Soda KL Plaza Sdn Bhd v Noble Circle (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–12–435 OF 2001

FAIZA TAMBY CHIK J

13 DECEMBER 2001

Civil Procedure *— Service — Setting aside — Copies of summons and statement of claim received by defendant not appended with any notice of appearance — Whether mandatory that notice of appearance be appended — Subordinate Courts Rules 1980 O 5 r 2*

Civil Procedure *— Striking out — Action — Title 'summons' wholly omitted — Whether purported 'summons' invalid — Whether omission of word 'summons' was a serious breach — Subordinate Courts Rules 1980 O 5 r 1*

At the sessions court, the first defendant's applied to strike out the plaintiff's summons and statement of claim on the ground that the 'summons' was invalid in breach of O 5 r 1 and Form 1 of the Subordinate Courts Rules 1980 ('the SCR'). The first defendant further applied to set aside the purported service of the plaintiff's summons and statement of claim because copies of the purported 'summons' and statement of claim received by the first defendant were not appended with any notice of appearance in accordance with O 5 r 2 of the SCR. The sessions court judge dismissed the first defendant's application. This was the first defendant's appeal against the decision of the sessions court.

Held, allowing the appeal:

(1) The purported 'summons' was invalid because the title 'summons' as stipulated in Form 1 of the SCR was wholly omitted. The omission of the word 'summons' was a very serious breach because O 5 r 1 of the SCR provided that 'every summons must be in Form 1'. The words 'shall' or 'must' connoted a mandatory requirement where no discretion could be exercised in the event of a breach. A fortiori, the forms of the rules of courts ought to be strictly adhered to and any variation would only be allowed where the circumstances of the case required (see pp 371G–I, 373D).

(2) The plaintiff had breached two mandatory provisions, namely, O 1 r 8 and O 5 r 1 of the SCR. There was no necessity for any variation of Form 1 since the circumstances of the instant case did not require any variation and the inclusion of the title 'Summons' was always necessary (see p 374C–D).

(3) Based on para 6 of the circular from the Chief Justice of Malaysia, the documents that were not in compliance with the rules of court ought to be rejected at the time they were filed. Practice

directions, though not law, ought to be strictly adhered to (see p 378F–G).

(4) Further, the plaintiff had failed to comply with O 5 r 2 of the SCR because the notice of appearance was not appended to the copies of the summons and statement of claim that were received by the first defendant (see pp 378H–379A). The copies of the summons and statement of claim that were served must also have a copy of the notice of appearance appended thereto. Order 5 r 2 of the SCR provided for the word 'must' and the non-compliance of this mandatory provision by the plaintiff could not be cured. As such, the summons and the purported service of the same were also null and void (see p 380A–B).

(5) The plaintiff had breached the mandatory provisions in O 5 r 1 and O 5 r 2 of the SCR and no valid explanation had been given by the plaintiff for the breaches. In any case, O 2 r 1(1) of the SCR would not assist the plaintiff in the circumstances of the case as the plaintiff had all this while, maintained that they had not breached O 5 r 1 or O 5 r 2 of the SCR. Having made this stand, the plaintiff could not now urge the court to cure the breach under O 2 r 1(1) of the SCR (see pp 382G–383A).

(6) Further, the rules of the court must be obeyed and in order to justify any exercise of discretion in favour of a party, there must be some material to satisfy the court that such discretion ought to be exercised. Order 2 r 1 of the SCR ought not to be wantonly utilized. In the instant case, the plaintiff had breached the law and 'justice according to the law' would be best served by upholding the rules of the court. Further, the breach of O 5 rr 1 and 2 of the SCR was beyond the curing provisions of O 2 r 1 of the SCR (see pp 383B–C, 384A–B); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 321 and *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 distinguished.

[Bahasa Malaysia summary

Di mahkamah sesyen, defendan pertama memohon untuk membatalkan saman dan penyata tuntutan plaintif dengan alasan bahawa saman plaintif tidak sah kerana telah melanggar A 5 k 1 and Borang 1 Keadah-Kaedah Mahkamah Rendah 1980 ('KMR'). Defendan pertama selanjutnya memohon untuk mengetepikan penyampaian saman dan penyata tuntutan plaintif kerana salinan 'saman' dan penyata tuntutan tersebut telah diterima oleh defendan pertama tanpa sebarang notis kehadiran menurut A 5 k 2 KMR. Hakim mahkamah sesyen telah membatalkan rayuan defendan pertama terhadap keputusan mahkamah sesyen. Ini adalah rayuan defendan pertama terhadap keputusan mahkamah sesyen tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) 'Saman' yang dikatakan adalah tidak sah kerana tajuk 'summons' seperti dalam Borang 1 KMR telah ditinggalkan. Ketiadaan perkataan 'summons' merupakan perlanggaran yang amat serius kerana A 5 k 1 KMR memperuntukan bahawa 'every summons must be in Form 1'. Perkataan-perkataan 'shall' atau 'must' menunjukkan keperluan yang mandatori di mana tiada budi bicara boleh digunakan jika berlakunya perlanggaran. A fortiori, borang-borang keadah-kaedah mahkamah patut dipatuhi dengan ketat dan sebarang perubahan akan dibenarkan hanya jika keadaan kes memerlukannya (lihat ms 371G–I, 373D).

