

GEH THUAN HOOI v. SERENE LIM PAIK YAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HUE SIEW KHENG J
[SUIT NO: 22NCvC-1267-10-2012]
19 DECEMBER 2014

CIVIL PROCEDURE: *Damages – Invasion of privacy – Whether an actionable wrong – Report on financial status in divorce proceeding – Whether information in report obtained by illegal means – Whether violation or invasion of privacy – Whether plaintiff entitled to damages*

TORT: *Breach of confidence – Cause of action – Report on financial status in divorce proceeding – Whether violation or invasion of privacy – Whether an actionable wrong – Whether defendants immune from being sued – Whether plaintiff waived his right to confidentiality by conduct – Without prejudice – Whether applicable*

TORT: *Breach of confidence – Grounds for claim – Principles applicable – Relationship between plaintiff and defendants – Whether information in report confidential – Whether defendants liable for breach of confidentiality*

The plaintiff and the first defendant obtained a divorce from the High Court on 28 April 2008 ('the divorce proceedings') wherein a consent order was entered ('the said consent order'). The plaintiff subsequently applied to vary the *decree nisi* in regards to the maintenance for their two daughters ('the variation proceedings'). The first defendant successfully opposed the variation proceedings and a written judgment of the variation application was subsequently published. In the variation proceedings, the plaintiff made certain disclosures with regards to his monthly income. The first defendant disbelieved the disclosures made by the plaintiff and engaged the second defendant to look into the financial affairs of the plaintiff. As a result, the second defendant conducted investigative checks on the plaintiff and prepared a report called 'AJ Miller's report' ('the said report') dated 1 October 2009. The said report was exhibited in one of the first defendant's affidavits in the variation proceedings. The third, fourth and fifth defendants were directors of the second defendant, whilst the D6 was a financial institution established under the Banking and Financial Institutions Act 1989 ('BAFIA') which the plaintiff maintained a savings account with. As a result, the judge in the variation proceedings accepted the said report and found that the plaintiff had failed to make 'full and frank disclosure' of his income. Therefore, the plaintiff's application for variation was dismissed. The plaintiff's claim against all the defendants was primarily focused on the said report for breach of confidence, breach of a duty of non-disclosure, breach of privacy, unlawful disclosure or unauthorised disclosure and/or breach of the provisions of the BAFIA.

A

B

C

D

E

F

G

H

I

A Held (allowing plaintiff's claim against second and third defendants; dismissing plaintiff's claim against first, fourth, fifth and sixth defendants):

- B** (1) The information belonging to the plaintiff were confidential and private in nature as they were related to the plaintiff's bank accounts and information relating to his EPF and income tax and were not for public consumption. The evidence of the third defendant showed that he was operating independently and outside of the law. He refused to disclose the sources of his information as disclosed in the report but made vague references. Therefore, the third defendant was nothing but a common purveyor of confidential information for hire and the clandestine manner in which he obtained the information showed that he was operating under the radar of the law. (paras 47, 54 & 56)
- C**
- D** (2) 'Without prejudice' correspondence could not be likened to the impugned report. The said report was not to facilitate any settlement but to buttress the first defendant's rebuttal of the plaintiff's attempt to vary the maintenance orders in respect of the two children. Therefore there was no waiver by conduct even if the plaintiff had not applied to expunge the said report. The proposition of the defendants herein that they were immune from being sued for preparing the said report could not be sustained. The 'absolute immunity' propounded in the case of *Arthur JS Hall* was in respect of what was said in the court and in certain instances, extended to statements made out of court. It did not extend to documents like the said report in this instant case. There was no basis in fact or in law for the defendants to claim immunity in respect of the said report. (paras 31, 32, 36, 38 & 40)
- E**
- F**
- G** (3) There was overwhelming evidence that the information had been communicated in circumstances importing an obligation of confidence. This was quite apart from non-compliance with the Private Agencies Act 1971 ('the Act') which regulated the conduct of investigation of another person. Section 2 of the Act defined 'business of private agency' as obtaining and furnishing information as to the conduct, activities or affairs of another person. As such, it was manifestly clear that the third defendant was aware of the statutory requirement to be licensed under the Act. (para 62)
- H**
- I** (4) Neither the order of court nor the grounds of judgment made any express or specific ruling on the legality or otherwise of the said report. Neither was the issue of breach of the law of confidence addressed. From the clear uncontroverted evidence of the plaintiff, there was unauthorised use of the plaintiff's private and confidential information when the said report was exhibited in the variation proceedings. As such, the second and third defendant was liable for breach of confidentiality. (paras 66-68)

- (5) There was unauthorised use of the plaintiff's private and confidential information when the report was exhibited in the variation proceedings. Thus, the second and third defendants were liable for breach of confidentiality. As for the first, second and sixth defendants, the plaintiff had failed to prove their breaches on the balance of probabilities. As such, the claim against them was dismissed. (pars 67, 68 & 69)
- (6) The present suit was not a relitigation of the variation application but concerned the issue of breach of confidentiality. It was also was not a collateral attack on the divorce proceedings and the variation proceedings. Therefore, it could not be an abuse of process. In respect of quantum, plaintiff was only entitled to nominal damages. The quantum to be awarded must reflect the repugnance and opprobrium that must be accorded to the illegal means in which the information contained in the said report was obtained. A sum of RM100,000 as general damages for breach of confidentiality against the second and third defendants jointly and severally was reasonable. (paras 73-76)

Case(s) referred to:

- AG v. Guardian Newspaper Ltd (No. 2) [1990] 1 AC 109 (refd)*
Arthur JS Hall & Co (a firm) v. Simons [2000] 3 All ER 673 (dist)
Coco v. AN Clark (Engineers) Ltd [1969] RPC 41 (refd)
Dato' Vijay Kumar Natarajan v. Choy Kok Mun [2010] 5 CLJ 443 HC (refd)
Duchess of Argyll v. Duke of Argyll [1967] Ch 302 (refd)
Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC (dist)
Imerman v. Tchenguiz [2011] 2 WLR 592 (refd)
Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co [2010] 1 CLJ 913 HC (dist)
Vestwin Trading Pte Ltd v. Obegi Melissa [2006] 3 SLR 573 (refd)
X Pte Ltd v. CDE [1992] 2 SLR 996 (refd)

Legislation referred to:

Married Women and Children (Enforcement of Maintenance) Act 1968, s. 8(1)(a)

Private Agencies Act 1971, s. 2

- For the plaintiff - LK Chow (Edward Saw with him); M/s Josephine, LK Chow & Co*
For the 1st defendant - Amritpal Singh; M/s Amritpal Singh
For the 2nd defendant - Nad Segaram (Soo Siew Mei with him); M/s Shearn Delamore & Co
For the 3rd and 5th defendants - Lim Tuck Sun (Firdaus Husni with him); M/s Chooi & Company
For the 6th defendant - Heng Yee Keat; M/s Christopher & Lee Ong

Reported by S Kahvitha

A **JUDGMENT**

Hue Siew Kheng J:

B [1] The plaintiff's action against the defendants is grounded on a report dated 1 October 2009 exhibited in an affidavit affirmed by the first defendant (D1) in Kuala Lumpur High Court (Family Division) Petition No. S8-33-405-2008.

C [2] The plaintiff's pleaded case against all the defendants is essentially for breach of confidence, breach of a duty of non-disclosure, breach of privacy, unlawful disclosure or unauthorised disclosure and/or breach of the provisions of the Banking and Financial Institutions Act 1989 (BAFIA). The plaintiff also pleaded that the sixth defendant (D6) was negligent and that it had committed a breach of contract, failed in its due diligence and its duty of care in relation to the plaintiff's account. In respect of the second to fifth defendants (D2 to D5), the plaintiff claims that they had committed D deception, misconduct and fraud in producing and disclosing the report.

Undisputed Facts

[3] The following facts are not disputed.

E (i) the plaintiff and D1 were previously married. They obtained a divorce from the Kuala Lumpur High Court on 28 April 2008 *vide* S8-33-405-2008 (the divorce proceedings) wherein a consent order was entered. The plaintiff had subsequently applied to vary the *decree nisi*, in particular, the order with regard to maintenance for their two daughters from their marriage (the variation proceedings). D1 successfully F opposed the variation proceedings. The written judgment of the Family Court Judge in respect of this variation application was published. The plaintiff was unsuccessful in his appeal against the said judgment;

G (ii) in the variation proceedings, the plaintiff had made certain disclosures with regards to his monthly income. D1 disbelieved the disclosures made by the plaintiff. She then engaged D2 in 2009 through her solicitors, Messrs James Khong to look into the financial affairs of the plaintiff. This was done without the plaintiff's knowledge or consent;

H (iii) as a result of this engagement, D2 had proceeded to conduct investigative checks on the plaintiff and prepared a report entitled 'Re: Financial Holdings Check Into Subject' for D1. That report is the subject matter of this suit (the report); and

(iv) D1 then subsequently exhibited this report in one of her affidavits in reply in the variation proceedings.

I [4] The third, fourth and fifth defendants (D3, D4 and D5) are directors of D2 whilst D6 (Maybank), is a financial institution established under BAFIA. At all material times, the plaintiff maintained a savings account with D6.

[5] The plaintiff had also filed a suit against D1 and one Tetuan Wong & Chua *vide* 22NCvC-899-09/2011 (the 899 suit) seeking, *inter alia*, for the consent order dated 28 April 2008 entered into in the divorce proceedings to be set aside. A

[6] D1 succeeded in striking out the plaintiff's claim in the 899 suit on the grounds of *res judicata* and issue estoppel. The plaintiff similarly failed in his appeal to the Court of Appeal in Appeal No. W-02(IM)(NCvC)-45-01/2012. B

[7] D1 then applied for attachment of the plaintiff's salary pursuant to s. 8(1)(a) of the Married Women and Children (Enforcement of Maintenance) Act 1968. Despite the plaintiff resisting the application, the court on 9 February 2012, allowed D1's application to attach the plaintiff's salary for only February and March 2012 as the plaintiff would be retiring in April 2012. C

Summary Of Plaintiff's Case

[8] The plaintiff's claim is primarily focused on the AJ Miller's report dated 1 October 2009 which the plaintiff asserts contains confidential personal banking information from various financial institutions including D6, KWSP and LHDN. The information as disclosed in the report was without his consent. D

[9] It is also the plaintiff's case that the information contained in the report was disclosed in D1's affidavit without his agreement or consent and was further used as evidence by D1 and exhibited as "exh. SL4". E

[10] As a result of D2's report, the learned judge in the variation proceedings had accepted the report and found that the plaintiff had failed to make "full and frank disclosure" of his income, as a result of which the plaintiff's application for variation was subsequently dismissed. F

[11] The plaintiff, incensed by the clandestine manner in which his confidential information was obtained and disclosed, then commenced this suit against all the defendants essentially for breach of confidentiality and breach of his privacy. G

Summary Of D1's Case

[12] D1 admitted to hiring D2 to investigate the financial background of the plaintiff. She, however, did not instruct D2 to do any act that may violate the law. H

[13] D1 further raised the issue of *res judicata* and issue estoppel given the court's decision in the divorce proceedings.

