Westech Sdn Bhd (in voluntary liquidation) v Thong Weng Lock (as surviving partner of Thong Kee Trading Co)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–659–03 OF 2012
SYED AHMAD HELMY, ABDUL WAHAB PATAIL AND ABDUL AZIZ ABD RAHIM JJCA
15 AUGUST 2012

Civil Procedure — Res judicata — Issue, similarity of — Whether res judicata applied to ruling on procedural issue — Jurisdiction — Court of Appeal — Power to review own previous decision — Whether order made by Court of Appeal was final order — Delay — Whether delay was inordinate

Companies and Corporations — Winding up — Voluntary winding up — Action against company after commencement of winding up — Whether leave required — Whether leave should be granted — Whether relief sought by plaintiff could be obtained in winding up proceedings

Thong Weng Lock ('the plaintiff'), a partner of Thong Kee Trading Co, filed a suit under the name of the partnership against Westech Sdn Bhd ('the defendant'). The sessions court gave judgment in favour of the plaintiff. Under the sessions court judgment it was specified that if the defendant failed to return the empty gas cylinders to the plaintiff, the defendant was required to pay the plaintiff damages in the sum of RM68,250 with interest. The defendant offered to return the gas cylinders to the plaintiff in accordance with the terms of the sessions court judgment but the plaintiff refused to accept delivery of the cylinders. The defendant then filed an application pursuant to O 31 r 11 of the Subordinate Courts Rules 1980 to record in the cause book that the sessions court judgment had been satisfied. When the application was rejected by the sessions court, the defendant appealed to the High Court. The High Court reversed the decision of the sessions court and allowed the defendant's application. Dissatisfied with the decision of the High Court, the plaintiff applied for and obtained leave to appeal to the Court of Appeal. Pending disposal of the appeal, the defendant went into voluntary liquidation. At the hearing of the appeal, the defendant raised the preliminary objection that the appeal was incompetent because the plaintiff had not obtained leave pursuant to s 263(2) of the Companies Act 1965 ('the Act') to proceed with the appeal against the defendant. The Court of Appeal upheld the preliminary objection and ordered the appeal to be struck off with costs. The plaintiff then filed an originating motion pursuant to s 263(2) of the Act at the High Court for leave to proceed against the defendant. By way of this motion the plaintiff

sought to set aside the order of the Court of Appeal dismissing the plaintiff's appeal and sought to have the appeal reinstated. The High Court judge allowed the plaintiff's motion and granted leave to the plaintiff. Hence the defendant's present appeal. The defendant submitted that the plaintiff was barred by the principle of res judicata from re-opening the issue that leave was required before it could proceed against the defendant, as this issue had already been considered by the Court of Appeal in the form of a preliminary objection. The defendant also argued that the Courts (the High Court and Court of Appeal) were functus officio because the Court of Appeal's order had been sealed and perfected and thus could not be set aside. The plaintiff contended that leave ought to be granted in the interest of justice because the proceedings brought by the plaintiff against the defendant were bona fide and the remedy sought could not be obtained in a winding up court.

Held, allowing the appeal with costs:

(1) Under s 263(2) of the Act it is patently clear that no action or proceeding could be commenced or proceeded against a company after the commencement of winding up. Case-laws have also established that the test for an application of s 263 of the Act applied whether the winding up was voluntary by members or otherwise. The granting of leave under s 263(2) of the Act was an exercise of discretion by the court and the only ground to be considered when considering whether leave should be granted was whether the claim could be dealt with adequately in the course of winding up proceedings. In the present case, when the High Court judge granted leave to the plaintiff she had not considered whether the relief sought by the plaintiff was capable of being obtained under the winding up procedure. From the evidence adduced it was clear that the plaintiff in the present case was trying to get the defendant to pay him damages as awarded by the sessions court in lieu of the empty cylinders, and this relief could have been resolved in the winding up proceedings (see paras 34–37).

(2) The High Court judge had erred in ruling that the doctrine of res judicata did not apply because the Court of Appeal's order was made in relation to a preliminary objection without hearing the appeal proper on the merits. It is settled law that the principle of res judicata applied to a ruling on procedural as well as substantive issues (see paras 39–40).

(3) Further, the High Court judge had not given judicial consideration to the defendant's submission that the plaintiff had argued by taking the position that no leave was required to prosecute the appeal. The plaintiff had thus made an election and ought not to be allowed to go back on his election. In addition, it was an undisputed fact that the Court of Appeal's order to strike off the appeal had been perfected and sealed. The Court of Appeal could review its own previous decision on limited grounds and

only in very exceptional circumstances. However, the plaintiff's notice of originating motion in the present case was not for a review of the Court of Appeal's order but for leave to file and prosecute a motion before the Court of Appeal to set aside the Court of Appeal's order and to prosecute the said appeal (see para 41).

