I TINGGI MALAYA DI SHAH ALAM

I SELANGOR DARUL EHSAN

(GUAMAN SIVIL NO: 22NCVC-526-10/2015)

ANTARA

GREGORY YUSRAN & ASSOCIATES .....PLAINTIFF

DAN

RAMASUNDRAMOORTHY A/L PERMALU
(No. K/P : 770617-01-6477) ....DEFENDANT

JUDGMENT

INTRODUCTION

1. This is an appeal by the Defendant/Appellant against the decision of the Learned Registrar delivered on 29 October 2018 whom had dismissed the Defendant's application (Enclosure 15) to set aside the judgment in default obtained by the Plaintiff/Respondent on 18 January 2016 and the Defendant be given leave for extension of time to file Memorandum of Appearance and Defence.

2. The Cause Paper for this application are as follows :
   (a) Writ and Statement of Claim dated 6 October 2016;
   (b) Plaintiff's Affidavit of Service affirmed by Dorai Raj a/l Subramaniam on 15 January 2016;

Non Appearance dated 18 January 2016;

Notice of Application dated 23 January 2018;

(e) Defendantôs Affidavit in Support dated 4 May 2017;

(f) Defendantôs Additional Affidavit (1) dated 16 May 2017;

(g) Plaintiffôs Affidavit in Reply dated 15 May 2018; and

(h) Defendantôs Affidavit in Reply dated 28 May 2018.

MATERIAL FACTS

3. Based on the Records of Proceeding, the Affidavits and the Written Submission filed by both parties, I have concluded the facts of case as below :

(a) The Plaintiff is a legal firm which predominantly engages in the practise areas of banking, property, corporate & insurance. At all material time, the Plaintiff has six (6) legal assistants. The Defendant was a former legal assistant of the Plaintiff;

(b) Somewhere in the midst of year 2012 the Plaintiff had expanded their practise area and had engaged in the industry of motor insurance. To assist in the expansion, the Plaintiff had engaged the Defendant as a Legal Assistant. The Plaintiffs managing partner in particular Mr Lourdes Gregory was given the impression by the Defendant that he had vast experience in the industry of motor insurance;

se the contract between the parties the employed the Defendant basing on certain terms and conditions pursuant to an agreement dated 3 October 2012;

(d) On or about 30 September 2014 the Plaintiff had issued various letters to the Defendant to attend work however all attempts failed. In such circumstances, the Defendant was left with no alternative but to terminate his employment if he did not attend work;

(e) During the course of his employment, the Plaintiff had expanded monies i.e. loan was given to the Defendant for the sum of RM 1,620,730.00 to the Defendant in light of the expansion of the motor insurance industry;

(f) It was discovered by the Plaintiff that the Defendant had failed to perform his duties diligently and caused mismanagement in the files. As a result of the Defendantôs lackadaisical attitude the Plaintiff had suffered losses;

(g) The Plaintiff had obtained a Judgment In Default against the Defendant on 18 January 2016 is a regular judgment. If read in detailed, there are no averments by the Defendant in their affidavits to suggest that the service of the Writ and Statement of Claim was irregular. The

erely makes a bare denial that the writ and claim was not served on him.

THE COURT'S FINDING

4. It is trite law based on a number of great authorities, an appellate court should but rarely interfere with the conclusion arrived at by the trial judge who has had the advantage of hearing the witnesses unless it is satisfied that the trial judge has acted on a wrong principle of law or has made a wholly erroneous estimate of damage suffered, either due to an omission to consider relevant materials or admitting irrelevant consideration. The cases in reference are : **Tan Kuan Yau v. Suhindrimani Angasamy (1985) 1 CLJ 429; (1985) CLJ (Rep) 323; Kyros International Sdn. Bhd. v. Ketua Pengarah Hasil Dalam Negeri (2013) 2 CLJ 813; and the case of : Kerajaan Malaysia v. Global Upline Sdn. Bhd. & Another Appeal (2016) 1 LNS 1158; (2017) 1 MLJ 187.**

