



Dan  
Dalam perkara mengenai Bahagian V Akta  
Suruhanjaya Sekuriti 1993

Antara

Suruhanjaya Sekuriti

... Plaintiff

Dan

1. Omega Holdings Berhad
  2. Milan Auto (M) Sdn Bhd
  3. Energo Berhad (dahulu dikenali sebagai Premium  
Transaction Sdn Bhd)
  4. Dato' Kenneth Chow @ Wira Tjakrawinata
- ... Defendan-  
Defendan]

### CORAM

Mohd Ghazali Mohd Yusoff, FC  
Abu Samah Nordin, JCA  
Ramly Ali, JCA

### JOINT JUDGMENT OF MOHD GHAZALI MOHD YUSOFF, FC, ABU SAMAH NORDIN and RAMLY ALI, JJCA

1. On 9 June 2004 the Securities Commission (the respondent in this appeal and hereafter referred to as “the SC”), pursuant to section 100 of the Securities Industry Act 1983 (“the Act”) applied by way of originating summons for several orders against three locally incorporated companies named Omega Holdings Berhad, Milan Auto (M) Sdn Bhd and Energo Berhad (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the court below) and one Dato

Kenneth Chow @ Wira Tjakrawinata (the 4<sup>th</sup> defendant in the court below and hereafter referred to as “Kenneth Chow”).

2. S.100 of the Act provides, *inter alia*, that where on an application of the SC, it appears to the High Court that any person has contravened a relevant requirement and that there are steps which could be taken to remedy the contravention or to mitigate the effect of such contravention including making restitution to any other person aggrieved by such contravention, the High Court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make, *inter alia*, the following orders -

(i) an order restraining the person from acquiring, disposing of or otherwise dealing with, assets which the High Court is satisfied such person is reasonably likely to dispose of or otherwise deal with;

(ii) an order declaring the whole or any part of a contract relating to securities, including a contract for the acquisition or disposal of securities, to be void, and if the High Court thinks fit, to have been void *ab initio* or at all times on or after a specified date before the order is made;

(iii) where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under a relevant requirement, an order requiring

such person to do such act or thing;

(iv) an order requiring that person, or any other person who appears to have been knowingly involved in the contravention, to take such steps as the High Court may direct to remedy it or to mitigate its effect including making restitution to any other person aggrieved by such contravention;

(v) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act; and

(vi) any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions of this subsection.

### *The background*

3. The SC filed the originating summons when it discovered that the submission provided by the 3<sup>rd</sup> defendant (Energio Berhad) for the restructuring and transfer of the listing status of the 1<sup>st</sup> defendant (Omega Holdings Berhad) contained some alleged material defects. The 2<sup>nd</sup> defendant (Milan Auto (M) Sdn. Bhd) was the vendor company which injected its assets into the 3<sup>rd</sup> defendant whilst Kenneth Chow, i.e., the 4<sup>th</sup> defendant was the alleged consultant of the 2<sup>nd</sup> defendant. The SC took out the originating summon when it discovered there were discrepancies in the submission provided by the

defendants.

4. At the material time Kenneth Chow was represented by the legal firm of Messrs Krish Maniam & Co (hereafter referred to as “the appellant legal firm”). Kenneth Chow was later adjudicated a bankrupt on 11 February 2005 in the High Court of the Republic of Singapore. Kenneth Chow is not a bankrupt in Malaysia.

5. On 28 April 2005 Abdul Wahab Patail J granted the orders and reliefs prayed for in the originating summons by the SC against the defendants. The Court was then not enlightened as to the fact that Kenneth Chow was made a bankrupt on 11 February 2005.

6. Subsequently by way of summons-in-chambers, Kenneth Chow applied for stay of execution of the various orders granted by the learned judge. In the affidavit in support of that stay application filed by the appellant legal firm, it was disclosed that Kenneth Chow was adjudicated bankrupt by the High Court of the Republic of Singapore on 11 February 2005 *vide* Bankruptcy No. B4438 of 2004/Y. The bankruptcy was put forward by Kenneth Chow as a ground in support of the stay application.

