

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: W-02(NCVC)(W)-501-03/2014**

ANTARA

TAN AH HONG

... PERAYU

DAN

**CTOS DATA SYSTEM SDN BHD
(NO. SYARIKAT: 247651-H)**

... RESPONDEN

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur, Wilayah
Persekutuan, Malaysia
Writ Saman No: 23NCVC-128-11/2012

Antara

Tan Ah Hong

... Plaintiff

Dan

CTOS Data System Sdn Bhd
(No. Syarikat: 247651-H)

... Defendan]

KORAM:

**ABDUL AZIZ BIN ABDUL RAHIM, HMR
MOHAMAD ARIF BIN MD. YUSOF, HMR
DAVID WONG DAK WAH, HMR**

(Date of Decision: 21.8.2014)

GROUND OF JUDGMENT

- [1]** This is the plaintiff/appellant's appeal against the decision by Vazeer Alam Mydin Meera JC given at Kuala Lumpur High Court on 23.4.2014 dismissing the appellant's claim with cost of RM25,000.00.
- [2]** The appellant had grounded his claim in the High Court on the tort of libel. The gist of the appellant's complaint before the High Court was that the information stored by the defendant/respondent in its electronic database which relates to the appellant has been published and distributed to various third parties including financial institutions. The appellant alleged that these information pertaining to details of legal proceedings against him by various parties (as particularized in paragraph 8 of the statement of claim) is defamatory of the appellant in that the words complained of are capable of carrying defamatory meanings. The words complained of are found in a report entitled "GTOS SELF CHECK REPORT DATED 2012-10-19+ (the Report)" which was printed from the respondent's database and given to the appellant and this report was referred to in paragraph 8 of the appellant's statement of claim.
- [3]** The background facts leading to the appellant's action in the High Court and this appeal are as follows:
- [4]** The appellant is an individual whilst the respondent is a company and a provider of credit rating information to its customers. At one stage the appellant's several application for banking facilities from various financial institutions to purchase motor vehicles and

properties were rejected. When the appellant made enquiries from the relevant financial institution for the rejection, the appellant was told that his historical and credit information stored in the respondent's database showed that the appellant had debt owing to various financial institutions, individuals and companies. The information also showed that there was bankruptcy proceedings being instituted against the appellant.

[5] The appellant then called the respondent and obtained the report. The information in the report was printed out from the respondent's database. The information in the report contained records about the appellant dated back to the 1990s and allegedly defamatory of the appellant. Sometimes in October 2012, the appellant wrote to the respondent through his solicitors demanding the records be updated as he had cleared all his debt and had been discharged from his bankruptcy.

[6] Based on information/documents provided by the appellant the respondent proceeded to update the record entries in its database and informed the appellant that the appellant could conduct a self-search of the respondent's current database to ascertain that fact.

[7] However the appellant was still not satisfied and alleged that the respondent had failed, refused or neglected to update their database and clear all outdated records relating to the appellant. The appellant complained that as a result he was put in much distress and difficulty and has suffered loss and damage. Hence, the suit against the respondent in the High Court.

[8] The appellant contends that the words contained in the report and which are particularized in paragraph 8 of the statement of claim are defamatory of the appellant. It was alleged that the words complained of in their ordinary and natural meaning are capable of being construed as:

- (i) That the appellant is financially troubled individual whose credit worthiness is suspect and cannot be trusted and that the appellant is unqualified to obtain any financial facilities;
- (ii) That the appellant's reputation and good name has been tarnished and he has been brought to public odium and contempt and his moral standing in society has been seriously impaired; and
- (iii) That the appellant has been treated without any respect or dignity and has been put under tremendous shame, loss of reputation and respect among his peers and subordinates.

The High Court Decision

[9] After full trial, the learned JC found that the appellant had failed to prove his case; and in particular the element of publication necessary to found a claim in libel had not been proved. The appellant's suit was accordingly dismissed.

[10] Further the learned JC held, relying on the case of ***Choo Foo Choo v The China Press Bhd [1999]1 CLJ 461*** and ***Soh Chun***

Seng v CTOS-emr Sdn Bhd [2012] 2 CLJ 886 which adopted the approach in **Choo Foo Choo** (supra), that if the information provided by the respondent in the report is not true or not accurate to the extent of carrying the current and updated information then the words are capable of bearing defamatory meaning. However in the light of the ~~DISCLAIMER~~ inserted by the respondent in the report that the information contained therein is not intended as confirmation of the current status of the case; and for current status further probe is necessary with relevant parties, the defamatory imputation could be negated. According to the learned JC the respondent had made it clear that they were merely purveying information as they collate them and further probe is necessary to determine the current status.

This Appeal

[11] We heard this appeal on the footing that there is no serious contentious issues regarding the words complained of are defamatory and that the words referred to the appellant. The primary issue in the appeal is whether there is publication of those defamatory words to third parties. In other words, the question for determination is whether the information related to the appellant in the respondents' database which was accessible by respondents' customers and clients (comprising of mainly banks and financial institutions, commercial firms and lawyers) albeit on subscription basis constitute publication to third parties.

[12] In defamation cases, publication means publication of the defamatory material to third parties . per Wan Hamzah SCJ in **S. Pakianathan v Jenni Ibrahim [1988] 1 CLJ (Rep) 233, 238.**

However if the defamatory statement is directed straight to the person of it is written it does not constitute publication . per Lord Esher M.R. in ***Pullman And Another v Walter Hill & Co. Limited [1891] 1 QB 524.***

[13] It is the appellant's case that the respondent had published the words complained of to prospective clients, purchasers, financial institution, prospective business partners, commercial firms and lawyers. However the respondent submitted that there is no evidence of publication to third parties. The appellant, it was argued, could not produce evidence to show that the clients of the respondent or purchasers of the information in the respondent's database had searched the database as agent of the third parties. The respondent also argued that the appellant failed to adduce any evidence to show that the rejection of his application by financial institutions for credit facilities was because of the information published by the respondent to these institutions. Also there is no evidence that the reason for the rejection of the appellant's application was because of the information obtained from the respondent's database. The respondent further argued that they have put a **DISCLAIMER** on the information in their database. This evidence was accepted by the learned JC as a ground to hold that the respondent cannot be made liable for the defamatory effect of the information in their database.

