DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
SAMAN PEMULA NO: WA-24NCVC-57-01/2020

Dalam perkara mengenai lapan (8) akaun Instagram dikenali sebagai "robert_tan_wong." "ct_s4lly," "aenisah1998," "chin_richard_8," "sweetlily_e," "sofia_sakina_" or "sakina_sf," "ieera_s," dan "zuleena_iena"

Dan

Dalam perkara di bawah Aturan 24 Kaedah 7A(1), Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara di bawah Aturan 24 Kaedah 7A(5), Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara di bawah Seksyen 25(2), Akta Mahkamah Kehakiman 1964 di baca bersama dengan Perenggan 14, Jadual Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara di bawah Aturan 92 Kaedah 4,
Kaedah-Kaedah Mahkamah 2012

ANTARA

1. **ABU JAMAL BIN SULAIMAN**
(No. K/P: 630313-10-5011)

2. **MARIANI BINTI MOHAMED SAAD**
(No. K/P: 640104-10-7722)

... PEMOHON-PEMOHON/APPLICANTS

DAN

FACEBOOK, INC. **... DEFENDAN/DEFENDANT**

GROUNDS OF JUDGEMENT

(Interlocutory – The Defendant's Application to set aside the service of the Originating Summons of the Applicants)

A. INTRODUCTION

[1] The Applicants who are husband and wife alleged that they were defamed by persons unknown to them because they had used fake Instagram accounts using the Defendant's platform.

[2] The Applicants wanted to take legal action against them (fake account holders/Defamors). However, they need to make a pre-action discovery on the Defendant. Hence, an Originating Summons was filed for the purpose of seeking informations regarding their identities and also documents about them, amongst others. (See Enclosure (1))

[3] Vide Enclosure (6), the Applicants had made an ex parte application for the Originating Summons together with the Affidavit in Support of the Applicants to be served on the Defendant (whose address is in the United State i.e outside jurisdiction) through the local Agent, i.e Facebook Malaysia. After hearing submissions by the Applicants' counsel, the application was granted.

[4] Vide Enclosure (13) the Defendant, Facebook Inc. had made an application to set aside the order on the principal ground that Facebook Malaysia is not the agent of the Defendant and has never been authorized to accept any documents on behalf of the Defendant. The application was disallowed with cost of RM5,000.00. Hence this appeal.

[5] Herewith are the grounds of the decision.

B. BACKGROUND FACTS

[6] The Applicants who are husband and wife had alleged that they were defamed by someone whose actual identities are unknown through

fake Instagram accounts (8 of them) using the Defendant's platform. Vide Enclosure (1), the Applicants had filed an Originating Summon dated 9 January 2020 to seek the Defendant's cooperation to provide all information which are within their possession, custody or power to enable the Applicants to determine the true identity of the owner/s of the fake Instagram accounts. The Defendant's office is outside the jurisdiction i.e in the United State.

[7] Amongst others, the purpose of making this so called pre-action discovery for information or data is to avoid any mistake of identity once the Applicants initiate a legal action based on defamation against those Defamor/s using the fake Instagram accounts.

[8] According to the Applicants, Facebook Inc. (Defendant) herein is not the party that they will file a suit against, as they believe that Facebook Inc. only provides the platform for the community to socialise, connect/communicate in which their service are widely known worldwide.

[9] Vide Enclosure (6) the Applicants had made an ex parte application vide Order 10 Rule 2 Rules of Court 2012 inter alia, for the Applicants to be granted leave to serve the Originating Summons (**"OS"**) and "Affidavit in Support" (AIS) affirmed by the Second Applicant for the main legal proceeding hereof (**"main action"**) through the Defendant's local agent known as Facebook Malaysia Sdn Bhd (**"Facebook Malaysia"**).

[10] Further "the Defendant must answer the main action within 14 days from the date of the main action being served on the Defendant's Agent".

[11] The grounds of the application as stated (see Enclosure (6)) in the Applicants' ex parte application can be summarised as follows:

(a) On 22 October 2019 the Applicants through its solicitors had sent a letter to the Defendant's Agent (Facebook Malaysia) to seek an appointment to discuss about the defamatory remarks published against the Applicants. However, they had received a direct response through email from the Defendant itself dated 26 October 2019 which had enclosed the Applicants' letter. According to the Applicants, this proved that the Defendant's Agent i.e Facebook Malaysia had played a role by forwarding the Applicants letter directly to the Defendant. (Hence Facebook Malaysia is the Defendant's Agent)

(b) Further, the Defendant's email dated 26 October 2019 could clearly be understood to mean that Facebook Malaysia is indeed the Defendant's Malaysian Agent or representative when the Defendant stated:

"Thank you for your letter to Facebook Malaysia dated 2019-10-22, a copy of which is attached to this massage for your reference"

"We are responding in our capacity as Facebook Inc, which operates the Facebook for Malaysian users ..."

