DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)
[GUAMAN SIVIL NO.: WA-22NCvC-822-12/2021]

ANTARA

TAN SRI DATO' KAM WOON WAH
(NO. K/P: 291129-10-5173) ... PLAINTIFF

DAN

1. DATO' SERI ANDREW KAM TAI YEOW
(NO. K/P: 620202-10-6039)

2. HANNAH KAM ZHEN YI
(NO. K/P: 91130-14-5118) ... DEFENDANTS

[TOGETHER WITH]
DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
GUAMAN SIVIL NO. WA-23NCvC-114-12/2021

ANTARA

TAN SRI DATO' KAM WOON WAH
(NO. K/P: 291129-10-5173) ... PLAINTIFF

DAN

1. HANNAH KAM ZHEN YI
(NO. K/P: 911130-14-5118)

2. MESSRS. THOMAS PHILIP, ADVOCATES AND SOLICITORS
(disaman sebagai sebuah firma) ... DEFENDANTS

GROUNDS OF JUDGMENT

(Ex-parte Application for Committal pursuant to Order 52 rule 4 of the Rules of Court 2012 & Applications to Set Aside Ex-Parte Application pursuant to Order 32 rule 6 of the Rules of Court 2012)

Introduction

[1] This is a consolidated judgment for 2 similar applications in 2 different suits: Suit 822 and Suit 114, stems from their shared cause of action and subject matter. Both cases involve committal proceedings against the Defendants, who are alleged to have provided the same false address to the Court.

[2] Although we have the same Plaintiffs in both cases, the Plaintiff's counsels for these 2 suits are different, which resulted in some variation in points. Nevertheless, they bare similar and common grounds, and thus, I have consolidated them together in this judgment.

Facts of the Case

[3] In both Suit 822 and 114, the Plaintiff had initiated an *ex-parte* application seeking leave for an order of committal against the Defendants ("the *Ex-parte* Leave Applications").

[4] In Suit 822, the Plaintiff filed the *ex-parte* leave application in Enclosure 85 against both the First and Second Defendant ("Enclosure 85"), be committed to prison or fined for their several acts of contempt of court in wilfully and deliberately providing a false address of No.45, Jalan Langgak Tunku, Bukit Tunku, 50480 Kuala Lumpur ("the Address"), in the following affidavits:

i) First Defendant's affidavit in reply (in opposing the Plaintiff's injunction application) (Enclosure 26); and

ii) First Defendant's affidavit in reply (No.2) (in opposing the Plaintiff's injunction application) (Enclosure 37);

iii) Second Defendant's affidavit in reply (Enclosure 25);

iv) Second Defendant's affidavit in support (Enclosure 33); and

v) Second Defendant's affidavit in reply (Enclosure 59).

[5] Meanwhile, in Suit 114, the *ex-parte* leave application (in Enclosure 81) was filed due to the allegation that the First Defendant had wilfully and deliberately provided the Address, which is alleged to be a false address by the Plaintiff, in her affidavit in support (Enclosure 24) affirmed on 24.3.2022 (both Enclosure 85 and Enclosure 81 will be referred to collectively as "Ex-Parte Leave Applications" herein).

[6] The Plaintiff in both Suit 822 and Suit 114 had subsequently obtained the ex-parte order from the former judge granting leave to the Plaintiff to commence committal proceedings against the Defendants under Order 52 rule 3 of the Rules of Court 2012 on 25.4.2022 and 29.07.2022 respectively ("the Leave Orders").

[7] The Defendants in both suits then filed the application to set aside the Leave Order ("Application to Set Aside the Leave Orders").

Plaintiff's Case

<u>Grounds in support of the *Ex-parte* Applications</u>

[8] The Plaintiff's main contention in Suit 822 and Suit 114 is that, the Address is not the Defendants' place of residence. Hence, it would be an act of contempt if a deponent of an affidavit misleads the court or is untruthful to the court.

