DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

SAMAN PEMULA NO: WA-24-12-03/2017

Dalam perkara Seksyen 3 Akta Undang-Undang Sivil, 1956

Dan

Dalam perkara Seksyen-seksyen 126, 127, 128 dan 129 Akta Keterangan, 1950

Dan

Dalam perkara Akta Profesion Undang-Undang, 1976

Dan

Dalam perkara Seksyen-Seksyen 80, 142(5) dan Bahagian V Akta Cukai Pendapatan, 1967

Dan

Dalam perkara, perkara 5 dan 96
Perlembagaan Persekutuan

Dan

Dalam perkara Aturan 7, Aturan
15 Kaedah 16 dan Aturan 28
Kaedah-Kaedah Mahkamah.
2012

Antara

BAR MALAYSIA ... PLAINTIF

Dan

KETUA PENGARAH HASIL DALAM NEGERI ... DEFENDAN

GROUNDS OF JUDGMENT

INTRODUCTION

1. The Plaintiff filed an Originating Summon ("OS") dated 7.3.2017 against the Defendant seeking the following relief; --

   (i) a Declaration that section 142(5) of the ITA does not entitle or empower the Defendant to disregard the privilege under Malaysian Law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an Advocate and Solicitor and his/her client or advice given by an Advocate and Solicitor to his / her client, whether contained in any book, statement, account or other record of any description whatsoever (hereinafter collectively referred to as "Client Communications"), and which privilege is referred to variously under Malaysian law as "legal privilege (hereinafter referred to as "Privilege") by requesting or demanding access to, or disclosure of, such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client ;

   (ii) a Declaration that Part V of the ITA generally, and Section 80 of the ITA in particular, do nor entitle or empower the Defendant to disregard the

Privilege that protects all Client Communications by requesting or demanding access to, or disclosure of, any such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

(iii) a Declaration that Privilege under Malaysian law generally, and as referred to in Sections 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require and Advocate and Solicitor to reject any request or demand of the Defendant for access to, or disclosure of, any, Client Communications, unless Privilege is waived by the Client.

2. Both parties have duly filed the following cause papers –

(i) Originating Summons dated 07.03.2017;

(ii) Affidavit in Support affirmed by Karen Cheah Yee Lyn on 07.03.201;

(iii) Affidavit in Reply affirmed by Hazlina binti Hussain on 28.04.2017;

(iv) Affidavit in Reply affirmed by Karen Cheah Yee Lyn on 26.05.2017; and

(v) Affidavit in reply affirmed by Chan Weng Keng on 29.05.2017.

3. Both parties have filed their respective written submissions. The Plaintiff's OS was heard on 16.1.2018 and the decision was adjourned to 29.3.2018 and subsequently on 2.4.2018.

BRIEF FACTS

4. The Plaintiff had written in to the Defendant on 3.11.2016 to state that: -

   (i) the Plaintiff had received complaints from members of Malaysian Bar that officers of the Defendant have been carrying out raids on the Plaintiff's member's law firms to conduct audit of their client's account and insisting to have sight of the relevant accounting books and records;

   (ii) Plaintiff's has taken a stance that such audit breaches the principle of solicitor-client privilege;

   (iii) Section 142(5) of Income Tax Act 1967 should not and does not prevail over the solicitor-client privilege.

5. The Plaintiff has also on 29.11.2016 wrote in to the Defendant as a follow up reminder to his letter dated 3.11.2016.

6. The Defendant had replied to the Plaintiff's letter vide letter dated 7.12.2016 and states that: -

(i) the Defendant believes that in providing service to the public, the Plaintiff has always ensured that their duty was observed in accordance with the law, but in ensuring tax compliance amongst the Taxpayers, the Defendant is under a duty to conduct audit to ensure that the tax assessment made is in accordance with the provision of the Income Tax Act 1967;

(ii) the Defendant took the stand that subsection 142(5) of Income Tax Act 1967 overrides the provisions of Chapter IX of Part III, Evidence Act 1950 and the Legal Profession Act 1976. In other words, the audit conducted by the Defendant did not breached the principle of solicitor-client's privilege;

(iii) The Defendant's stand is based on the followings: -

(a) Basic legal provision regarding the solicitor-client's privilege had been provided under section 126 Chapter IX Part III Evidence Act;

(b) However, the provision of subsection 142(5) and (b) of ITA in specific overrides provisions of Evidence Act and the Legal Profession Act.

