Malayan Law Journal Unreported/2012/Volume /Wee Nai Li v Sarawak Bank Employees Union - [2012] MLJU 1593 - 10 October 2012

[2012] MLJU 1593

Wee Nai Li v Sarawak Bank Employees Union

HIGH COURT (KUCHING)
DATUK YEW JEN KIE J
CASE NO KCH-11A-4/4-2012
10 October 2012

Victor Ng (Tang & Partners Advocates) for the appellant.

Angela Jinget (William Ding & Co) for the respondent.

Datuk Yew Jen Kie J:

GROUNDS OF DECISION

[1] This is the appeal against the decision of the Learned Magistrate, given on 5th April 2012, in striking out the Appellant's claim filed in the Small Claim Court with costs.

[2] For ease of reference the parties will be referred to as in the lower court.

Background Facts

[3] The Plaintiff took up employment with Public Bank Bhd., Kuching as a Bank Clerk since 10th June. 1993 and sometime on 9th March 1996, she joined the Defendant's Union - Sarawak Bank Employee's Union (SBEU) as an ordinary member.

[4] The activities and membership of SBEU are governed under the Rules of the Sarawak Bank Employee's Union (Rules of the Union).

[5] The Defendant Union obtained approval for the setting up of the Benevolent Fund for the benefit of their members on 1st May 1998 and such fund is governed by the Benevolent Fund Rules.

[6] The Plaintiff being a member of SBEU participated in this Benevolent Fund whereby, like all members of SBEU, she paid a monthly premium of RM20.00 which was invested by SBEU in Fixed Deposits and Fixed Assets on behalf of the participating members.

[7] The participating member can withdraw the fund under the following circumstances:

a. Upon retiring from the Bank/Finance Companies.
b. On promotion to any officer category that is outside the scope of SBEU coverage.
c. Upon resignation from the bank to take up employment in another industry or to become self employed.
d. Withdrawal by estate upon existing member's demise.

[8] On 17th September 2008, the Plaintiff wrote to the Defendant informing about her promotion to a Trainee Officer with effect from 1st September 2008.

[9] On 24th December 2010, the Plaintiff wrote a letter to the Defendant requesting for the refund of her investment in the sum of RM2,110.30 under the said Benevolent Fund on the ground that she had been promoted to a post of Operations Officer with effect from 1st September 2010.

[10] The Defendant replied that they were unable to refund her contribution paid to the Benevolent Fund on the ground that she is not promoted as a managerial staff and relied on Rule 3 of the Rules of the Sarawak Bank Employees' Union.

[11] Thereafter there were numerous correspondences between the parties.

[12] On 4th October 2011 the Plaintiff wrote to the Defendant requesting that her case be arbitrated since the Defendant insisted on not refunding her contribution to the Benevolent Fund.

[13] By a letter dated 29th November 2011 the Defendant informed the Plaintiff that her request for her case to be arbitrated had been considered.

[14] The Defendant via their letter dated 5th January 2012, had requested the Plaintiff to draw three (3) names out of the five (5) arbitrators from the list, at the fixed time and venue, but unfortunately she did not respond nor turn up.

[15] The Plaintiff subsequently filed her claims using FORM 164 at the Small Claims Court on 28th November 2011

[16] The Defendant filed and served the Defence in Form 165 on 12 December 2011.

[17] On 18th January 2012, the Defendant filed an application under Order 14 Rule 21 Subordinate Court Rules 1980 to strike out the Plaintiffs claims, which was allowed by the learned Magistrate with Costs of RM500.00.

[18] Hence this appeal.

The Appeal

Non-inclusion of grounds of decision. Memorandum of Appeal,

[19] It is pertinent to point out that the matter in the Magistrate's Court is an interlocutory matter and pursuant to Order 49 Rule 6(3) SCR 1980 (presently as Order 55 Rule 5(3) of the Rules of Courts 2012) ["ROC 2012"], the Record of Appeal shall not include ground of judgement, memorandum of appeal and notes of proceedings.

[20] The appeal shall proceed by way of rehearing.

[21] The Plaintiff filed her claim against the Defendant for the refund of RM2,110.30 vide Summons dated 25th November 2011 in the Magistrate's Court at Kuching (Small Claims Procedure).

[22] It is undisputed fact that following service of the Summons, the Defendant duly filed and served the defence on 12th December, 2011 and the Magistrate's Court fixed the trial on 12th January, 2012. The trial, however, did not proceed as on that day the Defendant applied for an adjournment to allow the Defendant to file a striking out application, which was duly filed on 18th January, 2012.

