MIDF AMANAH VENTURES SDN BHD A

v.

BOSTONWEB ACADEMY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
MAH WENG KWAI JC
[SUIT NO: D-22NCC-100-2010]
17 DECEMBER 2010

CIVIL PROCEDURE: *Judgments and orders - Judgment in default - Setting aside - Whether judgment in default irregular - Writ of summons unsigned, unsealed and undated - Manner of indorsement of writ - Whether vitiated service of writ - Whether prejudice caused to defendants - Filing memorandum of appearance - Whether defendants waived right to challenge validity of writ - Plaintiff claimed severally and jointly against defendants - Whether plaintiff allowed to claim excess of the sum owed - Whether there were grounds to set aside judgment in default* C D

CIVIL PROCEDURE: *Interest - Judgment debt - Plaintiff claimed interest of one per centum per month pursuant to a settlement agreement - Whether contrary to Rules of the High Court 1980, O. 42 r. 12* E

The plaintiff claimed for a sum of money against the 1st defendant as the borrower and against the 2nd and 3rd defendants as guarantors; the claim was made jointly and severally together with expenses and interest at the rate of one per centum per month. F Since the defendants failed to enter the memorandum of appearance ('MOA') on time, the plaintiff entered two judgments in default of appearance ('JID') against them. The defendants claimed that the JID were irregular and should be set aside *ex debitio justitae*. The defendants then filed the unconditional MOA G before obtaining leave to set aside the JID. The matter was heard by the Senior Assistant Registrar who dismissed the application. The defendants appealed on the following submissions: (i) the writ was defective as it was unsigned, unsealed and undated; (ii) the affidavit of service was defective as the form of indorsement was H not used; and (iii) the plaintiff had made a claim in excess of the original sum owed to it. The defendants further submitted that the agreed interest rate was eight per centum per annum following a letter of guarantee between the parties and not one per centum per month as claimed by the plaintiff, who had relied on a I settlement agreement between them to claim the said interest.

Held (dismissing the appeal):

(1) There was no requirement under the RHC for a sealed copy of the writ of summons to be served on the defendant. The writ was registered, signed and sealed by the Registrar and there was no doubt that the writ was properly issued by the court as the writ carried a case number. It was due to the carelessness of the plaintiff's solicitor that the copies sent to the defendants were unsealed, unsigned and undated. This, however, did not cause prejudice to the defendants as they could have done a file search or made enquiries to the plaintiff and, if dissatisfied with the writ, should have filed the unconditional MOA on time. The defendants failed to do this. (para 16)

(2) In the event the writ was defective, the defendants by filing the unconditional MOA after the JID were entered had elected to waive any argument on the irregularity in the issuance of the writ. (para 18)

(3) The form of indorsement at page five of the writ was for the convenience of the process server and it did not render the indorsement defective if the said form was not used. Furthermore, the manner in which the indorsement was made did not vitiate the fact that the writ was indeed served to the defendants. (paras 20 & 21)

(4) Although the plaintiff's claim against the defendants was on a joint and several basis, it did not entail that the plaintiff could claim in excess of the sum owed to it. To do so would result in unjust enrichment by the plaintiff, which would be unlawful. The defendants' contention that the plaintiff's claim was excessive was dismissed *in limine*. (para 29)

(5) It was clear from the reading of the letter of guarantee that in the event of inconsistencies between the letter of guarantee and the settlement agreement, the latter takes precedence. Since both parties had agreed contractually on the rate of one per centum per month in the settlement agreement, that rate was not in breach of O. 42 r. 12 RHC. Therefore, as stated in the settlement agreement the 2nd and 3rd defendants were to pay the plaintiff an interest of one per centum per month. (paras 35 & 36)

(6) The JID were not irregular and since the defendants did not submit on the merits of their case at all, there was no valid ground to set aside the regular JID. (para 38)

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor [2006] 2 CLJ 723 HC ***(refd)***

Arab-Malaysian Merchant Bank Bhd v. Dominance Resources Sdn Bhd & Anor [2002] 5 CLJ 1 HC ***(refd)***

BSN Commercial Bank (Malaysia) Bhd v. Mesra Venture Sdn Bhd & Anor [2007] 9 CLJ 173 HC ***(refd)***

