IN THE FEDERAL COURT OF MALAYSIA AT KOTA KINABALU

APPLICATION NO. 08(i)-297-06/2017

BETWEEN

Lai Cheng Ooi ... APPELLANT

AND

Lim San Peen & anor ... RESPONDEN

HEARD TOGETHER WITH

IN THE FEDERAL COURT OF MALAYSIA AT KOTA KINABALU

APPLICATION NO. 08(i)-300-06/2017

BETWEEN

Lai Cheng Ooi ... APPELLANT

AND

1. Naslei Enterprise Sdn Bhd
2. Lim San Peen
3. Tamparuli Granite Quarry (Sabah) Sdn Bhd
4. Danaharta Urus Sdn Bhd ... RESPONDEN-RESPONDEN

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APPLICATION NO. 08(i)-301-06/2017

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AND

1. Naslei Enterprise Sdn Bhd
2. Tamparuli Granite Quarry (Sabah) Sdn Bhd ... RESPONDEN-RESPONDEN

CORAM

Raus Sharif CJ
Balia Yusof FCJ
Jeffrey Tan FCJ

JUDGMENT OF THE COURT

1. On 13.4.2018, we heard and unanimously dismissed the application for leave to appeal on the following "questions of law":

(a) Whether the time-honoured and established principle of law that a High Court judge has no power or jurisdiction to set aside an order of another High Court judge regularly granted in the exercise of concurrent jurisdiction as enunciated in the classic Federal Court case of Hock Hua Bank Bhd v Sahari bin Mat [1981] 1 MLJ 143 be overruled?

(b) Whether the High Court has the power and jurisdiction to strike out the Writ of Summons in Suit no BKI-22NCvC-91/8-2015 under O.18 r.19 which was filed and submitted in the name of the Yang Di-Pertua the Agong of Malaysia?

2. The background facts could be summarised as follows. The Applicant of this leave application, Lai Cheng Ooi, is the widow and executor of Lee Tain Eshung (deceased) who held 60% of the equity of Tamparuli Granite Quarry (Sabah) Sdn Bhd (Tamparuli). On 10.5.1983, Tamparuli entered into a sale and purchase agreement (agreement) with Naslei Enterprise Sdn Bhd (Naslei) to purchase property described as "1202 Waikiki Condominiums" (property). Tamparuli paid RM304,000.00 towards the purchase price of RM970,000.00. The Applicant contended that Naslei admitted that a further sum of RM208,886.00 was set off against materials supplied by Tamparuli.

3. On 19.1.1989, receivers were appointed to manage Naslei. On 19.7.1991, the High Court ordered that no action could be maintained against Naslei or its receivers without the leave of court. On 23.11.2001, the deceased was adjudged a bankrupt and remained a bankrupt on the date of his death on 14.6.2008. On 6.2.2014, the Applicant obtained probate to the estate of the deceased. On 18.10.2011, Tamparuli was wound up on the petition of the Government of Malaysia.

4. The Applicant complained that the receiver failed to complete the purchase of the property. The Applicant averred that she was ready, willing, and able to pay the balance purchase price. The Applicant contended that though she was given notice, she was not allowed to attend the meeting of the creditors of

Tamparuli, that the Inland Revenue Department told her that her right to secure the property had been forfeited, that by letter dated 25.3.2014 she was informed that because of insufficient funds the receiver had no intention to complete the purchase of the property, and that Naslei forfeited the initial payments. The Applicant further contended that that asset of Tamparuli was given up to the detriment of Tamparuli. At the trial court, learned counsel for the Applicant argued that the intention of the Applicant to complete the purchase of the property should have been considered by the creditors; apparently, the Applicant was allowed to complete the purchase of another property by the deceased in his own name.

5. At the trial court, the Applicant sought (a) a declaration that the termination of the agreement and forfeiture of monies paid were null and void; (b) a declaration that the agreement was valid and subsisting; (c) a direction that Naslei do complete the sale of the property, upon payment by the Applicant through the receiver, of the balance purchase price.

