IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 65

Suit No 1596 of 1996, RA No 393 of 1997

Between

Hong Lam Marine Pte Ltd
Lim Teck Cheng

… *Plaintiff*

And

Koh Chye Heng

… *Defendant*

GROUNDS OF DECISION

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Hong Lam Marine Pte Ltd and Another v Koh Chye Heng

[1998] SGHC 65

Suit No 1596 of 1996, RA No 393 of 1997
Tay Yong Kwang JC
03 March 1998

Judgment:

GROUNDS OF DECISION

The Pleadings

1 This is an action for defamation. The First Plaintiff is a company incorporated in Singapore and the Second Plaintiff was a director of the First Plaintiff and of Wyno Marine Pte Ltd ("Wyno"). The Second Plaintiff holds all but one of the shares in the First Plaintiff. The Defendant was at all material times the manager director of Wyno. The Second Plaintiff held 60% of the shares in Wyno and the Defendant's wife held the other 40%.

2 Wyno was in the business of shipbuilding. Provisional liquidators were appointed on 22 November 1991. The company was eventually ordered to be wound up by the High Court on 4 January 1992 on the petition of a creditor, Chong Lee Leong Seng Co Ltd.

3 On 1 November 1991, the Defendant attended a meeting of Wyno's creditors during which he made certain statements alleging "approximately $70,000 as kick-back per engine was paid to Hong Lam's Directors" and that he did not think that "the kick-back and other payments to Hong Lam from Wyno would be reflected in the accounts anyway". These statements were recorded in the typewritten minutes of the meeting.

4 The Plaintiffs claim, *inter alia*, that such words meant or were understood to mean that the directors of the First Plaintiff, of which the Second Plaintiff was one, were corrupt and had received bribes and were calculated to disparage the First and Second Plaintiffs in their business.

5 The Plaintiffs claim that they have suffered distress and embarrassment as a result, including a seizure of the First Plaintiff's documents by the Commercial Affairs Department and the investigation and prosecution of the Second Plaintiff for criminal breach of trust and forgery.

6 Paragraph 9 of the Statement of Claim avers as follows:

> "9. Unless restrained by this Honourable Court, the Defendant will further publish or cause to be published the said or similar words defamatory of the 1st and 2nd Plaintiffs.
>
> **Particulars**
>
> The Defendant is currently giving evidence in the High Court of Singapore in Suit No. 2274 of 1993 where he has referred to the minutes and repeated the defamatory statements."

Suit No. 2274 of 1993 is the action commenced by the liquidators of Wyno against the First and Second Plaintiffs (and others) to recover sums allegedly due to the company from the First and Second Plaintiffs. The Defendant here is the First Third Party in that action.

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7 Based on the above averments, the Plaintiffs claim damages and an injunction to restrain the Defendant from repeating the said defamatory words.

8 In his Defence, the Defendant admits having made the said statements but denies that they were defamatory of the First Plaintiff. He also claims that the words in question were published on an occasion of absolute privilege in that the minutes of the creditors' meeting were exhibited in his affidavit filed on 15 November 1991 and reflected in paragraphs 38 to 62 of the same affidavit filed in support of the application by the creditors of Wyno to obtain a winding up order against the company in Companies Winding Up No. 244 of 1991.

9 Alternatively, the Defendant claims absolute privilege in the following manner. The liquidators of Wyno, appointed pursuant to the abovementioned winding up petition, commenced Suit No. 2274 of 1993. The Defendant, who is the First Third Party in that action, has filed an affidavit verifying the list of documents and the minutes of the creditors' meeting appear in that list. The Defendant has also filed an affidavit of evidence-in-chief in that action publishing the said words.

10 The Defence also relies on qualified privilege and justification.

11 Insofar as paragraph 9 of the Statement of Claim (reproduced in paragraph 6 of this judgment) is concerned, the Defendant claims absolute privilege in his testimony before the Court in the other action.

