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SECURITIES COMMISSION MALAYSIA v. WONG SHEE KAI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[SUIT NO: WA-2NCC-171-05-2020]
6 JULY 2023

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Abstract – *An application to attend a trial by way of remote communication technology would be dismissed if the allowance of it would bring the administration of justice into disrepute. Courts should not condone a situation where individuals could manipulate the legal system to their advantage as it would severely compromise the integrity of the justice system and the public's trust in the rule of law.*

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CIVIL PROCEDURE: *Trial – Conduct of proceedings – Application for – To attend trial proceedings by means of remote communication technology ('RCT') via Zoom – Applicant was involved in several related criminal and civil proceedings under Capital Markets and Services Act 2007 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether application ought to be allowed – Whether threshold requirement under O. 33A r. 3 of Rules of Court 2012 satisfied – Whether administration of justice would be brought into disrepute – Whether subsequent trial proceedings should be continued via RCT*

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The plaintiff was the Securities Commission Malaysia while the first and second defendants were the directors and shareholders of the third defendant, a company that owned substantial number of shares in Bright Packaging Industry Bhd ('BPI'). As per the plaintiff's investigation, it was found that the defendants had conducted fraudulent activities to defraud BPI of its money, *via* three corporate exercises. According to the plaintiff, these corporate exercises had caused BPI to effect substantial payments in fictitious transactions. The monies from these transactions were thereafter channelled to several nominee companies controlled by the defendants before being transferred to the first and third defendants' bank accounts. The present suit under ss. 200 and 360 of the Capital Markets and Services Act 2007 ('CMSA') were filed by the plaintiff against the defendants, due to the defendants' contraventions of sub-ss. 179(a) and/or (b) of the same Act, for the sake of recovering funds and compensation for those who were affected by the defendants' fraudulent act ('present suit'). During the trial of the present suit, at the time the defendants' sixth witness was giving evidence, the first defendant elected to attend the proceeding through remote communication technology ('RCT') *via* Zoom. A formal application by the

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first defendant to be allowed to continue attending the trial through RCT was filed a day after. In the said application, the first defendant sought for the following orders: (i) the trial of the present suit to be continued *via* RCT ('prayer A'); (ii) the hearing of any and all interlocutory proceedings to be conducted *via* RCT ('prayer B'); (iii) further to prayers A and B, the first defendant to be allowed and be at liberty to attend the trial of the present suit and any and all its interlocutory proceedings' hearing *via* RCT ('prayer C'); and (iv) that the first defendant to be allowed and be at liberty to give evidence as a party and witness on his behalf, if the first defendant so decided to give evidence, at the trial of the present suit *via* RCT ('prayer D') ('RCT application'). In support of the RCT application, the first defendant contended that: (i) the first defendant was not a prisoner. Thus, he was entitled to attend the trial of the present suit *via* RCT as of right, without being affected by the use of RCT or O. 33A r. 3 of the Rules of Court 2012 ('ROC'); (ii) even if the court ruled that O. 33A r. 3 of the ROC was applicable to the RCT application, since the first defendant was not a prisoner, the first defendant had met the conditions under O. 33A r. 3(2)(a), (b) and (d) of the ROC, with r. 3(2)(c) being inapplicable. The first defendant had also satisfied the only condition required under O. 33A r. 3(1) and (2) of the ROC as he had already disclosed the place from where he would log in; (iii) public policy should be balanced with proportionality, and O. 33A of the ROC provides a means for the first defendant's participation in the trial. The first defendant posited that as per the case of *Polanski v. Conde Nast Publications Ltd* ('*Polanski*'), consequences for the parties were relevant for public policy considerations. According to the first defendant, the reason why he had to attend the proceedings though RCT was because there was a real risk of arrest and punitive measures by the plaintiff if he returned to Malaysia to attend the trial physically; and (iv) the first defendant being a fugitive was not disentitled from seeking reliefs under O. 33A of the ROC. Citing the cases of *Polanski* and *Seymour and Another v. Commissioner of Taxation* ('*Seymour*'), it was posited that, respectively, (a) the first defendant was a fugitive from justice that was entitled to invoke the court's assistance and procedures to protect his civil rights. For that reason, the court's discretion should be exercised in the first defendant's favour; and (b) the first defendant's physical presence was not necessary for the trial's cross-examination. Therefore, on these grounds, the first defendant argued that the RCT application should be allowed. The issues that arose in determining the RCT application were (i) whether the first defendant had satisfied the threshold requirement under O. 33A r. 3 of the ROC; and (ii) whether if the RCT application was allowed, the administration of justice would be brought into disrepute.