(4) It is also settled law that a High Court of concurrent jurisdiction could not set aside a final order regularly obtained from another High Court of concurrent jurisdiction except where the order or judgment could be proved to be null and void on the ground of illegality or lack of jurisdiction. The same principle would apply to an order of the Court of Appeal. In the circumstances, the Court of Appeal's order in respect of the ruling on the preliminary objection as to the leave requirement was a final order (see para 41).

(5) In the factual circumstances of the present case, delay was inordinate. Although, there is no time frame prescribed under s 263(2) of the Act for filing of an application for leave, it is trite that where there was no time frame prescribed for the doing of any particular act that such act should be done within reasonable time (see paras 46–47).

[Bahasa Malaysia summary

Thong Weng Lock ('plaintif'), seorang rakan kongsi kepada Thong Kee Trading Co, telah memfailkan guaman di bawah nama perkongsian terhadap Westech Sdn Bhd ('defendan'). Mahkamah sesyen telah memberikan penghakiman menyebelahi plaintif. Dalam penghakiman mahkamah sesyen telah dinyatakan jika defendan gagal memulangkan silinder-silinder gas yang kosong kepada plaintif, defendan dikehendaki membayar plaintif ganti rugi sejumlah RM68,250 bersama faedah. Defendan telah menawarkan untuk memulangkan silinder-silinder gas itu kepada plaintif menurut terma-terma penghakiman mahkamah sesyen tetapi plaintif enggan menerima penyerahan silinder-silinder tersebut. Defendan kemudian memfailkan permohonan menurut A 31 k 11 Kaedah-Kaedah Mahkamah Rendah 1980 untuk membuat rekod dalam buku kausa yang penghakiman mahkamah sesyen telah dipenuhi. Apabila permohonan itu ditolak oleh mahkamah sesyen, defendan telah merayu kepada Mahkamah Tinggi. Mahkamah Tinggi telah mengakas keputusan mahkamah sesyen dan membenarkan permohonan defendan. Berasa tidak puas hati dengan keputusan Mahkamah Tinggi, plaintif telah memohon untuk dan memperoleh kebenaran untuk merayu kepada Mahkamah Rayuan. Sementara menunggu rayuan selesai, defendan telah membuat likuidasi sukarela. Semasa perbicaraan rayuan itu, defendan telah menimbulkan bantahan awal bahawa rayuan itu tidak kompeten kerana plaintif tidak memperoleh kebenaran menurut s 263(2) Akta Syarikat 1965 ('Akta tersebut') untuk memulakan rayuan terhadap defendan. Mahkamah Rayuan mengekalkan bantahan awal dan memerintahkan rayuan dibatalkan dengan kos. Plaintif kemudian telah memfailkan usul pemula menurut

s 263(2) Akta tersebut kepada Mahkamah Tinggi untuk kebenaran memulakan terhadap defendan. Melalui usul ini plaintif memohon untuk diketepikan perintah Mahkamah Rayuan yang menolak rayuan plaintif dan memohon agar rayuan itu dimulakan semula. Hakim Mahkamah Tinggi telah membenarkan usul plaintif dan memberi kebenaran kepada plaintif. Justeru rayuan defendan ini. Defendan berhujah bahawa plaintif dihalang oleh prinsip res judicata daripada membuka semula isu bahawa kebenaran dikehendaki sebelum ia boleh dimulakan terhadap defendan, kerana isu ini telahpun dipertimbangkan oleh Mahkamah Rayuan dalam bentuk bantahan awal. Defendan juga berhujah bahawa pihak mahkamah (Mahkamah Tinggi dan Mahkamah Rayuan) adalah functus officio kerana perintah Mahkamah Rayuan telah dimeterai dan disempurnakan dan oleh itu tidak boleh diketepikan. Plaintif berhujah bahawa kebenaran patut diberikan demi kepentingan keadilan kerana prosiding dimulakan oleh plaintif terhadap defendan adalah bona fide dan remedi yang dipohon tidak boleh diperoleh dalam mahkamah penggulungan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Di bawah s 263(2) Akta tersebut adalah jelas bahawa tiada tindakan atau prosiding yang boleh dimulakan atau diambil terhadap syarikat selepas bermula penggulungan. Kes-kes perundangan juga membuktikan bahawa ujian untuk permohonan s 263 Akta tersebut adalah terpakai sama ada penggulungan dilakukan secara sukarela oleh ahli-ahli atau sebaliknya. Pemberian kebenaran di bawah s 263(2) Akta tersebut adalah amalan budi bicara oleh mahkamah dan satu-satunya alasan yang perlu diambil kira apabila mempertimbangkan sama ada kebenaran patut diberikan adalah sama ada tuntutan itu boleh dikendalikan sewajarnya sepanjang prosiding penggulungan. Dalam kes ini, apabila hakim Mahkamah Tinggi memberikan kebenaran kepada plaintif beliau tidak mengambil kira sama ada relief yang dipohon oleh plaintif boleh diperolehi di bawah prosedur penggulungan. Berdasarkan keterangan yang dikemukakan adalah jelas bahawa plaintif dalam kes ini cuba mendapatkan defendan untuk membayarnya ganti rugi sebagaimana yang telah diawardkan oleh mahkamah sesyen menggantikan silinder-silinder kosong itu, dan relief ini boleh diperoleh dalam prosiding penggulungan (lihat perenggan 34–37).

