DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN

WRIT SAMAN NO. BA-22NCvC-257-06/2023

ANTARA

ZICO BANC BERHAD
(dahulunya dikenali sebagai Primesdale Berhad dan Primesdale Sdn Bhd)
[No Syarikat: 199101020861 (231172-P)] … **PLAINTIF**

DAN

WESTHILL ASSETS SDN BHD
[No. Syarikat: 201801015161 (1277177-T)] … **DEFENDAN**

GROUNDS OF JUDGMENT

Introduction

[1] The Plaintiff filed this action on 26-6-2023 for recourse under the **Bills of Exchange Act 1949** as the holder of nine (9) cheques drawn by the Defendant. The cheques totaling RM38,150,000.00 were dishonoured upon presentment for payment.

[2] No appearance being entered, the Plaintiff obtained a Judgment in default of appearance on 27-7-2023 (**"JID"**). The Defendant is now applying to set aside the JID.

Background facts

[3] On 6-4-2022, the parties entered into a Money Lending Agreement (**"MLA"**) by which the Defendant borrowed RM35 million from the Plaintiff (**"Loan"**). The Loan was secured by a first party charge over several parcels of land in Langkawi as well as corporate and personal guarantees.

[4] The Loan was repayable in 12 monthly instalments. Although it was not stipulated as a requirement of the MLA, the Defendant furnished 12 post-dated cheques (**"PD Cheques"**) to the Plaintiff to repay the Loan. The first three (3) cheques were honoured, but the Defendant dishonoured the rest by a stop payment countermand to the bank. Notices of dishonour were issued.

[5] The Defendant has alleged that the MLA is void and unenforceable and filed Shah Alam High Court Suit No. BA-22NCVC-90-03/2023 ("**Suit 90**") against the Plaintiff to seek a declaration to that effect. According to the Defendant, that is the reason why it countermanded payment on the PD Cheques.

[6] The Plaintiff has not only filed this suit, but also foreclosed on the charged parcels of land in Langkawi and filed Shah Alam High Court Suit No: BA-22NCvC-258-06/2023 ("**Suit 258**") to sue the Defendant and its guarantors for recovery of the Loan. The Defendant entered an appearance in Suit 258 and has filed its Defence there.

Grounds to set aside JID

[7] The principles applicable to the setting aside of default judgments under Order 13 Rule 8 of the Rules of Court 2012 are well established. If the default judgment is obtained irregularly, it may be set aside *ex debito justitiae* but if it is obtained regularly, the defendant must show a defence on merits.

[8] The Defendant's grounds to set aside the JID are as follows:

(a) that it is an irregular judgment because of impropriety on the part of the Plaintiff in failing to properly alert the Defendant to this action.

(b) the Defendant argues that it has a Defence on the merits that warrant giving it leave to defend, namely that the PD Cheques were in payment of a void and unenforceable MLA.

(c) the filing of this action is an abuse of process as the Plaintiff is seeking the same remedies in Suit 258.

Analysis of grounds

Delay in setting aside

[9] It is appropriate to deal first with the issue of delay raised by the Plaintiff, in the filing of this setting aside application. The JID was served by leaving the same at the registered address of the Defendant on 5-9-2023 and at the business address of the Defendant on 3-10-2023. The present application to set aside the JID was only on 17-10-2023 or 42 days counted from 5-9-2023.

[10] I will deal briefly with this issue by first highlighting that the Defendant proceeded with its application on the presumed basis that the JID was irregularly obtained and made no effort to explain why it neglected to appear after having been served and why it waited until 17-10-2023 to apply to set it aside.