[23] The Defendant's Notice of Application is for an order that the Plaintiffs Summons be struck out with costs on the following grounds:

a The summons filed is an abuse of the process of this court as the dispute between the Plaintiff and the Defendant falls within the scope of section 44(1) of the Trade Unions Act 1959, which requires for the dispute to be decided in the manner directed by the rules of the trade union;

b And that the Rules of the trade union (Rules of the Sarawak Bank Employees' Union) provide for the dispute to be arbitrated under Rule 26, and that the Plaintiff has not exhausted all domestic remedies as provided under the said Rule.

c In any event, the Plaintiff has come to the wrong court for arbitration as under Section 44(6) of the Trade Unions Act (1959) the claim must be before the Sessions Court Judge.

[24] Gleaning from the Plaintiffs Notice of Application, there are essentially only two issues for determination:

a. Forum issue.
b. Breach of Rule 26 of the Rules of The Sarawak Bank Employees' Union ["SBEU'],

Breach of Rule 26 SBEU?

[25] Pursuant to Rule 26 SBEU, dispute between the aggrieved member and the Union "shall be decided by reference to arbitration..." (see, Rule 26(1)(d)).

[26] Section 44(6) of the Trade Unions Act provides that where no decision is made on a dispute within forty days after application to the union for a reference under its rule, the aggrieved member may apply to a Sessions Court to determine the matter in dispute.

[27] Essentially, this issue is whether the Plaintiff has breached Rule 26 SBEU by filing the summons in the Magistrate's Court.

[28] It is an undisputed fact that the Plaintiff had on 4th October, 2011 requested for her case to be arbitrated under the SBEU. In the affidavit in support affirmed by Law Kiat Min on 18th January, 2012, it is averred in paragraph 10 that the Defendant Union have acceded to the Plaintiffs request on 5th January 2012 by inviting her to attend the drawing of the names of the 3 arbitrators at the prescribed date and time fixed. However, the Plaintiff did not attend and has instead filed this Summons in Court. The Defendant's letter to the Plaintiff for the drawing of names of arbitrators dated 5 January 2012 is marked as exhibit C.

[29] The Plaintiff in her paragraph (6) of her affidavit in opposition affirmed on 9th January, 2012 averred that she is entitled to bring this claim under the Small Claim procedure because the Defendant had not responded to her request for arbitration.

[30] It is noted that there was a span of three months from 4th October 2011 (request for arbitration by the Plaintiff) to 5th January 2012 (Defendant requested Plaintiff to draw the names of arbitrators), meaning that the Defendant did not respond to the Plaintiffs request to refer to arbitration within 40 days after application by the Plaintiff for reference to arbitration as stipulated under s 44(6) of the Trade Unions Act.

[31] Consequential to the breach of s 44(6) of the Trade Unions Act, in my judgement, it is within the right of the Plaintiff to elect to pursue the dispute in Court. In the premise, I fine no merits in the Defendant's contention that the Plaintiff has breached ss 26 SBEU.

[32] I agree with learned counsel for the Plaintiff that even assuming that there is such a breach as alleged, which I have found there is none, in accordance with the established principles governing contract law, the arbitration agreement in its original form has been terminated by the Defendant's filing its defence. In other words, the Defendant by filing its defence instead of applying for stay pending reference to arbitration of the dispute which form the subject matter of the claim, has taken a step in the proceeding which effectively nullified the arbitration clause.

[33] There is high authority which support my view. *Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858, where the Court of Appeal held:

> "The appellant had acted in breach of the arbitration agreement when it instituted the suit and the respondent accepted the breach by delivering its defence. In the result, by the application of well-established principles governing the law of contract, the arbitration agreement in its original form came to an end."
>
> "From the conduct of the parties, it is an inescapable conclusion that they were quite content to allow the Court to adjudicate upon the dispute. The agreement to arbitrate which the parties had earlier made had, accordingly, been substituted with an agreement to litigate."

[34] Consequentially, by having filed its defence, there is no longer any arbitration agreement to fall back on by the Defendant since 12 December 2011. Hence the Defendant's application is devoid of merits.

[34] Wah Bee's case was applied in the case of *Titi Latex Sdn Bhd v WRP Asia Pacific Sdn Bhd* [2009] 1 LNS 1462, where the High Court went on to say that:-

> Their conduct of filing the suit and the plaintiff's failure to apply for stay had in actual fact terminated the agreement to arbitrate.
>
> (Refer to page 174 BOA)

FORUM ISSUE

[35] Learned counsel for the Defendant contended that regardless of the amount of claim, under s 44(6) of the Trade Unions Act 1959, the Plaintiff should have filed her claim in a Sessions Court, and not Small Claims Court as has been done.

