IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[ORIGINATING SUMMONS NO.: 24NCC-49-02/2013]

In the matter of Order 7 rule 2, Order 88 rule 2 of the Rules of Court 2012

And

In the matter of Section 181 of the Companies Act, 1965

And

In the matter of United Eastern Resources Sdn Bhd (Company No: 416181-T)

BETWEEN

NG PIK LIAN
(NRIC NO.: 320718-05-5012) **... PLAINTIFF**

AND1. UNITED EASTERN RESOURCES SDN BHD
(COMPANY NO: 416181-T)

2. SAFETY CAPITAL SDN BHD
(COMPANY NO: 2678-V)

3. TAI MAY CHEAN
(NRIC NO.: 531113-10-5670)

4. CHUAH KIM SENG
(NRIC NO.: 530131-07-5183)

5. LOW WEE PENG
(NRIC NO.: 701031-11-5065) **... DEFENDANTS**

GROUNDS OF JUDGMENT

[1] There are four applications before the Court – enclosure ("Enc.") 418 and Enc. 420 made by the 3rd Defendant whilst Enc. 425 & 428 are made by the 2nd Defendant to cross-examine the Plaintiff and Lau Yoke Leong ("LYL") on their affidavits filed in support of Enc. 399. All four applications were filed pursuant to Order 38 Rule 2(2) of the Rules of Court 2012("ROC 2012") and/or under the inherent jurisdiction of the Court.

[2] On 8.4.2022, I dismissed all four applications with costs. As the applications were related, it is convenient to deal with all four enclosures in one judgment. This judgment as such contains the full reasons for dismissal of Enc. 418, Enc. 420, Enc. 425 and 428.

BACKGROUND

[3] The Plaintiff, 89 years old, is a director and shareholder of United Eastern Resources, the 1st Defendant. She is the mother of the 3rd Defendant who is the other director and shareholder of United Eastern Resources.

[4] In 2013, the Plaintiff filed this Originating Summons ("OS") under s. 181 of the Companies Act 1965 ("CA 1965") alleging oppressive conduct on the part of the 3rd Defendant in relation to her management of the affairs of United Eastern Resources and Safety Capital, the 2nd Defendant. Allegations were made against the 3rd Defendant and other Defendants for misuse of funds. The Plaintiff is also asking back for shares in certain companies registered in the daughter's name claiming she is a nominee for the Plaintiff and the daughter had pre-signed resignation letters as director and share transfer forms. The authenticity of these documents is disputed by the daughter and to be tried.

[5] Pending disposal of the OS, the Plaintiff filed an application for an interim injunction to prevent the 3rd Defendant from dealing with the funds of the 1st and 2nd Defendants without the prior written consent of the Plaintiff. A Consent Order was entered into on 21.2.2013 during the hearing of the application. The Consent Order was then amended on 22.3.2013 requiring 7 days' prior notice before making payment ("Consent Order"). It reads:

"By consent, it is agreed that pending the hearing and decision of the High Court on Enclosure 1 [the Originating Summons main suit], the 3rd Defendant will not deal with the funds of the 1st and 2nd Defendants outside the ordinary course of business, provided that the 1st, 2nd and 3rd Defendants are at liberty to use the 1st and 2nd Defendants' funds to pay taxes, tax liabilities and operating expenses. **Seven (7) days before** Within ten (10) working days of making the aforesaid permitted payments, the relevant Defendant who pays the monies shall give written monthly notice with sufficient particulars of the same to the Plaintiff's solicitors."

[6] The Plaintiff claimed that it was recently discovered that there are various irregularities and discrepancies pertaining to the

payment of "staff costs" by the 2nd Defendant to World Executive Search Sdn Bhd ("WES"). The discrepancies and irregularities suggest that the funds of the 2nd Defendant are being dissipated pending disposal of this OS. It was alleged that the 3rd Defendant is in control of WES. The 2 shareholders of WES are the 3rd Defendant and her husband, one Jonny, with the 3rd Defendant holding 99,999 units of share in WES and Johny holding 1 unit of shares. The board of directors is also comprised of the 3rd Defendant and Johny.

[7] As such, Enc. 399 was filed by the Plaintiff seeking for discovery against the 2nd and 3rd Defendant, and also WES for amongst others:

7.1 the discovery of documents in relation to the payments made by the 2nd Defendant, in respect of staff cost, cost of accounts manager, administrative executive, and secretary to WES for the years of 2013 to 2021; and

7.2 the Consent Order dated 21.2.2013 (amended on 22.3.2013) be set aside or varied to include an obligation by the 1st ,2nd, 3rd Defendant as the case may be, to render sufficient particulars of payments.