7. The SC successfully opposed Kenneth Chow’s application for stay and by way of an oral application sought a personal

order for costs of that application against the appellant legal firm. After hearing arguments canvassed by the parties, on 9 August 2005 the learned judge ordered that the appellant legal firm do personally pay the costs of the stay application. The appellant legal firm filed an appeal against that order but did not pursue the matter further.

*Summons-in-chambers*

8. Subsequently, on 31 October 2005 the SC applied by way of summons-in-chambers in the same proceedings for an order that the partners of the appellant legal firm personally pay the costs of and payable by Kenneth Chow to the SC in these proceedings commencing 11 February 2005, i.e., the date when Kenneth Chow was adjudicated bankrupt in Singapore and also costs of the application. The application made by the SC were based on the following grounds -

(a) that the appellant legal firm had acted for and represented Kenneth Chow from 11 February 2005 when they lacked authority to represent the latter;

(b) Kenneth Chow was adjudicated a bankrupt by the High Court of the Republic of Singapore on 11 February 2005;

(c) that an order had already been made by the Court on 9 August 2005 for payment of costs personally by the

appellant legal firm to the SC in relation to Kenneth Chow's unsuccessful application for stay; and

(d) that Kenneth Chow is incapable and has no funds personally to pay any costs to the SC as all his personal assets are vested in the Official Assignee, Republic of Singapore.

9. On 15 March 2006 the learned judge granted order in terms of the application, namely, that the partners of the appellant legal firm personally pay the costs of and payable by Kenneth Chow to the SC in these proceedings commencing 11 February 2005, and hence, this appeal by the appellant legal firm.

#### *The appeal*

10. Before us learned counsel for the appellant legal firm contended that the Court is *functus officio*, that is, the Court had on 28 April 2005 in granting the orders prayed for by the SC in the originating summons ordered, *inter alia*, that Kenneth Chow pay costs. Counsel pointed out that there is no order of costs made against the appellant legal firm neither was it raised as an issue. As such, counsel argued that the SC cannot by this belated application attempt to "add to" or "vary" that order of the Court by way of summons-in-chambers and pray for costs to be borne personally by the appellant legal firm. To support his contention, counsel referred to the case of *Abdul Rashid Maidin & Ors v Lian Mong Yee* [2008] 1 CLJ 1 where

this court held as follows -

“It is trite law that after a judge has made a final order which has been perfected, he is *functus officio* and has no jurisdiction to amend or vary his order or re-hear the issues, save under the slip rule or where the order can be said to be a nullity. (See the case of *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2004] 4 CLJ 232). Furthermore we took the view that an action filed by way of an originating summons is an originating process, while a summons-in-chambers is a subsidiary process which draws its life from the originating process. In the context of the present case, when the originating process was fully heard and finally disposed of, the cause of action was extinguished and no further application of a fresh and substantial nature might be made by the plaintiffs by way of a summons-in-chambers save those specifically permitted or directed by the original orders of the court. (See the case of *Hengwell Development Pte Ltd v Thing Chiang Ching* [2003] 3 SLR 84). It was equally clear that the High Court would in any event have no jurisdiction to order the conversion of the OS into a writ action after the OS had been finally disposed of and the appeal against the order of the High Court also finally disposed of by the Court of Appeal.”

11. The case of *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2004] 4 CLJ 232 which was referred to in the judgment of this court in *Abdul Rashid Maidin* relates to an appeal by the plaintiff from the decision of the learned judge varying a consent judgment entered into earlier between the plaintiff and the defendant. Before this court, the plaintiff contended that having dismissed the defendant’s application to set aside the consent judgment, the learned judge should not have proceeded to vary the consent judgment because he had

become *functus officio* and would therefore have no jurisdiction to vary the consent judgment. The appeal was allowed. In delivering the decision of this court, Nik Hashim JCA (as he then was) said (at page 238) -

“In the present case, the consent judgment dated 20 September 1996 had been drawn up and perfected. It was recorded in the presence of the parties in the course of the trial. In the circumstances, the learned judge having rightly dismissed the respondent’s summons in chambers, was *functus officio*, and therefore he could not alter, vary or set aside the judgment as he had no jurisdiction under the application to do so, except under the slip rule as set out in O. 20 r. 11 of the Rules of the High Court 1980 (the RHC). The Federal Court in the case of *Hock Hua Bank Berhad v Sahari bin Murid* [1981] 1 MLJ 143 ruled:

(1): the learned judge was *functus officio*;

(2): the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it had been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing.