5. In a civil dispute, the burden of proof as well as the initial onus to prove the claim rest with the Plaintiff and the Plaintiff is to discharge its onus to prove its cause of action against the Defendants as decided by the Federal Court in the case of: **Letchumanan Chettiar Alagappan @ L. Allagapan, M. Venkatachalam s/o Venkatachalam Chettiar v. Secure Plantation Sdn. Bhd. (2017) 5 CLJ 418; (2017) 4 MLJ 697**. Based on Letchumanan Chettiar Alagappan *(supra)* case, section 101 of the Evidence Act 1950 was referred holding that the burden to establish the case rests throughout on the party who asserts the affirmative of the issue.

alingam Periasamy v. Periasamy & Anor Gopal Sri Ram JCA delivering the judgment of the court :

> *".....it is trite law that this court will not interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has no fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion....."*

LAW ON SETTING ASIDE JUDGMENT IN DEFAULT

7. The law on setting aside Judgment in Default has been clearly defined in the following provision, namely :

> ***Order 13 Rule 8 Rules of Court 2012***
> *The Court may, on such terms as it thinks just, set aside or vary any Judgement entered in pursuant of this Order*
>
> ***Order 92 Rule 4 Rules of Court 2012***
> *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*

In the case of : **Adzmi bin Ali Anor. v. Mohamed Isa bin Kasad (1987) 2 MLJ 199 (SC),** Seah SCJ (ah His Lordship then was) delivering the judgment of the court :

a construction may be gathered from the speeches of the Law Lords in the case of Evans v Bartlam [19371 AC 473 where their Lordships held that if the default judgment was obtained regularly then there ***must be an affidavit of merits, meaning that the applicant/defendant must produce to the court evidence that he has a prima facie defence****…….*

In the case of : **Azmi bin Ahmad & Anor v. Ali bin Abdullah (1996) 6 MLRH 729**, KN Segara J held that :

*"…..****The primary consideration in any application to set aside a judgment in default regularly obtained is whether there is any merits in the defence. In order for the Court to properly exercise its discretion, there must be an affidavits of merits, meaning that the applicant must produce to the Court evidence that he has prima facie defence****. And the following dicta of Abdul Wahab Patail J (now JCA) in Utama Merchant Bank Bhd V Cawis Wira Sdn Bhd & Ors [2004] 3 MLRH 855 [2006] 7 CLJ 143 at 148 :*

> *In an affidavit based application, it is not enough to assert a fact in an affidavit. An assertion is not evidence. When an assertion is disputed, the onus lies upon the maker of the assertion to tender his evidence in a further affidavit, if he has not done so in his earlier affidavit where the assertion was made……"*

Furthermore, in the case of : **Segi Astana Sdn. Bhd. v. Pusparawi Pharmacy & Health Pro Sdn. Bhd. (2017) 1 MLRHU 1,** Abu Bakar Jais J held that :

...ious because there is a need to show this, ...onding duty on this court to evaluate whether the ***Defendant is able to raise a defence that must be worthy of a trial. It cannot be a defence that upon scrutiny will show that the Defendant on a balance of probability could not actually dispute the Plaintiff's claim****. That is why the law as enshrined on this subject stipulates "there must be defence on merits". Therefore, this court needs to judge, evaluate and assess whether the defence proposed has that merits. In that sense, it cannot be just a perfunctory or cursory examination on the same. Of course this is not to suggest that the Defendant must show evidence that its proposed defence would overwhelmingly defeat the Plaintiff's case. I am fully aware that is not the standard required of the Defendant. Needless to say that would be too high a requirement. Like I say the standard is merely to show triable and arguable case for the Defendant ....."*

THE LAW OF ABRIDGMENT OF TIME APPLICATION

8. In the case of: **Abdul Rahim Ponniah Bin Abdullah v. Kulim Intensive Driving Centre Sdn. Bhd. (2000) 6 MLJ 584**, the High Court in dealing with an application under Order 3, rule 5 of the Rules of the High Court 1980 held that :-

