



**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM  
DALAM NEGERI SELANGOR DARUL EHSAN  
[GUAMAN NO: BA-23NCVC-16-08/2017]**

**BETWEEN**

**YEO KIM THONG**  
(NO. KP: 550423-10-5944)

**... PLAINTIFF**

**AND**

**PJ UNIFORM SDN BHD**  
(NO. SYARIKAT: 167843-D)

**YAP KWEE YIN**  
(NO. KP: 520601-10-5262)

**... DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. This is an application by both the Defendant under Order 18 Rule 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 (“ROC 2012”) dated 13 November 2017 (Enclosure 14) to strike out the Plaintiff’s Writ of Summon dated 4 August 2017 (Enclosure 1).
2. The Defendant’s claimed that the Plaintiff’s claim is frivolous and vexatious that amounts to an abuse of Court’s process;
3. The cause papers for this application are as follows:
  - (a) Defendants’ Notice of Application dated 13 November 2017;



- (b) Defendants' Affidavit in Support affirmed by Yap Kwee Yin on 13 November 2017;
  - (c) Plaintiff's Affidavit in Reply affirmed by Yea Kim Thong on 22 November 2011;
  - (d) Defendants' Affidavit in Reply affirmed by Yap Kwee Yin on 29 November 2017;
  - (e) The Writ of Summons dated 4 August 2017;
  - (f) The Statement of Claim dated 2 August 2017;
  - (g) The Statement of Defence dated 11 September 2017;
  - (h) The Reply to the Statement of Defence dated 10 October 2017.
4. To simplify the above affidavits, the Plaintiff's cause of action based on the Letter whereby the Plaintiff claimed that the Defendants have defamed him in the Letter Nevertheless the Defendants are opposing such claim as the Plaintiffs claim could not be maintained and obviously unsustainable.

#### **THE ESSENTIAL FACT**

5. Having gone through the pleadings and affidavits filed by the respective parties, I have concluded the facts below:
- (a) St. John Ambulance Malaysia (SJAM) had on 1 February 2013 commenced a civil suit for trademark infringement and



passing off against the First Defendant in Shah Alam High Court via Suit. No. 22NCVC -148-0212013;

- (b) After the full trial of the Civil Suit, SJAM has managed to obtain a judgment against the First Defendant for the relief prayed for, amongst others, injunction, payment of damages, destruction of the infringing goods and cost;
- (c) Subsequently, the First Defendant filed an appeal against the Judgement which has been rejected by Court of Appeal on 20 May 2015 and leave to appeal to Federal Court failed to be obtained;
- (d) Upon crystallization of the Judgment, SJAM filed an application for assessment of damages. The First Defendant who was not satisfied with the amount payable assessed by the Senior Assistant Registrar subsequently appeal to Judge in chambers and the court of Appeal;
- (e) The SJAM on the other hand took an action to enforce the Judgment through the Garnishment Action filed at the High Court to freeze the First Defendant banking accounts;
- (f) However, the First Defendant has successfully dismissed the garnishment order which was premised on the Judgment obtained by SJAM as the Plaintiff has in the garnishment proceeding, affirmed an affidavit in his personal capacity instead of the Chief Operating Officer of Pantai Area,



Selangor;

- (g) As a result of the above, suspicious arose as to the power and authority of the Plaintiff in commencing the actions including the garnishment proceeding and the First Defendant (the company) had no choice but to write a letter via the Second Defendant in her capacity as the Director of the First Defendant entitled “Request for Confirmation of Authorisation by St. John Ambulance Malaysia” dated 17 March 2017 with the purpose of seeking confirmation from the specified members of the SJAM;
- (h) Therefore, the Plaintiff commenced this against the First and the Second Defendant for the cause of action premised on this Letter whereby the Plaintiff claimed that the First Defendant and the Second Defendant had defamed him in this Letter.

