IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF MALAYSIA
CIVIL SUIT NO.: 23NCVC-55-07/2015

BETWEEN

**KHAIRUL AZWAN BIN HARUN** **...PLAINTIFF**
(NRIC No. 761019-08-5697)

**AND**

**MOHD RAFIZI BIN RAMLI** **...DEFENDANT**

## GROUNDS OF JUDGMENT

1. The issue in this case is whether by reason of the Defendant having published in his blog, issues which are pending in this Court, there is a breach of the *sub-judice* rule and therefore a contempt of court. These are my grounds of judgment in respect of an ex-parte application by way of Notice of Application dated 11 May 2016 ("**the Application**") by which the Plaintiff is seeking leave for committal against the Defendant. The Application is supported by the Affidavit in Support affirmed by Khairul Azwan bin Harun on 11 May 2016 ('**the AIS**'); and, the Statement pursuant to Order 52(3) Rules of Court 2012.

## Background

2. The Plaintiff was at all material times the Deputy Youth Chief of the United Malaysia National Organisation ("**UMNO**") and is also a supreme council member of UMNO. He was also a director and the Chairman of Biosis Group Berhad. The Defendant is a member of Parti Keadilan Rakyat ("**PKR**") and is the Member of Parliament for the Parliamentary constituency of Pandan in Kuala Lumpur. He was also the General Secretary and Vice President of PKR and the director of an organization known as National Oversight and Whistleblowers ("**NOW**").

## The Defamation suit

3. The Plaintiff is suing the Defendant based on the publication of statements made by the Defendant at a press conference held at the office of NOW at Pusat Perkembangan Minda Uni Infiniti, Sungai Besi, 57000 Sungai Besi, Kuala Lumpur on 6 July 2015. I shall refer to it as "**the impugned statement**". The impugned statement made by the Defendant against the Plaintiff is as per paragraph 5.1 of the Statement of Claim. In pith and substance, the impugned statement pertained to various purchases of properties in Australia by an arm of Majlis Amanah Rakyat ("**MARA**") through its subsidiary MARA Inc.

4. The property purchases were purportedly undertaken by a subsidiary of MARA Inc. namely Thrushcross Land Holdings Limited, a British Virgin Island registered company or commonly known as a BVI company. According to the impugned statement, there were serious irregularities and misappropriation of monies belonging to MARA as a result of these property purchase transactions. The impugned statement is titled as "INDIVIDU TERBABIT DIDALAM URUSNIAGA MARA PERLU TAMPIL MEMBERI PENJELASAN". The Plaintiff's name is expressly mentioned in the impugned statement. In the impugned statement, the Defendant identified a number of individuals who were allegedly involved in the purchase of the properties. Some of these individuals are connected to MARA whereas some are not. In particular, the Defendant identified Erwan Azizi ("**Erwan**") and Izmir Abdul Hamid who were partners with business interests and links to the UMNO and UMNO Youth leadership. Erwan is also a non-executive director of Biosis Group Berhad. The Plaintiff was also named in the impugned statement and identified as the Chairperson of Biosis Group Berhad and as Deputy Chief of UMNO Youth.

5. The impugned statement goes on to state, *inter-alia*, that "*Ada ketirisan sebanyak RM63juta yang perlu dijawab oleh individi-individu yang saya namakan pada hari ini iaitu Erwan Azizi, Izmir Abdul Hamid, Mazrul Haizad Maarof, Dazma Shah Daud dan* ***Khairul Azwan Haron*** *yang semuanya adalah sama ada pemegang jawatan Pemuda UMNO ataupun individu yang rapat dengan mereka.*"

**Adjournment of the Trial**

6. In his defence, the Defendant has pleaded fair comment and justification. The matter was fixed for trial on 3 May 2016 – 4 May 2016 ('**the trial**'). However, on 29 April 2016 the Defendant's solicitors had written a letter to this Court seeking for an adjournment of the trial on the grounds as stated at paragraph 12 of the AIS.