> *".....The discretion of the court to extend time under O 3 r 5 if the Rules of the High Court 1980 ('the RHC1) must be exercised judicially and only in cases where there are merits.* ***In exercising its discretion, the following factors will be considered: (i) whether the delay caused by the defendant company is unjustified or unreasonable: (ii) what are the reasons for the delay: (Hi) whether the defence raised by the defendant company has any merits: and (iv) will the plaintiff be prejudiced*** *in any way should the application be granted.....*

rs are merely framework or guide for the the discretion and are not intended to be rigid mandatory requirements. It is not necessary that ail the four factors must be in favour of an applicant in order that the discretion may be exercised to the applicant's benefit....."

5. 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.

In the case of : **Saeed U Khan v. Lee Kok Hooi (2000) 7 CLJ**, Faiza Thamby Chik J held that :

"……..Further the defendant may seek to rely on O. 3 r. 5(1) of the Rules of the High Court 1980. Order 3 r. 5(1) provides :

> *the Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings….*

etion under O. 3 r. 5(1) of the Rules of the should take into account certain factors, such as:

(a) the delay in making the application;

(b) whether or not there are cogent reasons for the litigant not to have made the application within the prescribed time;

(c) the likelihood and degree of prejudice, as well as the injustice to the opposite party should the court exercise its discretion……"

Similarly, in the case of : **Microsoft Corporation v. PC House (Imbi) Sdn. Bhd. (1998) 5 CLJ 474**, the High Court in dealing with an application under Order 19, rule 7 of the Rules of the High Court 1980 held that :

"……..Although O. 19 r. 7 of the Rules of the High Court 1980 ('the RHC') uses the word "shall", vet the court may in its discretion extend the time within which a defence may be filed and served provided no injustice is caused. The court will not enter a judgment in default of defence which it will afterwards set aside on proper grounds being shown. The judge will exercise his discretion on the same lines as he will in setting aside a judgment in default..... "

The High Court referred to the decision in **Wallersteiner v. Moir (1974) 3 All ER 217 CA** and state at page 476 as follows :-

"……..Clearly the principles upon which a court need to apply in an application for judgment in default of defence are much the same as those relating to the setting aside of a default judgment This was what Lord Denning MR said in Wallersteiner:

> *...hambers has a discretion which he will ...e same lines as he will set aside a judgment in default.* ***He will require the party to show that he has a good defence of the merits****. This is a time-hallowed phrase going back for a hundred years: see Watt v Barnett; Farden v Richter. It has been explained by Lord Atkin as meaning that the applicant would produce to the court evidence that he has a prima facie case. The applicant must produce evidence by affidavit showing he has such a defence..... "*

FINDING OF THIS COURT

8. Having considered the above, it is now clear to my mind that this Honourable Court must predominantly consider :

(a) Whether the Writ and Statement of Claim was properly served on the Appellant/Defendant and obtained?

(b) Whether there was any delay and if so whether reasonable delay?

(c) Whether the Defendant had any defence on merits for the purpose of exercising its discretion.

t and Statement of Claim properly served on the Appellant/Defendant and obtained?

Under Order 10 Rule 1(1) Rules of Court 2012 clearly provides the mode of service of Writ and the Statement of Claim as below :

> ***General Provision (O.10 r.1)***
> *(1), a writ shall be served personally on each Defendant or sent to each Defendant by prepaid AR registered post addressed to his last known address and in so far as is practicable, the first attempt at service must be made not later than one month from the date of issue of the writ*

