IN THE HIGH COURT OF MALAYA AT KOTA BHARU

IN THE STATE OF KELANTAN DARUL NAIM, MALAYSIA

CIVIL SUIT NO: DA-22NCVC-64-12/2021

BETWEEN

WAN MOHAMAD RUZMAN BIN WAN MAT …PLAINTIF

(NO. K/P: 640106-03-6067)

AND

1. **TENAGA NASIONAL BERHAD**
   [NO. PENDAFTARAN: 199001009294 (200866-)]

2. **ZAINAL ZAM ZAM BIN ISHAK**
   (K/P NO: 710806-03-5939)

3. **MOHD FARHAN BIN FAKRI**
   (K/P NO: 890430-03-5535)

4. **LAKSANA CERGAS SDN BHD**
   [NO. PENDAFTARAN: 200801031813 (833146-D)]

…DEFENDANTS

GROUNDS OF JUDGEMENT

(Enclosure 14 and 16 – Striking out Writ Summons and Statement of Claim under O18 r19 Rules of Court 2012)

Introduction

[1] There are two applications filed under O18 r19 (ROC 2012) to strike out the Writ of Summons (WOS) and Statement of Claim (SOC). The first application is at Enclosure (E) 14 filed by the 1st and 2nd Defendant (1st and 2nd Def) while the second application is at Enclosure 16 by the 3rd and 4th Defendant (3rd and 4th Def).

[2] This court will evaluate and adjudicate both applications jointly due to the common issues relied by all parties.

Backgrounds Fact

[3] In essence the basis of the Plaintiff's claims stems from his dismissal from service on 24/4/2019 on ground of misconduct by the 1st Def. The Plaintiff (Plf) was employed as "Penyelenggaraan Stor Tingkatan Kanan", Level 'A' (Grade PP10) at the 1st Defendant's Bachok Local Store and at the material time, the Plf was responsible for providing support to the warehouse operations through effective stock handling while ensuring compliance with regulatory

requirements. The Plf's terms and conditions of service were governed by the 9th Collective Agreement between the 1st Def and Kesatuan Pegawai Perkhidmatan Sokongan TNB ("Union") (2017-2019).

[4] On 27/12/2017, the 1st Def discovered that between 16/7/2017 and 27/12/2017, 15 drum cables under the Plf's control and supervision were missing from the storage of the 1st Defendant's Bachok Local Store ("the loss of the 15 drum cables"). This led the 2nd Def to lodge a police report on 27/12/2017.

[5] The Plaintiff was then arrested on 2/1/2018 and remanded by police for investigations under Section 379 of the Penal Code. He was later released on police bail on 11/1/2018 pending decisions by the Deputy Public Prosecutor.

[6] In the meantime, on 5/1/2018, the 1st Def discovered that 8 transformers were kept in the storage of the 1st Defendant's Bachok Local Store had been tampered resulting the disappearance of cooper winding and copper busbars ("the components") form the said 8 transformers. This led the 2nd Def to lodge second police report. On 6/1/2018, the 2nd Def lodged an additional police report to confirm a total of 20 transformers kept in the storage of the 1st Defendant's Bachok Local Store were tampered resulting in the disappearance of the components form the said 20 transformers.

[7] On 24/1/2018, the Plf was suspended from service for 14 days with half pay, and later on full pay in order to facilitate the 1st Def's investigations into the loss of 15 drums of cables and the loss of the components of 20 scrap transformers.

[8] Following a report from the Senior General Manager, Security Services Department of the 1st Def ("Pengurus Besar Kanan, Jabatan Perkhidmatan Keselamatan"), the Integrity Department of the 1st Def had commenced investigations into the said report. In the course of investigations written statements were recorded from relevant employees of the 1st Def including the Plf, and the 2nd Def, as well as from third parties such as the 3rd Def, who was the Managing Director of the 4th Def, a contractor appointed by the 1st Def to collect scrap materials from the 1st Defendant's Bachok Local Store.

[9] In his written statement, the Plf confirmed, that while under remand by police, he had confessed to commit the act of taking the components from the said 20 transformers at the 1st Defendant's Bachok Local Store. While 3rd Def confirmed in his statement amongst others, the following facts:

(a) In October 2017, the Plf informed him that the 1st Def wished to sell the components from the said 20 transformers kept at the 1st Defendant's Bachok Local Store;

(b) In October 2017, the Plf allowed him on 3 occasions to take and carry out the components from the said 20 transformers from the 1st Defendant's Bachok Local Store; and

(c) In October 2017, the Plf requested and received from him cash payments for the purchase of the components from the said 20 transformers from the 1st Defendant's Bachok Local Store.

