

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S2-22-129-1996

BETWEEN

- 1. KEJURUTERAAN EMWELD SDN BHD**
- 2. IKTA SDN BHD**
- 3. KEJURUTERAAN JAYATEK**
- 4. LIK SAN ENGINEERING WORKS**
- 5. LEE SEEK WENG**
(berniaga di atas nama dan gaya
FEDERAL GROUP ENGINEERING WORKS)
- 6. HON CHOI PING @ HOON KENG**
- 7. TANG KEIN FOO**
(berniaga di atas nama dan gaya
SANG KEONG MOTOR)
- 8. YAP SANG KEONG**
(berniaga di atas nama dan gaya
SANG KEONG MOTOR)
- 9. CHONG TUCK KIN**
(berniaga di atas nama dan gaya
BENKEL MEMBAIKI KERETA CHONG TUCK KIN)
- 10. GAN BROTHERS AUTO ELECTRICAL SERVICE**
- 11. WINTRADE ENGINEERING WORKS**
.....PLAINTIFFS

AND

TENAGA NASIONAL BERHAD

.....DEFENDANT

GROUND OF JUDGMENT

Enclosure 107 is the Defendant's application for an interim injunction under Order 29 RHC. The Defendant prays for the following orders:

- a) An interim injunction to restrain Plaintiffs and/or their staffs and/or their agents from advertising the Judgment dated 17.5.2005 ("the said Judgment") to the public and/or media until Defendant's application to set aside the Judgment is heard by this Court; and
- b) An interim injunction to restrain Plaintiffs and/or their staffs and/or their agents from executing the said Judgment until Defendant's application to set aside the same is heard by this Court.

Background Facts

On 17.5.2005, the learned Judge at that time, Dato' Azmel bin Hj Maamor ("the Judge") had allowed Plaintiffs' claims with costs. The decision was only on liability. There was no order as to quantum of

damages, be it general or special damages. The Notes of Evidence in Exhibit “MFH-1” of Enclosure 106 reflects this.

Defendant had filed an appeal to the Court of Appeal against the Judge’s decision, which to date have not been disposed off by the Court of Appeal.

Meanwhile, the Plaintiffs via letter dated 15.7.2005, had sent the draft Judgment which specified the quantum of special damages to the Defendant’s previous Solicitors, Messrs Skrine for approval. Refer to exhibit “MFH-3” of Enclosure 106 for the said letter.

Messrs Skrine, however, did not approve the said draft Judgment as it was incorrect.

Both parties met up with the Judge, the Judge himself had confirmed that he had decided on liability only, and further advised the Plaintiff’s solicitors to file an application for assessment of damages.

Pursuant to that the matter came up before the Senior Assistant Registrar for the hearing of the assessment of damages and on 3.8.2007, she made an order of RM 300,000.00 to the Plaintiffs for general damages. A perusal of the minutes in the file on the 3.8.2007 written by the Senior Assistant Registrar states as follows:

“ Mahkamah dengan ini memperakui bahawa gantirugi yang ditetapkan kepada Plaintiff-Plaintif adalah sebanyak RM 300, 000.00 dan faedah 8 % setahun dari tarikh penghakiman hingga penyelesaian penuh.....

Bagi gantirugi khas – tiada bukti mengenai kerugian khas.....

4) RM 300,000.00 di benarkan sebagai gantirugi am impak daripada pemotongan elektrik Syarikat-Syarikat Plaintiff bagi jangka masa 14 hari tersebut...”

A copy of the Order dated 3.8.2007 is exhibited as “MFH-5” of Enclosure 106.

Plaintiffs had then filed an appeal to the Judge in Chambers to appeal against the said Order dated 3.8.2007. However, it was ordered by this Court on 8.10.2007, for both parties to appear again before the Senior Assistant Registrar to determine the issue on special damages.

Refer to the Order dated 8.10.2007 in exhibit “MFH~6” of Enclosure 106.

The court has never at any point in time granted to the Plaintiff the award for special damages.

However the said Judgment dated 17.5.2005 contained an amount for special damages.

Plaintiffs had served the said Judgment on the Defendant's Chairman, Tan Sri Amar Leo Moggie and not on the Defendant's Solicitors.

The Plaintiffs have demanded from the Defendant the sum of RM1,836,733.00 as special damages when in fact the said sum was never awarded by this Court.