7. Essentially, the grounds for adjournment were that the Defendant and his counsel intended to travel to Sarawak to participate in the campaign for the Sarawak State elections. In particular counsel pointed out that the Defendant and he were amongst the few politicians who were not barred from entering Sarawak and that they had a very small window of opportunity to travel to Sarawak and participate in the election campaign before polling day.

8. The other reason for the adjournment was that the Defendant needed to make an application to obtain leave of the Court to adduce the transcripts of judicial proceedings in Australia, which he intended to rely on to establish the nefarious property purchase activities by individuals within MARA or connected to MARA/ UMNO/UMNO Youth.

9. The Plaintiff objected to the request for the adjournment which was intimated by way of their solicitor's letter dated 29 April 2016. On the trial date, the Plaintiff was ready to be called as a witness. The Defendant's solicitors once again requested for an adjournment based on the grounds as stated in paragraph 14 of the AIS. This court allowed the adjournment with conditions as stated in paragraph 15 of the AIS. The trial was adjourned. The new trial dates were 6 June 2016 and 7 June 2016.

**The Defendant's Article – 3 May 2016**

10. According to the Plaintiff, on 3 May 2016, a few hours after the trial was adjourned, the Defendant published or caused to be published statements and comments pertaining to this case in his blog at http: //rafiziramli.com/2016/05/skandal-pembelian-hartanah-mara-apa-tindakan-pemuda-umno-untuk-dapatkan-balik-dana-mara-yang-diselewengkan/entitled:

"SKANDAL PEMBELIAN HARTANAH MARA APA TINDAKAN PEMUDA UMNO UNTUK DAPATKAN BALIK DANA MARA YANG DISELEWENGKAN?".

11. Counsel referred to the statements and comments made by the Defendant which can be found at Exhibit KA-3 of the Plaintiff's AIS wherein the Defendant states as follows:

> *"Kes saman Naib Ketua Pemuda UMNO, Khairul Azwan Harun terhadap saya mengenai satu kenyataan media berhubung skandal pembelian hartanah MARA di Australia bermula hari ini. Peguam saya, YB William Leong (Ahli Parlimen Selayang) mendapat pelepasan dari Yang Arif S Nantha Balan untuk menangguhkan perbicaraan bagi membolehkan saya memfailkan satu affidavit memasukkan transkrip perbicaraan di Mahkamah Melbourne sebagai bahan bukti pihak saya.*
>
> *Perbicaraan penuh akan bermula pada 6 dan 7 Jun 2016 ini.*
>
> *Sementara kes ini melalui proses undang-undang di mahkamah, fakta-fakta berhubung urusniaga yang melibatkan MARA dan beberapa individu yang dikaitkan dengan pemimpin dari kalangan Pemuda UMNO itu terus mendapat liputan.*
>
> *Sehingga kini, tidak ada sebarang tindakan atau pengumuman yang mengesahkan bahawa dana MARA yang diselewengkan oleh individu-individu tertentu ini telah dipulangkan kepada MARA. Dalam keadaan peruntukan untuk membiayai program pendidikan MARA dipotong mendadak sehingga biasiswa MARA dihapuskan dan jumlah penerima pinjaman pendidikan dikurangkan, kegagalan mendapatkan kembali dana MARA yang diselewengkan ini adalah satu pengabaian tanggungjawab di pihak kerajaan dan UMNO.*
>
> *Sebab itu saya berhak bertanyakan kepada Khairul Azwan Harun – sebagai Naib Ketua Pemuda UMNO, apakah langkah-langkah yang telah beliau ambil untuk membantu MARA mendapatkan kembali dana yang diselewengkan ini kerana jumlahnya besar dan dapat membantu ramai pelajar Bumiputra? Apakah langkah-langkah yang telah diambil oleh Pergerakan Pemuda UMNO untuk membantu*

*MARA mendapatkan kembali dana ini? Sudahkan sebarang tindakan diambil terhadap mana-mana anggota Pemuda UMNO yang dinamakan secara khusus di dalam dokumen-dokumen rasmi dan transkrip perbicaraan di Australia?*

*Jumlah yang diselewengkan bukanlah sedikit. Fakta-fakta berikut adalah hasil dari pengumuman MARA sendiri, jawapan menteri di Parlimen atau dokumen urusniaga yang dilaporkan secara meluas:*