Maskimi Sdn Bhd v. Lee Poh Heng [2000] 4 CLJ 840 HC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 967 HC ***(refd)***

Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 2 r. 1(1), O. 6 r. 1, O. 10 r. 1(1), O. 12 r. 5(1), O. 42 r. 12, O. 62 r. 4(1)(b)

For the plaintiff - Alvin Lai; M/s Sidek Teoh Wong & Dennis
For the defendant - SK Cheong; M/s SK Cheong

Reported by Melinda Robert

JUDGMENT

Mah Weng Kwai JC:

Brief Facts

[1] The plaintiff claimed the sum of RM500,000 against the 1st defendant as the borrower and against the 2nd and 3rd defendants as guarantors, jointly and severally, together with expenses, interest at the rate of 1% per month from 1 November 2009 till full payment and costs.

[2] The writ of summons and statement of claim were served on the 1st defendant by registered post on 28 January 2010 at its office address. An affidavit of service was filed by the process server on 10 February 2010.

[3] The writ of summons and statement of claim were served on the 2nd and 3rd defendants by AR registered post on 28 January 2010 at their business address. Similarly, an affidavit of service was filed by the process server on 1 March 2010.

[4] As the 1st defendant did not file its memorandum of appearance within the stipulated eight days, the plaintiff filed the certificate of non-appearance and entered judgment in default of appearance against the 1st defendant on 12 February 2010.

[5] The 2nd and 3rd defendants also did not file their memorandum of appearance. A certificate of non-appearance was filed and judgment in default of appearance was entered against the 2nd and 3rd defendants on 4 March 2010.

[6] On 12 March 2010, all three defendants filed their unconditional memorandum of appearance before obtaining the leave of court as required by O. 12 r. 5(1) Rules of the High Court 1980 (RHC), in light of the judgments entered against the 1st defendant on 12 February 2010 and against the 2nd and 3rd defendants on 4 March 2010 respectively.

[7] The defendants filed their summons in chambers (encl. 13) to set aside the respective judgments. On 30 July 2010, the learned Senior Assistant Registrar heard and dismissed the application with costs.

[8] The defendants then filed their notice of appeal (encl. 17) to the judge in chambers against the decision of 30 July 2010.

Defendants' Case

[9] Counsel for the defendants submitted that the judgments are irregular judgments and ought to be set aside *ex debitio justitae* on the following grounds:

(i) The writ of summons served on the defendants was not sealed, signed and dated;

(ii) There was no proper indorsement of service made on the writ of summons;

(iii) The plaintiff's claim was excessive;

(iv) The interest claimed was not in accordance with O. 42 r. 12 RHC.

[10] The defendants did not address the court on the merits of their case.

Plaintiff's Case

[11] Counsel for the plaintiff submitted that the judgments entered against the 1st defendant on 12 February 2010 and against the 2nd and 3rd defendants on 4 March 2010 are regular judgments having fully complied with the Rules of the High Court 1980 and accordingly the defendants ought to show a defence on merits which they failed to do, before the court could consider whether to set aside the judgments obtained.

Decision Of The Court

[12] Upon reading the written submissions and hearing the oral submissions of counsel for the plaintiff and the defendants, the court dismissed encl. 17 with costs of RM2,000.

Reasons For The Decision

Issue 1: Whether The Writ Of Summons Was Defective:

[13] The defendants contended that they were served with a writ of summons which was unsealed, unsigned and undated and as it was not properly issued, the judgments entered based on the writ of summons are irregular.

[14] Counsel for the defendants referred to the writ of summons shown in encl. 14 - exh. NM4 at p. 3, to highlight the absence of the seal of the court, the signature of the registrar and the date of issue.

[15] It will be noted however that the writ of summons carried the case number at the top of p. 1 of the writ of summons and bore the signature of the solicitors for the plaintiff on the second page.