(c) In addition, it is pertinent to stress that the Defendant's officers are statutorily empowered under subsection 80(1) to have full and free access to all lands, buildings and places to all books, documents etc.

(d) Therefore, the failure of the lawyers or their clients in giving access of the documents to the audit officers are in breach of the ITA 1967 and can be prosecuted under paragraph 116(a) of ITA 1967.

THE ISSUES

7. The Plaintiff in this case had relied on **Section 126 of the Evidence Act 1950** ("EA 1950") which generally provides for the evidentiary provision of the legal privilege principle whilst the Defendant argues that **Section 142(5) of the Income Tax Act 1967** ("ITA 1967") which specifically provides for LAW FIRM'S client's account was not protected by Privilege by its overriding effect over Section 126 of the EA 1950. Amidst all this, the question of law for the determination of this Court is whether Section 142(5) of ITA 1967 prevails over Section 126 of Evidence Act 1950 as there is conflict between both provisions.

8. If the answer is in the affirmative, then the Defendant is entitled to be given access to, or disclosure to the Plaintiff's member's (hereinafter referred to as the law firm) client's account for the purpose of tax audit / investigation.

9. After hearing the oral submissions from the Plaintiff's counsel and the Senior Revenue Counsel (SRC) for the Defendant and also referred to their written submissions and the authorities cited therein, the answer to the above issue which is the opinion of this Court is stated in the following paragraphs of this Judgment.

Whether Section 142(5) of the Income Tax Act Overrides Section 126 of Evidence Act 1950

10. I have considered the Defendant's positon especially the submission that subsection 142(5) (b) of the ITA has made it clear that its overriding effect extended to the operation of section 126 of EA 1950.The term ***"save as provided in para (b)"*** **in** subsection 142(5)(a) of ITA 1967 connotes that the operation of section 126 of EA 1950 which was part of Chapter IX of Part III of EA 1950 is **subjected to** and **has been ousted** by the operation of subsection 142(5) (b) of ITA 1967. When Section 142(5) of ITA containing the said clause refers to any particular provision which it intends to override, inter alia, Section 126 of EA 1950, it is permissible to hold that it excludes the whole application of the Section 126 of EA 1950.

11. I do not agree that section 142(5) (b) of the ITA 1967 goes beyond the provision of Section 126 of EA 1950. The argument is misconceived.

12. Section 126 of the Evidence Act 1950 ("EA") lies within Chapter IX Part III of EA which provides that-

> "(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure-
>
> (a) Any such communication made in furtherance of any illegal purpose;
>
> (b) Any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

"Save as provided" in s.142 (5) (b) of ITA 1967

13. Firstly, section 142 (5) (b) of ITA 1967 says-

Save as provided in paragraph (b) nothing in this Act shall –

(i) *affect the operation of Chapter IX of Part III of the Evidence Act 1950 (Act 56; or*

(ii) *be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Special Commissioners, the Director General or any other person any document, thing or information on which by that Chapter or those provisions he would not be required or permitted to produce or give to a court.*

(b) ***Notwithstanding the provisions of any other written law****, where any document, thing, matter, information, communications or advice consists wholly or partly of , or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions or dealings of any person (whether an advocate and solicitor, his client, or any other person), it shall not be privileged from disclosure to a court, the Special Commissioners, the Director General or any authorized officer if it is contained in, or comprises the whole or part of, any*

book, account, statement, or other record prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner of firm of practitioners or any other person.

