Dato' Dr Ng Meng Kee & Anor v Rightlink Capital Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-1012–06 OF 2022 AND W-02(IM)(NCVC)-1013–06 OF 2022
LEE SWEE SENG, MARIANA YAHYA AND LIM CHONG FONG JJCA
7 JULY 2023

Civil Procedure — Summary application — Rules of Court 2012 O 14A — Disposal of case on point of law — Appellants and respondent entered agreements whereby appellants appointed respondent as arranger for purposes of funding exercise — Appellants did not have Capital Markets Services License pursuant to s 61 of Capital Markets and Services Act 2007 — Appellants refused to pay respondent for services rendered pursuant to agreements — Respondent filed action claiming payment for services rendered — Appellants filed application pursuant to O 14A of Rules of Court 2012 — High Court judge dismissed appellants' application to dispose case on point of law — Whether questions raised involved mixed fact and law — Whether question raised could be conveniently dealt and decided by way of disposal on preliminary point of law — Rules of Court 2012 O 14A

Via a letter of engagement dated 20 June 2016 and its addendum as well as a letter of engagement dated 15 July 2017 ('the agreements'), the appellants had appointed the respondent as the arranger for purposes of funding exercise whereby the respondent would manage the process of obtaining funds from potential funders. During the provision of services in relation to the agreements, the respondent did not possess a Capital Markets Services License ('CMSL') issued pursuant s 61 of the Capital Markets and Services Act 2007 ('the Act'). The dispute between the parties arose when the appellants refused to pay the respondent's claim for payment for services rendered pursuant to the agreements. This dispute led to the filing of Suit 885 and Suit 886 by the respondent against the appellants. The appellants then filed an application pursuant to O 14A of the Rules of Court 2012 ('the ROC') for the determination of the following questions ('the questions'): (a) whether the respondent's scope of work under the agreements fell within the definition of 'regulated activities' as prescribed by Schedule 2 of the Act ('question 1'); (b) if question 1 was answered in the affirmative, whether the respondent required a CMSL pursuant to s 58 of the Act ('question 2'); and (c) if question 2 was answered in the affirmative, whether the agreements were illegal, void and/or unenforceable against the appellants ('question 3'). In opposition, the respondent argued that the questions involved mixed questions of fact and law and were thus unsuitable to be answered pursuant to O 14A of the ROC. The

A High Court dismissed the appellants' application premised on the finding, inter alia, that there were too many disputed facts which meant that the matter could not be resolved summarily. Dissatisfied with the decision, the appellants filed the present appeals.

B **Held**, dismissing the appeals with costs of RM10,000 for each appeal subject to allocator:

(1) The grant or otherwise of an application under O 14A of the ROC plainly involved the exercise of discretion. In the exercise of the court's appellate function, the court had reviewed the judgment of the High Court judge in light of the parties' contentions. In this respect and upon scrutiny of the pleadings, the court found that there were many contested issues of facts and mixed facts and law. This was not a case where the issue of illegality could be neatly excised from the other issues raised and be decided independently by itself. The assessment and evaluation of the questions posed must be undertaken on the pleadings as well as evidence of fact of the services actually provided. In other words, they could not be answered based on the pleadings alone unless the facts were agreed (see paras 27 & 29–30).

(2) In a case of 'regulated activities' where the law enforcer had seen it fit to issue Guidance Notes and Technical Notes, the court was of the view that to rely on a mere description of the scope of services rendered would be an oversimplification to determine if the services were caught within the meaning of 'regulated activities' requiring a license under s 58 of the Act for those providing such services or carrying out such activities. The scope, nature, benefits, and ramifications of these activities were best ascertained and evaluated after evidence of it had been adduced at trial and tested against the backdrop of what experts may say on the practice of it vis a vis the Securities Commission (see para 31).

(3) The issue of illegality here with its many ramifications should hence best be tried in a full trial when the underlying facts were seriously disputed as could be seen from the voluminous bundles of documents filed under Part B and Part C as well as the various defences pleaded in the alternatives like implied terms and even counterclaim with respect of the restitution for the amount already paid by the appellants to the respondent. In this regard, the court was also satisfied that the answering of the questions posed in the applications would not fully dispose Suit 885 and Suit 886 because the counterclaim would still have to be tried (see para 32).

(4) The court found no good reason to disagree with the learned High Court judge that the questions could not be conveniently dealt and decided by way of disposal on preliminary point of law. This was primarily because the questions posed could not be disassociated from the substratum facts

which were still very much disputed. The questions could not be answered in a vacuum. In the premises, the court found no misdirection on the part of the learned High Court judge that warranted appellate intervention (see paras 34–35).

