(DALAM MAHKAMAH RAYUAN DI PUTRAJAYA
BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: P-02-1369-2006

Dalam Perkara Mengenai Chen Qing Hung dan Chen Qing Jung (kedua-duanya budak)

Dan

Dalam Perkara Mengenai Seksyen 10 Akta Penjagaan Budak 1961

Dan

Dalam Perkara Mengenai Aturan 84 Kaedah-Kaedah Mahkamah Tinggi, 1980.

Antara

Chen Shian Liang ... Perayu

Dan

Chan Siew Choo … Responden

(Dalam Perkara Mengenai Saman Pemula No. S8-24-45-2006 dalam Mahkamah Tinggi Malaya di Kuala Lumpur, Dalam Negeri Wilayah Persekutuan, Malaysia dan kini dipindahkan ke Mahkamah Tinggi (3) di Pulau Pinang dan didaftarkan sebagai Saman Pemula No.24-1789-2006 menurut Perintah yang diberikan pada 11 haribulan Oktober, 2006)

Dalam Perkara Mengenai Chen Qing Hung dan Chen Qing Jung (kedua-duanya budak)

Dan

Dalam Perkara Mengenai Seksyen 10 Akta Penjagaan Budak 1961

Dan

Dalam Perkara Mengenai Aturan 84 Kaedah-Kaedah Mahkamah Tinggi, 1980.

Antara

Chan Siew Choo	**...**	**Plaintif**
	Dan	
Chen Shian Liang	**…**	**Defendan**

Koram:

Suriyadi Halim Omar, HMR
Raus Sharif, HMR
Zainun Ali, HMR

JUDGMENT OF THE COURT

In this appeal, the Appellant a medical specialist at a private hospital failed in his application at the High court to strike out the Respondent's claim and set aside service of the originating summons and the Respondent's affidavit in support.

The Respondent is an accounts clerk who claimed she knew the Appellant since 1983. They were not married but lived together since 2001.

The Respondent had two sons with the Appellant, where the first son was born on 9.7.2003 and the second on 16.2.2005. Both sons carry the Appellant's surname in their birth certificate. (See Exhibit CSC-1 of Enclosure 2).

The Respondent's Case

The Respondent claimed that the Appellant bought a house in their joint names in 2004, though the Appellant took out a bank loan for the purchase of the house in his own name. The property was charged to the bank (Exhibit CSC-2 of Enclosure 2).

The Respondent further contended that the Appellant had purchased insurance policies for their two sons at a fixed annual premium of RM5,000. The Appellant had also paid RM3,750 to a company called StemLife for 'cord blood banking' for the benefit of his sons. The Appellant was said to have provided for the Respondent and spends an average of RM6,000 per month on their elder son.

However all these came to an end, when on 6.3.2005 the Appellant ended their relationship. Since then, the Appellant had refused to provide for the Respondent and their children. He had also refused to service the housing loan and terminated the children's insurance policies.

The Respondent thus filed an originating summons and sought an order that she be given guardianship, custody, care and control of the two children under S.10 of the Guardianship of Infants Act 1961 (the Act). The Respondent had also applied for an order that the Appellant –

(i) undergo a DNA test to determine the sons' paternity;

(ii) maintain the sons' at RM12,000 per month until they attain the age of 18 years;

(iii) bear the costs of the sons higher education whether in Malaysia or abroad;

(iv) activate the sons' educational and medical insurance policies including paying the fees for the 'cord blood banking' with StemLife;

(v) pay all hospital treatment costs for the sons till they attain the age of 18 years;

(vi) pay the housing loan taken for the house;

(vii) costs and liberty to apply.

On 19.5.2006, the Appellant applied to have the Respondent's petition struck out on the grounds that –

(a) the Respondent, in instituting action on behalf of and for the benefit of the two sons, had not complied with the requirements of the Rules of the High Court 1980. That the Respondent cannot bring an action in her

personal capacity to claim reliefs on behalf of a third party;

(b) the defect in the Respondent's claim is prejudicial to him, is serious and thus incurable.

The issues as raised by the Appellant can be summarised thus –

(i) The Act does not make provision for maintenance of illegitimate children (as his sons are); that this court is not the proper forum to claim relief for illegitimate children;

(ii) thus the Respondent cannot maintain this action in her personal capacity as the action is brought for the benefit of the two children who are not named as parties;

(iii) that the Appellant cannot be compelled to provide a DNA test and the Appellant is not obliged to and cannot be compelled to provide for all the other reliefs claimed by the Respondent.

The question before us is: Do the above facts and law involved, come within an Order 18 rule 19(1) situation?

For convenience, Order 18 rule 19(1) is hereby reproduced –

> "Rule 19. Striking out pleading and indorsements. (Order 18 rule 19).
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended an pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that–
>
> (a) it discloses no reasonable causes of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court;
>
> And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) This rule shall, so far as applicable apply to an originating summons and a petition as if the

summons or petition, as the case may be, were a pleading."

The determining factor in an Order 18 rule 19(1) situation is where the cause of action is *"plainly and obviously unsustainable".* Undoubtedly the power to dismiss an action summarily without permitting a party to proceed to trial is quite harsh. Thus it must be exercised with circumspection. As the Federal Court in **Lee Nyan Choi v Voon Noon [1978] 1 LNS 94** observed:-

"… the power of summary procedure should only be resorted to in plain and obvious cases."

