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Mazni bt Ibrahim v Rosaidy Effandy dari Tetuan Khairil & Co

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–1495–07 OF 2012

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RAUS SHARIF PCA, ABDUL WAHAB PATAIL JCA AND ROHANA YUSUF JC

28 DECEMBER 2012

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Civil Procedure — Appeal — Record of appeal — Failure to serve draft appeal record on opposing party's solicitors before filing record — Whether failure fundamentally threatened reliability of appeal records — Whether failure rendered appeal defective

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The appellant had lodged a complaint against the respondent solicitor to the Disciplinary Board ('DB') under the Legal Profession Act 1976. The DB dismissed the complaint. Through her then solicitors ('former solicitors'), the appellant filed an originating motion ('OM') in the High Court to set aside the DB's decision but the OM was dismissed, inter alia, on the ground r 4 and 5 of

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the Legal Profession (Disciplinary Proceedings)(Appeal) Rules 1994 had not been complied with thus rendering the OM defective and incompetent. Not only was the appeal record ('AR') not filed within the prescribed time it was also not served on the respondent, the DB and the Bar Council. No application was filed asking for leave to file the AR out of time nor was any explanation given

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for the non-compliance with the said r 4 and 5. The appellant appealed against the decision to the Court of Appeal blaming her former solicitors for causing the OM to be dismissed. She did not, however, commence any civil suit against them for negligence. The appellant submitted she ought not to suffer for her former solicitors' negligence or mistake and asked that the appeal court allow

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the OM to be reheard on its merits. However, even in the instant appeal the objection was taken that the draft of the AR was not served on the respondent's solicitors before it was filed.

Held, dismissing the appeal with costs:

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(1) The failure to serve the draft AR before it was filed fundamentally threatened the reliability of records of appeals before the appellate courts and it could not be countenanced under any circumstance. Such defect was fatal to the AR. Without the AR filed, the appeal was fundamentally defective (see para 20).

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(2) It was not made possible to show either to the High Court, at the time of the OM, nor to the Court of Appeal, where the merits and therefore justice of the case lay. Both courts could only determine where merits and justice lay after each had respectively read the application and all the

documents required and heard or read the submissions. But the AR on the first occasion was incomplete and on the second occasion, in this court, it suffered from the fundamental defect of the draft not having been served upon the respondent and containing a submission denied to have been made or used by the respondent's counsel (see para 24).

(3) Although it was generally accepted that a client should not suffer for the negligence or mistake of his solicitor, it was first required to be established that the negligence or mistake was the act of the solicitor. Otherwise, it would become common practice to obtain a second bite of the cherry by changing counsel and blaming the errors in the first action upon the previous solicitor without any civil suit being commenced and maintained against that previous solicitor. It would make a mockery of the system of justice (see para 27).

(4) The principles of finality in litigation and that the solicitor was the agent of the client must mean that the general principle that a client should not suffer for the negligence or mistake of his solicitor was confined to a limited application where the injustice was one that could not be remedied by an action against the errant solicitor (see para 29).

[Bahasa Malaysia summary

Perayu membuat satu aduan terhadap responden peguam kepada Lembaga Tatatertib ('LT') di bawah Akta Profesion Undang-Undang 1976. LT menolak aduan tersebut. Melalui peguamcaranya pada masa itu ('peguamcara terdahulunya'), perayu memfailkan usul pemula ('UP') di Mahkamah Tinggi untuk mengetepikan keputusan LT tetapi UP tersebut ditolak, antara lain, atas alasan bahawa peraturan 4 dan 5 Peraturan-Peraturan Profesion Undang-Undang (Prosiding Tatatertib) (Rayuan) 1994 tidak dipatuhi dengan itu menjadikan UP tersebut cacat dan tidak kompeten. Bukan sahaja rekod rayuan ('RR') tidak difailkan dalam tempoh yang ditetapkan tetapi ia juga tidak diserahkan kepada responden, LT dan Badan Peguam. Tidak ada permohonan difailkan memohon kebenaran untuk memfailkan RR di luar masa dan juga tidak ada penjelasan diberikan bagi ketidakpatuhan dengan peraturan-peraturan 4 dan 5. Perayu merayu terhadap keputusan Mahkamah Rayuan dengan menyalahkan peguamcara terdahulunya telah menyebabkan UP ditolak. Dia tidak, walau bagaimanapun, memulakan apa-apa guaman sivil terhadap mereka bagi kecuaian. Perayu menghujah bahawa dia tidak sepatutnya mengalami kesusahan disebabkan oleh kecuaian atau kesilapan peguamcara terdahulunya dan meminta mahkamah rayuan membenarkan UP didengar semula di atas meritnya. Walau bagaimanapun, dalam rayuan ini juga bantahan dibuat bahawa draf RR tidak diserahkan kepada peguamcara responden sebelum ia difailkan.