[12] The Applicants averred that due to the urgent nature of the legal proceeding whereby the defamor/defamors is/are still posting defamatory remarks against them, it will be highly efficient if the same main action could be served by them on Facebook Malaysia being the Defendant's local Agent in Malaysia.

[13] After perusing through all the cause papers and hearing submissions from the Applicants, this Court had allowed the application, via its order dated 23 January 2020 – (see Enclosure (9)).

[14] Vide Enclosure (13), the Defendant had made an application to set aside the Ex Parte Order dated 23 January 2020 which was eventually disallowed, with cost of RM5,000.00.

D. ANALYSIS AND FINDING OF THIS COURT

[15] It is trite that the main objective of serving legal process against the Defendant, is to bring the attention or knowledge to the Defendant on the legal action taken against them as decided in the case of ***GETZ BROTHERS & CO GMBH v. PAN-MALAYSIAN WOOD PRODUCTS SDN BHD [1980] 2 MLJ 79*** at page 80. The Court held:

"Thomson CJ in his judgment observed at page 101 that "like all provisions relating to constructive service, (this rule) has to be read in

the light of the general principle that ***a defendant must be informed that proceedings have been commenced against him****. Such provisions are intended to ensure that when information cannot be conveyed to the defendant directly such steps are taken as experience shows will probably have* ***the effect of bringing the information to his notice****."*

[16] Based on the principle above this Court is of the considered opinion that the Defendant already had the knowledge on the existence of the legal action as they have received Enclosure (1) and Affidavit in Support on 11 February 2020 as acknowledged by them in paragraph 6, Defendant's Affidavit which stated:

"For completeness, a copy of the Originating Summons, (OS) AIS, and the Ex-Parte Order was received at the office of the Defendant on 11 February 2020…"

[17] However the Defendant is trying to avoid its involvement i.e refusing to reply and thereafter to take action on Enclosure (1) by denying that Facebook Malaysia is their agent and hence service on them through Facebook Malaysia was not regular and void.

[18] This Court observed that, when the Applicants made the ex parte application, vide Enclosure (6) it was made under Order 24 Rule 7A (1) and 7A (5), Rules of Court 2012 i.e pre-action discovery. It is to be read with Section 25 (2), Court of Judicature Act 1964.

[19] This Court is of the considered opinion that the Applicants had rightly followed the procedure under Order 24 r. 7A (5) which involves pre-action discovery to a person who is not a party to the proceeding like in this case where Facebook was made a party in the pre-action discovery to facilitate the Applicants in identifying the actual defamor/s and to take legal proceeding against the defamor/s in due course. The Applicants also had relied on Section 25 (1) and (2), Court of Judicature Act which reads as follows:

"(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same."

[20] Now, vide Enclosure (13), the Defendant is making an application to set aside the Order granting the Applicant to serve the O.S and Affidavit in Support (AIS) on the Defendant through Facebook Malaysia, on the ground that Facebook Malaysia is not their agent. The Defendant claimed that the Applicants failed to satisfy the conditions stipulated under Order 10 Rule 2 of Rules of Court 2012.

[21] After perusing through the cause papers, this Court holds that in the circumstances of this case, Facebook Malaysia is the agent of the Defendant. And as an agent of the Defendant the service of the OS and AIS by The Applicants on Facebook Malaysia is regular, as the ensuing paragraphs would show.

[22] Firstly, this Court observed that from the numerous informations on line, any reasonable man would come to a conclusion that Facebook Malaysia is indeed an agent of the Defendant by virtue of an implied contract in existence between them. For example, from the Prime Minister's Office official website it was published on May 28 2019 that Prime Minister, Tun Dr. Mahathir Mohamad (and Communication Minister, YB Tuan Gobind Singh Deo), were present at the Official Opening of Facebook Malaysia. The New Straits Times also carried and published the same news with the caption "It's official: Facebook opens office in Malaysia". The Defendant's official website also carried and published the same news and amongst others, it carried the caption: "Welcome to Kuala Lumpur". (Please see Exhibit MMS-28 averred by the 2nd Applicants).

[23] Secondly, vide "Exhibit MMS 29" the Second Applicant had averred that from the Securities Commission Malaysia (SCM) search, Facebook Malaysia are involved in "Marketing and Sales Support Services". There wasn't any firm denial from the Defendant about this fact.

[24] Thirdly, from the time of its inception, nothing was adduced convincingly before this Court to show that Facebook Malaysia had officially declared that they are not part of or an agent of the Defendant and vise-versa. Put it in another fashion, there wasn't any official public denial from both i.e the Defendant and Facebook Malaysia following the wide publicity it attracted during and after the launching.