1. *Sebuah syarikat bernama Thrushcross Land Holdings Ltd telah dibeli oleh MARA Inc dalam tahun 2014. Jumlah yang dibayar oleh MARA untuk membeli Thrushcross Land Holdings Ltd adalah A$86.9 juta (bersamaan RM260.7 juta) iaitu A$64.4 juta (bersamaan RM193.2 juta) bagi pembelian syarikat dan A$22.5 juta (RM67.5 juta) untuk membayar hutang syarikat itu. Jawapan ini diberikan oleh Menteri Pembangunan Wilayah dan Luar Bandar di Parlimen.*

2. *Thrushcross Land Holdings Ltd dimiliki oleh individu-individu yang berkait dengan pimpinan Umno dan pemimpin dari kalangan Pemuda Umno. Perkara ini saya huraikan dalam kenyataan media sayahttp://rafiziramli.com/2015/07/individu-terbabit-di-dalam-urusniaga-mara-perlu-tampil-memberi-penjelasan/*

3. *Thrushcross Land Holdings Ltd membeli dua bangunan asrama pelajar pada harga yang jauh lebih rendah iaitu Unilodge Swanston Street pada harga A$23.5 juta (bersamaan RM70.5 juta) dan Dudley House pada harga A$22.6 juta (bersamaan RM67.8 juta). Jumlah kos pembelian dua asrama pelajar ini hanyalah A$46.1 juta sedangkan syarikat itu dijual pada harga A$64.4 juta kepada MARA Inc. Selain itu, MARA Inc juga mengambil alih hutang Thrushcross Land Holdings Limited dengan WBC Finance dan WBC Commercial Bill sebanyak A$22.5 juta.*

4. *Ini bermakna, MARA Inc bukan sahaja membeli 2 asrama pelajar itu pada harga yang lebih mahal; malah ia juga membayar hutang yang digunakan oleh pemilik Thrushcross Land Holdings Ltd ini untuk membeli 2 asrama pelajar itu yang kemudiannya dijual kepada MARA Inc.*

5. *Akibat dari penyelewengan ini, MARA Inc terpaksa menjual kedua-dua bangunan asrama ini dan hasrat penjualan itu telah diiklankan. Perunding hartanah antarabangsa iaitu Colliers menganggarkan bahawa setiap satu asrama itu bernilai A$30 juta pada harga semasa.*

6. *Maka, MARA Inc akan kerugian sebanyak A$26.9 juta (bersamaan RM80.7 juta) iaitu jumlah yang dibayar A$86.9 juta tolak bidaan pembeli pada harga semasa A$60 juta.*

7. *Ini juga bermakna pemilik Thrushcross Land Holdings Limited iaitu individu-individu yang berkait dengan pemimpin UMNO dan pemimpin dari kalangan Pemuda UMNO ini memperolehi keuntungan durian runtuh sebanyak A$40.8 juta (bersamaan RM122.4 juta).*

8. *Dari jumlah RM122.4 juta keuntungan atas angin itu, sebanyak A$4.75 juta (bersamaan RM14.25 juta) dibayar kepada syarikat-syarikat yang berkaitan dengan individu dan pemimpin dari kalangan Pemuda UMNO.*

*Saya khuatir penyelewengan dana MARA yang membawa kesan besar kepada pelajar Bumiputra ini didiamkan begitu sahaja dan dana yang diselewengkan tidak dirampas dari individu-individu terbabit.*

*Oleh yang demikian, saya mencabar Saudara Khairy Jamaluddin atau Saudara Khairul Azwan Harun atau kedua-duanya sekali berdebat mengenai penyelewengan dana MARA ini untuk membuktikan bahawa Pemuda UMNO telah menjalankan tanggungjawabnya menjaga dana awam Bumiputra tersebut.*

**RAFIZI RAMLI**
**NAIB PRESIDEN/SETIAUSAHA AGUNG**
**AHLI PARLIMEN PANDAN"**

(hereinafter referred to as "**the Article**")

12. On 3 May 2016 at around 8.17 p.m., the gist of the Article had been republished by Malaysiakini online portal at https:// www.malaysiakini.com/news/340142, vide article entitled "Rafizi challenges KJ and deputy to debate Mara property purchase" ("**the Malaysiakini Article**").

