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RHB Bank Bhd lwn Unijaya Teknologi Sdn Bhd

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MAHKAMAH TINGGI (SHAH ALAM) — SAMAN PEMULA NO
24FC-373-03 TAHUN 2015
ZAKIAH KASSIM PK
15 JUN 2016

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Prosedur Sivil — Saman pemula — Mengenenpikan — Defendan mencagarkan sebidang tanah atas kemudahan pinjaman yang diberikan oleh plaintif — Plaintif memfailkan saman pemula bagi menjual tanah atas kegagalan defendan menjelaskan pinjaman — Defendan memfailkan notis permohonan bagi mengenenpikan saman pemula di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah 2012 — Sama ada permohonan plaintif untuk perintah jualan secara lelongan awam boleh diketepikan atas alasan tiada kausa tindakan yang munasabah dan terdapatnya 'cause to the contrary'

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Undang-Undang Tanah — Cagaran — Perintah jualan — Plaintif memfailkan saman pemula bagi menjual tanah atas kegagalan defendan menjelaskan pinjaman — Sama ada permohonan plaintif untuk perintah jualan secara lelongan awam boleh diketepikan atas alasan tiada kausa tindakan yang munasabah dan terdapatnya 'cause to the contrary' — Kaedah-Kaedah

F

Mahkamah 2012 A 18 k 19(1)(a)

Plaintif telah meluluskan dua kemudahan overdraft dan juga kemudahan pinjaman berjangka ('pinjaman-pinjaman tersebut') kepada defendan dengan cagaran hartanah ('hartanah tersebut'). Atas kegagalan defendan menjelaskan pinjaman-pinjaman tersebut, plaintif telah memfailkan saman pemula ('SP') ini untuk menjual hartanah tersebut bagi mendapatkan semula jumlah pinjaman yang terhutang. Sebelum SP difailkan, defendan telah membuat beberapa bayaran ansuran secara tunai dan melalui cek berdasarkan 'Repayment Arrangement' bagi mengelakkan pengambilan hartanah tersebut.

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Malahan, setelah SP difailkan, defendan masih lagi meneruskan pembayaran kerana defendan tidak pernah dimaklumkan mengenai pemfailan SP ini. Dalam tindakan ini, defendan telah memfailkan notis permohonan untuk mengenenpikan SP di bawah A 18 k 19(1)(a) dan (b) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Isu utama dalam tindakan ini adalah sama

I

ada permohonan plaintif untuk perintah jualan secara lelongan awam boleh diketepikan atas alasan: (a) tiada kausa tindakan yang munasabah; dan (b) terdapatnya 'cause to the contrary'.

Diputuskan, membenarkan permohonan defendan dengan kos:

- (1) Mahkamah mendapati bahawa plaintif telah gagal mematuhi A 7 k 2(1A) KKM untuk permohonan di perenggan 8 SP iaitu milikan kosong. Kegagalan ini menyebabkan bukan sahaja plaintif meletakkan defendan dalam kejutan tetapi mahkamah juga kerana plaintif menuntut perkara-perkara yang tidak dinyatakan dengan penuh, jelas dan tepat. Ketidakteraturan ini tidak boleh diperbaiki di bawah A 1A KKM (lihat perenggan 24). **A**
- (2) Sudah menjadi undang-undang yang mantap bahawa sebagai pemegang gadaian, plaintif hanya menguatkuasakan haknya untuk mendapatkan pinjaman yang masih terhutang. Perenggan satu SP telah dengan terang dan nyata menuntut perintah jualan atas kegagalan defendan membayar hutangnya dan fakta ini tidak dinafikan oleh defendan sama sekali. Tambahan pula, A 28 k 3C(1) KKM hanya menyebut mengenai keperluan affidavit untuk menyokong saman pemula dan penyerahan affidavit bukan keperluan untuk affidavit diikrarkan selepas penyediaan saman pemula. Merujuk kepada A 1A KKM, mahkamah memberi keutamaan kepada keadilan berbanding kesilapan teknikal, jika ada di bawah KKM. Berpandukan kepada alasan-alasan di atas, defendan gagal menunjukkan bahawa SP plaintif adalah secara terangnya tidak dapat dipertahankan untuk diketepikan (lihat perenggan 32–33, 37–38 & 40–41). **B**
- (3) Mahkamah melihat kepada fakta bahawa defendan telah bersungguh-sungguh membuat pembayaran demi pembayaran dengan menunaikan cek-cek tersebut mengikut tempoh yang ditetapkan atas permintaan pegawai-pegawai plaintif sendiri. Pembayaran-pembayaran telah diakui terima oleh plaintif menyebabkan plaintif diestop daripada membawa SP ini. Tindakan plaintif memulakan SP ini membawa ketidakadilan kepada defendan. Oleh itu, defendan telah berjaya membuktikan kewujudan ‘cause to the contrary’ di bawah s 256(3) Kanun Tanah Negara. Permohonan plaintif adalah remeh dan menyusahkan kerana tiada pelanggaran syarat berjaya dibuktikan yang membolehkan SP ini dibenarkan dan A 18 k 19(1)(b) KKM terpakai di sini (lihat perenggan 56–57). **C**

