

Client Alert

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For further information please contact

Andy Leck
+65 6434 2525
andy.leck@bakermckenzie.com

Yew Kuin Cheah
+65 6434 2644
yewkuin.cheah@bakermckenzie.com

Faith Lim Yuan
+65 6434 2550
faith.lim@bakermckenzie.com

Baker & McKenzie.Wong & Leow
8 Marina Boulevard
#05-01 Marina Bay
Financial Centre Tower 1
Singapore 018981

www.bakermckenzie.com

Defamatory Internet Publications - The Need for Electronic Evidence

In a recent Singapore High Court case, *Qingdao Bohai Construction Group Co, Ltd and others v Goh Teck Beng and another* [2016] SGHC 142, the Plaintiffs failed to prove defamation mainly because they could not establish that the Defendants had published allegedly defamatory online articles.

While restating the trite legal principles of defamation in Singapore, this case highlights the importance of obtaining electronic evidence to identify defendants and to show that third parties have downloaded and read such defamatory online publications.

Facts

The five Plaintiffs (consisting of three companies and two senior executives) sued two Singaporean Defendants for defamation and conspiracy. The Plaintiffs claimed that the two Defendants, directors of HuanYu (Qingdao) Development, which was then involved in multiple legal disputes with the Qingjian Group's construction projects in China, had the motive to take revenge on the Qingjian Group of companies.

The allegedly defamatory publications

The relevant publications involved 12 online articles on various websites based in China, Hong Kong and the United States, and two newspaper articles that the plaintiffs claimed contained untrue and defamatory statements about them, and that this resulted in damage to the Plaintiffs' reputation. As the decision regarding the newspaper publications is uncontroversial, we focus on the Court's decision regarding the online articles.

The Plaintiffs claimed that the Defendants published these articles, and tendered the following evidence as proof of such publication:

- (i) Video and audio recordings as evidence of the Second Defendant's alleged admission to the publication;
- (ii) Circumstantial evidence including the sign-off containing the Second Defendant's name on the online articles; and
- (iii) The Defendants' filing of a Central Commission for Discipline Inspection of the Communist Party of the People's Republic of China ("CCDI") report.

However, the Plaintiffs did not adduce any electronic evidence to prove that the Defendants had published the online articles.

In contrast, the Defendants denied that they had published the online articles, that publication occurred in Singapore, and alternatively that the meanings of the Online Articles pleaded by the Plaintiffs were true in substance and in fact.

Decision

The law on defamation

The Court reiterated the three legal requirements for defamation:

- (i) The defendants must publish material to a third party;
- (ii) The material must make reference to the plaintiffs; and
- (iii) The material must be defamatory to the plaintiffs.

To prove defamation, a corporate plaintiff must also prove that it has a reputation in the jurisdiction at the time of publication as a prerequisite for pursuing defamation.

Here, the Court held that the first Plaintiff, a China-incorporated company, had no such international reputation and failed to show a trading or business reputation. The Court held that the mere fact that the first Plaintiff had a wholly-owned Singaporean subsidiary was insufficient to prove the first Plaintiff's trading or business reputation in Singapore.

Defamation in the context of the Internet

To satisfy the publication requirement in the context of Internet defamation, a plaintiff must generally establish, on the balance of probabilities, that the defendant as the Internet user had uploaded or posted the material on the Internet. The plaintiff also needs to prove, on the balance of probabilities, that at least one third party reader has downloaded the material in Singapore.

Merely uploading or posting the material on the Internet does not satisfy the publication requirement, even if the defendant makes the offending material available to a third party.

Publication requires proof of identity and the third party's downloading of the online article

In this case, the Plaintiffs failed in particular to satisfy the necessary elements, since:

- (i) there was no actual proof that the Defendants had published the articles, but mere suspicion that the Defendants were responsible for the online articles' publication; and
- (ii) the publication of the articles was highly limited and restricted.

Proof of publisher's identity

The Court noted that although electronic evidence (e.g. IP addresses, or forensic examination and analysis) is not always necessary, the burden of proof will only be discharged with "cogent evidence" of a similar level.

The Court was not satisfied that the alleged admission and other circumstantial evidence proved that the Defendants published the online articles, given the admission's subjective nature, the ambiguous language used and the conversation's references.

The appearance of the Second Defendant's name in a few of the online articles was also insufficient, despite him being cited as the author with his

personal details attached to the article. Expert evidence showed that a third party could have included such details, and thus did not form conclusive evidence of publishing by the Defendant.

Moreover, although evidence showing that the Defendants were out for revenge was relevant, the Plaintiffs failed to prove that the Defendants had the propensity for revenge merely on the basis of the Defendants' lodging of the CCDI report and their argument that any defamatory publication was justified.

Necessity of direct proof of a third party downloading and reading the defamatory publication in Singapore

Employees of the Third Plaintiff testified that they had come across other articles with contents that were very similar to the online articles, but were not the online articles themselves. As such, the Plaintiffs failed to prove that third parties had actually downloaded the online articles in Singapore.

In contrast, the third witness for the Plaintiffs searched the Internet for articles on the Plaintiffs in Singapore and read the online articles, which the Court accepted as direct proof of publication of some of the online articles in Singapore. Nonetheless, the Court dismissed such direct evidence of publication since:

- (i) there was no actual evidence that the online articles were found on websites frequented by Singapore-based Internet users. The figures indicating the number of times the online articles had been read did not show the number of viewers from Singapore and were insignificant in the grand scheme of things on the Internet;
- (ii) none of the domains hosting the online articles were located in Singapore, suggesting that the websites were not even intended for a Singapore-based audience.
- (iii) where nearly all the online articles required a combination of search terms rather than the use of a single Plaintiff's name, the Court drew no inference of substantial publication in Singapore. There was no evidence that feeding any of the Plaintiffs' names, individually, into a standard search engine would reveal the online articles.

Overall, the Plaintiffs failed to prove that the Defendants were responsible for the publication of the online articles in Singapore.

Comments

Internet users are often protected by a wall of anonymity and the burden of proof of publication is therefore particularly challenging with online publications.

Where a party claiming defamation fails to take decisive steps to show the electronic trail or adduce other objective electronic proof to identify the publisher of the allegedly defamatory content, the circumstantial evidence tendered needs to be very strong. It is clear that with our digital environment, even a person's sign-off or personal details on an article may be inconclusive that the person has written and published that article.

Overall, electronic evidence is objective and remains the “most obvious way” to prove publication by defendants. As such, any person initiating a defamation suit should be taking proactive steps to ensure that such evidence is quickly and efficiently gathered.

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