IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
DIVORCE PETITION NO: WA-33-203-04/2021

Dalam perkara seksyen-seksyen 53 dan
54(1)(b) Akta Membaharui Undang-Undang
(Perkahwinan dan Perceraian) 1976

BETWEEN

AU YONG KIN CHOY **…PETITIONER**

AND

CHOW AYI LIAN **…RESPONDENT**

GROUNDS OF JUDGMENT

Introduction

[1] This was a divorce petition filed by the Petitioner husband who had sought, among other things, the dissolution of the marriage and an equal division of four properties purchased during the marriage. In response, the Respondent wife filed a cross-petition. Although she had not contested the divorce itself, she claimed for three of the properties to be declared hers solely, sought the recovery of rentals, and claimed compensation for the alleged theft of furniture by the Petitioner.

The factual background

[2] The Petitioner and Respondent (collectively, "the Parties"), aged 62 and 58 respectively at the time of the hearing, registered their marriage in December 1992. There are two children of the marriage, aged 28 and 25 years ("the Children") at the time of the hearing.

[3] The marriage deteriorated over time and in April 2021, the Petitioner filed a divorce petition ("the Divorce Petition") and the Respondent responded and cross-petitioned in May 2021 ("the Cross-Petition").

The Issues

[4] The primary contention revolved around the division of four properties, as asserted by the Petitioner, contrary to the Respondent's stance, who sought a declaration deeming three of such properties as non-matrimonial assets.

[5] The subsequent issues arose regarding the Respondent's claims were as follows: firstly, the entitlement to rental income purportedly collected

by the Petitioner with regard to one of the properties; secondly, the legitimacy of the Respondent's claim for rent from the Petitioner due to his occupancy in one of the properties; and finally, the validity of the Respondent's assertion to claim compensation for furniture allegedly pilfered by the Petitioner.

[6] The Divorce Petition was allowed, whilst the Cross-Petition was dismissed for the following reasons.

Contentions, evaluation, and findings

Whether properties were matrimonial assets and should be divided equally

[7] The properties in question were as follows:

a) A property at Taman Esplanade Bukit Jalil ("Property No. 11");

b) A property at Taman Esplanade, Bukit Jalil ("Property No. 91");

c) A three-story shop lot at One Puchong Business Park, Off Jalan Puchong, ("the Puchong Property");

d) A condominium at the Sky Park Residence ("the Sky Park Property");

(collectively "the four Properties").

[8] At the time of the hearing of the Divorce Petition and Cross-Petition, the Petitioner was residing at Property No. 11, whilst the Respondent occupied the Sky Park Property.

[9] The task of dividing matrimonial assets is prescribed by section 76 of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act"), which reads:

> Section 76 – *Power of court to order division of matrimonial assets*
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to-
>
> *(a)* the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;
>
> *(aa)* the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
>
> *(b)* any debts owing by either party which were contracted for their joint benefit;
>
> *(c)* the needs of the minor children, if any, of the marriage;
>
> *(d)* the duration of the marriage,
>
> and subject to those considerations, the court shall incline towards equality of division.
>
> **...**

> (5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.
>
> [Emphasis added]

[10] Property No. 11 was registered in both names of the Parties, whilst the remaining three ("the three Properties") were registered solely in the Respondent's name.

[11] The Respondent asserted that only Property No. 11 should be considered a matrimonial asset, contending that the three Properties belonged solely to her. The Respondent sought a declaration from this Court to affirm her position.

[12] In my view, the classification of assets as matrimonial cannot solely be determined by registered ownership. Drawing insight from the pertinent case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109, Gopal Sri Ram JCA (as he then was) provided a definition of 'matrimonial assets'. In that case, he outlined the concept beyond mere ownership, emphasising factors that contribute to the marital estate. The following passage from the case serves as a guiding principle in understanding the broader scope of matrimonial assets:

> The Act does not define what matrimonial assets are. We think that during the subsistence of a marriage the expression refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage

subsists these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.

[Emphasis added]

[13] It was undisputed that all four Properties were acquired during the course of the marriage, which was registered in 1992, and endured for at least 29 years before the Divorce Petition was filed in April 2021. Given these undisputed facts, it was my view that all four Properties should be deemed matrimonial assets. Consequently, the Respondent was not entitled to a declaration suggesting otherwise. The pivotal issue at hand, therefore, revolved around the equitable division of the four Properties, as dictated by section 76 of the Law Reform (Marriage and Divorce) Act.

