DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
(BAHAGIAN RAYUAN DAN KAUSA-KAUSA KHAS)
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
RAYUAN NO: BA-12ANCC-30-07/2020

ANTARA

KOTA LAKSAMANA MANAGEMENT SDN BHD **... PERAYU / PLAINTIF**
(No. Syarikat: 801399-X) (Pemiutang Penghakiman)

DAN

1. NEOS ENGINEERING SDN BHD
(No. Syarikat: 69568-U)
(dahulunya AKRA ENGINEERING SDN BHD)

2. LEE YUEN CHAK
(No. K/P: 661231-10-6207) **... RESPONDEN / DEFENDAN-DEFENDAN**
(Penghutang-Penghutang Penghakiman)

DAN

PUBLIC BANK BERHAD **... ORANG YANG DIGARNIS**

[Dalam Perkara Mengenai Guaman/Perlaksanaan No.: A52NCC-111-04/2015
Di Mahkamah Sesyen Shah Alam

ANTARA

KOTA LAKSAMANA MANAGEMENT SDN BHD ... PLAINTIF
(No. Syarikat: 801399-X) (Pemiutang Penghakiman)

DAN

1. NEOS ENGINEERING SDN BHD
   (No. Syarikat: 69568-U)
   (dahulunya AKRA ENGINEERING SDN BHD)

2. LEE YUEN CHAK
   (No. K/P: 661231-10-6207) ... DEFENDAN-DEFENDAN
   (Penghutang-Penghutang Penghakiman)

DAN

PUBLIC BANK BERHAD ... ORANG YANG DIGARNIS

Diputuskan oleh Puan Hakim Fathiyah Binti Idris di Mahkamah Sesyen Shah Alam pada 17 Jun, 2020]

GROUNDS OF JUDGMENT

Introduction

[1] This case originates from the Sessions Court. It relate to an appeal filed by the Appellant / Plaintiff against a decision made by the Sessions Court allowing the application filed by the Respondents / Defendants to set aside or vary a garnishment order made absolute.

[2] For the purpose of this judgment the parties will be referred to as they are in the Sessions Court.

Brief Salient Facts

[3] In Sessions Court Shah Alam Guaman No: A52NCC-111-04/2015 a consent order was recorded on 3.8.2015 between the Plaintiff and Defendants ("Consent Order"). The said order is reproduced below –

A52NCC-111-04/2015 126
SL2015082500859
9076779 SL2015082500859 25/08/2015 14:09:47
A52NCC-111-04/2015
DALAM MAHKAMAH SESYEN DI SHAH ALAM.....200.0 X 1
Jumlah RM**********200.00
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

GUAMAN NO.:A52NCC-111-04/2015

ANTARA

KOTA LAKSAMANA MANAGEMENT SDN BHD
(No. Syarikat: 801399-X) ...PLAINTIF

DAN

1. AKRA ENGINEERING SDN BHD
(No. Syarikat: 69568-U)

2. LEE YUEN CHAK
(NRIC No. 661231-10-6207) ...DEFENDAN-DEFENDAN

PADA 03 OGOS 2015 DALAM MAHKAMAH TERBUKA

PENGHAKIMAN PERSETUJUAN

Dalam kehadiran pihak peguamcara Plaintif dan pihak peguamcara Defendan-Defendan dalam tindakan ini.

ADALAH PADA HARI INI DIHAKIMI SECARA PERSETUJUAN bahawa:-

(i) Defendan-Defendan membayar jumlah sebanyak RM303,000-00 sebagai penyelesaian penuh dan muktamad kepada tuntutan Plaintif dalam masa satu (1) tahun dari tarikh 03.08.2015;

(ii) Lampiran 4 ditarik balik tanpa kos; dan

(iii) Kos tindakan ini ditanggung oleh pihak masing-masing.

Bertarikh pada 03 Ogos 2015

Pendaftar
Mahkamah Sesyen
Shah Alam

PENGHAKIMAN PERSETUJUAN ini telah difailkan oleh Tetuan Fairuz Ali & Co, Peguambela dan Peguamcara, Peguamcara bagi Plaintif yang tersebut di atas yang mempunyai alamat penyampaian di NO 12-1, Jalan Opera B U2/B,TTDI Jaya, Seksyen U2, 401050 Shah Alam, Selangor Darul Ehsan.
No Tel: 03-7831 3941, 03-7831 2605 No Faks: 03-7831 3951
(Ruj: FAC/L/KLMSB-AESB/208/14)
Email: fairuzali.law08@yahoo.com

[4] Pursuant to the Consent Order, the Defendants has contractually agreed to pay the sum RM 303,000.00 to the Plaintiff within 1 year from 3.8.2015 which is the date of the Consent Order.

