

Subpoenaing Regulatory Officers

Relevance, Materiality and Court's Inherent Jurisdiction



LAMBERT RASA-RATNAM
Senior Partner
Dispute Resolution



CHIA OH SHENG
Partner
Dispute Resolution



LIM JUN XIAN
Senior Associate
Dispute Resolution



FEUNGFA CHARAS VIROJNA
Associate
Dispute Resolution



ARIFF IQMAL BIN IDZQANDAR
Pupil
Dispute Resolution

Introduction

A subpoena is a compulsory process of the Court. As such, Courts have the inherent jurisdiction to prevent its misuse. A subpoena may be set aside where the proposed evidence is not relevant, material or capable of assisting in the Court's determination of an issue; and to prevent that process from being used oppressively, vexatiously or otherwise improperly. Where the attendance of a witness would serve no useful purpose, the subpoena will be set aside.

Ismail v Hasnul; Abdul Ghafar v Hasnul, FC [1968] 1 MLJ 108; *Wong Sin Chong & Anor v Bhagwan Singh & Anor*, SC [1993] 3 MLJ 679; and *Dea Ai Eng (P) v Dr Wong Seak Shoon & Anor*, HC [2007] 2 MLJ 357.

High Court

The High Court recently applied these principles in ***Sim Kwang Kai, Adrian v Johnathan Wong Futt Po & Ors*** (Suit No. WA-22NCC-425-06/2023) and ***Sim Kwang Kai, Adrian v Johnathan Wong Futt Po*** (Suit No. WA-22NCC-223-04/2023) ("**Suit 223**"). The subpoenas compelled an officer of the Securities Commission Malaysia ("**SC**") to testify in private cryptocurrency disputes between the parties, although SC and the officer had no personal knowledge of the dispute.

Grounds of Judgment

The High Court set aside the subpoenas, emphasising its control over the subpoena process. It held that the SC officer's attendance would not materially assist in resolving the issues. The Court held:

- (a) the proposed evidence must be relevant, material and capable of assisting the Court in determining the issues;
- (b) the interpretation and legal effect of a statutory and regulatory framework were questions of law for the Court to determine;
- (c) the officer had no personal involvement in, or personal knowledge of, the transactions in dispute; and
- (d) the relevant factual matters had already been adequately addressed through documentary evidence, leaving no remaining forensic purpose in compelling the witness's attendance.

Lambert Rasa-Ratnam, Chia Oh Sheng, Lim Jun Xian and Feungfa Charas Virojna appeared as counsel for SC's officer in the High Court. They were assisted by pupil-in-chambers, **Ariff Iqmal Bin Idzqandar**.

STATUS

An appeal against the High Court's decision in Suit 223 is presently pending before the Court of Appeal.

Considerations Before Issuing a Subpoena

The High Court's decision illustrates that the relevance of an issue does not, by itself, establish the need for a particular witness's attendance. Parties should identify what material evidence the witness can give, distinguish factual evidence from questions of law, and consider whether the necessary material is already available through other means. Against that background, the following five considerations, drawn from the decision and the wider authorities, should guide parties contemplating a subpoena against an officer of a regulatory body.

01 Is it pleaded?

Relevance is measured against the pleadings, and parties are bound by them. A subpoena directed at evidence wholly outside the pleaded case will not stand: *Wong Sin Chong & Anor v Bhagwan Singh & Anor*, SC [1993] 3 MLJ 679.

02 Does the witness know the facts?

A subpoena compels a witness of fact, being a person who has seen or knows the facts. A witness without personal knowledge has no relevant or material evidence to give: *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors*, CA [2013] 3 MLJ 35.

03 Is it a question of fact or law?

What the law requires, and whether conduct falls foul of it, is for the judge alone. Oral testimony of a factual witness on questions of law is irrelevant and inadmissible: *NVJ Menon v The Great Eastern Life Assurance Co Ltd*, CA [2004] 3 MLJ 38; *Bahamas International Trust Co Ltd v Threadgold*, HL (UK) [1974] 1 WLR 1514.

04 Is it really expert opinion you want?

Only a witness of fact is compellable by subpoena. The proper recourse for a party who needs expert evidence is to engage and call its own expert, in accordance with Order 40A of the Rules of Court 2012: *Seyfang v G D Searle & Co*, HC (UK) [1973] 1 QB 148; *Lively Ltd v City of Munich*, HC (UK) [1976] 3 All ER 851.

05 Is the witness's attendance necessary?

Where a matter is recorded in a public document within the meaning of section 74 of the Evidence Act 1950, of which the Court may take judicial notice under section 57(1)(a) of the Evidence Act 1950, this may obviate the need to subpoena a witness to testify to, or confirm, matters of public record.

Key Takeaway

A public body is not a witness of convenience. Private litigants cannot use a subpoena to obtain its view on the law, its expert or regulatory opinion, or its confirmation of matters of public record. The following observation by the House of Lords in *Connelly v Director of Public Prosecutions*, HL (UK) [1964] AC 1254 is worth keeping in mind:

Neither do I dispute that once proceedings are lawfully instituted the court can use its power to prevent its process being abused. Many instances occur to my mind. A litigant sometimes maliciously obtains the issue of subpoenas to all sorts of people holding positions of authority in the state without being able to show that these eminent persons can give relevant evidence in the suit. In such a case a subpoena may be set aside.

Connelly v Director of Public Prosecutions, HL (UK) [1964] AC 1254

These considerations help ensure that a subpoena serves a useful purpose in resolving the issues in dispute.

Key Contacts

If you have any queries, please contact **Chia Oh Sheng** (cos@lh-ag.com), **Lim Jun Xian** (ljx@lh-ag.com) or **Feungfa Charas Virojna** (fcv@lh-ag.com).

This alert is published by Lee Hishammuddin Allen & Gledhill for general information only. It does not constitute legal advice and should not be relied upon as such. Specific advice should be sought on the facts of any particular matter.