

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
IN THE FEDERAL TERRITORY OF KUALA LUMPUR, MALAYSIA
CIVIL SUIT NO: WA-22IP-37-09/2017

BETWEEN

DARUL FIKIR
(Business Registration No.: 000624088-H) ... PLAINTIFF

AND

DEWAN BAHASA DAN PUSTAKA ... DEFENDANT

JUDGMENT

(Court enclosure no. 4)

A. Introduction

1. This judgment raises a novel question of whether “*Dewan Bahasa dan Pustaka*” (**DBP**) is a legal entity against whom legal proceedings can be instituted.
2. The plaintiff (**Plaintiff**) is a partnership which is an exclusive distributor of an Islamic religious book, “*Mushaf Al Quran Bertajwid dan Berwarna*” (**Book**).
3. By a letter dated 19.4.2016, the Ministry of Education appointed the Plaintiff to supply the Books for the use of primary school students throughout Malaysia in 2017. On 2.9.2016, the Plaintiff entered into a

contract with DBP to, among others, print, supply and distribute the Books (**Contract**).

4. On 18.9.2017 DBP issued an open tender inviting Bumiputera book suppliers registered with DBP to bid for a contract to print, bind and supply the Books for 2018 (**Tender**).

B. Proceedings

5. The Plaintiff commenced this suit against DBP based on DBP's alleged breaches of the Contract (**This Action**). In This Action, the Plaintiff filed an application for an interlocutory injunction (**Enc. 4**) to restrain DBP from -

(1) acting on the Tender; and

(2) performing any work on the printing and supply of the Books without the Plaintiff's written consent

- pending the disposal of This Action.

C. Court's approach in deciding interlocutory restraining injunction applications

6. In **La Kaffa International Co Ltd v Loob Holdings Sdn Bhd** [2018] 7 MLJ 305, at paragraph 28, I have adopted the following approach in determining interim prohibitory injunction applications:

"28. In deciding how the court may exercise its discretion to grant an interim prohibitory injunction, the following considerations are relevant:

- (1) *whether a plaintiff has satisfied the court that there is at least a bona fide and serious question to be tried in respect of the plaintiff's cause of action against the defendant - please see the Supreme Court's judgment delivered by Mohd. Jemuri Serjan CJ (Borneo) in **Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors** [1995] 1 MLJ 241, at 253. If a plaintiff cannot satisfy the court that there is at least a bona fide and serious issue to be tried in respect of the plaintiff's cause of action against the defendant, the court shall refuse to grant an interim restraining injunction on this ground alone; and*

- (2) *if a plaintiff satisfies the court that there is at least a bona fide and serious question to be tried -*
 - (a) *whether damages constitute an adequate remedy for the plaintiff. If damages are a sufficient relief for the plaintiff, the court may refuse to give an interim prohibitory injunction - please see the decision of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of **Associated Tractors Sdn Bhd v Chan Boon Heng & Anor** [1990] 1 CLJ (Rep) 30, at 32;*

 - (b) *if damages do not constitute an adequate remedy for the plaintiff, whether the "balance of convenience" (some cases use the phrase "balance of justice") lies in favour of the grant or refusal of an interim restraining injunction. If the balance of convenience is not in favour of the grant of an interim prohibitory injunction, the interim prohibitory injunction should be refused on this ground alone - **Alor Janggus Soon Seng Trading**, at p. 266; and*

 - (c) *if the balance of convenience is in favour of granting an interim restraining injunction, is there any policy or equitable consideration*

*which militates against the grant of an interim restraining injunction? [please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of **Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors** [1995] 1 MLJ 193, at 206-207].*

Even if a plaintiff has satisfied the court -

- (i) of the existence of a bona fide and serious issue to be tried;*
 - (ii) damages are not an adequate remedy; and*
 - (iii) the balance of convenience lies in favour of a grant of an interim restraining injunction*
- the court may still exercise its discretion to refuse an interim prohibitory injunction on policy or equitable ground.”*

D. Is DBP a legal entity?

7. The title to the Dewan Bahasa dan Pustaka Act 1959 (**DBPA**) states that DPBA is an “*Act to institute and establish a body to be known as the Board of Control of [DBP] to promote the development of language and literature in Malaysia*”. I reproduce below the relevant provisions in DBPA:

“s 3(1) There shall be established a Board to be called the "Board of Control of the Dewan Bahasa dan Pustaka" ...

