Semangkuk 2 Bhd v Airmarine (M) Sdn Bhd [2024] MLJU 2419

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

LEONG WAI HONG JC

APPEAL SUIT NO WA-12ANCVC-89-04 OF 2024

24 September 2024

Kwong Chiew Ee (with Kan Hui Ling and Dominic Lee Wan - Ee (Pupil in Chamber)) (Rahmat Lim & Partners) for the appellant.
Eugene Yeap Zhe Jian (with Mirdhulekha Muralidharan) (David Gurupatham & Koay) for the respondent.

Leong Wai Hong JC:

Judgment

Introduction

[1] This judgment deals with an appeal from the Sessions Court to me at the High Court. The appeal is filed by the appellant/plaintiff/ Semangkuk 2 Berhad [“Semangkuk”].

[2] The Sessions Court on 26-03-2024 had granted an Order 14 A Rules of Court 2012 [“ROC 2012”] judgment in favour of the respondent/ defendant/Airmarine (Malaysia) Sdn.Bhd. [“Airmarine”]. The Grounds of decision is in Enclosure 27 pages 22 - 33.

[3] On 16-08-2024 I had allowed the appeal on these terms-

i. Appeal is allowed with costs here and below of RM 12,000 subject to allocatur.

ii. Order of Sessions Court set aside. Matter remitted back to Sessions Court to be heard by another judge.

[4] Airmarine has filed an appeal to the Court of Appeal on 12-09-2024. These are my Grounds of Judgment.
Background Facts

[5] The dispute between the parties concerns a tenancy at Block 1 – Unit 1, 2, 3 and 4, First Floor Mapletree Logistics Hub Shah Alam, Lot 1003, Jalan Jubli Perak 22/1A, Seksyen 22, 40300 Shah Alam, Selangor (“Premises”).

[6] Airmarine (as tenant) agreed to rent from Winning Paramount Sdn Bhd (as landlord) the Premises under a tenancy agreement dated 22-08-2018 and a supplemental agreement dated 01-10-2019 (collectively “Tenancy Agreements”). [See Appeal Record Volume 2B – Part C (Enclosure 29) at pages 164 - 212].

[7] The Tenancy Agreements were subsequently assigned by Winning Paramount Sdn Bhd to Semangkuk as evidenced by a Notice of assignment dated 31-12-2019 [See Appeal Record Volume 2B – Part C (Enclosure 29) at page 213].

A note of caution - the pagination in the Appeal Records enclosures 3-6 is carelessly done by solicitors for Semangkuk as

most pages were not paginated. The Appeal Records were refiled properly paginated and marked as enclosures 27 - 30. I will use the Appeal Records properly paginated.

[8] The tenancy period under the Tenancy Agreement was for a period of 47 months commencing from 01-09-2018 until 31-07-2022. The Tenancy Agreement was not renewed or extended after 31-07-2022, and thus, had expired on 31-07-2022. [See Appeal Record Volume 2B – Part C (Enclosure 29) at page 166 item 3].

Suit in the Sessions Court

Contentions of Semangkuk

[9] Semangkuk contends that as at 10-11-2020, there was an amount of RM 3,065,786.50 due and owing by Airmarine to Semangkuk under the Tenancy Agreements, being the outstanding monthly rental of the Premises beginning from March 2020 and outstanding utilities of the Premises beginning from January 2020 [See Appeal Record Volume 2B – Part C (Enclosure 29) at pages 219 - 221].

[10] Semangkuk also contends that Airmarine has a long-standing history of defaulting in payment of rental. Semangkuk cites the late payments of the rentals for May, June and July 2019 as examples. [See Appeal Record Volume 2C – Part C (Enclosure 30) statements of Account at pages 285 - 289].

[11] On 25-01-2021, Semangkuk commenced action against Airmarine in the Sessions Court to claim for, amongst others, the outstanding rental and utility charges due and owing by Airmarine to Semangkuk under the Tenancy Agreements. [See Appeal Record Volume 1 – Part A (Enclosure 27) at pages 34 - 48].

[12] Airmarine does not deny its non-payment of outstanding rental and utilities. Airmarine's defence against its non-payment is that its business was allegedly affected by the COVID-19 pandemic. [See Appeal Record Volume 1 – Part A (Enclosure 27) Re – Re Amended Defence and Counterclaim dated 10-10-2022 at page 51 paragraph 8)].

Airmarine's counterclaim

[13] In the Amended Defence and Counterclaim, Airmarine filed a counterclaim against Semangkuk for alleged unlawful interference of business by Semangkuk.

