IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

SUIT NO: D5-22-610-2006

BETWEEN

1. CELCOM (MALAYSIA) BERHAD
2. TECHNOLOGY RESOURCES INDUSTRIES BERHAD … PLAINTIFFS

AND

1. TAN SRI DATO' TAJUDIN BIN RAMLI
2. DATO' BISTAMAM BIN RAMLI
3. DATO' LIM KHENG YEW
4. DIETER SIEBER
5. DR FRANK-REINHARD BARTSCH
6. JOACHIM GRONAU
7. JOERG ANDREAS BOY
8. ALEX HASS
9. OLIVER TIM AXMANN … DEFENDANTS

(BY ORIGINAL ACTION)

1. TAN SRI DATO' TAJUDIN BIN RAMLI
2. DATO' BISTAMAM BIN RAMLI … PLAINTIFFS

AND

1. CELCOM (MALAYSIA) BERHAD
2. TECHNOLOGY RESOURCES INDUSTRIES BERHAD … DEFENDANTS

(BY COUNTERCLAIM)

Consolidated with

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

SUIT NO: D1-22-1960-2008

BETWEEN

1. CELCOM (MALAYSIA) BERHAD
2. TECHNOLOGY RESOURCES INDUSTRIES BERHAD … PLAINTIFFS

AND

1. TAN SRI DATO' TAJUDIN BIN RAMLI
2. DATO' BISTAMAM BIN RAMLI
3. DATO' LIM KHENG YEW
4. AXEL HASS
5. OLIVER TIM AXMANN
6. DETEASIA HOLDING GMBH
7. BERINGIN MURNI SDN BHD … DEFENDANTS

(BY ORIGINAL ACTION)

BETWEEN

1. TAN SRI DATO' TAJUDIN BIN RAMLI
2. BISTAMAM BIN RAMLI … PLAINTIFFS

AND

1. CELCOM (MALAYSIA) BERHAD
2. TECHNOLOGY RESOURCES INDUSTRIES BERHAD … DEFENDANTS

(BY COUNTERCLAIM)

JUDGMENT

(Court enclosure nos. 178, 180, 182, 184, 187, 190 and 210)

A. Introduction

1. This judgment discusses, among others, the novel question of whether before the commencement of trial, a person who has been subpoenaed to give evidence at the trial (**Subpoenaed Witness**), may apply to court to set aside the subpoena on the ground that the evidence which may be given by the Subpoenaed Witness is not admissible because the evidence is -

   (1) made on a "*without prejudice*" basis within the meaning of s 23 of the Evidence Act 1950 (**EA**); or

   (2) legally privileged under s 126(1) EA.

B. Background

2. The above two suits (**2 Suits**), Civil Suit No. D5-22-610-2006 (**1st Suit**) and Civil Suit No. D1-22-1960-2008 (**2nd Suit**), have been consolidated.

3. In the 1st Suit, the plaintiff companies (**Plaintiffs**) claimed, among others, that 9 individual defendants had breached their fiduciary and statutory duties as directors of the Plaintiffs regarding, among others, certain contracts and transactions [**Breach of Duty Issue (1st Suit)**].

4. The Plaintiffs alleged in the 2nd Suit, among others, that 7 defendants had conspired, either by lawful or unlawful means, to injure the Plaintiffs and had thereby caused loss to the Plaintiffs.

5. Tan Sri Dato' Tajudin bin Ramli (**1st Defendant**) and Encik Bistamam bin Ramli (**2nd Defendant**) are the first and second defendants in the 2 Suits. The 1st and 2nd Defendants have filed 2 counterclaims in the 2 Suits (**Counterclaims**). The Counterclaims pleaded, among others, as follows:

(1) there was a "*Global Settlement*" between -

(a) the Malaysian Government (**Govt.**) on behalf of, among others, the Plaintiffs; and

(b) the 1st Defendant;

(2) the 1st Defendant had complied with the Global Settlement by, among others, withdrawing all his claims and counterclaims in certain suits against, among others, the Govt., Pengurusan Danaharta Nasional Bhd., Malaysian Airline System Bhd., the Plaintiffs and Telekom Group of Companies;

(3) the Plaintiffs had breached the Global Settlement by refusing to withdraw the 2 Suits [**Breach of Global Settlement Issue (Counterclaims)**]; and

(4) the Plaintiffs had conspired with each other, among others, by filing the 2 Suits [**Conspiracy Issue (Counterclaims)**].

