HSL PLASTICS SDN BHD & ORS v. LIM KAI MENG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[SUIT NO: WA-22IP-45-11-2017]
25 JANUARY 2023

Abstract – *Where judgment given for damages makes no provision as to how the damages were to be assessed, the party entitled to damages is to apply to the court, pursuant to O. 37 r. 1 of the Rules of Court 2012, within 30 days of the judgment for directions for that assessment. However, such requirement is not mandatory.*

CIVIL PROCEDURE: *Assessment of damages – Extension of time – Application for – Court ordered damages with interest but made no provision as to how damages were to be assessed – Application for extension of time to apply for directions to assess damages – Whether application ought to be granted – Rules of Court 2012, O. 37*

On 5 September 2018, the court had allowed the plaintiffs' claim under the Copyrights Act 1987 for copyright infringement and dismissed the defendants' counterclaim with costs of RM112,045.80. The court then ordered damages with interest at 5% per annum but made no provision as to how the damages were to be assessed. On 1 November 2018, the plaintiffs filed an application for post-judgment discovery of documents in relation to the account of profits. It was only on 12 December 2018, just over three months after the judgment, that the plaintiffs filed this application, under O. 37 of the Rules of Court 2012 ('ROC') for assessment of damages and sought: (i) an extension of time to file an application for directions for assessment of damages; (ii) directions for the assessment of damages and for the filing of the notice of appointment for assessment of damages; and (iii) that the costs of the application be borne by the defendants. Objecting to the plaintiffs' application, the defendants argued that, *inter alia*, the plaintiffs' application was filed beyond the one-month timeline prescribed by O. 37 r. 1 of the ROC.

Held (allowing application in part):

(1) As the judgment did not contain any provision as to how the damages were to be assessed, O. 37 r. 1 of the ROC would have to be invoked for the plaintiffs to do so. Under O. 37 r. 1, where judgment is given for damages with no provision in the judgment as to how the damages were to be assessed, the party entitled to damages is to apply to the court within 30 days of the judgment for directions for that assessment. However, the requirement to apply for the directions for assessment of damages within 30 days is not mandatory. (paras 1, 5 & 38)

(2) The second and third plaintiffs were entitled to the extension of time they had applied for as (i) despite their delays, the defendants were quite happy to go along with the post-judgment discovery proceedings to proceed for years between November 2018 to October 2022 and not insist on the plaintiffs' application to be disposed of first; (ii) having gone through the entire process, it would be unjust for all of it to be rendered meaningless if the extension of time was refused; (iii) the second and third plaintiffs' explanation for wanting to explore and pursue the post-judgment discovery process was reasonable. Even though the ideal scenario would have been for them to have applied for directions to assess damages with the 30-day timeline and then apply for a post-judgment discovery, they should not be punished for not taking the ideal steps; and (iv) the plaintiffs did file an application for extension of time after only two months after the 30-day time limit had expired and, thus, there was no inordinate delay. It would be unjust, in the circumstances, not to grant it. (para 40)

(3) The court allowed prayer 1 of the plaintiffs' application *ie* for an extension of time, to 14 days from the date of this decision to apply under O. 37 r. 1(1) of the ROC for directions for assessment of damages. However, the court declined to order directions for the assessment of damages or issue directions for the filing of the notice of appointment for assessment of damages as, under O. 37 of the ROC, the application for directions for assessment of damages is a prerequisite to directions for assessment of damages and, at present, there was none. It would be premature to issue any such directions. (paras 41 & 42)

Case(s) referred to:

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra [2017] 1 LNS 422 HC ***(foll)***

Tetuan Sri Ling & Associates v. Lian Meng Wah [2015] 3 CLJ 63 CA ***(refd)***

Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Anor [2020] 7 CLJ 512 CA ***(foll)***

Legislation referred to:

Rules of Court 2012, O. 3 r. 5(1), O. 32 r. 13(1)(b), (c), O. 34, O. 37 r. 1(1), (2), (6)

For the plaintiff/applicant - Cyndi Chow Li Kian, Ong Hui Yi & Ho Yong Yi (pupil in chambers); M/s Josephine, LK Chow & Co

