TAN SRI DR MUHAMMAD SHAFEE ABDULLAH v. TOMMY THOMAS & ORS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
UMI KALTHUM ABDUL MAJID JCA
AHMADI ASNAWI JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1066-06-2016]
11 OCTOBER 2018
[2018] CLJ JT(5)

LEGAL PROFESSION: *Malaysian Bar – Bar Council – Whether President of Bar Council has legal identity within Legal Profession Act 1976 – Whether President could be sued – Whether rightful party to be sued is Bar Council*

LEGAL PROFESSION: *Practice and etiquette – Professional etiquette – Appellant appointed as lead counsel for Public Prosecutor – Whether appellant allowed himself to be part of political agenda of political party – Whether appellant willingly and knowingly lent himself to political event to attack and diminish reputation of accused person – Whether intended to demean accused person – Whether appellant's conduct was improper*

TORT: *Defamation – Defences – Justification, qualified privilege and fair comment – Filing of motion in relation to conduct of appellant in context of breach of etiquette and publicity rules of Legal Profession Act 1976 – Whether there was malice – Whether motion amounted to complaint – Whether defences proven*

TORT: *Breach of statutory duty – Duties imposed by statute – Filing of motion in relation to conduct of appellant in context of breach of etiquette and publicity rules of Legal Profession Act 1976 – Whether Malaysian Bar legally bound to receive motion – Whether motion was direction from members to lodge complaint with Disciplinary Board if and when motion was carried – Whether an attempt by members to usurp statutory duties of Disciplinary Committee and Disciplinary Board*

The appellant, a senior advocate and solicitor of the High Court in Malaya, was appointed as the lead counsel for the Public Prosecutor on an *ad hoc* basis for the case of *Dato' Seri Anwar Ibrahim v. PP* under s. 376 of the Criminal Procedure Code. On 10 February 2015, the Federal Court delivered its decision which resulted in Dato' Seri Anwar Ibrahim ('DSAI') being ordered to serve his sentence of five years imprisonment. Subsequent to the decision of the Federal Court on 10 February 2015, the appellant had allegedly behaved in a manner which constituted conduct unbecoming of an advocate and solicitor and had brought the legal profession into disrepute. This led to the filing of a motion by the first respondent, seconded by the second respondent, at the Annual General Meeting of the Malaysian Bar, to pass

three resolutions to: (i) condemn, in the strongest terms, the appellant's behaviour since 10 February 2015; (ii) call on the in-coming Bar Council to immediately lodge a complaint against the appellant with the Disciplinary Board ('DB'); and (iii) urge the Bar Council to take steps to prevent the appellant from continuing to bring the legal profession into disrepute. Upon being aware of the motion, the appellant filed an action premised on breaches of statutory duty and on the tort of defamation against all the respondents. The appellant obtained an *ex parte* injunction against the respondents which, in effect, prevented the motion of the first respondent being debated by the General Assembly of the Malaysian Bar. The High Court Judge ('HCJ') found in favour of the respondents and hence, this appeal. The issues that arose for the court's determination were: (i) whether the fourth respondent, the then President of the Bar Council, was rightly joined and sued; (ii) whether the first to fourth respondents were entitled to the defence of justification, qualified privilege and fair comment; (iii) whether the first to fourth respondents had committed the tort of conspiracy to defame/injure; (iv) whether the first and second respondents had breached their statutory duties by presenting the motion; and (v) whether the third and fourth respondents had breached their statutory duties by accepting the motion.

Held (dismissing appeal with no order as to costs)

Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The power to sue or defend is clearly set out in s. 57(j) of the Legal Profession Act 1976 ('LPA') and that power lies squarely with the Bar Council and no one else. Further, the 'President of the Bar Council' does not have a legal identity within the LPA. It is crystal clear from the words in the LPA that the rightful party to be sued in the case was the Bar Council. The court could not give meaning to words in a statute inconsistent to what the words say or to coin a phrase. Hence, the appellant's submission on this issue was rejected. (para 26)

(2) The defence of justification is also known as justification by truth, in that, if what is said in the defamatory statement can be proved to be true, that will provide a complete defence irrespective whether the statement was made with malice or bad faith. The first respondent had not pleaded justification to the meaning pleaded by the appellant but to a meaning which he ascribed to. This is known as a *Lucas-Box* plea. The main purpose of the *Lucas-Box principle* is one of pleading and it is only to make sure that the appellant knew what case he was facing and nothing whatsoever to do with the charges he may have to face if the motion was carried in the AGM. Accordingly, the appellant's complaint was without merit. (paras 28, 31 & 35)

(3) There was no merit in the appellant's complaint that the HCJ was wrong to conclude that the contents of 88 media articles had been proven by the first respondent, when the makers of the articles were not called as witnesses. The evidence by the reporter of the article with regards to the statements by the former Attorney General Abu Talib Othman was never challenged. Further, the appellant had, during the trial, informed the court that he had no objection to the accuracy of the article titled '*Legal experts: Bar Council must act against Shafee*'. As for statements by Professor Gurdial, the appellant had apologised to the same which only meant that there were such statements made. (paras 36-38)

(4) In support of the motion, the first and second respondents had listed the behaviour of the appellant to show that there were valid grounds for the Bar Council to take appropriate steps. The HCJ had dealt in great detail on whether the grounds were substantially true. Hence, there was no reason for the Court of Appeal to exercise its power of intervention. (paras 43-47)

(5) The Federal Court, in its decision, held that conspiracy against DSAI had not been proven as what was alleged was a statement from the dock and the Court of Appeal had applied the correct legal principle in analysing the weight to be given to statements of accused from the dock. In order for the public to know what were the reasons for their decisions, and to ensure that the press disseminated the correct information to the public, the Federal Court had given a press summary of its decision. Hence, the only inference to be made from the appellant's evidence was that the appellant had willingly and knowingly lent himself to a political event to attack and diminish DSAI's reputation. A DPP should not allow himself to be part of a political agenda of a political party. (paras 57, 58 & 61)

(6) An advocate's primary duty as an officer of the court is to the court and not to demean/dismiss it as being of no consequence. The appellant's statement, condemning a convicted person like DSAI, who could not defend himself, was improper and he clearly intended to demean DSAI and to score political points. Further, an order of a court remains valid and binding until it has been set aside. The in-camera evidence had not been transformed into evidence which anyone could refer to openly in the public domain. If there was doubt as to the effect of the in-camera evidence order, the appellant, as an officer of court, was duty bound to seek clarification from the trial court before he decides that the aforesaid order had lapsed or had been set aside by what had transpired at the hearings at the Court of Appeal and Federal Court. Despite the absence of any contempt proceedings against the appellant, the appellant had

breached the order of the in-camera evidence of the trial court by disclosing the in-camera evidence in the 'greatest detail' in his words in his talks and interviews. The appellant had also admitted that he had disclosed evidence which had been expunged in the trial court, which amounted to a blatant breach of a court order. (paras 62-72)

(7) There were two inferences from what the appellant said of the defence team: (i) the defence team did a bad job; and (ii) he did a better job than the defence team. This amounted to demeaning the defence team and praising oneself of his skills. In saying all these to the press and in talks arranged by a political party, the appellant was telling the world at large that he was a top-notch barrister as described in the motion and by the manner in which he had done it, had overstepped the line. Hence, the first and second respondents had successfully proven the defence of justification. (paras 74-76)

(8) The first and second respondents, as members of the Malaysian Bar and confronted with the conduct of the appellant, also a member of the Malaysian Bar, had an interest and duty to ensure that a fellow member comply with the rules and regulations as provided for under the LPA. They held a genuine belief that something was not right in the way the appellant was conducting himself and did what they did as a matter of necessity in the circumstance. Further, s. 64(6) of the LPA demands that the third and fourth respondents receive the motion. The motion, in substance, related to the conduct of the appellant in the context of breach of etiquette and publicity rules of the LPA and as the guardian of the LPA, the Malaysian Bar is legally bound to receive the motion. There was thus no malice on the part of the respondents. (paras 79, 80, 82, 85 & 90)

(9) The motion, read in the most liberal manner, did not amount to a complaint. It was nothing but a proposal as in all motions for something to be done, and in this case, a direction from the members to the governing body to lodge a complaint with the DB if and when the motion was carried. There was no attempt by the respondents to usurp the statutory duties of the Disciplinary Committee and the DB. Even if there was a statutory breach, the appellant had not shown what was the consequence of such breach as there is no provision in the LPA providing for any sanctions for such breach. The court further found that there was no evidence of conspiracy to defame/injure. (paras 92-94 & 96)

***Bahasa Malaysia** Headnotes*

Perayu, seorang peguam cara dan peguam bela kanan Mahkamah Tinggi Malaya, dilantik sebagai peguam utama untuk Pendakwa Raya ('PR') atas dasar *ad hoc* untuk kes *Dato' Seri Anwar Ibrahim v. PP* bawah s. 376 Kanun Tatacara Jenayah. Pada 10 Februari 2015, Mahkamah Persekutuan menyampaikan keputusannya menjurus pada Dato' Seri Anwar Ibrahim ('DSAI') diperintahkan menjalani hukuman penjara lima tahun. Selepas keputusan Mahkamah Persekutuan pada 10 Februari 2015, perayu dikatakan bertindak dalam cara yang dianggap tindakan tidak wajar peguam cara dan peguam bela dan mengakibatkan nama buruk pada profesion undang-undang. Perkara ini menjurus pada pemfailan usul oleh responden pertama, disokong oleh responden kedua, di Mesyuarat Agung Tahunan Badan Peguam Malaysia ('AGM'), untuk meluluskan tiga resolusi untuk (i): mengecam, dalam terma yang kuat, kelakuan perayu semenjak 10 Februari 2015; (ii) meminta Majlis Peguam baru melaporkan segera satu aduan terhadap perayu dengan Lembaga Disiplin ('DB'); dan (iii) menggesa Majlis Peguam mengambil langkah-langkah menghalang perayu daripada terus menyebabkan nama buruk kepada profesion undang-undang. Setelah mengetahui tentang usul tersebut, perayu memfailkan tindakan berasaskan pelanggaran kewajipan statutori dan dalam tort memfitnah terhadap kesemua responden. Perayu memperoleh injunksi *ex parte* terhadap responden-responden yang, pada asasnya, menghalang usul responden pertama dibahaskan oleh Perhimpunan Umum Badan Peguam Malaysia. Hakim Mahkamah Tinggi ('HMT') memutuskan berpihak kepada responden-responden dan oleh itu, rayuan ini. Isu-isu yang berbangkit untuk pemutusan mahkamah adalah: (i) sama ada responden keempat, Presiden Majlis Peguam pada ketika itu, digabungkan dan disaman dengan betul; (ii) sama ada responden-responden pertama hingga keempat berhak untuk pembelaan justifikasi, keistimewaan bersyarat dan komen wajar; (iii) sama ada responden-responden pertama hingga keempat melakukan tort konspirasi untuk memfitnah/menyakiti; (iv) sama ada responden-responden pertama dan kedua melanggar kewajipan statutori mereka dengan mengemukakan usul tersebut; dan (v) sama ada responden-responden ketiga dan keempat melanggar kewajipan statutori mereka dengan menerima usul tersebut.

