MALAYSIAN
JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Idrus Harun, JCA; Zabariah Yusof, JCA; Yeoh Wee Siam, JCA

Lembah Semarak Sdn Bhd v Global Upline Hotels and Resorts Sdn Bhd and 2 Other Appeals

Citation: [2018] MYCA 311 **Suit Number:** Civil Appeal Nos. Q-02(IM)(NCVC)-2405-11/2017, Q-02(IM)(NCVC)-2406-11/2017 & Q-02(IM)(NCVC)-2407-11/2017

Date of Judgment: 29 August 2018

Litigation & court procedure – Order – Amendment of a sealed order under slip rule or inherent jurisdiction – Whether the Court functus officio – Whether the High Court plainly wrong to vary, amend and/or correct its order that has been filed, perfected and sealed – Order 20 rule 11 and Order 92 rule 4 of the Rules of Court

JUDGMENT

INTRODUCTION

[1] There are three civil appeals heard together before us on 28.6.2018 and these are-

(1) Civil Appeal No. Q-02(IM)(NCVC)-2405-11/2012, regarding Civil Suit No. KCH-22NCVC-33/6-2016;

(2) Civil Appeal No. Q-02(IM)(NCVC)-2406-11/2017, regarding Civil Suit No. KCH-22NCVC-35/6-2016; and

(3) Civil Appeal No. Q-02(IM)(NCVC)-2407-11/2012, regarding Civil Suit No. KCH-22NCVC-34/6-2016

("the 3 Appeals" and "the 3 Suits" respectively).

[2] Although the Appellant (plaintiff in the High Court) in each of the 3 Appeals is different, the Respondent (defendant in the High Court) in the 3 Appeals is the same entity. These 3 Appeals essentially contain the same facts and are premised on the same issues. Hence they were all heard together in the High Court.

[3] In this Judgment, the parties will be referred to as they were in the High Court.

BACKGROUNDS FACTS

[4] In each of the 3 Suits, the defendant filed an application to set aside the Judgment in Default of Appearance ("JID") which had been entered by the respective plaintiffs in each of the 3 Suits against the defendant on 30.6.2016, and for leave to file the Statement of Defence and Counterclaim (if any) within 14 days from the date of the Order therein.

[5] The 3 Applications were heard together on 3.1.2017 by the learned High Court Judge, Yew Jen Kie J ("the 1st Judge"). On 3.3.2017, the 1st Judge delivered her oral decision which dismissed the 3 Applications of the defendant in the 3 Suits with costs of RM5,000.00 ("oral decision"). This Order dated 3.3.2017 was duly filed, and sealed by the Court.

[6] The defendant in each of the 3 Suits filed and appealed against the oral decision of the 1st Judge to the Court of Appeal on 23.3.2017. At the same time, the defendant in each of the 3 Suits also filed a Notice of Application for stay of proceedings.

[7] About 2 months later, in her written "Grounds of Decision" dated 4.5.2017 (or "written decision"), the 1st Judge reversed her oral decision which her ladyship had pronounced on 3.3.2017 and allowed the JID entered against the defendant in the 3 Suits to be set aside. It is stated, *inter alia*, in her written Grounds of Decision that in the Court's mind, the Application to set aside the JID ought to be allowed but the Court had inadvertently pronounced otherwise, and ruled that the Application to set aside the JID be dismissed. Consequently, the defendant in each Suit filed an Application to vary, amend and/or correct the said Order dated 3.3.2017, in respect of the defendant's Application for setting aside the JID from being "dismissed" to being "allowed" to reflect the Order of the 1st Judge in her written Grounds of Decision.

[8] On 23.10.2017, Stephen Chung Hian Guan J (as he then was) ("the 2nd Judge") heard the 3 Notices of Applications to vary, amend and/or correct the Order dated 3.3.2017 and he allowed the defendant's Applications with no Order as to costs. The Amended Order dated 23.10.2017 was extracted. The plaintiffs in each or the 3 Suits, being dissatisfied with the decision dated 23.10.2017, filed the present 3 Appeals which are before us.

[9] There are no written Grounds of Judgment for the High Court decision dated 23.10.2017. Reference is therefore made to the Order dated 23.10.2017 filed in Court.

[10] After having heard the submissions of the respective learned counsel, and perused the Record of Appeal, on 28.6.2018, unanimously we allowed the 3 Appeals respectively and set aside the decision and Order of the High Court dated 23.10.2017. We ordered costs of RM5,000.00 for all the 3 Appeals to the plaintiff, subject to payment of the allocator fees, and that the deposits be refunded. Our reasons hereinafter follow.

