PEMBINAAN DAN PEMAJU MAHAJIWA (SELANGOR) SDN BHD v. ASM DEVELOPMENT SDN BHD (DAHULUNYA DIKENALI SEBAGAI SOBENA MAJU SDN BHD)

FEDERAL COURT, KUALA LUMPUR

HAIDAR MOHD NOOR, HBM; ABDUL MALEK AHMAD, HMP; ABDUL HAMID MOHAMAD, HMR

RAYUAN SIVIL NO. 02-2-2003 (W)

23 SEPTEMBER 2003

[2003] 1 LNS 517

Counsel:

Bagi pihak Perayu: Encik Yusuf Khan, Encik Mathew Thomas; Tetuan Thomas Philip, Kwa & Lou

Bagi Pihak Responden: Dato' R.R. Sethu; Tetuan R.R. Sethu

GROUNDS OF JUDGMENT

The Appellant in this court was also the appellant in the Court of Appeal and the plaintiff in the High Court.

In 1988, the Appellant commenced Civil Suit No. D4-23-356-88. It was struck out on the ground that the writ had expired and its renewal was irregular. That suit does not concern us here.

On 1st December 1989, the Appellant commenced Civil Suit D3-22-2531-89 in the High Court at Kuala Lumpur ("the first suit").

On 19 May 1990 the Respondent filed a summons in chambers (Enclosure 8) for an order that:

"(a) the plaintiff's claim herein be struck out and/or stayed;"

The grounds of the application were:

"1. This action had been commenced without the authority of the Plaintiff's board.

2. The Plaintiff's solicitors have failed, despite demands, to produce evidence of such

authority."

On 6 September 1990, at the hearing of the summons in chambers (Enclosure 8), the notes recorded by the Senior Assistant Registrar shows that the Respondent's counsel applied for the minute book of the Appellant to be produced for inspection by learned counsel for the Respondent as he was of the view that the resolution was backdated. The learned Senior Assistant Registrar adjourned the hearing of Enclosure 8 to 11 October 1990 for the Appellant "to supply minutes book" to the Respondent by 4th October 1990.

On 11th October 1990, the matter again came up before the Senior Assistant Registrar. The learned counsel for the Respondent complained that the Appellant did not allow the Respondent's counsel to see the minute book to check whether the resolution was backdated. Only the particular resolution was shown. As a result the Respondent's counsel could not determine whether the resolution was backdated.

Learned counsel for the Appellant replied: "We won't show any other thing." The learned Senior Assistant Registrar then recorded an order in terms. The "order in terms" clearly refers to the prayers in Enclosure 8.

The Appellant then filed a notice of appeal to the Judge in Chambers (Enclosure 10). The appeal came up before the Judge in Chambers on 25 October 1990. Both parties were absent and the learned Judge struck out the appeal.

The matter ended there.

On 21 May 1992, the Appellant filed a fresh action D3-22-723-92 ("the second suit"). The parties and the cause of action were the same as in the first suit.

The writ and the statement of claim were served on the Respondent and the Respondent duly filed its appearance.

The Statement of Claim was amended on 2 September 1992 without leave of the court.

On 10th January 1994, the Appellant applied to re amend the amended statement of claim.

On 11 January 1994, the Respondent filed a summons in chambers pursuant to Order 18 rule 19 of the Rules of the High Court " (RHC 1980)", inter alia, for an order that "the Amended Statement of Claim dated 20.10.92 be struck out and set aside." The principal ground was that the Appellant was "reagitating an action that was struck out for non-compliance with an order of Court" and that this amounted to an abuse of the process of the court.

On 28 June 1995, the learned Judge dismissed the application to strike out. He, however, allowed the setting aside of the amended statement of claim but made no order on the application to re-amend.

The Appellant lodged two separate appeals to the Court of Appeal. The first appeal was in respect of the setting aside of the amended statement of claim (W-02-476-95). The second was in respect of the refusal to make an order on the application to re-amend (W-02-480-95).

