OOI SWEE KING v. STANDARD CHARTERED SAADIQ BHD

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[CIVIL APPEAL NO: WA-12AM-7-07-2023]
14 DECEMBER 2023

Abstract – *The courts' discretion to discontinue or dismiss legal proceedings, with or without the liberty to initiate fresh proceedings, is contingent upon the unique facts and circumstances inherent in each case. In determining whether to allow the discontinuation or dismissal of an action and under what conditions is inherently subjective. The courts have to carefully consider the specific details and nuances of the case at hand, by looking into all the circumstances of the case, including whether the default was intentional and contumelious, before proceeding to penalise the party in default. In some cases, a procedural misstep that can lead to a suit being struck out but is considered an oversight that does not amount to a serious neglect or omission, should not bar the party in default from being granted the liberty to file afresh.*

CIVIL PROCEDURE: *Action – Writ of summons and statement of claim – Striking out with liberty to file afresh – Whether there was act of non-compliance of court order – Whether oversight amounted to serious neglect or omission – Whether procedural misstep ought to bar suit from being filed afresh – Whether court's decision to exercise discretion to grant liberty to file afresh well founded and ought not to be disturbed*

This appeal emanated from the Sessions Court, where the Sessions Court Judge ('SCJ') granted the appellant's/ second defendant's ('D2') application, permitting the striking out of the respondent's ('plaintiff') writ of summons and statement of claim with liberty to file afresh. The first defendant ('D1') was the customer of the plaintiff bank who had applied for financing. The plaintiff granted D1 with a commodity murabahah facility amounting to RM500,000 ('facility'). Pursuant to a personal guarantee ('guarantee'), D2 agreed to guarantee all outstanding payments of the said facility. Based on the fact that D1 subsequently failed to settle the installment, the said facility was terminated ('termination notice'). The plaintiff thereafter commenced the suit against the defendants at the Sessions Court. A judgment in default of appearance was entered against D1 and D2. An application by D2 to set aside the said judgment was disallowed by the Sessions Court. Upon D2's appeal, the High Court set aside the default judgment on the grounds that the statement of claim that was served on D2 was undated. Within the same order, the High Court directed the plaintiff to re-serve the duly sealed, signed

and dated writ of summons and statement of claim on D2. The plaintiff unilaterally inserted a date in the said statement of claim and served it together with the writ *via* registered post. This triggered D2's striking out application as the writ of summons had already expired, and the fact that the plaintiff failed to amend or refile the statement of claim reflecting the actual date of issue. D2 prayed for the plaintiff's entire claim to be dismissed without liberty to file afresh. The Sessions Court, in its discernment, allowed D2's application for striking out. However, it extended the privilege of filing afresh to the plaintiff. Dissatisfied with the Sessions Court's decision on the aspect pertaining to granting liberty to file afresh to the plaintiff, D2 lodged an appeal. D2 contended that although the SCJ was correct in the striking out of the action, the plaintiff should be precluded from filing afresh due to their act of non-compliance of the High Court order made pursuant to D2's appeal to set aside the default judgment. The issue for determination was whether the SCJ had exercised his discretion correctly in granting the plaintiff liberty to file afresh upon striking out of the plaintiff's claim in the circumstances.

Held (dismissing appeal):

(1) The plaintiff had not ceased to be the dominant party (*dominus litis*) in the action based on the guarantee given by D2. D2 had not obtained any advantage or being denied of any good defence in the suit as he remained a guarantor to the facilities granted to D1. The suit had been challenged on a technical point (not on merits) at the initial stage wherein the challenge was merely on the issue of non-insertion of a date within the body of the statement of claim, whilst the writ being properly signed, dated and sealed. (para 28)

(2) On the issue of a peremptory order being allegedly disobeyed, the court analysed the alleged breach of the express direction of the court. Paragraph 4 of the said order was not a peremptory *per se*. This was because it did not provide for an ordered consequence in the event of a failure to do an act. There was also nothing in the rules to construe any inbuilt sanction to qualify the same to be peremptory. It was merely an order to re-serve the properly dated, signed and sealed writ and statement of claim within a specific timeline in light of the setting aside of the default judgment. (paras 29-31)

