

MOHAMAD BIN HAJI TUTONG @ TOTONG

... Plaintiff/Respondent

AND

**ABDUL LATIF BIN TUTONG @ TOTONG
SALMAH BINTI TUTONG @ TOTONG**

... Defendants/Appellants

(High Court of Brunei Darussalam)
(Civil Suit No. 32 of 2020)

Muhammed Faisal bin PDJLD Kol (B) DSP Hj Kefli, JC
20th May, 2024.

***Headnote:** Civil Procedure – application for setting aside judgement in default of appearance – application dismissed with cost*

Mr. Suhaimy (M/S Fathan & Co Advocates & Solicitors) for the Plaintiff/Respondent.
Defendants/Appellants In Person and Unrepresented.

Case cited:

Standard Chartered Finance (Brunei) Bhd v Osman bin Hj Abdullah [2005] 2 BLR 62

RULING

Muhammed Faisal, JC:

I. INTRODUCTION

This is an appeal against the Registrar’s decision to dismiss the Defendants’ application to set aside the Judgement in Default of Appearance (JID)

JID was entered on the 26th January 2021.

The 1st Defendant/Appellant do pay the Plaintiff/Respondent the following: -

- i. Damages for slander to be assessed;
- ii. Interest on damages; and
- iii. Cost of these proceedings.

The 2nd Defendant/Appellant do pay the Plaintiff/Respondent the following: -

- i. Damages for slander to be assessed;
- ii. Interest on damages; and
- iii. Cost of these proceedings.

A sealed copy of the JID was served on both defendants' appellants on 29th January 2021.

Hearing for assessment of damages was then fixed for the 31st of July 2021 but proceeded on the 22nd August 2022 where the Plaintiff, his witnesses and Defendants gave evidence. The ruling for assessment of damages was fixed for 12 November 2022 but was later vacated by the court in view that Defendant jointly filed an application on 5th November 2022 to wholly set aside the JID entered against them.

From the Registrar's notes, the application to set aside JID was heard on the 18th July 2023 before Registrar Mohamad Marzuqi. After hearing submissions from both sides, he ruled against the Defendants' application to set aside JID. The Defendants' now appeal against this decision.

II. THE STATEMENT OF CLAIM

For some context, the Plaintiff claim is explained briefly: -

The Plaintiff and both Defendants are siblings. They were all members of a WhatsApp group. The Plaintiff claims that the 1st Defendant harassed the Plaintiff in the WhatsApp group, making threats, false accusations, and interfering with the Plaintiff's property. The Plaintiff had filed three police reports against the 1st Defendant due to the harassment.

The 1st and 2nd Defendants also had made slanderous statements against the Plaintiff, who alleges that they had harmed his reputation.

The Plaintiff suffered significant distress and annoyance due to the Defendant's behavior and seeks damages for the harm caused.

Was Judgment in Default obtained regularly?

The Plaintiff first attempted to serve the Writ of Summons and Statement of Claim on both Defendants 30th October 2020. The second attempt was made to serve the court papers upon the 1st and 2nd defendants on 2nd November 2020. However, when the 1st Defendant was not in and the 2nd Defendant had refused to acknowledge and tried to evade service.

As such Order for Substitute Service by leaving the court papers at the Defendants address was granted on the 11th of November 2020.

The Plaintiff has taken all steps to bring to the notice of the Defendant of the Writ of Summons and Statement of Claim.

Both Defendants in their submissions, never stated that service was irregular.

Merits of the Defence case and triable issues

I refer to the Affidavit of the 1st and 2nd Defendant, filed on the 31 October 2022 and 29 October 2022, respectively.

In both of their Affidavits, the defendant both expressed their apologies in not entering appearance at the return date of the writ of summons; they claimed ignorance of the law, in particular the need to enter appearance. They then, in their own words express their denials of what was claimed against them by the plaintiff, as stated above.

They go on to express that they would not have the necessary funds to settle the judgement sum claimed by the Plaintiff.

In short, both of the Defendants did not produce any triable issue or defence on the merits.

Delay in filing the appeal

The Defendant had cited the following as reasons of their delay in their application;

- (i) They did not understand the documents served due to them written in English.
- (ii) This is the first time that they are dealing with such a situation and are unaware of court procedures.
- (iii) The Defendants were not at home when the writ of summons was served, which was left at the entrance.
- (iv) The Defendants were unaware of the time-sensitive nature of the matter and the requirement to enter an appearance in court.

A Court Order for Substituted Service was obtained on 11th November 2020, with JID entered on 26th January 2021. The assessment of damages hearing occurred on 22nd August 2022, and the Defendants only filed the application to set aside the JID on 5th November 2022. There is a significant lapse of time from when the JID was entered to the filing of the application to set aside it by the Defendants.

The delay has caused substantial prejudice to the Plaintiff. The Defendants allowed the matter to prolong unnecessarily and filed the application at a critical juncture when parties expected the ruling on the assessment of damages.

The Defendants' explanation that it is their first time dealing with such a situation falls short of being reasonable. The Defendants had ample time and opportunities to propose a defence or raise the issues stated in their affidavits. They attended the hearing for the assessment of damages on 31st July 2021, 6th June 2022, and 22nd August 2022 but did not put forward any defence during these dates.

In *Standard Chartered Finance (Brunei) Bhd v Osman bin Hj Abdullah* [2005] 2 BLR 62, the Defendant's application to set aside the JID was allowed despite a five-year delay because the defendant took steps, albeit incorrect ones, and provided reasonable grounds. However, the current case is distinguishable as the Defendants took no steps to propose a defence at an earlier stage. The Defendants did not attempt to propose a defence at an earlier stage nor provide reasonable grounds for the delay.

The Plaintiff has suffered great prejudice as the application to set aside the JID appears to be an afterthought and an attempt to stifle the Plaintiff's claim.

III. CONCLUSION

Concluding that the JID was obtained regularly, I also find that the Defendants' have fallen short of showing to the court any defence on the merits or triable issues. Coupled with the delay in making the application I would thus dismiss the Defendants' application.

The Defendants' application to set aside the Judgment in Default of Appearance is hereby dismissed.

Cost to the plaintiff, to be taxed, if not agreed.

MUHAMMED FAISAL BIN PDJLD Kol (B) DSP HJ KEFLI
Judicial Commissioner