

**MALAYSIA**  
**IN THE HIGH COURT IN SABAH AND SARAWAK**  
**AT KOTA KINABALU**  
**SUIT NO.: BKI-23NCvC-1/3-2022**

**BETWEEN**

**DATUK TEE GUAN PIAN**  
**(NRIC No.: 640804-10-6157)**

**... PLAINTIFF**

**AND**

**DAVID WONG**  
**(Singaporean Passport No.: E6335237A)**

**... 1<sup>ST</sup> DEFENDANT**

**CHEAH SOON LYE**  
**(NRIC No.: 540318-07-5529)**

**... 2<sup>ND</sup> DEFENDANT**

**BEFORE THE HONOURABLE**  
**HIGH COURT JUDGE**  
**JUSTICE LEONARD DAVID SHIM**

**GROUND OF DECISION**  
**(Enclosure 12)**

- [1] This is an application by the Defendants to strike out the Plaintiff's Writ and Statement of Claim under .18. r.19 (a) - (d) & o.92 r.4 ROC 2012.
- [2] The grounds of this application are as follows:
- a) Plaintiff's omission in the title of the writ to file action "...in the name and on behalf of the Company..." as required under Part I Twelfth Schedule item (a) Section 486(1) Companies Act 2016 ("CA2016");
  - b) Plaintiff has no right as liquidator to file action in ordinary civil court and
  - c) Alleged defamatory statement is protected by absolute privilege under *Lincoln v Daniels* [1962] 1 QB 237; and
  - d) Plaintiff's failure to file a reply under Order 78 rule 3(3) of the Rules of Court 2012 ("ROC2012") "...from which the malice is to be inferred" will render the defence to remain unrebutted.

### **Brief Facts**

- [3] The Plaintiff is a chartered accountant and a fellow member of various professional bodies, namely, the CPA Australia (FCPA), the Malaysian Institute of Accountants (MIA), the Malaysian Institute of Certified Public Accountants (MICPA), the Chartered Tax Institute of Malaysia (CITM), the Institute of Cooperative & Management Accountants and the Malaysian Institute of Management (MIM).

- [4] Besides that, the Plaintiff is also a holder of the Capital Market Services Representative's Licenses to call on all regulated activities of advisory on Corporate Finance pursuant to Capital Market and Services Act 2007.
- [5] To sum up, the Plaintiff specializes in several areas of expertise, including statutory audit, corporate planning and restructuring, company flotation, share valuation, tax planning, takeover and mergers, development of operational manual, investigative audit, receivership, and liquidation.
- [6] On 6.2.2017, the Plaintiff and Ms. Wong Shan Ty were appointed by the High Court to replace the Official Receiver as the Joint and several liquidators for a company known as Sagajuta (Sabah) Sdn Bhd (in Liquidation) ('Sagajuta') to manage and liquidate the assets belonging to Sagajuta.
- [7] Pursuant to a Court order dated 21.03.2019, the Plaintiff was subsequently appointed as the sole liquidator for Sagajuta due to the demise of Ms. Wong Shan Ty.
- [8] Under the purview of the Plaintiff as the Liquidator of Sagajuta, the Plaintiff was entrusted, inter alia, to carry out the following tasks:-
- (i) Rehabilitation of a project known as "the 1Sulaman Platinum Tower project";
  - (ii) Control and manage the 1Borneo Hypermall pending the issuance of the respective strata titles to the 1Borneo Hypermall; and

(iii) Liquidate all other assets belonging to Sagajuta for the benefit of the creditors and shareholders of Sagajuta.

**[9]** Since the appointment to the Plaintiff as Liquidator of Sagajuta in 2017, the Plaintiff contends that he had expended a considerable amount of time to ensure the rehabilitation of the 1Sulaman Platinum Tower is completed and to manage the 1Borneo Hypermall pending the issuance of the respective strata titles to the unit owners.

**[10]** In or about January 2020, after years of cumulative efforts of the Plaintiff, the Plaintiff has successfully obtained an Order to rehabilitate the abandoned 1Sulaman condominium towers which consists of more than 1,000 units of condominium.

**[11]** The Plaintiff's effort in successfully rehabilitating the 1Sulaman Platinum Tower has gathered widespread media coverage as it was the first abandoned project of such scale being successfully rehabilitated in the state of Sabah and the rehabilitation had brought more job opportunities for the state of Sabah.

**[12]** The Plaintiff contends that he has ever since his appointment as Liquidator of Sagajuta relentlessly attempting to obtain the issuance of the individual strata titles to the respective owners of the 1Borneo Hypermall. This is to ensure that the management and control of the 1Borneo Hypermall is surrendered to the hands of all owners of the 1Borneo Hypermall.