[5] The Defendants breached the terms of the Consent Order. The Plaintiff commenced garnishee proceedings pursuant to O 49 Rules of Court 2012 ("RoC 2012").

[6] The Plaintiff filed separate ex-parte applications against the 1st Defendant and 2nd Defendant under Order 49 rule 2 of the RoC 2012 seeking for an order that the 37 banking institutions named therein to show cause why garnishee order should not be made against them.

[7] On 1.11.2019 the Plaintiff obtained an order for the banking institutions to attend Court on 10.12.2019 at 9 am to show cause ("Garnishment Order Nisi").

[8] On 10.12.2019 the Sessions Court Judge ("SCJ 1") ordered the Garnishment Order Nisi in respect of Public Bank Berhad

("Garnishee") be made absolute ("Garnishment Order Absolute").

The said order is reproduced below –

43

A52NCC-111-04/2015

Encl No. 32

H0272101 BA1319276429 10/12/2019 15:40:35
A52NCC-111-04/2015
AS0064 ..... 40.00 x 1
Jumlah RM********** 40.00

DALAM MAHKAMAH SESYEN DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

GUAMAN SIVIL NO: A52NCC-111-04/2015

ANTARA

KOTA LAKSAMANA MANAGEMENT SDN BHD (No. Syarikat: 801398-X) ... PLAINTIF (Pemiutang Penghakiman)

DAN

1. NEOS ENGINEERING SDN BHD (No. Syarikat: 69560-U) (dahuluiya AKRA ENGINEERING SDN BHD)
2. LEE YUEN CHAK (No. K/P: 661231-10-6207)

DEFENDAN-DEFENDAN (Penghutang-Penghutang Penghakiman)

DAN

PUBLIC BANK BERHAD
146, Jalan Ampang,
50947 Kuala Lumpur. ...Orang Yang Digarnis

DI HADAPAN HAKIM MAHKAMAH SESYEN
AHMAD AZHARI BIN ABDUL HAMID
PADA 10 DISEMBER 2019 DALAM KAMAR

PERINTAH ORANG DIGARNIS

Selelah membaca Perintah Untuk Menunjukkan Sebab yang di buat dalam Perintah ini bertarikh 1 November 2019 dan setelah mendengar En Ozamil Izwan Othman (bersama-sama En Mohd Fairuz bin Ali), Peguamcara bagi pihak Pemiutang Penghakiman dan menyebut bagi pihak Orang Yang Digarnis, yang meriurutnya telah diperintahkan bahawa segala hutang yang kena dibayar atau terakru kena dibayar oleh Orang Yang Digarnis yang dinamakan di atas kepada Penghutang Penghakiman yang dinamakan di atas itu patut ditahan untuk menjawab penghakiman oleh Mahkamah pada

S/N QBuWYYVBlqU5oFhlbCMqEQ
**Note : Serial number will be used to verify the originality of this document via eFILING portal

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3 Ogos 2016 untuk sejumlah wang sebanyak RM386,962.00 yang termasuk faedah terakru setakat 21.10.2019 dan kos guaman yang masih lagi terhutang dan belum dibayar.

Adalah diperintahkan bahawa Orang Yang Digarnis tersebut hendaklah serta-merta membayar kepada Pemhutang Penghakiman tersebut sebanyak RM386,962.00 yang merupakan sekian banyak daripada hutang yang kena dibayar oleh Orang Yang Digarnis tersebut kepada Pehghutang Penghakiman tersebut sebagai cukup untuk menjelaskan hutang dan kos penghakiman tersebut, berserta kos RM2000.00 bagi prosiding Orang Yang Digarnis itu.

Bertarikh pada 10 Disember 2019

SYAJARATUDUR BINTI ABD RAHMAN
Penolong Kanan Pendaftar
Mahkamah Rendah
Shah Alam

Penolong Kanan Pendaftar
Mahkamah Sesyen
Shah Alam

PERINTAH ORANG DIGARNIS ini telah difailkan oleh Tetuan Fairuz Ali & Co, Peguambela dan Peguamcara, Peguamcara bagi Pemhutang Penghakiman yang tersebut di atas yang mempunyai alamat penyampaian di No. 12-1, Tingkat 1, Jalan Opera B U2/B, TTDI Jaya, Seksyen U2, 40150 Shah Alam, Selangor Darul Ehsan.
No. Tel: 03-7831 3941/7831 2605 No. Faks: 03-7831 3951
Email: fairuzali.law08@yahoo.com

[9] Premised on the Garnishment Order Absolute, the Garnishee was ordered to pay forthwith to the Plaintiff a sum of RM 386,962.00 being debt due from the Garnishee to the Defendant to satisfy the judgment debt of RM 386,962.00 and costs of garnishee proceedings in the sum of RM 20,000.00.

