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Teoh Soo Beng v Golden Castle City Sdn Bhd & Ors

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HIGH COURT (PENANG) — COMPANIES (WINDING-UP) NO 28–138 OF 2007
LIM CHONG FONG J
16 OCTOBER 2017

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Legal Profession — Disqualification — Conflict of interest — Representation by counsel — Application to disqualify counsel from representing respondents — Counsel advised petitioner on strategy and gave views in relation to issues in proceedings — Preliminary objection to affidavit — Fair trial — Whether petitioner established strong case against counsel — Whether counsel should be disqualified — Legal Profession (Practise and Etiquette) Rules 1978 rr 3, 4 & 5

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The petitioner applied vide encl AA1 to disqualify and/or disallow Mr Ranjit Singh s/o Harbinder Singh ('Mr Ranjit') from representing the respondents in the companies winding up proceedings. The application by the petitioner was premised on conflict of interest namely confidential information relating to the proceedings was revealed to Mr Ranjit and he had advised on strategy and gave his views in relation to the issues in the proceedings. Several affidavits were filed by both the petitioner and Mr Ranjit. The petitioner had raised a preliminary objection to Mr Ranjit's second affidavit as there was no direction from the court for the respondents to file the affidavit and consequently the petitioner was prejudiced by the said affidavit. The petitioner submitted that the respondents were the proper parties to oppose encl AA1 and further submitted that the court had inherent jurisdiction and power to disqualify the advocate as well as solicitor's firm to ensure a fair trial by preventing conflict of interest or raising of embarrassing ethical issues. In contrast, the respondents contended that Mr Ranjit was retained and acted for parties in 'kes-kes Auto-City' without objection from the petitioner.

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Held, dismissing encl AA1 with costs:

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(1) The preliminary objection by the petitioner was overruled as the procedural irregularities alleged by the petitioner were not infirmities. This was because the second affidavit, in substance disclosed relevant material. There was also absence of substantive prejudice allegedly inflicted upon the petitioner (see para 12).

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(2) The judge was not satisfied that the petitioner had established a strong case against Mr Ranjit to disqualify him from continuing to act for the respondents. There was not an iota of evidence of fiduciary relationship, particularly the retainer of Mr Ranjit or his firm to act for the petitioner.

In the absence of particulars of the alleged meeting between the petitioner and Mr Ranjit, the judge was unable to discern any impartation of confidential information to Mr Ranjit and the provision of strategic advice by Mr Ranjit to the petitioner. The petitioner had not crossed the onus of establishing a strong case against Mr Ranjit (see para 20).

(3) Mr Ranjit could not be said to have transgressed or contravened rr 3, 4 and 5 of the Legal Profession (Practise and Etiquette) Rules 1978 contrary to that asserted by the petitioner. The fact that the petitioner was discomforted having to face Mr Ranjit acting for the respondents was not per se sufficient to disqualify Mr Ranjit from acting on behalf of the respondents (see para 21).

(4) The petitioner never objected the appointment of Mr Ranjit or his firm from acting in other related Auto-City cases involving the petitioner or companies that he was connected. No objections were raised by the petitioner in those suits. The petitioner's delay in objecting to Mr Ranjit at the earliest possible opportunity had to be held against the petitioner himself. The petitioner must therefore be estopped from objecting to Mr Ranjit representing the respondents in these proceedings (see para 24).

[Bahasa Malaysia summary

Pempetisyen memohon melalui lampiran AA1 untuk membatalkan dan/atau tidak membenarkan Encik Ranjit Singh a/l Harbinder Singh ('Encik Ranjit') daripada mewakili responden-responden di dalam prosiding penggulungan syarikat. Permohonan oleh pempetisyen adalah berdasarkan atas konflik kepentingan iaitu maklumat sulit berkaitan kepada prosiding diberitahu kepada Encik Ranjit dan dia dinasihatkan atas strategi dan memberi pandangannya berkaitan kepada isu-isu dalam prosidingg tersebut. Beberapa afidavit difailkan oleh kedua-dua pempetisyen dan Encik Ranjit. Pempetisyen telah membangkitkan bantahan awalan kepada afidavit kedua Encik Ranjit memandangkan tiada arahan daripada mahkamah untuk responden-responden memfailkan afidavit tersebut dan akibatnya pempetisyen diprejudis oleh afidavit tersebut. Pempetisyen berhujah bahawa responden-responden adalah pihak yang betul untuk menentang lampiran AA1 dan selanjutnya berhujah bahawa mahkamah mempunyai bidang kuasa inherens dan kuasa untuk membatalkan peguam dan juga firma peguam untuk memastikan perbicaraan adil dengan menghalang konflik kepentingan atau membangkitkan isu-isu etika yang memalukan. Berbeza dengan responden-responden yang berhujah bahawa Encik Ranjit adalah retainer dan bertindak untuk pihak-pihak dalam 'kes-kes Auto-City' tanpa bantahan daripada pempetisyen.