[10] On 15/2/2018, the Integrity Department recommended a disciplinary action be taken against the Plf based on the findings of the said investigations. Consequently, a "Surat Pertuduhan" dated 27/11/2018 was issued and the 1st Def required the Plf to attend a Domestic Inquiry proceeding to answer 6 charges of misconduct specified therein.

[11] The Domestic Inquiry against the Plaintiff was carried out on 18/12/2018, 15/1/2018, 16/1/2019, 17/1/2019, 19/3/2019, 23/4/2019 and 24/4/2019, respectively. Since the Plf pleaded "Not Guilty" to the charges of misconduct preferred against him vide the "Surat Pertuduhan", the Prosecution team produced 5 witnesses including the 2nd and 3rd Def as witnesses to support the charges of misconduct preferred against the Plf. The Plf was accompanied and represented by 2 Union representatives in accordance with Article 94 of the 9th Collective Agreement.

[12] At the end of the Domestic Inquiry, on 24/4/2019 the Disciplinary Committee decided:

(a) that the charges of misconduct preferred against the Plaintiff in the "Surat Pertuduhan" dated 27/11/2018 specifically, Charges 1, 2, 3, 4 and 5 had been proven; and

(b) unanimously decided to impose the punishment of dismissal from service on the Plaintiff effective from 24/4/2019.

[13] By a letter dated 24/4/2019, the 1st Def informed the Plf of the decision of the Disciplinary Committee. By the same letter, the Plf was informed of his right to appeal against the decision of the Disciplinary Committee to the Chairman of the Disciplinary Appeal Committee within 15 working days from the date of receipt of the said letter.

[14] However, the Plf failed to file any appeal against the decision of the Disciplinary Committee to the Chairman of the Disciplinary Appeal Committee and thereby, failed to exhaust the domestic remedy available to him. However, on 13/5/2019, the Plf filed representations for reinstatement under Section 20(1) of the Industrial Relations Act 1967 (Act 177), that he was dismissed form service, without just cause by the 1st Def.

[15] By a letter dated 26/9/2019, the Industrial Relations Department informed the Plaintiff and the 1st Def that the Honourable Minister of Human Resources had decided under Section 20(3) of the Act 177 that the said representations were not fit to be referred to the Industrial Court.

[16] There was no action taken afterwards until 28/12/2021 when the Plf filed the claim herein to challenge the 1st Def's decision to dismiss him from service. The Plf's claim was on grounds of procedural impropriety and tort of conspiracy and further prayed for damages and consequential relief in regards to all salaries and benefits in arrears.

Law on O18 r 19 ROC 2012

[17] The principles applicable to the exercise of the Court's discretionary power under O. 18 r. 19(1), RHC have been lucidly expressed by the Supreme Court in **Bandar Builders Sdn. Bhd. and Ors v. United Malayan Banking Corporation Bhd. [1993] 4 CLJ 7; [1993] 3 MLJ 36** where Justice Mohd Dzaiddin, SCJ (as he then was) pronounced as follows:

> "The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC 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 MR in Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd 7, 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' (see AG of Duchy of Lancaster v. L & NW Rly Co 8). 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..."

[18] It is trite law that a claim should not be struck out save in exceptional circumstances where, for instance, it is without any sustainable basis or has no prospect at all of success. The strength or weakness of the claim is not a relevant factor. In the Court of Appeal case of **See Thong and Anor v. Saw Beng Chong [2014] 1 LNS 1099; [2013] 3 MLJ 235**, Justice Ramly Ali, JCA (as he then was) concluded that:

"The statement of claim is not hopeless, baseless or without any foundation in law. The statement of claim may not be perfect and 'not-so strong' in supporting the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out."

Further that,

"[S]triking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure

> is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see Federal Court decision in New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1; [1985] 1 MLJ 226)."