[10] On 19.12.2019, the Plaintiff and Defendant appeared before SCJ 1. It is the Plaintiff's contentions that such date was for further hearing of Garnishment Order Nisi in the presence of Plaintiff, Defendant and Garnishee. However the Defendant contended the date 19.12.2019 was fixed for case management for clarification purposes on issues raised by the Defendants via letter dated 10.12.2019 ("Defendants' Letter"). Further discussion on this point below.

[11] Subsequently on 7.1.2020 the Defendant filed an application pursuant to Order 42 rule 13 or Order 92 rule 4 of the RoC 2012 to set aside the Garnishee Order Made Absolute ("Setting Aside Application").

[12] The Setting Aside Application was heard before another Sessions Court Judge ("SCJ 2") as the SCJ 1 was on transfer. On 17.6.2020 the SCJ 2 varied the Garnishment Order Absolute and ordered the Plaintiff to pay to the Defendant a sum of RM 83,962.00 being difference between the judgment sum RM 303,000.00 and RM 386,962.00 the sum paid by the Garnishee to the Plaintiff pursuant to the Garnishment Order Absolute. The Amended

Garnishment Order Absolute ("Amended Garnishment Order") is reproduced below –

A52NCC-111-04/2015

121

Encl No. 56

H0272101 BA1320124371 21/07/2020 09:00:50
Jumlah RM*********200.00

DALAM MAHKAMAH SESYEN DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
GUAMAN SIVIL NO: A52NCC-111-04/2015

ANTARA

KOTA LAKSMANA MANAGEMENT SDN BHD **...PLAINTIF**
(Pemlutang Penghakiman)

DAN

1. **NEOS ENGINEERING SDN BHD**
   (No. Syarikat : 69568-U)
2. **LEE YUEN CHAK**
   (No. K/P : 661231-10-6207)

...DEFENDAN-DEFENDAN
(Penghutang Penghakiman)

PUBLIC BANK BERHAD
146, Jalan Ampang
50947 Kuala Lumpur

...Orang Yang Digarnis

DI HADAPAN HAKIM MAHKAMAH SESYEN
FATHIYAH BINTI IDRIS
PADA 17 JUN 2020

DALAM MAHKAMAH TERBUKA

PERINTAH
(Lampiran 36)

ATAS PERMOHONAN pihak Defendan-Defendan yang dinamakan di atas **DAN SETELAH MEMBACA** Notis Permohonan bertarikh 7 Januari 2020 bersama dengan Afidavit Sokongan Defendan-Defendan bertarikh 6 Januari 2020, Afidavit Jawapan Plaintif bertarikh 23 Januari 2020, Afidavit Balasan Defendan-Defendan bertarikh 5 Febuari 2020, hujahan bertulis Plaintif dan Defendan-Defendan **DAN SETELAH MENDENGAR**, Luqman Bin Mazlan, peguamcara pihak Defendan-Defendan dan Ozanul Izwan Othman, peguamcara pihak Plaintif **MAKA ADALAH DIPERINTAHKAN BAHAWA**:

a) Bahawa Perintah Orang Digamis bertarikh 10.12.2019 terhadap Orang Yang Digamis seperti yang tersebut di atas adalah diubah;

b) Bahawa Plaintiff mengembalikan / memulangkan lebihan wang sebanyak RM 83,962.00 yang telah diserahkkan kepada Plaintif oleh Orang Yang Digamis kepada Defendan-Defendan; dan

c) Kos permohonan ini yang berjumlah **RM 1000.00** dibayar oleh Plaintif kepada Defendan-Defendan.

Bertarikh 17 Jun, 2020.

METERAI MAHKAMAH BESTON SHAH ALAM

SYAJARATUDUR BINTI ABD RAHMAN
Penolong Kanan Pendaftar
Mahkamah Rendah
Shah Alam

Penolong Kanan Pendaftar
Mahkamah Rendah
Shah Alam

PERINTAH ini difailkan oleh Peguamcara Defendan Tetuan Norizan & Associates, yang mempunyai alamat penyampaian di Unit 16-17 & 16-18, 16th Floor, Plaza Azalea, Seksyen 14, Persiaran Bandaraya, 40000 Shah Alam, Selangor Darul Ehsan.
[No. Tel: 03-55243306 &03-55243307 / No. Faks: 03-55233304]
[Emel: mail@norizanassociates.com][No. Rujukan : L1.128.2019]

[13] Dissatisfied with the Amended Garnishment Order, the Plaintiff lodged an appeal on 25.6.2020.

Plaintiff's contentions

[14] The Plaintiff's main argument is this. The SCJ 2 has no jurisdiction to hear the Setting Aside Application because –

(a) being a Court of coordinate jurisdiction, the SCJ 2 has no jurisdiction to vary or set aside the order made by SCJ 1;

(b) that the Court has functus officio and pursuant to the doctrine of res judicata the Defendant is estopped from raising the matter; and

(c) the Defendant ought to have appealed against the SCJ 2 Order and not by filing the Setting Aside Application.