[9] The above assertion is substantiated by two main reasons:

a) An execution proceeding on 24.3.2022, through a writ of seizure and sale, was deemed unenforceable due to the discovery of the Address being in an abandoned and dilapidated state; and

b) This assertion is further supported by a notable decline in the electric bills associated with the Address.

[10] The Plaintiff in his affidavit in support insisted that the Defendants' failure to provide their residential address is in violation of Order 41 rule 1(4) of the ROC 2012.

[11] The Plaintiff added that the use of No.19-1, Jalan Gemilang, Off Jalan Duta, Taman Duta 50480 Kuala Lumpur ("the Taman Duta Address") in Enclosure 37 fortifies his *Ex-Parte* Leave Applications for committal as it shows that the Address is not the Defendants' true residential.

<u>Grounds in opposing the Defendants' Application to Set Aside Ex-parte Leave Order</u>

[12] The Plaintiff's counsels in Suit 822 and Suit 114 argued that the Defendants' application to set aside the Ex-parte Leave Order should be dismissed for, amongst other:

a) The Plaintiff has successfully established beyond reasonable doubt that the Defendants were in contempt of court by giving false address;

b) There was no requirement to serve formal notice to show cause under Order 52 rule 2B of the ROC 2012 as reflected in the judgment of *Tan Poh Lee v. Tan Boon Thien* [2022] 3 MLJ 177;

c) The purported suppressed material facts were not known to the Plaintiff at the time of making the *Ex-Parte* Leave Applications; and

d) The court has found a prima facie case of contempt based on statement and affidavit verifying the statement.

Defendants' Case

Grounds in Support of the Set Aside Applications

[13] The Defendants relied heavily on the judgment in *Folin Brothers Sdn Bhd (in Liquidation) v. Wong Boon Sun & Ors and Another Appeal* [2009] 5 MLJ 362 to support their contention.

[14] Furthermore, the Defendants premised that the Plaintiff has not satisfied the requirement under Order 52 rule 2B of the ROC, that is to serve notice to show cause to the Defendants.

[15] Next, according to the Defendants, there was a material non-disclosure or suppression of facts by the Plaintiff and hence the grant of Leave Orders ought to be set aside by the court.

Grounds in Opposing the *Ex-parte* Leave Orders

[16] The reliefs prayed, for in Application to Set Aside the Leave Orders are, *inter alia*:

(a) the *Ex-Parte* Leave Order to be set aside;

(b) all other interlocutory applications and proceedings pending between the Plaintiff and the First Defendant to be stayed pending the disposal of this application;

(c) that if prayer in paragraph 6(a) above is granted by this Court, consequential Orders that the Ex-Parte Leave Application ought to be struck out; and

(d) that if prayer in paragraph 6(a) above is granted by this Plaintiff pertaining to the issue of the Defendant's residential address be expunged or struck out from the file of this Court.

[17] In short, the Defendants submitted the following grounds in opposing the *Ex-Parte* Leave Application by the Plaintiff:

a) No committal orders should be granted based on affidavit evidence alone;

b) The Plaintiff has failed to prove his case beyond reasonable doubt;

c) The Plaintiff has failed to demonstrate in the Plaintiff's statement on how such failure to provide the allegedly false address would amount to an interference in administration of justice; and

d) The Plaintiff has alternative avenues.

Findings and Decisions of the Court

[18] After perusing the facts adduced by the parties through affidavits and the exhibits, and the submissions by the learned counsels for all parties, I dismiss the Plaintiff's *Ex-parte* Application for Leave for both Suit 822 and Suit 114 as the Plaintiff had failed to prove beyond reasonable doubt that the Defendants are in contempt of court by giving the alleged false address.

[19] This Court rule in favour of the Defendants and granted order in terms of Enclosure 89 and Enclosure 103 (for Suit 822) as well as Enclosure 82 (for Suit 114) with cost. Herein are my reasons.