The Respondent cross-appealed in W-02-476-95 in relation to the refusal to strike out the

second suit (D3-22-723-92).

On 17 September 1996, the Court of Appeal heard the cross-appeal first and allowed it. No grounds have been given. It is against that decision of the Court of Appeal that the Appellant appealed to this court. And this judgment is in respect of that appeal.

(The Court of Appeal also dismissed both the appeals in W-02-476-95 and W-02-480-95. The Appellant did not appeal against the dismissal of the two appeal).

On 10 February 2003 this court granted leave to the Appellant on the following issues:

"whether an order striking out an action (the "earlier action") for non-compliance with an order in the earlier action (the "Order") as a matter of course:

(a) prohibits the filing of a fresh action (the "fresh action") based on the same causes of

action in the earlier action; and

(b) deems the filing of the fresh action and abuse of process; and

(c) justifies the striking out of the fresh action."

The learned High Court Judge (as he then was) referred to two English case, i.e Janov v. Morris (1981) 3 All E.R. 780 and Bailey v. Bailey & another (1983) 3 All. E.R. 495.

The learned Judge stated the contention of the parties as follows:

"In the instant application it is the contention of the defendant that the 2nd suit was struck out for non compliance with a court order made on 6th September 1990. It is therefore an abuse of the process of court for the plaintiff to commence afresh the instant action.

The plaintiff on the other hand contended that the suit was struck out because it was commenced without the authority of the plaintiff and not because of non compliance with the order of court dated 6th September 1990."

and continued:

"The question to be determined is whether the 2nd suit instituted by the plaintiff was struck out for non compliance with an order of court as claimed by the defendant. To answer this question it is necessary to have a close look at the application to strike out the action. The application to strike out the action (Exhibit TYH 7) states the grounds of the application are : -

1. This action has been commenced without the authority of the plaintiff's board.

2. The plaintiff's solicitors have failed, despite demands, to produce evidence of such authority."

Considering the wording of the order dated 11 October 1990 and the affidavits of both

parties, the learned trial Judge concluded:

"On a close examination of the summon-in-chambers and the order dated 11th October 1990 and on the affidavit evidence adduced I am inclined to believe that the order to inspect the minute book of the plaintiff was for the purpose of establishing whether the solicitors for the plaintiff had the authority to institute the action. To my mind this order was complied with. The reason for striking out, to my mind was based on the ground as stated in the summon-in-chambers.

I am convinced that the order to strike out the action was made on the ground that the action was not instituted with the authority of the plaintiff and therefore not instituted properly under the rules of the court (a situation in Bailey v Bailey) and not on the ground of the plaintiff's disobedience of a peremptory order of the court (a situation in Janov v Morris).

Unfortunately, the Court of Appeal that reversed this decision did not give its grounds. We are left to wonder what the grounds were. Most likely, the Court of Appeal did not agree with the finding of the learned Judge that the first suit was not dismissed for failure to comply with the order of the Senior Assistant Registrar "that the Defendant be entitled to inspect the minute book of the Plaintiff's Company" but for the reason stated in the summons in chambers i.e. the action was not instituted with the authority of the plaintiff. The learned Judge was of the view that the order of the Senior Assistant Registrar that the Respondent be entitled to inspect the minute book of the Appellant company had been complied with.

Coming back to the law. It is trite that a suit may be struck out on the ground of an abuse of the process of the court. But what amounts to an abuse of the process of the court would depend on the facts of each case.

In this case, the alleged abuse of process of the court is on the ground that there has been a failure to comply with a court order.

Let us look at some cases on this point.

In Birkett v. James (1978) A.C. 297, the plaintiff issued a writ against the defendant. The defendant filed his defence. On 28th June 1973, an order for a trial on a preliminary issues of facts was made. The order required the action to be set down for trial within 28 days. The plaintiff did not set down the suit for trial and no further steps were taken by the plaintiff on 23 July 1975, when he gave notice of intention to proceed. On 2 October 1975, the defendant applied for an order to dismiss the action for want of prosecution. It was held, inter alia, that:

"(2) The plaintiff whose action was dismissed for want of prosecution before the limitation period had expired was, save in an exceptional case, entitled to issue a fresh writ for the same cause of action...."

