Ayob bin Abd Hamid & Ors v Asia Plantation Capital Pte Ltd & Ors [2024] MLJU 1057

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

SU TIANG JOO J

CIVIL SUIT NO WA-22NCvC-69-01 OF 2020

8 May 2024

Shobah Veera (with Deyvinah Ganesalingam) (Hakem Arabi & Assoc) for the plaintiffs.
Tharani Monusamy (Susielan & Assoc) for the first defendant.
Amitaesh Theva (Lavania & Balan Chambers) for the second, seventh, eighth, ninth, 12th, 16th and 20th defendants.
Ee Kah Fuk (with Marcus Chong Chao Shern) (KF Ee & Co) for the fourth defendant.
Arun Ganesh Boopalan (Kamil Hashim Raj & Lim) for the sixth defendant.
Siva Subramaniam (Subramaniam & Shafiq) for the 11th and 18th defendants.
Mohamed Fairoz Elyas Majeed (Elyas Majeed & Co) for the 19th defendant.

Su Tiang Joo J:

JUDGMENT

(Enclosures 11, 13, 15 and 25)
Introduction

[1] The four applications under consideration by this Court raised a

short and important point on what is the consequence when a party enters an appearance to the action even though the party received the Writ by courier

service instead of being served personally or by A.R. Registered Posted in accordance with Order 10 Rule 1(1) of the Rules of Court 2012.

Salient background facts

[2] In this action, save for Marion Fischer, Passport No: F0902867 (the 73rd plaintiff) who is a foreigner residing in Malaysia and AJP Properties Sdn Bhd, No. Syarikat: 116998-K (the third plaintiff) and Meru Saga Sdn Bhd, No. Syarikat: 301239-T, (the 152' plaintiff) which are both private limited companies registered in Malaysia, all the other plaintiffs are Malaysian individuals.

[3] All the 173 plaintiffs (collectively referred to as "the Plaintiffs") entered into an agreement with Asia Plantation Capital Pte Ltd (the first defendant which shall be referred to as "Dl"), a private limited company registered in Singapore to invest in a scheme where Agarwood trees are to be planted in Thailand before they are to be harvested and sold ("Agarwood Scheme"). D1 is the leasehold owner of the plantation in Thailand. Under the Agarwood Scheme the plaintiffs were to secure guaranteed returns to be calculated premised upon a prescribed formula under their respective agreements based upon the number of Agarwood trees they purchased.

[4] Payments were made by the Plaintiffs to Asia Plantation Singapore Pte Ltd, No. Syarikat: 201106988E, Singapore (the second defendant which shall be referred to as ("D2"), a company registered and having its place of business in Singapore.

[5] Neilson Navin a/I Anthony Aloysius (the 1 1 th defendant) and Chong Wai Chee (the 18th defendant) were agents for the sale and marketing agents of D1 through APS Asia Plantation Bhd (the third defendant) and Forestry First Sdn Bhd (the ninth defendant).

[6] The Plaintiffs claim that they invested in the Agarwood Scheme as a result of fraudulent misrepresentations made by the defendants who had individually or in combination amongst them conspired to injure them. They also allege that the Agarwood Scheme is tainted with illegality the particulars of which for purposes of this judgment, need not detain us.

[7] The respective agreements that the plaintiffs entered into with D1 each has a clause which provides that in the event of any dispute, the matter is to be resolved by way of arbitration (the "Arbitration Agreement").

[8] A judgment in default of appearance has been obtained against D1 on 7

January 2021. D1 had gone into liquidation, and on 11 April 2023, learned counsel acting for the liquidator withdrew Dl's application (Encl 174) to set aside the judgment in default of appearance. Thus, the judgment against D1 (Encl 161) which is reproduced hereunder remains valid:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DI WILAYAH PERSEKUTUAN MALAYSIA
(BAHAGIAN SIVIL)
GUAMAN NO: WA-22NCvC-69-01/2020

ANTARA

AYOB BIN ABD HAMID & 172 YANG LAIN-LAIN

...PLAINTIF-PLAINTIF

DAN

ASIA PLANTATION CAPITAL PTE LTD & 19 YANG LAIN-LAIN

...DEFENDAN-DEFENDAN

PENGHAKIMAN INGKAR KEHADIRAN
(Defendan Pertama)