13. The Malaysiakini Article although not precisely in the same words but adhering to the sense and substance, amongst others, reads as follows:-

> "PKR vice-president and secretary-general Rafizi Ramli has challenged Umno Youth chief Khairy Jamaluddin or his deputy Khairul Azwan Harun or both of them, to debate over the alleged abuse of Mara funds in the purchase of property.
>
> This if the Malay nationalist party wants to prove it is looking after the public funds of the bumiputera, he said.
>
> Rafizi, who is also Pandan MP, said Khairul Azwan's defamation suit against him is going to trial on June 6 and 7 as mediation had failed today, and he had obtained leave to file an affidavit to submit a transcript from the Melbourne court case proceedings, as part of his evidence.
>
> "While we await the hearing of the suit, the facts of the transaction involving Mara and several individuals linked to Umno Youth. continue to gain traction," he said.
>
> "Till today there is no action or announcement confirming that Mara funds were abused by certain individuals and if they were returned to Mara.
>
> "This is in light of Mara's sudden reduction in the giving out of education loans, following Mara's failure to get the funds returned. This showed the government and Umno have failed in their duty.

"Hence, I would like to ask Khairul Azwan, as Umno Youth deputy chief, what are the steps that he has taken to help Mara recover these funds, so that it could help finance bumiputera students.

"Has any action been taken on the Umno Youth members allegedly involved according to the documents and official transcript from Australia?" Rafizi asked in a statement today.

He said the funds involved were enormous and the facts are from the announcement made by Mara itself, minister's reply in Parliament and the documentation of the transactions including:

- Thrushcross Land Holdings Ltd which was bought by Mara Inc in 2014 at a cost of A$86.9 million (or RM260.7 million). A$64.4 million (RM193.2 million) was for the purchase of the company and A$22.5 million (RM67.5 million) was to pay the debts incurred by the Thrushcross. This answer was given by the Rural Development minister in Parliament.

- Thrushcross was owned by individuals related to Umno leaders who are in Umno Youth, and this allegation is made in Rafizi's previous statement on the blog.

- Thrushcross bought two student hostels at a reduced price where Unilodge Swanston Street costs A$23.5 million (RM70.5 million) and Dudley House cost A$22.6 million (RM67.8 million). The total cost of purchase of the two hostels was A$46.1 million (RM138.3 million) but sold to Mara Inc at A$64.4 million (RM193.2 million).

- This meant Mara Inc not only purchased the two student hostels at a high price but also paid the debt by Thrushcross to purchase the hostels which was then sold to Mara Inc.

- As a result of this dubious transaction, Mara Inc. had to sell the two properties at its current value of A$30 million. This meant that Mara Inc lost A$26.9 million (or RM80.7 million).

- This also meant that the owners of Thrushcross Land Holdings who are individuals related to Umno leaders and in Umno Youth, obtained a profit of A$40.8 million (RM122.4 million).

- Of the RM122.4 million in profit, a total of RM14.3 million was paid to companies related to individuals and Umno Youth leaders, Rafizi alleged.

The Pandan MP expressed concern that the abuse of Mara funds could bring a big impact to bumiputera students if this was left quiet.

"Hence I challenge Khairy or Khairul Azwan or both of them to debate with me over this alleged abuse in Mara funds to prove that Umno Youth is responsible in safeguarding the bumiputera public funds," he said."

14. According to the Plaintiff the contents of the Article are such that they interfere with the due administration of justice and is *sub-judice* and constitutes a contempt of court. As such, the Plaintiff maintains that the Application for leave for committal is necessitated by the conduct of the Defendant in interfering with the due process of law and course of justice in relation to this ongoing suit. It was submitted for the Plaintiff that the conduct of the Defendant in publishing the Article in relation to this suit on 3 May 2016, had interfered and has the likelihood or tendency to interfere with the administration of justice.

15. Continuing with his submissions counsel said that the Article attacked the merits of this ongoing suit and cast aspersions on the independence and integrity of the judiciary and judicial process and is a breach of the *sub-judice* rule and would therefore be an act of contempt.