(3) The court has a duty to look into all the circumstances of the case, including whether the default was intentional and contumelious, before proceeding to penalise the party in default. Examining the circumstances, the SCJ's decision to strike out the plaintiff's suit was justified due to the expiration of the writ of summons. However, it was evident that the plaintiff's oversight in this matter did not amount to a

serious neglect or omission. This distinction was crucial because, despite the procedural misstep that led to the suit's striking out, it was reasonable to argue that the plaintiff should not be barred from filing afresh. (para 38)

(4) Considerable criticism had been directed towards the allegation of tampering with court documents, a claim vehemently asserted by D2 as being illegal. Generally, the intentional insertion of an incorrect date or falsification of any information within a legal document was deemed tampering with court documents constituting a criminal offence. However, a distinction arose when the date was inadvertently left blank and subsequently filled in with accurate information. Although procedurally incorrect, such an action typically did not amount to a criminal offence. (para 39)

(5) Furthermore, the status of the undated statement of claim was legally characterised as that of a draft. The document only acquired full legal existence and significance when both were signed and dated. In light of this perspective, the plaintiff's unilateral act of inserting the correct date in the undated statement of claim was not inherently unlawful. Instead, it could be construed as an effort to enhance the statement of claim in its draft form. This action did not carry the same level of culpability as altering or adding to the contents of an existing and valid court document. The distinction underscored the nuanced nature of the alleged tampering, considering both the procedural irregularity and the intent behind the plaintiff's corrective action. (para 40)

(6) The courts' discretion to discontinue or dismiss legal proceedings, with or without the liberty to initiate fresh proceedings, was contingent upon the unique facts and circumstances inherent in each case. This implied that the determination of whether to allow the discontinuation or dismissal of an action and under what conditions was inherently subjective, with the courts carefully considering the specific details and nuances of the case at hand. The argument underscored the importance of a case-by-case assessment, emphasising that the exercise of judicial discretion in such matters was not governed by rigid rules but rather shaped by the individual context and intricacies of each legal scenario. The SCJ's decision to exercise his discretion to grant liberty to file afresh was well founded and should not be disturbed. (paras 41 & 43)

Case(s) referred to:

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***

Battersby and Others v. Anglo-American Oil Company Ltd And Others [1944] 2 All ER 387 ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors (No 2) [2001] 5 CLJ 476 HC ***(refd)***
Fox v. Star Newspapers & Co [1898] 1 QB 636 ***(refd)***
Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ Rep 684 HC ***(refd)***
Hytec Information Systems Ltd v. Coventry City Council [1997] 1 WLR 1666 ***(refd)***
In Re Jokai Tea Holdings Ltd (Note) [19921 1 WLR 1196 ***(refd)***
Janov v. Morris [1981] 3 All ER 780 ***(refd)***
Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(refd)***
MacFoy v. United Africa Co, Ltd (1961) All ER 1169 ***(refd)***
Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan [2002] 3 CLJ 370 CA ***(refd)***
Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***
Owners Of The Ship Or Vessel "SASACOM I" v. Bank Pembangunan Malaysia Bhd [2015] 1 CLJ 392 CA ***(refd)***
Ramesh Muniandy v. The Deputy Minister Of Home Affairs Malaysia & Ors [2012] CLJU 134; [2012] 1 LNS 134 HC ***(dist)***
Sama Assavakul v. Chop Kah Hoe & Anor [2023] CLJU 1311; [2023] 1 LNS 1311 HC ***(refd)***
Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***
Tan Chew Ho v. The Deputy Minister Of Home Affairs Malaysia & Ors [2011] CLJU 1685; [2011] 1 LNS 1685 HC ***(dist)***
Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 6 r. 7(2), O. 18 r. 19(1)
Rules of the High Court 1980, O. 18 r. 19(1)(d)

For the appellant/second defendant - Lum Kok Kiong & Jeslyn Ling; M/s Lum Kok Kiong & Co
For the respondent/plaintiff - Fadil Azuwan Zainon & Tay Yeong Hui; M/s Arifin & Partners

[Editor's note: Appeal from Sessions Court; Suit No: WA-B52M-121-04-04-2021.]