Diputuskan (menolak rayuan tanpa perintah untuk kos)
Oleh David Wong Dak Wah HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Kuasa untuk menyaman jelas diperuntukkan dalam s. 57(j) Akta Profesion Undang-undang 1976 ('APU') dan kuasa tersebut terletak pada Majlis Peguam dan bukan yang lain. Malahan, 'Presiden Majlis Peguam' tidak mempunyai identiti undang-undang dalam APU. Jelas daripada peruntukan dalam LPA bahawa pihak yang wajar disaman dalam kes ini

A ialah Majlis Peguam. Mahkamah tidak boleh memberikan maksud yang tidak konsisten atau membentuk frasa baru untuk perkataan-perkataan dalam statut bertentangan dengan maksud sebenar perkataan-perkataan itu. Oleh itu, hujahan perayu atas isu ini ditolak.

(2) Pembelaan justifikasi juga dikenali sebagai justifikasi dengan kebenaran, B di mana, jika apa yang dinyatakan dalam pernyataan memfitnah boleh dibuktikan sebagai benar, ia memberi pembelaan sepenuhnya tidak kira sama ada pernyataan itu dibuat dengan niat jahat atau secara tidak jujur. Responden pertama tidak memplid justifikasi pada maksud yang diplid oleh perayu tetapi pada maksud yang diertikan olehnya. Ini dikenali C sebagai pli *Lucas-Box*. Tujuan utama prinsip *Lucas-Box* adalah pliding dan hanya untuk memastikan perayu mengetahui apa kes yang dihadapinya dan bukan berkenaan pertuduhan yang perlu dihadapinya jika usul tersebut dibawa dalam AGM. Oleh itu, aduan perayu tidak bermerit.

D **(3)** Tiada merit dalam aduan perayu bahawa HMT khilaf apabila memutuskan bahawa kandungan 88 artikel media telah dibuktikan oleh responden pertama, bila pembuat artikel-artikel tersebut tidak dipanggil sebagai saksi. Keterangan pelapor artikel tersebut berkaitan dengan kenyataan-kenyataan bekas Peguam Negara Abu Talib Othman tidak E dicabar. Selanjutnya, perayu telah, semasa perbicaraan, memaklumkan pada mahkamah bahawa dia tiada bantahan berkaitan ketepatan artikel bertajuk '*Legal experts: Bar Council must act against Shafee*'. Berkaitan kenyataan-kenyataan oleh Professor Gurdial, perayu telah meminta maaf terhadapnya, yang membawa maksud bahawa kenyataan- F kenyataan tersebut telah dibuat.

(4) Untuk menyokong usul tersebut, responden pertama dan kedua telah menyenaraikan kelakuan perayu untuk membuktikan bahawa terdapat alasan sah untuk Majlis Peguam mengambil langkah-langkah sewajarnya. Hakim Mahkamah Tinggi telah mempertimbangkan secara G terperinci berkenaan sama ada alasan-alasan tersebut benar secara substansial. Oleh itu, tiada sebab untuk Mahkamah Rayuan melaksanakan kuasa campur tangan.

(5) Mahkamah Persekutuan, dalam keputusannya, memutuskan bahawa konspirasi terhadap DSAI tidak dibuktikan kerana apa yang didakwa H adalah kenyataan dari kandang orang salah dan Mahkamah Rayuan telah menggunakan prinsip undang-undang yang betul untuk menganalisa berat yang perlu diberikan pada kenyataan-kenyataan tertuduh dari kandang orang salah. Untuk orang awam mengetahui apakah alasan

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keputusan mereka, dan untuk memastikan pihak akhbar menyebarkan maklumat yang betul kepada awam, Mahkamah Persekutuan telah memberi ringkasan akhbar untuk keputusannya. Oleh itu, satu-satunya inferens yang boleh dibuat daripada keterangan perayu adalah bahawa perayu sengaja dan dengan pengetahuan membiarkan dirinya digunakan untuk acara berunsur politik untuk menyerang dan menjatuhkan reputasi DSAI. Seorang PR tidak boleh membenarkan dirinya dijadikan sebahagian agenda politik sesebuah parti politik.

(6) Tugas asas seseorang peguam bela sebagai pegawai mahkamah adalah kepada mahkamah dan bukan untuk merendahkan maruah/menolaknya sebagai tidak penting. Kenyataan perayu, mengecam orang yang disabitkan seperti DSAI, yang tidak boleh membela diri, tidak wajar dan jelas diniatkan untuk menjatuhkan maruah DSAI dan untuk mendapatkan kepentingan politik. Selanjutnya, sesuatu perintah mahkamah kekal sah dan mengikat sehingga ia diketepikan. Keterangan secara tertutup tidak dialihkan ke bentuk keterangan yang boleh dirujuk oleh sesiapa secara terbuka dalam liputan awam. Jika wujud keraguan berkaitan kesan perintah keterangan secara tertutup, perayu, sebagai pegawai mahkamah, berkewajipan untuk memohon penjelasan daripada mahkamah bicara sebelum memutuskan bahawa perintah tersebut telah luput atau telah diketepikan oleh apa yang berlaku semasa perbicaraan di Mahkamah Rayuan dan Mahkamah Persekutuan. Walaupun tiada prosiding penghinaan terhadap perayu, perayu telah melanggar perintah keterangan secara tertutup mahkamah perbicaraan dengan mendedahkan keterangan secara tertutup dengan terperinci dalam kata-katanya dalam ucapan dan wawancaranya. Perayu juga mengakui bahawa dia telah mendedahkan keterangan yang dipotong dalam mahkamah bicara, yang membentuk pelanggaran terang-terangan perintah mahkamah.

(7) Terdapat dua inferens daripada apa yang perayu katakan mengenai pasukan pembelaan: (i) kerja pasukan pembelaan tidak bagus; dan (ii) kerjanya lebih bagus daripada pasukan pembelaan. Ini bermaksud menjatuhkan maruah pasukan pembelaan dan memuji kemahiran diri sendiri. Dalam menyatakan perkara ini kepada akhbar dan dalam ucapan-ucapan yang diuruskan oleh parti politik, perayu memberitahu dunia keseluruhannya bahawa dia adalah peguam yang hebat seperti yang digambarkan dalam usul dan melalui cara yang dibuatnya, telah melanggar batasan. Oleh itu, responden pertama dan kedua berjaya membuktikan pembelaan justifikasi.

(8) Responden pertama dan kedua, sebagai ahli Badan Peguam Malaysia dan berhadapan dengan tindakan perayu, juga seorang ahli Badan Peguam Malaysia, mempunyai kepentingan dan tugas untuk memastikan bahawa ahlinya mematuhi kaedah-kaedah dan peraturan-peraturan yang

A diperuntukkan bawah APU. Mereka mempercayai secara jujur bahawa ada sesuatu yang tidak betul dalam cara perayu membawa dirinya dan melakukan apa yang perlu dalam keadaan tersebut. Selanjutnya, s. 64(6) APU menuntut bahawa responden ketiga dan keempat menerima usul itu. Usul tersebut, pada asasnya, berkait dengan tindakan perayu dalam
B konteks pelanggaran etika dan kaedah publisiti APU dan sebagai penjaga LPA, Badan Peguam Malaysia terikat secara undang-undang untuk menerima usul tersebut. Oleh itu, tiada niat jahat oleh responden-responden.

(9) Usul tersebut, dibaca secara yang paling liberal, tidak membentuk
C aduan. Ia sekadar cadangan seperti dalam semua usul untuk sesuatu dilakukan, dan dalam kes ini, arahan daripada ahli-ahli kepada badan yang menguruskan mereka untuk membuat aduan pada DB, jika dan bila usul tersebut dibawa. Tiada cubaan oleh responden-responden untuk merampas kewajipan statutori Jawatankuasa Disiplin dan DB. Walaupn
D terdapat pelanggaran statutori, perayu tidak menunjukkan apakah akibat pelanggaran tersebut kerana tiada peruntukan dalam APU yang memperuntukkan persetujuan terhadap pelanggaran sedemikian. Mahkamah selanjutnya mendapati bahawa tiada keterangan konspirasi untuk memfitnah/menyakiti.