[14] Airmarine's counterclaim was premised upon Semangkuk alleged interference with the business dealings between Airmarine and its potential clients resulting in cumulative losses of RM 122, 642,613.72. [See Appeal Record Volume 1 – Part A (Enclosure 27) Re - Re Amended Defence and Counterclaim at paragraphs 23 to 24.

Summary judgment application by Semangkuk

[15] On 09-03-2021, Semangkuk filed an application for summary judgment of Semangkuk's claim against Airmarine. In opposing the summary judgment application, Airmarine took the position that the applicability of *section 7* of the *Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 [Act 829] ("COVID-19 Act")* is a triable issue.

[16] The Sessions Court agreed with Airmarine and held that the applicability of *section 7* of the *COVID-19 Act* raises triable issues which are not suitable to be disposed of summarily. In paragraphs 19 - 20 of the Sessions Court Grounds of Judgment the Sessions Court held as follows:

> "[19] Mahkamah ini juga berpendapat bahawa *seksyen 7 Akta 829* **adalah terpakai dalam kes ini**…
>
> [20] … setelah meneliti fakta kes …Mahkamah ini berpandangan bahawa Defendan yang telah berjaya mengemukakan suatu pembelaan yang bermerit dan **bahawa tindakan ini tidak sesuai untuk dilupuskan secara penghakiman terus dan terdapat isu-isu yang wajar dibicarakan.**"
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> [See Appeal Record Volume 2B – Part C (Enclosure 29) at pages 260 - 261].

[17] On appeal to the High Court, the High Court affirmed the Sessions Court's decision and held that the applicability of *section 7* of the *COVID-19* Act is an issue to be ventilated in a full trial. [See Appeal Record Volume 2C – Part C (Enclosure 30) High Court Grounds of Judgment at page 314 paragraph 32].

Order 14A Application

[18] Subsequently Airmarine filed an application under Order 14A ROC 2012 to dispose of Semangkuk's claim

summarily on one question of law, which relates to the applicability of *sections 7* and *9* of the *COVID-19 Act* ("O.14A Application") [See Appeal Record Volume 1 – Part A (Enclosure 27) at page 119]:

> [a] Sama ada *Seksyen 7* dan *9 Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 ("Akta COVID-19")* yang berkuatkuasa pada 18 Mac 2020, digunapakai dalam tindakan guaman ini?"
>
> [b] …
>
> (c) Jika soalan di perenggan (a) dijawab secara afirmatif, pekara ini akan dibicarakan berkenaan relief dan remedi dalam **perrengan [sic] 44 Tuntutan Balas Terpinda Semula** dan **tuntutan Plaintif terhadap Defendan dibatalkan tanpa kos.**
>
> [Emphasis added]

Order 14A order by the Sessions Court

[19] On 26-03-2024, the Sessions Court allowed the Order 14A application. The Sessions Court ordered for an assessment of the damages suffered by Airmarine. [See Appeal Record Volume 1 – Part A (Enclosure 27) Order 14A Order at page 15 paragraph 2].

[20] The Grounds of Judgment is in Appeal Record Volume 1 – Part A (Enclosure 27) at pages 22 - 33.

[21] Semangkuk contends that the order for assessment of damages suffered by Airmarine was made by the Sessions Court despite no liability for Airmarine's counterclaim having been established or decided upon.

[22] Thus, on 04-04-2024, Semangkuk filed an appeal to me at the High Court against the Order 14A Order ("O.14A Appeal") [See Appeal Record Volume 1 – Part A (Enclosure 27) at pages 17 - 19].

The appeal before me

[23] Semangkuk relies on these three grounds to support its appeal-

i. The O14A Application was not suitable as the Sessions Court and the High Court had already decided that whether *section 7* and *9* of the *COVID-19* Act are applicable are triable issues to be ventilated at length in a full trial and requires long deliberation and mature consideration of law and facts. [See Appeal Record Volume 2B – Part C (Enclosure 29) the Sessions Court Grounds of Judgment at pages 260 - 261 paragraphs 19 - 20]. [See also Appeal Record Volume 2C – Part C (Enclosure 30) the High Court Grounds of Judgment at page 314 paragraph 32].

ii. The sessions court judge had ordered for assessment of damages of the counterclaim without deciding on the liability of the counterclaim.

iii. Airmarine did not produce any evidence to prove that its inability to pay was due to the measures under the COVID-19 Act.

[24] I begin the law on Order 14A ROC 2012.