TIADA KEHADIRAN telah dimasukkan oleh Defendan Pertama dalam tindakan ini dan **ADALAH HARI INI DIHAKIMI** bahawa Penghakiman Ingkar Kehadiran direkodkan terhadap Defendan Pertama sepertimana yang diplidkan di dalam Writ Saman dan Pernyataan Tuntutan kedua-dua bertarikh 31 haribulan Januari 2020 seperti berikut :-

(a) Defendan Pertama untuk membayar balik secara bersama dan/atau berasingan ('jointly and/or severally') kepada setiap Plaintif dan/atau Plaintif-Plaintif yang berkenaan jumlah harga belian yang dibayar bagi pembelian pokok Agarwood seperti yang dinyatakan disini dan/atau sebanyak RM 21,358,613.00 (Ringgit Malaysia Dua Puluh Satu Juta Tiga Ratus Lima Puluh Lapan Ribu Enam Ratus Tiga Belas sahaja) sepenuhnya;

(b) Defendan Pertama secara bersama dan/atau berasingan ('jointly and/or severally') membayar balik kepada setiap Plaintif dan/atau Plaintif-Plaintif

yang berkenaan yuran-yuran agensi pemasaran 'marketing fees' dan/atau yuran-yuran agensi pemasaran sebanyak RM 118,830.00 (Ringgit Malaysia Satu Ratus Lapan Belas Ribu Lapan Ratus Tiga Puluh sahaja);

(c) Defendan Pertama secara bersama dan/atau secara berasingan untuk membayar balik Gantirugi Spesifik iaitu sekurang-kurangnya SGD 26,960,000.00 (2 Tola) (SGD Dua Puluh Enam Juta Sembilan Ratus Enam Puluh Ribu sahaja) sehingga ke SGD 54,120,000.00 (4 Tola) (SGD Lima Puluh Empat Juta Satu Ratus Dua Puluh Ribu sahaja) selaku pulangan terjamin Plaintif-Plaintif dan/atau pada kadar yang diisytiharkan oleh Mahkamah Yang Mulia di sini;

(d) Defendan Pertama untuk membayar faedah pada kadar 5% setahun dari tarikh kausa tindakan sehingga penyelesaian penuh; dan

(e) Defendan Pertama untuk membayar kos tindakan sebanyak RM 2,157.00 (Ringgit Malaysia Dua Ribu Satu Ratus Lima Puluh Tujuh sahaja), dan/atau

(f) Perintah terhadap Defendan Pertama seperti yang dipilidkan dalam Pernyataan Tuntutan.

Bertarikh 7 Jan , 2021.

NURLIANA BINTI ISMAIL
Timbalan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

PENGHAKIMAN INGKAR KEHADIRAN ini difailkan oleh Tetuan Hakem Arabi & Associates peguamcara bagi pihak Plaintif-Plaintif yang beralamat di Suite No. 8-15-2, 15th Floor, Menara Mutiara Bangsar, Jalan Liku, off Jalan Riong, 59100 Kuala Lumpur.
Tel: 03-2282 2339 / Fax: 03-2282 2078
[Ruj.: HAA/KL/CL/AW/4787/19 /SV]

PENGIRAAN KOS

1.	Kos Dakwaan	-	RM1,500.00
2.	Membalikan Saman	-	RM416.00
3.	Afidavit Penyampaian	-	RM16.00
4.	Pesuruhjaya Sumpah	-	RM65.00
5.	Perakuan Kelidakhadiran	-	RM40.00
6.	Penghakiman Ingkar	-	RM60.00
7.	Bayaran Pos dan Salinan Foto	-	RM50.00
	Jumlah	-	RM2,157.00

Challenge to jurisdiction of the Court, applications to set aside the service of the Writ or to stay the action pending arbitration

[9] Five applications were made by diverse defendants to challenge the jurisdiction of this Court, and to have the service of the Writ upon them set aside due to irregular service of the Writ, or that the action be stayed pending arbitration. These applications were:

i) Enclosure 11 by the 18th defendant ("D18");

ii) Enclosure 13 by Asia Plantation Capital Bhd who is the fourth defendant ("D4");

iii) Enclosure 15 by Steven Malcolm Watts who is the sixth defendant ("D6");

iv) Enclosure 23 by Neilson Navin all Anthony Aloysius who is the 11th defendant ("011"); and

v) Enclosure 35 by Chong Wei Kiong who is the 19th defendant ("D19"). However, D19's application was withdrawn and struck out on 23 May 2023 with costs of RM2,000.00 subject to allocatur to be paid by D19 to the Plaintiffs.