[8] The hearing of Enc. 399 was adjourned pending the fate of Enc. 418, Enc. 420, Enc. 425 and 428.

Enc. 418 and Enc. 425 - 3rd and 2nd Defendant's case for cross examination of the Plaintiff

[9] The 3rd and 2nd Defendant's application for cross examination of the Plaintiff in Enc. 418 and Enc. 425 respectively are based on the same following grounds:

9.1. the proposed cross-examination of the Plaintiff is necessary due to the serious doubts in relation to her mental capacity and condition - whether she understands the nature of Enc. 399, whether she had in fact gave instructions for the filing of the same, and whether she had in fact made the averments in her affidavits affirmed on 24.8.2021, 3.11.2021 and 8.12.2021;

9.2. there are disputed issues of fact:

9.2.1. whether there is an alleged abuse of the Consent Order by the 3rd Defendant which warrants the relief sought under Enc. 399;

9.2.2. whether the Consent Order recognizes the 2nd Defendant as an active company that incurs expenses and taxes in the ordinary course of its business;

9.2.3. whether the increase in staff costs due to the additional work undertaken by the 2nd Defendant in managing its investments is justified and in accordance with the terms of the Consent Order;

9.2.4. whether there are alleged discrepancies between the staff costs disclosed in the Tables of Payments extended to the Plaintiff's solicitors and the staff costs reported by WES to EPF;

9.2.5. whether there are alleged discrepancies between the staff costs and investment advisory fees disclosed in the Tables of Payments and the staff costs and investment advisory fees reported in the Audited Financial Statements ("AFS") of WES;

9.2.6. whether the usage of estimates in respect of the payments to be made by the 2nd Defendant are prohibited under the Consent Order and whether there exists alleged overpayments by the 2nd Defendant;

9.2.7. whether there are alleged inconsistencies between the investment advisory fees disclosed in the Tables of Payments and the investment advisory fees reported in the AFS of the 2nd Defendant;

9.2.8. whether and when the Plaintiff had in fact requested and/or instructed LYL for purported expert accounting advice in support of her position in Enc. 399 and in which specific language/dialect did she communicate with LYL;

9.2.9. whether the Plaintiff understood and/or is capable of understanding and receiving the purported expert accounting advice from LYL in support of her position in Enc. 399. This is in view of her failure to state the specific language/dialect used by him throughout receiving the said advice and the fact that the Plaintiff only communicates in the Hokkien dialect;

9.2.10. whether and when the Plaintiff in fact met and showed the application and the affidavits in Enc. 399 to LYL despite the dearth of exact details of when and how this purportedly transpired; and

9.2.11. whether the Plaintiff is aware that all employer/ employee information within EPF is protected under the Personal Data Protection Act 2010 ("PDPA") and whether she is aware that the

procurement/usage of the alleged EPF information of WES by her derived from purported "reliable" third parties amount to a violation of the PDPA;

9.3. there are also serious questions as to whether the instructions to file Enc. 399 was in fact from the Plaintiff herself. In this respect, there is also a separate and parallel cross-examination application against LYL in relation to the truth of the averments made by him in his Affidavits of 3.11.2021 and 8.12.2021. The disputed issues raised in LYL's affidavits pertaining to amongst others, the credibility of LYL as a deponent and his language proficiency give cause for the 3rd Defendant to view the averments in the Plaintiff's affidavits with distrust and suspicion;

9.4. the proposed cross-examination of the Plaintiff would advance the cause of justice as the affidavit evidence and/or contemporaneous documents on the issues raised in Enc. 399 in themselves are insufficient to enable this Court to properly determine the issues raised therein; and

9.5. the application is made *bona fide*.

Enc. 420 and Enc. 428 - 3rd and 2nd Defendant's case for cross examination of Lau Yoke Leong ("LYL")

[10] The 3rd and 2nd Defendant's applications in Enc. 420 and Enc. 428 respectively to cross-examine LYL are also premised on similar grounds:

10.1. whether the Plaintiff had in fact requested LYL for his advice and shown to him the application and the affidavits in Enc. 399 despite the lack of particulars as to when and how this purportedly transpired; and

10.2. whether LYL in fact met and rendered his advice to the Plaintiff and if so, the circumstances and manner in which this was purportedly carried out;

10.3. what was the scope of the advice that LYL purportedly rendered to the Plaintiff in view of the issues pertaining to language, education, age and mental condition surrounding the Plaintiff;

10.4. whether LYL (as the CFO and Executive Director of Masteel) possess the qualifications and experience in fund and asset management as well as international capital market investments to purport to give evidence on the 2nd Defendant's revenue and staff costs;

10.5. whether LYL's purported evidence would qualify as expert evidence for it to be taken into account;

10.6. whether LYL is in fact independent and/or credible to depose averments on the 2nd Defendant pertaining to Enc. 399 in view that he reports directly to the MD/CEO of Masteel, Dato Sri Tai Hean Leng ("THL"), who is also the 1st Defendant in Suit 124 opposing the 3rd Defendant in that suit (this was not frankly disclosed by him);

10.7. whether LYL is capable of rendering expert accounting advice to the Plaintiff in support of his position that the increase in staff costs is unjustified.