[14] The Petitioner prayed for an equal division of all four Properties, whereas the Respondent contended that only Property No. 11 should be subject to an equal division. Her argument rested on the assertion that, except for Property No. 11, the remaining three Properties belonged solely to her, acquired through her sole efforts. The Respondent maintained that the Petitioner failed to substantiate any form of contribution towards these three Properties.

[15] Despite the Respondent's sole name registered on the three Properties, the Petitioner had disputed such acquisition, asserting that all four Properties were acquired jointly. The crux of the matter, therefore, centered on the contributions

made by each party towards the acquisition and maintenance of the three Properties.

[16] In my view, it was imperative to consider the contributions of both Parties, whether monetary or otherwise, irrespective of three Properties being registered solely in the Respondent's name. The Court must also take into account joint debts incurred for mutual benefit, in addition to the duration of the marriage.

[17] I agreed with the Petitioner that all four Properties should be divided equally between the Parties, for the following reasons.

[18] Firstly, the Respondent's claim of sole ownership over the three Properties was substantiated solely by their registration in her name. She had failed to provide evidence of her contributions to the purchase or establish her financial capacity to have acquired them, relying solely on her oral statements in Court.

[19] She had failed to adduce any evidence regarding her income and savings, relying solely on verbal assertions without supporting documentation. There existed a notable absence of any written proof concerning her earning potential, savings, or investment activities throughout the duration of the marriage.

[20] Contrastingly, the Petitioner had adduced evidence of his earning capacity and contended that all four Properties were acquired jointly, despite three being solely registered in the Respondent's name. He explained that this arrangement was a strategic decision

due to the higher risks associated with his job. In my view, this explanation held merit, as the decision to register matrimonial assets in one party's name is typically a matter of mutual choice between parties in a marriage.

[21] The Petitioner emphasised the significant financial contributions he had made towards the Children's education, family vacations, and various household expenses. In response, the Respondent disputed these claims, pointing out the lack of receipts to substantiate the Petitioner's alleged expenditures.

[22] I was unable to agree with the Respondent's standpoint, emphasising the fundamental principle that in the sacred union of matrimony, financial responsibilities are commonly shared, particularly when both spouses are gainfully employed. The commitment to the well-being and prosperity of the household and the familial unit is a shared duty, evident through various means. In cases where both parties are actively earning incomes, it is inevitable that each will allocate their respective earnings towards the collective improvement of their significant other and the entire family.

[23] It was crucial to recognise that within the intimate confines of familial relationships, meticulous bookkeeping practices, commonplace in other contexts, become a challenging issue. In this context, the insightful analysis presented by Abdul Hamid Mohamad JCA (as he then was) in the Court of Appeal case of *Sivanes Rajaratnam v Usha Rani Subramaniam* [2002] 1 MLRA 178, sheds light on the complexities involved in meticulously documenting all household and

familial expenditures within the intricate tapestry of a marriage. His Lordship explained the challenges in the following passages:

> From the authorities referred to us by both learned counsel and from my research, as far as I can ascertain, I am unable to find any decided case in Malaysia and Singapore to support an accounting of all the assets acquired or improved during the marriage and the income thereof and the determination of who had benefitted more or less and awarding a shortfall to the party who is found to have benefitted less. All the cases simply talk about the "division" of the matrimonial assets, which necessarily means the existing assets at the time of the divorce. Of course, the question of the size and nature of each spouse's contribution and who has enjoyed the property to the exclusion of the other (for example, as in this case, where only one party lived at the Crescent Court Apartment) and the reasons why, are relevant in determining the portion that each spouse should get, but not, in my view, for the purpose of calculating either spouse's share of past income.
>
> This view, in my opinion, is consistent with the wording and spirit of s. 76. That section talks of "division" of assets acquired during the marriage and provides the factors that should be taken into account when making the division.
>
> Besides (I am speaking generally here) in a marriage, both spouses share everything, both contribute towards the home and family in one way or another, to a bigger or smaller extent. Where both spouses work and earn income, each of them inevitably spends his or her own income for the family. Similarly, where there is income from an asset purchased during the subsistence of the marriage, say rent, even though it may be paid into the account of one spouse, eventually it will go to the family, may be all and may be part of it. No one keeps an account, indeed no one should, as a marriage is not a business venture.
>
> So, if and when the marriage breaks up, it is unreasonable that the court should undertake an accounting of their income and expenditure during the period the marriage subsists. The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into account the factors provided by s. 76.
>
> [Emphasis added]

[24] Therefore, it was only fair and sensible to refrain from imposing excessive expectations on spouses to meticulously document and justify every expense incurred in their efforts to support and assist each other within the sacred bonds of matrimony. Demanding a meticulous account of how matrimonial funds are allocated, especially during times of financial strain or when facing monetary challenges, would be both impractical and burdensome.

