IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA

[CIVIL APPEAL NO: BA-11BNCVC-14-05/2018]

BETWEEN

BUMIMETRO CONSTRUCTION SDN. BHD.
(Co. No.: 576189-W) **... APPELLANT**

AND

1. **TEAMWARE HARDWARE SDN. BHD.**
   (Co No.: 1140996H)
2. **MACVILLA SDN. BHD.**
   (Co. No.: 599978-A) **... RESPONDENTS**

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BUMIMETRO CONSTRUCTION SDN. BHD.

(Co. No.: 576189-W) **... RESPONDENT**

JUDGMENT

(2 appeals against Magistrate Court's decision after trial)

A. Legal Proceedings

[1] This judgment concerns the following two appeals (**2 Appeals**):

(1) in Civil Appeal No. BA-11BNCVC-14-05/2018 (**1st Appeal**), the appellant is Bumimetro Construction Sdn. Bhd. (**Bumimetro**) while the two respondents are -

(a) Teamware Hardware Sdn. Bhd. (**Teamware**); and

(b) Macvilla Sdn. Bhd. (**Macvilla**); and

(2) Civil Appeal No. BA-11BNCVC-15-05/2018 (**2nd Appeal**) has been filed by MacVilla against Bumimetro.

[2] The 2 Appeals arise from a suit filed in the Magistrate's Court (**MC's Suit**) by Teamware against Bumimetro (**Original Action**).

[3] In MC's Suit, Bumimetro has issued a third party notice against MacVilla (**Third Party Proceedings**) and has claimed for an indemnity from Macvilla in the event that the learned Magistrate allows the Original Action against Bumimetro and decides that Bumimetro is liable to Teamware [**Bumimetro's Liability (Original Action)**].

[4] The Original Action and Third Party Proceedings were tried together. After a trial, the Magistrate's Court decided as follows (**MC's Decision**):

(1) the Original Action was allowed with costs and the following order, among others, was made -

(a) Bumimetro was ordered to pay RM93,956.05 (as of 7.6.2017) to Teamware; and

(b) Bumimetro was ordered to pay Teamware interest at the rate of 1.5% per month on a sum of RM83,889.25 (**Judgment Sum**) from 8.6.2017 until the date of full payment of the Judgment Sum; and

(2) the learned Magistrate allowed the Third Party Proceedings with costs and Macvilla was ordered to indemnify Metrobumi in respect of Bumimetro's Liability (Original Action).

[5] Bumimetro filed the 1st Appeal against MC's Decision regarding the Original Action. The 2nd Appeal is lodged by Macvilla in respect of MC's Decision concerning the Third Party Proceedings.

[6] All the parties consented for the 2 Appeals to be heard and decided together.

[7] Teamware applied in court enclosure no. 11 (**Enc. 11**) to strike out the 1st Appeal under O. 18 r. 19(1)(b), (c), (d) and/or O. 92 r. 4 of the Rules of Court 2012 (**RC**) on the following two grounds:

(1) the notice of appeal for the 1st Appeal with the court's endorsement (**Bumimetro's Endorsed Notice of Appeal**) was served by Bumimetro's solicitors on Teamware's solicitors outside the fourteen days' period as stipulated in O. 55 rr. 2 and 3(4) RC (**14 Days' Period**); and

(2) Bumimetro's Endorsed Notice of Appeal was defective because MC's Decision did not order paragraph 2(ii) of Bumimetro's Endorsed Notice of Appeal, namely Macvilla was ordered to pay directly to Bumimetro for iron equipment delivered by Bumimetro for the benefit of MacVilla [**Paragraph 2(ii) (Bumimetro's Notice of Appeal)**].

[8] In support of Enc. 11, Mr. Lim Pang Tat, Teamware's Business Development (Sales and Marketing), affirmed an affidavit on 19.7.2018 (court enc. 14) and exhibited the following two emails:

(1) an email dated 18.5.2018 from Encik Hazarul Rozahan from Teamware's solicitors to the learned Magistrate which enquired whether MC's Decision had included Paragraph 2(ii) (Bumimetro's Notice of Appeal) [**Email (Teamware's Solicitors)**]. Regrettably, Email (Teamware's Solicitors) was not copied to the solicitors for Bumimetro and Macvilla; and

(2) the learned Magistrate replied to Email (Teamware's Solicitors) by way of an email dated 20.5.2018 and stated that Paragraph 2(ii) (Bumimetro's Notice of Appeal) had not been ordered in MC's Decision (**MC's Email**). Sadly, MC's Email was not copied to the solicitors for Bumimetro and Macvilla.

B. Background

[9] Macvilla is the developer of a construction project (**Project**). Macvilla has appointed Bumimetro as the Project's main contractor. On the instruction of the Project's architect, by a

letter of award dated 19.12.2014 (**LA**), Bumimetro had appointed Teamware as the "*Nominated Supplier for Supply and Delivery of Ironmongeries*" for the Project (**Supply of Ironmongeries**).