[16] I am of the view that although the writ of summons was unsealed, unsigned and undated, the omissions did not render the writ of summons defective for the following reasons:

A (a) There is no requirement under the RHC for a sealed copy of the writ of summons to be served on a defendant. I respectfully agree with the reasoning set out in the case of *Arab-Malaysian Merchant Bank Bhd v. Dominance Resources Sdn Bhd & Anor* [2002] 5 CLJ 1 in which Clement Skinner J (as B he then was) held:

> In my judgment, there is no need to serve a sealed copy of the writ on a defendant. I say so for the following reasons. There is nothing in the rules to indicate that it is a sealed copy of the writ that is served on a defendant. Instead, the C rules and practice indicate the opposite because:
>
> (i) when service of a writ is effected by way of personal service on a defendant, O. 62 r. 3(a) requires that if a defendant so requests, he must be shown the sealed copy of the writ. If the defendant is to be served with a D sealed copy of the writ, there would be no need for him to be shown, on request, the sealed copy.
>
> (ii) On issue of a writ, only two copies are sealed; one of which is retained by the registry as the original and the E other sealed copy returned to the plaintiff. If there are more than one defendant to be served and if each defendant is required to be served with a sealed copy of the writ, it would be impossible to do so.
>
> (iii) It is the sealed copy of the writ which is returned to the F plaintiff that is shown to a defendant if, on being served, he should insist on being shown a sealed copy of the writ. If that sealed copy is to be served on the defendant, the plaintiff would not have a sealed copy left to show to another defendant who, on being served, can insist on being shown a sealed copy of the writ. G

(b) The fact that the writ of summons carried a case number clearly indicated that the writ of summons had been registered by the court. A perusal of the court copy of the writ of summons (encl. 1) showed that the writ of summons had been H registered, signed and sealed by the registrar. There was no doubt whatsoever that the writ of summons had been properly issued by the court.

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(c) It is unfortunate that due to the carelessness of the solicitors for the plaintiff, the copy of the writ of summons that was posted to the defendants was not sealed, signed and dated.

(d) However, no prejudice had been caused to the defendants. On receipt of the writ of summons the defendants could have done one of two things. Firstly, given the case number, a file search could have been made in court, Secondly, with the indorsement of the name and address of the solicitors for the plaintiff, the defendants could have easily made the necessary inquiries with them. Having made the file search and /or inquiries and if the defendants were still not satisfied with the issuance of the writ of summons, they could have filed their unconditional memorandum of appearance. This the defendants did not do.

(e) For purposes of filing the memorandum of appearance, time starts to run from the date of receipt of the writ of summons and not from the date of the issuance of the writ of summons. In this sense, the date of the writ of summons was immaterial as the defendants could have filed their memorandum of appearance immediately on receipt of the writ of summons.

[17] In the event it is determined that it was wrong for the court to hold that the writ of summons was not defective, I am of the view that the defendants, by entering their unconditional memorandum of appearance on 12 March 2010, had waived or expressed their intention to waive their right to challenge the validity of the writ of summons.

In the case of *Maskimi Sdn Bhd v. Lee Poh Heng* [2000] 4 CLJ 840 it was held by KL Rekhraj J as follows:

> After the entering of the judgment, the defendant then attempted to enter an unconditional appearance, and by this act of unconditional appearance had elected to waive the argument of any on irregularity in the service.

[18] Although the case dealt with the issue of regularity of service, I am of the view that with the filing of the unconditional memorandum of appearance after judgment had been entered, the defendants had elected to waive the argument if any on the irregularity in the issuance of the writ of summons.

A *Issue 2: Whether The Affidavit Of Service Was Defective*

[19] The defendants argued that as the indorsement of service was written on the reverse of the last page of the writ of summons and not on p. 5 of the writ of summons, the plaintiff
B was in breach of O. 6 r. 1 of the RHC.

[20] I am of the view that this complaint is without merit. A writ of summons is prepared in the format of form 2 of the RHC. The forms in the RHC (Appendix 'A' - list of forms) are a guide to
C the drafting of documents under the RHC and any failure to comply strictly with the forms should not render a document defective so long as there is substantial compliance with the forms. The form of indorsement as per the format at p. 5 of the writ of summons is for the convenience of the process server, but should
D he decide not to avail himself on the use of the form, this should not render his indorsement defective. In reality and in practice the indorsement on p. 5 of the writ of summons is seldom made. It is common practice for a process server to record in his own hand writing the details of service as proof of service of a document,
E including a writ of summons, on the reverse of the last page of the document. And this is what the process server did in this case.