E **Case(s) referred to:**
Adam v. Ward [1917] AC 309 ***(refd)***
Albert Cheng v. Tse Wai Chun (2000) 3 HKCFAR 339 ***(refd)***
Benmax v. Austin Motor Co LD [1955] AC 370 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2016] 6 CLJ 161 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
F *Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC* ***(refd)***
Lucas-Box v. Associated Newspapers Group Plc [1986] 1 WLR 147 ***(refd)***
Mohamad Ramli Abdul Manan v. Lim Chee Wee [2014] 6 CLJ 168 CA ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Sattin v. Nationwide News Pty Ltd [1996] NSW Lexis 2530 ***(refd)***
G *Silkin v. Beaverbrook Newspapers Ltd & Another [1958] 1 WLR 743* ***(refd)***
Viscount De L'isle v. Times Newspapers Ltd [1988] 1 WLR 49 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 376(3)
Defamation Act 1957, ss. 8, 9
H Federal Constitution, art. 10(1)(a), (2)(a)
Legal Profession Act 1976, ss. 41, 57(j), 64(6)

Other source(s) referred to:
K Kuldeep Singh, *Tort of Defamation,* p 358

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For the appellant - Muhammad Shafee Abdullah; M/s Shafee & Co
For the 1st respondent - Ambiga Sreenevasan, Michael Yap Chih Hong & Lim Wei Jit; M/s Tommy Thomas
For the 2nd respondent - Porres Royan; M/s Kumar Partnership
For the 3rd respondent - Lambert Rasa-Ratnam, Andrew Chiew Ean Vooi, Kenneth Seet Wan Zheng & Diana Lau An Na; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: For the High Court judgment, please see Tan Sri Dr Muhammad Shafee Abdullah v. Tommy Thomas & Ors [2017] 2 CLJ 453 (affirmed).]

Reported by S Barathi

JUDGMENT

David Wong Dak Wah CJ (Sabah & Sarawak):

Genesis – The Motion

[1] The terms of the motion which was sought to be tabled at the Annual General Meeting of the Malaysian Bar dated 14 March 2015 (AGM) are these:

(a) WHEREAS barristers are members of a noble and honourable profession, and are expected to behave honourably at all times;

(b) WHEREAS barristers are prohibited from conducting themselves in any manner which would bring the legal profession into disrepute or which is likely to diminish public confidence in the legal profession;

(c) WHEREAS barristers must not permit their absolute independence and integrity to be compromised nor are they permitted to compromise their professional standards in order to please clients or for any other reason;

(d) WHEREAS in total violation of these long-established and cherished principles and values, Shafee Abdullah has, from the time the Federal Court delivered its decision to convict Anwar Ibrahim on 10 February 2015, behaved in a repugnant and obnoxious manner which has brought the legal profession into disrepute;

(e) WHEREAS since 10th February 2015, Shafee Abdullah, as leading prosecuting counsel, has wilfully and with impunity:

(i) held press conferences condemning Anwar Ibrahim who cannot respond as a convicted prisoner serving time;

(ii) drawn attention to his prowess, allegedly as a top rate prosecutor;

(iii) demeaned the accused Anwar Ibrahim and his legal team and the defences that were relied upon by them in court proceedings;

(iv) given interviews to the traditional and online media concerning his performance as prosecutor; and

(v) organised and participated in nationwide road shows, with a political party, for the purposes of insulting a convicted prisoner and bringing attention to his role in the conviction.

(f) WHEREAS such extreme and outrageous conduct, unprecedented in the annals of the common law, cannot be allowed to continue and must receive strong condemnation from his peers;

(g) WHEREAS a former Attorney General, Abu Talib, was quoted online on 16th and 17th February as stating that Shafee was advertising and promoting himself in the media, and called on Attorney General Gani Patail to revoke Shafee Abdullah's appointment;

(h) WHEREAS the totality of Shafee Abdullah's conduct since 10th February 2015 has been morally reprehensible and legally unacceptable, crossing all lines of decency;

(i) WHEREAS Shafee Abdullah, although supported by forces of the state, is not above the law, as Lord Denning reminded that Attorney General of the United Kingdom in 1977:

> To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you ever so high, the law is above you';

(j) WHEREAS Shafee Abdullah's conduct is in clear breach of Rules 5(a), 31, 32, 33 and 49 of the Legal Profession (Practice and Etiquette) Rules 1978;

(k) WHEREAS Rule 33 of the 1978 Etiquette Rules which reads:

> An advocate and solicitor shall treat adverse witnesses and parties with fairness and due consideration and shall not minister to the malevolence or prejudices of a client in the conduct of a case,

has particularly been breached by Shafee Abdullah; and

(l) WHEREAS Shafee Abdullah has violated the Legal Profession (Publicity) Rules 2001, Rule 5(1)(a)(ii) of which prohibits lawyers from publicising about themselves or their practice in any manner "that may reasonably be regarded as being … in bad taste … sensational, intrusive, offensive or in any other way unbefitting the dignity of the legal profession".

ACCORDINGLY, the Malaysian Bar hereby resolves to:

(i) Condemn, in the strongest terms, Shafee Abdullah's behaviour since 10th February 2015;

(ii) Call on the in-coming Bar Council to immediately lodge a complaint against Shafee Abdullah with the Disciplinary Board;

(iii) Urge the Bar Council to take all other steps to prevent Shafee Abdullah from continuing to bring the legal profession into disrepute.

The Personalities

[2] The appellant is a senior advocate and solicitor of the High Court in Malaya and a much sought-after barrister for his ability and advocacy skill in this country. Thus, it was not surprising that he was appointed as the lead counsel for the Public Prosecutor on an *ad hoc* basis for Criminal Appeal No: W-05-19-01-2012 in the Court of Appeal and Criminal Appeal No: 05-47-03-2014(W) at the Federal Court (*Dato' Seri Anwar Ibrahim v. PP* [2016] 6 CLJ 161) (Anwar Criminal Trial II). The aforesaid appointment was made by way of a "fiat" under s. 376(3) of the Criminal Procedure Code (CPC).

[3] The first respondent is a senior advocate and solicitor of the High Court in Malaya practising under Messrs Tommy Thomas and also a well-known barrister in the legal fraternity. He is the proposer of the motion.

[4] The second respondent is a very senior advocate and solicitor of the High Court in Malaya practising as a consultant with the firm of Messrs Skrine & Co and is the seconder for the said motion. He was a former judge of the Court of Appeal, Malaysia and also a well-known personality in the legal fraternity.

[5] The third respondent is the statutory body formed under s. 41 of the Legal Profession Act 1976 (LPA) with the fourth respondent being the President of the Bar Council of the Malaysian Bar at the time when this suit was filed.

[6] Both the third and fourth respondents were sued together.

Appellant's Cause Of Action And Sought-after Remedies

[7] After being aware of the motion of the first respondent, the appellant immediately filed an action premised on breaches of statutory duty and on the tort of defamation against all the respondents and sought in the main for the following reliefs:

(a) An injunction restraining the Defendants (Respondents) from moving the said motion in future Annual General Meetings and Extraordinary General Meetings of the Third Defendant;

(b) For a declaration that the said motion seeking the Third and the Fourth Defendants (the 3rd and 4th Respondents) to condemn and reprimand the Plaintiff is *ultra vires* the LPA in view that the said motion if adopted by the Third and the Fourth Defendants (the 3rd and 4th Respondents) would usurp the very jurisdiction and powers

of the Disciplinary Board of the Third Defendant under Part VII, in particular, sections 94, 99, 100, 103A, 103B, 103C and 103D of the LPA;

(c) For a declaration that the said motion is *ultra vires* as it is meant to move the Defendants (Respondents) to act beyond their statutory power under the LPA thus amounting to a breach of statutory duty;

(d) For a declaration that the said motion if adopted by the Third and the Fourth Defendants (3rd & 4th Respondents) is *ultra vires* and a breach of natural justice and the right to a fair hearing;

(e) For a declaration that the said motion to move the Third and the Fourth Defendants (3rd & 4th Respondents) during the said AGM is *mala fide*, politically motivated and would breach the Plaintiff's (Appellant's) constitutional rights under the Federal Constitution, in particular, and *inter alia* Articles 5 and 8 of the Constitution;

(f) General damages;

(g) Damages for libel; and

(h) Damages for tort of conspiracy.

[8] The appellant after filing his statement of claim obtained an *ex parte* injunction against the respondents which in effect prevented the motion of the first respondent being debated by the General Assembly of the Malaysian Bar.

Background Facts

[9] In late 2014, the Federal Court heard the appeal by Dato' Seri Anwar Ibrahim (DSAI) regarding his conviction on sodomy charges and the appeal by the Public Prosecutor against his sentence of five year imprisonment imposed by the Court of Appeal in Criminal Appeal No: W-05-19-01-2012. The Federal Court on 10 February 2015 delivered its decision and dismissed both appeals resulting in DSAI being ordered to serve his sentence of five years.

[10] What led to the motion of the first and second respondents was in essence related to the behaviour of the appellant as detailed in the motion after the Federal Court decision on 10 February 2015. It was the view of the first and second respondents that the behaviour of the appellant constituted conduct unbecoming of an advocate and solicitor and had brought the legal profession into disrepute.

[11] The first respondent, with the second respondent as the seconder, on 28 February 2015 published and submitted the motion to the secretary of the third respondent to be discussed at the 69th Annual General Meeting on 14 March 2015 (AGM), the alleged impropriety of the conduct of the appellant after DSAI's appeal at the Federal Court on 10 February 2015 was unsuccessful.

[12] Notice of the AGM was issued by the third and fourth respondents on 24 February 2015. The motion was presented to the third and fourth respondents on 2 March 2015. Upon receipt of the motion, the third and fourth respondents published it in writing and uploaded it online on the Bar Council website for dissemination to members of the Bar who had also received hard copies of the motion.

[13] The appellant on 11 March 2015 received the agenda and motions by hand at his office for the said AGM from the secretary of the third respondent together with a copy of the motion which the first and second respondents intended to move the third and fourth respondents to adopt as a specific agenda for discussion and action.