[14] However the appellant submitted that this Court in ***Soh Chun Seng*** (supra) relying on two English cases . ***Stubbs, Limited v Russel [1913] AC 336*** and ***Stubbs, Limited v Mazure [1920] AC 66***, the head notes (equivalent of a disclaimer) does not on the

facts of the case, absolve the defendant from responsibilities for its mistakes. In the words of Lord Viscount Cave in ***Stubbs, Limited v Mazure*** (supra):

“In the same case, Lord Viscount Cave held that Stubbs Limited could not hide behind such head-note to avoid responsibility. He wrote:

The portion of the above headnote which is relied upon in the present case is the statement that in no case does not publication of a decree imply anything more than the fact that the entry published appeared in the Court Books. If this means that readers of the Gazette are invited to rely upon the statement that the entry has appeared in the Court Books as a true statement of fact and to draw all proper inferences from it, then the headnote does not assist the appellants. But if it means that readers are not to draw from the fact stated any inference prejudicial to the credit of the person named, then I do not think that serious reliance can be placed upon a warning so contradictory to the nature of the publication itself. The Gazette is published and circulated in order that its readers may draw inferences as to the credit of the traders named; and it appears to me to be futile to suggest that the publishers of such a Gazette are protected by a mere warning that no such inference is to be drawn. So to hold would be in effect to hold them immune from responsibility for their mistakes, however serious the consequences which may ensue.”

[15] On whether there is publication of the information on the respondent's database to third parties, the appellant submitted that there is. On the evidence in this case it is without any doubt that the respondent's database is available to anyone who subscribed to the respondent's services (which is as provider of information of

credit worthiness of the subject of the search by the information seeker). Learned counsel for the appellant cited to us a passage by Lord Reading CJ in *Huth v Huth [1915] 3 KB 32, 38* which reads as follows:

“The fact that it is practically impossible to prove that any third person read it is the reason why the law takes judicial notice of the nature of the document, and says that the mere fact that the words are written on a post-card which is posted must be taken as some evidence that a third person will read it, or has read it. That is clear law and is quite beyond dispute.

The presumption is one of fact that arises upon proof of certain primary facts raising a prima facie inference that there must, in the ordinary course of events, have been publication to a third party. The presumption may be rebutted by a defendant by showing that not one person actually read the defamatory facsimile message. Of course, there may be particular circumstances in which the presumption is so strong that it may become impossible to rebut.”

[16] Having given our utmost consideration to the submission by the parties on the issue of publication of the defamatory statement, we are of the view that on the authorities cited and the facts of this case there is publication. To our mind it does not really matter whether a third party's access to the information in the respondent's database is by way of subscription only or if it is a one-time user, by a paying a fee. The fact that the respondent had deliberately and intentionally loaded onto its database the information to be accessed by third parties indicates a clear intention of publication. The respondent in our opinion ought not to be allowed the protection of the law if, at the first time the information loaded onto the database for consumption by third parties the information was correct and accurate, the respondent

has allowed the information to go outdated and stale to the extent that it no longer reflects the true state of affairs of the appellant as in this case, to remain in its database.

[17] Finally, we shall state briefly our view whether the words complained of (which words are particularized in details in paragraph 8 of the appellant's statement of claim) are defamatory of the appellant. The test for this purpose was stated by Gopal Sri Ram JCA (as he then was) in a passage in ***Choo Foo Choo v The China Press Bhd*** (supra) which was referred to by the learned JC in his judgment as follows: *"do the words published in their natural and ordinary meaning impute to the plaintiff (i.e. the appellant herein) any dishonorable or discreditable conduct or motives or lack of integrity on his part? If the response is affirmative then words complained of are defamatory."* This test and approach was adopted by this Court in ***Soh Chun Seng v CTOS –emr Sdn Bhd*** (supra). Applying this test to the facts of this appeal, particularly to the words complained of, we are left in no doubt that the words are defamatory. The information relating to the appellant on the respondent's database is information about appellant's financial affairs and financial credibility. Therefore any reasonable reader of the information, as the learned Judge in ***Soh Chun Seng*** (supra) puts it, would be lead to be suspicious of the creditworthiness of the appellant. This more so when the information contained therein as shown by the evidence in this is outdated. The learned JC in his judgment acknowledged that the CTOS SELF CHECK REPORT which was printed out and given to the appellant on 19.10.2012 contained stale information which dated back to 1990s.

[18] As for damages, since we have found the respondent is liable the appellant is entitled to damages. However, on the evidence the appellant had not proven that he had suffered actual damages.

[19] For the above reasons, we allowed this appeal with cost of RM40,000.00 to the appellant here and below. Deposit refunded. As for damages, we award nominal damages in the sum of RM5,000.00 as the appellant had failed to prove actual damages.

Dated: 3 February 2016

sgd
(DATO' ABDUL AZIZ BIN ABDUL RAHIM)
Judge
Court of Appeal, Putrajaya

Counsel and Solicitors:

For the appellant: Mr. James Culaz
Messrs. Culaz & Associates

For the respondent: Mr. Vimalan Ramanathan
Messrs. Kandiah Partnership