6. Naslei and the receiver of Tamparuli raised two objections to the action.

7. The first objection of Tamparuli was that pursuant to section 216 of the Companies Act 1965 read together with the provisions of the Bankruptcy Act 1967, the Applicant had no standing to complain about the manner in which the affairs of

Tamparuli was administered by the receiver in his capacity as the liquidator. The trial court held that by reason of section 216 of the Bankruptcy Act 1967, the Director-General of Insolvency (DGI) became the contributory of Tamparuli, and that the grant of probate did not entitle the Applicant to claim that she was a contributory of Tamparuli or the legal representative of the deceased with respect to the shareholding of the deceased in Tamparuli. The second objection of Tamparuli was that pursuant to section 226(3) of the Companies Act 1965, no action or proceeding could be proceeded with or commenced against Tamparuli without the leave of court. The trial court held that section 226(3) of the Bankruptcy Act 1965 did not apply, as the action was against the receiver and not against the company. However, the trial court held that under section 279 of the Companies Act 1965, the Applicant had no *locus standi* to challenge the decision of the DGI.

8. The objection of Naslei was that the leave of court was not obtained to commence the action against Naslei, in accord with the order of court dated 9.7.1991. The trial court upheld that objection and held that Naslei should be struck out as a defendant.

9. Essentially, the trial court held that the Applicant lacked the *locus standi* to challenge the decision of the DGI, and that the Applicant had no leave of court to commence the action against Naslei. The Applicant appealed to the Court of Appeal.

10. Pertinent to the leave of court to commence action against Tamparuli and or Naslei, the Court of Appeal imparted the following facts. On 19.6.2015 and 18.8.2015, the Applicant, pursuant to her *ex parte* applications, obtained leave to commence action against Tamparuli, Naslei, and the receivers of those companies. With leave, albeit obtained *ex parte*, the Applicant commenced action for specific performance (BKI-22NCvC-91/8-2015) against Naslei and receiver, Tamparuli and receiver, and Danaharta Urus Sdn Bhd. All defendants applied under Order 18 rule 19 of the Rules of Court 2012 to strike out the action. Naslei and receiver applied to set aside the *ex parte* leave. Meantime, the striking out application was stayed pending disposal of the application to set aside the *ex parte* leave. On 23.3.2016, the High Court (a different judge) set aside the *ex parte* leave. On 25.8.2016, the action was struck out.

11. In paragraphs 8 and 9 of its judgment, the Court of Appeal noted that (a) the order dated 9.7.1991 stated that "no action, application shall be commenced, continued or maintained against [Naslei] and or the court appointed Receivers and Managers thereof without first leave of this court being obtained", (b) the judge who set aside the *ex parte* leave recorded in the notes of proceedings that the order of 9.7.1991 was not brought to the attention of the judge who granted the *ex parte* leave, and (c) the judge who set aside the *ex parte* leave recorded in the notes of

proceedings that Naslei should have been served with notice of the application for leave.

12. In paragraphs 10 and 11 of its judgment, the Court of Appeal related that the Applicant argued that (a) the High Court was *functus officio*, as the order granting *ex parte* leave had been sealed and perfected, (b) the High Court had no power or jurisdiction to set aside the order of another High Court judge of concurrent jurisdiction, and (c) the defendants should have appealed against the *ex parte* leave or instituted separate proceedings to impeach the *ex parte* leave.

13. To those arguments, the Court of Appeal held that (a) any *ex parte* order is liable to be set aside, (b) the High Court was not *functus officio*, (c) it is not mandatory to appeal or file separate proceedings to impeach an *ex parte* order (the Court of Appeal referred to Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt [2000] 3 MLJ 201), (d) an order obtained in breach of the rules of natural justice can be set aside in the same proceedings, (e) the Applicant was in breach of the order dated 9.7.1991, (f) no action can be brought against a receiver without the leave of court (the Court of Appeal referred to Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors [1995] 1 MLJ 1), and (g) the setting aside of an *ex parte* order is an exception to the general rule that an order perfected and sealed cannot be set aside in the same action; errors can be corrected to reflect the intention

of the court, (h) it did not matter that the *ex parte* leave was set aside by a different judge, as either judge had the jurisdiction to set aside an *ex parte* order, (i) since *ex parte* leave was granted in the absence of parties who ought to have been heard, it became one of the exceptions to the general rule as to *functus officio*, (j) Badiaddin Mohd Mahidin & anor v Arab Malaysian Finance Bhd [1998] 2 CLJ 75, which was cited by the Applicant, was of no assistance to the Applicant, and (k) whatever assets of Tamparuli belonged to Tamparuli and not to shareholders; the Applicant had no cause of action to enforce the agreement entered by Tamparuli.

