

Luigi Angelo Buffone & Ors v Grace a/p George

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT 1–22–764 OF
2005

MARIANA YAHYA JC

25 APRIL 2008

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Civil Procedure — Case management — Pre-trial case management — Costs incurred to attend and dispose matter considerably high since both parties in Canada — Whether defendant's appeal for security for costs against plaintiff allowed — Whether parties should proceed with notice to appear for pre-trial case management before actual trial pending in order to expedite hearing

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This was the defendant's appeal against the decision of the senior assistant registrar ('SAR') in dismissing the defendant's application for security for costs against the first plaintiff. The first plaintiff and defendant were married and had two children (the second and third plaintiffs'). However, their marriage had irretrievably broken down due to the defendant's alleged affair with another man which caused the first plaintiff to leave the defendant, taking the second and third plaintiffs to Canada with him and commenced divorce proceedings in Canada. The defendant who had initially agreed to give custody of the children to the first plaintiff and to arrangements regarding the properties had reneged and contested the matter and had also migrated to Canada.

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Held, dismissing the defendant's appeal and upholding the SAR's decision:

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Both the plaintiff and defendant were in Canada and the costs incurred by them in attending and disposing of the matter in Malaysia were considerably high. Since the proceedings was still pending before the court and the parties had both shown their interest and willingness to proceed with the action, there was no reason why any of them should not be present. Thus, in order to expedite the hearing of the matter the parties should proceed with the notice to appear for pre-trial case management before the actual trial of the matter (see para 14).

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[Bahasa Malaysia summary]

Ini merupakan rayuan defendan terhadap keputusan penolong kanan pendaftar ('PKP') yang telah menolak permohonan defendan untuk jaminan

- A kos terhadap plaintif pertama. Plaintif pertama dan defendan telah berkahwin dan mempunyai dua orang anak ('plaintif-plaintif kedua dan ketiga'). Walau bagaimanapun, mereka mengalami keruntuhan rumahtangga akibat hubungan sulit defendan dengan lelaki lain yang menyebabkan plaintif pertama meninggalkan defendan, dan membawa plaintif-plaintif kedua dan
- B ketiga ke Kanada bersamanya dan telah memulakan prosiding perceraian di Kanada. Defendan yang pada mulanya telah bersetuju untuk memberikan hak penjagaan anak-anak kepada plaintif pertama dan urusan hartanah telah memungkiri janjinya dan mempertikaikan perkara tersebut dan juga telah berpindah ke Kanada.

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Diputuskan, menolak rayuan defendan dan mengekalkan keputusan PKP:

- D Kedua-dua plaintif dan defendan berada di Kanada dan kos yang ditanggung oleh mereka untuk menghadiri dan menyelesaikan perkara tersebut di Malaysia adalah sangat tinggi. Memandangkan prosiding masih belum selesai di hadapan mahkamah dan kedua-dua pihak menunjukkan minat dan keinginan mereka untuk meneruskan tindakan tersebut, tidak ada sebab kenapa salah seorang daripada mereka tidak hadir. Oleh itu, bagi tujuan
- E mempercepatkan pendengaran perkara tersebut pihak-pihak patut meneruskan dengan notis kehadiran untuk pengurusan kes pra perbicaraan sebelum perbicaraan sebenar perkara tersebut (lihat perenggan 14).]

Notes

- F For cases on pre-trial case management, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1646–1648.

Cases referred to

Ng Hui Lip & Anor v Chan Hwa Cheng & Ors [1958] MLJ 57, HC (refd)

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Legislation referred to

Reciprocal Enforcement of Judgments Act 1958 First Schedule

LK Chow (Josephine, LK Chow & Co) for the plaintiffs.

Ramesh NP Chandran (Ramesh Chandran) for the defendant.

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Mariana Yahya JC:

- I [1] This is an appeal by the defendant against the decision of the senior assistant registrar ('SAR') in encl 9 dismissing the defendant's application for security for costs against the plaintiff.