10.8. whether LYL's purported expert evidence that he purportedly deposed in his affidavits were in fact justified and correct;

10.9. whether the Plaintiff in fact met and instructed LYL to render his purported expert accounting advice, in what dialect did she communicate with him, whether she is

> capable of instructing him to do so in view of her mental condition and given that she can only understand Hokkien. LYL is evidently not proficient in the Hokkien dialect to communicate with the Plaintiff which gives cause to view his averments with distrust and suspicion.

[11] Besides the above, the Learned Counsel for the 3rd Defendant, Mr. Barry Goh submitted that a challenge against a deponent's mental condition amounts to a challenge against the truthfulness of the person's evidence in court citing *E.K. Seng Sdn Bhd v. Seng Dan Roo* [2010] 1 LNS 391 where the truth and veracity of an affidavit tendered by the Plaintiff was not taken at face value as the evidence was not subjected to cross-examination:

> "PW-5 is now old, infirmed and physically incapacitated with a terrible speech deficiency due to a stroke attack, Her mental capacity is also suspect. She testified on behalf of the plaintiff but was totally incomprehensible. I ended her testimony not long after she begun for nobody could understand what she was trying to say. (emphasis added)
>
> …
>
> Of course his mother (PW-5) put up an affidavit in an earlier proceeding … **However the truth and veracity of her affidavit cannot be taken at face value as the same was not subjected to the vagaries of cross-examination on account of her physical incompetency to testify**. She could only come up with some gurgling sound which nobody could understand." (counsel's emphasis)

[12] Counsel also cited the Australian case of *Re Gaal and Defence Force Retirement and Death Benefits Authority* [2008] 110 ALD 214 where the accuracy of the evidence of a litigant was

discredited upon cross-examination on grounds of the litigant's cognitive state:

> "[7] Although the applicant gave evidence and was cross examined in these proceedings, we have doubts regarding the accuracy of his evidence. By this we do not mean to impugn the applicant's honesty but he has had a long period of mental illness with prescribed medication (not all of it entirely suitable) and Electroconvulsive Therapy. An example of where we doubt the applicant is his evidence that he was the Captain of the Regimental Cricket Team. As pointed out by Dr Jolly (who himself has service experience) and by our own knowledge, it is highly unlikely that a 20-year old Lance Corporal would be directing officers and more senior non commissioned officer's what to do on a cricket field."

[13] Mr. Barry Goh pointed out instances that during the on-going litigation between the parties, serious doubts and questions arose in relation to the Plaintiff's mental capacity and her ability to instruct solicitors and in this connection, the 3rd Defendant filed the Mental Health Act Proceedings ("MHA Proceedings") against the Plaintiff for an inquiry to be held before the High Court to determine whether she is a mentally disordered person who is incapable of managing herself and her affairs. On 18.7.2019, the High Court made the MHA *Prima Facie* Order which was set aside by the Court of Appeal on 19.5.2021 but as at date of submissions, pending at the Federal Court. Counsel posited that as it stands, it is inconclusive whether the Plaintiff can confirm the truthfulness of her averments in her affidavits filed in support of Enc. 399 and severely doubtful that the Plaintiff understands the nature and purpose of Enc. 399 filed before this Court. This results in the truth and veracity of the averments in those affidavits being open to challenge.

[14] Counsel further urged upon the Court that :

14.1. the intended cross-examination of the Plaintiff and LYL ought to be granted to assist this Court in determining the core issue of Enc. 399 i.e. whether there has been an abuse of the Consent Order by the 3rd Defendant to warrant the relief sought in the said application;

14.2. there exists insufficient affidavit evidence for this Court to fairly dispose of Enc. 399;

14.3. the disputed issues and/or assertions of facts between the parties could not be determined on affidavits alone and in support, cited *Emporium Jaya (Bentong) v. Emporium Jaya (Jerantut)* [2002] 5 MLJ 675 (HC), *Yai Yen Hon v. Lim Mong Sam* [1997] 2 CLJ 812 (CA) in determining a deponent's credibility; *Regional Centre for Arbitration v. Ooi Beng Choo* [1999] 1 CLJ 819;

14.4. the three (3) prime considerations as set out in the decision of *Tetuan Kumar Jaspal Quah & Aishah[2007] 4 MLJ 638* are satisfied by the 3rd Defendant.