Diputuskan, menolak rayuan dengan kos:

(1) Kegagalan menyerahkan draf RR sebelum ia difailkan secara asasnya

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menggugat kebolehpercayaan rekod rayuan di hadapan mahkamah-mahkamah rayuan dan ia tidak boleh diperbetulkan dalam apa-apa keadaan pun. Kecacatan sedemikian adalah menjejaskan RR. Tanpa pemfailan AR, rayuan tersebut adalah pada asasnya cacat (lihat perenggan 20).

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(2) Ia tidak mungkin dapat ditunjukkan sama ada kepada Mahkamah Tinggi, pada masa UP, atau kepada Mahkamah Rayuan, di mana terletaknya merit dan dengan juga keadilan. Kedua-dua mahkamah hanya boleh menentukan merit dan keadilan hanya selepas kedua-duanya telah membaca permohonan dan kesemua dokumen yang diperlukan dan mendengar atau membaca hujahan. Tetapi RR pertama kali tidak lengkap dan pada kali kedua, di mahkamah ini, mengalami kecacatan asas pada drafnya kerana tidak diserahkan kepada responden dan mengandungi hujahan yang dinafikan dibuat atau digunakan oleh peguamcara responden (lihat perenggan 24).

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(3) Walaupun secara umumnya diterima bahawa seseorang anak guam tidak patut terjejas kerana kecuaian atau kesilapan peguamcaranya, adalah terlebih dahulu diperlukan untuk membuktikan bahawa kecuaian atau kesilapan tersebut adalah disebabkan oleh peguamcara tersebut. Sebaliknya, ia akan menjadi amalan biasa untuk memperoleh peluang kedua dengan menukar peguam dan menyalahkan kesilapan atas tindakan pertama terhadap peguamcara terdahulu tanpa apa-apa guaman sivil dimulakan dan dikekalkan terhadap peguamcara terdahulu tersebut. Ia akan menjadikan sistem keadilan sebagai satu sandiwara (lihat perenggan 27).

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(4) Prinsip kemuktamadan litigasi dan bahawa peguamcara adalah ejen kepada anak guam perlu membawa maksud bahawa prinsip am bahawa seseorang anak guam tidak wajar terjejas kerana kecuaian atau kesilapan peguamcaranya adalah tertakluk kepada aplikasi terhad yang mana ketidakadilan adalah sesuatu yang tidak boleh diperbetulkan melalui tindakan ke atas peguamcara yang manyeleweng tersebut (lihat perenggan 29).]

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Notes

For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1592–1656.

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Cases referred to

Duli Yang Amat Mulia Tunku Ibrahim Ibni Sultan Iskandar Al-Hai v Datuk Captain Hamzah Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

Legislation referred to

Legal Profession (Disciplinary Proceedings)(Appeal) Rules 1994 rr 4, 5
Rules of the Court of Appeal 1994 r 3A
Rules of the High Court 1980 O 1A

Appeal from: Originating Motion No 25-10–01 of 2012 (High Court, Shah Alam)

Noorazmir bin Zakaria (Noorazmir, Khadijah & Associates) for the appellant.
Yusman bin Che Aman (Khairil & Co) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] This is an appeal by the appellant Mazni bt Ibrahim from the decision of the High Court at Shah Alam.