[10] Teamware sent a letter dated 26.5.2015 to Macvilla which requested for, among others, a "*letter of undertaking*" from Macvilla that all payments for the Supply of Ironmongeries would be paid directly from Macvilla to Teamware (**Teamware's Letter**).

[11] Macvilla replied to Teamwear's Letter by way of a letter dated 29.5.2018 (**Macvilla's Letter**) signed by Ir. KK Ng, Macvilla's Project Director (**Mr. Ng**). According to Macvilla's Letter, among others, Macvilla confirmed that Macvilla "*shall undertake to pay [Teamware] on behalf of our main contractor, [Bumimetro]*" for the Supply of Ironmongeries.

C. Contentions of parties

[12] In the Original Action -

(1) Teamware had submitted, among others, that Bumimetro was contractually liable under the LA to pay the Judgment Sum to Teamware regarding the Supply of Ironmongeries; and

(2) Bumimetro has raised the defence that by reason of Teamware's Letter and MacVilla's Letter (**2 Letters**), there was a tripartite agreement among Bumimetro, Teamvilla and Macvilla under s. 63 of the Contracts Act 1950 (**CA**) for Macvilla (not Bumimetro) to pay Teamware in respect of the Supply of Ironmongeries.

[13] Regarding the Third Party Proceedings -

(1) Bumimetro had contended that due to Macvilla's Letter, if Bumimetro was liable to Teamware for the Supply of Ironmongeries, Macvilla should be ordered to indemnify Bumimetro in respect of Bumimetro's Liability (Original Action); and

(2) Macvilla resisted the Third Party Proceedings on the ground that Mr. Ng had no authority from Macvilla to issue Macvilla's Letter.

D. MC's Decision

[14] According to the learned Magistrate's Grounds of Judgment, among others -

(1) based on the LA, Bumimetro (not Macvilla) was contractually liable to Teamware for the Supply of Ironmongeries. Hence, the learned Magistrate allowed the Original Action with costs; and

(2) the learned Magistrate drew an adverse inference under s. 114(g) of the Evidence Act 1950 (**EA**) against Macvilla for not calling Mr. Ng to testify in this trial. Hence, the learned Magistrate held that based on Macvilla's Letter, the Third Party Proceedings was allowed and Macvilla was ordered to indemnify Bumimetro in respect of Bumimetro's Liability (Original Action).

E. Issues

[15] The following questions arise in Enc. 11 and the 2 Appeals:

(1) regarding Enc. 11 -

(a) whether it was ethical for Teamware's solicitors to communicate with the learned Magistrate regarding the scope of MC's Decision without informing the solicitors for Bumimetro and Macvilla;

(b) was it proper for MC's Email to be sent to Teamware's solicitors without it being copied to the solicitors for Bumimetro and Macvilla?;

(c) does the court have power under O. 18 r. 19(1), O. 92 r. 4 RC, the court's inherent jurisdiction and/or the court's inherent power to strike out a notice of appeal? There is a previous High Court case which has struck out a notice of appeal pursuant to O. 18 r. 19(1) and O. 92 r. 4 RC;

(d) whether O. 55 rr. 2 and 3(4) RC require -

(i) a notice of appeal with the court's endorsement of the notice of appeal (**Endorsed Notice of Appeal**) to be served by an appellant on the respondent within the 14 Days' Period; or

(ii) a duplicate copy of the notice of appeal without the court's endorsement (**Unendorsed Notice of Appeal**) to be served by an appellant on the respondent within the 14 Days' Period; and

(e) in view of O. 2 r. 1(1) and (3) RC, did the inclusion of Paragraph 2(ii) Bumimetro's Notice of Appeal prejudice Teamware in the 1st Appeal?;

(2) in respect of the 1st Appeal -

(a) whether Teamware can rely on clause 28.8 of "*Agreement And Conditions of PAM Contract 2006 (With Quantities)*" [**Clause 28.8 (PAM 2006 Contract**] to support Bumimetro's Liability (Original Action);

(b) was there a novation of Bumimetro's contractual liability (under LA to pay Teamware for the Supply of Ironmongeries) to Macvilla under s. 63 CA (**Alleged Novation**)?; and

(c) whether Bumimetro had made an "*admission*" under s. 17(1) EA of Bumimetro's Liability (Original Action) when Bumimetro did not deny Teamware's invoices regarding the Supply of Ironmongeries (**Invoices**); and

(d) if the Alleged Novation existed, whether Teamware was estopped from denying the Alleged Novation due to three direct payments by Macvilla to Teamware for supply of ironmongeries (**Macvilla's 3 Direct Payments to Teamware**); and

(3) concerning the 2nd Appeal -

(a) was learned Magistrate correct in law to draw an adverse inference under s. 114(g) EA against Macvilla for not calling Mr. Ng to testify in this case?; and

(b) whether Bumimetro can rely on the "*Indoor Management Rule*" and assume that Mr. Ng, Macvilla's Project Director, had the authority to issue Macvilla's Letter on behalf of Macvilla.