- [2] The first plaintiff and the defendant were married on 5 June 1992. From the marriage, they had two children, the second and third plaintiffs. The first plaintiff claimed that their marriage had irretrievably broken down in January 2000 due to the defendant's alleged affair with a local Indian man. This had caused the first plaintiff to leave the defendant, taking the second and third plaintiffs to Canada with him. The first plaintiff came to this court seeking to recover RM30,000 allegedly loaned to the defendant for the purchase of a Nissan car and 50% of the net profit of 'Buffone Enterprise' until the year 2000. The first plaintiff also prays for declaratory orders and proceeds of the sales of two properties in Damansara Jaya and Taman Sri Gombak ('the Damansara and Gombak properties'). The plaintiff said that he solely contributed to the purchase of the said properties and that the defendant's name was used for registration purposes. It was alleged that contrary to an earlier agreement, the defendant had sold off the properties. A
- [3] The first plaintiff had commenced divorce proceedings in Canada. The defendant, whom the first plaintiff claimed had initially agreed to give custody of the children to the first plaintiff and to arrangements regarding the properties, had reneged and contested the matter. For that purpose, the defendant was said to have migrated to Canada. B
- [4] The defendant further submitted that the defendant should be given security for costs since she had shown that she has a prima facie defence to the plaintiff's claim. The defendant submitted that if the plaintiff were to lose in this case, it would be cumbersome and impossible for the defendant to enforce her costs to be taxed in Canada because there is no security and further more the plaintiffs are Canadian citizens not domiciled in this country, with no assets in the jurisdiction. C
- [5] The defendant further submitted that the Canada is not a member country of the First Schedule of the Reciprocal Enforcement of Judgments Act 1958. The defendant referred to, inter alia, the case of *Ng Hui Lip & Anor v Chan Hua Cheng & Ors* [1958] MLJ 57 where Smith J held that: D
- ... the enforcement of a federation judgment in Singapore was not automatic and therefore the mere fact that a plaintiff is resident in Singapore is not a ground for the court refusing to order security for costs under s 369 of the Criminal Procedure Code. E
- [6] By virtue of the above decision the defendant submitted that any order obtained by the defendant here in Malaysia such as order as to costs or an interlocutory order as to damages is not enforceable against the plaintiffs in Canada since Canada is not a reciprocating country. F
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- A** [7] The defendant said that she will incur numerous expenses and costs since the matter would be going for trial. The defendant submitted that in view of the amount of work involved in defending this suit, the defendant should be given security for costs by the plaintiff.
- B** [8] Lastly, the defendant submitted that there is no prejudice to the plaintiff if the security for costs is awarded against them since the security for costs is a bond and is readily refunded to the plaintiffs when they are successful at the end of this suit.
- C** [9] The plaintiffs in their submission in reply said that the decision of the SAR and the discretion exercised should not be reversed since the SAR had exercised the discretion as allowed by the law in coming to a conclusion that no security for costs was payable in this case by the plaintiffs.
- D** [10] The plaintiffs submitted that any order for security for costs made against the plaintiffs will bring grave injustice to the plaintiffs as the main objective in bringing this suit against the defendant is to recover all monies that were put into the investment properties and business in view of setting up a home in Malaysia for the family and to bring up the children of the marriage.
- E**
- F** [11] The plaintiffs submitted further that this application by the defendant is designed to stifle the plaintiffs' claim and to cause hardship to the plaintiff. The plaintiffs claimed that the defendant is responsible for their current financial set back.
- G** [12] The plaintiffs contended that the position of the defendant is no different from that of the plaintiffs in that she is no longer resident in Malaysia and had now settled down in Canada. The plaintiffs found it absurd for the defendant to claim that she is entitled to security for costs while no such security is accorded to the plaintiffs.
- H** [13] The plaintiffs further submitted that it would be unjust if the plaintiffs were to pay security for costs when the defendant herself is not able to show her ability to satisfy payment of the judgment sum and costs and on top of that is also living in Canada.
- I** [14] After considering the defendant's application in encl 22, affidavits and written submission filed by both parties, the court arrived at the following decision:

- (i) Both the plaintiffs and defendant are in Canada and the costs incurred by them in attending and disposing of the matter in Malaysia are considerably high. **A**
- (ii) The proceedings are still pending before the court and the parties had both shown their interest and willingness to proceed with the action. I see no reason why any of them should not be present. **B**
- (iii) In my view in order to expedite the hearing of the matter the parties should proceed with the notice to appear for pre-trial case management in encl 20 before the actual trial of the matter. **C**
- [15] In the premises I make the following orders.
- [16] The defendant's appeal in encl 22 is dismissed with costs.
- [17] The SAR's decision on 18 August 2006 is upheld. **D**
- Defendant's appeal dismissed with costs. SAR's decision upheld.*

Reported by Ezatul Zuria Azhari **E**

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