AT THE HIGH COURT

[2] The appellant had applied by originating motion at the High Court for orders as follows:

(a) *bahawa keputusan Lembaga Tatatertib Peguam-Peguam bertarikh 9 Disember 2011 menolak aduan pihak pemohon di bawah s 103D Akta Profession Guaman 1976 hendaklah diketepikan*;

(b) *responden telah melakukan salah laku semasa mengendalikan kes yang melibatkan pemohon di dalam tindakan Saman Pemula No MT3–24–1872 tahun 2008*;

(c) *kos permohonan ini dibayar oleh responden; dan*

(d) *lain-lain relif yang mahkamah yang mulia ini fikirkan adil dan suai manfaat*.

[3] The grounds for the application were set out as follows:

(a) *Saya telah nasihati oleh peguamcara saya dan sesungguhnya percaya bahawa Lembaga Tatatertib Peguam-Peguam telah terkhilaf dalam mencapai satu keputusan menolak aduan tersebut apabila gagal mengambil kira fakta-fakta dan dokumen sokongan yang disertakan bersama aduan tersebut yang jelas menunjukkan wujudnya salah laku oleh responden*;

(b) *saya akan merujuk mahkamah yang mulia ini kepada aduan tersebut dan segala penyataan saya serta dokumen-dokumen yang dimasukkan bersama aduan tersebut bagi menunjukkan bahawa sememangnya wujud salah laku oleh responden*; dan

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(c) *saya menyatakan bahawa responden telah melakukan kesalahan seperti dalam aduan saya dan saya tidak bersetuju dengan keputusan Lembaga Tatatertib Peguam-Peguam tersebut*.

[4] In addition to the originating motion, the appellant had filed for the hearing:

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(a) an affidavit in support dated 18 January 2012 by the applicant; and

(b) written submissions for the application.

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[5] A preliminary objection was raised on the ground of non compliance with rr 4–5 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, thereby rendering the motion defective and incompetent.

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[6] The High Court dismissed the motion. We examined the grounds of judgment. Paragraphs 3, 4, 5 and 5 of the grounds of judgment of the High Court show that the dismissal was upon the preliminary objection because the applicant had not only failed to file an appeal record within the time allowed by the rules but also failed to file any record of appeal and to serve the same on the respondent, the disciplinary board and the Bar Council. There was also no application to file the record of appeal out of time and there was no explanation given for non-compliance with rr 4–5.

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[7] In the alternative, assuming it was wrong in holding there was non-compliance with rr 4–5, the High Court considered the motion, the affidavit in support and the written submission. It found that:

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> [8] Dari butiran yang diberikan oleh pemohon tersebut yang telah menjadi ketidakpuasan hati pemohon ke atas keputusan Lembaga Tatatertib Peguam-Peguam yang telah menolak pengaduan pemohon, mahkamah ini berpendapat salahlaku tersebut lebih menjurus kepada isu tanggungjawab professional oleh responden selaku peguamcara dalam pengendalian kes pemohon dan tidak boleh menjurus kepada satu salahlaku disiplin. Pemohon mungkin mempunyai remedi lain bagi melindungi haknya terhadap kegagalan tanggungjawab responden.

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[8] The High Court came to this conclusion because the particulars of misconduct set out in support of the originating motion were:

(a) *tidak menunjukkan dokumen-dokumen penting kepada anak guam*;

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(b) *menyembunyikan maklumat daripada anakguam*;

(c) *tidak memberitahu akan kewujudan affidavit pembetulan bertarikh 6 Februari 2009 sebelum perbicaraan tindakan utama tersebut pada 20 Februari 2009*;

(d) *tidak menasihatkan anak guam untuk menuntut kos dari pihak plaintif tersebut apabila plaintif tersebut menarik balik permohonan untuk injunksi erinford*;

(e) *dan pelbagai lagi salah laku*.

[9] Not satisfied with the dismissal of the notice of motion, the appellant filed an appeal to this court.