F. Enc. 11

F(1). Whether Teamware's solicitors could clarify scope of MC's Decision without informing solicitors for Bumimetro and Macvilla

[16] I have decided as follows in *MBF Factors Sdn Bhd v. Hong Kim Confectioner Sdn Bhd & Ors* [2014] 1 LNS 1067, at [20]-[22]:

> "*[20] In* ***Attorney General & Ors v. Arthur Lee Meng Kwang*** *[1987] 1 MLJ 206, at 209,* ***the appellant who was a senior and practising advocate and solicitor admitted that it was improper for him to approach the then Lord President in the absence of the opposing counsel in respect of a concluded appeal in the Supreme Court (the appellant acted as counsel in that appeal)***.
>
> *[21]* ***I am of the view that as a general rule, all correspondence with the court, be it letters, facsimiles and emails, should be copied to solicitors for all other parties, even if the party in question is a co- plaintiff, co-defendant, co-appellant or co-respondent. There will of course be exceptions such as correspondence with court in respect of ex parte applications where secrecy is essential***.
>
> *[22]* ***The general practice to avoid ex parte communication with court is in the interest of transparency of the legal process which in turn will ensure the integrity of the proceedings. This will also avoid any complaint or allegation against the court and solicitor in question***."
>
> (emphasis added).

There was no appeal to the Court of Appeal against the above judgment.

[17] The Email (Teamware's Solicitors) should have been copied to the solicitors for Bumimetro and Macvilla. There was no element of secrecy which could have justified the conduct of Teamware's solicitors in not copying the Email (Teamware's Solicitors) to the solicitors for Bumimetro and Macvilla.

[18] I am of the view that the above conduct of Teamware's solicitors has breached r. 18 of the Legal Profession (Practice and Etiquette) Rules 1978 (**LPR**) as follows:

> "***Advocate and solicitor to conduct with candour***, *courtesy and fairness*
>
> ***The conduct of an advocate and solicitor before the Court and in relation to other advocates and solicitors shall be characterised by candour***, *courtesy and fairness*."
>
> (emphasis added).

By not copying Email (Teamware's Solicitors) to the solicitors for Bumimetro and Macvilla, the solicitor who had sent the Email (Teamware's Solicitors), did not act with candour in relation to the solicitors for Bumimetro and Macvilla, as required by r. 18 LPR.

F(2). MC's Email should have been copied to solicitors for Bumimetro and Macvilla

[19] To compound to the above unethical conduct by Teamware's Solicitors, MC's Email was not copied to the solicitors for Bumimetro and Macvilla. It is axiomatic that except for *ex parte*

applications for *Anton Piller* orders and *Mareva* injunctions [when "*it is genuinely impossible to give notice without defeating the purpose of the order*" - please see Edgar Joseph Jr J's (as he then was) judgment in the High Court case of *Pacific Center Sdn Bhd lwn. United Engineers (M) Bhd* [1984] 2 MLJ 143, at 146], all letters, faxes and emails from the court should be conveyed to all solicitors and parties (who are not represented by solicitors) in question.

[20] In view of the Email (Teamware's Solicitors), the learned Magistrate should have sent a letter to the solicitors of Teamware, Bumimetro and Macvilla (**All Solicitors**) and fix a mutually convenient date with All Solicitors to clarify the scope of MC's Decision. Sadly, this was not done. It is hoped that the above conduct by the learned Magistrate is not repeated.

F(3). Can court strike out a notice of appeal under O. 18 r. 19(1), O. 92 r. 4 RC, court's inherent jurisdiction and/or power?

[21] I reproduce below the relevant part of O. 18 r. 19(1), (3) and O. 92 r. 4 RC:

> "*O. 18 r. 19(1)* ***The Court may at any stage of the proceedings order to be struck out*** *or amended* ***any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement****, on the ground that - ...*
>
> *...*
>
> *r. 19(3)* ***This rule shall, as far as applicable, apply to an originating summons as if it were a pleading****.*

O. 92 r. 4 ***For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court***."

(emphasis added).

[22] I am of the following view:

(1) O. 18 r. 19(1) RC only allows the court to strike out the following three matters (**3 Matters**) -

(a) a "*pleading*". According to O. 1 r. 4(1) RC, a "*pleading*" does not include a notice of application or a preliminary act;

(b) an endorsement of any writ; and

(c) an originating summons.

The court has no power to strike out a notice of appeal pursuant to O. 18 r. 19(1) and (3) RC because the Rules Committee has expressly provided for the court's power to strike out only the 3 Matters. The wording of O. 18 r. 19(1) and (3) RC attracts the application of the maxim of construction, *expressio unius est exclusio alterius*, namely the express mention of one matter, implies the exclusion of all other matters which have not been mentioned - please refer to the Federal Court's judgment delivered by Nik Hashim FCJ in *Jamaluddin bin Mohd Radzi & Ors v. Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener* [2009] 4 MLJ 593, at 605-606;

(2) if the Rules Committee had intended for the court to have power to strike out a notice of appeal, the Rules Committee would have expressly provided for such a power in O. 18 r. 19(1), (3) RC or in O. 55 RC (which provides for appeals to the High Court from the Subordinate Courts);

(3) if an appeal from a lower court to the High Court does not comply with any mandatory requirement in O. 55 RC (**Non-compliance**), a respondent may raise a preliminary objection (**PO**) against the appeal and the court may uphold the PO and strike out the appeal under O. 2 r. 3 RC if the Non-compliance has caused a substantial miscarriage of justice or has caused prejudice to the respondent which cannot be cured by a court order or which cannot be compensated in costs - please see *Jyothy Laboratories Ltd v. Perusahaan Bumi Tulin Sdn Bhd* [2019] 3 MLRH 454, at [16(1)].

