

BETWEEN

SUPARNI
(Brunei Green IC No. 51-241605)

Appellant/ Plaintiff

AND

METROBINA & PARTNERS SDN BHD
SEKUNTUM ZAHRAH SDN BHD
TIONG YIN KAY

Respondent/ Defendant
Third Party
Fourth Party

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 14 of 2024)

Steven Chong, C.J., Lunn and Sir Peter Gross JJAs

Date of Hearing: 25 October, 2025.

Date of Judgment: 20 January, 2026.

Headnote: Civil: Appeal from Judge's ruling refusing an appeal from Registrar's ruling that action deemed automatically discontinued, pursuant to O.21, r.2(6) RSC, and refusing reinstatement under O.21, r.2(10) RSC, dismissed.

Costs: Appellant to pay Respondent's costs of appeal, to be taxed if not agreed; lower court Orders that Appellant pay Respondent's costs upheld.

- *Court of Appeal 's decision in Ak Muhd Abdul Hafiz bin Pg. Zainal v Awg Lufti Bin Haji Awang Lamat, Civil Appeal No. 17 of 2024 ("Abdul Hafiz") followed I; no basis for distinguishing it or departing from it.*
- *Policy considerations aimed at combating delay underlying the rule in O.21, r.2(6) and telling, generally, against the disapplication of the rule, absent a stay under O.21, r.2(7); safety valves built into the system.*
- *Setting a matter down for trial not to be equated with the matter being trial ready; the PTC here was not akin to a stay; the fact that a PTC had commenced is (of itself) neither here nor there.*

- *Difficulties of preserving an action overstated and not a reason for disapplying O.21, r.2(6); diligently conducted and well-run litigation ought not to result in gaps of anything like one year or more between steps in the proceedings; if need be, O.21, r.2(8) provides a simple and obvious route for seeking to preserve an action; O.3, r.5 left for final determination in a case where resolution of the complexities relating to its application matter to the outcome.*
- *Court of Appeal proceeded on the assumption that it has power to depart from its own previous decisions in limited circumstances.*
- *Application of 3-limb test in Moguntia-Est Epices SA v Sea Hawk Freight Pte Ltd [2004] 4 SLR (R) 429 (“Moguntia”) adopted in Abdul Hafiz; Appellant satisfied first limb but failed second limb (and would have failed third limb had that limb arisen for decision); no proper basis to interfere with discretionary decisions of lower Courts; Court of Appeal in any event agreeing with those decisions.*

Mr Vincent Joseph assisted by Awang Ahmad Tarmizi@Awg Mohd Faiz Bin Hj Awg Jokeple (M/S Fortis Law) for the Appellant/Plaintiff.

Mr Brandon Chin Wei Chun (M/S Yusof Halim & Partners) assisted by Ms Nabilah Bte Zainal Abidin for the Respondent/Defendant, Third Party and Fourth Party.

Cases cited:

Ak Muhd Abdul Hafiz bin Pg. Zainal v Awg Lufti Bin Haji Awang Lamat, Civil Appeal No. 17 of 2024

Malayan Banking Berhad v Maxwell Co Sdn Berhad & Anor (HCCS No. 107 of 2005)

Moguntia-Est Epices SA v Sea Hawk Freight Pte Ltd [2004] 4 SLR (R) 429

Haji Mahmod Bin Haji Yakop v Siti Ratna Sari Binti Abd Rahman, Court of Appeal Brunei Darussalam (Civil Appeal No. 5 of 2024)

Sheikh Abul v Kwansoo (B) SDN BHD Daelim Industrial Co. Ltd (Intermediate Court of Brunei Darussalam) (Civil Suit No. 19 of 2020)

JUDGMENT

Sir Peter Gross, J.A.:

INTRODUCTION

1. This is another case concerning automatic discontinuance of an action under Order 21, rule 2(6) of the Rules of the Supreme Court (“O.21, r.2(6), RSC”), together with the approach to reinstatement of an action thus discontinued, under O.21, r. 2(10), RSC. Recently, this Court dealt with the same subject-matter in *Ak Muhd Abdul Hafiz bin Pg. Zainal v Awg Lufti Bin Haji Awang Lamat*, Civil Appeal No. 17 of 2024 (“*Abdul Hafiz*”). As will be seen, amongst the submissions advanced by the Appellant in the present case are that *Abdul Hafiz* is to be distinguished, alternatively that we should depart from *Abdul Hafiz* on the ground that it was wrongly decided.
2. We at once express our thanks to Mr Joseph, who appeared for the Appellant/Plaintiff (“the Appellant”), and Mr Chin, who appeared for the Respondent/Defendant (“the Respondent”), for their excellent submissions, both written and oral.
3. The Appellant appeals from the decision of Muhammed Faisal Bin PDJLD DSP Haji Kefli, J.C. (“the Judge”) dated 31 August 2024 (“the Judgment”), upholding the Ruling dated 27 February 2024 of Senior Registrar Hjh Noor Amalina Binti Dato Paduka Hj Alaihuddin (“the Registrar” and “the Registrar’s Ruling”) that the action should be deemed discontinued under O.21, r.2(6) and refusing reinstatement under O.21, r.2(10).
4. It follows that two principal Issues arise:
 - (I) The Application of the deemed discontinuance regime under O.21, r.2(6), RSC (“*Issue I: Deemed discontinuance*”);
 - (II) The question of reinstatement of the action under O.21, r.2(10), RSC (“*Issue II: Reinstatement*”).

