

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)**

**RAYUAN SIVIL NO. B-02-738-06**

**ANTARA**

**DULI YANG AMAT MULIA TUNKU IBRAHIM  
ISMAIL IBNI SULTAN ISKANDAR AL-HAJ  
(NO. K/P: 581122-01-5621)**

**... PERAYU**

**DAN**

**DATUK CAPTAIN HAMZAH BIN MOHD NOOR  
(NO. K/P: 500407-01-5345)**

**... RESPONDEN**

[Dalam Perkara Mahkamah Tinggi Malaya di Shah Alam  
Guaman No. MT3-22-655-2000

Antara

Datuk Captain Hamzah bin Mohd Noor  
(No. K/P: 500407-01-5345)

... Plaintiff

Dan

D.Y.A.M. Tunku Ibrahim Ismail Ibni  
Sultan Iskandar Al-Haj  
(No. K/P: 581122-01-5621)

... Defendan]

**DAN**

**RAYUAN SIVIL NO. W-02-393-2004**

**ANTARA**

**D.Y.A.M. TUNKU IBRAHIM ISMAIL IBNI  
SULTAN ISKANDAR AL-HAJ  
(NO. K/P: 581122-01-5621)**

**... PERAYU**

**DAN**

**ANDRE RAVINDRAN S. ARUL  
(NO. K/P: Singapura (S1606759/H))**

**... RESPONDEN**

[Dalam Perkara Mahkamah Tinggi Malaysia di Kuala Lumpur  
Guaman No. 22-621-2001 (S1)]

Antara

Andre Ravindran S. Arul  
(No. K/P: Singapura (S1606759/H))

... Plaintiff

Dan

D.Y.A.M. Tunku Ibrahim Ismail Ibni  
Sultan Iskandar Al-Haj  
(No. K/P: 581122-01-5621)

... Defendan]

**CORUM: Suriyadi Halim Omar, JCA  
Heliliah Mohd Yusof, JCA  
Wan Adnan Muhamad, JCA**

## **JUDGMENT OF HELILIAH MOHD YUSOF JCA**

Two appeals were heard together. The appeals are Rayuan Sivil No. B-02-393-04 and Rayuan Sivil No. B-02-738-06. My learned brother Suriyadi Halim Omar JCA in his draft grounds of judgment in respect of which I have already had the opportunity to peruse has (for ease of reference) referred to Rayuan Sivil No. B-02-738-06 as Appeal A while Rayuan Sivil No. W-02-393-04 as Appeal B. The two appeals have been dismissed by a majority. I have dissented for the reasons stated hereinafter.

The facts leading to the two appeals have been detailed by my learned brother Suriyadi Halim Omar and again for purposes of uniformity in the presentation of the facts I am adopting the facts as ably traced by my learned brother. Although the facts in Appeal A differ slightly from the facts in Appeal B nevertheless the main issue in both appeals pertain to the applications for extension of a writ made pursuant to O. 6 r. 7 (2A) of the Rules of the High Court 1980 [or RHC 1980]. As stated by my learned brother the parties to the appeal have agreed that the outcome of the decision in Appeal A would also be applicable to Appeal B. In terms of facts however it is noted that in respect of Appeal B there is firstly the application to extend the life of a writ which was itself made after its expiry and secondly prior to the writ elapsing no effort was made by the respondent to serve the writ on the appellant.

The issue before us has been aptly framed by the learned counsel for the respondent as follows:

“Two extensions of the writ had been granted by the court to an unserved writ, even though the application had been made after its expiry and prior to its expiry no attempt was made to serve it. The main vein of this appeal lies in the interpretation to be given to O. 6 r. 7 RHC 1980 with specific attention to be given to O. 6 r. 7 (2A)”.

The relevant provisions of O. 6 r. 7 RHC 1980 which should be referred to are:

**“7 Duration and renewal of writ (O 6 r 7)**

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for [6] months, beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

[(2) Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah dan Sarawak thrice and in admiralty actions 5 times), not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.]

[(2A) An application for renewal must be made before the expiry of the writ, ex parte by summons, supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.]

(3) .....

(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.

(5) A note of the renewal must be entered in the cause book”.

*(underlining for emphasis)*

The inception of r. 7 (2A) above was made with effect from 21<sup>st</sup> September 2000 vide the Rules of the High Court Amendment [PU(A) 342/2000]. There is no necessity to examine in detail any legislative history to the provisions. It would suffice however to point out that the amendment to Order 6 r. 7 RHC 1980 not only shortened the duration of the writ to 6 months but also introduced O. 6 r. 7 (2A). The previous O.6 r. 7 (2) states:

“(2) Where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time .....

The current provision of O. 6 r. 7 (2) makes it subject to subrule (2A). It is normal to read the entire provisions of O. 6 r. 7 together and the current O. 6 r. 7 (2) and r. 7 (2A) require two matters to be adhered to:

(i) where efforts to serve a writ on the defendant have been unsuccessful, the court may by order extend the validity of the writ not exceeding 6 months at any one time and the

extension is to commence with the day next following that on which it would expire.

- (ii) an application for renewal must be made before the expiry of the writ supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have made subsequent thereto to effect service.

At this juncture it is appropriate to examine the judgments of the High Courts from which these appeals have lodged.