[10] In summary, the applications were premised on three grounds namely:

i) that the Writ had not been duly served upon them;

ii) that by reason of *forums inconvenience,* this Court is not the convenient forum to hear the action: and

iii) that the action be stayed pending arbitration pursuant to section 10 of the Arbitration Act 2005 Act 646.

[11] Comprehensive written submissions were filed by learned counsel for all the relevant parties with oral submissions presented on 23 May 2023, and 28 July 2023 with I delivering my decision on 16 November 2023.

Court's analysis and decision

Stay pending arbitration/Court's jurisdiction/Forum non-conveniens

[12] On 28 July 2023, this Court was informed by learned counsel for D1 that although it is the only contracting party to the respective agreements with the Plaintiffs which carries an arbitration clause or agreement in each of these agreements, D1 has no intention of going for arbitration.

[13] At the same time, learned counsel for D4, Mr Ee Kah Fuk, informed this court of D4's decision to abandon prayers (a) and (b) of Enclosure 13 which are for: i) the setting aside of service of the Writ and Statement of Claim, and ii) for a declaration that this Court has no jurisdiction over the matter.

[14] However, Mr Ee brought to the attention of this Court that in a similar case in nature, namely, WA-22NCVC-848-12/2020 **("Suit 848")** involving the same Agarwood Scheme, an application was filed to stay the proceedings or alternatively to strike out the plaintiff's claim for want of jurisdiction pursuant to section 10 of the Arbitration Act 2005 and/or under Order 12 Rule 10 (1) (a) or (g) and Order 12 Rule 10 (2) till Order 12 Rule 10 (5) of the Rules of Court 2012 **("ROC")..** The application in Suit 848 was allowed with the action struck out for want of jurisdiction, and that the case is to be arbitrated and decided according to Singapore law and rules on arbitrations. The decision of His Lordship, Justice Akhtar Tahir, in Suit 848 was published as *Tan Keh Heng & Ors v Asia Plantations Capital Bhd & Ors* [2021] MLRHU 2365; [2021] MLJU 2808.

[15] In the course of deliberating on the applications before me, I had checked the Court's Case Management System, and I observed that on 7 August 2023, the aforesaid decision of His Lordship, Justice Akhtar Tahir, in Suit 848 has been overturned by a panel of Judges in the Court of Appeal in W-02(IM)(NCvC)-1992-

10/2021 comprising their Lordships, Justices Gunalan Muniandy, Azimah Omar and Wong Kian Kheong JCA which held as follows:

> *"Court: Unanimous Decision. To our minds, it is plain and obvious that the learned Judge's decision was wrong in law and facts. Amongst others, there was no privity of contract between the Appellant and the Respondent. The contract was only between the Appellant and the 2nd Defendant. For the Respondent to move the court under* section 10 of the Arbitration Act *which was the first basis or ground for the application before the High Court. The second ground was that the Malaysian Courts have no jurisdiction which again in our view is plainly wrong because of the causes of action pleaded by the Appellant which would include fraud, misrepresentation, illegality and importantly also conspiracy to injure which confer jurisdiction on the Malaysian court and not exclusively to the Singapore courts under the agreement which again does not bind the Appellants. Our considered view is that the learned Judge's decision is erroneous and plainly wrong that merits our intervention to correct the learned Judge's plain error of law and fact. We therefore, would conclude here this appeal has to be allowed which we hereby do and set aside the whole decision and order made by the High Court with costs to the Appellants here and below in the sum of RM10,000.00 subject to allocator. This matter is remitted for trial before another High Court Judge of the Kuala Lumpur High Court."*

[16] The Court of Appeal's decision is clear in that non-parties to the arbitration clause or agreement cannot seek to stay the action pending arbitration, and where fraud, misrepresentation, illegality and conspiracy to injure were pleaded, the Malaysian Court has jurisdiction to hear the matter.