14. My reading of the above provision is that only Paragraph (b) of section 142 (5) of the ITA 1967 excludes or overrides privilege conferred in other written law. The Act does not affect the operation of *Chapter IX of Part III of the Evidence Act 1950 (Act 56; or be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which by that Chapter or those provisions he would not be required or permitted to produce or give to a court.*

15. **Paragraph (b)** of section 142 (5) which was inserted vide the amendment made in Income Tax (Amendment) Act 1974 commence with the words ***"Notwithstanding the provisions of any other written law".*** Therefore, my view is as far as other written law which prohibit the disclosing or producing any document, thing or information to a court, the Special Commissioners, the Special Commissioners, the Director General, such protection or privilege does not apply. Para (b) overrides that Chapter or those provisions in that written law. **Paragraph (b)** saves Chapter *IX of Part III of the Evidence Act 1950* from operation of ITA 1967. In other words, Section 126 of the Evidence Act 1950 ("EA") which lies within Chapter IX Part III of EA is saved and not caught under section 142 (5) of the ITA 1967. Section 126 of the EA shall prevail over section 142 (5) of the ITA 1967 but of course the proviso

in section 126 does not protect privilege to disclose or produce any document, thing or information to communication made in furtherance of any illegal purpose and for showing that any crime of fraud has been committed by the Advocate.

16. The wordings of Section 142(5) of ITA 1967 is clear and unambiguous and it should not be misinterpreted or assigned with another meaning. This has been decided by Federal Court in ***Positive Vision Labuan Limited v Ketua Pengarah Hasil Dalam Negeri and other appeals (2017) MLJU 183;***

> "*The wordings of section 3B of the ITA and sections 3A and 2(3) of LABATA as well as the Exemption Order are clear and unambiguous.* ***It is trite that when the provisions of law are clear and does not admit of any ambiguity, then the provisions must be strictly interpreted.*** *This court in the case of Krishnadas Achutam Nair & Ors v Maniyam Samykano (1997)1MLJ94 had held:*
>
> > *"the function of a Court when construing an Act of Parliament is to interpret he statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie,* ***every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in***

a stature or subsidiary legislation or to treat them as superfluous or insignificant. *It must be borne in mind that:*

"As a general rule a Court will adopt that construction of a ***statute which will give some effect to all of the words which it contains*** *Per Gibbs J in Beckwith v. R. (1976)12ALR333, at p.337."*

17. I inclined to agree with the Plaintiff's submission that the Defendant has clearly failed to appreciate that the ancient rules of Privilege were framed to protect clients' confidentiality and thus it should not be treated in such a cavalier fashion as the Defendant had submitted before this Court. The Defendant has clearly confused themselves as they have failed to understand Privilege and also failed to address it.

18. I agree with the Plaintiff that the Defendant has wholly misconstrued the applicability of non-obstante clause in the instant case. The correct operation of a non-obstante clause has been explained by the recent Federal Court in the case of ***Ho Tack Sien & Ors v. Rotta Research Laboratorium SpA & Anor [2015] 4 MLJ 166*** where Zulkefli CJ held:

*"[39] Although s 40(1) of the Act begins with the words '**notwithstanding...**'. it is a general principle that a non-obstante clause cannot go outside the limits of the Act itself. We are in agreement with the contention of the plaintiff that non-obstante*

clause is subject to the limitations contained in the section and cannot be read as excluding the whole Act and standing by itself. ...

19. Further, in ***Smt. Geeta v. State of U.P & AMP LNIND 2010 SC 1218***, the Indian Supreme Court cited a few earlier Supreme Court cases, including ***A.G. Varadarajulu and another v. State of Tamil Nadu and others (1998) 4 SCC 231*** (which has been cited with approval by ***Ho Tack Sien (supra)***), to emphasize the importance of ascertaining the legislature's intention in interpreting non-obstante clauses (at pages 288 of PBA4):

> *"38. This Court also held in the case of ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Ors, reported in (2006) 10 SCC 452, that the wide amplitude of a non-obstante clause must be kept confined to the legislative policy and it can be given effect to, to the extent the Parliament intended and not beyond the same and that in construing the provisions of a non-obstante clause, it was necessary to determine the purpose and object for which it was enacted (See page 465- 6).*
>
> *39. In Central Bank of India v. State of Kerala & Ors, reported in (2009) 4 SCC 94, this Court reiterated that while interpreting a non-obstante clause the court is required to find out the extent to which the legislature intended to give it an overriding effect."*

20. Accordingly, care has to be exercised in construing the non-obstante nature of **Section 142(5) of the ITA** to give effect to the intention of the Parliament and not beyond the purpose and object for which **Section 142(5) of the ITA** is enacted.