[14] It is also averred that the plaintiff has no cause of action against D1. I

A Summary Of D2's Case

[15] It is D2's case that:

- (i) no objections whatsoever were raised by the plaintiff in the divorce proceedings as to the admission of the report and it has therefore formed part and parcel of the evidence before the court. The report is now a public document and within the public domain;
- (ii) invasion of privacy right itself does not give rise to a cause of action;
- (iii) there is no relationship between the plaintiff and the D2. There is also no duty of confidence between the plaintiff and the D2;
- (iv) disclosure in contravention of the provisions under BAFIA concerns criminal liability and is an offence under BAFIA and not an issue to be tried in the present action;
- (v) issues of *mala fide*, intention of profiting, deceit and wrongdoing are not a cause of action;
- (vi) the alleged issue of illegality is wholly unsustainable. No details were given to the second defendant to rebut and/or defend the claim;
- (vii) no particulars of fraud have been pleaded by the plaintiff. The purported claim is a bare allegation on the part of the plaintiff; and
- (viii) in any event, there is no detriment suffered by the plaintiff as a result of the production and admission of the report.

Summary Of D3 And D5's Case

[16] Similar assertions (see D2's summary above) were made. The only additional factor is the complaint of delay on the part of the plaintiff in filing this suit ie, 30 months after the dismissal of his application in the divorce proceedings.

Summary Of D6's Case

[17] It is D6's position that in respect of the information in respect of the plaintiffs account kept in Maybank:

- (i) at all material times, Maybank did not disclose and/or had never disclosed any information relating to the plaintiffs account or the information in the report to any of the first to fifth defendants or any third party;
- (ii) Maybank has no knowledge of how the information was obtained and/or acquired by any of the first to fifth defendants or any third party;
- (iii) in any event, the plaintiff had a legal obligation to the court to make full and frank disclosure including the information;

- (iv) further or in the alternative, if, which is not admitted, any information of and/or relating to the plaintiff's said account was obtained and/or acquired by any of the first to fifth defendants or any third party by way of or through illegal and/or fraudulent means and/or in an unauthorised manner, the same was so obtained and/or acquired without the consent and/or knowledge and/or authority of Maybank; and
- (v) in the premises, Maybank ought not to be held liable for the same.

The Trial

[18] The following witnesses were called:

- (i) PW1 Geh Thuan Hooi Plaintiff
- (ii) DW1 Serene Lim Paik Yan D1
- (iii) DW2 Elvira binti Rahmat D6's representative
- (iv) DW3 Allan James Miller D2
- (v) DW4 Marianne Liow Su-Ling D5

[19] At the conclusion of the trial, the following brief decision was delivered:

- i) The plaintiff's pleaded case against all the defendants is essentially for breach of confidence, breach of a duty of non-disclosure, breach of privacy, unlawful disclosure or unauthorised disclosure, and/or breach of the provisions of BAFIA. As against D6 the plaintiff has pleaded negligence, breach of contract and duty of care in respect of the plaintiff's account.
- ii) It is common ground that central to the plaintiff's claim is the Report dated 1.10.2009 which was prepared by DW3 entitled "Financial Holdings Check Into Subject" at the behest of D1 who was then involved in divorce proceedings with the plaintiff.
- iii) This Report contains information obtained by DW3 pertaining to the plaintiff's bank accounts, EPF, Income tax, directorship/ shareholding in companies. It was produced as evidence in a variation of maintenance proceedings before the family court.

Defence

- iv) D1 has raised, *inter alia*, the defence of *res judicata* and issue estoppel in respect of the BAFIA issue on the ground that it was heard and decided in the family court.
- v) D2 contends, *inter alia*, that there is no contractual relationship with the plaintiff, hence there is no duty of care owed to the plaintiff.
- vi) D3 and D5 contend similarly, *inter alia*, that since there is no contractual relationship with the plaintiff, therefore no duty of care is owed to the plaintiff.

- A vii) D6 denies that it had disclosed the plaintiff's information to the defendants or any third party. Such information as contained in the Report was obtained and/or acquired without the consent and/or knowledge and/or authority of D6.

Findings

- B viii) In respect of D6 from the evidence adduced, I concur with D6 that the plaintiff had failed, on the balance of probabilities to prove that Maybank had made the disclosures complained of. There is insufficient evidence to draw any inference in the circumstances that D6 had made the disclosures or had allowed such disclosures to be made. The claim against D6 is dismissed.
- C xv) As laid down in *Coco v. AN Clarke (Engineers) Ltd* [1969] RPC 41, with regard to breach of confidence, 3 requirements have to be met:
- a) the information must be of a confidential nature
- D b) the information must have been communicated in circumstances importing an obligation of confidence; and
- c) there must be unauthorised use of the information.
- x) As far as the 1st element is concerned, the defendant's witnesses have admitted that the information contained in the Report is private and confidential (DW1 and DW3). The 1st requirement is met.
- E xi) In respect of the 2nd element ie, that the information must have been communicated in circumstances importing an obligation of confidence, I find that insofar as D1 is concerned, she was concerned that the information to be acquired by DW3 would be by lawful means and had in fact asked him if he was a hacker. DW3 had assured her all would be done according to law. I find the 2nd element not proved against D1.
- F xii) However, as far as DW3 is concerned I find that the information contained in the Report which was authorised by him, to have been obtained surreptitiously and without authorisation and such information was obtained intentionally as he was paid by D1 for the said Report.
- G xiii) From his evidence it would appear that DW3 is of the view that by virtue of his credentials (which were never proved) he has *carte blanche* in extracting all manner of information, confidential or otherwise without any legal restraints.
- H xiv) He has refused to disclose his sources but merely testified, *inter alia*, "I go through various sources to be able to pull the information to get details of whatever is required" (page 115 Notes of Evidence). These sources are, according to DW3 "from various business organizations stated in the yellow pages ... Private investigation firms" which he describe as "a full network and matrix of people that provide information".
- I