[19] In **Hap Seng Consolidated Bhd. v. Darinsok Pangiran Apan & Ors. and Anor Appeal [2014] 1 CLJ 333** the Court of Appeal held:

> "The court will only strike out a writ and statement of claim when it is plainly obvious that the action cannot be sustained and was liable to be struck out pursuant to O. 18 r. 19 of the Rules of the High Court 1980. Herein, this was not a proper and fit case for the plaintiffs' writ and statement of claim to be struck out...."

Analysis and findings of this court

Whether there is remedy open for the Plaintiff under Industrial Relations Act 1967 (Act 177)

[20] It is undisputed that the Plf was subjected to the Domestic Inquiry (DI) by the 1st Def which was held before a Disciplinary Committee Panel (DCP) and the Plf was accompanied and represented by 2 Union representatives. The Plf was issued with “Surat Pertuduhan”

dated 27/1/2018 requiring him to attend the DI and to answer all 6 charges of misconduct. The DI was carried out on 18/12/2018, 19/12/2018, 15/1/2019, 16/1/2019, 17/1/2019, 19/3/2019, 23/4/2019 and 24/4/2019 respectively. On 24/4/2019, the Disciplinary Committee Panel decided that all charges of misconduct preferred against the Plf had been proved and the Plf be imposed the punishment of dismissal from service effectively on 24/4/2019.

[21] The Plf had then sought recourse for reinstatement under section 20(1) of Act 177 that he was dismissed from service without just cause. Nevertheless, by a letter dated 26/9/2019, the Industrial Relations Department informed the Plf and the 1st Def that the Minister of Human Resources had decided under section 20(3) of Act 177 that the representations were not fit to be referred to the Industrial Court.

[22] In this court considered view, when the Plf chose to seek remedy for his dismissal by recourse to section 20(3) of Act 177 and was later refused by the Minister, the avenue open for the Plf was to commence judicial review against the decision of the Minister under O53 ROC 2012.

[23] In **Idi Nabel Khairuddin v PT Lion [2016] 1 LNS 160**, the same issue was raised before the High Court in Shah Alam. It was held by Justice Gunalan Muniandy J as follows;

> "P chose to seek remedy for wrongful dismissal by recourse to S. 20, IRA by making representations to the Director General of the IRD for reference of the dispute with the Defendants to the Industrial Court. Upon refusal by the Minister to make the reference pursuant S. 20(3), IRA, the avenue open to P was to commence judicial review proceedings against the decision of the Minister under O. 53, Rules of Court, 2012 which P failed to do. Having elected to seek relief under S. 20, IRA P cannot now be permitted to institute a civil action against the Defendants for damages when his representations to the Director-General of the IRD did not result in the representations being referred to the Industrial Court for an award. To permit P to do so would amount to allowing an action that is scandalous, frivolous and an abuse of the Court process to proceed. This is all the more so as P failed to challenge the decision of the Minister as alluded to despite having the right to do so by invoking the procedure laid down in O. 53, ROC. To allow a civil action for compensation under this scenario would be to condone multiplicity of action."

[24] Where a statute creates a right and gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others (see; **Manggai v Government of Sarawak & anor [1970] 2 MLJ 41**). Allowing the Plf to take recourse by way of WS and SOC would amount allowing an action which scandalous, frivolous and an abuse of the court process.

[25] From the facts of this case, it is crystal clear that Plf has been sitting on Minister's decision since 26/9/2019 without any action. Obviously, the Plf is at present time barred from taking any action under O53 ROC. As such it can be inferred that the Plf opted to file the WS and SOC now in order to avoid the legal impediments in regards to time of filing the Judicial Review as required under O53 ROC 2012.

[26] Despite the failure of Plf to initiate the judicial review, this court also found that the Plf had failed to file a complaint of non-compliance under section 56(2) Act 177 notwithstanding the Plf's claim that there was a breach of the principles of natural justice.

[27] In **Annamalai Rengasamy & anor v Pathy Suppiah & ors [2009] 1 LNS 1806,** the issue before the court is whether section 24 of the Sports Development Act 1997 (Act 576) was broad enough to have allowed a referral to be made to the Minister to resolve dispute. Justice Mohamad Ariff Md Yusof J (as he then was) held;

> "From the above statutory provisions, it was clear that the Minister could have had the dispute referred to him under section 24 (3).
>
> The Plaintiffs could have referred the matter to the Sports Commissioner who could then have referred the matter to the Minister.

