

9 NOVEMBER 2020

Defamation Law: The Defences Of Reportage And Responsible Journalism

Contact Persons:

Datuk D P Naban
Senior Partner

+6019 997 3918
naban@rdslawpartners.com

Rosli Dahlan
Partner
Head of Dispute Resolution

+6012 649 4383
rosli@rdslawpartners.com

In *Raub Australian Gold Mining Sdn Bhd v MKini Dotcom Sdn Bhd & Ors*¹, the Court of Appeal held that the defences of reportage and responsible journalism are distinct and separate and also, mutually exclusive and incompatible.

This alert examines the reasoning behind this decision and its significance to defamation suits against media outlets and journalists.

Background Facts

The Appellant, Raub Australian Gold Mining Sdn Bhd, is the operator of a gold mine in Pahang. The 1st Respondent is MKini Dotcom Sdn Bhd, the operator of the online news portal, Malaysiakini. The 2nd, 3rd and 4th Respondents are all employees of Malaysiakini. The 1st Respondent had published on Malaysiakini three articles and two videos which contained statements alleged to be defamatory of the Appellant. The articles and videos alleged that the Appellant's use of cyanide in its operation had caused environmental pollution, health illnesses and the destruction of local environment.

The Appellant sued the Respondents for defamation and malicious falsehood over the said publications on Malaysiakini. In their defence, the Respondents raised the defences of qualified privilege, responsible journalism (which is also known as the Reynolds privilege²) and reportage.

The High Court's Decision

The High Court found that although the articles and videos were defamatory, the Respondents had succeeded in establishing the defence of qualified privilege, which encompasses both the defences of responsible journalism and reportage. As a result, the High Court dismissed the

¹ [2018] 4 MLJ 209; [2018] 1 LNS 62

² *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609; [2001] 2 AC 127

REIMAGINING
LEGAL
SOLUTIONS

Appellant's defamation claim. The claim of malicious falsehood, on the other hand, was dismissed on the finding that malice was not proven.

The Appellant appealed the High Court's decision to the Court of Appeal.

The Court Of Appeal's Decision

The relevant issues considered by the Court of Appeal were whether:

- Qualified privilege and reportage are separate and distinct defences that had to be separately pleaded.
- The Respondents could plead both defences in the alternative.

The Appellant argued that the High Court had erred by allowing the Respondents' defences of responsible journalism and reportage, when they had not been pleaded specifically. The Appellant contended that the defences of qualified privilege and reportage are separate, distinct and mutually exclusive.

On the other hand, the Respondents contended that the trial judge had correctly considered the two elements of the Respondents' defence of responsible journalism, that is to say:

- The publication concerns a matter of public interest.
- The Respondents had taken reasonable and fair steps to gather and verify the information before publication.

Therefore, the High Court was right to conclude that the Respondents had established the defences of responsible journalism and reportage.

Analysis

The Court of Appeal unanimously found that the High Court had erred in its ruling and allowed the appeal on the basis that:

- The defences of qualified privilege and reportage are separate and distinct and therefore, the two defences must be separately pleaded.
- The Respondents must decide which of the two defences they choose to rely on as it is '*forensically problematical*' to plead both in the alternative.

The Court of Appeal referred to the case of *Roberts and another v Gable and others*³, which held that the defence of reportage is a form of, or a special example of, the defence of responsible journalism with distinctive features of its own. The distinctive defining characteristic of reportage is that the report must have the effect of reporting the fact that the statements were made, as opposed to the truth of the statements. Where this is done, the defendant need not take steps to verify its accuracy and he would be protected from liability in defamation.

The Court also referred to the case of *Flood v Times Newspapers Ltd*⁴, where the United Kingdom Supreme Court explained that the defence of reportage arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. Where the defendant has taken proper steps to verify the making of the allegation, he is protected by the defence of reportage. This is to be distinguished with the defence of responsible journalism which requires that the subject matter of the allegation be of public interest.

On the issue of whether the defence of reportage and the defence of responsible journalism can be pleaded in the alternative, the Court of Appeal referred to the decision in *Charman v Orion Group Publishing Group Ltd & 2 Others*⁵ which held that the two defences are incompatible. In the

³ [2008] 2 WLR 129

⁴ [2012] 2 WLR 760

⁵ [2008] 1 All ER 750

defence of reportage, there is complete neutrality which infers a state of mind and intent, whereas in responsible journalism the defendant may offer their view regarding the truth of the allegation. Thus, once a defendant had relied on the defence of reportage, it will be 'forensically problematical' to fall back upon an alternative defence of responsible journalism. A defendant who intends to rely on these defences must decide which of the two that he wishes to plead.

Based on the above authorities, the Court of Appeal concluded that the defence of reportage, having its own distinctive and special features, must be treated as a distinct and separate defence from responsible journalism. Thus, in order for a defendant to rely on the defence of reportage, it must be expressly and separately pleaded. A defendant cannot raise the defence of reportage by relying on his plea of responsible journalism. As the Respondents had not pleaded reportage specifically, they may not rely on it in their defence.

Commentary

The Court of Appeal's decision reiterated the fundamental principles regarding the defences of responsible journalism and reportage, that the two defences are separate and distinct from each other. Where a defendant intends to rely on the defences, they must be pleaded specifically. More importantly, this decision sets out the principle that only one of the two defences can be relied upon by a defendant and a defendant may not plead both responsible journalism and reportage as alternative defences.

Authored by Elani Mazlan.⁶

⁶ Elani Mazlan is a pupil with the firm's Dispute Resolution practice and she read law at the University of Warwick.

Contact Persons:

Datuk D P Naban
Senior Partner

☎ +6019 997 3918

✉ naban@rdslawpartners.com

Rosli Dahlan

Partner

Head of Dispute Resolution

☎ +6012 649 4383

✉ rosli@rdslawpartners.com

How can we help you?

We are operating as usual and clients may pose any queries including those in relation to this alert via e-mail or telephone to:

- **Datuk D.P. Naban**
Senior Partner
- **Mr Rosli Dahlan**
Partner & Head of Dispute Resolution

About RDS

We are a full-service commercial firm with focus on the following areas:

- Capital Markets
- Civil & Commercial Disputes
- Corporate & Commercial
- Merger & Acquisitions
- Real Estate Transactions
- Tax, SST & Customs

For non-litigation queries, please contact:

S Saravana Kumar

Partner

Head of Tax, SST & Customs

✉ sara@rdslawpartners.com

Ooi Bee Hong

Partner

Head of Corporate & Real Estate Transactions

✉ beehong@rdslawpartners.com

Ong Eu Jin

Partner

Head of Capital Markets and Mergers & Acquisitions

✉ eujin@rdslawpartners.com

**REIMAGINING
LEGAL
SOLUTIONS**