**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM**
**DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA**
**[WRIT SAMAN NO. BA-23NCvC-37-08/2022]**

**ANTARA**

**1. WAN MOHD FAISAL WAN YUSOFF**
(No. K/P: 781120-03-5051)

**2. NUR AFIFA ABDUL AZIZ**
(No. K/P: 880625-02-5530)

**3. DAMAI BERSIH SDN. BHD.**
(No. Syarikat: 899106-T) **... PLAINTIF-PLAINTIF**

**DAN**

**NURULJANNAH MOHD AMIN**
(No. K/P: 910827-14-5666) **... DEFENDAN**

**JUDGMENT**

**[1]** In the area of practice and procedure, Courts are often besieged with applications from parties to censure their recalcitrant opponents for not complying with the provisions in the rules of court. In instances such as these, Courts have an unenviable and difficult task of deciding which of the following two options to invoke. They may choose to adopt a strict approach which may result in the dismissal of the action before the court or the entry of a judgment against the noncompliant party. The alternative is a liberal approach that disregards or condones breaches of the provisions in the rules of court.

**[2]** The former approach adheres to the principle of enforcing procedural discipline and demands that parties strictly observe the requirements as laid down in the rules of court. On the other hand, the

latter approach is in line with the overriding principle that calls for the substance of the dispute to be adjudicated.

**[3]** As pointed out by Bingham MR in *Costellow v. Somerset County Council* [1993] 1 WLR 256 at 263, each approach in itself is salutary.

**[4]** Since neither of the above approaches is absolute and it is generally impossible to give preference to one over the other, the task of striking a balance between these two competing approaches is made all the more difficult.

**The parties and the nature of the claim**

**[5]** Wan Mohd Faisal bin Wan Yusoff, Nur Afifa binti Abdul Aziz and Damai Bersih Sdn Bhd are the three plaintiffs in this case.

**[6]** The defendant is one Nuruljannah binti Mohd Amin.

**[7]** In a Writ action dated 8 August, 2022, the plaintiffs sought, *inter alia*, damages from the defendant for defamation.

**Background facts**

**[8]** The Writ, together with the Statement of Claim, were duly served on and accepted by the defendant on 29 August, 2022. Henceforth, the defendant appointed her solicitor on 6 September, 2022.

**[9]** Accordingly, the defendant filed a Memorandum of Appearance on 8 September, 2022. The defendant had thus complied with the requirement as laid down in Order 12 rule 4 of the Rules of Court 2012 ("RC 2012") in filing the Memorandum of Appearance within the 14-day time limit as prescribed in the said rule.

**[10]** However, one day prior to the filing of the Memorandum of Appearance, that is, on 7 September, 2022, the defendant's solicitor had written a letter to the plaintiffs' solicitor seeking a one-month extension to file the defendant's Defence. The request by the defendant

to the plaintiffs was for the Defence to be filed by or on 7 October, 2022.

**[11]** The plaintiffs responded to the above request on 20 September, 2022, agreeing to an extension up to 23 September, 2022. The assent by the plaintiffs, it should be noted, was to give a one-day grace period for the filing of the Defence. The last day for the defendant to file the Defence under Order 18 rule 2(1) of the RC 2012 was 22 September, 2022, that is, "before the expiration of fourteen days after the time limited for appearing", which in this case, was to be calculated from 8 September, 2022.

**[12]** On the same day the defendant received the above reply from the plaintiffs, she wrote a letter to the court seeking an extension of time until 7 October, 2022 to file her Defence. The parties were directed to appear for case management on 26 September, 2022. At the case management proceedings, the defendant again sought permission from the court for an extension of time to file her Defence and the plaintiffs objected to the request. The defendant was ordered to file a formal application for extension of time.

**[13]** A formal Notice of Application for an extension of time to file her Defence was made by the defendant on 3 October, 2022. In the meantime, the defendant had filed her Defence on 30 September, 2022.

**Present application and issues before the court**

**[14]** This was an interlocutory matter that required this Court to consider an application for an extension of time to file a Defence.

**[15]** This Court was also required to rule on the effect of the filing of a defence before a formal application for extension of time was made to the Court.

**[16]** The question of whether this Court should exercise its discretion to allow an extension of time, appeared, at least at first blush, to be one

that was simple and straightforward. Yet, this application highlighted the conundrum that Courts repeatedly face. And the challenge was the need for an appraisal and the consequent justification for the adoption of either one of the two opposing approaches alluded to in the opening paragraphs of this judgment.