It is to be noted that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order (see *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145 FC). Therefore, the appellant and the respondent in this case are bound by 20 September 1996 consent judgment.”

12. Another bone of contention raised by learned counsel for the appellant legal firm was that the firm had no knowledge that

Kenneth Chow was adjudicated bankrupt at the pertinent time. Counsel pointed out that there was no serious dereliction of duty on the part of the appellant legal firm and that this is not a case where they acted wilfully even after they had knowledge of the bankruptcy. In other words, what counsel is contending is that the SC sought personal costs against the appellant legal firm for the period commencing 11 February 2005, viz., the date when Kenneth Chow was adjudicated bankrupt to 28 April 2005, viz., the date the learned judge granted the orders prayed for by the SC in the originating summons when during that period, the appellant legal firm did not have knowledge that Kenneth Chow was adjudicated bankrupt in Singapore.

13. In opposing the appeal, learned counsel for the SC argued that want of knowledge of the fact of bankruptcy is irrelevant. Counsel submitted that it is the fact of bankruptcy that destroys any previous authority that the appellant legal firm have from the date of bankruptcy.

14. On the issue of the Court being *functius officio*, learned counsel for the SC submitted that the SC was not seeking any variation of the original orders made by the learned judge in relation to the originating summons. Counsel pointed out that the SC only sought a supplementary order on account of a fact disclosed in the course of the stay application, viz., that Kenneth Chow was adjudicated bankrupt on 11 February 2005. Learned counsel for the SC further submitted that the order

which is the subject-matter of this appeal was made on a specific summons taken out against the appellant legal firm as solicitors for Kenneth Chow and not Kenneth Chow himself.

15. In conclusion, learned counsel for the SC argued that the appellant legal firm was liable because they lacked authority at that material time and that the SC only sought costs on the ground of solicitors' want of authority and nothing else, and that too only from the date that Kenneth Chow was adjudicated bankrupt in Singapore.

*The issues*

16. Only two issues were raised in this appeal. The first issue is whether the Court was *functius officio* when it granted the orders prayed for by the SC *vide* summons-in-chambers on 31 October 2005, viz., that the partners of the appellant legal firm personally pay the SC the costs of and payable by Kenneth Chow in these proceedings as from 11 February 2005 and also costs of the application. The second issue is whether personal costs against the appellant legal firm can be ordered.

17. In relation to the first issue, learned counsel for the appellant legal firm pointed out that the proceedings under the originating summons was finally disposed of on 28 April 2005 and therefore the Court has no jurisdiction to "vary" the order it granted on that day by a subsequent order. We are of the view that this contention cannot hold water. The SC did not seek any

variation of the said order when it made the application. What the SC sought was a supplementary order on account of fact disclosed by Kenneth Chow, i.e., the client of the appellant legal firm, in his affidavit in the stay application. The order, the subject-matter of the appeal before us, was made on a specific summons taken out against the solicitors and not their client. The solicitors were acting as officers of Court and not a direct party in the proceedings. The SC sought personal costs against the appellant legal firm for the period commencing 11 February 2005, viz., the date when Kenneth Chow was adjudicated bankrupt to 28 April 2005, i.e., the date when the learned judge granted the orders prayed for by the SC in the originating summons. As such, we are of the view that the Court was not *functus officio*. The justice of the case entitled the Court under its inherent jurisdiction to hear and determine the summons-in-chambers filed by the SC. Further the jurisdiction as to costs is quite different and is not limited to costs incurred improperly or without reasonable cause within the scope of Order of Order 59 rule 8 of the rules.

