PEMILIK-PEMILIK DAN/ATAU PENCARTER-PENCARTER DEMIS TONGKANG ATAU VESEL 'WANTAS 17' v PEMILIK-PEMILIK KAPAL ATAU VESEL 'MY FERRY 2'

CaseAnalysis
| **[2021] MLJU 738**

Pemilik-Pemilik dan/atau Pencarter-Pencarter Demis Tongkang atau Vesel 'Wantas 17' v Pemilik-Pemilik Kapal atau Vesel 'My Ferry 2' [2021] MLJU 738

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COURT OF APPEAL (PUTRAJAYA)

NOR BEE ARIFFIN, AZIZAH NAWAWI AND LEE HENG CHEONG JJCA

RAYUAN SIVIL NO W-02(IM)(ADM)-2158-11/2019

5 May 2021

(LY Leong & Partners) for the appellant.
(Christopher & Lee Ong) for the respondent.

Lee Heng Cheong JCA:

JUDGMENT OF THE COURT

INTRODUCTION

[1] This is an appeal by the Appellant/2nd Defendant against the decision of the learned High Court Judge ("the Learned HCJ"), dismissing the Appellant/2nd Defendant's Notice of Application ("Enclosure 24") to strike out the present Suit including all pleadings filed therein and to set aside the Warrant of Arrest.

[2] The Appellant is the 2nd Defendant in the High Court Suit whereas the Respondent herein is the Plaintiff in the said Suit.

[3] We heard the appeal, after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeal and we unanimously allowed the appeal with costs. We now give our reasons for our decision for allowing to the appeal.

[4] For ease of reference, the Plaintiff in the High Court below shall be referred to as the Respondent, the 2nd Defendant in the High Court shall be referred to as the Appellant and the 1st Defendant in the High Court who is not a party here, shall be referred to as the 1st Defendant.

BACKGROUND FACTS

[5] A collision occurred on 30.12.2016 at about 0400 hours at Kuala Kedah Cargo Jetty between the

Appellant's dumb barge, "Wantas 17" (the "Appellant's Dumb Barge") allegedly under tow by the 1st Defendant's tugboat bearing no. "KKD000132-T" (the "1st Defendant's Tugboat") with the Respondent's vessel "MY FERRY 2" (Official No. 334178) (the "Respondent's Vessel") which was berthed at the Jetty.

[6] The Respondent proceeded to file a Writ in Rem No. WA-27NCC-52- 12/2018 on 28.12.2018 and subsequently applied for a Warrant of Arrest dated 25.06.2019 against Appellant's Dumb Barge and the 1st Defendant's Tugboat, despite being notified by the Appellant's lawyers that they have identified the wrong tugboat involved in the collision. The Respondent arrested the Appellant's Dumb Barge on 26.06.2019.

[7] The basis of the Respondent's claim was that the Appellant's Dumb Barge caused damage to the Respondent's Vessel on 30.12.2016 at the Kuala Kedah Cargo Jetty whilst being towed by the 1st Defendant's Tugboat") (see paragraph 5.2 at page 70 of the ROC, Volume 2A).

AT THE HIGH COURT

[8] The Respondent's claims against the Appellant and the 1st Defendant are for, inter alia, damages allegedly suffered by the Respondent due to the collision between the Respondent's Vessel, the 1st Defendant's Tugboat, and/or the Appellant's Dumb Barge. The Respondent contended that the collision was due to the negligence of the Appellant and the 1st Defendant in navigating the 1st Defendant's Tugboat and and/or the Appellant's Dumb Barge.

[9] The Appellant then filed an application vide Enclosure 24 under Order 18 rule 19(1) (a), (b) and (d) Rules of Court 2012 ("ROC 2012") to strike out the Respondent's Writ in Rem and to set aside the Warrant of Arrest vide Enclosure 24.

THE FINDINGS OF THE HIGH COURT

[10] The Learned HCJ *inter alia* held that th)e Respondent's claims against the Appellant is not obviously unsustainable and that for the purpose of the Appellant's application vide Enclosure 24, the identity of the tugboat whether it is the 1st Defendant's Tugboat or the 3rd Party's Tugboat which towed t he Appellant's Dumb Barge at the time of the collision is irrelevant.

[11] The Learned HCJ further held that the Respondent's claim which is founded on maritime lien appears to be sustainable even though there are conflicting facts as to the' identity of the tugboat. The Learned HCJ also held that the fact that a tugboat or a tow having control over the navigation is not necessarily a decisive factor of liability in respect of the collision.

