Dato' Seri Yong Tu Sang & Ors v Dato Chang Jong Yu & Ors [2024] MLJU 1143

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

SUZANA MUHAMAD SAID JC

GUAMAN SIVIL NO WA-22NCVC-166-03/2019

29 May 2024

(David Gurupatham and Koay) for the plaintiffs.
(Kee Sern, Siu & Huey) for the defendants.

Suzana Muhamad Said JC:

GROUNDS OF JUDGEMENT

(ENCLOSURE 239)
INTRODUCTION

[1] This is an application by Dato' Low Wan Cheong (**Applicant**) to set aside the Plaintiffs' Subpoena to Testify and Produce Documents dated 22.11.2023 (**Enclosure 221**) against the Applicant (**Enclosure 239**).
CAUSE PAPERS

[2] The relevant cause papers are-

Cause Papers	**Enclosure**
Writ of Summons (21.3.2019)	1
Amended Statement of Claim (5 .12.2019)	26
Issues to be Tried (2.7.2021)	123
Plaintiffs' Amended List of W itnesses (30.8.2023)	203
Praecipe for Subpoena (22.11.2023)	216
Subpoena to Testify and Produce Documents (22.11.2023)	216
Notice of Application to set aside enclosure 221 (8.12.2023)	239
Affidavit in Support affirmed by the Applicant (22.12.2023)	246
Affidavit in Reply by the Applicant (21. 1.2024)	250

[3] At the time of the hearing of Enclosure 239, there was no affidavit in reply, filed in this Court, by the Plaintiffs.
BRIEF FACTS

[4] The Plaintiffs sought in Enclosure 221 for the Applicant to produce the following:

(a) Declaration and/or documents relating to the Applicant's appointment as the architect to the subsidiaries of the 2nd Plaintiff;

(b) Declaration and/or documents relating to the Applicant's appointment as the architect of Top 2 Global;

(c) Letters informing the Board of Architects Malaysia in respect of the developments of relevant parties;

(d) All final accounts that were duly completed between Top 2 Global and all related contractors;

(e) Architect certificates relating to projects for work done that were issued by the Applicant to Top 2 Global's developer;

(f) Work certificates for the works that have been completed perfectly and defect liability that is fully complied with for the purpose of issuing the remaining 2.5% after 2 years of defect liability period;

(g) All work certificates for works that have been completed for subsidiaries of the 2nd Plaintiff for work done in the years 2006 to 2009;

(h) Confirmation of the works carried out for Pioneertech Sdn Bhd and Pioneercrete Sdn Bhd together with pictures that prove the works carried out have been completed; and

(i) All progress reports and site photographs as evidence of work done during each production notice.

(Documents)

[5] The Applicant in Enclosure 239 contended that the Documents—

(a) have not been specifically identified and are very wide in nature. It was not clear of what were the exact projects

(b) Some of the Documents relate to work that may have been done from 2006 to 2009 – this is more than 18 years ago. It is unreasonable to expect the Applicant to keep any sort of records from almost 2 decades ago;

(c) Top 2 Global, Pioneertech Sdn Bhd and Pioneercrete Sdn Bhd are not even parties to the present suit but yet the Plaintiffs are seeking for documents relating to such companies;

(d) The Documents sought to be produced have no relevance to the issues for determination as set out in the Statement of Issues to be Tried in Enclosure 123;

(e) The Applicant is not a material witness that can give evidence regarding a "fact in issue" or "relevant fact" in respect of any issues set out in the Statement of Issues to be Tried;

(f) The Plaintiffs seeks the Documents more than 2 years since this suit was filed and after 11 days of trial have taken place. No explanation has been provided for the long delay; and

(g) The Kuala Terengganu High Court Civil Suit No. TA-22NCvC-31- 11/2022 (***KTHC Suit No. 31***) against the Applicant is pending and it appears that the Plaintiffs (some of whom are the Plaintiffs in KTHC Suit No. 31) are attempting to do a backdoor discovery via this suit instead of applying for discovery in KTHC Suit No. 31. This is clearly a fishing expedition and amounts to an abuse of process.