[25] The Petitioner further asserted that his contributions went beyond financial support incorporating non-monetary aspects like caring for the Children.

[26] Based on the Petitioner's testimony, it was not unfounded to believe that he played an equal role in contributing to all four Properties, both in monetary and non-monetary terms, as he had asserted. This aligns with the overarching principle that matrimonial assets should typically be divided equally.

[27] In her attempt to counter the Petitioner’s claims regarding his contributions towards the matrimonial assets, the Respondent, lacking documentary evidence to establish her sole contribution towards the three Properties, called upon the Children, their son (RW 2) and daughter (RW 3) to testify on her behalf.

[28] At this pivotal juncture, it was crucial to recognise that, given the scarcity of documentary evidence adduced during this hearing, primary reliance was placed on the oral testimony provided by the Parties. Consequently, I felt

compelled to meticulously observe and consider the demeanour and conduct exhibited by witnesses.

[29] It is trite law that while adhering to the prescribed standard of proof mandated by law, a trier of fact must also engage in a judicial appreciation of the evidence adduced to render a decision in accordance with the law. A decision made without such careful assessment would be subject to correction on appeal. The importance of this principle cannot be overstated, underscoring the necessity of thoroughly evaluating and understanding the evidence to reach an informed and equitable decision.

[30] The trier of fact bears the responsibility of assessing the credibility, relevance, and weight of the evidence adduced by both Parties before arriving at a conclusion. Failure to conduct a proper judicial appreciation undermines the integrity of the decision-making process and may lead to erroneous judgments. By underscoring the need for a judicial appreciation of the evidence, this principle acts as a safeguard, ensuring fairness and justice in legal proceedings, and facilitating a more reliable and accurate resolution of the issues at hand.

[31] 'Judicial appreciation is concerned with the process of evaluating evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case, and assessing the demeanour of witnesses': per Gopal Sri Ram JCA

(as he then was) in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17.

[32] Credibility concerns the opportunities for the power of observation of the witness, his accuracy for recollection, and capacity to explain what he remembers: *Kwang Boon Keong Peter v. PP* [1998] 2 SLR 211. It embraces not only the concept of his truthfulness, that is, whether the evidence of the witness is to be believed, but also the objective reliability of the witness, that is, his ability to observe or remember facts and events about which the witness is giving evidence.

[33] Both RW 2 and RW 3 testified that they had not witnessed the Petitioner contributing towards the family expenses or spending quality time with them. According to their accounts, it was the Respondent who had primarily cared for them. Both RW 2 and RW 3 provided detailed descriptions of conflicts between the Petitioner and Respondent, giving the Petitioner no acknowledgment whatsoever as a father.

[34] Upon a comprehensive analysis of the testimonies of both RW 2 and RW 3, in conjunction with all other evidence, I deemed their reliability questionable. Consequently, I was unable to accept their testimony for the following reasons.

[35] Firstly, the evidence of both RW 2 and RW 3 were predominantly based on information relayed to them by the Respondent, rather than personal knowledge. This became evident during cross-examination when, despite insisting that the Respondent owned the three Properties, they

qualified their assertion with the phrase ‘to my knowledge’. This indicated a lack of awareness as ‘to my knowledge’ differs significantly from ‘personal knowledge’.

[36] "Personal knowledge" underscores information acquired through an individual’s direct personal experience or involvement. In contrast, "to my knowledge" implies that the person’s awareness of the situation might be rooted in another person’s direct personal experience or involvement.

[37] Furthermore, it became evident that both RW2 and RW 3 had no insight into the Petitioner’s financial contributions, as they were not privy to his financial affairs. Consequently, they could not verify which parent had contributed to the Properties, household expenses, education, and holidays.

[38] The testimonies of both RW 2 and RW 3 were also contradictory. Despite their insistence that the Petitioner had not spent any time with them nor taken them on holidays, the undisputed photographic evidence contradicted these claims.

