

**IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF KUALA LUMPUR, MALAYSIA
ORIGINATING SUMMONS NO. WA-24NCC-574-10/2019**

BETWEEN

- 1. RAUB MINING & DEVELOPMENT COMPANY SDN BHD**
- 2. RAUB OIL MILL SDN BHD** ... **PLAINTIFFS**

AND

DATO' SRI ANDREW KAM TAI YEOW ... **DEFENDANT**

GROUNDS OF JUDGMENT

BRIEF SUMMARY OF CASE

Suit 352

[1] On 5/9/2017 the Defendant, Dato' Sri Andrew Kam Tai Yeow ("DSA"), filed a suit against his father, Tan Sri Dato' Kam Woon Wah ("TSK") and 12 other defendants¹ vide KL High Court Civil Suit No.

¹ 13 defendants in Suit 352 are : TSK; Raub Mining & Development Company Sdn Bhd; Raub Oil Mill Sdn Bhd; Wahbunga Realty Sdn Bhd; Yum Sdn Bhd; Berjaya Realty Sdn Bhd; Grandfoods Sdn Bhd; Lead Enterprises Sdn Bhd; Granny's Kitchen Sdn Bhd; United Raub Oil Palms Sdn Bhd; Coastal Realty Sdn Bhd; Ng Pui Kuen; Lee Siew Kin

WA-22NCC-352-09/2017 ("Suit 352"). In that Suit 352, DSA sought for specific performance of an agreement dated 16/1/2017 which he said was entered into between him and his father. DSA contended that the said agreement provides that 50% of TSK's interest in the 1st Plaintiff company belongs to DSA, with DSA having the option to buy out the remaining 50% of TSK's interest in the 1st Plaintiff. DSA further contended that TSK held the said remaining 50% interest on trust for DSA and TSK shall ensure that that remaining 50% shares are not utilised in any manner contrary to DSA's interest.

This OS 574

- [2] Prior to the filing of Suit 352, Resolutions were proposed for shareholders' meeting of the 2nd Plaintiff company on 6/9/2017 to remove DSA as the 2nd Plaintiff's director and to approve the sale of the 2nd Plaintiff's assets (palm oil estate and palm oil mill).

- [3] On 6/9/2017 DSA obtained an ad interim injunction to prevent the defendants named in Suit 352, inter alia, from holding the shareholders' meetings on 6/9/2017 or any shareholders' meeting, from removing DSA as a director and from disposing off the assets of the 2nd Plaintiff.

[4] The Plaintiffs filed the current OS 574 in October 2019 as they pleaded that the injunction obtained by DSA merely prevents DSA's removal as a director but not his retirement. The Plaintiffs contended that DSA was due for retirement as a director by rotation, in respect of the 1st Plaintiff at the 1st Plaintiff's AGM for year 2018, and vis-a-vis the 2nd Plaintiff at the 2nd Plaintiff's AGM for year 2017. But due to the injunction, no AGM could be held by the Plaintiffs. Thus, the Plaintiffs pleaded, DSA is deemed to have retired and vacated his office on the last day of the year when the AGM was to be held respectively by the Plaintiffs. The current OS 574 seek for a declaration as to the status of DSA's directorships with the 1st and 2nd Plaintiffs.

OS 609, OS 642

[5] Aside from the Plaintiffs, three other companies, Lead Enterprises Sdn Bhd ("Lead"), Grandfoods Sdn Bhd ("GSB") and Granny's Kitchen Sdn Bhd ("GKSB") filed OS 609 (Lead) and OS 642 (GSB and GKSB) to similarly seek for declarations as to the status of DSA's directorships in these companies citing almost mirror grounds as in this current OS.

OS 577, OS 579

[6] In May and October 2019 DSA had demanded for access to the accounts and other confidential information of the Plaintiffs. The Plaintiffs refused to allow such demands on ground, among others, that he is deemed to have ceased being a director by reason of his retirement. On 30/10/2019 DSA filed OS 577 (against the 1st Plaintiff) and OS 579 (against the 2nd Plaintiff) to inspect their respective accounts and records.

THE APPLICATION

[7] This Court had given directions on the filing of affidavits by the parties in respect of this OS. The last affidavit was filed by the Plaintiffs on 19/12/2019. In the meantime, two interlocutory applications for recusal and transfer have been heard and decided.