For the defendant - In person

Reported by Najib Tamby

JUDGMENT

Azlan Sulaiman JC:

Overview

[1] Order 37 of the Rules of Court 2012 ("the Rules") is for assessment of damages. Under r. 1, where judgment is given for damages with no provision in the judgment as to how the damages are to be assessed, the party entitled to damages is to apply to the court within 30 days of the judgment for directions for that assessment. This judgment involves a situation where plaintiffs did not do so within that time-period and apply for an extension of that time, and two contrary Court of Appeal decisions in dealing with it. A further issue thrown into the mix is that, in between the hearing of the plaintiff's application, and this decision, the second defendant was wound up.

Salient Background

[2] The plaintiffs' application is for all intents and purposes an application for an extension of time to apply for directions to assess damages, with the other relief sought being ancillary to and dependent upon the extension is allowed.

[3] The factual matrix for the plaintiffs' application is as set out in the following five affidavits set out in table A (collectively, "the relevant affidavits"), as they were the only ones relevant to the plaintiffs' application. Despite the several other proceedings in this suit both prior to and after the plaintiff's application was filed, none of the parties filed any notice in Form 58 under O. 32 r. 13(1)(b) of the Rules of intention to use any of the other affidavits filed in them. The relevant affidavits are:

Table A

Date	Title	Encl.
7.12.2018	Afidavit Sokongan ("the Solicitor's Affidavit")	74
3.10.2022	Afidavit Sokongan Plaintif ke-2 dan Ke-3 ("the 2nd & 3rd plaintiff's 1st Affidavit")	167
19.10.2022	Afidavit Jawapan Defendan-defendan ("the defendants' 1st Affidavit")	169
3.11.2022	Afidavit Balasan Plaintif ke-2 dan Ke-3 ("the 2nd & 3rd plaintiff's 2nd Affidavit")	170
16.11.2022	Afidavit Balasan Defendan-defendan ("the defendants' 2nd Affidavit")	173

[4] On 5 September 2018, this court allowed the plaintiffs' claim under the Copyright Act 1987 ("the Act") for copyright infringement and dismissed the defendants' counterclaim, with costs of RM112,045.80 accruing interest at 5% per annum. In paras. 7a, 7b, 8, 9, 10, 11, 12, and 13 of the judgment, the court ordered damages with interest at 5% per annum. For convenience I set out those damages in table B below:

Table B

Para	Type of damages	Payable to
7a	Compensatory damages to the 2nd and 3rd plaintiffs under s. 37(1)(b) of the Act or an account of profits under s. 37(1)(c) of the Act, to be assessed, subject to the decision on post-trial disclosure proceedings	2nd plaintiff and 3rd plaintiff
7b	Statutory damages under s. 37(1)(d) of the Act, to be assessed	2nd plaintiff and 3rd plaintiff
8	Additional damages under s. 37(7) of the Act, to be assessed	2nd plaintiff and 3rd plaintiff
9	Damages in the form of an account of profits under s. 35 of the Industrial Design Act, 1996, to be assessed	2nd plaintiff
10	General damages for breach of fiduciary duties, to be assessed (1st defendant only)	1st plaintiff
11	Damages in the form of an account of profits of the 2nd defendant for breach of fiduciary duties, to be assessed (1st defendant only)	1st plaintiff
12	Exemplary damages, to be assessed	All plaintiffs
13	Aggravated damages, to be assessed	All plaintiffs

[5] As the judgment did not contain any provision as to how the damages were to be assessed, O. 37 r. 1 would have to be invoked for the plaintiffs to do so.

[6] On 1 November 2018, the plaintiffs filed an application for post-judgment discovery of documents in relation to the account of profits in para. 7a of the judgment ("the PJDA"), to ascertain which of the alternatives (a or b) would be more advantageous and possibly derive a higher yield.

[7] On 12 December 2018, just over three months after the judgment, the plaintiffs filed this application ("plaintiffs' application"):

(i) for an extension of time to file an application for directions for assessment of damages;

(ii) for directions for the assessment of damages;

(iii) for directions for the filing of the notice of appointment for assessment of damages; and

(iv) that the costs of the application be borne by the defendants.