[6] The Applicant further contended that the Plaintiffs' conduct is tainted with *mala fide* as Enclosure 221 was served on the Applicant less than fourteen (14) days prior to the trial date of 11.12.2023 which was in breach of Order 38 Rule 23 of the Rules of Court 2012 (**ROC 2012**).

[7] It was not disputed that the 1st, 2nd, 3rd, 4th, 5th, and 7th Plaintiffs in this Suit had also sued the Applicant in other proceedings which are pending before those courts. There are-

(a) Kuala Terengganu High Court Civil Suit No.: TA-22NCvC-31-11/2022 (KTHC Suit No. 31)

[8] KT Suit No.31 was first registered at the Kuala Lumpur High Court Civil Suit No.: WA-22NCvC-224-04/2022 but was later transferred to Kuala Terengganu High Court by an Order dated 13.9.2022.

[9] The cause of action against the Applicant in the KTHC Suit No.31 are-

(a) breach of fiduciary duties;

(b) abuse of power;

(c) fraudulent misrepresentation; and

(d) conspiracy to defraud and/or fraud.

(b) Kuala Lumpur High Court Civil Suit No.: WA-22NCvC- 356-06/2022 (KLHC Suit No. 356)

[10] On 27.6.2022, while the KTHC Suit No.31 was ongoing, the 2nd Plaintiff in this Suit No. 166, Kuala Ibai Development Sdn. Bhd. filed KLHC Suit No. 356 against the Applicant.

[11] The pleaded cause of action against the Applicant in the KLHC Suit No. 356 was for conspiracy to defraud.

[12] On 27.10.2022, the Applicant filed an application to strike out the KLHC Suit No. 356 on the ground that the KLHC Suit No. 356 was a duplicity and/or multiplicity of the KTHC Suit No.31.

[13] On 1.6.2023, the Kuala Lumpur High Court struck out the KLHC Suit No.356 with costs.

[14] The 2nd Plaintiff has since filed an appeal to the Court of Appeal against the striking out of the KLHC Suit No.356 and the appeal is fixed for hearing on 25.9.2024.

FINDINGS AND ANALYSIS

[15] When issuing a subpoena, the onus is on the party who issued the subpoena, to show the materiality of a witness (*Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679; [1993] 1 MLRA 519).

[16] In this context, the witness that has been issued the subpoena must clearly be a person that could give significant evidence that would contribute to proving a fact that is of consequence to the trial.

[17] In ***Wong Sin Chong*** (*supra*), the Supreme Court held-

> *"**(2)** In both criminal and civil cases, the onus was on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighed any oppression that may be caused to the party objecting…*
>
> ***(3)** The trial judge had stated the correct principles in particular the need for the party issuing and serving the subpoena to show to the court in what way the person served with the subpoena could give any relevant evidence. …"*

[18] In addition, the case of *World Grand Dynamic Marketing Sdn Bhd v. FJVAA Spa Sdn Bhd & Ors* [2016] MLRHU 990; [2016] MLJU 902, deliberated on the instances where a subpoena may be set aside-

> *"**[14]** As to how the Court may exercise its inherent jurisdiction or inherent power under* O 92 r 4 RC *to set aside a subpoena, I refer to the following appellate cases (in chronological order):*
>
> > *(1) according to Ismail, at p. 111 and 112:-*
> >
> > *"In three well-known instances the court has set aside a subpoena as an abuse of its process. In R Hurle-Hobbs [1945] KB 165 the court had no power to issue it. Steel Savory 8 TLR 94 was a case of oppression. In R Baines 25 TLR 79 the witness could give no relevant evidence. It is plain that these decisions do not enumerate all the cases which fall under this head. Each case must in the last analysis depend on the evaluation of its own facts. The short question which this court has to enquire is whether its process issued against the appellants has been abused. ...*
> >
> > *...*
> >
> > *For the above reasons it is difficult to see in what way the appellants can give relevant evidence to assist the defence. In the particular circumstances of this particular case the court has a right to protect them from the practice and process of this court being used simply for a matter that is misconceived and not for the purposes of justice."*
> >
> > *…;*
> >
> > *(2) it was held in Wong Sin Chong, at p. 686, 687 and 690, as follows:-*
> >
> > > *"The right of a party to the attendance of witnesses is a crucial part of our judicial system, but the right must be*