Reported by Suhainah Wahiduddin

JUDGMENT

Yusrin Faidz Yusoff JC:

Introduction

[1] This interlocutory appeal emanates from the Sessions Court, where the learned Sessions Court Judge granted the appellant's/second defendant's ('D2') application in encl. 28, thereby permitting the striking out of the respondent's/plaintiff's writ of summons and statement of claim with liberty to file afresh. For ease of reference, the parties will be addressed in this appeal as they were in the lower court.

[2] According to D2, the crux of the appellate decision lies in a singular question: whether, given the circumstances of the case, the plaintiff's suit should be dismissed with the provision of liberty to file afresh. D2 asserts that, although the learned Sessions Court Judge was correct in dismissing the suit pursuant to O. 18 r. 19(1) of the Rules of Court 2012 ('the Rules'), the plaintiff should not be afforded the liberty to file afresh. In contrast, the plaintiff contends that the learned Sessions Court Judge's decision to grant liberty to file afresh upon pronouncing the order of dismissal is justified. This establishes a fundamental divergence in perspective between the parties involved regarding the appropriateness of granting the plaintiff the opportunity to initiate a fresh suit based on the circumstances at hand.

[3] On 20 October 2023, this court held that taking into consideration the main underlying policies and basic principles of the Rules of Court 2012 the learned Sessions Court Judge is correct in the exercise of his discretion in granting the plaintiff liberty to file afresh upon the decision to dismiss. On that basis, this court dismissed the D2's appeal, and affirmed the Sessions Court decision dated 12 July 2023, with no order as to costs.

[4] On 1 November 2023, D2 filed an appeal against this court's decision (end 1).

Background

[5] The first defendant ("D1") was the customer of the plaintiff bank, who had applied for financing. Based on a letter dated 28 November 2018, the plaintiff granted D1 with a commodity murabahah facility amounting to RM500,000 under account No. 60070226 (the said facility). Pursuant to a personal guarantee dated 28 September 2018 ("guarantee"), D2 has agreed to guarantee all outstanding payments of the said facility.

[6] Based on the fact that D1 subsequently failed to settle the instalment, the said facility was terminated *vide* a notice of demand dated 5 April 2021 ("termination notice"). As at 23 April 2021, the sum of RM524,433.98 was outstanding and payable by the defendants.

[7] The plaintiff thereafter commenced the suit against the defendants at the Sessions Court in Suit No. WA-B52M-121-04/2021 by filing a writ of summons on 30 April 2021.

[8] A judgment in default of appearance was entered against D1 and D2 on 30 June 2021. An application by D2 to set aside the said judgment was disallowed by the Sessions Court on 16 December 2022. Upon D2's appeal (Appeal No. WA-12AM-11-12/2022), the High Court had on 20 March 2023 set aside the said default judgment on the grounds that the statement of claim that was served on D2 was undated. Within the same order, the High

Court directed the plaintiff to re-serve the duly sealed, signed and dated writ of summons and statement of claim on D2 within 14 days from 20 March 2023.

[9] The plaintiff's solicitors unilaterally inserted a date in the said statement of claim and served it together with the writ *via* registered post on 13 April 2023. This triggered D2's striking out application as the writ of summons had already expired, and the fact that the plaintiff failed to amend or refile the statement of claim reflecting the actual date of issue.

[10] Based on the striking out application dated 3 May 2023, D2 prayed for the plaintiff's entire claim to be dismissed without liberty to file afresh. On 12 July 2023, the Sessions Court, in its discernment, allowed D2's application for striking out. However, it extended the privilege of filing afresh to the plaintiff. D2, dissatisfied with the Sessions Court's decision on the aspect pertaining to granting liberty to file afresh to the plaintiff, lodged an appeal. It is noteworthy that despite having their claim struck out, the plaintiff has not pursued an appeal. Consequently, the sole matter for consideration before this court pertains to the appropriateness of granting liberty to the plaintiff for filing afresh.

Counsel's Contentions

[11] D2's learned counsel, Mr Lum Kok Kiong contends that although the learned Sessions Court Judge is correct in the striking out of the action, the plaintiff should be precluded from filing afresh due to their act of non-compliance of the High Court's order dated 20 March 2023 made pursuant to D2's appeal to set aside the default judgment.