[36] Learned counsel for the Defendant further contended that upon being served with the Summons in Form 164, they have duly complied with the directive order stated in the said Form, which states under "ORDER TO DEFENDANT" thus, "If you dispute the Plaintiffs claim, you must file in your Statement of Defence Form 165 within 14 days from the date of service of this Statement of Claim upon you." It was submitted that the "genuine intention" of the Defendant in filing the defence was merely to prevent default judgement being obtained against them, and they have no intention whatsoever to waive their right.

[37] Learned counsel for the Defendant next contended that in Small Claims Court, strict compliance with the Rules of Courts 2012 ("RC 2012") is not necessary since Form 164 itself contains directives as to what the Defendant ought to do. It was submitted that having regard to the purpose and nature of the Small Claims Procedure, the Court ought to invoke Order 1A of RC 2012, which provides that the Court should have regard to the overriding interest of justice and not only to technical non compliance with the Rules.

Whether RC 2012 applies to Small Claims Procedure

[38] The provision of Small Claim Procedure is provided under Order 54 Subordinate Courts Rules 1980 ("SCR 1980) whereby claims below RM5,000.00 are to be filed in the Magistrate's Court under the Small Claim Procedure. Pursuant to rule (7), it does not prohibit the defendant from seeking prior legal advice as provided under rule (7). Indeed, in the "IN-

STRUCTION TO DEFENDANT" in Form 164 under para 2, it is expressly stated: "You may consult a lawyer but cannot be represented by a lawyer at the hearing.

[39] In absence of an express provision in the Rules of Court 2012 that Small Claims Procedure are compartmentalized and therefore Rules of the Courts 2012 does not apply to it, it is only logical that the SCR 1980 applies with equal force to Small Claim Procedure as to all civil proceedings in the subordinate courts. In other words, Form 164 does not rewrite the Rules of Court and remove the application of the Rules of the Court regarding conditional appearance.

[40] It is to be noted that from the time of the filing of the summons on 25th November, 2011 right up to the filing of the Notice of Appeal on 20 April, 2012, at all material time the applicable rules of the court is SCR 1980. Pursuant to Order 1 Rule 4 SCR 1980, the High Court procedure on the entry on conditional appearance applies.

[41] The purpose of the Small Claim Procedure is to ensure that parties with small claims are not deterred from filing their claims in court because of the high legal costs that would be incurred in engaging lawyers to draft their pleadings and to represent them in court. Hence, it simplifies the pleadings by providing the standardized summons and statement of defence/counterclaim as per Form 164 and 165, and dispenses with legal representation. It does not, as stated earlier, prohibit the defendant from seeking prior legal advice.

[42] It is to be noted that the Defendant is no ordinary defendant. It is an union representing the bank employees in Sarawak and at the time of filing the defence, boasts of 2,300 members from 14 banks. In other words, the Defendant should have the means to seek prior legal advice and ought to have done so, given that, one of the defences being the Plaintiff ought to have commenced the action pursuant to s 44(6) of the Trade Unions Act 1959.

[43] It was opened to the Defendant to file conditional appearance and then apply to set the summons aside on jurisdictional ground. Instead of doing that, the Defendant proceeded to file its defence. The consequences of filing an unconditional appearance by filing a defence, in the context of our case, are two: (1) unqualified submission to the jurisdiction of the Magistrate's Court where the action is filed; and (2) unqualified waiver of irreg-

ularities in respect of the issuance of a Small Claim Procedure in the Magistrate Court.

Whether the claim can be filed in the Sessions Court irrespective of the claim amount

[44] Learned counsel for the Defendant contended that even if the Defendant, by filing a statement of defence which tantamount to unconditional appearance, had submitted to the jurisdiction of the Magistrate's Court, the Court must still determine whether the Magistrate's Court has the jurisdiction to hear the Plaintiffs claim.

[45] Learned counsel for the Defendant submitted that the learned Magistrate is correct to strike out the Plaintiffs claim as the Magistrate's Court does not have jurisdiction to entertain the Plaintiffs claim which is filed contrary to ss 44(5) & (6) of the Trade Unions Act 1959, citing *The Abro International* [1988] 1 MLJ 147, where Lai Kew Chai J said:

> "The one exception from the general effect of an unconditional appearance is the situation where a Court under any written law lacks jurisdiction to entertain the claim at all, as in *Wilkinson v Barkim Corporation* [1948] 1 KB 721...