O. 2 r. 3 RC states as follows -

> "***Preliminary objection for non-compliance of rules not allowed***
>
> *O. 2 r. 3* ***A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both***."

(emphasis added); and

(4) when there is an express provision in RC, there cannot be any resort to O. 92 r. 4 RC, the court's inherent jurisdiction or power - please see the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178, at 181. Since the Rules Committee has expressly provided in O. 18 r. 19(1) and (3) RC for the court's power to strike out only the 3 Matters (and not a notice of appeal), no resort can be made to O. 92 r. 4 RC, the court's inherent jurisdiction or power. If otherwise, O. 18 r. 19(1) and (3) RC will be unlawfully circumvented.

[23] I have not overlooked the High Court's decision in *Newlake Development Sdn Bhd v. Tetuan Kumar Jaspal Quah & Aishah* [2017] MLJU 1827 where a notice of appeal to the High Court against a decision of the Sessions Court, has been struck out under O. 18 r. 19(1) and/or O. 92 r. 4 RC. Firstly, there was no discussion in **Newlake Development** of the question whether the court may strike out a notice of appeal pursuant to O. 18 r. 19(1), O. 92 r. 4 RC, the court's inherent jurisdiction and/or power. Secondly, from the view point of the *stare decisis* doctrine, one High Court is not bound by a decision of another High Court - please see the judgment of Ong Hock Thye FJ (as he then was) in the Federal Court case of *Sundralingam v. Ramanathan Chettiar* [1967] 2 MLJ 211, at 213.

[24] Premised on the reasons explained in the above paragraph 22, Teamware cannot apply in Enc. 11 to strike out the 1st Appeal under O. 18 r. 19(1), O. 92 r. 4 RC, the court's inherent

jurisdiction and/or power. On this ground alone, Enc. 11 is dismissed with costs.

F(4). Whether O. 55 rr. 2 and 3(4) RC require endorsed notice of appeal to be served within 14 Days' Period

[25] O. 1A, O. 2 r. 1(2), O. 55 rr. 2 and 3(4) RC provide as follows:

> "***Regard shall be to justice***
>
> *O. 1A* ***In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules***.
>
> ***Non-compliance with Rules***
>
> *O. 2 r. 1(1).*
>
> *1(2)* ***These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective***.
>
> *Appeal to be by re-hearing on notice*
>
> *O. 55 r. 2* ***All appeals to the High Court*** *shall be by way of re-hearing and* ***shall be brought by giving a notice of appeal within fourteen days from the date of the decision appealed from***.
>
> ***Notice of appeal against a decision made after trial***
>
> *O. 55 r. 3(1)…*
>
> …

> *3(4)* ***A duplicate copy of the notice of appeal must be served by the appellant within the time limited for the filing of an appeal on all respondents***."
>
> (emphasis added).

[26] Based on the affidavits filed by Bumimetro and Teamware, the following events took place:

27.4.2018	MC's Decision
10.5.2018 and 11.5.2018	Two public holidays were declared by the Federal Government following the General Election held on 9.5.2018
11.5.2018	Bumimetro's solicitors attempted to fax Bumimetro's Unendorsed Notice of Appeal to Teamware's solicitors but were not successful
14.5.2018	Bumimetro's solicitors served Bumimetro's Unendorsed Notice of Appeal on Teamware's solicitors
6.6.2018	Bumimetro's solicitors served Bumimetro's Endorsed Notice of Appeal on Teamware's solicitors

[27] The question that arises is whether O. 55 rr. 2 and 3(4) RC require the service of an Endorsed Notice of Appeal or an Unendorsed Notice of Appeal within the 14 Days' Period.

[28] I am of the following view:

(1) before the enforcement of O. 55 rr. 2 and 3(4) RC, O. 49 r. 2(1) and (6) of the Subordinate Court Rules 1980 (**SCR**) provided as follows -

> "*O. 49 r. 2(1)* ***Appeals to the High Court shall be brought by giving notice of appeal in Form 140. A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court***.
>
> ...
>
> *2(6)* ***The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors***. *It shall not be necessary to serve parties not so affected*."
>
> (emphasis added).