(2) Hakim Mahkamah Tinggi terkhilaf dalam memutuskan bahawa doktrin res judicata tidak terpakai kerana perintah Mahkamah Rayuan telah dibuat berkaitan bantahan awal tanpa perbicaraan rayuan sewajarnya atas merit. Adalah undang-undang tetap bahawa prinsip-prinsip res judicata terpakai kepada keputusan berdasarkan isu-isu prosedur dan juga substantif (lihat perenggan 39–40).

(3) Selanjutnya, hakim Mahkamah Tinggi tidak memberikan pertimbangan

kehakiman kepada hujahan defendan bahawa plaintif telah berhujah dengan mengambil kedudukan bahawa tiada kebenaran diperlukan untuk memulakan rayuan ini. Plaintif dengan itu telah membuat pilihan dan tidak patut dibenarkan untuk menarik balik pilihannya itu. Tambahan pula, ia suatu fakta yang tidak dipertikaikan bahawa perintah Mahkamah Rayuan untuk membatalkan rayuan telah disempurnakan dan dimeterai. Mahkamah Rayuan boleh mengkaji semula keputusannya sendiri atas alasan terbatas dan hanya dalam keadaan tertentu. Walau bagaimanapun, notis usul pemula dalam kes ini bukan untuk kajian semula perintah Mahkamah Rayuan tetapi untuk kebenaran memfailkan dan memulakan usul di hadapan Mahkamah Rayuan untuk mengetepikan perintah Mahkamah Rayuan dan memulakan rayuan tersebut (lihat perenggan 41).

(4) Ia juga undang-undang tetap bahawa Mahkamah Tinggi yang mempunyai bidang kuasa sama tidak boleh mengetepikan perintah muktamad yang biasa diperoleh daripada Mahkamah Tinggi yang mempunyai bidang kuasa sama kecuali di mana perintah atau penghakiman itu boleh dibuktikan adalah terbatal dan tidak sah atas alasan menyalahi undang-undang atau tiada bidang kuasa. Prinsip sama digunapakai kepada perintah Mahkamah Rayuan. Dalam keadaan ini, perintah Mahkamah Rayuan berkaitan keputusan berhubung bantahan awal tentang keperluan kebenaran adalah perintah muktamad (lihat perenggan 41).

(5) Dalam keadaan faktual kes ini, kelewatan adalah melampau. Walaupun tiada tempoh masa yang ditetapkan di bawah s 263(2) Akta tersebut kerana memfailkan permohonan untuk kebenaran, adalah nyata bahawa di mana tiada tempoh masa ditetapkan untuk melakukan tindakan tertentu maka tindakan tersebut patut dilakukan dalam masa yang munasabah (lihat perenggan 46–47).]

Notes

For a case on voluntary winding up, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1912.

For cases on similarity of issue, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7230–7238.

Cases referred to

Ahmadi bin Yahya v PP [2012] 6 MLJ 37; [2012] 6 AMR 193, CA (refd)

Aro Co Ltd, Re [1980] Ch 196 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Gan Boon Kyee v Yap Hong Sin & Anor [1997] 2 MLJ 598, CA (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Ka Wah Bank Ltd, The v Low Chung Song & Ors [1998] 2 MLJ 507, HC (refd)
Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation) [2004] 1 SLR 671, HC (refd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, CA (refd)
Mosbert Berhad (in liquidation) v Stella D'cruz [1985] 2 MLJ 446, SC (refd)
Munusamy a/l Karupiah (sole proprieter of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors [2010] 2 MLJ 661, CA (refd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (Appointed Receivers and Managers) [2003] 4 MLJ 647, CA (refd)
Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd [2008] 5 MLJ 191; [2008] 3 CLJ 582, CA (refd)
Subramaniam a/l AV Sankar & Ors v Peter Tang Swee Guan [2010] 4 MLJ 626; [2010] 8 CLJ 963, CA (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)

Legislation referred to

Companies Act 1965 ss 257, 263, 263(2)
Subordinate Courts Rules 1980 O 31 r 11

Appeal from: Originating Motion No 25–6 of 2011 (High Court, Kuantan)

Su Tiang Joo (KL Pang and Shelby Chin with him) (Cheah Teh & Su) for the appellant.
Bastian Vendargon (R Sarengapani and Gene Anand Vendargon with him) (R S Pani & Assoc) for the respondent.