**The applicable law**

**[17]** The application before this Court required a consideration of a number of provisions in the RC 2012.

**[18]** Amongst the provisions to be examined include Order 1A, Order 2, Order 3 rule 5, Order 18 rule 2(1) and Order 92 rule 4 of the RC 2012.

**The case for the defendant**

**[19]** In support of her Notice of Application, the defendant had in her affidavit drew the Court's attention to the fact that (i) she had only appointed her solicitor on 6 September, 2020; (ii) the plaintiffs' claim based on libellous statements involved difficult issues; (iii) the location of the defendant's residence and the place she carried on her business made it difficult for her to communicate and to pass documents to her solicitor; (iv) the defendant was in the process of moving from Kelantan to Terengganu; and (v) her handphone which contained many relevant information had been confiscated by the police.

**[20]** Taking into consideration the totally of the above factors and the fact that the delay was a mere 8 days, the defendant contended that the delay was not unreasonable and prayed for the relief sought.

**[21]** The defendant urged this Court to exercise its discretion to extend the time as conferred by Order 3 rule 5 of the RC 2012. Order 3 rule 5 of the RC 2012 provides as follows:

> Extension of time (O. 3 r. 5)
>
> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the Court being made for that purpose.

**[22]** The defendant also invoked the provision in Order 92 rule 4 of the RC 2012. The relevant provision reads as follows:

> Inherent powers of the Court (O. 92 r. 4)
>
> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

**[23]** Finally, the defendant reasoned that the plaintiffs had not been prejudiced by the 8-day delay on the part of the defendant in filing the Defence nor by the fact that the Defence had been filed prior to the making of the formal application and the granting of an Order permitting an extension of time by this Court.

**The case for the plaintiffs**

**[24]** In their submissions, the plaintiffs relied on Order 18 rule 2(1) of the RC 2012 as the main basis for their argument that the application for an extension of time should be denied.

**[25]** The plaintiffs argued that the 14-day period for the filing of a Defence is a mandatory provision and the filing of the Defence before a formal application for extension of time had been made was irregular. Order 18 rule 2(1) of the RC 2012 provides as follows:

> Service of defence (O. 18 r. 2)
>
> (1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action shall, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of fourteen days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

**[26]** The plaintiffs further submitted that they had been prejudiced by the application as they had been denied their rights to apply for a judgement in default of defence.

**The authorities**

**[27]** In support of her application for an extension of time to file her Defence, the defendant relied on the following cases, namely, *Lim Thean Chye v. Lim Chow Chong* [1973] 1 LNS 75; [1973] 2 MLJ 100, *Malayan Flour Mills Bhd v. Teh Wee Kok* [2005] 7 CLJ 213; [2005] 7 MLJ 247, *National Union of Bank Employees v. Director General of Trade Union & Anor* [2013] 7 CLJ 957; [2013] 5 AMR 729, [2013] 6 MLJ 167, *Alleykutty James v. Syed Putra bin Syed Omar Shahabudin & Anor* [1978] 1 LNS 4; [1979] 1 MLJ 238b, *Idris bin Haji Salleh v. Federal Auto Holdings Bhd* [1976] 1 LNS; [1979] 2 MLJ 141 and *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 AMR 846; [1996] 1 MLJ 223.

**[28]** On the other hand, the plaintiffs had relied solely on *Badan Pengurusan Bersama Subang Parkhomes v. Zen Estates Sdn Bhd* [2020] 1 LNS 76; [2020] MLJU 240 (“*Subang Parkhomes”)* in resisting the defendant’s application.

**[29]** A number of other authorities that considered similar applications to extend time to file a Defence that were not cited by the parties include *Ng Hock Seng & Ors v. Kilang Papan Sungei Durian Sdn Bhd & Anor* [2012] 1 LNS 1419, *Tan Kim* Swee *v. Pegawai Pentadbir Pusaka Harta Pusaka Norazmi Ahmad* [2001] 1 CLJ 719, *Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn* Bhd [1996] 1 LNS 71 and *EON Bank Berhad v. Loyalex Industry (EM) Sdn Bhd & Ors* [1998] 5 CLJ 207. I will make reference to some of these cases in this judgment.

**Analyses of the principles**

**[30]** The application before me was heard on 28 March, 2023. I allowed the defendant's application for an extension of time to file her Defence and accepted the Defence that was filed on 30 September, 2022.