[15] The 2nd Defendant's counsel Datuk Wong Rhen Yen adopted the 3rd Defendant's counsel's arguments and added:

15.1. in compliance with the Consent Order, the payments to be made by the 2nd Defendant are disclosed including but not limited to payment of taxes, tax liabilities, statutory expenses of the 2nd Defendant to the Plaintiff's solicitors at the beginning of each month through a letter issued on a monthly basis. The Plaintiff's solicitors will be notified with regard to the details of the payee together with the description and amount of payments to be made by the 2nd Defendant;

15.2. as there exists serious doubts as to the mental capacity of the Plaintiff to instruct her solicitors and/or her purported communication with LYL and/or her understanding of LYL's advice and views on the payments extended to the Plaintiff, there is an alarming concern whether the Plaintiff can even satisfy the requirements of O. 41 r. 5 of the Rules of Court 2012; the veracity of the averments made by the Plaintiff and LYL in their affidavits ought to be tested through cross-examination;

15.3. the onus is on the respondent to show why-cross examination should not be granted – *Gomez v. Gomez* [1969] 1 MLJ 228;

15.4. that it is only in exceptional cases that a judge should refuse an application to cross-examine a deponent on his affidavit - *Comet Products UK Ltd v. Hawkex Plastics & Anor* [1971] 1 All ER 1141.

[16] This Court was also referred the following cases by Learned Counsel for the 2nd and 3rd Defendants:

16.1. *Leisure & Allied Industries v. Udaria Sdn Bhd* [1980] 1 MLJ 189*;*

16.2. *Charles Koo Ho-Tung v. Koo Lin Shen* [2016] 2 CLJ 267*;* and

16.3. *Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624.

The Plaintiff's objections

[17] In resisting the cross-examination applications, the Plaintiff's learned counsel Mr. Michael Chow argued that:

Tests for cross-examination not satisfied

17.1. the 2nd and 3rd Defendants have failed to satisfy the tests for cross examination:

17.1.1. the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah v. The Co-operative Central Bank Ltd* [2007] 4 CLJ 487 set out the 3 criterias for cross-examination as follows:

> "[24] You can discern from the authorities referred by the parties that 3 prime considerations would influence the court in the exercise of its discretion to allow or disallow cross-examination on affidavit. **Firstly, the truth of the averment in the affidavit must be challenged or the issues of fact identified. Secondly, cross-examination should only be allowed if the disputed fact is relevant to the issue to be decided and must be limited to that issue only. And thirdly, cross-examination would not advance the cause of justice and should be refused if there is sufficient affidavit evidence or contemporaneous documents to enable the court to properly decide without the need of cross-examination**."

17.1.2. the alleged disputed facts raised by the 2nd and 3rd Defendants are clearly irrelevant to issues in Enc. 399 and/or can in any event, be resolved with examination of the affidavits and documents;

17.1.3. the alleged disputed facts which concern the mental health/capacity of the Plaintiff, are issues

in the MHA Proceedings. These issues are clearly irrelevant to Enc. 399;

17.1.4. the alleged disputed facts which concern the interpretation of the Consent Order is a question of law, cross-examination is not at all relevant;

17.1.5. the alleged disputed facts which concern the inconsistencies in the figures on staff costs can be resolved by examination on the affidavits and the contemporaneous documents including the table of payment and the audited financial statements exhibited;

17.1.6. the alleged disputed facts which concern the Plaintiff's "awareness" on the protection of EPF information under the PDPA are irrelevant to Enc. 399;

17.1.7. the alleged disputed facts which concern the qualification and the credibility of LYL are irrelevant to the issues in Enc. 399 and can in any event, be resolved with examination of the affidavit evidence;

17.1.8. the alleged disputed facts which concern the Plaintiff's method of communication with LYL such as what dialect was used are also irrelevant to Enc. 399. LYL has also unequivocally stated in his affidavit in Enc. 417, paragraph 6 that:-

> "…I state that I spoke to Datin in Mandarin in the presence of Ng Siew Peng who assisted to translate my explanations to Hokkien when necessary."