[14] Despite given the chance to debate the motion at the AGM, the appellant saw it fit to and did obtain an *ex parte* injunction against the respondents to discuss the motion to which the third and fourth respondents duly complied with.

High Court

[15] The learned judge in our view rightly found and had dealt with the following issues:

(i) Whether the words are defamatory?

(ii) Whether the 4th Respondent has been rightly joined and sued?

(iii) Whether the Respondents had proved the defence of justification, qualified privilege and fair comment?

(iv) Whether there was malice on the part of the Respondents?

(v) Whether the Respondents had acted in breach of statutory duty? and

(vi) Whether the motion was *ultra vires* LPA?

[16] On the issue of defamation, the learned judge found that the words contained in the motion are defamatory and, in our view, rightly so, and supposedly explains as to why there is no cross-appeal by the respondents. Hence no discussion is required of us on this issue.

[17] In regard to whether the fourth respondent should have been sued as a party to the suit, the learned judge found that the fourth respondent was wrongly sued, and the proper party should be that of the Bar Council as it is the only body which represents the Malaysian Bar. The learned judge relied on the case of *Mohamad Ramli Abdul Manan v. Lim Chee Wee* [2014] 6 CLJ 168.

[18] We come now to the issue of justification which is pleaded by the first and second respondents as one of their defences. The learned judge found as a fact that the first and second respondents had discharged their burden proving that what they had said in the motion were substantially true after taking into consideration of what the appellant had said in the Kelana Jaya talk, the Permatang Pauh talk and various press conferences.

[19] As for the defence of qualified privilege, the learned judge also found in favour of the first and second respondents for the simple reason that the third and second respondents had an interest and a duty, legal or moral, to submit what is contained in the motion to the third respondent which also had the corresponding duty to accept the motion.

[20] As for the fair comment defence, the learned judge also found in favour of the respondents premised on the ground that the comments were of a genuine public interest nature concerning the conduct of the appellant as an advocate and solicitor.

[21] In regard to the breach of statutory duty by the respondents, the learned judge found no such breaches premised on the ground that they were entitled to do what they did under the LPA.

Our Grounds Of Decision

[22] From the submissions, oral and written from respective counsel and the appeal record, we are of the view that the determinative issues before us are quite similar to that of the trial court and they are these:

(i) Whether the 4th Respondent was rightly joined and sued?

(ii) Whether the 1st to 4th Respondents are entitled to the defence of justification, qualified privilege and fair comment?

(iii) Whether the 1st to the 4th Respondents have committed the tort of conspiracy to defame/injure?

(iv) Whether the 1st and 2nd Respondents have breached their statutory duties by presenting the motion?

(v) Whether the 3rd and 4th Respondents have breached their statutory duties by accepting the motion?

Whether The Fourth Respondent Was Rightly Joined And Sued?

[23] The appellant on this issue from the outset concedes that the Bar Council is the appropriate party to be sued but he had named the fourth respondent, being the then President of the Bar Council, as the representative of the same. He submits that the Bar Council is likened to the EXCO of any institution where it is the executive limb of the Malaysian Bar and since the fourth respondent is the head of the Bar Council, he ought to be made a party to this suit.

[24] At first blush, the submission of the appellant appears to have some merit. Here we are dealing with a piece of legislation in the form of the LPA and therein are provisions regulating the respective positions or status of bodies as to who can sue or be sued. The answer to this issue must be found within the confines of the LPA and not from any other sources.

[25] The relevant provisions of the LPA in our view are these:

Establishment of Malaysian Bar

41. (1) There is established a body corporate to be called the "Malaysian Bar".

(2) The Malaysian Bar shall be a body corporate with perpetual succession and a common seal, and with power subject to this Act to sue and be sued in its corporate name and to acquire and dispose of property both movable and immovable and to do and to perform such other acts as bodies corporate may by law perform.

Establishment of Bar Council

47(1) For the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions under this Act there shall be a Council to be known as the Bar Council.

(2) The Bar Council shall consist of the following –

(a) the immediate past President and Vice-President of the Malaysian Bar;

(b) the chairman of each State Bar Committee and the members elected to represent each State Bar Committee pursuant to subsection 70(7);

(c) members elected pursuant to section 50.

Powers and acts of Bar Council

56. The management of the Malaysian Bar and of its funds shall be vested in the Bar Council; and all the powers, acts or things which are not by this Act expressly authorised, directed or required to be exercised or done by the Malaysian Bar in general meeting may, subject to this Act or any rules made thereunder or any resolution passed from time to time by the Malaysian Bar in general meeting, be exercised or done by the Bar Council:

Provided that no such resolution of the Malaysian Bar shall invalidate the previous exercise of any powers or the previous doing of any act or thing by the Bar Council which would have been valid if the resolution had not been passed.

Specific powers of the Bar Council

57. Without prejudice to the general powers conferred by section 56 or the specific powers to make rules conferred by any other provisions of this Act the Bar Council shall have power:

...

(j) to institute, conduct, defend, compound or abandon any legal proceedings by and against the Malaysian Bar or its officers or otherwise concerning the affairs of the Malaysian Bar and to compound and allow time for payment or satisfaction of any debts due or of any claims or demands made by or against the Malaysian Bar.

[26] From the above provisions, the power to sue or defend is clearly set out in s. 57(j) of the LPA and that power lies squarely with the Bar Council and no one else. Further, it has been pointed out that the "President of the Bar Council" does not have a legal identity within the LPA. Hence, with respect, the words in the LPA are crystal clear as to who should be the rightful party to be sued in this case and it is clearly the Bar Council. Courts cannot give meanings to words in a statute inconsistent to what the words say. Or to coin a phrase, those relevant words mean exactly what they say. Hence, we reject the submission of the appellant on this issue.

Whether The First To Fourth Respondents Are Entitled To The Defence Of Justification, Qualified Privilege And Fair Comment?

Defence Of Justification

[27] This defence only relates to the first and second respondents. Just to recapitulate, the learned High Court Judge had found that the contents of the motion are defamatory of the appellant and no appeal had been lodged on this finding by first and second respondents. That being the case, we are only required to deliberate on the aforesaid defences.

[28] We start off by reminding ourselves of what is the legal position as to the defence of justification. This defence is what is also known as justification by truth in that if what is said in the defamatory statement can be proved to be true, that will provide a complete defence irrespective whether the statement was made with malice or bad faith. This defence is premised on the simple logic that what is true cannot be defamatory. Or put it in another way, one has to live with whatever deeds, be it good or bad or honourable or dishonourable, which one has committed in life. You are what you are so to speak.

[29] The defence of justification is codified in s. 8 of the Defamation Act 1957 which reads as follows:

> In an action for libel or slander in respect of words containing two or more distinct charges against the Plaintiff, a defence of justification shall not fail by reason only the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[30] The burden is on the first and second respondents to prove on the balance of probabilities, the following:

(i) that the defamatory imputation in the motion is true;

(ii) that there is justification for the imputation complained of; and

(iii) that the statements in the motion are true.

[31] In this case, we note that the first respondent had not pleaded justification to the meaning pleaded by the appellant but to a meaning which he ascribes to. This sort of pleading is what is known as a *Lucas-Box* plea. This sort of pleading is premised on the case of *Lucas-Box v. Associated Newspapers Group Plc* [1986] 1 WLR 147. Mustill LJ in a subsequent case of *Viscount De L'isle v. Times Newspapers Ltd* [1988] 1 WLR 49 explains the *Lucas-Box* concept in the following manner:

> First, as to *Lucas-Box*'s case (1986) 1 WLR 147: Two different interpretations have been put on the decision and judgment of this Court. The first is that a Defendant is now required to plead the meaning which he ascribes to the writing of which the Plaintiff complains if that differs from the meaning pleaded by the Plaintiff. Second, that the Defendant is obliged to make clear what version of the facts it is that he asserts to be true.
>
> The first interpretation he said was wrong. A Defendant in pleading justification is not obliged to ascribe a meaning to the words complained of; the Defendant is, however, obliged to plead justification in a way which makes it clear the meaning he seeks to justify.
>
> The essence of the decision of *Lucas-Box*'s case is that the justification must be pleaded so as to inform the Plaintiff and the Court precisely what meaning the Defendant will seek to justify. This is however an altogether different matter from saying that the Defendant is obliged to say, yea or nay, whether that meaning is the one which the writing really bears.

[32] The meaning which the first respondent ascribes to is found in paras. 16 and 17 of the amended defence which reads as follows:

> 16. It is denied that in their natural and ordinary meaning the said words as set out in Paragraph 13 of the Amended Statement of Claim in their context bore or were understood to bear or are capable of bearing the meanings alleged in Paragraphs 16, 16.1, 16.2, 16.3, 16.4, 16.5, 16.6 and 16.7 of the Amended Statement of Claim. The 1st Defendant will rely on the context and full effect of the said Motion at trial.

17. If and in so far as the said words read in context of the said Motion in its entirety, in their natural and ordinary meaning bore and were understood to bear the meanings set out below they were true in substance and in fact:

(a) that the Plaintiff has since the delivery of the Federal Court decision to convict Anwar Ibrahim, had behaved in a repugnant and obnoxious manner as described in Paragraph (e) of the said Motion;

(b) that the Plaintiff has by its conduct acted in violation of long-established principles of the legal profession and the Act and its rules; and

(c) that the Plaintiff's conduct has brought the legal profession into disrepute.

Particulars Of Justification

(a) Since 10-2-2015, the Plaintiff has:

(i) held press conferences condemning Anwar Ibrahim who cannot respond as a convicted prisoner serving time;

(ii) drawn attention to his prowess, allegedly as a top rate prosecutor;

(iii) demeaned the accused Anwar Ibrahim and his legal team and the defences that were relied upon by them in court proceedings;

(iv) given interviews to the traditional and online media concerning his performance as prosecutor;

(v) organised and participated in nationwide roadshows, with a political party, for the purposes of insulting a convicted prisoner and bringing attention to his role in the conviction; and

(vi) these nationwide roadshows were carried in full page advertisements in the press which also included a photograph of the Plaintiff.