The Defendant's Application

12 Several affidavits were filed by both parties in their earlier applications to strike out each other's pleading. After the Summons for Directions was taken

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out by the Plaintiffs, the Defendant applied by way of a Summons for Further Directions for an order that:-

> "1. The Statement of Claim be struck out under Order 18 Rule 19(1) of the Rules of Court 1996 and/or under the inherent jurisdiction of the Court on the grounds that:-
>
> (a) It is scandalous, vexatious, frivolous or
>
> (b) It may prejudice, embarrass or delay the fair trial of the action; or alternatively
>
> (c) It is otherwise an abuse of the process of the Court.
>
> 2. The Defendant be at liberty to dismiss the Plaintiffs' claim.
>
> 3. The costs of and incidental to this application and the costs of the entire proceedings be taxed and paid by the Plaintiffs to the Defendant forthwith."

The Assistant Registrar's Decision

13 The learned Assistant Registrar dismissed the Defendant's application with costs fixed at $1,300. The Defendant appealed against her order.

The Defendant's Affidavit

14 In his affidavit filed on 9 September 1997 in support of the application, the Defendant says his assistance was required as a witness in the winding up proceedings against Wyno. Accordingly, he affirmed an affidavit on 15 November 1991 in Companies Winding Up No. 244 of 1991 in support of an application that provisional liquidators be appointed. The minutes of the creditors' meeting held on 1 November 1991 were exhibited in that affidavit.

15 After Wyno was ordered to be wound up, the liquidators commenced the said Suit No. 2274 of 1993 against the present Plaintiffs. The Defendant here was

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brought in as a Third Party in that suit. The said minutes appeared in his list of documents in that suit.

16 The solicitors for the Defendants in that suit (ie. the present Plaintiffs) then asked for a copy of his affidavit filed in the winding up proceedings. The present Defendant's solicitors obliged.

17 The Defendant says that since the allegedly defamatory statements were used in the winding up proceedings by the liquidators, the documents should be accorded absolute privilege. Further, the documents disclosed in the course of discovery in Suit No. 2274 of 1993 are protected by the principle enunciated in Riddick v Thames Board Mills Ltd [1977] 3 WLR 63 ["Riddick"].

The Submissions

18 Before me, the Defendant accepts the Plaintiffs' position that they obtained the minutes of the creditors' meeting through the affidavit of one Lai Chong Meng filed on 22 November 1991 in Companies Winding Up No. 244 of 1991. Lai was a director of the petitioning creditors there and his affidavit was filed in support of the application for provisional liquidators to be appointed.

19 Mr Tan Kok Quan SC for the Defendant argues that it is an abuse of the process of the court for the Plaintiffs to commence an action for libel based on a document obtained from an affidavit. If the Plaintiffs sue Lai Chong Meng for defamation on the basis that the allegedly libellous statements in the minutes of meeting were exhibited in his affidavit, Lai would be entitled to rely on the defence of absolute privilege and strike out the action against him. Mr Tan submits that it would similarly be an abuse of the process of the court to sue a person based on the contents of someone else's affidavit because, if it were

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otherwise, the deponent might decide to protect the maker of the statements by holding back evidence which is relevant to the proceedings.

20 Mr Leong Kah Wah for the Plaintiffs submits that the Defendant's statements at the Creditors' meeting were not made in the course of judicial proceedings. The provisional liquidators were not appointed yet and the Defendant, on 1 November 1991, was not asked to prepare evidence in respect of the winding up proceedings. The Defendant also had an ulterior motive in making the statements in question. He was trying to absolve himself from liability. While agreeing with the public policy enunciated in Riddick, Mr Leong argues that discovery of documents is not quite the same as an affidavit filed in the course of proceedings. Discovery is broader in scope while an affidavit contains only what the deponent wishes to include. In any event, the Plaintiffs are suing the Defendant and not Lai, the deponent of the affidavit in question. The minutes were also obtained from an independent source (Lai) in November 1991.

My Decision

21 Gatley on Libel and Slander (8th Edition) contains the following passages in the chapter on 'Absolute Privilege':

> "381. General principles. There are certain occasions on which public policy and convenience require that a man should be free from responsibility for the publication of defamatory words. The courts are unwilling to extend the number of these occasions on which no action will lie even though the defendant published the words with full knowledge of their falsity and with the express intention of injuring the plaintiff. A statement of claim which alleges publication on such occasion will be struck out as disclosing no cause of action. An absolute privilege attaches to the following statements:
>
> (1) Statements made in the course of judicial proceedings.
>
> (2) Statements made in the course of quasi-judicial proceedings.