GROUNDS FOR OUR DECISION

The Law

[11] As submitted by learned counsel for the defendant in each of the 3 Suits, the law on amendment of a sealed Order under the slip rule (O. 20 r. 11) and under the inherent jurisdiction of the Court (O. 92 r. 4) is well established. In the leading case of **Hock Hua Bank Berhad v Sahari Bin Murid** [1981] 1 MLJ 143. Chang Min Tat FJ, in delivering the judgment of the Federal Court, stated as follows at page 144:

> "Clearly the Court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up **except under the slip rule in O. 28 Rule 11 of the Supreme Court 1957 (O. 20 Rule 11 of the Rules of the High Court 1980)** so far as is necessary **to correct errors in expressing the intention of the Court**. Re. St Nazaire Co. 12 Ch D. 88, Kelsey v Doune [1912] 2 KB 482, Hession v Jones [1914] 2 KB..."

[12] In **Sang Lee Co. Sdn. Bhd. & Ors v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm)** [2010] 5 MLJ 285, the Federal Court reaffirmed the principle that the Court has power pursuant to the slip rule to correct errors in orders and judgments. The learned Judge had this to say ...:

> "[8] A related issue which is raised in this appeal is the question of **whether the Court is functus officio when it purports to rectify and amend the Sealed Order to reflect what was actually pronounced. We are of the view in the light of a clear difference and discrepancy between the terms of the Sealed Order as compared with the actual Order pronounced by the learned JC1 on 27.6.2006, it was only right and proper that the Sealed Order be amended accordingly pursuant to Order 20 rule 11** of the RHC 1980...
>
> [9] The application to amend was filed as in Enclosure 45 and the learned JC2 on 23.5.2007 after considering the entire matter and hearing both parties had correctly granted an order in terms of Enclosure 45 to amend the terms of the Sealed Order. The Court of Appeal should not have set aside the Order for amendment made by the High Court on 23.5.2007 **as the purpose and intention for the amendment is merely to set the Court records straight and to ensure that the actual terms pronounced by the High Court on 27.6.2006 have been properly authenticated and recorded. In law, the Court can always amend an Order which does not reflect what was actually pronounced. In such a situation the Court is therefore not functus officio**. [See the case of Hock Hua Bank Bhd. v Sahari bin Murid (1981) 1 MLJ 143]." (emphasis added)

[13] O. 20 r. 11 of the **Rules of Court 2012 ("ROC")** and O. 92 r. 4 of the **ROC** provide as follows:

> "**11. Amendment of Judgment and orders. (O. 20, r. 11)**
>
> Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an

appeal.";

"**4. Inherent powers of the Court. (O. 92, r. 4)**

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."

[14] The law in this area is very clear and straightforward. O. 20 r. 11 of the **ROC** gives the Court discretion to make corrections only to "clerical mistakes" in a judgment or order.

[15] The effect of the above rule is explained in **Malaysian Civil Procedure 2015, Sweet & Maxwell, Thomson Reuters** at pg 290:

"**20/11/1 Effect of rule** - This rule is known as the "slip rule". It can be considered as an exception to r 8(2) by virtue of which the court has no power to amend or to correct any defect or error in any judgment or order. Amendments can only be made under this rule to correct clerical mistakes, or errors arising from accidental slips or omissions both by the officers of the court and the parties, or a mistake in a date: *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MJ 254. Once a judgment has been passed and entered, the court has no jurisdiction to amend it under the "slip rule" unless there has been an accidental slip in drawing up the judgment, or unless the judgment as drawn up does not correctly state what the court actually decided and intended: *Savena Supramaniam Pillay v Tan Kah Chiat, Administrator of Tan Kong Liang dec'd* [1934] MLJ 133, CA; followed in *Affin Bank Bhd v WTLow & Ng Realty Sdn Bhd* [2003] 2 AMR 417; [2003] 1 CLJ 674, HC."

Consideration of the 3 Appeals

No clerical mistake

[16] Applying O. 20 r. 11 of the **ROC** to the present case, we observe that the 1st Judge decided to reverse her oral decision by way of her written decision after going again into the merits of the Applications before her. In brief, her reasons for her change of decision are that when the plaintiff in Suit no. KCH-22NCVC-34/6-2016 applied for a prohibitory order in respect of the 3 parcels of property, she realised that she must have inadvertently made a wrong Order. She then proceeded to give reasons as to why the 3 Applications ought to be allowed. The gist of it is that the cause papers for the 3 Suits were served at the defendant's registered address. The Receiver and Manager ("R&M") of the defendant only became aware of the 3 Suits when the Writ of the 3 Suits were exhibited by the plaintiff in its Affidavit in Opposition dated 28.6.2018 to oppose OS No. KCH-24-45/6-2016 ("OS") filed by the defendant (under receivership) to remove the caveats lodged by the respective plaintiffs in the 3 Suits. A Memorandum of Appearance was immediately entered by the defendant on 1.7.2016. However, it was too late. The JID had already been entered against the defendant on 30.6.2016, a day after the R & M were made aware of the existence of the Writs which were annexed to the Affidavit in Opposition dated 28.6.2016. The 1st Judge also held that the non-