(2) Plaintif telah melanggar dua peruntukan mandatori, iaitu A 1 k 8 dan A 5 k 1 KMR. Tiada keperluan untuk sebarang perubahan kepada Borang 1 memandangkan keadaan di dalam kes ini tidak memerlukan sebarang perubahan dan kemasukkan tajuk 'Summons' adalah satu kemestian (lihat ms 374C–D).

(3) Berdasarkan perenggan 6 pekeliling Ketua Hakim Malaysia, dokumen-dokumen yang tidak mematuhi kaedah-kaedah mahkamah patut ditolak semasa dokumen-dokumen tersebut difailkan. Arahan amalan, walaupun tidak merupakan undang-undang, patut dipatuhi dengan ketat (lihat ms 378F–G)).

(4) Selanjutnya, plaintif gagal mematuhi A 5 k 2 KMR sebab notis kehadiran tidak disertakan bersama salinan saman dan penyata tuntutan plaintif yang diterima oleh defendan pertama (lihat ms 378H–379A). Salinan saman dan penyata tuntutan yang disampaikan juga mesti mempunyai sesalinan notis kehadiran. Aturan 5 k 2 KMR memperuntukkan perkataan 'must' dan ketidakpatuhan peruntukan mandatori ini oleh plaintif tidak dapat dibetulkan. Oleh itu, saman dan penyampaian yang dikatakan tidak sah dan batal (lihat ms 380A–B).

(5) Plaintif telah melanggar peruntukan mandatori A 5 k 1 dan A 5 k 2 KMR tanpa memberi sebarang alasan yang sah mengenainya. Walau bagaimanapun, A 2 k 1(1) KMR tidak akan menolong plaintif kerana plaintif selama ini telah menyatakan bahawa plaintif tidak pernah melanggar A 5 k 1 atau A 5 k 2 KMR. Setelah membuat pendirian ini, plaintif tidak boleh memohon kepada mahkamah ini untuk membetulkan perlanggaran di bawah A 2 k 1(1) KMR (lihat ms 382G–383A).

(6) Selanjutnya, kaedah-kaedah mahkamah mesti dipatuhi dan untuk menjustifikasikan sebarang perlaksanaan budi bicara untuk suatu parti, mesti terdapat sesuatu untuk memuaskan hati mahkamah bahawa budi bicara tersebut patut digunakan. Aturan 2 k 1 KMR tidak patut digunakan dengan sewenang-wenangnya. Di dalam kes ini, plaintif telah melanggar undang-undang dan 'justice according to the law' dapat dilaksanakan dengan wajarnya dengan memberi keutamaan kepada kaedah-kaedah mahkamah. Lagipun, perlanggaran A 5 kk 1 dan 2 KMR tidak dapat dibetulkan oleh

peruntukan A 2 k 1 KMR (lihat ms 383B–C, 384A–B); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 321 dan *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 dibeza.] A

Notes B

For a case on setting aside service, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 5323.

For cases on striking out an action, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5604–5615.

C

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 321 (distd)

Delta Drive (M) Sdn Bhd, Re [2000] 4 MLJ 27 (refd)

Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd [2001] 2 AMR 1752; [2001] MLJU 11 (refd) D

Insas Bhd & Anor v Raphael Pura [1999] 4 MLJ 650 (refd)

Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd [1985] 2 MLJ 440 (refd)

Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & Ors [2001] 1 MLJ 451 (refd) E

Malaysian Steel Glass Bhd v Non-Metallic Mineral Mineral Products Manufacturing Employees' Union [1998] 1 CLJ Supp 103 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Ng Lai Tien v Peregnine Finance Ltd [1995] 4 MLJ 7 (refd)

Nyana Pandithan @ MG Pandithan v Vettiveloo Kasinathan & Ors [1997] 1 CLJ Supp 30 (refd) F

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)

Raja Guppal a/l Ramasamy v Segaran a/l Pakiam [1999] 2 MLJ 677 (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)

Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor [1994] 3 MLJ 530 (refd) G

Seng Loong Trading Co v Angel Department Stores Sdn Bhd [1987] 1 MLJ 310 (refd)

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd [1996] 3 MLJ 533 (refd)

Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (refd) H

United Malayan Banking Corp v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (distd)

Yamamori (Hong Kong) Ltd v Davidson & Ors [1992] 2 MLJ 40 (refd)

Yeo Teik v Jemaah Pengadilan Sama, Pulau Pinang [1996] 2 MLJ 54 (refd) I

Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor [1999] 5 MLJ 180 (refd)

Legislation referred to

Rules of the High Court 1980 O 1 r 7, O 5 r 1, O 41 r 1(4), Form 114
Subordinate Courts Rules 1980 O 1 r 8, O 2 r 1(1), O 5 rr 1, 2, Forms 1, 2, 3

Appeal from: Summons No 3–52–2320 of 1999 (Sessions Court, Kuala Lumpur)

Justin Voon Tiam Yu (*Cheah Teh & Su*) for the first defendant/appellant.
YC Lee (*Thangaraj & Associates*) for the plaintiff/respondent.

Faiza Thamby Chik J: The appellant's/first defendant's appeal herein is against the decision of the sessions court judge given on 25 June 2001 which dismissed the first defendant's amended notice of application dated 25 July 1999 with costs. The said first defendant's amended notice of application (see pp 19–22 of the record of appeal), inter alia, prayed for the following orders:

(a) that the plaintiffs 'summons' dated 13 February 1999 and statement of claim dated 13 February 1999 be struck off;

(b) any purported service of the plaintiffs 'summons' dated 13 January 1999 and statement of claim dated 13 February 1999 upon the first defendant be set aside.

