

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
CIVIL SUIT NO: 22IP-32-06/2016

BETWEEN

1. **R RAMANI A/L M RAMALINGAM** (NRIC No.: 721013-05-5351)
(suing on behalf of the Recording Industry
Association of Malaysia, a registered society)
2. **WARNER MUSIC (MALAYSIA) SDN BHD**
(Company No.: 38942-P)
3. **SURIA RECORDS SDN BHD**
(Company No.: 61766-P) ... **PLAINTIFFS**

AND

DELUXE EXCLUSIVE LOUNGE SDN BHD
(Company No.: 101190-U) ... **DEFENDANT**

HEARD TOGETHER WITH

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AND

JB DISCOVERY SDN BHD
(Company No.: 668520-K) ... **DEFENDANT**

JUDGMENT

(Applications to transfer cases to Johore Bahru High Court)

A. Sole issue

1. This judgment concerns two suits - Civil Suit No. 22IP-32-06/2016 (**1st Suit**) and Civil Suit No. 22IP-33-06/2016 (**2nd Suit**). The 1st and 2nd Suits shall be referred to in this judgment as the “**2 Suits**”.

2. The 2 Suits raised a novel question of whether the Intellectual Property High Court in Kuala Lumpur (**IP Court**) should exercise its discretion under Order 57 rule 1(1) of the Rules of Court 2012 (**RC**) to transfer the 2 Suits to the Johor Bahru High Court (**JB Court**) for the following reasons:
 - (1) the cause of action arose in Johor Bahru (**JB**);

 - (2) the defendants in the 2 Suits (**Defendants**) have their place of business in JB; and

 - (3) the facts on which the 2 Suits are based, occurred in JB.

B. Background

3. The 2 Suits have been filed by 3 plaintiffs. On 25.8.2016, only the first plaintiff (**1st Plaintiff**) discontinued the 2 Suits with costs of RM1,000.00 for each case to be paid by the 1st Plaintiff to each of the Defendants. Henceforth, the 2 Suits are proceeded with by the second and third plaintiffs (**2nd and 3rd Plaintiff**). This judgment will refer to the 2nd and 3rd Plaintiffs as the "**Plaintiffs**".

4. In these 2 Suits, the Plaintiffs pleaded as follows, among others, in their Statements of Claim (**2 SOC**):
 - (1) the Plaintiffs carry on for commercial purposes, among others, the recording of songs and other performances by singers and artistes, the making and production of sound recordings, audio-visual recordings and karaoke recordings;

 - (2) the 2nd Plaintiff owns the copyright in the sound and/or karaoke recordings entitled "*Gadis Melayu*" (**1st Work**) and "*Seroja*" (**2nd Work**) by Dato' Jamal Abdillah;

 - (3) the 3rd Plaintiff is the copyright owner of "*Percayalah*" (**3rd Work**) and "*Cindai*" (**4th Work**) by Dato' Siti Nurhaliza;

 - (4) in the 1st Suit, the first defendant company (**1st Defendant**) has its –
 - (a) registered address in Muar, Johore; and

- (b) business address in JB (**1st Defendant's Business Premises**);
- (5) in the 2nd Suit, the second defendant company (**2nd Defendant**) has its registered and business addresses (**2nd Defendant's Business Premises**) in JB;
- (6) the records of the Companies Commission of Malaysia show that -
- (a) the 1st Defendant operates a "*nightclub*" business; and
- (b) the 2nd Defendant's business is "*club house, music karaoke, amusement and recreation centre*";
- (7) on or around 13.12.2012, 21.4.2013, 2.7.2015 and 25.8.2015, licensing officers from Recording Industry Association of Malaysia (**RIM**) had visited the 1st Defendant's Business Premises and found that the 1st Defendant had stored, reproduced and/or played the sound and/or karaoke recording of the 1st to 3rd Works for the purposes of the 1st Defendant's nightclub business without the Plaintiffs' license, permission or consent;

- (8) on or about 25.8.2015, the Enforcement Division of the Ministry of Domestic Trade, Co-operatives and Consumerism (**KPDNKK**) had raided the 1st Defendant's Business Premises and seized, among others, the 1st Defendant's server which consisted the 1st to 3rd Works;
- (9) on or around 13.12.2012 and 25.8.2015, RIM's licensing officers had visited the 2nd Defendant's Business Premises and found that the 2nd Defendant had stored, reproduced and/or played the sound and/or karaoke recording of the 1st and 4th Works for the purposes of the 2nd Defendant's business as a "*club house, music karaoke, amusement and recreation centre*" without the Plaintiffs' license, permission or consent;
- (10) on or about 25.8.2015, KPDNKK raided the 2nd Defendant's Business Premises and seized, among others, the 2nd Defendant's server which consisted the 1st and 4th Works; and
- (11) the Defendants had infringed the Plaintiffs' copyright in the 1st to 4th Works and the Plaintiffs prayed for the following relief against the Defendants, among others –
- (a) a permanent injunction to restrain the Defendants from infringing the Plaintiff's copyright in the 1st to 4th Works;