(b) The 1st Defendant repeats herein Paragraph 6 to 10 above.

(c) The conduct of the Plaintiff complained of and referred to in the said Motion is reflected in statements made by the Plaintiff and reports carried in the media and social media between 10-2-2010 *(sic)* and 11-3-2015.

(d) The Act and its rules contain numerous provisions relating to the conduct of members of the legal profession, including Rules 5(a), 31, 32, 33 and 49 of the Legal Profession (Practice and Etiquette Rules), 1978 and Rule 5(1)(a)(ii) of the Legal Profession (Publicity) Rules, 2001.

(e) The 1st Defendant further relies on such other events, circumstances and/or facts that become apparent in the course of these proceedings and/or upon discovery.

[33] The question we ask ourselves is whether the first respondent had complied with the *Lucas-Box* principle in that the appellant knew exactly what the case of the first respondent he must face. The learned judge on this issue said this:

> [56] In my view, a perusal of paragraphs 16 and 17 of the First Defendant's Amended Defence and paragraphs 10 and 11 of the Second Defendant's Amended Defence, show that the First and the Second Defendants had clearly and expressly pleaded the *Lucas-Box* meaning.
>
> [57] It is noted that the First and the Second Defendants first denied that the impugned words carried any impugned meanings. They then went on to plead that the meanings as set out in the motion were true in substance.
>
> [58] The First and the Second Defendants went on to plead particulars to support the meaning they gave to the impugned words.
>
> [59] In my view, the First and the Second Defendants had pleaded with clarity the meaning attributed to the impugned words which was different from the meaning given by the Plaintiff. Thus, the Plaintiff knew what case he had to meet and the meaning, which the Defendants sought to attribute to the impugned words.

[34] The appellant however in his grounds 5 and 6 of his memorandum of appeal says this:

> 5. The Learned Judge erred in fact and/or law when Her Ladyship stated that the Appellant/Plaintiff knew what case he had to meet and the meaning. In doing so, the Learned Judge also failed to judiciously consider that there were no/insufficient particulars provided in the Motion as to the Appellant/Plaintiff's alleged misconduct and this left the Appellant/Plaintiff without knowing the charges he would have faced had the motion gone on at the AGM.
>
> 6. The Learned Judge erred in fact and/or in law when Her Ladyship's application of the *Lucas-Box* principles to the case.

[35] To buttress grounds 5 and 6 above, the appellant in his submission from pp. 81-88 went through the contents of motion and ascribes to them the meaning of the same, in effect setting out what those allegations in the motion entail. With respect, we are not able to understand where the appellant is coming from in this part of his submission. The main purpose of the *Lucas-Box* principle is one of pleading and as pointed out earlier it is only to make sure that the appellant knew what case he is facing and nothing whatsoever to do with the charges he may have to face if the motion is carried in the AGM. Accordingly, we find that the appellant's complaint is without merit. With that, we now move to the area whether the first and second respondents had proven their defence of justification.

A **[36]** The appellant from the outset of his submission on this issue complains that the learned judge was wrong to conclude that the contents of the 88 media articles had been proved by the first respondent when the makers of those articles were not called as witnesses. Premised on that, the appellant submits that the learned judge made findings bereft of any evidence.
B With respect, the learned judge had made a finding that the appellant never disputed the contents of those media articles and before us, nowhere in his submission referred to did he specifically object to all or any of the 88 articles.

[37] As for the statements by the former Attorney General, Abu Talib
C Othman, the reporter of the article V Anbalagan was called to testify and as pointed by learned counsel for the first respondent, his evidence was not challenged at all. In regard to the concerns of Datuk Seri Shaik Daud, learned counsel for the first respondent on p. 22 of reply submissions had rightly pointed out that counsel for the appellant had on day five of the trial
D informed the court that he had no objection to the accuracy of the article titled "Legal experts: Bar Council must act against Shafee". As for statements by Professor Gurdial, the appellant had apologised to the same which only means that there were such statements made.

[38] Premised on the above, we see no merit in his complaint.

E

[39] As to what had been pleaded by the first and second respondents, the learned judge said that "in essence the impugned words as pleaded by the first and second respondents was that there were grounds for suggesting that there was improper conduct and the plaintiff had breached the relevant rules relating to the conduct of an advocate and solicitor." We are in full
F agreement with the learned judge in her analysis of the case which the appellant had to face in the defense of justification by the first and second respondents. Reading the motion as a whole and the *Lucas-Box* meaning ascribed to it, there is no other analysis which one can arrive at except the one arrived at by the learned judge.

G

[40] We come now as to whether the first and second respondents had on a balance of probabilities proved, their case. The learned judge, in her analysis of this task by the first and second respondents, set out each individual allegation in the motion and meticulously dissected the evidence of the relevant witnesses before arriving at her decision. She, of course, had
H also taken into consideration the detailed submissions from respective counsel. This can be seen from her grounds and one can say she left no stone unturned in her analysis of the issues before her.

I

[41] Our role as the appellate court on findings of fact by a trial judge is very limited and for good reasons as pointed out by the oft-quoted case of *Benmax v. Austin Motor Co LD* [1955] AC 370 where Viscount Simmons said this:

> ... It appears to me that these statements are consonant with the Rules of the Supreme Court, which prescribe that all appeals to the Court of Appeal shall be by way of rehearing (R. S. C. Ord 58, r. 1), and that the Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made (r. 4). This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here it must first be determined what the defendant has been negligent, and that is an end of the matter unless its verdict can be upset according to well established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility of bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the Learned Judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem.

[42] In the context of our jurisdiction, we apply the "plainly wrong" test as set out on the Federal Court case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97. The "plainly wrong" test in our view is simply to ask the question of whether the trial judge had judicially appreciated the evidence before him or her. Failure to clearly identify the issues or disputes required to be decided by the trial court and/or failure to give reasoned conclusions supported by evidence are markers showing that there has been a failure by the trial judge to judicially evaluate the adduced and admitted evidence which would invariably demand for appellate intervention.

[43] We have examined the reasons given by the learned judge in the case at hand together with the detailed submissions from the appellant as well as counsel for the respondents and we cannot say that the learned judge had been plainly wrong or that her decision on this issue is one which no reasonable tribunal could have arrived at. The learned judge in fact supported her findings with undisputed evidence and the manner which the appellant had given his testimony in court. She knew the very issues which needed to be decided and what needed to be proved and by whom. The appellant with respect had not shown to us why we should exercise our power of intervention.

[44] We agree with the learned judge's view that the substantial part of the plea of justification centres on the Kelana Jaya talk and what the appellant had said after the Federal Court decision on 15 February 2015 from his many press conferences and interviews. As far as evidence adduced in court, there is little doubt that there is a wealth of it relating to the conduct of the appellant. Foremost is the tape recording of the Kelana Jaya talk and the transcripts of the same are agreed documents in bundle B.

[45] There is no doubt whatsoever that the following had been proved either by way of admission by the appellant or clear documentary and/or visual evidence.

(a) The Kelana Jaya talk was not faked.

(b) The Kelana Jaya talk was organised by UMNO, a political party in this country.

(c) The appellant had advised the organisers the necessity of the Kelana Jaya talk.

(d) The appellant felt that there was a need to defend himself in view of the negative comments from the public.

(e) The appellant also felt that he had to defend the judgment of the Federal Court on the point of political conspiracy.

(f) The appellant had at the Kelana Jaya talk called DSAI a coward in criticising him for not subjecting himself to cross-examination.

(g) The appellant had said that if DSAI had been cross-examined by him, DSAI would have fainted in the witness box because he would not have been able to explain a lot of things, like why he put in his defence of alibi and then backed off.

(h) The appellant had at the Kelana Jaya talk divulged evidence at the Anwar Criminal Trial II which were expunged by the court.

(i) The appellant had divulged at the Kelana Jaya talk evidence which were given in camera at the trial of Anwar Criminal Trial II.

(j) The appellant had given several press conferences in regard to the Federal Court decision dated 10 February 2015 relating to DSAI, the defense team and his performance in the court in prosecuting the appeals.

(k) The appellant also took part in the gathering in Penang organised by UMNO.

[46] In our view, the whole purpose of the motion is to get the Malaysian Bar to pass three resolutions and they are simply these:

(a) Condemn, in the strongest terms, appellant's behaviour since 10 February 2015;

(b) Call on the in-coming Bar Council to immediately lodge a complaint against the appellant with the Disciplinary Board;

(c) Urge the Bar Council to take steps to prevent the appellant from continuing to bring the legal profession into disrepute.

[47] And in support of the motion, the first and second respondents had listed the behaviour of the appellant to show that there are valid grounds for the Bar Council to take appropriate steps. The issue which confronts us is whether those grounds are substantially true. The learned judge as pointed out earlier had dealt with this issue in great detail which we agree with and for us to repeat it would be an exercise in verbosity and may not do justice to the learned judge.

[48] That said, as an appellate court, it is incumbent on us to make certain observations on certain aspects of the case bearing in mind that the appellant and respective learned counsel had made lengthy submissions over two days of hearing. Hence, not to give our views on the aforesaid submissions would be unfair to the appellant and the respective learned counsel to say the least. Further this is a case where the appellant, one may say, had through his behaviour ventured into unchartered waters which also got a reaction from two senior members of the Bar which we may also say extraordinary to say the least.