production of the AR Card and/or registered postal slip with serial/ tracking number shows that the plaintiff's assertion of service is a mere bare statement with no substantiation. She further held that pursuant to rule 56 of the Advocates (Practice & Etiquette) Rules 1988, the then solicitors acting for the plaintiff, M/S Christopher Gabriel, ought to have given a 48 hours' notice to M/S Reddi & Co, solicitors representing the R & M in the OS before obtaining the JID.

[17] We found from her written Grounds of Decision, that when the 1st Judge reversed her earlier oral decision she had in fact delivered a second decision on the substantive matters and issues which are already the subject of the Appeal which had been filed by the defendant to the Court of Appeal, which can only be decided by the Court of Appeal, and not by the same High Court Judge.

[18] What the 1st Judge has described as "inadvertence" on her part is not a clerical mistake which can be rectified as envisaged by O. 20 r. 11 of the **ROC**. Consequently, the 2nd Judge erred when his lordship allowed, on 23.10.2017, under the "slip rule", the defendant's Applications to amend the Order dated 3.3.2017.

Court is functus officio

[19] Neither do we think that the High Court can exercise its inherent jurisdiction to vary, amend and/or correct the Order dated 3.3.2017 once the said Order has been perfected (see **Owners of Cargo carried in the ship "Gang Cheng" v Owners and/or Persons interested in the Ship "Gang Cheng" (No. 2)** [1998] 6 MLJ 492).

[20] In **Chua Wah Keaw v Ng Ho Huat** [1961] 1 MLJ 321, the Singapore Court of Appeal stated:

> "It may perhaps be argued that the principle laid down as it is in such wide terms, confers upon a Judge an unlimited power to withdraw, or alter, or modify an order made by him which has not yet been perfected. But a perusal of the cases in which the power has been exercised indicates that the power is not as untrammelled as it appears to be. In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order as pronounced...
>
> In our Judgment, an order which has not yet been perfected can be withdrawn, or altered, or modified only if to perfect it as orally pronounced would result in an erroneous order."

[21] In the present case, the Order dated 3.3.2017 has been filed, perfected and sealed. The High Court is therefore functus officio and can no longer reverse or change the said Order, which is a final Order, by way of a subsequent written decision, or by another decision to allow another Application to vary, amend, and/or correct the said Order under O. 20 r. 11, or O. 92 r. 4 of the **ROC**.

[22] In the circumstances of the case, the High Court was plainly wrong in its decision on 23.10.2017 to vary, amend and/or correct the Order dated 3.3.2017. Both the 1st Judge and 2nd Judge ought to have left the defendant's appeal regarding the Order dated 3.3.2017 to be decided by the Court of Appeal.

CONCLUSION

[23] Going by the above considerations, we find merits in the 3 Appeals. We are satisfied that the High Court had erred in fact and in law which warrants our appellate intervention. We allow the 3 Appeals and set aside the High Court Order dated 23.10.2017. We therefore ordered accordingly.

Dated: 29 August 2018

Sgd

YEOH WEE SIAM
Judge
Court of Appeal, Malaysia
Putrajaya

COUNSEL

For the Plaintiff/ Appellant: Christina Eng, Messrs CJ Eng

For the Defendants/ Respondents: Lim Lip Sze, Alan Bong, Messrs Reddi & Co

LEGISLATION REFERRED TO:

Advocates (Practice & Etiquette) Rules 1988, Rule 56

Rules of Court 2012, Order 20 Rule 11, Order 92 Rule 4

JUDGMENTS REFERRED TO:

Chua Wah Keaw v Ng Ho Huat [1961] 1 MLJ 321

Hock Hua Bank Berhad v Sahari Bin Murid [1981] 1 MLJ 143

Owners of Cargo carried in the ship "Gang Cheng" v Owners and/or Persons interested in the Ship "Gang Cheng" (No. 2) [1998] 6 MLJ 492

Sang Lee Co. Sdn. Bhd. & Ors v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) [2010] 5 MLJ 285

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