THE FACTS

5. The essential facts can be briefly outlined and are largely taken from the helpful chronologies prepared by the parties.
6. The underlying dispute concerns a personal injury claim dating back to an incident which occurred in 2015. The Writ and Statement of Claim were filed on 12 April 2018. The Respondent filed its Defence on 30 July 2018, contesting both liability and quantum. On 17 October 2018, the Appellant filed its Request for setting down the action for trial. On 19 December 2018, the first Pre-Trial Conference (“PTC”) was held. On 28 January 2020, the Respondent served on the Appellant the medico/legal report prepared by the Respondent’s medical expert.
7. On 27 July 2020, the eighth PTC was held. At the conclusion of the 27 July 2020 PTC (“the 27 July 2020 PTC”), the Registrar said this:

“Pending result of counter offer. Should counter offer not be accepted, re-examination of plaintiff to be conducted. Pending re-opening of borders. No further PTCs for 2020. For parties to write in by 2021.”
8. In the event, 27 July 2020 became the “*trigger date*” as that term is understood in the authorities. Accordingly, the “*guillotine date*” was 26 July 2021.
9. Between the trigger date and the guillotine date, the only activity concerned Third Party proceedings.
10. On 6 December 2022, a PTC took place where it was decided that the matter had been deemed discontinued.
11. On 26 October 2023, the Appellant filed an application to prevent the matter being deemed automatically discontinued and for reinstatement (if it had been).

THE RELEVANT RSC

12.O.21, r.2 provides as follows:

“(6) Subject to paragraph (7), if no party to an action or cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (8), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.

(7) Paragraph (6) does not apply where the action, cause or matter has been stayed pursuant to an order of court.

(8) The Court may, on an application by any party made before the one year referred to in paragraph (6) has elapsed, extend the time to such extent it may think fit.

...

(10) Where an action, cause or matter has been discontinued under paragraph...(6), the Court may, on application, reinstate the action, cause or matter and allow it to proceed on such terms as it thinks just.”

13.O.3, r.5, RSC is in these terms:

“Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month’s notice of his intention to proceed...

A summons on which no order was made is not a proceeding for the purpose of this rule.”

THE REGISTRAR’S RULING (27 February 2024)

14. Having highlighted the trigger and guillotine dates, the Registrar noted (at [6]) the submission of the Appellant that the action ought not to be automatically discontinued as the case had been set down for trial since 17 October 2018 and that trial dates should be fixed by the Court; no further step was required in order to proceed to trial.

15. The Registrar at once said this (at [7]):

“I must emphasise that the policy consideration behind the rule for deemed discontinuance is clear – it is a case management measure to ensure that actions filed in court are proceeded with diligently, and that those that are not will be deemed to be discontinued. ...while it is incumbent on the court to fix trial dates, parties are still able to take a step or proceeding after seeking trial dates by filing a notice of intention to proceed under Order 3, rule 5 of the RSC...”

The Registrar went on to say (at [8]) that O.3, r.5 complemented O.21:

“...in that it ensures that parties still actively want the matter to proceed for trial despite trial dates not yet being fixed and that they have not settled or abandoned the action before it is deemed discontinued.”

In this case (*ibid*):

“...parties were directed to write in for a further PTC in 2021 pending the result of the Plaintiff’s counter offer by the Defendant and whether a re-examination of the Plaintiff needed to be conducted. The Plaintiff still could have taken a step by writing to the court for a further PTC as directed or apply to preserve the action under Order 21 Rule 2(8) or filed in the notice of intention to proceed under Order 3, rule 5 but has failed to do any.”

Accordingly, the action was deemed discontinued on 27 July 2021.

16. Turning to reinstatement (at [9] and following), the Registrar had regard to the principal authorities (subsequently) discussed in *Abdul Hafiz*, namely, *Malayan Banking Berhad v Maxwell Co Sdn Berhad & Anor* (HCCS No. 107 of 2005) (“*Malayan Banking*”) and the decision of the Singapore High Court, *Moguntia-Est Epices SA v Sea Hawk Freight Pte Ltd* [2004] 4 SLR (R) 429 (“*Moguntia*”), holding that an order reinstating a claim deemed to have been discontinued should be an exception rather than the rule..

17. The Registrar referred to the now familiar 3-limb test in *Moguntia*, which it is convenient to set out here:

“...the court should consider whether the plaintiff has satisfied the court that:

- a. He is innocent of any significant failure to conduct the case with expedition prior to the trigger date, having regard to the particular features of the case;
- b. In all the circumstances, his failure to take any step in the action since the trigger date (including his failure to apply for an extension of time) is excusable i.e. should be forgiven; and
- c. The balance of justice indicates that the action should be reinstated.”

The three limbs were to be considered and satisfied sequentially, so that a failure by a plaintiff to satisfy the first limb would be sufficient to dismiss the application for reinstatement without the need to consider the second limb; so too, *mutatis mutandis*, as regards the second and third limbs.

