Perbadanan Pengurusan Palm Spring @ Damansara (Suatu badan yang ditubuhkan di bawah Akta HakMilik Strata 1985 (Akta 318))
v
Muafakat Kekal Sdn Bhd & 2 Ors

High Court, Kuala Lumpur – Civil Suit No. 22NCvC-567-10-2013
Hue Siew Kheng J

November 28, 2014

Civil procedure *– Setting aside – Order of court – First respondent applying to set aside order striking out defence for non-compliance with unless order and for defence to be reinstated – Whether there was cogent or credible material to justify exercise of discretion in favour of first respondent*

The instant application was filed by the first defendant seeking inter alia, orders to set aside the order striking out its defence and precluding it from defending the plaintiff's claim and for its defence to be reinstated. At the case management stage, the parties were issued a copy of the list of directions of the court to be complied with and an unless order warning the parties of the consequences of non-compliance. The first defendant breached the unless order in respect of filing and exchange of witness statements when it did not file and serve its witness statements on time. Consequently and in view of the first defendant's contumelious conduct, this court ordered the first defendant's defence to be of struck out and ruled that the first defendant be precluded from defending the plaintiff's case.

Issue

Whether the first defendant's application ought to be allowed.

Held, dismissing the application with costs

The first defendant's application for reinstatement was wholly devoid of merit. The delay in filing the witness statement purportedly caused by the change of witness was baseless, misconceived and was not a good reason to justify reinstatement. The first defendant's allegation that the time stipulated in direction to file in the witness statement "adalah sangat singkat" was baseless and scandalous. The further excuse given of "cuti raya" was wholly unacceptable and unsustainable as the other parties had Malay witnesses as well. As such the first defendant's application was groundless as there was no cogent or credible material to justify the exercise of discretion in favour of the first defendant. [*see p 171 para 18 – p 173 para 30*]

Cases referred to by the court

Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd (and Another Appeal) [1995] 3 AMR 3040; [1995] 3 MLJ 465, SC *(ref)*
Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor [1999] 1 AMR 956; [1999] 1 MLJ 359, CA *(ref)*
Tekital Sdn Bhd v Auto Parking Inc Sdn Bhd (In liquidation) [2011] 2 AMCR 430; [2011] MLJU 340, HC *(ref)*

Legislation referred to by the court

Malaysia
Rules of Court 2012, Order 34 rr 1(3), 2(3), (4), Order 64 r 5

Justin TY Voon and Ng Li Kian (Justin Voon Chooi & Wing) for plaintiff
Goik Kenzu (Nasir, Kenzin & Tan) for first defendant

Judgment received: January 7, 2015

Hue Siew Kheng J

Enclosure 94

[1] Enclosure 94 is the first defendant's ("D1") application seeking the following orders:

i) Perintah Mahkamah bertarikh 1 Ogos 2014 membatalkan pembelaan Defendan Pertama dan juga Penyata Saksi Defendan Pertama ditepikan;

ii) Pembelaan Defendan Pertama dihidupkan semula (reinstate);

iii) Kebenaran diberikan kepada Defendan Pertama untuk mengunapakai Penyata Saksi Defendan Pertama dan pembelaan yang telah difailkan di Mahkamah yang Mulia ini dan/atau secara alternative, Defendan Pertama diberikan perlanjutan masa untuk memfailkan Penyata Saksi Defendan Pertama.

iv) Perbicaraan penuh bagi tindakan ini digantung sehingga pelupusan permohonan ini dan/atau secara alternative Defendan Pertama diberikan kebenaran untuk memanggil saksi-saksi yang telah memberikan keterangan untuk pemeriksaan balas.

v) *Tetuan Nasir, Kenzin & Tan dibenarkan menarik diri mewakili Defendan Pertama.*

vi) Bahawa kos permohonan ini adalah kos dalam kausa.

vii) Apa-apa relif yang Mahkamah yang Mulia ini difikirkan adil dan suaimanfaat.