[49] Let us start off by saying that the appellant, like any citizen of this country, possesses the right of free speech and expression. That right is guaranteed by art. 10(1)(a) of the Federal Constitution which states that "every citizen has the right to freedom of speech and expression". That right is understandably not absolute and is subject to art. 10(2)(a) which empowers Parliament to enact laws to curtail the freedom of speech where "it deems necessary or expedient in the interest of the security of the Federation or any

A part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence".

B **[50]** In the context of this case, the appellant, as an advocate and solicitor and a member of the Malaysia Bar, is subject to the LPA which provides for rules of conduct in the form of Legal Profession (Practice and Etiquette) Rules 1978. The issue which confronts us is then whether in exercising his right of free speech and expression the appellant had gone overboard resulting in breach of the aforesaid rules.

C **[51]** The legal profession is considered by the public as an honourable profession which demands the highest standards and the highest tradition from those who practice it. Hence, it can be said that the fundamental aim of legal ethics is to ensure that the honour and dignity of the legal profession is maintained, to secure a cordial and professional cooperation between the D Bench and the Bar to promote the highest standard of justice, and to ensure fair dealings and honour between counsel with his clients, opponents and witnesses. The legal profession not only deserves but demands such high standard for the simple reason that it is considered as forming an important part of the fabric of society which ensures the rule of law is complied with.

E **[52]** With that, we now examine the conduct of the appellant bearing in mind of course his constitutional right of free speech.

Purpose Of The Kelana Jaya Talk

[53] There is little doubt in our mind that the appellant, when he agreed F to partake in the Kelana Jaya talk, knew exactly what he was getting involved in. He knew that the event was organised by a political party which naturally meant it was a political event as opposed to an educational and objective discussion of the Federal Court decision. It is also not in dispute that the Kelana Jaya talk was highly publicised by the organisers through the G established media and social media portals as a public forum and the topic related to the Federal Court decision on 10 February 2015 and the appellant would be the star speaker for that evening.

[54] It had been established also that as far as the organisers were concerned, the purpose of the talk was to defend Barisan Nasional and H UMNO, both of which are political entities and would be given the maximum public exposure through live online streaming. This is very apparent from the introduction speech by Khairy Jamaluddin, the then Minister of Youth Sports and this was what he said:

I

> Saya rasa terpanggil sebab ini maruah parti saya. Saya sebagai ketua pemuda ... kita buka ruang yang open forum. Malam ini kita tak tapis ... yang datang ini bukan semua ahli UMNO, penyokong Barisan Nasional ... maybe there will be some hostile questions. Tan Sri Shafee ... I don't know. I open it to everybody. Dua ratus dalam dewan ... seratus di luar ... ratusan atau ribuan tengok online streaming kita. Dan kita nak dengar daripada Tan Sri sendiri apa sebenarnya yang berlaku dan juga huraian Tan Sri. I'm sorry this for opposition is uncomfortable. "okay kes dah selesai, habislah cerita" Well, too bad. You had six years of talking about us ... now this is our time to explain our side of the story.

[55] This political purpose of the organisers is of course denied by the appellant to be his purpose. In his memorandum of appeal, the appellant had complained that the learned judge failed to appreciate that the true intention of his talk was, at all times, defending and clarifying the Federal Court judgment in the Anwar Criminal Trial II. In his testimony, he also said that he had to defend himself as he was part of the prosecution which had been criticised by a section of the public. His intention to defend himself in his view was consistent with defending the Federal Court decision.

[56] We start off with the intention of "defending" of the Federal Court decision. From the outset, we must remind ourselves that the Federal Court is the apex court of the land and in this base a judgment from a panel of five Federal Court Judges. We ask ourselves the question of what is it that is in need of defending in this judgment of the Federal Court. Criticism of judgment is part and parcel of the legal profession and we as judges treat those criticisms as also part of our job and in good spirit. And we rely on our very own words in analysing the law and facts to justify and defend our decisions. It is common knowledge that the position of DSAI was that there was a political conspiracy against him which led to him being charged in court. UMNO however, had always denied such conspiracy and after the Federal Court decision, which had ruled there was no such conspiracy, UMNO took the stand that it is now their turn to reaffirm that view. We suppose that was what Khairy meant when he said that they have waited six years to have their say on the political conspiracy theory. Here, the appellant acting as an *ad hoc* DPP had obtained a judgment in his favour resulting in the conviction of DSAI. Is there a need for the appellant to defend that decision except to refer critics of the Federal Court decision to the very words used by the five judges to justify the finding of no political conspiracy? This is what the Federal Court said:

> [201] The complaint by the appellant was that both the High Court and the Court of Appeal did not consider the political conspiracy defence which if accepted or believed would entitle the appellant to an acquittal.

A [202] We accept that the courts below did not explicitly consider the political conspiracy defence which was raised by the appellant in his unsworn statement from the dock. In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge. (*Lee Boon Gan v. Regina* [1954] 1 LNS 39; [1954] 1 MLJ
B 103; *Udayar Alagan & Ors v. PP* [1961] 1 LNS 146; [1962] 1 MLJ 39; *Mohamed Salleh v. PP* [1968] 1 LNS 80; [1969] 1 MLJ 104; *Juraimi Husin v. PP* [1998] 2 CLJ 383; [1998] 1 MLJ 537).

[203] The issue is did the trial judge and the Court of Appeal adopt the correct principle in assessing the appellant's statement? The trial judge in
C assessing the appellant's statement observed as follows:

> [196] The accused in this case had denied sodomising the complainant. Although this denial was made from the dock, it was still a denial. He believed the charges against him was made not because the sodomy took place, but to send him into political
D oblivion by attempting to put him behind bars.

[204] The Court of Appeal after discussing the law on a statement from the dock, agreed with the trial judge that the appellant's statement from the dock was a mere denial. The Court of Appeal observed as follows:

> [108] For the respondent to succeed in his defence, it is incumbent
E upon him to adduce evidence which can answer the allegations in the charge. In this case, the respondent did not even deny that he was at the scene of the crime at the material time and date as stated in the charge. He never disputed that his car was seen entering and leaving the condominium at the material time. He also did not dispute that he was seen entering the lift to the 5th
F floor of the condominium and later leaving the place. He also did not dispute that he had directed his chief of staff, PW24 to arrange for an envelope to be handed over to him at the said condominium and that PW24 had instructed PW1 to bring the envelope to him. The respondent also did not dispute the fact that PW1 had brought the envelope to him at the place of the incident. The
G Learned Judge found that the respondent's statement from the dock is a mere denial with which we fully agree. The bare denial by the respondent does not amount to any doubt whatsoever. A credible defence is one that answers the evidence thrown at it by the prosecution. It is also imperative that the respondent explain his case.

H [205] We hold that the Court of Appeal had adopted the right principle in assessing the appellant's statement from the dock. As such we find no merit on the appellant's complaint that the Court of Appeal had seriously misdirected itself in making adverse comments on the appellant's decision to give his statement from the dock. While it is true that it is within the

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appellant's right to give a statement from the dock, that statement must however amount to a credible defence. A mere denial does not amount to a credible defence. We hold that the defence of political conspiracy remains a mere allegation unsubstantiated by any credible evidence.

[57] Reading the view of Federal Court on whether the conspiracy against DSAI had been proved, it is quite clear that Federal Court held that it had not been proved as what was alleged was a statement from the dock and the Court of Appeal had applied the correct legal principle in analysing the weight to be given to statements of accused from the dock. In other words, there was no such conspiracy according to the Federal Court. One then asks with such clarity of finding, is there any need to defend or for that matter clarify the Federal Court decision? We say no.

[58] We also note that the Federal Court on 10 February 2015 had given a press summary of its decision, the purpose of which is to ensure that the public gets to know what the reasons for their decision and to ensure that the press disseminate the correct information to the public.

[59] We note here that the appellant had advised the organisers that it was necessary to defend himself. This is how he put it:

AS: I'm talking about Khairy Jamaluddin who said that this talk was necessary because they needed to answer the issue of political conspiracy. Did you at any time advise him that the forum was completely unnecessary because the Federal Court had made a finding that, in fact, there was no basis to that allegation?

PW1: I advised the reverse. That the forum was necessary and such forums, not just from UMNO, would be necessary to provide an equaliser, if I may use the word, to all the lies that have been told by the leaders of the Bar. That I was a member of a persecuting team. I had an agenda to correct, because my reputation was affected. Forget about the Attorney General. My reputation was affected that I am a part of persecution team.

AS: And therefore the forum...

PW1: Therefore, the forum to me was necessary.

AS: So, therefore, are you now telling me, Tan Sri, that your primary aim was not to defend the Federal Court judgment, but to defend yourself?

PW1: No. My interest and the Federal Court's judgment was consistent, because the Federal Court gave a judgment in my favour, no conspiracy, and I'm saying there's no conspiracy, there's no persecution, but you guys said it is persecution. So by defending myself, I'm defending the Federal Court as well.

[60] The appellant also did not see fit to state what his purpose was at the Kelana Jaya talk.

PR: Now, so what you are saying, Tan Sri, is your purpose is different than his?

P: Yes.

PR: Did you inform the audience that your purpose was different, after he had said that this was a comeback by UMNO?

P: It would be obvious from my speech. So I didn't have to ...

PR: My question, Tan Sri, if you could answer that question is, did you inform the audience that your purpose in addressing them is different than the stated purpose by Encik Khairy Jamaluddin? It's yes or no.

P: I explained my purpose. but I did not say my purpose is different from Khairy Jamaluddin. But I explained my purpose, which became obvious.

[61] Evaluating those evidence objectively, there can only be one inference and that is the appellant had willingly and knowingly lent himself to a political event to attack and diminish DSAI's reputation which we say any political party is entitled to do to its opponent. But is this right available to the appellant, bearing in mind that his status as the *ad hoc* DPP in the Anwar Criminal Trial II? We say no as conceded by the appellant himself that a DPP should not allow himself to be part of a political agenda of a political party.