[39] Furthermore, I observed that both RW 2 and RW 3 displayed an excessively critical stance towards the Petitioner, going to great lengths in their testimonies to portray him as a negligent parent. While recognising that the Children may have experienced estrangement from the Petitioner, their testimony, characterised by such extreme criticism,

strengthened my view that they lacked credibility, and that their evidence should be approached with caution.

[40] Additionally, both RW 2 and RW 3 demonstrated a tendency to exaggerate. RW 2 had even compiled a list of items purportedly stolen by the Petitioner from the Respondent, without actual knowledge of the original purchasers. RW 3, on the other hand, recounted a disagreement between the Petitioner and Respondent, describing it in her witness statement as 'murder'!

[41] I found the allegations of both RW 2 and RW 3 to be implausible and superfluous, given the absence of any imperative to delve into the minutiae of every dispute between the Petitioner and Respondent. It was evident that both RW 2 and RW 3 had chosen to testify with the intent of disparaging the Petitioner while elevating the Respondent, an undertaking devoid of relevance to the core matters concerning the division of the Properties and the merits of the Respondent's claims.

[42] Upon scrutiny of their witness statements, a notable similarity emerged, raising concerns about the authenticity of their testimonies. Both statements appeared nearly identical, except for the language difference, with RW 2's statement filed in Bahasa Malaysia and RW 3's in English. It was essential to highlight these aspects, indicating that the statements were a copy-and-paste job, albeit in different languages, suggesting a repetition of each other's assertions.

This was illustrated by the following examples taken *in verbatim* from their witness statements:

No	RW 2	RW 3
6	***Mengapa encik berpindah keluar rumah Responden tersebut?*** *Saya tidak berpindah kerana kesemua barang barang keperluan saya masih berada di rumah tersebut, saya cuma memilih menemani Responden iaitu ibu saya dan juga adik saya demi keselamatan utama mereka. Selain itu saya juga tidak puas hati dengan tingkahlaku Pempetisyen yang hanya mementingkan diri sendiri serta pemalas tanpa menunaikan tanggungjawab beliau sebagai seorang ayah. Saya berasa tidak selamat lagi tinggal di rumah Responden dan ingin memeriksa situasi tersebut. Saya hanya memainkan peranan dan tanggungjawab berat saya sebagai seorang anak serta abang untuk memastikan keselamatan, kesejateraan hidup mereka*	**Why did you move out of the Respondent's house?** I did not move out of the Respondent's house because all my belongings are still in the house. Until now, I have never returned to the said Respondent's house even though my books, certificates, and necessities etc. are still there. I know that if I go back, the Petitioner will chase and beat me and my mother as he used to do when I stayed at the said Respondent's house during my university semester break. For the sake of the Respondent's safety, which is my mother, I chose to stay close to my mother, besides that I am also not satisfied with the behavior of the Petitioner who is not only selfish but lazy, without fulfilling his responsibilities as a father.
7	***Mengapa encik risau dengan keselamatan Responden*** *Saya kerap melihat ibu saya, Responden, dipukul dan diugut oleh Pempetisyen. Pempetisyen pernah*	**Why are you worried about the Respondent's safety?** I often saw my mother, the Respondent re Respondent, being beaten and threatened by the

	beberapa kali mengugut Responden dengan pisau cina di depan mata saya. Saya juga pernah melihat ibu saya dipukul oleh Pempetisyen. Saya juga sentiasa melihat Pempetisyen mengejar ibu saya di rumah dari tingkat bawah hingga atas dan sebaliknya dengan memegang penyapu. Pengalaman yang paling dahsyat adalah pempetisyen melontar kerusi besi atas kepala ibu saya dari belakangnya, tapi disekatkan and diselamatkan oleh adik saya. Selain itu, Pempetisyen sering bertutur secara kasar terhadap Responden dan sering marah serta menjerit terhadap Responden. Keadaan ini sering berlaku menjadikan pengutamaan emosi and stress terhadap ahli keluarganya	Petitioner. The Petitioner has threatened the Respondent several times with a meat knife in front of my own eyes. I also witnessed the Petitioner attacked the Respondent from behind by throwing an iron chair on her head without her noticing. Before that, the Petitioner was chasing the Respondent from the third floor to the second floor. Then he stopped chasing when he reached the second floor, and pretended to be calm. The Respondent stopped running and walked down the stairs to the ground floor towards the kitchen. I, who was always watching the Petitioner from behind to protect the Respondent from being attacked, saw the Petitioner suddenly pick up the iron chair beside the stairs and ran towards the Respondent and threw the iron chair towards the back of the Respondent's head.
9	***Siapa pemilik rumah Responden tersebut?*** *Setahu saya, Responden merupakan pemilik rumah tersebut*.	**Who is the owner of the said Respondent's house?** To my knowledge, the Respondent is the owner of the house.
10	***Adakah encik tahu Pempetisyen menyumbang apa-apa kepada rumah Responden tersebut?*** *Dia hanya membeli sebuah televisyen sahaja*	**Did the Petitioner contribute anything to the said Respondent's house?** He only bought a television. This is because he is the only person who