21. Whilst **Section 142(5)(b) of the ITA** was enacted by the Parliament to *"enable disclosure of information contained in records to be required and to be made and prevents privilege from being claimed in respect of such information, notwithstanding any other written law to the contrary"* according to the Explanatory Statement, my view is that **Section 142(5)(b) of the ITA**, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing the their clients and it does not extend to "advocates and solicitors". I agree with the Plaintiff that this is because it is clear from **Section 142(5)(b) of the ITA** itself that Parliament had used two different terms, namely "practitioner" and "advocate and solicitor".

22. It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers (See the judgment of Thomson CJ in ***Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1***. It is a principle of statutory interpretation that when the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different

meaning and effect is intended, and if different language is used in contiguous provisions, it must be presumed to have done so designedly (see NS Bindrai's Interpretation of Statutes (8th Ed) at p 275) (See His Lordship Arifin Zakaria FCJ in the recent Federal Court case of ***Manokaram a/l Subramaniam v. Kaur a/p Nata Singh [2009] 1 MLJ 21)***

23. Accordingly, in **Section 142(5)(b) of the ITA**, Parliament had clearly used different words as it recognized that "practitioner" and "advocate and solicitor" are different persons and it is trite that Parliament does not act in vain and significance must be given to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded – ***Foo Loke Ying & Anor v Television Broadcasts Ltd & Ord [1985] 2 MLJ 35.***

24. I further agree with the Plaintiff that the terms "practitioner" and "advocate and solicitor" in **Section 142(5)(b) of the ITA** are meant to refer to different persons, especially in light of the numerous times the term "advocate" has been used throughout the statute. The meaning of "practitioner" and "advocate and solicitor" must be consistent throughout the **ITA** as a statute must be read as a whole – ***Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 MLJ 513.***

25. The intention of the Parliament and the object and purpose of **Section 142(5)(b) of the ITA** has been thoroughly explained in the Plaintiff's written submission as follows:

(i) the deliberate and conspicuous dropping of the word "legal" preceding "practitioner";

(ii) in reading the **ITA** as a whole, the word "practitioner" only appears in **Section 142(5)(b) of the ITA** whereas the word "advocate" appears 6 times and is clearly intended to refer to an advocate and solicitor – **Section 3 of the Interpretation Acts 1948 and 1967**;

(iii) the **LPA** uses "legal practitioner" throughout the Act;

(iv) **Section 142(5)(b) of the ITA** contains a reference to "advocate and solicitor" and a reference to a "practitioner". As Parliament does nothing in vain, 2 different phrases must convey 2 different meanings – ***Foo Loke Ying & Anor v. Television Broadcasts Ltd. & Ors [1985] 2 MLJ 35***, ***Funk David Paul v. Asia General Asset Bhd [2014] 1 MLJ 681***, ***Gurbachan Singh v. Public Prosecutor [1967] 2 MLJ 220***, ***Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581***;

(v) "advocate and solicitor" is a technical phrase and it is not to be supposed that Parliament uses the phrase in any other sense – ***Mohindar Singh and another v. Rex [1950] 16 MLJ 97***, ***DP Vijandran v. Majlis Peguam [1995] 3 MLJ 576***, ***All Malayan Estates Staff Union v. Rajasegaran & 2 Ors***

[2006] 5 AMR 585, Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707.

(vi) the terms "contained in records" of the Explanatory Statement demonstrate that **Section 142(5) of the ITA** does not enable the disclosure of Privileged communications per se, i.e. any documents pertaining to Client Communications found in the possession of solicitors to the Defendant; and

(vii) the phrase "notwithstanding the provisions of any other written law" in **Section 142(5)(b) of the ITA** does not eliminate the operation of common law.

26. Therefore, **Section 142(5)(b) of the ITA** cannot be used by the Defendant as an excuse to be given access to the clients' account with a view to taxing the advocates and solicitors.