protected against any oppression or abuse. Thus in Raymond v. Tapson [(1883) 22 Ch D 430](), *it was held that any party may, without leave of the court, issue a subpoena for the examination of a witness at any stage of an action; but the court will exercise a control over the privilege to prevent it being oppressively used. In that case, the plaintiffs had subpoenaed a solicitor, who had acted for both parties in a mortgage transaction, in order to examine him with respect to the moneys received by him on account of both parties. The court held that the plaintiff was entitled to issue the subpoena and to examine the witness. But, where no useful result would be obtained by the attendance of a witness, the subpoena should be refused - see Re Mundell, Fenton v. Cumberlege* (1883) 52 LJ Ch 756*.*

...

In every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting.

...

Further, there is no explanation for the delay in the issue of the subpoena, notwithstanding the notice given earlier, and having regard to its timing, there could be no doubt, on balance, that it was an oppressive subpoena, with a mala fide motive of depriving the Wongs of the services of Dato' Wrigglesworth in the middle of the hearing. In the circumstances, the subpoena was an abuse of process and as such the court had a duty to set it aside. In addition, the failure of the subpoena to identify the documents to be produced, particularly after consent was withheld by Mr Bhagwan Singh to the inclusion of all relevant documents in the agreed bundle of documents notwithstanding the agreement already given by the second respondent to such inclusion, did not assist Mr Bhagwan Singh at all on the issue of bona fide."

(4) in the Court of Appeal case of ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2014] 1 MLRA 275; [*[2013] 3 MLJ 35*](); [2013] 3 AMR 8***, at sub- paras 7(c) to (e), Hamid Sultan J (as he then was) decided as follows:-***

"7(c) the law in respect of setting aside of subpoena is well settled. Any witness who has seen the facts or who knows the facts can be compelled to assist the court and should assist the court by giving evidence unless the exception applies. In Harmony Shipping Co SA v. Davis and Others [1979] 3 All ER 177*, the English Court of Appeal asserted that aside from issues of oppression the subpoena must be obeyed. The court stated:*

> *That principle is established in the case of a witness of fact: for the plain, simple reason that the primary duty of the court is to ascertain the truth by the best evidence available. Any witness who has seen the facts or who knows the facts can be compelled to assist the court by giving that evidence ...*

In this particular case Mr Davis has been subpoenaed by the defendants. It seems to me that that is very right and proper. It was suggested that the subpoena should be set aside. As far as I know, no subpoena ad testificandum has ever been set aside except at the instance of the witness himself when he has claimed that it would be oppressive to make him answer that subpoena. Otherwise a subpoena ad testificandum must be obeyed by the witness. He must come to the court and be ready to give his evidence and answer such questions as the judge permits to be answered.

We must say here that the above case and many other cases in this area of jurisprudence cannot be taken as the authority to compel persons who have no nexus to the case or where their evidence will not be relevant or admissible to give evidence readily for the purpose of assisting the litigants (as opposed to assisting the court to arrive at the truth) that too to arrive at the quantum. The test to compel is a strict test. The witnesses who can be compelled are those 'who have seen the facts or who know the facts' and this will usually relate to liability and rarely to quantum. Such strictures may not be applicable if the witness voluntarily gives evidence on the issue of liability or quantum;

[19] The Plaintiffs contended that the involvement of Top 2 Global as stated in the pleadings is sufficient to substantiate and clarify the issues involving Top 2 Global by the Applicant as the architect of Top 2 Global. The Plaintiffs also contended that the Applicant could provide material evidence as the Plaintiffs do not have access to the Documents as the First Defendant has taken all the Documents.

[20] This Court is not convinced with the reasons given by the Plaintiffs. The Applicant is not a party to this Suit and neither is Top 2 Global Sdn. Bhd. Thus, the Plaintiffs have failed to show the materiality of the Applicant to give evidence in this Suit.