18. In arguing this issue, learned counsel for the appellant legal firm referred to *Abdul Rashid Maidin (supra)* and *Gai Hin Refrigeration Sdn Bhd (supra)*. We are of the view that the two authorities cited have no bearing upon the instant appeal. The facts of the two cases were very different.

19. With regards to the second issue, learned counsel for the

appellant legal firm argued that during that period, i.e., between 11 February 2005 to 28 April 2005, the appellant legal firm did not have knowledge that Kenneth Chow was adjudicated bankrupt in Singapore. Further, there was no serious dereliction of duty on the part of the appellant legal firm.

20. In relation to this issue, learned counsel for the SC argued that a solicitor who acts for a client without authority will be personally liable for costs and that that jurisdiction is both under Order 59 rule 8(1) of the Rules of the High Court (“the Rules”) and under the inherent jurisdiction of the Court. Order 59 rule 8(1) of the Rules reads -

(1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default the Court may make against any solicitor whom it consider to be responsible (whether personally or through a servant or agent) an order-

(a) disallowing the costs as between the solicitor and his client and

(b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or

(c) directing the solicitor personally to indemnify such other parties against cost payable by them.

21. The power and practice of the courts that a solicitor who acts for a client without authority will be personally liable for costs is clearly based on the principle that a solicitor who acts for a client warrants that he has authority to act for client. What is a warranty? According to *Osborns's Concise Law Dictionary* (7<sup>th</sup> ed) a "warranty" is "a guarantee or assurance". *Jowitt's Dictionary of English Law*, Vol 2 (2<sup>nd</sup> ed) put it as follows -

"A warranty may be express or implied by law or statute."

"Implied warranties have been said to underlie or to be the gist of actions for negligence or breach of duty arising out of the special relations between parties (*Coggs v Bernard* (1703) 2 Ld.Raym.909)."

"When a man holds himself out as the agent of another he is deemed to warrant his authority to act as agent, and if, and in so far as, he is without such authority as he purports to have, an action for breach of warranty of authority will lie against him for one damnified by such absence of authority."

22. On the facts of this instant appeal, it can be said that the partners of the appellant legal firm have impliedly warranted throughout the proceedings leading to the granting of the orders and reliefs sought by the SC in the originating summons that they had the authority to act for Kenneth Chow notwithstanding that they were not aware that he had been adjudicated bankrupt on 11 February 2005. In our view, their claim that they cannot be faulted for the lack of authority to continue acting for Kenneth Chow, under the circumstances, does not seem to assist them. In *Simmons v Liberal Opinion*

*Limited, In re Dunn* [1911] 1 KB 966 the Court of Appeal held that a solicitor assuming to act for one of the parties to an action warrants his authority, and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked the authority. In his judgment, Cozens-Hardy MR said (at page 971) -

“A solicitor must be held to warrant the authority which he claims as representing his client. *Yonge v Toynbee* is a recent illustration of this well-established principle.”

23. As discussed earlier, a warranty may be express or implied by law. With regard to what amounts to an “implied warranty of authority” is best described in paragraph 857 (at page 515) of *Halsbury’s Laws of England* Volume 1 (4<sup>th</sup> ed) which reads -

“Warranty implied. Where any person purports to do any act or make any contract as agent on behalf of a principal, he is deemed to warrant that he has in fact authority from such principal to do the act or make the contract in question. If, therefore, he has no such authority, he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent to believe that he had authority to do the act or make the contract, and who, by acting upon such belief, has suffered loss in consequence of the absence of authority.”

“The agent’s belief in the existence of his authority is immaterial, whether the belief extends to an authority which the agent believed that he had but in fact never had, or to an authority which the agent originally had but which has ceased without his knowledge or means of knowledge. He will not, however, be liable if at the time of doing the act

or making the contract he expressly disclaims any present authority, or if the other party knows that he has no authority, or is fully acquainted with the facts from which the inference of authority is drawn.”

24. In *Chitty on Contract*, Vol 2 (25<sup>th</sup> ed), at page 2286, the learned author said -

“It is not necessary that the representation of authority should be made expressly: merely purporting to act as agent will normally constitute a representation. Thus a solicitor who institutes an action thereby sufficiently warrants that he is properly authorised to do so, even though he makes no express statement to that effect.”