The Common Law on Privilege

27. I am also of the view that the words *"notwithstanding the provisions of any other written law"* in **Section 142(5) (b) of the ITA** does not exclude the operation of common law.

28. In ***Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257***, the Federal Court discussed **Article 160(2) of the Federal Constitution** which recognizes that common law is different from that of written law (at pages 307 of PBA4):

> *"The Court of Appeal correctly referred to the definition of 'law' in art 160(2). It reads as follows:*
>
> > *Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof."*

29. It is trite that in enacting a statute, the Parliament may elect to exclude common law. The High Court of Australia held in the case of ***Blunden v. Commonwealth of Australia [2003] HCA 73*** that-

> *"For the purposes of s 80 of the Judiciary Act the words 'laws of the Commonwealth' related only to statute law and did not include common law."*

30. **Section 142(5) of the ITA** makes no reference to common law and the Plaintiff therefore, such an exception should not be read into the statute. This has been

confirmed in ***Yeo Hock Cheng v Rex [1938] 1 MLJ 104*** where the Court confirmed the pronouncement in the case of Arthur v Bokesham 11 Mod 150 that-

> *"The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare."*

31. The Supreme Court in ***Manilal & Sons (M) Sdn Bhd v M Majumder [1988] 2 MLJ 305*** cited Walsh v Alexander (1913) 16 CLR 293 with approval:

> *"... that where rights and liabilities are not created by a statute, but arise by common law, then, even though they are affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, unless the statute expressly or by necessary implication excludes the common law remedy, the latter still remains."*

32. This is fortified by the judgment of New Zealand Court of Appeal in ***Commissioner of Inland Revenue v. West-Walker [1954] NZLR 191:***

"*And where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law*".

33. Applying the above authorities, I agree with the Plaintiff that Parliament does not intend to apply **Section 142(5)(b) of the ITA** to the exclusion of the common law on Privilege and that **Section 142(5)(b) of the ITA** cannot be given effect to the extent beyond the Parliament's intention! At most, **Section 142(5) (b) of the ITA** may only apply to the possible secondary cases.

Section 126 of the EA is the specific provision

34. I also agree with the Plaintiff that the Defendant has also misunderstood and misapplied the Latin maxim of *Generalia Specialibus Non Derogant* in this case. Based on the clear and express language in **Section 126 of the EA**, it cannot be disputed that the **EA** is the specific statute which governs matters pertaining to Privilege. Although **Section 126 of the EA** was enacted before **Section 142(5) of the ITA**, it is a specific provision on Privilege, and as such excludes the operation of the general provision of **Section 142(5) of the ITA** to the extent of any inconsistency (See ***Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600 and*** **Bennion on Statutory Interpretation, Sixth Edition*).***

35. The Plaintiff has submitted numerous authorities on the subject matter of privilege. The Defendant cannot ignore the superior and apex courts' judgments that Privilege is absolute and it remains so until waived by the privilege holder.

36. In the very recent case of ***Gideon Tan v. Tey Por Yee and another appeal [2017] 1 MLJ 352*** decided by the Court of Appeal and Federal Court, a lawyer sought to rely on privileged information to defend himself in a committal proceeding. In rejecting the same, the Court of Appeal and Federal Court once again affirmed that Privilege affords protection to clients only and not to lawyers.

37. Further, the Federal Court in ***Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 MLJ 14*** held that **Sections 126 to 129 of the EA** embody the common law position and expressly held that "*Legal professional privilege under s. 126 of the Act is absolute and it remains so until waived by the privilege holder, i.e. the client.*". This goes to show that Privilege is grounded and inherent in common law and **Section 142 of the ITA** simply cannot take away such fundamental principles.

38. In **Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2014] 3 CLJ 367** the Court has held that that-

> *"The solicitor-client privilege is absolute and permits of only one exception which is waiver: (a) upon the express consent of the client given and*

directed to the advocate; and (b) such consent must be intentional and deliberate.

...

The law is very clear that this privilege is absolute and permits of only one exception which is upon the express consent of the client given and directed to the advocate and which consent must be intentional and deliberate. The common law maxim "once privileged, always privileged" as embodied in ss. 126 to 129 of the Evidence Act 1950 must be recognized."