By applying for an extension of time, the plaintiff obviously knew of the one-month prescribed by O. 37 r. 1.

[8] However, after that until October 2022, the parties occupied themselves with and the court's time was taken up by matters related to the PJDA and other matters between the parties.

[9] Then, between early October 2022 to the middle of November 2022, after a three-year hiatus, the plaintiffs' application again became the focus, with the filing of the second to fifth of the relevant affidavits.

[10] The defendants (now without solicitors and acting in person) cited three grounds for opposing the plaintiffs' application and asking for it to be dismissed. They may be summarised as follows:

(i) the plaintiffs' application was filed beyond the one-month timeline prescribed by O. 37 r. 1 of the Rules;

(ii) the plaintiffs' application is misconceived as it is filed for all three plaintiffs whereas Messrs Josephine, LK Chow & Co (who filed it) were not authorised to represent the first plaintiff, and Ms Tham Jolene had no authority to affirm the solicitor's affidavit for and on behalf of the first plaintiff; and

(iii) in any event the solicitor's affidavit should be ignored because it was affirmed by a solicitor and not any of the actual parties to the proceedings.

Analysis And Decision On The Second And Third Objections

[11] For the purposes of this judgment, I will deal with the second and third objections first, because they can be disposed of relatively summarily compared to the first.

[12] In my view, the second objection can be dismissed. Though the plaintiffs' application on its face is indeed filed by all three plaintiffs, even if the first plaintiff did not either authorise it or assent to it, this court has the power and jurisdiction to hear and consider it *vis-à-vis* the second and third plaintiffs. As can be seen in table B above, only the damages in paras. 10, 11, 12 and 13 are payable to the first plaintiff. If the first plaintiff does not wish to claim them and has never applied for them to be assessed, that is its prerogative. But that itself does not prevent this court from dealing with the plaintiff's application from the second and third plaintiffs' perspective.

[13] Furthermore, in the second and third plaintiffs' affidavits, Tan Keng Meng made it quite clear that the plaintiff's application was only being pursued by the second and third plaintiffs and, even then, for the damages in paras. 7, 8, 9, 12 and 13 of the judgment which they can claim. They have excluded the damages in paras. 10 and 11 which are payable to the first plaintiff. Any misnomer in the plaintiff's application having being filed by all the plaintiffs' can thus been overlooked and ignored, and I so do.

[14] In respect of the solicitor's affidavit, in the second and third plaintiffs' affidavits, Tan Keng Meng did not take any objection to it. I will regard that as tacit consent to it and further regard the solicitor's affidavit as having been affirmed by Ms Tham Jolene for and on behalf of the second and third plaintiffs only. Even if I am wrong in doing so, the plaintiffs' application can still be heard and considered on the second and third plaintiffs' affidavits.

[15] As for the contention that the solicitor's affidavit should be ignored because it was affirmed by a solicitor and not one of the actual parties to the proceedings, that is misconceived. There is no legal impediment to solicitors affirming affidavits on their client's behalf, provided they have the authority to do so.

[16] I accordingly dismissed the defendant's second and third objections to the plaintiffs' application.

Analysis And Decision On The Objection To The Extension Of Time

[17] The starting point would obviously be O. 37 r. 1(1) of the Rules which sets the time frames for a party adjudged to be entitled to have damages to be assessed to put that assessment process in motion. Order 37 r. 1(1) provides:

> Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, **within one month from the date of the judgment**, apply to the Registrar for directions and the provisions of O. 34 shall, with the necessary modifications, apply. (emphasis added)

[18] In *Tetuan Sri Ling & Associates v. Lian Meng Wah* [2015] 3 CLJ 63, the Court of Appeal dealt with a scenario involving a judgment for damages to be assessed and where the notice of appointment to assess damages was filed almost three years after the judgment. Idrus Harun JCA (as he then was) said:

> The procedure relating to assessment of damages is found in O. 37 of the Rules of Court 2012. Under O. 37, the assessment of damages is carried out by the Registrar subject to the provisions of the order while the party entitled to the benefit of the judgment is required to apply to the Registrar for directions within one month from the date of the judgment. In the instant case, therefore, LMW was required to apply to the Registrar for such directions within one month from 19 January 2010.
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> In the application for directions the Registrar may give directions as to the time by which a notice of appointment for assessment of damages shall be filed. Once filed, the notice is required to be served not later than seven days from the date of the filing of the same on the party against whom the judgment is given. In addition, the notice of appointment for assessment of damages is required to be filed within six months from the date of judgment.