[15] Whereas the Defendant took a diametrically opposed position. It is contended pursuant to Order 42 rule 13 or Order 92 rule 4 of the RoC 2012 the SCJ 2 has the jurisdiction to set aside or vary the Garnishment Order Absolute due to the following reasons –

(a) the said order was obtained without the presence of the Defendant and without merits of the application being heard;

(b) the Garnishment Order Nisi was not served on the Defendant which is in violation of Order 49 rule 3 (1) (b) of the RoC 2012; and

(c) the Garnishment Order Nisi was wrongly and irregularly obtained. This is because the amount that the Plaintiff is entitled to garnish is RM 303,000.00 which is the sum stipulated in the Consent Order. The sum garnished under the Garnishment Order Absolute was RM 386,962.00 which is in excess of the judgment sum agreed in the Consent Order.

Court's findings

[16] After considering the records of appeal, submissions and the relevant law, this Court dismissed the Plaintiff's appeal. The reasons are stated below.

[17] The main issue is whether SCJ 2 has jurisdiction to hear the Setting Aside Application. It is indisputable that the Garnishment Order Nisi was obtained pursuant to the Plaintiff's ex-parte application pursuant to Order 49 rule 2 of the RoC 2012.

[18] Order 49 rule 3 of the same requires the Plaintiff to serve the Garnishment Order Nisi on the Garnishee and also on the Defendant who is the judgment debtor unless the Court otherwise directs.

[19] In the case of ***Malaysian International Trading Corporation Sdn Bhd V. RHB Bank Bhd*** [2016] 2 CLJ 717; [2016] 2 MLJ 457 the Federal Court in discussing Order 49 rule 1 Rules of High Court 1980 (which is equivalent to Order 49 rule 1 of the RoC 2012) said this –

[33] *Procedurally, garnishee proceedings begins with the filing of an ex parte notice of application, supported by an affidavit in Form 98 (O. 49 r. 2). The affidavit will identify the judgment or order to be enforced, the amount remaining unpaid under the judgment or order at the time of the application, with the garnishee identified, and the applicant stating his belief that the garnishee is within the jurisdiction and is indebted to the judgment debtor.*

[34] *At this stage, the burden is on the garnishor, but without any opposition facing it, the latter invariably succeeds. As said earlier at para. 5 an order successfully obtained pursuant to this ex parte application order will be in Form 97 and is an order to show cause (garnishment order nisi).*

...

[36] To make it absolute O. 49 r. 4(1) of the RHC, which must be read together with O. 49 r. 3 of the RHC, must first be complied with*. For purposes of this second stage ie* ***in order to obtain the order absolute, the garnishment order nisi must first be served personally on the garnishee and also on the judgment debtor, unless directed otherwise****. A return date is given, seven days after service, whereupon the garnishee attends a hearing in order to show cause, why he should not pay the judgment creditor the debt due from him to the judgment debtor. At the conclusion of the hearing the garnishment order nisi is either made absolute or not…*

(emphasis added)

[20] On the facts, There is no evidence to show that the Court had dispensed with service of the Garnishment Order Nisi on the Defendant. Thus the Plaintiff is obliged to serve the same on the Defendant at least 7 days before the day appointed by the Court to hear the matter. There is no evidence to that effect. It must be noted that the Plaintiff in its affidavit opposing the Setting Aside Application failed to respond to the Defendants' specific averment that the Garnishment Order Nisi was only served on the Defendants on 5.12.2020 ie less than 7 days before the hearing of the Garnishment Order Nisi which was fixed on 10.12.2020. The failure of the Plaintiff to reply to such specific and material averment indicate clearly an admission on the part of the Plaintiff (see ***Ng Hee Thong v Public Bank Bhd*** [1995] 1 CLJ 609; [1995] 1 MLJ 281). Thus it is without doubt the service of the Garnishment Order Nisi was irregular as it was not made in accordance with Order 49 rule 3 of the RoC 2012 in so far as the Defendant is concerned.

[21] Despite the irregular service, the Defendants' solicitor had, via telephone call on 9.12.2019 to the Plaintiff's solicitor, notify the Plaintiff's solicitor that the Defendants will be attending hearing on 10.12.2019 at 9.00 a.m to challenge the Garnishment Order Nisi.