For the purpose of these appeals the relevant parts of the judgment of the learned judge in Appeal B which should be considered is the following:

**“Grounds advanced by the defendant in support of enclosure 23**

1. The applications by the plaintiff for extension of the life of the Writ were made out of time i.e. after the Writ has expired. This runs contrary to Order 6 rule 7 (2A) of the Rules of High Court (RHC) which demands that such applications must be made before the expiry of the Writ.
2. The extension orders for the Writ are all void *ex-debito justitae* since the commence date for the extension begins from a new date rather than the continuation from the last date before the Writ expired.
3. The plaintiff did not make any attempts to serve the Writ on the defendant before it expired. This contradicts Order 6 rule 7 (2) RHC that requires the plaintiff to make efforts to serve the Writ before making an application for extension of the Writ.

## **Analysis**

*1<sup>st</sup> ground: application for extension made out of time*

On the first ground challenging the plaintiff's for making the applications for extension after the Writ has expired thereby contravening Order 6 rule 7 (2A) RHC, the plaintiff counter this with section 45 of the Interpretation Act 1948 & 1967 which provides:

***'Construction of power to extend time***

Where in any written law a time is prescribed for doing any act or taking any proceedings and power is given to a court or other authority to extend that time, the power may be exercised by the court or authority although the application for its exercise is not made until after the expiration of the time'.

Reading this together with section 23 (1) of the same Act:

***'Avoidance of subsidiary legislation in case of inconsistency with Act***

Any subsidiary legislation which is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency'.

The plaintiff contends that his application for extension of the Writ can be made after expiry of the Writ.

I agree with this proposition. Though Order 6 rule 7 (2A) RHC requires application for such extension to be made before expiry of the Writ but it runs contrary to section 45 of the Interpretation Act that allows such application to be made after the expiration of the prescribed time. And since section 23 (1) of the Interpretation Act declares a subsidiary legislation (of which the RHC is made under such an enactment) containing inconsistent provision to be void then section 45 of the Interpretation Act must prevail over Order 6 rule 7 (2A) RHC. With these, I find that the defendant's first contention cannot sustain.

*3<sup>d</sup> ground: No attempts were made by the plaintiff to serve the Writ to qualify for consideration for extension*

The third accusation levied on the plaintiff is that since the plaintiff made no attempts to serve this Writ then he has failed to comply with the prerequisite set out in Order 6 rule 7 (2) RHC requiring the plaintiff to make efforts to serve this Writ and such service has been unsuccessful before his application can be considered.

The principle applicable in respect of this issue is extensively considered by Justice Skinner in ***Mayban Finance Bhd v Umas Sdn Bhd & Anor.*** (2002) 4 MLJ 276 @ 287. I agree with the learned Judge's view that the test to be applied for consideration for extension of the Writ is "where the court is satisfied that good reasons appear to excuse the delay in service" (see Lord Goddard in ***Battersby & Ors v Anglo-American Oil Co Ltd & Ors*** (1945) 1 KB 23 @ 32) rather than basing it on the mere fact that there is no attempt to serve the Writ before the application for extension is made.

In this case I find there is sufficient reason to justify the plaintiff's non-action in the service of the Writ. There was a parallel action commenced in the Singapore High Court by the plaintiff against the defendant on the same subject matter. But the defendant had raised a preliminary issue of *forum non-conveniens*. While the Singapore courts were considering this matter, the plaintiff filed this action as a protective writ, to preserve the plaintiff's cause of action in the event the Singapore courts rule in favour of the defendant and requires the plaintiff to litigate in Malaysia. The filing of such protective writ is allowed by law – see ***The Goldean Mariner*** (1990) 2 Lloyd's Rep 218 @ 219. For this reason the plaintiff withheld service so as to avoid duplicity of action, and, instead, continued to extend the life of the Writ until the Singapore Court of Appeal decided against him on the issue mentioned. Once that was decided, the plaintiff served this Writ on the

defendant. This, I consider as good reason for the delay in the service of the Writ leading to there being no flaw in the extension orders of the Writ”.

In Appeal A (i.e. B-02-738-2006) the learned Judicial Commissioner stated the following in her grounds of judgment:

“The next and more critical issue to be determined is the scope of O. 6 R. 7 (2) and (2A) of the RHC and whether the SAR was correct in granting the two *ex partes* order extending the validity of the writ based on the grounds put forward by the Plaintiff. It is not in dispute that the Plaintiff has made no attempt to serve the writ on the Defendant after its filing. This writ is filed as a ‘protective writ’ i.e. to preserve the plaintiff’s cause of action, while waiting for the outcome of the Singapore’s case.

The Defendant’s counsel in his submission is basically asking me to give a restrictive and strict application to the provisions of O. 6 R. 7 (2) and (2A) in that an order for extension of the validity of a writ is conditional upon unsuccessful efforts being made to serve the writ within one month of its issue and subsequently thereafter. It is submitted further that such efforts must be deposed in the supporting affidavit for the application to extent the validity of the writ. Therefore, the learned counsel for the Defendant submits that there is clear and blatant disregard of the rules by the Plaintiff in this case and the SAR has no jurisdiction or power to make the order of extension. Several case authorities were referred to by counsel to support his contention that such non-compliance of the rules is not just an irregularity but a nullity that goes to the root of the matter.