ENCLOSURE 8A BEFORE THIS COURT

[10] The date 24 October 1012 was the hearing date of the appeal before this court. Following directions given, the written submission for the respondent was filed by both parties on 10 October 2012. But on the same day, a notice of motion at encl 8a dated 10 October 2012 was also filed for the appellant to include in the record of appeal:

(a) a copy of an email from the appellant's previous solicitors Encik Adnan Seman @ Abdullah of Tetuan Adnan Sharida & Associates dated 8 August 2012;

(b) a copy of an email from the appellant's previous solicitors Encik Adnan Seman @ Abdullah of Tetuan Adnan Sharida & Associates dated 12 July 2012, 18 July 2012, 24 July 2012 and 2 July 2012; and

(c) written submissions for the respondent dated 10 May 2012 (pp 49– 59 *rekod rayuan (Jil 1) bahagian B*).

[11] In addition, the appellant sought leave with liberty to file and serve the additional record of appeal within 14 days, or alternatively for leave to refer and to use the three documents at the hearing of the appeal.

[12] Although he had no objection to the notice of motion at encl 8a being heard on the day of hearing, counsel for the respondent objected to the proposed additional record of appeal on the grounds that those are communication between the appellant and her previous solicitor and had nothing to do with the case. Furthermore, those documents were with the appellant at all times.

[13] We examined the grounds laid out in encl 8a, the affidavit in support, and in the submissions before dismissing the application. In setting out our reasons, we first set out the material parts of these documents.

[14] The grounds set out in the application at encl 8a were:

(i) Email-email yang ingin dimasukkan sebagai dokumen tambahan di

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dalam Rekod Rayuan tersebut merupakan bukti bahawa berlakunya kecuaian di pihak Peguamcara Perayu yang terdahulu dalam mengendalikan kes ini di Mahkamah Tinggi hingga menyebabkan Usul Pemula Perayu bertarikh 19/1/2012 telah ditolak oleh Mahkamah Tinggi akibat daripada kegagalan Peguamcara Perayu yang terdahulu memfailkan Rekod Rayuan sepertimana yang diperuntukkan di dalam Kaedah 4 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994.

(ii) Email daripada Peguamcara Perayu yang terdahulu iaitu Encik Adnan Seman @ Abdullah dari Tetuan Adnan Sharida & Associates bertarikh 8/8/2012 tersebut dengan jelas menyatakan pengakuan bersalah Peguamcara Perayu yang terdahulu akibat daripada kegagalan mematuhi Kaedah 4 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut.

(iii) Perayu percaya bahawa permohonan ini tidak memprejudiskan dan/atau menjejaskan keadilan kepada pihak-pihak kerana email-email …;

(iv) Perayu percaya bahawa Perayu mempunyai tuntutan yang munasabah dan merit kes yang kukuh dalam kes ini;

(v) Perayu percaya bahawa Mahkamah Tinggi Shah Alam telah tersilap dari segi undang-undang dan/atau fakta apabila memutuskan bahawa permohonan Perayu adalah cacat dan fatal di atas ketidakpatuhan Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut, sedangkan Perayu tidak diberi peluang untuk melantik Peguamcara yang baru bagi menggantikan Peguamcara Perayu yang terdahulu yang ternyata telah cuai dalam mematuhi Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut;

(vi) Perayu percaya bahawa Mahkamah Tinggi Shah Alam telah tersilap dari segi undang-undang dan/atau fakta apabila memutuskan bahawa permohonan Perayu adalah cacat dan fatal di atas ketidakpatuhan Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut, sedangkan ketidakpatuhan tersebut boleh diperbaiki dan tindakan boleh diambil bagi mematuhi peraturan tersebut melalui pemfailan permohonan bagi memfailkan dan menyerahkan Rekod Rayuan di luar jangkamasa melalui Peguamcara Perayu yang baru;

(vii) Perayu percaya bahawa Mahkamah Tinggi Shah Alam telah tersilap dari segi undang-undang dan/atau fakta apabila memutuskan bahawa permohonan Perayu adalah cacat dan fatal di atas ketidakpatuhan Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut, sedangkan Perayu tidak harus diprejudiskan untuk mendapatkan keadilan yang sewajarnya akibat daripada ketidakpatuhan dan kecuaian Peguamcara Perayu yang terdahulu tersebut;