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(3) Statements contained in documents made in judicial or quasi- judicial proceedings.

(4) ...

383. General rule. No action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those of an established court of justice. "The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies whether against judges, counsel, witnesses, or parties for words spoken in the course of any proceeding before any court recognised by law and this although the words were written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party defamed." It is immaterial whether such proceedings take place in open court or in private, whether they are of a final or preliminary character, whether they are *ex parte* or *inter partes*, and whether the court has jurisdiction to deal with the matter before it or not. "The authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against *judges*, *counsel*, *witnesses*, or *parties*, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law." The privilege will also attach to any matter incidental to the proceedings "practically necessary for the administration of justice." That it is convenient is insufficient

384. The rule founded on public policy. "This rule of law is not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but is founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." ... "... the rule of law is one which involves the balancing of conflicting public policies; one general, that the law should provide a remedy to the citizen whose good name and reputation is traduced by malicious falsehoods uttered by another; the other particular, that witnesses before tribunals recognised by law should, in the words of the answer of the judges in *Dawkins v. Lord Rokeby* give their testimony free from any fear of being harassed by an action on an allegation whether *true* or *false* that they acted from malice." "

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22 Applying these principles, the first point to be made is that the Defendant was obviously not speaking in the course of proceedings before a court or tribunal when he made those statements at the creditors' meeting convened by himself. Since the liquidators, provisional or otherwise, were not yet on the scene, it could not be said also that the creditors' meeting was a matter incidental to judicial proceedings. The Defendant therefore could not claim absolute privilege in making the statements at the creditors' meeting.

23 Lai, as the deponent of an affidavit in judicial proceedings, would indisputably fall within the protective parameters of absolute privilege. The issue is whether such privilege extends to the maker of a statement or document relied upon by the deponent of an affidavit. If witnesses should be free from any fear of being harassed by defamation actions, should they also be assured that their sources of information would be similarly immune?

24 The Defendant says 'Yes' and I agree. A person giving evidence in Court can only do so freely if he does not have to worry about the consequences to himself or to others outside the scope of the proceedings. The only fetter on him should be the fear of punishment for perjury should he give false evidence. He should not be deterred from telling the Court what someone else had told him out of concern that he would land that person in defamation litigation. In this context, there is no difference between a deponent of an affidavit exhibiting a document emanating from a non-party to the proceedings and a witness testifying in Court relying on something conveyed to him orally or in writing by a non-party. Gatley at paragraph 385 buttresses this view. The passage states:-

> "385. Categories of privilege. "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 which are done *coram judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and

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> witnesses, and includes the contents of documents put in as evidence."

[emphasis added]

25 Turning to a different but related point, could it be said that the minutes of the creditors' meeting come within the principle enunciated in Riddick, namely, that it is an abuse of the process of the court to launch an action for defamation based on a document disclosed on discovery in a previous action?

26 In Riddick, the Plaintiff was dismissed from his employment in the Defendant company. The Plaintiff and his solicitor complained to the company about the dismissal and the matter in which it was effected. The chief personnel manager at the company's head office then asked a colleague to ascertain the facts concerning the dismissal. That colleague made enquiries and reported what he was told in a memorandum to the chief personnel manager who read it and then filed it. The Plaintiff sued the company for wrongful arrest and false imprisonment. The said memorandum was disclosed in the course of discovery. That action was eventually settled. Subsequently, the Plaintiff commenced another action against the company for defamation based on the contents of the memorandum and obtained judgment in his favour. The company appealed successfully to the Court of Appeal.

27 The Court of Appeal held that a party who disclosed a document on discovery was entitled to the protection of the court against any use of it otherwise than in the action in which it was disclosed and that the Plaintiff therefore could not use the memorandum disclosed in the first action as the basis for the subsequent defamation action. Lord Denning MR reasoned as follows at pages 74 and 75 of the case report:-

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> "Discovery of documents is a most valuable aid in the doing of justice. … The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e., in making full disclosure. … I proceed to hold the balance in the present case. On the one hand discovery has been had in the first action. It enabled that action to be disposed of. The public interest there has served its purpose. Should it go further so as to enable the memorandum of April 16, 1969, to be used for this libel action? I think not. The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter-departmental memoranda would be lost or destroyed or said never to have existed. In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose."

