



THE MOOT PROBLEM

Updated at 11.30am on 28.7.2021

A. The Background

1. Jibster Jibbie (“**Jibster**”) is a seasoned politician in Malaysia. He is a member of a political party named “The Order of the Fallen” (the “**Order**”). Jibster was elected as a Member of Parliament (“**MP**”) on numerous occasions in the past.
2. However, he has stepped down from active politics after the 13th General Elections. He did not contest in the 14th General Elections in 2018. This was due to internal disputes within the Order amongst high-ranking party members. Jibster decided to play a more direct role in engaging with the public.
3. Jibster has his own Facebook and Twitter social media account which he created in or around 2011. He enjoys engaging with the public on social media. Over the years, Jibster garnered a large following on social media.
4. In or around 2018, Jibster created his own Facebook page due to his large number of followers.
 - 4.1. The terms of services and guides on operating a Facebook page are publicly available online. The critical terms and documents are as follows.
 - 4.2. The Statement of Rights and Responsibilities starts with the following terms:

“This Statement of Rights and Responsibilities (“Statement,” “Terms,” or “SRR”) derives from the Facebook Principles, and is our terms of service that governs our relationship with users and others who interact with Facebook, as well as Facebook brands, products and services, which we call the “Facebook Services” or “Services”. By using or accessing the Facebook Services, you agree to this Statement, as updated from time to

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time in accordance with Section 13 below. Additionally, you will find resources at the end of this document that help you understand how Facebook works.”

- 4.3. Clause 2 which is titled “Sharing Your Content and Information” commences with the terms:

“You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition...”

- 4.4. Clause 5 concerning other people’s rights starts with the words:

“We respect other people's rights, and expect you to do the same”

- 4.5. Clause 17 defines “information” and “content” as:

“By "content" we mean anything you or other users post, provide or share using Facebook Services.

By "information" we mean facts and other information about you, including actions taken by users and non-users who interact with Facebook.”

- 4.6. Facebook has specific terms and policies for pages, groups and events. The terms commence with:

“The following terms, as well as our Data Policy, Community Standards, and Terms of Service, apply to all creators and administrators of Pages, Groups and Events on Facebook. You are responsible for ensuring that

your Page, Group, or Event complies with all applicable laws, statutes, and regulations.”

4.7. Item 3 of the Page-Specific Policies provide:

“Content posted to a Page is public and can be viewed by everyone who can see the Page.”

5. In so far as Jibster’s Facebook page is concerned, he included his relevant personal details including his picture and links to his other social media pages. His Facebook page was called “Jibby Jibster”.

5.1. Facebook allows the page owner to moderate his/her page to a limited extent using a keyword-blocking feature. The page owner can include his/her own choice of words in the filter. In the event a comment posted by the user contains word(s) included in the filter, the comment will still be published but will not be visible in the page save from the user’s profile. To put it in simpler terms, only the page owner and the user who posted the comment (with the word(s) under the preset list of the keyword-blocking feature) will be able to see his/her comment. The rest of the world will not be able to see it. The comment will essentially be hidden from the public.

5.2. Facebook also has its own profanity filter where it has a list of words determined by Facebook by using the most commonly reported words and phrases marked offensive by the community. This list is not available to the public. A Facebook page owner can opt to use this profanity filter as well and set it to either Medium or Strong.

5.3. When Jibster’s page was set up, he did not add his own words into the keyword-blocking feature. He did however set the Facebook profanity filter to Strong.

- 5.4. Jibster would be notified whenever a follower comments or shares his post.

B. The Dispute

6. The internal dispute within the Order grew in intensity after the 14th General Elections.
- 6.1. The Order is part of the political coalition called “Perikatan Backstreet Men” that formed the Federal Government (“**PBM**”).
- 6.2. Although the Order has the highest number of MPs amongst the political parties in PBM, Tun Palpatine from the party “The Katakas of Malaysia” was appointed as the Prime Minister.
- 6.3. This caused unrest amongst members of the Order. There was an apparent split within members of the governing council of the Order, called the Jedi Council. Jibster was a member of the Jedi Council. One faction sided with the party President, Lim Lah Lang, who firmly believed that the party should stick with PBM. The other faction believes that the Order should leave PBM and join the opposition coalition called “Pakatan New Hope”. Jibster is part of the latter faction.
- 6.4. Jibster was critical of the policies and actions of the Federal Government. He would often make his criticisms public on his social media accounts.
7. By 2020, Jibster’s Facebook page had about 4 million followers and likes.
- 7.1. Due to the large volume of comments, Jibster had engaged a public relations company to manage his Facebook page. Jibster would publish

about 5 posts a day. On average, each post would have around 1000 comments and around 500 shares.