[Bahasa Malaysia summary

Melalui surat lantikan bertarikh 20 Jun 2016 dan adendumnya serta surat lantikan bertarikh 15 Julai 2017 ('perjanjian-perjanjian tersebut'), perayu-perayu telah melantik responden sebagai pengatur untuk tujuan pembiayaan di mana responden akan menguruskan proses mendapatkan dana daripada bakal pembiaya. Dalam tempoh penyediaan perkhidmatan berhubung dengan perjanjian-perjanjian tersebut, responden tidak memiliki Lesen Perkhidmatan Pasaran Modal ('CMSL') yang dikeluarkan menurut s 61 Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta tersebut'). Pertikaian antara pihak-pihak timbul apabila perayu-perayu enggan membayar tuntutan responden untuk bayaran perkhidmatan yang diberikan menurut perjanjian-perjanjian tersebut. Pertikaian ini membawa kepada pemfailan Saman 885 dan Saman 886 oleh responden terhadap perayu-perayu. Perayu-perayu kemudiannya memfailkan permohonan menurut A 14A Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk penentuan soalan-soalan berikut ('soalan-soalan tersebut'): (a) sama ada skop kerja responden di bawah perjanjian-perjanjian tersebut termasuk dalam takrif 'aktiviti terkawal' seperti yang ditetapkan oleh Jadual 2 Akta tersebut ('soalan 1'); (b) jika soalan 1 dijawab secara afirmatif, sama ada responden memerlukan CMSL menurut s 58 Akta tersebut ('soalan 2'); dan (c) jika soalan 2 dijawab secara afirmatif, sama ada perjanjian-perjanjian tersebut menyalahi undang-undang, batal dan/atau tidak boleh dikuatkuasakan terhadap perayu-perayu ('soalan 3'). Dalam menentang, responden berhujah bahawa soalan-soalan tersebut melibatkan persoalan campuran fakta dan undang-undang dan dengan itu tidak sesuai untuk dijawab menurut A 14A KKM 2012. Mahkamah Tinggi menolak permohonan perayu-perayu berdasarkan dapatan, antara lain, bahawa terdapat terlalu banyak fakta yang dipertikaikan yang bermakna perkara tersebut tidak dapat diselesaikan secara ringkas. Tidak berpuas hati dengan keputusan tersebut, perayu-perayu memfailkan rayuan-rayuan semasa.

Diputuskan, menolak rayuan-rayuan dengan kos sebanyak RM10,000 bagi setiap rayuan tertakluk kepada alokator:

(1) Pembenaran atau sebaliknya permohonan di bawah A 14A KKM 2012 pada dasarnya melibatkan penggunaan budi bicara. Dalam menjalankan fungsi rayuan mahkamah, mahkamah telah menyemak penghakiman hakim Mahkamah Tinggi berdasarkan pertikaian pihak-pihak. Dalam hal ini dan setelah meneliti pliding, mahkamah mendapati terdapat banyak isu fakta dan campuran isu fakta dan undang-undang yang

dipertikaikan. Ini bukanlah satu kes di mana isu kepenyalahan undang-undang boleh diasingkan dengan kemas daripada isu-isu lain yang dibangkitkan dan boleh diputuskan secara bebas dengan sendirinya. Penilaian dan penentuan soalan-soalan yang dikemukakan mesti dilakukan ke atas pliding serta keterangan fakta berhubung dengan perkhidmatan sebenar yang diberikan. Dalam erti kata lain, soalan-soalan tersebut tidak boleh dijawab berdasarkan pliding semata-mata melainkan fakta telah dipersetujui (lihat perenggan 27 & 29–30).

(2) Dalam kes 'aktiviti terkawal' di mana penguatkuasa undang-undang telah melihat kewajaran untuk mengeluarkan Nota Panduan dan Nota Teknikal, mahkamah berpandangan bahawa untuk bergantung pada penerangan skop perkhidmatan yang diberikan semata-mata terjumlah kepada pemudahan berlebihan dalam menentukan sama ada perkhidmatan tersebut termasuk dalam pengertian 'aktiviti terkawal' yang memerlukan lesen di bawah s 58 Akta tersebut bagi mereka yang menyediakan perkhidmatan tersebut atau menjalankan aktiviti tersebut. Skop, sifat, faedah dan kesan daripada aktiviti ini paling baik dipastikan dan dinilai selepas keterangan mengenainya telah dikemukakan dalam perbicaraan dan diuji berlatarbelakangkan apa yang pakar (Suruhanjaya Sekuriti) mungkin katakan tentang amalan tersebut (lihat perenggan 31).