[8] Vide enclosure 47 in this OS574, DSA filed an application pursuant to O. 92 r. 4, O. 28 r. 3C and O. 3 r. 5 of the Rules of Court 2012 ("ROC") for this Court to grant leave for him to file his Supplementary

Affidavit affirmed on 7/8/2020 (enclosure 48) and for that Affidavit to be ruled as valid, based on the following grounds:

- (i) DSA had recently discovered fresh evidence in the form of various tax documents that are relevant and necessary for the just disposal of this OS 574;
- (ii) these fresh evidence could not have been discovered earlier by DSA as the tax documents were not circulated to him prior to their submissions to the relevant Government authorities;
- (iii) these fresh evidence showed that the parties whom had acted on behalf of the Plaintiffs have admitted to the relevant Government authorities that DSA is a director of the Plaintiffs;
- (iv) these fresh evidence also shows further mismanagement of the finances of the Plaintiffs.

(See paragraphs 7-10 of the Affidavit in Support (enclosure 49) and paragraphs 6-8 of the intended Supplementary Affidavit (enclosure 48).

[9] DSA had filed for mirrored applications in OS 577 (enclosure 45), OS 579 (enclosure 47), OS 609 (enclosure 82) and OS 642 (enclosure 48). The learned Counsels of all parties had agreed that

due to the similarities of all five (5) applications and the prayers sought, this Court shall refer to the cause papers and the arguments and submissions of parties for the current application in enclosure 47 to OS574 and shall apply the same to all these other applications. It follows that my decision for the current application applied, mutatis mutandis, to the other applications.

[10] Due to this reason, this Grounds of Judgment shall apply equally to all the current appeals before Your Lordships.

THE FRESH EVIDENCE THAT SOUGHT TO BE ALLOWED

[11] The fresh evidence that DSA had referred to in his applications comprised the following twenty (20) documents:

11.1 Fresh evidence pertaining to the 1st Plaintiff Raub Mining & Development Company Sdn Bhd (“RMDC”)

- (i) “Borang Nyata Syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967” Income Tax Computation Year of Assessment 2018;
- (ii) Income Tax Computation Year of Assessment 2018;

- (iii) "Borang Nyata Syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2019;
- (iv) Income Tax Computation Year of Assessment 2019;
- (v) "Rumusan Pendapatan Berkanun Perniagaan dan Perkongsian" for the Income Tax Computation Year of Assessment of 2019;
- (vi) Letter by RMDC to Mazars Taxation Services Sdn Bhd dated 27/9/2019; and
- (vii) Letter by RMDC to Mazars Taxation Services Sdn Bhd dated 28/2/2020.

11.2 Fresh evidence pertaining to the 2nd Plaintiff Raub Oil Mill Sdn Bhd ("ROM")

- (i) "Borang Nyata Syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2015;
- (ii) Income Tax Computation Year of Assessment 2015;
- (iii) "Borang Nyata Syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2016;

- (iv) Income Tax Computation Year of Assessment 2016;
- (v) "Borang Nyata Syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2017;
- (vi) Income Tax Computation Year of Assessment 2017;
- (vii) "Borang Nyata Syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2018;
- (viii) Income Tax Computation Year of Assessment 2018;
- (ix) "Borang Nyata Syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2019;
- (x) Income Tax Computation Year of Assessment 2019;
- (xi) "Rumusan Pendapatan Berkanun Perniagaan dan Perkongsian" for the Income Tax Computation Year of Assessment of 2019;
- (xii) Letter by ROM to Mazars Taxation Services Sdn Bhd dated 26/9/2019; and
- (xiii) Letter by ROM to Mazars Taxation Services Sdn Bhd dated 28/2/2020.

ARGUMENTS OF PARTIES

[12] It is the Defendant's submission that as the parties whom had acted on behalf of the Plaintiffs had knowledge of the contents of the tax documents, which were created, procured and instructed to be so prepared by them, there will be no prejudice to the Plaintiffs if the application is allowed by this Court. On the contrary, the Defendant would suffer prejudice if this application is disallowed as these documents are highly relevant and necessary for the determination of the issues in this OS. Relying on *Lim Seak Huat v Malayan United Realty Sdn Bhd [1997] 5 CLJ 336*, and a decision of the *Irish High Court in Irish Bank Corporation Ltd (in special liquidation) v Gaw [2019] IEHC 476*, the learned counsel for the Defendant submitted that this Court a fortiori, enjoys an inherent jurisdiction "to fulfill itself as a court of law, to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner."

