

**IN THE HIGH COURT OF MALAYA IN SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
[CIVIL SUIT NO: BA-22NCC-86-07/2022]**

BETWEEN

U-LI AUTO PARTS & SERVICE SDN BHD **... PLAINTIFF**
[COMPANY NO: 199501021654 (350857-M)]

AND

BUMI GT SDN BHD
[COMPANY NO: 200201029940 (597603-P)] **... DEFENDANT**

GROUND OF JUDGMENT

(O.24 r.16 striking out and O.92 r.4 stay)

Introduction

[1] There are two (2) applications of the Defendant which were dismissed by this Court on 3.3.2023, namely:

- (a) Enclosure 29: the Defendant's application under O.24 r.16 and/or under O.92 r.4 for order to compel the Plaintiff to comply with item s. (1) to (3) of a consent order of discovery, or failing which, to strike out the Plaintiff's action; and
- (b) Enclosure 26: the Defendant's application under O.92 r.4 for stay of the Plaintiff's proceedings, including the Plaintiff's application for summary judgment in Enclosure 9, pending the disposal of the applications in Enclosures 26 and 29.

[2] Dissatisfied with the said dismissals, the Defendant has filed two (2) notices of appeal against the dismissal of both applications.

Nature and background of Plaintiff's action

[3] The Plaintiff sues the Defendant for RM4,347,994.44 for alleged unpaid values of motor vehicle parts said to be supplied by the Plaintiff to the Defendant over a period of time: see Amended Statement of Claim in Enclosure 4.

[4] In its Defence, the Defendant denied the Plaintiff's claims and alleged *inter alia* that the Plaintiff did not provide the documents for proving or verifying the claims despite requests by the Defendant: see the Defence in Enclosure 6.

[5] By Enclosure 7 the Defendant made an application for discovery of documents under O.24 rr. 3, 5 and 7. The documents sought to be discovered were as follows:

"1. Plaintiff dalam empat belas (14) hari dari tarikh perintah ini harus memfailkan Senarai Dokumen-dokumen menurut Aturan 24 kaedah 5(1) Kaedah-kaedah Mahkamah 2012 ["Senarai Dokumen- dokumen"] berkenaan senarai dokumen-dokumen yang dipohon dan dinyatakan di dalam Jadual A ["Dokumen-dokumen Jadual A"] yang dilampirkan di sini, dan menyebabkan untuk memfailkan dan menyampaikan sesalinan Affidavit Mengesahkan Senarai Dokumen- dokumen menurut Aturan 24 kaedah 5(3) Kaedahkaedah Mahkamah 2012 ["Affidavit"] dan menyampaikan Affidavit tersebut ke atas Defendan, berkenaan perkara-perkara yang dibangkitkan di dalam Pembelaan bertarikh 29-8-2022 ["Pembelaan"] dan surat jawapan peguamcara Defendan kepada peguamcara Plaintiff bertarikh 1-7-2022 ["Surat Jawapan Defendan"];

2. *Selanjutnya dan tambahan kepada pohonan (1) di atas, Plaintiff dengan rujukan kepada Senarai Dokumen-dokumen, menyatakan di dalam Afidavit tersebut jika Plaintiff mempunyai atau pada mana- mana masa telah mempunyai di dalam milikan, jagaan dan kuasa Dokumen-dokumen Jadual A permohonan tersebut yang difailkan di sini dan/atau Afidavit tersebut;*

3. *Menurut pohonan (2), di dalam keadaan Plaintiff tidak mempunyai di dalam milikan, jagaan atau kuasa Dokumen-dokumen Jadual A dan/atau Afidavit, Plaintiff harus menyatakan bila mereka berpisah dengan dokumen-dokumen tersebut dan mengkhususkan individu atau pihak yang kini mempunyai milikan dokumen-dokumen di dalam pohonan (2);*

4. *Dalam tujuh (7) hari pemfailan Afidavit tersebut melampirkan Senarai Dokumendokumen, Plaintiff harus menghantar salinan- salinan Dokumen-dokumen Jadual A dan/atau Afidavit kepada peguamcara Defendan untuk pemeriksaan Defendan dan akibat dari itu, Defendan dan/atau peguamcara mereka mempunyai kebebasan untuk meneliti dan membuat salinan-salinan dokumen- dokumen tersebut;*