(3) Isu kepenyalahan undang-undang di sini beserta dengan akibat-akibatnya seeloknya hendaklah dibicarakan dalam perbicaraan penuh apabila fakta asas telah dipertikaikan dengan serius seperti yang dapat dilihat daripada ikatan dokumen yang banyak difailkan di bawah Bahagian B dan Bahagian C serta pelbagai pembelaan yang diplid secara alternatif seperti terma tersirat dan juga tuntutan balas berkenaan dengan pengembalian amaun yang telah dibayar oleh perayu-perayu kepada responden. Dalam hal ini, mahkamah juga berpuas hati bahawa jawapan bagi soalan-soalan yang dikemukakan dalam permohonan tersebut tidak akan melupuskan sepenuhnya Saman 885 dan Saman 886 kerana tuntutan balas masih perlu dibicarakan (lihat perenggan 32).

(4) Mahkamah mendapati tiada alasan yang kukuh untuk tidak bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa soalan-soalan tersebut tidak boleh diuruskan dan diputuskan dengan mudah melalui pelupusan isu awalan undang-undang. Ini adalah terutamanya kerana soalan-soalan yang dikemukakan tidak dapat dipisahkan daripada fakta substratum yang masih sangat dipertikaikan. Soalan-soalan tersebut tidak boleh dijawab dalam vakum. Berdasarkan alasan tersebut, mahkamah mendapati tiada salah arah di pihak hakim Mahkamah Tinggi yang bijaksana yang memerlukan campur tangan rayuan (lihat perenggan 34–35).]

Cases referred to

Arab Malaysian Finance Bhd v Meridien International Credit Corporation Ltd London [1993] 3 MLJ 193, SC (refd)
Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil [1985] QB 966, QBD (refd)
Curragh Investments Ltd v Cook [1974] 1 WLR 1559, Ch D (refd)
Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 429; [2019] 7 CLJ 143, CA (refd)
Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals [2014] 6 MLJ 31, FC (refd)
Mahmoud and Ispahani, Re [1921] 2 KB 716, CA (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)
Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals [2021] 3 MLJ 914; [2021] 2 CLJ 318, FC (refd)
Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299, FC (refd)
Tilling v Whiteman [1980] AC 1; [1979] UKHL 10, CA (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 58, 61, Schedule 2, Part 1
Rules of Court 2012 O 14A, O 33 r 2

Appeal from: Civil Suit No WA-22NCVC-885–11 of 2019 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (with Balan Nair Thamodaran, Lim Yvonne and Danielle Devinna Dickman) (Lavania & Balan Chambers) for the appellant.
Cecil Abraham (with Noor Muzalifah bt Shabudin, Polwin Sua Shiang-Nian and Cheah Kha Mun) (Wong Kian Kheong) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] These are appeals against the dismissal of both applications for disposal of case on point of law.

[2] The appeals concerned emanated from Kuala Lumpur High Court Suit No WA-22NCVC-885–11 of 2019 ('Suit 885') and Kuala Lumpur High Court Suit No WA-22NCVC-886–11 of 2019 ('Suit 886').

[3] The appellants in both appeals were the defendants and the respondent was the plaintiff. For convenience and clarity, we will address below the parties as they appear in the High Court.

[4] We have on 2 May 2023 unanimously dismissed both appeals with costs of RM10,000 for each appeal subject to allocator.

[5] We now provide below the grounds of judgment.

BACKGROUND

[6] The defendants in Suit 885 and Suit 886 by a letter of engagement dated 20th June 2016 ('first LOE') appointed the plaintiff as the arranger for purposes of funding exercise whereby the plaintiff would manage the process of obtaining funds from potential funders such as OCBC bank and LOCAF-OCBC bank. The scope of services as arranger are stated as follows in para 1.1 of the first LOE:

(a) identify and arrange suitable parties as the investor to subscribe for the SPV debt;

(b) assist the client to develop a suitable capital structure for the SPC for the funding exercise;

(c) facilitate and advise in negotiations between the investor and the client on terms and conditions of the SPV debt including security and redemption; and

(d) manage the process of the funding exercise including the offer and close of the SPV debt and to liaise with the appointed lawyers on legal documentation.