[English summary

The plaintiff had approved two overdraft and term loan facilities (‘the loans’) to the defendant with the security of a property (‘the property’). Due to the defendant’s default in repayment, the plaintiff filed originating summons (‘OS’) to sell the property in order to retrieve the owing monies. Before the OS was filed, the defendant made cash progressive payments and by way of a cheque based on ‘repayment arrangement’ to evade acquisition of the property. In fact, after the OS was filed, the defendant continued to proceed with the payment as the defendant was never notified about the filing of this OS. In this action, the defendant filed an application notice to set aside the OS under O 18 **D**

H**I**

A r 19(1)(a) and (b) of the Rules of Court 2012 ('the ROC 2012'). The main issues in this action were whether the plaintiff's application for a sale order by way of public auction could be set aside on the grounds that (a) there was no reasonable cause of action disclosed; and (b) there was cause to the contrary.

B **Held**, allowing the defendant's application with costs:

C (1) The court held that the plaintiff failed to comply with O 7 r 2(1) of the ROC for an application under para 8 of the OS which was vacant possession. This non-compliance did not only cause the plaintiff to place the defendant but also the court in shock as the plaintiff sought for matters which were not stated fully, clearly and accurately. This irregularity could not be remedied under O 1A of the ROC (see para 24).

D (2) It is trite law that as a chargee, the plaintiff only asserted its right to recover the owing loans. The first para of the OS clearly and visibly sought for an order for sale due to the defendant's failure to pay the owing monies and this fact was not at all denied by the defendant. Furthermore, O 28 r 3C(1) of the ROC only mentioned about the need for the affidavit to support the OS and the adducing of the affidavit, not the need for the affidavit to be sworn after preparing the OS. In reference, to O 1A of the ROC, the court gave priority to justice as compared to technical glitches, if any under the ROC. Based on the above grounds, the defendant failed to show that the plaintiff's OS was clearly unmaintainable to be set aside (see paras 32–33, 37–38 & 40–41).

E (3) The court referred to the fact that the defendant had dilligently made payment after payment by encashing the cheques based on the time fixed upon the request of the plaintiff's own officers. The payments were duly acknowledged by the plaintiff, causing the plaintiff to be estopped from filing this OS. The plaintiff's action in commencing the OS caused injustice to the defendant. Therefore, the defendant successfully showed that there was a cause to the contrary under s 256(3) of the National Land Code. The plaintiff's application was frivolous and vexatious as there was no breach of condition proven that could enable this OS to be allowed and O 18 r 19(1)(b) of the ROC was applicable (see paras 56–57).]

H **Nota-nota**

Untuk kes-kes mengenai mengenyepikan saman pemula, lihat 2(3) *Mallal's Digest* (5th Ed, 2015) perenggan 6389–6392.

I Untuk kes-kes mengenai perintah jualan, lihat 8(2) *Mallal's Digest* (5th Ed, 2015) perenggan 2844–3016.

Kes-kes yang dirujuk

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, MP (dirujuk)

- Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545; [1999] 4 CLJ 665, MR (dirujuk) **A**
- Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, MP (dirujuk)
- CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779; [2014] 9 CLJ 1012, MP (dirujuk) **B**
- Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478; [2009] 6 CLJ 81, MP (diikuti)
- Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149, MP (diikuti) **C**
- Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119; [1993] 4 CLJ 332, MP (diikuti)
- Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384, MP (diikuti) **D**
- Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36, MP (dirujuk)
- Multi-Purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576; [2000] 2 CLJ 73, MT (dirujuk) **E**
- Murugappa Chettiar v Letchumanan Chettiar* [1939] 1 MLJ 296 (dirujuk)
- Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85, MR (diikuti)
- Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409, MT (dirujuk) **F**
- See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235, MR (dirujuk)
- Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd* [2013] 4 MLJ 545, MR (dirujuk)
- Yamamori (Hong Kong) Ltd v Davidson & Ors* [1992] 2 MLJ 410, MT (dirujuk) **G**

Undang-undang yang dirujuk

- Kaedah-Kaedah Mahkamah 2012 A 1A, A 7 kk 2(1A), 3, A18 k 19(1)(a), (1)(b), A 28 k 3C(1), A 41 k 1 (1), A 83, Borang 16D, 16K **H**
- Kanun Tanah Negara ss 256, 256(3), 271, 272

Hafizi (Sidek Teoh Wong & Dennis) bagi pihak plaintif.
Justin Voon (Kho Zhen Qi bersamanya) (Justin Voon Chooi & Wing) bagi pihak defendan. **I**

Zakiah Kassim PK:

[1] Pada 15 September 2008, 24 September 2008 dan 30 November 2011, plaintif telah meluluskan:

- A (a) dua kemudahan overdraf masing-masing sebanyak RM200,000 dan RM400,000; dan
(b) kemudahan pinjaman berjangka sebanyak RM295,000.
- B [2] Sebagai cagaran, defendan iaitu pemilik berdaftar hartanah yang dipegang di bawah hakmilik 73621, Lot 59262, Mukim Mukim Petaling Daerah Petaling Negeri Selangor telah mencagarkan hartanah tersebut pada 28 Januari 2009.
- C [3] Defendan gagal menjelaskan semua pinjaman tersebut dan plaintif telah memfailkan saman pemula ('SP') ini untuk menjual hartanah defendan bagi mendapatkan semula pinjaman yang terhutang iaitu:
(a) RM540,095.02 beserta faedah untuk kemudahan overdraf; dan
- D (b) RM231,947.83 untuk kemudahan pinjaman berjangka beserta faedah 3.5% setahun, kedua-duanya dalam kiraan bulanan mulai 21 Mac 2015 hingga penyelesaian penuh.
- E [4] Borang 16D iaitu notis kemungkiran mengenai suatu gadaian dan Borang 16K iaitu notis mengambil milik dengan cara menduduki, masing-masing bertarikh 12 Januari 2015 menunjukkan jumlah yang terhutang ialah:
(a) RM588,988.17 bagi kemudahan overdraf; dan
- F (b) RM227,279.72 bagi kemudahan pinjaman berjangka beserta faedah 3.5% setahun, kedua-duanya dalam kiraan bulanan mulai 21 Mac 2015 hingga penyelesaian penuh.
- G [5] Bagi mengelakkan pengambilan hartanah yang merupakan jaminan pinjaman-pinjaman ini, defendan telah membayar ansuran bulanan untuk Mac dan April 2015 sebanyak RM4,000 dan telah membayar RM6,000 pada 5 Disember 2014 dan RM2,000 pada 30 Disember 2014. Seterusnya defendan telah membayar RM55,000 pada 21 Januari 2015 bagi menyelaraskan akaun overdraf untuk mencapai had yang dipersetujui oleh plaintif. Bagaimanapun plaintif menolak permintaan defendan untuk menjadikan akaun overdraf tersebut kembali ke 'initial situation' dan berpegang kepada *surat variasi* bertarikh 20 Januari 2015 yang merupakan *repayment arrangement* tertakluk kepada beberapa syarat.
- I [6] Berpegang kepada *repayment arrangement* defendan telah pada 4 Februari 2015 menandatangani tiga *post-dated* cek bertarikh 25 Februari 2015, 25 Mac 2015 dan 25 April 2015 yang masing-masing berjumlah RM10,000 setiap satu bagi pembayaran bulan Februari hingga April 2015.

Namun, defendan telah meminta plaintif untuk menanggungkan pendepositan cek tersebut kerana defendan masih belum mendepositkan wang ke dalam akaunnya. A

[7] Perkara ini tidak diendahkan oleh plaintif mengakibatkan cek bagi bulan Februari 2015 ditendang. Defendan kemudiannya telah bertindak pantas dengan mendepositkan RM10,000 tunai ke dalam akaun overdraf. B

[8] Pada 25 Mac 2015, wakil defendan Cik Siti Rohani memaklumkan Mr Yeap (pegawai plaintif) untuk tidak mendepositkan cek bagi bulan Mac 2015 kerana defendan dimaklumkan yang akaun overdraf telah ditutup. Namun, Mr Yeap telah mengarahkan wakil defendan untuk membayar juga RM10,000 ke dalam akaun overdraf mengikut terma penyelesaian serta untuk Term Loan *facility account*. Atas arahan itu, pada hari yang sama juga, defendan telah mendepositkan RM10,000 ke dalam akaun overdraf dan RM2000 ke dalam *term loan facility account* walaupun bayaran bulanannya ialah RM1,987.84). C D

[9] SP ini difailkan pada 30 Mac 2015.

[10] Pada 6 April 2015, plaintif melalui seorang bernama Ms Ng telah meminta Cik Siti Rohani untuk mendepositkan lagi wang ke dalam *term loan facility account* dan defendan akur dengan mendepositkan RM4,000 sebagai bayaran bulanan untuk bulan Mac dan April 2015 *untuk mengelakan tindakan undang-undang dan mengelakan pengambilan harta jaminan pinjaman ini*. E F

[11] Defendan tidak pernah dimaklumkan mengenai pemfailan SP ini. Sekali lagi, Ms Ng pada 9 April 2015 telah meminta Cik Siti Rohani untuk membuat pembayaran bagi bulan April 2015 sebanyak RM10,000 ke dalam akaun overdraf. G

[12] Defendan memfailkan NP untuk mengenyepikan SP di bawah A18 k 19(1)(a) dan (b) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') atas alasan-alasan berikut: H

- (a) *intitulement* tidak memplidkan s 272 KTN;
- (b) SP tidak disokong oleh affidavit yang sah:
 - (i) 25 Mac 2015 – affidavit plaintif diikrarkan;
 - (ii) 30 Mac 2015 – affidavit difailkan; dan I
 - (iii) 30 Mac 2015 – SP difailkan.
- (c) tidak mendedahkan terdapat tindakan guaman di mahkamah sesyen, B52NCC-884-12 Tahun 2014 dan penghakiman ingkar telah