## Law of Contempt

16. Counsel for the Plaintiff referred to the Federal Court case of *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401 where Haidar Mohd Noor FCJ held as follows:

> "Following the principle, Oswald's Contempt of Court , 3rd edn provides a good guide to a general definition of contempt of court thus:
>
> > To speak generally Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigants or their witnesses during litigation.
>
> What therefore is contempt of court is interference with the due administration of justice' per Nicholls LJ at p. 923 of Attorney-General v. Hislop and Another [1991] 1 All ER 911 (CA):
>
> > In view of the generality of the phrase "interference with the due administration of justice" we are of the view that the categories of contempt are never closed. To that extent we respectfully endorse the statement made by Low Hop Bing J, in Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 at pp. 549-550:
> >
> > > The circumstances and categories of facts which may arise and which may constitute contempt of court, in a particular case, are never closed. This is the same position as in the case of negligence in which the scope for development is limitless. Contempt of court may arise from any act or form whatsoever, ranging from libel or slander emanating from any contemptuous utterance, news item, report or article, to an act of disobedience to a court order or a failure to comply with a procedural requirement established by law. Any of these acts, in varying degrees, affects the administration of justice or may impede the fair

> trial of sub judice matters, civil or criminal, for the time being pending in any court.
>
> The particular matrix of the individual case is of paramount importance in determining whether a particular circumstance attracts the application of the law of contempt. Hence, a positive perception of the facts is a prerequisite in deciding whether or not there is any contravention necessitating the invocation of the law of contempt."

17. Next, counsel referred to the Court of Appeal case of *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 5 CLJ 698 ("*the Bursa case*") , at page 719, paragraph 29, where it was held that:

> "The law in relation to what may be published concerning current legal proceedings is sometimes referred to as the sub judice rule. The publications are such they are intended to impede or prejudice the administration of justice which may in turn constitute acts punishable as contempt of court."

18. Counsel emphasized that the *Bursa* case had referred to the English Court of Appeal case, *AG v. Times Newspaper Ltd* [1973] 3 All ER 54 wherein Lord Denning MR stated:

> "When litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is contempt of court if he prejudges the truth before it is ascertained in the proceedings. To that rule about a fair trial, there is this further rule about bringing pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his

> defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain. The law should be maintained in its full integrity. We must not allow 'trial by newspaper' or 'trial by television' or 'trial by any medium' other than the courts of law. This law applies only when litigation is pending and is actively in suit before the court and there must appear to be 'a real and substantial danger of prejudice' to the trial of the cause or matter or to the settlement of it."

19. It was pointed out that the case went up on appeal to the House of Lords, and the decision of the Court of Appeal was reversed. Nevertheless, the general principles stated by Lord Denning, as quoted above, were not expressly departed from. Lord Reid said:

> "There is ample authority for the proposition that issues must not be prejudged in a manner likely to affect the mind of those who may later be witnesses or jurors. But little has been said about the wider proposition that trial by newspaper is intrinsically objectionable...
>
> I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable, not only because of the possible effect on that particular case but also of its side effects which may be far reaching. Responsible "mass media" will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and if the mass media are allowed to judge, unpopular people, and unpopular causes will fare very badly (at page 300)"

20. Counsel also drew my attention to the decision of the High Court in the case of *Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur Ahmad Kamar & Anor* [2012] 6 CLJ 93, at page 105, paragraph 35, wherein Justice Mohamad Ariff Yusof ( as he then was ) held that:

> "[35] If I may add, it is all a matter of proportion and circumstance. If a comment attacks the merits of an ongoing litigation, for example, or cast aspersions on the independence and integrity of the judiciary and the judicial process in the context of an ongoing active suit, there will obviously be a breach of the sub judice rule and will be an act of contempt, as was the case in Murray Hiebert, supra."