The first defendant's application was supported by the affidavit affirmed by one Lau Khim Woon on 26 July 1999 (see pp 24–27 of the record of appeal). The plaintiff/respondent filed two affidavits in reply, namely:

(a) the affidavit in reply affirmed by Chan Kok Wah on 1 November 1999 (refer to pp 28–30 of the record of appeal); and

(b) the affidavit in reply (II) affirmed by K Karunagaran on 1 November 1999 (refer to pp 31–33 of the record of appeal).

The main grounds of the first defendant's application are as follows:

(a) The said plaintiffs 'summons' is invalid in breach 1 of O 5 r 1 of the Subordinate Courts Rules 1980 ('the SCR') and Form 1 of the SCR;

(b) It is also in breach of O 5 r 2 of the SCR because the copy of the purported 'summons' and statement of claim received by the first defendant was not appended with any notice of appearance in accordance to the SCR;

The purported plaintiff's 'summons' is annexed in pp 12–19 of the record of appeal. I am of the view that the purported 'summons' is invalid because the title 'summons' as stipulated in Form 1 of the Rules of the High Court 1980 ('the RHC') was wholly omitted. The omission of the whole title of 'summons' is a very serious breach because O 5 r 1 of the RHC provides that 'every summons must be in Form 1'. The words 'shall' or 'must' connotes a mandatory requirement where no discretion can be exercised should the said provision be breached. This principle of law was decided in the case of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85, at p 93 where it is stated:

Order 32 r 13(2)(b) makes it mandatory for such an affidavit in reply to be filed and served within 14 days from the time the affidavit that it seeks to reply is received. The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion.

In *Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor* [1999] 5 MLJ 180, at p 190 the court said:

The affidavit in support, ie encl 2 did not comply with O 41 r 1(4) of the RHC, as the deponent has not stated his residential address as required.

Order 41 r 1 (4) of the RHC provides:

'Every affidavit must be expressed in the first person and must state the place of residence of the deponent ... .'

This is a mandatory requirement because of the word 'must' as stated in the Court of Appeal case of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 at p 93:

'... The word "must" as opposed to "may" is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word "may" implies. We equate the meaning of the word "must" as that given to the word "shall", and for that reason the choice of the word "must" in the rule does not create the existence of any discretion or empowers the court to exercise such discretion.'

In *Re Delta Drive (M) Sdn Bhd* [2000] 4 MLJ 27, at p 35 the court said:

In the event that this court is wrong in not accepting the arguments of the learned counsel for the respondent, then because of the admission of the said counsel that the address of Ng Kah Thin stated in the said affidavit is a business address of the respondent company and not his residential address, this is therefore an unfortunate departure from O 41 r 1(4) of the RHC where the word 'shall' appearing therein have been interpreted to imply a peremptory mandate where no discretion could be exercised by this court. The end result is that the said affidavit of Mr Ng Kah Thin could not be accepted. Therefore the application by way or summon in chambers at encl 19 has no supporting affidavit.

In the circumstances, the preliminary objection on the above point is therefore allowed and the summons in chambers at encl 19 is dismissed with costs.

In *Malaysian Steel Glass Bhd v Non-Metallic Mineral Products Manufacturing Employees' Union* [1998] 1 CLJ Supp 103, at p 108 the court said:

Seperkara lagi yang tidak disentuh oleh mana-mana pihak dan dapat diperhatikan oleh mahkamah ialah kegagalan pihak pemohon memfailkan satu afidavit yang memberikan nama, alamat, tempat dan tarikh penyampaian ke atas orang yang telah disampaikan notis usul itu sebgaimana diperuntukkan di bawah A 53 k 2(4) KMT. Dalam kes ini, tidak ada afidavit sedemikian di hadapan mahkamah semasa pendengaran. Tanpa afidavit tersebut, rekod

menjadi tidak lengkap, dan justeru itu, mahkamah tidak dapat melayan dan meneruskan pendengaran notis usul itu.

Encik TM Varughese akui perkara-perkara tersebut di atas tidak dipatuhi. Namun demikian, beliau mengatakan kegagalannya tidak memprejudiskan responden kerana kegagalannya itu hanyalah sebagai luar aturan dan oleh itu, beliau pohon mahkamah menggunakan A 92 k 4 KMT untuk menyelamatkan kesnya.

Kaedah-kaedah Mahkamah Tinggi 1980 telah digubal sekian lama untuk diikuti dan dipatuhi oleh semua pihak (*Syarikat Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1993] 2 MLJ 420). Pada hemat saya, peruntukan-peruntukan di bawah A 53 k 2(1), k 2(4) dan A 8 k 3 KMT adalah peruntukan mandatori kerana terdapat perkataan 'mestilah' digunakan dalam kaedah-kaedah tersebut (sila lihat *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85), dan dengan itu wajib dipatuhi. Ketidakpatuhan kehendak kaedah-kaedah tersebut adalah padah dan boleh menyebabkan notis usul ini dibatalkan kecuali ia terlebih dahulu dipinda dan diselaraskan dengan sewajarnya.

It can be seen that the aforesaid case authorities had consistently interpreted the word 'shall' or 'must' in the RHC as a mandatory provision which must be strictly complied with wherein a breach of the same cannot be cured because no discretion can be exercised. A fortiori, it is trite law that the Forms of the RHC ought to be strictly adhered to and any 'variation' would only be allowed where 'the circumstances of the particular case require'. Order 1 r 8 of the SCR provides:

> The Forms in Schedule A shall be used where applicable with such variations as the circumstances of the particular case require.