[22] However, it was averred by the Defendants that although they attended the Court with their counsel as early as 8.45 am on 10.12.2019, the Defendants were informed that the Plaintiff had attended the Court at 8.00 am and had obtained the Garnishment Order Made Absolute. On the same day the Defendants' solicitor issued a letter ("Defendant's Letter") to the Plaintiff's solicitor setting out the events that took place on 10.12.2019 and that the Court has fixed, at the request of the Defendant, 19.12.2019 for case management. A copy of the Defendant's Letter is reproduced below –

NORIZAN & ASSOCIATES
ADVOCATES & SOLICITORS

Unit 16-17 & 16-18, 16th Floor, Plaza Azalea
Seksyen 14 Persiaran Bandaraya
40000 Shah Alam, Selangor Darul Ehsan

Telephone: 603.5524.3305 | 603.5524.3307
Facsimile: 603.5523.3304
Email: mail@norizanassociates.com
Website: www.norizanassociates.com
Office Hours: 0830 to 1730 Mon to Fri

Norizan Binti Hj Yasin LL.B (Hons) MALAYA, DLSA UITM
Ahmad Danial Bin Mohd Azlan MBA (UITM), LL.B (Hons) UITM, DLSA UITM
Mohd Izzan Iswat Bin Mohd Noor LL.B (Hons) UITM, DLSA UITM
Mohamad Hafiz Firdaus Bin Jamiruddin LL.B (Hons) UITM

Ruj Tuan. : FAC/MF/LKGP/KLM-AKRA&LYC/GP/087/17
Ruj Kami : L1.128.2019
Tarikh : 10/12/2019

TETUAN FAIRUZ ALI & CO
PEGUAMBELA & PEGUAMCARA
NO. 12-1, 1ST FLOOR
JALAN OPERA B U2/B, SECTION U2
TTDI JAYA 40150 SHAH ALAM

FAKS/EMEL/SERAHAN TANGAN
fairuzali.law06@yahoo.com/
fairuzalico.kd@gmail.com
03-78313951/ 03-76117026

(U/P: EN. FAIRUZ ALI)

PER: MAHKAMAH SESYEN SHAH ALAM
GUAMAN NO.: A02NCC-111-04/2015
KOTA LAKSMANA SDN BHD ...PLAINTIF
(PENIUTANG PENGHAKIMAN)

-V-

NEOS ENGINEERING SDN BHD (dahulunya AKRA ENGINEERING SDN BHD)
&
LEE YUEN CHAK ...DEFENDAN-DEFENDAN
(PENGHUTANG PENGHAKIMAN)

Dengan segala hormatnya kami merujuk kepada perkara di atas di mana kami merupakan sebuah firma guaman yang mewakili Penghutang Penghakiman (selepas daripada ini dirujuk sebagai "Anakguam kami tersebut"). Kami juga merujuk kepada pendengaran Perintah Orang Digamis Untuk Menunjukkan Sebab ("pendengaran tersebut") pada 10.12.2019.

Seperti yang sedia maklum, pendengaran tersebut telah ditetapkan pada 10.12.2019 untuk pihak-pihak yang terlibat hadir dan di dengar termasuk Anakguam kami tersebut. Namun, pihak Tuan telah hadir pada tarikh pendengaran tersebut seawal pukul 8.00 Pagi tanpa menunggu kehadiran pihak-pihak lain yang terlibat termasuk Anakguam kami tersebut. Pihak Tuan selanjutnya meneruskan dengan pendengaran tersebut dan mendapatkan perintah-perintah seperti berikut:

A. Perintah Gamsi Mutlak ("Garnishee Order Absolute") bagi permohonan di lampiran 12; dan

B. Permohonan di lampiran 15 ditarik balik.

Pihak kami telah hadir di mahkamah pada lebih kurang pukul 8.45 pagi dan dimaklumkan bahawa pihak Tuan telah memohon untuk didengar tanpa kehadiran pihak-pihak terlibat. Selanjutnya, kami diarahkan oleh pihak mahkamah untuk menghubungi peguam daripada firma Tuan yang mengendalikan pendengaran tersebut iaitu En. Fairuz Ali untuk hadir semula ke mahkamah bagi tujuan klarifikasi. Namun, panggilan dan pesanan ringkas daripada pihak kami kepada nombor telefon firma guaman Tuan dan nombor telefon bimbit En. Fairuz Ali tidak dijawab dan dibalas.