- (b) a publication of full apology by the Defendants to the Plaintiffs –
 - (i) in terms, content and format acceptable to the Plaintiffs;
 - (ii) in 3 daily newspapers of the Plaintiff's choice; and
 - (iii) of a size and at a page of the newspapers to be specified by the Plaintiffs;
- (c) an inquiry of damages and payment of damages by the Defendants to the Plaintiffs after such an inquiry;
- (d) additional damages pursuant to s 37(7) of the Copyright Act 1987; and
- (e) aggravated damages.

C. Defendants' 2 applications (2 Applications)

5. The 2 Applications are -

- (1) Court enclosure no. 5 in the 1st Suit; and

- (2) Court enclosure no. 4 in the 2nd Suit
- to transfer the 2 Suits to JB Court.
6. The Defendants are represented by learned counsel, Encik Mohd Fairuz bin Mahmood (**Encik Mohd Fairuz**) while Ms. Su Siew Ling (**Ms. Su**) acted for the Plaintiffs.
7. All the parties agreed for the 2 Applications to be heard together as the 2 Applications concerned the sole question of whether the IP Court should exercise its discretion to transfer the 2 Suits to JB Court.
8. In support of the 2 Applications, Encik Mohd Fairuz submitted as follows, among others:
- (1) the cause of action for the 2 Suits arose in JB;
 - (2) the Defendants' business premises are in JB (**Defendants' Business Premises**). This is clear from KPDNKK's raid on the Defendants' Business Premises;
 - (3) the facts on which the 2 Suits are based, occurred in JB;
 - (4) the above 3 facts (**3 Facts**) –

- (a) fall under s 23(1)(a) to (c) of the Courts of Judicature Act 1964 (**CJA**); and
 - (b) fulfil Order 57 rule 1(4)(A), (B) and (C) RC;
- (5) the following reasons make it desirable in the interest of justice to transfer the 2 Suits to JB Court within the meaning of Order 57 rule 1(4)(E) RC –
- (a) all the Defendants’ witnesses reside in JB. KPDNKK’s officers who raided the Defendants’ business premises, are based in JB. If the 2 Suits are tried in the IP Court, the Defendants’ witnesses and KPDNKK’s officers have to expend time, effort and expense to travel from JB to testify in the IP Court;
 - (b) the Defendants’ servers (**Servers**) are in KPDNKK’s custody in JB. If the IP Court tries the 2 Suits, KPDNKK’s officers have to bring the Servers to the IP Court; and
 - (c) in view of the above reasons, the Plaintiffs have abused Court’s process by filing the 2 Suits in the IP Court when the Plaintiffs could have easily instituted the 2 Suits in the JB Court. The same solicitors for the Plaintiffs in these 2 Suits had filed 6 other copyright infringement cases for other clients against other defendants in the Kuala Lumpur

subordinate courts (**6 Other Cases**). The 6 Other Cases could have easily been filed in JB subordinate courts (due to the existence of the 3 Facts). These 6 Other Cases showed the abuse of Court process by the Plaintiffs' solicitors;

- (6) there is no Practice Direction, Chief Registrar's Circular or Circular from the Registrar of the High Court of Malaya which has expressly provided that only the IP Court can hear intellectual property disputes (**IP Disputes**) in West Malaysia. Based on the Practice Direction No. 6 of 2013 (**PD No. 6/2013**), the IP Court is only one of the "*New Commercial Courts*" to hear IP Disputes which arise in Kuala Lumpur (**KL**). This is clear from paragraph 13 of PD No. 6/2013;
- (7) the IP Court is unlike the Construction Court in Kuala Lumpur and Shah Alam (**Construction Court**). By virtue of the Chief Registrar's Circular No. 2 of 2013 (**CR's Circular No. 2/2013**), the Construction Court has been specifically established to hear all construction disputes;
- (8) if the 2 Suits are transferred to JB Court, the learned Judge or Judicial Commissioner serving in JB Court will be given the opportunity to be exposed to IP matters; and