18. In the present case, the Registrar held (at [12]) that the Appellant had acted with reasonable diligence in the conduct of the case prior to the trigger date and had therefore satisfied the first limb.

19. As to the second limb, the Registrar focused on the period between the trigger and guillotine dates and whether she was satisfied that the Appellant’s failure to take any step during this period of time was excusable.

20. The Appellant argued (at [14]) that he believed the proceeding was still alive pending the fixing of a new PTC and/or trial dates, there being no other procedural application that he was required to take for the matter to proceed to trial. The Appellant also relied on the onset of the COVID-19 pandemic, given that the Appellant was in Indonesia and unable to travel and the medical expert was unwilling to conduct non-urgent medical examinations.

21. The Registrar rejected these submissions, holding as follows:

“15. Again, whilst I do agree that it is incumbent on the courts to fix trial dates, the Rules of the Supreme Court give to the Plaintiff the initiative in bringing his action on for trial and it is inherent in an adversarial system that relies on parties...to take whatever procedural steps appear to them to be expedient to advance their case and proceed to trial. The plaintiff could still have applied for an extension of time under Order 21 Rule 2(8) ...or written in to court as directed seeking a further PTC date ...This could have still been done as the courts were still running during the COVID-19 pandemic with online filings continuing to be accepted and PTCs conducted on Zoom.

16. As the Plaintiff is asking the court to exercise its discretion in their favour, they must furnish me with sufficient facts on which to do so and unfortunately there is nothing in their affidavit which makes reference as to why they did not apply to preserve the action under Order 21 Rule 2(8) nor have they provided a cogent explanation as to why the court’s direction to seek another PTC date in 2021 was not complied with.”

22. Accordingly (at [17]), the Appellant had failed to surmount the second limb and there was no need to consider the third limb. The action was therefore deemed discontinued and was not reinstated.

THE JUDGMENT OF THE JUDGE (31 August 2024)

23. The Appellant appealed to the Judge, arguing that the action should be reinstated *“...on the grounds that no necessary steps in the proceedings had been missed, particularly in light of ongoing...[PTCs]...”*. In a concise judgment, the Judge dismissed the appeal.

24. The Judge (at p.2) had well in mind that there had been significant delays, *“many of which have been attributed to various external factors, including the COVID-19 pandemic, which caused disruptions in court schedules and access to necessary resources.”* Regarding the PTC held on the trigger date, the Judge said this (*ibid*):

“At this PTC, it was noted that no further PTC would be fixed pending the defendant’s decision on a counter-offer and the re-examination of the plaintiff after the reopening of borders. Despite these directions, no further steps were taken by the plaintiff to advance the proceedings, leading to a period of inactivity.”

25.As to O.21, r.2(6), the Judge observed (at pp. 2-3) that it was designed “to prevent undue delays in litigation and to ensure that cases progress efficiently through the court system...”; there was a need for “proactive management of litigation by the parties, particularly by the plaintiff who bears the burden of advancing the case, but not to the extent of litigants to frivolously file applications to extend time.”

26.After reviewing the parties’ submissions and the principal authorities (including *Malayan Banking* and *Moguntia*), the Judge held (at p.5) that the action was deemed discontinued by the guillotine date:

“The plaintiff could have written to the court for a further PTC or applied to preserve the action but failed to do so. The date of automatic discontinuance ...[would]...thus be 27 July 2021 due to no step or proceeding being taken.”

27.As to reinstatement (*ibid*), the Judge agreed with the Registrar as to the Appellant satisfying the first limb. The Appellant had, however, failed to meet the second limb:

“Specifically, he has not demonstrated that his failure to take any steps is excusable. Although the challenges presented by the pandemic are acknowledged, they do not excuse the plaintiff from complying with the necessary procedural requirements.”

28.The Judge therefore dismissed the Appellant’s application for reinstatement and awarded costs to the Respondent, to be taxed if not agreed. From that decision, the Appellant appealed to this Court.

THE RIVAL CASES ON THE APPEAL

29.(A) *The case for the Appellant*: For the Appellant, Mr Joseph contended that the Judge had fallen into error. Mr Joseph's submissions were grouped under four principal headings:

(1) O.21,r.2(6) was inapplicable because there was nothing further for the Appellant to do under the RSC ("O.21, r.2(6) was inapplicable").

(2) Insofar as *Abdul Hafiz* held otherwise, it was distinguishable ("*Abdul Hafiz is distinguishable*").

(3) If need be, this Court should depart from its decision in *Abdul Hafiz*, because it was wrongly decided ("*Abdul Hafiz was wrongly decided*").

(4) If wrong thus far, so that the action was deemed discontinued, it should be reinstated ("*The action should be reinstated*").

30.(1) *O.21, r.2(6) was inapplicable*: Mr Joseph's starting point was that the Rule referred only to a Court application or documents to be filed in Court. Given the draconian consequences of this deeming provision, it was to be strictly construed. The wording therefore excluded correspondence with the Court or with the parties. In any event, it was unclear whether the wording used at the conclusion of the 27 July 2020 PTC was directory or merely advisory. Be that as it may, the intention could not have been that frivolous applications must be filed. There was no need to resort to a notice under O.3, r.5 RSC, because the PTC was continuing. If, however, it was necessary to resort to O.3, r.5, a notice thereunder could not save an action from being discontinued.