5. *Defendan mempunyai kebebasan untuk memohon senarai dokumen-dokumen lanjut dan khusus di mana ia kelihatan:-*

(1) *daripada kandungan-kandungan Dokumen-dokumen Jadual A dan/atau penegasan-penegasan dan/atau ekshibit-ekshibit di dalam Afidavit itu sendiri;*

(2) *daripada dokumen-dokumen yang dirujuk kepada di dalam Dokumendokumen Jadual A dan/atau Afidavit; dan*

(3) *daripada pengakuan-pengakuan yang dibuat sama ada di dalam pliding oleh pihak yang membuat penzahiran atau sebaliknya; bahawa pihak Plaintiff yang membuat penzahiran mempunyai atau telah mempunyai dokumen-dokumen lain yang relevan di dalam milikan, jagaan atau kuasa mereka;”*

- [6] Vide Enclosure 9, the Plaintiff made an application for summary judgment. In the application for summary judgment, the Plaintiff has exhibited numerous documents including delivery orders, invoices, statements of accounts and reminder letters totalling about 2,400 pages [see exhibits in Enclosures 11 and 12].
- [7] Without this Court’s hearing of any submission on the discovery application, the Plaintiff consented to the Defendant’s application for discovery and on 17.10 2022 the parties entered in a consent order (Enclosure 20) for discovery in the following terms:
- (1) *“Plaintif dalam dua belas (12) hari bekerja (tidak termasuk Sabtu, Ahad dan cuti umum) dari tarikh perintah ini harus memfailkan Senarai Dokumen-dokumen menurut Aturan 24 kaedah 5(1) Kaedah-kaedah Mahkamah 2012 [“Senarai Dokumen-dokumen”] berkenaan senarai dokumen-dokumen yang dipohon dan dinyatakan di dalam Jadual A [“Dokumen- dokumen Jadual A”] yang dilampirkan di sini, dan menyebabkan untuk memfailkan dan menyampaikan sesalinan Afidavit Mengesahkan Senarai Dokumendokumen menurut Aturan 24 kaedah 5(3) Kaedah-kaedah Mahkamah 2012 [“Afidavit”] dan menyampaikan Afidavit tersebut ke atas Defendan, berkenaan perkara-perkara yang dibangkitkan di dalam Pembelaan bertarikh 29-8-2022 [“Pembelaan”] dan surat jawapan peguamcara Defendan kepada peguamcara Plaintiff bertarikh 1-7-2022 [“Surat Jawapan Defendan”]:*

JADUAL A

No.	Dokumen-dokumen
1.	<i>Semua sebut harga ('quotation') yang dikeluarkan oleh Plaintiff kepada Defendan</i>
2.	<i>Semua dokumen-dokumen berkenaan Pesanan(-pesanan) Pembelian ('Purchase Order') Defendan kepada Plaintiff yang berada di dalam milikan Plaintiff</i>
3.	<i>Semua dokumen-dokumen berkenaan Pesanan(-pesanan) Penghantaran ('Delivery Order') Plaintiff kepada Defendan</i>
4.	<i>Semua dokumen-dokumen berkenaan Invois(-invois) Plaintiff kepada Defendan, berkenaan dan antara lainnya, dari tarikh 5-1-2018 sehingga 31-1-2022 kepada Defendan</i>
5.	<i>Semua dokumen-dokumen berkenaan Penyata(-penyata) Akaun Plaintiff untuk menunjukkan transaksi urusan antara Plaintiff dan Defendan.</i>
6.	<i>Semua surat-menyurat di antara Plaintiff dan Defendan yang menyebabkan timbulnya pertikaian ini dan yang menjurus kepada tindakan Plaintiff di sini.</i>
7.	<i>Kesemua dokumen yang dibawah milikan, jagaan atau kuasa Plaintiff di mana Plaintiff berniat untuk menggunakan semasa bicara penuh di Mahkamah. (2) Selanjutnya dan tambahan kepada pohonan (1) di atas, Plaintiff dengan rujukan kepada Senarai Dokumen-dokumen.</i>

