19 FEBRUARY 2021

PRESS SUMMARY FOR THE DISSENTING JUDGMENT IN THE FEDERAL COURT OF MALAYSIA CIVIL APPEAL NO: 08(L)-4-06/2020 (W) PEGUAM NEGARA MALAYSIA v MKINI DOTCOM SDN BHD AND ANOTHER

PRESS SUMMARY

1. This matter involves a novel point. The Respondents, namely **Mkini Dotcom Sdn Bhd** and the **Editor of Malaysiakini** operate an online news portal, which allows for the publication of comments by third parties in response to online news articles. This is done by way of online forum postings. **The issue that arises for consideration is whether the Respondents are liable in contempt for those third-party comments.** The species of contempt in question is that known as 'scandalising the court'. The Respondents unequivocally accept that the comments in question are contemptuous.

Salient Facts

2. I shall not repeat the salient facts which are set out in the majority judgement and my full minority judgement. Suffice to repeat that as a consequence of the four contemptuous statements made by third party subscribers through the 1st Respondent, the AG commenced proceedings for contempt against M'kini Dotcom and its Editor, Steven Gan. The Respondents' application to set aside the leave was unsuccessful and this Court determined that a prima facie case had been made out, relying primarily on **section 114A of the Evidence Act (EA)** which allows for a

presumption that the Respondents did indeed publish the impugned comments. But that presumption is a rebuttable one.

Setting Aside Application by the Respondents

3. On 13 July 2020 we heard the substantive merits of the committal application. The Respondents filed further affidavits to explain the operating system for the news portal, specifically for the posting of third-party comments.

4. They utilise a software called "Talk" which allows for the screening of a comment against a list of banned and suspected words. However, two matters became clear:

(i) Firstly, the software only allows for a comment administrator to approve or reject comments **after** publication. The comment with the suspected word would therefore be visible to readers;

(ii) Secondly the software cannot detect more complex concepts involving sentences and words taken together, as the artificial intelligence is not advanced enough;

5. In summary neither the editors nor administrators would be aware of the content of third-party comments including the impugned comments until a suspected word is detected by Talk. There is no provision for the pre-monitoring of suspected words in third party comments save for banned words which can be caught by the software.

6. The primary mode of dealing with offensive comments which fall into the suspected category is what is known as the **'flag and take down' policy**. This is in keeping with the **Malaysian Communications and Multimedia Code ('Code')** under the **Communications and Multimedia**

Act 1998 (‘CMA’). But key to all this is the fact that these measures only come into play **after** the publication of the comments.

The Law

7. The law relating to the contempt of scandalizing the court is well stated in **Arun Kasi’s** case and I do not propose to add to it save to reiterate the statements made there. I have relied on the South African case of **S v Mamabolo [2001] ZACC 17; 2001 BCLR 449 (CC)**.

Issues:

8. The issues before us were:

(a) Whether the Respondents rebutted the presumption of publication under section 114A of the EA?

(b) Whether ‘publication’ requires the element of intention and/or knowledge to be fulfilled; and

(c) Whether the Respondents had the requisite “intention to publish” for the purposes of scandalizing the court contempt?

Issue (a):Was the presumption under section 114A EA rebutted?

9. I concluded that the Respondents had successfully rebutted the presumption for a number of reasons. **Firstly, it is because the totality of the evidence points to the fact that at the time when the comments were first visible to readers, the Respondents were unaware of the existence and content of the same, until it was brought to their attention on 12 June 2020.** They have given sworn evidence of this fact and there has been no challenge to this evidence given on oath.

Publication – Did the Respondents 'publish' the third party comments? Has section 114A been rebutted?

10. This brings us to the heart of the case: If the Respondents had no knowledge of the existence and content of the third-party comments can it be said that they "published" those comments? And further can they be said to have "intended to publish" the impugned comments by reason of the fact that they are the hosts of an internet portal news site. With respect to the element of 'publication' I have in my judgement gone on to refer to case-law relating to defamation because that is the closest analogy that can be found. However, in doing so, I have cautioned myself that the offence of criminal contempt is in a considerably different category compared to the tort of defamation.

11. I concluded in relation to the issue of publication that an online content service provider such as Malaysiakini, operated by the 1st Respondent, is a "publisher" **only if it does have knowledge of the existence and content of the comments posted by third parties. If it does not, then it cannot be said to have published those comments because knowledge is a necessary element of publication.** In so concluding I considered case-law from the United Kingdom, The European Court of Human Rights, Hong Kong, New Zealand, Australia and India (*see page 45, para 89 onwards*).