[25] In fact, the best opportunity for Facebook Malaysia to take advantage of was to declare during that official ceremony that they are not an agent of the Defendant (Facebook Inc.) if indeed they are not. But this never happens. Hence, it can be inferred that Facebook Malaysia is an agent of the Defendant and that the Defendant is the principal. It follows that there exists implied contract between them.

[26] Fourthly, the conduct of the Defendant's Agent (Facebook Malaysia) when receiving the letter from the Applicants (Exhibit MMS-11, Affidavit in Support) bears significance as it has rendered that an implied contract had existed between them and which had given rise to their being an agent and principal. Towards that end, it is germane to note that the same letter had been addressed under the Defendant's Agent (Facebook Malaysia)'s name and not under the name of the Defendant but it reached the Defendant successfully. Further, on its own volition, the Defendant had replied to the Applicants directly via email dated 26 October 2019 with the following message:

"We are responding in our capacity as Facebook Inc. which operates the Facebook for Malaysia users …"

[27] Accordingly, if Facebook Malaysia is not the Defendant's agent or has locus standi to act for the Defendant, it should have returned those letters/documents straight back to the Applicants' Solicitors. Further, when replying via email on 26th October 2019, the Defendant should have mentioned specifically that whilst they have received the documents from Facebook Malaysia, Facebook Malaysia is not their agent. This failure reaffirmed the position that the Defendant is the principal to Facebook Malaysia. Hence, their action vide enclosure 13 to set aside the OS and AIS is an afterthought.

[28] For the above reasons, this court has no reason to blame the Applicants as any reasonable person would come to the conclusion that Facebook Malaysia is part of the Defendant. The Defendant is trying to avoid from replying Enclosure (1) for this case through the Defendant's Agent based on the principle of separate legal entity between them.

[29] This Court also holds that when Facebook Malaysia was officially opened or launched in Malaysia, the Defendant is indeed conducting business in Malaysia. Towards this end, it is germane to emulate from the finding of the English Court of Appeal in relation to Principal-Agent relationship. In the case of ***SACCHARIN CORP. LTD. v. CHEMISCHE FABRIK VON HEYDEN AKTIENESELLSCHAFT [1911] 2 KB 516*** the Court held as follows:

(a) At **page 520**:-

> *"... Atkin, K.C., in reply. There is no authority for the proposition that the place of business of the foreign corporation in this country must be a place of which the* ***foreign corporation has exclusive possession as tenant.*** *If that were the law, a* ***foreign corporation could always evade service in this country by arranging for its premises to be taken in the name of an agent*** *..."*

[30] ***Saccharin's case (supra)*** also seems to be the authority to hold that the principal can be considered as "residing in the jurisdiction through its agent" for the purpose of services of an originating process. This was what the Court said at page 518:

> *"... In that case Collins M. R. said that 'the true test in such cases is* ***whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction****, that being the only way in which a corporation can reside in this country.* ***It can only so reside through its agent, it must be considered for this purpose as itself residing within jurisdiction****.' ..."*

At page 518, (middle) the Court said:

> *"... if for a substantial period of time* ***business is carried out by a foreign corporation at a fixed place of business in this country, through some person, who there carries on the corporation's***

business as their representative *and* ***not merely his own independent business, then for that period the company must be considered as resident within the jurisdiction for the purpose of service of a writ****. …"*

[31] The Court also held that even if the agent simultaneously acts for another foreign firm and was paid commissions instead of fixed salaries, what is pertinent is that the principal have had their business in this country and hence submit its jurisdiction to this country.

[32] At page 519, the Court held:

"… The mere facts that the premises are taken in their agent's name, that he acts as agent for another foreign firm also, and that he is paid by commission instead of by a fixed salary are immaterial, ***because none the less by reason thereof it is their business carried on in this country*** *…"*

[33] At page 523, the Court held:

"… I have no doubt myself that ***a foreign corporation can carry on business at a place in this country*** *within the meaning of the rule, if* ***although the corporation is not lessees of the place, it is in any sense its own place*** *of business. …"*

[34] The Court in the case of ***Getz Brothers & Co GMBH v. PAN-MALAYSIAN WOOD PRODUCTS SDN BHD [1980] 2 MLJ 79*** echoed the same principle and held:

"... The Swiss firm as the local agent clearly had this ***"obligation" in respect of complaints*** ***and by extension*** ***in respect also of the issue and service of the writ****. ..."*

[35] From the aforesaid principles, this Court also holds that by conducting the Defendant's business in Malaysia, it is clear and apparent that the Defendant's Agent i.e Facebook Malaysia is indeed the agent for the Defendant in Malaysia. It follows that it can receive any mode of originating process on behalf of its principal here.

