

A Bundling Dilemma

by

*Tasha Chandra**

Introduction

The recent Federal Court decision in the case of *Melawangi Sdn Bhd v. Tiow Weng Theong*¹ has garnered mixed reactions from the legal fraternity as to its impact on the legal status of documents filed as part of the bundles of documents in a civil trial. Although the said case involved several legal and factual issues, the main issues that will be discussed here are the legal implications and effects of documents placed in the various bundles of documents, that are parts A, B and C that are to be filed in court prior to trial.

As a quick refresher, once pleadings have closed, the court will fix case management with the parties to, amongst others, enquire about any matters arising in the action, confirm that there has been compliance with the court's directions and generally, to give directions as to the future course of the case. This is known as a pre-trial case management which can be found under O. 34 of the Rules of Court 2012. At this pre-trial case management, the court will also direct the filing of documents such as the statement of agreed facts, issues to be tried, witness statements and other documents necessary for the expeditious and economical disposal of the trial. One of the core items that are crucial in every trial is the filing of the bundle of documents². The bundles should consist of all the documents that will be relied upon or referred to in the course of the trial.

Under O. 34 r. 2(2)(d) and (e), it is stipulated that documents whereby the contents are agreed by both parties shall be placed in Part A, documents where the authenticity is not disputed but the contents are disputed are filed as Part B and lastly, documents whereby the authenticity and contents are disputed are filed as Part C. It is this very nature of the documents and a consideration of its true legal significance that formed one of the main issues in the *Melawangi* case. Both the High Court and the Court of Appeal considered the implications of Part A documents and reached different views on the subject. Hence, the appeal to the Federal Court.

Facts

The salient facts of the above case are as follows:

The parties will be referred to as per the High Court proceedings. The plaintiff, Melawangi Sdn Bhd was the developer of Amcorp Trade Centre ('ATC') which included the Melawangi Tower. The defendant was a unit

* Sole Proprietor of Messrs K Chandra & Co

owner at the Melawangi Tower as well as a committee member of the ATC owners and tenants association. It was not disputed that the defendant was dissatisfied with the conduct of the first AGM of the joint management body of ATC. A letter detailing the complaints was published and circulated and thereafter, an email followed. The plaintiff, acting on the assumption that the defendant sent out the letter and email, requested that the defendant withdraw his allegations, offer to pay damages and refrain from any future publication of defamatory statements. However, the defendant refused. This prompted the plaintiff to initiate defamation proceedings against the defendant based on the said letter and email. In preparation for trial, the parties agreed to place the alleged defamatory email in Part A of the agreed bundle of documents.

High Court

The plaintiff succeeded at the High Court whereby the learned Judicial Commissioner ('JC') stated amongst others, that documents placed in Part A required proof of truth. The defendant's argument was that by virtue of agreeing to place the email in the agreed bundle A, the plaintiff had agreed to the truth of the contents of the email thus absolving the defendant from the claim of defamation against him. The plaintiff, on the other hand, argued that the email was placed in Part A because the plaintiff agreed that the email was authentic and that the wordings of the email *ie*, the content, was an issue in the suit. The plaintiff argued that they did not agree to the truth of the contents of the email, only that the email and the words thereof did exist. The learned JC agreed with the plaintiff's argument and held that the plaintiff had successfully proven defamation against the defendant based on the three ingredients, namely, the words were defamatory, the words referred to the plaintiff and the words were published to third parties.

Court of Appeal

Dissatisfied with the High Court's decision, the defendant appealed to the Court of Appeal citing two issues for consideration:

- (i) the legal effect or consequence of including the email in Part A of the bundle of documents; and
- (ii) the adducing of further alleged defamatory statements at trial which were not pleaded in the amended statement of claim.

As stated above, this commentary will be centred on the first issue that is the placement of the email in Part A. Nevertheless, for the purposes of completion, it is noted that the Court of Appeal also disagreed with the High Court in relation to the second issue whereby the Court of Appeal held that the adducing of further allegations during trial which were not pleaded in the plaintiff's pleadings, was not allowed.

The judgment of the Court of Appeal was delivered by Justice Nallini Pathmanathan, with the relevant portions pertaining to Part A documents found at para. 24 onwards of the learned judge's written judgment. In deciding the legal effect and consequence of including the said email in Part A, Justice Nallini referred to the dissenting judgment of Justice Hamid Sultan Abu Backer in the case of *Yeo Ing King v. Melawangi Sdn Bhd*⁵ whereby the view was taken that documents in Part A should be treated as accepted for its authenticity and truth.

In considering the legal effects of placing a document in Part A, it is also necessary to consider the implications of documents placed in Parts B and C. Order 34 states as follows:

Rule 2(d): the contents of the bundle of documents referred to in sub-para (c) shall be agreed on between all parties as far as possible and this bundle of agreed documents shall be filed by the plaintiff and marked as Part A;

Rule 2(e): if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:

- (i) Part B - documents where the authenticity is not disputed but the contents are disputed;
- (ii) Part C - documents where the authenticity and contents are disputed.

The Court of Appeal, upon considering the above rules, came to the decision that by agreeing to place a document in Part A, this meant that:

- (i) The parties agree that the said document is authentic *ie*, not a fabricated document; and
- (ii) That the contents or the truth of the contents is not an issue and whatever the content, it is agreed and accepted.

The above findings were premised on the inference that if Part B documents were documents where the contents were disputed and Part C documents were documents where the contents and authenticity were disputed, it would logically follow that Part A documents were documents where the contents and authenticity were not in dispute.

