

**MALAYSIA**  
**IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING**  
**SUIT NO.: 22-53-2009-II**  
**AND**  
5 **SUIT NO.: 22-51-2009-III**

**BETWEEN**

10 **HOCK PENG REALTY SDN BHD**  
**(COMPANY NO.: 20325-D)**  
**WISMA HOCK PENG**  
**NO. 123, JALAN LAPANGAN TERBANG**  
**93250 KUCHING** ... **PLAINTIFF**

15 **AND**

20 **TING SIE CHUNG @ TING SIEH CHUNG**  
**(WN.KP. 441211-13-5217)**  
**NO. 508 TAMAN LI HUA**  
**BINTULU**

OR

25 **c/o MESSRS TING & TING ADVOCATES**  
**7D DRIVE 4 BROOKE DRIVE**  
**96000 SIBU** ... **DEFENDANT**

**BEFORE THE HONOURABLE**

30 **MR. JUSTICE DATUK LINTON ALBERT**      **IN CHAMBERS**

**R U L I N G**

The two suits which involve the same Plaintiff and Defendant in both suits arose out of identical facts. Briefly they are these.

35 The Plaintiff had apparently acted on a misapprehension when it lodged a caveat on the Defendant's properties premised on an unpaid debt due from the Defendant to the Plaintiff. In the event the Defendant successfully obtained the removal of the caveat.

The Plaintiff appealed against the removal of the caveat and the appeal is still pending before the Court of Appeal.

The Plaintiff and the Defendant had agreed on a consent order which provided for the Defendant to proceed with the assessment of damages relating to the caveats but the payment therefor be stayed pending the disposal of the Plaintiff's appeal: 5 The damages assessed in favour of the Defendant was RM1,842,073.91. Notwithstanding the stay agreed under the consent order, the Defendant issued a writ of seizure and sale on 10 16.5.2007 against seven parcels of land belonging to the Plaintiff and lodged a Prohibitory Order on the seven parcels of land. So much for the identical facts upon which the two suits are grounded.

In Suit 22-53-2009-II (the First Suit) the pleaded cause of action is defamation. The defamatory words complained of are 15 those of the Prohibitory Order which are these:

20 "WHEREAS you the said HOCK PENG REALTY SENDIRIAN BERHAD, the above-named Defendant/Judgment Debtor has failed to satisfy an Order given on 30<sup>th</sup> day of January 2007 and dated the 29<sup>th</sup> day of February 2007 in favour of TING SIEH CHUNG, the Plaintiff/Judgment Creditor, for the sum of RM1,842,073.91 (as at 15<sup>th</sup> May 2007) together with the interest at the rate of 8% per annum from the 30.01.2007 until the full settlement and costs which shall be paid by the Defendant/Judgment Debtor to the Advocates for the Plaintiff/Judgment Creditor". 25

The Plaintiff also pleads that the natural and ordinary meaning of the words complained of meant and are understood to mean:

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- “(i) the Plaintiff company knowingly and intentionally refused to respect or honour the order of the court to satisfy the judgment debt;
  - (ii) the Plaintiff company is dishonest in not satisfying the judgment debt;
  - (iii) the Plaintiff is insolvent or financially unsound;
  - (iv) the Plaintiff is a bad pay master;
  - (v) the Plaintiff had no financial means to pay the judgment debt”.

10 There are also other additional meanings ascribed to the words complained of by the Plaintiff.

In suit 22-51-2009-III (the Second Suit) the pleaded cause of action was *‘malicious prosecution/execution’*.

15 The Defendant took out two separate applications under O 18 r 19 RHC 1980 to strike out the writ of summons and statement of claim in each of the two suits and have the actions dismissed. The principle to be applied is set out in the headnote in ***BANDAR BUILDER SND BHD v UNITED MALAYAN BANKING CORPORATION BHD*** [1993] 4 CLJ 7:

20 “The principles upon which the Court acts in exercising its power under any of the four limbs of O 18 r 19 (1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted  
25 when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.

30 So long as the pleadings disclose some course of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out”.

The ground common to both applications which is the duplicity of proceedings in the two suits is patently devoid of merit because it is not unknown for the same set of facts to give rise to more than one cause of action. In any event it is not suggested in  
5 each of the affidavit in support what are the possible consequences of the duplicity.

There is also no merit in the other ground relied on in the application relating to the first suit because it is not suggested that the words complained of are not defamatory. The Plaintiff is not  
10 relying on any legal innuendo and the failure to give particulars required under O 78 r 3 RHC 1980 or any other particulars suggested by the Defendant is of no consequence. In the circumstances the question whether the words complained of are defamatory and the relief sought ought to go to trial.

15 As to the other ground advanced on behalf of the Defendant in his application in respect of the second suit which is to the effect that the pleaded facts do not constitute a cause of action in malicious prosecution and the pleaded cause of action in malicious prosecution/execution of a prohibitory order is totally  
20 alien to our legal system.

The essential requirements of the tort of malicious prosecution are these (see: **CLERK & LINDSELL ON TORTS, 19TH EDITION [2006] SWEET & MAXWELL**):

25 “In action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause;

5 fourthly, that it was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort”.

A prohibitory order is undoubtedly not a criminal charge. In **GREGORY V PORTSMOUTH CITY COUNCIL [2000] 1 AC 419** Lord Steyn said at p 427:

10 “In English law the tort of malicious prosecution is not at present generally available in respect of civil proceedings. It has only been admitted in a civil context in a few special cases of abuse of legal process. Sometimes these cases are described as constituting a separate tort of abuse, but in my view *Fleming, The Law of Torts*, 9<sup>th</sup> ed. (1998), p. 687 is correct in observing  
15 that they ‘resemble the parent action too much to warrant separate treatment’. The most important is malicious presentation of a winding up order or petition in bankruptcy.”

and at p 428:

20 “In English law the tort of malicious prosecution has never been held to be available beyond the limits of criminal proceedings and special instances of abuse of civil legal process”.

Clearly, the tort of malicious prosecution/execution of a prohibitory order remains unknown and non-existent in our jurisdiction.

25 In the circumstances and for the reasons aforesaid, the Defendant’s application in respect of the First Suit is dismissed. The Defendant’s application in respect of the Second Suit is allowed and the Plaintiff’s action in the Second Suit accordingly dismissed. Each party shall bear its/his own costs.

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**LINTON ALBERT, J.**

Date: 11<sup>th</sup> February, 2010

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For the Plaintiff: Lim Heng Choo  
M/S Lim & Lim Advocates  
Kuching

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For the Defendant: Tai Choi Yu (Henry Ling with him)  
M/S Tai Choi Yu Advocates  
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