- 7.2. The company has no control over his account. The company would curate posts, monitor comments or shares and curate replies to comments if they think necessary. They will then send it to Jibster for him to post if he decided to do so.
- 7.3. Jibster still created his own posts from time to time. He would also occasionally read through the comments by his followers.
- 7.4. One of the reasons Jibster engaged a public relations company was to improve his standing amongst members of the public. He intends to contest in the next general elections and also to contest for the post of President in the Order.
- 7.5. Jibster was also concerned with the amount of defamatory comments posted on his Facebook page. He did not have time and resources to look through every comment. He still wanted to maintain and promote free discussion on his Facebook page concerning topical matters.
- 7.6. Although the public relations company was not specifically tasked with identifying defamatory comments, it was within their job scope to flag “negative” comments. Jibster’s primary aim was to further increase his popularity amongst Malaysians in preparation for the elections.
- 7.7. The public relations company also provided Jibster with a list of foul words to include under the Facebook page keyword-blocking feature, which he did.
- 7.8. Since their engagement, Jibster only deleted two comments where users had insulted the Yang di-Pertuan Agong. He also blocked the said users.

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8. On 11.01.2021, the Federal Government imposed certain movement control orders throughout Malaysia due to the Covid-19 pandemic.

8.1. However, a large number of services were still allowed to operate. Jibster published the following post on his Facebook page on 02.02.2021 at around 2.30pm:

“Nama je lockdown. Covid-19 cases are going up. Most factories are up. We should leave Backstreet Men! #westlife”

(the “**FB Post**”)

8.2. There were around 1,200 comments on the FB Post and about 700 shares. Jibster continued to publish other postings after that.

8.3. On 20.02.2021, a user with an account named “CyberTro0per#456” published the following comment on the FB Post at around 12.30pm:

“Saya setuju Bossku! Si Lah Lang tu corrupted giler! Completely incompetent and unworthy of leading our beloved Order. Judiciary kita pun sama! Time for revolution!”

(the “**Comment**”)

8.4. By the time the Comment was posted, Jibster had published around 50 posts on his Facebook page after the FB Post. The public relations company usually stops monitoring a particular post after about a day as new posts would be published continuously.

8.5. Jibster and the public relations company were not aware of the Comment when it was posted. The Comment started garnering likes. By around

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12pm on 21.02.2021, the Comment had about 200 likes. It still did not catch the attention of Jibster or his public relations company as they were more focused on new posts.

9. At around 4pm on 21.02.2021, Jibster received a letter of demand by Lim Lah Lang's solicitor demanding him to remove the Comment and make a public apology.
 - 9.1. Jibster was surprised when he read the letter. Before he could call his lawyers, an inspector from the Sentul police station called him. The inspector asked that Jibster come to the police station to provide a statement in relation to a police report made by the Chief Justice's office on the Comment.
 - 9.2. Jibster said that he will cooperate but he needs to speak to his lawyers as soon as possible. At around 4.30pm, Jibster spoke to his lawyers. They advised him to remove the Comment. Jibster deleted the Comment at around 4.35pm. He also blocked the user who posted the Comment.
 - 9.3. By that time, screenshots of the Comment had widely circulated through various social media platforms such as Twitter and Whatsapp.
 - 9.4. On 22.02.2021, Jibster provided his statement to the police. He said that he had no knowledge of the Comment and removed it as soon as he was made aware of the same.
 - 9.5. Jibster's maintained the same position in his response to Lim Lah Lang's letter of demand.

C. The Legal Proceedings

10. On 26.02.2021, Lim Lah Lang commenced a defamation claim against Jibster in relation to the Comment.

10.1. Lim Lah Lang relied on section 114A(1) of the Evidence Act 1950 to argue that there was a presumption of publication on part of Jibster.

10.2. Jibster immediately filed an application to strike-out the claim and made the following assertions:

- a. He accepted that the Comment was published on his Facebook page which he administered and the Comment was defamatory. However, he did not author the Comment.
- b. The Comment was authored by a third-party. He had no knowledge of the Comment until about 4pm on 21.02.2021, at which point he deleted the Comment.
- c. The presumption in section 114A(1) of the Evidence Act 1950 was bound to be rebutted as he did not publish the Comment.

10.3. Lim Lah Lang did not dispute the following facts:

- a. Jibster was not the author of the Comment nor was he the primary publisher of the Comment.
- b. Jibster did not have actual knowledge of the Comment.