Diputuskan, menolak lampiran AA1 dengan kos:

(1) Bantahan awalan oleh pempetisyen ditolak memandangkan luar aturan prosedur yang didakwa oleh pempetisyen bukanlah kelemahan. Ini adalah kerana afidavit kedua, pada dasarnya mengemukakan material yang relevan. Juga terdapat ketiadaan prejudis substantif yang didakwa dikenakan ke atas pempetisyen (lihat perenggan 12).

(2) Hakim tidak berpuas hati bahawa pempetisyen telah membuktikan kes kukuh terhadap Encik Ranjit untuk tidak melayakkannya daripada terus bertindak bagi responden-responden. Tidak terdapat sedikitpun keterangan mengenai hubungan fidusiari, terutamanya retainer Encik Ranjit atau firmanya untuk bertindak bagi pempetisyen. Di dalam ketiadaan butir-butir mengenai mesyuarat yang didakwa di antara pempetisyen dan Encik Ranjit, hakim tidak dapat membezakan mana-mana impartasi maklumat sulit kepada Encik Ranjit dan peruntukan nasihat strategik oleh Encik Ranjit kepada pempetisyen. Pempetisyen tidak melampaui beban untuk membuktikan kes kukuh terhadap Mr Ranjit (lihat perenggan 20).

(3) Encik Ranjit tidak dapat dikatakan melanggar kk 3, 4 dan 5 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etiket) 1978 bertentangan dengan apa yang ditegaskan oleh pempetisyen. Fakta bahawa pempetisyen rasa tidak selesa untuk menghadapi Encik Ranjit yang bertindak untuk responden-responden tidak sepatutnya mencukupi untuk membatalkan kelayakan Encik Ranjit daripada bertindak bagi pihak responden-responden (see para 21).

(4) Pempetisyen tidak pernah membantah pelantikan Encik Ranjit atau firmanya daripada bertindak di dalam kes-kes berkaitan Auto-City yang lain yang melibatkan pempetisyen atau syarikat yang dia mempunyai hubungan. Tiada bantahan dibangkitkan oleh pempetisyen di dalam tindakan-tindakan tersebut. Kelewatan pempetisyen dalam membantah kepada Encik Ranjit pada peluang paling awal perlu diputuskan terhadap pempetisyen sendiri. Pempetisyen oleh itu mesti diestop daripada membantah terhadap Encik Ranjit dalam mewakili responden-responden dalam prosiding-prosiding ini (lihat perenggan 24).]

Notes

For cases on conflict of interest, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1604–1605.

Cases referred to

Berjaya Land Bhd v Wong Chee Hie & Ors [2012] 8 MLJ 129, HC (refd)
Mirza Mohamed Tariq Beg bin Mirza HH Beg v Margaret Low Saw Lui & Ors [2009] 4 MLJ 671; [2009] 4 CLJ 303, CA (refd)

Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh [2009] 4 MLJ 293, CA (refd)
Russell McVeagh McKenzie Batrleet & Co v Tower Corporation [1998] 3 NZLR 641, CA (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2004] 4 MLJ 118, HC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972
Legal Profession (Practise and Ettiquette) Rules 1978 rr 3, 4, 5

Justin Voon (Lee Chooi Peng and Zulaikha Aini with him) (Salehuddin Saidin & Assoc) for the petitioner.
Yeoh Cho Keong (Kumar & Co) for the respondents.

Lim Chong Fong J:

INTRODUCTION

[1] Enclosure AA1 is the application by the petitioner to disqualify and/or disallow Mr Ranjit Singh s/o Harbinder Singh ('Mr Ranjit') and Messrs Ranjit Singh & Yeoh ('firm') from representing the respondents in this companies winding up proceedings ('proceedings').

[2] The petitioner's application is premised generally on conflict of interest on the following grounds:

(a) confidential information in relation to the proceedings was revealed to Mr Ranjit; and

(b) Mr Ranjit advised on strategy and gave his views in relation to the issues in the proceedings.