[21] Besides, the case of *Dea Ai Eng (P) v. Dr Wong Seak Shoon & Anor* [2006] 4 MLRH 10; [2007] 2 MLJ 357, held-

> "***[12]*** *In respect of the present application of the first defendant, it must be made clear at the outset, the court has an inherent jurisdiction to set aside a subpoena which is issued on the basis of improper motive or to prevent an abuse of process or for the purpose of 'fishing' for evidence or is speculative or oppressive in nature. (see Pit Stop Auto Accessories v. Tan Kock Stang; Minister of Communications* [1974] 1 MLRH 91; ; [1974] 2 MLJ 79, *Ismail v. Hasnul, Abdul Ghafar v. Hasnul* [1967] 1 MLRA 391; ; [1968] 1 MLJ 108, *Raymond v. Tapson* [1882] 22 Ch D 430*.) ...*
>
> *...*
>
> ***[13]*** *The general principles applicable to subpoenas duces tecum are as follows: (see Re Global Info Ltd* [1999] 1 BCLC 74 *and Ismail v. Hasnul, Abdul Ghafar v. Hasnul* [1967] 1 MLRA 391;; [1968] 1 MLJ 108*.)*
>
> (1) *the documents must be specifically identified; (see Lee v. Angas* [1866] LR 2 Eq 59 *at p. 63, Wakefield v. Outhwaite* [1990] 2 Lloyd's Rep 157 *at p. 160)*
>
> (2) *A subpoena may not be used as an instrument to obtain discovery; (see The Lorenzo Halcoussi* [1988] 1 Lloyd's Rep 180 at p. 184 *Macmillan Inc v. Bishopsgate Investment Trust plc* [1993] 4 All ER 998 *at p. 1005)*
>
> (3) *A subpoena must not be of a 'fishing or speculative' nature (see The Lorenzo Halcoussi* [1988] 1 Llyod's Rep. 180 at p. 184*, and Re Asbeston Insurance* [1985] 1 WLR 331 *at p. 338A.)*
>
> (4) *Production must be necessary for the fair disposal of the action or to save costs; (see Marcel v. Comm. of Police of the Metropolis* [1992] 1 All ER 72 *at p. 82-83)*
>
> (5) *Confidentiality; (see Morgan v. Morgan* [1977] 2 All ER 515*)*
>
> (6) *Variation of a subpoena; (see Wakefield v. Outhwaite* [1990] 2 Lloyd's Rep 157 *at p. 165 and The Lorenzo Halcoussi* [1988] 1 Lloyd's Rep 180 *at p. 185)*
>
> *(Emphasis Added)*

[22] Furthermore, from the facts, it was obvious that Enclosure 221 was only filed by the Plaintiffs, after eleven (11) days of trials.

[23] This Court opines that parties cannot simply file documents in Court as they please and at their convenience, particularly when trial has already commenced. Order 34 of the ROC 2012 explicitly provides what is required for the purpose of just, expeditious and economical disposal of proceedings, which parties must strictly comply with. Otherwise, this Court may make such order under Order 34, rule 1 of the ROC 2012, as the Court deems fit.

[24] Accordingly, Order 34, rule (1)(3) of the Rules of Court 2012 states—

> *(3) Where any party fails to comply with any order made or direction given by the Court under paragraph (1), the Court may dismiss the action, strike out the defence or counterclaim or make such other order as it thinks fit.*

[25] Furthermore, this Court finds that the Plaintiffs' contention that the delay in filing Enclosure 221 was because of the new findings of which the Plaintiffs have only limited access earlier, is not justified as the explanation given was insufficient. The Court will not condone unnecessary delay that would be prejudicial and oppressive to the other party. Thus, the reason given by the Plaintiffs for the delay, is unacceptable and not justified.

[26] This Court also observed that the last-minute attempt by the Plaintiffs in regards to Enclosure 221 is inappropriate and clearly oppressive to the applicant as it was a short notice for the Applicant to produce the Documents, if, in existence (*ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 3 MLJ 35).

[27] Hence, pursuant to the Court's inherent jurisdiction and power under Order 92 rule 4 of ROC 2012, this Court allows Encl 239 and set aside the subpoena issued to the Applicant.

End of Document