On his part the Plaintiff’s counsel argued that the court always has the discretion to grant the extension if there is sufficient good reason for non-service of the writ and that even if there was non-compliance of the rules, it is merely an irregularity that caused no prejudice to the Defendant. There is one case law referred to by Plaintiff’s counsel involving the same

Defendant and it is **Andre Ravindran S Arul v DYAM Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-haj [2004] 6 CLJ 226**. In that case, *Mr. Justice James Foong*, despite the provisions of O. 6 R. 7 (2) of the RHC, was of the opinion that the test to be applied for considering the extension of the writ is “where the court is satisfied that good reasons appear to excuse the delay in service”. The learned judge was of the view that withholding of the service of the writ so as to avoid duplicity of action while waiting for a parallel case to be decided in the Singapore court is considered a good reason for extending the validity of the writ. The decision of the learned judge is being appealed to the Court of Appeal.

The Defendant’s counsel naturally disagreed with the decision in **Andre Ravindran’s case** arguing that that case completely ignores the provisions of O. 6 R. 7 (2) and (2A) and the other decided cases in respect of this provision.

I am of the opinion that in applying and administering any of the rules and provisions of the RHC, the court has to bear in mind O. 1A of the RHC, i.e. by having regards to the justice of the particular case. As such, I am therefore incline to agree with the observations made by *Mr. Justice James Foong* in the **Andre Ravindran’s case**. The provisions O. 6 R. 7 (2) and (2A) do not take away the court’s power and discretion to grant an extension of the writ if there is good reason for the non-service of the writ.

There are other grounds put forward by the Defendant in challenging the decision of the SAR in granting the two *ex parte* orders but suffice it to say that I found them without merits.

In this case I am satisfied that there is good reason for the Plaintiff to withhold the service of the writ and as such there is no question of the Plaintiff abusing the process of the court”.

Having appraised the aforementioned paragraphs in the two judgments, it is found that the issues to be addressed in this appeal are as follows:

- (i) The extent (if any) to which section 23 and section 45 of the Interpretation Act 1948 & 67 have any effect in relation the provisions of O. 6 r. 7 (2), 7 (2A).
- (ii) The scope of O. 6 r. 7 (2), 7 (2A) RHC 1980.
- (iii) The extent to which O. 1A could be invoked in the circumstances of the case.

**Issue (i) : Sections 23, 45 Interpretation Act 1948 and 1967**

The first issue here is whether section 23 and section 45 of the Interpretation Acts 1948 and 1967 (or Act 388) have any sort of effect on the application of O. 6 r. 7 RHC 1980. The RHC 1980 were promulgated pursuant to s. 16 of the Courts Judicature Act 1964 (or CJA 1964 or Act 91). CJA 1964/Act 91 is a revised Act and hence by virtue of section 2 (1) (e) of Act 388, Act 388 is applicable for purposes of interpretation. Section 2 (1) (e) of Act 388 states:

- “2. (1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to –
- (a) .....
  - (b) .....
  - (c) .....
  - (d) .....

- (e) all subsidiary legislation made after the 31<sup>st</sup> December 1968, under the laws revised under the Revision of Laws Act 1968”.

Section 23 (1) states:

“23. (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency”.

As mentioned above RHC 1980 were promulgated pursuant to s. 16 (1) of CJA 1964/Act 91 which is an enabling provision which states, *inter alia*:

**“16 Rules of court**

Rules of court may be made for the following purpose:

- (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court [to the Court of Appeal or to the Federal Court] shall be made”.

*(underlining for emphasis)*

It is found that having examined the relevant limb of section 16 (1) especially the parts which states “..., and the time within which any

applications which are to be made to a High Court” there does not seem to be anything ultra vires about O. 6 r. 7 (2) or r. 7 (2A) for it is not inconsistent with s. 16 CJA 1964/Act 91.

O. 6 r. 7 (2) provides that an application for renewal must be made before the expiry of the writ by summons, supported by affidavit showing that efforts have been to serve the defendant within one month of the issue of the writ and that efforts have been made subsequent thereto .....

O. 6 r. 7 must be read in *toto* and in O. 6 r. 7 (1) there is a duration for the validity of a writ. Again there is nothing that could be said to be contrary to s. 16 (1) of CJA 1964/Act 91. In effect s. 23 of Act 388 is totally inapplicable and need not be considered.

It is in relation to s. 45 of Act 388 that the matter is to be further considered. S. 45 Act 388 states:

“45. Where in any written law a time is prescribed for doing any act or taking any proceeding and power is given to a court or other authority to extend that time, the power may be exercised by the court or authority although the application for its exercise is not made until after the expiration of the time prescribed”.

This section has apparently been relied upon to enable the court to exercise its power to extend time where a time is prescribed for doing any act although the application for the exercise of the power is not made until after the expiration of the time prescribed.

It is to be noted however that section 45 Act 388 is not the only section that enables the court to exercise discretion with regard to time.

Section 25 of the CJA 1964/Act 91 provides:

“Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same”.

Item 8 of the Schedule states:

**“Time**

Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefore be not made until after the expiration of the time prescribed”.

Section 25 (2) as referred to above prescribes additional “powers” as opposed to the word “jurisdiction” in s. 25 (1). In addition the proviso to section 25 (2) expressly states that the additional power “shall be exercised in accordance with any written law or rules of court relating to the same”.

The expression “rules of court” means under s. 3 of Act 388 the following:

“rules of court” means rule or other subsidiary legislation relating to the practice and procedure of a court or courts”.