These crucial findings by the Court of Appeal have significant bearings on the filing of bundles of documents particularly Part A documents. For example, previously where a letter was sent to A by B which resulted in a dispute, and A intended to rely on the contents of the said letter at trial, if parties agree that the letter was indeed authentic and there was no dispute

regarding the written contents of the letter, parties would normally agree to place the said letter in Part A. The basis of this would be that it was agreed that the letter was sent by B and that the contents were written by B. However, it may not have been A's position that A agreed with the truth of the contents. If that was the case, then it would be quite redundant for A to pursue legal action based on the letter.

With these findings of the Court of Appeal, it would appear that by virtue of placing a document in Part A, regardless of whether the issue pertaining to the said document had been brought up as an issue to be tried, the courts would regard the contents of the said document to be true and agreed upon by the parties.

The legal implications of this decision have far-reaching consequences as seen in the *Melawangi* case. As stated above, the parties had agreed to place the alleged defamatory email in the Part A bundle of documents. It is important to note at this juncture that based on the judgment of the Court of Appeal, it would appear that a persuasive factor relied upon by the Court of Appeal was that the plaintiff did not object to the placing of the said email in Part A and 'insisted on the email remaining in Part A'. This important point will be revisited later when discussing the Federal Court's decision.

In placing the said email in Part A, the Court of Appeal unanimously held that the plaintiff therefore agreed to the truth of the contents of the email and therefore, on that basis, the defendant had made out its case of justification. It should be noted that the Court of Appeal here adopted an entirely different approach from the decision of the Court of Appeal in the *Yeo Ing King* case where it was held there that the placement of a document in Part A was only an agreement as to the contents of the document and not the truth of the contents, unless otherwise agreed by the parties. If the truth of the contents was agreed, this would have to be separately stated by the parties. This is not something that is commonly practised by lawyers and therefore, an approach that is quite difficult to reconcile with. It is very rare that any party would write to the other to state that they agree to the placement of a document in Part A because they agree to the 'truth' of the content of the document. Furthermore, O. 34 does not refer to the 'truth' of the contents but states the contents shall be agreed by all parties as far as possible.

Therefore, it may be more favourable and feasible to the parties if the Court of Appeal's view was adopted as the implications of the placement of documents appear to be clearly spelt out.

Federal Court

The plaintiff sought and obtained leave to appeal to the Federal Court on four questions of law, namely:

- (i) whether the documents that are included in Part A which were then admitted and marked as evidence meant that the authenticity and truth of the contents had been agreed and/or could not be challenged;

- (ii) whether O. 34 r. 2(c)-(e) applied to all causes of actions;
- (iii) whether a defendant in a defamation suit could raise this argument when the parties had agreed that the truth of the document was an issue to be tried; and
- (iv) whether the defendant in a defamation suit would be diminishing his pleaded defence of justification by agreeing to place the impugned defamatory document in Part B.

The Federal Court, upon considering the facts of the case that gave rise to the legal arguments pertaining to the Part A documents, found in favour of the plaintiff and allowed the appeal with costs, thereby setting aside the Court of Appeal's decision and restoring the order of the High Court. At this juncture, it would therefore appear that the Federal Court disagreed entirely with the findings of the Court of Appeal in relation to the legal implications of Part A documents. However, the Federal Court overruled the Court of Appeal's decision based on the factual matrix of the case.

The Federal Court, upon perusing the notes of proceedings at the High Court, disagreed with the Court of Appeal's findings that the plaintiff 'insisted' on the email remaining in Part A when given the chance to place it in Part B. In fact, as was recorded, counsel for the plaintiff had in fact requested for the court's permission to move the said email to Part B prior to the commencement of trial. The Federal Court therefore held that the facts on which the Court of Appeal's findings were based were not in fact accurate. Based on the facts and the notes of proceedings, the Federal Court took the view that it was apparent that the plaintiff did not unreservedly agree to the placing of the alleged defamatory email in Part A. Flowing from this misinterpretation of facts by the Court of Appeal, the Federal Court decided that the judgment of the Court of Appeal was premised upon wrong facts and it is for this reason that the Federal Court allowed the appeal.

What is of utmost importance here is that when delivering their judgment, the Federal Court specifically declined to answer the questions of law that were posed. The Federal Court was of the view that such questions of law pertaining to the legal implications and effects of Part A documents should be left to a case where the questions must necessarily be answered. Thus, it is with much disappointment that the legal implications and effects of Part A documents were not clarified by the apex court. Consequently, the Court of Appeal's findings regarding the legal implications and effects of Part A documents would arguably still be applicable⁴.

Conclusion

Although the Federal Court overruled the Court of Appeal's decision, this would not arguably alter the current position regarding the legal implications of placing a document in Part A. The Federal Court did not, in its judgment, consider the interpretation of O. 34 r. 2 nor did they find that the Court of

Appeal was mistaken in its interpretation of the same. Thus, it would still be arguable that the contents of documents placed in Part A are taken to be true and accepted by the parties and consequently, not to be challenged. It is therefore highly advisable that parties exercise additional diligence and care when agreeing to documents specifically placed in Part A of the agreed bundle of documents. In many cases, counsel from both sides may argue or assert pressure to place documents in Part A due to the ease of admitting such documents into evidence, however, when in doubt and to avoid potential prejudice to a client's case, parties should place the documents in Part B. If any conflict arises, there is always the option of seeking the court's guidance prior to trial.

Endnotes:

1. [2020] 4 CLJ 1.
 2. Order 34 r. 2(2)(c)-(i) of the Rules of Court 2012.
 3. [2017] 1 CLJ 512.
 4. The author is aware that a crucial question is whether the legal implications of Part A documents apply only to defamation suits or all civil proceedings. This is a question that has yet to be answered or tested in the courts at the time of writing.
-