C. 7 applications

6. This judgment concerns 7 applications filed by the following persons to set aside subpoenas issued by the 1st and 2nd Defendants (**Respondents**) for them to testify in the trial of the 2 Suits (**Trial**):

   (1) an application in court enclosure no. 178 (**Enc. 178**) by Tan Sri Mohamed Azman bin Yahya (**Tan Sri Azman Yahya**);

   (2) an application in court enclosure no. 180 (**Enc. 180**) by Tan Sri Dato' Azman bin Mokhtar (**Tan Sri Azman Mokhtar**);

   (3) an application in court enclosure no. 182 (**Enc. 182**) by Tan Sri Zamzamzairani bin Mohd. Isa (**Tan Sri Zamzamzairani**);

   (4) an application in court enclosure no. 184 (**Enc. 184**) by Datuk Bazlan bin Osman (**Datuk Bazlan**);

   (5) an application in court enclosure no. 187 (**Enc. 187**) by the Plaintiffs and Puan Putri Noor Shariza binti Noordin Omar (**Puan Putri**);

   (6) an application in court enclosure no. 190 (**Enc. 190**) by the Plaintiffs and Mr. Ng Swee Kee (**Mr. Ng**); and

   (7) an application in court enclosure no. 210 (**Enc. 210**) by Tan Sri Dato' Dr. Mohd. Munir Abd. Majid (**Tan Sri Munir**).

D. Court's power to set aside subpoenas

7. It is not disputed that the court has inherent jurisdiction and/or inherent power under Order 92 rule 4 of the Rules of Court 2012 (**RC**) to set aside a subpoena on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process - please see the cases referred to in **World Grand Dynamic Marketing Sdn Bhd v FJVAA Spa Sdn Bhd & Ors** [2017] 1 AMR 94, at paragraphs 12-15.

D(1). Whether application to set aside subpoena is made before commencement of trial or is made during trial

8. I am of the view that the court should distinguish between an application to set aside a subpoena (**Setting Aside Application**) which has been filed before the commencement of a trial and a Setting Aside Application which is made during a trial. This distinction is necessary for the following reasons:

   (1) before the commencement of a trial, the court should not decide on issues regarding admissibility of evidence. Questions on admissibility of evidence should be decided by the trial court after the commencement of the trial. This will preserve the integrity of the trial. Accordingly, if a Setting Aside Application is filed before the commencement of a trial based solely on an allegation that the Subpoenaed Witness' evidence is not admissible (for whatever reason), the court should not consider, let alone decide on, the issue on the admissibility of the evidence proposed to be given by the Subpoenaed Witness before the commencement of trial. If otherwise,

the court hearing a Setting Aside Application before the commencement of trial, will usurp the duty and function of the trial court to decide the question of admissibility of the evidence in question during trial; and

(2) if a Setting Aside Application is made before the commencement of trial, the court can only decide such an application based on affidavit evidence. It is trite law that in an application based on affidavit evidence, the court should refrain from resolving any conflict in affidavit evidence by having a trial based on affidavits. Furthermore, in deciding a Setting Aside Application made before the commencement of trial, the court cannot ascertain the truth of the contents of affidavits because generally, the deponents of affidavits cannot be cross-examined by learned counsel from the opposing party.

9. In a Setting Aside Application, the party (who has obtained a subpoena) has the burden to satisfy the court that the subpoena -

(1) is not frivolous;

(2) is not vexatious; and

(3) does not constitute an abuse of court process

by showing that the Subpoenaed Witness is able to give some evidence regarding -

(a) any "*fact in issue*" (defined in s 3 EA as "*any fact from which, either by itself or in connection with other facts, the existence, non-existence,*

nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows"); or

(b) every fact declared by EA as relevant, namely a fact which is relevant under ss 6 to 55 (contained in Chapter 2 EA which is entitled "*Relevancy of Facts*"). According to s 3 EA, "*one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the [EA] relating to the relevancy of facts*".