[17] See also *Jaya Sudhir A/L Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 (FC) where the Federal Court held that the Arbitration Act 2005 Act 646, and in particular, sections 8, 10 (1) and 10 (3) thereof do not apply to a party who is not a party to the arbitration agreement. At paragraph 32, the Federal Court held:

> *[32] By way of emphasis, an important point that we would like to make at this juncture is that in this case it is as plain as a pikestaff that there is* ***no arbitration agreement as between the appellant and the first respondent as defined in*** s 9 ***of Act 646, whether in relation to the subject matter of the appellant's claim in this action or otherwise. The appellant is also not a party to the arbitration proceedings as defined in*** s 2 ***of Act 646. It is thus not possible for the appellant or the first respondent to refer this action to arbitration. The appellant's claim in this action and the injunction application therefore do not come within the ambit and scope of*** sub-s 10(1) ***of Act 646."***

[18] In the instant case, the applicants in the four remaining applications before me, namely, D4, D6, D11 and D18 are not parties to the arbitration agreement that the plaintiffs have made with D1. And, with them having grounded their action on fraudulent misrepresentations, that the Agarwood Scheme is tainted with illegality and that the defendants have conspired to injure them who are all residing or having a place for business in Malaysia, this Court has jurisdiction to hear the matter, see section 23 (1) (b) of the Courts of Judicature Act 1964 Act 91.

[19] As for the issue of *forum non conveniens,* the following judgment of the Federal Court in *Goodness For Import And Export v. Phillip Morris Brands Sarl* [2016] 7 CLJ 303 (FC) on the doctrine of *forum non conveniens* is instructive, and it cannot be gainsaid, that it is binding on this Court:

[55] This brings us to the question relating to forum conveniens/non conveniens. The learned judge in the High Court ruled that Malaysia and the High Court here was not the forum conveniens to try the present case. With respect, for reasons which we will set out in a moment we are unable to agree with her. The principle governing the doctrine of forum non conveniens was restated in ***Petrodar Operating Co Ltd v. Nam Fatt*** *(supra) when this court said:*

[21] Next we move on to the issue of forum non conveniens. In discussing the issue of forum non conveniens one cannot escape from the reasoning's postulated in the case of American Express, wherein the then Supreme Court was of the view that forum non conveniens refers to the suitability or appropriateness and not convenience itself. The fundamental principle governing this maxim is that whether there is some other tribunal, having competent jurisdiction, in which the case can be tried more suitably for the interest of all parties to meet the ends of justice. A good guide for Court in deliberating on the issue of forum non conveniens was well set out in the foregoing passage of His Lordship Peh Swee Chin's judgment which is reproduced herein below as follows:

> *In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the Court that "some other forum is more appropriate" per Lord Templeman in the Spiliada. Where on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under* O. 11 r. 1 of the RHC *is involved then according to the reasoning of Lord Templeman, the plaintiff, (not the defendant, be it noted) would have to satisfy a Malaysian Court that, by comparison, that Malaysian Court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case the burden lay on the bank customers, the plaintiffs to satisfy the High Court below that Malaysia was the most appropriate forum.*

Having regard to the reasoning of the learned Law Lords in the Spiliada and the learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O. 11 r. 1 of RHC*, or for setting aside such leave, it will be obligatory for a Malaysian Court to consider in any event, a most important factor i.e., whether "it would be unjust to the plaintiff to confine him to remedies elsewhere". It is indispensable when a Malaysian Court considers all cases in connection with forum non conveniens.*

The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualise a large number of factors which overlap with one another.

[22] In American Express there was an express clause in the agreement that parties chose the Singapore Courts for litigation. This is a point of considerable significance which His Lordship Peh Swee Chin took cognizance of and later held that: (emphasis added)

> ***We considered the relevant factors in this instant appeal. A very glaring factor in the instant appeal was the foreign jurisdiction clauses in both the said agreements as set out above by which the bank customers had chosen Singapore Courts for the litigation i.e., expressly, in other words, the bank customers had submitted to the jurisdiction of the chosen Singapore Courts; and further both parties had chosen Singapore law as the law of their choice for the litigation, prospective or otherwise.***
>
> ***It would be clear that, notwithstanding such clauses, a Malaysian Court i.e., High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not, please see Federal Court's case of*** *Globus Shipping & Trading Co (Pte) v. Taiping Textile Bhd.* [1976] CLJU 31; [1976] 1 LNS 31; [1976] 2 MLJ 154.

