**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR**

**IN THE FEDERAL TERRITORY, MALAYSIA.**

**[CIVIL APPEAL NO: WA - 11ANCVC - 31 - 03/2022]**

**BETWEEN**

**MOHD AZLAN HAZILMAN ... APPELLANT**

**AND**

**1. JACKYSOH CHEW WEI**

**2. MAJIN BIN GUMBINA ... RESPONDENTS**

**(In the matter of Magistrate's Court Kuala Lumpur**

**In the Federal Territory, Malaysia.**

**Civil Suit No: WA - A73KJ - 1068 - 05/2021**

**BETWEEN**

**MOHD AZLAN HAZILMAN ... PLAINTIFF**

AND

**1. JACKYSOH CHEW WEI**

**2. MAJIN GUMBINA ... DEFENDANTS)**

## JUDGMENT

### Introduction

**[1]** The parties are referred to as they were at the trial court. This is an appeal by the plaintiff against the decision of the learned Magistrate in striking out his claim pursuant to Order 18 rule 19(1)*(b)* and/or *(d)* of the Rules of Court 2012. After hearing the parties, l allowed the plaintiff's appeal with RM1,000.00 cost.

### Brief background facts

**[2]** The plaintiff sued the defendants for negligence based on a motor vehicle accident. The accident occurred on 13,05.2015. The 1st defendant was the driver of the motor vehicle which had collided with the plaintiff's motorcycle whereas the 2nd defendant was the owner of the motor vehicle.

**[3]** On 22.05.2021 the plaintiff filed the claim against the defendants. On 24.11.2021, the defendants applied to strike out the claim under Order 18 rule 19(1)*(b)* and/or *(c)* and/or *(d)* of the Rules of Court 2012. In submissions, the learned counsel for the defendants contended that the plaintiff's claim was statute barred under section 6 of the Limitation Act 1953 as it was filed nine days after expiry of the cause of action. As such, the defendants were prejudiced and the claim was an abuse of process.

**[4]** On the hand, the learned counsel for the plaintiff submitted that the plaintiff had, on 23.10.2020, sent to the defendant's insurer the notice pursuant to section 96(2) of the Road Transport Act 1987. The defendant's insurer replied on 09.03.2021 that it was willing to make a direct settlement with the plaintiff provided the issue of dual representation of the plaintiff by another firm of solicitors could be resolved.

**[5]** Despite the plaintiff himself affirming a statutory declaration confirming Messrs. Kohi & Associates as the one appointed to represent him, the defendant's insurers insisted on having a letter from the other firm of solicitors withdrawing from "representing" the plaintiff. When that firm of solicitors eventually issued the letter, the defendant's insurers refused to continue with the settlement and said that the plaintiff was out of time.

**[6]** The plaintiff alleged *mala fide* on the part of the insurer. The plaintiff also alleged that he was prejudiced when the insurer drew him into the protracted communication about the settlement and then bailing out although the plaintiff had resolved the dual representation issue as requested.

## Analysis and findings

**[7]** An application under Order 18 rule 19(1) of the Rules of Court may be allowed if the claim is, on the face of it, obviously unsustainable. So long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. (See: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC; [1993] 3 MLJ 36).

**[8]** The affidavit in-support of the defendants' striking out application was affirmed by the defendants' solicitors. At paragraphs 6 and 8 of the affidavit in-support, it was averred that the plaintiffs cause of action had lapsed and the defendants applied to strike out the plaintiff's claim under paragraphs *(b), (c)* and *(d)* of Order 18 rule 19(1) of the Rules of Court 2012.

**[9]** In response, the plaintiff in his affidavit in-reply averred that the delay in filing of the plaintiff's claim should not be an issue since

the defendants' insurer had assured the plaintiff that his claim can be settled provided the issue of dual representation was resolved. It was also averred that the insurer had acted *mala fide* and caused prejudice to the plaintiff when it refused to settle the plaintiff's claim despite the plaintiff having resolved the dual representation issue.

**[10]** It is pertinent to observe that although the defendants purported to strike out the plaintiff's claim under paragraphs *(b)* and/or *(c)* and/or *(d)* of Order 18 rule 19(1) of the Rules of Court 2012, the affidavit in-support alluded to a circumstance envisaged under paragraph *(a)*, namely in respect of the plaintiff's cause of action albeit not exactly within the terms of paragraph *(a)*. There was not a single averment made as to whether the plaintiff's action was scandalous, frivolous or vexatious under paragraph *(b)*, or whether the plaintiff's action may prejudice, embarrass or delay the fair trial of the action under paragraph *(c)*, or whether the plaintiff's action was an abuse of the process of the Court under paragraph *(d)*. None whatsoever.

**[11]** An affidavit in-support serves as evidence to substantiate the application. Unless the affidavit in-support contained valid and sufficient grounds, the court should not exercise its discretion to grant the relief prayed for in the application. To do so would be tantamount to allowing an application under the Rules to be made without any grounds.

**[12]** If the challenge mounted by the defendants against the plaintiff's claim rested on limitation period, the striking out application should not relate to the cause of action. This is due to the fact that despite limitation being raised as a defence, it may not be an obvious case for a striking out application because limitation does not in any manner affect cause of action. In *Yeo Chu Hui v. Lim Cheng Jin & Anor* [1993] 3 CLJ 432; [1993] MLJU 21, His Lordship Haji Abdul Malek bin Haji Ahmad J. observed as follows:

> "In any case, in *Ronex Properties Ltd. v. John Laing Construction Ltd. and others* (*Clarke, Nicholls & Marcel (a firm), third parties*) [1982] 3 All ER 961, it had been held that since statutes of limitations merely barred a plaintiffs remedy and not his cause of action, and since a limitation defence when pleaded might be subject to exceptions, a defendant could never apply under O. 18 r. 19 of the Rules to strike out a claim against him as disclosing no reasonable cause of action merely because he might have a good limitation defence.".

**[13]** It is for the defendants to state the exact grounds in their affidavit in-support to support the striking out application. The averments must be precise and unequivocal for the application to be properly considered by the court. In my considered view, it is not for the courts to figure out under which paragraph of Order 18 rule 19(1) of the Rules of Court 2012 should the grounds fit into. If the defendants premised the application on certain grounds but failed to allude to those particular grounds in the affidavit, the defendant cannot be said to have established valid reasons in support of that application.

**[14]** In *RS Krishnan a/l RS Naidu v. Eric Soon Boo Teck (Rawang Hills Resort Sdn Bhd, Third Party)* [2004] 1 MLJ 252, the High Court had dealt with a similar situation. In finding that the application was without merit, His Lordship Mohd Hishamudin J. (later JCA) held as follows:

> (1) The defendant relied on O. 18 r. 19(1)*(b), (c)* and *(d)* of the RHC to strike out the plaintiffs statement of claim. Therefore, the legal burden was on the defendant to show that the statement of claim was scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or was an abuse of the process of the court. This burden should be discharged by affidavit evidence (see para 5).

(2) Upon examining the defendant's two affidavits i.e., ends 13 and 16 it was held that the defendant had failed to show that the statement of claim was within the three limbs relied on by him, i.e. O. 18 r. 19(1) *(b), (c)* and *(d)* (see para 6).

(3) It appeared that the only ground given by the defendant, in his affidavit was that the statement of claim did hot disclose any reasonable cause of action. As a matter of law, the defendant could not rely on this ground which is the first limb, i.e. O. 18 r. 19(1)*(a)* of the RHC since the defendant had stated in his summons in chambers that he was merely relying on limbs *(b), (c)* and *(d)* (see para 8).

(4) The affidavits in support should not contradict or be inconsistent with the grounds set out in the summons in chambers. Therefore, there was no merit in the defendant's . application (see paras 8-9).".

**[15]** I fully subscribe to the views expressed by the Honourable Judge in *RS Krishnan a/I RS Naidu (supra.)* and in the circumstances of the present appeal I do not find any basis to merit a different position. That remains the law.

**[16]** In a running down action, the defendant will be liable in damages if the plaintiff succeeds in his claim. Upon the finding of liability against the defendant, the defendant's insurer is under a legal obligation pursuant to section 96(1) of the Road Transport Act 1987 to pay the judgment sum to the plaintiff provided a notice under section 96(2) of the Act was given to the insurer. It is also an accepted practice in accident cases for a wouid-be plaintiff to write in to the insurers and attempt to secure an out of court settlement, if an amicable settlement is possible, there would be no necessity for the plaintiff to resort to legal action. That is the reality scenario.

**[17]** The plaintiff was represented by Messrs. Kohi & Associates. On the instructions of the plaintiff, on 23.10.2020 Messrs. Kohi & Associates gave the insurer of the motor vehicle owned by 2nd defendant a notice pursuant to section 96(2) of the Road Transport Act 1987 for purposes of instituting a claim against the defendants. Later on 04.03.2021, Messrs. Kohi & Associates gave the insurer their opinion on liability and quantum and forwarded the relevant documents for consideration. Messrs. Kohi & Associates also sought from the insurer for a possible settlement.

**[18]** In its reply five days later on 09.03.2021, the insurer confirmed that it was the insurer for the motor vehicle owned by the 2nd defendant but claimed that the plaintiff was also "represented" by Messrs. Suriati & Co. The insurer then requested for the matter to be sorted out to enable the matter to be settled expeditiously. On 12.03.2021, Messrs. Kohi & Associates responded to the insurer and provided a statutory declaration from the plaintiff confirming that the plaintiff was represented by Messrs. Kohi & Associates.

**[19]** On 13.04.2021, the insurer responded that Messrs. Suriati was still "acting" for the plaintiff and that it could not revert with any offer for settlement. The insurer insisted for the issue of "dual representation" be resolved before any offer for settlement can be made. After a number of requests made by Messrs. Kohi & Associates for the insurer to revert with its offer for settlement and despite having provided the insurer with the plaintiffs statutory declaration, on 24.05.2021 the insurer only replied with a prompt to Messrs. Kohi & Associates that the plaintiffs claim was time-barred on 13.05.2021.

**[20]** Pursuant to section 6(1)*(a)* of the Limitation Act 1953, the limitation period for the plaintiff to bring an action against the defendants is six years from the date the cause of action accrued. The collision occurred on 13.05.2015 and the plaintiff's cause of action would have been statute-barred by 12.05.2021. In the present appeal, the plaintiff commenced the action against the defendants ten days

after expiry of the cause of action although the learned counsel for the defendants said it was nine days. That was not in dispute. However, have the defendants make out a case under Order 18 rule 19(1)*(b)*, *(c)* and/or *(d)* of the Rules of Court 2012?

**[21]** On 09.03.2021, the insurer had assured the plaintiff that it will be able to make an offer to settle the plaintiff's claim provided the issue of dual representation was resolved. As far as the plaintiff was concerned, the issue of dual representation was resolved when the statutory declaration was provided to the insurer. Since the insurer insisted on a "withdrawal" from the other firm of solicitors, Messrs. Kohi & Associates only managed to secure this on 24.05.2021. The fact of the matter is, there was no legal requirement for any "withdrawal" of legal representation to be made by Messrs. Suriati & Co and the statutory declaration made by the plaintiff confirming that he was represented by Messrs. Kohi & Associates should suffice in the circumstances.

**[22]** After Messrs. Kohi & Associates provided the insurer with the opinion on quantum and liability and the relevant documents for consideration, the insurer had represented to the plaintiff that it would revert with an offer for settlement provided the issue of dual representation could be resolved. Relying on this representation, it is reasonable to infer that once the plaintiff was able to resolve the dual representation issue, there should not be any necessity to file any action in court as the matter could be settled amicably. The plaintiff should be allowed the opportunity to take advantage of the pending settlement instead of having to institute a legal action to achieve the same objective.

**[23]** By the same token, the defendant too should not be allowed to take advantage of the situation when his own insurers have expressed an intention to settle the plaintiff's claim. This is even more so after Messrs. Kohi & Associates had provided the insurer with the opinion on liability and quantum and the relevant documents.

**[24]** If an out of court settlement was not even remotely possible, the insurer should inform the plaintiff accordingly after having the benefit of the opinion and the relevant documents. By allowing the plaintiff to be drawn into the protracted communication about the settlement and then bailing out when the plaintiff had nothing else to hold on to may well support a reasonable inference of *mala fide* as averred to by the plaintiff in his affidavit in-reply. In such a circumstance, the application may well be viewed as a design to defeat the claim by the plaintiff which bolstered the *mala fide* argument.

**Conclusion**

**[25]** On the background facts, 1 am of the considered view that this was not a proper case for a discretion to be exercised in allowing the claim to be struck out and dismissed summarily. In my considered view the defendants have failed to make out a case under paragraph *(b)* or *(c)* or *(d)* of Order 18 rule 19(1) of the Rules of Court 2012. The grounds relied on by the defendants as averred in the affidavit in-support did not substantiate the application. On the premise of these reasons, I allowed the appeal with RM1,000.00 cost subject to allocatur.

**Dated:** 30 DECEMBER 2022

**(AHMAD SHARIR MOHD SALLEH)**
Judge
High Court of Malaya Kuala Lumpur

**COUNSEL:**

*For the appellant - Kohila Yanasekaran; M/s Kohi & Associates*

*For the respondents - Tan Lilian; M/s Naicker & Associates*

**Case(s) referred to:**

*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC; [1993] 3 MLJ 36*

*Yeo Chu Hui v. Lim Cheng Jin & Anor [1993] 3 CLJ 432; [1993] MLJU 21*

*RS Krishnan a/l RS Naidu v. Eric Soon Boo Teck (Rawang Hills Resort Sdn Bhd, Third Party) [2004] 1 MLJ 252*

**Legislation referred to:**

Limitation Act 1953, s. 6(1)(a)

Road Transport Act 1987, s. 96(1), (2)

Rules of Court 2012, O. 18 r. 19(1), (b), (c), (d)