Abdul Aziz Abd Rahim JCA (delivering judgment of the court):

INTRODUCTION

[1] This is the appellant's (the defendant in the High Court) appeal against the decision made on 8 March 2012 ('the High Court's order') of the High Court of Malaya at Kuantan allowing the respondent's (the plaintiff in the High Court) originating motion filed pursuant to s 263(2) of the Companies Act 1965 for leave to proceed against the appellant (in voluntary winding up) for the following matters:

(a) to file and prosecute a motion in the Court of Appeal to set aside a Court of Appeal order dated 27 May 2010 ('the Court of Appeal's order') made by the Court of Appeal in Civil Appeal No B-04–265 of 2006 ('the said appeal') and for re-instatement of the said appeal;

(b) if the motion referred to above is granted, to prosecute the said appeal on its merits.

[2] Fixed together (for a second time) with the hearing of this appeal, is the notice of motion by the respondent in encl 19a to move the court for an order that the Court of Appeal's order be set aside and the said appeal be re-instated in the cause book and be heard and disposed of on its merits.

[3] In this appeal, the appellant also filed a notice of motion in encl 11a seeking, inter alia, for an order that this appeal be heard first before the respondent's notice of motion in encl 19a. It was submitted that this appeal was filed first in time before encl 19a was filed; and the case of *The Ka Wah Bank Ltd v Low Chung Song & Ors* [1998] 2 MLJ 507 was cited as supporting authority. Further, it was submitted that if the appeal is allowed encl 19a would be dismissed as consequence on the ground of failing to obtain leave. On the other hand if encl 19a is heard first and allowed this appeal may be rendered academic.

[4] However after preliminary submissions the parties agreed that this appeal be heard first because if the appellant succeeds in this appeal the notice of motion in encl 19a filed by the respondent will stand dismiss.

[5] After hearing counsel and having read the records of this appeal, we were unanimous in allowing this appeal with costs of RM20,000 and set aside the High Court's order. We also struck off the respondent's notice of motion in encl 19a with costs of RM10,000. We further ordered that the costs awarded shall carry interests of 5%pa from the date of order until date of judgment. Below are our reasons.

[6] For ease of convenience and reference, in this appeal the appellant shall be referred to as the defendant and the respondent as the plaintiff.

BRIEF FACTS

[7] At all material times the plaintiff was the partner of Thong Kee Trading Co (Thong Kee). A suit was commenced under the name of Thong Kee (suing as a firm) against the defendant vide Summons No 52–49 of 1989 at the Kuantan Sessions Court. The said case was subsequently transferred and registered at Shah Alam Sessions Court vide Summons No 52–186 of 1989.

[8] On 20 January 1998, after a full trial, the sessions court gave judgment ('the sessions court judgment') in favour of Thong Kee. The material part of the sessions court's judgment reads as follows:

MAKA ADALAH PADA HARI INI DIHAKIMI bahawa Defendan mengembalikan 195 Gas Cylinder kosong kepada firm Plaintiff DAN SELANJUTNYA DIHAKIMI bahawa jika Defendan gagal mengembalikan Gas Cylinder kosong tersebut defendant hendaklah membayar kepada Plaintiff gantirugi sebanyak RM68,250.00 dengan faedah keatasnya pada kadar 8% setahun dari 1.02.1986 hingga ke tarikh penyelesaian. (see pp 424–426 of the appeal record 2(2))

[9] The defendant then filed an appeal to the High Court. On 15 June 2000, the learned judge after hearing submissions from both parties dismissed the appeal with costs. The defendant's motion for leave to appeal to the Court of Appeal was dismissed on 22 August 2002. Earlier, on or about 8 August 2002, the defendant offered to deliver the gas cylinders to the plaintiff in accordance with the terms of the sessions court judgment but the plaintiff refused to accept delivery of the cylinders (see p 311 and 314 of the appeal record 2(2)).

[10] The defendant's application for stay of execution filed in the sessions court was also dismissed on 27 June 2002. An appeal was filed to the High Court against this order but the appeal was subsequently withdrawn on 25 July 2003.

[11] Upon dismissal of the application for stay of execution in the High Court, the defendant appointed new solicitors, who filed an application ('the said application') pursuant to O 31 r 11 of the Subordinate Courts Rules 1980 for an order that the sessions court judgment be recorded as satisfied in the cause book. The reason given for the said application was that offer was made to return the empty gas cylinders to the plaintiff and not the money, but that was not accepted by the plaintiff.

[12] The said application was dismissed by the sessions court ('the sessions court's order').

[13] The defendant filed an appeal to the High Court against the sessions court's order. On 20 September 2005, the learned judge after hearing submissions from both parties reversed the decision of the sessions court and allowed the defendant's said application.

[14] Thong Kee, being dissatisfied with the said High Court's decision of 20 September 2005, filed a motion for leave to appeal to the Court of Appeal (because the matter originated in the sessions court). After hearing parties, leave was granted on 3 August 2006 and the said appeal was filed in the Court of Appeal as Appeal No B-04–265 of 2006.

[15] Pending disposal of the said appeal, the defendant went into voluntary

winding up and one Datuk Tan Kin Leong was appointed as liquidator and later replaced by one Mok Chew Yin effective 5 March 2010.

