

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
(CIVIL DIVISION)  
CIVIL SUIT NO. S2 - 23 - 38 - 2006

BETWEEN

1. SARAWAK SHELL BHD (71978-W)
2. SHELL MALAYSIA TRADING SENDIRIAN BERHAD (6078-M)
3. SHELL REFINING COMPANY (FEDERATION OF MALAYA) BHD (3926-U)
4. SHELL TIMUR SDN BHD (113304-H)
5. SHELL EXPLORATION AND PRODUCTION MALAYSIA B.V. (993963-V)
6. SHELL OIL AND GAS (MALAYSIA) LLC (993830-X)
7. SHELL SABAH SELATAN SDN BHD (228504-T)
8. SABAH SHELL PETROLEUM COMPANY LTD (993229-W) ... PLAINTIFFS

A N D

HUONG YIU TUONG

... DEFENDANT

**PLAINTIFFS' SKELETAL SUBMISSIONS**  
**(INTERIM INJUNCTION)**

*May it please you, My Lord,*

**BACKGROUND**

**History**

1. This is set out in the affidavit of Thavakumar Kandiah Pillai of 5.4.06 and we now merely highlight the salient portions.

See: Paragraphs 5 to 10

The Defendant was formerly an employee of the 1<sup>0</sup> Plaintiff. He was dismissed on 28.5.03 for unaccounted absence from work and insubordination.

3. In retaliation, the Defendant commenced a tirade of defamatory publications that extended beyond his former employer, the 1<sup>0</sup> Plaintiff, to the Plaintiffs generally.
4. The Plaintiffs commenced proceedings against the Defendant in Kuala Lumpur High Court Suit No. S2-23-41-2004 (the Previous Action) for defamation.
5. On 24.6.04, the Plaintiffs obtained an Interim Injunction against the Defendant to restrain him from repeating the publications containing the allegations of the kind that led to the Previous Action (the Existing Injunction).
6. The Existing Injunction remains in force.
7. Notwithstanding the Existing Injunction, the Defendant continued publishing statements defamatory of the Plaintiffs. In the Plaintiffs' view, some constituted contempt of court in the Previous Action. Contempt proceedings have since been initiated. For those statements that probably fell outside the scope of the Previous Action and the Existing Injunction, the Plaintiffs commenced the present proceedings.

The Present Proceedings

8. This action has been commenced for 3 specific publications. These are:
  - 8.1 A 2.2.06 publication of the Defendant's letter to Jyoti Munsiff (Publication No. 1)
  - 8.2 A 7.2.06 publication on the Shellnews.net website (Publication No. 2)

8.3 A 8.2.06 publication on the Shellnews.net website (Publication No.3)

See: Paragraph 11 of Thavakumar Kandiah Pillai's affidavit of 5.4.06

9. The Plaintiffs' position is that the facts show that the Defendant will repeat these defamatory statements, or publish words to like effect, unless restrained by Order of Court.

See: Paragraphs 28 to 35 of Thavakumar Kandiah Pillai's affidavit of 5.4.06

10. *Interim* injunctive relief is therefore sought by this application.

#### SUBMISSIONS

##### The Legal Principles

11. The following passage from *Halsbury's Laws of England* (4<sup>th</sup> Edition), Vol 28 ¶166 [TAB A] represents the law:

The High Court may grant an interlocutory injunction restraining the Defendant, whether by himself or by his servants or agents or otherwise, from publishing or further publishing matter which is defamatory or of malicious falsehood. It is not necessary to show that there has already been an actionable publication or that damage has been sustained. In appropriate cases an injunction may be granted *ex parte* and before the issue of a writ.

12. In other words, an injunction can be granted even before damage occurs. The present facts are therefore *a fortiori*.

