defence of innocent dissemination, relieving themselves of the strict publication rule which would otherwise be applicable. The question is not whether, originally being non-publishers, they have, when fixed with knowledge of the defamatory postings, demonstrated their consent to and adoption of those postings, turning themselves into publishers.***"

20. In this context, the court disagreed with ***Tamiz (supra)***. Ribeiro PJ said, at pp.272-273:

"*[53] In this context,* ***I respectfully part company with the reasoning (adopted on an interlocutory basis) of the English Court of Appeal in Tamiz v Google Inc.45 It is reasoning which proceeds on the basis that successful invocation of the defence of innocent dissemination results in the defendant being deemed not to have published at all. For the reasons previously given,46 I do not accept that premise. Nor am I able to accept the distinction drawn between the notice board and graffiti analogies, nor the suggestion that 'the provision of a platform for blogs is equivalent to the provision of a notice board'.47 As indicated above, my view is that the provider of an internet discussion platform similar to that provided by the respondents falls from the outset within the broad traditional concept of 'a publisher', a characteristic not shared by a golf club or other occupier who puts up a notice board on which a trespassing message is posted***."

21. However, consistent with the approach taken by the English courts, knowledge wads a significant factor. Ribeiro PJ said, at pp.273, 275 and 279:

"*[56] The distinction between the first or main publishers of a work which contains a libel49 and subordinate publishers of that work, central to the innocent*

dissemination defence, was developed in the era of mass communications in the print medium. ***As we have seen, the defence was designed to relieve from the strict publication rule, persons such as wholesalers, distributors, booksellers, librarians, newsagents and the like. While such persons came within the very broad traditional concept of 'publication' since they intentionally participated in distribution of the work, they were relieved of liability if they could show that they did not know and could not with reasonable care have known the defamatory content of the article they were disseminating.***

…

[63] ***Plainly, if a defendant knew the content of a defamatory article and authorised or participated in its publication, that defendant would be liable as a main publisher. As Eady J pointed out in Bunt v Tilley, 'It is clear that the state of a defendant's knowledge can be an important factor' – a point to which I shall return. But in the present case, it is not in dispute that the respondents were unaware of the offending words until some time after they had been published on the forum…***

…

*[78] And as laid down by Romer LJ in Vizetelly****, to avail himself of the defence, the defendant must establish '… that he was innocent of any knowledge of the libel contained in the work disseminated by him.'***

[79] ***The knowledge criterion is also reflected in the traditional inclusion of printers as within the class of first or main publishers – and in the more recent tendency to question whether such treatment of printers ought to be maintained.***"

22. Pertinently, a subordinate publisher cannot be held responsible if, upon acquiring knowledge of the defamatory statement, he promptly took all reasonable steps to

remove the offending content from circulation as soon as reasonably practicable. Ribeiro PJ said, at p.285:

"*[97] In my view, it is consistent with the policy underpinning the defence that the same standard of reasonableness should be applied in a situation of acquired knowledge.* ***A subordinate publisher should be afforded the continued protection of the defence if he proves that upon becoming aware of such content, he promptly took all reasonable steps to remove the offending content from circulation as soon as reasonably practicable.***"