[16] When the said appeal came up for hearing on 26 May 2010 the defendant raised a preliminary objection that the said appeal was incompetent for reason that no leave was obtained to proceed with the said appeal pursuant to s 263(2) of the Companies Act 1965. Counsel for the plaintiff however was of the view (and took the stand) that no leave was required because the plaintiff was taking a purely defensive action in respect of the said application, in accordance with law. The Court of Appeal deferred the decision to the following day (27 May 2010). On 27 May 2010, the Court of Appeal upheld the preliminary objection and ordered the said appeal to be struck off ('the Court of Appeal's order'). The deposit of RM500 was ordered to be paid to the defendant as costs.

[17] Based on the Court of Appeal's order, the plaintiff filed an originating motion (dated 12 April 2011 — p 30 of the appeal record 1 and the subject matter of this appeal) at the High Court Kuantan pursuant to s 263(2) of the Companies Act 1965 for leave to proceed against the defendant (in voluntarily winding up) for the following matters:

(a) to file and prosecute a motion in the Court of Appeal to set aside the order of Court made on 27 May 2010 in the Court of Appeal vide Civil Suit No B-04–265 of 2006 and for re-instatement of the said appeal;

(b) if the motion referred to above is granted, to prosecute the said appeal on its merits.

[18] On 8 March 2012, the High Court judge made the High Court order and allowed the plaintiff's originating motion hence this appeal.

MEMORANDUM OF APPEAL

[19] In their memorandum of appeal the defendant states the following grounds of appeal:

(a) the learned judge erred in law and in fact in granting leave to the plaintiff under s 263(2) of the Companies Act 1965 to apply to the Court of Appeal to set aside the Court of Appeal's order dated 27 May 2010 which dismissed the said appeal on the ground that such leave was required for the plaintiff to proceed with the said appeal and that the respondent had failed to obtain such leave;

(b) the learned judge erred in law and in fact in granting leave for the plaintiff

to apply to set aside the Court of Appeal's order on the plaintiff's contention that such leave was not required for the plaintiff to proceed with the said appeal;

(c) the learned judge erred in law and in fact in holding that the plaintiff was not barred by the doctrine of res judicata from contending that such leave was not required — even though the Court of Appeal had by the Court of Appeal's order held that such leave was required;

(d) the learned judge erred in law and in fact in failing to hold that the Court of Appeal's order which the plaintiff seeks to set aside is a final and perfected order and which correctness cannot be challenged;

(e) the learned judge erred in law and in fact in failing to hold that the plaintiff's belated application for leave is a concession that the Court of Appeal's order is correct in that such leave was required before the plaintiff could proceed with litigation against the defendant;

(f) the learned judge erred in law and in fact in failing to hold that the plaintiff's application was made too late in the day after the said appeal has already been dismissed by the Court of Appeal on 27 May 2010 on the ground that the plaintiff failed to obtain prior leave to proceed with the said appeal;

(g) the learned judge erred in law and in fact in accepting the plaintiff's explanation for the inordinate delay in applying for leave;

(h) the learned judge erred in law and in fact in failing to hold that the plaintiff had during the hearing before the Court of Appeal elected to take the position that leave was not required and ought not to be permitted to now resile from such position; and

(i) the learned judge erred in law and in fact in failing to hold that the plaintiff is the author of his own misfortune by electing to argue at the Court of Appeal that leave was not required instead of asking for an adjournment to seek leave.

THE ISSUE

[20] Therefore the primary issue in this appeal is whether the plaintiff requires leave to appeal under s 263(2) Companies Act 1965 against the High Court's order reversing the sessions court's order of the defendant's said application pursuant to O 31 r 11 of the Subordinate Courts Rules 1980, when at the time the said appeal came up for hearing the defendant already in voluntary winding up and whether the High Court was right in granting the

leave.

THIS APPEAL

[21] Before us, counsel for the plaintiff maintained his earlier stand and argued that no leave was required.

[22] Citing s 263(2) of the Companies Act 1965 which reads:

> After the commencement of the winding up, no action or proceeding shall be proceeded with, or commenced against the company, except by with of the Court and subject to such terms as the Court imposes.

[23] It was submitted that the said application in the sessions court was commenced by the defendant to have the sessions court's judgment of 20 January 1998 be recorded in the cause book as being satisfied. When the application was dismissed by the sessions court and, (on appeal by the defendant) the High Court reversed it, the plaintiff's action in pursuing the appeal to the Court of Appeal against the High Court's reversal of the sessions court's order was purely a defensive step. For that, it was submitted no leave is required and s 263(2) does not apply.

[24] It was argued that the rationale for s 263(2) of the Companies Act 1965 is to prevent unnecessary litigation which will burden the company in liquidation with expenses and prevent unnecessary depletion of assets for distribution to unsecured creditors. It was submitted that the provision is applicable to insolvent companies. However in the present case, the company is voluntarily wound up; so it is implicit by virtue of the declaration of solvency under s 257 of the Companies Act 1965, the company in question is solvent. Hence s 263(2) of the Companies Act 1965 does not apply to members' voluntary winding up companies.