- (9) reliance had been placed on the High Court's decision in **Asia Debut Sdn Bhd v Kementerian Pendidikan Malaysia & Ors** [2015] 9 MLJ 770.
9. Ms. Su had opposed the 2 Applications on the following grounds, among others:
- (1) the 2 Suits concerned copyright infringement. The “*very purpose*” of establishing the IP Court is for the IP Court to deal with all IP Disputes. As such, the IP Court is the proper forum to try the 2 Suits. Ms. Su relied on the following cases -
- (a) the High Court case of **Malacca Securities Sdn Bhd v Loke Yu** [1998] 3 CLJ 22; and
- (b) the Supreme Court's judgment in **American Express Bank Ltd v Mohamad Toufic Al-Ozeir & Anor** [1995] 1 CLJ 273;
- (2) the 2 Suits raise novel issues on copyright law which will be a precedent for the subordinate courts. Hence, the need for the 2 Suits to be heard in the IP Court;
- (3) if the 2 Applications are allowed, this will defeat the very objective of establishing the IP Court;

- (4) there is no prejudice to the Defendants if the 2 Suits are tried in the IP Court because –
- (a) KL and JB are well-connected by express highways, trains and airplanes. Travelling between KL and JB is common and can be easily done in one day;
 - (b) if the 2 Suits are decided in the Defendants' favour, the Defendants will be adequately compensated in costs; and
 - (c) if the 2 Suits are disposed of summarily, trials will not be held. In such a case, witnesses need not travel from JB to KL; and
- (5) even if s 23(1) CJA has not been satisfied in the 2 Suits, the Court has inherent powers under s 23(2) CJA to hear the 2 Suits. Ms. Su cited **Panaron Sdn Bhd v Univac Switchgear Sdn Bhd** [2015] 2 CLJ 286.

D. IP Court's jurisdiction to try cases

10. Before I discuss the 2 Applications, it is necessary to clarify the jurisdiction of the IP Court to try cases. This is because of Encik Mohd Fairuz's far-reaching contention that the IP Court can only try IP

Disputes which arise in KL. For this discussion, I will refer to Article 121(1)(a) of the Federal Constitution (**FC**), the meaning of “*federal law*” in Article 160(2) FC, the definition of “*local jurisdiction*” in s 3 CJA, ss 4 and 23 CJA as follows:

“FC

Article 121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely –

- (a) *one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and*

...

... and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

Article 160(2) “federal law” means –

- (a) *any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and*
- (b) *any Act of Parliament;*

CJA

s 3 *“local jurisdiction” means -*

(a) *in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and ...*

4. *In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.*

23(1) *Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where -*

(a) *the cause of action arose;*

(b) *the defendant or one of several defendants resides or has his place of business;*

(c) *the facts on which the proceedings are based exist or are alleged to have occurred; or*

(d) *any land the ownership of which is disputed is situated,*

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

- (2) *Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.”*

(emphasis added).

11. I am of the following view regarding the jurisdiction of the IP Court to try cases:

- (1) by virtue of Article 121(1)(a) FC, the IP Court as a High Court in Malaya has jurisdiction as conferred by “*federal law*”. CJA is a “*federal law*” as defined Article 160(2) FC. Section 23(1) CJA is a provision which expressly confers jurisdiction on the High Court to try cases. This is clear from Ahmad Maarop FCJ’s judgment in the Federal Court case of **Goodness For Import And Export v Phillip Morris Brands Sarl** [2016] 5 MLJ 171, at paragraphs 28 and 31, as follows –

“28. ... *It is settled law that s 23(1) [CJA] also confers extra-territorial jurisdiction on the High Court, independently of O 11 of the RHC.*

...

31. *Does s 23(1) [CJA] apply in this case? In determining the question whether in this case the High Court has jurisdiction under that section, the allegations by the plaintiff in statement of claim must be assumed to be true. ...”*

(emphasis added);

(2) according to s 3(a) CJA, the “*local jurisdiction*” of the High Court in Malaya comprises of the “*territory comprised in the States of Malaya*”, including the Federal Territory. As such, the IP Court has jurisdiction to try all cases within its “*local jurisdiction*” (West Malaysia) which fall within any one of paragraphs (a) to (d) of s 23(1) CJA. In this regard, I cannot accede to Encik Mohd Fairuz’s submission that the IP Court can only try IP Disputes which arise in KL;

(3) s 4 CJA has expressly provided that if there is a conflict between CJA [such as s 23(1)(a)] and any other written law (other than FC), CJA “*shall prevail*”. Accordingly, if there is any inconsistency between –

(a) ss 3(a) [definition of “*local jurisdiction*”] and 23(1)(a) CJA on the one part