[2] The grounds cited in support of this application are:

i) Kelewatan memfailkan Penyata Saksi tidak memprejudiskan pihak-pihak;

ii) Sekiranya kemudaratan wujud ianya boleh dipampas dengan kos;

iii) Defendan Pertama yang akan diprejudiskan memandangkan tidak dapat membela tindakan ini dan tidak boleh dipampas dengan kos;

iv) *Firma Tetuan Nasir, Kenzin & Tan dibenarkan menarik diri mewakili Defendan Pertama kerana gagal mendapatkan kerjasama yang baik daripada Defendan Pertama.*

[3] These were the cause papers filed:

Enclosure 94	–	Notice of application.
Enclosure 95	–	Affidavit in support of Mohd Nor bin Md Deros, D1's lawyer.
Enclosure 100	–	Affidavit in support of Azran bin Abdul Rahman, a director of D1.
Enclosure 101	–	Affidavit in reply of Sumita Menon, a council member of the plaintiff.

Events leading to the striking out

[4] During the case management held on March 7, 2014, parties were issued a copy of "encl A" containing directions of the court (see "exh C" of encl 101). The trial date was also fixed on that day.

[5] In "encl A" the list of directions to be complied with were fully set out. Parties were warned of the "unless order" as set out in item 10 of "encl A". It reads:

> 10. Unless Order – O.34 of the Rules of Court 2012 where any party fail to comply with any order made or direction given by the court under paragraph (1) the court may dismiss the action, strike out the defence or counter claim or make such other order as it thinks fit.

[6] During the second case management on July 18, 2014, the parties were directed to file and exchange their respective witness statements on or before July 24, 2014 and an "unless order" was specifically issued wherein the parties were warned of the dire consequences of non-compliance, particularly D1 as it had previously failed to comply with certain directions of this court.

[7] In breach and complete disregard of the "unless order" issued on July 18, 2014 in respect of the filing and exchange of witness statements, D1 chose to file and serve its witness statements on July 31, 2014, i.e. one day before trial.

[8] At the same time, D1 purported to amend its witness list by filing and serving an "amended witness list". To compound matters, the witness statement filed was also not from a witness in the original witness list.

[9] D1 had displayed its propensity for flagrant and willful disregard of court directions earlier on by failing to file its case summary and its list of witnesses within time.

[10] Then, on the first day of hearing i.e. on August 1, 2014, D1's witnesses and/or its representative did not attend court and D1's lawyer attempted to seek an adjournment.

[11] In view of the foregoing and D1's contumelious conduct, this court ordered D1's defence to be of struck out and ruled that D1 be precluded from defending the plaintiff's case.

Preliminary objections of the plaintiff's counsel

[12] Learned counsel from the plaintiff raised a preliminary issue that the notice of application as found in encl 94 is defective, wrongful and invalid as it contained two separate and distinct applications i.e., an application to set aside the striking out order and an application to discharge D1's solicitors from acting for D1 in this suit.

[13] It was pointed out that the notice did not state who made the application i.e. whether it is by D1 or its solicitors or both. This rendered the application invalid, embarrassing and confusing.

[14] It was further submitted that such a "hybrid" application is not possible since the two discrete applications are different, involving different rules and different forms of application and therefore, cannot be combined.

[15] Since the court's order dated August 1, 2014 was made pursuant to Order 34 r 1(3) and/or r 2(3) of the Rules of Court 2012, the application to set aside must be made by D1 pursuant to Order 34 r 2(4).

[16] In respect of the application for discharge, the application can only be made by D1's solicitors pursuant to Order 64 r 5.

[17] In view of the objection taken, learned counsel for D1 wisely chose to withdraw prayer (5) for discharge on the date of hearing of encl 94.

Findings

[18] Having perused the cause papers and having heard learned counsels for the plaintiff and D1, I find D1's application for reinstatement to be wholly devoid of merit for the following reasons.