- A dimasukkan terhadap defendan dan defendan telah memfailkan permohonan untuk mengeneipkan penghakiman ingkar tersebut;
- (d) tiada kausa tindakan yang munasabah diplidkan kerana fakta kes tidak disertakan iaitu:
- B (i) tiada terma material dalam gadaian, kemudahan overdraf dan pinjaman berjangka diplid dalam SP;
- (ii) terma dan syarat asas surat tawaran tidak diplid;
- C (iii) butir pengeluaran pinjaman, jumlah pembayaran balik, jumlah pemecahan kontrak dan fakta asas mengenai 'gagal, enggan dan/atau cuai untuk mengawal selia kemudahan-kemudahan' tidak diplid; dan
- D (e) terdapat kompromi untuk penyelesaian hutang sejak awal Disember 2014; dan terdapat *cause to the contrary* kerana tuntutan SP perlu dibuat berdasarkan surat tawaran penyelesaian bukan gadaian. Oleh itu prinsip *estoppel* terpakai.
- E [13] *Isu utama dalam prosiding ini ialah sama ada permohonan plaintif untuk perintah jualan secara lelongan awam boleh diketepikan atas alasan:*
- (a) tiada kausa tindakan yang munasabah; dan
- (b) terdapatnya *cause to the contrary*.
- F ATURAN 18 KAEDAH 19(1)(a) KKM 2012
- [14] Menurut A18 k 19(1)(a) dan (3) yang menyatakan seperti berikut:
- 19 Striking out pleadings and endorsements (O 18 r 19)
- G (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 —
- H (a) it discloses no reasonable cause of action or defence, as the case may be;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- I (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subparagraph (1)(a);

- (3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading. A

[15] Kes utama berkenaan *striking out* ialah *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7. Mohamed Dzaidin SCJ menjelaskan: B

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 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. C

[16] Dalam kes *Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd* [2013] 4 MLJ 545, Mahkamah Rayuan di ms 11 menyatakan seperti berikut: D

20. Judges dealing with striking out application under O 18 r 19 of the RHC must always bear in mind that the power to strike a case under the Order without having to go for trial *should be exercised sparingly and only in a plain and obvious case*. The procedure is of a summary. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is *obviously unsustainable*. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347; [1985] CLJ Rep 45, had said that 'the inherently power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution'. It is a power which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrence v Norrey* — as cited in *CC Ng & Brothers*). E

[17] Apakah yang dimaksudkan dengan *obviously unsustainable* telah dijelaskan dalam kes *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235 di mana Ramly Ali HMR (kini HMP) menyatakan seperti berikut: G

... striking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see Federal Court decision in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226; [1985] 1 LNS 1). H

[18] Berpandukan kepada prinsip dalam kes-kes di atas, mahkamah telah meneliti saman pemula plaintif dan hujahan peguam defendan yang terpelajar I

A dan pandangan mahkamah mendapati dalam membuat keputusan bagi permohonan ini isu-isu yang berikut diambilkira.

SAMA ADA SP TIDAK MENGANDUNGI FAKTA-FAKTA MATERIAL YANG PERLU DIPLID BAGI MENUNJUKKAN KAUSA TINDAKAN YANG MUNASABAH UNTUK PERINTAH JUALAN

B

Intitulement SP

C [19] *Intitulement* yang dinyatakan dalam SP menunjukkan permohonan ini dibuat di bawah s 256 Kanun Tanah Negara ('KTN') yang berbunyi:

256 Application to Court for order for sale

- D (1) This section applies to land held under:
- (a) Registry title;
 - (b) the form of qualified title corresponding to Registry title; or
 - (c) subsidiary title, and to the whole of any divided share in, or any lease of, any such land.
- E (2) Any application for an order for sale under this Chapter by a charge of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
- F (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[20] *Intitulement* juga merujuk kepada A 83 KKM 2012 yang menyebut:

G 83 Charge actions

1 Application and interpretation (O 83 r 1)

- H (1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs:
- (a) payment of moneys secured by the charge;
 - (b) *sale of the charged property*;
 - (c) foreclosure;
 - (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the charger or by any other person who is or is alleged to be in possession of the property;
 - (e) redemption;
- I

- (f) reconveyance of the property or its release from the security; **A**
- (g) delivery of possession by the chargee.

- (2) In this Order, 'charge' includes a legal and an equitable charge.
- (3) An action to which this Order applies is referred to in this Order as a charge action. **B**
- (4) These rules apply to charge actions subject to the following provisions of this Order.

[21] *Hujahan peguam defendan ialah intitlement tidak memplidkan s 272 KTN tetapi walau bagaimanapun perenggan 6.5 affidavit plaintif 2 membangkitkan peruntukan tersebut.* Seterusnya plaintif membangkitkan s 271 KTN *dalam hujahan bertulisnya.* Perenggan 8 SP memohon perintah untuk milikan kosong dan perenggan 15 affidavit plaintif bertarikh 26 Mac 2015 yang jelas menyatakan 'Plaintif dalam tindakan ini turut memohon kepada mahkamah untuk defendan menyerahkan milikan dan posesi kosong hartanah yang digadaikan kepada plaintif'. Plaintif juga mengekshibitkan Borang 16K tetapi gagal menyatakan peruntukan undang-undang yang terlibat dalam SP, walaupun diplidkan dalam affidavit plaintif. **C**
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[22] Seksyen 272 dipetik seperti berikut:

272 Procedure for taking possession

- (1) A chargee intending to enter into possession of any land pursuant to section 271 shall — **F**
 - (a) where he is to do so by receiving the rent payable to the chargor under any lease or tenancy, serve a notice in Form 16J on the lessee or tenant, and a copy thereof on the chargor; and
 - (b) where he is to do so by going into occupation, serve a notice in Form 16K on the chargor. **G**
- (2) Upon the service of a notice in Form 16J on any lessee or tenant, there shall pass to the chargee all the rights, powers and remedies of the chargor with respect to the receipt and recovery of, and the giving of discharges for, the rent in question (including any amount due, but not paid, prior to the service of the notice). **H**
- (3) Where any chargor on whom a notice in Form 16K is served fails within the period specified in that behalf in the notice to admit, or secure the admission of, the chargee into occupation of the land in question, the chargee may apply to the Court for an order for possession in accordance with the provisions of any law for the time being in force relating to civil procedure. **I**

[23] Merujuk A 7 k 2(1A) KKM 2012:

A 7 Originating summonses: General provisions

2 Forms of originating summons (O 7 r 2)

(1) *Every originating summons shall be in Form 5 or 6 whichever is appropriate.*

B (1A) Every originating summons shall state in its intitulement any provision of these Rules and any *provision of any written law under which the Court is being moved.*

C [24] *Mahkamah mendapati bahawa plaintif telah gagal mematuhi A 7 k 2(1A) KTM 2012 untuk permohonan di perenggan 8 SP iaitu milikan kosong. Pada mahkamah, kegagalan ini menyebabkan bukan sahaja plaintif meletakkan defendan dalam kejutan tetapi mahkamah juga kerana plaintif menuntut perkara-perkara yang tidak dinyatakan dengan penuh, jelas dan tepat. Mahkamah bersetuju dengan kes Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149 dan Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 yang dikemukakan oleh peguam defendan bahawa ketidakaturan ini tidak boleh diperbaiki di bawah A 1A KKM 2012.*

E [25] Namun demikian, plaintif juga telah dengan jelas menyebut s 256 KTN dan A 83 KKM 2012 dalam SP nya dan disokong oleh affidavit plaintif. Untuk permohonan perintah jualan di bawah kedua-dua peruntukan undang-undang tersebut, mahkamah mendapati tiada unsur kejutan dicipta oleh plaintif.

FAKTA MATERIAL TIDAK DIDEHAHKAN

G [26] Peguam defendan juga menghujahkan bahawa kegagalan plaintif untuk menyatakan kes mahkamah sesyen, B52NCC-884-12 Tahun 2014 dalam tuntutan nya mencatitkan permohonan ini dan ia merupakan fakta material yang perlu didedahkan.

H [27] Mahkamah merujuk kepada dokumen BANKING FACILITY(ES) GRANTED TO UNIJAYA TEKNOLOGI SDN BHD ('BORROWER') di affidavit plaintif eksh 'NYT1', klausa 9 menyatakan:

9. BANK'S RIGHT TO COMMENCE FORECLOSURE AND LEGAL POCEEDING CONCURRENTLY

I Upon default or breach by the Borrower of any term, covenant, stipulation and/or undertaking herein provide and on the part of the Borrower to be observed and performed, the *Bank shall thereafter have the right to exercise all or any remedies available whether by this letter of offer or Security Document or by statute or otherwise and shall be entitled to exercise such remedies concurrently, including*

pursuing all remedies of sale, possession and civil suit to recover all moneys due and owing to the Bank.

A

[28] Ini bermakna defendan mempunyai pengetahuan di atas semasa menandatangani kontrak tersebut bahawa plaintif mempunyai pilihan untuk mengambil apa-apa tindakan sama ada secara semua atau mana-mana remedi yang ada pada plaintif dengan serentak walaupun permohonan defendan untuk mengeneipkan penghakiman ingkar bagi kes di mahkamah sesyen masih belum diselesaikan.

B

[29] Mahkamah bersetuju dengan peguam plaintif yang terpelajar yang merujuk kepada kes *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478; [2009] 6 CLJ 81, iaitu kes Mahkamah Persekutuan yang mengikat mahkamah ini yang mana plaintif berhak untuk mengambil apa-apa tindakan untuk semua atau mana-mana remedi:

C

D

[8] We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary. Such an agreement is not to be implied from a clause in an annexure to a charge in terms of cl 8 and 16 in the present instance. All that a clause in those terms does is to create a right in the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall. It is not an agreement by the instant respondent bank to postpone its right to bring an action in personam for the recovery of the whole sum lent (together with interest) until after the charged land has been sold. If the courts were to read such an agreement into the clauses in question it would amount to an unwarranted restriction on a lender's rights to seek the remedies open to it. The fallacy of the contrary argument is revealed by asking the question: what if the land can never be sold despite all attempts to do so? It would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender upon the covenant to pay would be that it is a condition precedent that the land be sold and a shortfall produced before any suit may be instituted. The want of logic in that proposition is sufficient to demonstrate that it is not common sense and certainly not the common law.

E

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G

[30] *Defendan juga membangkitkan kegagalan plaintif untuk menyatakan dengan cukup fakta mengenai ketiadaan terma material dalam gadaian, kemudahan overdraf dan pinjaman berjangka, terma dan syarat asas surat tawaran tidak diplid, butir pengeluaran pinjaman, jumlah pembayaran balik, jumlah pemecahan kontrak dan fakta asas mengenai 'gagal, enggan dan/atau cuai untuk mengawal selia kemudahan-kemudahan' tidak diplid dalam SP.* Atas kegagalan plaintif itu, mahkamah tidak dapat mengenal pasti kausa tindakan berkenaan relif yang dipohonnya.