(b) with PD No. 6/2013 and CR’s Circular No. 2/2013 on the other part

- s 4 CJA clearly provides for ss 3(a) [definition of “*local jurisdiction*”] and 23(1)(a) CJA to prevail over PD No. 6/2013 and CR’s Circular No. 2/2013;

(4) the following decisions have explained the effect of Practice Directions –

(a) Raja Azlan Shah LP decided in the Federal Court case of **Jayasankaran v Public Prosecutor** [1983] 1 MLJ 379, at 380, as follows -

“We are of the view that Practice Note No.2 of 1960 was intended to be no more than a direction for administrative purposes. It cannot be exalted into a rule of law reflecting the true effect of the requirements of section 307 of the [Criminal Procedure Code], and if it is wrong then the position should be recitified. We think it is wrong.”

(emphasis added);

(b) in **Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal** [1995] 3 MLJ 465, at 470, Zakaria Yatim JCA (as he then was) delivered the Supreme Court’s judgment that *“Practice directions are intended to be no more than a direction for administrative purpose.”*; and

(c) the judgments of Steve Shim CJ (Sabah and Sarawak), Abdul Malek Ahmad FCJ (as he then was) and Mohtar Abdullah FCJ in the majority decision of the Federal Court in

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, at 403-404, 418 and 428, have held, among others, that Practice Directions do not have statutory authority and cannot supercede or deviate from rules of Court;

- (5) in view of s 4 CJA and the appellate decisions in the above subparagraph (4), no reliance can be placed on PD No. 6/2013 and CR's Circular No. 2/2013 to confine the IP Court's jurisdiction to try IP Disputes which arise in KL only; and
- (6) for the purpose of deciding whether the High Court in Malaya has jurisdiction to try a case, the Court must assume the contents of the 2 SOC to be true - **Goodness For Import And Export**, at paragraph 31. Based on the 2 SOC (please see the above paragraph 4), the 3 Facts occurred in JB, within the "*local jurisdiction*" (territory in West Malaysia) of the IP Court. Accordingly, the IP Court has the jurisdiction under s 23(1)(a), (b) **and/or** (c) CJA to try these 2 Suits.

E. Court's discretionary power to transfer cases under Order 57 rule 1(1) RC

12. The relevant part of Order 57 rule 1 RC provides as follows:

“1(1) **Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.**

...

(4) **Before making any order to transfer any proceedings from –**
(a) the High Court to another High Court of co-ordinate jurisdiction;

...,

the High Court Judge or the Judge of the Sessions Court or Magistrate, as the case may be, shall take into consideration whether the High Court or Subordinate Court which shall hear the case is located at or nearest to the place where –

- (A) the cause of action arose;**
- (B) the defendant, or one of the several defendants, resides or has his place of business;**
- (C) the facts on which the proceedings are based exist or are alleged to have occurred;**
- (D) the land the ownership of which is disputed is situated;**
or
- (E) for other reasons it is desirable in the interests of justice that the proceedings should be transferred.”**

(emphasis added).

13. I am of the following opinion concerning Order 57 rule 1(1) RC:

(1) Order 57 rule 1(1) RC is not found in the previous Rules of High Court 1980. Prior to the introduction of Order 57 rule 1(1) RC, civil cases have been transferred by relying on s 20 CJA and paragraph 12 of the Schedule to CJA (**Paragraph 12**). Section 20 CJA and Paragraph 12 read as follows -

“20. The distribution of business among the Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

Paragraph 12

Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:

Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.”

Previous cases regarding the Court’s power to transfer cases based on s 20 CJA and/or Paragraph 12 do not apply to the construction of Order 57 rule 1(1) RC;

(2) in **Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd** [2016] 3 MLJ 553, at paragraph 19, Zulkefli

Makenudin CJ (Malaya) in the Federal Court held, among others, Order 57 rule 1(1) RC does not allow a transfer of cases between the High Court of Malaya and the High Court in Sabah and Sarawak. The High Court's decision in **Asia Debut** (which allowed the transfer of a case from the KL High Court to the High Court in Kota Kinabalu), cited by the Defendants' learned counsel, was not followed in **Hap Seng Plantations (River Estates)**;

(3) Order 57 rule 1(1) RC provides a discretionary power for the Court to transfer cases. This is clear from the use of the permissive term "*may*" in Order 57 rule 1(1) RC. In exercising the Court's discretionary power under Order 57 rule 1(1) RC, there are 2 cumulative conditions to be fulfilled, namely –

(a) the Court "*shall take into consideration*" the matters enumerated in Order 57 rule 1(4)(A) to (E) RC (**1st Condition**); and

(b) the Court "*is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court*" (**2nd Condition**); and

(4) the exercise of the Court's discretion to grant a transfer or otherwise in a particular case, must necessarily depend on the particular affidavit evidence adduced in the case in question. As

such, the exercise of judicial discretion in a transfer application under Order 57 rule 1(1) RC, is not a binding precedent from the view point of the *stare decisis* doctrine.

