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## Spilling the Beans in Litigation

It is a well-settled principle that courts must administer justice publicly and in open court.<sup>1</sup> Once originating processes and pleadings are filed in court, they are open for public inspection.<sup>2</sup> A usual dilemma therefore arises when litigants embark on the litigation journey without certainty that the confidentiality of their trade secrets would remain preserved.

Fortunately, there are exceptions. One of the considerations justifying a departure from the principle is where the notion of open justice would destroy the subject matter in dispute and render it nugatory.<sup>3</sup> Disclosure of trade secrets and confidential information to the public is one instance of such potential nugatoriness.<sup>4</sup>

In Malaysia, we see a shift by the courts towards recognising this exception, in the form of granting a “protective order”<sup>5,6</sup> The parameters of a protective order may be tailored to suit the circumstances of a particular case, such as ensuring only the court and counsel have access to the confidential information,<sup>7</sup> or exempting parties from filing documents containing confidential information by way of electronic filing.<sup>8</sup>

Although there is no universal formula to be applied when deciding whether to grant a protective order, the court is tasked to balance competing considerations of the:<sup>9</sup>

- (a) Interest of the public which requires disclosure of all relevant evidence to enable the court to decide justly;

<sup>1</sup> *Re JN Taylor Holdings Limited (in liq)* [2007] SASC 193 at para [5]

<sup>2</sup> *Tan Chi Min v The Royal Bank of Scotland* [2013] SGHC 154 at para [20]

<sup>3</sup> *Supra* n 1 at para [6]

<sup>4</sup> *Ibid* at para [8]

<sup>5</sup> By the exercise of the court's inherent jurisdictions pursuant to O 92 r 4 of the Rules of Court 2012

<sup>6</sup> *Kingtime International Ltd & Anor v Petrofac E & C Sdn Bhd* [2019] MLJU 731 (“*Kingtime*”) at para [20], citing *BBW v BBX & Ors* [2016] 5 SLR 755

<sup>7</sup> *Singham Sulaiman Sdn Bhd v Appraisal Property Management Sdn Bhd & Anor and another suit* [2018] 10 MLJ 187 at para [37]

<sup>8</sup> *Kingtime*, *supra* n 6 at para 22(8)

<sup>9</sup> *Ibid* at para 20(5)

- (b) Rights of a plaintiff to seek discovery of relevant documents; and
- (c) Rights of a defendant to protect its proprietary interest in the confidential information.

Similar considerations arose in *Central Sugars*,<sup>10</sup> a case concerning breach of confidence. Here, the court allowed the plaintiff's application for a protective order to preserve confidential documents and information, including customer details and manufacturing processes. The court held without a protective order, the documents filed to court would risk being accessible by and available to the public.<sup>11</sup> In *Kingtime*,<sup>12</sup> the court granted a protective order to protect confidential information which may be disclosed pursuant to a post-trial discovery order.

Apart from a protective order, other measures<sup>13</sup> are also available to protect confidential information, such as applying for an order to:

- (a) Redact a document in respect of the confidential information; or
- (b) Require an undertaking by the opposing party to use the document only for the purposes of the case.

To sum up, litigants in disputes involving trade secrets or other confidential information should explore the possibility of preserving confidentiality by way of the various measures observed above.

#### **CK Lung and Esther Koh Tsi Jing**

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<sup>10</sup> *Central Sugars Refinery Sdn Bhd v Tang @ Tung Shook Kuan* [2020] MLJU 798 (“*Central Sugars*”), citing *Kingtime*  
<sup>11</sup> *Central Sugars* at para [29]  
<sup>12</sup> *Supra* n 6  
<sup>13</sup> *Supra* n 7 at para [37]