However, it must be pointed out that that case concerned an application to strike out a suit on the ground of want of prosecution, which is not the case before us.

In Tolley v. Morris (1979) 2 All E.R. 561 (H.L.), it was, inter alia, held that "even though there had been inordinate and inexcusable delay in prosecuting the respondent's action, it would not be dismissed for want of prosecution because the respondent could, by virtue of her right under section 22 (of the English Limitation Act 1939) issue a fresh writ for the same

cause of action."

At page 571 of the report, Lord Diplock said:

"Disobedience to a peremptory order would generally amount to such "contumelious" conduct as is referred to in Bickett v. James and would justify striking out a fresh action for the same cause of action, as an abuse of the process of the court."

Lord Edmund-Davies at page 571 of the report said:

"I am not presently persuaded that a person who starts an action within the limitation period is liable to have it struck out as constituting an abuse of the process of the court, for the sole reason that a previous suit instituted by him in respect of the same cause of action was itself struck out on the ground that his disobedience to the court's orders (peremptory or otherwise) amounted to contumelious default."

Lord Keith of Kinkel, at page 572 of the report, said:

"It is, however, the general rule tat, provided no estoppel arises by reason of res judicata or other wise and his conduct is not vexatious or an abuse of the process of the court, as plaintiff is entitled to bring successive actions founded on the same right of action until such time as the limitation period for the cause of action has expired."

In Janov v. Morris (1981) 3 All. E.R. 780, the plaintiff instituted an action against the defendant for breach of contract. Due to an unexplained delay on the part of the plaintiff in proceeding with the action, the court ordered that the action be dismissed for want of prosecution unless the plaintiff serves a summons for direction by a certain date. The plaintiff did not comply with that order. Neither could it give any explanation. The court dismissed the action for want of prosecution. The plaintiff subsequently brought a second action against the defendant based on the same cause of action. The defendant applied for an order that the second action be struck out on the ground that it was an abuse of the process of the court under the Order 18 rule 19(1)(d) of the (English) Rules of the Supreme Court, which is in pari materia with the Order 18 rule 19 (1)(d) of the Rules of the High Court 1980 ("RHC 1980). The court struck out the second action. The Court of Appeal (England) upheld that decision. The Court of Appeal held:

"Where an action had been struck out on the ground of the plaintiff's disobedience of a peremptory order of the court and the plaintiff commenced a second action within the limitation period raising the same cause of action the court had a discretion under RSC Ord. 18, r 19 (1) (d) to strike out the second action on the ground that it was an abuse of the court's process. In exercising that discretion the court would have regard to the principle that court orders were made to be complied with."

In Bailey v Bailey & Another (1983) 3 All. E.R.495, the plaintiffs first action was dismissed on the ground of plaintiff's inordinate and inexcusable delay. The plaintiff subsequently filed a second action based on the same cause of action. The defendants applied to strike out the second action on the ground of an abuse of the process of the court. The Registrar granted the order prayed for. The learned Judge upheld the Registrar's decision. The Court of Appeal allowed the appeal against the decision of the learned Judge. The Court of Appeal held:

"Since the plaintiff's first appeal has been struck out for mere failure to observe the rules as to time and the second action had been commenced within the limited period, the plaintiff was entitled to proceed with the second action."

In In re Jokai Tea Holdings Ltd. (1992) 1 W.L.R. 1196, the plaintiff (a Bank) served a request for further and better particulars of the defence. It was not answered. The plaintiff then served a summons for an order for the particulars. The time for compliance was extended. Again no particulars were supplied by the defendants. On 9 November 1987, the Registrar ordered that the particulars should be served within 56 days and that in default the points of defence should be struck out and the plaintiff should be at liberty to apply for the relief claimed. One day before the expiry of the order, the defendants issued a summons seeking to extend the time for compliance with the order, for a stay of the order and for leave to amend their defence. The plaintiff then restored its originating notice of motion for judgment. About a week later the defendants served further and better particulars of the existing points of defence. About two weeks later the defendants served the proposed amendments to the points of defence, which involved the abandonment of all the paragraphs of which particulars had been ordered and raised a different defence. The following week, the learned Judge gave judgment for the bank on the grounds of breach of the order of 9 November 1987 (ordering that the particulars be served within 56 days of the date of the order). The defendants appealed to the Court of Appeal which allowed the appeal.