[7] The parties thereafter executed an addendum that is supplemental to the first LOE. The scope of services as arranger are stated as follows in para 1.1 of the addendum:

(a) advise on an appropriate structure for the funding exercise;

(b) identify and arrange suitable financier(s) to participate in the funding exercise and facilitate negotiations between these parties and the client;

(c) advise the client and mange accompanying due diligence exercise(s), legal documentation and close the funding exercise; and

(d) provide advice to the client on matters related to the funding exercise and the client's proposed acquisition of shares in the company and its subsidiaries.

[8] Subsequently, the defendant in Suit 886 by a further letter of engagement dated 15 July 2017 ('second LOE') appointed the plaintiff to act as advisor in relation to aforementioned funding exercise. The scope of services as arranger are stated as follows in para 1.1 of the second LOE:

(a) liaise with tax, legal, and/or other professionals to identify options for a more efficient group structure vide rationalisation or restructuring which may include but not limited to a redomiciled global operational headquarters;

(b) assist and advise the client in its consideration of the options which may be presented from (a) and to assist the client in implementation;

(c) identify and/or hold discussions with suitable potential investor(s) including those introduced by third partied in relation to the proposed transaction;

(d) liaise with potential investor(s) on enquiries, including facilitating negotiations between the client and these parties;

(e) assist the client in its evaluation of offers from potential investor(s) and advise on deal structure; and

(f) advise the client and coordinate accompanying due diligence exercise(s), legal documentation and close of the proposed transaction.

The first LOE and addendum as well as the second LOE are hereinafter collectively referred as agreements

[9] The plaintiff at all material times during the provision of services in relation to aforementioned agreements did not possess a Capital Markets Services License ('CMSL') issued pursuant to s 61 of the Capital Markets and Services Act 2007 ('the Act').

[10] The plaintiff claimed against the defendants payment for services rendered pursuant to the agreements respectively.

[11] However, the defendants denied liability in that the claims made by the plaintiff are exorbitant.

[12] As the result, the plaintiff on 29 November 2019 initiated Suit 885 and Suit 886 against the respondents. Both Suit 885 and Suit 886 were thereafter consolidated.

[13] Besides denying liability in their defence, the defendants counter-claimed that the agreements are illegal, void and/or unenforceable bargains by reason that the plaintiff did not have a CMSL to provide the services rendered.

[14] The plaintiff in retort denied that the services rendered involved regulated activity specified in Part 1 of Schedule 2 to the Act.

IN THE HIGH COURT

[15] After the close of pleadings, the defendants moved the High Court to answer the following questions pursuant to O 14A of the Rules of Court 2012 ('applications'):

(a) whether the plaintiff's scope of work under the agreements falls within the definition of 'regulated activities' as prescribed by Schedule 2 of the Act ('question 1')?

(b) if question 1 is answered in the affirmative, whether the plaintiff requires a CMSL pursuant to s 58 of the Act ('question 2')? and

(c) if question 2 is answered in the affirmative, whether the agreements are illegal, void and/or unenforceable against the defendants ('question 3')?

Question 1, question 2 and question 3 are hereinafter collectively referred as 'questions'.

[16] The defendants contended that it is readily apparent the questions that centred on illegality are fundamentally determinative in nature. It is evident that the determination of question 3 only necessitated the consideration of the terms and conditions of the agreements in light of the material provisions of the Act. These terms and conditions are clear and unambiguous.

[17] According to the defendants, the services provided under the agreements contravened provisions of the Act and are summarised as follows:

Type of regulated activity under Part 1, Schedule 2 CMSA	Interpretation of regulated activity under Part 2, Schedule 2, CMSA	Scope under relevant Agreement
Addendum (being the amended terms of the 1st LOE) *in respect of the **Funding Exercise** which is understood as follows:* *(i) Respondent having arranged for a mezzanine loan facility of RM53 million (the "**Mezzanine Loan**")* *(ii) the Mezzanine Loan is to be utilised to:* - *fund the acquisition of shares in Mega Fortris (Malaysia) Sdn Bhd ("**MFM**"); and* - *partially fund the acquisition of the minority shareholding in certain subsidiaries of MFM*		
Dealing in securities	Para 1(b)(i) Making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into any agreement for or with a view to acquiring, disposing of, subscribing for or underwriting securities	1.1(b) To identify and arrange suitable financier(s) to participate in the Funding Exercise and facilitate negotiations between these parties and the Client; 1.1(d) To provide advice to the Client on matters related to