		watches television every day with loud volume until late night.
11.	***Mengapa encik kata Pempetisyen tidak menunaikan tanggungjawab sebagai seorang ayah?*** *Walaupun Pempetisyen mempunyai pekerja syarikat sendiri, saya tidak pernah melihat dia menyumbang pendapatan beliau kepada kami adik beradik tidak kira dari segi perbelanjaan harian dan pendidikan melainkan yuran university saya, itupun hanya separuh sahaja. Dia tidak pernah menyumbang kepada pembelanjaran pendidikan sejak sekolah rendah, menengah hingga kolej. Beliau tidak pernah membeli apa-apa kepada saya. Semua perbelanjaan adalah dibuat oleh ibu saya, Responden. Pempetisyen juga tidak pernah ambil berat akan keadaan keluarga, pekerjaan karir serta pendidikan saya*	**Why did you say the Petitioner did not fulfill his responsibilities as a father?** I have never seen him contribute his earnings to us regardless of daily expenses and education. He never bought me anything. All expenses were incurred by my mother, the Respondent. The Petitioner never bother about our family situation and my education. The most important thing to him is that when my brother and I get good results from exams, he will show it to his family, that is, his sister, his mother and friends. But when it comes to paying fees, buying computers, textbooks, school clothes, food money and so on, he just doesn't care and ask me to get from the Respondent even for small amount like rm5.

[43] It was evident that both RW 2 and RW 3 had collaborated in crafting their witness statements, seemingly aiming to persuade the Court of the veracity of their testimony in support of the Respondent. However, given the reasons I outlined above, I remained unconvinced of their narratives.

[44] When evaluating the demeanour of both RW 2 and RW 3, I found guidance in the case of *Ch'ng Kheng Phong v Chung Keng Huat & Ors* [2011] 8 MLJ 32. In this case, Chew Soo Ho JC provided valuable insight in the following passage:

> I have also observed the demeanour of DW2 when he gave evidence. More than often, he took time to answer questions posed, evasive and at time gave no answer. Questions had also sometimes to be explained several times before he could answer them. He does not appear to be a truthful witness. From the whole evidence of DW2 coupled with numerous material inconsistencies and his demeanour, I find that DW2 is not a credible and reliable witness but a witness who has an axe to grind as he was prepared to lie and gave conflicting evidence. It is most unsafe to rely on evidence that is full of inconsistencies and uncertainties. The defence had failed to advance any reasonable explanation nor lead any evidence to clear all lingering doubts and all the inconsistencies which remained at the end of the trial. Therefore, this court finds that no weight ought to be accorded to DW2's evidence and his evidence that he had witnessed the deceased affixing his signature on the second will which this court finds grave doubt is consequently rejected on a balance of probabilities upon positive finding of facts above.
>
> [Emphasis added]

[45] In fact, I took a dim view of the Respondent's actions in summoning her children, RW2 and RW 3 to testify with the aim of supporting her narrative and undermining the credibility of the Petitioner. It was essential to recognise that the mere quantity of witnesses does not necessarily translate to the quality of evidence adduced. The presence of two witnesses attempting to corroborate the Respondent's account did not automatically bolster her

case, as highlighted in section 134 of the Evidence Act 1950 ("Evidence Act"), which states:

> Section 134 – Number of witnesses
>
> No particular number of witnesses shall in any case be required for the proof of any fact.

[46] I drew guidance from the Federal Court in *Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] CLJ Rep 101, where it was stated by Eusoffe Abdoolcader FJ:

> On the number of witnesses called to support the defence of alibi, we pause to observe *'testes ponderantur, non numerantur'* (witnesses are weighed, not numbered or counted), that is, in case of a conflict of evidence, the truth is to be sought by weighing the credibility of the respective witnesses, not by the mere numerical preponderance on one side or the other - a principle ossified and reflected in the provisions of s. 134 of the Evidence Act.
>
> [Emphasis added]

[47] Both RW 2 and RW 3, while understandable in their inclination to support the Respondent as the custodial parent, had failed to provide valuable assistance to this Court during these proceedings. Their testimony was marred by bias, partiality, and a lack of credibility.