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Held (dismissing RCT application; directing subsequent trial proceedings to continue *via* RCT):

(1) By referring to the threshold requirement relating to O. 33A r. 3 of the ROC, it was clear from the first defendant's affidavit that he had not disclosed his location specifically for the threshold to be met and for the court's direction to be complied with. It was not sufficient for the first defendant to merely aver in his affidavit that he would log in from Port Moresby, Papua New Guinea. Since the specific location had not been disclosed, it could also not be said that sufficient administrative and technical facilities and arrangements had been made at that place. The first defendant could have provided proof that sufficient and technical facilities and arrangements were made at whichever place he wanted to log in from, but none had been given. (paras 30-34)

(2) The proper administration of justice prevailed over the first defendant's entitlement to appear in these proceedings as a party *via* RCT. The first defendant, who was a fugitive, had refused to comply with the orders of the court. He had also refused to comply with the plaintiff's notices to be examined on two separate occasions, showing a deliberate refusal to cooperate with the legal process. Additionally, there were also two warrants of arrest issued by the Magistrate's Court and other proceedings initiated against the first defendant under the CMSA and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA') that had been disregarded by him. However, notwithstanding this recalcitrance, the first defendant still sought assistance from the court to allow him to participate in these proceedings. Therefore, if prayers C and D were to be allowed, it would create a dangerous precedent that would undermine the proper administration of justice. It would also open the door for individuals facing criminal charges to conveniently avoid prosecution while still engaging in civil proceedings related to those charges. As such, the court could not condone a situation where individuals could manipulate the legal system to their advantage as it would severely compromise the integrity of the justice system and the public's trust in the rule of law. (paras 41 & 42)

(3) The situation in the present suit was different from that of the *Polanski* case. In that case, the fugitive was facing criminal charges and extradition for an offence commenced in the USA, but the civil suit in question, which was not related to his criminal liability, was in the UK. The situation in the present suit was akin to that in the *Seymour* case. Similar to the *Seymour* case, the first defendant here was also facing a possible criminal charge which arose from the same facts of the present suit in the same jurisdiction where the present suit was being tried.

There was a very close connection between the present suit which arose from breaches of sub-ss. 179(a) and/or (b) of the CMSA and the criminal charges that the first defendant was facing under the CMSA and the AMLA. Hence, by allowing the RCT application, not only that it would undermine the operation of the CMSA and the AMLA which would bring the administration of justice into disrepute, but it would also be an affront to the public conscience. (paras 43 & 45)

(4) The first defendant's contention that he had not returned to Malaysia since March 2019 because of the plaintiff's action of using investigative and legal instruments at its disposal to prosecute him could not be accepted. This was because, the allegation of persecution by the plaintiff was a serious and unsubstantiated allegation which tantamount to an allegation of *mala fide* which carried a high burden of proof and could only be proved on trial. By not providing any cogent proof, the first defendant had not met the threshold of proving the *mala fide*. (paras 48 & 49)

(5) The first defendant had not provided any specific reason why the trial and its other interlocutory proceedings must be conducted by RCT instead of physically. It could only be surmised that it was for the first defendant to avoid attending physical trial if he intended to attend the proceedings and/or to give evidence. Nevertheless, (i) since the first defendant had failed to satisfy the threshold requirement of disclosing the specific location from which he intended to log in; (ii) the administration of justice would be severely undermined, *ie*, by allowing accused individuals to avoid criminal charges while participating in civil proceedings, if the RCT application was allowed; and (iii) the allegation of the first defendant that he was being persecuted by the plaintiff had been rejected, the court refused to make an order that the trial of the present suit and its interlocutory proceedings should be conducted *via* RCT instead of physically. The RCT application was therefore dismissed. (paras 51-52, 54 & 55)

(6) Pursuant to the court's direction under para. 5 of the RCT Practice Direction, the subsequent trial proceedings were directed to resume by way of RCT as they had already been conducted for eight days *via* that mode. Changing the mode now would be to the defendants' disadvantage as the defendants' counsel only had the opportunity to cross-examine the plaintiff's witnesses through RCT. The plaintiff would enjoy an advantage in a physical trial. In this sense, there would be no level-playing field if the trial mode was to be changed to a physical trial. (para 53)

Case(s) referred to:
Ahmad Zahid Hamidi v. PP [2020] 1 LNS 1986 CA ***(refd)***
Erceg (Millie) v. Erceg (Lynette) (Mode of Evidence) [2016] NZAR 85 ***(refd)***
McGlinn v. Waltham Contractors Ltd & Ors [2006] EWHC 2322 ***(refd)***
Mohd Rafizi Ramli v. PP [2014] 4 CLJ 1 CA ***(refd)***
Polanski v. Conde Nast Publications Ltd [2005] 1 All ER 945 ***(dist)***
R v. Noddle [2016] BCJ No. 783 ***(refd)***
Seymour And Another v. Commissioner Of Taxation [2016] 151 ALD 234 ***(foll)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001, s. 32(3)(a)
Capital Markets and Services Act 2007, ss. 179(a), (b), 200, 360
Courts of Judicature Act 1964, s. 15A
Rules of Court 2012, O. 33A r. 3(1), (2)(a), (b), (d)

For the plaintiff - Kwan Will Sen, Annabel Tan Sher May, Esther Hong Hui Jun, Nurul Rafeeza Hamdan, Aaron Abhilash Paul Chelliah; M/s Lim Chee Wee Partnership
For the 1st & 3rd defendants - Ivanpal Singh Grewal; M/s AJ Ariffin & Harpal
For the 2nd defendant - Michelle Teoh; M/s Nethi & Saw

Reported by Syamim Ariffin

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] This judgment concerns an application by a defendant to allow him to attend a trial by Zoom from a remote location despite having warrants of arrest against him.