Pihak mahkamah kemudiannya melalui jurubahasa bernama Puan Ivy berjaya menghubungi En. Fairuz Ali yang memaklumkan kepada pihak mahkamah bahawa beliau baru selesai kes di Mahkamah Tinggi Shah Alam dan akan menghadirkan diri ke Mahkamah Sesyen Sivil 5. Walaubagaimanapun, sehingga lebih kurang pukul 11.45 pagi, En. Fairuz Ali tidak menghadirkan diri. Pihak kami selanjutnya memohon kepada Tuan Hakim untuk didengar yang mana kami memaklumkan perkara-perkara seperti berikut, antara lain:

A. Anakguam kami hanya menerima Perintah Orang Digamis Untuk Menunjukkan Sebab pada 5.12.2019 (Khamis) lebih kurang pukul 6.00 Petang;

B. Anakguam kami baru melantik pihak kami pada 9.12.2019 (Isnin) lebih kurang pukul 4.00 Petang; dan

C. Sejurus dilantik secara rasmi oleh Anakguam kami tersebut, peguam yang mengendalikan pendengaran tersebut bagi pihak kami iaitu En. Luqman Mazlan menelefon En. Fairuz Ali dan memaklumkan perkara tersebut;

D. En. Luqman Mazlan juga memaklumkan bahawa beliau akan hadir bagi pendengaran tersebut untuk membantah permohonan pihak Tuan;

E. Anakguam kami berhak untuk hadir dan didengar ketika pendengaran tersebut; dan

F. Hak Anakguam kami tersebut telah diprejudiskan apabila pendengaran tersebut diteruskan tanpa kehadiran kami dan/atau Anakguam kami tersebut walaupun pihak kami telah memaklumkan kepada pihak Tuan kehadiran kami dan telah tiba di Mahkamah Sesyen Sivil 5 sesawal pukul 8.45 pagi.

Lanjutan daripada perkara yang tersebut di atas, Tuan Hakim telah memberi arahan untuk menangguhkan segala proses dan pemfailan perintah bagi tujuan klarifikasi daripada pihak Tuan dan pihak Kami. Justeru, Tuan Hakim telah menetapkan untuk PENGURUSAN KES bagi tujuan klarifikasi pada 13.12.2019 (Jumaat) Pukul 9 Pagi.

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Norizan & Associates
continuation page ...

Selanjutnya, sekitar pukul 3 Petang pada tarikh yang sama, En. Luqman Marzlan telah menerima panggilan telefon daripada pihak mahkamah dan dimaklumkan melalui jurubahasa Puan Ivy bahawa tarikh PENGURUSAN KES telah ditukarkan. Sila ambil perhatian bahawa tarikh baru PENGURUSAN KES adalah pada 10.12.2019 (Khamis) Pukul 9 Pagi.

Sekian,

Terima Kasih
NORIZAN & ASSOCIATES

S.K. TUAN HAKIM MAHKAMAH SESYEN SIVIL 5
KOMPLEKS MAHKAMAH SSAS
PERSIARAN PEGAWAI, SEKSYEN 5
40000 SHAH ALAM, SELANGOR

E-FILING

[23] Again, in its affidavit the Plaintiff did not deny receiving the Defendant's Letter. Importantly, the Plaintiff did not deny nor dispute the contents of the said letter, in particular the fact that the Plaintiff's solicitor has obtained the Garnishment Order Absolute on 12.10.2019 at around 8 am without the presence of the Defendant's solicitor. The conduct of the Plaintiff's solicitor smacks of mala fide in view that the Plaintiff's solicitor had notified the Defendants' solicitor that hearing of the Garnishment Order Nisi was scheduled on 10.12.2019 at 9.00 a.m.

[24] Taking into account what transpired on 10.12.2019 which resulted in the Garnishment Order Nisi being converted to Garnishment Order Absolute, it is this Court's considered view that the Garnishment Order Absolute was an ex-parte order made without merits of the matter adjudicated and ventilated. Being an ex-parte order it is lia ble to be set aside.

[25] However the Plaintiff contended that Order 42 rule 13 of the RoC 2012 is not applicable as there is no provision in Order 49 of the RoC 2012 which provides for the setting aside of a garnishment order. On this point reference is made to the Federal Court case of ***Malaysian International Trading Corporation Sdn Bhd V. RHB Bank Bhd*** [2016] 2 CLJ 717; [2016] 2 MLJ 457 which opined as follows –

> ***[39] Jurisdictionally, a court under O. 32 r. 6 of the RHC or under O. 92 of the RHC, may set aside any ex parte order.*** *In Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1989] 1 LNS 140; [1990] 1 MLJ 445 at 446-447, VC George J held that the court could even set aside an ex parte final order pursuant to O. 32 r. 6 of the RHC.* ***This provision has general application to general applications and proceedings in chambers, and unless there were specific rules***

> ***elsewhere that do away with the said rules of general application, it was applicable in an ex parte garnishment proceedings****. In fact VC George J had no hesitation in holding that* ***even if O. 32 r. 6 were inapplicable the court still was equipped with inherent jurisdiction to prevent injustice.*** *See also Hongkong And Shanghai Banking Corporation v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee) [1985] 1 LNS 119; [1986] 2 MLJ 86, [1984-1985] SLR 804 and Lee Phet Boon v. Hock Thai Finance Corporation Bhd [1994] 3 CLJ 466; [1994] 2 MLJ 448.*
>
> (emphasis added)

[26] The Setting Aside Application was made pursuant to Order 42 rule 13 and Order 92 rule 4 of the RoC 2012. This Court is incline to agree with the Plaintiff that Order 42 is not applicable as Order 42 does not contain provision for the setting aside of garnishment order. However, as held by the Federal Court in the ***Malaysian International Trading Corporation*** case, Order 92 rule 4 is applicable in order to prevent injustice. As such the Defendants' invocation of Order 92 rule 4 is in order.