**[31]** The issue raised in this interlocutory application concerned an important subject matter pertaining to the timeous steps that parties in the civil litigation process are required to take. In determining whether the timelines as laid down in the numerous provisions in the RC 2012 are mandatory or directory, it is necessary that the wordings in the provisions under consideration and the overall scheme and objective of the RC 2012 be scrutinized and understood.

*Underlying philosophy of the RC 2012*

**[32]** Order 1A was introduced into the Rules of the High Court 1980 ("RHC 1980") some 21 years ago. Order 1A remains in the rules of court when the RHC 1980 was replaced with the RC 2012. The intent of Order 1A is to make clear that Judges will no longer allow lawyers to raise preliminary objections on purely technical grounds. Instead, the Courts will pay due regard to the justice of ach case. Order 1A reads as follows:

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.

**[33]** Further evidence concerning the partiality towards the substance of the case can be traced to Order 2 rule 1 of the RC 2012. In this regard, the relevant provision provides as follows:

Non-compliance with Rules (O. 2 r. 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non- compliance with the requirement of these Rules, the non- compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.

(3) The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.

**[34]** However, Judges retain the discretion to uphold a technical objection if the Judge is of the view that non-compliance with the rules

has caused a substantial miscarriage of justice. This exception comes in the form of Order 2 rule 3 of the RC 2012, which provides as follows:

> Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)
>
> A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both.

**[35]** The law reports are replete with cases that have elucidated the objective of and invoked the above provisions. (See Malaysian Court Practice 2021, para. 1A/1/1; paras. 2/1/1 – 2/1/3; and para. 2/3/1).

**[36]** Be that as it may, the rule that requires Judges to disregard pedantic procedural technicalities if a Judge is of the view that the non-compliance has not occasioned a substantial miscarriage of justice give rise to difficulties. Terms such as "justice of the case" and "substantial miscarriage of justice" resist easy definition or characterization. A non-compliance that has the effect of delaying proceedings may or may not amount to a substantial miscarriage of justice. Each non-compliance will have to be examined against the background of the factual matrix of the case before the Court.

*The rule in Order 18 rule 2*

**[37]** Order 18 rule 2 of the RC 2012, concerning the service of defence expressly provides that "a defendant who enters an appearance in, and intends to defend, an action shall, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of fourteen days after the time limited for appearing or after the statement of claim is served on him, whichever is the later".

**[38]** The plaintiffs relied on *Subang Parkhomes* and referred to what the High Court had observed and held in that case.

> Order 18 rule 2(1) of the ROC 2012 requires strict compliance to file the Statement of Defence within the prescribed time. The word "shall" in my considered view must be interpreted as a peremptory mandate. To state otherwise would defeat the very purpose of O.18 r. 2(1).

**[39]** The High Court in *Subang Parkhomes* highlighted the adoption of the term "shall" in Order 18 rule 2(1) of the RC 2012. The word "shall" as used in Order 18 rule 2(1), and for that matter in all the other provisions in the RC 2012, no doubt connotes an expression of a strong assertion or intention by and on the part of the members of the rules committee for parties to observe the mandate as laid in the relevant rules. However, the word "shall" in used over 2,170 times in the entire RC 2012. To interpret the term "shall" each time it is used in all of these provisions in the RC 2012 as an absolute mandate will strip the Courts of their discretionary power and that surely cannot be the intent of the rules committee.

**[40]** In the context of Order 18 rule 2(1) of the RC 2012, it is clear that Courts retain the discretion to enlarge or extend the fourteen-day period prescribed therein for the filing and service of Defence. This is evident form the phrase "unless the Court gives leave to the contrary".

**[41]** Order 3 rule 5(1) of the RC 2012 provides further support for the proposition that Courts have the power to grant an extension of time for the filing of a Defence. Reference to pleadings in general, which includes a Defence, is made in Order 3 rule 5(3) of the RC 2012. The rules committee made it clear that the period to serve and file a Defence "may even be extended by consent in writing without an order of the Court being made for that purpose".

**[42]** In support of her argument that the principle which gives primacy to the substance of the dispute over procedural discipline should be applied, the defendant referred to *Lee Thean Chye v. Lim Chow Chong* [1973] 1 LNS 75 and *Malayan Flour Mills Bhd v. Teh Wee Kok* [2005] 7 CLJ 213.