[2] After hearing this application, I dismissed the application. This judgment contains the full grounds for my decision.

Background Facts

[3] This suit arises from alleged fraudulent activities committed by the defendants in relation to three corporate exercises undertaken by Bright Packaging Industry Berhad ("BPI"). The plaintiff, the Securities Commission Malaysia, as the regulatory body for the Malaysian capital market, has filed a lawsuit under s. 200 and s. 360 of the Capital Markets and Services Act 2007 ("CMSA") to seek recovery of funds and compensation for those who suffered losses due to the defendants' contravention of s. 179(a) and/or 179(b) of the CMSA.

[4] The first defendant, Ricky Wong Shee Kai, is the son of the second defendant, Madam Teh and both of them are directors and shareholders of the third defendant, Wong SK Holdings Sdn Bhd. The third defendant is a substantial shareholder of BPI, making the first defendant and the second

defendant indirect shareholders of BPI. Although the first defendant and second defendant were authorised signatories of BPI's bank accounts, they were not the directors of BPI.

[5] The plaintiff's investigations revealed that the defendants used the corporate exercises as fraudulent devices, schemes, and acts that defrauded BPI. It is alleged that substantial payments were channelled through nominee companies controlled by the defendants before being transferred to the bank accounts of the first defendant and third defendant. The plaintiff further contends that these nominee companies received funds from BPI based on fictitious transactions.

[6] In the main suit, the plaintiff seeks the recovery of funds from the defendants under the provisions of the CMSA. The plaintiff alleges that the defendants engaged in prohibited conduct by using fraudulent devices, schemes, or acts that defrauded BPI, particularly in relation to the proceeds raised from the corporate exercises. The plaintiff claims that BPI suffered a loss of RM56,074,500, and the defendants unlawfully gained the same amount from the fraudulent activities. The plaintiff seeks various reliefs against the defendants including payment of three times the amount of pecuniary gain alleged made by the first defendant, amounting to RM140,323,500.

[7] Prior to the filing of this suit, the Public Prosecutor initiated legal proceedings in court against the first defendant under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA").

[8] In March 2019, the first defendant departed Malaysia *via* the Kuala Lumpur International Airport and has not returned since.

[9] A warrant of arrest issued against the first defendant on 27 December 2019 upon the application of the plaintiff to the Kuala Lumpur Magistrate Court as the first defendant failed to appear before the plaintiff's investigating officer, as required by s. 32(3)(a) of the AMLA. The plaintiff then obtained a second warrant of arrest against the first defendant on 29 September 2021 which alleged offences under the CMSA in relation to Asia Media Group Berhad ("AMGB"), of which the first defendant is a director of.

[10] The plaintiff also initiated proceedings under the AMLA against Havana Bayview Sdn Bhd, which related to the first defendant, and the first defendant, seeking to forfeit assets previously frozen under encl. 17 herein. The plaintiff also charged Ken Ong Kar Kian, a witness for the defendants, for failing to appear and providing a false statement. Additionally, in these proceedings, the plaintiff attempted to freeze the assets of the first defendant's brother and the second defendant's son in spade assets limited resulting in a recorded consent order.

[11] On 23 May 2022, a *Mareva* injunction order was granted, freezing the defendants' assets up to the value of RM169,223,500.

[12] The warrants of arrest against the first defendant are still outstanding.

[13] The trial commenced on 5 April 2021 and the plaintiff called 14 witnesses before closing its case. After eight days of trial, on 7 June 2022, which was a date fixed for trial for the defendants' sixth witness to give evidence, the first defendant elected to attend the proceedings of the action through remote communication technology (RCT) using Zoom. However, the plaintiff's counsel objected to the first defendant's presence and he was subsequently directed to leave the Zoom hearing. The next day, the court heard arguments from both parties' counsel regarding the first defendant's attendance in the Zoom hearing and future proceedings conducted *via* RCT. Following these arguments, the court directed the first defendant to make a formal application to seek the court's direction for the first defendant to attend these proceedings by means of RCT.

The Application

[14] The main orders prayed by the first defendant in his notice of application in encl. 475 ("the RCT application") are:

(i) prayer A: the trial of the action herein be continued to be conducted *via* RCT;

(ii) prayer B: the hearing of any and all interlocutory proceedings herein be conducted *via* RCT;

(iii) prayer C: further to prayers (a) and (b) above, that the first defendant be allowed and be at liberty to attend the trial of the action herein and any and all hearing/s of interlocutory proceedings herein *via* RCT; and

(iv) prayer D: further, that the first defendant be allowed and be at liberty to give evidence as a party and witness on his behalf, in the event that the first defendant so decides to give evidence, at the trial of the action herein *via* RCT.