Criticising DSAI

[62] The appellant had made the following statements on DSAI:

If the prosecution had been cross-examined, I think he would have fainted in the witness box because he would not be able to explain a lot of things, like why he put in his defence of alibi and then backed off.

He made silly remark from the dock, saying this was because his alibi witnesses would be interviewed by the police. Look, that's the whole idea of a notice, isn't it? You give a notice of alibi so that the police can interview the alibi. witnesses as provided for by the law (under the Evidence Act 1950).

I can easily tell you hundreds of facts that would have been zoomed in on if he was cross-examined. He knew that, so that is why I believe he took the cowardly step of giving a statement from the dock, ...

And, of course, Datuk Seri Dr Wan Azizah Wan Ismail, who was on the top of the list of alibi witnesses. We wanted to know why she was significant to the alibi when she was never even there.

> At the end of the day, to me, Anwar hid behind a skirt. He didn't dare come into the witness box to be cross-examined and he never provided any defence at all.

[63] It is common ground between the parties that it would be improper for the appellant to condemn a convicted person like DSAI who cannot defend himself. The question then is what the appellant had said about DSAI amounts to condemnation. The appellant defends his description of DSAI as a coward by saying that it is a "legalistic" description and explains it this way:

> PW1: Legalistic, because, let me explain. I don't think anyone in this Court would disagree that Anwar is the most articulate speaker. He could get out of almost any situation. Statement from the dock is meant for the infirmed mind, people who cannot explain. No matter what they explain, they look guilty. Those are the people who use, who uses statement from the dock like the Adam Rambo situation I defended. The guy was mad, so he gave a statement from the dock. Anwar is certainly not mad. So if he cannot take the witness box by putting Saiful 7 days of harsh cross-examination, what would you describe that? Not cowardly?
>
> AS: But the Court never described him that way?
>
> PW1: Who cares about what the Court described?

[64] With respect, if one wants to describe the right of an accused to make a statement from the dock legalistically, the appellant should have pointed out that under the law, DSAI had an unfettered right to make a statement from the dock but the court may find little or no evidential value to the same, resulting in dire consequence of a conviction which had happened in Anwar Criminal Trial II. To say that DSAI is a coward or hiding behind a skirt is, with respect, nothing legalistic. It is, we would say, a way to score political points which the appellant cannot do as a DPP or as an advocate and solicitor. We also note the manner he dismissed the fact that the court never described DSAI as a coward in making a statement from the dock by saying "who cares what the court described". That speaks for itself. We are fully aware that the appellant had tried to explain away this part of his testimony but again we repeat that the manner in which he said it spoke for itself. An advocate's primary duty as an officer of the court is to the court and not to demean/dismiss it as being of no consequence.

[65] Further to describe the complainant in the Anwar Criminal Trial II as a slave of DSAI is another instance which we say is completely uncalled for, for the simple reason that no such finding was ever made by both the Court of Appeal nor the Federal Court. The intention is quite clear and that is to demean DSAI and to score political points. With respect, the appellant must

A have been caught up by the "moment" of the occasion, so to speak and forgot that he is still a member of the prosecution team, a member of the Malaysian Bar and above all, an officer of the court.

[66] Premised on the above, we have no hesitation in finding that the appellant had condemned DSAI who had no chance to defend himself.

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Disclosure Of Camera Evidence

[67] There is no dispute that the trial court had during the trial of Anwar Criminal Trial II made an order that certain part of the proceedings was to be heard in camera. What that means in plain language is that the testimony C of the witness will be heard without the presence of the public and the press.

[68] There is also no dispute that the appellant had disclosed in camera evidence in the "greatest details" in his words in his talks and interviews. It is also common ground between the parties that if the appellant had disclosed in camera evidence, he would have breached an order of the trial court. What D is not on common ground is that the appellant says that the evidence disclosed may have been in camera evidence at the trial court but those evidence had been overridden by events in the Court of Appeal and the Federal Court where those in camera evidence were openly referred to in submissions by respective counsel.

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[69] In his memorandum of appeal, the appellant says that the learned judge had committed an error when she did not accept that the in camera evidence was already in the public forum and that it had been referred to in the Court of Appeal and Federal Court hearings openly. Hence the appellant submits that the order of the trial court had been effectively set aside by the Court F of Appeal and the Federal Court.

[70] It is trite that an order of a court remains valid and binding until it has been set aside. The question which confronts us is simply whether the in camera evidence order of the trial court had been set aside by any court of competent jurisdiction. There is no application, formal or otherwise, to G set aside the in camera evidence order before any court.

[71] Granted that the in camera evidence was referred to openly in the Court of Appeal and the Federal Court, we are of the view that those in camera evidence had not been transformed into evidence which anyone can refer to openly in the public domain. The appellant as well as counsel for H DSAI at the Court of Appeal and Federal Court hearings in the Anwar Criminal Trial II with respect, should have alerted the courts of the in camera evidence order made by the trial court as we have alerted the appellant and counsel for the respondent during this appeal. In fact, as officers of the court, respective counsel should have applied for the in camera

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evidence order be set aside if they had wanted to openly refer to it in open court. Despite these failures or oversight, we are of the view that the in camera evidence order remains valid and binding. We agree with learned counsel for the first and second respondents that the ramification would be horrendous in that, if the appellant's stand is correct, in future counsel, be it DPP or not, can disclose in camera evidence at press conferences and openly inform the public about those evidence. That cannot be the law by any stretch of imagination. Even if there is doubt as to the effect of the in camera evidence order, the appellant, as an officer of court, is duty-bound to seek clarification from the trial court before he decides that the aforesaid order had lapsed or set aside by what had transpired at the hearings at the Court of Appeal and Federal Court.

[72] Hence, we say that despite the absence of any contempt proceedings against the appellant, the appellant had breached the order of the in camera evidence of the trial court which up until today has not been set aside and the appellant cannot ignore it irrespective of whatever views he may hold of it.

[73] Before we leave this area of discussion, we note that the appellant had also admitted that he had disclosed evidence which had been expunged in the trial court. Suffice to say, there is a blatant breach of a court order by the appellant here.

Criticising The Defence Team

[74] The relevant part of the testimony on this issue is this:

AS: "... So, that is what happen, when you have too many, too many generals in fact, in this particular case, in the defense team, when you have that, the other problem is one is thinking the other is doing the work. In the end, nobody does the work. So the one on the other side, one person, he knows he got to know everything, he will do everything, in the end. So that is the reason why I think we performed better". So, you were praising yourself?

PW1: No

AS: ... Then you say, at line 10, "Second question is what is the most challenging in the appeal, the most challenging was because rather the defence counsel with due respect to them, they were able to spin small insignificant things into a giant issue and sometimes you can miss the woods for the trees": Here again, Tan Sri, I put it to you that you are critical of the defence team and you demean work that they did. You were demeaning about the work that they did.

PW1: I disagree because I said the same thing in open Court to them.

[75] Looking at what the appellant said of the defence team objectively, we can infer only two inferences. One, the defence team did a bad job and two, he did a better job than the defence team. And if that is not demeaning the defence team and praising oneself of his skills, we do not know what it is really. In saying all these to the press and in talks arranged by a political party, there is also one natural inference and that is the appellant is telling the world at large that he is a top-notch barrister as described in the motion. Further, the manner in which the appellant had done it, he had overstepped the line.

[76] From what we have said above, we find that the first and second respondents had successfully proven the defence of justification. The allegations in the motion had been proved substantially true. The appellant's conduct in fact had warranted the former Attorney General Tan Sri Talib Othman to call for the immediate revocation of his appointment as *ad hoc* DPP and in our view rightly so. The view of the former AG cannot be taken lightly in that if he had found the appellant's conduct to be inappropriate and unnecessary, hence due deference must be given to it.

Qualified Privilege

[77] The defence of qualified privilege accords freedom of communication in certain relationships without the fear of a defamation action. Those relationships encompass situations or circumstances where the person communicating the statement has a legal, moral or social duty to make it and the recipient has a corresponding interest in receiving it. Instances such as communications between teachers and parents, local councillors, officers of companies, employers and employees, or traders and credit agencies, are all relationships that are protected by qualified privilege. Whether what is communicated is true or not is irrelevant provided that the required relationship exists and that the statement made is not motivated by malice (see *Adam v. Ward* [1917] AC 309).

[78] There are basically three tests which we are required to look at and they are the "duty test", the "interest test" and the "circumstantial test". (See *Tort of Defamation* – K Kuldeep Singh p. 358).

[79] In regard to the "duty test", we ask the question of whether the first and second respondents had the duty to submit the motion in the manner as they did. Both the first and second respondents are members of the Malaysian Bar and confronted with the conduct of the appellant also a member of the Malaysian Bar. We have no problem in finding that they had an interest and duty to ensure that a fellow member complies with the rules and regulations as provided for under the LPA. As we have earlier said, the conduct of the appellant was extraordinary to say the least and as concerned senior members of the Malaysian Bar, they are fully entitled to do what they did and more probably expected of by their fellow members to do it.

[80] In regard to the position of the third and fourth respondents under the "interest test", s. 64(6) of the LPA demands that they receive such a motion. This is what the subsection says:

> (6) If any member desires to propose any motion to be considered at an annual general meeting convened under this section, he shall, not less than seven days before the date first appointed for holding the meeting, serve on the Secretary of the Malaysian Bar a notice of such motion in writing.

[81] Not only the wordings in s. 64(6) are very clear, the Federal Court in *Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor* [2008] 4 CLJ 317, at p. 343, had described Malaysian Bar in the following manner:

> It is therefore clear that it is the Bar Council that has been entrusted with the duty of maintaining the standard and conduct of advocates and solicitors and not the DB. It acts on its own motion in cases involving misconduct under s. 94 of the LPA. In other cases warranting disciplinary action the DB acts on complaints made to it by, *inter alia*, the Bar Council.. It is thus beyond doubt that the Malaysian Bar is the guardian of professional conduct and etiquette of advocates and solicitors ...

