

WONG SAM CHAI @ WONG HIN YUI v TAN CHOOI NEE (P)

CaseAnalysis
| [2022] MLJU 1109

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HIGH COURT (PENANG)

AMARJEET SINGH SERJIT SINGH JC

PETISYEN PERPISAHAN KEHAKIMAN NO 33-429-11/2019

28 March 2022

Kan Weng Hin (W H Kan) for the petitioner.

Daphne Choy Gaik Choo (Tam Xin Shun with her) (Choy & Assoc) for the respondent.

Amarjeet Singh Serjit Singh JC:

JUDGMENTIntroduction

[1]This judgment concerns the decisions rendered by me in two notices of application where discovery was sought pending trial in a petition where a decree of judicial separation was sought under section 64(1) of the Law Reform (Marriage and Divorce) Act 1976 (“the LRA”). The petitioner is the husband while the respondent is his wife. The first application was filed by the petitioner on 20.2.2020 (enclosure 12) and the second application was filed by the respondent on 6.3.2020 (enclosure 14).

[2]The notices of application were made pursuant to O. 24 r. 12 of the Rules of Court 2012 as allowed by r. 24 of the Divorce and Matrimonial Proceedings Rules 1980. On 31.1.2022, I allowed both applications. My reasons for the decisions are as follows.

The law

[3]The starting point would be O. 24 r. 12 of the Rules of Court 2012 which provides as follows:

(1) At any stage of the proceedings in any cause or matter the Court may, **subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter** that falls within one of the following descriptions:

- (a) documents on which the party relies or will rely;
- (b) documents which could –
 - (i) adversely affect a party’s case; or
 - (ii) support a party’s case; and
- (c) documents which may lead to a series of inquiry resulting in the obtaining of information which may –
 - (i) adversely affect a party’s case; or
 - (ii) support a party’s case.
- (d) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

[4]The above provision states that O. 24 r. 12(1) is subject to O. 24 r. 13(1) of the Rules of Court 2012. Rule 13(1) which is reproduced below provides the criteria for making an order for productions of documents in the following words:

An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules **unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.**

[5]In view of the above provisions and established case-law the principles of discovery in relation to O. 24 r. 12(1) can be summarised as follows:

- (i) The documents sought must be relevant to any petition) and must be or have been in the matter in the cause or matter (in the instant case the possession, custody or power of the party against whom the order for discovery is sought (*Yekambaran s/o Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581)
- (ii) In respect of the issue of “relevance”, a party is obliged to make discovery of all documents relevant to the matters in question in the action. The matters in question would in turn depend on the pleadings. A document relates to the matter in question if the document contains information which may either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences (*Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International* [1981] 1 MLRH 584).
- (iii) The discovery must be such that is necessary for costs. The purpose of the rule is to ensure that one disposing fairly of the cause or matter or for saving party does not enjoy an advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection (*Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Sdn Bhd* [2009] 5 MLJ 40)
- (iv) Discovery may be refused if the court is of the view that it is unduly oppressive to the party giving discovery or that the applicant is merely on a “fishing expedition” for evidence to prop up his case. Fishing expedition in the context of discovery has been described as “*aimless trawling of an unlimited sea*”. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes “*to drop a line (or two)*”, would not regard that as a ‘fishing expedition’. (see *Leslie S Holmes v. Engineering Service Inc* [1993] 1 AMR 27 and *Thyssen Hunnebeck Singapore Ltd v. TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75)

[6]It is also trite that the power is to be exercised judiciously having regard at all times to the circumstances of the case. Discovery is said to be a tool designed to do justice between opposing parties and the court must have all the relevant information to achieve this object (per Lord Donaldson MR in *Davis v Eli Lilly & Co* [1987] 1 All ER 801).
Analysis and decision

[7]The applications before me directly concern the issue of division of matrimonial assets which is the main issue before me apart from the issue of whether the decree of judicial separation ought to be granted. The court’s power in respect of the division of matrimonial assets is a statutory power conferred by section 76 of the LRA and is in the following terms:

- (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**
- (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.

- (3) 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.

[8] Thus, the division of assets between the parties of any assets acquired by either party separately or jointly during the marriage and the division between the parties of the proceeds of the sale of such asset is an issue to be determined at the trial of the petition.

[9] The discovery of documents of such assets would therefore be relevant to determine the issue of division of matrimonial assets. In this regard the court must ensure that one party does not enjoy an advantage or suffer an unfair disadvantage as the result of a document not being produced for inspection. To dispose fairly the cause or matter all the relevant documents and information are necessary ought to be before the court.