		the Funding Exercise and the Client's proposed acquisition of shares in the Company and its subsidiaries.
Advising on corporate finance	Para 4(a) Giving advice concerning or relating to the raising of funds by any corporation	1.1(a) To advise on an appropriate structure for the Funding Exercise;
Investment advice	Para 5 Carrying on a business of advising others concerning securities or derivatives or as part of a business, issues or promulgates analyses or reports concerning securities or derivatives	1.1(a) To advise on an appropriate structure for the Funding Exercise; 1.1(c) To advise the Client and manage accompanying due diligence exercise(s), legal documentation and close of the Funding Exercise; 1.1(d) To provide advice to the Client on matters related to the Funding Exercise and the Client's proposed acquisition of shares in the Company and its subsidiaries.
Financial planning	Para 6 Analysing the financial circumstances of another person and providing a plan to meet that other person's financial needs and objectives, including any investment plan in securities, whether or not a fee is charged in relation thereto.	1.1(a) To advise on an appropriate structure for the Funding Exercise; 1.1(d) To provide advice to the Client on matters related to the Funding Exercise and the Client's proposed acquisition of shares in the

		Company and its subsidiaries.
2nd LOE *in respect of a Proposed Exercise which is understood as follows:* *(i) Exploring a group rationalisation exercise with the objective of identifying a more efficient structure to unlock operational improvement and value creation opportunities; and* *(ii) Subsequently seek offers from suitable investor(s) to acquire shares which may result from a restructuring of the group*		
Dealing in securities	Para 1(b)(i) Making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into any agreement for or with a view to acquiring, disposing of, subscribing for or underwriting securities	1.1(c) To identify and/or hold discussions with suitable potential investor(s) including those introduced by third parties in relation to the Proposed Transaction; 1.1(d) To liaise with potential investor(s) on enquiries, including facilitating negotiations between the Client and these parties
Advising on corporate finance	Para 4(a) Giving advice concerning or relating to the raising of funds by any corporation	1.1(e) To assist the Client in its evaluation of offers from potential investor(s) and advise on deal structure;
Investment advice	Para 5 Carrying on a business of advising others concerning securities or derivatives or as part of a business, issues or promulgates analyses or reports concerning securities or derivatives	1.1(e) To assist the Client in its evaluation of offers from potential investor(s) and advise on deal structure; 1.1(f) To advise the Client and coordinate accompanying due diligence exercise(s),

		legal documentation and close of the Proposed Transaction.
Financial planning	Para 6 Analysing the financial circumstances of another person and providing a plan to meet that other person's financial needs and objectives, including any investment plan in securities, whether or not a fee is charged in relation thereto.	1.1(a) To liaise with tax, legal and/or other professionals to identify options for a more efficient group structure vide a rationalisation or restructuring which may include but not limited to a redomiciled global operational headquarters; 1.1(b) To assist and advise the Client in its consideration of the options which may be presented from (a), and to assist the Client in implementation; 1.1(e) To assist the Client in its evaluation of offers from potential investor(s) and advise on deal structure; 1.1(f) To advise the Client and coordinate accompanying due diligence exercise(s), legal documentation and close of the Proposed Transaction.

They are therefore straightforward questions of interpretation of statute.

[18] The defendants placed great reliance on the English case of *Curragh Investments Ltd v Cook* [1974] 1 WLR 1559 that has been approved in *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 318 (FC). It was held by Mary Lim FCJ as follows:

> [55] We find support for this view in *Curragh Investments Ltd v Cook* [1974] 3 All ER 658, a case where the purchaser of land was resisting a completion of sale on the ground that the seller company was not registered in Great Britain as required under s 407 of the Companies Act 1948 where Megarry J opined:
>
> > ... I accept of course, that where a contract is made in contravention of some statutory provision then, in addition to any criminal sanctions, the courts may in some cases find the contract itself is stricken with illegality. But for this to occur *there must be sufficient nexus between the statutory requirement and the contract.* If the statute prohibits the making of contracts of the type in question, or provides that one of the parties must satisfy certain requirements (eg by obtaining a licence to registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. *But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question* ...

[19] The defendants also relied on the other English cases of *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil* [1985] QB 966 and *Re Mahmoud and Ispahani* [1921] 2 KB 716.

[20] In opposition, the plaintiff contended that the questions involve mixed questions of fact and law and are thus unsuitable to be answered pursuant to O 14A of the Rules of Court 2012. Reliance has been made on the cases of *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299 (FC) and *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31 (FC). This is the same according to the plaintiff even if the application has been made pursuant to the less stringent O 33 r 2 of the Rules of Court 2012 as seen in *Arab Malaysian Finance Bhd v Meridien International Credit Corporation Ltd London* [1993] 3 MLJ 193 (SC) and *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC).

[21] The plaintiff in response to the summary produced by the defendants alluded to in para [17] above counter produced the plaintiff's summary of disputes of fact and law involved as an appendix to the plaintiff's written submission. The plaintiff's summary is however too copious to be reproduced here.