13. Defamation actions however involve special considerations. In THE NEW STRAITS TIMES PRESS (M) BHD v AIRASIA BHD [1987] 1 mg 26 [TAB B], the Federal Court ruled that the ordinary AMERICAN CYNAMID principles did not apply. The substance of this decision was the recognition that too free the granting of an interlocutory injunction in defamation cases would stifle free speech.
14. There is however no blanket ban on interlocutory injunctions in defamation actions. In short, there is no untrammelled right to continue defame pending trial. In NGOI THIAM WOH v CTOS SDN BHD [2001] 4 MLJ 501 [TAB C] the court summarised 4 factors that must be satisfied.
- 14.1 The statement must be unarguably defamatory
- 14.2 The statement must be clearly false (ie. justification will fail as a defence)
- 14.3 There must be no available defence
- 14.4 There must be evidence of an intention to repeat the defamation
15. The Plaintiffs case is that all 4 factors are satisfied.
16. The Defendant has sought to contend that the publications were by Donovan, not him. This is disingenuous and not the law. As a matter of law, publication is the dissemination of defamatory material to at least one other person:
- See: PULLMANN v HILL & CO [1891] 1 QB 524 [TAB D]
17. Here, there was communication from the Defendant to Donovan. Donovan then republished the defamatory material. In law, this is deemed to be publication by the Defendant as the publication by Donovan was the natural and probable consequence of the publication from Huang to Donovan.
- See: SLIPPER v BBC [1991] 1 All ER 165 [TAB E] where the court ruled thus:

The law would part company with the realities of life if it is held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs.

18. The same point is made in **McMANUS v VICTORIA BECKHAM [2002] 1 WLR 2982 [TAB 9]** (at ¶34 of the report):

If a **Defendant is actually aware**

1. **that what she says or does is likely to be reported, and**
2. **that if she slanders someone, that slander is likely to be repeated in whole or in part,**

**there is no injustice in her being held responsible for the damage that the slander causes via the publication. I would suggest further that if a jury were to conclude that a reasonable person in the position of the defendant should have appreciated that there was a significant risk that what she said would be repeated in whole or in part in the press and that that would increase the damage caused by the slander, it is not unjust that the defendant should be liable for it.**

19. That is precisely the case here.

The statements are unarguably defamatory

20. A publication is defamatory if it lowers a person in the estimation of right thinking members of the public generally.

See: **CHOK FOO CHOO v THE CHINA PRESS BHD [1999] 1 MJ 371 [TAB G]**

SYED HUSIN ALI v SHARIKAT PENCHEKAKAN  
UTASAN MALAYU BHD [1973] 2 mq 56 [TAB H]

21. On this test, the Publication Nos. 1 to 3 are unarguably defamatory.

*Publication No. 1*

22. The full text of this publication is exhibited as 'TK-2' of Thavakumar Kandiah Pillai's affidavit of 5.4.06. It is a letter to Jyoti Munsiff the newly appointed Chief Ethics and Compliance Officer of Royal Dutch Shell plc.
23. We now merely highlight certain passages from that publication to show their defamatory nature:

**As you know I am being sued by eight companies of the Royal Dutch Shell Group for alleged defamation. The relevant Shell companies have obtained a restraining order which prevents me for speaking the TRUTH in line with the United Nations Universal Declaration on Human Rights. My rights to freedom of expression have in fact been restrained for over 18 months. I had thought that Shell supported this UN Declaration, but it seems that this assumption must be incorrect. I would welcome your clarification on this point as I am sure that my analysis must be at fault?**

**Something really must be seriously amiss. The answers to my questions are important if - as I assume must be the case - you genuinely want to encourage whistleblowers to speak out if they become aware of misdeeds which are in contravention of the Shell Statement of General Business Principles (SGBP).**

**It is surely essential in this regard that an even-handed approach is adopted in such matters so that would be whistleblowers and parties**

with genuine grievances are not deterred by the prospect that they could be ostracized, victimized, sacked and/or sued if they do come forward. In regards to this paragraph I am speaking of course in general terms, not about my case, as that would be inappropriate under the current ongoing litigation.

This letter also seeks confirmation from you for me to make significant inputs for improving ethics and compliance at Shell. I sincerely believe that for obvious reasons I have a unique perspective on the question of Shell employees engaging professionally in whistle blowing when faced with ethical, moral and/or legal dilemmas.

I also believe that it is fair to make readers of this communication aware that apart from the High Court Restraining Order, I am also constrained in my comments by a threat of imprisonment.

I am sure that the eight Royal Dutch Shell companies who collectively decided to sue me believe that their action is an appropriate and proportionate response to the alleged defamatory comments by one former Malaysian employee of 29 years.

