

Haraz Industrial Sdn Bhd
Yau Wee Woon
Wu Chay Chin

... 1st Plaintiff
... 2nd Plaintiff
... 3rd Plaintiff

AND

Lee Fat Khong

... Defendant

(High Court of Brunei Darussalam)
(Originating Summons No. 44 of 2014)

Muhammed Faisal Bin PDJLD Kol(B) DSP Haji Kefli, J.C.

Date of Ruling: 26th January, 2026.

Headnote: Civil Procedure — Pleadings — Amendment — Appeal by way of rehearing — Late amendment — No affidavit explaining delay — Introduction of new and potentially dispositive defence — Prejudice — Discretion — When amendment should be refused Contract — Repudiation — Distinction between breach and repudiation — Election — Contract Act (Cap. 106) — Limitation defence — Futility Practice and Procedure — Registrar’s decision — Appeal — Rehearing — Discretion to allow amendment — Ketteman & Ors v Hansel Properties Ltd & Ors applied

Mr. Haji Mansur Bin Dato Paduka Dr Haji Abdul Latif of Messrs Pengiran Izad & Lee for the Plaintiffs.

Mr. Mohd Shazale Bin Haji Mat Salleh of Messrs Mohd Shazale Salleh Advocates & Solicitors & Mr. Zamri Bin Haji Mohammad Taha of Messrs Zamri Taha Associates for the Defendant.

Cases cited:

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213

Hong Leong Finance Bhd v Low Thiam Hoe & Ors [2016] 1 MLJ 301

Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189

BIBD v Bofone Sdn Bhd & 2 Ors [HCCS 79 of 2014]

Statutes:

Section 9 of the Limitation Act (Cap. 14)

Section 40 of the Contracts Act CAP 106

Order 20 rule 5(1) of the Rules of the Supreme Court

RULING

Muhammed Faisal, J.C.:

I Introduction and Background

1. This is the Defendant’s appeal against the decision of the Registrar dated 28 July 2025 granting the Plaintiffs leave to amend their Amended Reply to Defence and

Counterclaim by introducing a plea that the Defendant's Counterclaim is statute-barred under section 9 of the Limitation Act (Cap. 14).

2. The underlying dispute arises from a Sale and Purchase Agreement ("SPA") and a subsequent Deed of Variation ("DOV") entered into between the parties in or around 2005–2006 in respect of immovable property. The Plaintiffs' substantive claim is for vacant possession. The Defendant resists that claim and advances a Counterclaim alleging, inter alia, non-payment of the agreed purchase price, repudiation of the SPA and DOV by the Plaintiffs, and loss and damage suffered as a result.
3. The Defendant's Counterclaim was first pleaded in January 2017. The Plaintiffs filed an Amended Reply but did not at that time plead limitation. In July 2025, shortly before the scheduled trial, the Plaintiffs applied for leave to further amend their Amended Reply to raise limitation as an alternative defence to the Counterclaim. The Registrar allowed that amendment. The Defendant now appeals against that decision.
4. The appeal therefore concerns the exercise of discretion allow the amendment by the Registrar. It does not require this Court to determine the substantive merits of the limitation defence, but rather whether the amendment ought to have been permitted.

II Parties' Arguments

Defendant's Submissions

5. The Defendant submits that the Registrar erred in the exercise of her discretion in allowing the amendment. The Defendant's arguments may be summarised as follows.
6. First, the amendment was sought after an inordinate and unexplained delay. The limitation defence was available as early as January 2017 when the Counterclaim was pleaded, yet it was only raised more than eight years later and shortly before trial. No satisfactory explanation for this delay was provided in the Plaintiffs' supporting affidavit.
7. Secondly, the Defendant contends that the amendment is not bona fide but is a tactical afterthought designed to defeat the Counterclaim on technical grounds after many years of litigation.
8. Thirdly, it is argued that the amendment introduces a new and substantive defence which changes the character of the proceedings, requiring the Defendant to meet a fundamentally different case at a very late stage.
9. Fourthly, the Defendant submits that the proposed limitation defence is legally misconceived and therefore futile. In particular, the Defendant argues that the Plaintiffs wrongly conflate breach with repudiation. Under the *Contract Act (Cap. 106)*¹, repudiation requires election by the innocent party. On the Defendant's case, the SPA and DOV were treated as subsisting until repudiation was expressly asserted, such that the cause of action based on repudiation accrued only in 2017.

¹ See S.40 Contracts Act CAP 106

10. Finally, the Defendant submits that allowing the amendment has caused, and will continue to cause, prejudice that cannot be adequately compensated by costs, including the loss of trial dates, further delay in long-running proceedings, and erosion of finality.

Plaintiffs' Submissions

11. The Plaintiffs oppose the appeal and submit that the Registrar's decision should be upheld.
12. The Plaintiffs rely on *Order 20 rule 5(1)*² of the *Rules of the Supreme Court* and authorities such as *Yamaha Motor Co Ltd*³, *Hong Leong Finance Ltd*⁴, *Ketteman & Ors*⁵ and *BIBV v Bofone*⁶ emphasising the wide discretion of the Court to allow amendments at any stage in order to determine the real issues in dispute.
13. While accepting that the amendment was sought late, the Plaintiffs argue that delay alone is not determinative, particularly where the amendment is sought before trial and where no irremediable prejudice is shown.
14. The Plaintiffs contend that the amendment is bona fide and raises a genuine triable issue. They argue that on the Defendant's own pleaded case, non-payment occurred within fixed contractual timelines in 2006–2007, such that any repudiation must have accrued at that time. On this footing, the Counterclaim pleaded in 2017 is said to be prima facie time-barred.
15. The Plaintiffs further submit that the amendment does not change the character of the proceedings, as it does not introduce a new factual matrix but merely raises a legal defence to the Counterclaim. Any prejudice to the Defendant is said to be compensable by costs.
16. In support of their position, the Plaintiffs rely, inter alia, on *Ketteman & Ors*⁷, contending that amendments should generally be allowed in the absence of fraud or irremediable prejudice.