- [13]** In or about mid of 2018, a group of owners of the 1Borneo Hypermall led by the 1<sup>st</sup> Defendant approached the Plaintiff with a view of forming a committee of purchasers of the 1Borneo Hypermall and take over the control and management of the 1Borneo Hypermall.
- [14]** The group of owners had represented to the Plaintiff that they are ready and able to properly manage the 1Borneo Hypermall and it would be prudent to allow a committee of owners to take over the control and management of the 1Borneo Hypermall.
- [15]** As the process of issuance of the respective subsidiary titles to the owners of the 1Borneo Hypermall was nearing its completion, the Plaintiff verily believed that it was practical to appoint a committee of owners to manage and control the 1Borneo Hypermall as the management of the 1Borneo Hypermall would eventually be vested on them upon the issuance of the subsidiary title to the respective owners for the 1Borneo Hypermall.
- [16]** On 19.12.2018, the Plaintiff appointed United 1Borneo Hypermall Sdn Bhd ('U1BH') to carry out all powers as Sagajuta's agent and/or manager to control, manage and collect service charges from the respective unit owners of the 1Borneo Hypermall.
- [17]** In carrying out the duties as Sagajuta's agent and/or manager of the 1Borneo Hypermall, U1BH had commenced legal actions against owners of the 1Borneo Hypermall for their failure to pay their respective maintenance.

- [18] On or about 30.11.2021, the Plaintiff was subpoenaed by one of the unit owners of 1Borneo Hypermall, See Hong Cheen @ See Hong Chen, who was sued by U1BH in Kota Kinabalu Civil Suit no.BKI-22NCvC-7/1-2020 (HC2) [“the said Suit”] for allegedly failing to pay service charges for their units at the 1Borneo Hypermall. The Plaintiff was subpoenaed in his capacity as Liquidator of Sagajuta to give evidence on the appointment of U1BH as agent / manager of the 1Borneo Hypermall.
- [19] Thereof, the Plaintiff states that he had dutifully appeared in Court and testified as Liquidator of Sagajuta in the said suit. At all material times, the Plaintiff had testified on oath and gave evidence on what he believed to be the truth of the matter.
- [20] The Plaintiff contends that on or about 31.12.2021, the Defendants disseminated a statement in their respective group chats in the Whatsapp instant messaging app (Whatsapp) and the Telegram messaging app (Telegram) and began an orchestrated attack against the Plaintiff.

### **Contention of the Parties**

- [21] The Defendant contends that the grounds for striking out are as follows:
- (a) Plaintiff’s omission in the title of the writ to file action “... in the name and on behalf of the Company...” as required under Part I Twelfth Schedule item (a) Section 486(1) Companies Act

2016 (“CA2016”) for “powers exercisable without authority” of the Court;

- (b) Plaintiff has no right as liquidator to file action in ordinary civil court and should have been filed in post winding-up court under Part IV CA2016;
- (c) Alleged defamatory statement is protected by absolute privilege under the principle in *Lincoln v Daniels* [1962] 1 QB 237; and
- (d) Plaintiff’s failure to file a reply as required under Order 78 rule 3(3) of the Rules of Court 2012 (“ROC2012”) “...must serve a reply giving particulars of the facts and matters from which the malice is to be inferred” will render the defence to remain unrebutted.

**[22]** The Plaintiff’s has named himself, Datuk Tee Guan Pian in his personal capacity instead of Sagajuta (Sabah) Sdn Bhd (in liquidation). However, the Plaintiff had claimed in his capacity as liquidator in the pleadings as follows:

*“[26] ... exposed the Plaintiff into public scandal, odium, hatred and contempt on his capacity as Liquidator of Sagajuta and an insolvency practitioner in general for his failure to properly execute his obligations as the Liquidator of Sagajuta.*

...

*[28] ... the Plaintiff has suffered serious injury to his professional reputation as the Liquidator of Sagajuta...*

...