Submissions Of The First Defendant

[15] The first defendant takes the primary position that he, who is not a prisoner, is entitled to attend the trial *via* RCT as of right, in line with the trite legal principle that a party litigant has the right to be present at trial, which is not affected by the use of RCT or O. 33A r. 3 of the Rules of Court 2012 ("ROC"). This position is supported by the four distinct categories of persons contemplated in r. 3 (a person attending proceedings (excluding parties, a witness giving evidence, a prisoner as a witness, and a prisoner as a party), none of which includes a party who is not a prisoner. This is also

consistent with the Chief Justice's Practice Direction 1/2021 ("the RCT practice direction"), which allows disclosure of RCT platform details to related parties without seeking leave of the court.

[16] Alternatively, if the court rules that O. 33A r. 3 of the ROC applies to the RCT application, it is submitted that the first defendant has met the conditions under O. 33A r. 3(2)(a), (b), and (d) of the ROC, with r. 3(2)(c) being inapplicable as the first defendant is not a prisoner. The first defendant has already disclosed the place from where he will log in, satisfying the only condition required under O. 33A r. 3(1) and (2) of the ROC.

[17] The first defendant argues that public policy should be balanced with proportionality, and O. 33A of the ROC provides a means for his participation in the proceedings. Citing the House of Lords case of *Polanski v. Conde Nast Publications Ltd* [2005] 1 All ER 945, the first defendant emphasises that the consequences for the parties are relevant to public policy considerations. The first defendant has deposed on affidavit the reasons for not returning to Malaysia, stating the real risk of arrest and punitive measures by the plaintiff. In support, the New Zealand case of *Erceg (Millie) v. Erceg (Lynette) (Mode of Evidence)* [2016] NZAR 85 is cited, where the court accepted the real risk of arrest as a reason for allowing evidence *via* RCT. Furthermore, it is argued that the plaintiff would not suffer prejudice as the first defendant only seeks to participate *via* RCT and give evidence once the plaintiff concludes its case. The case of English High Court case of *McGlinn v. Waltham Contractors Ltd & Ors* 2006 EWHC 2322 (TCC) is referred to support the notion that the plaintiff would not face significant prejudice in cross-examining the first defendant *via* video link.

[18] The first defendant argues that being a fugitive does not disentitle him from seeking reliefs under O. 33A of the ROC, citing *Polanski v. Conde Nast Publications Ltd* (*supra*). The case establishes that a fugitive from justice is entitled to invoke the court's assistance and procedures to protect his civil rights. The first defendant asserts that the court's discretion should be exercised in his favour, as no prejudice would be caused to the plaintiff, and cites the the Federal Court of Australia case of *Seymour And Another v. Commissioner Of Taxation* [2016] 151 ALD 234 to support the proposition that physical presence is not always necessary in cross-examination. Therefore, the first defendant should be allowed to attend the trial *via* RCT and give evidence if desired.

Submissions Of The Plaintiff

[19] The plaintiff argues that the first defendant, who is a fugitive and has consistently failed to comply with court orders and appear for examination, should not be allowed to participate in the proceedings. It contends that permitting the defendant's involvement would undermine the proper

A administration of justice and set a precedent where fugitives can use remote communication technology to avoid criminal charges while engaging in civil proceedings. The plaintiff cites the case of *Seymour And Another v. Commissioner Of Taxation* (*supra*) to support its position, highlighting the public interest in upholding the law and the importance of in-person cross-
B examination, especially in cases involving allegations of fraud or evasion.

[20] The plaintiff submits that the first defendant who is a fugitive and has repeatedly refused to comply with court orders, should not be allowed to participate in the proceedings. It asserts that granting the defendant's RCT application would undermine the proper administration of justice and set a
C precedent for accused individuals to avoid criminal charges while engaging in civil proceedings. The plaintiff draws support from the case of *Seymour and Another v. Commissioner of Taxation* (*supra*), where the full court of the Australian Federal Court affirmed the decision to disallow evidence *via* video link, emphasising the public interest in upholding the law and the importance
D of cross-examination in cases involving allegations of fraud or evasion.

[21] The plaintiff argues that the *Polanski* case is not applicable to the present situation for several reasons. Firstly, the first defendant is facing charges in Malaysia and is seeking assistance from the same jurisdiction, unlike Roman Polanski who was seeking help from a different jurisdiction.
E Secondly, allowing the first defendant to participate would impede the proper administration of justice in Malaysia, while Polanski's involvement in the UK had no impact on its justice system. Furthermore, granting the RCT application would undermine the operation of relevant laws and open the door for accused individuals to avoid criminal charges while defending
F themselves in civil proceedings.