Bad faith and collateral purpose

17.2. It is clear from the 2nd and 3rd Defendant's affidavits that the applications in Enc. 418, 420, 425 and 428 were filed with bad faith for collateral purposes to dispute the mental capacity of the Plaintiff and to reventilate the issues on the mental health and/or capacity of the Plaintiff which have already been raised in the MHA Proceedings:

17.2.1. paragraphs 7 to 11, 12 to 16 of Enc. 419, paragraph 8(8) of Enc. 421 affirmed by the 3rd Defendant, and paragraphs 23 to 26 of Enc. 426, paragraph 15 of Enc. 429 affirmed on behalf of the 2nd Defendant are essentially issues in the mental health proceedings;

17.2.2. the Inquiry Order of the High Court has been set aside by the Court of Appeal on 19.5.2021. The Matter is now pending appeal at the Federal Court (at time of submissions); see :

(i) *Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors* [2015] 1 LNS 755 where the High Court held at paragraph 59 that an application to cross examine a deponent must not be made with bad faith or for collateral purpose; and

(ii) *Tang Choon Keng Realty (Pte) Ltd & Ors v. Tang Wee Cheng* [1992] 2 SLR 1114, where the Singapore High Court dismissed the application to cross examine a deponent's affidavit as it was made for a collateral purpose to dispute a person's mental capacity:-

"65. **They want to cross-examine him on his mental capacity to understand the nature**

and contents of the draft petitions as affirmed by his affidavit. They say that if they are allowed to cross-examine him they might be able to establish that he was unable to understand the contents and the nature thereof and if that were established then, of course, his affidavit is worthless because it is an affidavit filed without understanding. That obviously is different from saying that the defendant is either telling the truth or not telling the truth because to be able to discern whether he is telling the truth or not he must have the understanding to do so. However, in submission it is now said that, 'Well, we are not saying that he lacks mental capacity absolutely in the sense that he does not understand anything. We are saying that he understands sufficiently but not enough to understand the contents and nature of this action or the allegation that he is making.' **As I have indicated, this court has no expertise whatever to judge that kind of understanding, without the aid of expert witnesses. I think I will be wholly wrong for the court to allow the plaintiffs to embark on this kind of exercise in the hope that the defendant may not be able to demonstrate that he is sane or mentally competent in the present proceedings**. It is obvious that the person who makes an allegation against the mental competency of a particular person must produce the evidence to prove that he is mentally incompetent. **It is not for him to put**

the defendant in the box to prove that he is mentally incompetent. I really do not understand this application. That is the first point. **I have said that I am not competent to decide by myself whether or not a person is competent to understand the nature and contents of his affidavit**.

66. The second point is that obviously, the real purpose of this exercise is to test the veracity of the witness. **It is not to test his mental capacity because it is now admitted that he has got some mental capacity**. But the principle is that at this stage of the proceedings a party should not be cross-examined on that basis because it will actually go into the merits of the case, ie, whether or not what he is saying is true on the basis of which he has filed the affidavit. I do not think I need to deal with the other cases cited by counsel for the plaintiffs, but quite clearly, looking at them, I find that they have nothing to do with interlocutory injunctions. They were cases where the cross-examination on the very fact in dispute will determine that fact in dispute. **What is the fact in dispute here? It is not the fact of the competency of the defendant. It is whether there was oppression or unfair conduct**. That is the point in issue in this case. Here is a collateral attack on the main issue.

…

69. **So I have come to the conclusion that this application to cross-examine on the basis of**

which it is put, that is whether or not he understands his affidavit is totally misconceived from the beginning. I allow the appeal with costs here and below. The order of the registrar is reversed."(counsel's emphasis)

17.2.3. these alleged issues/disputed facts are also in any event, irrelevant to issues in Enc. 399 (see *Tetuan Kumar Jaspal Quah & Aishah v. The Co-operative Central Bank Ltd* [2007] 4 CLJ 487).

Interlocutory matter

17.3. Enc. 399 is only an interlocutory matter and cross-examination would cause delay and render the time and effort to prepare the affidavit evidence meaningless:

17.3.1. it is trite law that the court should be slow in granting leave for cross-examination of a deponent in an interlocutory matter as these applications will inevitably cause delay and render the time and effort to prepare the affidavit evidence meaningless - *Tun Dr Mahathir bin Mohamad & Ors v. Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2016] 11 MLJ 1:

"[47] Further despite the discretion given, it ought to be appreciated that the **request for cross-examination is rarely given** as pointed by Lim Beng Choon J in *Balwant Singh Purba v. R Rajasingam* [1987] CLJ Rep 468 where he said:

This is an application made by the plaintiff for leave pursuant to O. 38 r. 2(3) [RHC] to cross-examine the

defendant in respect of the affidavit made by him in support of his application to set aside the interim injunction granted by this court on 18 December 1986. I dismissed this application after hearing the submissions of counsel of the respective parties.

For purpose of this judgment I need only mention two of the principles. The first one is mentioned in the following passage appearing at p 592 of the English Supreme Court Practice [1979] Vol 1:

> There is a discretion as to ordering cross examination on affidavits filed on interlocutory applications. **Cross examination upon affidavits sworn in applications for interlocutory injunctions is very rare**. (Emphasis added.)

