

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL DIVISION)
CIVIL SUIT NO. S2 - 23 - 38 - 2006**

BETWEEN

1. **SARAWAK SHELL BHD (71978-W)**
2. **SHELL MALAYSIA TRADING SENDIRIAN BERHAD (6078-M)**
3. **SHELL REFINING COMPANY (FEDERATION OF MALAYA) BHD (3926-U)**
4. **SHELL TIMUR SDN BHD (113304-H)**
5. **SHELL EXPLORATION AND PRODUCTION MALAYSIA B.V. (993963-V)**
6. **SHELL OIL AND GAS (MALAYSIA) LLC (993830-X)**
7. **SHELL SABAH SELATAN SDN BHD (228504-1)**
8. **SABAH SHELL PETROLEUM COMPANY LTD (993229-W) ... PLAINTIFFS**

A N D

HUONG YIU TUONG

... DEFENDANT

PLAINTIFFS' SKELETAL SUBMISSIONS
(CROSS-EXAMINATION)

May it please you, My Lord,

BACKGROUND

1. This application arises from simple facts. The Defendant published the 3 statements which form the subject matter of this action, with the assistance of Donovan and his websites.

The Defendant is a Malaysian, residing within Malaysian jurisdiction. Donovan is an Englishman who conspicuously remains outside Malaysian jurisdiction.

3. When the Plaintiffs applied for interim injunctive relief against the Defendant, Donovan, quite conveniently, filed an affidavit accepting sole blame and responsibility for the 3 publications.

See: **Donovan's affidavit of 19.5.06**

4. The Plaintiffs question the *bona fides* of Donovan. They have therefore applied to cross-examine him on his affidavit of 19.5.06. A list of the broad areas these questions will relate to are set out in the Schedule to these Skeletal Submissions.

SUBMISSIONS

The law on cross-examining deponents of affidavits

5. The court's power to cross-examine the deponent of an affidavit is found in Order 38 Rule 2 of the Rules of the High Court 1980:
 1. **The Court may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it is reasonable so to order.**
 2. **An order under paragraph (1) may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.**

6. The jurisdiction is unfettered. The burden of proof however turns on the nature of the underlying application. In TANG CHOON KENG REALTY (PTE) LTD & ORS v TANG WEE CHENG [1992] 2 SLR 1114 (TAB A) the court express the law thus (at page 11421 of the report):

The first point is that in an action tried on affidavits a party who has sworn an affidavit may be subject to being cross-examined on it. In a case such as the present, the onus is on the plaintiffs to show why the defendant should be cross-examined. But this general rule does not apply in the case of an application for an interlocutory injunction: see AMERICAN CYANAMID. In such cases, the burden is on the deponent why he should not be cross-examined.

[Our emphasis]

7. Donovan's affidavit was filed to oppose an application for an interim injunction. The burden therefore lies on the Defendant to show that cross-examination should not be permitted. Our submission is that this burden cannot be established.
8. One factor the court takes into account in deciding whether to order cross-examination is the *bona fides* of the contents of the affidavit in question.

See: RE: SMITH & FAWCETT LTD [1942] 1 All ER 542 (TAB B) (at page 545 of the report)

If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies, should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination.

9. The following passage appears in GEORGE v SECRETARY OF STATE FOR THE ENVIRONMENT (1979) 38 P & CR 609 and was quoted with approval in RE SINGH KALPANATH [1992] 2 SLR 639 (TAB C) (at page 6480 of RE SINGH KALPANATH):

I would have thought, on reading the affidavits, that there was an overwhelming inference that the evidence was both ingenuous and ingenious and so suspicious that, without cross-examination, it should anyway be rejected. If, however, [the learned judge] was not prepared, as he was not, to go as far as that, it was, in my view, his duty to admit the cross-examination in order to determine whether the evidence was reliable.

10. The nature of the action in which cross-examination appears is not decisive.
11. In RE SINGH KALPANATH for example, the person sought to be cross-examined was the Chairman of the Disciplinary Committee who heard a complaint against the applicant. The application to cross-examine was opposed. Chan Sek Keong J (now Chief Justice) ruled thus (at page 650A of the report):

The objection, if upheld, would have resulted in a denial to the applicant of the natural justice which he alleged had already been denied him by CS. In this case, not only was the applicant's career at stake, but more importantly, confidence in the integrity of the administration of justice by a disciplinary tribunal would have been diminished if CS had been immunized from cross-examination.