(viii) Email-email tersebut juga berkait rapat dengan Alasan Rayuan Perayu di dalam Memorandum Rayuan yang telah difailkan di Mahkamah sebelum ini;

(ix) Hujahan Bertulis Responden bertarikh 10/5/2012 [mukasurat 49 - 59

Rekod Rayuan (Jilid 1) Bahagian B] pula sebenarnya telah diberikan oleh Peguamcara Perayu kepada Perayu pada 13/6/2012. Namun, Peguamcara Responden kemudiannya melalui surat bertarikh 27/8/2012 telah menafikan bahawa mereka ada menyediakan Hujahan Bertulis tersebut; dan

(x) Hujahan Bertulis tersebut perlu dijadikan keterangan lanjut kerana ia membuktikan bahawa Perayu sememangnya tidak mempunyai pengetahuan mengenai sebarang bantahan awal oleh Peguamcara Responden ketika Pendengaran kes di Mahkamah Tinggi.

[15] The affidavit in support by the appellant supports the grounds set out above and added:

(i) 11. Berdasarkan kepada pernyataan-pernyataan di atas saya telah dinasihatkan dan sesungguhnya percaya bahawa keputusan Mahkamah Tinggi Shah Alam pada 21/5/2012 perlu diketepi dan dibatalkan di mana merit Usul Pemula Perayu perlu didengar semula dan Perayu perlu diberi kebenaran untuk memfailkan Rekod Rayuan untuk Usul Pemula tersebut di luar jangka masa.

(ii) 12. Selanjutnya saya menyatakan bahawa peguamcara Responden melalui surat bertarikh 27/8/2012 telah menyatakan bantahan kepada kemasukan Hujahan Bertulis Responden bertarikh 10/5/2012 [mukasurat 49 - 59 Rekod Rayuan (Jilid 1) Bahagian B] di dalam Rekod Rayuan.

Salinan surat peguamcara Responden bertarikh 27/8/2012 dilampirkan di sini dan ditanda sebagai Ekshibit "Ml-S**.

(iii) 13. Berikutan bantahan peguamcara Responden, Perayu memfailkan permohonan ini bagi mendapatkan kebenaran Mahkamah Yang Mulia ini di bawah seksyen 69 Akta Mahkamah Kehakiman 1964 dan Kaedah 7 Kaedah-Kaedah Mahkamah Rayuan 1994 untuk membenarkan keterangan lanjut tersebut dirujuk oleh pihak-pihak.

(iv) 14. Saya sesungguhnya percaya bahawa keterangan-keterangan lanjut di perenggan 1(c) Notis Usul yang telah dimasukkan di dalam Rekod Rayuan tidak akan memprejudiskan Responden pada mana-mana takat kerana dokumen tersebut sebenarnya adalah dokumen yang telah diberikan oleh Peguamcara Perayu yang terdahulu melalui staf beliau iaitu Encik Anuar kepada Perayu pada 13/6/2012.

(v) 15. Saya amat terperanjat apabila Peguamcara Responden melalui surat mereka bertarikh 27/8/2012 tersebut menyatakan bahawa Hujahan Bertulis tersebut adalah dokumen palsu dan tidak pernah wujud.

(vi) 16. Malah, Peguamcara Perayu yang terdahulu kemudiannya melalui surat bertarikh 29/8/2012 turut telah menyatakan bahawa mereka tidak mempunyai pengetahuan mengenai Hujahan Bertulis yang didakwa sebagai palsu tersebut.

Salman surat dahpada Tetuan Adnan Sharida & Associates bertarikh 29/8/2012 dilampirkan di sini dan ditanda sebagai Ekshibit 'MI-4'.

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(vii) 17. Rentetan daripada itu, saya telah menghantar surat saya bertarikh 4/9/2012 kepada Peguamcara Perayu yang terdahulu bagi mendapatkan penjelasan tentang perkara ini memandangkan Hujahan Bertulis tersebut jelas telah diberikan oleh Peguamcara Perayu yang terdahulu kepada saya. Salinan surat saya bertarikh 4/9/2017 dilampirkan di sini dan ditanda sebagai Ekshibit 'MI-5".