[12] The Learned HCJ then dismissed the Appellant's said Application to strike out the suit and of set aside The Warrant of Arrest.

BEFORE THE COURT OF APPEAL

[13] The Appellant contended that the Learned HCJ erred in law and facts in her findings for the following reasons:-

(a) that it is plain and obvious that the Respondent's claim is unsustainable;

(b) that the Respondent's claim which is founded on maritime lien is misconceived;

(c) that it is important and crucial in determining the identity of the offending tugboat at the time of collision;

(d) that whilst approaching the Jetty, the Appellant had informed the Respondent that the Appellant's Dumb Barge was actually towed by another tugboat namely Tugboat, "KKD00059-T" (the "3rd Party's Tugboat") which was not named as a defendant in the present Suit; and

(e) that the tugboat towing the Appellant's Dumb Barge has control over the navigation of the dumb barge.

[14] The Respondent on the other hand contended:-

(a) that the Learned HCJ found that there is no clear evidence that the Appellant's Dumb Barge has no means of navigation and that the Appellant has not adduced any evidence that the Dumb Barge has no means of navigation;

(b) The Learned HCJ also found that just because the Appellant's Dumb Barge was towed by a tug boat, does not inadvertently mean that it had no means of propulsion and that further investigation will be needed to determine this;

(c) Further, based on the Amended Marine Department Report (page 261 of Rekod Rayuan Jilid 28), it is doubtful that the Appellant's Dumb Barge did indeed lack the means of self- propulsion; and

(d) That Enclosure 15, in particular the Marine Department Reports at Exhibits 'KAR-4' (Page 224 of Rekod Rayuan Jilid 2B)and 'KAR-9' (Page 261 of Rekod Rayuan Jilid 28) states that the tow was solely to blame for the collision based on the information in Box 34 in the Amended Marine Department Report (page 263 of Rekod Rayuan Jilid 28).

RELEVANT LAW AND AUTHORITIES

[15] Since the said Application is grounded on Order 18, rule 19(1) (a), (b) and (d) of the ROC 2012 to strike out the Respondent's suit, we should also briefly refer to the trite law on striking out. The leading authority on Order 18 r. 19(1) of the RC 2012 is the Supreme Court decision in *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, and in particular the following part of the judgment of Mohamed Dzaiddin SCJ (as he then was):-

> *"The principles upon which the Court acts in exercising its power under any of the four limbs of* O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86*, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (Attorney - General of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in pari materia with our O. 33 r. 2 Rules of the High Court) *(Hubbuck v. Wilkinson) (supra). The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable".*

[16] A claim may be struck out if it is obviously unsustainable ***Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Berhad supra*)**.

[17] Given the nature and context of the instant striking out application, a reference to the following passage from the Court of Appeal decision in *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and other appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661, on a striking out application made under Order 18 r. 19 of the former Rules of High Court 1980, is both apt and instructive:-

> "The words 'plain and obvious' also need clarification. This case involved complex questions of company law. What may be 'plain and obvious' to a specialist in this field may not be so to another who does not have this specialized knowledge. I therefore feel obliged to state that the standard here is an objective one and implies that the perception required here is that of a person who has the required expertise. Support for this view can be found in *McKay v. Essex Area Health Authority* [1982] 2 All ER 771*, where it was held that the right course was for the court to strike out a claim, even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action, because the plaintiff was entitled to be relieved of the objection to meet it"*

[18] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 the Court of Appeal held as follows:

"*... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision.* ***But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence*****."**

(Emphasis is mine)

[19] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of *"insufficient judicial appreciation of evidence"* adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

OUR FINDINGS

[20] Bearing in mind the above principles, we will now consider the Appellant's appeal.

[21] The Appellant anchored the said Application on the following grounds namely that the Respondent's suit discloses no reasonable cause of action or defence, as the case may be, that it is scandalous, frivolous or vexatious and it is otherwise an abuse of the process of the Court. We will next examine the arguments presented by parties and the affidavit evidence made available to determine whether the said Applications is meritorious and deserving the striking out of the Respondent's suit.

WHETHER THE RESPONDENT' S CLAIM WHICH IS FOUNDED ON DAMAGE MARITIME LIEN IS MISCONCEIVED.

[22] According to **Admiralty Law And Practice, Second Edition; by Toh Kian Sing SC,** there are two requirements under a damage maritime lien to be satisfied:

(a) Firstly, the damage must be the result of a wrongful or negligent act or manoeuvre by persons engaged in the navigation or management of the ship; and

(b) Secondly, the ship must be the actual instrument by which the damage is done.