The RHC 1980 is such a subsidiary legislation promulgated under s. 16 of CJA 1964/Act 91. As already stated the RHC 1980 is *intra vires* s. 16 of the CJA 1964/Act 91 where s. 23 Act 388 for the circumstances of these appeals is entirely irrelevant.

Further to be noted however is O. 3 r. 5 which relevant parts are as follows:

“(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 is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period”.

In the light of the various provisions found under s. 25 CJA 1964/Act 91 as well as s. 16 (a) CJA 1964/Act 91, s. 45 of Act 388 is only declaratory of an existing position. Nevertheless while Act 388 is a general law the CJA is a special Act relating to courts. In my view this is an instance where the *maxim generalia specialibus non derogant* is applicable. In **Seward v. The Vera [1884] 10 App Cas. 59** the Earl of Selborne LC said:

“... where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any of a particular intention to do so”.

In the context of these appeals the CJA 1964/Act 91 is the earlier legislation. The legislative history of s. 25 CJA 1964/Act 91 is already extensively traced in the judicial statements of Salleh Abas LP (as he then was) in **Dato’ Mohamed Hashim Shamsuddin v Attorney General, Hongkong [1986] 2 MLJ 112 at 113 – 115**. I would even add further to state that here there is not even a conflict between a general law (Act 388) and the special law (CJA 1964/Act 91). Rather with the CJA 1964/Act 91 conferring specific powers as expressly provided in s. 25 (2) it is this provision that has to be analysed further in examining the power and not the jurisdiction, of the court in relation to the abridgement or extension of time in a cause (which term in s. 3 of CJA 1964/Act 91 is defined to include any action, suit or other original proceeding between a plaintiff and defendant .....).

S. 25 (2) incorporates a proviso which states that the additional powers set out in the Schedule (which includes item 8) shall be exercised in accordance with the rules of the court relating to the same. O. 6 r. 7 is thus one such rule.

The word “shall” in the context of section 25 (2) indicates that it is mandatory that the additional powers are to be exercised in accordance with any rules of court. Section 25 (2) has also been

judicially considered in **Majlis Peguam & Anor. v Tan Sri Dato' Mohamed Yusoff bin Mohamed [1997] 2 MLJ 271, 287** per Mohd Azmi FCJ (as he then was):

“The relevant enacting part of s 25(2) clearly and plainly provides that ‘the High Court shall have the additional powers set out in the Schedule’. We cannot imagine how such plain expression of legislative words can ever be doubted as a legislative intention to confer such powers outright. It is therefore difficult to accept that the proviso to that section is intended to provide not merely as an exception to the enacting part but to cripple it completely by imposing a blanket qualification that the court must look for another power-conferring statute, merely because the proviso requires such powers to be exercised ‘in accordance with’ any written law or rules of court relating thereto.

It is important to observe that the proviso does not say the statutory powers are ‘subject to’ any written law which if it is the case may perhaps attract a condition precedent to the exercise of such powers and therefore entitling this court to conclude that the whole Schedule to the 1964 Act is merely declaratory in nature. Under the canon of statutory interpretation, it is not open to any court to substitute the phrase ‘subject to’ for the words ‘in accordance with’. In our view, the phrase ‘in accordance with’ in the proviso simply refer to the mode of exercising the power and nothing more should be read into those words. Further, it is important to construe literally the word ‘any’ immediately preceding ‘written law or rules of court’. In our opinion, what is plainly intended by Parliament is merely that the mode of exercising the powers must be in accordance with any existing written law or rules of court and not in accordance with any written law or rules to be enacted in the future. If it were the legislative intent to prohibit the exercise of the power in the absence of another statute, it would have said so in the enacting part by direct qualification, and not by way of a proviso, because

the proviso should not be interpreted as a qualification which is inconsistent with what is plainly expressed in the enacting part by rendering that part practically lame and useless.

Thus, the mode of exercising the power to abridge under para 8 must be in accordance with and not contrary to existing written law or rules of court if any. That is the only qualification or exception imposed by the proviso. In the absence of any written law or rules of court relating to shortening of time, it does not mean that in appropriate cases the additional power cannot be exercised at all. Apart from the 1964 Act itself, it is difficult to imagine if ever the legislature would find it necessary to enact separately another statute or rules relating to the abridgement or extension of time under s 15(5), apart from the existing provisions as to time in the Interpretation and General Clauses Ordinance 1948 and the Interpretation Act 1967.

.....

In the circumstances, we disagree with Mr Robert Lazar's argument that para 8 of the Schedule to the 1964 Act is not a power-conferring but a mere declaratory provision. The general power to abridge a prescribed time must of course be exercised judicially, depending on the facts of each particular case. It also goes without saying that the general provision under para 8 cannot be invoked to defeat or supersede a mandatory requirement of any written law as to time".

**Issue (ii) : The Scope of O. 6 r. 7**

Bearing in mind the above it is now necessary to revert to O. 6 r. 7 (2), 7 (2A). Rules 7 (2) begins with the words "Subject to paragraph (2A) where efforts to serve a writ on a defendant have been unsuccessful the court may by order extend .....".

Thus even in the context of r. 7 (2) itself it is expressly made subject to r. 7 2 (A) & R. 7 (2A) prescribes the procedure by which the application could be made. Hence the following requisites are prescribed:

- (i) efforts to serve a writ on a defendant must be shown to have been unsuccessful.
- (ii) the application for renewal must be made before the expiry of the writ.
- (iii) the application must be supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto.