## **THE BRIEF ARGUMENTS**

- 6. In summary, the thrust of the Defendant’s submissions were as follows:
  - (a) The Plaintiff’s action against the. Defendants is obviously unsustainable as the Letter is a mere letter of inquiry which intends to seek clarifications from the specific members of the SJAM Council;
  - (b) Even if the Statements are defamatory (which is denied), the Defendants are relying on the Defences of Justification,



qualified privileged and fair comments;

(c) The Plaintiff's cause of action against the Second Defendant is obviously unsustainable as the Second Defendant is a different entity from the First Defendant.

7. In answer, counsel for the Plaintiff, Messrs, Josephine, L K Chow & Co. had raised the following objection, namely:

(a) The Plaintiff takes the position that the Letter dated 17 March 2017 is *mala fide* and intended to defame the Plaintiff as the Letter has been distributed and published to the members of SAM;

(b) As a consequence of the publication, the Plaintiff suffered loss and damage to his professional reputation;

(c) As the Defendant had acted in bad faith at all material times, the Defendant are not entitled to rely on the defence of privileged, fair comment and justification;

(d) The Second Defendant can still be held personally accountable and liable for defamation as she is the author of the Letter.

## **THE LAW OF STRIKING OUT**

8. The principles governing a striking out application are automatically set out in *Bandar Builder Sdn. Bhd. & 2 Ors. v. United Malayan Banking Corporation Berhad* [1993] 4 CLJ 7;



[1993] 2 AMR 1969; [1993] 1 MLRA 611 (FC). It is only in plain and obvious cases where it is clear that the claim is unsustainable is the power to summarily strike out a case exercised, Mohamed Dzaidin Sal delivering the judgment of the Federal Court as follows:

*“... the principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19....are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule...and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it “obviously unsustainable it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.....*

*Both the counterclaim and the defence to the counter claim have raised some issues which required serious consideration. This was not a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. So long as the pleadings disclose some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that there were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were*

*otherwise an abuse of the process of the court...”*

9. The above case and principles was also followed in the Court of Appeal judgment in *Enersafe Sdn. Bhd. v. Megarina Sdn. Bhd.* [2006] 2 CLJ 1021 (CA), Zulkefli Makinuddin JCR (as he then was) had said this:

*“... (12) We find it is most appropriate here to state the well established principle in that the power of striking out pleadings under O. 18 r. 19...as invoked by the appellant in this case is too well known that **it can only be exercised when the respondent’s claim on the face of it is obviously bound to fail...**”*

10. Similarly, in another Court of Appeal decision of *Sivakumar a/l Varatharaju Naidu v. Ganesan a/l Retanam* [2011] 6 MLJ 70, Abdul Malik Ishak JCA held that:

*“...the summary procedure under Order 18 Rule 19 should only be resorted to when it is conspicuously clear that the Plaintiff’s claim, on the face of it is obviously unsustainable. **The court will always strike out a claim in plain and obvious cases and where the claim is obviously unsustainable. The power to strike out must be exercised by the court sparingly. It is a rule of thumb that if it can be shown that the pleadings do disclose some cause of action or that it has raised some question fit to be decided, then the case should be set down for argument notwithstanding that the chances of success are minimal. The pleadings must be entirely hopeless, baseless or without foundation in law or in equity before they can be***

*struck out...*”

11. This court is always reminded by plethora of cases that the power to strike out summarily without a trial is a drastic power which should be exercised with utmost caution and should only be exercised in plain and obvious cases (see *Tractors Malaysia Berhad v. Tio Chee Hing* [1975] 2 MLJ 1, *Bandar Builders Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd.* [1993] 3 MLJ 36).

#### **FINDING OF THIS COURT**

12. In the beginning, the Defendants have raised a preliminary objection in respect of the Plaintiffs Affidavit in Reply as the endorsement of the said Affidavit is wrong and the jurat on the said Affidavit is defective as it did not state that it was affirmed or sworn by Plaintiff. As this is not the main issue or crux of the application, I shall not deal in detail about it. Suffice to say that the provision of Order 2 Rules 3 of the Rules of Court 2012 states as follows:

***“Preliminary objection for non-compliance of rules not allowed***

*A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the grounds of non-compliance of any provision of these Rules unless the Court or Judge*



*is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudiced that cannot be cured either by amendment or an appropriate order for costs or both .....*”

