

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM SELANGOR DARUL EHSAN, MALAYSIA
[WRIT NO: BA-22NCVC-111-03/2021]**

ANTARA

**KOK AH HWOI @ KOK AH HOI
[NO. K/P: 391216-10-5137]**

... PLAINTIF

DAN

**1. COLUM AIWAH
MCNAMARA
[NO. SIJIL KELAHIRAN
IRELAND 1798]**

**2. LEE SUAN CHOO
[NO. K/P: 390214-07-5347]**

... DEFENDAN-DEFENDAN

JUDGMENT

Introduction

[1] The present matter before this Court concerns an interlocutory application filed by the Plaintiff in Enclosure 137. This application comprises two distinct components. First, it seeks an extension of time to amend a paragraph within the Plaintiff's Statement of Claim, an amendment previously permitted but inadvertently overlooked by the Plaintiff. Second, it entails a fresh plea to amend three additional paragraphs within the Statement of Claim.

[2] Upon initial assessment, the amendments sought, particularly those pertaining to the latter limb, may appear minor and straightforward. Given the classic pronouncement of Brett MR in *Clarapede & Co v. Commercial Union Association* [1883] 32 WR 262 on the judicial approach towards applications for amendments to pleadings and the broad discretionary authority vested in the courts pursuant to Order

20, rule 5(1) of the Rules of Court 2012, one might naturally assume that the present application will not be met with resistance and should merit approval as a matter of course. However, it is noteworthy that the application in Enclosure 137 is vigorously contested by the Defendants.

- [3] In the interest of equitable treatment for all parties involved in this litigation, this Court has meticulously considered the factual matrix of the case, scrutinized the contentions presented by both sides, and adhered to the current principles governing this aspect of procedural law.

The Core Issues

- [4] The first essential question for determination is whether leave of court should be granted for an extension of time to amend paragraph 29.2 of the Statement of Claim as per this Court's Order issued on August 2, 2023
- [5] The second key question is whether leave of court should be granted to permit the Plaintiff to amend paragraphs 13, 14 and 27.1 of the Statement of Claim.

The First Component of Enclosure 137

- [6] On 20 July, 2023, the Plaintiff filed an application to amend the said Statement of Claim to include paragraph 29.2.
- [7] Paragraph 29.2 reads as follows:

29.2 Si Mati juga telah amat mementingkan adat, amalan dan/atau kepercayaan tradisi Cina termasuk kepercayaan/pandangan berhubung keluarga patriarki, memberi penghormatan kepada nenek-moyang keluarga dan pemurjaan nenek-moyang.

[The Deceased also placed great importance to Chinese

customs, *traditions, practices and/or traditional beliefs including the belief/notion of patriarchal family, paying respect to family ancestors and ancestral worship.*]

- [8] The Defendants did not object to the above application and this Court orally granted the Order in Terms on 2 August, 2023.
- [9] Due to an oversight, the Amended Statement of Claim to include the said amendment was not filed timeously, resulting in the present application.
- [10] The pertinent law is Order 20 rule 9 of the Rules of Court 2012. That relevant provision states as follows:

Failure to amend after order (O. 20, r. 9)

Where the Court makes an order under this Order giving any party leave to amend a writ, pleading or other document, then, if that party does not amend the document in accordance with the order before the expiration of the period specified for that purpose in the order or, if no period is so specified, of a period of fourteen days after the order was made, the order shall cease to have effect, without prejudice, however, to the power of the Court to extend the period.”

- [11] Interestingly but unsurprisingly, both parties relied on Order 20 rule 9 of the Rules of Court 2012 to support their respective positions. They did so by underscoring phrasings in the said provision that support their respective contentions.
- [12] In the case of the Defendants, they highlighted that following phrases, that is: “... if that party does not amend the document in accordance with the order ... a period of fourteen days after the order was made, the order shall cease to have effect ...”.
- [13] The Defendants also relied on the Court of Appeal case of *Makro Cash & Carry Distribution (M) Sdn Bhd v. Henry Butcher Lim &*

Long (*N*) *Sdn Bhd* [2010] 9 CLJ 140 (which they submitted as a decision of the Federal Court) where the Court of Appeal held as follows:

[13] It is apparent that the fourth issue also justified appellate intervention. The writ and statement of claim was amended on 23 February 2001 pursuant to Order of Court dated 12 January 2001. Though the writ at p. 8 AR shows that the amendment was made pursuant to an order dated 14 February 2001 the amending order at p. 16 AR shows the correct date as 12 January 2001. Order 20 r. 9 RHC requires any party given leave to amend a writ, pleading or other documents to do so within 14 days failing which the amending order ceased to have effect unless extended. As the amendment here was made contrary to the rule it was rendered ineffective and any judgment on the claim as amended when it was actually not amended was a nullity.

The Defendants placed emphasis on the last two sentences in the above quoted paragraph.

[14] As for the Plaintiff, he relied on the following qualification in Order 20 rule 9, namely: "... without prejudice, however, to the power of the Court to extend the period."

[15] The Plaintiff also raised the ground of estoppel, that is, since the Defendants had not objected to the amendments when it was first sought, they are now estopped from objecting to the present application to extend time. The Plaintiff also cited *United Overseas Bank Ltd v. Heap Huat Rubber Co Sdn Bhd* [1995] CLJU 256; [1995] MLJU 230; [1995] 6 MLRH 242 and *MKSK Trading Sdn Bhd v. Shani Safuan* [1993] CLJU 305; [1993] 1 LNS 305; [1993] MLJU 436; [1993] 6 MLRH 406.

The Decision on the First Component of Enclosure 137

[16] This Court would like to express its displeasure with the manner in

which the Defendants have omitted to acknowledge the power conferred on the court to extend time under Order 20 rule 9 in their written submissions. However, in fairness to them, they did concede to this point during the hearing of Enclosure 137.

[17] Likewise, when citing *Makro Cash & Carry Distribution (M) Sdn Bhd v. Henry Butcher Lim & Long (N) Sdn Bhd* in their written submissions, the Defendants ought to have been aware that the pronouncement by the Court of Appeal was qualified by the phrase “unless extended”, which again they omitted to recognise.

[18] As for the Plaintiff’s contentions, this Court is of the considered view that the ground of estoppel relied by the Plaintiff is misconceived. The fact that the Defendants had not objected when the application was first made does not mean that the Order permitting the amendment will operate indefinitely. The party that had successfully applied for an amendment to be carried out must take the necessary steps to amend the document within the specified time period, failing which the Amending Order will cease to have effect.

[19] However, a successful party in an earlier application, such as the Plaintiff in the present application, is at liberty to apply for an extension of time pursuant to Order 20 rule 9 of the Rules of Court 2012.

[20] Following the decision in *MKSK Trading Sdn Bhd v. Shani Safuan* and considering the amendments were in the first place agreed to by the Defendants, the application for an extension of time to amend paragraph 29.2 of the Statement of Claim is allowed.

The Second Limb of Enclosure 137

[21] The proposed amendments to paragraphs [13], [14] and [27.1] are as follows:

13. Pada atau sekitar Februari 2020 atau Mac 2020, Si Mati telah menyatakan kepada Plaintiff bahawa beliau baru-baru ini telah membuat Wasiat Terakhirnya (selepas ini dirujuk sebagai “Wasiat Sebenar”) kerana beliau mempunyai firasat (premonition) mengenai kematiannya dan beliau sangat terganggu dengan perkara itu. Si Mati telah meminta Plaintiff untuk memikul tanggungjawab sebagai Wasi untuk memenuhi hajat-hajat Si Mati.

On or about February 2020 or March 2020, the Deceased had mentioned to the Plaintiff that he had recently made his Last Will (hereinafter referred to as “the True Will”) as he had a premonition regarding his death and was very disturbed by it. The Deceased had requested the Plaintiff to shoulder the responsibility as Executor to honour the Deceased’s wishes.]

14. Pada atau sekitar Februari 2020 atau Mac 2020, Si Mati telah meninggalkan satu salinan Wasiat Sebenar bersama Plaintiff. Namun begitu, Si Mati tidak memaklumkan kepada Plaintiff mengenai keberadaan salinan asal Wasiat Sebenar itu.