[82] The motion in substance relates to the conduct of the appellant in the context of breach of etiquette and publicity rules of the LPA. As the guardian of the LPA, the Malaysian Bar is legally bound to receive the motion. Hence the "interest test" is complied with.

[83] As for malice, the burden is on the appellant to prove. And what needs to be proved is that the respondents had possessed express malice in putting forth the motion. The Supreme Court in *S Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173, at p. 179, paras B-I, left, puts it in this manner:

> The protection afforded by the law to a publication made on an occasion of qualified privilege is not an absolute protection but depends on the honesty of purpose of the person who makes the publication. If he is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege. If the publication takes place under circumstances which create a qualified privilege, in order to succeed the plaintiff has to prove express malice on the part of the defendant. Broadly speaking, express malice means malice in the popular sense of or desire to injure the person who is defamed. To destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication. Knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in *bona fide* protection of his own legitimate interests. The mere proof that the words are false is not evidence of malice, but proof that the defendant knew that the statement was false or that he had no genuine belief in its truth when he made it would usually be conclusive evidence of malice. If the defendant publishes

A untrue defamatory matter recklessly without considering whether it be true or not, he is treated as if he knew it to be false. In ordinary cases, what is required on the part of the defamer to entitle him to the protection of the privilege is honest belief in the truth of what he published. But if he was moved by hatred or a desire to injure and used the occasion for that purpose, the publication would be maliciously made even though he
B believed the defamatory statement to be true. Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred: *Lee v. Ritchie* (1904) 6 F (Ct of Sess) 642.

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[84] The appellant's submission on this issue is similar to that raised in the High Court and they are that as listed by the learned judge:

(i) First, no attempt to verify the information. The first defendant had stated that he had come to the conclusions that he put in his motion
D solely by the media articles.

(ii) Second, the evidence of DW2 that he was annoyed with the Bar Council for not lodging a report *via* the mechanisms of the LPA.

(iii) Third, DW3 gave evidence that if the Bar had at that point of time already lodged a complaint on the plaintiff, he would have
E dissuaded DW1 from proposing the motion in that case.

(iv) Fourth, if what the Bar Council wanted to do was to stop the alleged conduct of the plaintiff, they could have resorted to an injunction *via* a civil suit *via* the proper mechanism of the court's process. Instead, they have chosen the motion to create maximum
F publicity and draw negative attention onto the plaintiff.

(v) Fifth, pre-determination of the 'would be' complaint at the AGM. It would be a pre-determination on the alleged misconduct of the plaintiff and therefore placing any possible hearing before the Disciplinary Board of the third defendant nugatory and prejudicial and unfair to the interest of the plaintiff.

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[85] Suffice for us to say that the learned judge had dealt with those contentions admirably and had not misdirected herself on the law and the application of the same to the facts before her. We will just add that having perused the evidence of the first and second respondents, we can only infer
H that they both held a genuine belief that something is not right in the way the appellant was conducting himself and did what they did as a matter of necessity in the circumstance.

Fair Comment

[86] Fair comment defence is set out in s. 9 of the Defamation Act 1957
I as follows:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[87] Fair comment can be said to be a privilege and right developed by the courts to allow robust, even outrageous published or spoken opinions about public officials and public figures. Fair comment provides the press the freedom to publish statements on matters of public interest, as long as the same are not made with ill will, spite, or with the intent to harm the plaintiff.

[88] What is fair is as summed up by Diplock J (as Lord Diplock then was) said in *Silkin v. Beaverbrook Newspapers Ltd. and Another* [1958] 1 WLR 743, at 749:

> Would a fair-minded man holding strong views, obstinate views, prejudiced views, have been capable of making this comment? If the answer to that is yes, then your verdict in this case should be a verdict for the defendants ... If you were to take the view that it was so strong a comment that no fair-minded man could honestly have made it, then the defence fails and you would have to consider the question of damages.

[89] In regard to malice in the context of fair comment (which is different from the malice in the context of qualified privilege), Lord Nicholls of Birkenhead NPJ said in *Albert Cheng v. Tse Wai Chun* (2000) 3 HKCFAR 339 at pp. 3601 to 361D:

> My conclusion on the authorities is that, for the most part, the relevant judicial statements are consistent with the views which I have expressed as a matter of principle. To summarise, in my view a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred. Proof of motivation may also be relevant on other issues in the action, such as damages.
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> It is said that this view of the law would have the undesirable consequence that malice would bear different meanings in the defences of fair comment and qualified privilege, and that this would inevitably cause difficulty for juries. I agree that if the term 'malice' were used, there might be a risk of confusion. The answer lies in shunning that word altogether. Juries can be instructed, regarding fair comment, that the

A defence is defeated by proof that the defendant did not genuinely believe the opinion he expressed. Regarding qualified privilege, juries can be directed that the defence is-defeated by proof that the defendant used the occasion for some purpose other than that for which the occasion was privileged. This direction can be elaborated in a manner appropriate to the facts and issues in the case.

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[90] As held earlier by us, the first and second respondents' action was premised on the genuine belief that it was necessary to protect the legal profession as an honourable one. Accordingly, we find no malice on the part of the respondents.

C **Breach Of Statutory Duty**

[91] From what we can understand from the appellant, his complaint is that the motion put forth was not done according to what is prescribed by the LPA. What is required by the LPA is for the first and second respondents to merely lodge a complaint with the Disciplinary Board which shall then D deal with the complaint as it deems fit in accordance with what is prescribed by the LPA. The manner in which the motion is couched, it is submitted by the appellant, shows that it is nothing but a blatant attempt to find him guilty of misconduct through the AGM, in effect by passing the process of hearing by the disciplinary committee and Disciplinary Board which are mandated E by the LPA to deal with misconduct of members of the Malaysian Bar. Hence both the first and second respondents had committed a statutory breach.

[92] With respect, reading the motion in the most liberal manner, we cannot find that it amounts to a complaint. It is nothing but a proposal as in F all motions for something to be done. In this case, it is nothing but a direction from the members to the governing body to lodge a complaint with the Disciplinary Board if and when the motion is carried. To read anything more to that is overstretching the plain meaning of the words contained in the motion. There is no attempt by the respondents to usurp the statutory duties G of the disciplinary committee and Disciplinary Board.

[93] In regard to the third and fourth respondents, the appellant submits that they had no duty to accept such a motion as the first and second respondents should have made a complaint directly to the Disciplinary Board. As mentioned earlier, the Bar Council as the policing authority of the H conduct of its members is duty-bound to receive and publish the motion. As not to do so would in the words of the fourth respondent, the third respondent would be in breach of its statutory duty to ensure that all motions regarding the Malaysian Bar are brought to the attention and action of its members at the AGM.

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[94] For completeness, we wish to note that the appellant had not shown to us, even if there is a statutory breach, what is the consequence of such breach as there is no provision in the LPA providing for any sanctions for such breach. It appears that the appellant is trying to link the statutory breach to his claim for defamation. He seems to be saying that because the respondents had breached their statutory duties, you have defamed me. With respect, such contention is flawed.

[95] We say that for the simple reason that there are two independent and separate causes of action here. The breach of statutory duty is a cause of action by itself, only that breach in law gives rise to a cause of action. The tort of defamation is also an independent cause of action by itself. Any attempt to merge these two causes of action is improper and should be resisted. The reason for such resistance is lucidly explained by Levine J in *Sattin v. Nationwide News Pty Ltd* [1996] NSW Lexis 2530 where he said as follows:

> It appears to me that there is a good reason namely the public policy considerations referred to by Lord Diplock and they are at odds with any enforceable duty to exercise due care and skill in the provision of a reference. It appears that Goff LJ is suggesting that the defence of qualified privilege is relevant to one cause of action but not to another and that, in effect, is the end of the matter. For the defendant it is suggested, and I agree, that public policy should logically transcend mere forms of action, it not being merely a matter of a defence being applicable to one cause of action but not to another: the view of Lord Goff fundamentally frustrates the policy behind the defence of qualified privilege and clearly so ...
>
> I would add conformably with what their Honours in New Zealand's Court of Appeal and his Lordship Lord Keith have remarked upon, that the law of negligence really has a limited role to play in the matter of communications, it fundamentally being confined to the Hedley Byrne situation or perhaps others in which freedom of speech is not a legitimate consideration. In media situations the lawfulness or otherwise of communication to the public depends on the operation of the laws and rules of defamation: this is not to say that a communication cannot amount to a breach of confidence for example or indeed a breach of contract but damages for publication in circumstances of the case with which I am concerned in my view to have always been governed by the law of defamation which is the field in which the remedies have been sown and harvested. As Brennan J cautioned in *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424 at 481: it is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by massive extension of a *prima facie* duty of care ...

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Conspiracy To Defame/Injure

[96] We have nothing more to add to what the learned judge had found as we also find no such evidence of conspiracy for reasons stated earlier.

Conclusion

B

[97] Though this appeal took two days of submission, it is in our view a straightforward case of defamation where we find that the respondents had proven their defences available to them.

[98] During submission, the appellant urged us to follow other jurisdictions like England and America where it is allowed that counsel are entitled to call press conferences and interviewed by mainstream newspaper to discuss what had happened in high profile cases. On this, we say firstly it had not been shown to us examples of such instances of the other mentioned jurisdiction where counsel had disclosed in camera evidence and described matters in a manner which added spice to the language used by the courts. Secondly, whatever said and done, we have the LPA in this country and all members of the Bar are subject to what are provided therein as far as their conduct is concerned. We do no more no less than apply the rules contained therein to the factual matrix before us.

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[99] Accordingly, we dismiss the appeal with no order as to costs as agreed. Deposit refunded. We further order that the deposit be refunded to the appellant.

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