*[30] ... the Plaintiff has suffered serious injury to his professional reputation, inter alia, considering his profession as a long-standing Liquidator being involved in high-profile employments in his professional carrer...”*

**[23]** The Defendants contend that the distinction between the two capacities was highlighted in the Federal Court case of **Lim Eng Guan v Ruslan bin Kassim and another appeal [2021] MLJU 226**. The core issue in the appeal is whether an individual who holds political office or is a government official is disentitled from bringing an action in defamation in his official capacity. The Federal Court decided that the Court of Appeal was plainly in error when it was decided that public officials are precluded in the public interest from bringing a defamation action in their official capacity or in relation to matters affecting their official functions. Harmindar Singh Dhaliwal FCJ in delivering the judgment, state the distinction as follows:

*“[107] ... whether the plaintiff public official is bringing the suit in relation to personal or official matters. In essence, the former relates to one’s private life or previous character whilst the latter is concerned with a public official’s fitness for office...”*

**[24]** The Defendants submit that the pleadings of the Plaintiff indicated that the action brought by the Plaintiff is not personally but rather in his professional capacity as liquidator of Sagajuta. This is because the purported defamatory statement (“said statement”) revolves

around the Plaintiff's conduct during cross-examination where he testified as a liquidator.

[25] The Defendants submit that this amounts to failure by the Plaintiff to comply with Part I Twelfth Schedule item (a) and Section 486(1) of CA2016, which states as follows:

*“The liquidator may –*

*(a) bring or defend any action or other legal proceedings in the name and on behalf of the Company;”*

[26] The Plaintiff therefore needs to name Sagajuta (Sabah) Sdn Bhd (in liquidation) as the Plaintiff instead of putting his own name pursuant to Part I Twelfth Schedule item (a) and Section 486(1) of CA2016 for “powers exercisable without authority” of the court.

[27] The Defendants submit that as the Plaintiff filed suit in his capacity as a liquidator, this matter should be heard before post-winding up court instead of ordinary civil court.

[28] In the Court of Appeal case of **KTM Transformers Sdn Bhd v N Chanthiran a/l Nagappan [2015] 5 MLJ 547**, one of the issues is whether company should have applied for leave to sue as only winding up court had facts before it to determine whether or not liquidator was acting bona fide qua liquidator when alleged libel was committed. His Lordship Abdul Wahab Patail JCA in delivering the judgment states that:

*“[14] ... In that regard, it is only the winding up court, with the facts of the winding up before it, that can correctly determine whether N Chanthiran a/l Nagappan was bona fide acting in his capacity as liquidator of STM Transformers Sdn Bhd or not in respect of the factory lot, and to decide whether to grant leave to the appellant to sue the liquidator of STM Transformers Sdn Bhd or not. Only the winding up court can determine if the factory lot was part of the assets of STM Transformers Sdn Bhd or not...”*

**[29]** In this present case, the Plaintiff pleaded that he was acting in the course of his duties as liquidator when the alleged libel was committed by the Defendants. The Defendants contend that this suit should have been filed in the post winding up court because it is the one having facts before it which helps to determine whether or not the Plaintiff was acting bona fide qua liquidator.

**[30]** In **Chin Cheen Foh v Ong Tee Chew [2003] 3 MLJ 57**, the preliminary objection was concerned about the Plaintiff filing the proceedings against the Defendant (a Court appointed provisional liquidator) without the leave of the winding up court. His Lordship Abdul Malik Ishak J held that:

*“In a nutshell, from these authorities it can rightly be said that before bringing an action against the defendant who is an officer of the court by virtue of his position as a court appointed provisional liquidator, the plaintiff should first obtain leave of the winding up court.”*

[31] The Defendants submit that the Plaintiff by bringing an action in his personal capacity against the Defendant requires leave from the winding up court. Since the Plaintiff did not do so, this action must fail.

[32] The purported defamatory statement by Plaintiff (“said statement”) is part of a quasi-judicial proceeding that attracts absolute privilege because the said statement was simply a comment on the answer given by Plaintiff while testifying in the cross examination of BKI-22NCvC-7/1-2020 (“said Suit”).

[33] The case of **Lincoln v Daniels [1962] 1 QB 237** categorize absolute privilege into three areas as follows:

*“The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories.*

*The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence.*

*The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings.*

*The third category is the most difficult of the three to define. It is based on the authority of Watson v. M'Ewan, 33 in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In Beresford v. White, 34 the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.”*

[34] The Defendants submit that it is the Plaintiff's pleaded case in paragraph 24 of the Statement of Claim that the said statement was “... *in a group chat in Telegram in English...*”. Further in paragraph 25 that the “... *group comprising owners of the 1Borneo Hypermall...*”. The Defendants contend that it is undisputed that this group chat is a closed group and not open to the public. It is a group of purchasers interested in the proceedings in the said suit during the hearing of the same. The said statement falls within the ambit of ‘*other documents brought into existence for the purpose of the proceedings*’. In fact, the said statement will not have come into existence had there was no proceeding in which the Plaintiff testified for. By reason thereof, it is protected under the second category of absolute privilege as in Lincoln case.