<u>A.</u> <u>The Law</u>

[20] It is a well-established legal principle that in committal proceedings, the burden of proof falls squarely on the plaintiff, requiring them to establish their case beyond reasonable doubt (See *Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors* [1982] CLJ Rep 203).

[21] The Court of Appeal in *Tan Sri Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060 could not be clearer when Abdul Wahab Patail JCA held as follows:

“[13] It has been held by the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 FC that it is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards before a party is labelled as an alleged contemnor and committal proceedings allowed to be begun against him. ***Firstly, even though it is obtained ex-parte, the law nevertheless required leave to be obtained to commence committal proceedings. Secondly, strict compliance is required. Thirdly, be it a civil or a criminal contempt, the standard of proof required is proof beyond reasonable doubt.*** *”* [Emphasis added]

[22] Applying the above principle to our present case, the court will have to ensure that the leave will only be granted to the Plaintiff to commence committal proceedings, even if obtained *ex-parte*, upon strict compliance with legal procedures. It is trite that both civil and criminal contempt cases demand proof beyond a reasonable doubt as the standard of proof.

[23] I am also guided by the judgment by the Court of Appeal in *Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals* [1995] 4 CLJ 427, where Lamin bin Haji Mohd Yunus PCA emphasizes the standard of proof required in contempt of court proceedings, stating that the proof must meet the level of beyond reasonable doubt, similar to the standard used in criminal cases and that any doubts should be resolved in favour of the person charged with contempt.

[24] Hence, if there is any slight doubt arises, such doubt has to be resolved in favour of the person accused of being in contempt of court, namely the Defendants in our present cases herein.

B. *Ex-parte* Applications

[25] Now, the Plaintiff's premise is mainly on the allegation that the Defendants purportedly furnished a false address in the affidavits, constituting an act of contempt of court.

[26] The Plaintiff's counsel in Suit 114 cited the case of *Datuk Nadraja Ratnam* [2017] CLJU 2263; [2017] 1 LNS 2263 to support the contention that it would be an act of contempt if a deponent of an affidavit misleads the court or is untruthful to the court.

[27] It is apt to note that the Plaintiff relied on the following evidences to prove that the Address in the affidavits is false: firstly, the electricity bills for the Address and secondly the affidavits affirmed by Siew Shyh Shan and Lai Wing Ee.

i) The Electricity Bills

[28] The Plaintiff's counsel asserted that there was a significant drop in the electricity usage at the address since June 2020 which irresistibly points to the conclusion that the Defendants and their families had moved out of the Address and no longer resided there after the transfer of property by the First Defendant to the present owner.

[29] Conversely, the Defendants contended that the electric bills are inadmissible, dismissing them as mere hearsay evidence.

[30] The Plaintiff's reliance in Suit 822 on *Kuruma v. The Queen* [1955] AC 197, *Ramli bin Kechik v. PP* [1986] 2 MLJ 33, and *Hanafi bin Mat Hassan v. PP* [2006] 2 MLJ 134 to bolster the argument that illegally obtained evidence is admissible as long as it is relevant is, in my view, misguided, as these cases involves evidences obtained by the authorities and not by a private person.

[31] The Defendants' counsels aptly directed this Court's attention to the conspicuous absence of any reference to the electricity bills in both the Plaintiff's statement and the Plaintiff's verifying affidavit.

[32] In other words, the electricity bills only surfaced for the first time in

Enclosure 98 (Suit 822) and did not form part of the Statement under Order 52 or the affidavit verifying the contents.

[33] It is crucial to emphasize that the Plaintiff's case should strictly adhere to the confines of the statements stated in his affidavit in support of his applications, and any attempt to introduce additional facts or supplement information through subsequent affidavits is not permissible (See *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458).

[34] The Defendants' counsel mentioned that although Order 41 rule 5(2) of the ROC provides an exception to the rule against hearsay evidence where an affidavit for use in interlocutory proceedings may contain hearsay evidence, this provision did not apply for committal proceeding. The Defendants relied on the case of *Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors (No 2)* [2007] 9 CLJ 400 to support his contention on this point.