21. Counsel referred to the Court of Appeal case of *Murray Hiebert v Chandra Sri Ram* [1999] 4 CLJ 65, at page 100, paragraph g to i, where Denis Ong JCA held that:

> "It is common ground that in order to determine whether a given article is a contempt of court, the proper approach is to consider that article in its entirety. And in the case of an excerpt or passage from a speech published, the former Supreme Court states in the Lim Kit Siang case that such excerpt or passage must be carefully considered, viewed objectively and dispassionately and in the proper perspective to determine whether it constitutes a contempt of court. In the present case, I think the proper approach is to consider the disputed paragraphs in their proper context in the light of the said article as a whole and the effect on the ordinary reasonable reader."

22. Based on the above cited authorities, counsel submitted that the publication of statements and comments on an active ongoing suit amounts to a breach of the sub-judice rule and would therefore be an act of contempt. Based on the contents of the Article, it was submitted as follows:

22.1. The Defendant is aware of and has knowledge that the issue pertaining to the transaction involving MARA and Thrushcross Holdings Pty Ltd is an issue before this Court. Despite this, he had published the statements and comments which clearly refers to this active ongoing suit.

22.2. According to the Plaintiff (as per paragraph 2.1.1. of the AIS), the statements and comments made on 3 May 2016 attacks the merit of the Plaintiff's claim and that when read in its entirety, means as follows:-

22.2.1. That the Plaintiff had abused MARA funds in the transaction.

22.2.2. That the Plaintiff had failed to refund the monies which have been allegedly abused.

22.2.3. That the Plaintiff had failed to take any steps to recover the funds.

22.2.4. That the Plaintiff's conduct in abusing the funds had caused the allocation for the educational program under MARA to be drastically deducted.

22.2.5. That the Plaintiff had neglected his responsibility as UMNO Youth Deputy Chief.

22.3. It was submitted for the Plaintiff that the publication of the Article by the Defendant is intended to impede or prejudice the administration of justice which constitutes a contempt of court. According to counsel, the publication is prejudicial to the Plaintiff and that this is because the Judge, the witnesses and the public would be influenced by the publication.

22.4. It was argued that an inference can be made from the Article that the Plaintiff was in fact involved in the purported MARA transaction although this is clearly denied. (See paragraph 22.3 and it sub paragraphs of the AIS).

22.5. The Plaintiff took umbrage with the Defendant's statement at the last paragraph of the Article which amongst others had invited and had challenged the Plaintiff to debate over the issue of MARA and Thrushcross. According to the Plaintiff, the invitation to a debate gives the impression that the Plaintiff was actually involved in the said transaction.

23. Based on the aforementioned submission, facts and circumstances and the law on contempt, counsel submitted that the test to be applied to constitute contempt of court is for the Plaintiff to prove beyond reasonable doubt that the conduct of the above-named Defendant, is likely or tends to interfere with the proper administration of justice. It was emphasized that the Defendant's conduct if it is not interfering, it would, at least, have the likelihood and tendency to interfere with the administration of justice which constitutes contempt of Court.

**Analysis and Conclusion**

24. I will start with some basic principles on the law of contempt under the *sub-judice* rule. An appropriate starting point is the case of *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 at p.719, where the Court of Appeal lucidly expounded on the law of contempt in relation to the "*sub-judice*" rule as follows :

> "**[29]** The law in relation to what may be published concerning current legal proceedings is sometimes referred to as the *sub judice* rule. The publications are such they are intended to impede or prejudice the administration of justice which may in turn constitute acts punishable as contempt of court. The true nature of the doctrine itself requires that there have to be established an *actus reus* and *mens rea* to cause certain publications which would have a prejudicial effect on the criminal proceedings. In the appeal before us it cannot even be gleaned whether the situation could lead to civil contempt. Hence the court is invited to consider assertions which are speculative.

**[30]** In *AG v. Times Newspaper Ltd* [1973] 3 All ER 54 Lord Denning MR stated:

> When litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is contempt of court if he prejudges the truth before it is ascertained in the proceedings. To that rule about a fair trial, there is this further rule about bringing pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain. The law should be maintained in its full integrity. We must not allow 'trial by newspaper' or 'trial by television' or 'trial by any medium' other than the courts of law. This law applies only when litigation is pending and is actively in suit before the court and there must appear to be 'a real and substantial danger of prejudice' to the trial of the cause or matter or to the settlement of it."