[11] The Federal Court has held in ***Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance*** **[1996] 1 MLJ 30 ("*Tuan Haji Ahmed*")** that delay in applying to set aside an irregularly obtained default judgment is not fatal to the application and that the court still retains a discretion, provided it is satisfied that:

> *"(a) no one has suffered prejudice by reason of the defendant's delay;*
> *(b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or*
> *(c) to let the judgment to stand would constitute oppression."*

[12] In the case of a regularly obtained default judgment, it has been stated in ***Ban Huat Seng Co Ltd v Lee Poh Soo*** **[1967] 1 MLJ 145** that:

> *"The power to set aside a regular judgment however is discretionary and in exercising its discretion the court may, apart from the question of merits, consider the conduct of a defendant, viz., whether he has been guilty of laches in making the application and his explanation, if any, as to why he neglected to appear after having been served and why he allowed the judgment to be regularly obtained. (See judgment of Lord Wright in the above case). I am aware of the case of Attwood v.*

Chichester, often cited as the authority for the view that lapse of time is no bar to an application to set aside a default judgment, but this proposition seems to me to be subject to this qualification, viz., that the conduct of the defendant should be bona fide."

[13] The Plaintiff is relying on non-compliance with Order 42 Rule 13 of the Rules of Court 2012 which makes no distinction between default judgments whether they are regularly or irregularly obtained. Order 42 Rule 13 of the Rules of Court 2012 provides that:

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

[14] For purposes of moving on from this point, I will invoke Order 1A and Order 2 Rule 3 of the Rules of Court 2012 to disregard the Defendant's 12-day delay in filing this application as it did not occasion any miscarriage of justice. This is not to say that the JID was irregular or that I accept the weak submission made from the Bar that the papers served in this action must have been overlooked.

Irregularity of JID

[15] This suit was filed by the Plaintiff on the same day as Suit 258 and the sealed Writ and Statement of Claim was served by leaving them at the Defendant's business address on 28-6-2023 and at its registered

address on 3-7-2023. It was served concurrently with the papers for Suit 258 which the Defendant received.

[16] The Defendant claims that it was not aware of Suit 257 and as I have noted, there is no explanation for this but a presumed lack of vigilance on its own part. To put it bluntly, the Defendant accuses the Plaintiff of taking advantage of the situation by failing to alert the Defendant of the existence of Suit 257 while in communication about the other on-going suits.

[17] What constitutes an irregularly obtained default judgment has been explained in ***Tuan Haji Ahmed*** as follows:

> *"It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity."*

[18] No precedent or authority was cited by the Defendant for the proposition that the want of notice from solicitors for the Plaintiff in the circumstances of this case was tantamount to impropriety so serious as to render the JID a nullity. In reviewing the **Legal Profession (Practice And Etiquette) Rules 1978** which neither party brought up during submissions, this Court considered rule 56:

> *"Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing*

the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-named advocate and solicitor."

[19] Rule 56 above usually applies to the conduct of solicitors vis-à-vis an opponent before, during or after court proceedings. It is also worded widely enough to apply to the situation where the fact of representation in a related matter is known to the other side. However, in ***Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd*** **[2005] 4 CLJ 767 (*"Sri Minal"*)** the Court of Appeal has held that a breach of rule 56 by the plaintiff in not giving prior notice to the defendant before judgment in default was entered did not make the judgment obtained irregular.

[20] The Defendant entered its appearance to Suit 258 through the same solicitors representing the Defendant in the related suits, the Plaintiff proceeded to file a Certificate of Non-Appearance on 24-7-2023 and as mentioned, JID was promptly entered on 27-7-2023. Based on the authority of ***Sri Minal*** the JID is still a regularly obtained judgment.

Abuse of Process

[21] Before I deal with the question of whether there is a defence on merits in this case, I will briefly address the contention by the Defendant that the filing of this suit is an abuse of process because the Plaintiff is

already pursuing Suit 258. I reject this contention. Firstly, it is not an excuse for not allowing judgment to be entered in default nor is it a defence to the claim. Secondly, the 2 suits are premised on different causes of action.