25. The argument canvassed by learned counsel for the appellant legal firm that this is not a case where they had acted wilfully even after they had knowledge of the bankruptcy, in our view, cannot absolve them. In *Babury Ltd v London Industrial plc and anor*, a decision of the Queen’s Bench Division, referred to by learned counsel for the SC, appearing in the New Law Journal edition of 24 November 1989, Steyn J held (at page 1596) that a solicitor who has been deceived by his client into instituting proceedings on behalf of a company without authority will be ordered by the court, exercising its inherent jurisdiction, to pay the other side’s costs even though he acted bona fide in instituting the proceedings.

26. In *Barbury Ltd*, the plaintiff company was the tenant of the defendant landlords. On 4 August 1987 the plaintiff company

was struck off the register under s.652(5) of the Companies Act 1985 and was dissolved by notice in the London Gazette on 25 August 1987. The landlord issued a warrant for distress on August 21 in respect of arrears of rent and thereafter unaware that the company had ceased to exist, levied distress in mid-September. A director of the company instructed the company's solicitors, Messrs Suriya & Co, to take proceedings against the landlords for wrongful distress. The solicitors, who bona fide thought that the company was still in existence, issued the proceedings and entered judgment against the landlords in default of service of a defence. The landlords subsequently discovered that the plaintiff company had been dissolved about a month before the proceedings were issued. The landlords applied for the judgment to be set aside and an order under RSC Ord 62, r 11 that their costs of the action be paid by the solicitors on the grounds that the proceedings had been instituted without authority. The master set aside the judgment but refused to make any order for costs against the solicitors. The landlords appealed against the master's refusal to order costs against the solicitors. In allowing the appeal, Steyn J said (at pages 1596-1597) -

"This case raises a narrow but important question, regarding a solicitor's liability for costs when he instituted legal proceedings without authority as a result of a deception perpetrated upon him by a client ...

Our courts have for many years exercised a summary jurisdiction to order solicitors, who acted without authority on behalf of a plaintiff or a defendant, to pay the costs needlessly incurred by the opposing party.

That jurisdiction, although exercisable in summary fashion rather than in the shape of a fully blown action against the solicitor has always been exercised only after the solicitor has been given a fair opportunity to put his case before the court. It has never been considered to be a bar to the exercise of this jurisdiction that the solicitor acted bona and in reasonable reliance upon instructions.”

“... Having made clear that there is no inflexible rule, it is nevertheless right, in my view, to emphasise that a solicitor who clearly acted without authority, causing by his representation of authority the opposing party to incur wasted costs, must usually expect to ordered to pay the costs in the exercise of the court’s summary jurisdiction.”

27. In explaining the rationale of the principles discussed above, Styen J referred to *Yonge v Toynbee* [1910] 1 KB 215. Subsequently, referring to the instant case under appeal before him from the decision of the Master, Steyn J said -

“In the present case one is dealing with a solicitor who acted on behalf of a non-existent party. It appears to be the classic case for the exercise of the summary jurisdiction. And it matters not that the solicitors acted bona fide and were deceived by their client.

On behalf of the solicitors it was, however, submitted that the application was based on RSC Order 62, r 11 ... It is argued that the present case falls outside the scope of this rule. The plaintiffs argued that the costs were “improperly” incurred in the sense that they were wrongly incurred. In my view “improperly” has overtones of conduct unbecoming a solicitor. I am therefore prepared to accept that the present case falls outside the scope of Ord 62, r 11.

That does not mean, however, that Ord 62, r 11 has taken away the inherent jurisdiction of the court to order a solicitor who acted without

authority to pay the costs of the other party. The Supreme Court Rule Committee had no power to take away that inherent jurisdiction. In any event, Ord 62, r 11 does not purport to do so. I rule, therefore, that Ord 62, r 11 does not in any way alter the power and practice of the courts regarding a solicitor who acted without authority ...