**Having closely scrutinized the said Plaintiffs Affidavit in Reply, to my mind these irregularities are very minor and not fatal. It would not cause any substantial miscarriage of justice or in any way had prejudiced the Defendant. Such endorsement at the end of the Affidavit are merely typographical errors that had never occasioned any failure of justice, It is still a good Affidavit, and may be used in so far as. Enclosure 14 is concerned.** This can be evidence by the respond and answered as well as addressed by the Defendant all the averment made by the Plaintiff. If at all, I grant leave to the Plaintiff to continue using the said Affidavit in Reply in respect of Enclosure 14 despite some minor errors and omission. Be that as it may, at the end of the Defendants counsel submission before me, they have retracted this issue and would not proceed further. Having scrutinized the above, I shall now consider the rival contentions of the parties. To my mind after reading the Affidavits filed by both parties and their submissions, this proceeding would only involved one issue.

**ISSUE**



*Is there: “He said She said” position existed? Dispute by parties?*

*Defamations?*

13. In considering this issue, it is the Defendants contention for striking out as such:

- *That the Letter titles “Request for Confirmation of Authorization by St. John Ambulance Malaysia” dated 17 March 2017 was a letter of inquiry by the Defendants and intended to seek confirmation from members of SJAM Council and not a defamatory letter;*
- *That the “butir-butir fitnah” as pleaded in the Statement of Claim are statement of facts so that the Defendants question/ query could be understood by the members of SJAM Council;*
- *That the Letter was never conveyed and/or distributed to the general members of SJAM, other areas SJAM group and/ or general public;*
- *That the Letter do not contain any facts which may caused the Plaintiff to be lowered in the estimation of fight thinking members of society. In essence, the Plaintiff could riot have suffered loss or damage to his reputation from the contents of the Letter;*
- *That the Defendants are entitled to rely on privileged, fair*



*comment and the defiance of justification; end*

- *That the Second Defendant cannot be held liable as she has written/ drafted the Letter in the capacity as the Director of the First Defendant. Accordingly, there is no exception to lift the corporate veil to support the Plaintiff's claim.*

14. On the other hand, the Plaintiff asserted that the Letter dated 17 March 2017 was written in Bad Faith and intended to defame the Plaintiff as such the “Defamatory Letter” has been distributed and published to the members of SJAM, the respective personal assistants and helpers who are task to attend their letter. As a consequence to this, the Plaintiff claimed that he has suffered loss and damage to his professional reputation. As the Defendant had acted in bad faith, they are not entitled to any defences. Since the Second Defendant is the author of the said Letter, his accountability for Defamation lies. It is to be noted that the Plaintiff’s cause of action towards the Defendants for Defamation as the Defendants are aware of the Plaintiff’s power and authority to act on behalf of St. John Ambulance Malaysia. His authority and power to sign Affidavit on behalf of SJAM has been dismissed in an earlier proceeding and confirm by the SJAM Commander in Chief. There is no requirement for the Defendants to Issue the Letter dated 17 March 2017 as the Garnishee Order was made absolute.

**Sub-issue**



*Any question arises??*

15. Having considered the assertion by both the Plaintiff and the Defendants, several questions arises, namely:

*Whether the Letter dated 17 March 2017 is a Letter of Inquiry or is a Mala Fide letter intended to Defame and embarrass the Plaintiff?*

- *Whether the Letter dated 17 March 2017 is distributed and published, as pleaded?*
- *Whether the publication of the Letter dated 17 March 2017 has cause loss and damage to the Plaintiffs reputation?*
- *Whether the Defendants are entitled to rely on the defence of privileged, fair comments and the defence of justification?*
- *Whether the Second Defendant can be liable as the author of the Letter?*

16. Having had several questions in mind and a note of reminder that the Plaintiff's claim against the Defendant is under the tort of Defamation, it is best to refer the case of : *Date Seri Tiong King Sing v. Datuk Justine Jingtog* [2003] 6 MLJ 433, Sulaiman Daud J held that:

*".....It cannot be doubted that the court is empowered under*



*Order 18 Rule 19 of the RHC or its inherent jurisdiction to dismiss an action on the ground that the pleadings disclosed no reasonable cause of action **but such jurisdiction ought to be sparingly exercised**, and only in very exceptionally cases. In *New Straits Times (Malaysia) Bhd. v. Kumpulan kertas Niaga Sdn. Bhd. & Anor* [1985] 1 MLJ 226, Mohamed Azmi FJ, in delivering the judgment of the Federal Court said at page 227,*

*In a claim for damages for libel, It was held that the power under Order 18 rule 19(1)(a) could only be used in plain and obvious cases ... the court will not strike out a pleading on the ground that the words are incapable of defamatory meaning but will leave the question whether they are capable of such meaning to be dealt with at a trial...*

*Based on the aforesaid authority, it is quite impossible for this court to determine at this stage of the proceedings whether the words complained of in pares 4, 6, 7, 8 and 9 of the statement of claim are capable of the defamatory meaning as attributed thereto in Para 12 thereof. it can only be resolved at a trial upon considering the context and circumstances in which<sup>14</sup> the statement was made as a whole. Likewise, the Defendant will riot succeed on this ground...*



*...On this point, suffice for me reiterate my earlier finding that the question as to whether the words complained of are capable of such meaning are triable issues to be dealt at a trial. it is necessary to take into account, not only the actual words used but also the context thereof and the circumstances in which the same were uttered.....”*

**Having considered the above case, it is my considered view that the question of whether the Letter is a mere letter of inquiry which intends to seek clarification or a defamatory letter, as averred, is triable, not only in its context but also on the surrounding circumstances of which the Letter came about.**

**Sub-issue**

***Defences applicable to Defendant?***

17. The Defendant’s counsel had also submitted that they are entitled to rely on the defence of justification, fair comment and qualified privileged. **Having considered this, to my mind Enclosure 14 is premature as the Defendants is attempting to put forward their submission “as if” this matter have already proceeded for a full trial.** The Defendant appeared to have assumed the findings of this court, even before this court has opportunity to peruse or consider the documentary evidences as well as the testimonies of witnesses.

**Sub-issue**



*Doctrine of Separate Legal Entity?*

18. In another issue of doctrine of separate legal entity, the Defendant's counsel had submitted that since the Plaintiff had not specifically pleaded malice on the part of the Second in her personal capacity, the Plaintiff's cause of action against the Second Defendant is obviously unsustainable. The Second Defendant is a different entity from the First Defendant and hence it is wrong for the Plaintiff to name the Second Defendant as one of the Defendants in the suit although the Second Defendants the Director and Shareholder of the First Defendant. **Having considered that the Plaintiff have pleaded in the Statement of Claim that the Second Defendant had acted *mala fide* at all material times in issuing the Letter, to my mind this doctrine and whether the First Defendant's corporate veil ought to be lifted are issues that need to be tried.**
19. In light of prematurity mentioned above, to my mind that the Defendant's averments should be disregarded by this court and the Defendants ought to have reserved their averments until after the trial in this matter.

**CONCLUSION**

20. In light of the foregoing and in the upshot, after hearing the submission by both parties, I hold that the Plaintiff's pleading clearly contained issues that can only be resolved by evidences during the trial. Such determination requires further evidence which can only be adduced by examination of witnesses at a trial. I also



found out that the Plaintiff's case under the Tort of Defamation is not hopeless, baseless or without any foundation in law or in equity which entitle the Defendants to strike out under Order 18 Rule 19(1)(a), (b) or (d) Rules of Court 2012. For the reasons stated above, these issues cannot in my view be used as a ground for striking out the Plaintiff's action. In the circumstances, I dismiss the Defendant's application herein with cost RM4000.00.

**DATED:** 25 JANUARY 2018

**(MOHAMAD SHARIFF HJ ABU SAMAH)**  
Judicial Commissioner, NCVC 6  
High Court of Malaya  
Shah Alam, Selangor Darul Ehsan

**Counsel:**

*For the plaintiff - Lim Eu Jin & MX Chang; M/s Josephine, L K Chow & Co*

*For the defendant - Ng Yong Yee & Lee Yoke Shan (PDK); M/s Chris Lim Su Heng*