[25] It was further submitted that the Court of Appeal's order in upholding the preliminary objection in the said appeal on the ground that no leave was obtained to prosecute the appeal has left the plaintiff with no choice but to file an application for leave notwithstanding the plaintiff's genuine belief that leave is and was not required in this instance.

[26] It was also submitted that the exercise of power under s 263(2) of the Companies Act 1965 is a matter of pure discretion and it is treated as an absolute discretion — see *In Re Aro Co Ltd* [1980] Ch 196. Moreover it is contended that there is no time limit for an application for leave under the section.

[27] With regard to the question as to why leave was not applied prior to the appeal before the Court of Appeal, the plaintiff explained that firstly, it was of the view that leave was not required. Secondly, the plaintiff took some time to decide what steps ought to be taken as the point involved was an unusual one. As such, research on the law has to be conducted not just within local jurisdiction but also in foreign jurisdictions on similar issue.

[28] Citing *Walter Woon on Company Law* (Rev 3rd Ed pp 751–752) and a Singapore decision in *Korea Asset Management Corp (in liquidation) v Daewoo Singapore Pte Ltd* [2004] 1 SLR 671, learned counsel for the plaintiff urged the court that leave ought to be granted in the interest of justice because in this case the proceedings brought by the plaintiff against the defendant are bona fide and the remedy sought by the plaintiff could not be obtained in a winding up court. This principle was laid down by the then Supreme Court in *Mosbert Berhad (in liquidation) v Stella D'cruz* [1985] 2 ML J 446. The plaintiff also disagreed with the defendant's suggestion that the plaintiff should apply for leave from the Federal Court. It was argued that the matter originated from the sessions court and therefore the Court of Appeal is the apex court. Citing *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25 it was submitted that leave will not be granted when a matter arises for the first time in the Court of Appeal. Finally it was argued that remedy sought is also non monetary.

[29] In the face of the above arguments by the plaintiff, the defendant impressed upon us that the appeal should be allowed. The defendant advanced four grounds. Firstly, it was submitted that the plaintiff was barred by the principle of res judicata to re-open the issue that leave is required was wrongly decided by the Court of Appeal. Therefore, the plaintiff is estopped from re-agitating the issue.

[30] Therefore it was submitted that the Court of Appeal's order of 27 May 2010 cannot be reopened and thus there is no issue or reinstating the said appeal which has already been dismissed.

[31] Secondly, the defendant argued that the courts (High Court and Court of Appeal) are *functus officio* because the Court of Appeal's order has been sealed and perfected. Therefore it cannot be set aside — *Munusamy a/l Karupiah (sole proprieter of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661 (CA).

[32] Thirdly, the defendant submitted that the plaintiff's application to set aside the Court of Appeal's order is an exercise in futility. It was argued that (a) at the hearing of the said appeal the plaintiff had elected to take the stand that no leave is required in this case; but after the Court of Appeal's order, the

plaintiff had filed an application seeking leave from the High Court to prosecute the said appeal and this amounts to a concession that leave is necessary. The plaintiff therefore should be allowed to blow 'hot and cold' on the issue of leave; (b) the Court of Appeal will only review or set aside its own previous order on a very limited grounds — see *Subramaniam a/l AV Sankar & Ors v Peter Tang Swee Guan* [2010] 4 MLJ 626; [2010] 8 CLJ 963.

[33] Fourthly, there was inordinate delay of 12 months from the date of the Court of Appeal's order before the plaintiff applied for leave. Moreover in this case the leave application was made after the event that is after the Court of Appeal had struck off the said appeal for want of leave.

THE COURT'S OPINIONS

[34] In our view the language in s 263(2) of the Companies Act 1965 is patently clear that no action or proceeding is to be commenced or proceeded with against a company after the commencement of a winding up is made except with leave of the court. The section makes no distinction between a voluntary winding up by members of the company or winding up by a creditor on the ground of the company's insolvency. The rationale for this section is explained by Seah SCJ in *Mosbert Berhad (in liquidation) v Stella D'cruz* [1985] 2 MLJ 446 (at p 447) as follows:

> But in our opinion, this practice of the Court (referring to the decision of Jessel MR in *Re Western & Brazilian Telegraph Co v Bibby* (1880) 42 LT 821) should be adopted and followed for these reasons, viz., it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company pari passu amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. (The words in the brackets are our addition).

[35] On this point we disagree with the view expressed by learned counsel for the plaintiff that s 263 of the Companies Act 1965 does not apply to voluntary winding up. Case laws have established that the test for an application of s 263 of the Companies Act 1965 is not whether the winding up is voluntary by members or otherwise. The real test is as laid down by the then Supreme Court in *Mosbert Bhd* which is stated in this form:

> In Re Cuthbert Lead Smelting Co Ltd it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.