[13] On the Plaintiffs main objection to the application on ground that those fresh evidence are statutorily prohibited to be produced as evidence in Court pursuant to s.138 of the Income Tax Act 1967 ("ITA"), the Defendant's counsel argued that s. 138 will only operate

against the Defendant if he comes within the definition of “classified person” as defined under s. 138(5) ITA. Even if s. 138(2) applies against the Defendant, it was argued that the exception therein would apply in favour of the Defendant as the Defendant himself could provide the authority pursuant to paragraph 139(1)(b) of ITA which is to be read to mean that the Defendant is “ ... to be taken to have control of ... the Plaintiffs as he ... possesses or is entitled to acquire ... the greater part of the issued share capital of ... the Plaintiffs”.

- [14] Relying on the decision of Richard Malanjum J (as His Lordship then was) in ***Sharif Bungsu B Sharif Zen & Anor v PP [1999] MLJU 645***, where His Lordship held:

“In any event I do not think it is the business of the Appellants to complain on the tendering of this documents whilst relying on the specific provisions in the Income Tax Act 967 as in my view such provision is intended for the benefit of the tax payer, probably for confidentiality reason, and not to be utilized by anyone as an obstacle to benefit him. Moreover, it is trite law that a piece of evidence is admissible so long as it is relevant to the fact in issue and it is admitted regardless of the manner of its procurement...”

the Defendant’s counsel submitted further that the fresh evidence shall be allowed by this Court and are admissible as they are

relevant to issues raised by the Plaintiffs in their OS against the Defendant.

[15] The Plaintiffs' opposition to the application premised on three grounds. The 1st being the application was premised on wrong provision and ground as it should have been for an extension of time. The learned counsel for the Plaintiffs, however, conceded that this Court is empowered to allow the Plaintiffs an extension of time.

[16] The 2nd and 3rd grounds of objections comprised the Plaintiffs' main grounds of objection to the application. The Plaintiffs submitted that the application cannot be allowed as these documents fall within the definition of "classified materials" under the ITA and by virtue of subsection 138(2) of ITA, this Court is statutorily prohibited from allowing the Defendant to use the said tax documents in evidence in this Court. Relying on the Court of Appeal decisions in ***Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389*** and ***Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat [2004] 1 MLJ 525***, the Plaintiffs' counsel submitted that the language used in s. 138(2) ITA is imperative and the prohibition is mandatory. Thus, the said statutory provision absolutely excluded any exercise of judicial

power to admit the tax documents, unless the Defendant is said to fall under any of the statutory exceptions.

[17] Subsection 138(2) ITA provides that the classified material can only be produced in court or otherwise only under the following circumstances:

“(a) for the purposes of this Act or another tax law;

(b) in order to institute or assist in the course of a prosecution for any offence committed in relation to tax or in relation to any tax or duty imposed by another tax law; or

(c) with the written authority of the Minister or of the person or partnership to whose affairs it relates.”

[18] The counsel for the Plaintiffs submitted that the Defendant may fall within the exception in paragraph (c) if he obtains a written authority “of the person of partnership to whose affairs it relates.” The fact that the Plaintiffs – whose affairs the said income tax documents relate – are opposing the Defendant’s application is submitted as self-evident that no such authority has been or will be given.

[19] As the Defendant does not fall under any of those exceptions, he cannot be allowed to use the classified materials in any circumstances.

[20] The counsel for the Plaintiffs submitted further that even if the application is deemed by this Court as not prohibited by s. 138 ITA, that evidence cannot be allowed in as they constitute hearsay evidence. It was argued that the said tax documents are, at best, in the same nature of a balance sheet, which has been held by the Supreme Court in ***KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627*** :

“ ... a balance sheet does not by itself prove the facts stated therein ... All that the balance sheet, as submitted, shows is that certain statements were made. The mere fact that the statements were made can never be taken as proving that the statements were correct. ... The burden is on the party who asserts a statement to be correct to prove the same by relevant and acceptable evidence.”

[21] The intended Supplementary Affidavit is for the purposes of the Defendant's argument against the Plaintiffs' in the main OS application. Thus, such hearsay probative value of evidence purports to be introduced by the Defendant - even if this Court rule

to not fall within the ambit of s. 138(2) of the ITA - cannot be allowed as such evidence is not allowed under O. 41 r. 5 ROC.