Sir Nicholas Browne - Wilkinson V.-C. in his judgment discussed, inter alia, Birkett v. James (supra), Tolley v Morris (supra), Janov v. Morris (supra) thus:

"The first class of case considered in Birkett v. James is where the plaintiff has been guilty of "intentional and contumelious conduct." Disobedience to a peremptory order is "generally" to be treated as contumelious conduct: Tolley v. Morris [1979] 1W.L.R. 592. 603. per Lord Diplock. Where there has been such contumelious disobedience not only the plaintiff's original action but also any subsequent action brought by him based on the same cause of action will be struck out: Janov v. Morris [1981] 1W.L.R. 1389. The basis of the principle is that orders of the court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed. The rationale of such penalty being that it is contumelious to flout the order of the court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court's order, his conduct is not contumelious and therefore the consequences of contumely do not flow.

In Janov v. Morris a plaintiff whose first action had been struck out for failure to comply with an "unless" order brought a second action based on the same cause of action. The basis of the decision was that the failure to comply with the peremptory order was contumacious: see [1981] 1 W.L.R. 1389, 139H, per Watkins L.J. It is clear that the court, in reaching the conclusion that the conduct was contumacious, placed much reliance on the fact that no explanation or excuse had been given by the plaintiff for his disobedience to the order.

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be

treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

The questions therefore which arise in the recent case are whether, apart from the defendants' conduct in failing to comply with the "unless" order, leave to amend the defence should be given and, if so, whether such failure to comply was contumelious. The judge did not approach the case in that way and, in my judgment, erred in principle. We must therefore exercise the discretion ourselves."

On the failure to comply with the "unless" order by the defendants in that case, his Lordship said, at page 1205 of the report:

"In these circumstances, I consider that the defendants have given an explanation of their failure within the 56 days limited by the "unless" order either to serve the particulars ordered or obtain leave to amend the defence. Although the defendants should have acted with greater diligence, the failure to comply with the "unless" order is primarily due to the mistake as to the date of the expiry of the order and the obstructive conduct of the bank in relation to the documents. The defendants' explanation shows that they were not defying or ignoring the court order and in the result it is, in my judgment, impossible to characterise their conduct as contumelious. Accordingly, the failure to comply with the "unless" order does not, in my judgment, provide sufficient reason for refusing to exercise the discretion of the court in giving leave to the defendants to amend their defence and thereby have a trial of the dispute on the merits."

Parker L.J., in agreeing with Sir Nicholas Browne - Wilkinson V.-C., inter alia, said, at page 1206 of the report.

"In the present case I have no doubt that the defendants conduct was not sufficient to the punishment inflicted."

Sir John Megaw was of the view that "The conduct of the defendants, having regard to all the circumstances, could not be described as "contumelious".

Two things that should be pointed out about this case are that, first, there was a peremptory order that was not complied and secondly, it was the "first case" that was in issue.

This court had occasion to consider Janov v. Morris (supra) in Lim Oh & Ors v. Allen & Gledhill (2001) 3 M.L.J. 481 (F.C.) In that case, on May 1986, the appellants instituted the first suit against two original defendants. On 13 June 1988, the appellants filed an application to amend the writ of summons to include Allen & Gledhill, the respondent, as a party to the action. On 24 January 1990, the application for amendment was granted. As required by Order 20 rule 9 RHC 1980, the amendment would have to be filed within 14 days from the date of the order. The appellants failed to do so. On 7 June 1990, the appellants obtained an order for leave to extend time to file their amended writ of summons and statement of claim of the first suit. Again, they failed to effect the amendment within the prescribed period. On 27 November 1990, when the respondent was served with the amended writ of summons and the statement of claim, the respondent took out an application to set aside the same. The learned Senior Assistant Registrar granted the application. There was no appeal against the decision of the Senior Assistant Registrar.