31. For these reasons, the Rule did not apply to all cases before the Court; it was inapplicable, or generally inapplicable, in cases which had been set down for trial. Fixing a trial date was a matter for the Court as was fixing the dates for PTCs (*Rebuttal submissions, para. 5.2*). From the moment case management was conducted, "*the Court dictates the tempo of litigation*": (*Rebuttal submissions, para. 6.3*). Once an action had been set down for trial the progress of the case was the joint responsibility of the

Court, the plaintiff and the defendant; it was disproportionate and unjust for the entire responsibility (and draconian consequences) to rest on the plaintiff. There might be exceptions where interlocutory matters remained to be dealt with after setting down but, if so, it was necessary to identify in which respect/s the Appellant had breached the RSC. A party was not to be penalised when no more was required from him under the RSC.

32. Furthermore, an adjourned PTC was akin to a stay and, on that ground too, the Rule did not apply.

33.(2) *Abdul Hafiz is distinguishable*: Under this heading, the essence of Mr Joseph's submission was that if the Appellant was not in breach of any of the rules of the RSC and the case was under case management, r.2(6) was inapplicable. The case was not dormant, and nothing was required from the Appellant under the Rules. The present matter had been well advanced in terms of discovery and the preparation of medical reports; the Third and Fourth Party proceedings had caused delays. The facts of *Abdul Hafiz* were or may have been different and the decision was distinguishable.

34.(3) *Abdul Hafiz was wrongly decided*: If wrong thus far and if *Abdul Hafiz* could not be distinguished then Mr Joseph respectfully invited us to depart from that decision on the ground that it had been wrongly decided. In summary, he submitted that the decision in *Abdul Hafiz* had not:

- (i) Drawn a distinction between the role of the plaintiff pre- and post-setting down a case for trial and had not evaluated the respective roles of the parties once an action had been set down and a PTC had commenced. Further, *Abdul Hafiz* may have inadvertently strayed into readiness for trial, which did not form part of O.21, r. 2(6).
- (ii) Identified with which RSC the plaintiff had failed to comply. Additionally, *Abdul Hafiz* had not identified what amounted to steps in the proceedings; in this latter regard, Mr Joseph relied on para. 4 of the (Brunei Darussalam) *FAQ - Rules of Supreme Court (Amendment) Rules 2017* ("the 2017 FAQ"), which provides as follows:

“What action will be deemed sufficient to keep the case alive?

...

Under Order 21 rule 6, parties must have taken a ‘step or proceeding’ which will appear in the court’s records. ...only a court event will constitute such ‘step or proceeding’. For example, the filing of a Summons in Chamber would constitute a ‘step or proceeding’. Writing a letter to court, unless it is specifically required under the RSC, would not constitute a ‘step or proceeding’.”

- (iii) Addressed the status of proceedings once a PTC had commenced and not completed.
- (iv) Demonstrated that O.3, r.5 and O.21, r.2(8) were relevant or helpful in the context of automatic discontinuance.

35.(4) *The action should be reinstated:* Permeating his submissions, Mr Joseph emphasised that rules of procedure were servants of Justice not masters; depriving a litigant of his day in court was draconian. Proportionality was of the first importance.

36. Mr Joseph contended that if his submissions (outlined above) did not serve to preclude automatic discontinuance, they were nonetheless relevant to reinstatement. In this regard, the Court, he submitted, had an unfettered discretion. Any failures on the part of the Appellant (or his legal advisers) were *“due to the havoc that the unprecedented COVID-19 pandemic wreaked on the running of law offices and legal files”* (Appellant’s Submissions, para. 20) and/or a genuine belief that no applications were required after a matter had been set down for trial. For all these reasons, the Judge was wrong to hold that the Appellant had failed to satisfy the (*Moguntia*) second limb.

37. In all the circumstances and for the reasons already set out, the balance of justice under the 3rd limb favoured reinstatement. Moreover, the Appellant would not be able to commence a fresh action as the limitation period had expired.

38. Finally, albeit without citation of authority, Mr Joseph submitted that the *Moguntia* test for reinstatement (involving the 3 limbs, considered sequentially) was now more rigid than the current test in English law. The position in English law (as submitted by Mr Joseph) was to consider at Stage 1 the seriousness and significance of the failure; at Stage 2, to consider why the default occurred; and at Stage 3 to evaluate all the circumstances of the case to enable the Court to deal justly with the application for relief from sanction.

39.(B) *The case for the Respondent:* For the Respondent, Mr Chin's submissions were straightforwardly advanced under two principal headings:

- (1) Did O. 21., r.2(6) apply notwithstanding setting down for trial (*Issue 1: "The Setting Down Issue"*);
- (2) If so, did the Judge err in refusing reinstatement under O.21, r.10? (*Issue 2: "The Reinstatement Issue"*).

Mr Chin submitted that the answer to (his) Issue 1 was "Yes" and the answer to Issue 2 was "No".