- xv) It is trite that private investigators are regulated by law. DW3 seems to be operating outside of the law. A
- xvi) It is a disquieting thought that a person like him who is nothing more than a purveyor of information for hire can operate freely in this country extracting private and confidential information with impunity and without legal restraint. B
- xvii) I find D2 and D3 to have breached the 2nd and 3rd elements of confidentiality.
- xviii) There is insufficient evidence against D5 to hold her liable for breach of confidentiality.
- xix) In the circumstances, I find as follows: C
- a) The plaintiff's claim against D1, D5 and D6 is dismissed.
- b) I find that the plaintiff has proved his case for breach of confidentiality against D2 and D3 and the plaintiff's claim is accordingly allowed. D

The AJ Miller Report

[20] The report is as follows:

AJ MILLER
CONSULTING

Date: 1 October 2009

To:
Serene Lim Paik Yan

From:
Allan J Miller
Managing Director
AJ Miller Consulting Services Sdn Bhd

RE: FINANCIAL HOLDINGS CHECK INTO SUBJECT

Introduction

Instructions were received from Serene Lim Paik Yan to conduct a brief financial holdings check on a subject named GEH.

Results

See report for details

Investigation

A brief financial holdings check was conducted on GEH Thuan Hooi (I/C 560526-07-5185, 4962289).

The searches for this particular report consisted of the following:

- Bank search
- Employee Provident Fund (EPF) Check
- Directorship/shareholder Search
- income Tax Check

I

A *Bank Search*

The following tables list the known accounts for GEH.

Data is at 24 September 2009. The information our office received is of one month of past transaction activities.

Al Rajhi Bank Bhd**B**

Account Number	On File
Account Type	Current
Open Date	03/07/2007
Available Balance	RM187.05
Primary/Joint	Primary
Branch	Kuala Lumpur
Status	Active

HSBC Bank Bhd**D**

Account Number	On File
Account Type	Saving
Open Date	17/05/2006
Available Balance	RM1,373.78
Primary/Joint	Primary
Branch	Petaling Jaya
Status	Active

E**Maybank Bhd**

Account Number	On File
Account Type	Saving
Open Date	26/10/2005
Available Balance	RM1,172.89
Primary/Joint	Primary
Branch	Petaling Jaya
Status	Active

F

The Maybank account above is the subject's most active account and shows a salary deposit on 26 August 2009 for RM16,240.07.

G

Please bear in mind that the above accounts show cash holdings at the time and does not include loan amounts held with the respective banks.

Employee Provident Fund Check

According to a source at the Employee Provident Fund (EPF), GEH is employed by Sunway City Berhad (employee number 011939490) showing a monthly salary of RM29,917.00 per month. The employee's contribution is RM1,538.00 per month while the employer's is RM3,590.00 per month.

H*Directorship/Shareholder Search*

According to information provided by the Companies Commission of Malaysia (SSM), GEH is involved in the following Malaysian-registered companies/businesses:

I

1. Sunway Lagoon Club Berhad (Director) A
 2. Flower Verandah Sdn Bhd (Director) - DISSOLVED

The SSM reports shall be forwarded to the client.

Income Tax Check

Information provided by the Malaysian Income Tax Department shows that GEH's last income tax return was filed for the year 2008. Records indicate the following: B

An annual income of	:	RM268,944.00	
Personal deduction	:	RM17,000.00	
Taxable Income	:	RM251,944.00	C
Tax owing	:	RM55,519.32	

End of Report

The Law Of Confidence D

D1's Submission

[21] It was submitted on behalf of D1 that there is no relationship of confidence between the plaintiff and D1 when the report was prepared and given to D1's solicitor because the nature of the relationship between the two was not one of confidentiality since they were engaged in acrimonious litigation and the information contained in the report was specifically obtained for the purpose of the ongoing litigation. E

[22] Furthermore, the plaintiff had waived his right to confidentiality simply because he had given evidence in respect of his financial capacity in the variation proceedings, knowing full well that his evidence as shown in his affidavit would invite a response from D1. D1 claimed waiver by conduct, citing the case of *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749 in support. F

D2's Submission G

[23] It is D2's contention that it does not owe any duty of confidence to the plaintiff as:

- (i) there is no relationship between them since they do not know each other; H
- (ii) it was not the plaintiff's pleaded case that the information had been communicated in circumstances importing an obligation of confidence on the part of D2;
- (iii) D2 was only a third party recipient of the alleged confidential information in the report; and I
- (iv) the plaintiff's concern were only that the information was not given with his consent.

A [24] D2 further contends that, in any event, the plaintiff had not suffered any detriment as a result of the production of the report.

D3 And D5's Submissions

B [25] A similar position was taken by D3 and D5 that they owed no duty of confidence to the plaintiff, although not on identical grounds. D3 and D5 take the position that persons who provide such evidence as well as those who prepare such evidence are immune. As such, the plaintiff cannot circumvent this immunity by framing his action premised on breach of confidence. *Arthur JS Hall & Co (a firm) v. Simons* [2000] 3 All ER 673 and *Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co* [2010] 1 CLJ 913; [2010] 1 MLJ 284 were cited in support.

C [26] It is also contended that the plaintiff has failed to establish the existence of a relationship of confidence or some fiduciary relationship, particularly when, as in this case, the plaintiff does not know D3 and D5. D Furthermore, D3 did not access the plaintiff's bank accounts or other records, as the same was obtained from third parties and at no time were the primary documents produced in public.

