

Judgements Without Trial in Civil Proceedings in Malaysia: A Brief Analysis on the Burden of Proof Required

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ABSTRACT

Civil proceedings involve a complex procedure with various interlocutory applications before the matter is set for trial. Some of the interlocutory applications, namely applications to enter judgment in default, to strike out pleading and for summary judgment, may result in the plaintiff obtaining early judgment or disposal of the case without a full trial. Interestingly, these applications require a different burden of proof for the plaintiff to satisfy. This article seeks to explore the burden of proof necessitated in those applications in order to evaluate the likelihood of the plaintiff obtaining judgment without trial. In achieving this objective, the process of civil proceedings in Malaysia is briefly explained. This is followed by an analysis on the burden of proof required in the said applications. It is observed that although judgment in defaults or summary judgment may be entered against the defendant upon the plaintiff's satisfaction of mere procedural requirements, it is equally 'easy' for the defendant to set aside or oppose such judgment or application. A conclusion can be derived that civil procedure in Malaysia allows the defendant a sufficient right or opportunity to have 'his day in court' by placing a low threshold for him set aside judgment in default or oppose summary judgment application. Further, it is also observed that a stringent burden of proof is needed for the plaintiff to be able to strike out the defendant's defence and enter judgment on his behalf. This is, arguably crucial so as to cloth the defendant with the right to a fair trial which includes the right to be heard and present their cases sufficiently.

Keywords: Civil procedure; interlocutory proceedings; burden of proof

INTRODUCTION

Civil procedure can be described as a set of rules that "deals with the formal steps required to be taken to enforce a substantive right in a civil court."¹ These rules are derived from various sources including statutes, rules, case law, practice directions and forms.² The main references to civil procedure in Malaysia comprise of the Rules of Court 2012, Rules of the Court of Appeal 1994 and Rules of the Federal Court 1995. The main objective of civil procedure is to safeguard just, fair and expeditious disposal of civil actions.³ This objective is envisaged in the judgment of the court in *S.A. Andavan v Registrar of Titles, Negeri Sembilan & Ors*⁴ where it was stated that:

"Litigation is governed by the rules of procedure and no one side may take undue advantage over another, by side-stepping any rule and it is the duty of the court, to ensure that parties engage themselves in a fair contest." (at p.221)

In civil proceedings, there are various interlocutory applications that may be filed before the matter is fixed for a full trial that could lead to the plaintiff obtaining early

judgment without having to undergo a trial. These include applications to enter judgment in default, for summary judgment and to strike out pleadings. In this article, several interlocutory applications that may result in judgment entered without trial are selected in order to analyse the burden of proof needed. First, however, the process involved in civil litigation is briefly laid out.

CIVIL PROCEEDINGS IN MALAYSIA: A BRIEF GUIDE INTO THE PROCESS

O. 5, r. 1 of the Rules of Court 2012 (ROC) provides for two modes of commencement of civil proceedings namely, Writ and Originating Summons (OS). The former encompasses proceedings which include a substantial dispute of fact that must be disposed of by a full trial as encapsulated in O.5, r. 2 ROC. The latter, on the other hand, concerns applications made under any written law as provided in O.5, r.3 ROC. In proceedings began by Writ, there are several avenues for the plaintiff to obtain early judgment without having to reach full trial. Firstly, after serving the Writ (and Statement

of Claim), the plaintiff may enter judgment in default of appearance should the defendant fail to enter an appearance within the stipulated time. Similarly, judgment in default of defence is also available for the plaintiff in the event the defendant's statement of defence is not filed and served within time. If the defendant has entered an appearance, then the plaintiff may consider filing an application for summary judgment or he may seek to strike out the defendant's defence on the grounds provided in the ROC. In both applications, judgment may be entered against the defendant without a full trial. These applications are considered in turn in the following section.

JUDGMENTS WITHOUT TRIAL: BURDEN OF PROOF REQUIRED

In this section, several interlocutory applications that may offer the plaintiff a judgment without trial under a claim commenced by Writ are considered.

APPLICATION TO ENTER JUDGMENT IN DEFAULT OF APPEARANCE OR DEFENCE

Under O. 13, r. 4 ROC, the time permitted for entering appearance is 14 days where the Writ is served within Peninsular Malaysia or 21 days for Writ served in Sabah and Sarawak. Failure of the defendant to do so would grant the plaintiff the right to apply for judgment of default of appearance (JID of Appearance) under O. 13 ROC. Similarly, under O. 18, r.2 ROC, the defendant is required to serve his defence within 14 days after the time allocated for entering appearance or after the statement of claim is served on him, whichever is the later. Should the defendant fail to comply with this requirement, the plaintiff may, under O. 19, r. 2-7 ROC apply for judgment in default of defence (JID of Defence). Obtaining judgment in defaults does not require any burden on the plaintiff to prove. So long as the plaintiff may satisfy the procedural requirements stated in O. 13, r. 7 ROC or O. 19, r. 2-7 ROC accordingly, the court will enter judgment in default of appearance or defence for the plaintiff.