40. *Issue 1: The Setting Down Issue:* In Mr Chin's submission, "*Setting a matter down for trial does not immunise it from discontinuance*". PTC orders from 2018 - 2020 showed outstanding steps to be taken by the parties. The Appellant was wrongly seeking to shift the case progression responsibility onto the Court. The Appellant's submissions as to whether letters and/or correspondence "counted" as a step in the proceedings were beside the point; formal steps under O.21, r.2(8) and/or O.3, r.5 were available but were not taken. There was no stay order; to the contrary, the concluding direction in the 27 July 2020 was "*the antithesis of a stay; it expects activity from the parties.*" At that stage, the case was clearly not ready for trial. The Third/Fourth party proceedings were neither here nor there.

41. In any event, Issue 1 has already been decided by *Abdul Hafiz*. O.21, r.2(6) made no exception for actions which had been "set down". The Appellant's "*nostalgic invocation of pre-1999 practice*" could not override the law as it now stood. The Appellant had mis-characterised the position as between

the parties; for obvious reasons, namely that the plaintiff typically wanted relief from the Court, the automatic discontinuance provision likely affected plaintiffs more than defendants; there was nothing unfair or “draconian” in this. The Appellant had argued that *Abdul Hafiz* had failed to define the meaning of “ready for trial” but the judgment was unambiguous: “Readiness must mean resolving all pre-trial issues, not just perfunctory setting down”. *Abdul Hafiz* had grappled with the roles of the parties and steps required under the rules “head-on”; the Appellant’s disagreement “is not with any analytical gap in *Abdul Hafiz*, but with its outcome.”

42. As to this Court departing from *Abdul Hafiz*, the principle in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 remained firmly established.

“The Court of Appeal should only depart from its own prior decisions in strictly limited circumstances. Namely, where there are conflicting authorities, a later inconsistent decision of a higher court, or where a prior decision was made per incuriam...”

Mr Chin submitted that none of those exceptions arose here.

43. *Issue 2: The Reinstatement Issue:* The Respondent did not contest the conclusion of the Registrar and the Judge that the Appellant had satisfied the first *Moguntia* limb. The second limb was, however, the crux of the case and both the Registrar and the Judge held, rightly, that the Appellant “fell woefully short of this requirement”. COVID-19 did not furnish the Appellant with a blanket excuse. The Appellant’s submission that the automatic discontinuance regime was “draconian” was misplaced; the law did not operate without safety valves: “Proportionality and exceptionality are both baked into Order 3 Rule 5 and Order 21 Rule 2(10). The Appellant did none of those things.” If the 3rd limb was reached, the balance of justice told strongly against reinstatement. It was implausible that the delay had caused no real prejudice to the Respondent, bearing in mind that this was a personal injury claim arising from an incident that occurred in 2015 – which the Appellant was seeking to reinstate in 2025 and beyond. Prejudice to the Respondent far outweighed any justification for reinstatement. The

Appellant's submissions overlooked the fact that delay had long been recognised as the enemy of justice.

44. We turn to the principal Issues.

ISSUE I: DEEMED DISCONTINUANCE

45. We are content to address this Issue adapting the principal headings utilised by Mr Joseph, namely:

(A) Whether O.21, r.2(6) was inapplicable?

(B) Whether *Abdul Hafiz* is distinguishable?

(C) Whether this Court should depart from *Abdul Hafiz*?

We deal with the matters argued under these headings separately but there is an unavoidable degree of overlap between them.

46.(A) *Whether O.21, r.2(6) was inapplicable?* We have reached the clear conclusion that there is no good reason for O.21, r.2(6) to be inapplicable in this case. Our reasons follow.

47.(1) *The scourge of delay:* In keeping with a developing common law trend internationally (and as highlighted by the Registrar and the Judge), *Abdul Hafiz* gives effect to a policy decision to discourage delay: see, *passim*, and, for example [16(2)]. As this Court observed in *Haji Mahmud Bin Haji Yakop v Siti Ratna Sari Binti Abd Rahman*, Court of Appeal Brunei Darussalam (Civil Appeal No. 5 of 2024) ("*Haji Mahmud*"), at [12]:

"...Delay is the bugbear of court proceedings and can distort memories and attitudes thus jeopardising a just outcome."

To achieve this policy objective, the decision in *Abdul Hafiz* holds that the deemed discontinuance rule (O.21, r.2(6)) is of general but not invariable application. It does not apply where the action, cause or matter has been stayed pursuant to an order of the Court (O.21, r.2(7)). While individual cases are of course fact specific, we said this in *Abdul Hafiz*:

“It follows both from the structure of O.21, r.2 and from the case management policy underpinning the rule, that it will generally apply otherwise, at least unless good reason is demonstrated for disapplying it.”

(At [16(3)]) and:

“This does not mean that there are never circumstances (apart from a stay) where O.21, r.2(6) might not apply – but there needs to be good reason to draw such an inference where no stay is in place. Moreover, too ready a disapplication of the automatic discontinuance rule would undermine the policy underpinning the rule...”

(At [48] and see too at [49])

48. The consequences of deemed discontinuance are indeed grave, whether or not they justify the description “*draconian*”. That they fall on the plaintiff is inevitable, given the parties’ typical roles in adversarial litigation. That said, delay (which deemed discontinuance is designed to counter) is itself a serious impediment to justice; moreover, safety valves are built into the system – both in preventing deemed discontinuance from arising and permitting argument on the restoration of actions which have been discontinued.