(2) The Board shall be a body corporate with perpetual succession and a common seal.

6(1) It shall be the duty of the Board to formulate and implement policies in the carrying out of its objects.

7(1) The Board shall have the power to do anything and to enter into any contract or business transaction (whether or not involving expenditure, the acquisition, use and disposal of any movable, immovable, tangible or intangible property) which in its opinion is calculated to facilitate the performance of its duties or the exercise of its powers effectively:

Provided that this power shall not include the power to borrow other than as provided in subsection 19(2).

(2) Without prejudice to the generality of subsection (1), the Board shall have the power -

- (a) to carry out any commercial, industrial, research or training activity or any other activity the carrying out whereof appears to it to be requisite, advantageous or convenient for or in connection with the performance of its duties or the exercise of its powers;*
- (b) to impose fees or any other charges it deems fit for services that the Board is requested to carry out, render or perform;*
- (c) to receive in consideration of the services carried out, rendered or performed by it such commission or payment as may be agreed upon; and*
- (d) to perform all duties and exercise all powers which, under any written law, are or may be, or may become, vested in the Board or are delegated to the Board.**

s 26. The Public Authorities Protection Act 1948 [Act 198] shall apply to any action, suit, prosecution or proceeding against the Board

or against any member, officer, servant or agent of the Board in respect of any act, neglect or default done or committed by him in such capacity."

(emphasis added).

8. I am of the view that there is no *bona fide* and serious question to be tried in This Action as regards DBP. On this ground alone, Enc. 3 is dismissed with costs. This decision is premised on the following reasons:

- (1) based on DBPA's long title, ss 3(1), (2), 6(1), 7(1), (2) and 26 DBPA, Parliament has clearly intended for the "*Board of Control*" of DBP (**Board**) to be the statutory entity for the purpose of all legal proceedings. Accordingly, by reason of DBPA, the Board (not DBP) should have been sued by the Plaintiff in This Action. In fact, under s 7(1) DBPA, the Contract should have entered into by the Board (not DBP);
- (2) in deciding an interim injunction application, the court exercises its discretion on whether an equitable remedy of interlocutory injunction should be granted or otherwise. There is a maxim of Equity that "*Equity follows the law*" (the application of Equity shall be subject to the operation of statutes) - please see Chang Min Tat J's (as he then was) decision in the High Court case of **Wong Kim Fatt v Leong & Co Sdn Bhd & Anor** [1976] 1 MLJ 140, at 142. The court should not exercise its discretionary power to order an interlocutory injunction against DBP which will be contrary to DBPA's long title, ss 3(1), (2), 6(1), 7(1), (2) and 26 DBPA; and

- (3) even if this court grants any interlocutory injunction in the Plaintiff's favour against DBP, such an order cannot be enforced against a non-entity. There is a maxim in Equity that "*Equity does not act in vain*" - please see Idrus Harun JCA's judgment in the Court of Appeal case of **Khoo Kay Aun & Ors v Koe Liew Hi** [2016] 1 LNS 1455, at paragraph 34.
9. I am aware that under O 15 r 6(1) of the Rules of Court 2012 (**RC**), a suit shall not be defeated by reason of a non-joinder of any party. However, the Plaintiff cannot rely on O 15 r 6(1) RC in this case. This is because if the Plaintiff has wrongly sued DBP (which is not a legal entity under DBPA), O 15 r 6(1) RC does not provide any lawful basis for the court to allow Enc. 4. It is incumbent on the Plaintiff to amend the writ and statement of claim to substitute the Board in place of DBP in This Action.