Judgment in default of appearance and defence entered under the abovementioned provisions of the ROC may, however, be set

aside on the application of the defendant, under O. 13, r. 5 and O. 19, r. 19 ROC respectively. This application must be made within 30 days after the receipt of the judgment by the defendant (O. 42, r.13 ROC). The tests and burden of proof adopted by the courts in dealing with both applications to set aside JID of Appearance and JID of Defence are nonetheless, similar. In *Bank Bumiputra (M) Bhd. v Majlis Amanah Rakyat*⁵ the Federal Court held:

“It is axiomatic that if the judgment is regular, then it is inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merit.” (at p.24)

Further, in *Cheow Chew Khoon v Abdul Johari*⁶ the court reiterates the principle that an irregular judgment will be set aside as of right. In summary, the court has a discretion to set aside JID but this discretion is normally exercised upon satisfaction of two grounds by the defendant, namely:

1. irregularity of the judgment obtained where any of the procedural rules is not complied with; or
2. there exist defence on the merits.

In *Fira Development Sdn. Bhd. v Goidwin Sdn. Bhd.*⁷ the court elaborated on the burden that the defendant needs to satisfy to show the existence of meritable defence. Simply put, a defence on the merits means “raising only an arguable or triable issue.” The meaning of defence on the merits was further elaborated in several cases. In *Yap Ke Huat & Ors. v Pembangunan Warisan Murni Sejahtera Sdn. Bhd.*⁸ the Court of Appeal stated:

“When the judgment is a regular judgment, this defendant: must show to the court that he has a defence that has some merits of which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence, there is no defence and the application must fail – *Jemuri Serjan CJ (Borneo) in Hasil Bumi Perumahan Sdn. Bhd. & 5 Ors v United Malayan Banking Corp. Bhd.* (Emphasis added.)”

In proving a triable issue or defence on the merits, the courts, according to Choong have

decided that mere denials by the defendant is not sufficient to discharge the burden of proof.⁹ The defendant must provide evidence to prove the existence of defence on the merits.¹⁰ Without proof of a triable defence, the court will not be inclined to exercise its discretion to set aside the JID as illustrated in *Ching Yik Development Sdn. Bhd. & Anor. v Wordware Distributors (M) Sdn. Bhd. & Anor.*¹¹

The case laws discussed above illustrate the burden of proof that the defendant needs to discharge in order to set aside default judgments entered against him for failing to enter an appearance or filing statement of defence. The crucial test is for the defendant to prove that he has defence on the merits if the plaintiff can prove that the service of the Writ and/or Statement of Claim is regular. A similar test or burden of proof is observed in an application for summary judgment under O. 14 ROC.

APPLICATION FOR SUMMARY JUDGMENT

Summary judgment is a procedure that is intended for the plaintiff to obtain judgment expeditiously without a full and lengthy trial. Under O. 14, r.1 (1) ROC, a plaintiff may apply for summary judgment after the defendant has entered appearance, on the ground that the defendant has no defence to the claim as stated in *National Company for Foreign Trade v Kayu Raya Sdn. Bhd.*¹² In *Malayan Insurance (M) Sdn. Bhd. v Asia Hotel Sdn. Bhd.*¹³, the Supreme Court stated:

“The underlying philosophy in the Order 14 provision is to prevent the plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied in cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should be exercised in very clear cases.” (at p.185)

The principle behind an application for summary judgment was reiterated by the Supreme Court in *Bank Negara Malaysia v Mohd. Ismail & Ors.*¹⁴ Here, the court clearly stated that in a summary judgment application, the court must be satisfied that there is no triable issue raised in the defendant’s defence. Although a complete defence is not necessary, there must be a triable issue exhibited. Thus, it is clear from these decisions that for the defendant

to oppose the plaintiff’s application for summary judgment, he must show in his affidavit the existence of a triable issue that must be determined in a full trial. This condition is also stated in O. 14, r. 3 ROC that clearly provides, *inter alia*:

“Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim..., that there is an issue or question in dispute which ought to be tried or that there ought for some other reason be a trial of that claim...”

However, it is crucial to note that the burden to prove the existence of a triable issue is placed on the defendant. This proposition was emphasised by the Federal Court in *Cempaka Finance Bhd. v Ho Lai Ying & Anor*¹⁵. In this case, it was held that the Court of Appeal has erred in law when it placed the burden of proof on the plaintiff to prove his case in an O.14 application. The correct principle, according to the Federal Court is for the plaintiff to establish these conditions:

“that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent’s belief that there is no defence to the claim...Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite.”