28 Riddick was applied by Chan Sek Keong JC in Sim Leng Chua v J.E. Manghardt [1987] 2 MLJ 153. In that case, the Plaintiff sued a company in an earlier action and obtained discovery of a letter signed by the director-general adjoint of the company and addressed to a third party. The Plaintiff then commenced an action against the director-general adjoint for defamation. The Defendant applied to strike out the action on the ground that the Riddick principle was equally applicable to civil proceedings against a third party arising out of discovery. As observed by Chan Sek Keong JC, Riddick involved the same parties as in the earlier action but in respect of a different cause of action.

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After examining the Riddick principle and cases referring to it in various situations, the learned Judicial Commissioner held that the Plaintiff's action against the Defendant was an abuse of the process of the court and ordered that it be struck out.

29 The Plaintiffs in this action argue that the minutes in question were not obtained by them in the course of discovery but from an independent source and that their case therefore does not come within the ambit of the Riddick princple. The Plaintiffs rely on the following 2 cases considered in Sim Leng Chua's case. In Sony Corporation v Time Electronics [1981] 3 AER 376, the Plaintiffs obtained an order against the Defendants for delivery up of counterfeit goods. While serving the order, the Plaintiffs' solicitor discovered goods of another type on the Defendants' premises which were also manufactured by the Plaintiffs. He instructed one of his employees to make a test purchase of those goods. The Plaintiffs then applied for a further order against the Defendants in respect of those goods. It was held there that the new action was not founded on something disclosed as a result of the earlier order but on the evidence obtained on the test purchase.

30 In Sybron Corporation v Barclays Bank PLC [1985] 1 Ch 299, the Plaintiffs commenced an action in 1981 against the bank. After discovery had taken place, the Plaintiffs decided to add other parties as Defendants. In view of possible difficulties which might arise in relation to limitation if those parties were added to the 1981 action, the Plaintiffs decided to commence another action in 1983. The Plaintiffs applied for leave, if such were necessary, to refer in the 1983 action to the documents discovered in the 1981 action. Scott J held that the Plaintiffs could not make use of those documents or any information contained therein in any other proceedings without leave of the court having been first obtained, unless such information was from a wholly independent source. His

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Lordship also found that the causes of action in both sets of proceedings were the same. In the unusual circumstances of that case, the new action was nothing more than a joinder of additional parties and such joinder as a consequence of discovery was a common procedural occurrence to which no valid objection could be taken on the ground that discovered documents ought not to be used for such a purpose. In the result, the Plaintiffs were granted leave to use the documents for the purposes of the 1983 action.

31 Was the affidavit of Lai, in which the minutes of the creditors' meeting were exhibited, a "wholly independent source" in the circumstances of this case? I think not. The Second Plaintiff was also a director and majority shareholder of Wyno. Lai's affidavit was filed in winding up proceedings commenced by a creditor of Wyno against the company. The Second Plaintiff was therefore very much involved in the proceedings which gave rise to the occasion for Lai's affidavit. The Second Plaintiff was also a director and majority shareholder of the First Plaintiff. In these circumstances, the First Plaintiff cannot be said to be a total stranger to the winding up proceedings and Lai a wholly independent source. Similarly, the Defendant here was the managing director of Wyno and was equally involved in the winding up proceedings.

32 Accepting the Plaintiffs' contention would also mean that any stranger to judicial proceedings could request a copy of documents lodged therein from one of the parties and found an action on that document. A party to proceedings could easily broaden the attack against his adversary by purporting to check with the stranger some minor point raised in potentially defamatory documents disclosed on discovery. The stranger would inevitably ask for a copy of the document in question and may then decide to sue the party concerned. Even if the author of the potentially defamatory statements was not one of the parties in the existing proceedings, it could lead to someone related to one or more of the

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parties being sued by the stranger. In the event that the stranger sues another stranger, both totally unrelated to the litigants in the existing proceedings, it would still lead to the highly undesirable situation in which one set of proceedings spawn another set (or worse, several other sets) of proceedings, which could in turn spawn many others. This, in my view, runs contrary to public interest. In my opinion, the Riddick principle applies to the same parties in subsequent proceedings and also to actions by or against strangers arising out of the documents discovered in the initial proceedings. I repeat the words of Lord Denning MR in Riddick - "The courts should, therefore, not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose".