[36] The Defendant is determined to set aside the Order on the ground that it was irregularly served and hence invalid. This is because as the Application was also made under Order 10 Rule 2, the Applicants failed to satisfy all the 3 requirements stipulated thereunder. Essentially the Defendant is taking the position that the Applicants failed to prove that there was a contract between the Defendant and Facebook Malaysia to warrant an existence of "Principal-Agent relationship", so that, Facebook Malaysia is not an agent of an oversea principal. This Court has made a finding that there must have been in existence a contract albeit an implied contract between them. If at all the denial by the Defendant is true, this court cannot fathom how "Facebook", being a renowned "brand" and a household name, being used by Facebook Malaysia, without the permission of the

Defendant, is not being sued if Facebook Malaysia is not its agent. This is illogical and absurd. Again, it follows that Facebook Malaysia must be an agent of the Defendant.

[37] Lest we forget, this pre-action discovery application was made by the Applicants solely to seek cooperation from the Defendant as the owner of the Instagram to give information regarding the identity/identities of the Defamor/s who are using the fake Instagram accounts to maliciously defame the Applicants. This is to ensure that the Applicants are suing the right parties (see the Applicant's Draft Writ and Statement of Claim at Exhibit "MMS 24"). Hence, the Defendant will not be a party to the eventual suit against the defamor/s.

[38] Order 10 rule 2 Rules of Court 2012 are rules of procedures and the Court can exercise its wide discretion whether to adhere strictly or otherwise. As encapsulated in Order 1A, the Court in exercising its discretion should have regard to the overriding interest of justice and not only to the technical non-compliance of the Rules. The rules should be utilized to facilitate the administration of justice and not to make it difficult for genuine grievances to be heard – see ***Chang Chai Chin v. Superintended of Lands and Survey [2008] 2 MLJ 1122***. This Court also has taken cognizance of such and has made a balancing exercise, regards being given as to whether any question of miscarriage of justice would be occasioned especially that if this application to set aside is granted, the door to justice will be completely shut for the Applicants.

[39] At the risk of repetition, in this case, the Defendant will eventually not be a party to the suit. The Applicants will be suing the defamors who are account holders of the Instagram App. of the Defendant's platform. This Court have perused the Affidavits of the Applicants in 2 thick enclosures where the Applicants exhibited numerous malicious and defamatory remarks made by 8 Account holders which have reduced the Applicants into, with respect, as though they are criminals and irresponsible couple who does not deserve any respect from society, to say the least. The defamatory words used, amongst others are that the couple are kidnappers, pedophiles, rapist, satans practicing black magic etc. Indeed, the couple are experiencing great difficulties to identify the right party to sue, and the many Court procedures to be adhered to, have created a great stumbling block for them to seek justice.

[40] For the aforesaid reason, notwithstanding the submissions and the stand taken by the Defendant, this Court opined that, if this application to set aside is allowed by this Court, it will be highly prejudicial and cause grave injustice to the Applicants as though their rights to bring the actual culprits to Court will be completely shut. In fact, it will continuously cause anxiety, sufferings, trauma, shame etc to the Applicants while the wrongdoer/s is/are still slandering the Applicants, through the product owned by the Defendant, i.e Instagram. According to the Applicants, currently, there are approximately **FOUR HUNDRED (400)** slandering posts in the social media Instagram and is still growing. There is no prejudice caused to the Defendant but on

the other hand the Applicants and family are still receiving continuous accusations and slanders.

[41] This Court opined that on the finding that Facebook Malaysia is the agent of the Defendant based on implied contract, even if there exist some shortcomings or non-compliance on the part of the Applicants, regarding the service of the OS and AIS, they are just a mere irregularity which can be cured as encapsulated in Order 2 Rule 1, Rules of Court 2012 viz:

"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. …"*

[42] According to "Malaysian Rules of Court 2012 – An Annotation", one of the passages said, "…In fact, law makers and the Court have adopted the "forgiving approach" prior to the enforcement of the RHC Ord 1A – see ***Karima Saujana v. Albert a/l A. Tass [2008] 8 MLJ 693***. A litigant cannot purely complain of non-compliance and seek a matter to be dismissed when there is no evidence to demonstrate that he has suffered any prejudice. Even if there is non-compliance with the rules, the matter ought not to be dismissed without giving an opportunity for the other side to comply."

CONCLUSION

[43] For the aforesaid reasons, the Defendant's application was dismissed with costs of RM5,000.00.

Dated: **30th October 2020**

SALINAN DIAKUI SAH

SAIFUL BAKTIAR BIN CHE ABD HAKIM
SETIAUSAHA KEPADA
Y.A. DATO' AHMAD BIN BACHE
MAHKAMAH TINGGI KUALA LUMPUR

(DATO' AHMAD BIN BACHE)
Judge
Civil High Court NCvC 3
Kuala Lumpur

Parties:

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