The meaning of ‘triable issues’ has been defined by the courts in several instances. In *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim*,¹⁶ the plaintiff alleged that the defendant has trespassed and wrongfully erected premises on the plaintiff’s land. This allegation was denied by the defendant in his statement of defence and in his affidavit opposing the plaintiff’s application for summary judgment. In allowing the plaintiff’s application, the High Court opined that in this case, the “triability of the issue depends upon evidence as opposed to law.” The court further held that facts deposed in the affidavits are sufficient to resolve the claim by quoting the judgment in *Banque de Paris v de Naray*¹⁷:

“It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which

is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence."

The Court of Appeal in *Maju Puncakbumi Sdn. Bhd. v Ch'Ng Han Keong*¹⁸ has also considered the meaning of triable issues by referring to its previous decisions such as *Bank Negara Malaysia v Mohd. Ismail & Ors.*¹⁹ Quoting Mohamed Azmi SCJ at page 408:

"Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statement by the same deponent or is inherently improbable in itself, then the judge has the duty to reject such assertion or denial, thereby rendering the issue as not triable."

Hence, the Court of Appeal affirmed the High Court's decision that the defendant's defence of unsuitability of the representative action brought by the plaintiff, the validity of the notice of demand and the legality of the Option Agreement as well as the suitability of the claim for aggravated damages does not qualify as triable issues. On the contrary, in a High Court decision in *Malayan Banking Berhad v Sun Star Communications Sdn. Bhd. & Ors*²⁰ the respondent disputed the main core of the appellant's claim namely, the existence of the Letter of Offer for the loan facility, the Loan Facility Agreement, the Letters of Guarantee, the Letter of Demand and the certificate of indebtedness exhibited in the appellant's affidavits for summary judgment. The Court held that "the duty to disprove the amount claimed, which at that instance is shifted to the Defendants, can only be discharged by the Defendants at a full trial and through affidavit evidence." Hence, the Court ordered for a full trial to enable the respondent to produce evidence to challenge the value of the certificate of indebtedness. In construing the facts alleged as triable issues, the Federal Court has, in *United Malayan Banking Corpn. Bhd. v Palm & Vegetable Oils (M) Sdn. Bhd.*²¹ explained that it is not the duty of the courts to examine the facts alleged and decide on its merit. The court need only determine whether there are issues

or questions in dispute that must be tried as "summary judgment is only given in plain and obvious cases."

Thus far, the similarities of the burden of proof required in an application to set aside a judgment in default and summary judgment is observed. Both applications mandate the defendant seeking to oppose such applications, to prove the existence of defence on the merits or triable issues. It is, however, not for the court, this stage of the proceeding to evaluate and determine the acceptability or strength of the defence proposed. The defendant needs to simply show to the court that there is a prima facie defence to the plaintiff's claim that can only be properly adjudicated in a full trial, and not merely through affidavits.

APPLICATION TO STRIKE OUT PLEADINGS

Another option for the plaintiff to obtain early judgment without full trial is by filing an application to strike out the defendant's defence. This application may be made by either party under O. 18, r. 19 ROC on the grounds stated therein, namely the pleading, (a) discloses no reasonable cause of action or defence; (b) is scandalous, frivolous and vexatious; (c) may prejudice, embarrass or delay the fair trial of the action; or (d) is otherwise an abuse of the process of the court. Judgment may be entered against the defendant if the plaintiff is successful in his application to strike out the defendant's defence. In an application to strike out a pleading, the Supreme Court in *Bandar Builders Sdn. Bhd. v United Malayan Banking Corp.*²² has enunciated the following principle:

"The principles upon which the court acts in exercising its power under any of the 4 limbs of O 18 r 19 RHC 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable.' It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or defence."

The court continued to emphasise that "so long as the pleadings disclosed some cause of action or raised some questions fit to be decided by a judge, the mere fact that the case was weak and not likely to succeed at the trial was no

grounds for the pleading to be struck out.” In *Bandar Builders Sdn. Bhd.*, the court found that the counter-claim and the defence to counter-claim contained several issues that merit consideration from the court. This principle was restated by the Federal Court in *Seruan Gemilang Sdn. Bhd. v Kerajaan Negeri Pahang*²³ and the Court of Appeal in *Tan Poh Yee v Tan Boon Thien & other appeals*.²⁴ The Federal Court in the former case reaffirmed the principle enunciated in *Bandar Builder’s* case when it stated that:

“The ‘obviously unsustainable’ test as adopted in *Bandar Builder*, would ensure fair trial and access to the courts to litigants. The respondents (the plaintiffs) should be given their day in court to prove their case. The court should not strike out an action purely or for simple reason that it is ‘unsustainable’. The degree of ‘unsustainability’ must be higher, i.e. it must be ‘obviously unsustainable’ before the action can be struck out summarily. The court should not pull its shutter down and close its door to the respondents by striking out their action summarily.”