In the Court of Appeal case of *MBF Cards Services Sdn Bhd v. Chew Ah Too @ Chew Hoe Kee* [2009] 1 MLJ 684, at [12] to [25], Suriyadi JCA (as he then was) applied O. 49 r. 2(1) and (6) SCR to require an appellant to serve the Endorsed Notice of Appeal within the 14 Days' Period. **MBF Cards Services** has been followed by Choo Kah Sing JC (as he then was) in the High Court in *Mat Sanusi bin Mohamad & Anor v. Jeevaratnam a/l Thevaraj* [2016] MLJU 805;

(2) the wording of O. 55 r. 3(4) RC is materially different from O. 49 r. 2(1) SCR. O. 55 r. 3(4) RC only requires a "*duplicate copy of the notice of appeal*" to be served by an appellant on the respondent. O. 1 r. 4(1) RC does not

define the term "*duplicate*". O. 1 r. 4(1) RC however provides that the term *"copy"* in relation to a document, means "*anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly*".

Sections 3 and 66 of the Interpretation Acts 1948 and 1967 (**IA**) do not define the word "*duplicate*".

In *Toms v. Cuming* [1845] 135 ER 38, at 40, Tindal CJ decided that the "*very meaning of the term duplicate is, that one document resembles the other in all essentials*". According to the "*Concise Oxford English Dictionary*", 11th Edition (Revised), at p. 445, "*duplicate*" means, among others, "*one of two or more identical things*".

Based on the meaning of "*duplicate*" as held in **Toms** and the dictionary meaning of that word, O. 55 rr. 2 and 3(4) RC only require an Unendorsed Notice of Appeal to be served by an appellant on a respondent. This is because an Unendorsed Notice of Appeal (not an Endorsed Notice of Appeal) is a "*duplicate*" of the notice of appeal [within the meaning of O. 55 r. 3(4) RC] which has been filed by the appellant;

(3) in *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* [2017] 10 CLJ 296, at [11], Hamid Sultan Abu Backer JCA decided as follows in the Court of Appeal -

> "*[11] ...**We are of the considered view that the appeals should be allowed in limine. Our reasons inter alia are as follows:***

(i) ***in the instant case, notice of appeal as well as the duplicate copy of the appeal have been served on the respondent within time frame and in compliance with O. 55 r. 3(4) [RC];***

(ii) ***there is no requirement in law or rules to require an endorsed notice of appeal to be served within the time frame of the appeal. Even if there is such a rule, it will cause travesty of justice as it is common knowledge that court documents and endorsement or seal of the court are not placed immediately upon filing at the court registry or even through the e-filing system***. *(See* ***Jumatsah Daud v. Voon Kin Kuet & Anor*** *[1980] 1 LNS 176; [1981] 1 MLJ 254]. ...*"

(emphasis added); and

(4) premised on O. 1A RC, in administering all the provisions in RC [including O. 55 rr. 2 and 3(4) RC], the court "*shall have regard to the overriding interest of justice*". It is to be noted that the Rules Committee has employed the mandatory term "*shall*" in O. 1A RC. Furthermore, according to O. 2 r. 1(2) RC, all the rules in RC [including O. 55 rr. 2 and 3(4) RC] are subject to the overriding objective of enabling the court to deal with cases justly. In accordance with O. 1A and O. 2 r. 1(2) RC, the overriding interest of justice does not require an appellant to serve an Endorsed Notice of Appeal within the 14 Days' Period under O. 55 rr. 2 and 3(4) RC.

[29] In this case, Bumimetro's Unendorsed Notice of Appeal had been served within the 14 Days' Period as stipulated in O. 55 rr. 2 and 3(4) RC. This decision is based on the following reasons:

(1) in determining whether Bumimetro had served Bumimetro's Unendorsed Notice of Appeal within the 14 Days' Period as stipulated in O. 55 rr. 2 and 3(4) RC, the court shall apply O. 3 rr. 2 and 4 RC and not s. 54 IA. This is because there cannot be any reference to IA when the Rules Committee has made express provisions in O. 3 rr. 2 and 4 RC - please see *Teras Kimia Sdn Bhd v. Government of Malaysia* [2015] 3 AMR 608, at [23] to [25];

(2) MC's Decision was delivered on 27.4.2018. O. 3 r. 2(2) RC provides that the 14 Days' Period "*begins immediately after*" 27.4.2018. In other words, the date of 27.4.2018 cannot be taken into account in the computation of the 14 Days' Period; and

(3) a period of 14 days from the date of MC's Decision would end on Friday, 11.5.2018. However, Friday (11.5.2018) was declared to be a public holiday. Saturday (12.5.2018) and Sunday (13.5.2018) are weekly holidays. Hence, based on O. 3 r. 4 RC, the 14 Days' Period would end on Monday (14.5.2018), the next working day after public holidays (11.5.2018) and weekly holidays (12.5.2013 and 13.5.2013). O. 3 r. 4 RC provides as follows -

> "***Time expires on weekly holiday***
>
> *O. 3 r. 4* ***Where the time prescribed by these Rules****, or by any judgment, order or direction,* ***for doing any act at the Registry expires on a weekly holiday or other day on which the Registry is closed, and by***

> ***reason thereof that act cannot be done on that day, the act shall be in time if done on the next day on which the Registry is open***."
>
> (emphasis added).