[35] The Second Defendant's counsel further averred that without any certification as to the authenticity and accuracy of the electric bills, the Plaintiff cannot place reliance to track down the unknown whistle blower to verify the authenticity of the electric bills. To this I agree and hold that these electric bills are not to be considered.

ii) Affidavits affirmed by Siew Shyh Shan and Lai Wing Ee

[36] The Plaintiff (for both Suit 822 and Suit 114) postulated that the Address was at the material times not the Defendants' residential address as the property had been sold and transferred to its current owner on 11.6.2020. This was further confirmed by the following events:

a) On 24.3.2022, an execution by way of writ of seizure and sale was carried out at the Address in the presence of the Kuala Lumpur Session Court's bailiff, Mr Ahmad Azlan, Mr Siew Shyh Shan and Ms Lai Wing Ee;

b) The execution cannot be levied as the Address was found to be in an abandoned and dilapidated condition without an occupant except for a security guard;

c) Mr Siew Shyh Shan and Ms Lai Wing Ee have each affirmed an affidavit in Kuala Lumpur High Court Companies (Winding up) Petition No. WA-28NCC-885-12/2021, narrating what they witnessed during the execution.

[37] The Defendants refuted this point and asserted that none of these individuals mentioned by the Plaintiff have filed any affidavits in neither Suit 822 nor Suit 114.

[38] I concur entirely with the Defendants' argument that the Plaintiff is barred from relying on the contents of the bailiff's report as the Session Court's bailiff did not affirm any affidavit regarding the report, thereby rendering it inadmissible before this Court. It was simply not before this Court.

[39] As for Suit 114, the Defendants submitted that the Plaintiff's affidavit in support of the *Ex-parte* Leave Applications is inadmissible for it is merely an affidavit based on assumptions or perceptions of the third parties and the allegation set out are not within the Plaintiff's own personal knowledge.

[40] In Suit 114, the Plaintiff relied on the following four (4) affidavits of third parties filed in separate suits:

(a) Exhibit "KWW-5" of the Plaintiff's Affidavit in Support being the Affidavit of Service No.1 affirmed by Koh Chuan Zhan on 24.03.2022 in a separate suit registered as Kuala Lumpur High Court Civil Suit No. WA-23-NCvC-11-02/2022 ("Suit 11");

(b) Exhibit "KWW-6" of the Plaintiff's Affidavit in Support being the Affidavit of Service No. 2 affirmed by Edward Siah Lit Shuen on 24.03.2022 in Suit 11;

(c) Exhibit "KWW-7" of the Plaintiff's Affidavit in Support being the Petitioner's Supplementary Reply (No. 1) affirmed by Siew Shyh Shen on 24.03.2022 in a separate suit registered as Kuala Lumpur High Court Companies (Winding-Up) Petition No. WA-28NCC-885-12/2021; and

(d) Exhibit "KWW-8" of the Plaintiff's Affidavit in Support being the Petitioner's Supplementary Reply (No. 2) affirmed by Lai Wing Ee on 24.03.2022 in Petition 885, altogether referred as ("Third Party Affidavits").

[41] It is pertinent to note that none of the individuals mentioned above filed any affidavits to support the *Ex-Parte* Leave Applications in Enclosure 81 before this Court.

[42] As such, the Defendants' counsel insisted that the Plaintiff has no personal knowledge of the incidents stated in these affidavits, which took place at the Address and such is not in dispute.