Further attention is to be given to word “must”. It has to be interpreted in its ordinary meaning. In **Ting Hwa Yiew v Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ** Abdul Kadir Sulaiman J (as he then was) considered the word “must” in the context of O. 32 r. 13 (2) which states *inter alia*:

“(2) Save as otherwise provided in these rules –

- (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application .....

In his judgment he stated:

“Order 32 r. 13 (2) (a) use an imperative word “must”. In its ordinary meaning it is a word of absolute obligation. Therefore for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of the learned counsel for the defendant that in renders the said affidavit inadmissible. O. 2 r. 1 of the RHC would not be of any help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said affidavit”.

The RHC 1980 and its genesis the Rules of Supreme Court 1957 were adapted after the English Rules of the Supreme Court as they were developed, enlarged and reissued as well as replaced by the Rules of Supreme Court 1965. Consequently in my opinion English cases are relevant in construing the word “must”.

One such case is **Shell Chemicals UK Ltd & Another v Vinamul Ltd (formerly Vinyl Products Ltd) The Times 7 March 1991, 135 SJ 412 (Transcript Association)**. It is not necessary to state the actual facts of the case. The circumstances were that there were already protracted litigation between the plaintiff and defendant and in the course of submission on a question of quantum in a claim for damage the issue arose whether the defendant was required to plead a matter in their defence and hence a further issue ensued whether the defendant might need to amend pleading. The plaintiff had countered that one of the provisions to be relied upon is O. 18 rule 8 (1) of the English Rules. That rule, *inter alia*, reads:

“A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of the relevant period of limitation, fraud or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading”.

Lord Woolf in the course of his judgment in this case stated:

“Mr Slater submits that when the language of Order 18, rule 8 (1) is looked at sub-rules (a) and (b) clearly apply to this case. The matters which the defendants now wish to rely on are ones which make a claim of the plaintiffs not maintainable, and ones which, if not specifically pleaded, might take the opposite party by surprise. Mr Slater refers to the fact that the language of the rule is mandatory. It states that “a party must in any pleading subsequent to a statement of claim [specifically plead the matters referred to]”. He submits that it is not a matter of discretion for the learned judge, but a matter of practice laid down in the rules which establishes whether a matter has to be pleaded or not.

In my judgement, Mr Slater’s approach is the correct approach on an issue of this sort, subject to the qualification that there are always going to be matters of judgment involved in deciding whether or not a particular pleading fulfils the requirement of Order 18, rule 8. Speaking for myself, if a case falls within a grey area where it may be said it does or does not comply with the particular rule, the approach of this court is likely to be one which would involve the court hesitating long before interfering with a

decision of a learned judge, who is responsible for trying the case. This is for the very practical reason – and this is a matter to which Mr Harvey referred – that the learned judge who is conducting a trial, as Mr Justice Schiemann was, will normally be in a very good position to assess whether the rule is being complied with or not.

However, this case, in my view, does not fall within that sort of grey area. This case, in my view, is one where very clearly the language of Order 18, rule 8, required the specific issue which the defendants wanted to rely on to be pleaded. The arguments which were advanced by Mr Harvey as to the language of rule 8 in my view do not alter that clear situation. He submits that Order 18, rule 8 (1) (a) refers primarily to claims, in other words issues as to liability rather than matters of damages. Secondly, he contends that rule 8 (1) (b) must be construed objectively.

Accepting for the purposes of this appeal, without deciding the matter, that that is a correct approach, in my view this does not alter the fact that both the language and the spirit of Order 18, rule 8 (1) require an issue of this sort (which is a highly unusual issue, which involves the application of the principle of the Mark Rowlands case ([1986] QB 211, [1986] 3 All ER 473) to a very different situation) to be pleaded”.

Another case which illustrates that the word “must” has to be interpreted within its context is **Mayhew v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon [1991] 2 EGLR 89**. Briefly the facts indicate:

“(a) By section 1 of the Leasehold Reform Act 1967 (Encyclopedia para 2-0373), those who hold long tenancies at low rents of house (as defined) are given the right to acquire the freehold or an extended lease of the property (see also *Dymond v Arundel-Timms* above, p 397). In order to be

eligible to exercise the right, the rateable value of property must not exceed limits set out in section 1 (1) (a) of the Act. By section 1 (4A), a leaseholder is permitted to apply for a notional reduction of the rateable value of premises where Schedule 8 to the Housing Act 1974 applies.

Schedule 8 (Encyclopedia para 2-0715) applies to any improvement to the property made or contributed to by the tenant or any previous tenant, which is a “structural alteration, extension or addition”. Initially the tenant must serve a notice in the prescribed form on the landlord requiring him to agree to a reduction under the Schedule”.

The relevant parts of the Schedule which were considered are:

“(b) (2) This schedule applies to any improvement made by the execution of works amounting to structural alteration, extension or addition.

2(1) The amount of any such reduction may at any time be agreed in writing between the landlord and the tenant.

(2) Where, at the expiration of a period of six weeks from the service of a notice under paragraph 1 of this Schedule any of the following matters has not been agreed in writing between the landlord and the tenant, that is to say, -

(a) whether the improvement specified in the notice is an improvement to which this Schedule applies;

(b) what works were involved in it;

(c) whether the tenant or a previous tenant under the tenancy has made it or contributed to its cost and

(d) what proportion his contribution, if any, bears to the whole cost;

the County Court may on the application of the tenant determine that matter ...