[48] I would add that if the courts were to allow cross- examination of a deponent of an affidavit for **interlocutory applications** for the slightest reasons, **these applications will inevitably render the time and effort to prepare the affidavit evidence meaningless**. Unless it can be shown that it is relevant and necessary such applications for cross-examination should not be allowed."

(See also *Petrochemical Commercial Company International Ltd & Ors v. Nexus Management Group Sdn Bhd* [2020] 1 LNS 886 at paragraph 24)

Findings and decision on Enc. 418, Enc. 420, Enc. 425 and 428

[18] As the applications are made under Order 38 Rule 2(2) of the ROC 2012, I propose to set out Order 38 Rule 2(2) for convenience:

"(2) In any cause or matter begun by originating summons and on any application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court."

[19] In an application under this provision of the ROC 2012, I am guided by a catenation of cases on the subject. Firstly, it is settled law that the court retains an absolute discretion whether or not to allow cross-examination of a deponent on his affidavit – see as mere examples, *Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd* [1980] 1 MLJ 189; *Balwant Singh Purba v. R Rajasingam* [1987] CLJ Rep 468; [1987] MLJU 3; *Regional Centre for Arbitration v. Ooi Beng Choo & Anor* [1998] 2 MLJ 383. As such, each case is to be decided on its own particular facts as "Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case." - *Structural Concrete Sdn Bhd v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300, at 306 CA.

[20] Second, cross-examination in interlocutory applications are rarely given. In *Balwant Singh Purba v. R Rajasingam (supra)* Lim Beng Choon J said:

> "This is an application made by the plaintiff for leave pursuant to O. 38 r. 2(3) [RHC] to cross-examine the defendant in respect of the affidavit made by him in support of his application to set aside the interim injunction granted by this court on 18 December 1986. I dismissed this application after hearing the submissions of counsel of the respective parties.
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> For purpose of this judgment I need only mention two of the principles. The first one is mentioned in the following passage appearing at p 592 of the *English Supreme Court Practice* [1979] Vol 1:
>
> > There is a discretion as to ordering cross-examination on affidavits filed on interlocutory applications. **Cross-examination upon affidavits sworn in applications for interlocutory injunctions is *very rare*.**
>
> The second principle is that the power as conferred by the said O. 38 r. 2(3) can be invoked only in respect of an issue which the Court is asked to determine in the interlocutory proceeding and not in respect of any other issue which should be determined at the trial of the action proper. In this connection reference may be made to *Abraham & Co. v. Dunlop Pneumatic Co.* [1905] 1 KB 46 @ 52 where Mathew LJ said:
>
> > That applies only to a question of fact which the Court or a Judge has at the time jurisdiction

> to decide, and not to a question to be tried in the action. The question under which this appeal arises relates to an issue in the action which must be tried in the action with the other issues, and is not a matter that can be determined at chambers. (Emphasis added.)

Besides the 2 cases of *Tun Dr Mahathir bin Mohamad & Ors v. Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2016] 11 MLJ 1 and *Petrochemical Commercial Company International Ltd & Ors v. Nexus Management Group Sdn Bhd* [2020] 1 LNS 886, cited by the Plaintiff's counsel, see also *Syarikat Tungaring Kilang Papan Sdn Bhd v. Sabah Forest Industries Sdn Bhd & Ors* [1990] 2 MLJ 38); *Charles Koo Ho- Tung v. Koo Lin Shen* [2015] MLJU 910; *SAP (M) Sdn Bhd & Anor v. I World HRM Net Sdn Bhd & Anor* [2006] 2 MLJ 678 ; *Charles Koo Ho-Tung v. Koo Lin Shen* [2015] MLJU 765; [2016] 2 CLJ 267); *Nasser Ali Azayez Maktoum Al Sheraifi & Ors v. Affinity Heights Sdn Bhd (in receivership)* [2018] 11 MLJ 684; [2018] 5 CLJ 751.

[21] Thirdly, the applicant for leave to cross-examine a deponent bears the legal burden to persuade the court to exercise its discretion to grant leave - in *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v. The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638; [2007] 4 CLJ 487. With utmost respect, Datuk Wong's reliance on *Gomez v. Gomez (supra)* that the burden is on the respondent/Plaintiff to show why-cross examination should not be granted and that only in exceptional cases that a judge should refuse an application to cross-examine a deponent on his affidavit citing *Comet Products UK Ltd v. Hawkex Plastics & Anor* [1971] 1 All ER 1141 is misplaced as the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah* has dealt squarely with these 2 cases as follows:

" [18] It was the appellant's contention, relying on an extract from the High Court judgment in *Gomez v. Gomez* [1969] 1 MLJ 228, that the onus is on the respondent to show why cross-examination should not be allowed which in this case the respondent has failed to do. It was also contended that only in exceptional cases should the judge refuse an application to cross-examine a deponent on his affidavit — see Collin LJ in *Comet Products UK Ltd v. Hawkex Plastics Ltd & Anor* [1971] 2 QB 67 at p 77.