On or about February 2020 or March 2020, the Deceased left a copy of the True Will with the Plaintiff. However, the Deceased did not inform the Plaintiff as to the location of the original True Will.]

- 27.1 Wasiat Sebenar bertarikh 9.3.2019 telah dilaksanakan sewajarnya dan telah disaksikan oleh seorang Lee See Leng (No. 15 K/P: 541120-10-5133) dan seorang, Poon Chem Kiang (No. K/P: 601020-10-5891) sekitar Februari 2020 atau Mac 2020.

[The True Will dated 9.03.2019 was duly executed ~~on~~ and

was witnessed by one, Lee See Leng (NRIC No.: 541120-10-5133) and one, Poon Chem Kiang (NRIC No.: 601020-10-5891) sometime in February 2020 or March 2020.]

In short, what the Plaintiff seeks to amend is the date of execution of the 2019 Will from “9-3-2019” to “around February 2020 or March 2020”.

[22] The Plaintiff justified his attempt to amend the above based on “the recent discovery of the actual date of execution of the Will dated 9.3.2019 (2019 Will) after PW1 and PW2 respectively had testified in Court as witnesses to the 2019 Will on the 1st day of Trial, 25.7.2023 and clarified ... that the said Will was duly executed around February or March 2020 and not on 9.3.2019.”

[23] The Plaintiff further submitted that:

7.2 Given the above, the Plaintiff (PW3) in his Witness Statement (Enclosure 133) had explained to this Honourable Court about the above recent discovery.

and

7.3 It is to be noted that PW1, PW2 and PW3 were all subjected to intense cross-examination by the Defendants’ counsel at the previous trial dates.

[24] The Plaintiff argued that the application is bona fide as the Proposed Amendments are: (a) intended to (i) ensure that the pleadings are consistent with the testimonies in Court; and (ii) to provide the background and/or factual details of the Plaintiff’s case; (b) necessary to (i) clarify the pleaded facts of the Plaintiff’s case; and (ii) determine the question in controversy between the parties; (c) made to ensure a fair trial; (d) there is no prejudice caused to the Defendants which cannot be compensated by costs; and (e) there is no delay.

[25] The Plaintiff cited and relied on numerous authorities and these

include *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] CLJ (Rep) 428; [1983] 1 MLJ 213; [1982] 1 MLRA 417, *Hong Leong Finance Bhd v. Low Thiam Hoe* [2015] 8 CLJ 1; [2016] 1 MLJ 301; [2016] 3 MLRA 81 (“*Hong Leong Finance*”), *Chen Chow Lek v. Tan Yew Lai* [1983] CLJ Rep 79; [1983] 1 MLJ 170; [1982] 1 MLRA 447 (“*Chen Chow Lek*”), *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 2 AMR 1413; [1997] 1 CLJ 361; [1997] 1 MLJ 629; [1996] 2 MLRA 80, *Alloy Consolidated Sdn Bhd & Anor v. Dato Dr Haji Adnan Harun* [2011] 4 AMR 301; [2011] 5 CLJ 705; [2011] 5 MLJ 655; [2011] 1 MLRA 346, *HSBC Bank Malaysia Bhd v. Macquarie Technologies (M) Sdn Bhd* [2004] 4 AMR 580; [2004] 3 CLJ 121; [2004] 4 MLJ 398; [2004] 1 MLRA 460, *Palaniappan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693; [1995] 1 MLJ 353; [1995] 1 MLRH 546, *YB Datuk Dr Soon Choon Teck v. YB Datuk Robert Lau Hoi Chew & Ors* [2009] 4 AMR 759; [2010] 7 CLJ 931; [2009] 3 MLJ 785; [2009] 4 MLRA 505, *China Orient Asset Management Corporation v. Alexma Corporation Sdn Bhd* [2017] 7 AMR 213; [2017] 1 LNS 1558; [2017] MLJU 1532; [2018] 2 MLRA 680 and *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2006] 6 AMR 757; [2005] 3 CLJ 793; [2005] MLJU 279; [2005] 1 MLRA 643.