III Issues for Determination

17. The principal issues arising on this appeal are:

- (a) the applicable legal principles and standard of review governing an appeal against a Registrar's discretionary decision to allow an amendment;

² O.20 r.5(1) "Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

³ *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213

⁴ *Hong Leong Finance Bhd v Low Thiam Hoe & Ors* [2016] 1 MLJ 301

⁵ *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] AC 189

⁶ *BIBD v Bofone Sdn Bhd & 2 Ors* [HCCS 79 of 2014]

⁷ *Supra* at No.5

- (b) whether the proposed amendment discloses a genuine triable issue or is plainly futile;
- (c) whether the application to amend was made bona fide and whether the delay is satisfactorily explained;
- (d) whether the amendment alters the character of the proceedings;
- (e) whether the Defendant would suffer prejudice that cannot be adequately compensated by costs; and
- (f) whether, balancing all relevant factors, the Registrar's discretion should be upheld or set aside.

IV Repudiation under the Contract Act (Cap. 106)

18. A central aspect of the parties' submissions concerns the concept of repudiation and its distinction from breach. Under the *Contract Act (Cap. 106)*, these concepts are not synonymous.
19. *Section 40* of the *Contract Act*⁸ provides that where a party to a contract refuses to perform, or disables himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified acquiescence in its continuance. The provision makes clear that repudiation does not automatically terminate a contract. Rather, it confers on the innocent party a right of election: to accept the repudiation and treat the contract as at an end, or to affirm the contract and insist on performance.
20. Mere non-performance or non-payment within a stipulated time constitutes a breach. Whether such breach amounts to repudiation depends on its nature and, critically, on whether the innocent party elects to treat it as such. Until that election is made, the contract may remain subsisting.
21. In the present case, the Plaintiffs' limitation defence proceeds on the premise that non-payment within the contractual timelines in 2006–2007 necessarily amounted to repudiation, such that time began to run from that point. The Defendant, on the other hand, contends that he treated the SPA and DOV as subsisting for many years thereafter and only elected to treat them as repudiated when repudiation was expressly pleaded.
22. The Defendant's distinction between breach and repudiation is more consistent with the structure and language of the *Contract Act*⁹. Repudiation, as a legal consequence, depends not only on breach but also on election. This doctrinal point is material in

⁸ "When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance." - S.40 Contracts Act (CAP 106)

⁹ id

assessing whether the proposed limitation defence is legally sustainable or, at least, whether its prospects are sufficiently doubtful to engage the futility argument.

V *Ketteman & Ors v Hansel Properties Ltd & Ors*¹⁰

23. Both parties placed reliance on *Ketteman*. It is therefore necessary to consider the principles laid down in that decision and their application to the present case.
24. In *Ketteman*, Lord Griffiths emphasised that the discretion to allow amendments must be exercised in the interests of justice between the parties. At p.220, four guiding considerations emerge:
 - (a) whether the amendment would cause injustice to the other party, particularly injustice not compensable by costs;
 - (b) the lateness of the application, especially where trial is imminent or has begun;
 - (c) whether there is a satisfactory explanation for the delay; and
 - (d) whether allowing the amendment would disrupt the orderly conduct and finality of the proceedings.
25. While *Ketteman* recognises that amendments may be allowed even at a late stage, it is equally a cautionary authority. It rejects an overly indulgent approach and stresses that justice cannot always be measured in terms of money.
26. The Plaintiffs rely on *Ketteman* to support a liberal approach to amendment in the absence of fraud. However, when the principles articulated in that case are applied to the facts here, the balance points in the opposite direction.
27. The amendment was sought at a very late stage, many years after the Counterclaim was pleaded and shortly before trial. No satisfactory explanation for this delay was provided on affidavit. The amendment introduces a threshold defence capable of defeating the Counterclaim in its entirety and has already resulted in the vacating of trial dates and further delay in long-running proceedings.
28. In these circumstances, the potential injustice to the Defendant goes beyond mere inconvenience and cannot be fully addressed by an award of costs. Properly understood, *Ketteman* supports a disciplined approach to late amendments and weighs against allowing the amendment on the facts of this case.

VI Other Relevant Considerations

29. This appeal is by way of rehearing. While I have given due weight to the Registrar's decision, I am entitled to reconsider the application afresh and to determine how the discretion ought properly to be exercised on the material before the Court.
30. Having done so, and for the reasons set out above, I am satisfied that leave to amend should not have been granted. The very late stage at which the amendment was

¹⁰ *Supra* at No.5

sought, the absence of any sworn explanation for the delay, and the prejudice to the Defendant, when considered in the context of the principles in *Ketteman* and the applicable law on repudiation, justify the setting aside of the Registrar's order.

VII Conclusion

31. Taking all matters into account, including the applicable principles governing amendments, the law on repudiation under the Contract Act, and the guidance in *Ketteman*, I am satisfied that the Registrar's decision to allow the amendment falls outside the proper exercise of discretion.
32. The Defendant's appeal is therefore allowed. The Registrar's order granting the Plaintiffs leave to amend their Amended Reply to Defence and Counterclaim is set aside. Costs shall follow the event.

MUHAMMED FAISAL BIN PDJLD KOL(B) DSP HAJI KEFLI
Judicial Commissioner