[10] In the instant case the petitioner and respondent, as the case may be, bears the burden to demonstrate that the documents sought are relevant to the action and that the documents are necessary either for disposing fairly the cause or matter and/or for saving costs.

Enclosure 12: The petitioner's application for discovery

[11] In enclosure 12 the petitioner seeks an order that the respondent affirms and files an affidavit within 14 days of this order stating whether she had or at any time had in her possession, custody, control or authority the following documents and if she had any of the said documents but such documents are currently no longer in her possession, custody, control or authority to state when she was dispossessed of and what has happened to the same:

- (a) a list of properties owned personally by the respondent or jointly with other persons within or outside Malaysia;
- (b) in respect of properties owned and registered in the respondent's name: the title, sale and purchase agreement, loan facility taken, quit rent and assessment, refinance or loan settlement, bank statements commencing from approval of the loan to date, rental agreements and rent received to date;
- (c) documents concerning disposal of properties registered in the respondent's name from 2016 to date (if any) and the payments received of such disposal;
- (d) bank account numbers, in the respondent's name or jointly held with another person, within or outside Malaysia including bank statements of such accounts from 2016 to date;
- (e) income received including salary, bonuses, allowances, dividend as shareholder, benefits, subsidies received from TCN Realty Sdn Bhd from 2016 to date;
- (f) income tax including documents in support of any tax reliefs from 2016 to date;
- (g) share, trust, investment in any insurance company bought and owned by the respondent from 2016 to date; and
- (h) a list of the vehicles registered in the respondent's name and/or currently used by the respondent.

[12] In the petition, the petitioner, apart from the matrimonial assets, which he had identified and claims to have been obtained with the joint effort of the respondent has also claimed a part of all the assets belonging to the respondent and/or held by her nominees and/or held in joint names. The instant application is to seek discovery of such assets which relate to the respondent's income and assets acquired during the marriage which are under the respondent's control and possession. In this regard, the petitioner has also sought an order to set aside any transfer, disposal or parting of the respondent's share in any matrimonial asset in the three years preceding the filing of the petition as provided under section 102 of the LRA. The petition was filed on 12.11.2019. Thus, the documents sought three years preceding this date would be 13.11.2016.

[13] I am of the view that the documents sought, if existing, are relevant and necessary for the fair disposal of this petition, in particular, with regards to the issues before this Court in respect of the division of such assets which includes the setting aside of any transfer, disposal or parting of any share in an asset found to be a matrimonial asset within three years preceding the filing of the petition. Without such documents, this Court would not be in a position to carry out its judicial function fairly as required by sections 76 and 102 of the LRA.

[14]It must be noted that the respondent has admitted that all properties acquired during the marriage are registered under her name, that she is in charge of the affairs and accounts of the family household and that she is the director and major shareholder of TCN Realty Sdn Bhd which is a company set up in 22.6.2004 by the petitioner and respondent. The petitioner had also alleged in the petition that the capital for the company came from the monies from his Employees Provident Fund (“EPF”) and monies from the sale of his share in Air-Conditioning Systems Design Sdn Bhd. The respondent has of course denied the petitioner’s assertions in respect of the source of the capital that went in TCN Realty Sdn Bhd.

[15]In respect of this dispute as well as the other allegations made by the respondent I kept in mind the following test of “relevancy” or “materiality” which was approved by the Court of Appeal in *Format Communications Mfg. Ltd. v. ITT (UK) Ltd.* [1983] FSR 473 and adopted by in *Yekambaran s/o Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581:

... for the purpose of testing the materiality of the discovery to a particular issue... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

[16]In my mind the documents sought concerns the issues regarding the division of matrimonial assets as pleaded in the petition. Such documents may, it is reasonable to suppose at this stage, contain information which may directly or indirectly enable the petitioner to advance his own case or to damage the case of respondent. This the petitioner can only do with the information in the document which may fairly lead him to a train of inquiry to advance his own case or to damage the case of respondent.

[17]I also find support for my view in the case of *Sheng Lien @ Sheng Len Yee v. Tan Teng Heng & Ors* [2010] 11 MLRH 849 where an order for discovery was granted by Yeoh Wee Siam J in a petition where similar prayers for discovery were made. Her Ladyship there said:

... This is necessary to enable the Court later on in the proceedings for judicial separation to make an Order regarding the division of matrimonial assets under s. 76 of the LRA. Such an application by the Petitioner for discovery of documents or information necessary for the fair disposal of the cause or matter by the Court cannot be dismissed as a fishing expedition by the Petitioner. Neither is this application for general discovery which should not be allowed (see *Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors (No. 2)* [2001] 5 CLJ 476 at page 489).

