

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
IN THE FEDERAL TERRITORY, MALAYSIA.  
[CIVIL SUIT NO. WA-22NCVC -701 -12/2022]**

**BETWEEN**

**NAUTICAL SUPREME SDN BHD**

[No. Syarikat 201201019240 (989385-H)]

**... PLAINTIFF**

**AND**

**AZIMUTH SHIP MANAGEMENT SDN BHD**

[No. Syarikat 200801011807 (813095-H)]

**... DEFENDANT**

**GROUND OF JUDGMENT**

(Enclosure 131)

**Introduction**

- [1] This is the defendant's application in Enclosure 131 for leave under Order 20 rule 5 of the Rules of Court 2012 to amend its defence dated 26.01.2023 and to introduce a new counterclaim.
- [2] The proposed amendments sought to include matters arising from separate derivative proceedings filed in Originating Summons No. WA-24NCC-677-12/2023 ("OS 677"). The defendant contended that the institution of OS 677 reflected an inconsistent position adopted by the plaintiff and/or its alleged privies. On that basis, the defendant sought to raise defences founded, amongst others, on approbation and reprobation, issue estoppel and unjust enrichment.
- [3] The plaintiff opposed the application. It argued that the amendments were made after inordinate delay, lacked cogent explanation,

constituted a tactical manoeuvre and would cause substantial prejudice.

- [4] Having perused the application and considered the submissions of both parties, I dismiss the defendant's application for the reasons that follow.

### **Background facts**

- [5] The plaintiff commenced this writ action in December 2022. The defendant entered appearance and filed its defence in January 2023. The matter thereafter proceeded through active case management with a total of 18 sessions conducted to date.
- [6] During the 7<sup>th</sup> case management session in June 2023, this Court directed that all pre-trial documents be filed by 04.10.2023. The court further directed that any interlocutory applications be filed within one month after the close of pleadings. Trial dates were fixed for 13.10.2025, 14.10.2025 and 15.10.2025.
- [7] On 05.12.2023, one Timor Shah Rafiq ("Timor") filed OS 677 against Nautilus Tug & Towage Sdn Bhd ("NTT") seeking leave to commence derivative proceedings. Timor was a director of the plaintiff and had previously deposed affidavits on behalf of the plaintiff in the present proceedings. NTT later filed an affidavit in opposition in January 2024.
- [8] During the 12<sup>th</sup> case management session in May 2024, this Court revised its earlier direction and directed that all pre-trial documents and any interlocutory applications be filed by 09.09.2024 instead.
- [9] On 05.06.2024, the defendant became aware of OS 677 through NTT and received copies of the cause papers. This fact was admitted in paragraphs 5 and 6 of the affidavit of Shashi G Harinarayanan affirmed on 17.07.2024.

- [10] On 17.07.2024, the defendant applied to intervene in OS 677. In November 2024, the High Court (Commercial) dismissed that application to intervene. The defendant appealed against that decision but the Court of Appeal dismissed the appeal in April 2025.
- [11] During the 17<sup>th</sup> case management session in April 2025, the defendant for the first time indicated its intention to apply for leave to amend its defence. Against that indication, the court remarked specifically that such application would be out of time as the revised deadline of 09.09.2024 had long expired.
- [12] By 25.04.2025, both parties had complied with all pre-trial directions. The case now stands ready for trial on the scheduled dates of 13.10.2025 to 15.10.2025.
- [13] However, on 29.05.2025, some 8 months and 20 days after expiry of the revised deadline, the defendant filed Enclosure 131. The application sought to insert new paragraphs 33(a) to (d) in the statement of defence, alleging that the plaintiff and/or its "parties privies" had instituted OS 677 thereby abandoning the plaintiff's stance and adopting an inconsistent position. The proposed amendments also sought to introduce a new counterclaim founded on those allegations.

## **Analysis and findings**

### *The applicable legal principles*

- [14] The defendant submitted that the principles governing amendment applications are as stated by the Federal Court in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191 ; [1983] 1 MLJ 213; [1982] 1 MLRA417.
- [15] In *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301; [2016] 3 MLRA81, the Federal Court through His Lordship the Right Honourable Zulkefli Ahmad

Makinudin CJ (Malaya) (later PCA), clarified that when an amendment application is made at an advanced stage of proceedings, additional and more stringent considerations apply beyond the three questions set out in *Yamaha Motor (supra.)*.