(viii) 18. Namun, Peguamcara Perayu yang terdahulu melalui email bertarikh 11/9/2012 langsung tidak menjawab setiap butiran yang saya nyatakan di dalam surat saya bertarikh 4/9/2012 tersebut. Sebaliknya, mereka hanya membuat penafian kosong semata-mata tanpa memberikan sebarang penjelasan dan tidak pun menjawab setiap fakta yang saya perincikan di dalam surat saya bertarikh 4/9/2012 tersebut. Salinan email daripada Tetuan Adnan Sharida & Associates bertarikh 11/9/2012 dilampirkan di sini dan ditanda sebagai Ekshibit 'MI-6'.

(ix) 19. Saya kemudiannya melalui surat bertarikh 13/9/2012 kepada Peguamcara saya yang terdahulu telah menyatakan kekeliruan saya atas tindakan mereka terhadap saya di mana saya turut telah menegaskan pendirian saya bahawa: …

(x) 20. Saya selanjutnya menyatakan bahawa Peguamcara saya yang terdahulu kemudiannya langsung tidak menjawab kepada surat saya bertarikh 12/9/2012 tersebut.

(xi) 21. Oleh itu, saya percaya bahawa Hujahan Bertulis tersebut perlu dijadikan sebagai keterangan lanjut memandangkan ia adalah bukti bahawa saya sememangnya tidak mengetahui wujudnya bantahan awal oleh Peguamcara Responden di Mahkamah Tinggi. Apatah lagi, Peguamcara Perayu yang terdahulu langsung tidak menjawab setiap butiran yang saya nyatakan di dalam surat saya kepada mereka yang membuktikan bahawa setiap butiran yang saya sebutkan tersebut adalah betul dan tidak dinafikan.

(xii) 22. Justeru, saya telah dinasihati oleh Peguamcara saya dan saya menyatakan bahawa saya tidak harus diprejudiskan atas segala kekeliruan yang timbul akibat daripada tindakan Peguamcara saya yang terdahulu.

[16] It was submitted for the appellant in respect of the emails sought to be added to the record that:

(i) Pemohon/Perayu perlu diberikan kebenaran dan kebebasan untuk memasukkan dokumen (a) Notis Usul …

(ii) Pemohon/Perayu juga perlu diberikan kebenaran dan kebebasan untuk memasukkan dokumen (b) Notis Usul Pemohon/Perayu …

(iii) Permohonan ini tidak memprejudiskan dan/atau menjejaskan keadilan kepada pihak-pihak kerana email-email tersebut amat penting dalam membuktikan di Mahkamah yang Mulia ini bahawa kegagalan untuk mematuhi Kaedah 4 dan Kaedah 5 tersebut adalah di luar pengetahuan Perayu dan ia adalah disebabkan oleh kecuaian di pihak Peguamcara

Perayu yang terdahulu sepertimana yang diakui sendiri oleh Peguamcara Perayu yang terdahulu melalui email bertarikh 8/8/2012 tersebut setelah Perayu berulangkali meminta Peguamcara Perayu yang terdahulu tersebut memberikan penjelasan atas keputusan Mahkamah Tinggi tersebut.

(iv) Dokumen-dokumen (a) dan (b) Notis Usul tersebut merupakan keterangan lanjut memandangkan ia adalah sebagai bukti kepada perenggan 1 Memorandum Rayuan yang telah difailkan di Mahkamah yang Mulia ini (sila rujuk mukasurat 8 Rekod Rayuan) di mana ia dinyatakan bahawa: 'kegagalan untuk mematuhi Kaedah 4 dan Kaedah 5 tersebut adalah di luar pengetahuan Perayu dan ia adalah disebabkan oleh kecuaian di pihak Peguamcara Perayu yang terdahulu. Malah, kecuaian tersebut diakui sendiri oleh Peguamcara Perayu melalui email mereka kepada Perayu bertarikh 8/8/2012 setelah Perayu berulangkali meminta Peguamcara Perayu yang terdahulu tersebut memberikan penjelasan atas keputusan Yang Arif Hakim tersebut.'