[43] In the Court of Appeal case of ***Folin Brothers (supra)*** which was cited by the Defendants, Zaleha Zahari JCA (as Her Lordship then was) held that:

"[33] The affidavits filed in support of the notice of motion relates to matters which took place more than 13 years ago in respect of matters which the deponent clearly had no personal knowledge of as the deponent was not the liquidators of Folin at that material point of time (November 1986). ***The deponent*** **by his own admission relied on information and belief of Wong Sin Fan which was hearsay, which was admittedly based on assumptions and perceptions, which is not evidence."** [Emphasis added]

[44] Based on the above, I could not negate the Defendants' argument and therefore held that the statements are deemed hearsay and inadmissible in court.

iii) *<u>The Plaintiff has not proved beyond reasonable doubt that the False Address, even if true, was intended to misled, obstruct or interfere with the Administration of Justice</u>*

[45] The Defendants submitted that the Plaintiff's statement has failed to disclose how such failure to state their residence address, amounts to an interference in the administration of justice.

[46] It is well established in law that in contempt proceedings, the charge must be fully set out in the statement itself, adequately described and particularised in details (See ***Tan Sri Dato'(Dr) Rozali Ismail (supra)***).

[47] In dealing with the issue of whether a statement made by a contemnor was intended to be false and misleading and whether it was made with actual intention of interfering with due administration of justice, one has to look at the requirement sets out in ***Edmund Ming Kwan (supra)*** where Vincent Ng J had summarized the following:

"[4] On the question whether the statement was intended to be false and misleading (mens rea) and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice, this court would have to: (i) ***firstly, look at the relationship between the alleged false statements and the issues to be decided in the main proceedings*** (see *Keeley v. Brooking* [1979] 25 ALR 45); (ii) secondly, bear in mind that unlike the offence of perjury, ***contempt requires the actual or inevitable intent or consequence of frustrating or obstructing the administration of justice*** (see *Jaginder Singh & Ors v. Attorney-General* [1983] CLJ (Rep) 176 at 179, *Coward v. Stapleton* [1953] 90 CLR 573, *Re Bride, Ex-parte Steward* [1984] WB 455, *R v. Christopher Charles Murfett* [2004] VSC 160 and Halsburys Laws of England, 4th Ed Vol 9(1) pp 242–243); (iii) thirdly, ***be mindful that a 'mere falsity of evidence is not enough to justify a contempt charge'*** (see *Yee Sang Metal*

[2002] HKCU 1255); and, (iv) fourthly, ***be slow to draw inferences from affidavits as to the bona fides or mala fides of the alleged contemnor*** (see in *Re Smith and Fawcett Ltd* [1942] Ch 304)". [Emphasis added]

[48] It is apt to note that the criteria sets out in ***Edmund Ming Kwan (supra)*** was later affirmed in the Court of Appeal case of *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Other Applications* [1994] 3 MLJ 89 where Mohd Ghazali Yusoff JCA held at para [29] : "…We fully adopt the requirements that have to be considered by the court in determining the question as to whether a statement was intended to be false or misleading and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice as summarised by Vincent Ng J in Edmund Ming Kwan".

[49] In the current scenario, the crucial elements of a demonstrated intention by the Defendants to obstruct the course of justice are absent from the Plaintiff's statement. Furthermore, the Plaintiff has not furnished details on how the administration of justice is purportedly affected in both Suit 822 and Suit 114. This alone should be sufficient to allow the Defendants their applications with costs.

[50] I also find the First Defendant's reliance on the judgment in *Tan Boon Lee v. Tan Boon Huat & Ors* [2014] 9 CLJ 717 is assisting, where the alleged act of contempt was also in respect of providing a false address in sworn affidavits. The High Court there dismissed the committal application. I do not see any reason not to concur the same.

Application to Set Aside Leave Order

[51] The Defendants applied and prayed for the court to set aside the *ex-parte* order obtained by the Plaintiff. The reasons are mainly as follows:

a) the Plaintiff has failed to issue notice to show cause to the Defendants, as required in Order 52 rule 2B of the ROC;

b) there was material non-disclosure or suppression of facts by the Plaintiff in obtaining the *ex-parte* order; and

c) the Plaintiff had failed to prove prima facie case for contempt.

i) Notice to show Cause

[52] The Plaintiff contended that there is no requirement to serve a formal show cause notice, in sole reliance upon the Federal Court decision in *Tan Poh Lee v. Tan Boon Thien* [2022] 3 MLJ 177.