H

I

[31] Diturunkan A 7 k 3 KKM 2012 seperti berikut:

A 7 Originating summonses: General provisions

3 Contents of originating summons (O 7 r 3)

- (1) Every originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.
- (2) Order 6, rule 2, except for subparagraphs (1)(a) and (b) shall apply in relation to an originating summons as it applies in relation to a writ.

[32] Sudah menjadi undang-undang yang mantap bahawa sebagai pemegang gadaian, plaintiff hanya menguatkuasakan haknya untuk mendapatkan pinjaman yang masih terhutang. Kes *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119; [1993] 4 CLJ 332 iaitu kes Mahkamah Persekutuan menjadi duluan yang mengikat mahkamah ini:

Held:

- [1] The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code *does not commence an action*. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The order for sale when made under s 256 of the Code is not a judgment or a decree. The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issues.

[33] Perenggan 1 SP telah dengan terang dan nyata menuntut perintah jualan atas kegagalan defendan membayar hutangnya. Berpandukan kepada affidavit jawapan defendan, fakta ini tidak dinafikan oleh defendan sama sekali.

[34] Dalam kes yang dirujuk oleh peguam defendan terpelajar, *Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409, Mahkamah Tinggi memutuskan:

However, this originating summons filed by the plaintiff did not contain any such statement of questions for the court's determination or direction nor was there a concise statement of the relief or remedy claimed and neither was there a statement with sufficient particulars to identify the cause or causes of action in respect of which it wishes to claim that relief or remedy, but merely contained the prayers it wished for as follows:

- (a) Penentang dilarang memfailkan dan/atau meneruskan petisyen penggulangan terhadap pemohon hingga perintah lanjutan.
- (b) Ganti rugi ditaksir oleh penolong kanan pendaftar.
- (c) Kos dalam kausa.

(d) Apa-apa relief lain yang dianggap munasabah oleh mahkamah.

A

The above originating summons does not disclose a cause of action. There is no substantive issue for the court's determination. Had the court granted the injunction, the injunction would have been to preserve the status quo of the parties pending the determination of the substantive issue or cause of action. If indeed the debt is being disputed on substantial grounds, some effort ought to be made to state it in more detail with sufficient particulars. As it stood, there appears to be no substantive cause of action. Apart from the injunction, what other order could this court make bearing in mind that the relief prayed for is an injunction to prevent the defendant from filing a winding-up proceeding until further order.

B

C

[35] Seterusnya peguam defendan terpelajar menghujahkan bahawa SP ini telah difailkan secara *tidak teratur kerana affidavit plaintiff diikrarkan pada 25 Mac 2015, lebih awal enam hari daripada tarikh SP iaitu 30 Mac 2015, walaupun kedua-duanya difailkan pada hari yang sama iaitu 30 Mac 2015*. Ketidakteraturan ini suatu yang *fatal dan tidak boleh diperbaiki kerana affidavit tidak menyokong satu kausa tindakan apatah lagi perenggan 18 affidavit plaintiff 1 menyebut, 'Oleh yang demikian, saya memohon untuk perintah seperti yang dipohon di dalam saman pemula seperti yang telah difailkan di sini'*.

D

[36] Merujuk kepada A 41 k 1 (1) KKM 2012:

E

41 Affidavits

Form of affidavit (O 41 r 1)

Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter shall be entitled in that cause or matter.

F

SP ini walaupun tidak mempunyai rujukan kepada affidavit plaintiff 1, perenggan 15 affidavit plaintiff 1 tidak menafikan kewujudan SP. SP dan affidavit plaintiff 1 mempunyai *intitulement* dan nama-nama pihak yang sama dan kedua-dua SP dan affidavit jelas menegaskan fakta-fakta pinjaman dan kegagalan defendan untuk membuat pembayaran semula walaupun telah diminta untuk berbuat demikian.

G

[37] Persoalan yang timbul ialah sama ada tindakan plaintiff ini menjadikan SP *fatal* dan menyebabkan tiada kausa tindakan yang munasabah. Peguam defendan terpelajar telah merujuk kepada A 28 k 3C(1) KKM 2012 dan saya turunkannya di sini:

H

28 Originating summons procedure

3C Supporting affidavits (O 28 r 3C)

I

Unless otherwise provided in any written law, where the plaintiff intends to adduce evidence in support of an originating summons, he shall do so by affidavit and shall file the affidavit or affidavits and serve a copy thereof on every defendant not later

A than seven days after the service of the originating summons.

[38] Peruntukan di atas hanya menyebut mengenai keperluan affidavit untuk menyokong saman pemula dan penyerahan affidavit bukan keperluan untuk affidavit diikrarkan selepas penyediaan saman pemula.