[22] The plaintiff argues that the right to access justice is not an absolute fundamental right but is subject to the jurisdiction and powers of the court as provided by law. The court's power to conduct remote proceedings *via* RCT is governed by s. 15A of the Courts of Judicature Act 1964 and O. 33A
G of the ROC. The relevant practice direction is the RCT Practice Direction which outlines the procedures for conducting proceedings through RCT.

[23] The plaintiff submits that the first defendant's statements regarding his willingness to disclose his location and participate in the proceedings *via* RCT fall short of fulfilling the requirements under O. 33A of the ROC. The
H applicant is expected to disclose the specific place of appearance and ensure the availability of necessary administrative and technical arrangements. A careful review of the first defendant's affidavits reveals that his averments do not meet the threshold for such an application.

I **[24]** The plaintiff contends that the first defendant's prayer D in his RCT application is improper and inappropriate as it seeks an order allowing him to give evidence only if he decides to do so. This indicates that the first

defendant is not committing himself to become a witness and is seeking wide discretion on when and whether he would give evidence. Furthermore, the first defendant's failure to file a witness statement when it was agreed upon by the parties and his subsequent filing of new witness statements would significantly prejudice the plaintiff's case. This disregard for the rules and court directions warrants the dismissal of the RCT application with costs.

[25] The plaintiff maintains that the first defendant's application to include a new witness is marred by undue delay and lack of good faith. The application was filed more than a year after the defendants had already filed their list of witnesses, and the first defendant had ample opportunity to indicate his intention to give evidence during this period. Despite being represented by solicitors since May 2020, the first defendant consciously chose not to participate or affirm any affidavits until now. This lackadaisical attitude and late filing of the RCT application demonstrate a lack of good faith and should not be permitted.

[26] It is submitted that the plaintiff's case against the first defendant is well-documented and clear. Multiple cause papers have been filed since May 2020, outlining the case, and the first defendant's defence was filed in July 2020. However, the belated filing of the RCT application demonstrates a disregard for the court's directions and undermines the proper administration of justice.

[27] The plaintiff submits that the first defendant failed to fulfil the conditions set out under O. 33A of the ROC, and his lack of cooperation and credibility raise doubts about the degree of control the court would have over him as a witness in an RCT. Additionally, the plaintiff argues that the assessment of witness conduct and demeanour, crucial in cases involving allegations of fraud, would be hampered in an RCT. The first defendant's belated application, after more than two years of trial, and his refusal to disclose his location further support the denial of the RCT application.

[28] The plaintiff argues that the first defendant's allegation that the plaintiff is persecuting him lacks evidence and is unsubstantiated, as the plaintiff's claim is supported by evidence of a money trail demonstrating fraudulent conduct. The plaintiff employed legitimate means, such as seeking assistance from the public and Interpol, to locate the first defendant, and any allegations of *mala fide* intention or persecution must be proven at trial.

Court's Analysis And Findings

[29] For the purposes of this analysis, I will begin with prayers C and D, as they are the focal prayers that require consideration in light of the first defendant's sudden attendance during the Zoom hearing on 7 June 2022. These prayers pertain to the attendance of the first defendant during the proceedings.

Prayers C And D

Threshold

[30] The first defendant, based on his affidavits have not satisfied the court that he has met threshold for a RCT hearing by fulfilling the conditions set out in O. 33A r. 3(2)(d) of the ROC:

> the Court or Registrar is satisfied that sufficient administrative and technical facilities and arrangements are made at the place where the person, witness or prisoner as a witness or party is to make an appearance or to give evidence.

[31] The first defendant has not sufficiently disclosed the place where he is to make an appearance or to give evidence. The location to be disclosed must be specific for the court to determine the platform and the designated location to carry out the proceeding as provided in paras. 3 and 7 of the RCT Practice Direction. The first defendant only averred in his affidavit in support that:

> I am fully willing and able to disclose my physical location at the material time I attend the proceedings of this action conducted *via* RCT"
>
> ... In any event, in the interest of full disclosure, for now I will be attending these proceedings *via* RCT from Port Moresby in Papua New Guinea.

[32] In addition, my ruling and direction given on 8 June 2022 was "first, referring to O. 33A r. 3 para. (1) and (2) for the court to direct a person to attend these proceedings by means of RCT, the court has to know from where the person is logging in from. This is condition (a) stated in para. (2) O. 33A r. 3. I may add that this is the only condition applicable since Ricky Wong is only intending to attend as a party and in no other capacity. This has to be stated by way of affidavit evidence with proof of where Ricky Wong is located."

[33] Here, I was only referring to the threshold requirement relating to O. 33A r. 3. It is clear from the first defendant's averments that he has not disclosed his location for the threshold to be met and for my direction to be complied with. This location must be disclosed in his affidavit filed in support of this RCT application, not at a future time. Saying that he is in Port Moresby is not sufficient.