[23] From the plain reading of His Lordship Peh Swee Chin's reasoning on the existence of such jurisdictional clause which sets out the manner in which parties would litigate in case of any dispute, we can safely conclude that notwithstanding the presence of such a clause the Malaysian court ie, the High Court below, could not be precluded simpliciter thereby from

exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not. In American Express based on the facts and circumstances it was held that:

> *... except for the fact that the alleged fraudulent and misleading information or instructions from the foreign bank to the bank customers were received by the bank customers in Kuala Lumpur, all 127 foreign exchange transactions had taken place, outside Malaysia, in London, New York and Singapore and all the securities of the customers were deposited with the foreign bank in Singapore and London. The bank customers who were husband and wife, were residents in Malaysia; but the main protagonists from the foreign bank's camp were residents outside Malaysia, either in London, or Singapore. There were no peculiar difficulties which the bank customers would face apart from the inconvenience and expenses in crossing the causeway to Singapore which was more suitable as a forum. The bank customers, as plaintiffs, had plainly failed to satisfy the Court that the Malaysian Court was the most appropriate forum to try the action which they launched.*

[24] It is clear from the above, the Supreme Court in American Express was satisfied based on the facts and circumstances which is peculiar to that case that it was much suitable for the case to be adjudicated in Singapore. Reverting back to the case at hand, it therefore behoves us to consider whether Malaysia is the appropriate forum to adjudicate this matter.

[56] ***Thus, the fundamental question which the court must consider is whether there is some other tribunal, having competent jurisdiction in which the case can be tried more suitably for the interests of all parties to meet the ends of justice."***

[20] In asserting that this Court does not have jurisdiction or is not the *forum conveniens* to hear the matter, the applicants (D4, D6, D11 and D18) individually and in combination amongst them assert that:

i) the subject matter of the suit has no connection with Malaysia;

ii) the plaintiffs are individual purchasers under their respective sale and purchase agreements with D1 to purchase Agarwood trees located in Thailand;

iii) D1 is incorporated in Singapore and has its place of business in Singapore;

iv) in the sale and purchase agreements made with D1, there is a clause (Clause 40) providing that the laws and regulations in Singapore are to apply;

v) the plaintiffs have an alternative claim seeking specific performance of their sale and purchase agreements which contain an arbitration clause for any disputes to be resolved by way of arbitration in Singapore to be administered at the Singapore International Arbitration Centre, with reliance placed upon *Apex Marble Sdn Bhd & Anor v Leong Tat Yan* [2018] 7 MLJ 84 (HC) where the High Court held that it is trite that a choice of law or choice of forum clause will ordinarily tilt the balance to the choice as stated in the contractual provision;

vi) the Court ought to give effect to the foreign or exclusive jurisdiction clause and not rewrite the terms of the agreement, see *World Triathlon Corp v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394 (CA); *Globus Shipping & Trading*

Co. (Pte) Ltd v Taiping Textiles Berhad [1976] 2 MLJ 154 (SC); *American Express Bank Ltd v Mohamad Toufic Al-Ozier & Anor* [1995] 1 CLJ 273 (SC); *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC) and *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 (FC);

vii) the purchase price for the Agarwood trees were transferred directly by the plaintiffs into a bank account set up and maintained in Singapore by D2 and this bank account falls under the purview of the regulatory authorities of Singapore;

viii) viii) it would be costly and time consuming to call experts to give evidence on the laws of Singapore; and

ix) the adjudication of issues against all defendants should not be separated to avoid multiple proceedings to avoid the embarrassment of inconsistent findings.

[21] In my considered view, this Court has the jurisdiction to hear the matter. Section 23 (1) (b) of the Courts of Judicature Act 1964 provides that subject to the limitations contained in Article 128 of the Constitution, which is to do with the jurisdiction of the Federal Court and which is not relevant here, the High Court shall have jurisdiction to try **all** civil proceedings where the defendant **or one of several defendants resides or has his place of business.** In this case, it is undisputed that D4 has its place of business in Malaysia.

[22] Therefore, in applying the test as was laid down in *Petrodar Operating Co Ltd v. Nam Fatt Corp Bhd & Anor* [2014] 1 CLJ 18 (FC) and reaffirmed by the Federal Court in **Goodness For Import And Export** (supra) it behoves this Court to consider whether Malaysia is the appropriate forum to adjudicate this matter.