Defence on Merits

[22] The Defendant's sole proposed defence to this action on the PD Cheques is the contention that the MLA is illegal, void and unenforceable. The Plaintiff contends that it is not a defence in an action on the PD Cheques as a separate and distinct cause of action under the **Bills of Exchange Act 1949** and the only defence available is that the PD Cheques are not supported by consideration.

[23] The Plaintiff accepted the PD Cheques from the original drawer and so there is no issue of the cheques having been endorsed to any subsequent holder. The Plaintiff argues the release of the RM35 million loan to the Defendant is good consideration. The Defendant did not articulate the legal basis for the defence but it would seem that it is premised on want of consideration i.e. because the MLA is void and unenforceable as alleged in Suit 90 and Suit 258.

[24] The provisions in the **Bills of Exchange Act 1949** relevant to the question of consideration for a bill of exchange are sections 27, 29 and section 30 which when read together, simply mean that every holder of a bill is presumed to have received it for value if at any stage in the history of a bill there has been consideration. It is for the original drawer (the Defendant in this case) to prove that at no time has there been consideration.

[25] In the Court of Appeal case of ***Ong Guan Hua v. Chong*** **[1963] 1 MLJ 6**, Thompson CJ distinguished the position in a bill of exchange from a contract in the following terms:

> *"In an action based on a contract it is for the Plaintiff to prove consideration, in an action on a negotiable instrument* ***consideration is presumed and it is for the maker or the endorser of the instrument if he wishes to defend the action to prove that there was no consideration****."*

[26] In ***Jupiters Ltd (Trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor*** **[2007] 7 MLJ 228** (**"*Jupiters*"**), a cheque in payment of a gambling debt was dishonoured on presentment. The plaintiff stated that their cause of action was purely based on the alleged dishonour of the said six cheques simpliciter, i.e. without the onus of having to prove the underlying contract for which the cheques were given.

[27] The High Court held in ***Jupiters*** that despite the operation of sections 43(2) and 55(1) of the **Bills of Exchange Act 1949**, the Plaintiff's action would be dismissed because a gaming contract is void and unenforceable according to section 26 (1) of the **Civil Law Act 1956** and therefore, the plaintiff had not given valuable consideration or in the alternative that if at all there was consideration, the consideration was illegal or unlawful and was therefore void.

[28] Both cases above related to cheques drawn in gambling related transactions. The facts of the case relied on by the Defendant, ***Ladup Ltd v Shaikh Nadeem*** **(1983) QBB 225** also related to gambling debts. Now cheques issued as security or in payment of gambling debts are distinguishable from the facts of this case. However, those cases do give reason for pause.

[29] In this case, apart from the general question of whether any illegality affecting the MLA taints the PD Cheques, there may technically be two views of what the consideration for the PD Cheques might be: (i) the Plaintiff's agreement to enter into the MLA; or (ii) the Plaintiff's release of RM35 million to the Defendant. If the contract on the PD Cheques is collateral to the MLA, there may conceivably be an arguable defence on the merits.

Conclusion

[30] For the above reasons, and because there is no need for the Defendant to establish its defence at this stage, I will give the Defendant the benefit of the doubt and leave to defend. Accordingly, Enclosure 9 is allowed with costs in the cause, and the JID is accordingly set aside. The Defendant is to file its Defence within 14 days.

[31] Following this decision, the parties have consented to transfer this suit to the Court that is hearing Suit 90 and Suit 258 and it has been so ordered.

Bertarikh : 13 November 2024

SGD

ELAINE YAP CHIN GAIK

PESURUHJAYA KEHAKIMAN

MAHKAMAH TINGGI MALAYA

SHAH ALAM

Peguam

Untuk Plaintif	**:**	**George Varughese (with Johan Mohan Abdullah), Messrs Johan Arafat Hamzah & Mona (Petaling Jaya)**
Untuk Defendan	**:**	**Dheeris A/L Thevandran, Messrs S Ravichandaran & Anuar (Kuala Lumpur)**