[27] The Plaintiff's argument that the Defendants are not entitle to attend the hearing on 10.12 2019 is untenable. Had that been the intention of the law, there will not be a requirement imposed under O 49 rule 3 of the RoC 2012 for the Garnishment Order Nisi be served at least 7 days before the hearing. On this point I find support in the High Court of Singapore case ***Hongkong & Shanghai Banking Corp v Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)*** [1986] 1 MLJ 86 which held a judgment debtor can attend before the Court to state his objection to the garnishee order nisi being made absolute notwithstanding no objection mounted by the garnishee.

[28] In the instant case the fact that there is no objection from the Garnishee cannot be a criteria to determine the Defendant's right to attend and object to the garnishment proceedings. It is noted the requirement for service under Order 49 rule 3 of the RoC 2012 explicably reinforce the right of the Defendants as a judgment debtor to be heard. This is because any order made by the Court would inevitably affect the Defendants' interest in so far as his indebtedness to the Plaintiff is concerned as it is the Defendants money kept in the account with the Garnishee ie Public Bank Berhad

which will be garnished. It is not the Garnishee's monies that is intended to be garnished, the reason why the Garnishee is not objecting.

[29] As the garnishee proceedings relate to the execution of the Consent Order, it goes without saying that the Plaintiff in executing the Consent Order is only entitled to be paid in accordance with the terms of the Consent Order and nothing more. For the Plaintiff to be paid a sum of RM 386,962.00 to satisfy the judgment sum of RM 303,000.00 is unlawful. And for the Plaintiff to secure the Garnishee Order Absolute in the manner as set out in the Defendants' Letter (which the Plaintiff did not deny nor dispute) is an abuse of the process of court. It has adversely prejudiced the Defendants.

[30] The SCJ 2 is therefore justified in exercising its discretion under Order 92 rule 4 of the RoC 2012 to vary the Garnishment Order Absolute as it is of the utmost importance and necessary to prevent injustice to the Defendants and to prevent the process of the Court from being abused.

[31] As the Garnishment Order Absolute was obtained irregularly and without merits of the matter being adjudged, the Plaintiff's contentions that the SCJ 2 is estopped from hearing the Setting Aside Application on the ground of functus officio and res judicata is flawed –

(a) at the risk of repetition, when the Garnishment Order Absolute (ie at the hearing of the Garnishment Order Nisi on 10.12.2019) was made, the Defendants' objections on the sum sought to be garnished (ie the sum is more than the judgment sum as stated in the Consent Order) and the cost were not effectively heard.

(b) The minutes of proceedings before the SCJ 1 on 10.12.2019 and 19.12.2019 was reproduced by the SCJ 2 in her judgment is as follows –

TOTAL CLAIM - RM 386, 962.00

MAH: ORDER IN TERM L12 –

GARNISHEE 10.12.2019 (C) GARNISHEE SHOW CAUSE

Selanjutnya pada 10/12/2019, minit prosiding Mahkamah adalah seperti berikut :

(L12) GARNISHEE ABSOLUTE RM 386, 962.00 KE ATAS PUBLIC BANK (G30) & COST RM 2, 000.00

MAH: ORDER IN TERM L12

11AM - LUQMAN BIN MAZLAN & DANIAL AZLAN HADIR - JD LAWYER TERIMA PERINTAH GARNISHEE 05.12.2019 KAMI BARU DILANTIK SEMALAM; SAYA MENDAPAT ARAHAN & SAYA TELEPHONED MR. FAIRUZ UNTUK MAKLUM KAMI AKAN HADIR & AKAN OPPOSE N/P TERSEBUT; OPPOSE BERKAITAN JUMLAH TUNTUTAN COST RM 20, 000.00.

MAH: 19.12.2019 (CM) PC & JD LAWYER HADIR

Seterusnya minit prosiding Mahkamah pada 19/12/2019 adalah seperti berikut:-

PIHAK JC: MENGESAHKAN BAHAWA KAMI MENARIKBALIK TERHADAP MAY BANK & OCBC (G25 & G26 & G28 & G29). G MAY BANK & OCBC: KEDUA-DUA POHON COST RM 250.00

JD: KAMI MEMBUAT BANTAHAN TERHADAP N/P JC & AKAN FILE AFFIDAVIT;

KAMI HADIR PADA TARIKH PERINTAH TERSEBUT TETAPI TIDAK BERPELUANG DIDENGAR; KAMI ADA HAK UNTUK MEMBANTAH; BANTAHAN KAMI IALAH TERHADAP COST GUAMAN RM 20, 000.00 & COST FAEDAH 5%; OLEH ITU KAMI PERLU HADIR UNTUK BANTAH PERKARA TERSEBUT.