[12] D2 argues that subsequent to the High Court's decision to set aside the default judgment, the plaintiff neither amended the undated statement of claim nor had it refiled. However, in marked contrast and defiance of the High Court's directive, the plaintiff opted to serve an expired writ of summons dated 30 April 2021 along with a statement of claim marred by illegality, wherein the plaintiff unilaterally and/or erroneously introduced a date into the statement of claim. The relevant cause papers were served *via* registered post on 13 April 2023, a circumstance acknowledged by the plaintiff. At all material time, the said service of the irregular pleading was not set aside.

[13] D2's solicitors emphasise that the Sessions Court Judge granted the liberty to file afresh solely due to the fact that the merits of the case have not been considered. The case of *Ramesh Muniandy v. The Deputy Minister of Home Affairs Malaysia & Ors* [2012] CLJU 134; [2012] 1 LNS 134; [2012] MLJU 164 is cited wherein Su Geok Yiam J struck out the application with no liberty to file afresh under O. 18 r. 19(1)(d) of the Rules of the High Court

1980 where the merits of the application have not been heard, on the grounds that there has been an abuse of process. D2's solicitors further rely on the case of *Tan Chew Ho v. The Deputy Minister Of Home Affairs Malaysia & Ors* [2011] CLJU 1685; [2011] 1 LNS 1685; [2012] 8 MLJ 772 to contend that the determination of whether to grant liberty to file afresh should not hinge solely on whether a case has been heard on its merits. Rather, the court should consider the conduct and demeanour exhibited by the involved parties in handling the case.

[14] D2's solicitors refer to the case of *Sama Assavakul v. Chop Kah Hoe & Anor* [2023] CLJU 1311; [2023] 1 LNS 1311; [2023] MLJU 1455, and argue the fact that there has been a breach of a peremptory order by the plaintiff wherein the same has been intentionally disregarded in anticipation of filing afresh. It is argued that the High Court's direction for the properly dated statement of claim be served on D2 amounts to a peremptory order, a default of which should bar the plaintiff from the opportunity to file afresh.

[15] The Federal Court's cases of *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233; [2001] 3 MLJ 481 and *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 MLJ 461 were cited by D2 to argue the effect of non-compliance of a peremptory order. In *Lim Oh & Ors v. Allen & Gledhill* (*supra*), the Federal Court relied on the English case of *Janov v. Morris* [1981] 3 All ER 780 and held that, it was not a mere failure to comply with the rules of court as there was a specific court order directing the filing of the amended writ of summons. The Federal Court held that the appellants ought to have appealed against the decision striking out their first suit for disobedience of the peremptory order; wherein the filing of the second suit, containing the same issues and reliefs as the first suit amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court. The Federal Court in *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* (*supra*) held as follows:

> [17] We shall now deal with the second issue. It should be noted that even in the case of *Birkett v. James* it was conceded that a second suit filed after the first suit was dismissed for breach of a peremptory order would be an abuse of the court's process and liable to be dismissed.
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> This point was discussed fully by the English Court of Appeal in *Janov v. Morris* [1981] 3 All ER 780, where the relevant principles to consider were set out in the head-notes as follows:
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> > Where an action had been struck out on the ground of the plaintiff's disobedience of a peremptory order of the court and the plaintiff commenced a second action within the limitation period raising the same cause of action, the court had a discretion under RSC O. 18 r. 19(1)(d) to strike out the second action on the ground that it was an abuse of the court's process. In exercising that discretion the court would have

> regard to the principle that court orders were made to be complied with. Accordingly, because there had been no explanation by the plaintiff for his failure to comply with the peremptory order made in the first action and there was no indication that he was likely to comply with orders made in the second action, the commencement of the second action was an abuse of the process of the court and the court would exercise its discretion under O. 18 r. 19(1)(d) to strike it out.
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> ...
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> A critical factor for consideration is whether any explanation was offered for non-compliance with the peremptory order in the first suit. On this point Dunn LJ observed in the above cited case at p. 785b as follows: In my view, the court should be cautious in allowing the second action to continue and should have due regard to the necessity of maintaining the principle that orders are made to be complied with and not to be ignored.