FINDING

Fresh evidence disallowed

[22] It is my finding that the crux of the decision should focus on whether or not all the twenty documents as enumerated in paragraphs 11.1 and 11.2 above fall within s. 138(2) of ITA. If the answer is in the affirmative, then this Court would not allow the Defendant's application to use and refer to those documents for purposes of the hearing of the Plaintiffs' substantive OS application. Further, it is my finding that if the answer is the affirmative, it would not be necessary for this Court to decide on the Plaintiffs' argument that the fresh evidence cannot be allowed for its probative value being hearsay.

[23] For ease of reference I shall regurgitate s. 138 ITA in full as follows:

- "(1) Subject to this section, every classified person shall regard and deal with classified material as confidential; and, if he is an official, he shall make and subscribe before the prescribed authority a declaration in the prescribed form that he will do so.*
- (2) No classified material shall be produced or used in court or otherwise except -*

- (a) *for the purposes of this Act or another tax law;*
 - (b) *in order to institute or assist in the course of a prosecution for any offence committed in relation to tax or in relation to any tax or duty imposed by another tax law; or*
 - (c) *with the written authority of the Minister or of the person or partnership to whose affairs it relates.*
- (3) *No official shall be required by any court -*
 - (a) *to produce or disclose classified material which has been supplied to him or another official otherwise than by or on behalf of the person or partnership to whose affairs it relates; or*
 - (b) *to identify the person who supplied that material.*
- (4) *Nothing in this section shall prevent -*
 - (a) *the production or disclosure of classified material to the Auditor-General (or to public officers under his direction and control) or the use of classified material by the Auditor-General, to such an extent as is necessary or expedient for the proper exercise of the functions of his office;*
 - (b) *the Director General from publicising, from time to time in any manner as he may deem fit, the following particulars in respect of a person who has been found guilty or, convicted of any offence under this Act or dealt with under subsection 113(2) or section 124 -*
 - (i) *the name, address and occupation or other description of the person;*
 - (ii) *such particulars of the offence or evasion as the Director General may think fit;*
 - (iii) *the year or years of assessment to which the offence or evasion relates;*
 - (iv) *the amount of the income not disclosed;*
 - (v) *the aggregate of the amount of the tax evaded and penalty (if any) charged or imposed;*
 - (vi) *the sentence imposed or other order made:*

Provided that the Director General may refrain from publicising any particulars of any person to whom this paragraph applies if the Director General is satisfied that, before any investigation or inquiry

has been commenced in respect of any offence or evasion falling under section 113 or 114, that person has voluntarily disclosed to the Director General or to any authorized officer complete information and full particulars relating to such offence or evasion.

(5) *In this section -*

"another tax law" means any Ordinance wholly repealed by this Act, any written law relating to estate duty, film hire duty, payroll tax or turnover tax and any other written law declared by the Minister by statutory order to be another tax law for the purposes of this section;

"classified material" means any return or other document made for the purposes of this Act and relating to the income of any person or partnership and any information or other matter or thing which comes to the notice of a classified person in his capacity as such;

"classified person" means -

(a) an official;

(b) the Auditor-General and public officers under his direction and control;

(c) any person advising or acting for a person who is or may be chargeable to tax, and any employee of a person so acting or advising if he is an employee who in his capacity as such has access to classified material; or

(d) any employee of the Inland Revenue Board of Malaysia;

"official" means a person having an official duty under or employed in carrying out the provisions of this Act."

[24] Subsection 138(2) unequivocally provides that when an income tax return or document falls within the definition of "classified material", such material is prohibited from being produced or used in court or otherwise, except if it falls within any of the exceptions enumerated in paragraphs 138(2)(a)(b) or (c) therein.

[25] The exceptions under paragraphs (a) and (b) squarely cannot apply to the Defendant. I agree with the counsel for the Plaintiffs that the Defendant may fall within the exception in paragraph (c) only if he could show proof that he had obtained the Plaintiffs' written authority to use those fresh evidence in court. The fact that the Plaintiffs – whose affairs the said income tax documents relate – are opposing the Defendant's application is self-evident that no such authority has been or will be given.