The principal argument of counsel for the solicitors, as I understood it, was that the defendants were, as he put it, guilty of contributory negligence inasmuch as they could have conducted a company search into the status of the plaintiff company. Accordingly, he submitted, the defendants should be left to pursue their remedy for breach of warranty of authority in a fully action. I reject this argument on the facts of this case. In this case the solicitors made the clearest representation of authority. They had that means of investigation. They chose not to do so. The other side relied on their representation and it is contrary to the way in which litigation is conducted to expect the defendants' solicitors to research the authority of the plaintiff's solicitors ...

In my judgment the solicitors ought to be ordered to pay the costs until the date when the first defendants discovered that the plaintiff company had been dissolved, that is until November 27, 1987 ...”

28. We would agree with the views expressed by Steyn J above. In the instant appeal before us, the word “improperly” appearing in Order 59 rule 8(1) of the Rules would similarly have overtones of conduct unbecoming a solicitor. The facts does not denote there was conduct as such. On that premise, we are of the view that the circumstances found in this instant appeal would fall outside the scope of Order 59 rule 8(1). We would similarly be of the view that Order 59 rule 8(1) has not taken away the inherent jurisdiction of the court to order a solicitor who acted without authority to pay the costs of the

other party (see *Mohd Yusof bin Awang v Malayan Banking Bhd* [1995] 4 MLJ 493).

29. The facts of *Yonge v Toynbee, supra*, are as follows. On 21 August 1908, the defendant, against whom the plaintiff was threatening to institute an action for libel, instructed a firm of solicitors to act for him. On 8 October 1908, unknown to his solicitors, the defendant was certified to be insane. Meanwhile, prior to that date, the solicitors have undertaken to accept service of the writ on the defendant's behalf and enter an appearance for him, and on 6 November 1908 entered an appearance. The plaintiff however discontinued this action but on 19 December 1908 brought a second action against the defendant. On 21 December the defendant's solicitors undertook to accept service and enter an appearance in that action and on 30 December 1908 an appearance was entered. In January and February 1909, pleadings were delivered by both sides. On 5 April 1909 the solicitors for the first time learned of the defendant's incapacity. The plaintiff then took out a summons asking that the appearance and all subsequent proceedings in the action be set aside and that the defendant's solicitors might be ordered to pay personally to the plaintiff all the costs of her action against the defendant up to date, on the ground that they had no authority to appear and defend. The Court of Appeal held that although the defendant's solicitors had acted throughout in good faith and without knowledge of the defendant's mental condition, they were personally liable to

pay the costs upon an implied warranty or contract that they had an authority, which in fact they had not. The Court was of the view that an agent's liability in such cases arise not from any wrong or omission of right on his part, but from an implied contract - an implied undertaking or promise - made by him that the authority which he professes to have does in fact exist. In his judgment, Swinfen Eady J said (at page 209) -

“ ... Wontner & Sons contended that in August 1908, when the defendant was of sound mind, they received authority to represent the defendant, and did represent him, in respect of the matters to which the action relates, and that they were not aware and by due diligence could not have ascertained that their authority had been determined, and they rely upon *Smout v Ilbery* ((1842), 10 M & W 1) and *Salton v New Beeston Cycle Co* ([1900] 1 Ch 43) as determining that under such circumstances they are not under any liability for the costs incurred by the other side. In my opinion the material date to consider is 30 December 1908, when appearance was entered. That was the date upon which Wontner & Sons represented that they had authority to defend the action on behalf of the defendant, upon which representation the plaintiff has acted to her prejudice by continuing the legal proceedings which have so far proved abortive. On this view the respondents are not protected by the principle of *Smout v Ilbery*, and they are simply in the position of having acted in good faith, but without authority. Under such circumstances good faith alone will not protect them, and they are liable to pay the costs of the party misled: *Newbiggin-by-the-Sea Gas Co v Armstrong* ((1879), 13 Ch D 310); see also *Fricke v Van Grutten* ([1896] 2 Ch 649).