[See also ***Protasco Bhd v. PT Anglo Savic Utama & Ors [2016] 7 MLJ 523]***

39. As submitted by the Plaintiff, **section 126 of the EA** embodies every Privileged communication, including the Client Communications. The terminology of "in the course and for the purpose of (an advocate's) employment" is repeated numerous times throughout **Section 126 of the EA**. However, **Section 142(5)(b) of the ITA** merely makes reference to the term "in connection with any client". The terminology of "in connection with" is far from specific and is extremely general as to its meaning as well as its applicability.

40. As such, the **EA** is undeniably more precise, unambiguous and specific. With those circumstances in mind, it is my considered opinion that **Section 126 of the EA** must take precedence over **Section 142(5) (b) of the ITA** to the extent of any inconsistency in respect of matters relating to Privilege.

41. It is to be noted that the Defendant in fact has admitted that the ITA is a general legislation by citing the following passage from the case of ***Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar [2006] 5 CLJ 217***:

> *"[3] Section 80(13) of the LPA stipulates that the Malaysian Bar be exempted from tax on the compensation fund. The said provision is constituted under art. 96 of the Federal Constitution which provides "No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law." The LPA is a specific legislation whilst the ITA is a general legislation. Where there is a conflict between the LPA and ITA provisions, the LPA prevails. ..."*

42. I would agree with the Plaintiff that the fact that the Parliament would have had in mind the earlier (although not general) Act (the **EA**) when it enacted the later Act (the **ITA**) and intentionally chose a different terminology, i.e. "practitioner" as opposed to "advocate", is evident of the Parliament's intention that **Section 142(5)(b) of the ITA** is not to be applied to advocates and solicitors. Otherwise, the Parliament would have used the same terminology in the **ITA** having in mind the **EA**.

Basis for Looking into the Client's Accounts

43. The Defendant has stressed that the Defendant is clear with its objective in requesting for a view to the law firm's client's account which is to ensure that the law firm itself do not understate its income and therefore, an audit on the full documents held by the Applicant is necessary which also includes the "client's account". The Plaintiff has a duty to regulate LPA which includes providing for the keeping by advocates and solicitors at banks for client's money pursuant to **Section 78 of the LPA**. In furtherance to that, **Rule 2 of the Solicitors' Account Rules 1990 ("SAR")** provides that a *"client account"* means *"a current or deposit account at a bank* ***in the name of the solicitor*** *in the title of which the word "client" appears.*

44. Based on the same provision it can be concluded and it is also never disputed that the Plaintiff's members (law firms) had full access to maintain the client's account. Therefore, the client's account is never fully protected from misuse by the law firms and this is supported by myriads of cases where law firms had misuse client's account which also includes circumstances whereby the client's account was use to hold transfers which was done fraudulently by law firms.

45. Defendant submitted that this illegal conduct is not foreign in other developing countries. In fact, few attempts had been done by local authorities in other developing country to curb the matter. Relying on the same basis, the Defendant finds it important to ensure that the Plaintiff did not use the client's account as a means to park the law firm's own incomes which will then result to an

understatement of income by the respective law firm. The decision to look into the respective law firm's client's account was not done arbitrarily but in fact in accordance with the law. Had the law did not provide for the same, the Defendant would not have decided to look into the Plaintiff's member's client's accounts.

46. In essence, what the Defendant is trying to say is that although as contended by the Plaintiff, "client's account" does not hold monies of lawyers but it is rather a subjective matter open to challenge. This is because, few cases cited had proven that "client's account" had been misused by law firms as the account was actually made in the name of the solicitor itself. This shows multiple possibilities of misuse of "client's account" for law firm's income.

47. The Plaintiff in reply submitted that the equitable doctrine that an Act of Parliament (in this case, the **ITA**) shall not be used as an instrument of fraud has long been recognized and applied in numerous English and Malaysian cases (see ***British Railways Board v. Pickin [1974] AC 765***, House of Lords and ***Koh Siew Keng (P) & Anor v. Koh Heng Jin [2008] 3 MLJ 822***, Court of Appeal). In the instant case, it was the Plaintiff's contention that the Defendant have sought to use the **ITA** as an instrument of fraud purportedly to fish for information on the clients of the law firms.