[53] However, one must note that the decision in ***Tan Poh Lee (supra)*** should be distinguished on its facts from our present case, for the following reasons. First, it pertained to an alleged violation of a valid court order, the terms of which were well understood by both the litigant and the alleged contemnor. Next, the Federal Court additionally examined that the main focal point of consideration revolves around the failure to adhere strictly to the court's order. Moreover, and the most important of these, the Federal Court determined that Order 52 rule 2B of the ROC should not be interpreted to impose an additional mandatory prerequisite for a pre-notice when the contemnor is already a party to, and fully aware of, a court order made against him or involving him.

[54] Hence, it is clear that the Apex Court in ***Tan Poh Lee (supra)*** was driven by the primary consideration to ensure that the court order must be complied with strict and promptly as explained by Nallini Pathmananthan FCJ:

"[15] We concur with the appellant's submissions that while contempt proceedings may well entail criminal consequences, and that great care must be taken in contempt proceedings, bearing in mind the possible consequences to the liberty of a person, ***such***

***consideration must be balanced against the equally important requirement that court orders must be complied with strictly*.” [Emphasis added]

[55] In contrast to our current situation, there is no claim of any violation of any court order, and consequently, there is no primary consideration of that nature to be considered.

[56] The First Defendant’s counsel referred this Court to the dicta in ***Tan Sri Dato’ (Dr) Rozali Ismail (supra)*** where Arifin Zakaria CJ explained:

“[29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. ***Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance.*** In this regard, Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112 had this to say:

Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.

It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by Taylor v. Roe, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits." [Emphasis added]

[57] Therefore, I am of the opinion that, given the absence of this primary consideration, it is imperative to exercise great care to ensure strict compliance with the safeguards provided by the law.

ii) Material non-disclosure of facts

[58] It bears emphasis that the Leave Order was obtained by the Plaintiff *ex-parte*, thus it means at the time of the application and hearing, the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application (See ***Tan Sri Darshan Singh (supra)***).

[59] In other words, (any fact which is likely to be disputed by the other party), the Plaintiff must state and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial.

[60] In Suit 822, the First Defendant submitted that the following material facts were suppressed or not disclosed by the Plaintiff:

a) In Kuala Lumpur High Court Civil Suit No. WA-22NCC-352-09/2017, the Plaintiff had previously raised similar allegations that the Address was not the Defendants' address, in reliance on the purported unsigned surveillance report, which turn out to be a complete fabrication or false;

b) The Plaintiff failed to disclose nor refer to the First Defendant's Affidavit in Reply No.3 in opposing the Plaintiff's injunction application (Enclosure 4) affirmed on 11.4.2022 ("AIR No.3") which contained material evidence and facts showing that the Address was in fact the First Defendant's place of residence at the material time.

[61] The Defendants in Suit 114 postulated that the following material facts were suppressed and/or not disclosed by the Plaintiff:

a) that the exact same Third Party Affidavits exhibited in the Plaintiff's Affidavit in Support dated 18.04.2022 were affidavits that were already previously exhibited in two separate affidavits filed by the Plaintiff in this very same action, namely they were exhibited in the Plaintiff's affidavit dated 05.04.2022 in support of the Plaintiff's Application to Reject the First Defendant's Affidavit (Enclosure 30) as well as the Plaintiff's affidavit dated 11.04.2022 in reply to the First Defendant's Striking Out Application (Enclosure 34);

b) that the Plaintiff failed to draw to this court's attention that the First Defendant had in fact replied at length vide affidavits towards all of the baseless allegations made in the Third Party Affidavits;

c) that the Plaintiff failed to aver facts on the personal service of originating pleadings in this action was successful at the Address and the First Defendant had personally accepted service of pleadings in this action at the Address from a lawyer from the Plaintiff's solicitors' firm;