[36] This test was adopted and followed by this court in *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2008] 5 MLJ 191; [2008] 3 CLJ 582. A

[37] We agree that the granting of leave under s 263(2) of the Companies Act 1965 is an exercise of discretion by the court. However in our view, on the authorities, the granting of leave is an exception rather than the norm; and the only ground to be considered whether leave should or should not be granted is whether the claim can or cannot be dealt with adequately in the winding up or whether the remedy can or cannot be given in a winding up proceedings. B

C

[38] In her written judgment of 25 May 2012, the learned High Court judge had not considered whether the relief sought by the plaintiff is capable of being obtained under the winding up procedure. We noted that in its effort to satisfy the sessions court's judgment of 20 January 1998 (after its appeal to the High Court and Court of Appeal and its application for stay of the order were unsuccessful) the defendant had attempted to return the empty gas cylinders to the plaintiff but this was rejected by the plaintiff. The defendant then filed the said application under O 31 r 11 Rules of the Subordinate Courts 1980 to record in the cause book that the sessions court's judgment had been satisfied. The said application was rejected by the sessions court. however on appeal to the high court by the defendant it was allowed by the High Court. It is pertinent to note under the sessions court's judgment it is specified that if the defendant failed to return the empty gas cylinders to the plaintiff, the defendant is required to pay the plaintiff damages in the sum of RM68,250 together with interest thereon at 8%pa from 1 February 1986 until full satisfaction. The plaintiff had reasoned that he rejected the offer for the return of the empty gas cylinders because the defendant took such a long time to do so. In the circumstance, we are of the view that the plaintiff is trying to get the defendant to pay him the damages awarded by the sessions court in lieu of the return of the empty cylinders. The question that we asked is this: Why this relief cannot be resolved in the winding up? We think it can. D E F G

[39] We also think that the learned High Court judge had fallen into error when she ruled that the Court of Appeal's order is not a final order because it is an order in relation to a preliminary objection and the appeal proper has not been heard on the merits; and therefore the doctrine of res judicata does not apply. The learned judge did not cite any authority to support her view on the proposition. In our opinion, she had not adequately and judiciously considered the law as stated by the Supreme Court in *Asia Commercial Finance Ltd* and the Court of Appeal in *Hartecon JV Sdn Bhd* on the application of this doctrine. H I

[40] The case of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 is an authority for the principle that res judicata applies to a ruling on procedural as well as substantive issue. Further in the same case,

Gopal Sri Ram JCA (as he then was) said that a decision on a preliminary objection rendered the point taken res judicata. In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 the then Supreme Court said that ' … the issue estoppel, in a nutshell, means …, that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies were parties.'

[41] In relation to the above argument we are of the view that the learned High Court judge had not given judicial consideration to the defendant's submission that the plaintiff had, in arguing the said appeal, took the position that no leave is required to prosecute the said appeal. The plaintiff had thus made an election. The plaintiff ought not be allowed to go back on his election. Further, in this case the Court of Appeal's order had been perfected and sealed. This fact is not in dispute. In this regard we agree with the submission by learned counsel for the defendant that the Court of Appeal has inherent jurisdiction to review its own previous decision on limited grounds and only in very exceptional circumstances. This principle was stated by the Federal Court, in the judgment by Raus Shariff PCA, in *Ahmadi bin Yahya v Public Prosecutor* [2012] 6 MLJ 37; [2012] 6 AMR 193. In that case the court said that 'An apex court must be armed with such inherent powers in order to correct obvious mistakes and to do justice. However, in exercising such powers, it should not position itself as if it were hearing an appeal.' In this respect we noted that the effect of the plaintiff's amended notice of originating motion is not for review of the Court of Appeal's order but for leave to file and prosecute a motion before the Court of Appeal to set aside the Court of Appeal's order and to prosecute the said appeal. We are of the view that the learned High Court judge had side-stepped this issue and had failed to consider its implication in the light of authorities. At this juncture we also mention the principle deduced from the Federal Court's decision in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 that a High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction except where the order or judgment could be proved to be null and void on the ground of illegality or lack of jurisdiction. Corollary, the same principle applies to a coram of Court of Appeal hearing an appeal against the order of another coram of the Court of Appeal of concurrent jurisdiction. And it is our view that in respect of the ruling on the preliminary objection as to the leave requirement the Court of Appeal's order is a final order.

[42] In her judgment the learned judge correctly said that ' … *apabila Mahkamah Rayuan menolak rayuan plaintiff dengan kos ia bermaksud keseluruhan rayuan kes B-04-265-2006 telah ditolak*.' (see para (3) of the ALASAN PENGHAKIMAN at p 8 of the supplementary appeal record). The learned judge was also correct to state in her judgment (at the same paragraph)

that *'Apabila tiada kebenaran untuk merayu ia sama seperti tiada rayuan di hadapan Mahkamah Rayuan.'* But we are of the view that the learned judge erred when she went on to say that *'Mahkamah juga berpendapat suatu rayuan itu boleh dihidupkan semula sekiranya rayuan berkenaan dibatalkan dan tidak ditoiak.'* We think it is contradiction in terms to say that on one hand there is no competent appeal before the Court of Appeal because no leave to appeal was obtained and that on the other hand 'an appeal' may be re-instated if it is struck off and not dismissed. We cannot understand the rationale how an appeal that never exists can be re-instated.