48. Further, the audits carried out by the Defendant on the law firms and the documents related to Client Communications are in the guise of a fishing

expedition to unlawfully fish for information on the clients of the law firms. Such unmeritorious conduct of the Defendant in seeking to use **Section 142(5) of the ITA** as an engine of fraud is abusive, unlawful and illegal.

49. In the case of ***S.R. Batliboi & Co. v. Department of Income Tax (Investigation) LNIND 2009 DEL 689***, the High Court of India held-

> *"It appears plain to us, therefore, that for a search or seizure to be legal it should not be firstly ordered for malafide, extraneous or for oblique reasons. Secondly, it must be predicated on information received by the Authority who would have reason to believe that it is necessary to conduct such an operation. Thirdly, it should not be in the nature of a roving or fishing exercise. These three factors must be observed rigorously and even punctiliously since the exercise of such powers invariably result in a serious invasion of the privacy and freedom of the citizen...*
>
> *It is also our view that the Income Tax Department cannot make fishing or roving inquiry to initiate proceedings against all these companies which are the clients of the Petitioner."*

50. The Plaintiff contended that the Defendant failed to comprehend that, by looking into the clients' accounts of the law firms in the process of auditing the law firms, the Defendant could never be able to ascertain the income of the law firms, as the

clients' accounts do not in any way constitute part of the income of the law firms – ***Choong Yik Son v. Majlis Peguam Malaysia [2008] 7 MLJ 215***. It is also held that any advocate and solicitor caught meddling with the client's account must face the wrath of the law.

51. Applying the above authorities, The Plaintiff submitted that the contention by the Defendant is merely an excuse for the Defendant to unlawfully fish for information from the clients of the law firms. The Defendant's contention which is based on presumption does not hold water and is bound to fail.

52. My observation is that while the Defendant may have its own purpose and objective, however, any action done must be in accordance with the law. It is understood that the Defendant relied on section 142 (5) of the ITA to view the "client's account". But while I agree that paragraph (b) of section 142 (5) does not protect privilege communication or documents in other written law, the fact remains that solicitor -clients privilege under section 126 of the Evidence Act 1950 ("EA") which lies within Chapter IX Part III of EA is not affected by the operation of ITA 1967.

53. Be that as it may, section 126 of the EA does not protect the privilege in the following circumstances-

i) Any such communication made in furtherance of any illegal purpose;

ii) Any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment

54. It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

55. **In my considered opinion, before the Defendant is required to view the "client's account" there must some information of an illegal act/purpose and/or any crime of fraud or reasonable belief that the Plaintiff has used the client's account as a means to park the law firm's own incomes which resulted to an understatement of income by the respective law firm which warrant an investigation.**

CONCLUSION

56. In conclusion, the summary of my decision are follows-

1. Privilege is absolute unless it is waived by the privilege holder or falls within the proviso to **Section 126 of the EA** and it therefore affords protection to clients and not to lawyers;

2. it is not open for the Defendant to have any access to the clients' account with a view to checking whether the law firms have understated their income without having any reasonable suspicion of any misconduct or criminal conduct on the part of the law firms;

3. the Defendant cannot be allowed to use the **ITA** as an instrument of fraud purportedly to fish for information on the clients of the law firms;

4. the non-obstante nature of **Section 142(5)(b) of the ITA** ought to be read in accordance with the actual words of Parliament;

5. **Section 142(5)(b) of the ITA**, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing their clients and it does not extend to "advocates and solicitors";

6. in **Section 142(5)(b) of the ITA**, Parliament had clearly used different words as it recognised that "practitioner" and "advocate and solicitor" are different persons;

7. **Section 142(5)(b) of the ITA** does not oust the common law on Privilege; and

8. based on the clear and express language in **Section 126 of the EA**, it cannot be disputed that **Section 126 of the EA** is the specific provision which governs matters pertaining to Privilege. The Defendant has misunderstood and misapplied the Latin maxim of *Generalia Specialibus Non Derogant*.