[34] Because this specific location is not disclosed, it cannot be said that sufficient administrative and technical facilities and arrangements are made at the place. In the alternative, the first defendant could provide proof that sufficient administrative and technical facilities and arrangements are made at whichever place he wants to log in from but none has been given.

Whether Administration Of Justice Is Brought Into Disrepute

[35] The first defendant primarily relied on *Polanski v. Conde Nast Publications Ltd* (*supra*), an English House of Lords case to argue the position that the court is ought to strike a balance between public policy imperatives and proportionality in considering the first defendant's participation in the proceedings.

[36] In the *Polanski* case, Roman Polanski, a renowned film director, was involved in a libel action against the publishers of "Vanity Fair" in the UK. Polanski sought permission to provide his evidence through video link, from France, fearing that his personal attendance in London would expose him to the risk of arrest and extradition to the United States. This concern arose due to his guilty plea in the late 1970s for unlawful sexual intercourse with a 13-year-old girl, which led to his status as a "fugitive from justice." The initial order granted by the judge allowing permission was appealed by the publishers. The Court of Appeal allowed the appeal stating that it goes against the court's policy of discouraging litigants from evading the legal process. At Polanski's appeal at the House of Lords, the issue was whether upholding the earlier order to allow Polanski to provide his evidence through video link would bring the administration of justice into disrepute.

[37] Allowing Polanski's appeal, Lord Nicholls held:

> [16] ... Public policy is based on wider considerations than the interests of the parties themselves. But this does not mean the consequences for the parties are irrelevant when considering wider questions of public policy. On the contrary they may be of relevance and importance ...
>
> [17] This approach accords with the contemporary trend in this area of the law. The trend on matters of this kind is to look broadly at the requirements of justice. Whether the use of the court's procedures in a particular way would bring the administration of justice into disrepute or, as it is sometimes put, would be an affront to the public conscience, calls for an overall balanced view. This does not mean the courts now apply lower standards in the administration of justice or that the public conscience is now less easily affronted. Rather, it means the courts increasingly recognise the need for proportionality. The sanction must be appropriate having regard to all the circumstances. Indeed, an over-rigid interpretation of the requirements of public policy in this field may be counter-productive. A legal principle based on public policy which ignores the consequences for the parties can itself bring the administration of the law into disrepute. It may also involve a breach of the parties' rights under article 6 of the European Convention on Human Rights.
>
> [18] A similar approach is now adopted in cases where a party seeking to be heard by the court is in contempt of court. That fact is not of itself a bar to the contemnor being heard ...

[38] Lord Nicholls further held:

> [25] Second, a fugitive from justice is not as such precluded from enforcing his rights through the courts of this country. This is so whether the fugitive is claimant or defendant. Mr Polanski's status as a fugitive offender does not deprive him of any rights he would otherwise possess in respect of the subject matter of this action. His flight from California in 1978, and the steps he has taken ever since to remain beyond the reach of the Californian court, do not preclude him from bringing proceedings in England in respect of damage to his reputation flowing from publication of defamatory material in this country.
>
> [26] At first sight this may seem unattractive. It may seem unattractive that a person can, at one and the same time, evade justice in respect of his criminal conduct and yet seek the assistance of the courts in protection of his own civil rights. But the contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that for so long as a fugitive remained 'on the run' from the criminal law, his property and other rights could be breached with impunity. That could not be right.
>
> Such harshness has no place in our law. Mr Polanski is not a present-day outlaw. Our law knows no principle of fugitive disentitlement.

[39] The first defendant argued that the first defendant should be allowed to attend the resumed trial *via* RCT as the first defendant's situation is analogous to that of the claimant in *Polanski*, being a fugitive from justice, the first defendant should be granted permission to participate in the trial through RCT as a fugitive should not prevent him from utilising video conferencing as a procedural facility to protect his civil rights in proceedings properly brought before the court.

[40] With these observations in mind, I considered the question of whether if the first defendant is allowed to attend these proceedings by RCT the administration of justice will be brought into disrepute and it would be an affront to the public conscience. After considering the affidavits and submissions of counsel, I find that the question is answered in the positive.

[41] In the circumstances of this case, the proper administration of justice prevails over the first defendant's entitlement to appear in these proceedings as a party by RCT. From the evidence before the court, the first defendant who is a fugitive, refuses to comply with orders of the court. He refused to comply with the plaintiff's notices to be examined on two separate occasions, showing a deliberate refusal to cooperate with the legal process. Additionally, he disregarded two warrants of arrest issued by the Magistrate Court. Notwithstanding this recalcitrance, he seeks assistance from the court to allow him to participate in these proceedings.

[42] I accept that if prayers C and D of the RCT application are allowed, it would create a dangerous precedent that undermines the proper administration of justice. It opens the door for individuals facing criminal charges to conveniently avoid prosecution while still engaging in civil proceedings related to those charges. The court cannot condone a situation where individuals can manipulate the legal system to their advantage. This would severely compromise the integrity of the justice system and undermine public trust in the rule of law.