In the Affidavit of Service affirmed by Dorai Raj a/l Subramaniam dated 15 January 2016, had confirmed that he has served a copy of Writ and the Statement of Claim dated 6 October 2015 to the Defendantôs address No. 4A, Jalan Factory, 85400 Chaah, Johor Darul Takzim through AR Registered Post and was received by the Defendant on 1 December 2015. A copy of the Postal receipt and the AR Card were also exhibited in the Affidavit. Moreso, a copy of the solicitorôs letter dated 20 November 2015 acting for the Plaintiff informing of the Case Management Date to the Defendant was also sent through the AR Registered Post. To my mind, the notices and proper time was given to the Defendant and the Defendant ought to know about the matter. Though the Defendant had denied receiving such Writ and the Statement on the reason that it was received and signed by one, Pemalu a/l Krishnan, to my mind, that was the last known address of the Defendant. Having considered the above

equirement for the Plaintiff to prove the sing the AR Card. Nevertheless, as exhibited in the Affidavit of Service, I am fully satisfied that the Writ and the Statement of Claim was properly served on the Defendant. The fact remains that the service was proper and acknowledged by a person known to the Defendant. Furthermore, a close cursory examination of the Defendantôs Affidavit would suggest that the ñ*Jalan Factory"* address is the address which is resided by the Defendant. In the case of: **Yap Ke Huat & Ors. v. Pembangunan Warisan Murni Sejahtera Sdn. Bhd. & Anor (2008) 1 MLRA (276) (CA),** James Foong JCA (as His Lordship then was) delivering the judgment of the court :

> *"……[30] In respect of this defendant, the prepaid AR registered post acknowledgement card was not returned. But, following what we have expounded earlier, this does not mean that the service of the writ and statement of claim is deemed defective.* ***What is demanded in O 10 r1 of the RHC is that the writ (and in this case including the statement of claim) be sent by prepaid AR registered post to the defendant's last known address. When there is sufficient evidence of posting, as it is in this case, then under the rules, the writ (and statement of claim) is deemed to be served on the defendant.*** *There is no necessity to prove that the acknowledgement of the AR registered posting has been returned. Of course, if it is returned by the post office then it is further proof that it was not only sent but also received. But for the purpose of service, proof of sending by prepaid AR registered post is sufficient…… In this instance, the Plaintiff had elected to serve the writ and statement of claim on this Defendant by way of sending it by prepaid AR Registered Post. This Defendant did*

...ch process was never undertaken. ***Once this ...d out , it is our view that there is no provision in law to say that the Plaintiff must also prove that the person so named in the post had received it****……"*

Similarly, in the case of : **Sivamurthy s/o Muniandy & Ors. v. Lembaga Kumpulan Wang Simpanan Pekerja (2013) 5 MLJ 533 (CA),** Syed Ahmad Helmy JCA (as His Lordship then was) delivering the judgment of the court :

"…..[9] There is no necessity for the respondent to prove receipt of the writ by the person named in the AR registered post. The Court of Appeal in Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 15 MLJ 112; [2008] 4 CLJ 175 held:

> ***There was no provision of law that the plaintiff must also prove that the person so named in the post had received the writ of summons and statement of claim. Once the writ of summons and statement of claim are sent by AR registered post, it is prime facie proof of service*** *unless the defendant is able to rebut this. From the facts, that presumption was not rebutted……"*

In furtherance, in the case of : **Pengkalen Concrete Sdn. Bhd. v. Chow Mooi (guarantor of Kin Hup Seng Construction Sdn. Bhd.) & Anor (2003) 3 MLJ 67,** Suriyadi J (as His Lordship then was) held that :

"……In fact under sub-r 1(1) of 0 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it, i.e. if it was sent by

*post. **It therefore was satisfied that, as in prerequisites were fulfilled, as the plaintiff had done so, the recipient being 'Yanti' did not vitiate that service……"***

Based on the principles enunciated in the above authorities, **it is my considered view that the service was done accordingly and the default judgment, is regular.**

SECOND ISSUE

Is the delay in filing the Defence reasonable?

