

**DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU
GUAMAN SIVIL NO. JA-22NCVC-210-10/2018**

ANTARA

1. P.T. TARAKUSUMA INDAH
2. MKA MOTORPARTS (M) SDN BHD PLAINTIF-PLAINTIF

DAN

THE QBEE MOTOR GROUP SDN BHD DEFENDAN

JUDGMENT

**CHOO KAH SING
JUDGE
HIGH COURT JOHOR BAHRU**

Date:13.10.2019

Introduction

[1] The plaintiffs brought a defamation suit against the defendant, and the parties have gone through a full trial. On 14.8.2019, this Court dismissed the plaintiffs' claim. The reasons for the decision are set down as below.

Background Facts

The Plaintiffs' case

[2] The 1st plaintiff is a company incorporated in Indonesia. The 1st plaintiff's nature of business is manufacturing, distributing and selling motorcycle helmets and related accessories under the brand name and style of "KYT".

[3] The 2nd plaintiff is a company incorporated in Malaysia. The 2nd plaintiff is the exclusive distributor and seller of the 1st plaintiff's products in Malaysia, especially the helmets with the brand name "KYT".

[4] The plaintiffs averred that on 14.10.2017, a posting in the Facebook account 'Durian Bikers' stated as follows:

"Last week's accident in JB, Malaysia. 2 different helmets, 2 different outcomes – KYT Helmet user passed away. Pilot Helmet user survived. What do you make of this? Comment below and the most interesting comment wins a free helmet from Bro Durian Bikers."

(hereafter 'the impugned statement')

[5] The plaintiffs also averred that the same Facebook account 'Durian Bikers' had previously reported similar defamatory statements at different occasions.

[6] On 29.1.2017, 6.5.2017 and 9.10.2017 respectively, statements made in the Facebook 'Durian Bikers' were as follows:

"Thanks to our fans for liking our page, we pledge to you that we will always ensure unethical traders like KYT Helmets Malaysia Motorparts Asia MKA Motorparts stop cheating Malaysian customers."

"Durian bro verdict: NHK Helmet is superior to KYT Helmets Malaysia – KYT Helmet has zero ventilation and colour fades within 3 months after using, sometimes even in showroom, colour smudge. Even have customers returning helmets to us due to crack visor with no visible impact – KYT Helmets paling fragile."

"...klu nak minum susu dedek, sila pergi KYT sdd mereka mcm pondan. KYT Helmets Malaysia kualiti mcm tahi. Don't shoot the messenger, we can't mollycoddle the truth."

(hereafter 'the further impugned statements'). The impugned statement and the further impugned statements shall collectively refer to as 'those impugned statements'.

[7] In gist, the plaintiffs complained that those impugned statements ‘taken collectively has the effect of defaming and slandering the name and commercial reputation of the KYT products whether taken in its ordinary meaning and/or by imputation or innuendo thereby creating a negative perception and connotation amongst the users and readers of Facebook not only in Malaysia but also internationally as Facebook has the capacity of reaching millions of readers worldwide.’ Those statements also bear ‘the meaning and imputation that KYT Helmets are low quality products which causes severe injury or death to its users in the event of an accident, that they are generally unsafe, dangerous, and untrustworthy and does not comply with the regulations.’ They also bear the connotation that ‘all KYT Helmets were sold with clear intention to deceive their customers in Malaysia in respect of their performance and quality.’ The plaintiffs also complained that those statements were made ‘with bad faith and intended malice to destroy the commercial reputation of the KYT brand, to which the 1st plaintiff is the sole registered trademark owner.’

The Defendant’s case

[7] In gist, the defendant’s defence is that the defendant did not publish or distribute those impugned statements or cause those impugned statements to be published or distributed.

[8] The defendant averred that it is not the owner of the Facebook account ‘Durian Bikers’, and that it could not be held responsible for those impugned statements being published or distributed or cause those impugned statements to be published or distributed in the Facebook account ‘Durian Bikers’.

[9] The Facebook account 'Durian Bikers' belonged to and was registered by one Yellow Dynamic Resources company, not the defendant. The defendant also averred that it is not the account administrator of Facebook 'Durian Bikers'. The defendant has no control over the Facebook account 'Durian Bikers' and the contents published therein.

[10] In the alternative, the defendant pleaded that if the defendant is found to be responsible for the publication and distribution of those impugned statements, then the defendant's defence would be that those impugned statements 'are not capable of referring to the plaintiffs or that in their natural and ordinary meaning and/or in their inferential meaning or is capable of being understood to defame the plaintiffs.' The defendant further relied on the defences of 'qualified privilege', 'fair comment' and 'justification'. The defendant denied there was any malice on its part in the publication of those impugned statements.

The Findings of this Court

[11] It is obvious that in a defamation action the purported defamatory statement, be it libel or slander, has to originate from the defendant. In the present case, the issue whether those impugned statements were made by the defendant has to be determined first by this Court, since the defendant has denied having published and/or distributed those impugned statements or having caused those impugned statements to be published or distributed.

[12] The plaintiffs through their witness Syajaratuddur Bt Mawardee (PW2) adduced a 'Project Durian Bikers' Investigation Report' (see exhibit A pp. 106-151) dated April 2018 (hereafter 'the investigation report'). The object of PW2's testimony was to establish that the defendant was the maker of those impugned statements.

[13] PW2 is an investigator in the company RichForce Security Services Sdn Bhd. She was engaged by the plaintiffs and tasked to (i) conduct an investigation and ascertain who the administrator was and who had administered the Facebook page 'Durian Bikers, and (ii) ascertain any relationship between the Facebook page 'Durian Bikers' and the defendant and/or related companies of the defendant.