[23] In the words of Lord Watson in *Currie v M'Knight* [1897] AC 97***, 106-107***:

"I think it is of essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result of a wrongful or negligent act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage"

[24] Guidance can be found in the case the *"Eschersheimn"* [1976] 2 Lloyd's Rep 1 and *Berliner Bank A.G v C. Czarnikow Sugar Ltd ("The Rama")* [1996] 2 Lloyd's Rep 281**.** In the case of the ***"Eschersheim"*** *supra,* the House of Lords held:

"*... To fall within the phrase not only must the damage be the direct result or natural consequence of something done by those engaged in the navigation of the ship but the ship itself must be the actual instrument by which the damage is done ...*"

[25] The English court in the case of the *"**Rama**" supra*, held:

"In short, the physical navigation or management of the vessel must cause the alleged loss or damage and the vessel or part of her must in a physical sense be, as Lord Cairns and others put, the active cause, the noxious instrument or the instrument of mischief."

[26] Paragraph 11.56 of the ***Law of Tug and Tow and Offshore Contracts*** states: "*where* a *collision occurs between tug and/or tow and* a *third party and the third party* is *innocent of blame, the possible*

liabilities of *tug and tow, depending on the allocation of fault and the incidence of control (and assuming them to be in separate and not common ownership), can be summarised* as *follows;*

1. Where a tow collides with a third vessel and is *solely to blame, the tow will be solely liable.*

...

3. Where a tow collides with a third vessel by reason only of the fault of the tug:

i. *the tug owners will be liable; and*

ii. *the tow owners may be liable also if it demonstrated that, in all circumstances, the tow retained control of the navigation of both tug and tow."*

[27] Applying the principles distilled form the above authorities and applying them to the evidence and facts of the present suit, we find that the Learned HCJ's findings that there is no clear evidence that the Appellant's Dumb Barge has no means of navigation and that just because the Appellant's Dumb Barge was towed by a tug boat, does not inadvertently mean that it had no means of propulsion, is erroneous.

[28] We also find that the Respondent's reliance on the Laporan Kemalangan Perkapalan (Report of a Shipping Casualty) (page 261 of Rekod Rayuan Jilid 2B), to show that it is doubtful that the Appellant's Dumb Barge did indeed lack the means of self- propulsion is erroneous, as the Certificate of Malaysian Registry of the Appellant's Dumb Barge dated 29/7/2013 (found at page 96 of the Rekod Rayuan Jilid 2A) states that it is a steel dumb barge, without any engine or boiler thus without any means of self-propulsions and incapable of navigating on its own.

[29] We find that even if the Learned HCJ and the Respondent are correct in contending that the Appellant's Dumb Barge did have the means of propulsion, however based on the said Amended Laporan Kemalangan Perkapalan (Report of a Shipping Casualty) (at page 261 of Rekod Rayuan Jilid 2B), the Appellant's Dumb Barge at the time of the collision was being towed by a tugboat. In the light of such a tow, we can safely assume that it was the tugboat which was doing the towing as it would be highly illogical for the Appellant's Dumb Barge which is being towed, to be still navigating and propelling itself. As such, in such a situation, the tugboat would still have control and management of the Appellant's Dumb Barge.

[30] From the evidence and facts adduced, we find that the Appellant's Dumb Barge is a dumb barge and has no navigational or self- propulsion capabilities at all and the control of the navigation of the Appellant's Dumb Barge lies with the tugboat.

[31] Based on the said Laporan Kemalangan Perkapalan (Report of a Shipping Casualty), Item or Box 34 of the Report stated inter alia that the 3rd Party's Tugboat was towing the Appellant's Dumb Barge at the material time. Even though the Respondent contended that the tow was the cause of the collision, we find that it was the 3rd Party's Tugboat which was towing the Appellant's Dumb Barge and not the 1st Defendant's Tugboat. We are persuaded that the "one ship" rule does not apply in this case, as at the material time, the Appellant's Dumb Barge was under the control and management of the servants or agents of the 3rd Party's Tugboat. Therefore, the 3rd Party must be responsible for the natural consequences of the tugboat being wrongly steered which resulted in the collision with the Respondent's Vessel. Thus the Appellant cannot be made liable for the act of the 3rd Party or its agents or servants.