[16] It is argued by D2's solicitors that should there be non-compliance with the court's peremptory order, the Sessions Court is mandated to strike out the case without liberty to file afresh. Conversely, the appropriate recourse for the plaintiff is to challenge the setting aside of the default judgment through an appeal. Granting liberty to file afresh would essentially disregard the High Court's order dated 20 March 2023, enabling the plaintiff to circumvent the appeal process, constituting an abuse of the court's procedures. D2 further argues that the plaintiff's non-compliance is aggravated by the act of tampering with court document *ie*, by unilaterally inserting a date to the undated statement of claim.

[17] Learned counsel for the plaintiff, Fadil Azuwan bin Zainon, contends that the case is not at an advanced stage, and its merits remain undetermined. The plaintiff posits that the High Court's decision to set aside the default judgment and the Sessions Court's decision to strike out the plaintiff's suit were grounded in irregularities pertaining to the service of the writ and statement of claim. It is further argued that the substantive dispute between the parties has not been heard or decided by the Sessions Court due to the absence of any interlocutory application. Given that the suit was dismissed at the initial stage, D2 did not file any defence. To substantiate this point, the plaintiff's solicitors referred to the case of *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* [2002] 3 CLJ 370, and argued that the court in that case granted liberty to file afresh to the plaintiffs on the grounds that the suit had not reached an advanced stage in litigation.

[18] Secondly, the solicitors of the plaintiff argue that the cause of action against D2 is still subsisting and that the limitation period prescribed under s. 6(1)(a) of the Limitation Act 1953 has not set in. The claim against D2 is based on a guarantee agreement dated 28 September 2018 wherein breach occurred upon demand in April 2021. It is therefore argued that if liberty to

refile is not granted, D2 would be unfairly discharged of his liability as a guarantor wherein it would amount to grave injustice to the plaintiff. The case of *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24 is relied by the plaintiff, wherein the Federal Court held that:

> [23] It is our considered view that in the present case the appellant, being a person who has given a guarantee and more importantly an indemnity, is primarily liable for losses which the principal borrower could not have been made liable. His liability is not dependent or secondary to the liability of the principal borrower. He is a principal debtor himself. The liability under a contract of indemnity does not depend on whether the principal debt is enforceable. It has no reference in law to the obligation of any third person. In essence, the liability of the person who has given an indemnity can be more extensive than that of the liability of the principal borrower ...

[19] The plaintiff's solicitors ultimately argue that the discretion of the courts to discontinue or dismiss an action, with or without liberty to file afresh, will depend on the facts and circumstances of each and every case.

Analysis Of The Law

[20] The issue for my determination was whether the learned Sessions Court Judge had exercised his discretion correctly in granting the plaintiff liberty to file afresh upon striking out of the plaintiff's claim in the circumstances set out above.

[21] Concerning the appropriate approach for this court in determining whether to allow or dismiss an appeal against the lower court's exercise of discretion, we simply need to look to the Supreme Court case of *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 2 MLJ 150 where Abdoolcader J (as he then was) delivering the judgment of the court said at pp. 103 to 104 (CLJ); p. 151 (MLJ):

> (b) Review of discretion by an appellate court
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> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate Court can review questions of discretion if it is clearly satisfied that the Judge was wrong but there is a presumption that the Judge has rightly exercised his discretion and the appellate court must not reverse the Judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co. v. Johnston* [1942] AC 130, 148 at p. 148 per Lord Wright). The Privy Council held in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v. Bartlam* [1937] AIR AC 473.

A The House of Lords, approving the decision of the English Court of Appeal in *Ward v. James* [1966] 1 QB 273 held to the same effect in *Birkett v. James* [1978] AC 297, 317, 326. For good measure, we would refer to the felicitous expression of Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22, 25 on this point (at p. 25):

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> ... the duties of an appellate court in such matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has
C applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

D **[22]** The question therefore is whether the learned Sessions Court Judge had exercised his discretion on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice when he decided to grant the plaintiff the liberty to file the action afresh.

[23] Having careful consideration, I am not persuaded that the learned
E Sessions Court Judge had fallen into error. On the contrary, I am of the view that on the evidence before him, the learned Sessions Court Judge was entirely justified in reaching the conclusion that the plaintiff should be given liberty to file afresh.