14. Evidently, there was leave of court, albeit made *ex parte*, to commence the action against Naslei and receiver, and Tamparuli and receiver. But when the *ex parte* leave was set aside, that was no longer the requisite leave of court to proceed with the action against Naslei and receiver, and Tamparuli and receiver. The action was commenced with the leave of court. But when the *ex parte* leave was set aside, the action could no longer be proceeded with against Naslei and receiver, and Tamparuli and receiver. Both courts below ruled in favour of the Respondents on the ground that the Applicant lacked the *locus standi* to challenge the decision of the DGI, and that there was no leave of court to commence the action against Naslei and receiver, and Tamparuli and receiver.

15. We were however of the view that when the *ex parte* leave was set aside, the action could no longer be proceeded with against Naslei and receiver and Tamparuli and receiver. The action could be struck out on that ground alone without the necessity to consider the *locus standi* of the Applicant. Section 226(3) of the Companies Act 1965 (repealed by Companies Act 2016) provided that "when a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced except with the leave of court". That equally applied to an action or proceeding against the receiver of a company under liquidation. In *Tai Kwong Goldsmiths*, the former Supreme Court per V.C. George J, as he then was, delivering the judgment of the court, held that "no action could be brought against a receiver, in his capacity as such, ... without the leave of the court and if such an action or proceeding is brought without leave, its further prosecution will be restrained".

16. When the *ex parte* leave was set aside, it produced the result that there was no leave of court to proceed with the action, such that the Applicant could only proceed with the action, if leave were applied afresh and granted, or if the order setting aside the *ex parte* leave were set aside. The Applicant opted to attack the order setting aside the *ex parte* leave. Leave question 1 proposed that it was "the time-honoured and established principle of law that a High Court judge has no power or jurisdiction to set aside an order of another High Court judge regularly granted in the exercise

of concurrent jurisdiction as enunciated in the classic Federal Court case of Hock Hua Bank Bhd v Sahari bin Mat [1981] 1 MLJ 143 be overruled". But with respect, the principle that a judge has no power or jurisdiction to set aside an order of another judge of concurrent jurisdiction does not apply to *ex parte* orders. Any "order made *ex parte* may be set aside (see O. 32 r. 6 of the Rules of Court 2012) by the same judge or court which granted the *ex parte* order, or by a different judge of the same court which granted the *ex parte* order. For that clear position in law, we need only to refer to the recent decision of Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ 457, where it was held by the Federal Court per Suriyadi FCJ, delivering the judgment of the majority, that "jurisdictionally, a court under O 32 r 6 of the RHC or under O 92 of the RHC, may set aside any *ex parte* order". Under O 32 r 6 of the Rules of Court 2012, any judge of the same court has jurisdiction to set aside any *ex parte* order. "This is necessary in the interest of justice as the party who was not heard may wish to object to the order" (Singapore Court Practice 2017 by Jeffrey Pinsler Volume 1 at paragraph 32/3/4).

17. An order made *ex parte* may be regular, in that it was made within jurisdiction. But that does not mean that an *ex parte* order could not be set aside, be it by the same or different judge of the court which granted the *ex parte* order. The proposed leave questions, even if allowed to be argued in full, could not possibly

succeed. It was for the aforesaid reasons, that we dismissed the leave application with costs.

Dated this 28th day of May 2018.

Tan Sri Jeffrey Tan
Hakim
Mahkamah Persekutuan
Malaysia

C O U N S E L

For the Appellant	:	Tai Choi Yu Solicitors: Tetuan C. L. Lim & Co.
For the 1st Respondent: in 08-297-06/2017, 08-301-06/2017 & for 1st & 2nd Respondents in 08-300-06/2017		S. Vanugopal Solicitors: Tetuan S. Vanugopal & Partners
For the 3rd & 4th Respondents in 08-300-06/2017	:	Monica Lin Sua Jabatan Insolvensi Malaysia
For the 5th Respondent: in 08-300-06/2017		Wong Heu Fun Solicitors: Tetuan Leong & Wong

SALINAN DIAKUI SAH

ZALEHA KASSIM
Setiausaha kepada
YA Tan Sri Jeffrey Tan Kok Wha
Hakim Mahkamah Persekutuan
Malaysia