[43] The situation here is different from the *Polanski* case and has similarities to the facts of the *Seymour And Another v. Commissioner Of Taxation* (*supra*) decided by the Federal Court of Australia which affirmed the primary judge's decision disallowing evidence to be given *via* video link. In the *Seymour* case, the appellants left Australia for Mauritius due to a significant tax assessment issued by the Australian Tax Commissioner. Although they submitted necessary documents, they were unwilling to provide evidence in Australia. They applied to the Administrative Appeals Tribunal (AAT) for permission to give evidence through a video link, stating that they would only return if assured by the Commissioner that they would not be prevented from leaving Australia or arrested. The AAT granted its request. Subsequently, the respondent sought a judicial review of the AAT's decision. The primary judge in the Federal Court allowed the review and quashed the AAT's decision. The appellants appealed this ruling, and the full court of the Federal Court, after considering the House of Lords case of *Polanski*, upheld the primary judge's decision. Siopsis J, delivering the judgment of the Full Court of the Federal Court stated:

> [23] The primary judge characterised the Tribunal's error as taking into account an irrelevant consideration, in the sense that the AAT Act impliedly precluded the Tribunal from treating the desire of an overseas litigant to avoid the reach of the Australian authorities, as being a legitimate reason upon which to base the exercise of the discretion in s 35A in favour of permitting the litigant to give video evidence from abroad. I would, however, prefer to characterise the Tribunal's error slightly differently, namely, as the failure by the Tribunal to have regard to the public interest in the proper administration of the Taxation Administration Act 1953 (Cth), in particular, and to the administration of justice, in general.
>
> ...
>
> [28] However, by leaving Australia once the Commissioner commenced an audit into their tax affairs, as the appellants did, the appellants have pre-empted the operation of s. 14S of the Taxation Administration Act and have succeeded in leaving Australia without having made arrangements for the payments of their tax liability satisfactory to the Commissioner. In making their application to give evidence from abroad,

A the appellants seek to entrench their peremptory action, whilst still not making arrangements to the satisfaction of the Commissioner for the payment of their tax liability.

[29] Whilst it is the case, as the appellants contend, that in making the impugned orders, the Tribunal did not "assist" the appellants to avoid the
B operation of Australian law – this was achieved by the appellants' own conduct in fleeing Australia; nevertheless, in my view, the making of orders permitting the appellants to give evidence from abroad has a tendency to undermine the operation of the Taxation Administration Act.

[30] This is a consideration which, in my view, the Tribunal ought to have taken into account. In failing to take into account the effect of the orders
C on the administration of the Taxation Administration Act and the wider public interest, the Tribunal failed to have regard to a relevant consideration and fell into jurisdictional error. The Tribunal did not, therefore, consider whether leave should be refused on public policy grounds, or whether the competing elements of public interest comprising
D the appellants' right to challenge their tax liability,

...

[83] All this evidence simply served to highlight the significance of the appellants' own evidence in response to the serious allegations made against them of fraud and evasion and provided strong support for the
E Commissioner's opposition to having the appellants give their evidence by video link and not in person.

[84] The primary judge was also aware of the fact that the AAT had itself acknowledged in [32] of its reasons for decision that the evidence of the appellants was important and that their credit might be put in issue in the
F Pt IVC proceeding. Indeed, this had been expressly acknowledged in the AA T by the appellants' junior counsel. Nevertheless the AAT had concluded that "it is unlikely that their evidence will necessarily be determinative". Consequently, the AAT did not consider that cross-examination of them by the Commissioner "will be impeded". That reasoning is highly problematic, particularly in circumstances where the
G appellants' credit was at issue, there were voluminous relevant documents and the Commissioner not unreasonably wanted to cross-examine the Seymours in person in a case where allegations of fraud or evasion had been made against them.

[44] To sum up, the AAT, in allowing the appellants to provide evidence
H *via* video link, fell into error because it failed to consider the public interest and the proper administration of justice. Additionally, the appellants' application to give evidence from abroad was seen as an attempt to solidify their peremptory actions while neglecting to make satisfactory arrangements for their tax liability. The AAT's decision to grant permission for evidence
I to be given abroad was seen as facilitating the appellants' avoidance of Australian law, thereby undermining the Taxation Administration Act.

Furthermore, the AAT neglected to take into account the potential impact of its orders on the administration of the Taxation Administration Act and the wider public interest, failing to balance the appellants' rights to challenge their tax liability with the need for proper administration.

[45] The fugitive in the *Polanski* case was facing criminal charges and extradition for an offence commenced in the USA but the civil suit in question, which is not related to his criminal liability was in the UK. However, like the *Seymour* case, the first defendant is facing a possible criminal charge which arises from the same facts of this civil suit in the same jurisdiction where the civil suit is being tried. There is a very close connection between between this civil suit which arises from breaches of ss. 179(a) and/or 179(b) of the CMSA and the criminal charges that the first defendant is facing under the CMSA and AMLA. Allowing these prayers would undermine the operation of the CMSA and AMLA which will bring the administration of justice into disrepute and be an affront to the public conscience.