On this issue, Chang Min Tat FCJ (as he then was) commented that:-

"… This rule enforces the rules of pleading. The court has the power (i) in a summary manner, i.e. without trial, to stay or dismiss an action or enter judgment accordingly where the pleading discloses no reasonable cause of action or defence, or is scandalous, frivolous or vexatious or it prejudices embarrasses or delays the fair trial of the action or it is otherwise an abuse of the

> process of the court. The rule applies as well to an originating summons and a petition, as if the originating summons and a petition were a pleading. But the rule also empowers the court to allow amendments of any pleading in addition to the powers under Order 20."

In connection with Order 20 as is referred to above, it was the Appellant's contention that the Respondent cannot maintain this action in her personal capacity since the action was brought for the benefit of her two sons, who incidentally, were not made parties.

However on this issue the Respondent responded by saying that the question with regard to capacity or rather lack of it, can be remedied by the simple expedience of amending the petition to bring in the sons as parties. In fact at the time when the petition was heard in the High Court, the Respondent had already filed such an application.

Order 20 rule 5(4) clearly allows for this. It reads:-

> "(4) An amendment to alter the capacity in which a party sues (whether as Plaintiff or as Defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party

> will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued."

In any case, we find that any defect in the pleading may be remedied by way of an application to amend, consistent with the principle *"that all parties ought to be brought before the court so that their rights and liabilities may be determined in one action instead of in several"* (**Malite Sdn Bhd v Abdul Karim b Gendut & Ors [1981] 2 MLJ 29**).

Thus this issue raised by the Appellant is easily refuted.

The next issue concerns the Respondent's claim for custody care and control of the sons and claims for their maintenance.

On both issues raised by the Respondent above, the Appellant submitted that the Act does not apply to illegitimate children especially to the maintenance of illegitimate children. As for the other reliefs claimed, the Appellant submitted that he cannot be compelled to provide a DNA test and is not obliged to

and cannot be compelled to provide for all the other reliefs as claimed by the Respondent.

The Respondent countered that the Respondent can apply to this court for custody care and control. With regard to maintenance, the Respondent submitted that although maintenance for illegitimate children is provided for under the Married Woman and Children (Maintenance) Act 1950, the Act does not preclude the High Court from making such orders as it seems fit.

The Respondent submitted that regardless of whether the reliefs asked for are allowed or otherwise, these should be determined in a hearing and not at this stage of the proceeding.

In the light of the facts and law above, should the Appellant succeed in his bid to strike out the Respondent's claim?

As the learned judge in **Pet Far Eastern (M) Sdn. Bhd. v Tay Young Huat & Others (1999) 2 CLJ 886** ruled:

"… it would be appropriate to say that a case should only be struck out if it is obviously unsustainable."

In such a situation, the court is precluded from undertaking at this stage, a detailed scrutiny and perusal of the documents of each party to the dispute. To do so would fly in the face of what the provisions of Order rule 19(1) require.

The parties and the court are also prohibited, in an Order 18 rule 19(1) application, from deciding the case on affidavit evidence and confines the court to the four corners of the pleadings only (**Owen Sim Liang Khui v. Piasau Jaya Sdn. Bhd. & Anor [1996] 4 CLJ 716**). In an Order 18 rule 19(1) application, it would be an incomplete exercise were this court, to exclude the observation of the court in **Bandar Builder Sdn Bhd and 2 Others v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7** where it was observed that –

"The principles upon which the court acts in exercising its power under any of the four limbs of Order 28 rule 19(1) Rules of the High Court 1980 are well

settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. 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."

And in the same case, Mohamed Dzaiddin Abdullah SCJ (as he then was) said succinctly –

> "This Court as well as the Court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (**Moore v. Lawson [1915] 31 TLR 418 CA**); (**Wenlock v. Moloney**)(supra)."

In this, without having regard or considering the Appellant's affidavit at Enclosure (6), a perusal of the Respondent's claim shows that there are issues to be tried and decided. In fact the

very nature of the reliefs, asked for, such as claims for custody, care and control and maintenance for the two sons and compelling the Appellant to provide for the other reliefs asked for, when the Appellant vigorously contended that the above reliefs were improperly brought to the court by the Respondent, only reinforced the point that this petition cannot be said to be obviously unsustainable. The proper course will be for the court to hear both parties and make relevant orders thereafter.

We find that the pleadings disclose a reasonable cause of action. Even assuming that the merits therein are tenuous, weak or flimsy, the Respondent should not be deprived of her right to have her case heard in a proper trial. And in that event, should the Respondent be able to prove her claim, she will be entitled to the reliefs prayed for.

The Appellant on the other hand, through his affidavit and submissions made, had not been able to show that the defect in the Respondent's claim is prejudicial to him and how the said defect is so serious that it cannot be cured.

In other words, the Appellant had failed to show that the Respondent's claim is frivolous, vexatious or an abuse of the court process.

By the same token, the summary process should only be resorted to in plain and obvious cases, of which this case is certainly not.

In that connection the learned High Court judge had exercised her discretion correctly and had not misdirected herself. There is therefore no reason for appellate intervention in this appeal.

The appeal is dismissed with costs here and below. The High Court order is affirmed. Deposit to the Respondent to account for taxed costs.

Dated this 5th day of May 2009

(DATUK ZAINUN BINTI ALI)
Judge
Court of Appeal
Malaysia.

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