Plaintiff's Submission

E [27] It is the plaintiff's submission that the law on breach of confidence does not require a contractual relationship between the plaintiff and the defendants, as contended by the defendants. *Vestwin Trading Pte Ltd v. Obegi Melissa* [2006] 3 SLR 573 was referred to wherein the three essential elements necessary to establish a case of breach of confidence in non-contract cases as laid down in *Coco v. AN Clark (Engineers) Ltd* [1969] RPC 41 were adhered to. These essential elements are:

- F (i) the information must be of a confidential nature;
- (ii) the information must have been communicated in circumstances imputing an obligation of confidence; and
- G (iii) there must be unauthorised use of the information.

Preliminary Issues

H [28] Before proceeding to address, the submissions raised by the parties in respect of the first element, it is apposite at this juncture to deal with the issues of waiver of confidentiality and immunity as submitted by the defendants.

Waiver

I [29] D1 had highlighted the following passage of *Dusun Desaru Sdn Bhd & Anor (supra)* in support of his contention that there was waiver of confidentiality by conduct of the plaintiff (at p. 759):

Here, waiver of Mr Mohd Fairuz bin Abdullah was by conduct when the “without prejudice” letter was exhibited and annexed to encl. 4. The decision and the rationale behind the case of *Great Atlantic Insurance Co (supra)* may lie in the need of the court to satisfy itself by perusing through the document and thereby releasing the shield of privilege. The justice of the case demands just that for otherwise the actual weight and meaning to be attached to the document would be lost and be misunderstood (*Nea Karteria Maritime Co Ltd v. Atlantic & Great Lakes Steamship Corporation* [1981] Com LR 138 as applied vigorously in *General Accident Fire and Life Assurance Corp Ltd v. Tanter, The Zephyr* [1984] 1 All ER 35 at 43; and *Attorney-General (NT) v. Maurice* [1986] 69 ALR 31).

Justice too requires this court to examine in depth all the letters whether open or “without prejudice” in ends. 3, 4, 7 and 11. Mr Mohd Fairuz bin Abdullah must be held accountable for waiving the shield of privilege and, with respect, he too may be estopped from denying the waiver.

[30] With respect, this is a case where the issue was whether the “veil of privilege” as described by Abdul Malik Ishak J (as he then was) was waived when a party exhibited a “without prejudice” letter in an application to remove a private caveat. The court held, quite rightly, that a waiver may be implied by conduct and found the plaintiffs had waived privilege when they first introduced the “without prejudice” letter and therefore, their preliminary objection with regard to the defendant’s subsequent “without prejudice” letters filed in rebuttal failed.

[31] The facts of this instant case however are not on all fours. I cannot see how “without prejudice” correspondence can be likened to the impugned report. The rule in respect of the privilege attached to “without prejudice” correspondence is to facilitate genuine negotiations with the sole object of settlement.

[32] As D1 had freely admitted, they were actively engaged in acrimonious and hostile litigation – the report was not to facilitate any settlement but to buttress D1’s rebuttal of the plaintiff’s attempt to vary the maintenance orders in respect of the two children. The waiver that the court was addressing in *Dusun Desaru Sdn Bhd & Anor (supra)* has no bearing on this case.

[33] I do not agree that there is any waiver by conduct even if the plaintiff had not applied to expunge the said report.

Immunity

[34] D3 and D5 have submitted that they are immune from being sued and look to *Arthur JS Hall & Co* and *Sri Alam Sdn Bhd (supra)* for backup.

[35] With all due respect, it must be pointed out that these two cases were in respect of immunity of advocates who were sued for negligence. The House of Lords in a 4-3 majority decision in *Arthur JS Hall*, decided in favour of abolition of immunity for advocates as it was no longer in the public interest to maintain such immunity, since all other professionals, like doctors and engineers, do not enjoy such immunity.

A

B

C

D

E

F

G

H

I

A [36] The proposition of the defendants herein that they are immune from being sued for preparing the report cannot be sustained if one were to carefully study Lord Hoffman’s speech. He had elucidated (at p. 687) on the four “heads” why their Lordships considered it appropriate to re-examine the immunity rule which hitherto had prevented solicitors from being sued for negligence.

B [37] The witness analogy highlighted in the defendant’s submission was one of the four “heads” that the House of Lords looked at. This is what His Lordship said (at p. 688):

C 5. THE WITNESS ANALOGY

No one can be sued in defamation for anything said in court. The rule confers an absolute immunity which protects witnesses, lawyers and the judge. The administration of justice requires that participants in court proceedings should be able to speak freely without being inhibited by the fear of being sued, even unsuccessfully, for what they say. The immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court. So it is said that a similar immunity against proceedings for negligence is necessary to enable advocates to conduct the litigation properly.

D [38] The “absolute immunity” that His Lordship was talking about was in respect of what was said in court and in certain instances, extended to statements made out of court. It did not extend to documents like the report in this instant case.

E [39] I am in agreement with the view expressed by the learned judge in *Sri Alam Sdn Bhd (supra)* that “for witnesses, immunity was necessary so that they would be more willing to come forward to tell the truth” (at p. 293). Beyond that passing remark, however, the judgment dealt mainly with whether legal immunity should be granted to a solicitor being sued for negligence.

F [40] I do not see how these two cases can advance the defendants’ claim for immunity in preparing and providing the report. There is no basis in fact or in law for the defendants to claim immunity in respect of the report.

G **Findings Regarding Breach Of Confidence**

First Element: Confidential Nature Of The Documents

H [41] It is the plaintiff’s content in that all the three elements laid down in *Coco v. AN Clark (Engineers) Ltd (supra)* have been proved.