[26] The crux of the Defendants’ grounds may be summed up as follows:

- there are no cogent reasons or bona fide explanations in the Plaintiff's Affidavit in Support as to why the application was filed late;
- the Plaintiff's Second/Further Amendment Application is a 'tactical manoeuvre' to repair the Plaintiff's own irreparable case;
- the amendments sought in the Plaintiff's Second/Further Amendment Application fundamentally alters the material facts and character of the suit of an inconsistent character - of

which the entire Statement of Claim had rested on at the onset; and

- the Plaintiff's Second/Further Amendment Application is one which, if allowed, will result in prejudice against the Defendants that cannot be compensated by costs.

[27] On the delay ground, the Defendants alluded to the fact that the Plaintiff's Writ of Summons was filed on 16 March, 2021 – hence a 33 month-delay in the filing of the Plaintiff's Second/Further Amendment Application, coupled with the fact that it was filed “at the eleventh hour during the middle of full trial”.

[28] The Defendants placed great reliance on *Hong Leong Finance*.

[29] The Defendants further submitted that the Plaintiff's Second/Further Amendment Application was “not bona fide and a ‘tactical manoeuvre’ to repair the Plaintiff's own irreparable case because”:

- the amendments sought in the Plaintiff's Second/Further Amendment Application “contains information which should have been available to the Plaintiff since the filing of the Writ of Summons on 16-3-2021”;
- “the amendment comes after all pre-trial management documents have been filed and the trial had started”; and
- “the Plaintiff's witnesses, Poon Chem Kiang (PW1) and Lee See Leng (PW2), have been cross-examined by both the Defendants' solicitors on the first day of the trial on 25-7-2023”;
- the Second/Further Amendment Application was only made on 12 November, 2023; and
- “in their witness statements which have been filed in court and exchanged with the Plaintiff, the 1st Defendant's and 2nd

Defendant’s witnesses had pointed out flaws in the alleged “original date” of execution of the alleged “2019 Will”, which the Plaintiff now is attempting to repair”.

[30] On the bona fide or lack thereof and tactical manoeuvre arguments, the Defendants relied on the case of *Mah Sing Properties Sdn Bhd v. SG Prestige Sdn Bhd* [2021] 2 AMR 403; [2021] 1 LNS 3; [2021] MLJU 2; [2021] MLRHU 1.

[31] The Defendants also stressed that by seeking to change the alleged date of execution of the 2019 Will, the purpose “was not for ‘further clarification’ – but instead is to change entirely a material fact which in return would create an entirely new timeline”.

The Decision on the Second Limb of Enclosure 137

[32] It is granted that Order 20 rule 5(1) of the Rules of Court 2012 expressly permits an application for an amendment to be made “at any stage of the proceedings”. That applicable provision reads as follows:

Amendment of writ or pleading with leave (O. 20, r. 5)

5. (1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.

[33] “At any stage in the proceedings” connotes the permissive nature of the provision. Be that as it may, it does not mean that an application made at an advanced stage of proceedings will be permitted.

[34] While there are numerous authorities indicating that applications for amendments made at case management stage (see for example, *Dato Tan Heng Chew v. Tan Kim Hor* [2010] 1 AMR 114; [2010] 8 CLJ 1;

[2009] 5 MLJ 790); [2009] 4 MLRA 513, during trial (see for example *Mahan Singh v. Government of Malaysia* [1973] CLJU 85; [1973] 2 MLJ 149; [1973] 1 MLRH 507, after trial but before judgment (see for example *Lim Koon Ee v. Mohd Saad* [1962] CLJU 90; [1962] 28 MLJ 242; [1962] 1 MLRH 545 and post-judgment amendments (see for example *Charlesworth v. Relay Roads Ltd* [2000] 1 WLR 230; [1999] 4 All ER 397) have traditionally received favorable consideration from the Courts, the approach has shifted following the *Hong Leong Finance* case.

[35] The Plaintiff strenuously drew this Court’s attention to the Federal Court’s decision in *Chen Chow Lek* where the Court allowed the application to amend the statement of claim made during the hearing of the appeal and held that “it is fair that we should do so as the proposed amendment is fully covered by evidence in the records and not in any way prejudicial to the respondent.” However, this case embodies the pre-robust approach that was established prior to the ruling in *Hong Leong Finance*.

