A **WAJA MANUFACTURING (M) SDN BHD & ORS**

v.

ALLIANCE BANK MALAYSIA BHD & OTHER APPEALS

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
HASHIM YUSOFF FCJ
GOPAL SRI RAM FCJ
[CIVIL APPEAL NOS: 02(i)-39-2008(W),
C 02(i)-40-2008(W) & 02(i)-41-2008(W)]
28 JUNE 2009

CIVIL PROCEDURE: *Action - Consolidation of actions - Whether filing of a defence a prerequisite - Whether application for consolidation*
D *premature - Rules of the High Court 1980, O. 4 r. 1, O. 18 r. 2*

The respondent bank in these three appeals, which had lent money to three companies, contended that the loans were defaulted upon and thus brought separate actions against each of
E the borrowers and the guarantors of the loans. The three companies and the guarantors brought a separate action against the bank for breach of an agreement to disburse certain monies that it had promised to advance for the purchase of some machinery. Later, the bank took out a summons for judgment in
F each of its suits. The appellants resisted the summons and they also took out a summons to consolidate the actions. The High Court dismissed that summons and the resulting appeal to the Court of Appeal also failed on the sole ground that the appellants had not filed their defence. The appellants then applied to this
G court and obtained leave to appeal on this question: whether the filing of a defence is a prerequisite to an application by a defendant for an order that matters be consolidated or heard together under O. 4 r. 1 of the Rules of the High Court 1980 ('RHC').

H **Held (dismissing the appeals)**
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) The Court of Appeal's ground for dismissing the appeal was
I flawed for two reasons, one having to do with the circumstances of this case and the other based on principle. Firstly, it was clear that in the present instance the appellants

having been served with summonses for judgment were relieved from delivering their defences to the several actions until after the disposal of those summonses. This was made clear by O. 18 r. 2 of the RHC. Secondly, following O. 4 r. 1 of the RHC, there was no requirement that a defence must have been filed. *Daws v. Daily Sketch and Daily Graphic* (dist). (paras 2 & 3)

(2) Although it would appear that the High Court and the Court of Appeal were *prima facie* wrong here in declining consolidation, there were other grounds on which their ultimate orders may be supported. To recall, the present actions were at the stage at which summonses for judgment in the bank's actions were pending disposal before the High Court. That court may enter summary judgment in the bank's favour, which would render any application for consolidation academic. Or it may grant the appellants unconditional leave to defend, in which event the appellants would be able to seek consolidation of the several actions. These matters showed that the appellants' present application for consolidation was premature, and it was on that ground that the order of the Court of Appeal must be upheld. The real case for the appellants was that they wanted all the summonses for judgment taken together. The bank did not oppose this course, and any apparent difficulty may quite easily be resolved administratively under the new tracking system that is in place at the Kuala Lumpur High Court. All it requires is for the parties to place their request before the managing judge of the Commercial Division who will no doubt accede to it. (paras 6 & 7)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Responden/bank dalam ketiga-tiga rayuan ini, yang telah meminjam wang kepada tiga syarikat, mendakwa bahawa pinjaman-pinjaman itu telah diingkar dan, oleh itu, telah memulakan tiga tindakan berbeza terhadap setiap satu peminjam-peminjam dan penggerenti-penggerenti pinjaman-pinjaman itu. Ketiga-tiga syarikat dan penggerenti-penggerenti memulakan suatu tindakan berbeza terhadap bank disebabkan pelanggaran satu perjanjian untuk membayar wang tertentu yang telah dijanjikan oleh bank sebagai pendahuluan bagi pembelian beberapa jentera. Selepas itu, bank