The law on Order 14A ROC 2012

[25] Order 14A ROC 2012 can be utilised if a posed question of law or construction of a document, on the undisputed facts as disclosed in the pleadings and affidavits, is sufficient for the court to decide on the entire dispute between the parties. [See *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 4 MLRA 73 FC &; *[2014] 6 MLJ 31* FC at (36)].

[26] Order 14A ROC 2012 can also be used if there is no dispute by the parties as to the relevant facts. If parties can't agree on the relevant facts, the court can still allow an Order 14A application if the Court having scrutinise the pleadings and affidavits conclude that the material facts are really not in dispute. [See *Thein Hong Teck & Ors v Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49 FC at (47)].

First ground of appeal - The O14A Application was not suitable as the Sessions Court and the High Court had already decided that whether section 7 and 9 of the COVID-19 Act are applicable are triable issues

[27] I agree with this ground. The issue had been ventilated fully earlier. No appeal was filed by Airmarine to the Court of Appeal. The issue is res judicata in the narrow and wide sense. [See *Mahathir Mohamad Mohd Ali Jinnah*

& Ors v Jagdish Singh Amir Singh [2022] MLRHU 802 HC]. It is also an abuse of process to file an O14A application when the same issue has been held to be triable in an earlier O14 application.

Second ground of appeal - The Sessions Court judge had ordered for assessment of damages of the counterclaim without deciding on liability of the counterclaim

[28] I also agree with this ground. The Sessions Court with respect had erred. The question to recap was-

> [a] Sama ada *Seksyen 7* dan *9 Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 ("Akta COVID-19")* yang berkuatkuasa pada 18 Mac 2020, digunapakai dalam tindakan guaman ini?"
>
> [b] …
>
> (c) Jika soalan di perenggan (a) dijawab secara afirmatif, pekara ini akan dibicarakan berkenaan relief dan remedi dalam **perrengan [sic] 44 Tuntutan Balas Terpinda Semula** dan **tuntutan Plaintif terhadap Defendan dibatalkan tanpa kos.**
>
> [Emphasis added]

[29] The Sessions Court ordered an assessment of the damages suffered by Airmarine. [See Appeal Record Volume 1 – Part A (Enclosure 27) the O.14A Order at page 15 paragraph 2]. The exact terms of the order read as follows-

> *Perbicaraaan taksiran gantirugi yang dialami oleh Defendan berikutan keputusan Mahkamah yang membenarkan permohonan Defendan (Lampiran 149) di bawah* Aturan 14A Kaedah-Kaedah Mahkamah 2012 *ditetapkan pada 15.4.2024 jam 9.00 pagi;*

[30] It is clear the order made by the Sessions Court was not what Airmarine had prayed for in Enclosure 149.

[31] The prayer asked for was for "*pekara ini akan dibicarakan berkenaan relief dan remedi dalam perenggan [sic] 44 Tuntutan Balas Terpinda Semula dan tuntutan Plaintif terhadap Defendan dibatalkan tanpa kos*". This prayer can be broken into two limbs-

i. The first relief prayed for by Airmarine was for Airmarine's *relief and remedies in* paragraph 44 *Tuntutan Balas Terpinda Semula* to be tried.

ii. The second relief prayed for was for Semangkuk's claim to be dismissed without cost.

[32] Further, when the Sessions Court made the order on 26-03-2024, Airmarine had amended its *Tuntutan Balas Terpinda Semula* [See Additional Appeal Record (Enclosure 31) at pages 560 - 580] to *Tuntutan Balas Terpinda Semula Kedua* dated 23-02-2024. [See Additional Appeal Record (Enclosure 31) at pages 609 - 629].

[33] Airmarine had added allegations that its businesses with Syarikat Next Logistics Sdn Bhd, Syarikat SJ Holdings Sdn Bhd, Syarikat Transplace Sdn Bhd and Syarikat Subalipack (M) Sdn Bhd were disturbed and hindered by Semangkuk. [See Additional Appeal Record (Enclosure 31) at page 624 paragraph 55].

[34] These allegations that its businesses with Syarikat Next Logistics Sdn Bhd, Syarikat SJ Holdings Sdn Bhd, Syarikat Transplace Sdn Bhd and Syarikat Subalipack (M) Sdn Bhd were disturbed and hindered by Semangkuk were never before the Sessions Court and there were no evidence led and findings by the Sessions Court that these allegations were proven.

[35] A Court cannot order an assessment of damages in the absence of a judgment awarding the plaintiff damages. [See *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* *[1997] 2 MLJ 565* FC per Gopal Sri Ram JCA].