B

[39] Dalam kes *Multi-Purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576; [2000] 2 CLJ 73 Mahkamah Tinggi memutuskan seperti berikut:

C

[5] But there is no rule that says that a plaintiff who intends to adduce evidence in support of an originating summons at the first hearing, must do so by affidavit affirmed only after the cause or matter has been instituted. *An affirmation which precedes the filing of the originating summons is not necessarily not in order.*

D

[6] Order 41 r 1(1) of the RHC mandates that an affidavit sworn in a cause or matter must bear the title of that cause or matter. While it is necessary that every affidavit sworn in a cause or matter must be entitled in that cause or matter, strict and total observance is not sine qua non. Minute divergences are tolerated and are covered by O 41 r 4 of the RHC. As a matter of fact, O 41 rr 1(2) and 1(3) of the RHC allow abridgement of the title of an affidavit. But it is fatal, in the sense that the affidavit would not be admitted, if the title is so deviant that it gives rise to a serious doubt as to whether the affidavit was indeed sworn in that cause or matter or in some other cause or matter. In the present case, that could not be doubted as both the originating summons and the affidavit are identically entitled — parties, case number, subject matter and all. Undoubtedly, the affidavit was properly entitled to the letter and spirit of the law.

E

F

[40] Merujuk kepada A 1A KKM 2012, mahkamah ini memberi keutamaan kepada keadilan berbanding kesilapan teknikal, jika ada di bawah KKM 2012:

G

1A Court or judge shall have regard to justice

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.

H

[41] Berpandukan alasan-alasan di atas, mahkamah mendapati peguam defendan terpelajar gagal menunjukkan SP plaintiff adalah *obviously unsustainable* (secara terangnya tidak dapat dipertahankan) untuk diketepikan.

I

SAMA ADA DEFENDAN TELAH MEMBUKTIKAN KEWUJUDAN CAUSE TO THE CONTRARY **A**

Tiga kategori bagi ujian cause to the contrary

[42] Kes utama untuk ujian kewujudan *cause to the contrary* ialah kes Mahkamah Persekutuan *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36 iaitu: **B**

- (a) where a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the NLC; **C**
- (b) where the chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; or,
- (c) where the chargor is able to demonstrate that the order for sale would be contrary to some rule of law or equity. **D**

[43] Persetujuan untuk penyusunan semula pembayaran telah dibuat melalui *surat variasi* yang ditandatangani oleh pihak-pihak selepas Borang 16D dan 16K (masing-masing bertarikh 12 Januari 2015) dikeluarkan oleh plaintif. Plaintif juga telah bersetuju dengan penyusunan pembayaran semula dan akan menangguhkan apa-apa tindakan undang-undang termasuklah tindakan ini. **E**

[44] Surat variasi antara lain mengandungi maklumat yang dipersetujui seperti berikut: **F**

(A) Overdraft — Account No. 21242400027579

- (i) To accept your upfront payment of RM55,000 payable on 23/10/2015 as partial settlement of above overdraft account; **G**
- (ii) Thereafter, you are to repay a sum of RM10,000 a month commencing 01/01/2015 up to 01/04/2015 as interim payment arrangement subject to review of the account thereafter
- (iii) [NB – You are to furnish us three (3) post dated-cheque of RM10,000 each for February — April 2015 payment in conjunction to the above] **H**

(B) Term Loan Account No. 71242400023258

- (i) You are to continue servicing the monthly instalment of RM1,987.84 until full settlement of the account without further default.

(C) The bank shall withhold legal action against you and guarantor(s) subject to your compliance of the above repayment arrangement. **I**

[45] Surat variasi itu *dengan jelas tidak mengubah apa-apa* kandungan terma dan syarat dalam surat tawaran dan apa-apa pindaan yang ada dalam surat

A tawaran dan surat variasi dibaca sebagai suatu dokumen yang disatukan yang termasuklah apa-apa pindaan.

[46] Berpandukan kepada surat variasi di atas dan arahan-arahan lisan yang diterima dari dua orang pegawai plaintif, defendan telah membuat pembayaran berjumlah RM85,000 bagi akaun overdraf dan RM6,000 bagi *term loan facility account*.

B
C SAMA ADA PEMBAYARAN-PEMBAYARAN YANG DIBUAT OLEH DEFENDAN BERDASARKAN SURAT VARIASI DAN ATAS ARAHAN PLAINTIF MEWUJUDKAN 'CAUSE TO THE CONTRARY'

[47] Surat variasi bertarikh 20 Februari 2015 dibuat bertujuan untuk program pembayaran semula bagi membolehkan defendan menyusun semula jadual pembayaran kedua-dua pinjaman tersebut. Ia merupakan sebahagian dari surat tawaran dan kedua-dua plaintif dan defendan masih terikat dengan terma dan syarat surat tawaran yang menjadi dokumen kontrak yang asas kepada kedua-dua pinjaman tersebut. Defendan telah berjaya mematuhi syarat-syarat baru dalam surat variasi dan plaintif seperti di perenggan C surat variasi telah bersetuju untuk tidak meneruskan apa-apa tindakan undang-undang ke atas defendan.