JC: O49 HANYA 2 PIHAK SAHAJA BOLEH BANTAH IAITU (i) PIHAK GARNISHMENT & (ii) 3RD PARTY SELAIN DARI JD O49 r6; PIHAK JD TIDAK WAJAR UNTUK HADIR; RUJUK CASE MING ANN HOLDINGS SDN BHD VS DANAHARTA URUS SDN BHD & KONG THAI SAWMILL (MIRI) SDN BHD SEPATUTNYA DIBANTAH DALAM PROCEEDIN BERASINGAN & TIDAK BOLEH DATANG MENGGANGGU PROCEEDING GARNISHMENT; TIDAK ADIL UNTUK JD DALAM MENCABAR (KEP) TERSEBUT TANPA MEMBAWA SEBARANG DOCUMNET; PIHAK JC TELAH MEMATUHI PERINTAH DIBAWAH O49 & TIADA HAK UNTUK JD DATANG SECARA TIBA-TIBA & MEMBANTAH.

JD REPLY: PIHAK KAMI AKAN FILE BANTAHAN DI ATAS ISSUE YANG KAMI BANGKIT TERSEBUT.

JC: JD PERLU FILE 1 N/P LAIN YANG TIDAK BERCAMPUR ADUK DENGAN PERMOHONAN INI; KAMI TELAH MEMATUHI PROCEEDING INI WAKTU PERMOHONAN TERSEBUT JD SEPATUTNYA FILE.

MAH: MENGEKALKAN (KEP) PUBLIC BANK & COST RM 250.00 BAGI MAY BANK & OCBC DITOLAK DARI ACCOUNT JD.

(c) The Plaintiff's blatant disregard of the requirement under Order 49 rule rule 3 (1) (b) of the RoC 2012 and its mala fide action has caused the Defendants being deprived of the right to be heard at the hearing of the Garnishment Order Nisi. The Plaintiff cannot now

raise the issue of functus officio as to do so would allow the Plaintiff to benefit from its own wrongdoing;

(d) With regards to res judicata, reference is made to the case ***Farlim Properties Sdn Bhd v Goh Keat Poh & Ors (And Other Appeals)*** [2003] 4 CLJ 505 where the Court of Appeal explained the approach Court is required to adopt when faced with issue on the applicability of doctrine of res judicata –

> ***When the plea of res judicata is raised it is necessary to identify with precision the issue that was decided in the earlier proceedings***. *In Tong Lee Hwa & Anor v. Lee Yoke San [1979] 1 MLJ 24, [1981] 1 MLJ 54 Chang Min Tat FC held that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in Kok Hoong v. Leong Cheong Kweng Mines Ltd [1964] MLJ* ***49 'necessarily and with precision' determine the point in issue.***

(emphasis added)

(e) It is patently clear no where in the minutes of proceedings on 10.12.2019 and 19.12.2019 reproduced above indicate that the parties have effectively submitted on the objections raised by the Defendant. In fact the Defendant was not given the opportunity to file an affidavit as requested. Also, no where in the minutes to indicate that the SCJ 1 has considered the objections and gave his reasons dismissing the Defendants' objections; and

(f) As such, contrary to the Plaintiff's contentions, the issues raised by the Defendants were not effectively and fully ventilated by the parties to the garnishee proceedings and adjudicated by the court. Accordingly the issue of res judicata does not apply.

Conclusion

[32] Premised on the above, the Plaintiff's appeal is dismissed and order of the SCJ 2 as in the Amended Garnishment Order affirmed.

t.t.

(KHADIJAH BINTI IDRIS)
JUDGE
HIGH COURT

DATED 21 DECEMBER 2022

Counsels:

Appellant	:	Ms. Nurkhairina binti Mohd Nasar of Messrs Fairuz Ali & Co.
Respondents	:	Mr. Ahmad Danial bin Mohd Azlan of Messrs Norizan & Associates.

Conclusion

[32] Premised on the above, the Plaintiff's appeal is dismissed and order of the SCJ 2 as in the Amended Garnishment Order affirmed.

(KHADIJAH BINTI IDRIS)
JUDGE
HIGH COURT

DATED 21 DECEMBER 2022

Counsels:

Appellant	:	Ms. Nurkhairina binti Mohd Nasar of Messrs Fairuz Ali & Co.
Respondents	:	Mr. Ahmad Danial bin Mohd Azlan of Messrs Norizan & Associates.