[43] Finally, that is the issue of delay. The High Court's order that reversed the decision of the sessions court rejecting the defendant's application to return the empty gas cylinders was pronounced on 20 September 2005 by Justice Hj Suriyadi bin Halim Omar (as he then was) thus allowing the defendant's appeal against the decision of the sessions court (pp 228–229 of the appeal record Vol 2(1)). In the said High Court's order, the court also ordered the plaintiff to refund the monies paid by the defendant under protest and threat of a winding up proceedings after the defendant failed to obtain a stay of the sessions court's judgment. Until today the monies have not been returned to the defendant.

[44] The plaintiff obtained leave from the Court of Appeal to appeal against Justice Hj Suriyadi's decision on 3 June 2006 (pp 230–231 of the appeal record Vol 2(1)). The plaintiff filed the said appeal sometime on 7 August 2006 (pp 233–234 of the appeal record Vol 2(1)). On 26 October 2006, the defendant commenced voluntary winding up and this fact was communicated to the plaintiff's solicitors on 28 February 2007 (p 422 of the appeal record Vol 2(2)). The voluntary winding up was commenced before the said appeal could be heard. It is pertinent to note that at the material time the said appeal already pending before the Court of Appeal and awaiting date for hearing. The said appeal was fixed for hearing on 26 May 2010, some three years after the plaintiff was informed and had had knowledge of the defendant's voluntary winding up which was on 28 February 2007. Between the two dates the plaintiff did nothing to obtain any leave. Perhaps, as submitted before us, the plaintiff and his solicitors believed that no leave is required to prosecute the said appeal. The Court of Appeal's order in respect of the said appeal was pronounced on 27 May 2010; but it was not perfected and sealed until 11 May 2011 — almost a year after its pronouncement.

[45] However, faced with the prospect that there is no more appeal to prosecute after the pronouncement of the Court of Appeal's order, the plaintiff in an about turn filed a motion in the High Court on 12 April 2011 for leave under s 263(2) of the Companies Act 1965 to file an application to set aside the

Court of Appeal's order and to prosecute the said appeal. The application was granted by the learned High Court judge on 8 March 2012. This is the subject matter of the present appeal.

[46] In her judgment on this issue of delay, the learned judge accepted the fact there was delay. In her judgment she acknowledged that there is a delay of three years nine months between the date leave was granted to appeal against the sessions court's judgment and the date of hearing of the said appeal. The learned judge also acknowledged that there is a delay of 12 months from the date the Court of Appeal pronounced the Court of Appeal's order and the date of filing of application for leave to file the motion before the Court of Appeal to set aside the Court of Appeal's order. However she was of the opinion that the delay was not inordinate and is excusable on the explanation by the plaintiff that the plaintiff had to wait for the fair copy of the Court of Appeal's order to be perfected before taking any further steps. The learned judge is also of the view that there is no time frame prescribed under s 263(2) of the Companies Act 1965 for filing of application for leave.

[47] We must say that we do not share the view of the learned High Court judge on this issue of delay. Firstly, we are of the view that it is trite that where there is no time frame prescribed for the doing of any particular act, then such act must be done within reasonable time. Secondly, in the factual circumstances of this case, delay is inordinate. The plaintiff's solicitors were informed of the defendant's voluntary winding up about three years before the appeal was heard. But the plaintiff did nothing. In this regard, we agree with the submissions by learned counsel for the defendant that on the authorities cited, the law and the court will not assist the indolent: *Gan Boon Kyee v Yap Hong Sing & Anor* [1997] 2 MLJ 598 (CA), *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (Appointed Receivers and Managers)* [2003] 4 MLJ 647 (CA). The plaintiff has no one to blame except his own conduct in not making an immediate application to the winding up court for leave to prosecute the said appeal after the Court of Appeal has struck off the said appeal on 27 May 2010. The plaintiff or his solicitors may have the belief that no appeal is required in this case; but unfortunately the Court of Appeal that heard the said appeal did not share that belief. Having had the knowledge of the defendant's winding up before the said appeal was fixed for hearing, the plaintiff could have, out of abundance of caution, applied for leave to prosecute the appeal notwithstanding the plaintiff's belief that no leave was necessary. In this regard we agree with the submission by learned counsel for the defendant that the plaintiff is the author of his own misfortune as in the case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 (CA) referred to by the learned counsel for the defendant in his submissions.

[48] On the foregoings, we unanimously allowed this appeal by the defendant with cost as mentioned above and set aside the High Court's order of 8 March 2012. We also ordered encl 19a to be struck off with cost as ordered.

Appeal allowed with costs.

Reported by Kohila Nesan