I [42] As pointed out in *Vestwin Trading Pte Ltd (supra)* the protection of the law of confidence is not restricted to trade secrets nor confined to communicating valuable information. The obligation to keep confidence encompasses all information which any party has an interest in keeping confidential.

[43] Closer to home, Mohd Hishamuddin J (as he then was) in *Dato' Vijay Kumar Natarajan v. Choy Kok Mun* [2010] 5 CLJ 443; [2010] 7 MLJ 215 referred to the following passage in Clerk and Lindsell on Tort: A

General principles. A duty of confidence arises when confidential information comes to the knowledge of a person (a confidant), in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others (*Clerk and Lindsell on Tort* (17th Ed) at p. 1417, para. 26-01). B

His Lordship went on to quote Ungoes-Thomas J in *Duchess of Argyll v. Duke of Argyll* [1967] Ch 302 at p. 304: C

A contract or obligation of confidence need not be expressed, but could be implied, and a breach of contract or trust or faith could arise independently of any right of property or contract (other than any contract which the imparting of the confidence might itself create); and that the court, in the exercise of its equitable jurisdiction, would restrain a breach of confidence independently of any right at law ... D

In para. 4 of his judgment, the learned judge noted:

[4] The law of confidence is based upon a broad equitable obligation of conscience. Indeed, the action of breach of confidence is originally an equitable remedy. The most famous early instance of its application is in the well-known case of *Prince Albert v. Strange* [1849] 2 De D & SM 652 wherein an injunction was granted to prohibit the publication of a catalogue describing the etchings made by the Prince and Queen Victoria. The catalogue was based on information obtained by one JT Judge from a person named Middleton. Middleton was employed by Brown who had a contract to print some of the etchings from the private employment of the royal family. In breach of confidence, Middleton, who was not a party to the cause, sold copies of the etchings to Judge. Judge was enjoined from using information which he must be taken to have known was sold to him in breach of confidence or breach of trust. E

[44] *Dato' Vijay Kumar Natarajan (supra)* case was relied on by D2 to support the argument that D2 owed no duty of confidence to the plaintiff. The following statement of the learned judge (at para. 25) was highlighted: F

[25] Now, the tort of breach of confidence requires more than merely an agreement by the recipient of an information that the information should be kept confidential. G

[45] It would have been more profitable and instructive if the whole paragraph had been reproduced because His Lordship amplified his statement in that paragraph. The whole paragraph is reproduced in full below: H

I

A [25] Now, the tort of breach of confidence requires more than merely an
agreement by the recipient of an information that the information should
be kept confidential. The law looks at the nature of the information itself.
The law does not protect just any information: the information must be
of a nature of the courts, through judicial precedents, have always
recognised its confidentiality and has accorded it judicial protection; for
B example, trade secrets; or information of sexual relationship between
spouses; or information between a professional (a doctor, for instance)
and his client. In *Clerk and Lindsell on Torts* ((17th Ed) at p. 1422,
paras. 26-10) the learned author states:

C The disclosure of information will only be restrained if it has the
necessary quality of confidence about it.

(emphasis added)

[46] From the evidence adduced at trial, D1 and D3 admitted that the
information contained in the report are personal and confidential in nature:

D (i) D1 agreed under cross-examination that the information contained in
the report was confidential, private and belonged to the plaintiff (see
pp. 89 to 90 of notes of evidence);

E (ii) DW2, D6's representative, agreed that bank information and customer
information regarding banking accounts is confidential information (see
p. 105 of notes of evidence); and

F (iii) DW3, Allan James Miller, conceded that banking information such as
those disclosed in the report are confidential and personal to the
plaintiff, as also the EPF and Income Tax Information (see p. 116 of
notes of evidence).

G [47] From the nature of the information contained in the report as set out
in para. 20 of this judgment and the admissions of the defendants as set out
above, I have no hesitation in holding that the first element has been met:
these information belonging to the plaintiff, are confidential and private in
nature, as they relate to his bank accounts and information relating to his
EPF and income tax and are not for public consumption.

Second Element: Communication Of Information/Obligation Of Confidence

H [48] The plaintiff complains that D1, D2, D3 and D5 have been very
casual and nonchalant in the way they handled the confidential information
that came into their hands, despite the sensitive nature of the information.

[49] It is not disputed that the information contained in the report was
obtained by D3 at the behest of D1. This was her testimony in respect of the
appointment of D3:

I

Question 6: Can you explain to this honourable court the fact of your appointment of the second defendant?

A

Answer:

6(a1): My solicitor Mr James who represented me in the variation proceedings advised me that since the plaintiff had raised his current financial statuses relation to the maintenance of RM14,000.00 and because he is not being candid and may be concealing his full financial information from the court it was best to hire an investigator to do a background check on the plaintiff.

B

6(a2): Mr James introduced me to the third defendant in the office of Mr James. The third Defendant had represented to me that he can try to provide basic financial background check on the plaintiff.

C

6(a3): When I met the third defendant I only asked one question if the information he is going to obtain is by illegal means because if it was illegal I would not employ him. I got a very stern retort from the third defendant who firmly and categorically said NO and went on to say that the second defend is a reputable company and does not indulge in illegal activity. That's all I asked him and based upon that condition I employed him to investigate the financial background of the plaintiff.

D

6(a4): I must add here that I did not request from Mr Miller any specific information. I thought that Mr Miller was going to just give me the plaintiff employment details and salary as the plaintiff may have had increase in his salary after the divorce.

E

6(a5): I did not make a specific request from Mr Miller to obtain any information from the sixth defendant or any bank or financial institution where the plaintiffs maintain his accounts nor did I request any information that would violate any provision of banking and financial information act or any law for that matter. That was never in my mind when and I agreed to appoint Mr Miller.