In the Supreme Court case of **Wong Sin Chong & Anor v Bhagwan Singh & Anor** [1993] 3 MLJ 679, at 687, Mohamed Azmi SCJ has required a party issuing a subpoena to show the "*materiality*" of the Subpoenaed Witness for the just decision of the case. With respect, our EA provides for "*facts in issue*" and "*relevant facts*". A party who has obtained a subpoena, may successfully resist a Setting Aside Application if the party is able to show that the Subpoenaed Witness is in a position to give some evidence regarding a "*fact in issue*" or "*relevant fact*".

10. When a Setting Aside Application is made before the commencement of trial, I am of the following view:

(1) the party who has subpoenaed a witness, may discharge the burden to persuade the court that the Subpoenaed Witness is able to give some evidence regarding a "*fact in issue*" or "*relevant fact*" by averring such a fact in an affidavit which is filed to oppose the Setting Aside Application (**Opposing Affidavit**). In this regard, I am not able to accede to a contention by Mr. Lambert Rasa-Ratnam (learned counsel for Tan Sri Zamzamzairani and Datuk Bazlan) that "*materiality of a*

witness must be assessed based on the parties' pleaded case and not what they claim on affidavit". Mr. Lambert relied on the High Court case of **Berjaya Land Bhd v Wong Chee Hie & Ors** [2012] 4 CLJ 356. Firstly, **Berjaya Land** did not decide that a party issuing a subpoena is only confined to the party's pleaded case and cannot rely on an Opposing Affidavit to resist successfully a Setting Aside Application. More importantly, O 18 r 7(1) RC mandatorily requires a pleading to contain "*a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits*". As a pleading cannot contain averments regarding evidence [by reason of O 18 r 7(1) RC], it is unjust to confine a party (who has obtained a subpoena] to the party's pleaded case in respect of the party's opposition to a Setting Aside Application;

(2) if the Opposing Affidavit cannot show that the Subpoenaed Witness is able to give some evidence regarding a "*fact in issue*" or "*relevant fact*", the party (who has subpoenaed the witness) has failed to discharge the burden to satisfy the court that the subpoena is not frivolous, not vexatious and does not constitute an abuse of court process. Accordingly, the court should exercise its discretion pursuant to its inherent jurisdiction and/or power to set aside the subpoena;

(3) if the Opposing Affidavit is able to show that the Subpoenaed Witness may give some evidence regarding a "*fact in issue*" or "*relevant fact*" -

(a) if the contents of the Opposing Affidavit are denied by an affidavit from the Subpoenaed Witness, the court hearing the Setting Aside Application should -

(i) not resolve any conflict in affidavit evidence [please see the reasons given in the above sub-paragraph 8(2)]; and

(ii) dismiss the Setting Aside Application; and

(b) if the Subpoenaed Witness raises any ground to object to the admissibility of evidence to be given by the Subpoenaed Witness, the court hearing the Setting Aside Application should -

(i) not decide on the issue regarding the admissibility of evidence to be given by the Subpoenaed Witness (which should be decided by the trial court after the commencement of the trial - please see the above paragraph 8); and

(ii) dismiss the Setting Aside Application.

I rely on Nallini Pathmanathan J's (as she then was) decision in **Berjaya Land**, at paragraphs 25, 28, 29 and 33, as follows -

> "*[25]* ***It also needs to be considered whether this court should or can, at this interlocutory stage, determine this issue summarily rather than at trial****. …*
>
> *…*
> *[28] As such the issue before the court is whether or not the privilege and thereby confidentiality that exists in respect of solicitor-client communications is lifted by reason of an illegal*

purpose. In order to decide whether the purpose is illegal or otherwise, is it permissible for this court to determine that issue on a perusal of the 2nd email and on the basis of the affidavits and submissions filed by the parties? Is the court to make a determination of whether or not the 2nd email was made or written in furtherance of an illegal purpose at this interlocutory stage in a summary fashion on the basis of conflicting affidavits?