As Bumimetro's solicitors had served Bumimetro's Unendorsed Notice of Appeal on Teamware's solicitors on Monday (14.5.2018), Bumimetro had thus complied with the 14 Days' Period as provided in O. 55 rr. 2 and 3(4) read with O. 3 rr. 2 and 4 RC. Consequently, I have no hesitation to dismiss Enc. 11 with costs.

F(5). Whether inclusion of Paragraph 2(ii) Bumimetro's Notice of Appeal has prejudiced Teamware in 1st Appeal

[30] I reproduce below O. 2 r. 1(1) and (3) RC -

> "***Non-compliance with Rules***
>
> *O. 2 r. 1(1)* ***Where****, in beginning or purporting to begin any proceedings or* ***at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done*** *or left undone,* ***been non- compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings****, any step taken in the proceedings, or any document, judgment or order therein.*
>
> …
>
> ***(3) The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise***

as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity."

(emphasis added).

[31] Paragraph 2(ii) Bumimetro's Notice of Appeal is erroneously included. Having said that, Paragraph 2(ii) Bumimetro's Notice of Appeal does not concern the 1st Appeal. As such, I cannot see how Paragraph 2(ii) Bumimetro's Notice of Appeal can prejudice Teamware in any manner in the 1st Appeal. I am of the view that the erroneous inclusion of Paragraph 2(ii) Bumimetro's Notice of Appeal -

(1) "*shall be treated as an irregularity and shall not nullify*" the 1st Appeal - please see O. 2 r. 1(1) RC; and

(2) is curable under O. 2 r. 1(3) RC.

G. 1st Appeal

G(1). Whether Teamware can rely on Clause 28.8 (PAM 2006 Contract)

[32] Teamware's learned counsel has contended that Clause 28.8 (PAM 2006 Contract) supports Bumimetro's Liability (Original Action). I am not able to accept this submission for the following reasons:

(1) LA did not refer to Clause 28.8 (PAM 2006 Contract). Nor did the LA incorporate Clause 28.8 (PAM 2006 Contract).

Accordingly, by reason of ss. 91 and 92 EA, Clause 28.8 (PAM 2006 Contract) cannot be "*added*" to the LA - please see Chang Min Tat FJ's judgment in the Federal Court case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, at 232-233; and

(2) Clause 28.8 (PAM 2006 Contract) cannot be implied into the LA because the following two cumulative conditions for implying a contractual term as laid down by Peh Swee Chin FCJ in the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 MLJ 151, at 169-170, have not been fulfilled -

(a) if an "*officious bystander*" is asked whether Clause 28.8 (PAM 2006 Contract) can be implied into the LA, the "*officious bystander*" would **not** have answered "*of course*"; **and**

(b) it is **not** necessary to give business efficacy to the LA by implying Clause 28.8 (PAM 2006 Contract) into the LA.

G(2). Was Alleged Novation proven?

[33] Section 63 CA provides as follows:

"***Effect of novation**, rescission and alteration* ***of contract***

***63. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed**.*

ILLUSTRATIONS

(a) ***A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted***.

(b) ***A owes B RM10,000. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for RM5,000 in place of the debt of RM10,000. This is a new contract and extinguishes the old***.

(c) ***A owes B RM1,000 under a contract. B owes C RM1,000. B orders A to credit C with RM1,000 in his books, but C does not assent to the agreement. B still owes C RM 1,000, and no new contract has been entered into***."

(emphasis added).

[34] The following two decisions of our appellate courts have explained when a tripartite agreement or novation takes effect under s. 63 CA:

(1) in *LYL Hooker Sdn Bhd v. Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52, at 53, Salleh Abas LP delivered the following judgment of the Supreme Court -

"***Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract***

which is already extinguished. *(**See Chitty on Contract**, Vol. 1, 1983 edition at paragraphs 1315 and 1316).*"

(emphasis added); and

(2) Ong Hock Thye FJ (as he then was) decided as follows in the Federal Court case of *Toeh Kee Keong v. Tambun Mining Co Ltd* [1968] 1 MLJ 39, at 43 -

"*... **The effect of section 63 of the Contracts Ordinance is thus stated in 8 Halsbury (3rd Ed.) p. 262:-***

*"**Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability. The introduction of a new party prevents the new contract from being a mere accord without satisfaction and thus affords a defence to any action upon the old contract.**"* "

(emphasis added).

[35] I am of the view that the learned Magistrate has committed an error of law in not finding that the Alleged Novation has been proven from the contents of the 2 Letters (**Legal Error**). I reproduce the 2 Letters as follows:

(1) Teamware's Letter -

"*[**Teamware's letterhead**]*

[Teamware's name and address]

Mr. KK Ng

[Macvilla's name and address] ***26th May 2015***

[Name and details of Project] Dear Sir/Madam,

Re: Direct Payment from [Macvilla] for the [Supply of Ironmongeries]

Refer to the above and as per our tel-conversation, please confirm that all the payment for ironmongery will be paid direct to [Teamware]. All the monthly statement [sic], delivery order [sic] & invoice [sic] will be submitted to [Macvilla] in [sic] a monthly basis. Terms of payment should be 60 days from the date of submission.