In the case of *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2001] AMR 1752 at p 1756; [2001] MLJU 11, the High Court at Kuala Lumpur held as follows with regard to O 1 r 7 of the RHC which is in pari materia with O 1 r 8 of the SCR:

> The word 'shall' as used in O 56 r 1(2) of the RHC indicates the mandatory nature of the requirement. In *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120, Chang Min Tat J, held that the rules and prescribed forms thereunder are primarily to be followed unless departure justifies it. This case was cited with approval by the Federal Court in *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45.

In this context, I fully agree with Abdul Malik Ishak J, in *Dato' Wong Gek Meng*'s case when he said:

> In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed prima facie as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old-fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. In the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multimedia Superior Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands

and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter.

In that case, the court was dealing with the same issue as in our present case ie non-compliance with Form 114 of the RHC (whereby the court had struck out the notice of appeal with costs, for such non-compliance).

I would also like to refer to O 1 r 7 of the RHC which says:

> The Forms in Appendix A shall be used where applicable with such variation as the circumstance of the particular case require.
>
> Again, the word 'shall' used thereunder indicates the mandatory nature of the requirement. Variations can only be accepted as the circumstances of the particular case require.

In the circumstances, I am of the view that the plaintiff had breached two mandatory provisions, namely: Order 1 r 8 of the RHC ('shall') and O 5 r 1 of the SCR ('must'). There was also no necessity for any variation of the Form 1 since the circumstances of the instant case did not require any variation and the inclusion of the title 'summons' is always necessary. In the case of *Genisys Integrated Engineers Pte Ltd*, at p 1758 the court said:

> Order 1 r 7 of the RHC makes it mandatory for litigants to sue the Forms in Appendix A where applicable with such variation as the circumstances of each particular case require. In our present case, there is nothing to show that the circumstance of the case require the petitioner not to comply with the relevant requirement ie to state the order sought to be obtained in encl 38. There's no reason given as to why the petitioner cannot fulfil the said requirement.

The plaintiffs counsel contends that the word 'summons' is stated at the' top of the general title in Form 1 of the SCR and in the form entitled 'General Title', the word summons' is stated in the position marked '(1)'. The plaintiffs submission is in fact inherently flawed and does not represent the true purport of Form 1 and the form entitled 'General Title' of the SCR. It is obvious from the reading of all the relevant forms in Schedule A of the SCR that apart from the 'General Title', each of the relevant cause paper/ documents filed into court must be entitled with the nature of the cause paper/documents (eg 'summons' (Form 1), 'notice of appearance' (Form 3), 'Originating Application' (Form 6), 'affidavit of Service' (Form 9) etc). This main title ('summons', 'notice of appearance', etc) is distinct and separate from the 'General Title' and would identify the cause paper/document concerned. The portion marked '1)' in the form entitled 'General Title', as the note to the said form suggest, would state the 'nature of the proceedings' before the suit number (eg summons No ....., Originating Application No ..... etc). But this would not detract from the need to identify the cause paper/document concerned ie whether the said cause paper/document is a 'summons' or 'notice of appearance', for instance. Should the plaintiffs submission be accepted, it would render the words identifying the nature of the relevant cause paper/document otiose and this would lead to an absurd result. For example, in Form 2 of the SCR, a proper notice of appearance ought to be set out as follows:

Notice of Appearance
(Monetary Claims)

IN THE SESSIONS COURT AT KUALA LUMPUR
IN THE STATE OF WILAYAH PERSEKUTUAN MALAYSIA
Summons No .....

Between

AB ... Plaintiff

And

CD ... Defendant

OR

IN THE SESSIONS COURT AT KUALA LUMPUR
IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA
Summons No .....

Between

AB ... Plaintiff

And

CD ... Defendant

Notice of Appearance

The above example would show a cause paper/document identified as a 'notice of appearance' filed in a suit where 'the nature of proceedings' is one of a 'summons' (as shown in the general title). I note that in West Malaysia, the practice seems to be to place the main title at the bottom of the general title whereas in Sarawak, for instance, the practice seems to be to place the main title above the general title. An example of a Writ issued in the Sibu High Court is as follows:

WRIT OF SUMMONS
MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT SIBU
SUIT NO 22–26 OF 2000

BETWEEN

RHB BANK BHD (Company No 6171–M)
Tower Two & Three
RHC Centre, Jalan Tun Razak
50400 Kuala Lumpur ... PLAINTIFF

AND

DOMINANCE PROPERTIES SDN BHD (CO No 331521–P)
No 21, 2nd Floor
Brooke Drive
96000 Sibu, Sarawak ... FIRST DEFENDANT

PHILIP LING LEE KANG (BIC K814294)
No 25, Upper Lanang Road
96000 Sibu, Sarawak ... SECOND DEFENDANT

YANG AMAT ARIF TAN SRI DATUK AMAR CHONG SIEW FAI, PSM, DA, PNBS, CHIEF JUDGE OF THE HIGH COURT IN SABAH AND SARAWAK IN THE NAME AND ON BEHALF OF SERI PADUKA BAGINDA YANG DI PERTUAN AGONG

To: 1 DOMINANCE PROPERTIES SDN BHD
2 PHILIP LING LEE KANG

WE COMMAND you that within ten days after the service of this Writ on you inclusive of the day of such service, you do cause an appearance to be entered for you in a cause at the suit of the abovenamed plaintiff.