[21] In any event, the defendants have not suffered any prejudice from the non-strict compliance of the indorsement. The manner of
F indorsement does not vitiate the fact that the writ of summons was indeed served. Further, O. 1A and O. 2 r. 1(1) of the RHC may be invoked by the court to come to the aid of the plaintiff.

[22] The affidavit of service in respect of the 1st defendant in
G encl. 3 - exh. SBH2 clearly shows that the writ of summons was sent by registered poston 28 January 2010. This is in compliance with O. 62 r. 4(1)(b) of the RHC on the mode of service of the writ of summons on a corporation.

H **[23]** The affidavit of service in respect of the 2nd and 3rd defendants in encl. 4 - exh. SBH2 also clearly shows that the writ of summons was sent by AR registered post on 28 January 2010. This is in compliance with O. 10 r. 1(1) of the RHC.

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[24] In the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 967, it was held that:

> It is quite obvious that the purpose of filing an affidavit of service is simply to prove that service has been effected. The two affidavits of services in enclosures 204 and 205 were very thorough. It stated in clear terms by whom the documents were served, the dates on which they were served and where and to whom they were served. It was crystal clear and yet the defendant disputed them.

[25] The court was thus satisfied that the writ of summons was properly and validly served on the respective defendants. Further, if it is held that the indorsement on the service of the writ of summons is defective and/or irregular, it should be remembered that the defendants did not intend to challenge the validity of the service of the writ of summons as they had filed an unconditional memorandum of appearance on 12 March 2010 after judgments had been entered against them.

Issue 3: Whether The Plaintiff's Claim Is Excessive

[26] The plaintiff entered judgment against the 1st defendant on 12 February 2010 for RM500,000.

[27] The plaintiff entered judgment against the 2nd and 3rd defendants on 4 March 2010 for RM500,000.

[28] By an incredulous submission, counsel for the defendants argued that the plaintiff had in effect obtained judgments in encls. 7 and 9 totalling RM1,000,000 against the defendants.

[29] This argument must surely be dismissed in limine as the claim against the defendants is on a joint and several basis. The maximum that the plaintiff can hope to recover from the defendants, jointly or severally, will be RM500,000. Any attempt to recover a sum in excess of RM500,000 from the defendants will result in undue enrichment by the plaintiff which will be unlawful and most certainly will not be countenanced by the court.

[30] The term 'jointly and severally liable' has taken on the force of law in the case of *Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723 in which the court held as follows:

A [32] The words "jointly and severally" [are] defined as "persons who are jointly and severally bound [to] render themselves liable not only to a joint action against them, but also to a separate action against them individually." (see: *A Dictionary of Law* L.B. Curzon)

B [33] When the letters of guarantee provide for 'joint and several' liability what they meant is that the plaintiff has a cause of action against both the defendants as guarantors not only to a joint action against them but also to separate action against them individually. In such situation, the plaintiff can proceed with one
C action against both of them at the same time or 2 separate actions against both of them individually. The effect is that, either way, the cause of action against any one of them is not discharged if judgment is entered against the other one. *The fact that the said judgment in default dated 25 January 2005 against the 2nd defendant as well as the prayer in the Plaintiff's Statement of Claim do not state or*
D *insert the words "jointly and severally" does not in any way change the position. The plaintiff's right on the cause of action against both of the defendants either jointly or individually (ie, severally) still survives. The plaintiff can always proceed against the 1st defendant even though a final judgment in default had been entered against the 2nd defendant.* (emphasis added).
E

[31] The case clearly illustrates that even if the plaintiff enters judgment in default against the 1st defendant without inserting the phrase "jointly and severally" in the judgment, it does not preclude the plaintiff from proceeding with the action against the 2nd and
F 3rd defendants and the cause of action against the 2nd and 3rd defendants still survives either jointly or severally. And although the suit resulted in two judgments, this does not mean that the Plaintiff can claim or try to recover twice the judgment sum.

G *Issue 4: Whether The Claim For Interest Is In Breach Of O. 42 r. 12 Of The RHC*

[32] The defendants submitted that the plaintiff's claim for interest at 1% per month is contrary to O. 42 r. 12 of the RHC.