[19] With respect, I do not think these are correct statements of the law in this country…

[20] The English equivalent provision was considered in *Comet Products* and the Court of Appeal unanimously reversed the trial court's decision and refused cross-examination of the defendant upon his affidavit in an interlocutory application…."

[22] Fourthly, the application has to be made *bona fide* or in good faith. In *Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd* [1980] 1 MLJ 189, at 190, Salleh Abas FJ said :

"To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (*Re Lucas* [1952] 1 All ER 102); "otherwise foreigners would have an advantage" (*Strauss v. Goldschmidt* 8 SLR 239). **It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit much be prepared to stand up to it by** cross-examination **unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings** (*Allen v. Allen* [1894] P 239). **In view of the**

appellant's application for judgment under Order 32 Rule 6, I am not, however, prepared to hold the respondent's application to cross-examine the appellant's witnesses as being without just cause or motivated by desire to delay the proceedings or without *bona fide* or sham or vexatious.(emphasis added)

[23] Fifthly, relevancy as to disputes of the facts has to be shown to warrant cross -examination. The Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah (supra)* stated:

"[25] You can discern from the authorities referred by the parties that three prime considerations would influence the court in the exercise of its discretion to allow or disallow cross-examination on affidavit. Firstly, the truth of the averment in the affidavit must be challenged or the issues of fact identified. Secondly, cross-examination should only be allowed if the disputed fact is relevant to the issue to be decided and must be limited to that issue only. And thirdly, cross-examination would not advance the cause of justice and should be refused if there is sufficient affidavit evidence or contemporaneous documents to enable the court to properly decide without the need of cross-examination.

It is important to take into account all facts when considering an application for cross-examination and if it has little relevance or little weight to the issue which the judge has to decide, then cross-examination should not be permitted."

[24] Last but not least, as stated in *Tetuan Kumar Jaspal Quah & Aishah (supra)* cross-examination must advance the cause of justice. When a conflict in affidavit evidence may be resolved by undisputed contemporaneous document, the cause of justice is not advanced.

[25] In the present matter before the Court, it is my judgment that whether Enc. 399 ought to be allowed is an exercise of discretion based on whether discovery is necessary for disposing fairly of the proceedings or for saving costs. The other relief sought to vary or set aside the Consent Order based on abuse can be decided based on questions of law. Bearing in mind the legal principles earlier alluded to as to whether cross-examination ought to be ordered, it is my respectful view, that Enc. 399 can be decided without the necessity of any cross-examination. I find that the 2nd and 3rd Defendants' affidavits in support of their respective application to cross-examine the Plaintiff and LYL to be bereft of any good grounds :

25.1. there is abundant documentary evidence that were not disputed which would assist the Court to arrive at a decision on the matter;

25.2. it was made plain by the 2nd and 3rd Defendants that they intended to prove through cross-examination whether the Plaintiff has the mental capacity to understand the nature and contents of Enc. 399 filed by her. This dispute in my respectful view is irrelevant to the discovery application. Besides, it is wholly inappropriate and not within the remit of this Court to determine mental capacity in this proceeding. In *Indrani a/p Rajaratnam & Ors v. Fairview Schools Bhd* [2001] 4 MLJ 56; [2002] 1 CLJ 1, CA, KC Vohrah J (later JCA) observed:

"It is important to take into account all factors when considering an application for cross-examination and if it has little relevance or little weight to the issue which the judge has to decide, then cross- examination should not be permitted."

25.3. in any case, the 2nd and 3rd Defendants have not produced credible evidence on the mental incapacity of the Plaintiff to bring the application in enc. 399. Bearing in mind that the Mental Health Act Inquiry has been set aside by the Court of Appeal, I tend to think that it is utterly wrong to accede to the such a request. To put the Plaintiff through the tedium of cross-examination if allowed to be pursued, will in my view be unfair to the Plaintiff, who is close to 90 years old, and open the doors for her harassment and oppression when the issues to be decided in Enc. 399 is whether discovery ought to be ordered and whether there was abuse of the Consent Order. I can be forgiven for making the overwhelming inference that the applications are not made *bona fide* at all and brought to stultify/frustrate the application in Enc. 399; and as such, an abuse of the process of the court;