57. In the result, the answer to the issue is in the negative. I allowed the Plaintiff's application in the Originating Summon with Cost of RM 5,000.00.

Dated: 2nd April 2018

(KAMALUDIN BIN MD SAID)

JUDGE

HIGH COURT KUALA LUMPUR

SOLICITORS

Messrs. Shearn Delamore & Co (Anand Raj and Foong Pui Chi) for the Plaintiff

Ahmad Ishak bin Mohd Hassan and Ruzaidah bte Yaacob) for the Defendant

ACTS OF PARLIAMENT REFERRED TO

Section 80, 142(5) of the Income Tax Act 1967

Sections 126, 127, 128 and 129 of the Evidence Act 1950

Section 3 of the Interpretation Acts 1948 and 1967;

Section 78 of the Legal Profession Act 1976

Rule 2 of the Solicitors' Account Rules 1990

BOOKS/ARTICLES REFERRED TO

CCH's Malaysian Tax Reporter in 3 Volumes: Commentary On Malaysian Revenue Law

Bennion on Statutory Interpretation, Sixth Edition

CASES REFERRED TO

Balakrishnan V. Ketua Pengarah Perkhidmatan Awam Malaysia and The Government of Malaysia, Federal Court (1981) 2 MLJ 259

Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret Davil Wildson (2010) 5 CLJ 889

Ghulan Nabi and Others V. State of Jammu And Kashmir and others (2013) CLJ 1

Sazean Engineering & Construction Sdn Bhd V. Bumi Bersatu Resources Sdn Bhd (2016)1LNS 1356

Luggage Distributors (M) Sdn Bhd V. Tan Hoe Teng @ Tan Tien Chi & Anor (1995)1 MLJ 719

Commissioner of Income Tax V. Shahzada Nand & Sons AIR 1966 SC134,

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) (1995) 2 MLJ 600

Shunmuga Vadevu s Athimulam & Ors V. The Malaysian Co-Operative Insurance Society Ltd & Anor (1999)1CLJ 231

Positive Vision Labuan Limited v Ketua Pengarah Hasil Dalam Negeri and other appeals (2017) MLJU 183;

Ho Tack Sien & Ors v. Rotta Research Laboratorium SpA & Anor [2015] 4 MLJ 166

Smt. Geeta v. State of U.P & AMP LNIND 2010 SC 1218,

A.G. Varadarajulu and another v. State of Tamil Nadu and others (1998) 4 SCC 231

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1

Manokaram a/l Subramaniam v. Kaur a/p Nata Singh [2009] 1 MLJ 21

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ord [1985] 2 MLJ 35

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 MLJ 513

Foo Loke Ying & Anor v. Television Broadcasts Ltd. & Ors [1985] 2 MLJ 35

Funk David Paul v. Asia General Asset Bhd [2014] 1 MLJ 681

Gurbachan Singh v. Public Prosecutor [1967] 2 MLJ 220

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581

Mohindar Singh and another v. Rex [1950] 16 MLJ 97

DP Vijandran v. Majlis Peguam [1995] 3 MLJ 576

All Malayan Estates Staff Union v. Rajasegaran & 2 Ors [2006] 5 AMR 585

Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257

Blunden v. Commonwealth of Australia [2003] HCA 73

Yeo Hock Cheng v Rex [1938] 1 MLJ 104

Manilal & Sons (M) Sdn Bhd v M Majumder [1988] 2 MLJ 305

Commissioner of Inland Revenue v. West-Walker [1954] NZLR 191:

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600

Gideon Tan v. Tey Por Yee and another appeal [2017] 1 MLJ 352

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 MLJ 14

Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2014] 3 CLJ 367

Protasco Bhd v. PT Anglo Savic Utama & Ors [2016] 7 MLJ 523

Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar [2006] 5 CLJ 217:

British Railways Board v. Pickin [1974] AC 765

Koh Siew Keng (P) & Anor v. Koh Heng Jin [2008] 3 MLJ 822,

S.R. Batliboi & Co. v. Department of Income Tax (Investigation) LNIND 2009 DEL 689

Choong Yik Son v. Majlis Peguam Malaysia [2008] 7 MLJ 215