> Declaratory relief should not be granted where there existed a suitable alternative procedure."

[28] In their court considered view, by virtue of this, the WS and SOC filed by the Plf against all Defendants became wholly unnecessary and irrelevant. As such it is "scandalous" (see; **Boey Oi Leng t/a Indah Reka Construction & Trading) v Tans Resources Corp Sdn Bhd [2002] 1 CLJ 405**, **Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & Teh Hong Jet [2006] 7 CLJ 541** and **Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam [2010] 9 CLJ 825**).

[29] Hence it warrants the WS and SOC to be struck out.

Whether there exists cause of action against 2nd Def , 3rd Def and 4th Def

[30] The crux of the Plf's claim was the alleged wrongful dismissal on 24/4/2019 by the 1st Def. It was contended that the Plf was dismissed without any opportunity to defend himself and as such it was in breach of the principles of natural justice. It was also argued that the criminal investigation against the Plf is still ongoing and as such, the Plf contended that the verdict against him was made with prejudice.

[31] Apart from wrongful dismissal, the Plf was also claiming for tort of conspiracy against all Defendants. It is the Plf's case that all the Defendants were allegedly conspiring against the Plf for his dismissal.

[32] The meaning of tort of conspiracy was explained by the COA in **Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and Another Appeal [2016] 3 CLJ 676; [2016] 3 MLJ 797** as follows:

> ""[11] There are two kinds of conspiracy, the elements of which are distinct:
>
> (a) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and
>
> (b) lawful means conspiracy: a combination to perform acts which, although not themselves per se unlawful, are done withthe sole predominant purpose of injuring the claimant — it is in the fact of the conspiracy that the unlawfulness resides (see Milicent Rosalind Danker and Anor v. Malaysia-Europe Forum Bhd & Ors [2012] 2 CLJ 1076 (HC); SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389; [2011] 4 MLJ 393 (CA)).

[12] The distinction between the two was succinctly elucidated by Lord Bridge in Lonrho plc v. Fayed [1991] 3 All ER 303 as follows:

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure theplaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[13] The elements required to bring an action for unlawful means conspiracy are as follows:

> A combination or agreement between two or more individuals It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. The court looks at the overt acts of the conspiracy and infers from those acts that there was agreement to further the common object of the combination. It is sufficient that two or more persons combine with the necessary intention or that they deliberately co-operate, albeit tacitly, to achieve a commonend (R v. Siracusa [1990] Cr App R 340). Neither is it necessary that all those involved should

have joined the conspiracy at the same time; but all those said to be parties to the conspiracy should be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design (R v. Simmonds [1969] 1 QB 691).

It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that they join the conspiracy; they are not liable retrospectively for the damage that has been suffered prior to their joining (Keefe v. Walsh [1903] 2 IR 681).

[14] In these instant appeals, we are concerned with lawful means conspiracy. The element of lawful means conspiracy are the same as for unlawful means conspiracy detailed above, with the exception of the intention to injure requirement."

[33] An allegation of conspiracy is equivalent to that of fraud as it is a serious allegation and should not be lightly made. In **Renault SA v. Inokom Corp Sdn. Bhd. [2010] 5 CLJ 32; [2010] 5 MLJ 394**, the Court of Appeal held that:

"[48] Just as fraud must be pleaded with great particularity, so must the constituent ingredients of the alleged conspiracy by TC. Euro be pleaded."

[34] Meanwhile in **Repco (Malaysia) Sdn. Bhd. v. Tan Toh Fatt & Others [2012] 1 LNS 116; [2013] 7 MLJ 408**, it was held:

"[64]....It is settled law that the assertion of conspiracy requires the strictest pleading and must be supported by full particulars. It is also settled law that parties are bound by their pleadings and shall not adduce any evidence for issues which had not been pleaded. It is trite that unless particulars of conspiracy are specifically pleaded, no evidence can be led on them (YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 4 CLJ 300; [1997] 2 MLJ 621)."

[35] In **Renault SA (supra)** the Court of Appeal allowed the appellants' appeal to strike out the claim and held 4 elements must be satisfied in a claim for conspiracy at the interlocutory stage as follow:

"[32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:

(a) an agreement between two or more persons (that is an agreement between Tan Chong and others);

(b) an agreement for the purpose of injuring Inokom and Quasar;

(c) the acts done in execution of that agreement resulted in damage to Inokom and Quasar;

(d) damage is an essential element and where damage is not pleaded the statement of claim may be struck out."