d) that the First Defendant had even accepted service of the writ and statement of claim in respect of Suit 11 outside the gate of the Address before the appointed timeslot due to the fact that the representative from the Plaintiff's firm of solicitors had parked outside the gate of the Address on that occasion;

e) that there was never any issue of service of court documents upon the First Defendant in any court proceedings;

f) the Plaintiff's counsel did not during the hearing of the

Plaintiff's Ex-Parte Application for Leave on 29.07.2022 draw to this Court's attention to the further affidavits filed in reply to the Third Party Affidavits and/or the pending Plaintiff's Application to Reject D1's Affidavit which is essentially on the same frivolous ground;

g) that the Plaintiff failed to disclose to the court that Siew Shyh Shen and Lai Wing Ee have been cross-examined on the Address issue in a separate suit, being the Kuala Lumpur High Court Civil Suit No. WA-22NCvC-140-03/2018;

h) that the Plaintiff had failed to bring the attention of this Court to the decision of YA Nadzarin Wok Nordin in *Raub Mining & Development Co. Sdn. Bhd. v. Akay Holdings Sdn. Bhd.* [2022] CLJU 764; [2022] 1 LNS 764 rejecting identical contention raised by the Plaintiff against the First Defendant's father, Dato' Sri Andrew Kam Tai Yeow. His Lordship was of the view that there was insufficient credible evidence to contradict the deponent's denial that the Address stated in the affidavit was not his real address.

[62] The Plaintiff's counsels in Suit 822 and Suit 114 rebutted by stating that, the alleged material facts referred to by the Defendants consists of irrelevant matters which transpired after the filing of the relevant cause papers of the *Ex-Parte* Leave Applications were filed against the Defendants.

[63] Furthermore, the Plaintiff's counsels in Suit 822 and Suit 114 submitted that even if there is non-disclosure of material facts, it is not so severe that even if it was disclosed, the court hearing the *ex-parte* application would not have granted the Leave Order altogether. The Plaintiff cited the case of *Hong Leong Holdings Ltd v. Sunbird Pte Ltd* [1990] 3 MLJ 65 and *Lim Hean Pin v. Thean Seng Co Sdn Bhd* [1992] 2 MLJ 10 to support its contention.

[64] Nevertheless, it is crucial to note that these cases pertain to injunctions and should, therefore, they should be distinguished from the specifics of our present case.

[65] I echo my learned sister, Celestina Stuel Galid J in her judgment of *Perfect Oil Resources (Sabah) Sdn Bhd v. Ladang Sri Harapan (Sabah) Sdn Bhd* [2022] 10 MLJ 422 that it was not for the Plaintiff to contend whether the materials it had disclosed to the court amounted to sufficient disclosure. It is for the court to determine so (See also *Bakmawar Sdn Bhd v. Malayan Banking Bhd* [1992] 1 MLJ 67).

[66] Hence, I fully concur with the Defendants that it is the duty of the Plaintiff in an application for committal to aver all relevant facts regardless the facts are in his favour or detrimental to his application as after all only the Plaintiff has the opportunity to be heard upon in the *ex-parte* application (See *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2019] 4 CLJ 491). This applies to all facts known to him even after the filing of his application. He must put this to the knowledge of the judge by way of additional affidavit.

[67] Therefore, upon careful examination of the facts presented by the Defendants, this Court acknowledge the significance of these details, deeming them crucial as they would potentially impact the Leave Order previously granted by the Court.

iii) Prima Facie Case of Contempt of Court

[68] The Defendants asserted that the Plaintiff had failed to establish a prima facie case of contempt of court due to the insufficient grounds for the leave to be granted.

[69] The Plaintiff in both suits disproved this by arguing that the court has found a prima facie case of contempt based on the statement and affidavits verifying the statement. The Plaintiff further argued that it does not lie within the mouth of the Defendants to challenge such findings at this stage as the proper time for them to raise this issue is at the stage of the hearing proper of the committal application.