Hence, it is observed that the principles or burden of proof required in a summary judgment application discussed earlier and an application

to strike out are different even though both may result in early judgment. A plaintiff who succeeds in obtaining summary judgment may not, however, succeed to strike out the

defendant’s defence. An application to strike out pleadings requires a strict burden of proof and is only granted in plain and

obvious cases where the defence is obviously unsustainable. This is contrasted with summary judgment applications where the defendant needs only to prove the existence of an issue that must be determined in a full trial.

ANALYSIS AND CONCLUSION

This paper has undertaken the task of analysing the different burden of proof required in interlocutory applications that may result in early judgment without trial. These applications are applications to enter judgment in default and applications to set aside a judgment in default, applications for summary judgment and applications to strike out pleadings. To recapitulate, Table 1 is produced:

TABLE 3.1

Application	Burden of Proof
Judgment in default and to set aside a judgment in default under O.13, r.5 or O.19, r.2 ROC	Defendant to prove defence on the merits (to set aside JID)
For summary judgment under O.14 ROC	Defendant to prove a triable issue to oppose summary judgment application
To strike out pleadings under O.18, r. 19 ROC	Plaintiff to prove that the defence is obviously unsustainable.

To obtain a judgment in default of appearance or defence and summary judgment under O.14 ROC, the plaintiff only needs to satisfy procedural requirements laid out in Rules of Court 2012. However, judgments in default may be set aside by defendant by merely showing to the court that he has defence on the merits. Similarly, it is not difficult for the defendant to defeat the plaintiff’s application for summary judgment under O. 14 ROC as the defendant is only required to prove the existence of a triable issue. A triable issue means an issue that can only be adjudicated in a trial by calling witnesses and not through affidavits. On the contrary, for the plaintiff to succeed in

his application to strike out the defendant’s defence and obtain an early judgment, a stringent burden of proof is placed on him. Here, the plaintiff must be able to prove that the defendant’s defence is obviously unsustainable.

The burden of proof placed in all these applications is arguably intended to provide the defendant a fair chance to have his defence heard and adjudicated in a full trial before judgment is entered against him. As rightly put by Harvey, among the elements of a fair trial in civil proceedings is that parties are provided with right to be heard and a reasonable opportunity to present their case to the court.²⁵ If judgments may be easily entered

against the defendant at the interlocutory stage without a full trial, the defendant's right to a fair trial may be jeopardised.

NOTES

- ¹ Abu Backer, H.S. 2019. *Janab's Key to Civil Procedure*. 6th ed. Janab (M) Sdn. Bhd., Kuala Lumpur.
- ² Abu Backer, H.S. 2019. *Janab's Key to Civil Procedure*. 6th ed. Janab (M) Sdn. Bhd., Kuala Lumpur.
- ³ Abu Backer, H.S. 2019. *Janab's Key to Civil Procedure*. 6th ed. Janab (M) Sdn. Bhd., Kuala Lumpur.
- ⁴ [1977] 2 MLJ 220
- ⁵ [1979] 1 MLJ 23
- ⁶ [1995] 1 MLJ 457
- ⁷ [1989] 1 MLJ 40
- ⁸ [2008] 5 MLJ 112
- ⁹ Choong Yeow Choy. 2006. *Default Judgment Principles and Procedure*. Lexis Nexis. Kuala Lumpur.
- ¹⁰ Wong Kim Fatt. 'Setting Aside Judgment in Defaults Revisited' [2011] 4 MLJ Ixxxii.
- ¹¹ [2012] 10 MLJ 611
- ¹² [1984] 2 MLJ 300
- ¹³ [1987] 2 MLJ 183
- ¹⁴ [1992] 1 MLJ 400
- ¹⁵ [2006] 2 MLJ 685
- ¹⁶ [1985] 2 MLJ 225
- ¹⁷ [1984] 1 Lloyd's Rep. 23
- ¹⁸ [2019] MLJU 1290
- ¹⁹ [1992] 1 MLJ 400
- ²⁰ [2019] MLJU 1547
- ²¹ [1983] MLJ 206
- ²² [1993] 3 MLJ 36
- ²³ [2016] 3 MLJ 1
- ²⁴ [2017] 3 MLJ 244
- ²⁵ Harvey A.K. 2018. *Right to a Fair Trial in Civil Law Cases in Grote, Lachenmann and Wolfrom* (eds.) Max Planck Encyclopaedia of Comparative Constitutional Law, OUP.

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