telah mengeluarkan saman untuk penghakiman dalam setiap satu guamannya. Perayu menentang saman itu dan mereka juga mengeluarkan saman untuk menyatukan tindakan-tindakan itu. Mahkamah Tinggi menolak saman itu dan rayuan yang timbul ke Mahkamah Rayuan juga gagal atas alasan tunggal bahawa perayu-perayu tidak memfail pembelaan mereka. Perayu-perayu kemudian memohon ke mahkamah ini dan telah memperolehi kebenaran untuk merayu atas soalan ini: sama ada pemfailan pembelaan adalah satu prasyarat kepada sesuatu permohonan oleh suatu defendan bagi satu perintah bahawa perkara-perkara disatukan atau dibicara bersama di bawah A. 4 k. 1 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan (menolak rayuan-rayuan)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Alasan Mahkamah Rayuan untuk menolak rayuan adalah salah atas dua sebab, satu berkenaan dengan halkeadaan kes ini dan satu lagi berdasarkan prinsip. Pertamanya, ia adalah jelas bahawa dalam keadaan semasa perayu-perayu setelah diserahkan dengan saman-saman untuk penghakiman telah dilepaskan dari menyampaikan pembelaan-pembelaan mereka terhadap beberapa tindakan-tindakan itu sehingga penyelesaian saman-saman itu. Ini telah dijelaskan dengan nyata oleh A. 18 k. 2 KMT. Keduanya, mengikut A. 4 k. 1 KMT, tiada apa-apa keperluan bahawa sesuatu pembelaan mesti difailkan. *Daws v. Daily Sketch and Daily Graphic* (dibezakan).

(2) Walaupun ia nampaknya bahawa Mahkamah Tinggi dan Mahkamah Rayuan telah *prima facie* khilaf di sini apabila menolak penyatuan itu, terdapat alasan-alasan lain yang dapat menyokong perintah-perintah muktamad mereka. Mengingat kembali, tindakan-tindakan semasa adalah di peringkat di mana saman-saman untuk penghakiman dalam tindakan-tindakan bank menunggu penyelesaian di hadapan Mahkamah Tinggi. Mahkamah itu boleh mencatat penghakiman terus bagi pihak bank, yang akan membuat apa-apa permohonan untuk penyatuan dijadikan akademik. Atau ia boleh memberikan perayu-perayu kebenaran tak bersyarat untuk membela, dalam keadaan mana perayu-perayu boleh menuntut untuk penyatuan beberapa tindakan-tindakan itu. Perkara-perkara ini menunjukkan bahawa permohonan semasa perayu-perayu

untuk penyatuan adalah pramasa, dan ia adalah atas alasan itu bahawa perintah Mahkamah Rayuan mesti disahkan. Kes sebenar untuk perayu-perayu ialah bahawa mereka ingin kesemua-semua saman-saman untuk penghakiman diambil bersama-sama. Bank tidak melawan jalan ini, dan apa-apa kesusahan yang ada boleh diatasai dengan mudah secara administratif di bawah sistem pengesanan baru yang berada di Mahkamah Tinggi Kuala Lumpur. Apa yang hanya diperlukan ialah untuk pihak-pihak untuk mengemukakan permintaan mereka di hadapan hakim pengurus Divisyen Komersial yang akan tanpa ragu-ragu menyetujui dengannya.

[Diperintah sedemikian.]

Case(s) referred to:
Daws v. Daily Sketch and Daily Graphic Ltd [1960] 1 WLR 126 ***(dist)***
Horwood v. Statesman Publishing Co Ltd [1929] All ER Rep 558 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 4 r. 1, O. 18 r. 2

For the appellants - Malik Imtiaz Sarwar (M Indrani with him); M/s M Indrani Lee & Co
For the respondent - N Chandran (Koh Yew Chong with him); M/s Albar & Partners

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram FCJ:

[1] There are three appeals before us. The respondent to these appeals is a bank. It lent money to three companies, Waja Manufacturing (M) Sdn Bhd, Polyrak Industries Sdn Bhd and Portola Closure Manufacturing Sdn Bhd. Its case is that these loans were defaulted upon. So, it brought separate actions against each of the borrowers and the guarantors of the loans. The three companies and the guarantors brought a separate action against the bank for breach of an agreement to disburse certain monies that it had promised to advance for the purchase of some machinery. Later, the bank took out a summons for judgment in each of its suits. The appellants are resisting the summonses. They also took out a summons to consolidate the actions. That

summons was dismissed by the High Court. An appeal to the Court of Appeal failed. The appellants then applied to this court and obtained leave to appeal on the question: whether the filing of a defence is a prerequisite to an application by a defendant for an order that matters be consolidated or heard together under O. 4 r. 1 of the Rules of the High Court. Arguments were heard, the question reserved though answered in the negative, these appeals were nevertheless dismissed for the reasons that now follow.