12. The learned counsel for the Defendant in his submission at page 8 cited as follows:

> *"…15A. Selepas Defendan exits firma Plaintiff pada 31/10/2014, non of the agents were in talking terms with the Defendants and non agreed to cooperate with thr Defendant in terms of giving evidence and or affidavits. Only after telling the agents that the Plaintiff had made the Defendant bankrupt notwithstanding the facts that the capital sum invested was refunded back to the Plaintiff vis deduction s, one of the agents agreed to sign an affidavit in May 2017. Further all the documentary evidence was not the Defendant after he left the firm in 31/10/2014. Only in May 2017, the Defendant has manage to get it through someone in the Defendant's firm who were sympathize with the Defendant's predicament with bankruptcy. Between 2015-2016, nobody were to help the Defendant. without this evidence, practically the Plaintiff will get the Judgment with any doubts……"*

bove, the Defendant is blaming others in not problem. It is nothing more than attracting this Honourable Court to be more sympathetic with such scenario. I hardly find any reasonable explanation for such delay and such delay took more than 2 year before the Defendant filing an application to set aside the Judgment obtained by the Plaintiff. **To my mind, with such an inordinate delay, there should be no more opportunity given to the Defendant at this late stage, i.e. 2 years 7 months to set aside the judgment which is regularly obtained.**

THIRD ISSUE

Has the Defendant any meritable Defence?

14. Based on the Defendant Affidavit, the learned counsel had submitted on 3 grounds namely :

(a) the Plaintiff was not satisfied with the Defendant's work in the firm and had grudge on him;

(b) there was misappropriation of money in the firm by others; and

(c) there was an element of fraud and cheating by the Plaintiff in obtaining the Judgment.

In deciding this issue, it is best to refer to the case of : **Lembaga Kumpulan Simpanan Pekerja v. Agmi Energie Sdn. Bhd. & Ors (2014) 8 MLJ 565**, wherein the Court held that :

apply to set aside a regular judgment, the
***ust show that he has a defence on the merits**, otherwise there may be no point in setting it aside…… "*

In another case of : **Public Finance Berhad v Zainall bin Osman T/A Putera Foto Studio (2001) MLJU 476** wherein the Court held that :

> *"……In an application to set aside a regular judgment in default of appearance, **the burden is on the defendant to show a defence on the merits**; Kwong Yik Bank Bhd v Sa'Adiah Bte Mastan [1994] 2 MLJ 830; Evans v Bartlam [1937] AC 473. It is therefore incumbent on the defendant to show in his affidavit that he has a defence on the merits……"*

Having perused the affidavit in detail, if the allegation by the Defendant is true, I hardly find any police report made to this effect. What is there for the Defendant to inform this Honourable Court in his Affidavit, when in fact he has ample time i.e. more than 2 year to lodge a police report and such investigation be made by the police. **In the finality, it is my considered view that the Defendant had no meritable defence in the Plaintiff's claim. Having failed to raise any merit in the defence so as to allow any abridgment of time to file Defence and Counterclaim, to my mind the Plaintiff is justified for leave to enter a judgment in default of Defence against the Defendant.**

ubmissions of the learned counsel for the Plaintiffs as well as the Defendants, it is pertinent and be guided by the advise in the case of : **Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng (2004) 4 CLJ 309; (2005) 2 MLJ 1(FC),** Steve Shim CJ (Sabah and Sarawak) (as His Lordship then was) delivering the judgment of the court :

> *"……..The Court of Appeal had clearly borne in mind the central feature of appellate intervention i.e., to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence.* ***In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This was reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.*** *This was consistent with the established "plainly wrong" test. Therefore, there was no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. What the Court of Appeal had done was merely to accentuate the established "plainly wrong" test consistently applied by the appellate courts in this country……"*

tail, to my mind the learned Registrar did not her decision. The learned Registrar had correctly made the decision in accordance with the principles of law and facts. **I hardly find any merit and justification in the appeal which tantamount to any judicial interference by this Honourable Court. As such, the decision of the learned Senior Assistant Registrar is affirmed and this appeal be dismissed with cost of RM2,000.00 to be paid by the Defendants/Appellants to the Plaintiffs/Respondents.**

Dated 04 March 2019

(DATO' HJ. MOHAMAD SHARIFF BIN HJ. ABU SAMAH)
Pesuruhjaya Kehakiman (NCVC 6)
Mahkamah Tinggi Malaya
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