Please confirm the above statement with your letter of undertaking before we can proceed to deliver the quantity for sample house. We'll also need a delivery schedule from [Bumimetro] asap.

Thanks,

Regards

(Jason Lim)

Assistant Marketing Manager

[Teamware]"

(emphasis added); and

(2) the contents of Macvilla's Letter (copied to Bumimetro) are as follows, among others -

"*[**Macvilla's letterhead**]*

[Macvilla's name and address]

29th May 2015

*[**Teamware's name and address**]*

Attention: Mr. Jason Lim

Sir,

[Name and details of Project]

Ref: Confirmation of Undertaking For Payment On Behalf For The [Supply of Ironmongeries]To [Bumimetro]

With reference to our tele-conversation for the aforesaid subject and your letter dated 26/5/2015 [Teamware's Letter], we would like to confirm that we shall undertake to pay you on behalf of our main contractor [Bumimetro] for the [Supply of Ironmongeries] for the [Project] which we have verbally informed Mr. SK Wong and Mr. Roberto of [Bumimetro] and they have no objection for the said arrangement in principal [sic].

Kindly proceed to liaise with [Bumimetro] directly for the order and delivery of the said material. Meanwhile, please arrange to supply & deliver those required ironmongeries for our mock up unit immediately. We trust the above is well informed and your kind attention and action is appreciated.

Thank you,

Yours truly,

———————————

[Mr. Ng]

Project Director

CC:

...

[Macvilla] *(site) - Mr. Chan L.I.*

[Bumimetro] *- Mr. CP Tan/Mr. SK. Wong* ”

(emphasis added).

[36] Whether the Alleged Novation existed in this case is a question of law regarding the construction of the 2 Letters. In respect of the interpretation of the 2 Letters, the High Court (sitting in an appellate capacity) is in the same position as the trial court. The learned Magistrate does not enjoy any audio-visual advantage over the High Court in respect of the construction of the 2 Letters. Hence, the High Court may intervene regarding a subordinate court’s interpretation of documents if such an intervention is in the interest of justice.

[37] In view of the Legal Error, it is in the interest of justice to set aside MC’s Decision regarding Bumimetro’s Liability (Original Action). Teamware should have sued Macvilla for the Judgment Sum based on the 2 Letters.

G(3). Whether Bumimetro had admitted Bumimetro’s Liability (Original Action) by its failure to deny Invoices

[38] Teamware's learned counsel had contended that when Bumimetro did not dispute the Invoices, Bumimetro had "*admitted*" Bumimetro's Liability (Original Action). I cannot accept this submission because -

(1) the 2 Letters clearly show that the Alleged Novation exists. In fact, Teamware initiated the tripartite agreement among Teamware, Bumimetro and Macvilla by sending Teamware's Letter; and

(2) s. 17(1) EA provides as follows –

> "***Admission*** *and confession* ***defined***
>
> *17(1)* ***An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned***."
>
> (emphasis added).

Our s. 17(1) EA is *in pari materia* with s. 17 of India's Evidence Act 1872 [**EA (India)**]. In *Sahoo v. The State of Uttar Pradesh* AIR 1966 SC 40, at 42, Subba Rao J (later the Chief Justice of the Indian Supreme Court) delivered the following judgment of the Indian Supreme Court -

> "***A scrutiny of the provisions of sections 17 to 30 of [EA (India)] discloses, as one learned author puts it, that statement is a genus, admission is the species and confession is the sub- species. Shortly stated, a confession is a statement made by an accused admitting his guilt. What does the expression "statement" mean? The dictionary***

> ***meaning of the word "statement" is "the act of stating, reciting or presenting verbally or on paper." The term "statement", therefore, includes both oral and written statements***."
>
> (emphasis added).

Based on **Sahoo**, a party can only "*admit*" a fact within the meaning of s. 17(1) EA if there is a "*statement*", written or verbal, from the party regarding that fact. In this case, there was no "*statement*" from Bumimetro wherein Bumimetro had made an "*admission*" under s. 17(1) EA that Bumimetro was liable for the Supply of Ironmongeries. Bumimetro's failure to deny the Invoices cannot amount to a "*statement*" and an "*admission*" pursuant to s. 17(1) EA.

G(4). Is Teamware estopped from denying Alleged Novation by reason of Macvilla's 3 Direct Payments to Teamware?

[39] After the 2 Letters, it was not disputed that Macvilla's 3 Direct Payments to Teamware had been made. Accordingly, Teamware is estopped by Macvilla's 3 Direct Payments to Teamware from denying the existence of the Alleged Novation (by way of the 2 Letters) - please see the wide application of the doctrine of equitable estoppel in Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at 294.