[29] ***If the current application to set aside the subpoena did not fall to be determined, the issue of whether or not the communication was written in furtherance of an illegal purpose would be determined in the normal course of events at trial. The subject witness would attend and assert the right not to reply to questions pertaining to the 2nd email on the grounds of privilege under s 126 [EA] whereupon the court would then hear arguments and make a determination at trial. Should the court embark upon this exercise at this stage?***

…

[33] ... ***The proper forum and time for this contention to be taken, it seems to me, is at trial.***"

(emphasis added); and

(4) if it is proven later at the trial that the Subpoenaed Witness is not able to give any evidence regarding a "*fact in issue*" or "*relevant fact*", the following redress is available -

(a) if the Subpoenaed Witness has suffered any loss or damage due to the subpoena which constitutes an abuse of court process, the Subpoenaed Witness may file a suit against the party (who has obtained the subpoena) to claim damages for the tort of abuse of

court process (by obtaining a frivolous and vexatious subpoena) - please see **Sri Paandi Restaurant Sdn Bhd & Anor v Saraswathy a/p Kesavan & Ors** [2017] 4 AMR 593, at sub-paragraph 18(1)(b). The decision in **Sri Paandi Restaurant** has been affirmed on appeal to the Court of Appeal; and

(b) the court may penalize the party who has wrongfully obtained the subpoena with costs pursuant to O 59 r 8(b) RC (*the conduct of all the parties, including conduct … during the proceedings*).

11. When a Setting Aside Application is made during a trial -

(1) the party (who has subpoenaed a witness) has the burden to satisfy the trial court that the subpoenaed witness is in a position to give evidence regarding a "*fact in issue*" or "*relevant fact*". In deciding the Setting Aside Application, the trial court may refer to the affidavits filed in the Setting Aside Application and the following documents -

(a) the pleadings;

(b) statement of issues to be tried [filed pursuant to O 34 r 2(2)(k) RC];

(c) witness statements [filed pursuant to O 34 r 2(2)(m) RC],

(d) common bundles of documents [filed pursuant to O 34 r 2(2)(c) to (i) RC]; and

(e) oral evidence recorded from other witnesses (if any)

(**Court Materials**);

(2) based on the Opposing Affidavit and Court Materials, if the party (who has obtained a subpoena) cannot show that the Subpoenaed Witness is able to give some evidence regarding a "*fact in issue*" or "*relevant fact*", the trial court should exercise its discretion pursuant to its inherent jurisdiction and/or power to set aside the subpoena on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process; and

(3) if, based on the Opposing Affidavit and Court Materials, the party (who has subpoenaed a witness) is able to show that the Subpoenaed Witness can give evidence regarding a "*fact in issue*" or "*relevant fact*" but if the Setting Aside Application is based on an alleged non-admissibility of evidence (for whatever reason) to be given by the Subpoenaed Witness, the trial court is duty bound to decide on the issue of admissibility of evidence to be given by the Subpoenaed Witness. If the trial court finds that the proposed evidence to be given by the Subpoenaed Witness is -

(a) admissible at the trial, the trial court should dismiss the Setting Aside Application; and

(b) not admissible at the trial, the trial court should exercise its discretion pursuant to its inherent jurisdiction and/or power to set aside the subpoena on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process.

12. If the position set out in the above paragraphs 8 to 11 is adopted, a party should not file a Setting Aside Application before the commencement of trial if the party only intends to object to the admissibility of evidence which may be given by a Subpoenaed Witness. In such a situation, the party should wait for the trial to commence and then either -

    (1) file a Setting Aside Application; **or**

    (2) object to the admissibility of evidence given by the Subpoenaed Witness.

    The above approach will ensure that the commencement of a trial is not unduly delayed by the filing of a Setting Aside Application.

E. <u>Encs. 178 and 180</u>

13. The Respondents had filed 2 affidavits to oppose Enc. 178. Both affidavits from the Respondents, in my view, do not show how Tan Sri Azman Yahya. is able to give some evidence regarding a "*fact in issue*" or "*relevant fact*" in the Trial. Accordingly, I exercise my discretion pursuant to the court's inherent jurisdiction and/or power to allow Enc. 178 and set aside the subpoena issued to Tan Sri Azman Yahya on the ground that the subpoena is frivolous, vexatious and constitutes an abuse of court process.