[23] Having perused the affidavits filed and the submissions presented, I am of the considered view that this Court is the appropriate forum to adjudicate the matter for the following reasons:

i) the applicants, D4, D6, D11 and D18 are not parties to the respective sale and purchase agreements and premised upon the doctrine of privity of contract, at this interlocutory stage, it cannot be held for certain that they can assert rights under these agreements which house the arbitration and exclusive jurisdiction clauses, see *Tan Poh Yee v. Tan Boon Then and other appeals* [2017] 3 CLJ 569; [2017] 3 MLJ 244 (CA) at para. [18], which is reproduced hereunder, for the trite principle that a stranger to a contract suffers no liabilities and obtain no rights thereunder:

> *"[18] The fundamental principle of law on this point has been constantly followed and repeated by our courts that only a party to a contract can sue on it and only the parties to a contract have enforceable rights and obligations under such contract. We may categorically state, as an extension to this principle, that no stranger to the consideration can take advantage of a contract, although made for his benefit.";*

ii) the validity of their respective sale and purchase agreements are being challenged by the plaintiffs who assert that various representations were made prior to these agreements being made, including that of the number of trees each were to get, the length of time, the amount of oil the trees would produce and in fact, the legality of the agreements are being questioned;

iii) that these representations made by the several persons who are also being sued as defendants are asserted to be fraudulent and with the bulk of the representations being made in Malaysia, it is more than arguable that the cause of action arose in Malaysia, see section 23 (1) (a) of the Courts of Judicature Act 1964 Act 91 which provides that subject to the limitation of Article 128 of the Federal Constitution, the High Court shall have jurisdiction to try all civil proceedings where the cause of action arose; and

iv) almost all of the 173 plaintiffs but two (Ratnakar Kota who is the 128th plaintiff and Vasantha Kota who is the 129th plaintiff) reside in Malaysia and it would be more convenient for them to give evidence here in Malaysia and the number of any experts on foreign law to be called as witnesses, if at all necessary, pales in comparison to the number of plaintiffs in this action.

Issue of service of Writ and Statement of Claim

[24] As mentioned above, in the several applications before the Court, the applicants (D4, D6, D11 and D18) have applied to set aside the service of the Writ and Statement of Claim on each of them and to declare that the service upon them to be irregular. Their respective applications were grounded on Order 12 rule 10 of the ROC. Order 12 rule 10 of the ROC provides that:

> **"Dispute as to jurisdiction** (O. 12, r. 10)
>
> *10.(1) A defendant who intends to dispute the jurisdiction of the Court in the proceedings by reason of any irregularity as is*
>
> *mentioned in rule 9 or on any other ground shall enter an appearance and, within the time limited for serving a defence, apply to the Court for—*
>
> (a) *an order setting aside the writ or service of the writ on him;*
>
> (b) *an order declaring that the writ has not been duly served on him;*
>
> (c) ...
>
> (d) ...
>
> (e) ...

(f) ...

(g) ...

(h) ...

[25] The service of the Writ on the applicants (D6, D11, and D18) were by way of courier. They asserted that such service is irregular because Order 10 Rule 1(1) ROC provides that a Writ shall be served personally or be sent to them by prepaid A.R. Registered post addressed to their last known address

[26] In the course of the hearing of the several applications, learned counsel for D4 informed the Court that D4 is abandoning the ground that service upon it was irregular. I commend learned counsel for taking such a gracious stand for the reasons now following.

[27] It is undisputed the other remaining applicants (D6, D11 and D18) have all entered appearances to this action. The respective Memoranda of Appearances filed by these defendants are as follows

i) D6 (together with D4) on 4 March 2020 (Enclosure 9);

ii) D11 on 8 April 2020 (Enclosure 22); and

iii) D18 on 4 March 2020 (Enclosure 10).

[28] With all these defendants having entered appearances, in my considered view, pursuant to Order 10 rule 1 (3) ROC, they are deemed to have been duly served on the diverse dates that they have entered appearances. Order 10 rule 1(3) of the ROC 2012 provides:

> "(3) ***Where a writ is not duly served on a defendant but he enters an appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance."***

[29] In *Supreme Finance (M) Bhd v Wing Hong How* [1999] 3 MLJ 114 (CA) His Lordship, N H Chan JCA after referring to Order 10 rule 1 (3) of the Rules of the High Court 1980 which is in pari materia with Order 10 rule 1 (3) of the ROC summarized the rules on service and said that:

> *"(1) Where service of a writ is required by the rules or by an order of the court to be served personally, it must be so served on each defendant or (since 1993) by sending it by prepaid AR registered post addressed to the defendant's last known address* (O 10 r 1(1) and O 62 r 1(1)*). See also Kenneth Allison Ltd & Ors v AE Limehouse & Co* [1991] 3 WLR 671 *(HL). In the present case the respondent Wing Hong How was never personally served with the writ at all.*
>
> ***(2) But a writ is not required to be served personally on a defendant in the following situations:***

(i) *Where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of the defendant. In such a case the writ is deemed to have been served on the defendant on the date on which the indorsement was made* (O 10 r 1(2));

(ii) ***Where, without a writ being duly served on him, a defendant enters unconditional appearance in the action. In such a case the writ is deemed to have been served on him on the date on which he entered appearance*** (O 10 r 1(3));

(iii) *Where the defendant or his solicitor undertakes in writing to accept service and enter an appearance* (O 62 r 1 (3))."