(3) An application under the last foregoing sub-paragraph must be made within six weeks from the expiration of the period mentioned therein or such longer time as the court may allow.

(c) This is a narrow but important point. The appellant's contention is simple. It is that paragraph 2 (3) provides that an application under that paragraph must be made within the time limited or such longer time as the court may allow. The provision is clearly mandatory. The respondent not having applied within the time and his application for an extension having been refused he could not thereafter make a fresh application. The Schedule permits of one try only. Any other construction makes nonsense of the mandatory time limit. If, notwithstanding that he is out of time and must obtain an extension in order to proceed, the tenant can serve a second notice the time limit becomes meaningless.

(d) Although the tenant had not applied within the time so limited the valuation officer in fact gave a certificate for a reduction in the rateable value by £50. If this was valid the value for the purposes of determining the basis of the purchase price would thus be that more favourable to this tenant. The difference between the two price bases was some £30,000.

The landlord contended that, as the tenant had failed to comply with the time limit the certificate was bad, and the higher valuation basis must therefore apply. The question went to the County Court where it was held that the timetable was mandatory but it was declared that the tenant was entitled to serve a further Notice under Schedule 8. The landlord appealed.

The tenant cross-appealed contending that the timetable was not mandatory”.

In this case the English Court of Appeal led by Parker LJ was urged to apply the decision of the Court of Appeal in **Pollock v Brooke Shepherd (1982) 45 P & CR 357** which was submitted to be binding. Parker LJ referred to the leading judgment of Lawton LJ in the latter Pollock’s case (supra) who having set out the terms of paragraph 2 (3) stated:

“In my judgment it is clear from paragraph 2 of Schedule 8 that any dispute as to whether an improvement has been made must be brought within that time, that the time limit is mandatory and cannot be exceeded without the consent of the County Court judge”.

Parker LJ also agreed with the decision of Griffiths LJ who also decided that the paragraph 2 (3) of Schedule 8 must be read as mandatory. Parker LJ stated in his own judgment:

“(e) In my judgment the ratio of both Lawton LJ and Griffiths LJ was clearly (a) that the time limits were mandatory and (b) that there could be no second application without destroying the entire structure of the Schedule.

I regard the decision as binding and determinative of the issue under consideration. If I am wrong I would also conclude that there can be no second application for the reasons so cogently and succinctly expressed by Griffiths LJ. That paragraph 2(3) is mandatory admits in my view of no contrary argument. If they are mandatory there is no room for a second notice. It is impossible to suppose that having made it mandatory to apply within the time limited or any further time permitted by the court, Parliament can have intended that the tenant could start afresh. If he could there

would be no time limit at all. A tenant who was out of time would not need to apply for an extension. He could simply initiate the procedure over again. If he did apply and was refused he could do the same”.

While it may be that Mayhew’s case pertains to the interpretation of the word “must” in the context of an Act while the issue before me in these appeals pertain to the interpretation of the word “must” in the RHC 1980 which is regarded as subsidiary legislation I still consider that the decision in Ting Hwa Yew’s case (supra) is also applicable and the English cases strong guidance in rendering the approach to be given in interpreting the word “must” in the context in which it is emplaced in O. 6 r. 7 (2A) as read with O. 6 r.7 (2) since the latter is to be read subject to the former. In short the word “must” here is mandatory and not merely directory.

The important question is when is the court’s discretion under O. 6 r. 7 (2) to extend the validity of writ to be exercised. As previously observed O. 6 r. 7 (2) being subjected to O. 6 r. 7 (2A) there must be a timeous application before the expiry of the writ before the discretion may be exercised. The timeous application must be made before the expiry of the writ where the affidavit supporting the application shows that efforts have made to serve the defendant within one month of the date of the issue of writ.

The discretion is to be exercised when there is before the court an application made before the expiry of the writ it itself. If it were to be otherwise it would be tantamount to the court permitting the party filing the application to circumvent the effect of O. 6 r. 7 (2A) under the

purported exercise of discretion pursuant to s. 45 of Act 388. S. 45 does not override a specific statutory provision which circumscribes the parameters of the exercise of the discretion.

In these appeals it is found that both the learned High Court judge and the learned Judicial Commissioner went completely into the reasons for which the writs were not served without considering the preceding statutory requirement that the application must be made before the expiry of the writ. The discretion could not be invoked when the application is itself out of time and with complete disregard to the statutory requirements of both O. 6 r. 7 (2) and O. 6 r. 7 (2A).

In the circumstances of this case the respondent has been permitted unilaterally to impose itself not to make any effort to have the writ served on the defendant using the actions filed in Singapore as a reason not to make any effort at all. It is therefore a case of non effort in complete disregard of the statutory requirement as opposed to making efforts and failing which an application is to be made within the mandatory time frame to enable the court to exercise its discretion within the parameters described in O. 6 r. 7 (2) and r. (2A). In my view there was here a premature exercise of discretion to extend the period during which the application itself is to be made.

I now come to the reasons furnished for not even attempting to serve the writs as opposed to attempts being made but that the writs could not be served. Those reasons in my view constitute the unilateral or self imposed inhibitions so as not to make any effort to have the writ served.