[22] The plaintiff therefore contended that Suit 885 and Suit 886 must proceed to trial.

[23] The learned High Court judge dismissed the applications and held as follows in his grounds of judgment:

> [27] It is trite that O 14A application should not be granted when there are disputed facts. In this two suits, there are too many disputed facts which means that this matter cannot be resolved summarily here at this juncture. The facts that both parties cannot resolve out with 'an agreed fact', speaks volume. The plaintiff alone itself has filed 93 volumes of documents (PBOD) and the defendants have filed in 48 volumes of their documents (DBOD).
>
> ...
>
> [34] This court hereby ruled that the questions of law here really require mature considerations and lengthy arguments.
>
> > Hence witnesses have to be called to explain and parties to ventilate and argue at length the legal terminologies for example the meaning of 'regulated activity'. Thereafter evidence has to be led by the plaintiff (and rebutted by the defendants) that the plaintiff's business is not a regulated activity. This will determine as to whether a license is required under. S 58 of the CMSA. Documents have to be examined by witnesses from the 93 PBOD that support the plaintiff's case that it is not a regulated activity. Towards that end, again this case cannot be resolved summarily as the questions of law warrants viva voce evidence to be adduced.
>
> [35] Secondly, since there are many disputed facts alluded to earlier which are capable of resolution only after taking viva voce evidence during trial, the case should not be determined or dispose off summarily based on affidavit evidence only. See also *Seruan Gemilang Makmur v Kerajaan Negeri Pahang* [2016] 3 MLJ 1; [2016] 3 CLJ 1 (FC). Hence, the defendants' O 14A application should be dismissed with costs.
>
> [36] Further, as there are also issues of facts that are interwoven with issues of law, before the proposed questions could be determined, these facts must first be ascertained and established and this can only be determined at the trial proper where witnesses will be called to testify orally and also with reference to the contemporaneous evidence in the PBOD.
>
> ...
>
> [41] On that note, in this case the applications should not be allowed as parties have reached the final stage of the CM. Amongst others, the plaintiff had sent 93 volumes of PBOD to the defendant's solicitors for their classification and filed 46 volumes of CBC (Part C). The defendants had sent 48 volumes of DBOD to the plaintiff's solicitors which documents have all been classified as Part B by the plaintiff. Hence, these two applications under O 14A should not be granted. See *Ranjan Paramalingam & Anor v Bangsar Park Residents Association* [2019] MLJU 409.
>
> ...
>
> [46] Finally, in an O 14A application, this court has to be cautious and mindful to

ensure that the discretion to allow such application is exercised sparingly. This is because, like any other interlocutory applications which have finality in its effect (eg O 14, O 18, O 81 etc), once granted to the applicant (the defendant here), the opposite party, ie the plaintiff will lose everything and will never have his day in court akin to shutting the door to justice to them (see *Thong v Saw Beng Chong* [2013] 3 MLJ 235). The plaintiff will certainly be unfairly prejudiced. Hence, this application should only be allowed sparingly. See *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retnanam* [2011] 6 MLJ 70 (Court of Appeal) pp 82–83.

[24] The defendants are dissatisfied; thus, they lodged their appeal here.

FINDINGS OF THIS COURT

[25] It is apt we reproduce O 14A of the Rules of Court 2012 that formed the basis of the defendants' applications:

14A Disposal of case on point of law

1. Determination of questions of law or construction (O 14A r 1)

(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18 rule 19 or any other provisions of these Rules.

Manner in which applications under rule 1 may be made (O 14A r 2)

An application under rule 1 may be made by a notice of application or, notwithstanding Order 32 rule 1, may be made orally in the course of any interlocutory application to the Court.

[26] In *Thein Hong Teck v Mohd Afrizan bin Husain & anor appeal*, Hasan Lah FCJ held as follows:

[47] *It is trite law that O 14A of the Rules of the High Court 1980 may only be resorted*

to if there is no dispute by the parties as to the relevant facts, or that the Court, upon scrutinizing the pleadings concludes that the material facts are not in dispute (see Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812*). Where the issues of fact are interwoven with legal issues raised, it will be undesirable for the Court to split the legal and factual determination for to do so would in effect be to give rulings in vacuo or on a hypothetical ruling, which the court will not do* (see *State of Bank of India v Mariani Marketing*, 1 March 1991, CA Transcript No 91/0304). (Emphasis added.)