[30] See also *Development & Commercial Bank Bhd. v Aspatra Corp. Sdn. Bhd.* (1995) 3 MLJ 472 (SC), His Lordship, Peh Swee Chin, speaking for the Supreme Court in a unanimous decision said:

> ***"*** *if a person becomes aware of an irregularity of service and subsequently takes a further step in the action which could only be useful if the service had been good, the irregularity is waived. As Lorrain had applied for leave to file an appearance and statement of defence, this clearly indicated that the irregularity of service was a matter of the past and no longer an issue."*

[31] However, it has been held by several authorities that service by courier is "nothing more than personal service". In *Jeganathan all Paramachivain v Liberty Insurance Berhad* [2020] MLJU 1176 (HC) His Lordship, Amarjeet Singh Sergit Singh JC (now J) held as follows:

> [29] *It has been held that courier service is nothing more than personal service. It has the same features as prepaid A.R. registered post. In Jaya Asahak v Munggau Lawai & Ors* [2008] 5 CLJ 270 *it was held that service of a writ using Pos Laju is good service as Pos Laju, which is in effect courier service, is a specie of prepaid A.R. registered post. Further in Chatime Milk Tea Ltd v Duria Manufacturing Sdn Bhd & Anor* [2018] 1 LNS 24 *and Aseam Bankers Malaysia Bhd & Anor v Tan Sri Dato Lim Cheng Pow* [2011] 1 LNS 1487 *it was held that* ***service of an originating process affected by courier service is good service.*** *The latter two decisions established that courier service is as good as personal service.* ***In the circumstances there is nothing wrong with the service of the originating summons by courier.*** *Having said that it is prudent and salutary practice to always follow the modes stated in* O 10 r 1 of the Rules of Court *to avoid the pitfalls that took place in the present case."*

[32] In any event, in my considered view, the ground being advanced by these applicants (D6, D11 and D18) are highly technical and does little, if any, for the action to be disposed of in a just, expeditious and economical manner. The Writ have come to their knowledge. They are not in any way prejudiced. In fact, to my mind and with respect to the postal authority, the plaintiffs have adopted a more efficient manner of effecting service of the Writ, and it cannot be denied that in administering he Rules of Court, this Court is enjoined by the imperative language used in Order 1A of the ROC that the Court or a Judge **shall** have regard to the overriding interest of justice and not only to the technical non-compliance with the Rules

[33] Order 1A was inserted by the Rules of the High Court (Amendment) 2002 PU

(A) 197/2002 rule 2 and which came into force on 16 May 2002. It was undoubtedly inspired by the oft quoted words of Mohtar Abdullah FCJ, who wrote one of the seminal judgments in the Federal Court case of *Megat Najmuddin Dato Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd* [2002] 1 MLJ 385; [2002] 1 AMR 1089; [2002] 1 CLJ 645 where His Lordship said:

> *"A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law."*

[34] If at all required, and bearing in mind that much technological progress has been made in instantaneous mode of communications such as the use of emails, WhatsApp and Telegram, **I** invoke my residual powers under Order 92 rule 4 of the ROC to order that the service of the Writ upon the applicants (D6, Dll and D18) by way of courier service with delivery of the Writ having proved to have been effected upon them, to be good and sufficient service upon them on the dates they have received the Writ via courier service.

Conclusion

[35] Wherefore, having considered the written and oral submissions presented by the parties, this court dismissed all the applications in Enclosures 11, 13, 15 and 25 with costs to be paid to the Plaintiffs by the respective applicants as follows:

i) D4, the sum of RM6,000.00,

ii) D6,the sum RM10,000.00,

iii) D11, the sum of RM10,000.00 and

iv) D18, the sum of RM10.000.00,

with all costs to be subject to the payment of allocatur fees.

[36] Lastly, this Court means no discourtesy to the respective learned counsel for not citing the numerous authorities referred to by them for purposes of this judgment given the reasons I have set out above in arriving at this decision.

End of Document