[24] The rational and criteria governing the grant or refusal of a suit's
F dismissal with liberty to file afresh can be discerned from the principle established in the case of *Fox v. Star Newspapers & Co* [1898] 1 QB 636 at p. 639. This principle, which found endorsement in the case of *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* (*supra*), states that:

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> ... after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer be *dominus litis*, and it is for the Judge to say whether the action shall be discontinued or not upon what terms.

[25] The High Court in *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991]
H 3 CLJ 1783; [1991] 2 CLJ Rep 684 expounds on the circumstances under which discontinuation may or may not be permissible, providing valuable insights into the similar legal considerations pertaining to an order of dismissal in the current case. Lim Beng Choon J in the said case held as follows:

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The principles that can be extracted from the aforementioned cases are that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant.

Injustice would be caused to the defendant if:

(1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v. Brown & Root Ltd*;

(2) the discontinuance was not made *bona fide* by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominus litis* as the defendant has a perfectly good defence – see *Overseas Union Finance Ltd. v. Lim Joo Chong* [1971] 1 LNS 101 case;

(3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation – see *Coveil Matthews & Partners v. French Wools Ltd*. case.

[26] In the case of *Sama Assavakul v. Choo Kah Hoe & Anor* (*supra*) which was relied by D2, the facts are different in that there were two suits. The first suit was automatically struck out due to non-compliance of a security for costs order within the prescribed period of time. The court struck out the second suit in light of the fact that the same was filed to circumvent the first suit. The plaintiff was no longer *dominus litis* in the first suit rendering the filing of the second suit as a clear abuse of process.

[27] The case of *Ramesh Muniandy v. The Deputy Minister Of Home Affairs Malaysia & Ors* (*supra*) relied by D2 is distinguished in that the same pertains to a withdrawal applied by the plaintiff wherein there were ten affidavits filed on behalf of the respondents to oppose the writ of *habeas corpus*. In such circumstances, the plaintiff ceased to be *dominus litis* in the suit wherein to allow him to refile afresh would be prejudicial to the respondents. Similarly, the case of *Tan Chew Ho v. The Deputy Minister of Home Affairs & Ors* (*supra*) pertains to another *habeas corpus* application wherein 11 affidavits were filed before the plaintiff decides to withdraw. In such case, there is a clear abuse of process wherein the court is justified in exercising its discretion in not granting liberty to file afresh upon the matter being withdrawn.

[28] In our case, the plaintiff has not ceased to be the dominant party (*dominus litis*) in the action based on the guarantee given by D2. D2 has not obtained any advantage or being denied of any good defence in the suit as he remains a guarantor to the facilities granted to D1. The suit has been challenged on technical point (not on merits) at the initial stage wherein the challenge was merely on the issue of non-insertion of a date within the body of the statement of claim, whilst the writ being properly signed, dated and sealed.

[29] On the issue of a peremptory order being allegedly disobeyed, D2 relied on the case of *Lim Oh & Ors v. Allen & Gledhill* (*supra*). In that case, the plaintiff failed to file the amended defence wherein there is a specific provision or inbuilt sanction in the rules that amendment would have no effect if it is not filed within 14 days of obtaining the order *ie*, a peremptory or unless order. D2 further relies on the case of *Syed Omar bin Syed Mohamed v. Perbadanan Nasional Bhd* (*supra*) wherein the court found that there was an intentional and contumelious default on the plaintiff's part in not complying with the discovery order which was held to be a peremptory order.

[30] In order to analyse the alleged breach of the express direction of the court, I reproduce the content of the said High Court order dated 20 March 2023 herein:

Penghakiman (Kandungan 1)

Rayuan Ini telah ditetapkan untuk pendengaran pada hari ini dalam kehadiran Lum Kok Kiong (Gregory Sebastian, Pelatih Dalam Kamar bersamanya), peguam bagi pihak Perayu dan Fadil Azuwan bin Zainon (Anis Ameera bt Mohd Azham, Pelatih Dalam Kamar bersamanya) peguam bagi pihak Responden Dan Setelah Membaca Rekod-Rekod Rayuan dan hujahan bertulis yang kesemuanya difailkan di sini Dan Setelah Mendengar hujahan pihak-pihak Maka Adalah Diperintahkan bahawa:

1. Rayuan Perayu adalah dibenarkan;

2. Perintah bertarikh 16.12.2022 oleh Mahkamah Sesyen adalah diketepikan;

3. Penghakiman Ingkar Kehadiran bertarikh 30.6.2021 terhadap Perayu/Defendan Kedua adalah diketepikan;

4. Responden/Plaintif hendaklah menyampaikan semula Writ dan Pernyataan Tuntutan yang lengkap (bertarikh dan termeterai) kepada Perayu/Defendan Kedua dalam tempoh 14 hari daripada tarikh penghakiman ini dimeterai;

5. Perayu/Defendan Kedua hendaklah memasukkan kehadiran dan memfailkan Pembelaan mengikut garis masa yang ditetapkan oleh Kaedah-Kaedah Mahkamah 2012;

6. Tindakan ini adalah dikembalikan semula ke Mahkamah Sesyen; dan

7. Tiada perintah terhadap kos.

Bertarikh pada 20 Mac, 2023 ...

[31] To my mind, para. 4 of the said order is not a peremptory *per se*. This is because, it does not provide for an ordered consequence in the event of a failure to do an act. There is also nothing in the rules to construe any inbuilt

sanction to qualify the same to be peremptory as opposed to the facts in the case of *Lim Oh & Ors v. Allen & Gledhill* (*supra*). It was merely an order to re-serve the properly dated, signed and sealed writ and statement of claim within a specific timeline in light of the setting aside of the default judgment.

[32] One point that was not raised by either party is the legal effect of para. 4 of the said order in light of the status of the writ of summons. It is to be noted that upon the High Court pronouncing the order of setting aside of the default judgment and directing the properly dated cause papers to be served within 14 days, the writ of summons dated 30 April 2021 has already expired. This occurred on 29 October 2021 *ie*, six months after its issuance on 30 April 2021. This would render para. 4 capable of being set aside *ex debito justitiae*. Such direction is automatically void and can be treated as such, without more ado. It stands as nullified *ex vigore legis*, *ie*, by operation of law and be ignored *simpliciter*. The clarity of the principle is conveyed by a statement of Lord Denning in *MacFoy v. United Africa Co, Ltd* (1961) All ER 1169 at 1172, PC that:

> If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is bad and incurably bad.

[33] On the other hand, based on D2's solicitors line of argument, the High Court dated 20 March 2023 implied for the plaintiff to renew the writ, amend the statement of claim and have it served within the time limit of 14 days *ie*, on or before 3 April 2023. As the plaintiff did not do so, and served D2 the expired writ together with the statement of claim which was unilaterally dated, it was arguably justified for D2 to have it struck out without liberty to file afresh. To my mind, no one can be expected to do the impossible. At the stage, the direction was pronounced by my predecessor in office, it was in law impossible for the plaintiffs counsel to comply. The subsequent extension obtained by the plaintiff on 2 June 2023 due to D2's delay in preparing the order, which resulted in the High Court's variation of the timeline to serve the writ of summons and statement of claim 14 days after the said order was sealed, did not cure the nullity of para. 4 of the order.

[34] I took the liberty in examining the minutes and cause papers filed in Appeal No. WA-12AM-11-12/2022; wherein it is clear that the issue of the writ of summons being expired was not brought to the attention of the presiding judge. I believe that even if this concern had been raised with the presiding judge, it would still be legally impossible to renew the validity of the writ of summons. This is so as O. 6 r. 7(2) of the Rules mandates that the writ of summons can only be extended twice, and each extension must

not exceed six months. *Ergo*, the maximum duration the validity of the writ of summons could have been extended to is only up to 29 October 2022. Further, as per the case of *Battersby and Others v. Anglo-American Oil Company Ltd And Others* [1944] 2 All ER 387, referenced by the Federal Court in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329, Lord Goddard (at p. 389 F) held as follows:

> If the writ had ceased to be in force, the position is the same as if it had never been issued.

[35] Given the mandatory prerequisites outlined in O. 6 r. 7(2A) of the Rules, I do not think it is possible for the expired writ to be renewed. In view thereof, I do not think it is fair for D2 to place the blame on the plaintiff for the procedural consequences related to the impossibility to comply with this portion of the order.