(2) Selanjutnya dan tambahan kepada pohonan (1) di atas, Plaintiff dengan rujukan kepada Senarai Dokumen-dokumen, menyatakan di dalam Afidavit tersebut jika Plaintiff mempunyai atau pada mana-mana masa telah mempunyai di dalam milikan, jagaan dan kuasa Dokumen-dokumen Jadual A permohonan tersebut yang difailkan di

sini dan/atau Afidavit tersebut;

- (3) *Menurut pohonan (2), di dalam keadaan Plaintiff tidak mempunyai di dalam milikan, jagaan atau kuasa Dokumen-dokumen Jadual A dan/atau Afidavit, Plaintiff harus menyatakan bila mereka berpisah dengan dokumen-dokumen tersebut dan mengkhususkan individu atau pihak yang kini mempunyai milikan dokumen-dokumen di dalam pohonan (2);*
- (4) *Dalam tujuh (7) hari pemfailan Afidavit tersebut melampirkan Senarai Dokumendokumen, Plaintiff harus menghantar salinan- salinan Dokumen-dokumen Jadual A dan/atau Afidavit kepada peguamcara Defendan untuk pemeriksaan Defendan dan akibat dari itu, Defendan dan/atau peguamcara mereka mempunyai kebebasan untuk meneliti dan membuat salinan- salinan dokumen-dokumen tersebut;*
- (5) *Defendan mempunyai kebebasan untuk memohon senarai dokumen-dokumen lanjut dan khusus di mana ia kelihatan:-*
 - (a) *daripada kandungan-kandungan Dokumen-dokumen Jadual A dan/atau penegasan-penegasan dan/atau ekshibit-ekshibit di dalam Afidavit itu sendiri;*
 - (b) *daripada dokumen-dokumen yang dirujuk kepada di dalam Dokumendokumen Jadual A dan/atau Afidavit;*
 - (c) *daripada pengakuan-pengakuan yang dibuat sama ada di dalam pliding oleh pihak yang membuat penzahiran atau sebaliknya bahawa pihak Plaintiff yang membuat penzahiran mempunyai atau telah mempunyai dokumen- dokumen lain yang relevan di dalam milikan, jagaan atau kuasa mereka;”*

- [8] On 3.11.2022 the Plaintiff filed and served the List of Documents (Enclosure 21) and Affidavit Verifying List of Documents (Enclosure 22). The List of Documents in Enclosure 21 listed 2370 items of documents including delivery orders, invoices, statements of account and reminder letters totalling 2,417 pages. In effect, the List of Documents reproduced and repeated the documents enclosed as exhibits to the supporting affidavit for the Enclosure 9 application for summary judgment.
- [9] Within 2 weeks thereafter, the Defendant on 17.11.2022 filed the applications in Enclosures 26 and 29, which now form the subject matters of two separate appeals.

Legal principles on stay of proceedings

- [10] *In Alliance Bank Malaysia Berhad v. Sureendhran Subramaniam & Anor* [2021] 5 CLJ 362 this Court analysed the court rules and decided authorities and summarised the law on stay of court proceedings as follows:

“[20] Based on the Rules of Court 2012 and the decided authorities of the appellate courts, the legal principles which can be gleaned therefrom in respect of stay applications can be summarised as follows:

- (i) There is a difference between a stay of execution of judgment or order pending appeal and a stay of court proceedings.*
- (ii) For stay of execution of judgment or order pending appeal, the legal principles applicable are laid down by the Federal Court in Kosma Palm Oil Mill (supra), the locus classicus on the subject.*
- (iii) The High Court has powers to order a stay of court proceedings in the following situations:*

- (a) *res judicata or multiplicity of proceedings: para. 11 of the Schedule to the Courts of Judicature Act 1964;*
 - (b) *inherent powers to prevent injustice or to prevent an abuse of the process of the court: O. 92 r. 4 of the Rules of Court 2012; Chip Chong Sawmill case (supra); and*
 - (c) *temporary stay pursuant to case management powers of the High Court to give directions for smooth, expeditious and economical disposal of court proceedings: O. 34 r. 1(1)(b) and O. 4 r. 1 of Rules of Court 2012.*
- (iv) *The general powers of stay of proceedings under O. 34 r. 1(1)(b) or O. 4 r. 1 of the Rules of Court 2012 are to be exercised in accordance with the guidance of the Court of Appeal’s decision in Ling Peek Hoe case (supra) who approved and accepted the English Court of Appeal’s decision in AB (Sudan) v. Secretary of State for the Home Department [2013] EWCA Civ 921, the English court in R (on the application of AO & AM) v. Secretary of State for the Home Department [2017] UKUT 168 (1AC) and the cases of Edelsten v. Ward (No 2) (1988) 63 ALJR 346 and PP v. Dato’ Sri Mohd Najib Hj Abd Razak [2019] 6 CLJ 561; [2019] 4 MLJ 421.”*

[11] In *Ling Peek Hoe & Anor v. Golden Star & Ors* [2020] 9 CLJ 601; [2020] MLJU 1233 Hanipah binti Farikullah JCA delivering the judgment the Court of Appeal explained the difference between stay of execution pending appeal and stay of proceedings in the following words:

[45] The issue of staying proceedings was the subject of detailed consideration by the Court of Appeal in AB (Sudan) v. Secretary

of State for the Home Department [2013] EWCA Civ 921. The court firstly contrasted a stay of proceedings with a stay of enforcement of a judicial decision or order. It emphasised that stay of proceedings issue involves case management decisions. It added at para [25]:

27. A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown.

28. In cases where a request for a stay on proceedings is coupled, expressly or by necessary implication, with a request for interim relief, the court will need to take into account the factors relevant to both types of decision, and may need to take into account a third: that by securing interim relief and a stay, the applicant may be asking the court to use its powers to give

him, for as long as he can secure it, a benefit that he may not obtain at the trial.

[12] The English Court in *R (on the application of AO & AM) v. Secretary of State for the Home Department* [2017] UKUT 168 (1AC) referred to *AB (Sudan)* (*supra*) and stated as follows:

(i) Every claimant is entitled to expect expeditious judicial adjudication. The strength of this expectation will be calibrated according to the individual litigation equation.

(ii) The judicially imposed delay flowing from a stay order requires good reason.

(iii) Judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former.

(iv) Great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case.

[13] The case of *AB (Sudan) and R (On The Application Of AO & A M)* were cited with approval recently by the Federal Court in *PP v. Dato' Sri Mohd Najib Hj Abd Razak* [2019] 6 CLJ 561; [2019] 4 MLJ 421.

Analysis of this Court on the stay application

[14] In the circumstances of the present case, this Court finds that notwithstanding some slight delay in serving the List of Documents and the Affidavit Verifying List of Documents, the Plaintiff has in substance complied with the consensual discovery order. The slight delay serving the Affidavit Verifying List of Documents is justified in the present case as there were unexpectedly numerous items of documents (i.e. more than

2,400 items) to be disclosed in the Affidavit Verifying List of Documents.

[15] There is no abuse of process on the part of the Plaintiff in filing and serving the List of Documents and the Affidavit verifying List on 3 November 2022. There is no injustice to the Defendant which can be occasioned by the slight delay in the filing and service of the List of Documents and the Affidavit verifying List on 3 November 2022.

[16] O.3 r.5 of the Rules of Court 2012 provides as follows:

“Extension of time (O. 3, r. 5)

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.”

[17] This Court has no hesitation in holding that the present case is a fit and proper case for granting an extension of time for the Plaintiff to file and serve the List of Documents and the Affidavit Verifying the List.

[18] In the entire circumstances of the present case, this Court does not find any valid or sufficient ground for granting a stay of the Plaintiff’s proceedings in the action herein.

Application under O.24 r.16

[19] O.24 r.16 provides as follows:

“Failure to comply with requirement for discovery (O. 24, r. 16)

16. (1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rule 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.”

[20] Dismissal or striking out an action summarily for non-compliance with a court order is a drastic power which should not be used without much caution and circumspection.

[21] In the context of summary striking out or dismissal of action under O.33 for non-compliance with the Court’s case management order or direction, the appellate courts have laid down stringent requirements of (a) repetitious or contumelious defiance of court’s order or direction; and (b) issuance of an “unless order” or peremptory order in advance before any striking out or dismissal for non-compliance can be considered: see the Court of Appeal’s decision in *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88 at p. 94.

[22] These same stringent requirements should also be applied to an order under O.24 r.16 to strike out or dismiss an action for non-compliance with a discovery order.

[23] Furthermore, this Court should also consider the fact that the

consensual discovery order in the present case was entered into between the parties and it was not a discovery order in a contested application in which this Court has heard submissions and adjudicated upon it.

[24] In considering such an application under O.24 r.16, this Court should also consider whether the non-compliance is minor or major, whether the non-compliance is contumelious or not, and whether the non-compliance would cause injustice to the other party.

[25] In *Dr. Sim Kui Hian v. Chong Chieng Jen & Other Appeals* [2021] 6 CLJ 305 the Court of Appeal allowed an appeal against summarily striking out of the plaintiff's action where there was a delay of 1 month in complying with the direction on filing of bundles of documents. The Court of Appeal, in a judgment by Ravinthran Paramaguru JCA held as follows:

“[34] We also note that there was no prior warning that the court would dismiss the claim of the plaintiff if the bundle of documents were not filed within the stipulated time. There was no unless or peremptory order issued by the court prior to the date of the dismissal of the action. We are mindful that the requirement for a prior peremptory order or unless order is not stated in O. 34 r. 2(3). Be that as it may, we are of the view that unless the nature of the non-compliance is sufficiently serious to defeat the purpose of the case management directions, the drastic action of dismissing the action without warning should not be resorted to. The purpose of pre-trial case management directions is to “secure the just, expeditious and economic disposal of the action or proceedings” (see O. 34 r. 2(2) of the Rules of Court 2012). In the instant case, by all accounts including that of counsel for the defendant as we noted earlier, the trial schedule was not disrupted despite the delay in the filing of the bundle of documents by the plaintiff. Therefore, the

dismissal of the suit merely because the explanation for the delay was unbelievable cannot be reconciled with the main purpose of the case management regime provided in O. 34 of the Rules of Court 2012 that we adverted to earlier.

[35] For avoidance of doubt, we hasten to add that we are in no way condoning the delay in complying with the court’s case management directions on the part of Mr Shankar Ram. However, given the fact that the non-compliance in question cannot be construed as amounting to total disregard of directions that affected the conduct of the trial or derailed the trial that was still on track at that time, the avenue of penalising the plaintiff under O. 59 r. 8(b) of the Rules of Court 2012 at the end of the trial with a costs order to show the court’s disapproval would have been more appropriate. The said rule enacts that the court in exercising its discretion as to costs shall in appropriate circumstances consider, among others, “the conduct of all the parties, including conduct before and during the proceedings”. It would have been otherwise if the bundle of documents and bundle of pleadings were not filed at all or other directions were ignored despite the looming trial date.”

[26] In *Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor* [2010] 3 CLJ 550 the Court of Appeal allowed an appeal against a summary striking out of the plaintiff’s action for non-compliance with a peremptory order for filing of documents. The Court of Appeal, in a judgment delivered by Hasan Lah JCA (later FCJ) held as follows:

*“[19] On the facts of the present case we are unable to say that the conduct of the plaintiff in not complying the peremptory order of the court was intentional and contumelious. In this connection the Court of Appeal in *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88 at p. 94 said:*

Order 34 r. 7 provides for the discretionary power of the judge to make such order against the defaulting party “as meets the ends of justice” should any party fail to comply with any direction given by the judge at any pre-trial case management conference.

*Whilst it is true that a party’s action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Ltd v. Coventry City Council* [1997] 1 WLR 1666 at p. 1674 para H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party (see *In re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196 CA).”*

[27] In the circumstances of our present case this Court finds that the Plaintiff has in substance complied with the consent order of discovery and that any non-compliance in form or timing is minor. There has been no repetitious act of non-compliance and no contumelious conduct in the Plaintiff’s filing and serving of the List of Documents and the Affidavit Verifying the List.

[28] In the premises this Court has found that this is not a fit or proper case for issuing an order under O.24 r.16 of the ROC 2012 against the Plaintiff here.

Conclusion

[29] In conclusion, this Court on 3 March 2023 dismissed with costs the Defendant’s applications in Enclosures 26 and 29.

Dated: 2 MAY 2023

(TEE GEOK HOCK)
JUDGE
HIGH COURT OF MALAYA AT SHAH ALAM
(NCvC 10)

Counsel:

For the plaintiff - Ng Kean Yip; M/s Arifin & Partners
(Kuala Lumpur)

For the defendant - Farez Mohd Ali Jinnah, Nadhirah Amalina Abdul Rahman; M/s Farez Jinnah

(Kelana Jaya)