25.4. cross-examination if permitted, will unduly delay the hearing of Enc. 399 which was adjourned pending the hearing of these applications and this Court must be astute enough and exercise utmost caution to prevent the matter from dragging its "weary length" any further. I have not overlooked that this action has remained in the Court's docket for close to 10 years owing to the litigious propensity of the parties involved. Particularly too, due to the Plaintiff's advanced age, delay cannot be brooked so as not to cause an injustice to her;

25.5. I am inclined to accept Mr Micheal Chow's arguments that the dispute in staff costs can be resolved by examining the affidavits and exhibits produced. In my view, ultimately, it is for the Plaintiff to show on a balance of probability whether she is entitled to the orders sought in Enc 399. I

do not think that it appropriate to subject the Plaintiff and LYL to cross-examination at this interlocutory stage;

25.6. I can not see anything in the 2nd and 3rd Defendants' affidavits which established disputes of fact which needed to be resolved by cross-examination in order for a decision on Enc. 399. In my view the 2nd and 3rd Defendants do not necessarily have to accept everything that the Plaintiff or LYL stated in their affidavits, or else there would be no litigation. There is simply no necessity for cross-examination in a straightforward interlocutory application as it remains for the court to evaluate what weight to be given to the cross-allegations in the respective affidavits after hearing the arguments on Enc. 399 and not at this juncture. In *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 at p 217, Lord Diplock had this advice in respect of resolving conflicts of evidence on affidavits:

"… Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just', the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions

of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of this discretion under s. 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong…"

[26] Having weighed all the arguments by the respective counsel, premised on the principles in the cases discussed, and for the reasons given, I have no hesitation to exercise my discretion against allowing cross-examination of the Plaintiff and LYL.

[27] In my judgment, cross-examination should only be allowed in an exceptional case. Based on the facts of this case, I find nothing remarkable here to necessitate cross-examination in order that justice may be done between the parties. On the contrary, it is my view that cross-examination in this case will not serve any useful purpose and will not secure a just, expeditious and economical disposal of Enc. 399. That aside, the grim reality is that allowing cross-examination in interlocutory matters such as the instant case, will stretch the Court's limited resources, hence the reason why cross-examination is rarely given.

[28] In the result, Enc. 418, 420, 425 and 428 are dismissed with costs subject to allocator.

Dated: 29 MAY 2022

(LIZA CHAN SOW KENG)
Judicial Commissioner
High Court of Malaya
at Kuala Lumpur

COUNSEL:

For the plaintiff - Michael Chow & Wong Zhi Khung; M/s Michael Chow

For the 2nd defendant - Wong Rhen Yen & Emily Wong; M/s Dennis Nik & Wong

For the 3rd defendant - Barry Goh Meng Yew, David Ng, Muhammad Zarqali & Goh Jen Nie; M/s Steven Thiru & Sudhar Partnership

Case(s) referred to:

E.K. Seng Sdn Bhd v. Seng Dan Roo [2010] 1 LNS 391

Re Gaal and Defence Force Retirement and Death Benefits Authority [2008] 110 ALD 214

Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1980] 1 MLJ 189

Balwant Singh Purba v. R Rajasingam [1987] CLJ Rep 468; [1987] MLJU 3

Regional Centre for Arbitration v. Ooi Beng Choo & Anor [1998] 2 MLJ 383

Structural Concrete Sdn Bhd v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300

Tun Dr Mahathir bin Mohamad & Ors v. Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2016] 11 MLJ 1

Petrochemical Commercial Company International Ltd & Ors v. Nexus Management Group Sdn Bhd [2020] 1 LNS 886

Syarikat Tungaring Kilang Papan Sdn Bhd v. Sabah Forest Industries Sdn Bhd & Ors [1990] 2 MLJ 38

Charles Koo Ho- Tung v. Koo Lin Shen [2015] MLJU 910

SAP (M) Sdn Bhd & Anor v. I World HRM Net Sdn Bhd & Anor [2006] 2 MLJ 678

Charles Koo Ho- Tung v. Koo Lin Shen [2015] MLJU 765; [2016] 2 CLJ 267

Nasser Ali Azayez Maktoum Al Sheraifi & Ors v. Affinity Heights Sdn Bhd (in receivership) [2018] 11 MLJ 684; [2018] 5 CLJ 751

Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v. The Co-Operative Central Bank Ltd [2007] 4 MLJ 638; [2007] 4 CLJ 487

Comet Products UK Ltd v. Hawkex Plastics & Anor [1971] 1 All ER 1141

Legislation referred to:

Companies Act 1965, s. 181

Rules of Court 2012, O. 38 r. 2(2)