[36] Nevertheless, if I am wrong on the fact that para. 4 of the said order not being peremptory and not being null and void, cases have shown that despite the existence of a peremptory order, the court still have the duty to look into all the circumstances of the case, including whether the default was intentional and contumelious, before proceeding to penalise the party in default. This can be seen in the case of *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88, wherein the Court of Appeal held as follows:

> [1] Although a party's action or counterclaim may be struck out for non-compliance with a peremptory order of the court, such an order (striking out) will not be made unless there has been a history of failures to comply with other orders of court. A peremptory order (unless order) is an order of the last resort. Such an order will not meet the "ends of justice" if it results in a miscarriage of justice. The judge must look into all the circumstances of the case, including whether the default was intentional and contumelious, before proceeding to penalise the party in default, (p 94 c-d);

[37] In the High Court's case of *Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors (No 2)* [2001] 5 CLJ 476, Abdul Malik Ishak J (as he then was) had quoted excerpts from the judgment of Ward LJ in *Hytec Information Systems Ltd v. Coventry City Council* [1997] 1 WLR 1666 (at p. 1674) and Sir Nicholas Browne-Wilkinson VC in *In Re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196 (at p. 1203) where Sir Nicholas Browne-Wilkinson mentioned as follows:

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an 'unless' order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded.

> But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed." Thus, in this case I must examine the reason given by the plaintiff for breaching the unless order.

[38] Examining the circumstances, the learned Sessions Court Judge's decision to strike out the plaintiff's suit is justified due to the expiration of the writ of summons. However, it is evident that the plaintiff's oversight in this matter does not amount to a serious neglect or omission. This distinction is crucial because, despite the procedural misstep that led to the suit's striking out, it is reasonable to argue that the plaintiff should not be barred from filing afresh.

[39] I now address the issue of the alleged illegality in the plaintiff's conduct which is argued by D2 to be another factor in denying the plaintiff's right to refile afresh. Considerable criticism has been directed towards the allegation of tampering with court documents, a claim vehemently asserted by D2 as being illegal. Generally, the intentional insertion of an incorrect date or falsification of any information within a legal document is deemed tampering with court documents, constituting a criminal offense. However, a distinction arises when the date is inadvertently left blank and subsequently filled in with accurate information. Although procedurally incorrect, such an action typically does not amount to a criminal offence.

[40] Furthermore, drawing insights from the precedent set in the case of *Owners Of The Ship Or Vessel "SASACOM I" v. Bank Pembangunan Malaysia Bhd* [2015] 1 CLJ 392; [2015] 4 MLJ 841, the status of the undated statement of claim is legally characterised as that of a draft. The document only acquires full legal existence and significance when both signed and dated. In light of this perspective, the plaintiff's unilateral act of inserting the correct date in the undated statement of claim is not inherently unlawful. Instead, it can be construed as an effort to enhance the statement of claim in its draft form. Importantly, this action does not carry the same level of culpability as altering or adding to the content of an existing and valid court document. The distinction underscores the nuanced nature of the alleged tampering, considering both the procedural irregularity and the intent behind the plaintiff's corrective action.

[41] I therefore agree with assertion made by the solicitors of the plaintiff in that the courts' discretion to discontinue or dismiss legal proceedings, with or without the liberty to initiate fresh proceedings, is contingent upon the unique facts and circumstances inherent in each case. This implies that the determination of whether to allow the discontinuation or dismissal of an

action and under what conditions is inherently subjective, with the courts carefully considering the specific details and nuances of the case at hand. The argument underscores the importance of a case-by-case assessment, emphasising that the exercise of judicial discretion in such matters is not governed by rigid rules but rather shaped by the individual context and intricacies of each legal scenario.

Decision

[42] Upon considering the facts of the case and the circumstances surrounding the plaintiff's non-compliance with the High Court's directive regarding the service of writ of summons and statement of claim, I find that there is no merit in D2's appeal herein.

[43] The learned Session Court Judge's decision to exercise his discretion to grant liberty to file afresh is well founded and should not be disturbed. D2's appeal in encl. 1 is therefore dismissed with no order as to costs. The learned Sessions Court Judge's decision dated 12 July 2023 is therefore affirmed.