12. If the Chairman of a Disciplinary Committee can be Goss-examined, so can Donovan.

13. The fact that Donovan is a foreigner is also irrelevant. This precise point was made in **LEISURE & ALLIED INDUSTRIES PTY LTD v UDARIA SDN BHD 119801 1 MLJ 189 (TAB D)** (at page 190 of the report):

To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (RE LUCAS 11952] 1 All ER 102); 'otherwise foreigners would have an advantage' (STRAUSS v GOLDSCHMIDT 8 SLR 239). It is really a matter of commonsense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings (ALLEN v ALLEN (18941 P 239)).

14. **The same point has been more recently adopted in PARUVATHYPALANY v SATHIASEALAN A/L GOVINDASAMY [199915 MLJ 151 (TAB E).**
15. The court will be more reluctant to allow cross-examination of a deponent if that cross-examination is in relation to an issue that will eventually be dealt with at the trial. This was **the point made in SAP (M) SDN BHD & ANOR v I WORLD HRM NET SDN BHD & ANOR (2006] 2 mg 678 (TAB F).**
16. The reason why the court generally does not allow cross-examination before trial is that nothing may be gained in the exercise. In **SYARIKAT TUNGARING KILANG PAPAN SDN BHD v SABAH FOREST INDUSTRIES SDN BHD & ORS 11990) 2 mg 38 (TAB G)**, the court put it thus (at page 41H of the report):

... I do not think the granting of the application to cross-examine them on this issue is of real help. It will, at most, be a repetition of what they already deposed to in their affidavits.

17. In other words, an application which would serve no purpose would not be allowed. Naturally if there is important evidence that can be ascertained by cross-examination that will not be available at the trial, cross-examination will be allowed.

Application of the law to the facts

18. The Plaintiffs' case is that the Defendant is using Donovan to post defamatory material for him.
19. Donovan's *hone fides* is in issue. In particular, his admission of sole blame and responsibility should not be accepted whilst he conveniently remains ensconced in England.
20. Donovan's affidavit should therefore not be admitted without him being cross-examined first:

See: **Paragraphs 11 to 20 of Thavakumar Kandiah Pillai's affidavit of 21.6.06 (Thavakumar Kandiah Pillars 2nd affidavit)**

21. The matter **cannot** be left to trial because Donovan will not be attending the trial.

See: Exhibit 'TK-6' of **Thavakumar Kandiah Pillar's 2nd affidavit (at paragraph 2 of the 4th page of the exhibit)**:



My son and me relish the opportunity to face Shell in "Open Court" in the libel courts but not in a court located thousands of miles away.

[Our emphasis]

See: **Exhibit 'TK-6' of Thavakumar Kandiah Pillai's 2nd affidavit where Donovan repeats his refusal to attend court to give evidence for the Defendant (at paragraph q, page 9 of the exhibit):**

The Plaintiffs can satisfy themselves **of the truth by suing** me and/or my son for defamation. We admit responsibility for ALL of the relevant publications, so that should make things much more straightforward. However they will have to sue me in an appropriate legal jurisdiction, not in a Country several thousand miles away.

[Our emphasis]

22. We respectfully submit that **in the** circumstances, there is no reason to consider Donovan's affidavit in interlocutory proceedings when his evidence will not be available at the end of the day at the trial. The Defendant should therefore be compelled to procure Donovan's attendance in court to be cross-examined on his affidavit, or risk having his affidavit disregarded entirely.

23. In addition Donovan has impeded the administration of justice in Malaysia. He has, in particular, been contemptuous of the Malaysian judiciary and has even alleged to the world at large that they are predisposed to decide in favour of Shell companies:

See: Paragraphs 21 and 22 **of Thavakumar Kandiah Pillai's affidavit of 21.6.06**

**Paragraphs 6 to 10 of Thavakumar Kandiah Pillai's 2d
affidavit**

24. There are therefore very good reasons why Donovan's affidavit should not be admitted into evidence without cross-examination.

CONCLUSION

25. For the above reasons, we respectfully pray that the application be allowed with costs.

Much obliged.

Dated this 13th day of October, 2006.



**MESSRS T H LIEW & PARTNERS
SOLICITORS FOR THE PLAINTIFFS**

This **Plaintiffs' Skeletal Submissions** is filed by **Messrs** T H Liew & Partners, solicitors for the Plaintiffs abovenamed and whose address for service is at 4-02, 4th Floor, Straits Trading Building, 2, Lebuhr Pasar Besar, 50050 Kuala Lumpur.

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