LMW failed to comply with the mandatory requirement in O. 37 r. 1(1) of the Rules of Court 2012 when he did not file for directions of the Registrar within the prescribed period of one month from the date of the said judgment in default. Neither did LMW comply with O. 37 r. 1(3) which requires him to file the notice of appointment for assessment for damages within six months from the date of judgment which is also a mandatory requirement.

In the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149, the Federal Court held that where there is a mandatory prerequisite, that should be complied with and non-compliance rendered the service defective. The court in *Aminah Abas v. Pentadbir Tanah Daerah Kuantan* [2004] 5 CLJ 1; [2003] 4 MLJ 669 and *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2003] 1 MLJ 389 also gave similar interpretation to the word 'shall' which means mandatory and not directory and that the word reflects a measure of mandatoriness in it.

Having considered the circumstances leading to the order made by the learned judge in respect of encl. 48, it would seem clear that there is serious non-compliance with O. 37 on the part of LMW as regards the procedure that is required to be followed relating to assessment of damages. There was indeed no explanation proffered by LMW on the non-compliance with the law and the long delay of almost three years to file the notice of appointment for assessment of damages. In our judgment, the learned judge clearly had erred when she proceeded to assess the damages and decided that the quantum was sufficiently proven relying only on the affidavit of LMW especially when no directions had been given by the learned SAR as required under O. 37 r. 1(1) of the Rules of Court 2012.

[19] The Court of Appeal in the *Tetuan Sri Ling & Associates* case was clearly of the view that the 30-day period was mandatory.

[20] The *Tetuan Sri Ling & Associates* case is also authority for the proposition that where a party has not applied for directions within the prescribed 30 days, then it must proffer an explanation why it did not do so. In other words, it must provide a reasonable and acceptable explanation for the delay.

[21] Order 3 r. 5(1) of the Rules of Court 2012 generally applies to every situation where a prescribed time for doing an act has not been complied with and an extension of time is needed. It provides:

The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.

[22] Case law is in abundance that where there is a delay then the party guilty of it must provide a cogent and reasonable explanation for it. However, the words "may, on such terms as it thinks just" in O. 3 r. 5(1)

mean that it is ultimately at the court's discretion whether the extension of time should be granted or not, the paramount consideration being that it would be just to do so.

[23] In paras. 4 to 8 of the solicitor's affidavit, Ms Tham Jolene proffered the following explanation for the delay:

(i) Messrs Josephine, LK Chow & Co "kini telah menerima arahan daripada plaintif-plaintif untuk memulakan prosiding bagi taksiran ganti rugi menurut penghakiman tersebut." The word "kini" denotes that that instruction would presumably have been given in December 2018; and

(ii) the filing of the application for directions "telah ditangguhkan" as the plaintiffs had applied for post-judgment discovery to elect whether to claim compensatory damages under s. 37(1)(b) of the Act or an account of profits under s. 37(1)(c) of the Act, to be assessed.

[24] The explanation for the delay in the plaintiffs' affidavits filed in October and November 2022 runs along the following lines:

(i) on 1 November 2018, the plaintiffs applied for post-trial discovery;

(ii) that application for post-trial discovery was only disposed of by an order dated 28 February 2020 for the defendants to disclose the documents set out in paras. 1 a to f of that order ("the discovery order");

(iii) the defendants did not comply with and/or delayed complying with the discovery order, for which the plaintiff's moved committal proceedings against the defendants;

(iv) the plaintiffs were compelled to send the documents actually provided by the defendants to an auditor to get better clarity;

(v) the auditors produced their report on 13 May 2022;

(vi) owing to the defendant's non-compliance with the discovery order, the second and third plaintiffs were prevented from making an assessment on whether to claim compensatory damages under s. 37(1)(b) of the Act or an account of profits under s. 37(1)(c) of the Act, to be assessed; and

(vii) as the second and third plaintiffs could not pursue an assessment of damages based on an account of profits under s. 37(1)(c) of the Act, it had elected to seek an assessment of compensatory damages under s. 37(1)(b) of the Act.