[48] Tindakan *plaintif* yang telah memfailkan SP ini pada 30 Mac 2015 iaitu sebulan sembilan hari dari tarikh surat variasi adalah sangat tidak wajar kerana terlalu awal, terburu-buru dan tidak menepati semangat yang terdapat dalam surat variasi tersebut. Ini sudah tentu mengecewakan defendan yang telah berusaha sedaya upayanya dan bersusah payah memastikan pembayaran dibuat dengan teratur untuk melindungi hartanahnya dari dijual tetapi pada masa yang sama hartanahnya akan dijual secara lelongan awam. Syarat A dalam surat variasi telah dipatuhi dengan sepenuhnya manakala bagi syarat B, plaintif gagal membuktikan defendan telah melanggar syarat untuk menyambung pembayaran sehingga penyelesaian penuh *term loan facility account*.

[49] Jelas juga bahawa plaintif telah membantu defendan untuk membuat pembayaran segera dengan arahan-arahan lisan dari pegawai-pegawai plaintif walaupun setelah SP ini difailkan dan menunjukkan usaha kedua-dua pihak untuk mengelakkan tindakan SP ini.

[50] Mahkamah bersetuju dengan kes-kes *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331 (MP) yang dikemukakan oleh peguam defendan terpelajar bahawa:

All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings.

Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that his conduct was so influenced by the encouragement or representation thereafter to enforce his strict legal rights (per Rober Goff J In *Amalgamated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at p 105) (Emphasis added.)

A

B

[51] Begitu juga dengan kes *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 (MP) yang menyatakan:

From the view of the above cases, we are of the opinion that *the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied as to whether 'a cause to the contrary' has been shown or not. The chargee must not only come to court with proof that the charger has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonableness conduct*, and that there was no right of 'innocent third parties' to be affected by the order. (Emphasis added.)

C

D

[52] Kes *Murugappa Chettiar v Letchumanan Chettiar* [1939] 1 MLJ 296 yang dkemukakan oleh peguam defendan terpelajar telah dirujuk dalam kes Mahkamah Persekutuan *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779 di ms 797–798; [2014] 9 CLJ 1012 di ms 1034–1035 yang menyatakan seperti berikut:

E

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 at p 298 where he said:

F

I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'show cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

G

H

PEMAKAIAN PRINSIP ESTOPEL

[53] Peguam defendan menghujahkan bahawa tindak tanduk plaintif yang menerima pembayaran-pembayaran pinjaman dari defendan menyebabkan plaintif di estop dari memulakan SP ini. Peguam defendan terpelajar merujuk kepada kes *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 dan *Yamamori (Hong Kong) Ltd v*

I

A *Davidson & Ors* [1992] 2 MLJ 410.

[54] Mahkamah merujuk kepada keputusan yang dibuat oleh Mahkamah Persekutuan dalam kes *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 khususnya *Held* [2] hingga [5]:

B [2] The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve justice. C Indeed the circumstances in which the doctrine may operate are endless.

D [3] It is not an integral part of the doctrine of estoppel that a litigant who invokes the doctrine of estoppel must prove that he was induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a Court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine. In this respect, all that needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights. E

F [4] It is correct to state that estoppel is a matter which requires to be pleaded under the rules of Court, as exemplified by rr. 7(1) & 8(1) of O 18 Rules of the High Court 1980. However, the requirement of these rules is sufficiently met if the material facts giving rise to estoppel are sufficiently pleaded without actually using the term 'estopped'. Thus, although Courts do normally require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle. G

H [5] A Court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interest of justice to do so. It is really a matter of the particular Judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case.

[55] Kes di atas telah dirujuk dalam kes Mahkamah Rayuan iaitu *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545; [1999] 4 CLJ 665:

I These are cases decided when the doctrine of estoppel was in an embryonic state. Much learning has been added to the subject since then. That an agreement may be established by an estoppel was accepted by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, where (at p 344) recognition was accorded to the wide scope of the doctrine:

The time has come for this court to recognise that the doctrine of estoppel is a

flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

A

Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443; [1992] 1 LNS 7 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

B

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 IA 203 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors v. Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v Calgary Milling Co Ltd* [1919] 48 DLR 295; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions*.

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D

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[56] Justeru, mahkamah ini melihat kepada fakta bahawa defendan telah bersungguh-sungguh membuat pembayaran demi pembayaran dengan menunaikan cek-cek tersebut mengikut tempoh yang ditetapkan atas permintaan pegawai-pegawai plaintif sendiri. Pembayaran-pembayaran telah diaku terima oleh plaintif menyebabkan plaintif diestop daripada membawa SP ini. Tindakan plaintif memulakan SP ini membawa ketidakadilan kepada defendan yang bertindak atas kepercayaan bahawa pembayaran pinjaman tersebut sedang diusahakan dan untuk mengelak dari kemungkiran pematuhan surat variasi.

G

H

[57] Atas alasan-alasan di atas, saya berpendapat peguam defendan yang terpelajar telah berjaya membuktikan kewujudan *cause to the contrary* di bawah s 256(3) KTN. Permohonan plaintif ini adalah remeh dan menyusahkan kerana *tiada pelanggaran syarat berjaya dibuktikan yang membolehkan SP ini dibenarkan dan A 18 k 19(1)(b) terpakai di sini*. Atas alasan-alasan di atas, permohonan defendan untuk membatalkan SP ini *dibenarkan dengan kos*.

I

Permohonan defendan dibenarkan dengan kos.