[3] For purposes of encl AA1, the following affidavits were filed by the respective parties:

(a) the petitioner's affidavit in support affirmed on 24 July 2017 ('petitioner's first affidavit');

(b) Ranjit Singh's affidavit in opposition affirmed on 1 August 2017 ('RS's first affidavit);

(c) the petitioner's affidavit in reply affirmed on 14 August 2017 ('petitioner's second affidavit'); and

(d) Ranjit Singh's affidavit in opposition (2) affirmed on 21 August 2017 ('RS's second affidavit);

[4] After reading the written submissions filed by the parties, I heard counsel on 29 August 2017 and dismissed encl AA1 with costs in the cause. I consequently furnish below the grounds of my decision in respect of the application.

THE PETITIONER'S SUBMISSION

[5] Firstly the petitioner raised a preliminary objection to the filing of RS's second affidavit because there was no direction from the court for the respondents to file the said affidavit. Consequently the petitioner is prejudiced by the said affidavit because:

(a) RS's second affidavit exhibited many new documents including a caveat application lodged by the petitioner to support the allegation that the petitioner is not a mere witness in Penang High Court Civil Suit No 22–52 of 2010; and

(b) Ranjit Singh is now affirming the RS's second affidavit on behalf of the respondents which wasn't so stated in the affidavit itself ('procedural irregularities').

[6] The petitioner further submitted that the respondents are the proper parties to oppose encl AA1 and not Mr Ranjit.

[7] In support of the substantive application, the petitioner submitted that the court has the inherent jurisdiction and power to disqualify the advocate as well as the solicitor's firm in order to ensure a fair trial by preventing any conflict of interest or the raising of embarrassing ethical issues. There is no reason given by the respondents as to why it is so crucial and critical that Mr Ranjit must be the counsel for the respondents and no others can take over his place.

[8] It is the petitioner's recollection that confidential information and strategies were disclosed and/or discussed during the meeting between the petitioner, a Mr Lim Hock Siang and Mr Ranjit over a meeting nine years ago.

[9] The petitioner emphasised that there was obviously liaison between Mr Ranjit and the petitioner and this is not a case where Mr Ranjit had no previous introduction and dealings with the petitioner whatsoever. Consequently the petitioner prayed that encl AA1 ought to be allowed in the interest of justice.

THE RESPONDENT'S REPLY

[10] The respondents submitted that the petitioner failed to establish a strong case against the disqualification application because the petitioner's allegations are completely bare and baseless. Casual advice is not enough to disqualify an advocate because neither Mr Ranjit nor his firm was retained as solicitor or that they were paid a fee for advice rendered.

[11] In essence, the respondents submitted if as alleged, the petitioner had discussed 'kes-kes Auto-City' with Mr Ranjit as alluded to in the petitioner's first affidavit and ought therefore to be disqualified from acting in this proceedings, then petitioner equally should have disqualified Mr Ranjit from acting in various other Auto-City cases involving the petitioner or companies that were connected to the petitioner. No objection was however taken thus far in those other cases.

FINDINGS OF THE COURT

Preliminary objection

[12] As for the preliminary objection raised by the petitioner, there is no express provision in the Companies (Winding-Up) Rules 1972 in respect of the specific contents of affidavits and timing of filing of affidavits for applications in chambers. Accordingly and since RS's second affidavit in substance disclosed relevant material, I do not hence consider the procedural irregularities alleged by the petitioner to be infirmities in any way. I do not also see any substantive prejudice that is inflicted upon the petitioner. The Preliminary objection was thus overruled.

Conflicts of interest

[13] I am guided by a few decided cases and rules in the dismissing the application of the petitioner. In this present case, it is useful to note the following relevant provisions in the Legal Profession (Practise and Ettiquette) Rules 1978 ('the LP Rules'):

> Rule 3 Advocate and solicitor not to accept brief if embarrassed
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> (a) Advocate and Solicitor shall not accept a brief if he is or would be embarrassed
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> (b) An embarrassment arises —
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> (i) When the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter

(ii) Where there is some relationship between him and party or a witness in the proceedings

Rule 4 No advocate and solicitor to accept brief if professional conduct likely to be impugned

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

Rule 5 No advocate and solicitor to accept brief if difficult to maintain professional independence

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render or would render it difficult for him to maintain his professional independence or is incompatible with the interest of the administration of justice.

(b) If an advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with institution or defence of any suit, appeal of other proceedings shall not act appear or plead for the opposite party in that suit, appeal or other proceedings.

[14] In the face of the clearly worded the LP Rules, it could be said that an advocate must refrain from acting for a client where he may be in a position of actual or potential conflict of interest. Should an advocate accept a brief where there is such conflict; the other party may seek injunctive relief against him from conducting the brief.