[48] Equally lacking in credibility was the Respondent herself. Despite her insistence that the three Properties belonged to her, she adduced no evidence to substantiate this claim. A careful review of the notes of proceedings revealed her inability to challenge the Petitioner's evidence with any proof. The only evidence she had adduced was a

handwritten note, allegedly detailing the monies owed to her by the Petitioner.

[49] I found it untenable to accept this note as evidence for several reasons. Firstly, the Respondent had not pleaded any specific amounts owed by the Petitioner. Secondly, the note was marked by ambiguity and vagueness, lacking essential details such as the dates of purported loans, loan amounts, repayment terms, and the circumstances surrounding the creation of such note.

[50] The Respondent's lack of transparency extended to two properties in the United Kingdom (UK). Despite having purchased the first property with RW 3 in 2017, followed by its sale and the subsequent acquisition of a second property in 2021, the Respondent failed to disclose these facts. Documents titled 'Search For & Property Information' from gov.uk, adduced by the Petitioner, provided evidence supporting these transactions.

[51] Counsel for the Respondent, seemingly unaware of these UK property acquisitions, raised an objection to marking of the 'Search For & Property Information' documents as exhibits, claiming 'ambush'. Instead, he insisted on maintaining them as ID. In response, the Petitioner's Counsel argued that the Petitioner had only recently uncovered information about these property purchases, asserting that the element of surprise was, in fact, on his side. The status of the documents, however, remained ID.

[52] In considering this objection, I reflected on the implications of designating a document as ID, guided by the case of *Jaafar bin Shaari & Anor (Suing as administrators of the estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693, where Gopal Sri Ram JCA explained:

> Thirdly such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either of examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to if by either of the parties at any time before the conclusion of the case...
>
> [Emphasis added].

[53] Although the 'Search For & Property Information' documents were marked as ID, Counsel for the Petitioner proceeded to cross-examine both the Respondent and RW 3 regarding the UK properties. There was no objection to the cross-examination. Notably, both Respondent and RW 3 affirmed the accuracy of the contents of the 'Search For & Property Information' documents, acknowledging the purchase and sale of the initial UK property and the subsequent acquisition of the second one.

[54] At this juncture, it was paramount to underscore the established procedure when dealing with ID documents. As these documents were not classified as Part A or Part B under Order 34 rule 2 of the Rules of Court 2012 ("Rules of Court"), the party tendering the ID document must ensure its alignment with at least one of the exceptions to the rule

against hearsay. Importantly, documents marked as ID are not automatically deemed inadmissible but are subject to the full force of the Evidence Act.

[55] This procedural aspect aligns with the elucidation provided by Ramly Ali J (as he then was) in *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474:

> ...At that stage of the proceedings, all those documents have to be marked as "ID" first, but it does not stop the court from deciding on their admissibility at the end of the trial ie, during submissions stage. Section 73A(2) of the Evidence Act 1950 empowers the court to do so. The said subsection provides for the exercise of the power "at any stage of the proceedings, having regards to all the circumstance of the case". There is nothing to say that those documents cannot be admitted as evidence under s. 73A(2) just because they have only been marked as "ID"...
>
> [Emphasis added.]

[56] In the present case, despite the absence of the maker of the documents, it was undisputed that these documents were printouts sourced from a publicly accessible website based in the UK. The inherent nature of these documents categorised them as business records, unequivocally falling under the provisions of sections 32(1)(b) and 73A of the Evidence Act, rendering them admissible as evidence.

[57] Nevertheless, the issue regarding the properties in the UK, while not directly relevant to the Petitioner's claim, served to reveal the Respondent's lack of transparency. Concealing this information not only from the Court but also from her solicitor indicated a lack of honesty, prompting me to approach her evidence with circumspection.

[58] Although the Petitioner had not asserted any interest in the UK property, as his pleadings were crafted before his awareness of its existence under the names of the Respondent and RW 3, I was compelled to take into account this circumstance. This factor had, in fact, contributed to my decision to order the equal distribution between the Parties of all four Properties.