14. In support of Enc. 180, Dato' Nitin Nadkarni, learned counsel for Tan Sri Azman Mokhtar, contended as follows:

(1) the Respondents relied on a series of "*without prejudice*" letters in 2014 (**2014 Letters**) to show the relevancy of evidence which might be given by Tan Sri Azman Mokhtar at the Trial. Tan Sri Azman Mokhtar objects to the admissibility of the 2014 Letters; and

(2) even if the 2014 Letters can considered by the court, Tan Sri Azman Mokhtar cannot give any evidence which is relevant to the Trial because -

(a) the Global Settlement was alleged by the Respondents to have been reached before 14.2.2012. Accordingly, the 2014 Letters were irrelevant to the question of whether the Global Settlement had been concluded in 2012; and

(b) an examination of the 2014 Letters did not prove that the Global Settlement had been attained. On the contrary, a "*without prejudice*" letter dated 9.5.2014 from Datuk Azzat Kamaluddin (**Datuk Azzat**) to the 1st Defendant (copied to, among others, Tan Sri Azman Mokhtar) showed that "*without prejudice*" negotiations were still carrying on at that time.

15. Regarding Enc. 180, this court is satisfied that the Respondents have discharged the burden to prove that Tan Sri Azman Mokhtar is in a position to give evidence in the Trial regarding a "*fact in issue*" or "*relevant fact*" concerning the Breach of Global Settlement Issue (Counterclaims) **and/or** Conspiracy Issue (Counterclaims). This is clear from the following evidence:

(1) Tan Sri Azman Mokhtar was the Chairman of Axiata Group Bhd. (**AGB**), the holding company of the Plaintiffs; and

(2) the following letters involved Tan Sri Azman Mokhtar -

(a) the 1st Defendant's letter dated 19.3.2014 to Tan Sri Azman Mokhtar as the Managing Director (**MD**) of Khazanah Nasional Bhd. (**Khazanah**);

(b) letter dated 4.4.2014 from Khazanah's Legal Director, Encik Mohammed Nasri Sallehuddin (**Encik Nasri**) to the 1st Defendant (this letter was copied to, among others, Tan Sri Azman Mokhtar);

(c) the 1st Defendant's letter dated 7.4.2014 to Tan Sri Azman Mokhtar;

(d) Encik Nasri's letter dated 14.4.2014 to the 1st Defendant (this letter was copied to, among others, Tan Sri Azman Mokhtar); and

(e) the 1st Defendant's letter dated 15.4.2014 to Datuk Azzat, a Senior Independent Director of AGB (this letter was copied to, among others, Tan Sri Azman Mokhtar).

16. As explained in the above paragraphs 8 to 11, before the commencement of trial, the court cannot consider whether the 2014 Letters are admissible or not as evidence at the Trial. Once the Respondents are able to discharge the burden to show that Tan Sri Azman Mokhtar is able to give evidence regarding the Breach of Global Settlement Issue (Counterclaims)

and/or Conspiracy Issue (Counterclaims), Enc. 180 should be dismissed on this ground alone.

17. Dato' Nitin represented Tan Sri Azman Yahya and Tan Sri Azman Mokhtar in Encs. 178 and 180 respectively. As the court had allowed Enc. 178 but dismissed Enc. 180, Dato' Nitin proposed that no order as to costs should be made regarding these 2 applications. Learned counsel for the Respondents, Mr. Lim Kian Leong, agreed to Dato' Nitin's proposal and I so ordered.

F. Enc. 182

18. Mr. Lambert submitted that Enc. 182 should be allowed on the following grounds:

    (1) Tan Sri Zamzamzairani merely received a letter dated 8.8.2011 from the then Hon. Minister in the Prime Minister's Department, Datuk Seri Mohamed Nazri bin Abdul Aziz (**Minister**) regarding the alleged Global Settlement. Tan Sri Zamzamzairani has no personal knowledge regarding the alleged Global Settlement; and

    (2) Tan Sri Zamzamzairani was not involved in any discussion, negotiation or arrangement concerning the alleged Global Settlement.

19. I accept Mr. Lim's submission that Tan Sri Zamzamzairani is able to give evidence at the Trial regarding a "*fact in issue*" or "*relevant fact*" in respect of the Breach of Global Settlement Issue (Counterclaims) **and/or** Conspiracy Issue (Counterclaims). This decision is premised on the following reasons:

(1) at the material time, Tan Sri Zamzamzairani was the MD and Chief Executive Officer (**CEO**) of Telekom Malaysia Bhd. (**TMB**), the third defendant in the Counterclaims; and

(2) the letter dated 8.8.2011 was not sent by any person but by the Minister. Furthermore, the Minister's letter was sent specifically to Tan Sri Zamzamzairani as TMB's MD and CEO (this letter was copied to, among others, the then Second Minister of Finance). Significantly, the contents of the Minister's letter concerned the Global Settlement.