H. 2nd Appeal

[40] I have no hesitation to dismiss the 2nd Appeal with costs for the following reasons:

(1) the Third Party Proceedings was justified by the 2 Letters which proved that with the tripartite agreement (among Teamware, Bumimetro and Macvilla), Bumimetro's liability to pay Teamware for the Supply of Ironmongeries had been novated to Macvilla;

(2) the court may draw an adverse inference under s. 114(g) EA against a party who has suppressed material evidence in a case - please see the Supreme Court's judgment delivered by Mohd. Azmi SCJ in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, at 494. The learned Magistratre did not err in law and in fact in making an adverse inference under s. 114(g) EA against Macvilla for suppressing the material evidence of Mr. Ng in this case. The invocation of an adverse inference is premised on the following evidence and reasons -

(a) Mr. Ng was a material witness in this case because -

(i) Mr. Ng was the Project Director for Macvilla;

(ii) Teamware's Letter was sent to Mr. Ng (on behalf of Macvilla); and

(iii) Mr. Ng issued Macvilla's Letter on behalf of Macvilla;

(iv) Macvilla did not withdraw or disclaim the contents of Macvilla's Letter; and

(v) Macvilla's 3 Direct Payments to Teamware were made after the 2 Letters; and

(b) Macvilla had suppressed Mr. Ng's material evidence in this case because Macvilla did not adduce any evidence on why -

(i) Mr. Ng could not be called by Macvilla to testify in this case; and

(ii) Macvilla could not have applied to the Magistrate's Court to issue a subpoena to compel Mr. Ng to give evidence in this case; and

(3) I cannot give credence to Macvilla's submission that Mr. Ng has no authority to issue Macvilla's Letter on behalf of Macvilla. Firstly, Bumimetro could rely on the Indoor Management Rule or the Rule in **Turquand's case** to assume that Mr. Ng, Macvilla's Project Director, had the authority to issue Macvilla's Letter on behalf of Macvilla - please see the judgment of Mohd. Azmi SCJ in the Supreme Court case of *Hew Sook Ying v. Hiw Tin Hee* [1992] 1 CLJ (Rep) 120, at 128.

There is an exception to the Indoor Management Rule (**Exception**) - where a person (**X**) has actual or constructive knowledge or notice at the material time that another person (**Y**) who purports to act for a company (**Z Company**), has no actual authority to act for Z Company (**Y's Act**), X cannot then rely on the Indoor Management Rule and Z Company is therefore not bound by Y's Act. The Exception is explained in two Federal Court judgments as follows -

(a) the decision of Edgar Joseph Jr FCJ in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 MLJ 465, at 507- 509; and

(b) Prasad Abraham FCJ's judgment in *Kang Hai Holdings Sdn Bhd & Anor v. Lee Lai Ban (trading as the sole proprietor under the name and style of 'Sang Excavating Services')* [2018] 2 MLJ 574, at [20] and [21].

In this case, Macvilla could not avail itself of the Exception because no evidence had been adduced by Macvilla to show that Bumimetro had actual or constructive knowledge or notice at the time of the issuance of Macvilla's Letter that Mr. Ng had no actual authority to send Macvilla's Letter.

I. Court's decision

[41] Premised on the above evidence and reasons:

(1) Enc. 11 is dismissed with costs to be paid by Teamware to Bumimetro;

(2) the 1st Appeal is allowed with costs of the 1st Appeal to be paid by Teamware to Bumimetro;

(3) the 2nd Appeal is dismissed with costs of the 2nd Appeal to be paid by Macvilla to Bumimetro;

(4) the entire MC's Decision is set aside;

(5) Teamware shall pay costs of the Original Action to Bumimetro based on the scale of costs provided in O. 59 r. 23(1) RC (**Scale**); and

(6) Macvilla shall pay costs of Third Party Proceedings to Bumimetro based on the Scale.

[42] In view of the fact that the Alleged Novation has been proven in this case, Teamware should expeditiously institute a suit against Macvilla and claim regarding the Supply of Ironmongeries before the expiry of the six- year limitation period [as provided in s. 6(1)(a) of the Limitation Act 1953].

(WONG KIAN KHEONG)
Judge Commissioner
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

Dated: 27 NOVEMBER 2019

COUNSEL:

For the bumimetro - Steven Wong Chin Fung & Shahrezal Shukri; M/s Arifin & Partners

For the teamware - Chris Chin Shang Yoon & Sutha Jayanrajoo; M/s Shang & Co

For the macvilla - Audrey Quah Hooi Kean; M/s Shui-Tai

Case(s) referred to:

MBF Factors Sdn Bhd v. Hong Kim Confectioner Sdn Bhd & Ors [2014] 1 LNS 1067

Pacific Center Sdn Bhd lwn. United Engineers (M) Bhd [1984] 2 MLJ 143

Newlake Development Sdn Bhd v. Tetuan Kumar Jaspal Quah & Aishah [2017] MLJU 1827

Sundralingam v. Ramanathan Chettiar [1967] 2 MLJ 211

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283

Legislation referred to:

Contracts Act 1950, s. 63

Rules of Court 2012, O. 18 r. 19(1)(b)(c)(d), (3), O. 55 rr. 2 and 3(4), O. 92 r. 4