12. I am fortified by the provisions of the **Communications and Multimedia Act ('CMA')** and the **Malaysian Communications and Multimedia Code ('Code')** within it. The latter prescribes that an internet intermediary such as Malaysiakini, is only affixed with liability as a publisher, from the point in time when it actually became aware of the existence and content of the third-party comments. To suggest that intermediaries such as the Respondents are bound to take steps to prevent such comments from appearing on the site, a means that apart from the filtering system the Respondents and all other intermediaries

with a comments section including Facebook and Twitter users will have to provide supervision throughout the day and night. This is in light of the evidence from the Respondents that comments may arise at any time during the day or night and at any point of time in the future. That, to my mind, with respect, appears to be an untenable proposition. And that is why Parliament in its wisdom adopted the 'flag and takedown' approach that enables the intermediaries to respond as soon as they acquire knowledge.

13. In the instant case the objectionable content was taken down within 12 minutes of M'kini being advised of the fact. That is an immediate response, demonstrating their intent not to allow such contemptuous material on their portal.

Constructive Knowledge or the Ought to Have Known Test

14. In concluding that **knowledge is a pre-requisite for publication in the context of contempt, I have rejected the "ought to have known" of the existence of such comments or a "constructive knowledge" test** as being the applicable basis or test on which to determine whether the element of publication is made out. **Under such a test, an online news portal is affixed with liability as soon as the third party impugned comment appears on the portal and it will be unable to avoid that consequence, even if it removes the impugned comment**, because it will be caught by the test that it ought to have known and anticipated that comment before it could be posted.

15. It effectively makes an online intermediary liable for not taking steps to prevent unlawful comments being made. This is not in accord with the legislation enacted by Parliament. The objective of the **CMA** is that nothing in the Act should be construed as permitting the censorship of the Internet (**see section 3(3).** This is further fortified in the **Code**, which provides that responsibility for online content rests primarily with

the content creator[1] and also that an internet content hosting provider like the 1st Respondent is not required to block access by its users or subscribers to any material unless directed to do so by the Complaints Bureau; nor is it required to monitor the activities of its users and subscribers[2].

16. When the internet content host is notified of a user providing prohibited content, and the host is able to identify such user, it has 2 working days to inform the user that the prohibited content must be removed within 24 hours failing which the host has the right to remove such content.[3] Finally **section 98(2) of the CMA** stipulates that compliance with the **Code** is a defence against a prosecution or action or proceeding of any nature whether in court or otherwise regarding a matter dealt with in that code. It is significant that M'kini acted in compliance with the Code.

17. For these reasons I am satisfied that the **1st Respondent, M'kini Dotcom Sdn Bhd** was not a 'publisher' when the impugned comments first appeared on 9 June 2020, because it had no knowledge of the same. It became affixed with knowledge on 12 June 2020, after which the comments were taken down within 12 minutes.

18. **The second Respondent, Steven Gan** as the chief editor is further removed from having 'published' under **section 114A of the EA** as it does not apply to him. Neither is he implicated in the factual matrix of the case.

[1] See section 4.1(b) of the Code
[2] See section11.1(c) and (d) of the Code
[3] See section 10.2 of the Code

Intent to Publish, an Essential Element to establish Contempt, was Not Fulfilled

19. As I have concluded that neither of the Respondents 'published' the third-party comments, it follows that they could not possibly have possessed the requisite 'intention to publish' the impugned comments by third parties. Such 'intention to publish' is an essential element of scandalizing the court contempt (see Arun Kasi). The standard of proof, moreover, is beyond reasonable doubt. That standard is not met on the material before us.

Can Intent to Publish be inferred from the Surrounding Circumstances?

20. The majority judgment relies on the doctrine of constructive knowledge to adjudge the 2nd Respondent liable for contempt. They rely on the contention that both elements of 'publication' as well as an 'intent to publish' may be inferred from surrounding circumstances. Analogies to the doctrine of 'wilful blindness' and 'constructive knowledge' which feature in other areas of criminal law are utilized to establish liability for contempt.

21. To my mind and with the greatest of respect, they have no application to contempt. This is because in the law of contempt, constructive knowledge or the fact that 'you ought to have known' cannot be applied against an online content provider who is not the author of the comments. It is after all the author who is the person who committed the primary offence. M'kini is not the primary perpetrator. So, while the concept of 'you ought to have known' may be applicable to the primary perpetrator it is neither sound nor sustainable in law to extend such an inference to a party once removed from the author or primary perpetrator. It becomes a fiction to maintain that M'kini knew of the existence of the comments and chose and intended to publish the same.

22. For these reasons I conclude that the Applicants have failed to establish beyond reasonable doubt that the Respondents possessed the requisite knowledge of the existence of the third-party comments and deliberately intended to publish those comments. The Respondents have, moreover, apologized unreservedly for indirectly being involved in the airing of these contemptuous third-party comments. Therefore, they are not liable in contempt.

23. That having been said, contempt of court is a serious offence and all online portals ought to be vigilant of, and act to prohibit any attempts to erode the confidence of the public in this august institution.

NALLINI PATHMANATHAN
Judge
Federal Court of Malaysia

Note: This summary is merely to assist in understanding the judgment of the court. The full judgment is the only authoritative document.