20. Based on the above reasons, I have no hesitation to dismiss Enc. 182 with costs.

G. <u>Enc. 184</u>

21. Mr. Lambert advanced the following submission in support of Enc. 184:

(1) at the material time, Datuk Bazlan was not a member of the first plaintiff company's (**1st Plaintiff**) -

(a) board of directors (**BOD**); and

(b) Board Committee of Independent Directors (**BCID**);

(2) regarding the minutes of meetings of the 1st Plaintiff's BOD and BCID, the Plaintiffs would be calling the 1st Plaintiff's company secretary and certain members of the 1st Plaintiff's BOD and BCID (including Datuk Azzat). As such, Datuk Bazlan was not the "*proper*" witness to be subpoenaed by the Respondents; and

(3) the price of the 1st Plaintiff's shares (**Price**) in respect of the 1st Plaintiff's acquisition of TM Cellular Sdn. Bhd. (**Acquisition**) was decided by the 1st Plaintiff's BOD and not by Datuk Bazlan. Furthermore, the Price had been fixed after the 1st Plaintiff's BOD had considered a valuation by the 1st Plaintiff's independent advisors, Goldman Sachs Singapore Ltd. (**Goldman**). The Independent Advice Letter by Aseambankers Malaysia Bhd. (**Aseambankers**) stated the Price was fair and reasonable. In any event, the Respondents had subpoenaed witnesses from Goldman and Aseambankers to testify in the Trial regarding the Acquisition. Accordingly, Datuk Bazlan was not the proper witness to be subpoenaed by the Respondents to give evidence at the Trial.

22. I am of the view that that the Respondents have discharged the burden to satisfy the court that Datuk Bazlan is in a position to give evidence at the Trial regarding a "*relevant fact*" concerning the Price [which is relevant to the Respondents' defence in respect of the Breach of Duty Issue (1st Suit) and/or is relevant regarding the Conspiracy Issue (Counterclaims)]. This decision is due to the following reasons:

(1) Datuk Bazlan was the 1st Plaintiff's Chief Financial Officer at the material time; and

(2) Datuk Bazlan attended meetings of the 1st Plaintiff's BOD and BCID concerning the Price.

23. Once the Respondents are able to show that Datuk Bazlan is able to give evidence at the Trial regarding a "*relevant fact*", it does not matter that -

    (1) the Plaintiffs would be calling "*appropriate*" witnesses (not the Subpoenaed Witness) to testify at the Trial; and

    (2) Datuk Bazlan is not the "*proper*" witness to be subpoenaed by the Respondents.

24. Premised on the above reasons, I am constrained to dismiss Enc. 184 with costs.

H. Encs. 187 and 190

25. Mr. Nad Segaram, learned counsel for the Plaintiffs, Puan Putri and Mr. Ng, submitted that at all material times, Puan Putri and Mr. Ng were Advocates and Solicitors who acted for the 1st Plaintiff. As such, any evidence regarding the communication between Puan Putri and Mr. Ng on the one part and the 1st Plaintiff on the other part (**Communication**), is legally privileged and cannot be admitted as evidence in the Trial pursuant to s 126(1) EA. Reliance was placed on, among others, VT Singam J's decision in the High Court case of **Dea Ai Eng v Dr Wong Seak Shoon & Anor** [2007] 2 MLJ 357.

26. I accept Mr. Lim's contention that Puan Putri and Mr. Ng are in a position to give evidence at the Trial regarding a "*relevant fact*" concerning the Acquisition [which is relevant to the Respondents' defence regarding the Breach of Duty Issue (1st Suit) and/or Conspiracy Issue (Counterclaims)].

This is because Puan Putri and Mr. Ng attended meetings of the 1st Plaintiff's BOD and BCID concerning the Acquisition.

27. Once the Respondents are able to discharge the burden to show that Puan Putri and Mr. Ng are able to give evidence at the Trial concerning a "*relevant fact*", at this juncture (before commencement of Trial), I cannot decide on the admissibility of the Communication (which is the judicial duty and function of the trial court) - please see the above paragraphs 8 to 11. This decision is supported by **Berjaya Land**, at paragraph 35, as follows -

> "*[35]* ***It appears to this court that the most appropriate course to adopt would be for the solicitor to attend as a witness pursuant to the subpoena and to invoke the privilege under s 126 [EA], at that stage. It would then be open to the parties to take up the arguments now set out and for the court to make a determination then. The court might well allow or disallow certain questions in order that it may determine the legality or otherwise of the 2nd email. The court will then be in a position to make a ruling on the matter more fully***."
>
> (emphasis added).