10.4. However, Lim Lah Lang argued that Jibster would still be liable as:

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- a. He facilitated the publishing of the Comment. Jibster had control over his Facebook page and ought to have known of the Comment.
 - b. Given the nature of Jibster’s control over his Facebook page, he can be regarded as a secondary or subsidiary publisher.
- 10.5. On 15.03.2021, the High Court allowed Jibster’s striking-out application. The court found:
- a. The claim was bound to fail as Jibster cannot be regarded as a publisher in law. The presumption under section 114A(1) of the Evidence Act 1950 was bound to be rebutted as Lim Lah Lang conceded that Jibster was not the primary publisher of the Comment.
 - b. As Lim Lah Lang also conceded that Jibster had no actual knowledge of the Comment until about 30 minutes prior to its removal, he could not be regarded as a secondary or subsidiary publisher.
11. Lim Lah Lang immediately filed an appeal to the Court of Appeal.
- 11.1. There was a great deal of public attention on the case, especially with the recent decision of the Federal Court in *Peguan Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor [2021] 2 MLJ 652* (“*Mkini Dotcom*”).
 - 11.2. Jibster’s opponents were calling on the Attorney-General to institute contempt proceedings against Jibster.
 - 11.3. The hearing of the appeal was expedited. On 14.05.2021, the Court of Appeal dismissed Lim Lah Lang’s appeal and upheld the High Court judgment.

12. Lim Lah Lang filed an application for leave to appeal in the Federal Court on the following question of law:

“Whether an owner or administrator of a Facebook page can be regarded as a publisher for the purposes of liability for the tort of defamation?”

13. Around that time, pressure was mounting within PBM to initiate contempt proceedings against Jibster.

13.1. On 01.06.2021, the Attorney-General obtained leave to commence committal proceedings in the Federal Court against Jibster for facilitating the publication of the Comment which scandalized the judiciary.

13.2. A few days later, Lim Lah Lang obtained leave from the Federal Court to appeal against the Court of Appeal decision of 14.05.2021. The Federal Court took the view that the relevant facts were not in dispute.

13.3. In the committal proceedings, Jibster raised the same assertions he did in the defamation proceedings with the following additional points:

- a. Section 114A of the Evidence Act 1950 is unconstitutional as it reverses the presumption of innocence, a cornerstone in criminal proceedings. Contempt proceedings are quasi-criminal in nature.
- b. The filing of the contempt application in the Federal Court deprived him of his right to appeal.
- c. In any event, the contempt of scandalizing the court requires intentional publication which is not the case here.

14. The Federal Court decided to hear the defamation appeal by Lim Lah Lang and the contempt proceedings by the Attorney-General together as there were

common issues of law. The Attorney-General issued a fiat to Lim Lah Lang's counsel to act for him in the contempt proceedings.

D. The Issues of Law

15. The following matters are not in dispute for the purposes of both the defamation appeal and the contempt proceeding:

15.1. The Comment was both defamatory and contemptuous.

15.2. Jibster was not the author or primary publisher of the Comment. The Comment was authored and uploaded by a third-party user.

15.3. Jibster had no actual knowledge of the Comment until about 4pm on 21.02.2021.

15.4. Jibster had no control over the uploading of the Comment save for the keyword-blocking feature made available by Facebook.

15.5. The matters in paragraphs 4, 5, 7, 8 and 9 above are not in dispute.

16. The issues before the Federal Court are as follows:

16.1. Whether the contempt application by the Attorney-General ought to have been filed in the High Court instead of the Federal Court, and if so, does that nullify the contempt application?

16.2. Whether section 114A of the Evidence Act is unconstitutional?

In the event the issues above are answered in the negative:

- 16.3. Whether Jibster can be regarded as having published the Comment for the purposes of liability for the tort of defamation?
- 16.4. Whether Jibster can be regarded as having published the Comment for the purposes of liability for the contempt of scandalizing the court?

E. The e-Moot

17. For the purposes of the e-Moot:
 - 17.1. Counsel for the Attorney-General and Lim Lah Lang will have to argue that the issues be answered in the following manner:
 - Issue 1: Negative
 - Issue 2: Negative
 - Issue 3: Positive
 - Issue 4: Positive
 - 17.2. Counsel for the Respondent in both proceedings, Jibster, will have to argue that the issues be answered in the reverse.
 - 17.3. Counsel will have to argue all issues regardless on how the earlier issues are answered.
 - 17.4. Although the issue of publication is partly a question of fact, counsel are to bear in mind that, as noted in paragraph 15.5 above, the material facts are not in dispute. The Attorney-General and Lim Lah Lang are also not disputing the manner in which Facebook pages operate.
18. The characters and facts in this moot problem are purely fictional.