The reasons given are that there was a protective writ filed and certain actions were filed and certain actions were filed in another jurisdiction which in the circumstances of this appeal appeared to be more of a “wait and see” disposition.

The case of **Llyod Triestino Societa v Chocolate Products (M) Sdn Bhd [1978] 2 MLJ 27** has been cited. The decision of the Federal Court in this case is one in which the former O. 8 r. of the Rules of Supreme Court was being considered. It is also a case where a writ had not been served within the twelve months of the issue. An application for renewal was made within the twelve months. The statements that are relevant here in reflecting the judicial approach are to be extracted from the judgment of Chang Min Tat FJ (as he then was) as follows:

‘We agree, with respect, with Lord Goddard L.J. (as he then was) in *Battersby & Ors. v. Anglo-American Oil Co. Ltd. & Ors., supra*, at pages 32-33 that

“..... even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right that people

should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal, his application may very possibly come before a master or judge other than the one who made the order and who will not necessarily know the grounds on which the discretion was exercised” ‘.

Learned Counsel for the appellant has cited **Dagnell & Another v JL Freedman & Co (a firm) and others [1993] 2 All ER 161** and **Singh v Dupont Harper Foundation [1994] 2 All ER 889**. Both cases refer to judgments where O. 6 r. 8 of the RSC have been considered, O. 6 r. 8 it is noted is not in *pari materia* although some similarities may be identified. In order to elucidate the similarities Ord. 6 r. 8 is reproduced below that is follows:

“RSC Ord. 6 r. 8 (2)

Subject to paragraph (2A) where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time for such period, not exceeding 4 months of any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the court before that day or such later day (if any) as the court may allow.

RSC Ord. 6 r. 8 (2A)

Where the court is satisfied on an application under paragraph (2), that despite the making of all reasonable efforts, it may not be possible to serve the writ within 4 months, the court may, if it thinks fit, extend the validity of the writ for such period, not 12 months, as the court may specify”.

The provisions cited above differ from O. 6 r. 7 (1) (2) and (2A) of the RHC 1980 in that in Malaysia the discretion of the writ in the first instance is 6 months. RSC Ord. 6 r. 8 (2A) contains the words “despite the making of all reasonable efforts”. O 6 r. 7 (2A) specifies that “efforts have been made”.

It is observed that in view of these abovementioned provisions being different from O. 6 r. 7 (2A) RHC 1980 the interpretation that have been rendered to the former may at best serve as general guidance. However the observation of Farquhaurson LJ is useful in indicating the approach to be taken as follows:

“RSC O. 6 r. 8 was intended to provide a code whereby undue delay in the service of writs is avoided. It is for this reason that the period for the validity of a writ was recently reduced from 12 months to four .....

..... the following propositions should be applied:

(1) Where a litigant seeks an extension of the validity of a writ the provision of RSC Ord. 6 r. 8 will apply.

(2) An application under that rule must be made during the validity of the writ i.e. four months in the usual case, or during the four months next following .....

(3) .....

(4) If the litigant has not confirmed with the requirements of the Rule he cannot be granted relief under Or. 6 r. 8.

(5) In exceptional circumstance and where the interest of justice so require the court will entertain an application to extend the validity of the writ under the provisions of Ord. 2 r. 1 and Ord. 3 r. 5. Before the court will

extend the validity of the writ the applicant must show that there is good reason for such an extension and where appropriate provide a satisfactory explanation for the failure to apply during the period of the original validity”.

The above appears to be reinforced with annotations found in the Supreme Court Practice 1997 Vol. I at page 54:

‘Paragraphs 1, 1A, 2 and 2A derive from a recommendation in the Civil Justice Review (Cm. 394, paras. 201 to 204 inclusive) and represent a substantial change in civil procedure. Previously a writ was valid in the first instance for 12 months, and the court had power to extend the validity of a writ for up to 12 months. The Review Body considered that these periods were “unnecessarily long for all but special cases”. .....

Under para. 2 the period for which the Court may extend the validity of a writ is also reduced to a period not exceeding 4 months, and under this paragraph there is no greater period provided for writs for which leave is required for service out of the jurisdiction. Para. 2A, however, provides that an extension of up to 12 months may be granted where the Court is satisfied that “despite the making of all reasonable efforts, it may be not be possible to serve the writ within 4 months”. This provision serves to cover what the Civil Justice Review (para. 201) referred to as “special cases”, and may be resorted to where, for example, a writ has to be served in some particularly remote parts of the world; it should not be assumed to be of general application.

This rule provides a comprehensive code for the renewal of a writ, and therefore an irregularity in procedure caused by failure to renew a writ under this rule is such a fundamental defect in the proceedings that the wide powers of the Court under O. 2, rr. (1) and (2) to cure non-compliance with the rules ought not to be exercised by treating a writ which has become

invalid for service as though it had been renewed and is therefore valid for service (*Bernstein v. Jackson* [1982] 1 W.L.R. 1982; [1982] 2 All E.R. 806, C.A.)'.

Whilst having the above in mind in the circumstances being considered in these appeals I do not regard the affidavits as having explained that there were efforts to serve the writs. They are self serving in that they only choose to indicate why the writs need not be served until the respondent's matters in Singapore are resolved. The attention of this court has even been drawn to certain oral statements made in the proceedings in Singapore that a writ has been issued to be served on the appellant. This seems to be the only indication of some form of intention to conform with the requirements of O. 6 r. 7 (2) and r. 7 (2A).