[25] The explanation in the plaintiffs' affidavit has inconsistencies with the explanation in the solicitor's affidavit. The former suggests that the application for the court's directions for assessment of damages could not have been made until the post-judgment discovery process under the PJDA was completed, whilst the latter is clear evidence of a contrary stand that that application could still have been made even when the post-judgment discovery process had just started. The court's records show that, at the time

the plaintiffs filed the plaintiffs' application on 12 December 2018, PJDA filed on 1 November 2018 had only undergone two case managements but with no firm directions yet to have been issued. In fact, by filing the plaintiffs' application even at the preliminary stages of the post-judgment discovery proceedings, the second and third plaintiffs can be assumed to have known that their application for directions for assessment of damages was not dependent thereon.

[26] It is also obvious from table B that any post-judgment discovery proceedings would be relevant for the damages in para. 7a only but not paras. 7b, 8, 9, 10, 11, 12, and 13 of the judgment. Thus, only one out of eight types of damages ordered might have involved post-judgment discovery proceedings, and even then, only if the plaintiff's wanted their compensatory damages assessed on an account of the defendant's profits from the copyright infringement. If the plaintiffs had opted for compensatory damages under s. 37(1)(b) of the Act, post-judgment discovery proceedings would have been avoided altogether.

[27] A further observation is that even the application for post-trial discovery was made over 30 days from the date of the judgment.

[28] Thus, in reality, there was nothing to stop the plaintiffs from applying for directions for assessment of damages within the 30 days, and then commencing the post-judgment discovery proceedings. In other words, commencing the post-judgment discovery proceedings after first applying for directions for assessment of damages. Under O. 37 r. 1 itself, in issuing those directions for assessment, the provisions of O. 34 (pre-trial case management) – importing the necessary modifications – apply. Those directions could handily include adjusting the timetable for the assessment of damages to cater for any post-judgment discovery proceedings. That is already a common occurrence in pre-judgment case management proceedings; even though a case management date is assigned when the originating process is sealed and issued, in the ensuing case management, the court may cater for the disposal of any interlocutory applications filed along the way.

[29] Accordingly, the prudent course for a party being adjudged to be entitled to damages would be to submit its application for directions for assessment of it within the prescribed 30-day period, so as to avoid running afoul of O. 37 r. 1 and having to satisfactorily explain the delay.

[30] It must be noted that that 30-day period was not in the previous Rules of High Court, 1980. In my mind, the purpose of inserting it must have included the need for the expeditious disposal of any post-judgment assessment of damages proceedings and to ensure that a successful party at the judgment stage did not rest on its laurels to claim what the court had allowed it. If the courts are expected to adjudge and dispose of a claim as

soon as is reasonably possible, then surely a successful litigant is likewise expected to reap the benefits of that judgment expeditiously too. Having toiled for months to get to the seat of judgment, surely it makes sense to make hay while the sun shines.

[31] Thus, if the plaintiff's application was to be decided solely on the *Tetuan Sri Ling* decision, then I would have been inclined to dismiss it.

[32] However, a contrary decision by the Court of Appeal, in *Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Anor* [2020] 7 CLJ 512; [2020] MLJU 695, which learned counsel for the second and third plaintiff's brought to my attention on the hearing of the plaintiffs application, extended them a much-needed lifeline.

[33] In that case, the order for assessment of damages was on 27 November 2014 and the application for an extension of time to apply for assessment of damages was filed some three years later, on 19 December 2017. Based on the *Tetuan Sri Ling* decision, the High Court dismissed the application.