I think a proper 'summons' in the instant case should be as follows:

SUMMONS
IN THE SESSIONS COURT AT KUALA LUMPUR
IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA

SUMMONS No 3-52-2320-1999

Between

Noble Circle (M) Sdn Bhd ... Plaintiff

And

1 Soda KL Plaza Sdn Bhd
2 Loh Yah Shih
3 Lau Khim Woon ... Defendants

To: .....

OR

IN THE SESSIONS COURT AT KUALA LUMPUR
IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA
SUMMONS No 3-52-2320-1999

Between

Noble Circle (M) Sdn Bhd ... Plaintiff

And

4 Soda KL Plaza Sdn Bhd
5 LohYah Shih
6 Lau Khim Woon ... Defendants

SUMMONS

To: .....

Based on the aforesaid, I am of the view that the purported 'summons' by the plaintiff reproduced in para 2.3 of the respondent's reply is incomplete and in clear breach of Form 1 of the SCR. The cause paper/document concerned has not been properly identified. There is a marked difference between stating the 'Summons No ..... and entitling that the cause paper/document itself as a 'summons'. It is noted that the plaintiff had merely complied with the Form called 'General Title' but not Form 1 of the SCR. The plaintiff had referred to the 'Malaysian Court Forms In Civil Proceedings' to purportedly justify the purported 'summons' used by the plaintiff in the instant case. An obvious perusal of the said 'Court Form'

would show that the main title 'summons' had been clearly provided at the top in full compliance with Form 1 of the SCR. In the circumstances, the plaintiffs counsel's submission that the word 'summons' in Form 1 of the SCR merely describes Form 1 is misconceived. If the plaintiffs argument is accepted, it would also mean that the title 'notice of appearance' also need not be stated in a notice of appearance in compliance with Form 2 of the SCR. The words 'Summons No .....' would only identify the nature of proceedings but it does not identify the nature of the cause paper/document ie whether it is a 'summons', notice of appearance', 'subpoena', etc. The omission of the whole title of 'summons' is a very serious breach because O 5 r 1 of the SCR which provides 'Every summons must be in Form 1'. The case authorities have decided that the word 'must' is a mandatory requirement where no discretion can be exercised should the said provision be breached. It is important to emphasize that the 'summons' is an important cause paper/document which is usually served upon the Defendant directly and not via solicitors, and the instant case is no different. The failure to act upon it promptly or to bring it to the attention of solicitors may lead to the entry of a judgment. As such, it is very important that such a cause paper/document must be properly titled and identified. What is conspicuously missing in the 'summons' filed and served by the plaintiff is the main title of the documents itself. In any event, notwithstanding the aforesaid, I think the issue of 'prejudice' would not arise at all herein because the breach is a breach of a mandatory/fundamental requirement of the rules of the court. For example, in the cases of *Zamrud Properties Sdn Bhd* and *Re Delta Drive (M) Sdn Bhd* [2000] 4 MLJ 27, the question would also arise in those cases as to what is the prejudice to the other party if a deponent did not state his residential address in this affidavit in compliance with O 41 r 1(4) of the RHC? In both the decisions, the court held that because of the word 'must', there was a breach of mandatory requirement which cannot be cured. I think it would make a mockery of the rules of procedure should the plaintiff be entitled to issue a 'summons' without even properly entitling or identifying the same in accordance with the rules of court.

Premised on the above authorities, I come to the conclusion that the Sessions court would not have the discretion to cure the non-compliance of the said mandatory provisions in accordance with O 2 of the SCR. In any event, it is trite law that 'rules must be obeyed' and I find support from the following case authorities.

In *Zamrud Properties Sdn Bhd*, at p 191, the court said:

> Further, the defects raised in preliminary objections (1), (2), (3), (5), (8) and (9) are fundamental defects which cannot be cured. The Privy Council in the celebrated case of *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 has stated that rules of the court must prima facie be obeyed. The lax and cavalier attitude that has been adopted by the applicant in this matter if condoned will make a mockery out of the rules of the court.

In *Raja Guppal a/l Ramasamy v Segaran a/l Pakiam* [1999] 2 MLJ 677, at p 680, the court said:

> By way of postscript, we quote *'it is time the litigants and their legal advisers realize and appreciate that rules are made to be observed and complied with and not flouted or wantonly ignore ad libitum'* per Abdoolcader J, in dealing with the failure of the appellant to comply with the statutory provision requiring service of the copy of the record of appeal on the Respondent or their solicitors in the Federal Court case of *Ng Yit Seng & Anor v Syarikat Jiwa Mentakap Sdn Bhd & Ors* [1981] 2 MLJ at p 195. (Emphasis added.)

In *Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420, at pp 422–423 the court said:

> From the appeal record, we note that he had also submitted in the High court that the impugned directory should not have been admitted in evidence because it had not been translated into Bahasa Kebangsaan as required by O 92 r 1 of the RHC ('the RHC') which states:
>
> 'Any document required for use in pursuance of these rules *shall be* in the national language, and may be accompanied by a translation thereof in the English language:
>
> Provided that any document in the English language may be used as an exhibit, with or without translation thereof in the national language.'
>
> We find that O 92 r 1 of the RHC, is a mandatory provision which requires that any document which is not in the national language or in the English language must be translated into the national language before it can be admitted as an exhibit. Further, it has been held by the courts that rules of court are to be obeyed. Failure to comply with them will lead to chaos in the conduct of litigation. See *Lee Guat Eng v Tan Lian Kim* and *Ratnam v Cumarasamy & Anor*. (Emphasis added.)