[27] Furthermore, in *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals*, Abdul Hamid Embong FCJ held as follows:

[24] In light of the above cases, learned counsel for the plaintiff then referred to us the following passages of the judgment of the Court of Appeal in the *Terengganu*'s case, which he argued, severely restricts and curtails the right of a party with a substantive claim to lead and extract relevant evidence in the manner long established and recognised as a litigants basic right, by way of a trial through the examination and cross-examination of witnesses:

> Legally, in O 14A and O 33 r 2 of the RHC applications no party has any liberty to disagree just for the sake of disagreeing to any fact pleaded which is obviously undisputed because for the court to give indulgence to such disagreement will not only erode the efficacy but also will stultify the objective and purpose of those orders. On that basis, we scrutinised the pleadings and the proposed statement of agreed facts (re Appendix 11), then we called upon the parties to submit on the proposed statement of agreed facts wherein certain facts, which were not agreed to previously, had been agreed to by the defendants, and finally, having considered the respective submission on the matter we decided to impose upon the parties to accept the facts which, in our considered view, having regard to the other related facts which are obviously undisputed or facts which had been agreed to by the defendants, should have been agreed to by the parties, with or without variation or reservation.
>
> However, that liberty is to be subject to the constraints and limitations as dictated in this judgment relating to the matters that may be proved by affidavit evidence except that in the case of pleaded facts which are not sufficient for the purpose of determining the additional question of law (per Appendix D) affidavit evidence may be used by the parties. However, the decision whether to allow such application, if any, and to what extent it should be allowed and the nature and extend of the affidavit evidence to be used for the limited purposes as aforesaid, is left entirely to the learned judges discretion.

[25] It was further argued by learned counsel for the plaintiff that the correct proposition of law on O 14A now, as envisaged in the recent decisions of the Federal Court in the cases referred above, is that where facts are interwoven with legal issues, the splitting of legal and factual determination is considered inappropriate and hence negating such application in the determination of a matter.

[26] Learned counsel for Petronas submitted that the decisions of the Federal Court on O 14A in cases referred to by learned counsel for the plaintiff do not depart from the *Terengganu*'s case and further, do not set up any new proposition of law. It was argued by learned counsel for Petronas that in *Dream Property* and *Thein Hong Teck*

respectively, the Federal Court had decided that recourse to O 14A is unsuitable in the circumstances of those cases since there were serious dispute of facts involved, which can be distinguished from the present case. It was further argued that the Federal Court in *Bato Bagi* also made no critical remark on the decision in the *Terengganu*'s case. In this regard, the same stand was also taken by learned senior federal counsel for the second defendant.

[27] We are in agreement with the submission of learned counsel and senior federal counsel for Petronas and second defendant respectively that the decisions of the Federal Court on the application of O 14A in the three cases cited above do not in any way depart or steer away from the decision in the Terengganu's case. *In our view, the Court of Appeal in the Terengganu's case did not attempt to lay down a hard and fast rule on the application of O 14A. The decision in the Terengganu's case merely stated some of the relevant factors which should be considered in dealing with an application under O 14A and they are not meant to be exhaustive. This view had already been expressed by Richard Malanjum CJSS in Bato Bagi which says:*

> *With respect, I do not think the Court of Appeal in Petroleum Nasional Bhd laid down a hard and fast rule for courts to comply with when confronted with applications under O 14A. All the Court of Appeal did was to state the relevant factors which should be considered and which in my view the relevant factors to consider are not exhaustive …*

[28] We share the same view as expressed in *Bato Bagi* above and we are unable to understand how the decision in that case can be said to have steered away from the decision of the Court of Appeal in the *Terengganu*'s case, as argued by counsel for the plaintiff.

[29] Meanwhile, *Dream Property* concerns the issue of the determination of delivery of vacant possession and the confirmation thereof pursuant to the special condition of a sale and purchase agreement entered into between the parties. In *Thein Hong Teck*, among the critical disputes were the issues of dissolution of a partnership before the filing of a petition for winding up and the preservation of rights of the partnership in respect of legal actions commenced before the dissolution of the partnership (as a result of the Federal Court order in one of the many suits filed in connection with the partnership). *The issues in these two cases, as viewed by the Federal Court, were questions of facts which were seriously disputed between the parties and required to be determined in a full trial, to which the application of O 14A was held unsuitable in the circumstances of those cases. In addition, it is also to be noted that in Dream Property, there was no question of law framed or a specific question on the construction of the agreement forwarded by the plaintiff to the court for consideration. By the above decisions, it is clear that the position of the law in an* O 14A *application is that where there are serious disputes of facts involved, it is inappropriate and unsuitable to have recourse to an* O 14A procedure. In contrast, the Court of Appeal in the *Terengganu*'s case, after having carefully scrutinised the pleadings, concluded that the issues raised were purely legal issues based on the construction of documents which are suitable to be determined by the O 14A procedure. In our considered view, the facts and circumstances in the three cases above and in the *Terengganu*'s case must be distinguished. The decisions of the Federal Court in those three cases did not change or set up any new proposition of law on the application of O 14A

A laid down in *Terengganu*'s case and therefore, we answer the first question posed in the affirmative. (Emphasis added.)