[35] The Defendants submit that the Plaintiff has failed to serve a reply to the Defendants on particulars of the facts and matters from which

the malice is to be inferred, despite alleging several times in the Statement of Claim (“SOC”) as follows:

*“[23] ... the Defendants who were the members of the respective chat groups maliciously spread false and unverified allegations to attack, discredit, malign and defame the Plaintiff.*

...

*[24] The 1<sup>st</sup> Defendant had on or about 31.12.2021 published and spread malicious allegations against the Plaintiff in a group chat in Telegram in English...*

...

*[27] ... the Defendants had wilfully and maliciously made the defamatory statements in question...*

...

*[36] (f) The Defendants published the above said defamatory statement with malice and without verifying the truth that the above said defamatory statement...”*

**[36]** In reply to the argument of malicious falsehood that the Plaintiff tried to establish, the statement of defence dated 11.04.2022 (Exhibit DW-1 of the said AIS) stated in paragraphs 11 and 13 that the Defendants are relying on the defence of fair comment and qualified privilege. It is important to note that Order 78 rule 3(3) of the Rules of Court 2012 clearly states as follows:

*“(3) ... but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice,*

*he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.”*

[37] The Defendants submit that the pleadings indicated that the Plaintiff intended to allege that the Defendant was actuated by express malice. Therefore, by virtue of Order 748 rule 3(3) of ROC 2012, it is a must for the Plaintiff to serve a reply in order to rebut the defences invoked by the Defendants. Failure to do so is fatal to the Plaintiff’s claim.

[38] In the High Court case of **Subramaniam A/L Paramasivam v Courts Mammoth Berhad and Anor [2010] 9 MLJ 363**, the Plaintiff’s action was based on words or innuendos contained in a letter of termination issued by the first Defendant’s solicitor and in a letter of complaint issued by the first defendant to the Advocates & Solicitors’ Disciplinary Board (“the board”). The complaint was subsequently dismissed by the board. The Defendants pleaded the defences of qualified privilege and justification. His Lordship Abdul Wahab Patail J stated that compliance with Order 78 rule 3 is mandatory especially when the Defendant relied on the defence of privilege in reply to malicious allegations by the Plaintiff:

*“[14] Order 78r 3 of the Rules of the High Court 1980 operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must serve a reply giving particulars of the facts and matters from which malice is to be inferred...”*

[39] His Lordship also stated the significance of Order 78 rule 3 for the Defendant as follows:

*“[20] The effect of O 78 r 3 is to require particulars of malice to be pleaded so that the truth and correctness of the particulars relied upon can be checked and verified.”*

[40] The Plaintiff contends that the Plaintiff commenced legal proceedings of Defamation against the Defendants for spreading malicious allegations of the Plaintiff in a group chat in Telegram and Whatsapp, of which the Plaintiff claims are defamatory (hereinafter referred to as “the Impugned Statement”).

[41] The said Statement are hereby reproduced as follows:

*“Dear all:*

*2021 has been a good year except for C-19 and the Liquidator whose actions has not been for the benefit of 1 B: we could have achieved a discounted Service fee rate of 30 percent if the Liquidated has not sided and favour the 3 big defaulters into not paying a total of RM4.68 million service fee to date.*

*One of the defaulters has even told the Boss of Bataras that David Wong will be removed 3 weeks ago from managing the Mall.*

*Here’s an update of the latest:*

*Recently, the Liquidator (Datuk Tee) is an officer of the court has committed a serious offence in the COURT by telling Lies that he has never been involved in the Management of 1 Borneo management Corporation Sdn Bhd (1BMC) during Cross examination by United 1 B Lawyer Roland Cheng :(. We all know that the liquidator and his UHY has always been managing 1BMC until it went Sour). WHAT A BIG LIES Under the Oath in the COURT. Our Lawyer has given notice to the liquidator to tender his resignation within 7 days which is due on the 3rd Jan, failing which a Court decision will be taken to Remove him as Liquidator for Sagajuta Sabah.”*

- [42] Subsequently, the Plaintiff has filed and served the Writ of Summons as well as the Statement of Claim on the Defendants’ solicitors. Thereafter, Defendants had entered appearance and duly served their Statement of Defence on the Plaintiff.
- [43] In their Defence, the Defendants contend that the said Statements are the truth and therein sought to rely on the defence of fair comment, qualified and/or absolute privilege.
- [44] Following thereto, the Defendants have filed the current application to strike out the Plaintiff’s action.
- [45] In summary, the Defendants’ application are pursuant to Order 18 Rule 19(1)(a),(b),(c) and (d), Order 78 Rule 3(3) and Order 92 Rule 4 of the Rules of Court 2012 wherein the grounds are as follows: (a) the Plaintiff has failed to obtain leave from the Court prior to the commencement of the action against the Defendants on behalf of