[34] However, the Court of Appeal allowed the appeal. Hamid Sultan JCA, delivering the judgment of the court, said (in paras. 6 and 12 of the judgment):

> The reading of O. 37 *per se* does not take away substantive rights. It only requires the parties to expeditiously file for order for assessment of damages within one month. If the winning party does not file, the losing party can do so. If both do not file, there is an obligation for the court to give directions rather than striking out the substantive rights as set out in O. 34 (case management proceeding). Order 37(1) cannot be read in isolation. It has to be read as among others with Orders 37(3), (7), *etc.* as well as O. 34 inclusive of O. 1A.
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> Order 37 of RC 2012 must be read with O. 34. In addition, the phrase 'shall' is not mandatory in nature as it also allows the opposing party to file directions as well as the court in its own motion to set the matter for case management if the application is not made within a month. In addition, a six month period is given to the opposing party to make such an application under O. 37 Rule 1(7) keeping the subject matter of assessment open until some action is taken by parties or registrar. It will be travesty of justice to allow the defendants to object on the ground of non-compliance when they are given the right to remedy the breach. Thus, reading O. 37(1) of RC 2012 in isolation will lead to miscarriage of justice.

[35] The Court of Appeal also referred to the decision of this court in *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra* [2017] 1 LNS 422; [2017] 3 AMR 849, which dealt rather extensively with O. 37 r. 1.

[36] In that case, the application for directions for the assessment of damages was filed over five months after the order of damages, without any application for extension of time, and the defendants raised an objection by way of preliminary objection. In dismissing it, Khadijah Idris, JC (as Her Ladyship then was) said in paras. 41 and 42 of her judgment:

> Adopting the approach laid down and applying the principles established in the authorities, I conclude O. 37 r. 1(1) RoC 2012 in so far as the 1 month requirement for filing of application to seek direction for assessment of damages is not intended to be mandatory in nature. My reasons are as follows:
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> (a) Order 37 r. 1(1) ought to be read in the context of O. 37 as a whole and not in isolation;
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> (b) Order 37 r. 1(3) provides in the event a party in whose favour the judgment was made fail to seek direction within 1 month from the date of the judgment, the party against whom the judgment is given may apply to the court for the damages to be assessed. If the 1 month requirement under O. 37 r. 1(1) is intended to be absolutely mandatory, r. 1(3) would not have been formulated by the legislator. As we are reminded time and again, Parliament does not legislate in vain;
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> (c) although the word used in O. 37 r. 1(3) is "may", such provision is intended as a "back up" provision to O. 37 r. 1(1). The said r. 1(3) intends to put on alert the party against whom the judgment is made of the steps it should take in the event the party who is entitled to the benefit of the judgment fail to seek for direction from the court. No doubt the other party against whom judgment is made would not want to do so for obvious reason and would conveniently and deliberately leave it to the party who is entitled to the benefit of the judgment to pursue the matter. The moment the party who is entitled to the benefit of the judgment commence to seek for directions *albeit* out of time, the other party will attack on technical grounds, just like in the instant appeals;
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> (d) the defendants could or should have invoked O. 37 r. 1(3) RoC 2012 to seek for directions from the court when the plaintiffs fail to do so within the stipulated period in O. 37 r. 1(1) RoC 2012. By choosing not to do so, the defendants contribute to the delay which they alleged to have been committed by the plaintiff in seeking directions for damages. The fact that the said O. 37 r. 1(3) provides for the defendants to apply to court for damages to be assessed in the event plaintiff fail to act within the 1 month after judgment is clearly a strong indication that O. 37 r. 1(1) was never intended to be mandatory;
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> (e) such intention is further illustrated in O. 37 r. 1(7) which provides for the filing of a notice of appointment of assessment of damages (in Form 62A) to be made by any other party to the matter in the

event the party who is entitled to the benefit of the judgment fail to do so within 6 months from the date of the judgment. This r. 1(7) to my mind is another "back up" provision;

(f) I am aware the words "... shall within one month ..." were subsequently inserted when amendment was made to the said provision. The said insertion obviously impose a fixed period within which the direction for assessment of damages is to be sought by the party entitled to the benefit of the judgment;

(g) under O. 37 RHC 1980 there was no requirement to seek directions for assessment of damages from the court. Instead the party in whose favour the judgment is made is required to obtain the necessary appointment date from the court and serve the notice of appointment on the party against whom the judgment is made. The old provision does not fix a time frame as to when the appointment date is to be obtained. Also, there is no requirement for the party against whom the judgment is made to obtain the appointment date should the party who is entitled to the benefit of the judgment fail to do so. In other words, there is no "back up" provision equivalent to the current O. 37 r. 1(3) and (7) RoC 2012;