[28] The grant or otherwise of an application under O 14A of the Rules of Court 2012 thus plainly involves the exercise of discretion.

B

[29] In *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150, Abdoolcader J (later FCJ) held as follows:

There is a catenation of cases on this point and it will suffice to cull and refer to a few C which restate the well-settled principles. *An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion* (*Charles Osenton & Co* D *v Johnston* [1942] AC 130 *(at p 148), 148 per Lord Wright). The Privy Council held in Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.

E

The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett* [1978] AC 297 (at pp 317, 326), 317, 326. For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22, p 25 on this point (at p 25):

F

> *... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded* G *matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.* (Emphasis added.)

See also *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] H MLJU 429; [2019] 7 CLJ 143.

[30] We have consequently in the exercise of our appellate function reviewed the learned High Court judge's judgment in light of the parties' contentions before us which are basically reiterations of their contentions in the High I Court.

[31] In this respect and upon scrutiny of the pleadings, we find there are many contested issues of facts and mixed facts and law. This is not a case where the issue of illegality can be neatly excised from the other issues raised and be

decided independently by itself. We are of the opinion that the assessment and evaluation of the questions posed must be undertaken on the pleadings as well as evidence of fact of the services actually provided. In other words, they cannot be answered based on the pleadings alone unless the facts are agreed.

[32] Furthermore in a case of 'regulated activities' where the law enforcer has seen it fit to issue guidance notes and technical notes, we are of the further and considered opinion that to rely on a mere description of the scope of services rendered would be an oversimplification to determine if the services are caught within the meaning of 'regulated activities' requiring a license under s 58 of the Act for those providing such services or carrying out such activities. The scope, nature, benefits and ramifications of these activities are best ascertained and evaluated after evidence of it has been adduced at trial and tested against the backdrop of what experts may say on the practice of it vis a vis the Securities Commission. The court is of course not bound by the opinion of experts or even the Securities Commission but a better assessment and evaluation of these activities would surely be made as to whether they are attracted or included within 'regulated activities' within the meaning of Part 1 Schedule 2 of the Act.

[33] The issue of illegality here with its many ramifications should hence best be tried in a full trial when the underlying facts are seriously disputed as can be seen from the voluminous bundles of documents filed under Part B and Part C as well as the various defences pleaded in the alternatives like implied terms and even counterclaim with respect of the restitution for the amount already paid by the defendants to the plaintiff. In this connection, we are also satisfied that the answering of the questions posed in the applications would not fully dispose Suit 885 and Suit 886 because the counterclaim will still have to be tried.

[34] We also noted that both consolidated Suit 885 and Suit 886 are ready and awaiting trial. At the end of the day, the High Court judge has a discretion with respect to assessing whether the applications would substantially save time and costs in a matter that is ready for trial. We are therefore disinclined to interfere with the judge's exercise of discretion unless it is very clear that the questions of law raised would substantially dispose of the issues before the court.

[35] In summary, we find there is no good reason to disagree with the High Court judge in his arriving at the decision that the questions cannot be conveniently dealt and decided by way of disposal on preliminary point of law. This is primarily because the questions posed cannot be disassociated from the substratum facts which are still very much disputed. The questions cannot be answered in a vacuum.

[36] In the premises, we find there is no mis-direction on the part of the learned High Court judge that warrants appellate intervention.

CONCLUSION

[37] These appeals mirror the dilemma that arose in the House of Lords case of *Tilling v Whiteman* [1980] AC 1; [1979] UKHL 10 wherein Lord Scarman finally stated: 'Preliminary points of law are too often treacherous short cuts'.

[38] It is for the foregoing reasons that we dismissed the appeals as so ordered. Before concluding, we noted that the learned High Court judge in his grounds of judgment in dismissing the defendants' appeals also answered the questions in the negative but we believe he actually meant they need not be answered in the circumstances at that stage.

Appeals dismissed with costs of RM10,000 for each appeal subject to allocator.

Reported by Dzulqarnain Ab Fatar