[46] To further support the contention that the filing of unconditional appearance via the statement of defence does not preclude the Defendant from making an application under Order 14 Rule 21 SCR 1980 for striking out the Plaintiffs claim, the following cases were cited:

a *BPI International Finance Ltd rformerlv knonw as Syla Finance (TOO Ltdl v Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 MLJ 831, the Court of Appeal held:

> With regard to the filing of the unconditional appearance, the appellant, having filed such an appearance could not be taken to have abandoned its right to file the application under O 18 r 19 of the RHC. Neither the entry of an unconditional appearance, nor the serving of the statement of defence, precluded the appellant from making an application under the said rule

b In *Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co (sued as a firm) & Ors* (2001) 6 MLJ at page 550, Su Geok Yiam JC (as she then was) said as follows:-

> I, therefore, hold that the mere fact that the second defendant has filed an unconditional appearance and a statement of defence does not bar or preclude the second defendant from applying to strike out the plaintiffs' claim under O 18 r 19 of the RHC because the words 'at any stage of the proceedings' which qualify the words 'The court may... order to be struck out' in the rule itself presupposes the making of such an application unless the ground relied upon is a lack of locus standi or jurisdiction.

[47] In BPI International Finance Ltd (supra) case, the appellant applied under O 18 r 19 of the RHC 1980 to strike out the writ and statement of claim on the ground that the statement of claim had set up causes of action which were barred by Limitation Act 1953. The High Court allowed the striking out application which decision was overturned by the Court of Appeal. The appeal to the Federal Court was allowed and the Federal Court held that filing of unconditional appearance could have been taken to have abandoned its right to file the application under O 18 r 19 of the RHC 1980. Neither the entry of an unconditional appearance, nor the serving of statement of defence, precluded the appellant from making an application under the said rule.

[48] In Doree Industries (supra) case, the 2nd defendant applied to strike out the plaintiffs amended statement of claim pursuant to O 18 r 19(1) of the RHC 1980 on the ground that it did not disclose a reasonable cause of action, alternatively on grounds that the plaintiffs action is frivolous, vexatious and an abuse of process of the court.

[49] In Chan Min Swee (supra), the Defendant applied to strike out the plaintiffs claim under O 18 r 19(1) of the RHC 1980 and under the inherent jurisdiction of the Court, which was dismissed by the SAR.On appeal, the HC allowed the appeal, Abdul Malik Ishak J, held:

> If a party is interested to strike out a writ and the statement of claim on other grounds, the party can enter an unconditional appearance because the effect of an unconditional appearance (be it for defective writ or for defective service thereof or for want of jurisdiction) will not be relevant to the main ground for the striking out application.

[50] I do not think the cases cited above assisted the Defendant because in none of these cases, there arose jurisdictional issue. Hence, filing of unconditional appearance and filing of statement of defence does not preclude the defendant from making striking out application under Order 18 rule 19 of the RHC 1980. The decision of the learned Judge in Chan Min Swee (supra) supports the Plaintiffs submission that where there is jurisdictional issue, the proper thing for the defendant to do is by filing a conditional appearance. Accordingly, the exception in *Wilkinson v Barking Corporation* (1948) 1 All ER 564 is of no assistance to the Defendant.

[51] On the surface reading of s 44(6) of the Trade Unions Act, it would appear that the forum for resolution of dispute, where there was no decision on a dispute within 40 days after application for reference is made to the union, is the Sessions Court.

[52] This runs contrary to the provision in Order 54 Rule 2 SCR 1980 which expressly provides that this Order shall apply to claims where the amount in dispute or the value of the subject-matter of the claim does not exceed RM5,000.00.

[53] The word "shall" in the Order is to be construed as giving mandatory effect to the Order. See, *Tan Ah Chai v Loke Jee Yah* [1998] 4 CLJ 73.

[54] Learned counsel for the Plaintiff submitted that the legal conundrum here can be harmoniously construed without having to compromise one over the other, citing *Wan Khairani Wan Mahmood v Ismail Mohamad & Anor* [2007] 6 CLJ 582.

[55] In Wan Khairani Wan Mahmood case, the Court of Appeal held:

> The reason for the presumption as aforesaid is that the legislature while enacting a law has a complete knowledge of the existing laws on the subject-matter and, therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. The burden to show that there has been a

repeal by implication lies on the party asserting it. Relying upon Statutory Interpretation by Francis Bennion (1984 Edn.), counsel contends that where, as in the present case, the provisions of the later enactment (the Act) are contrary to those of the earlier (the Code), the later by implication repeals the earlier in accordance with the maxim leges posteriors priores contrarias abrogant (later laws abrogate earlier contrary laws). This is, however, subject to the exception embodies in the maxim generalia specialibus non derogant (a general provision does not derogate from a special one).