Based on the aforesaid case authorities, I think the issue of prejudice would not arise following the non-compliance of the said mandatory provisions. In fact the said 'summons' which did not comply with the mandatory provisions ought to have been 'rejected' at the time when it was filed — I refer to para 6 of the circular from the Chief Justice of Malaysia dated 10 April 2000 which states:

> Dokumen yang tak mengikut Peraturan Mahkamah (Lihat Pekeliling Ketua Pendaftar Mahkamah Persekutuan Bil 2/1999 bertarikh 22 May 1999). Writ saman, afidavit dan lain-lain dokumen yang difail tidak mengikut peraturan hendaklah ditolak.

A Practice Direction, although not law, ought to be strictly adhered to (See *Yeo Teik v Jemaah Pengadilan Sama, Pulau Pinang* [1996] 2 MLJ 54, at p 56. Hence, as the issuance of the said 'summons' is null and void the purported service is also void (see *Seng Loong Trading Co v Angel Department Stores Sdn Bhd* [1987] 1 MLJ 310).

Apart from the aforesaid, the plaintiff had failed to comply with O 5 r 2 of the SCR which provides as follows:

> Every summons other than the original and the sealed copy thereof must be appended with a notice of appearance in duplicate in Form 2 or 3, whichever is applicable.

The first defendant avers that no notice of appearance was appended with the purported 'summons and statement of claim' which was received by the first defendant. However it is noted that a copy of the said 'summons and statement of claim' which was received by the first defendant is exhibited in exh 'LKW–1' in the affidavit of support of the first defendant (refer to pp 35–42 of the record of appeal). It is clear from the said exhibit that no notice of appearance was attached. It is also noted that in both of the plaintiffs affidavits in reply, although the plaintiff claims that a copy of notice of appearance was appended, they failed to prove that the said copy of the purported 'summons' and statement of claim had a copy of notice of appearance appended to it and only produced covering letters (refer to Exhibits 'KK–1', 'KK–2' and 'KK–3', pp 43 48 of the record of appeal). The contents of the purported covering letters also did not disclose that a notice of appearance was enclosed. No 'summons and statement of claim' were exhibited by the plaintiff. In the absence of such proof being exhibited and in light of exh 'LKW–1' disclosed by the first defendant, I am of the view that the bare allegations of the plaintiff ought not be accepted by this court.

In *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530 the court held:

> The defendant's affidavit in reply did not contain any exhibits to support their case and was a blatant exaggeration and untrue.

In *Insas Bhd & Anor v Raphael Pura* [1999] 4 MLJ 650, at p 667 the court said:

> To a question by the court whether the defendant had attached any exhibits in his affidavit to back up his allegations, Encik Shafee's response was there are no exhibits attached because there is no necessity. With that I refused to hear him further and indicated there was no need for a response from the plaintiff.
>
> To my mind the defendant has failed to show a basis to seek the amendment. Whilst affirming an affidavit he has totally failed to exhibit any documents that support his prayer for amendment. Without the exhibits how is the court to know the basis of the defendant's allegations. In his affidavit in para 2, the defendant has admitted having 'records' to which he has access on which the affidavit it was based. Where are those records? What are those records?

In para 1 of the affidavit affirmed by K Karunagaran on 1 November 1999 (p 31 of the record of appeal), K Karunagaran deposed that he had access to the documents and records from which the 'information were obtained'. I think without the documents being produced, on the balance of probabilities, the bare allegations of the plaintiff ought not to be accepted. In para 4 of the said affidavit by K Karunagaran (pp 32–33 of the record of appeal), he alleged that 'semasa writ saman dan penyataan tuntutan difailkan, mahkamah yang mulia ini tidak akan menerima writ saman dan pernyataan tuntutan sekiranya notis kehadiran tidak dilampirkan kepada writ saman dan pernyataan tuntutan.' The said allegation of the plaintiff is also misconceived and misleading because pursuant to O 5 r 2 of the SCR,

the 'original and the sealed copy' filed is not required to be attached with a copy of the notice of appearance. Clearly, only the copies served must have a copy of notice of appearance appended thereto in accordance with either Forms 2 or 3. The said O 5 r 2 of the SCR provides for the word 'must' and premised on the above stated grounds, I am of the view that this non-compliance of mandatory provision by the plaintiff cannot be cured. Hence, the 'summons' and purported service of the same is also null and void. Another matter is that the plaintiff are also 'confused' because their affidavits in reply time and again made references to 'writ of summons' wherein this term is only applicable to High Court cases only and the relevant terms in the instant case should be 'summons' in this case. I am of the view that as the plaintiff's allegations in their affidavits are bare allegations, the first defendant need not file a reply to the same by way of affidavit (see *Ng Lai Tien v Peregnine Finance Ltd* [1995] 4 MLJ 7 at p 16).