(v) Perayu tidak harus diprejudiskan untuk mendapatkan keadilan yang sewajarnya akibat daripada ketidakpatuhan dan kecuaian Peguamcara Perayu yang terdahulu tersebut.

(vi) Keputusan Mahkamah Tinggi Shah Alam pada 21/5/2012 perlu diketepi dan dibatalkan di mana merit Usul Pemula Perayu perlu didengar semula dan Perayu perlu diberi kebenaran untuk memfailkan Rekod Rayuan untuk Usul Pemula tersebut di luar jangkamasa.

[17] We dismissed the application at encl 8a for the following reasons:

(a) the filing of the application on the same date as the date for the filing of the written submissions for the appeal is not merely a filing at the eleventh hour, but it means that the matter of making the application is only attended to at the eleventh hour. Such application is safe to be allowed only if there is no dispute or objection;

(b) if there are disputes or objection, last minute applications are unsafe to be allowed as it does not give adequate time to the parties to check and verify the truth and correctness thereof. If allowed, it opens the court to the risk of relying upon evidence that are unsafe, thus lowering the quality of justice that can be delivered;

(c) such last minute applications if allowed will give endorsement to counsels to attend to a case only at the last minute when it is due to be heard, and then seeking to make corrections and other last minute amendments on the date of hearing itself. If allowed, such a practice of entertaining last minute applications will surely cause dates of hearing to be vacated. It will erode discipline in the hearing and disposal of appeals before the courts and a backlog will begin to be created again;

(d) the passages reproduced above show the emails were available to the appellant well before 10 October 2012. It appears to be presented that

there was reluctance by the previous solicitor to issue the emails. If true, it only affects the value that may be placed upon such emails. But more to the point the memorandum of appeal filed on 14 August 2012 stated:

> … Malah, kecuaian tersebut diakui sendiri oleh Peguamcara Perayu melalui email mereka kepada Perayu bertarikh 8/8/2012 setelah Perayu berungkali (sic) meminta Peguamcara Perayu yang terdahulu tersebut memberikan penjelasan atas keputusan Yang Arif Hakim tersebut.

(e) the fact that no civil action was undertaken against such solicitor throws much doubt upon the value of the emails for the purposes of consideration; and

(f) the application at encl 8a sought to admit written submissions dated 10 October 2012 of the respondent. But these written submissions, we note, were already in the record of appeal at RR:49–59. The appellant acknowledged it was challenged by the respondent's counsel as 'dokumen palsu dan tidak pernah wujud'. Such challenge cannot be resolved by affidavits.

[18] Accordingly, we dismissed the application with costs.

THE APPEAL

[19] On the appeal itself, the respondent raised the objection that the record of appeal filed in this appeal should be struck out and the appeal be dismissed on the grounds that:

(a) the draft record of appeal had never been served upon the respondent's counsel before it was filed;

(b) the respondent's counsel had never prepared, served, filed or used the purported written submission dated 10 May 2012 as shown at RR:49–59; and

(c) the respondent's counsel had filed only one written submission dated 10 May 2012 and this is shown at RR:60–72.

[20] The record of appeal now before this court was not served upon the respondent's counsel before filing it. We observed that the purported the respondent's written submission sought to be admitted through encl 8a is only part of the record of appeal. Allowing encl 8a would not have remedied non service of the draft record of appeal before it was filed. Such failure is a fundamental threat to the reliability of records of appeals before the appellate courts that it cannot be countenanced under any circumstances. Such defect is, therefore, fatal to the record of appeal. Without a record of appeal filed, the appeal is fundamentally defective.