[36] In *Lai Yoke Ngan* Gopal Sri Ram JCA said at pages 582I – 583A.

> "It is elementary law that there can be no assessment of damages in the absence of a judgment granting damages. Such a judgment did not come until 2 December 1991. So, here is a case where the cart had been squarely placed before the horse. The judgment for the assessment of damages was found in a judgment which was flawed in other respects. The learned judge was therefore perfectly entitled, in the interests of justice, … to set aside the whole of the offending judgment."

[37] In conclusion, in an O14A application the Sessions Court cannot grant reliefs not prayed for and surely not litigated upon.

Third ground of appeal - Airmarine did not produce any evidence to prove that its inability to pay was due to the measures under the COVID-19 Act

[38] I also agree with this ground.

[39] I have in one of my earlier judgments set out the background to COVID-19 lockdowns in Malaysia in the form of Movement Control Order (in Malay: *Perintah Kawalan Pergerakan*), commonly referred to as MCO or *PKP* and the legislation passed to mitigate the impact of COVID-19 lockdowns on contractual obligations. [See *Atd Soluton (M) Sdn Bhd v Kementerian Pendidikan Malaysia & Anor* *[2024] MLJU 1162* HC].

[40] A contracting party seeking to be excused from his contractual obligation is required by *section 7* read with the Schedule to Part II of the COVID-19 Act to show that-

i. His contract is one of the categories of contracts specified in the Schedule to Part II; and

ii. That he was unable to perform his contractual obligation due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19.

[See *Ravichanthiran Ganesan v Lee Kok Sun & Ors* [2021] 1 LNS 1581 at [21] per Evrol Mariette Peters JC, *SN Akmida Holdings Sdn Bhd v Kerajaan Malaysia* [2021] 1 MLJU 2449 at [80] per Aliza Sulaiman J and *Panzana Enterprise Sdn Bhd v Turnpike Synergy Sdn Bhd* *[2022] MLJU 1000* per Wong Kian Kheong J]

[41] In *Ravichanthiran Ganesan v Lee Kok Sun & Ors* [2021] 1 LNS 1581 Evrol Mariette Peters JC observed:

> [21] … there are two aspects to *section 7* of the *Covid-19* Act that the Plaintiff was required to establish, namely, that a party was unable to perform the contractual obligation; and that such inability was due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19.

[42] In *SN Akmida Holdings Sdn Bhd v Kerajaan Malaysia* [2021] 1 MLJU 2449 Aliza Sulaiman J said-

> *[80] With respect*, I do not think that a party can simply invoke *s 7* of the *Covid-19 Act* just because the country is experiencing a pandemic and that there have been, and still are, MCO in force to curb the spread of the disease. The situation plaguing the nation, in general, and the Plaintiff as a contractor for the Project, in particular, does not relieve the Plaintiff from the burden of proving, on a balance of probabilities, that –
>
> (a) it is unable to perform any contractual obligation whereby the precise duty or duties under the contract should be specified;
>
> (b) the inability to perform the contractual obligation arises from one of the categories of contracts as listed in the Schedule to Part II of the Covid-19 Act; and
>
> (c) the inability to perform the contractual obligation is due to the measures prescribed, made or taken under Act 342 to control or prevent the spread of COVID-19. The precise measure as prescribed, made or taken under Act 342 must be identified and the nexus between the said measure and the Plaintiff's inability to perform its contractual obligation(s) must be demonstrated.
>
> Hence, even if the Plaintiff has established that its contract with the Defendant falls under the said Item 1, the Plaintiff has clearly failed to prove elements (a) and (c) as outlined above to the satisfaction of this Court.

[43] Airmarine thus bears the burden to show it was unable to perform its rental payment obligation due to the measures prescribed, made or taken under the COVID-19 Act. These issues are not suitable to be disposed of on affidavit evidence.

[44] The Session Court held that Airmarine has satisfied the burden to show it was unable to perform its rental payment obligation due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19 by taking judicial notice of media statements made by the government and that it is reasonable to assume there will be impact on the business of

Airmarine. [See Grounds of Judgment paragraph 30]. With respect this is a wrong approach as the law required actual evidence to be provided by Airmarine.

Decision

[45] For the reasons above, I allow the appeal on these terms-

i. Appeal is allowed with costs here and below of RM 12,000 subject to allocatur.

ii. Order of Sessions Court set aside. Matter remitted back to Sessions Court to be heard by another judge.

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