### **Issue (iii) : Is O. 1A relevant**

The third issue pertains to the exercise of discretion in invoking O. 1A. Here it is clear that that the learned Judicial Commissioner has taken the position that the non service of the writs constitute a mere irregularity that is curable under O. 1A. It must be stated that this is not on outright power but one related to the exercise of discretion conferred by subsidiary legislation. It is the duty of the court to construe the provisions of the RHC 1980 so as to be harmonious. Neither should the interpretation render other provision redundant. Equally however could it be taken that O. 1A overrides the discretion that has been circumscribed in O. 6 r. 7 (2) and O. 6 r. 7 (2A) in that O. 6 r. 7 (2A) indicates the requirements that must be observed before the exercise of discretion arises. On the same reasoning if the

requirements of O. 6 r. 7 (2A) have not been fulfilled does O. 1A override the former.

O. 1A is again a general declaratory statement which encapsulates an underlying principle that in the dispensation of justice there should not be heedless and rigid observance of technical rules which would not serve the ends of justice itself. I do not believe that the object of one Order in one part of the RHC 1980 could be utilised to defeat the object of introducing O. 6 r. 7 (2A). The following may perhaps be cited:

“In the field of interpretation of statutes the courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should effect. Further it cannot be said that a word or words used in a statute are either unnecessary or superfluous unless there are compelling reasons to say so looking to the scheme of the statute having regard to the object and purpose sought to be achieved by it”.

*NS Bindra : Interpretation of Statutes pg 669*

I do not believe that the aforementioned passage would not apply in respect of subsidiary legislation made under the CJA 1964/Act 91. In this context I would support the exhortatory remark made by the learned judge in **Balakrisnan a/l Varathan & Anor. v. Muniandy a/l Varathan & Anor. [2005] MLJ 380** per Mohd Hishamudin J:

“..... I must remark here that since the introduction of O. 1A and O. 2 r. 3 it has come to my observation that some litigants have the tendency to regard these provisions as a licence to ignore or to treat lightly rules of procedure”.

It is noted here that apart from O. 1A itself there is an even more specific provision as found in O. 3 r. 5 where again the words “as it thinks just” [O. 5 r. 3 (1)] and “the court may extend” [O. 5 r. 3 (2)] are specified. The discretion however as with all discretions must be properly exercised. **Veerasingham v PP [1958] MLJ 78, 79.**

The conduct of the respondent other than alleging that the purpose of the writ was to serve as a protective measure borders on an attempt to circumvent compliance with the actual requirements of O. 6 r. 7 and O. 6 r. 7(A) to preserve its own position or even preclude the application of the limitation period.

With regard to assertion of applications for stay I would agree with the statement that was reiterated by the learned counsel for the appellant that the intended opposing party in litigation should not be left ignorance with a view to enabling certain steps that could be taken.

I have now to address a final question that is the extent to which an appellate court could tamper or disturb the discretion that have been exercised by the judges in the High Court. The judicial proposition that establish principles of appellate interference are found to name a few in **Shanghai Hall v. Town House Hotel Ltd [1967] 1 MLJ 223**, **Vasudevan v. Damodaran & Anor. [1981] 2 MLJ 150** and **Motor Sports International v. Delcont [1996] 2 MLJ 605**. The most apt however underlying the circumstances of these two appeal are the statements of HRH Raja Azlan Shah J (as he then was) in Shanghai Hall’s case (at page 227):

‘As a rule a court of appeal is slow to interfere with the exercise of discretion by the judge below unless there are some special circumstances such as some error of principle or misapprehension of fact on his part or giving undue weight to a particular aspect of the facts. It is sufficient to refer in this connection to Gordon v. Craddock and to quote the words of Willner J:-

“It appears to me that the question what terms ought to be imposed on a defendant as a condition of giving him leave to defend is very much a matter of discretion for the judge. That being so, this court is naturally reluctant to interfere with the exercise of discretion by the judge below unless it can be shown that there has been some error of principle on his part, or that he has in some way misapprehended the facts or has given undue weight to thus or that aspect of the facts” ‘.

Applying the principle to the present appeals I come to the conclusion that there has been an error in the form of a misconceived exercise of discretion. There is an error in not having due regard to the non compliance by the respondent to the requirements of O. 6 r. 7 (2), O. 6 r. 7 (2A) as traced above. In the final analysis the two appeals are therefore to be allowed. The orders therefore are to be as follows:

**In Appeal A Rayuan Sivil No. B-02-738-2006:**

Appeal allowed with costs here and below. The orders of the Senior Assistant Registrar dated 8.06.2001 and 6.12.2001 are to be set aside and consequently the service of the Shah Alam writ be set aside.

**In Appeal B Rayuan Sivil No. W-02-393-2004:**

Appeal allowed with costs here and below. The orders of the Senior Assistant Registrar dated 26.03.2002 and 26.03.2002 are to be set aside. Consequently the service of the Kuala Lumpur writ is to be set aside.

Dated this 28<sup>th</sup> day of August 2008.

**( DATUK HELILIAH BT. MOHD YUSOF )**  
Judge  
Court of Appeal Malaysia.

**RAYUAN CIVIL NO. B-02-738-06**

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**RAYUAN CIVIL NO. W-02-393-2004**

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