[59] The duration of the marriage, a factor stipulated in section 76(2)(d) of the Law Reform (Marriage and Divorce) Act, had also played a crucial role in my decision to divide the Properties equally. With the parties having been married for 29 years before the Divorce Petition was filed, dividing the Properties equally between the Parties was, in my view, fair and reasonable.

Whether Respondent was entitled to claim rentals from Puchong Property

[60] The Respondent's demand for half of the rentals from the Puchong Property was based on her contention that the Petitioner had purportedly collected and retained the proceeds for himself. Her pleadings indicated that the Petitioner owed her MYR58,100. I dismissed the Respondent's claim based on the following reasons.

[61] Primarily, the Respondent had explicitly directed the tenants of the Puchong Property not to remit the rentals to the Petitioner. Given that the tenants adhered to this instruction and did not the rentals to the Petitioner, the foundation for the Respondent's claim for such rentals from the Petitioner was consequently lacking.

[62] Secondly, the Petitioner clarified that the irregularity in rental income was attributed to the absence of consistent tenants for the Puchong Property.

[63] Thirdly, amidst the Movement Control Order, the tenants sought a 30% reduction in rent, a request to which the Petitioner had acquiesced.

[64] Fourthly, the Petitioner demonstrated that the rental income was utilised to service the bank loan for the Puchong Property, covering quit rent, maintenance charges, and repairs. Lastly, the Respondent's inconsistent claims regarding the amount owed raised doubts about the accuracy of her assertions, as she had pleaded MYR58,100 but subsequently claimed that the amount owing was MYR87,150. It was palpable that the Respondent was not even sure what amount had been collected, if at all.

[65] I also had to consider the irrefutable fact that the Respondent had been consistently collecting rental income from Property No. 91 without providing any transparent record or accountability for the funds received. Hence to make a claim against the Petitioner for rentals that he had collected from the Puchong Property, if at all, was an affront to fairness and equity.

Whether Respondent was entitled to claim rentals from the Petitioner for his occupancy in Property No. 11

[66] The Respondent's claim for rentals from the Petitioner himself for his occupancy in Property No. 11 was also dismissed for the following reasons.

[67] Firstly, no demand for rentals was made by the Respondent against the Petitioner during his occupancy at Property No. 11. Secondly, the Respondent's claim was inconsistent, where she had stated a monthly amount of MYR6,000 in her pleadings, but sought a monthly amount of MYR8,642.98 in her submissions. Thirdly, considering that Property No. 11 is part of matrimonial assets, it was transactional and avaricious of the Respondent to demand rental from the Petitioner for occupying a matrimonial property, especially when the Respondent herself occupied another matrimonial asset, namely the Sky Park Property, without a similar claim for rent from the Petitioner.

[68] Last, but certainly not least, and of equal significance was the fact that all four Properties have been designated as matrimonial assets, entitling the Petitioner to occupy any of them to the same extent as the Respondent. As such, demanding rental from one spouse for inhabiting a property deemed matrimonial assets seems excessively calculated and transactional.

Whether the Respondent was entitled to claim compensation for furniture allegedly stolen

[69] Additionally, the Respondent asserted a claim of MYR 28,000, alleging that such was the value of furniture purportedly stolen by the Petitioner. However, the Respondent failed to provide any substantive evidence for this claim, relying solely on the testimony of RW 2, who merely echoed the Respondent's assertions *in verbatim.*

[70] In detailing the purportedly stolen furniture items, the Respondent neglected to substantiate their existence or confirm her personal purchase with supporting receipts or purchase details. This situation compelled me to emphasise the principle that merely presenting a claim without substantiation falls short. To quote Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] The 64 TLR 177 cited in *Sum Kum v. Devaki Nair & Anor* [1963] 1 LNS 131; [1964] 3 MLJ 74:

> It is not enough to write down the particulars and throw them at the head of Court, saying, "This is what I have lost; I ask you to give me damages.
>
> [Emphasis added.]

[71] Both Parties contended that the onus of proving their respective claims rested on the other. However, given the Petitioner's plea for an equal division of the Properties, in harmony with the Court's inclination, and the Respondent's comprehensive assertions concerning the three Properties, including specific rental details and amounts attributed to the Petitioner for his occupancy at Property No. 11, it fell upon the Respondent to substantiate these claims on a balance of probabilities, as outlined in section 103 of the Evidence Act, which reads:

> Section 103 – *Burden of proof as to particular fact*
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> [Emphasis added]

[72] In my view, the Respondent had failed to meet the requisite threshold of proof for any of her assertions. On the contrary, the Petitioner successfully demonstrated to this Court that an equal division of the Properties was justifiable, aligning with the Court's inclination toward such a distribution.