[70] The Plaintiff had nonetheless did not cite any legal authority supporting the notion that once the Leave Order has been granted, the Defendants cannot challenge the finding of prima facie contempt through a setting aside application.

[71] In this regard, I find the judgment in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2007] 9 CLJ 784 of great assistance, where Abdul Wahab Patail J (as he then was) held that although the court granting leave to commence committal proceedings is a prima facie finding of contempt, this would not bar the defendant's application to set aside the leave. His Lordship opined that the costs to be incurred by the defendant to defend the committal proceedings may be avoided if the application to set aside the leave is successful such as where the court has been misled into granting the leave.

[72] Reverting to our present case, although the court had granted the Leave Order on the basis that there was prima facie case that the Defendants were in contempt of the court order, there was no finding as yet that they were in fact guilty of contempt.

[73] Besides, I am in full agreement with the Defendants when they postulated that in such contempt application there must be a real risk of interference with the administration of justice and that the allegation of false Address simpliciter is insufficient.

[74] The Plaintiff in Suit 822, on the other hand, relied on the judgment in *Teo Cheng Hua v. Ker Min Choo & Ors* [2015] 5 MLJ 365 and *Murray Hibbert v. Chandra Sri Ram* [1999] 4 MLJ 321 to support that the correct test for contempt in Malaysia is 'if it is likely to interfere with the proper administration of justice'.

[75] The Defendants refuted this and pointed out that the correct test laid in the case of *Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors* [1982] CLJ Rep 203, where Raja Azlan Shah AG L.P held that p.147: "...the real question for the court in this case to decide whether there is contempt, is whether the risk of prejudice to a fair and proper trial of the pending legal proceedings is serious or real or substantial".

[76] The judgment in ***Loot Ting Yee (supra)*** was later adopted by the Apex Court in *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd: Asian International Arbitration Centre (Intervener)* [2019] 6 CLJ 1. In determining whether statements of a proposed contemnor amounted to a scandalising the court, Ramli bin Haji Ali FCJ held that:

"[55] As submitted by the Attorney-General, the test for liability of the offence of scandalising contempt is objective in nature. This is derived from case -law extending from the earliest English common law cases to Malaysian case-law on contempt. ***The test is whether, having regard to the facts and the context of the publication, the impugned statements pose a real risk of undermining public confidence in the administration of justice?*** *"*

[Emphasis added]

[77] Put differently, it is not enough for the Plaintiff to merely demonstrate that the impugned act might interfere with the proper administration of justice. What is necessary is evidence of a tangible risk that it has indeed done so.

[78] Hence, the burden lies on the Plaintiff to establish beyond reasonable doubt that, by submitting the alleged false address in the Affidavits, the Defendants intended to hinder or actually obstruct the administration of justice. Unfortunately, the Plaintiff in both suits had failed to do so.

Conclusion

[79] For both Suits, I hereby allow the Defendants' Applications to Set Aside the Leave Order and dismiss the Plaintiff's Ex-Parte Leave Applications with cost.

Dated: 29 SEPTEMBER 2024

(JOHN LEE KIEN HOW @ MOHD JOHAN LEE)
Judge
High Court Malaya
Kuala Lumpur

Counsel:

For Sivil Suit No.: WA-22NCvC-822-12/2021

For the plaintiff - YC Wong; M/s Y.C. Wong

For the first defendant - Ambiga Sreenevasan & Lim Wei Jit; M/s K.P Lu & Tan

For Sivil Suit No.: WA-23NCvC-114-12/2021

For the plaintiff - Michael Chow, Neoh Kai Sheng, Derek Chong Ching Hsiang & Koh Chuan Zhan; M/s Derek Chong

For the first defendant - Ambiga Sreenevasan & Lim Wei Jit; M/s Justin Faye & Partners

For the second defendant - Low Chi Cheng; M/s Low Aljafri & Associates

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