[15] It is understandable that every litigant client wishes to have his chosen best advocate to represent him and I was mindful of the following declaration of an advocate's duty of loyalty made by Henry Peter Brougham QC (later Lord Chancellor) to the House of Lords several centuries ago:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

That notwithstanding, the advocate in the Malaysian courts is also an officer of the court and his or her duty to the client is therefore subordinated to the duty to the court and observance of the LP Rules.

[16] In this application, the petitioner claimed he met Mr Ranjit at the invitation of Mr Lim Hock Siang, his previous lawyer in the current proceedings for the purpose of getting further legal advice from Mr Ranjit. The

petitioner could not however point to a retainer nor a fee paid simply because Mr Ranjit or his firm was not retained either as advocate and solicitor respectively and neither were they paid a fee. More importantly, the petitioner could not even particularise the details of the meeting. As far as Mr Ranjit is concerned he had no recollection of any meeting to discuss the present proceedings. He could only recall a meeting at the behest of Mr Lim Hock Siang that took place in 2008 in relation to another matter where he acted for the petitioner and Edmund Teow who were the seventh and ninth defendants in Penang High Court Civil Suit No 22–605 of 2007 that is unconnected with this proceedings.

[17] Raus Sharif JCA (now CJ) held as follows in the Court of Appeal case of *Mirza Mohamed Tariq Beg bin Mirza HH Beg v Margaret Low Saw Lui & Ors* [2009] 4 MLJ 671; [2009] 4 CLJ 303 with emphasis added by me:

> In *Rakusen*'s case (*Rakusen v Ellis, Munday& Clarke* [1912] 1 CH 831 the Court of Appeal founded the jurisdiction on the right of the former client to the protection of his confidential information. This was challenged by counsel for Prince Jefri who contended for an absolute rule, such as that adopted in the United States, which precludes a solicitor or his firm altogether from acting for a client with an interest adverse to that of the former client in the same or a connected matter. In the course of argument, however he modified his position, accepting that there was no ground on which the court could properly intervene unless two conditions were satisfied:
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> (i) that the solicitor was in possession of information which was confidential to the former client; and
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> (ii) that such information was or might be relevant to the mater on which he was instructed by the second client. This makes the possession of relevant confidential information the test of what is comprehended within the expression 'the same or a connected matter'. On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.
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> ...
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> I accept the above principles of law. *Two important propositions emerge. First, for the principle of confidentiality to apply warranting a court to intervene, there must first be established a relationship of solicitor and client or some other fiduciary relationship. In the absence of such a relationship, the principle does not apply*. The facts of *Hardless v Hardless* AIR 1932 Allahabad 536 provide a good example as to how the principle is to be applied. In that case, the respondent to a divorce petition wrote to a counsel referring to complaints that he had against his wife and stating that he desired to take action so that he might obtain custody of the children. However, the letter did not definitely engage counsel's services. Later, the said counsel was engaged by the petitioner to act for her and the respondent husband made application to prohibit him from acting in the matter. The court dismissed the application and held as follows:
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> A great deal has to take place before counsel can be said to be engaged by a party to

a suit, so that it would be unprofessional for him to appear on the other side. In order to prevent counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party. Nothing of this sort has occurred here. There is nothing of a confidential nature in the letter of 24 December which would prejudice the respondent if Capt Carleton appears for the petitioner. If this sort of letter acted as a bar to counsel appearing for the opposite party, nothing would be simpler for a prospective litigant than to write to all the leading counsel in the court a letter such as this. He need not have the slightest information of engaging any of them. The petition is rejected.

Second, it depends on the facts of each case whether confidential information was conveyed. In order to bar a solicitor or other fiduciary from acting, the applicant must place before the court full particulars of the relevant confidential information that was allegedly disclosed to the solicitor or fiduciary. Mere general or vague allegations are insufficient. As was stated in *State v Lalit Mohan Nanda* AIR 1961 Orissa 1:

> ... the onus of proving that confidential information was conveyed lies heavily upon the applicant.