Sagajuta (Sabah) Sdn Bhd (in liquidation); and (b) the Plaintiff has failed to comply with Order 78 Rule 3(3) of the ROC. The Plaintiff referred to the case of **See Kok Loong v Liew Swee Yee & Anor [2018] MLJU 1461**.

[46] The Plaintiff submit that there is no question that the Plaintiff's Statement of Claim is insufficiently pleaded as far as the requirements of defamation is concerned and in accordance with the principles propounded in the authorities above.

[47] It must also be highlighted that it was never disputed by the Defendants that the said statement was in fact disseminated by the Defendants to third parties, i.e. the members of the chat groups in Whatsapp and Telegram. The Plaintiff submitted that in the said defence, the Defendants had expressly admitted to the fact that they disseminated the said statement.

[48] As such, the Plaintiff submits that the elements to disclose a reasonable cause of action in defamation in the instant case has been satisfied.

[49] In response to the Defendants' first ground, the Plaintiff submits that it is manifestly clear that the Plaintiff is bringing the current action as a claimant against the Defendants in his personal capacity.

[50] While the Plaintiff appreciate that leave is required should any parties intend to commence legal action against a Liquidator, the Plaintiff submits that there is no vice versa requirement for a

Liquidator, either in his personal capacity or his capacity as Liquidator to seek leave to commence any legal action.

**[51]** In **Pollution Treatment & Construction – Petitioner Sdn Bhd v Eramara Jaya Sdn Bhd [2012] MLJU 1752**, Hadharah bt Syed Ismail (as her Ladyship was then) held as follows:-

*“The leading case on the granting of leave to commence action against liquidators is the Court of Appeal case of Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 4 CLJ 11. ... IN delivering the judgment of the court, Abu Mansor Ali JCA held:*

*A liquidator, having been appointed by the Court, is an officer of the Court. It goes without saying that leave of the Court is needed before an action is commenced against him and officers like him.”*

**[52]** The Plaintiff submits that there is no question that an officer of the Court has to obtain leave prior to initiating any legal proceedings. The very reason of such requirement is to ensure that no frivolous actions are taken against a wound-up company or its Liquidator.

**[53]** By the same token, the Plaintiff submits that there is no requirement or whatsoever under the Companies Act 2016 for the Liquidator to obtain leave to commence an action under his personal capacity. Therefore, the Plaintiff submits the Defendant’s assertion that the Plaintiff shall obtain the Court’s leave prior to proceeding with his claim as the Plaintiff is simply a non-starter.

[54] It is also the Defendants' contention that the Plaintiff has failed to comply with Order 78 Rule 3(3) of the Rules of Court 2012 states that:

*“Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.”*

[55] The whole issue raised by the Defendants herein revolves around whether the Plaintiff has given sufficient particulars of facts and matters from which malice arising from the said impugned statement is to be inferred.

[56] It was held by the Court of Appeal in **Khalid Bin Abdul Samad v Dato' Dr Hasan bin Haji Mohamed Ali [2016] MLJU 387** that:

*“[32] There was another matter that was raised by the Defendant pertaining to the Plaintiff's pleaded case on malice. It is this. The law was clear. Malice must be pleaded and pleaded by the Plaintiff. It was submitted for the Defendant that the Plaintiff must so plead in his reply to the defence when the latter denies the same in his defence. A failure on the part*

*of the Plaintiff to do just that would be fatal. So the case for the Defendant was articulated.*

*[33] Suffice for the purpose of dealing with that submission, for us to quote learned Justice Lee Hun Hoe CJ (Borneo) in the case of Luk Kai Lam v Sim Ai Leng [1978] 1 MLJ 214 where his Lordship had occasion to say the following at page 217:*

*“I should point out the proviso speaks of express malice. Thus, Mallal’s Supreme Court Practice at page 266 cites Smith’s case (1917) 142 LT 263 to say where, in order to succeed, it is necessary for the plaintiff to prove that the defendant was actuated by an improper motive he need not specifically allege malice in his reply if he has already done so in his statement of claim or if the defendant in his defence has pleaded that he acted in good faith. The point is that if plaintiff has already alleged malice in his statement of claim the proviso does not come into play. Consequently, the last ground must also fail.” [Italics by us for emphasis.]*