25. In more recent times, in *Syarikat Bekalan Air Selangor Sdn Bhd v. Fadha Nur Ahmad Kamar & Anor* [2012] 6 CLJ 93 HC ("**the SYABAS case**"), Mohamad Ariff Yusof J (as he then was) cautioned that the Court must "*tread very carefully*" before committing a person for contempt based on the *sub-judice* rule. In the SYABAS case, the learned Judge said, *inter-alia*, freedom of expression cannot be relegated below the *sub-judice* rule and emphasized that it all boils down to proportionality and circumstances.

26. The learned Judge also recognized that discussion on a matter of "public interest" should not be curtailed for fear of contempt and that, quoting Lord Denning at p. 105 of the judgment, "*criticisms can continue to be made and can be repeated. Fair comment does not prejudice a fair trial*". The learned Judge's views on the topic of sub-judice and freedom of expression are clearly demonstrated in the following paragraphs of the judgment in the SYABAS case and they merit reproduction in full :

> **"Media Freedom, Fair Comment And Fair Trial**
>
> **[34]** Mr Tommy Thomas also cites with full force Lord Denning's crispy statement of the relevant law in *Wallersteiner v. Moir* [1974] 3 All ER 217, which is worth repeating with full contemplation:
>
> > I know that it is commonly supposed that once a writ is issued, it puts a stop to discussion. If anyone wishes to canvas the matter in the press or in public, it cannot be permitted. It is said to be sub judice. I venture to suggest that it is a complete misconception. The sooner it is corrected, the better. If it is a matter of public interest, it can be discussed at large without fear of thereby being in contempt. Criticisms can continue to be made and can be repeated. **Fair comment does not prejudice a fair trial.** (emphasis added)
>
> **[35]** If I may add, it is all a matter of proportion and circumstance. If a comment attacks the merits of an ongoing litigation, for example, or cast aspersions on the independence and integrity of the judiciary and the judicial process in the context of an ongoing active suit, there will obviously be a breach of the *sub judice* rule and will be an act of contempt, as was the case in *Murray Hiebert,supra*.

**[36]** I cannot find these elements here. In a larger constitutional context, the law of contempt must necessarily bend to the higher liberty of freedom of expression, not the reverse.

**[37]** The Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corporation* [1995] 120 DLR 12 (a case highlighted to this court by Mr Tommy Thomas) has adopted, in my opinion, the correct approach in constitutional interpretation in the area of media freedom and freedom of expression generally. As such, the common law rule in relation to *sub judice* has to be molded accordingly in the light of fundamental liberties provisions. The Canadian Supreme Court said:

> It is open to this Court to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution": *Dolphin Delivery*... I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter (the Canadian Charter of Human Rights). Given that publication bans by their very definition, curtail the freedom of expression of third parties, I believe the common law must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:
>
> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. (per Lamer CJC, at pages 37-38)

[38] These persuasive principles, emanating from such an illustrious court, can be considered as forming a good jurisprudential basis to decide cases such as the present. I cannot believe the sensitivities of the average Malaysian can be so different so as to incline us to adopt a completely different juristic approach which relegates freedom of expression below the *sub judice* rule.

**Conclusion**

[39] As I said at the outset, the preliminary governing principles on *sub judice* and contempt require the court to tread very carefully when an allegation of contempt or to commit a citizen to prison for it, comes before the court. The court has been satisfied on a high burden of proof that the administration of justice has been sullied or compromised. Ultimately, the test of possible or likelihood of prejudice has to have reference to the professional judge who will be hearing the case, not a collection of layman jurors - a system which has ceased to exist in our system of civil litigation. I would have thought it will require more than a criticism of a litigant in a media of limited circulation (such as Harakah) to influence a judge to be somehow prejudiced against the litigant criticized."

## The Article

27. I have read the entire Article very carefully. In my view, the Article was an obvious attempt by the Defendant to draw attention to the MARA property purchase issue and to put pressure upon the Plaintiff and the Chief of UMNO Youth ( Khairy Jamaluddin ) to explain what action UMNO Youth has taken in relation to the alleged irregularities and misappropriation of monies belonging to MARA via the alleged nefarious property purchase transactions which undoubtedly are a matter of public concern and public interest.