On 12 March 1991, the appellants filed the second suit. The respondent then applied to strike it out on grounds of res judicata and/or issue estoppel and an abuse of the process of the court. The application was allowed by the Senior Assistant Registrar. Appeal to Judge in Chambers was dismissed. (The first appeal to the Judge in Chambers and then to the Supreme Court is omitted). The learned Judge dismissed the appeal on the ground that issue estoppel applied and, therefore, the filing of the second suit constituted an abuse of the process of the court. The appellants appealed to the Court of Appeal that dismissed the appeal essentially on the same grounds as the High Court Judge. Leave was granted to the appellant to appeal to the Federal Court.

Steve Shim C.J. (Sabah and Sarawak), delivering the judgment of the Court, inter alia, said:

"It is significant to note the following undisputed facts, namely, that there was an application by the appellants (as plaintiff) to amend their writ of summons and statement of claim to include the respondent as a defendant in the first suit; that in consequence thereof, the court made an order granting the said application, the effect of which would require the appellants (as plaintiffs), as a matter of course, to comply with 0 20 r 9 of the RHC which stipulates that the amendment was to be made within 14 days from the date of the court order, otherwise the amendment would cease to have any effect; that the appellants had failed to effect the said amendment within the stipulated period and apparently without any explanation for such failure.

In our view, the factual circumstances in the instant case clearly indicated that it was not a situation where there was a mere failure on the part of the appellants to comply with the rules of court because quite obviously, there was in existence a specific court order directing the appellants to effect the amendments in compliance with the RHC. It was in the nature of a peremptory order of the court, and the appellants (as plaintiffs) failed to comply with such a peremptory order."

After referring to Janov v. Morris (supra), the learned C.J. (Sabah & Sarawak), continued:

"Given the view which we take that there was clearly in existence a peremptory order of the court, and that the learned SAR had struck the appellants' first suit out for disobedience of that peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit, containing as it did, the same issues and relief as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court."

From the authorities it is quite clear that failure to comply with a peremptory court order that amounts to a contumelious conduct may constitute an abuse of the process of the court that gives the court the discretion not only to strike out the first suit but also the second suit. However, it is not in all cases of a breach of a peremptory court order that the discretion should be exercised in favour of striking out even the first suit. We see, for example, in Tolley v. Morris (supra), Bailey v. Bailey (supra) and In re Jokai Tea Holdings Ltd (supra) that the courts refused to strike out even the first suit. Back home, however, the second suit was struck out: Lim Oh & Ors v. Allen & Gledhill (supra).

Let us see whether the present case can be distinguished from Lim Oh & Ors v. Allen & Gledhill (supra). We see that in Lim Oh & Ors v. Allen and Gledhill (supra), the appellants

failed to comply with the court order twice, once upon the making of the order to amend the writ of summons and the statement of claim, and the second time, after having obtained an order for an extension of time to file the same. That goes to the contumelious conduct of the appellant. There was no dispute about the terms of the order: to file the amended writ of summons and the statement of defence by a certain date.

In the instant case, the application (Enclosure 8) to strike out or for a stay of the Appellant's claim was made on the ground that the action had been commenced without the authority of the Appellant's board of directors. The second ground i.e. that the Appellant failed to produce evidence of such authority refers the "demands" by the Respondent of such evidence prior to the making of the order by the Senior Assistant Registrar. So the "failure" on the part of the appellant to produce evidence of such authority as contained in the application is not a failure or refusal to comply with an order of the court. At the hearing on 6 September 1990, the Senior Assistant Registrar ordered the Appellant "to produce minute book" of the Appellant to the Respondent. The Appellant showed the Respondent the resolution in question but refused to allow the Respondent's counsel to check the whole minute book. The Respondent wanted to see the whole minute book in order to check whether the resolution was backdated. The Appellant did not want the Respondent to have access to other unrelated information relating to the Appellant.