Concluding remarks

[73] The Respondent's attitude towards the marriage and her conduct during the trial led me to emphasise that although marriage is a contract, it must be distinguished from other commercial contracts, as highlighted by Abdul Malik Ishak J (as he then was) in the case of *Wong Kim Foong v. Teau Ah Kau* [1998] 1 CLJ 358, in the following passages:

> But a marriage contract is quite unlike a commercial contract and there are marked dissimilarities between the two. Of pertinence to note would be the following dissimilarities:
>
> (1) Special formalities are needed and must be fulfilled before a marriage vow is exchanged between the parties.
>
> (2) The law relating to capacity to marry is entirely different from that of, say, the sale of goods.
>
> (3) What are said to be void and voidable in a marriage can never be the same for other contracts.
>
> (4) A voidable marriage cannot be declared void ab initio by repudiation by one of the parties but it may be set aside by a decree of nullity pronounced by a divorce court.
>
> (5) A marriage once contracted cannot be discharged by agreement, frustration or breach.

[74] While the term "contract" is often employed to characterise marriage, its implications extend far beyond the legal realm, encompassing social and emotional dimensions. The emotional, social, and cultural facets of marriage make it a unique institution within human societies. Consequently, the Respondent's monetary claims against the Petitioner prompted consideration of whether she truly comprehended the essence of marriage.

[75] Upon meticulous examination, it was evident that the Respondent's claims suffered from a glaring lack of essential and pertinent evidence. Without the necessary document substantiation, this Court was compelled to rely on oral testimonies. However, scrutiny revealed that the oral testimony of the Respondent and her witnesses, RW 2 and RW 3, lacked conviction, characterised by contradictions, ambiguity, and vagueness. The entirety of the Respondent's argument hinged on the claim that the Petitioner had failed to furnish the necessary evidence to substantiate his claims. However, it was, in fact, the Respondent who fell short in providing the requisite evidence to substantiate her assertions regarding the matrimonial assets.

[76] In contrast, the Petitioner, while not producing specific receipts, did adduce documentary evidence indicating his financial capacity to have contributed towards the acquisition and improvement of the Properties. His contention advocating for an equal division of all the Properties had also resonated with the Court's predisposition, especially considering the extended duration of the marriage.

[77] In conclusion, drawing upon the aforementioned rationales and having undertaken a thorough examination and discerning evaluation of the comprehensive evidence before this Court, in conjunction with the submissions put forth by both Parties, the Petition was granted and the Cross-Petition dismissed with costs to the Petitioner in the amount of MYR20,000 (subject to allocatur) to be paid by the Respondent within 21 days from the date of this decision.

[78] The decree nisi was made absolute immediately, and, it was ordered that within nine months from the date of this decision, the realisable value of all four Properties was to be divided equally. Each party was to receive their share of such value, either by selling the Properties altogether and dividing their proceeds, or by either party purchasing the other party's 50% share of any of the Properties.

Dated: 14 January 2024

SIGNED

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(EVROL MARIETTE PETERS)
Judge
High Court, Kuala Lumpur

Counsel:

For the Petitioner – Malika Lee and Jayaletchumi Rajaretnam; Messrs Mallika & Lim

For the Respondent – Lim Chi Chau; Messrs Lim Chi Chau & Co

Cases referred to:

- *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474
- *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] The 64 TLR 177
- *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17
- *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109
- *Ch'ng Kheng Phong v Chung Keng Huat & Ors* [2011] 8 MLJ 32
- *Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] CLJ Rep 101
- *Jaafar bin Shaari & Anor (Suing as administrators of the estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693
- *Kwang Boon Keong Peter v. PP* [1998] 2 SLR 211
- *Sivanes Rajaratnam v Usha Rani Subramaniam* [2002] 1 MLRA 178
- *Sum Kum v. Devaki Nair & Anor* [1963] 1 LNS 131; [1964] 3 MLJ 74
- *Wong Kim Foong v. Teau Ah Kau* [1998] 1 CLJ 358

Legislation referred to:

- Evidence Act 1950 – sections 32(1)(b), 73A, 103, 134
- Law Reform (Marriage & Divorce) Act 1976 – section 76
- Rules of Court 2012 – Order 34 rule 2