It is observed that the plaintiffs counsel submitted that 'the appellant chose not to reply to the said material averments' in para 3 of the affidavits in reply (II) affirmed by K Karunagaran on 1 November 2001 and therefore would 'tantamount to an admission on the part of the appellant'. The plaintiffs submissions are misleading. Indeed, the First pefendant did not reply to the said plaintiffs affidavit but this I am of the opinion was because there was no necessity to reply any further in the context of the issues already raised in this application. The first defendant had already categorically averred in para 5(b) of the first defendant's affidavit in support affirmed by Lau Khim Woon on 26 July 1999 that the plaintiff had breached O 5 r 2 of the SCR because the notice of appearance was not attached together with the 'summons' and statement of claim purportedly served. In fact, the copy of the 'summons' and statement of claim actually received by the defendant was exhibited by the first defendant as exh 'LKW–1' of the said affidavit. Paragraph 3 of K Karunagaran's said affidavit was averred in reply to the said para 5(b) of the Lau Khim Woon's affidavit. Accordingly, then there would be in effect already a joinder of issue on this contention with respect to the lack of notice of appearance and this is not a case in which a positive assertion on a matter in issue had gone unchallenged. In the case of *Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & Ors* [2001] 1 MLJ 451, at p 463, the court stated:

> With reference to the plaintiff's attempt to discharge its evidential burden by the use of the principle governing the evaluation of affidavit evidence as stated in the case of *Ng Hee Thoong & Anor v Public Bank Bhd*, I regret to say the principle is of no avail to the plaintiff in this case as firstly, it was the defendants who had by their affidavit made the allegation of lack of authority and what was said by Lo Kok Kee was said in reply to the defendants; allegation; there had, accordingly, been a joinder of issues on the question of authority and therefore this was not a case in which a positive assertion on a matter in issue had gone unchallenged; and secondly, the assertion made by the plaintiff regarding the authority it had allegedly given Wong Nam Loong concerned matters solely within its own knowledge and it was for the plaintiff to make good that bald assertion by producing evidence in support thereof, but none was. The failure or omission of the defendants to refute or contradict the assertion does not in the circumstances give rise to any inference that the

defendants f admitted the truth of the assertion. Nor does it follow that the court ought to accept the assertion. (See *Cold Storage Singapore (1983) Pte Ltd v Management Corp of Chancery Court* [1992] 1 SLR 521).

Further, since the plaintiff had failed to adduce any evidence apart from a bare allegation that the 'summons' and statement of claim was attached with the notice of appearance, it would be illogical for the first defendant to merely file an affidavit just to 'deny' para 3 of K Karunagaran's affidavit. As can be seen from exhs 'KK–1', 'KK–2' and 'KK–3' of K Karunagaran's said affidavit they merely show covering letters. No office copy of the 'summons and statement of claim' were exhibited and the contents of the purported covering letters also did not say that a notice of appearance was enclosed. I wholly agree with the principles of law stated in the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 and *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 referred to by the plaintiffs counsel. However, I think based on the aforesaid the principles therein have no application herein. In essence, since the first defendant had averred an oath that the 'summons' and statement of claim received was not appended with a notice of appearance and the plaintiff disputed the same, the parties are entitled to submit on this issue. I can see that there is no admission as alleged by the plaintiff. The 'crux' of the matter would be whether on the balance of probabilities, the first defendant's or the plaintiffs contentions on this issue is to be believed. On the balance of probabilities, the plaintiffs contention is hereby rejected because as stated in the case of *Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & Ors*, when the matter asserted by the plaintiff concerns matter solely with its own knowledge, it was for the plaintiff to make good the bald assertion by producing evidence in support thereof. Here, although K Kamnagaran alleged the that 'summons' and statement of claim was not attached with a notice of appearance, only the plaintiff would know whether such a notice of appearance have been enclosed with the covering letter shown by the plaintiff. As for the first defendant, the copy of the 'summons' and statement of claim received did not contain a notice of appearance and proof of the same was exhibited. The plaintiff submitted that 'how could the Respondent exhibit a copy of the summons and statement of claim which was annexed with the notice of appearance and served on the appellant, when the said document is in the possession of the appellant!' This argument is fallacious simply because the plaintiff could at least exhibit the office copy of the 'summons' and statement of claim complete with a notice of appearance to show that such documents were indeed prepared. It would be inconceivable that the plaintiff does not keep a complete copy of the summons and statement of claim (with the notice of appearance attached) in their file since they alleged they had served such a copy. If the plaintiffs argument is taken further, I would like to ask how come the plaintiff managed to exhibit copies of the covering letters when these documents were purportedly also served onto the first defendant? Also, no purpose would be fulfilled by showing the covering letters when they do not prove that the notice of appearance was enclosed. Therefore without proper exhibits, the plaintiffs allegations are bare allegations and would not be

accepted by the court (see *Segar Restu (M) Sdn Bhd v Wong Kai Chuan* [1994] 3 MLJ 530 and *Insas Bhd & Anor v Raphael Pura*). Since the first defendant had exhibited the 'summons' and statement of claim actually received by them in exh 'LKW–1' of the affidavit affirmed by Lau Khim Woon (see pp 36–42 of the appeal record) and the plaintiff had failed to show any evidence otherwise, on the balance of probabilities I do not believe the plaintiffs allegation. There is one further point which would clearly show that the summons and statement of claim received by the first defendant did not enclose a notice of appearance. At the back of the statement of claim received by the first defendant found at the back of p 42 of the Appeal Record is the number '330' ie the BC Box number which would show that that page is the last page of the document and no further notice of appearance could have been attached. The plaintiffs counsel also alleged that 'no challenge was made by affidavit as to why summons and statement of claim were not enclosed in the affidavit in reply (II)'. I think the first defendant is not obliged to point out omissions in the plaintiffs affidavits and this is a point which could be validly taken up by the first defendant in their submissions. It is trite law that an affidavit is not a place to make submissions (summons and statement of claim were not enclosed in the affidavit in reply (II)'. I think the first defendant is not obliged to point out omissions in the plaintiffs affidavits and this is a point which could be validly taken up by the first defendant in their submissions. It is trite law that an affidavit is not a place to make submissions *Yamamori (Hong Kong) Ltd v Davidson & Ors* [1992] 2 MLJ 40. Similarly, it is improper for the plaintiff to contend that the averment in para 4 of the affidavit in reply (II) of K Karunagaran that the court would not accept the summons if the notice of appearance is not annexed was not challenged by the first defendant by affidavit. This is a matter of court procedure, subject to rules and ultimately for this court to decide. For instance, if one makes an averment in an affidavit that an invalid Writ of summons would be accepted by court, would the non–reply to the same make such an allegation true? Pursuant to O 5 r 2 of the SCR, the 'original and sealed copy' filed is not required to be attached with a copy of the notice of appearance. I am of the opinion that the plaintiffs contention are premised mainly on the 'non–reply' of affidavits and the plaintiff had failed to properly deal with the merits and facts and circumstances raised by the first defendant.