49.(2) *Setting down for trial and readiness for trial*: Underlying the Appellant’s case in *Abdul Hafiz* (and here) was the argument that once a case had been set down for trial responsibility for case progression rested on the Court or on all the parties, therefore it was unfair for the grave consequences of discontinuance to be visited on the plaintiff alone. This argument was considered and emphatically rejected in *Abdul Hafiz*, the Court saying (at [16(4)]):

“...while it is incumbent on the Court to fix trial dates, it is and remains the duty of the parties to do what can be done to make progress with the litigation in accordance with the Rules of Court. The responsibility of the Court to fix trial dates does not absolve the parties from this duty; there should be no misunderstanding in this regard. In any event, it is only when all pre-trial issues are resolved (so that the matter is ready for trial) that

trial dates will be allocated. Merely setting down a matter for trial does not equate to the matter being ready for trial.”

See too, at [47].

50. On the facts in *Abdul Hafiz*, the matter had already been set down for trial: see, at [15]. The Court, in terms, rejected this feature as a reason for displacing the automatic discontinuance rule: [45], observing (at [46])

“...the central fallacy in the Appellant’s submissions is the attempt to equate setting the matter down for trial with the matter being trial ready.”

We repeat and endorse those observations here.

51. It follows that the relevant distinction was not between cases which had or had not been set down for trial but between cases which were or were not *ready for trial*. The meaning of *ready for trial* is plain: all pre-trial issues have been resolved. It is at that stage when with nothing more for the plaintiff or the parties to do, a party should not be penalised (depending on the precise circumstances of the individual case) for a failure by the court to fix trial dates: *Abdul Hafiz*, at [14]. As Mr Chin submitted, and we agree: *“Readiness must mean resolving all pre-trial issues, not just perfunctory setting down.”*

52. That the present case was not ready for trial at the time of setting down is apparent, without more, from the fact that 8 PTCs took place between setting down and the trigger date.

53.(3) *The 27 July 2020 PTC was not akin to a stay:* 0.21, r.2(7) expressly provides that 0.21, r.2(6) does not apply where the action has been stayed pursuant to an order of the Court. Seeking to capitalise on this provision, Mr Joseph submitted that the 27 July 2020 PTC was akin to a stay. We reject this submission. To the contrary, as Mr Chin submitted, its concluding Direction was *“the antithesis of a stay; it expects activity from the parties.”* Further and insofar as the contrary was argued, that wording was directory, not advisory only. At the very least, the Appellant could and should have acted on that direction by writing to the Court seeking a further PTC before

2021. Regardless of whether a communication of this nature would *by itself* have preserved the action, it would have initiated a series of events which would likely have done so.

54.(4) *Keeping an action alive*: As already noted, Mr Joseph placed much emphasis on the difficulty of identifying action that would be sufficient to keep an action alive. Having regard to the 2017 FAQ, correspondence with the Court would not suffice; nor for that matter, he submitted, would a notice under O.3, r.5, *ex hypothesi* given after more than a year had elapsed since the last proceeding.

55. We disagree; the matter is simpler than suggested by Mr Joseph and the difficulties of preserving the action have been overstated. Thus:

- (1) To state the obvious, diligently conducted and well-run litigation ought not to result in gaps of anything like one year or more between steps in the proceedings. Insofar as this is a matter of practitioners' mindsets, *Abdul Hafiz* was clear that such mindsets need to change.
- (2) The practical rationale for the 2017 FAQ is plain and is designed to avoid satellite litigation as to isolated correspondence, which might easily go astray or not be recorded. It is altogether too great a leap from the 2017 FAQ to suggest that the insufficiency of such correspondence to preserve an action somehow undermines the deemed discontinuance regime.
- (3) The wording of O.21, r.2(6), namely "*any step or proceeding in the action...that appears from records maintained by the Court...*" must be adhered to and applied. The difficulties of doing so have, however, been over-stated. Notably, Mr Joseph's submissions did not grapple with O.21, r.2(8) (set out above). That rule provides, with respect, the simple and obvious route to be taken by a party concerned as to the march of time and plainly neither encourages nor, still less, requires, any frivolous applications to court. An application of this nature before the guillotine date *would*, in all probability, have preserved the action.
- (4) In fairness to Mr Joseph, his submissions on O.3, r.5 have more force. If an O.3, r.5 notice is given over a year after the previous step in the

proceedings, it can be argued that the deeming provision in O.21, r.2(6) has already *automatically* bitten, so that the notice will not save the action. As it seems to us, there are jurisprudential complexities about the position which arises if an O.3, r.5 notice is given more than a year after the previous step in the action but *before* the Court has made an order that the action has been discontinued. Does the deeming provision prevail in advance of a Court making an order to this effect? Is O.21, r.2(8) self-executing? These are potentially deep waters. As no such point arises in the present case, final determination is best left for an occasion when its resolution matters. However that may be, what can at once be said is that a notice under O.3, r.5, given before the issue of an application to Court for an order that the action be deemed discontinued would, at the very least, be relevant, perhaps (depending on the facts of the individual case) of real significance, on any application for reinstatement.