[19] D1 vide paragraphs 6 and 7 of Azran's affidavit (encl 100) alleged that the delay in filing the witness statement was due to the following reasons:

(i) D1 wished to replace its main witness i.e. Lee Aik Chong with Azran bin Abdul Rahman as Lee Aik Chong is not a director of D1 and he is also a bankrupt;

(ii) Moreover, Azran needs to be called as a witness as there were some sale and purchase agreements which were signed by him; and

(iii) The delay in filing of the witness statement was due to the aforesaid reason.

[20] With all due respect, I find these reasons to be baseless and misconceived as:

(i) Lee Aik Chong had been adjudicated bankrupt since May 14, 2001 which was well before the filing of this suit on/about October 2013 (see "exh A" of Sumita's affidavit);

(ii) If D2 had indeed genuinely felt that Lee Aik Chong is not fit and/or not suitable to be called as a witness then he should not have been named as D1's witness *from the very beginning*;

(iii) In any event, it is trite law that a person who had been adjudicated bankrupt is not prohibited from giving evidence in court (see *Tekital Sdn Bhd v Auto Parking Inc Sdn Bhd (In liquidation)* [2011] 2 AMCR 430; [2011] MLJU 340);

(iv) Azran bin Abdul Rahman should have been listed as a witness from the very beginning since he is the director of D1 at all material times since January 16, 2002 until to-date (see "exh B" of Sumita's affidavit); and

(v) The sale and purchase agreement was in the bundle of documents all along and ought to be known to the first defendant at all material times.

[21] Based on the foregoing, the delay in filing the witness statement purportedly caused by the change of witness is baseless, misconceived and is not a good reason to justify reinstatement.

[22] D1's allegation that the direction to file in the witness statement on or before July 24, 2014 "adalah sangat singkat" is baseless and scandalous bearing in mind "encl A" containing the court's directions were issued on July 7, 2014 and parties were informed of the trial dates i.e. August 1, 15 and 18, 2014. The direction for witness statements to be filed seven days before the trial and the peremptory orders had been made known and were issued on March 7, 2014 and July 18, 2014.

[23] All other parties i.e. the plaintiff, D2 and D3 had no difficulty complying with the court directions except for D1.

[24] The excuse given of "cuti raya" is wholly unacceptable and unsustainable as the other parties had Malay witnesses as well. They had no problem attending court on August 1, 2014 ready for trial.

[25] It is pertinent to note that in encl 95, D1's solicitor had, as a ground for discharge, deposed in paragraph 10 the following:

> 10. Saya juga memohon agar Firma Tetuan Nasir, Kenzin & Tan dibenarkan menarik diri mewakili Defendan Pertama kerana gagal mendapatkan kerjasama yang baik daripada Defendan Pertama. Kami telah memaklumkan kepada Defendan Pertama akan tarikh bicara pada 1.8.2014 dimana kehadiran Defendan Pertama adalah perlu. Namun begitu, Defendan Pertama gagal untuk hadir ke Mahkamah pada 1.8.2014.

[26] It is clear as daylight that D1 had tried all means, mostly foul, to delay the expeditious disposal of this case and had no real intention of defending the suit. D1's reasons for the delay in filing the witness statement and last minute changes to the witness list is nothing more than a deliberate, devious tactical manoeuvre to scuttle the trial. This is clearly confirmed by its own counsel in encl 95 that D1 had failed to give "kerjasama yang baik" to its own lawyer and despite being told to attend court on August 1, 2014, had deliberately chosen not to do so.

[27] It is trite law that there must be "cogent material" before the court for the court to exercise any discretion (see *Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 AMR 956; [1999] 1 MLJ 359; *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd (and Another Appeal)* [1995] 3 AMR 3040; [1995] 3 MLJ 465).

[28] In view of the foregoing, I find that D1's application to be groundless as there is no cogent or credible material before this court to justify the exercise of discretion in favour of D1.

[29] Any prejudice caused, in my view would be to the plaintiff as the preparation of the plaintiff's case would be thrown into disarray by the late service of D1's witness statement.

[30] In any event, I find the issue of prejudice is irrelevant vis-à-vis D1 where there is a willful breach of the peremptory order of the court without any justifiable cause or excuse.

[31] Enclosure 94 was accordingly dismissed with costs.