[18]For the above reasons I allowed the prayers in enclosure 12.
Enclosure 14: The respondent’s application for discovery

[19]In enclosure 14 the respondent seeks an order that the petitioner affirms and files an affidavit within 14 days of this order stating whether he had or at any time had in his possession, custody, control or authority the following documents and if he had any of the said documents but such documents are currently no longer in his possession, custody, control or authority to state when he was dispossessed of and what has happened to the same:

- (i) the policy of insurance purchased from Hong Leong Assurance, showing the amount of monies realised from the said policy, an account of the said monies, an account of the remainder of the monies including the bank accounts where the monies are kept;
- (ii) details of particulars of the loans taken from the petitioner’s siblings, details of payments that were made to the said siblings, account of the monies
- (iii) received and where the monies were spent;
- (iv) an account of the monies spent by the petitioner on one Ng Geom Hah;
- (v) the sale of shares in Air-Conditioning Systems Design Sdn Bhd and a detailed account of the proceeds of the sale;
- (vi) payments made in respect of the following properties referred to by the petitioner:
 - (a) the matrimonial home at No. 8 Changkat Minden, Gelugor, Penang;
 - (b) Lot 65, Bukit Merah, Semanggol, Perak;
 - (c) the condominium at Sunway Lagoon View Resort,
 - (d) Petaling Jaya; and

- (e) the condominium at Springfield Condominium, Bayan Lepas, Penang;
- (vii) EPF withdrawals, Public Mutual trust funds withdrawals, savings withdrawals referred to by the petitioner;
- (viii) bank account numbers, in the respondent's name or jointly held with another person, including bank statements of such accounts from 2016 to date; and
- (ix) documents taken by the petitioner when he left the matrimonial home.

[20]The respondent pleaded that the petitioner bought the insurance policy from Hong Leong Assurance for her benefit and had made her the beneficiary. However, the policy was surrendered to finance the education of the youngest child of the marriage. There was a surplus of monies which the petitioner claims are an asset of the marriage. The respondent claims that the petitioner's bank accounts will shed light on the surplus. It is also claimed that the sale of the petitioner's shares in Air- Conditioning Systems Design Sdn Bhd are assets of the marriage and the documents surrounding the sale and use of the monies are documents in possession of the petitioner. The petitioner also has possession of the documents concerning matrimonial assets taken when he left the matrimonial house. The amount of withdrawals from the EPF, Public Mutual trust funds and savings accounts would directly be an issue at the trial concerning the division of property.

[21]I am of the view that the documents sought are relevant and necessary for the fair disposal of this petition, in particular, with regards to the division of matrimonial assets. Similarly, as with the petitioner's application, this Court would not be in a position to carry out its judicial function fairly as required by sections 76 of the LRA if the order for discovery is not made.

[22]In my mind the documents sought by the respondent concerns the issues regarding the division of matrimonial assets. Such documents may, it is reasonable to suppose at this stage, contain information which may directly enable the respondent to advance her case, or to damage or minimise the case of the petitioner. This the respondent can only do with the information in the documents which may fairly lead her to a train of inquiry to damage or minimise the case of respondent.

[23]The petitioner submits that from the perusal of the answer to the petition the respondent has not made a claim for the distribution of property against the petitioner and has merely denied the grounds set out in the petition by contending that the marriage has not irretrievably broken down. It is argued that the respondent in such circumstances can only seek discovery to support the allegation or defence that the marriage has not broken down.

[24]I disagree. The main issue before this Court is the division of matrimonial property. The respondent is entitled to not only advance her case but also to damage the case of the petitioner. It must also be noted that the respondent had alleged that the claims made by the petitioner are without merit and a concoction or fabrication. In my view, the respondent is entitled to present all evidence before this Court to ensure that the issue of division of property is fully ventilated for a just order to be made. The issue of division of matrimonial assets is before the court and the respondent has a right to be heard on the said issue. For this purpose, this Court is empowered to make an order of discovery sought. A denial of such right to seek a fair share of the matrimonial assets where the defence of no break-down of marriage fails is untenable.

[25]For the above reasons I allowed the prayers in enclosure 14.