[16] The Federal Court emphasised several requirements as follows:

- (a) first, the applicant must provide a cogent and reasonable explanation in the supporting affidavit for the delay in filing the application,
- (b) second, the application must not constitute a tactical manoeuvre,
- (c) third, the proposed amendments must contain sufficient particulars to allow the court to assess whether there exists a real prospect of success, and
- (d) fourth, the lateness of the application cannot necessarily be cured by an award of costs.

[17] The Federal Court also recognised that the procedural landscape has evolved since *Yamaha Motor (supra.)* was decided. The introduction of pre-trial case management procedures has shifted the focus towards the just, expeditious and economical disposal of actions. This modern framework demands a more exacting standard when parties seek amendments at an advanced stage of proceedings.

[18] In *E & O Trading Sdn Bhd v. Americk Singh Sidhu & Ors and another appeal* [2018] 7 CLJ 685; [2018] 6 MLJ 783; [2018] MLRAU 168, the Court of Appeal, through His Lordship the Honourable Idrus Harun JCA, applied the *Hong Leong Finance* principles to dismiss an amendment application filed at a late stage.

[19] The present application, filed four and a half months before trial and nearly one year after the defendant became aware of the matters now

sought to be pleaded, falls squarely within the ambit of these authorities.

*Inordinate delay and absence of cogent explanation*

- [20] The chronology of events is not in favour of the defendant. The defendant admitted that it became aware of OS 677 on 05. 06.2024. Yet, Enclosure 131 was filed only on 29.05.2025, that is almost one year later. The court's revised deadline for filing interlocutory applications expired on 09.09.2024. The defendant therefore breached the deadline by more than eight months. No explanation was offered for this prolonged and unjustified delay.
- [21] The sole explanation advanced in the defendant's submissions was that its solicitors became aware of OS 677 only "sometime in April 2025". This explanation is fatally wanting for several reasons.
- [22] First, it amounts to a bare assertion and not supported by evidence. In *Hong Leong Finance Bhd (supra.)*, the Federal Court ruled that a bare assertion carries no evidential value and that the defendant's affidavit did not discharge the 'heavy onus' imposed on the amending party as the defendant did not disclose any material and cogent reasons to explain the inordinate delay. The same circumstance arises here in the present case.
- [23] Second, the explanation improperly conflates the knowledge of the defendant's solicitors with that of the defendant itself. The applicant in Enclosure 131 is the defendant company, not its solicitors. The defendant has already admitted that it acquired actual knowledge of OS 677 no later than 05. 06.2024. In *Angel Cake House Sdn Bhd & Ors v. Bandaraya Development Bhd* [2001] 1 CLJ 746; [2001] 1 MLRH 12; [2001] 1 AMR 1161, the High Court observed that it is the knowledge of the defendant and not its newly appointed solicitors, that is relevant.

- [24] In the present case, the defendant provides no explanation as to why it failed to instruct its solicitors regarding OS 677 for nearly eleven months.
- [25] Third, the defendant had actively applied to intervene in OS 677 on 17.07.2024. This demonstrated a full awareness and concern about those proceedings. It is therefore implausible that the defendant found it necessary to intervene in OS 677 as early as July 2024, yet only realised in April 2025 that amendments might be required in the present action.
- [26] In *Kua Khai Shyuan & Ors v. Equities First Holdings LLC* [2022] CLJU 869; [2022] CLJU 869; [2022] 1 LNS 869, the High Court found that even a delay of two months without a reasonable explanation justified an inference that the application was not *bona fide*. *By contrast, the present delay of nearly one year is far more egregious and wholly inexcusable.*