[21] We considered whether the defect is curable. It is provided in r 3A of the Rules of the Court of Appeal 1994 that:

> 3A Preliminary objection on the ground of non-compliance shall not be allowed.
>
> A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[22] In principle, r 3A is similar to O 1A of the Rules of the High Court 1980. If there is any misconception that O 1A, and therefore r 3A is panacea to non-compliance with the rules of court, it has been decisively dismissed in *Duli Yang Amat Mulia Tunku Ibrahim Ibni Sultan Iskandar Al-Hai v Datuk Captain Hamzah Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329 (FC) where the Federal Court held at para 50 of the judgment that:

> As I had mentioned in court, if O 1A is sought to be invoked whenever a party fails to comply with any provision of the rules, then the whole of the Rules of the High Court 1980 would be rendered useless. For example, can failure to enter appearance or file defence within the specified period be considered as an irregularity? Of course it cannot be. A party who is late in filing the relevant papers must obtain an order from the court to extend the time, if such extension is required and is permitted by the rules. Therefore, the answer to question two is in the negative.

[23] There is, in this case, no application for leave to file the record of appeal out of time. There is, therefore, nothing placed before us to consider in that direction.

[24] We were not unaware that this potentially leaves the appellant, assuming there is merit in her case, without remedy and an injustice. But this is only true if there is merit in her originating motion. Hence, it is mere speculation. Neither the High Court at the time of the originating motion nor this court in the appeal herein can possibly know in which direction the merits lay before hearing. Both courts can only determine where merits and justice lay after each respectively had read the application, all the documents required and put before the court in accordance with law, the submissions and heard any oral submissions. But the record of appeal in the first occasion was incomplete and in the second occasion, the record of appeal in the Court of Appeal suffered from the fundamental defect of the draft not having been served upon the respondent and containing a submission denied to have been made or used by the respondent's counsel. It was not made possible to show where the merits and therefore justice lay.

[25] The submissions for the appellant before us is that because of the

A injustice occasioned to the appellant by the negligence or mistake of her previous solicitor, the High Court ought to have adjourned the case, allowed new counsel to be appointed, accorded enough time to rectify the originating motion and then proceed to hear it on its merits, because the appellant ought not suffer from the negligence of her previous solicitor.

B

[26] Again, the logic follows that there is injustice occasioned by her previous solicitor's negligence or mistake only if the merits lay in her direction. And without a properly reliable record, it is impossible to determine that. C Alternatively, if the merits did not lie in her direction, she cannot be said to have suffered from her previous solicitor's negligence or mistake.

[27] It is generally accepted that a client should not suffer from the negligence or mistake of the solicitor. But it first requires to be established that D the negligence or mistake is the act of the solicitor. Otherwise, it will become common practice to obtain a second bite of the cherry by changing counsel, and blaming the errors in the first action upon the previous solicitor, without any civil suit being commenced and maintained against that previous solicitor. It would make a mockery of the system of justice.

E

[28] In this case, we note this saga commenced with the appellant's complaint to the disciplinary board that the respondent, a solicitor in Messrs Khairil & Co appointed to defend her in the High Court at Shah Alam Originating Summons MT3-24–1872 of 2008, had committed various F misconduct. Unhappy with the dismissal of the complaint by the disciplinary board, the appellant appealed to the High Court by way of an originating summons in Usul Pemula No 25–10–01 of 2012, through Tetuan Adnan Sharida & Associates. Unhappy with the dismissal of that originating summons, the appellant filed a notice of appeal through Tetuan Adnan Sharida G & Associates. The memorandum of appeal in the Court of Appeal was filed on 14 August 2012 through the present solicitors Tetuan Noorazmir Khadijah & Associates, placing blame upon Tetuan Adnan Sharida & Associates for the failure to comply with rr 4–5, but without commencing any litigation against the solicitor. Now before us, we find that the record of appeal suffered from a H fundamental defect.

[29] It is trite that in a solicitor and client relationship, the client is the principal and the solicitor is the agent. In the law of agency, the principal is bound by the actions of his chosen agent within the scope of that appointment. I In our view, the principles of finality in litigation and that the solicitor is the agent of the client must mean that the general principle that a client should not suffer from the negligence or mistake of his solicitor is confined to a limited application where the injustice is one that cannot be remedied by an action against the errant solicitor. Otherwise, to obtain a second bite of the cherry all

a litigant has to do is to appoint new solicitors, and blame the causes of dismissal of an appeal, claim or defence upon the previous solicitors. Of course that cannot be right.

[30] In the event, we dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar