



**IN THE HIGH COURT MALAYA, PENANG  
[CIVIL CASE NO: 22-286-2010]**

**BETWEEN**

**EMPLOYMENT PROVIDENT FUND BOARD ... PLAINTIFF**

**AND**

- 1. IBRAHIM HASHIM TRANSPORT SDN BHD**
- 2. IBRAHIM HASHIM**
- 3. AHMAD ROZAINI IBRAHIM ... DEFENDANTS**
- 4. ROHAIZI IBRAHIM**

**AND**

- 1. TAN MENG KANG**
- 2. MOHAMAD KARIM MUSTAFA... THIRD PARTIES**

**GROUND OF JUDGMENT**

**INTRODUCTION**

[1] There were two interlocutory applications filed for the decision of this court which were as follows:-



- (a) application by 3<sup>rd</sup> parties to strike out the statement of claim filed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants against the 3<sup>rd</sup> parties under Order 18 rule 19(1) (a), (b), (c) and / or (d) Rules of Court 2012 (**enclosure 86**).
- (b) application by the 1<sup>st</sup> defendant for stay of proceeding of the suit by the plaintiff against all the defendants pending appeal by the 1<sup>st</sup> defendant against the decision of the High Court dismissing the 1<sup>st</sup> defendant's application for summary judgment under Order 14, Rules of Court 2012 (**enclosure 87**).

The summary judgment (**enclosure 59(a)**) among others is for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to be held liable to pay the outstanding EPF contribution to the plaintiff.

### **Backgrounds Facts**

- [2] The first defendant, Ibrahim Hashim Sdn. Bhd (the company) was incorporated on the 20.3.1985 and its nature of business is contractor for transportation.
- [3] The 2<sup>nd</sup> defendant was the director of the company from 20.3.1985 to 2.12.2003. The 3<sup>rd</sup> defendant was appointed as director on the 28.2.1997 and resigned on the 16.9.1999. The 4<sup>th</sup> defendant was the director of the company from 19.12.1994 to 1.3.1997.

- [4] On 22.4.2010 plaintiff instituted a suit against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants for outstanding EPF contribution of RM176,633 for the period from January 1995 to January 1998 under section 46 (1) of the Employees Provident Fund Act 1991 (the Act).
- [5] On 9.11.2012, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, filed a statement of claim against the 3<sup>rd</sup> Parties claiming indemnity and contribution from the 3<sup>rd</sup> Parties as the current directors of the company.
- [6] The 3<sup>rd</sup> Parties, Tan Meng Kai was appointed as director of the company on the 17.1.2001 and Mohamad Karim bin Mustaffa was appointed on the 2.5.2001.

#### **Submission Of The 3<sup>rd</sup> Parties For Striking Out**

- [7] The learned counsel for the 3<sup>rd</sup> Parties in his submission impressed upon this Court that the claimed by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants against the 3<sup>rd</sup> Parties were:
- (a) without merits.
  - (b) failed to disclose any cause of action.
  - (c) scandalous, frivolous and vexatious.
  - (d) will obstruct and delay the trial and abuse of court's process.
  - (e) obviously unsustainable.

- [8] It is the contention of the 3<sup>rd</sup> Parties that they were not the directors of the company at the material time when the company failed to pay the EPF contribution. Tan Meng Kang and Mohamad Karim Mustafa were appointed as directors of the company on 17.1.2001 and 2.5.2001 respectively. As such it was argued that the 3<sup>rd</sup> Parties cannot be held liable for the outstanding payment that occurred before they were appointed as directors.
- [9] The case of *Lembaga Kumpulan Simpanan Pekerja v. HOL Chainstore (M) Sdn. Bhd & Ors* [2014] 7 MLJ 622 and *Sivamurthy s/o Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2013] 5 MLJ 533 was cited to support the 3<sup>rd</sup> Parties contention.
- [10] In *Lembaga Kumpulan Simpanan Pekerja v. HOL Chainstore (M) Sdn. Bhd & Ors (supra)* the High Court stated inter alia as follows:

*'Pursuant to s. 46 of the EPF Act 1991, in the event that any contribution remain unpaid, then any person who were registered directors of the company during the period of default, shall together with the company be jointly and severally liable for all contribution, dividend and interest owing'.*

and in *Sivamurthy s/o Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja (supra)*. His Lordship Syed Ahmad Helmy JCA at page 540 had this to say:



*The claim herein against the former directors is a unequivocal cause of action created by s. 46(1) of the EPF Act 1991 for the purpose of enabling the EPF board to go after directors or responsible individual of errant companies or entities. The wording of s. 46(1) of the Act reflect the legislative intent to provide a right or recourse against errant directors jointly and severally of defaulting companies which in law such right or recourse was non-existent because of the corporate personality concept.*

[11] It is pertinent to note here that both cases cited by the 3<sup>rd</sup> Parties explained the liability of former directors for outstanding EPF contribution under section 46(1) of the act. The issue which is relevant in the present application is whether the current directors are liable for indemnity and contribution in respect of the unpaid EPF contribution as claimed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant.

### **Submission Of The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants**

[12] Learned counsel for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the statement of claim have disclosed reasonable cause of action against the 3<sup>rd</sup> Parties.

[13] It was contended that the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants have claimed for indemnity and contribution from the 3<sup>rd</sup> Parties in respect of the outstanding EPF contribution. This give rise to an issue which ought to be tried.

- [14] It was also submitted that by filing their affidavits, the 3<sup>rd</sup> Parties have impliedly acknowledged that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, in their statement of claim have shown some reasonable cause of action against the 3<sup>rd</sup> Parties.
- [15] The learned counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants further submitted that the grounds of application for striking out in enclosure 86 and affidavit in support (enclosure 86A) have been raised by 3<sup>rd</sup> Parties in their Notice for Third Party Direction dated 15.11.2013 (enclosure 75) and their supporting affidavit by Tan Meng Kang on the 14.11.2013, wherein the 3<sup>rd</sup> Parties applied to strike out the Third Party Notice dated 10.10.2013.
- [16] On the 11.3.2014, enclosure 75 was heard and dismissed by the High Court on the grounds that there are triable issues which ought to be tried. There was no further appeal against this decision and it become final and conclusive on the issue raised by the 3<sup>rd</sup> parties. As such, it was contended that doctrine of res judicata applies in the present case.
- [17] Among the case cited by the learned counsel on the issue of *res judicata* is *Hartecon JV Sdn. Bhd* [1996] 2 MLJ 57 wherein the Court of Appeal held as follows:-

*"(1) Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an*

*interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the lis until its reversal on appeal. The decision of the judge overruling the respondents preliminary objection rendered the point taken res judicata (see pp 65G and 66H). Government of Malaysia v. Dato' Chong Kok Lim [1973] 2 MLJ 74 followed".*

### **The Law On Striking Out**

[18] Order 18 rule 19(1) (a), (b), (c) and (d) Rules of Court 2012 clearly provides the court the power to strike out pleading at any stage of the proceedings.

[19] This power, however should be exercise with care and only when the threshold requirement of an obvious and unsustainable case has been satisfied. This is clearly explained in the Federal Court's case of *Serac Asia Sdn. Bhd v. Sepakat Insurance Brokers Sdn. Bhd* [2013] 5 MLJ 1 at page 18:

*".....We also make this observation on the application of the court's summary power to strike out a pleading under 0.18 r 19 of the Rules of Court 2012 (successor to RHC 1980). **Although the power to strike out is a wide discretion, it should be exercised with care and only when the threshold requirement of 'an obvious and unsustainable case, can a pleading be struck out. In exercising it, and especially under r 19(1)(a), the court must have regard to the 'quality of an all the circumstances surrounding the plea (see Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga***

*Kumpulan Wang Simpanan Pekerja (2000 3 MLJ 65; [2000] 2 AMR 2119 (FC). The court should also bear in mind that the effect of striking out a pleading is to completely deprive a plaintiff from having his day in court."*

(See also *Bandar Builder Sdn. Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 and *Metroplex Holdings Sdn. Bhd v. Commerce Merchants Bankers Bhd* [2013] 4 MLJ 520).

[20] In the case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn. Bhd & Anor* [1985] 1 MLJ 226, the Court stated that the test to be applied in striking out application is **"whether on the face of the pleadings, the court is prepared to say that the cause of action or defence is obviously unsustainable"**.

[21] The above authorities succinctly explained that the power to strike out pleadings should only be exercised in an obvious unsustainable case on the face of the pleadings and should be exercised sparingly bearing in mind the effect of striking out pleading would deprive a party to present his case in court.

### **Findings of Court**

[22] In this case it was not disputed that the 1<sup>st</sup> defendant had failed to pay the EPF contribution for the period from January 1995 to January 1998 with a total sum of RM178,663.00. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>

defendants were the directors during that material time and the 3<sup>rd</sup> parties are the current directors of the company.

[23] Under section 65(1) of the act, all EPF contribution can be recovered summarily as a civil debt.

**Section 65(1)** provides:

*Notwithstanding the provisions of any other written law all contribution payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.*

[24] Turning to the present case, the action for non-payment of the EPF contribution was instituted against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants pursuant to section 46(1) of the act which reads:

*'Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, **the directors of such company including any persons who were directors of such company during such a period in which contribution were liable to be paid, or the partners of such firm, including any partners who were partners of such firm during such a period in which contributions were liable to be paid, or the office-bearers of such association of during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contribution due and payable to the fund.'***

[25] As the applicants have been made the 3<sup>rd</sup> Parties in the action by plaintiff against the defendants their liability begin when the defendants are held liable for the outstanding EPF contribution under section 46(1) of the act.

[26] In *Mat Abu bin Man v. Medical Superintendent, General Hospital Taiping, Perak & Ors* [1989] 1 MLJ 226, Supreme Court at page 228 explained as such:

*"Third-party proceedings for contribution should be regarded as independent of and separate from proceeding by plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is held liable'.*

[27] In the instant case, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have claimed for indemnity and contribution from the 3<sup>rd</sup> Parties as current directors of the company for the outstanding EPF contribution. This is an issue which ought to be tried by the court based on the facts and relevant law.

[28] Whether the case by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants against the 3<sup>rd</sup> Parties is weak or otherwise is not a relevant consideration for the court.

In *Loh Holdings Holdings Sdn. Bhd v. Peglin Development sdn. Bhd* [1984] 2 MLJ 105, the Federal Court explained that as long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out.

(See also *Mooney & Ors v. Peat Marwick Mitchell & Anor* [1967] 1 MLJ 87).

[29] Applying the test and threshold requirement in striking out as explained in the above cited authorities, I am of the considered view that the claimed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants against the 3<sup>rd</sup> Parties is not obviously unsustainable.

[30] On the issue of res judicata, in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn. Bhd* [1995] 3 MLJ 189, Peh Swee Chin FCJ (a he then was) explained as follows:

*"What is re judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an stopped per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation - interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action - nemo debet bis vexari pro eadem causa. Both maxis are the rationales for the doctrine of res*

*judicata, but the earlier maxim has the further elevated status of question of public.*

[31] His Lordship goes on to say:

*'The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time'.*

[32] In the case of *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 2 MLJ 74 where His Lordship Sharma J referred to the case of *Satyadhyan Ghosel and others v. Sint Deorajin Dobi and another* AIR 1960 SC 94 where the principles of res judicata was explained as follows"

*"The principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res is judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter- whether on a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal as taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure, not even where section 11 does not apply the principle of res*

*judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.*

*"The principle of res judicata applies also as between two stages in the same litigation to this extent that a court whether the trial court or higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the mater again at subsequent stage of the same proceedings".*

[33] Upon perusing the affidavit in support of this striking out application affirmed by Tan Meng Kang dated 7.4.2014 (**enclosure 86(a)**) and affidavit in support of application to strike out the Third Party Notice affirmed by the same person dated 4.11.2013 (**enclosure 76**), I found that both application were based on the same grounds.

[34] As the application to strike out the Third Party Notice (enclosure 76) was dismissed on 11.2.2014 by the High Court on the grounds there are triable issue which out to be tried and no appeal was filed against this decision, I am of the view res judicata estop the 3<sup>rd</sup> Parties to raise the same issue in this present application.

### **The 1<sup>st</sup> Defendant's Submission For Stay Of Proceedings**

(a) In regards the application for stay of proceedings (enclosure 87) the learned counsel for 1st defendant submitted that if the appeal by the 1st defendant with regards to enclosure 59a is successful, this

court has only to decide the claim by the plaintiff against 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. This will save costs and the court's time.

- (b) It was also contended that if the said appeal is successful by not allowing stay of proceeding, it would rendered the appeal nugatory.

### **Plaintiff's Submission In Rebuttal**

[35] The plaintiff submitted that the appeal for summary judgment under order 14 Rules of Court 2012 by the 1<sup>st</sup> defendant against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants has no bearing on the suit that plaintiff brought against all the defendants for the outstanding EPF contributions under section 46 (1) of the act, all defendants are jointly and severally liable for the outstanding EPF contribution.

[36] As such the 1<sup>st</sup> defendant appeal would not be rendered nugatory, if were to succeed in its appeal.

[37] It was also submitted that the 1<sup>st</sup> defendant has failed to show any special circumstances before stay of proceedings can be granted.

### **The Law On Stay Of ProceedingsSection 73**

[38] **Section 73** of the Court of judicature Act 1964 provides that an appeal shall not operate as a stay of execution unless ordered by the court.

**Section 73**

*"An appeal shall not operate as a stay of execution or proceedings under the decision appealed from unless the court below or Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.*

[39] Apart from s. 73 CJA there are plethora of authorities on the principles of stay of proceeding or execution.

[40] The court in determining whether to grant stay will consider whether there exist special circumstances for granting stay. One example that constitute special circumstances is nugatory appeal. In *Kosma Palm Oil Mill Sdn. Bhd v. Koperasi Serbaguna Makmur Bhd* [2013] 4 CLJ 1 at page 16. Y.A. Augustine Paul JCA (as he then was) stated:

*"It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one."*

[41] In *See Teow Guan & Ors v Kian Joo Holding Sdn. Bhd* [1995] 3 Mil 598 on the issue of nugatory appeal Gopal Sri Ram JCA (as he then was) said this:

*"In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Court of Judicature Act 1964, is*

*that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo".*

[42] On this issue of special circumstances it has been decided by numbers of authorities that it must be special, not ordinary, common or usual circumstances.

*(See Min Ann Holdings Sdn. Bhd v. Danaharta Urus Sdn. Bhd [2002] 3 CLJ 380).*

[44] Apart from the above principles merit of the case is not a relevant consideration in application for stay.

*(See Federal Court's case of Kosma Palm Oil Sdn. Bhd (supra), Ming Ann Holdings Sdn. Bhd (supra) and in Re Khong Than Sawmill [1976] 1 MLJ 131).*

### **Findings Of The Court**

[45] Plaintiff's action against the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants is for the outstanding EPF contribution under section 46(1) of the act. Meanwhile the 1<sup>st</sup> defendant application for summary judgment against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants is among others for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to pay the unpaid EPF contribution to the plaintiff.

[46] As all the defendants are jointly and severally liable for the said outstanding EPF contribution under section 46(1) of the act, I do not see by taking action for summary judgment against 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants would exonerate the 1<sup>st</sup> defendant from his liability. As such the outcome of the 1<sup>st</sup> defendant's appeal to the Court of Appeal would not be rendered nugatory if stay was refused.

[47] Apart from this, there is no other special circumstances shown by the 1<sup>st</sup> defendant in this application for this court to grant stay of proceedings.

### **Conclusion**

[48] For the abovestated reasons the application by 3<sup>rd</sup> parties to strike out the statement of claim of 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendant (enclosure 86) was dismissed with costs of RM3,000 to be paid by 3<sup>rd</sup> parties to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

[49] The application by 1<sup>st</sup> defendant for stay of proceeding (enclosure 87) was also dismissed with costs of RM2,000 to be paid by 1<sup>st</sup> defendant to the plaintiff.

**(NORDIN HASSAN)**

Judicial Commissioner

High Court

Penang.

**Dated:** 6 AUGUST 2014



**Counsel:**

*For the plaintiff - Afifi Ahmad; M/s Azrul Affifi & Azuan*

*For the 1<sup>st</sup> defendant and 3<sup>rd</sup> parties - Goh Chak Kng; M/s Lim Kim Sew & Co*

*For the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants - M. Kanesan; M/s M. Kanesan & Associates*