Awangku Muhammad Mursyid Bin Pg Hj Ali … **1st Appellant**
Pg Ali Bin Pg Maon … **2nd Appellant**

AND

Makrami Bin Hj Md Noor … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 23 of 2008)

Power, P.; Mortimer and Davies, JJ.A.
24th November, 2008.

Application for leave to appeal to Court of Appeal against order of judge adjournment an appeal from a Registrar. Approach of Court of Appeal to interference with a discretionary order.

Mr. Lim Chin Wah of Messrs. Dr Colin Ong Legal Services for the 1st and 2nd Appellants.
Mr. Eugene Loh Jit Kuan of Messr. Cheok Sankaran Halim for the Respondent.

Cases cited in the Judgment:

Lee Kwan Yew v Tang Liang Hong [1997] 3 SLR 489 at 496.
Maxwell v Keun [1928] 1 K.B. 645 at 653.

Power, P.:

This is an application for leave to appeal against an order of Madam Justice Hayati adjourning cross-appeals by the plaintiff and the defendant made consequent upon a judgment by Deputy Chief Registrar Lim delivered on 12 April 2008. The action involved a motor vehicle collision and consequential claims for damages.

Immediately after the judgment, on 16 April, the plaintiff filed a Notice of Appeal against "all of the orders" made by Judge Lim. One day later the defendants filed a Notice of Appeal which was limited to *"matters dealing with loss of future earnings, special and general damages, loss of amenities, loss of car, failure to admit defendant's affidavit and oral evidence in chief of Walter Boyd and issue of court interest."* These words set out the only grounds upon which the defendant then relied. It is to be noted that there was no mention of alleged defects in the Statement of Claim although these had been relied upon by the defendant in the action for damages. It appears that the defendants had already paid the plaintiff the sum of $98,889.30 for pain and suffering and agreed special damages except for the loss of the car. We are not, however, concerned here with those payments.

Up to this point the matter was proceeding with admirable expedition. The appeal and cross-appeal ("the appeals") were set down by the plaintiff's solicitors for hearing before Madam Justice Hayati on 4th September 2008 – almost 6 months later. When the matter came on before Hayati J the defendants' counsel, who had, on that day, provided written submissions to the court and to the plaintiff's counsel, was asked by the court to address on two of the issues which he had raised – the effect of the allegedly defective Statement of Claim and the excluded evidence of Walter Boyd. He did so.

Counsel for the plaintiff was taken by surprise. The principal reason for this was that he had no indication from the Notice of Appeal that the first of those was a ground of appeal and was, faced, further with substantial written argument on the issue. He asked for an adjournment to prepare argument and, not surprisingly, it was granted.

Counsel was given until 20th October, a period of 7 weeks, to furnish his written submissions and the matter was set down for hearing on Monday 3rd November. On 16th October the plaintiff filed a summons seeking leave to amend the Statement of Claim. It appears that this summons was not served on defendant and that no hearing date for it had been fixed. The submissions were provided on 20th October. However, on 30th October, the plaintiffs' solicitors wrote to the Chief Registrar in the following terms with a copy to the plaintiff's solicitor:

> *"We write to inform Your Honour that the Appellant has filed a Summons in Chambers and Affidavit in Support on 16.10.2008 to amend the Plaintiff's Statement of Claim ("SIC") which is currently pending extraction from the Court with the hearing date.*
>
> *In light of the aforesaid, we humbly believe that the hearing of the SIC should proceed first before the appeal as it would put to rest the issue of pleadings which is 1 of the points to be addressed by the parties before the Honourable Justice Datin Paduka Hajah Hayati on 3rd November 2008 at 2.15pm.*
>
> *As such, we would humbly request for the SIC to be heard on the aforesaid date, if possible, to enable the smooth flow of the chronology of the appeal.*
>
> *If the court is not minded to hear the SIC on the aforesaid date, may we humbly apply to adjourn the appeal to a later date after the hearing of the SIC in due course."*

Particularly significant is the request for the summons to the heard on 3rd November. On 31st October the defendants' solicitor wrote to the Registrar asking that the summons should await the outcome of the appeal. The Registrar took no action.

On 3rd November the appeal resumed before Hayati J who, and this is important, refused the application to hear the summons. The plaintiffs' counsel asked the judge to adjourn the appeal to await the outcome of the summons. This hearing was adjourned to 5th November. When the hearing resumed on 5th November the judge, ruled:

> *"Having heard both parties on the plaintiff's intention to apply for leave to amend their pleadings; (unfilled SIC shown/copy given to the defendant) and without going into the merits of the application, the plaintiff is allowed to proceed with their SIC and application for leave to amend.*
>
> *However any cost occasioned by any amendment allowed shall be paid by the plaintiff to the defendant, to be taxed if not agreed.*
>
> *The part-heard appeal before me is adjourned pending the outcome of the application to amend. Cost of the adjournment of the appeal (which had only proceeded on 2 issues) will be paid by the plaintiff to the defendant, to be taxed if not agreed.*
>
> *Defendant's application to 'stay' the plaintiff's SIC pending the outcome of their purported appeal to the Court of Appeal against this Ruling is DENIED."*

The defendants now seeks leave to appeal against the decision of Hayati J which was to adjourn the appeals to allow the plaintiff's summons to be heard. The defendants if given leave will ask us to quash the judge's order adjourning the appeal and to stay all further actions in the matter pending resolution of the appeal.

Mr Lim Chin Wah, who appears before us for the defendants, contends that an application for leave to appeal to this court was made to the judge and was refused. Mr Eugene Loh, who appears for the plaintiff, contends that no such application was made.

However, that may be we were satisfied that we could properly hear the application for leave and proceeded to do so.

Mr Lim submits that the conduct of plaintiff has been obstructive throughout causing inexcusable delay. We are asked to quash the order granting the adjournment to stay all actions in the matter pending resolution of the appeals and to direct that the appeals be heard on the earliest available date.

Mr Loh contends that he has a good argument that the defendants are estopped by reason of their conduct at the trial from contending that the statement of claim is deficient and that he has a right to apply to amend his pleadings at any stage even during the pending of at appeal.

We think it proper to say at the outset that there was in our view no obstruction and inexcusable delay on the part of the plaintiff. The initial delay after 4th September came about because the plaintiff, taken by surprise, sought and was properly granted an adjournment. The delay now faced is no fault of the plaintiff who sought to have the summons and appeals heard on 4th November.

Before this court both sides eventually came to agree that the best course would have been for the judge to have heard both matters taking the hearing of the summons first. Indeed that was the contention of Mr Loh before the judge and we think it proper to say that we, without hesitation, agree that that would have been the best course.

It must, however, be said that it is not what Mr Lim originally sought in his application for leave. He was asking this court to give leave and, allowing the appeal, to quash the order for adjournment and stay all further actions.

It is not necessary for us to canvass the three limbs that can be relied upon when leave to appeal is sought (see *Lee Kwan Yew v Tang Liang Hong* [1997] 3 SLR 489 at 496). The problem which faces us is succinctly dealt with by Atkin L.J. in *Maxwell v Keun* [1928] 1 K.B. 645 at 653:

> *"The other point that was made by the defendants was that this was a discretionary order, and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."* (Emphasis supplied)

What we must ask is whether the adjournment was such as to defeat the rights of the parties and to do an injustice. It is not for us to substitute the order which we would have made had we been in the position of the judge. We are bound to respect the judge's discretion and to set it aside only if we are satisfied to the extent indicated by Atkin L.J.

We are not so satisfied. Leave is refused.

Before leaving this matter we again indicate our view that it is desirable that speedy resolution of it be achieved by the giving of an early date for a joint hearing of the summons and the appeals.

There will be an order nisi that the defendant pay the costs of this application to be taxed if not agreed. Thus order will become absolute at 9:00 a.m. on Thursday 27 November if application is not made.

Power, P.

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