[Our emphasis]

24. The Plaintiffs case is that these passages clearly identify and defame the Plaintiffs. The crux of the defamation is the allegation that the Defendant, a 'whistleblower has been gagged to prevent him from speaking the 'TRUTH'. He has been restrained from revealing 'misdeeds' that are illegal, immoral and or unethical. The allegation therefore is that the Plaintiffs have abused the legal process afforded by the High Court
25. However viewed, the allegations are defamatory.
26. The Defendant denies this conclusion. He contends that Publication No. 1 merely asserts that the Defendant has been restrained from speaking freely

presumably in accordance with the United Nations Universal Declaration of Human Rights.

**See: Paragraph 20 of the Defendant's affidavit of 19.5.06**

27. We respectfully submit, that even this meaning, which the Plaintiffs do not accept as the proper interpretation, is defamatory.

*Publication No. 2*

28. The text of this publication is exhibited as 'TK-3' of Thavakumar Kandiah Pillai's affidavit of 5.4.06. It is a compilation of scandalous allegations of wrongdoing against the Plaintiffs.

**See: Paragraphs 16 to 22 of Thavakumar Kandiah Pillai's affidavit of 5.4.06**

29. There can be no question that the publication defames the Plaintiffs. The allegations include the following:

**However Dr Huang discovered in 1997 and the immediately following years that the SGBP are in fact empty promises - propaganda for use in the circumstances described above and in global advertising campaigns such as "Profits and Principles" or "the triple bottom-line". The SGBP amounted to nothing more than a confidence trick to encourage the public and financial institutions into investing Shell.**

**[Our emphasis]**

**See: Page 2 of the printout exhibited as TK-3' to Thavakumar Kandiah Pillai's affidavit of 5.4.06**



Dr Huong was, as far as I am aware, the first Shell employee to blow the whistle at Shell (in 1997) about the deliberate falsification of hydrocarbon reserves.

[Our emphasis]

See: Page 2 of the printout exhibited as 'TK-3' to Thavakumar  
Kandiah Pillai's affidavit of 5.4.06

His objections to bending his principles by turning a blind eye to wrongdoing proved to be the turning point in Dr Huong's previously highly successful career with Shell. He was humiliated, victimised, put under intolerable pressure which made him ill and was ultimately, sacked, thereby further aggravating stress brought about by Shell's actions against him. Prior to the wrongful dismissal, the domestic inquiry heard that this medical record in the care of the company doctor could not even be found. The records had mysteriously disappeared, just like Shell hydrocarbon reserves.

[Our emphasis]

See: Page 3 of the printout exhibited as '7K-3' to Thavakumar  
Kandiah Pillai's affidavit of 5.4.06

30. The 'affidavit' contains related defamatory assertion of, for example, racism against the Plaintiffs:

Mr Alfred Donovan has pointed out in the same vein that Shell settled a retirement funds related class action law suit brought against it by its American employees, whilst it has for years, dragged out retirement fund related lawsuits brought by its Malaysian former employees.

It there is any substance to Mr Donovan's speculation, then *we* would have to add '*racist policies*: to the description listed above.

[Emphasis in original]

See: Page 14 of the printout exhibited as 'TK-3' to  
Thavakumar Kandiah Pillai's affidavit of 5.4.06

**31. Even the Judge in the Previous Action is impugned:**

Shell is well aware of the situation I have described because Mr Alfred Donovan faxed a letter to the relevant Judge in Kuala Lumpur on 5th July 2004 admitting his facilitating key role, yet Shell has not taken any action against Mr Alfred (or John) Donovan other than the domain name proceedings against Mr Alfred Donovan via the WIPO (which was unsuccessful).

See: Page 16 of the printout exhibited as 'TK-3' to  
Thavakumar Kandiah Pillai's affidavit of 5.4.06

**32. Significantly, the Defendant does not deny any of this. Instead, his position is that his allegations are justified, a matter to which we will return.**

See: Paragraph 22 of the Defendant's affidavit of 195.06

*Publication No. 3*

33. This publication is an email dated 8.2.06 sent by the Defendant to Human Rights Watch. It is exhibited as 'TIC-5' of Thavakumar Kandiah Pillai's affidavit of 21.6.06.