A B C D E F G

It is to be observed in the instant case, that the plaintiff had breached not, one but two mandatory provisions, namely O 5 rr 1 and 2 of the SCR. Although the plaintiff submitted that each case has to be determined on its 'peculiar facts', the plaintiff had failed to explain what are the peculiar facts of this case that would distinguish the principle of law interpreting the word 'must' in the cases cited by the first defendant. It is seen that the plaintiff has no valid explanation for the said breaches and could not distinguish the said principle of law. Order 2 r 1(1) of the SCR would not assist the plaintiff in the circumstances of this case. The plaintiffs submissions on 'O 2 r 1(1) of the SCR' is not bona fide at all. The plaintiff had all this while maintained in their submissions that they had not breached O 5 rr 1 or 2 of the SCR. Having made this stand, why are they referring to O 2 r 1 of the SCR. The

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plaintiffs argument is not even an argument on the alternative. By asking for a cure, the plaintiff would admitted that they have breached O 5 rr 1 and 2 of the SCR. It is submitted that the plaintiff cannot be allowed to 'blow hot and cold' and urge this court to disregard the plaintiffs submissions on this issue. Further the cases referred to by the plaintiff did not specifically rule on the word 'must' which have been consistently held not to 'create the existence of any discretion or empowers the court to exercise such discretion'.

In any event, it must be noted that in order for the court to exercise any discretion in favour of the plaintiff, there must be some material to justify such exercise of direction. It is trite law that rules of the court must be obeyed and in order to justify any exercise of discretion in favour of a party, there must be material to satisfy the court that such discretion ought to be exercised (see *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228). Further, the said O 2 r 1 of the SCR ought not to be wantonly utilized.

In *Nyana Pandithan @ MG Pandithan v Vettiveloo Kasinathan & Ors* [1997] 1 CLJ Supp 30, at p 36 the court said:

> Instead, as I have stated above, and this is most unfortunate, she merely urges this court to cure (I believe this is what she meant by 'rectify') the irregularity by invoking O 2 r l of the SCR. With respect, this approach as adopted by her, only goes to reflect her cavalier attitude , towards rules of procedure as well as the grave misconception on her part of the purpose of O 2 r l. May I remind learned counsel that a generous use of this provision by the courts would only make a mockery of our rules of procedure.
>
> With respect, although I accept that by virtue of O 2 r 1 the defect is an irregularity and does not render the proceeding a nullity, nevertheless, in my judgment, the failure to enclose in the appeal record the decision appeal from is not a minor irregularity but a serious omission which cannot be cured simply by invoking O 2 r l.

In the case of *Genisys Intergrated Engineers Pte Ltd*, at p 1718, the court said:

> Order 1 r 7 of the RHC makes mandatory for litigants to sue the Forms in Appendix A where applicable with such variation as the circumstances of each particular case require. In our present case, there is nothing to show that the circumstance of the case require the petitioner not to comply with the relevant requirement ie to state the order sought to be obtained in encl 38. There's no reason given as to why the petitioner cannot fulfil the said requirement.

Similarly, in the instant case, the plaintiff merely urges this court to 'cure'. Firstly, what does the plaintiff wish to cure if they maintain that all is in order. Secondly, what is the explanation for the cure? The Court of Appeal case of *United Malayan Banking Corp v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 can be distinguished as it dealt with a bankruptcy action at an appellate stage. This Court of Appeal decision ought to be read in the light of the various Privy Council, Supreme Court and Court of Appeal cases wherein the court had consistently held that rules must be obeyed strictly. Further, the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 321 dealt with the principle of estoppel. In any event, by analogy, with respect to the passage in the case of Boustead

that the courts ought to do justice according to the law, would justice be served if the plaintiff be allowed to blatantly breach the mandatory rules of procedure without proper explanations? Further, it is pertinent to note that it is not that 'courts must do justice' but 'courts must do justice according to the law'. The plaintiff had breached the law and 'justice according to the law' would be best served by upholding the said rules of court. In *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1985] 2 MLJ 440, at p 454 the Court of Appeal held that 'certain breaches of procedures are placed beyond the curing provisions of the RHC' and I think that O 5 rr 1 and 2 of the SCR are examples of such provisions.

Based on the aforesaid grounds, the appeal herein is allowed with costs, and order in terms is hereby granted with respect to the first defendant's application vide amended notice of application dated 26 July 1999.

Appeal allowed.

Reported by Lim Lee Na