(5) Insofar as Mr Joseph contended that *Abdul Hafiz* had not addressed this topic, the short answer is, with respect, that the contention is not well-founded: cf., *Abdul Hafiz*, at [49]. That the matter was there dealt with more briefly than here simply reflects the submissions advanced to the Court.

56. Pulling these threads together: disapplying O.20, r.2(6) would subvert the policy of combating delay in litigation; the fact that an action is set down for trial is not a reason (without more) for disapplication; the 27 July 2020 PTC in this case was not at all akin to a stay; the suggested difficulties of preserving the action are not such as to lend support to the case for disapplying O.20, r.2(6) or to deprive that rule of meaning and effect. The reality, we infer, is that nothing was done because, however unfortunately, the matter was lost sight of. We answer the question posed by heading (A), “No”.

57.(B) *Whether Abdul Hafiz is distinguishable?* For the reasons already given, we are unable to agree that *Abdul Hafiz* is distinguishable. Notably, in both cases, the actions had initially been diligently conducted (*Abdul Hafiz*, at [64] and the unchallenged conclusions of the Registrar and the Judge here) and had been set down for trial; in neither case, however, was the action

ready for trial. For completeness, the Third/Fourth Party proceedings are irrelevant to the present debate and no more than a distraction. We answer the question posed by heading (B), “No”.

58.(C) *Whether this Court should depart from Abdul Hafiz?* No Court should assume that it is incapable of error, and any Court should carefully weigh a seriously advanced submission that it has gone wrong. Having regard, however, to the availability of an appeal to the Judicial Committee of the Privy Council on terms and in certain cases, the question of this Court’s power to depart from its own previous decisions is not entirely straightforward. Nonetheless, we are content to approach this submission from Mr Joseph on the assumption, favourable to the Appellant, that we do have such a power. That said, in the interests of certainty and an orderly justice system, this Court, for practical purposes largely the final Court of Appeal in Brunei Darussalam, would be slow to exercise any such power and would be overwhelmingly unlikely to do so save in the limited circumstances laid down in *Young v Bristol Aeroplane (supra)*, applied *mutatis mutandis* to this Court: namely (at p.300):

“(i) *The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.*”

59.As it seems to us, and in agreement with Mr Chin’s submissions, none of these circumstances (i.e., (i) – (iii)) apply. Circumstances (i) and (ii) were rightly not suggested. As to (iii), while Mr Joseph certainly contended that *Abdul Hafiz* was wrongly decided, we did not understand him to contend that it was decided *per incuriam* – but, if we are wrong about that, no foundation was demonstrated for any such submission. This conclusion suffices to dispose of the argument that we should depart from *Abdul Hafiz*.

60.For completeness, however, and in deference to Mr Joseph’s careful submissions, we are, in any event and as a matter of substance, wholly

unpersuaded that *Abdul Hafiz* was wrongly decided. By reference to Mr Joseph's submissions on this point (set out above) and for reasons already given:

- (1) There is no relevant distinction between the role of a plaintiff pre- and post-setting down an action for trial. *Abdul Hafiz*, rightly, drew no such distinction.
- (2) *Abdul Hafiz*, rightly, did not take time on the status of proceedings when a PTC had commenced, as the fact that a PTC had commenced is, of itself, neither here nor there. Moreover, the Appellant's suggested emphasis on that status would undermine case progression responsibilities.
- (3) *Abdul Hafiz* did identify the steps the plaintiff could have taken under the RSC to preserve the action (at [49]) and demonstrated the relevance and helpfulness of O.21, r.2(8) and O.3, r.5.

61. We accordingly reject the submission that this Court should depart from the decision in *Abdul Hafiz* and answer the question posed by heading (C), "No".

62. It follows that we uphold the Ruling of the Registrar and the Judgment of the Judge, and dismiss the Appellant's Appeal on Issue I.

ISSUE II: REINSTATEMENT

63.(A) *Introduction*: We can take Issue II considerably more briefly. The relevant authorities were fully discussed in *Abdul Hafiz* (at [7] and following), with the key principles highlighted at [16 (5) - (8)]. There is no need to repeat that survey here. We confine ourselves to the principal matters in issue.

64.(B) *Discussion and conclusions*: We begin by reminding ourselves that the conclusions of both the Registrar and the Judge were reached in the exercise of their discretion, with which this Court will be slow to interfere.

65. It is common ground that the Appellant satisfied the first *Moguntia* limb. The key battleground is the second limb.

66.(1) *The RSC are servants not masters*: Mr Joseph emphasised that the RSC are servants not masters, the fundamental goal being to do justice in the case. A proportionate approach was to be followed. We readily accept these propositions as a matter of principle. Mr Joseph's formulation must, however, be expanded to take into account a consideration of the impact of delay, at least generally the enemy of justice – and the policy priority of combating delay in litigation. It is only when delay is additionally placed in the scales that a proper balance can be struck. As Mr Chin reminded us, the O.21, r.2 regime did not operate without safety valves: "*Proportionality and exceptionality are both baked into Order 3 Rule 5 and Order 21 Rule 2(10)*".