*Tactical manoeuvre and absence of bona tides*

- [27] The timing and strategic context of Enclosure 131 invites the inescapable inference that the application is a tactical manoeuvre. The defendant filed Enclosure 131 on 29.05.2025. That was after the Court of Appeal dismissed its appeal in OS 677 on 30.04.2025. This sequence of events suggests an attempt to revive, within the present proceedings, arguments that had already been rejected in OS 677. In my considered opinion, this course is reactive and opportunistic.
- [28] In *Hong Leong Finance Bhd (supra.)*, the Federal Court observed that applications motivated by tactical manoeuvres ought to be dismissed. Likewise, in *Tenaga Nasional Bhd v. Ice Man Sdn Bhd* [2020] 6 CLJ 783; [2020] 11 MLJ 584; [2020] MLRHU 232; [2020] 3 AMR 514, the High Court held that a delay springing from tactical motives does not facilitate the speedy disposal of proceedings and must therefore be refused.

- [29] The defendant's conduct reinforces this conclusion. It had demonstrated full awareness of OS 677 by filing an intervention application on 17.07.2024. Despite that, the defendant remained silent regarding any proposed amendments in this action through successive case management sessions held on 09.09.2024, 09.12.2024, 09.01.2025 and 28.04.2025.
- [30] This prolonged inactivity undermines any claim of *bona fides*. The application does not advance the efficient disposal of the matter. Instead, it would reopen discovery, necessitate the filing of further pleadings and likely cause the adjournment of trial dates in an action that has been pending for more than two and a half years.

*The proposed amendments are without merit*

- [31] The foundation of the proposed amendments rests on the allegation that the plaintiff and/or its "parties privies" had taken an inconsistent stance by instituting OS 677. With respect, this position is fundamentally misconceived.
- [32] The plaintiff is not a party to OS 677. Timor, a director of the plaintiff, was the applicant in OS 677 seeking leave to commence derivative proceedings in the name of NTT. If leave were granted, the derivative action would be brought by NTT, not by the plaintiff or by Timor personally.
- [33] The principle of separate legal personality operates against the defendant's contention regarding privity. The plaintiff and NTT are distinct legal entities and their actions cannot be conflated.
- [34] The defendant's further contention that Timor constitutes a "party privy" of the plaintiff by virtue of his directorship reflects a fundamental misunderstanding of the doctrine of privity. The status as a director alone does not create privity between a director and the company.

[35] Moreover, the beneficiaries of the respective proceedings are entirely different. In this action, the plaintiff seeks recovery of sums allegedly due under the Letter dated 09.02.2015. In OS 677, the intended beneficiary is NTT. The proposed amendments therefore fail to address, much less answer, the plaintiff's substantive claim.

### *Prejudice*

[36] If Enclosure 131 were allowed, the plaintiff would suffer substantial prejudice that cannot be adequately compensated by costs. The plaintiff had diligently complied with all pre-trial directions over a span of two and a half years and through 18 case management sessions.

[37] The introduction of wholly new issues at this stage would nullify that effort and preparation. It would also necessitate the vacation of trial dates causing significant delay in the resolution of the plaintiff's claim.

[38] Conversely, the dismissal of Enclosure 131 causes no meaningful prejudice to the defendant. The defendant remains at liberty to institute fresh proceedings or, if leave is granted in OS 677, to advance its counterclaim in those proceedings.

### **Conclusion**

[39] For the reasons set out above, I am satisfied that the defendant has failed to discharge the heavy onus required of an applicant seeking leave for late amendments. The delay of nearly one year from the date of actual knowledge is inordinate. No cogent or credible explanation has been offered.

[40] The surrounding circumstances give rise to a clear inference of tactical manoeuvring. The proposed amendments are devoid of merit and would cause substantial prejudice to the plaintiff. These factors collectively militate against the grant of leave.

[41] Accordingly, Enclosure 131 is dismissed with costs in any event to the plaintiff. The trial shall proceed as scheduled on 13. 10.2025, 14.10.2025 and 15.10.2025.

**Dated:** 10 October 2025.

**(AHMAD SHAHRIR MOHD SALLEH)**

Judge

High Court Of Malaya

Kuala Lumpur.

**Counsel:**

*For the plaintiff - Pang Kong Leng & Jonathan Lim See Kheng; M/s Cheah Teh Su*

*For the defendant - Meyappan Pillai, Jennifer Chandran & Nur Amalina Suhainy; M/s Vaasan Chan & Chandran*