If, however, contrary to my opinion, the true view is that the time with reference to which the point is to be decided whether the solicitors had originally authority to defend the action in August 1908, when they

were instructed to act for defendant, then it becomes necessary to consider what is the result of their continuing to act upon an authority which they once had, but which has determined without their knowledge. Where an agent represents that he has authority to do a particular act, and he has not such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have. It would seem to follow from this, in principle, that, where the authority upon which an agent is professing to act is a continuing authority, there is a continuing representation by him that he has authority to do the series of acts, and an implied contract or warranty that he possesses such authority.”

30. Later in his judgment, Swinfen Eady J said (at page 210) -

“I wish to add that in the conduct of litigation the court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one.”

31. The contention of the appellant legal firm that they were not aware of Kenneth Chow’s bankruptcy at the material time seems totally irrelevant under the circumstances of the instant appeal. In *Yonge v Toynbee, supra*, Buckley LJ said (at page 206) -

“I can see no distinction in principle between the case where the agent never had authority and the case where the agent originally had authority but that authority had ceased without his knowledge or means of knowledge. In the latter case, as much as in the former, the proposition, I think, is true - that without any mala fides he has at the moment of acting represented that he had an authority which in fact he had not. In my opinion he is then liable on an implied contract that he had authority whether there was fraud or not.”;

Buckley LJ went on to say (at page 207) as follows -

“The question is not as to his honesty or bona fides. His liability arises from an implied undertaking or promise made by him that the authority which he professes to have does in point of fact exist. I can see no difference of principle between the case in which the authority existed at all and the case in which the authority once existed and has ceased to exist.”

32. The SC only sought costs, on the ground of the solicitors' want of authority, from the date of the bankruptcy. In *Amos William Dawe v Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230, a solicitor who acted for a litigant, adjudged a bankrupt in Singapore, was ordered to pay the costs personally to the adversary. In delivering the judgment of the Federal Court, Chang Ming Tat FJ said (at page 231) -

“Section 104 of the Bankruptcy Act 1967 (No. 55 of 1967) provides for reciprocal provisions between Singapore and Malaysia in all matters of bankruptcy and insolvency. By subsection (3) the Yang di-Pertuan Agong by notification in the *Government Gazette* may declare that the Government of the Federation has entered into an agreement with the

Government of the Republic of Singapore for the recognition by each of such Governments of the Official Assignees in Bankruptcy appointed by the other Government. No such notification has been made, but there is one, L.N. 37A of 1950 with effect from February 1, 1950 in respect of the Bankruptcy (Transitional Provisions) Ordinance 1946 and the Transfer of Powers Ordinance 1948. It is not argued, least of all by the appellant, that the operation of this notification does not extend to the present Act.”

33. In the instant appeal, *vide* the application made by way of summons-in-chambers on 31 October 2005, the SC prayed for an order that the appellant legal firm, i.e., the solicitors for Kenneth Chow personally pay the costs of the main proceedings, viz., the originating summons from 11 February 2005, namely, the date when Kenneth Chow was adjudged bankrupt to 28 April 2005, namely, the date when the learned judge made his final decision on the originating summons. The only issue before the learned judge was whether the appellant legal firm was personally liable to costs when they continued to act for a client who was a bankrupt. The authorities discussed earlier clearly show that a solicitor who acts for a client without authority is personally liable for costs. Under the circumstances of the instant appeal, the learned judge was right in ruling that the appellant legal firm lacked authority to act for Kenneth Chow from 11 February 2005. The Court was not *functus officio* in making such an order on costs. It was made on a specific summons taken out against the solicitor, not the client, and the solicitor was acting as an officer of Court or agent and was not a direct party to the proceedings. The SC clearly did not seek

any variation but a supplementary order.

34. For the reasons discussed above, it is our unanimous judgment that this appeal by the appellant legal firm must fail. The appeal is hereby dismissed with costs. Deposit to respondent to account of taxed costs.

Dated this 3<sup>rd</sup> day of June 2009.

Mohd Ghazali Mohd Yusoff  
Judge, Federal Court  
Malaysia

Abu Samah Nordin  
Judge, Court of Appeal  
Malaysia

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