**[43]** The defendant further relied on the decision of the Federal Court in *National Union of Bank Employees v. Director General of Trade Unions & Anor* [2017] 7 CLJ 957 and *Idris bin Haji Salleh v. Federal Auto Holdings Ltd* [1976] 1 LNS 43; [1979] 2 MLJ 141 to support her application to extend the time as prescribed in Order 18 rule 2(1) of the RC 2012 to file her Defence. (See para [27] of the FC's judgment).

**[44]** Finally, the defendant also referred to *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 ("*Khor Cheng Wah*") for the proposition that when the issue of delay is before the court, "the burden is upon the litigant who has delayed to render a satisfactory explanation for it". The Court of Appeal in that case had pointed out that whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. As further noted by the Court of Appeal, in a matter which involves the exercise of discretion, it is for the Judge in whom the law primarily vests the discretion.

**[45]** This court is not only in agreement with, but more importantly, is bound by the principles and guidelines as enunciated by the Court of Appeal and Federal Court in the above cases.

**Decision of this Court**

**[46]** The facts in the present case do not present much difficulty. Yes, there was a delay in the filing of the defence. There was a delay of 8 days. More importantly, the defendant had in fact "anticipated" the difficulty in filing her defence in time and had therefore sought the consent for an extension of time from the plaintiffs. The plaintiffs responded (thirteen days later) to this request and offered the defendant

a one-day extension period. By the time the plaintiffs responded to the defendant, the defendant had two more days to file her Defence as required under Order 18 rule 2(1) of the RC 2012. On 20 September, 2022, the same day the defendant received the response from the plaintiff, the defendant had written to the Court to seek an extension of time to file the Defence. The defendant eventually filed her Defence on 30 September, 2022, three days before she filed her formal application to this Court in Enclosure 7 for an extension of time to file her Defence.

**[47]** Based on the above facts, I do not find the defendant to be a recalcitrant party. While I commend the plaintiffs for their fervour in pursuing their claim, I cannot help but find the plaintiffs to be unreasonable in their refusal to agree to the request by the defendant for a reasonable extension of time to file the defence and in opposing the application to file the defence 8-days outside the period as provided for in Order 18 rule 2(1) of the Rules of Court 2012.

**[48]** I am also unable to reach the conclusion that the plaintiffs would be prejudiced if this Court were to allow the defendant's application in Enclosure 7. The reason put forward by the plaintiffs was that they would be deprived of their right to obtain a judgment in default of defence against the defendant. There is a short answer to the plaintiffs' submission on this point. A judgment in default of defence is not a judgment on the merits of the case. Even if the plaintiffs had been presented with the occasion to enter a judgment in default of defence against the defendant, that judgment in default is subject to being set aside. (see *Evans v. Bartlem* [1937] AC 473 at p. 480 and Order 19 rule 9 of the RC 2012).

**[49]** Whether an application for extension of time should or should not be allowed would depend on the factual matrix of the case before the Court. The authorities that considered similar applications to extend time to file a defence, namely, *Ng Hock Seng & Ors v. Kilang Papan Sungei Durian Sdn Bhd & Anor* [2012] 1 LNS 1419, *Tan Kim Swee v. Pegawai Pentadbir Pusaka Harta Pusaka Norazmi Ahmad* [2001] 1 CLJ

719, *Paul Law Ung Hua & Anor v. Hong Wei Organisation Sdn* Bhd [1996] 1 LNS 71 and *EON Bank Berhad v. Loyalex Industry (EM) Sdn Bhd & Ors* [1998] 5 CLJ 207 reached differing conclusions.

**[50]** It is axiomatic that no two set of facts from two different cases can be identical. Hence the differing conclusions reached in the diverse cases can be justified on the basis that the facts, factors and circumstances were dissimilar.

**[51]** Applying the principles and guidelines as adumbrated by the Court of Appeal in *Khor Cheng Wah* and the Federal Court in *National Union of Bank Employees v. Director General of Trade Unions & Anor* to the facts in the present case, I allowed the application by the defendant in Enclosure 7 to file her defence outside the 14-day period as required by Order 18 rule 2(1) of the RC 2012. The defence filed on 30 September, 2023 was thereby accepted as duly filed.

**[52]** The order for costs for this application was costs in the cause.

**Dated:** 13 MAY 2023

**(CHOONG YEOW CHOY)**
Judicial Commissioner
High Court of Malaya
Shah Alam

**Counsel:**

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