Hua Chan Nam … **Appellant**

AND

Low & Lim Sdn Bhd … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 12 of 2008)

Before: Power, P; Mortimer and Davies, JJ.A.
Date:……..

Judgment in default. Failure by Registrar to resolve contested issue of fact regarding service of writ. Judgment set aside.

Appellant in person.
Mr Zamri Taha of Messrs. Zamri Taha & Associates.

Cases cited in the Judgment:

Anlaby v Praetorius [1888] 20 Q.B.D.767
Hackney LBC v Driscoll [2003] EWCA Civ. 1037, 1 QB 464

Power, P.:

The Judgment in Default

On 23rd February 2004 the plaintiffs, Low & Lim Sdn Bhd filed a writ claiming $264,231.52 being the balance of goods sold and delivered to the defendant, HUA CHAN NAM. The writ required the defendant to enter an appearance 8 days after service. Judgment in default of appearance was entered against the defendant on 8th June 2004.

This judgment was granted in reliance upon an affidavit of service by IMRAN BIN HAJI AHMAD made on 23rd March 2004 in which he affirmed that at 11.00 a.m. on Friday 19th March 2004 he had met the defendant at his workplace in Kg Kiarong and that, although the defendant had refused to acknowledge service, he had left the writ with him.

The Summons To Set Aside

Almost 2½ years later on 7th November 2006 the defendant filed a summons to set aside the default judgment. This summons was supported by an affidavit from the defendant in which he denied, in clear terms, that Imran bin Haji Ahmad had served the writ on him as alleged in the affidavit of 23rd March 2004. The defendant stated that he was at a site meeting at a customer's construction site from 9.30 a.m. to 12 noon on Friday 19th March 2004 and that he had witnesses who could prove his whereabouts at that time. Further he exhibited a letter by Arkitek Rekajaya which confirmed his presence at that meeting. He stated that he first learnt of the judgment in default on 31st August 2006 and that he then asked his solicitor to ask the plaintiff's solicitor for copies of the writ and statement of claim. This was an explicit and carefully detailed denial that the writ had been served upon him. The defendant concluded by saying that he then instructed his solicitor to apply to set aside the judgment in default of appearance.

The Decision of the Registrar

The application to set aside came before Registrar Hazarena bte POKSJ DP Hj Hurairah on 28th March 2007 and was dismissed on 16th April 2007.

The learned Registrar set out in her findings that, in the hearing before her, the defendant was contending both that the judgment had been irregularly obtained and that there were merits to his defence. The Registrar was satisfied that the judgment was regularly obtained. This finding was as follows:

> *"The Court must now look at whether the judgment in default was obtained regularly. According the Affidavit of Service of Imran Bin haji Ahmad filed on 23rd March 2004 he had met with the Defendant to serve the Writ of Summons and Statement of Claim, however the Defendant refused service. As such the process server thought fit to leave the documents with the Defendant in accordance with* ***Order 62 Rule 3 of the Brunei Supreme Court Rules*** *that states*

personal service is affected by "leaving a copy with the person to be served". Judgment in Default of Appearance together with a Certificate of Non-Appearance was entered on 8th June 2007 by the Registrar. Before signing the judgment the Registrar who signed the writ would have read the affidavit of service and would then have to be satisfied that the Defendant has been served properly. The Defendant argued that he was a meeting at the time the documents were served. The letter dated 19th March 2004 does not state where the meeting was held therefore it is not clear where exactly the Plaintiff was at the time the documents were served, there may well be a possibility that the meeting was held at the Plaintiff's address. I note that the address of alleged service same as address provided by the Defendant in his affidavit. The Defendant submitted that the process server may have been untruthful there has been no other evidence to suggest otherwise. I do not see any reason as to why the process server would have been untruthful. There would have been no fault on the process server if he hadn't been able to serve the documents and Counsel for the Plaintiff would have had other avenues to serve the documents through substituted service. I do not accept the Defendant's submission in that the process server had been untruthful when he served the Defendant.

I am satisfied that the documents were served on the Defendant and that he was aware of the action. I am also satisfied that the Judgment in Default of Appearance was obtained regularly." (Emphasis Supplied)

The Registrar was further satisfied that there were no merits to the defence.

The Decision of the Appellate Judge

An appeal from this decision was made by the defendant to Justice Chong in the High Court. Having recited the facts the judge first asked whether the default judgment was obtained regularly. He held, correctly in our view, that:

"Where the judgment is irregular the defendant has the right to set it aside, ex debito justitae, on the basis that it is a fundamental defect: Anlaby v Praetorius (1888) 20 QBD 767 and Hackney LBC v Driscoll [2003] EWCA Civ 1037 [2003] 1 WLR 2602.

The point of time to be looked at in deciding whether judgment was regularly obtained is the time when judgment was entered: Thomas Bishop Ltd v Helmville Ltd (1972) 1 QB 464."

He then held:

"In the present case the affidavit of service of the process server states that the defendant was served with the writ and statement of claim at the stated address, date and time by leaving the documents with the defendant because he refused to acknowledge service. Personal service was therefore effected in compliance with RSC O.62 r.3. Default judgment was entered after a Certificate of Non-Appearance was filed on 2 June 2004.

The Registrar was satisfied that in the above-mentioned circumstances default judgment was obtained regularly.

I agree. Clearly, in obtaining default judgment, there has been full compliance with the rules and the application to set aside the default judgment on a procedural basis is devoid of merit."

The judge went on to state that the defendant had not shown that he had any real prospect of success on the merits and that he found the Registrar's decision unassailable and dismissed the appeal.

The Issue before this Court

We do not need to consider the merits of the defence as we are satisfied that the real issue before this court is whether the judgment was regularly obtained. If it was not then the defendant has, as Chong J. held, *"the right to set it aside, ex debito justitae, on the basis that it is a fundamental defect."*

In the present circumstances, the judgment cannot be held to have been regularly obtained unless it be established that it was properly served.

The matter for our decision is whether the Registrar was right to hold that the evidence established that the defendant was properly served and, if she was not right in so holding, whether that error was corrected on the appeal to Justice Chong.

There was as to the service of the writ a clear contested issue of fact. The process server stated that he had met with the defendant and had served the writ and statement of claim upon him. The defendant explicitly denied this and indicated that he had witnesses whom he could call to prove the contrary.

Was the Registrar correct to resolve this issue by holding:

> *"The defendant submitted that the process server may have been untruthful there had been no other evidence to suggest otherwise. I do not see any reason as to why the process server would have been untruthful." (Emphasis supplied)*

This passage is, firstly, open to criticism when it suggests that the defendant's contention was that the process server "may have been untruthful."

This is a serious mis-statement of the position of the defendant. He was explicit in his evidence in which he positively contended that the process server had been untruthful.

It is, further, difficult to know what was meant by the words "there has been no other evidence to suggest otherwise". There was, potentially, evidence from witnesses, whom the defendant said could be called, which would have suggested otherwise.

In our view an issue had arisen which could only have been properly resolved by giving the parties the opportunity to call witnesses. The Registrar, we are satisfied, should have followed that course and was wrong to deal with this matter in the summary which she adopted.

We turn next to ask whether the matter was, in the outcome, resolved by the Judge on appeal. It plainly was not. It is clear from the passage set out above that the Judge accepted without criticism the flawed finding of the Registrar.

This appeal must succeed. The order of the Registrar of 16th April 2007 is quashed and the judgment in default is set aside.

Power, P.

Mortimer, J.A. **Davies, J.A.**