*[34] Applying the principle as enunciated by the Federal Court in the LUK Kai Lim v Sim Ai Leng case [supra] since the Plaintiff had pleaded in his Statement of Claim that the Defendant had been malicious in defaming him, there was no need for the Plaintiff to have to state in his reply to the statement of defence that the Defendant had been malicious. Malice had been pleaded, as such there was no further need*

*to plead it again just because the Defendant had referred to in his statement to of defence. Redundancy in pleading of material facts does not add further value to what has been pleaded. There was no merit in the contention of the Defendant in that regard.”*

See also: **Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and Another Suit [2013] 8 MLJ 199.**

[57] More importantly, the Court of Appeal in **Dr Syed Azman bin Syed Ahmad Nawawi & Ors v Dato’ Seri Hj Ahmad bin Said [2015] 5 MLJ** has made clear the law on compliance with Order 78 Rule 3(3) by holding that:

*“[32] There can be no dispute that O78 r3(3) is a specific adjectival provision that had to be strictly complied with or adhered to, if one was intending to disqualify the defence of qualified privilege or fair comment on the grounds of express malice. The mandatory nature of this requirement had been affirmed by a long line of decisions of our courts.*

*[33] Subramaniam all Paramasivam v Courts Mammoth Bhd & Anor [2010] 9 MLJ 363; [2011] 10 CLJ 739 was one such decision on strict compliance required with respect to O78 r3(3), which also went on to set out succinctly the rationale for such strict compliance with this rule procedure in the following terms:*

*Order 78 r 3 ... operates to make a mandatory requirement that if the plaintiff disputes the defence of privilege on the grounds of malice, the plaintiff must serve a reply by giving particulars of the facts and matters from which malice is to be inferred. Thus the plaintiff bears the burden of proof (of) malice. The effect of O 78 r 3(3) RHC is to require particulars of malice to be pleaded so that the truth and correctness of the particulars relied upon can be checked and verified.*

[58] Based on the applicable test as enunciated by the Court of Appeal in *Dr Syed Azman bin Syed Ahmad Nawawi & Ors v Dato' Seri Hj Ahmad bin Said* (supra), the Plaintiff submits that the primary concern of this Court is whether or not the statement of claim has sufficiently pleaded what is required under Rule 3(3).

[59] If at all, the Plaintiff submits that the issue of malice does not come into play unless and until the defence of fair comment and/or qualified privilege has been successfully raised by the Defendant.

[60] In **Abdul Khalid @ Khalid Jafri Bin Bakar Shah v Party Islam Se Malaysia**, [2002] 1 MLJ 160, Kalamathan Ratnam J (as his Lordship was then), held as follows in respect of the issue of 'malice':-

*"Malice*

*The publication of defamatory statements giving rise, prime facie, to a cause of action. The law presumes in the plaintiff's*

*favour that the words are false, unless and until the defendant proves to the contrary. Here, the defendants have not proved to the contrary. The plaintiff also does not have to prove malice on the part of the defendant unless and until the court rules that the words were published on a privileged occasion. In the absence of such a plea, this proviso does not arise. In defamation, the law presumes malice from the mere act of the defendant publishing of such defamatory matter.*

*In Adam v Ward [1917] AC 309, Lord Finley said at p 318 as follows:-*

*... from the mere publication of defamatory matter malice is implied, unless the publication was on what is called a privileged occasion.*

*Malice is not only provable by extrinsic evidence, it may be 'inferred from the terms from of the alleged libel itself' (see Thomas v Bradbury, Agnew & Co. Ltd Anor [1906] 2 KB 627)."*

[61] Clearly, this Court remains to be bound to determine whether the impugned article is defamatory of the Plaintiff before the question of malice comes into play. In **Tan Sri Dato' Seri Halim Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor [2013] 8 MLJ 348**, the High Court held as follows:-

**"APPLICABLE LAW ON DEFAMATION**

*The procedure in establishing a claim on libel has been well illustrated in the leading case of Ayob bin Soud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152; 1 CLJ (Rep) 321) where His Lordship Mohamed Dzaidin J (as His Lordship then was) said: In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words were defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he had made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: Rajagopal Rajan. (Emphasis added)*

...

