

**IN THE MATTER OF THE HIGH COURT OF MALAYA IN JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TA'ZIM
ORIGINATING SUMMONS NO. JA-24NCVC-307-05/2019**

Dalam perkara Seksyen 24 (C) Akta Kehakiman
(Courts of Judicature Acts) 1964

Dan

Dalam perkara mengenai Aturan 42, Aturan 92
Kaedah 4 Kaedah-Kaedah Mahkamah 2012

BETWEEN

FARIDAH BINTI MOHAMED
(NRIC NO.: 600406-01-5608)
(bertindak sebagai Pengarah Syarikat
Ban Heng Credit (M) Sdn Bhd)

... APPLICANT

AND

TAN HUAN HIANG
(NRIC NO.: 660706-01-6105)

... RESPONDENT

GROUND OF JUDGMENT

JUDGMENT

[ENCLOSURE 54]

INTRODUCTION

- [1] This is the Respondent's application in Enclosure 54 to amend an Order of the Court dated 25.08.2020 made by YA Awg Armadajaya bin Awg Mahmud ("the Order"). The amendment sought by the Respondent is to add two new paragraphs and a penal notice to the Order. The two paragraphs are as follows:

"[5] Pemohon dan/atau sesiapa sahaja gagal, abai, enggan mematuhi Penghakiman ini berisiko menghadapi tindakan menghina Mahkamah yang Mulia; dan

[6] Sekiranya Pemohon gagal, abai mematuhi Penghakiman ini mengikut masa yang dihadkan maka tindakan komital boleh dikenakan terhadap Pemohon dan/atau mana-mana perlaksanaan bagi maksud memaksa Pemohon mematuhi.

- [2] The penal notice intended to be added to the Order, which should substantially be as prescribed in Form 83 of the Rules of Court 2012 ("ROC"), is missing from the proposed amended Order, exhibited in Lampiran A to Enclosure 54. Likewise, it is also not included in Exhibit "OWL-B" in Lampiran 55 of the Affidavit in Support. The proposed penal notice is only mentioned in the Respondent's submission.

Thus, even if this Court were to allow the amendments sought by the Respondent in Enclosure 54, the penal notice would still not form part of the amendment. As such, the proposed committal proceedings against the Applicant would likely face an obstacle without a further amendment.

BACKGROUND FACTS

- [3] This application in Enclosure 54 was initially made as an ex parte application. Upon coming up for the first hearing, I ordered the Respondent to serve this application to the Applicant, for it to be heard inter-parte as it would be an abuse of the court process to make amendments to a final court order without notifying the opposing party and allowing the other party to raise any objections he may have to such proposed amendments. My direction to serve the application was made under Order 92 rule 4 and Order 42 rule 13 of the ROC.
- [4] As expected, upon service of the Notice of Application on the Applicant's solicitors, they filed an affidavit in reply objecting to the application, followed by their written submissions opposing the Respondent's application.

SUBMISSIONS BY THE PARTIES

Inordinate Delay in Filing This Application

- [5] [i] The Applicant submits that this application is made out of time and the Respondent has not applied nor been granted any extension

of time to file this application. The Order was made by YA Awg Armadajaya bin Awg Mahmud on 25.08.2020. This application was filed on 15.12.2020 which is more than three months after the date of the Order.

Order 42 rule 13 ROC provides as follows:

Setting aside or varying judgment and orders (O. 42, r. 13)

*Rule [13]. Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall **make an application to the Court and serve it on the party** who has obtained **the order** or judgment **within thirty days** after the receipt of the order or judgment by him.*

Therefore, any application to amend an order of court should be filed within 30 days of service of that order on the other party.

[ii] In the present case, the final order was extracted by the Respondent's solicitors. Hence, there is no issue of the date of service of the Order to consider. The Respondent is out of time by about two months and has not filed any application for extension of time to make this application. The Applicant submits that on this ground alone, the Respondent's application ought to be dismissed in limine.

[6] The Respondent claims that the penal notice was included in the earlier draft Order, however, the paragraph containing the penal

notice was cancelled by the Senior Assistant Registrar (“S.A.R.”). Hence, the necessity for this application.

The Applicant submits that the Respondent did not seek any appointment with the S.A.R. to seek clarification on her decision to delete the paragraph, nor did the Respondent file any appeal against the decision.