34. In it the Defendant sanctions the publications sent to Human Rights Watch on his behalf on 7.2.06 (Publication No. 2). His specific words were the following:

. . . I do not take issue with anything stated in the Draft Affidavit bearing in mind that I am under threat of imprisonment and it would

**not be prudent for me to comment further on this matter other than to state in general terms that I support freedom of expression.**

35. This is a cynical tongue-in-cheek response. It is undoubtedly an endorsement of the previous publication (which in any event we say *is* the Defendant's). If the Defendant refuted the statements, all he had to do was to say so. That would not have been a breach of the Existing Injunction in the Previous Action. It also would not have been defamatory.
36. If he endorsed them but felt constrained by the Injunction in the Previous Action, he should have either not responded, or responded privately. By responding publicly the Defendant was endorsing the publication. The 'affidavit' he endorses includes the assertions of racism and judicial impropriety referred to in paragraphs 26 and 27 above.

*The statement **must be clearly false***

37. Given the nature of the allegations, this is clearly the case. The Defendant has gone on wild rampage with Alfred Donovan to consider any wrongdoing done by any Shell company around the world. He then extrapolates from the particular - individual instances of impropriety anywhere in the world - and reaches a general conclusion that the 8 Plaintiffs have been dishonest, engage in criminal conspiracy and criminal conduct generally.
38. In the rambling megalomaniacal 'affidavit' the Defendant elevates himself to a pedestal and concludes from the fact that he was dismissed and that this was because he had discovered the 'TRUTH'.
39. Yet, in all this, not one iota of specific fact is raised to justify any of the serious allegations against the Plaintiffs. As we have seen, these include allegations of:

- 39.1 Deliberate falsification
- 39.2 Destroying documents to thwart legal proceedings
- 39.3 Racism

That is why he had to run to the Donovans for assistance. Even now, not one specific fact of wrongdoing has been supported.

*There must be no available defences*

*justification*

- 40. As we have explained, this defence will fail.

*Qualified privilege*

- 41. The Defendant concedes that this defence does not apply. He does not plead it.

Fair Comment

- 42. Fair comment also cannot apply.

**RATUS MESRA SON BHD v SHAIK OSMAN MAIM** (1999) 13 Nuj 529 (TAB 11 sets out the 4 elements of this defence. These are:

- 43.1 The words complained of must be comment and not fact
- 43.2 The comment must be on a matter of public interest.
- 43.3 The comments must be based on the facts.
- 43.4 The comments must be one that a fair-minded person can make.

- 44. Here, save for possibly the second element, the other 3 elements cannot be met. In particular, the allegations of dishonesty, racism, falsification of documents etc are allegations of fact. No question of comment arises.

45. In any case, malice vitiates this defence as well.
46. In LEE KUALA YEW v DAVIES (19891 SLR 1063 (TAB J1 the court explains that express malice is publishing something:
- . . . without considering or caring whether it was true or false; they were indifferent to the truth. They are equated with a publisher who publishes materials or articles without considering or caring *whether* they are true or false. In that sense, they acted recklessly. In my judgment, for the reasons I have given, the fourth defendants were also actuated or affected by express malice.
47. 'Over-the-top' abusive and snide statements like those made by the Defendant, aided and abetted by Alfred Donovan constitute clear evidence of an absence of honest belief.
48. This case is very similar to another case in the High Court in Suit No. 52-23.89-2002 (Perusahaan Otomobil Kedua Sdn Bhd & 2 Ors v Fong Khee -Choorvg, Richard). In that case, the Defendant bought a car from the Plaintiff which he subsequently discovered, had a minor defect He demanded a replacement but all the Plaintiffs was willing to do, was to repair the minor defect There was an impasse.

The Defendant then launched into a tirade of abuse on the Internet against the Plaintiffs. He made various allegations of corruption, deceitful conduct, etc, etc against the Plaintiffs all because there was a defect in his car. The Plaintiffs sued and obtained an interim injunction against the Defendant, granted *by* Justice Hishamuddin.

The Defendant's appeal to the Court of Appeal *was* dismissed *with costs*. Justice Hishamuddin's Grounds of Decision are annexed as (I'AB K).


49. Further, if the Defendant's publications are genuine, there would be no need for the facade of carrying on with defamatory publications and claiming that they are by Alfred Donovan.

CONCLUSION

50. For the above reasons, we respectfully pray that the application be allowed with costs.

*Much obliged.*

Dated this 13<sup>th</sup> day of October, 2006.

  
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MESSRS T H LIEW & PARTNERS  
SOLICITORS FOR THE PLAINTIFFS

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