28. In particular, the Article reveals that the Defendant has raised a query as to whether action has been taken by the Plaintiff and the UMNO Youth Chief against UMNO Youth members who the Defendant claimed were "involved" in the MARA property purchase issue.

29. With respect, I do not read the Article as suggesting either expressly or implicitly that the Plaintiff was "involved" in the nefarious property purchase transactions or misappropriated monies belonging to MARA. But I do agree that the Article suggests very clearly or implicitly that the Plaintiff had or may have neglected his responsibility as UMNO Youth Deputy Chief. However, that is not the issue in the defamation suit as the Plaintiff's case against the Defendant is predicated on an allegation that the Plaintiff is involved in the MARA property purchase issue. In this regard, I must say quite emphatically that I am leaving open the question as to whether the impugned statement dated 6 July 2015 bears the imputation that the Plaintiff was involved in wrongdoing *vis-a-vis* the irregularities and misappropriation of monies belonging to MARA which resulted in an alleged "*ketirisan*" to the tune of RM63 Million. Indeed, even the question as to whether there were irregularities or misappropriation of MARA funds to the tune of RM63 Million is an open question. As such, these are all plainly and patently questions to be determined at trial.

30. As I said earlier, the general rule is that the law of contempt cannot be used to curtail public discussion of matters of public importance and public interest albeit that these matters may already be the subject of a court action. Ultimately the Court must be satisfied that the administration of justice has been sullied or compromised by reason of the matters that were published whilst the defamation case is on-going.

31. The *sub-judice* rule is after all a matter of proportion and circumstance. The clearest legal position in this regard or the approach to be taken is the one which was articulated by the learned Judge in the SYABAS case where he said in paragraph 35 of the Judgment that:

> "If a comment attacks the merits of an ongoing litigation, for example, or cast aspersions on the independence and integrity of the judiciary and the judicial process in the context of an ongoing active suit, there will obviously be a breach of the sub-judice rule and will be an act of contempt, as was the case in Murray Hiebert, supra."
>
> (see: p.105 of the Judgment )

32. In the present case, I do not see any real and substantial attack on the judiciary or the judicial process or on the person of the Judge. As I said earlier the attack or challenge to the Plaintiff is with respect to his duties as the Deputy Chief of UMNO Youth. That's a separate matter altogether.

33. As for the invitation or challenge to a debate about the MARA property purchase issue, again I do not see how this can be construed as breaching the *sub-judice* rule as debates are a healthy, vibrant and necessary aspect of a maturing democracy and progressive society. I should add that on the facts of this case, the public interest element outweighs any argument on *sub-judice* as debates on important public interest issues should not be stifled or be readily sacrificed on the altar of *sub-judice*. But there may be exceptions to this approach and the balance may be shifted accordingly. But in the present case, I do not see any exception applying to exclude public discussion or dissemination of matters concerning the MARA property purchase issue.

## The Outcome

34. In the result, based on the materials placed before me, I find that the Plaintiff has not crossed the minimum threshold for leave for committal under Order 52 Rule 3(2) of the Rules of Court 2012. For the reasons as stated above, I am of the view that there is no *prima facie* case of contempt. As such, the Application does not meet the requisite threshold for the grant of leave under Order 52 Rule 3(2) Rules of Court 2012 and Enclosure 36 is hereby dismissed.

Order accordingly.

Date: 19 May 2016

**S. Nantha Balan**
Judge
High Court
Kuala Lumpur

**Counsel:**

Datuk M. Reza Hassan (together with Ellia Zuraini Mat Zin and Umi Farhanah Mohd Nasir) (*Messrs Raja Riza & Associates*) for the Plaintiff.

**Cases:**

*Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401 FC

*Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 at p.719 (CA)

*Syarikat Bekalan Air Selangor Sdn Bhd v. Fadha Nur Ahmad Kamar & Anor* [2012] 6 CLJ 93 HC

*Murray Hiebert v Chandra Sri Ram* [1999] 4 CLJ 65 CA