The Applicant submits that based on decided authorities, including **Lembah Semarak Sdn Bhd v Global Upline Hotels and Resorts Sdn Bhd and other appeals [2018] MLJU 1309**, the slip rule, under which the Respondent is making this application, is not the appropriate provision for the Court to exercise its discretion to allow the Respondent’s application herein. The slip rule is only applicable to correct any “slip” i.e. clerical errors in the Order or where the Order does not correctly state what the Court actually decided.

In **Tan Han Kwan & Ors v Ch’ng Kong San & Ors [2020] MLJU 2420**, the KL High Court held:

“However, if an order which is properly drawn up that clearly expresses the intention of the Court, this slip rule cannot be used even though it contains a mistake of law apparent on the face of it.”

The Order may contain a mistake in law but this court has no jurisdiction to set it aside. To correct such a mistake, if any, other means must be used, such as filing a fresh suit or by way of appeal.

- [7] The Applicant further submits that this application by the Respondent to include a penal notice in the Order is to enable the Respondent to enforce the Order by way of committal.

However, the Order is principally an Order for payment of a liquidated sum. The Order is not amenable to enforcement via an order of committal by virtue of Order 45 rule 1 read with rule 5.

The only paragraph in the Order which does not concern payment of a liquidated sum is paragraph 2, which is, in essence, a “declaratory order”, which declares the right of the Respondent to receive certain documents from the Company Secretary within 30 days of the Order.

Paragraph 2 of the Order provides:

*“Respondent adalah berhak terhadap kesemua Dokumen Salinan diakui sah dari 1.10.1998 sehingga 11.07.2017 dari **Setiausaha Syarikat Ban Heng Credit Sdn Bhd** dalam tempoh tiga puluh (30) hari dari penerimaan meterai Pengahkiman ini.”*

- [8] It is clear that the paragraph does not **order the doing or abstaining from doing any** act as mentioned in Order 42 rule 5 of the ROC. It is merely a declaratory relief which is not amenable to a committal order. Additionally, the relief in paragraph 2 of the Order is directed towards the Company Secretary of Ban Heng Credit Sdn Bhd and not against the Applicant as a Director. All company documents are in the custody of the Company Secretary.

The Applicant vide her solicitors' letter dated 25.08.2020 had indicated to the Respondent that she has no objections to allowing the Respondent to obtain copies of all company documents from the Company Secretary. All the Respondent is required to do is to request for the document from the Company Secretary and enclose the letter of consent from the Applicant's solicitor.

[9] After considering the submission by both parties, I am in agreement with the submission of the Applicant, and I find that this application in Enclosure 54 should be dismissed for the following reasons:

- i. This application is out of time as provided by Order 43 rule 13. Thus, this application should be dismissed in limine.
- ii. If I am wrong on the above, on the substantive issue, I find that the Order being in essence an Order for payment of monies is not amenable to any enforcement by way of committal proceedings. On this, I am guided by the very case cited by the Respondent i.e. **Mctronic Industries Sdn Bhd v Urus Jaring Sdn Bhd & Ors [2014] 1 LNS 1644**, where the Learned Judge found as follows:

"For the above reasons, I rule that the judgment dated 30 November 2013 is a monetary judgment which does not fall under Order 45 rule 5 of the Rules of Court 2012 and therefore, does not warrant the endorsement of a penal notice."

CONCLUSION

[10] For the reasons aforesaid, I dismiss the Respondent's application with cost of RM3,000.00 subject to allocatur fees.

Dated 1st September 2021

Signed,

.....
Ahmad Murad Bin Abdul Aziz
Judicial Commissioner
High Court of Malaya
Johor Bahru
Johor Darul Ta'zim

Curia Advisari Vult

Counsel / Solicitors:

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[Ref: 19042/LIT/SMN/THH/ONG]

Cases Referred To:

- Lembah Semarak Sdn Bhd v Global Upline Hotels and Resorts Sdn Bhd and other appeals [2018] MLJU 1309
- Tan Han Kwan & Ors v Ch'ng Kong San & Ors [2020] MLJU 2420
- Mctronic Industries Sdn Bhd v Urus Jaring Sdn Bhd & Ors [2014] 1 LNS 1644

Legislation Referred To:

- Order 92 rule 4
- Order 42 rule 13
- Order 45
- Rules of Court 2012

Hearing Date: 15.03.2021

Decision Date: 11.07.2021