33 The Plaintiffs also raise the argument that disclosure by way of an affidavit is not disclosure by the process of discovery. I see no sensible distinction between documents disclosed generally as part of the process of discovery and those disclosed specifically by incorporation in affidavits. It is true, as the Plaintiffs contend, that documents exhibited in affidavits are there due to a conscious choice to use them. However, the Riddick principle is premised not on whether a document is relied upon but on what comes to light as a result of the litigation between the parties. It need not be confined to discovery pursuant to Order 24. What is so relevant as to find its way into an affidavit must surely be found in the list of documents exchanged in discovery anyway.

34 Riddick concerns an internal memorandum, a document which may be classified as private or confidential communication and which would probably never have come to the knowledge of Mr Riddick had he not sued the company in the first action. However, the principle enunciated is not confined to such private or confidential documents. It is therefore immaterial that the minutes of the creditors' meeting were not strictly in the class of private or confidential documents.

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35 The Riddick principle in the present case, in Sim Leng Chua's case and in Riddick itself is invoked to strike out derivative proceedings whose cause of action is defamation. The principle can, however, apply to derivative civil actions based on other causes of action as well. One does not need to look further than the examples cited by Chan Sek Keong JC in Sim Leng Chua to support this proposition.

36 As Chan Sek Keong JC put it so ably in Sim's case, the Plaintiffs' private interest in being able to protect their reputation must be subjugated to the public interest in getting to the truth. Even if there were a public interest in their being able to litigate or enforce their rights in court, it would not override the greater public interest in full and frank disclosure in discovery proceedings. Moreover, the Plaintiffs here are in fact able to defend their reputation in court. They, together with the Defendant, are parties to the suit brought by the liquidators of Wyno. As is apparent from the impugned paragraph 9 of the Statement of Claim in the present case, the allegedly defamatory remarks do feature as an issue in Suit No. 2274 of 1993.

37 I come now to the final point of contention, that is, whether paragraph 9 of the Statement of Claim ought to be struck out in any event. It is patently clear to me that the Plaintiffs cannot gag a witness giving evidence in Court by such collateral means. The Defendant's evidence in the other action will undoubtedly be regulated by the rules of relevancy and which will be applied by the Court there. It is not for a Court in this action to decide whether he should be permitted to say certain things in the other action. Accordingly, this paragraph should be struck out as an abuse of the process of the court even if I am wrong on the earlier points.

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38 It is trite law that the draconian summary process in Order 18 rule 19 should be used only in plain and obvious cases. What we have here is in essence an application to determine preliminary questions of law. These questions do not depend on facts which have yet to be determined. The parameters are clear and there is no scope for the application of the curative power in Order 18 rule 19 to aid the Plaintiffs.

Summary

39 In summary, firstly, the contents of documents relied upon by witnesses in oral testimony or by deponents in affidavits come within the protective umbrella of absolute privilege as much as the witnesses and deponents themselves. Secondly, the Riddick principle applies to:

(1) parties as well as strangers or non-parties to the earlier proceedings;

(2) all documents disclosed, whether they are private and confidential or otherwise;

(3) derivative or subsequent civil proceedings whether founded in defamation or any other cause of action; and

(4) disclosure by the process of discovery or by annexing documents as exhibits in affidavits.

40 For the above reasons, I allowed the Defendant's appeal against the learned Assistant Registrar's decision and ordered that the Statement of Claim be struck out and the Plaintiffs' claim be dismissed with costs fixed at $2,000.

TAY YONG KWANG

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JUDICIAL COMMISSIONER

Tay Yong Kwang JC

Leong Kah Wah and Navinder Singh for the plaintiffs (respondents)
Tan Kok Quan, SC with Roy Kumar for the defendant (appellant)

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