One of the important tests to determine the issue of implied repeal would be whether the provisions of the Act are irreconcilably inconsistent with those of the Code that the two cannot stand together or the intention of the legislature was only to supplement the provisions of the Code. This intention is to be ascertained from the provisions of the Act. Courts lean against implied repeal. If by any fair interpretation both the statutes can stand together, there will be no implied repeal. If possible, implied repeal shall be avoided. It is, however, correct that the presumption against the intent to repeal by implication is overthrown if the new law is inconsistent with or repugnant to the old law, for the inconsistency or repugnancy reveals an intent to repeal the existing laws. Repugnancy must be such that the two statutes cannot be reconciled on reasonable construction or hypothesis. They ought to be clearly and manifestly irreconcilable. It is possible, as contended by Mr Jethmalani, that the inconsistency may operate on apart of a statute.

In addition the abovementioned decision also made a ruling which has been referred to in N.S Bindra's 'Interpretation of Statutes' 9th edn at p. 356 as follows:

> The rule of harmonious construction is applicable not only to the conflicting provisions of the same statute but also in cases where the provisions of different statutes are in conflict.

[56] Two principles can be gleaned from the authority of Wan Khairani Wan Mahmood, supra:

a The "rule of Harmonious Construction" is not limited provisions within the same statute but also provisions of different statues.
b The Harmonious Approach in statutory interpretation, where possible, is always preferred.

[57] It is to be noted that s 44(6) of the Trade Unions Act 1959 does not have the preposition "Notwithstanding". In Words, Phrases & Maxims Legally & Judicially Defined by Anandan Krishnan Volume 11, M, N and O, the preposition "notwithstanding" has been defined as follows:

> ***NOTWITHSTANDING***
>
> Not to stand against or in the way of. Despite, in spite of, although, nevertheless. However, even though, but yet. In legal drafting, used to signal an overriding condition, for example, notwithstanding anything to the contrary contained in this agreement.

[58] The absence of the preposition "Notwithstanding" any other law in s 44(6) of the Trade Unions Act, this provision is not "Non-obstante". To put it another way, s 44(6) is not a standalone provision that is intended to be construed in isolation. To the contrary, absence of the preposition "Notwithstanding" any other law can only mean one thing: it is a provision capable of qualification as the situation permits because it is never intended to preclude in advance any construction to the contrary by way of provision or qualification.

[59] It is obvious that S 44(6) of the Trade Unions Act 1959 was enacted in 1959 prior to Order 54 SCR 1980. Hence, when Order 54 was drafted, the legislature must have been appraised of the existing law - which includes s 44(5) and (6) of the Trade Unions Act 1959. With that knowledge, Order 54 rules 1 and 2 was drafted without the preposition of "Notwithstanding" when the legislature could have done so.

[60] In my considered view, bearing in mind that the harmonious approach in statutory interpretation, where possible, is always preferred and that the rule of harmonious construction is not limited to provisions within the same statute but also provision of different statues, given that the provision in

s 44(6) of the Trade Unions Act which is not "non-obstante" in nature, it can stand harmoniously together with Order 55 SCR 1980 without causing any confusion or resulting in absurd or illogical consequences.

[61] In my considered view, to interpret s 44(6) of the Trade Unions Act literally would lead to an illogical or absurd situation such as this: Consider a reverse situation when a claim amount is beyond the monetary jurisdiction of the Sessions Court under s 65 of the Subordinate Courts Act 1948, would the plaintiff be deprived of his legal rights to pursue the matter in the High Court for the sum in excess of the monetary jurisdiction of the Sessions Court by virtue of s 44(6) of the Trade Unions Act? This surely cannot be the case. Thus, harmonious approach in the construction of s 44(6) must be adopted to avoid such absurdity.

[62] Applying the rule of harmonious approach in statutory interpretation, and for the reasons given above, s 44(6) of the Trade Unions Act and Order 56 can stand together. Order 59 rule 2 SCR 1980 should be read as a proviso to and s 44(5) and (6) of the Trade Unions Act 1959. Consequentially, the Magistrate's Court has the jurisdiction to hear a claim for RM5,000.00 or less.

Conclusion

[63] In view of the above, I allow the appeal and make the following orders:

a The order of the Magistrate is hereby set aside and the order of costs of RM500 is substituted with costs of RM100.00 in favour of the Plaintiff.

b The case be restored in the cause list and to be mentioned in the Magistrate's Court before a different Magistrate on 14th December 2012 at 9.00 a.m. for case management.

c Cost of RM200.00 for this appeal.