[14] The investigation report concluded that the administrator of the Facebook page 'is someone employed or related' to the defendant company or any other related companies, such as QBEE Superbike Centre Sdn Bhd, Quian Long Auto Parts Sdn Bhd and Yellow Dynamic Resources.

[15] After considering PW2's evidence and the contents of the investigation report, this Court is not satisfied that, on a balance of probabilities, the defendant had published or distributed those impugned statements or had caused those impugned statements to be made or published or distributed in the Facebook page of 'Durian Bikers'.

[16] First, there is no evidence who administered the Facebook page 'Durian Bikers'. The investigation report merely referred to 'someone'. Who was this 'someone'? This 'someone', according to the investigation report, could be employed by or related to three other companies

besides the defendant. The finding in the investigation report was vague and inconclusive and uncertain as to who the administrator for the Facebook page 'Durian Bikers' was.

[17] Secondly, the fact that an email address of the defendant was found in the Facebook page 'Durian Bikers' to link readers to the defendant company could not prove on a balance of probabilities that the defendant had made those impugned statements or the defendant had caused those impugned statements to be made. It is not uncommon to find links on a website linking to other websites or to find third parties' email addresses on a website. The sharing of a single platform in the e-commerce community is a common practice in today's information technology business. The conclusion of PW2's investigation, i.e. that the administrator of the Facebook page is 'someone employed or related' to the defendant company or any other related companies, was purely based on conjecture or assumption.

[18] Thirdly, although there are common directors and shareholders in QBEE Superbike Centre Sdn Bhd, Quian Long Auto Parts Sdn Bhd and the defendant, that fact could not implicate the defendant as the one who published or distributed those impugned statements or caused those impugned statements to be published or distributed. The finding that there were common directors and shareholders in the two companies and the defendant could not prove on a balance of probabilities that the defendant had made those impugned statements or had caused those impugned statements to be made. Again, PW2's conclusion is based on conjecture or assumption.

[19] Fourthly, it is not denied that the proprietor of Yellow Dynamic Resources Ng Pek Feei is the daughter of Ng Tiong Sew (DW1) who is one of the directors of the defendant company. Ng Pek Feei and DW1 share a common residential address. That finding is not unusual in view of their relationship. The establishment of a father and daughter relationship between the owner of the website and a director of the defendant could not prove that the defendant was responsible for making or causing those impugned statements to be made. The proprietor of Yellow Dynamic Resources was not called to give evidence in court.

[20] Fifthly, the sharing of primary and secondary servers of a common Internet Protocol address (IP address) found in the websites 'Durian Bikers' and the defendant company also could not establish those impugned statements were made or cause to be made by the defendant.

[21] Lastly, all the above findings by PW2 have one common thread which is DW1, the director of the defendant company, has an indirect link to the Facebook account 'Durian Bikers'. Other than such indirect link, there is nothing in the plaintiffs' case that could prove that the defendant was the one who made, published and/or distributed those impugned statement or caused those impugned statements to be made, published and/or distributed. The plaintiffs established a connection between the defendant's director and the Facebook account 'Durian Bikers' proprietor, but the plaintiffs failed to establish that the defendant had control over the Facebook account 'Durian Bikers'. The plaintiffs also failed to establish that the administrator or the proprietor of the said Facebook account had made those impugned statements under the instruction of the defendant.

[22] PW2's finding has established the relationships of the parties named in her report, but the report falls short of establishing in evidence that the administrator of the Facebook page 'Durian Bikers' was employed by the defendant. It was purely based on conjecture and assumption. Further, there was no evidence to suggest who the "someone" was in the report. Even if the "someone" is related to the defendant, there is no evidence to prove on a balance of probabilities that the defendant has control over the "someone" who was the administrator of the Facebook account. This Court is of the opinion that there is still a vacuum in evidence to show that the defendant has the control over the administrator of the Facebook account 'Durian Bikers'.

[23] For the above reasons, this Court is of the considered view that the plaintiffs have failed to establish on a balance of probabilities that the defendant was the maker of those impugned statements or had caused those impugned statements to be made. The plaintiffs' evidence on this point was purely based on assumption that it was the defendant who made those impugned statements.

[24] The plaintiffs' counsel submitted that the defendant had denied making those impugned statements, but it had pleaded all sort of defences, as such, its conduct amounted to "appropriation and reprobation". The entire statement of defence should be rejected by the court, urged the counsel. This Court could not agree with the counsel's submission because the defendant was entitled to plead in its statement of defence more than one defence in the alternative. In the event the defendant has been implicated as the party responsible for the making of those impugned statement, the defences ought to be availed to the defendant. Further, the defendant was and still is in a business which is

related to the plaintiffs' business, therefore, the defendant would be aware of the customers' sentiment and feedback in the market in relation to the plaintiffs' products. The defendant had previous business dealings with the plaintiffs and sold the plaintiffs' products in the past, therefore, the defendant would have first-hand knowledge of the plaintiffs' products and the defendant could give its comments and opinions on the plaintiffs' products in court as part of its defence in this case.

[25] In view of the finding of this Court that the plaintiffs failed to establish it was the defendant who made or caused those impugned statements to be made, therefore, the plaintiffs' case ought to fail *in limine*.

Conclusion

[26] For the above reasons, this Court dismissed the plaintiffs' claim and ordered costs of RM15,000.00 (subject to allocator fees) to be paid by the plaintiffs to the defendant. This Court further ordered that the security for costs of RM50,000.00 to be returned to the 1st plaintiff after the deduction of the costs so ordered.

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(CHOO KAH SING)
Judge
High Court Johor Bahru

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