

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
GUAMAN SIVIL NO. 22NCvC-235-02/2012

ANTARA

YAP KIT WAH & 30 ORS

... PLAINTIF-PLAINTIF

DAN

YAP KIM CHOON @ YAP SIW SIN & 2 ORS

... DEFENDAN-DEFENDAN

DI DALAM KAMAR

DI HADAPAN Y.A. DATO' HUE SIEW KHENG

HAKIM

(Enclosure 103)

1. On 30.6.2014, this court had granted the 23rd plaintiff's (P23) application (Encl.103) for leave to withdraw his claim against the defendants pursuant to O.21 r.3 of the ROC 2012. In allowing the application, the 2 following orders were made:
 - i) P23's claim against the defendants is struck out with no liberty to file afresh; and

- ii) Costs of RM3,000.00 to each defendant respectively to be paid within 30 days of the service of this order (hereinafter referred to as "the Order for Costs").
2. In view of the Order for Costs as set out in paragraph 1(ii) above, learned counsel for the defendants seek leave for the penal notice provided for in Form 83 pursuant to O.45 r.7(4) of the ROC 2012 to be endorsed on the sealed order.

Defendants' submission

3. Learned counsel has submitted, *inter alia*, that Order 45 r.6(2) and Order 45 r.7(4) allows for a penal endorsement in the order which in part mandates an act to be done, i.e. the payment of costs within 30 days.
4. The following cases were cited in support:
 - i) *Tan Bee Ang v Siew Chee Chong* (2011) 1 LNS 121;
 - ii) *Muhammad Said Amin v Haszeri Hussin* (2014) 3 CLJ 536;
 - iii) *Gribbles Pathology (M) Sdn Bhd v Adventist Hospital & Clinic Services (M) Bhd (No. 2)* (2003) 1 CLJ 317;
 - iv) *Electrical Angels MSC Sdn Bhd v Proton Edar Sdn Bhd* (2013) 1 LNS 1101; and
 - v) *Lee Lay Ling v Goh Kim Nam & Anor* (2013) 1 LNS 1000.

Plaintiff's submission

5. Learned counsel for P23 submitted that the said Order for Costs is not a monetary judgment and as such a penal notice should not be endorsed on the sealed order. No authorities were cited in support.

Court's Ruling

6. Having given due consideration to the issue raised, I am of the view that a penal endorsement should be allowed in respect of the Order for Costs. My reasons are as follows.
7. It is to be noted that a number of interlocutory applications were made in this suit which involves 31 plaintiffs and 3 defendants. Orders for costs were made in respect of these applications. The defendants complain that these orders for costs have still to be complied with by some of the plaintiffs: accordingly when Enclosure 103 was heard and the order for costs given, learned counsel for the defendants applied for a further order that costs be paid within 30 days from the date of service of the sealed order. In view of the non-compliance of the earlier orders for costs, this was allowed.
8. The cases cited by learned counsel for the defendants are with regard to penal endorsements in respect of judgments or orders obtained in respect of the suit proper as opposed to an order for costs: see *Lee Lay Ling; Tan Bee Ang; Gribbles Pathology (supra)*.

9. However, it is to be noted that the relevant sub-rules cited by the defendants refer to "any judgment or order". This can be clearly seen from the following:

i) O.42 r.6 provides –

(1) Subject to paragraph (2), a judgment or *order which requires a person to do an act* shall specify the time after service of the judgment or order, or some other time, within which the act is to be done.

(2) Where the act which any person is required by any judgment or *order to do is to pay money to some other person*, give possession of any immovable property or deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order in accordance with paragraph (1), but the foregoing provision shall not affected the power of the Court to specify such a time and to adjudge or order accordingly.

ii) O.45 r.6 provides –

(2) Where, notwithstanding Order 42, rule 6(1), or by reason of Order 42, rule 6(2), a judgment or *order requiring a person to do an act* does not specify a time within which the act is to be done the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.

10. By O.42 r.6(2) the Court has the power to specify a time for the payment of money. This is reiterated in O.45 r.6(2) which goes further to empower the court to make such an order specifying the

time within which the payment must be made subsequent to the order requiring payment to be made, if it was not earlier specified.

11. It is clear that the Order for Costs granted in this case falls squarely within the provisions of O.42 r.6(2) read together with O.45 r.6(2) as it is an order requiring P23 to pay to each of the defendants the sum of RM3,000.00 as costs within 30 days.

The Penal Endorsement

12. O.45 r.7(4) is as follows:

(4) There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served –

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time to specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it.

(emphasis added)

13. The notice in Form 83 is the penal endorsement, of which the relevant endorsement is –

No. 83

NOTICE ON CERTAIN JUDGEMENTS (O.45,r.7)

The endorsement should be in the following words or words to the following effect:


- (a) In the case of a judgment or order requiring a person or body corporate to do an act within a specified time –
"If you, the within-named.....(or.....) neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same."

14. It is the contention of the defendants that in the absence of a penal endorsement, this will be a real impediment to committal proceedings should the defendants seek to enforce the order for costs. The authorities cited including *Tan Bee Ang* and *Gribbles Pathology (supra)* bear testimony to the mandatory requirements of a penal endorsement before committal proceedings can be initiated.

15. In *Gribbles* the court held –

Clearly, the mandatory requirement of the need to indorse the punitive sanction in the order has to be complied with. The reason is obvious. If a party is required to do an act, he has to exert energy and time and effort to comply with the order. The reality of punitive sanctions being imposed will no doubt jolt the recalcitrant to immediate action and it is with this in mind that the indorsement of punitive sanction becomes a mandatory requirement.

16. In light of the mandatory requirement for a penal endorsement on an order requiring an act to be done within a specified time expressly provided for by the opening words "There **shall** be endorsed" of O.45 17(4) and where committal proceedings are contemplated (see also O.45 r.5) to ensure due compliance of the Order for Costs and the rules mandate such an endorsement, I am of the view that the penal endorsement applied for should be allowed in respect of an order for payment of costs within a specified time.


(DATO' HUE SIEW KHENG)
Judge
High Court Malaya
Kuala Lumpur

Date: 13 October 2014


PEGUAMCARA / PEGUAMBELA

En. Cheng Poh Heng bersama En. Tan Kinv Tat (Tetuan Tan Kim Soon & Co.) – bagi pihak plaintif-plaintif.

En. Yae Khoon Chin (Tetuan Yae, Seng Wai & Partners) – bagi pihak defendan pertama dan kedua.

En. Alex Chang bersama Cik Lim Soo Zee (Tetuan Alex Chang & Co.) – bagi pihak defendan ketiga.

SALINAN DIAKUI SAH


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