*In the event a defence of qualified privilege is set up by the defendants, the burden is on the second defendant to prove that she had made the statement honestly, without any direct or improper motive. If the second defendant succeeded in establishing her defence that the statement was made honestly and without any indirect and or improper motive, the burden would then shifted to the plaintiffs to show express malice. If the plaintiffs succeeded in showing malice then the communications is no longer privileged.”*

[62] The Plaintiff submits that should the Court finds the impugned article to be defamatory of the Plaintiff and the Defendant's defences to fail, the issue of malice would not arise at all. Therefore, the primary issue remains on whether the impugned article is defamatory of the Plaintiff which ought to be decided during trial.

### **Evaluation and Findings**

[63] The 1<sup>st</sup> ground for striking out the Writ and Statement of Claim of the Plaintiff is that he files this action..."in the name and on behalf of the Company..." as required under Part 1 Twelve Schedule item (a) Companies Act 2016 (CA 2016) which provides:

*"the liquidator may-*

*(a) bring or defend any action or other legal proceeding in the name and on behalf of the company."*

[64] In **Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd [2010] 3 CLJ 785**, the Federal Court (per Gopal Sri Ram FCJ) held:

*"(1) once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. Once authority is given either by the liquidator or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question."*

**[65]** In the present case, the Plaintiff's claim for defamation is a personal action for injury to the Plaintiff's reputation as a person as well as in his professional capacity and does not involve or concern the assets and liabilities of Sagajuta. Neither does it concern the reputation of Sagajuta. Therefore, the Plaintiff's cause of action for defamation does not vest in the Liquidator of Sagajuta but is vested in the Plaintiff personally.

**[66]** Item (a) of Part 1 of the Twelve Schedule of CA 2016 provides for the powers conferred on a liquidator in a winding up by the Court in relation to an 'exempt disposition' under s.472 (2) CA 2016 from the prohibition against avoidance of dispositions of property of the company or attachment, sequestration, distress or execution against the estate or effects of the company after the presentation of the winding up petition under s.472 (1) and (3) CA 2016. The powers conferred in Part 1 of the Twelve Schedule is also exercisable under s.486 CA 2016.

**[67]** In the instant case, the liquidator is bringing this action for defamation in his personal capacity against the Defendant. The said defamation action is a separate and distinct cause of action which is vested in the Plaintiff personally. Neither does this Suit concern any disposition of property of the company, Sagajuta or attachment, sequestration, distress or execution against the estate or effects of Sagajuta. It has not been pleaded that Sagajuta has been defamed and/or the claim is brought by the Liquidator for the benefit of Sagajuta and/or that the Plaintiff brings this action in his capacity as the Liquidator of Sagajuta. Further, the reliefs and/ or damages claimed herein is for the benefit of the Plaintiff personally. Therefore,

it is not wrong for the Plaintiff, Datuk Tee Guan Pian to omit the words “in the name and on behalf of the company...” in the title of the Writ in this action. In the premises, this Court finds that Item (a) of Part 1 of the Twelve Schedule does not apply to the present case and the 1<sup>st</sup> ground raised by the Defendants is without merit.

**[68]** The 2<sup>nd</sup> ground raised by the Defendants is that the Plaintiff has no right as liquidator to file action in ordinary civil Court and it should have been filed in post winding-up Court under Part IV CA 2016. It is clear that this is a personal action in tort for defamation by the Plaintiff brought in his personal capacity against the Defendants. The cause of action for defamation serves to vindicate the good name, character and reputation of a person and compensate him or her for the hurt and loss caused to such person personally by the alleged libel. This action does not concern the exercise of the powers of a liquidator in a winding up by the court under s.486 and s.487 CA 2016. Neither does it involves the disposal of property or attachment or execution against the assets of Sagajuta. As this action is a civil action for defamation brought in his personal capacity solely for the benefit of the Plaintiff and not Sagajuta, this Suit falls within the ordinary jurisdiction of the civil Court. Thus, there is no requirement in the CA 2016 or other applicable laws for the Plaintiff to obtain leave from the winding-up Court to institute this action for defamation which is undeniably brought in the Plaintiff’s personal capacity and for his personal benefit.

**[69]** The 3<sup>rd</sup> ground raised by the Defendants is that the alleged defamatory statement is protected by absolute privilege under the principle in *Lincoln v Daniels* (1962)1 QB 237. The defendants relied

on the second category of the principle in *Lincoln v Daniels* which “covers everything that is done from the inception of the proceedings onwards and extends to all proceedings and other documents brought into existence for the purpose of the proceedings and starting with the Writ or other document which constitutes the proceedings.”