H **[33]** There are two operative clauses on the rate of interest payable in the agreements entered into between the plaintiff and the 1st defendant. Firstly, cl. 3.2 of the settlement agreement states as follows:

I 3.2 MIDF shall be entitled to charge interest on the Instalment Payments outstanding out of the Balance Sum at any time upon an event of default being triggered including without

> limitation where payment in respect of any of the Instalment Payments are not cleared or withheld for any reason whatsoever and in such a case, interest shall be charged at 1% per month for the remaining sum unpaid on the Balance Settlement Sum.

and cl. 3.3 which states:

> 3.3 ... for avoidance of doubt, upon an event of default being triggered ... the entire remaining sum unpaid on the balance Settlement Sum shall become due and MIDF shall have full and absolute right to proceed and commence with all necessary action against Bostonweb and/or the Promoters including legal action.

while cl. 13 of the letter of guarantee furnished by 2nd and 3rd defendants states as follows:

> 13. The Guarantors shall be liable to pay interest at the rate of eight per cent (8%) per annum calculated on a daily basis on any judgment granted by courts from the date of court order until final settlement.

[34] To determine what the correct and agreed rate of interest payable by the 2nd and 3rd defendants is, useful reference can be made to cl. 10 of the letter of guarantee. Clause 10 of the letter of guarantee provides:

> 10. This Guarantee shall be continuing and unconditional and shall remain in full force and effect as from the date of the issuance hereof together with all interest charges and costs under the terms of Settlement Agreement.

[35] I am of the view that since cl. 10 of the letter of guarantee refers to the settlement agreement for the "terms of interest, charges and costs" and not to cl. 13 of the said letter of guarantee, it is clear that it was the intention of the parties to refer to the settlement agreement in the event of any inconsistency between the settlement agreement and the letter of guarantee in respect of the issue of interest, charges and cost. As such I hold that cl. 3.2 of the settlement agreement applies and that the interest chargeable shall be 1% per month "for the remaining sum unpaid on the balance settlement sum."

[36] As the parties have agreed contractually on the rate of interest at 1% per month in the settlement agreement, that rate is not in breach of O. 42 r. 12 of the RHC. In the case of *BSN Commercial Bank (Malaysia) Bhd v. Mesra Venture Sdn Bhd & Anor* [2007] 9 CLJ 173 the High Court held:

> [41] Under the amended O. 42 r. 12, generally every judgment debt shall carry interest at the maximum rate of 8% pa, but an exception arises where the parties have agreed to another rate of interest. In view of the fact that the defendants have agreed to a rate other than the rate of 8% pa, and that the amendment to O. 42 r. 12 came into force on 11 December 1986, ie, some 21 years ago, it is permissible for the plaintiff to include in the judgment debt either a rate of interest not exceeding 8% ('the statutory rate') or the rate which has been otherwise agreed between the parties ('the contractual rate'): see *Lee Tain Tshung* per Ahmad Fairuz JCA (now CJ Malaysia) at p. 389.

Principle Of Law In Setting Aside Judgment In Default

[37] The principle on the setting aside of a judgment in default has been clearly enunciated in the Court of Appeal case of *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175 in which the court held as follows:

> [15] It is trite that when considering an application to set aside a judgment in default, the first task is to ascertain whether it is a regular or irregular judgment. If it is an irregular judgment, then the default judgment ought to be set aside *ex debitio justitae*. If it is regularly obtained, then the principle expounded in *Evans v. Bartlam* [1937] AC 473 applies - see the judgment of the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & 5 Ors v. United Malayan Banking Berhad* [1994] 1 CLJ 328. This requires the defendant to show that he has a defence on merits. Delay in making such application is a factor to be considered by the court in deciding whether to grant or refuse the application - see *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241.

Conclusion

[8] For the reasons given in respect of each of the issues considered above, I am of the view that there was no valid ground raised by the defendants to enable the court to set aside the two judgments obtained regularly by the plaintiff. It will be reiterated that the defendants did not submit on the merits of their case at all. In the result, the appeal (encl. 17) was dismissed with costs.