[2] The only ground on which the Court of Appeal dismissed the appeal is that the appellants had not filed their defence. That finding is flawed for two reasons, one having to do with the circumstances of this case and the other based on principle. As for the first, it is clear that in the present instance the appellants having been served with summonses for judgment are relieved from delivering their defences to the several actions until after the disposal of those summonses. This is made clear by RHC O. 18 r. 2 which states:

> (1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.
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> (2) If a summons under Order 14, rule 1, is served on a defendant before he serves his defence, paragraph (1) shall not have effect in relation to him unless by the order made on the summons he is given leave to defend the action and, in that case, shall have effect as if it required him to serve his defence within 14 days after the making of the order or within such other period as may be specified therein.

[3] As for the second reason, this turns on the construction of RHC O. 4 r. 1 which reads:

> (1) Where two or more causes or matter are pending, then, if it appears to the Court:
>
> (a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

As may be seen, there is no requirement that a defence must have been filed. Yet, the bank sought to argue otherwise in reliance of the decision in *Daws v. Daily Sketch and Daily Graphic Ltd* [1960] 1 WLR 126 which it said is authority for the proposition that the filing of a defence is a *sine qua non* for the rule to bite.

[4] *Daws* was a libel action. Two suits had been filed against the same defendants in respect of the same article. The plaintiff in the first suit and the plaintiffs in the second suit were represented by the same solicitors. In the first suit the defendants admitted that the words complained of referred to the plaintiff, denied that the words were defamatory, and pleaded an offer of an apology in mitigation of damage. In the second action the defendants denied that the words complained of referred to the plaintiffs, and denied that they were defamatory, but did not rely on any offer of an apology. The High Court ordered consolidation but the Court of Appeal reversed on the ground that Scrutton LJ's *dictum* in *Horwood v. Statesman Publishing Co Ltd* [1929] All ER Rep at p 558 did not apply to the case before the court. This is what Scrutton LJ said:

The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of

A the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

[5] Willmer LJ in *Daws* was satisfied that:

B … when we look at the issues raised in the present cases we are far from finding here

> a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be C disposed of at the same time …

> The only issue in the two actions which is, strictly speaking, common to both of them is the issue whether the words are defamatory at all, an issue which, as counsel for the plaintiffs D suggested, might well be one which would not give the jury very much trouble. But there are very distinctive differences between the matters in issue in the two actions, having regard to the different defences put forward, to which I have already referred.

As may be seen, the circumstances in which consolidation was E refused in *Daws* are very different from those present in the instant case. *Prima facie*, therefore it would appear that the High Court and the Court of Appeal were wrong here in declining consolidation. But there are other grounds on which their ultimate orders may be supported.

F

[6] To recall, the present actions are at the stage at which summonses for judgment in the bank's actions are pending disposal before the High Court. That court may enter summary judgment in the bank's favour which would render any application for G consolidation academic. Or it may grant the appellants unconditional leave to defend in which event the appellants will be able to seek consolidation of the several actions. These matters show that the appellants' present application for consolidation to be premature. And it is on that ground that the order of the H Court of Appeal must be upheld.

[7] The real case for the appellants is that they want all the summonses for judgments taken together. The bank does not oppose this course. Any apparent difficulty may quite easily be resolved administratively under the new tracking system that is in I place at the Kuala Lumpur High Court. All it requires is for the parties to place their request before the managing judge of the Commercial Division who will no doubt accede to it.

[8] For the reasons already given the appeal was dismissed. Having regard to the fact that the Court of Appeal found against the appellants for the wrong reasons and having regard to the justice of the case, no order as to costs at all levels was made and the deposit in court was ordered to be refunded to the appellants.