67.(2) *COVID-19*: The Appellant submitted that the failure to take any action after the trigger date was to be excused due to COVID-19. Mr Joseph, as we have recorded, focused on the havoc that the pandemic "*wreaked on the running of law offices and legal files*". As far as the evidence goes, the high point of the Appellant's case was found at para. 26 of the Affidavit in Support of Nuramalina Binti Abd Latif, of the Appellant's solicitors, sworn on 30 December 2023. The deponent there said:

"...the Covid-19 protocols in place in Brunei had also adversely disrupted the workings of our firm due to our staff either contracting covid-19 or being deemed close contacts to those who had Covid-19. There were also additional movement control restrictions of varying degree of severity within Brunei itself and from abroad. Office workers were required to work from home. Offices were also required to be closed if anyone from the office were either tested positive or a close contact. This had jeopardised and adversely affected the running and management of cases including this case."

68. While acknowledging (as did the Judge) the challenges posed by COVID-19, we are not persuaded:

- (i) We accept that there are cases where COVID-19 can be shown *on the evidence* to have impacted, *directly*, on the running and management of cases so as to excuse the resulting delay; *Sheikh Abul v Kwansoo (B) SDN BHD Daelim Industrial Co. Ltd* (Intermediate Court of Brunei Darussalam) (Civil Suit No. 19 of 2020) was such a case, having regard to the facts set out at pp. 6-7.
- (ii) But that is not this case and cannot bridge the gulf between the generalised complaint set out in the final sentence of para. 26 of the Affidavit in Support set out above and the particular facts required to make good what might be termed a COVID defence (such as those found in *Sheikh Abul*). As Mr Chin put it, “Covid-19 cannot be a blanket excuse”.
- (iii) As this Court underlined in *Haji Mahmud (supra)*, at [11]:

“The Appellant cannot rely upon the disruptions caused by [the] COVID-19 pandemic. The arrangements made to facilitate the course of litigation by the courts were certainly within the capability of the legal profession. There is always a learning curve for new practitioners and the burden upon the existing experienced practitioners is to be understood by the simple application of the fundamental duty to one’s client and to the profession and administration of justice.”

69.(3) *No applications were required after the matter had been set down for trial: mistaken belief:* Mr Joseph submitted that, COVID apart, the inaction was due to a mistaken belief to this effect. Though, with respect, we have some misgivings as to this submission – as flagged earlier, an inference (consistent with the COVID plea) was that the case was simply overlooked – we shall take the submission at face value for the purposes of this argument and assume, in the Appellant’s favour, that the inaction was at least partly attributable to this mistaken belief. Neither the Registrar nor the Judge was persuaded; nor are we. The self-evidently prudent course would have been to respond to the Registrar and take such steps as discussed earlier to preserve time and indicate an intention to proceed. For this reason too, we are unable to accept that the Appellant surmounts

the hurdle of the *Moguntia* second limb, a conclusion fatal to the Appellant's case on Issue II.

70. Let it, however, be supposed that mistaken belief enabled the Appellant to succeed on the *Moguntia* second limb. The upshot would be the need to consider the balance of justice under the third limb. As it seems to us, if, hypothetically, this stage was reached, the Appellant's case is doomed to fail. A restoration in 2025/2026 of a personal injuries action originating in 2015 would be inherently likely give rise to difficulty and prejudice to the Respondent far outweighing any justification for reinstatement based on the mistaken belief of the Appellant's legal representatives.
- 71.(4) *The limitation period has expired:* Though the Appellant alluded to the fact that the limitation period has expired in a plea for mercy, this consideration points in favour of a *refusal* to restore the action, as explained in *Malayan Banking*, at [32], cited in *Abdul Hafiz*, at [12], because it would deprive the Respondent of the advantage of an accrued time bar.
- 72.(5) *The Moguntia test is more rigid than the current test in English law:* First, the short answer to this submission is that we are considering this case under the law of Brunei Darussalam as it stands and no submission has been advanced, still less developed, that the 3-limb test should be replaced with the (suggested) current approach in English law. Secondly and if need be, we doubt that whichever approach is adopted the answer would be different. Once the significant delay in this case is factored into the English law approach and all the circumstances of the case are considered, it is anything but clear that the Appellant would be granted relief from sanctions under English law. Put bluntly, this point goes nowhere.
- 73.(6) *An appeal from a discretionary decision:* For the reasons given, we see no proper basis for departing from the Ruling of the Registrar and the Judgment of the Judge, refusing, in the exercise of their discretion, to reinstate the action. That is sufficient to determine Issue II but we go further and are content to add that we agree with the decisions of the Registrar and the Judge.

74. Accordingly, we dismiss the Appeal on Issue II and thus dismiss the Appeal as a whole.

COSTS:

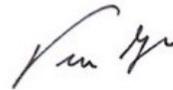
As counsel accepted when the matter was canvassed at the conclusion of the Hearing, costs follow the event. We therefore uphold the order of the Judge awarding costs to the Respondent and similarly order that the Appellant pays the costs of the Appeal.



DATO SERI PADUKA STEVEN CHONG, C.J.



MICHAEL LUNN, J.A.



SIR PETER GROSS, J.A.