F. Should IP Court transfer 2 Suits to JB Court?

14. In deciding these 2 Applications –

(1) regarding the 1st Condition -

(a) I am of the view that the following matters are relevant in the exercise of the Court's discretion to transfer the 2 Suits to JB Court -

(i) the cause of action for the 2 Suits arose in JB – Order 57 rule 1(4)(A) RC;

(ii) the Defendants' places of business are in JB – Order 57 rule 1(4)(B) RC. The residential addresses of the Defendants' directors are not relevant because under s 16(5) of the Companies Act 1965, the Defendants are legal entities which are separate from their directors, shareholders and employees; and

(iii) the facts on which the 2 Suits are based, are alleged to have occurred in JB – Order 57 rule 1(4)(C) RC; and

- (b) the following matters do not constitute reasons whereby “*it is desirable in the interests of justice that the proceedings should be transferred*” to JB Court under Order 57 rule 1(4)(E) RC –
- (i) the expense, time and inconvenience for the Defendants’ witnesses and KPDNKK officers to travel from JB to the IP Court to testify in these 2 Suits. Such reasons are not relevant because firstly, all the parties in these cases may consent to a Court order under Order 38 rule 2(1) RC to allow these witnesses to testify in JB through Skype – please see **China Harbour Engineering Co Ltd v Lunar Shipping Agencies Sdn Bhd** [2016] AMEJ 1185, at sub-paragraph 47(2)(d);
 - (ii) even if the Defendants’ witnesses and KPDNKK officers have to travel from JB to testify in the IP Court, if the Defendants succeed at the end of the trial, the Defendants will be sufficiently compensated in respect of all the expenses incurred by the Defendants’ witnesses and KPDNKK officers, in the form of costs to be paid by the Plaintiffs to the Defendants; and
 - (iii) all the parties in the 2 Suits may consent to the contents of the Servers as “*Part B*” documents under Order 34

rule 2(2)(e)(i) RC, namely parties may only dispute the weight to be attached to the contents of the Servers but not their authenticity. Even if the parties cannot agree that the contents of the Servers be classified as “*Part B*” documents, the expense incurred by KPDNKK in adducing the Servers at the trial of these cases, can be claimed by the Defendants as part of the costs of the 2 Suits (provided that the Defendants succeed at the end of the trial); and

(2) in respect of the 2nd Condition, despite the fact that the 3 Facts are relevant under Order 57 rule 1(4)(A) to (C) RC [please see the above paragraph 14(1)(a)], I have declined to exercise my discretion under Order 57 rule 1(1) RC to transfer the 2 Suits to JB Court (**This Decision**). This Decision is premised on the following reasons –

(a) there is no affidavit evidence to show why the 2 Suits cannot be “*fairly tried*” in the IP Court;

(b) the 2 Suits can be “*more conveniently*” tried in the IP Court which specializes solely in IP matters. There is no IP Court in JB;

(c) the purposes for establishing the IP Court on 17.7.2007 are –

- (i) to promote, if not ensure, the uniformity, consistency and predictability in the development of IP jurisprudence and case law by the IP Court;
- (ii) the uniformity, consistency and predictability in IP jurisprudence and case law as developed by the IP Court, may in turn –
 - (iia) attract foreign investors in respect of IP matters to this country;
 - (iib) benefit all parties who deal with or are involved in IP matters; and
 - (iic) assist IP practitioners, be they be lawyers, patent agents and trade mark agents; and
- (iii) to promote IP specialization of the Judge or Judicial Commissioner sitting in IP Court; and
- (d) the very objective of establishing the IP Court will be defeated by allowing the transfer of the 2 Suits to JB Court. In fact, IP cases which have been filed in West Malaysia in High Courts outside KL, should be transferred to the IP Court under Order 57 rule 1(1) RC so as to achieve the very

purpose of constituting the IP Court. Accordingly, the fact that the 6 Other Cases have been filed in KL subordinate courts, are consistent with the purposes for setting up the IP Court.

G. Decision

15. Premised on the above reasons, the 2 Applications are dismissed with costs of RM2,000.00 for each application and an allocatur fee shall be imposed on the above costs in accordance with Order 59 rule 7(4) RC.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 21 DECEMBER 2016

1st and 2nd Suits

Counsel for Plaintiffs:

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