E. Whether damages are an adequate remedy for Plaintiff

10. Clause 5 of the Contract and Schedule E to the Contract provide that the total payment for the Plaintiff's services is RM8,175,998.42. As such, I have no hesitation to decide that damages are an adequate remedy for the Plaintiff in This Action - please see the judgment of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of **Associated Tractors Sdn Bhd v Chan Boon Heng & Anor** [1990] 1 CLJ (Rep) 30, at 32. Enc. 4 is therefore dismissed with costs on this ground.
11. Alternatively or additionally, the Plaintiff bears the evidential onus to satisfy this court that the damages are not an adequate remedy for the Plaintiff -

please see the Court of Appeal's judgment delivered by Ahmad Fairuz JCA (as he then was) in **Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd** [1997] 3 MLJ 90, at 99. I am of the view that the Plaintiff has failed to discharge the evidential burden to persuade the court that damages are not a sufficient relief for the Plaintiff in this case.

F. Where does balance of convenience lie?

12. Based on the Supreme Court's judgment delivered by Mohd. Jemuri Serjan CJ (Borneo) in **Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors** [1995] 1 MLJ 241, at 270-271, where the balance of convenience lies depends on which proposed court order carries a lower risk of injustice. If the grant of an interim restraining injunction carries a lower risk of injustice than its refusal, the balance of convenience lies in favour of the grant of an interlocutory restraining injunction. Conversely, if the grant of an interim prohibitory injunction carries a higher risk of injustice than its refusal, the balance of convenience lies against the grant of the interim prohibitory injunction.
13. I am of the view that a refusal of Enc. 4 carries a lower risk of injustice than to allow an interlocutory injunction in this case. This decision is premised on the following reasons:
 - (1) if Enc. 4 is dismissed and the Plaintiff succeeds at the trial of This Action (provided that the Plaintiff substitutes the Board for DBP in this case), damages are an adequate remedy for the Plaintiff - please see the above paragraph 10. The Board is a statutory body under DBPA

and there is no reason to doubt its commercial solvency. In fact, the Plaintiff has not alleged that the Board is commercially insolvent; and

- (2) if Enc. 4 is allowed, this will cause serious and irreparable prejudice to primary school students of the Islamic faith throughout Malaysia because they will be deprived of the Books for the purpose of their religious education. Such a prejudice cannot be compensated in monetary terms.

Based on the above reasons, Enc. 4 is dismissed with costs because the balance of convenience lies heavily against the grant of an interim prohibitory injunction in this case.

G. Grant of interlocutory restraining injunction is contrary to public interest

14. The following High Court cases have refused to grant interim prohibitory injunctions on the ground of public interest:

- (1) the judgment of Edgar Joseph Jr J (as he then was) in **Saw Seng Kee v Director of Lands & Mines, Penang & Ors** [1987] 1 MLJ 80, at 82; and
- (2) Mohd. Noor J's (as he then was) decision in **Saonah bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah** [1994] 3 MLJ 758, at 764.

15. In the Court of Appeal case of **Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors** [1995] 1 MLJ 193, at 206-207, Gopal Sri Ram JCA (as he then was) has held that the court deciding an interlocutory restraining injunction application should consider, among others, public interest.
16. If Enc. 4 is allowed, this will deprive primary school students of the Islamic faith throughout Malaysia of the Books for the purpose of their religious education. The grant of such an interlocutory injunction in this case is clearly contrary to public interest.

H. Conclusion

17. The upshot is that Enc. 4 is dismissed with costs. Any party dealing with the Board should ensure that the Board (not DBP) is the contracting party and if there is litigation, the Board (not DBP) should be cited in legal proceedings.

WONG KIAN KHEONG
Judge
High Court (Commercial Division)
Kuala Lumpur

DATE: 14 JUNE 2018

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