[36] Applying these basic principles to the SOC filed in this case, this Court found that the Plf, though at great length explained what happened that leads to the dismissal proceeding against him is however lacking of material facts that are needed in claiming tort of conspiracy. What the Plf did was merely explaining the facts.

[37] This court found that the SOC did not plead any existence of an agreement between two or more persons (between 1st Def, 2nd Def, 3rd Def and 4th Def) for the purpose of injuring the Plf and any act done in execution of that agreement which resulted in damage to the Plf.

[38] It is trite that the matter relating to conspiracy cannot be inferred from statements which are vague ang general in nature. When the alleged conspiracy is against more than two Defendants like the present case, the Plf must specify, with particularity each of the Def's conduct.

[39] When the SOC was lacking of such particularisation, the SOC can be considered as bad pleading. In **Ho Hup Construction Company Bhd v Zem Courts Sdn Bhd [2018] 1 LNS 340**, it was held;

> "Pleadings sans particularisation is bad pleading because matters such as fraud and conspiracy cannot be expected to be inferred from statements which are vague and general in nature, more so as the concept of fraud itself is ever changing. Similarly, when alleging fraud and conspiracy against more than one defendant, like presently, the plaintiff must specify, with particularity, each of the defendant's offending conduct. The defendants cannot be grouped together without identifying which defendant has committed which wrong."

[40] Given the absence of particularisation of the act of conspiracy against the Defendants, the SOC should be held to be defective and plainly unsustainable as it fails to disclose a reasonable cause of action in the tort of conspiracy against all the Defendants. As such the WS and SOC warrant to be struck out.

Conclusion

[41] In view of the foregoing reasons, it is in this court's judgment that the Defendants have successfully established that the claim filed by the Plf against them to be obviously unsustainable under any one of the grounds stipulated under Order 18 r. 19 (1) of ROC 2012. The writ action by the Plf in other words fails to disclose a reasonable

cause of action against the Defendants and is frivolous and vexations and otherwise an abuse of process.

[42] Accordingly, E14 and E16 are hereby allowed with cost at RM2,000.00 each and subject to allocator fee. Hence the WS and SOC in E1 and E2 are hereby struck out.

Dated: 11th. October, 2022

(DATUK MOHAMAD ABAZAFREE BIN MOHD ABBAS)

Judicial Commissioner

High Court (2) Malaya

Kota Bharu, Kelantan.

Counsel:

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Date of Hearing : 27th. June, 2022

Date of Decision : 30th. August, 2022

Laws Referred:

- *Rules of Court 2012*
- *Industrial Relations Act 1967*
- *Sports Development Act 1997*

Cases Referred:

- *Bandar Builders Sdn. Bhd. and Ors v. United Malayan Banking Corporation Bhd. [1993] 4 CLJ 7; [1993] 3 MLJ 36*
- *See Thong and Anor v. Saw Beng Chong [2014] 1 LNS 1099; [2013] 3 MLJ 235*
- *Hap Seng Consolidated Bhd. v. Darinsok Pangiran Apan & Ors. and Anor Appeal [2014] 1 CLJ 333*
- *Idi Nabel Khairuddin v PT Lion [2016] 1 LNS 160*
- *Manggai v Government of Sarawak & anor [1970] 2 MLJ 41*
- *Annamalai Rengasamy & anor v Pathy Suppiah & ors [2009] 1 LNS 1806*
- *Boey Oi Leng t/a Indah Reka Construction & Trading) v Tans Resources Corp Sdn Bhd [2002] 1 CLJ 405*
- *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & Teh Hong Jet [2006] 7 CLJ 541*
- *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam [2010] 9 CLJ 825*
- *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and Another Appeal [2016] 3 CLJ 676; [2016] 3 MLJ 797*

- *Renault SA v. Inokom Corp Sdn. Bhd. [2010] 5 CLJ 32; [2010] 5 MLJ 394*
- *Repco (Malaysia) Sdn. Bhd. v. Tan Toh Fatt & Others [2012] 1 LNS 116; [2013] 7 MLJ 408*
- *Ho Hup Construction Company Bhd v Zem Courts Sdn Bhd [2018] 1 LNS 340*