[70] Under the 2<sup>nd</sup> category, the document should be brought into existence for the purpose of the proceedings in Suit No. BKI-22NCvC-7/1-2020 (the said Suit). In **Hormat Mulia Holdings Sdn Bhd v Kerajaan Malaysia & Anor [2020] 7 MLJ 55**, the High Court, per Darryl Goon JC (as his Lordship then was) held:

*“(2) Having regard to the wording of the advertisements, the court was however not persuaded that the advertisements in anyway lowered the plaintiff in the estimation of right thinking members of the public or exposes the plaintiff to hatred, ridicule or contempt or would cause it to be shunned or avoided. The advertisements, required under the Companies Act 1965 and the applicable procedure under the Companies (Winding-up) Rules 1972, clearly fell within the ambit of the second category from the case of *Lincoln v Daniels* [1962] 1 QB 237 as documents brought into existence for the purpose of the proceedings, starting from the petition which instituted the winding-up proceedings. Having regard to the ratio decidendi of the case of *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2009] 5 MLJ 754, the first defendant’s advertisement of the petition was therefore upon*

*an occasion of absolute privilege. Accordingly, the plaintiff's action in defamation must also fail."*

**[71] In Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd [2009] 5 MLJ 754, the Federal Court held:**

*"(4) Under the scheme of the Act and the Rules, the advertisement was clearly mandatory and in the circumstances, the advertisement was absolutely privileged. This would fall squarely under the second category of absolute privilege as mentioned by Devlin LJ in Lincoln v Daniels [1962] 1 QB 237."*

**[72]** In the present case the Defendants does not dispute the fact that the purported defamatory statements were made or published in a group chat in Telegram and also in a Whatsapp chat group named "Owners Group 1 Borneo" wherein the members of the group are comprising of owners of units of shoplots in 1Borneo Hypermall. The Affidavit evidence does not show that the alleged defamatory statement was brought into existence for the purpose of the said Suit. There is no evidence to suggest that the purported defamatory statement was tendered or referred to in the proceedings or trial of the said Suit. Further, there is no order or direction of the Court or statutory provision requiring the said Telegram group chat or Whatsapp chat group to be set up as a forum for unit owners or anyone to make comments on the proceedings and witnesses who gave evidence in the said Suit. It is clearly a social media platform established and used by the members of the group themselves and not involving or shared with the judicial officers and Court staff.

- [73] The Affidavit evidence shows that the publication of the purported defamatory statement is not mandatory in law or made in pursuance of a Court Order or direction. Applying the principles enunciated by the Federal Court in *Savant-Asia Sdn Bhd* above, the making or publication of the impugned statement does not appear to fall under the 2<sup>nd</sup> category of absolute privilege as is mentioned by Devlin J in **Lincoln v Daniels (1962) 1 QB 237**. This is an issue which requires mature and more extensive legal argument and should aptly be ventilated during the trial.
- [74] The last ground relied upon by the Defendants is that the Plaintiff's failure to file a reply under o.78 r. 3(3) ROC 2012...from which the malice is to be inferred" will render the defence to remain unrebutted.
- [75] A careful perusal of paragraphs 23-27 and 36 the Statement of Claim shows that the Plaintiff has pleaded malice and has given sufficient particulars of facts and matters from which express malice arising from the impugned statement is to be inferred. Applying the principles enunciated by the Court of Appeal in **Dr Syed Azman bin Syed Ahmad Nawawi & Ors v Dato' Seri Hj Ahmad bin Said [2015] 5 MLJ 141**, it is unnecessary to file a reply under o.78 r.3(3) ROC 2012 since the Plaintiff had already set out sufficient particulars of the facts and matters from which express malice is to be inferred in his Statement of Claim. See also **Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and Another Suit [2013] 8 MLJ 199**.

[76] I have considered the other issues and points raised by the parties and with respect, I found that it has not persuaded me to change my findings hereinabove.

[77] In the final analysis, this Court does not find the Plaintiff's claim for defamation to be obviously unsustainable. In my judgment, this is not a plain and obvious case for recourse to the summary process under o.18 r.19 ROC 2012 to be had. See **Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 FC.**

[78] Based on the reasons aforesaid, Encl.12 is dismissed with costs in the total sum of RM5,000.00 to be paid by the Defendants jointly and severally to the Plaintiff subject to payment of allocatur fee.

**Dated 29<sup>th</sup> September, 2022.**

***Signed***

**Leonard David Shim**

**Judge**

**High Court Kota Kinabalu**

For the Plaintiff : Eric Chong of Messrs. ECL & Associates

For the Defendants : Roland Cheng of Messrs. Roland Cheng & Co.

*[Notice: This Grounds of Decision is subject to official editorial revision]*