[46] Administration of justice will be brought further into disrepute if the court provides assistance to the first defendant who flouts the orders of the court and fails to respond to the charges against him. The first defendant's submission to the court's jurisdiction by way of entering his appearance is not sufficient for the first defendant to be entitled to participate in the RCT trial. In the Canadian Court of Appeal case *R v. Noddle* [2016] BCJ No. 783, it was observed that it is rare for the court to grant such an indulgence to an offender who is flouting the order that he is appealing. the court held:

> [7] In the case before us, not only has Mr Noddle flouted a court order and failed to deal with his outstanding charges and the arrest warrant, but he is also seeking the indulgence of the Court in his application for an extension of time. It will be rare for the Court to grant such an indulgence to an offender who is flouting the order that he is appealing.
>
> [8] Mr Noddle has been aware, through the case management process that his failure to deal with the outstanding warrant will have consequences for his appeal. He has known since at least December that the Court was unlikely to entertain his application for appointment of counsel until the warrant issue was dealt with. Since January, he has been fully aware that his appeal was in danger of being dismissed.
>
> [9] Mr Noddle has failed to show reason why the time to appeal should be extended and has failed to pursue the appeal with diligence. He has also repudiated the jurisdiction and is flouting the order that he seeks leave to appeal. In the circumstances, I am satisfied that the appropriate course is to deny an extension of time. It follows that the conviction and sentence appeals would stand dismissed.

[47] The same applies here. Administration of justice will be brought into disrepute if the court grants an indulgence to the first defendant who flouts the orders of the court and fails to respond to the charges against him which arises from the same breaches of ss. 179(a) and/or 179(b) of the CMSA which is the subject matter of this civil suit.

[48] I also cannot accept the first defendant's contention that he has not returned to Malaysia after he left Malaysia in March 2019 because of the actions of the plaintiff in using investigative and legal instruments at its disposal to persecute him. The allegation of persecution by the plaintiff is a serious and unsubstantiated allegation. This tantamount to an allegation of *mala fide* on the part of the plaintiff and can only be proved at trial. The first defendant has not met the threshold proving *mala fide* without providing any cogent proof.

[49] Proving *mala fide* allegations carries a high burden of proof, as stated by the Court of Appeal in *Ahmad Zahid Hamidi v. PP* [2020] 1 LNS 1986; [2021] 1 MLJ 620:

> ... it is trite law that the onus of proving *mala fide* is on the appellant who makes the allegation and it is not an easy one to discharge. The allegations of *mala fide* are often more easily made than proven and the very seriousness of such allegations demands proof of high order of credibility ... Mere suspicion is not enough.

[50] In *Mohd Rafizi Ramli v. PP* [2014] 4 CLJ 1; [2014] 3 MLJ 114 (Court of Appeal) it was held that "the issue of *mala fide* ... is a question of fact and must be proved by evidence and this can only be adduced and tested at the trial".

Prayers A And B

[51] The first defendant has not provided any specific reason why the trial and other interlocutory proceedings have to be conducted by RCT instead of physically. I can only surmise that this is for the first defendant to avoid having to attend a physical trial if he intends to attend the proceedings and/or give evidence. The plaintiff on the other hand, has attempted to persuade the court that because this case involves serious allegations of fraud against the first defendant, a physical trial is more suitable.

[52] I would decline to make an order that the trial and other interlocutory proceedings have to be conducted by RCT instead of physically. Instead, I choose to retain my discretion to direct those proceedings be conducted by RCT in the interest of justice as permitted in para. 5 of the RCT Practice Direction:

> Bagi maksud di atas, Mahkamah mempunyai budi bicara penuh di bawah seksyen 15A Akta 91 dan seksyen 101B Akta 92 untuk mengarahkan suatu prosiding untuk dijalankan melalui teknologi komunikasi jarak jauh demi kepentingan keadilan.

[53] For now, I direct subsequent trial proceedings will be continued by RCT as the trial was conducted earlier by way of RCT for eight days. Changing the mode now would be to the defendants' disadvantage as the defendants' counsel only had the opportunity to cross-examine the plaintiff's witnesses by RCT. The plaintiff would enjoy an advantage in a physical trial. In this sense, there will be no level playing field if the trial mode is changed to a physical trial and will not be in the interest of justice. To be clear, this direction is not pursuant to prayers A and B of the RCT application being allowed but through the exercise of my discretion pursuant to para. 5 of the RCT Practice Direction.

Conclusion

[54] In conclusion, the court finds that the first defendant has not met the threshold requirement for a RCT hearing, as he has failed to disclose the specific location from which he intends to participate. Allowing the first defendant to attend the proceedings by RCT would undermine the administration of justice and set a precedent that allows accused individuals to avoid criminal charges while participating in civil proceedings. Additionally, the court rejects the first defendant's allegation of persecution, as it lacks substantiation.