F

6(a6): I do not know how Mr Miller got his report but when the report was obtained by my lawyer Mr James he advised me to put in the affidavit.

G

[50] D3, the managing director and founder of D2 testified that D2 provides "forensic audit support services" and that the information contained in the report was obtained through middle men information providers whom D2 engages and that all the information was through his sources and intermediaries. He declined to disclose who his sources and intermediaries were.

H

[51] As far as the second element is concerned, there is no denying that D3 played a crucial, in fact the most important, role.

[52] Under cross examination, he denied he was a private investigator but boldly compared himself to the "big four auditor firm(s)". He said (at p. 137 of notes of evidence):

I

A SD3&5: ... Mr Miller earlier you were asked this question whether you are licensed under the Private Agencies Act and you said there is no need for that can you elaborate?

B DW3: Yes I can. My role and my function is very very similar ... basically the same as one of the big four auditor firm. I am a forensic auditor, a cooperate investigator. I am a certified fraud investigator ... and as such I have confirmed and checked with the big four accounting firms as recently as a month ago ... just to reverify for this trial ... because I did the same work that they do and I work in conjunction with these firms, I do not require a KDN license. A private investigator is tasked and falls under KDN purview due to the fact that they have agents that go to into the field. Insurance companies that have agents required the same licensing as do security guard. Since I don't have security guard, private investigator and am not an insurance company, I strictly do forensic audit, and these big four accounting firms also put on their website that they do fraud investigating, this is what they do. They do not require a KDN license. And they get the same information as I did.

E [53] With all due respect, D3's claim to be equal to the "big four" is wholly misplaced and misleading. From his evidence, he claimed to be independent and not subject to any form of statutory regulatory control and supervision. It is public knowledge and certainly within D3's knowledge (since he claims to do the same work that they do and work in conjunction with these firms) that these firms are subject to a strict regime of regulations, control and supervision of agencies like Bank Negara, Suruhanjaya Syarikat Malaysia (SSM), the Malaysian Institute of Accountants and the Audit Oversight Board established pursuant to the Securities Commission Act.

G [54] The evidence of D3 showed that he is operating independently and outside of the law. He refused to disclose the sources of his information as disclosed in the Report but made vague references to "various sources in the Yellow Pages (!) middle men who work at various research organizations" (see p. 119 of notes of evidence) and claimed that these information are "triple verified along the chain". He conveniently neglects to disclose how it is "triple verified" and by whom.

H [55] He claimed to be a certified fraud investigator but there is no evidence at all who the certifying body is. If indeed he is a certified fraud investigator pursuant to Malaysian laws, it is odd and suspicious that he cannot lay claim to accreditation by any local body.

I [56] To my mind, D3 is nothing but a common purveyor of confidential information for hire and the clandestine manner in which he obtained the information shows that he is operating under the radar of the law. This is probably what prompted him to change the nature of his business as declared in the SSM records as at 13 June 2012 (before this suit was filed) from "security research and consulting" to "general trading" after this suit was filed.

[57] In his explanation to the court for the change in description of the nature of D2's business, D3 had attributed it to his immigration consultant advising him to remove "security" from the description as Immigration would then check with the various ministries dealing with security. This answer is very telling and revelatory of D3's knowledge that "security" is subject to strict regulatory control.

A

B

[58] However, I am sceptical of his explanation that it was SSM's suggestion that D2 changed the description of its business from "security research and consulting" to "general trading". A more probable reason, as advanced by the plaintiff, is that the previous description of the nature of business of D2 might raise uncomfortable questions at trial.

C

[59] As I had said earlier, it is a disquieting thought that a person like him who is nothing more than a purveyor of information for hire can operate freely in this country extracting private and confidential information with impunity and without legal restraint. It is my finding that the information contained in the Report was obtained by illegal means.

D

[60] In *Vestwin Trading Pte Ltd (supra)* the court held that an obligation of confidence would be imported where the confidential information had been obtained by illegal means.

[61] In *AG v. Guardian Newspaper Ltd (No. 2)* [1990] 1 AC 109 the court made this observation:

E

The second requirement in *Coco* ([34] *supra*), while accurate on the facts of the case, does not amount to a requirement that there be an intentional communication of the confidential information by a plaintiff to a defendant in order to found a cause of action.

F

It was held in *X Pte Ltd v. CDE* [1992] 2 SLR 996:

The second element is not limited to information being imparted in confidence. **It will satisfy the second element if the Information is received or learned in such circumstances that it is clear that a duty of confidentiality arises.**

G

(emphasis added)

[62] In this case, I find that there is overwhelming evidence that D2 and D3 (who is the alter ego of D2) had breached the second element that the information must have been communicated in circumstances importing an obligation of confidence. This is quite apart from non-compliance with the Private Agencies Act 1971 which regulates the conduct of investigation of another person: see s. 2 of the Act which defines "business of private agency" as:

H

(b) obtaining and furnishing information as to the conduct, activities or affairs of another person;

I

A From his evidence, it is manifestly clear that D3 was aware of the statutory requirement to be licenced under the Private Agencies Act 1971.

Third Element: Unauthorised Use Of Information

B [63] In the recent case of *Imerman v. Tchenguiz* [2011] 2 WLR 592, the English Court of Appeal held, *inter alia*, as follows:

[69] In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant.

C [64] The plaintiff has vehemently protested that the disclosure of his private and confidential information as contained in the report was without his consent and/or authorisation.

D [65] D2, D3 and D5 have not pleaded *res judicata* or issue estoppel. D3 and D5 have merely pleaded that they will rely on the order of court and grounds of judgment.

E [66] With respect, neither the order of court nor the grounds of judgment made any express or specific ruling on the legality or otherwise of the report. Neither was the issue of breach of the law of confidence addressed.