[26] As the Defendant does not fall under any of those exceptions, it is my finding that this Court is statutorily prohibited by subsection 138(2) ITA to allow the impugned documents or fresh evidence to be used in court. Such statutory prohibition further frustrates the Defendant counsel's call for this Court to invoke its inherent jurisdiction. On the contrary, it is based on the very reason that this Court shall fulfill itself as a court of law, to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner, that it cannot transgress statutory provision, such as the mandatory prohibition envisaged by s. 138 ITA.

[27] On the same note, this Court cannot agree with the submission of the Defendant's counsel that subsection 138(2) ITA does not apply against the Defendant as he is not a "classified person" as defined under s. 138(5) ITA. Such a reading is, at best, blurring and confusing and does not reflect the actual intent of the legislation.

[28] It is my finding that the Defendant's counsel's reliance on the decision of Richard Malanjum J (as His Lordship then was) in ***Sharif Bungsu B Sharif Zen & Anor v PP [1999] MLJU 645***, was misplaced. There, His Lordship was considering the the evidence of the witness in respect of an income tax return of one Yaw Soon Wah when he was conducting the business of distribution of newspapers and stationary. His Lordship ruled that as Yaw Soon Wah's business has since been taken over by PW5, the man behind the said business is PW5 upon which the said tax returns were submitted. PW5 gave evidence on the said tax returns which were never objected by the appellant at the trial. Those tax returns were therefore allowed as the requirements of s. 138(2) of the ITA had been ruled as having complied with. The same facts did not occur here and thus the decision cannot apply.

[29] Based on the above considerations, it is my finding that the documents which comprise the Plaintiffs' income tax returns pursuant to s. 77A for various years of assessment and summary of income of the Plaintiffs' business and partnership for various years (exhibits DSA-16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 to the Defendant's Supplementary Affidavit), as enumerated in paragraphs 11.1(i)-(v) and 11.2(i)-(xi) above, are documents that were made for the purposes of the ITA and relating to the income of the Plaintiffs, and they contain information which had come to the notice of official of the Inland Revenue Board and the Plaintiffs' tax agent, whom are both defined as "classified person" under s. 138 (5). These documents fell within the definition of "classified materials" as defined under s. 138(5) of the ITA and therefore shall not be allowed to be adduced in evidence before this Court and shall be expunged in its entirety.

Fresh evidence allowed

[30] That does not in any way mean that this Court cannot allow the Plaintiffs application *in limine*. I am in agreement with the learned counsel for the Defendants that this Court has the discretion to allow an extension of time for the Defendant's late filing of the

Supplementary Affidavit, pursuant to Item 8 of the Schedule to the Courts of Judicature Act 1964 and the relevant provisions of the ROC 2012. Granted, that discretion cannot be exercised arbitrarily. I would need to satisfy myself that the delay was justified, not purely looking at the mathematical duration of the period of the delay; and whether the delay had caused any prejudice to the Plaintiff, and whether there are exceptional circumstances to warrant dismissing the application for extension of time : (See *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuoso & Ors* [1995] 1 LNS 331, [1997] 1 MLJ 453, *The Tokai Maru* [1998] 2 SLR (R) 646; *Courts Mammoth Bhd v Subramaniam a/l Paramasivam* [2007] 4 MLJ 544).

- [31] Applying my inherent powers under O. 92 r. 4 of the ROC 2012, this Court regards the Defendant's application as an application for an extension of time to file the Supplementary Affidavit, and this Court granted leave and allow the Defendant's Supplementary Affidavit in enclosure 48, subject to my finding in rejecting the documents prohibited by s. 138 of the ITA.

[32] It is my finding further that as the following documents-

- (a) letter by RMDC to Mazars Taxation Services Sdn Bhd dated 27/9/2019;
- (b) letter by RMDC to Mazars Taxation Services Sdn Bhd dated 28/2/2020;
- (c) letter by ROM to Mazars Taxation Services Sdn Bhd dated 26/9/2019; and
- (d) letter by ROM to Mazars Taxation Services Sdn Bhd dated 28/2/2020,

do not fall within the meaning of “classified materials” under s. 138 ITA, these documents are allowed to be adduced in evidence by the Defendant as they do not fall within the prohibition of s. 138 of the ITA.

Dated: 21 January 2021



(MOHD RADZI BIN HARUN)

Judge

High Court (Commercial Division (Intellectual Property))

Kuala Lumpur

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