What transpired on 11 October 1990 at the continued hearing of Enclosure 8 is significant. The learned counsel for the Respondent submitted that the court "should draw an adverse inference." The Senior Assistant Registrar then made an order in terms.

First, coming back to the order of the Senior Assistant Registrar on 6 September 1990. The order that the Appellant "to supply minute book" to the Respondent is in itself rather vague. The sole ground of the application was that the suit was filed without the authority of the Appellant's board of directors. The resolution was produced. Certainly the Respondent should not be allowed to have access to other unrelated information of the Appellant under the pretext of verifying the veracity of the resolution.

Secondly, on 11 October 1990, at the continued hearing of Enclosure 8, the sole ground argued was that the suit was commenced without the authority of the board, the learned counsel for the Respondent asked the Senior Assistant Registrar to draw an adverse inference. That can only mean that he was asking the Senior Assistant Registrar to draw an adverse inference that there was no authority. It is not surprising, therefore, that the Senior Assistant Registrar recorded an order in terms, meaning in terms of the application, that is, the suit be struck out because it was commenced without authority. In the circumstances, even the order dated 11 October 1990 did not mention that the Appellant's claim was struck out because of non-compliance with the order that the Respondent be entitled to inspect the minute book of the Appellant. The order mentioned that such an order was made on 6 September 1990 and the summons coming up for continued hearing on 11 October 1990 and upon hearing counsel for both parties the Appellant's claim was struck out with costs. This appears to be consistent with the submission of the learned counsel for the Respondent on 11 October 1990 that an adverse inference (that there was no authority) should be drawn.

I agree with the submission of the learned counsel for the Appellant before us that the first suit was struck out for want of authority and not for failure to comply with a court order. It would have been different if upon hearing the complaint by the learned counsel for the Respondent on 11 October 1990 and the stand taken by the Appellant, the Senior Assistant

Registrar had made a further order directing that the whole book be produced for inspection by the Respondent failing which the suit would be struck out, and the Appellant failed to comply with that order. Indeed, if such an order was made, the Appellant would be entitled to appeal against such an order.

That being the case, is it an abuse of the process of the court for the Appellant to file the second suit? I do not think so.

It is true that the Appellant did not appeal against the order of the Senior Assistant Registrar striking out the first suit. But, that is a matter for the Appellant to decide. The Appellant had an option whether to try to save the first suit or to abandon it and file a fresh suit. Indeed, upon an objection being raised, if it is true that the first suit was commenced without authority, the Appellant could on its own accord, discontinue the action and file a fresh one. That clearly would not be an abuse of the process of the court. To sum up, on the facts of this case, where the appellant had two options before it, the fact that it chooses one and not the other, is not an abuse of the process of the court.

The situation in Janov v. Morris (supra) is different. In that case due to unexplained delay on the part of the plaintiff in proceeding with the action the court ordered that the action be dismissed for want of prosecution unless the plaintiff served a summons for directions by a certain date. That order was ignored. In other words, the order made it very clear that if it was ignored the suit would be struck out. But that is not the case here.

In the circumstances of this case, I am of the view that the learned Judge was right in refusing to strike out the Appellant's second suit. So, on the facts of this case, I am of the view that there was no abuse of the process of the court on the part of the Appellant that warrants a prohibition of the Appellant from filing a fresh suit or that justifies the striking out of the fresh action on the ground of an abuse of the process of the court.

I would therefore allow the appeal with costs here and below and order that the deposit be refunded to the Appellant.

My Chief Judge (Malaya), Haidar Mohd. Noor and my brother Abdul Malek Ahmad F.C.J. have read this judgment in draft and have expressed their agreement with it.

23 September, 2003.

(DATO' ABDUL HAMID BIN HAJI MOHAMAD)

Hakim Mahkamah Persekutuan Malaysia Kuala Lumpur.

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