Refer to the Plaintiffs' Solicitors' letter dated 29.5.2008 in exhibit 'MFH-7" of Enclosure 106.

Whether the said Judgment dated 17.5.2005 can be set aside and whether this court is functus officio

Clearly the said Judgment dated 17.5.2005 which had been perfected, does not contain what was actually ordered by the Judge on 17.5.2005. Thus, the issue is whether this court has the jurisdiction to vary or set aside such order.

On this point I refer to the case of ***Leung & Another v. Minister For Immigration And Multicultural Affairs*** (1997) 150 ALR 76, a decision of the Federal Court of Australia, which had this to say (see p. 84 of the report):

“The origin of the principle of *functus officio* as that expression currently employed is to be found in the latter part of the last Century in England when it was decided that a final decision of a court could not be reopened. The reason given was that the power to reopen a dispute had been transferred to the court of appeal: *Re St Nazaire Co* (1879) 12 Ch D 88. The rule applied only after the formal judgment of court had been passed and entered and was subject to two exceptions, viz where there had been a slip in drawing it up and where there had been an error in expressing the intention of the court: *Re Swire* [1885] 30 Ch. 141....”

As for the said Judgment dated 17.5.2005, although it was a perfected Judgment, it does not reflect the actual order of the Judge which was delivered on the said date. There was an error when drawing up the Order. Therefore, this court is not *functus officio* in correcting such an error, especially since the said Judgment does not reflect the intention of the Court.

Therefore the said Judgment is not a regular Judgment.

Whether an Interim Injunction should be granted

I granted the interim injunction due to the following reasons:

a) There is clearly a dispute as to the validity of the said Judgment in this present case before this Court.

Plaintiffs had indicated to the Defendant that they are going to execute the said Judgment which is seriously disputed by the Defendant and which is irregular.

The Court had never ordered that the Plaintiff is entitled to the sum of RM1,836,733.00 as special damages.

b) Damages would not constitute an adequate remedy

From the facts mentioned above, the Defendant would suffer an irreparable damage if the Plaintiffs are not restrained from executing the Judgment which is invalid. The Defendant is a big and reputable company and the enforcement of the said Judgment will certainly affect its reputation. This certainly cannot be quantified in monetary terms. This would cause hardship to the Defendant.

Plaintiffs would not suffer any damages if the injunction granted in Defendant's favour pending the determination of the validity of the said Judgment.

Moreover the Defendant, has given an undertaking that the Defendant is financially capable to compensate the Plaintiffs in the event this injunction should not be given to the Defendant.

c) Balance of convenience

It is clear and obvious from the facts that the Judgment is irregular and there is a mala fide intention on the part of the Plaintiff in serving an irregular judgment on the Defendant, when they were fully aware that the Court had never at any point in time made any order as to the amount of special damages.

Therefore pending the hearing and determination of the application for the setting aside of the said Judgment, it is in the interest of both parties that the Judgment is not enforced yet. It will not prejudice the Plaintiffs in the mean time. Thus, balance of convenience is in favour of granting the interim injunction pending the disposal of the hearing of the application to set aside the said Judgment.

Therefore I allowed the application of the Defendant in Enclosure 107 for prayers (1), (2) and (3) with the Defendant's undertaking as to damages.

Enclosure 110:

Enclosure 110 is an application by the Defendant to set aside the Judgment dated 17.5.2005. The reasons are the same as stated for the application in Enclosure 107.

Clearly, the said Judgment which had been sealed and perfected does not reflect what actually was ordered by the learned Judge and this was clarified and explained by the learned Judge to both

parties when they met up with him. In fact parties were advised to get the damages assessed before the SAR.

Since the Judgment is irregular, I granted order in terms of Enclosure 110 with costs. With the granting of order in terms for Enclosure 110, the interim injunction granted in Enclosure 107 is academic and no longer relevant.

Enclosure 113:

Enclosure 113 is the Plaintiff's application to set aside the Defendant's application in Enclosure 107 and the interim injunction granted by the court on 11.6.2008. The ex parte order of injunction is no longer relevant after the granting of the order in terms of Enclosure 110. Hence I dismissed the application in Enclosure 113 with costs.

Datin Zabariah Mohd Yusof

Tarikh : 8.6.2009

Bagi Pihak Plaintiff : Encik Bosco Philip
Tetuan Bosco Philip Anthony

Bagi Pihak Defendant : Encik Mokhzani
Tetuan Aziz Hon Annuar