[32] In *The Owners of the ship 'MV Hong Leong' v The Owners of the ship MT Man Hua No 3 & Anor* [1994] 3 MLJ 800*,* there was a collision between the plaintiff's ship, MV Hong Leong, while at anchor at Tanjung Po in the sea of Sarawak, and the second defendant's steel barge, Bosta Jaya Ex THM-182 ('the Bosta Jaya'), which at that material time was being towed by the first defendant's vessel, MT Man Hua No 3. In this case, the Bosta Jaya is a dumb barge. It has no engine and no power of its own to move. The High Court at page 800 held that:

"[1] ***The collision occurred on account of the negligent act of the first defendant's ship in navigating its tow,*** **a** ***dumb barge.*** *Although in applying the Merchant Shipping (Collision Regulations) Order 1984, the court usually treats the tug and her tow as one ship,* ***it was evident that at the material time, the barge*** **was** ***under the control and management of the servants or agents of the first defendant. Therefore, the first defendant must be responsible for the natural consequences of the tug being wrongly steered which resulted in the collision with the plaintiff's ship. The 'one ship' rule does not apply in the present case.*** **As a** ***result, the second defendant, being the owner of the barge, cannot be made liable for the act of the first defendant or its agents or servants."***

(Emphasis is mine)

[33] Further guidance can be found in *Trans Resources Corporation Sdn Bhd v Inai Kiara Sdn Bhd & Ors; Shiniaga Sdn Bhd (Third Party)* [2014] 5 MLRH 245 where Lim Chong Fong JC (as he then was) at para 50 held that:

"[50] ... ***It would also be unjust and unreasonable to impose liability on the second defendant since it has no control and management of the vessels at the material time of the collision. There is therefore no duty of care owed by the second defendant to the plaintiff here.*** *Accordingly the plaintiff's submission that the ET and IT constituted a 'one boat' or 'one vehicle making the second defendant, a joint tortfeasor with the first defendant is misconceived."*

[34] In The ***"Bramley Moore" [1963] Lloyd's List Law Report Vol 2 429,*** Lord Denning at page 436, held that:

"... It can well be said that the owners of the tug were guilty of "improper navigation" of the barge - ***in that they were in control of the movement of the barge through the water****. But the section requires you also to look at the cause of the damage. That is clear from the words by reason of. And in a case where those on the tug are negligent, and those on the barge are not, the cause of the damage is in truth the improper navigation of the tug, not the improper navigation of the barge. It is the tug which is the cause of all the trouble... "*

(Emphasis added)

[35] In the light of the above authorities and the factual matrix of the case, we are of the opinion that the Appellant, being the owner of the Appellant's Dumb Barge should not be held liable for the damage to the Respondent's Vessel as their Dumb Barge had no navigational and/or self-propulsion capabilities. Further the Appellant's Dumb Barge was under the control and management of the servants or agents of the tugboat towing. Thus, the tugboat towing it, must be responsible for the natural consequences of the tug being wrongly steered which resulted in the collision with the Respondent's Vessel. As a result, the Appellant, being the owner of the Appellant's Dumb Barge, cannot be made liable for the act of the owner of the tugboat towing it.

WHETHER THE RESPONDENT SUED THE RIGHT PARTY?

[36] Since we found that the "one ship" rule is not applicable to the present case, meaning the tugboat only is responsible for the collision and not the Dumb Barge, it would be crucial to identify which tugboat was actually towing the Appellant's Dumb Barge at the material time before any liability can be imposed.

[37] In *Shencourt Sdn Bhd v Prima Ampang Sdn Bhd & Ors* [2011] 5 MLRH 421, Zabariah Mohd Yusof J (as she then was) said "Similarly, in our case it has been shown that the names of the 1st and the 4th Defendant are wrong. On this issue alone, the Plaintiff's Writ and Statement of Claim ought to be struck out on the application by the 1st and the 4th Defendants."

[38] Similarly, in *Chua Lay Kim v Royal Jordanian Airlines* [2015] 5 MLRH 98, the plaintiff named the defendant as "Royal Jordanian Airlines". However, the defendant is registered as "Alia - The Royal Jordanian Airline Corporation". The Court dismissed the plaintiff's appeal. This is what Yeoh Wee Siam J (as she then was) held:

"[22] As can be seen from the chronology of events above, the defendant had on 17 and 18 February 2014, 18 March 2014, 11 April 2014 acknowledged receipt of the sealed interlocutory JID, the plaintiff's letter for assessment of damages, the plaintiff's notice of interlocutory JID etc respectively by using the chop "ROYAL JORDANIAN". In my opinion, the chop can either be the abbreviated name of the defendant as wrongly cited, or the abbreviated name of the defendant's registered and correct name. ***However, it does not detract from the crucial fact that the defendant was wrongly named by the plaintiff in this action."***