(h) whilst it is obvious the insertion of the 1 month requirement in O. 37 r. 1(1) RoC 2012 is to fix a time period, such provision must be read together with r. 1 (3) and (7) of O. 37 RoC 2012 which was also inserted at the same time when the 1 month requirement is inserted in O. 37 r. 1(1) RoC 2012. Interpreting O. 37 r. 1(1) RoC 2012 in isolation and without regard to the other sub-rules in the same O. 37 would create disharmony which would defeat the full effect of the said O. 37; and

(i) it is apparent that O. 37 was formulated with "back up" provisions where both parties are required and expected to take the necessary steps to put a closure to the matter expeditiously. This is especially so in the instant case where judgment was made by the High Court after full trial where testimonial evidence of witnesses were heard. I am of the view such formulation is manifestly clear of the different approach of the RoC 2012 (in particular O. 37 in this instant appeals) which is intended to prevent delay in the progress of a case to trial and for its completion (*Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC). In this regard reference is made to O. 2 r. 1(2) RoC 2012 which states that parties are required to assist the court to achieve the overriding objective of enabling the court to deal with cases justly.

As it is my considered opinion that O. 37 r. 1(1) RoC 2012 is not mandatory, non-compliance with the 1 month requirement is not fatal and therefore may be cured or remedied. In this regard O. 1A and O. 2 r. 1 RoC 2012 is applicable.

[37] In *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532, Gopal Sri Ram JCA (as His Lordship then was) said: A

> Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasised that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. So, when a party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint. B C

[38] I am inclined to follow the approaches of the Court of Appeal in *Vellasamy Ponnusamy* and the High Court in *Petra Perdana* on O. 37 r. 1, and hold that the requirement to apply for the directions for assessment of damages within 30 days is not mandatory. D

[39] I suspect too, that the Court of Appeal in the *Tetuan Sri Ling* case were so persuaded by the delay of three years with no explanation provided. That is not the case here. E

[40] Even if it were, I would still hold that the second and third plaintiffs are entitled to the extension of time they had applied for, more so in light of the following:

(i) despite the second and third plaintiffs' delay, the defendants were quite happy to go along with the post-judgment discovery proceedings to proceed for years between November 2018 to October 2022, and not insist on the plaintiffs' application being disposed of first; F

(ii) having gone through that entire process, it would be unjust for all of it to be rendered meaningless if the extension of time is refused;

(iii) the second and third plaintiffs' explanation for wanting to explore and pursue the post-judgment discovery process is reasonable. Even though the ideal scenario would have been for them to have applied for directions to assess damages within the 30-day timeline and then applied for post-judgment discovery, they should not be punished for not taking the ideal steps; and G H

(iv) the plaintiffs did file an application for extension of time after only two months after the 30-day time limit had expired and thus there was no inordinate delay. It would be unjust in the circumstances not to grant it. I

[41] I therefore allowed prayer 1 of the plaintiffs' application for an extension of time to 14 days from the date of this decision for them to apply under O. 37 r. 1(1) for directions for assessment of damages, but with no order as to costs.

[42] I declined to order directions for the assessment of damages or issue directions for the filing of the notice of appointment for assessment of damages. This is because, under O. 37, the application for directions for assessment of damages is a prerequisite to directions for assessment of damages, and at present there is none. It would therefore be premature to issue any such directions.

[43] In that regard, I note that on 15 November 2022 before I even heard the plaintiffs' application, the second and third plaintiffs had filed a notis temujanji untuk penaksiran ganti rugi. However, under O. 37 r. 1(6) of the Rules, a party shall not file any such notice "unless directions for the filing and exchange of affidavit evidence pursuant to O. 34 have been given or complied with, as the case may be."

[44] As I said, under O. 37 r. 1(2) of the Rules, those directions are issued on the hearing of the application for directions. We are not even there yet; the plaintiffs' application is for an extension of time to file an application for directions. Accordingly, the notis temujanji untuk penaksiran ganti rugi has been filed prematurely, and I make no order on it.