[18] In the earlier Court of Appeal in the case of *Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh* [2009] 4 MLJ 293, Suriyadi JCA (now FCJ) further held as follows:

> [16] It was our view that to disqualify the firm from representing the appellants, a strong case has to be established first by the respondent, with the evidence to be gauged from the supporting affidavits. What is strong will depend on the evidence and requirement of the law.
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> In *Johnson and another, Assignees of Colchester v Marriot [Court of Exchequer of Pleas] 1833* p 40 the defendant had wanted to employ one Mr Jay as his attorney though he was previously the plaintiff's solicitor. The plaintiff wishing to prevent him from defending the defendant, for fear of him revealing confidential communication that had passed between them in the course of the previous relationship, had filed an application to restrain him from acting as the defendant's attorney. With no affidavits forthcoming from the plaintiffs (assignees), which could divulge any confidential communication having passed between them, the court refused to grant the order of restrain, on account of the evidence not being sufficiently strong. Bayley B remarked:
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> > There are one or two cases in which applications of this nature have been considered: one is the case of *Grissell v Pelo*, in which is said, that an attorney ought to be restrained from acting, where he has obtained information which should not be disclosed; but that a strong case should be made out, to authorise the court to interfere. (Emphasis added.)

[19] The practical approach is succinctly set out in the New Zealand Court of Appeal case of *Russell McVeagh McKenzie Batrleet & Co v Tower Corporation* [1998] 3 NZLR 641 as follows:

> It is necessary to go back to the basic issue, which is the protection of confidential information from disclosure. In our view this issue should be addressed by the court applying a principle approach, for which it is neither necessary nor desirable to lay down a series of propositions covering a variety of different hypothetical situations which are likely some time later to be found non-exhaustive. Three questions emerge. The first is whether confidential information is held which if disclosed is likely to affect the concerned (former) client's interests adversely. The second is whether in the particular factual circumstances, viewed objectively there is real or appreciable risk that the confidential information will be disclosed. The third, which arises if the first two questions are answered affirmatively, is whether recognising the significance and importance of the special fiduciary relationship which gives rise to the duty of protection, the court's discretionary power to disqualify should be exercised.

[20] From the evidence that was available before me where both sides could not particularise the meeting that took place nearly a decade ago, I am not satisfied that the petitioner has herein established a case, let alone a strong case against Mr Ranjit to disqualify him from continuing to act for the respondents. There isn't an iota of evidence of fiduciary relationship particularly retainer of Mr Ranjit or his firm to act for the petitioner. Moreover and in the absence of particulars of the alleged meeting between the petitioner and Mr Ranjit, I am unable to discern any impartation of confidential information from the petitioner to Mr Ranjit and conversely the provision of strategic advice by Mr Ranjit to the petitioner. The onus of establishing a strong case is a high hurdle and I am satisfied that the petitioner had not crossed it from an objective standpoint.

[21] In the circumstances, Mr Ranjit could not be said to have transgressed or contravened rr 3, 4 and 5 of the LP Rules contrary to that asserted by the petitioner. I know that the petitioner is nonetheless discomforted in having to face Mr Ranjit acting for the respondents but that per se is not enough to disqualify him.

ESTOPPEL

[22] I noted that the respondents have also contended that Mr Ranjit was retained and acted for party(ies) in 'kes-kes Auto-city' without objection from the petitioner all this while. In this regard, Zulkefli J (now PCA) held as follows in the case of *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2004] 4 MLJ 118:

> ... it is my finding that the respondents by their conduct and representation in the court proceedings involved between the parties since the year 2000 have shown that they have waived their right and are estopped from objecting to the firm acting for the petitioners in this petition.

[23] Likewise in the case of *Berjaya Land Bhd v Wong Chee Hie & Ors* [2012]

8 MLJ 129, Varghese George JC (later JCA) followed *Tan Kim Hor & Ors v Tan Heng Chew & Ors* and held as follows:

> One final word about the defendant's conduct, namely the defendant's delay in raising the objection as to LHAG's position as a firm to act for the plaintiff promptly in the earlier two suits or in the other interlocutory: proceedings within this action itself. I hold that the explanation proffered by the defendants for this delay was not reasonable or acceptable, further, such failure to raise an objection timeously should not be dismissed as totally irrelevant in the determination of an application in the nature of encl 33 here.

[24] From the evidence adduced in the affidavits before me, I am satisfied that petitioner never objected the appointment of Mr Ranjit or his firm from acting in other related Auto-City cases to wit: Penang High Court Civil Suit No 22–52 of 2010 and Penang High Court Civil Suit No 22–466 of 2010 involving the petitioner or companies that he was connected. No objections have been raised by the petitioner thus far in all these suits. In the premises, the petitioner's delay in objecting to Mr Ranjit at the earliest possible opportunity had to be held against the petitioner himself. He must therefore be estopped from objecting to Mr Ranjit representing the respondents in this proceedings.

CONCLUSION

[25] It is for the foregoing reasons that I dismissed encl AA1 with costs.

Enclosure AA1 dismissed with costs.

Reported by Fatin Mohd Ismail