[39] In *Proton Parts Centre Sdn Bhd V Mohamed Bin Zainal And Another Appeal* [2010] 2 MLJ 212, the Court of Appeal at paragraph 17 of the judgment said:

"As for the third defendant, **there is yet another reason why the action against them ought to be struck out. They have not been properly cited in the writ and statement of claim. The registered name of the third defendant as a company, is 'Perusahaan Otomobil Nasional Bhd'. But they have been wrongly cited in the writ and statement of claim as 'Proton Berhad**' ... "

(Emphasis is mine)

[40] In the Federal Court case of *Colgate-Palmolive (Asia) Ltd v Swedish East Asia Company Ltd* [1996] 1 MLRA 566**,** Winslow J held that "... *it should be observed that, from the correspondence, Counsel for the plaintiffs/appellants were, in effect, informed, before the issue of the original writ, that the correct defendants should have been 'Swedish East Asia Co. Ltd'. This seems to have been ignored or overlooked. Furthermore, if the bill of lading in question had been more carefully scrutinised it would have been obvious that the carrier of the goods in question was 'Swedish East Asia Co. Ltd and nobody else. On the merits it seems to me that the plaintiffs have only themselves to blame*".

[41] In the present case, we find that the error made by the Respondent in citing and suing the owner of the 1st Defendant's Tugboat which was not towing the Appellant's Dumb Barge at the material time, is much more serious than the errors stated in the above authorities as the Respondent have instituted legal proceedings against the owner of the wrong tugboat. The Respondent sued the owner of the 1st Defendant instead of the owner of the 3rd Party's Tugboat. The Respondent apparently relied on the Laporan Kemalangan Perkapalan (Report of a Shipping Casualty) dated 1/1/2017 which had been amended on 10.01.2017, which showed that initially the 1st Defendant's Tugboat was involved in the collision but this was later amended to state that the 3rd Party's Tugboat was involved in the collision and not the 1st Defendant's Tugboat. The Respondent is in possession of the duly amended Laporan Kemalangan Perkapalan (Report of a Shipping Casualty) dated 1/1/2017 which marked as Exhibit "KAR-1" and annexed to the Affidavit in Support of Ku Azhar Bin Abdul Razak filed in support of the Respondent's application for a Warrant of Arrest against the Appellant's Dumb Barge (refer to page 129 of Rekod Rayuan - Jilid 2A (Bahagian B dan C).

[42] We are of the considered view that th)e Learned HCJ's findings that whether it is the 1st Defendant's Tugboat or the 3rd Party's Tugboat which towed t he Appel lant 's D u mb Bar ge at the time of the collision is irrelevant, is a serious misdirection as the identity of the tortfeasor or wrong doer is crucial otherwise the Respondent's cause of action is incomplete.

[43] It is apposite to define the phrase "cause of action". It means 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person': per Diplock LJ in *Letang v. Cooper* [1964] 2 All ER 929 ***at p 934.*** See also *Lim Kean v. Choo Koon* [1970] 1 MLJ 158, *Nasri v. Mesah* [1971] 1 MLJ 32 (FC), *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 3 MLJ 301, *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC), and *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 1 MLJ 409 (SC), *as found in Malaysian Court Practice 2007 Desk Ed LexisNexis at p 144.*

[44] In the light the above, it is our unanimous view that that the Learned HCJ have further misdirected herself when she held at paragraph 23 of her Grounds of Judgment that *"Even though there is conflicting*

fact as to the identity of the vessel *which towed 'Wantas 17" it is undisputed that while 'Wantas 17" is being navigated, it collided and caused damage to "MY FERRY* 2. *Thus, the Plaintiffs' claim against the 2nd Defendant founded on maritime lien appears to be sustainable."*

CONCLUSION

[45] In the light of our above findings, we find that that it is plain and obvious that the Respondent's claim against the Appellant is obviously unsustainable as it discloses no reasonable cause of action, that it is scandalous, frivolous or vexatious and it is otherwise an abuse of the process of the Court which deserves to be struck out *in limine* since the Respondent had instituted legal proceedings against the wrong tortfeasor who is wholly responsible liable for the collision.

ORDER

[46] Premised on the reasons enumerated above, we are satisfied that there are merits in the appeal. In the premises, the appeal is hereby allowed with cost of RM5,000.00 subject to payment of allocator fee. The order of the High Court dated 24.10.2019 is set aside.

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