[36] Considering that the crux of the opposing parties’ case hinges largely on the validity of the 2019 Will, allowing the sought-after amendments would prejudice the Defendants, and such prejudice cannot be adequately redressed through costs.

[37] Leave to amend paragraphs 13, 14 and 27.1 of the Statement of Claim is denied.

[38] The Plaintiff to pay costs of RM5,000 to each of the Defendants, subject to allocatur.

Dated: 1 JULY 2024

(CHOONG YEOW CHOY)

Judicial Commissioner

High Court of Malaya

Shah Alam

Counsel:

For the plaintiff - Watson Peters & Andrea Tan; M/s. Peters Chambers

For the first defendant - Steven Wong, Nur Diana Ramlan & Wan Elya Nadiah Wan Azizi; M/s Arifin & Partners

For the second defendant - Sharen Rosli; M/s. Lee Sharen

Cases referred to:

Alloy Consolidated Sdn Bhd & Anor v. Dato Dr Haji Adnan Harun [2011] 4 AMR 301; [2011] 5 CLJ 705; [2011] 5 MLJ 655; [2011] 1 MLRA 346

Charles worth v. Relay Roads Ltd [2000] 1 WLR 230; [1999] 4 All ER 397

China Orient Asset Management Corporation v. Alexma Corporation Sdn Bhd [2017] 7 AMR 213; [2017] 1 LNS 1558; [2017] MLJU 1532; [2018] 2 MLRA 680

Clarapede & Co v. Commercial Union Association [1883] 32 WR 262

(“Chen Chow Lek”) Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 2 AMR 1413; [1997] 1 CLJ 361; [1997] 1 MLJ 629 [1996] 2 MLRA 80

Dato Tan Heng Chew v. Tan Kim Hor [2010] 1 AMR 114; [2010] 8 CLJ 1; [2009] 5 MLJ 790); [2009] 4 MLRA 513

(“Hong Leong Finance”) Chen Chow Lek v. Tan Yew Lai [1983] CLJ Rep 79; [1983] 1 MLJ 170; [1982] 1 MLRA 447

Hong Leong Finance Bhd v. Low Thiam Hoe [2015] 8 CLJ 1 [2016] 1 MLJ 301; [2016] 3 MLRA 81

HSBC Bank Malaysia Bhd v. Macquarie Technologies (M) Sdn Bhd [2004] 4 AMR 580; [2004] 3 CLJ 121; [2004] 4 MLJ 398; [2004] 1 MLRA 460

Lim Koon Ee v. Mohd Saad [1962] CLJU 90; [1962] 28 MLJ 242; [1962]

1 MLRH 545

Mah Sing Properties Sdn Bhd v. SG Prestige Sdn Bhd [2021] 2 AMR 403; [2021] 1 LNS 3; [2021] MLJU 2; [2021] MLRHU 1

Mahan Singh v. Government of Malaysia [1973] CLJU 85; [1973] 2 MLJ 149; [1973] 1 MLRH 507

Makro Cash & Carry Distribution (M) Sdn Bhd v. Henry Butcher Lim & Long (N) Sdn Bhd [2010] 9 CLJ 140

MKSK Trading Sdn Bhd v. Shani Safuan [1993] CLJU 305; [1993] 1 LNS 305; [1993] MLJU 436; [1993] 6 MLRH 406

Palaniappan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693; [1995] 1 MLJ 353; [1995] 1 MLRH 546

Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals [2006] 6 AMR 757; [2005] 3 CLJ 793; [2005] MLJU 279; [2005] 1 MLRA 643

United Overseas Bank Ltd v. Heap Huat Rubber Co Sdn Bhd [1995] CLJU 256; [1995] MLJU 230; [1995] 6 MLRH 242

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] CLJ (Rep) 428; [1983] 1 MLJ 213 [1982] 1 MLRA 417

YB Datuk Dr Soon Choon Teck v. YB Datuk Robert Lau Hoi Chew & Ors [2009] 4 AMR 759; [2010] 7 CLJ 931; [2009] 3 MLJ 785; [2009] 4 MLRA 505