[67] I am of the view that, from the clear uncontroverted evidence of the plaintiff, the third element has been proved in that there was unauthorised use of his private and confidential information when the report was exhibited in the variation proceedings.

F [68] In light of the foregoing, I found D2 and D3 liable for breach of confidentiality. As for D1 and D5, I found that the plaintiff had failed to prove their breaches on the balance of probabilities and accordingly, the plaintiff's claim against them was dismissed.

Plaintiff's Claim Against D6

G [69] In respect of D6, from the evidence adduced, I concurred with D6 that the plaintiff had failed, on the balance of probabilities to prove that Maybank had made the disclosures complained of. There is insufficient evidence to draw any inference in the circumstances that D6 had made the disclosures or had allowed such disclosures to be made. The claim against D6 was dismissed.

Quantum

I [70] The defendants' main contention is that the plaintiff did not lead any evidence to prove his losses.

[71] With respect I disagree.

[72] In his witness statement, he had testified to the following:

- Q49: What were the consequences of this report being adduced in proceedings by the 1st Defendant? A
- A49: I had been wrongfully accused of being untruthful. The Family Court basically referred and relied upon the report of the 2nd Defendant to hold that I had failed to make a full and frank disclosure of my income. This is certainly not true and there is no proof that I have not disclosed the same. I could not have proven something which was not available and not true, except to furnish what I had and was available then. The Court then arrived at its findings based on the bare contents of the erroneous report. B
- I had suffered a great deal of stress, embarrassment and shame as the judgment of the Family Court was reported. It is publicly accessible and can even be viewed and read from the internet. This unauthorised investigation was done recklessly and carelessly. My challenge of the report went unheeded. The fact that the Court had made reference to it and made a decision premised upon it does not legalise or ratify the illegality of it in the very first place. C
- Notwithstanding whether the decision of the Family Court is right or wrong in referring to this report (which report seems illegal to me) as a decision had been made upon it, the issue before this Court is to make a finding on the cause of action premised on the actions of the parties in obtaining my private and confidential data unlawfully and disclosing it and making it public even before the Court was able to refer and decide upon the matter. D
- After the report surfaced, I had to bring out documents to disclose the true state of affairs to counter the allegations of the 1st Defendant, in which, I had to adduce my company's documents on my income, my detailed bank statement and I had even to approach my employers to get official confirmation on my status. I had to explain why I needed those letters which then exposed my personal affairs to the company as well. I believe the 1st Defendant then had my bank account number (as I had disclosed my bank statements in my affidavit in reply) and thus proceeded to institute a *garnishee* action on the Maybank account to my detriment. E
- I had lost out on the variation of *decree nisi* proceedings in which material aspects of my application was to reduce the sum of maintenance payment. I was stuck with a figure to pay the 1st Defendant which I could not afford. F
- The 1st Defendant went and garnished my salary in my previous employment for 8 months. She had acted unfairly towards me when she knew that the sums of maintenance I was made to pay was a sum stated in error when the *decree nisi* was entered into G
- H
- I

- A as I was paying for a lot of other things myself directly for the children and the household which went into the calculation of the RM14,000.00.
- To date, I am not able to access the frozen funds in my Maybank account. I have been branded a dishonest person as can be seen from the Judgment of the Learned Judge. I had to earn the trust of my employers after this episode and it certainly affected my reputation and my standing in the industry that I worked in. I can say that I was unjustly victimised.
- B
- C This report was wrongfully commissioned by the 1st Defendant, carelessly produced by the 2nd Defendant and produced without my authorisation or any prior authorisation of the Court. This was clearly done in breach of confidence, unlawful disclosure, in breach of privacy laws and in breach of the statutory provisions of BAFIA 1989 by the Defendants.
- D The 2nd - 5th Defendants had carried out the instructions of the 1st Defendant without the rights to do so and accordingly also practiced deception and fraud in obtaining the information and upon the Court and myself for allowing the same to be used at trial, knowing that the information therein was illegal, unsubstantiated and unverified.
- E Q50: How did this affect your reputation and your standing in your profession?
- A50: I am regarded as one of the leaders in Malaysia's Human Resources fraternity where I head a committee in MIHRM (Malaysian Institute of Human Resource Management). I am also invited to give talks to people everywhere and I am appointed unto advisory councils and even won some HR awards. I am most affected when people read about me on the internet as my legal case will appear the moment people 'Google' my name. This is enough to tarnish my reputation and puts my integrity into question. Further, when they actually read my case, they immediately think that I am such a dishonest person for lying in court and that is not good for anyone in any industry, and especially so in my case, as my area of expertise requires me to be an example to employees as a leader in HR.
- F
- G
- H I have been asked by people who have read the case as to what happened and I am sure there are many others who have read about me and now think badly of me. I have had to explain myself many times over to many people about the truth of the matter and I also do not have the chance to explain myself to people who do not ask me about it.
- I [73] I agree with the defendants that this is not the forum for relitigating the variation application. However, as I have earlier stated, this suit is not a relitigation of the variation application but as found by this court, concerns

the issue of breach of confidentiality. This suit is not a collateral attack on the divorce proceedings and the variation proceedings. It therefore cannot be an abuse of process.

A

[74] Having considered the submissions of the parties in respect of quantum, I do not agree with the defendants that the plaintiff is only entitled to nominal damages.

B

[75] The quantum to be awarded must reflect the repugnance and opprobrium that must be accorded to the illegal means in which the information contained in the report was obtained.

[76] In the circumstances, I am of the considered opinion that a sum of RM100,000 as general damages for breach of confidentiality against D2 and D3 jointly and severally is reasonable.

C

[77] Parties are to bear their own costs.

D

E

F

G

H

I