28. Without intending any disrespect to Mr. Nad, except for **Dea Ai Eng**, all the cases cited by him do not concern Setting Aside Applications which had been filed before the commencement of trial and which were based on inadmissibility of evidence to be given by the Subpoenaed Witness.

29. I acknowledge that in **Dea Ai Eng**, the High Court had set aside a subpoena before the commencement of trial on the ground that the evidence to be given by the expert medical doctor was privileged. There

was however no discussion in **Dea Ai Eng** that questions on admissibility of evidence should be dealt by the court during trial and not by way of affidavits before the commencement of trial. With respect, I decline to follow **Dea Ai Eng** due to the reasons expressed in **Berjaya Land** and the above paragraphs 8 to 12. It is to be noted that one High Court Judge or Judicial Commissioner is not bound by a decision of another High Court Judge or Judicial Commissioner - please see Ong Hock Thye FJ's (as he then was) judgment in the Federal Court case of **Sundralingam v Ramanathan Chettiar** [1967] 2 MLJ 211, at 213.

30. Premised on the reasons given in the above paragraphs 8 to 12 and 26 to 29, Encs. 187 and 190 are dismissed with costs.

I. Enc. 210

31. Mr. Nad has contended that Tan Sri Munir is not able to give any relevant evidence at the Trial. I am however persuaded by Mr. Lim's submission that Tan Sri Munir is in a position to give evidence at the Trial regarding a "*relevant fact*" concerning the Acquisition [which is relevant to the Respondents' defence regarding the Breach of Duty Issue (1st Suit) and/or Conspiracy Issue (Counterclaims)]. This is clear from the following reasons:

    (1) Tan Sri Munir affirmed a statutory declaration pursuant to s 169(15) of the Companies Act 1965 regarding the 1st Plaintiff's audited accounts; and

    (2) at the material time, Tan Sri Munir was the Chairman and director of the 1st Plaintiff.

32. Based on the above reasons, Enc. 210 is dismissed with costs.

J. Court's decision

33. In summary -

(1) Enc. 178 is allowed with no order as to costs;

(2) Enc. 180 is dismissed with no order as to costs;

(3) Encs. 182, 184 and 210 are dismissed with costs of RM5,000.00 for each application;

(4) Encs. 187 and 190 are dismissed with costs of RM1,500.00 for each application; and

(5) an allocatur fee is imposed on the above sums of costs

(**Decisions**).

34. I should end by stating the following:

(1) despite the Decisions, the Respondents retain the right not to call witnesses subpoenaed by them to testify at the Trial [except for Tan Sri Azman Yahya (whose subpoena is set aside by the court)];

(2) no finding on admissibility or non-admissibility of evidence is made in the Decisions because the court did not embark on a trial based on affidavits, especially when there are conflicting averments in the affidavits; and

(3) the integrity of the Trial is preserved and the parties are at liberty to -

(a) examine-in-chief, cross-examine and re-examine witnesses; and

(b) object to the admissibility of any evidence and to apply to court to exclude, expunge or disregard any evidence [except for statement of agreed facts which is filed pursuant to O 34 r 2(2)(j) RC and documents marked as Part A and Part B according to O 34 r 2(2)(d) and (e)(i) RC]

- as the parties see fit without being constrained in any manner by the Decisions. In other words, the Decisions do not invoke the application of issue estoppel principle to bar the parties at the Trial.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 9 JANUARY 2018

Counsel for Tan Sri Azman Yahya & Tan Sri Azman Mokhtar	*Dato' Nitin Nadkarni & Ms. Crystal Wong Wai Chin (Messrs Lee Hishammuddin Allen Gledhill)*
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Counsel for Plaintiffs, Puan Putri, Mr. Ng & Tan Sri Munir	*Mr. Nad Segaram, Ms. Soo Siew Mei & Ms. Siew Huei Ira (Messrs Shearn Delamore & Co.)*
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