CHAPTER IV

CIVIL PROCEDURE AND DELAY

A. Introduction

The rules of Civil Procedure have been defined as those rules that govern the whole process of civil litigation including the commencement of civil action, the adjudication of the civil disputes based on merits and the enforcement of the remedy so rewarded.[1] This wide definition appears to include the rules of Evidence. Unlike the rules of Civil Procedure which are chiefly found in the Rules of the Supreme Court 1957[2] and the Subordinate Courts Rules, 1950[3], the rules of Evidence are enacted separately in the Evidence Act, 1950. The rules of Evidence play an important part in the legal process of litigation by providing the manners and methods by which the facts of civil disputes are proved.

In comparison, the rules of civil procedure are totally different from the rules of Criminal Procedure. Although both rules serve as machinery of justice, the nature of their functions are different. While the rules of civil procedure are only set in motion at the behest of parties who are entangled in private disputes; the rules of Criminal Procedure govern the legal process by which the state enforces its power against criminal offenders of state laws. On the

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[1] A Justice Report, "Going to Law - A Critique of English Civil Procedure", Stevens and Sons, London, 1974, p. 4.

[2] Hereinafter known as the R.S.C. in the text.

[3] Hereinafter known as the S.C.R. in the text.

other hand, the rules of Civil Procedure are not used for the adjudication of administrative disputes which is regulated by a simpler and less formalistic set of procedural rules.

Our present Rules of the Supreme Court, 1957 came into force on April 1958[4]. As a consequence, the different systems of procedural rules were replaced so that all the High Courts of Malaysia would follow a uniform set of procedural rules. In March 1957, the Civil Procedure Codes (Repeal) Ordinance, 1957 (No. 57) was enacted to repeal the 1934 Straits Settlements Rules; the Federated Malay States Civil Procedure (which was followed in Johore); the simpler procedural rules of Kedah and Perlis; and the rules of Civil Procedure followed in Kelantan and Trengganu.

The Rule Committee[5] introduced the English rules of Civil Procedure of the Annual Practice, 1957 into our R.S.C. with minor variations to suit the local conditions. Those rules that are marked with an asterisk are peculiar to our R.S.C. only.

On the other hand, the Subordinate Courts Rule Committee of The Rule Committee Ordinance 1948[6] prepared a different set of Civil procedural rules to regulate the process of civil litigation in the

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[4] L.N. 42 of 1958.

[5] The Rule Committee was officially constituted by virtue of Section 3 of the Rule Committee Ordinance 1955.

[6] The Rule Committee Ordinance, 1948 was replaced by the Rule Committee Ordinance 1955. The Rule Committee Ordinance of 1955 was revised in 1971 and is now called the Subordinate Courts Rules Act, 1955.

Subordinate Courts. The rules of Civil Procedure followed in the Subordinate Courts are found in the Subordinate Courts Rule 1950.[7]

B. The High Court Procedure

The R.S.C. comprises an elaborate set of complex and technical rules. It consists of a total of 90 different Orders and a greater number of rules and sub-rules. It provides 4 different modes of originating processes, namely, the Writ of Summons,[8] Petition[9], Originating Motions[10] and Originating Summons.[11] Each mode of originating processes sets out its own procedural steps which are regulated by different conditions. In addition to the complexity of the various proceedings, the R.S.C. embodies a number of technical principles the infringement of which will cause the whole proceedings to be nullified or irregularised. The case of Tay Choon v. Jeet Kaur[12] is illustrative. In this case, the Court held that the whole proceedings was nullified on the ground that the statement of claim was wrongly signed by a person other than the plaintiff or his solicitor.

1. The Writ

The bulk of the civil actions involving issues in disputes

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[7] The Subordinate Courts Rule 1950 came into force in September, 1951.

[8] R.S.C. O.2 r.1.

[9] Ibid., O.52 r.1.

[10] Ibid., O.52 r.16.

[11] Ibid., O.54 r. 4B

[12] [1972] 1 M.L.J. 216.

is commenced by way of a Writ. The Writ is a formal document containing a concise statement of the nature of the claim made and the relief or remedy asked for.[13] The Writ must be prepared by the plaintiff or his Solicitor and it shall be issued in the name of the Chief Justice who acts on behalf of the Yang DiPertuan Agong[14]. The general endorsement prescribed in the Writ seeks to notify the defendent the reason why an action has been instituted against him;[15] and serves to command the defendant to enter appearance within eight days from the day of service.[16]

A Writ can be generally endorsed as described above or specially endorsed wherein a full and detailed statement of claim[17] is contained. Most solicitors prefer to use the Specially Indorsed Writ because the defendant can be notified immediately of the allegations of facts made against him. Moreover, the plaintiff can apply for summary judgement under Order 14 which helps to hasten the disposal of the proceedings. While a General Indorsed Writ will require the drafting of a Statement of Claim separately and its subsequent service to the defendant will necessarily take up a further ten days or more if an extension of time is made.[18]

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[13] R.S.C. O.2 r.1.

[14] Ibid., O.2 r.8.

[15] W.B. Odgers, Pleading and Practice, Twentieth Edition, Stevens & Sons. London, 1971, p. 43.

[16] R.S.C. O.2 r.9.

[17] Per Lord Coleridge C.J. in Frahauf v. Grosvenor (1892) 67 L.T. 351. "But if a man employs the machinery of a Specially Indorsed Writ, he must make his indorsement a full and complete statement of his cause of action."

[18] R.S.C. O.20 r.1 (b).

However, a renewal of a Writ will not be allowed if such renewal will cause delay or will deprive the defendent of the defence that the action is time-barred.[19]

The Writ becomes officially issued and authenticated when it is dated, signed and sealed by the Registrar.[20] The Plaintiff will be required to deliver the unstamped, original Writ to the bailiff for service to the defendant; while the stamped copy will be recorded in the Cause Book of the High Court Registry.[21]

2. (a) Service of Writ

The object of service is to give adequate notice to the defendant with regards to the action which is instituted against him. When the defendant or his solicitor does not undertake in writing to accept service,[22] he must make his indorsement a full and complete statement of his cause of action. Then the Writ must be served personally on the defendent.[23] To constitute a good and effective personal service, the Writ must be left near the defendant such that his attention is directed to it. For instance, the throwing of a copy of a Writ down near the defendant in

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[19] Battersby v. Anglo-American Oil Co. [1945] 1 K.B. 23.

[20] R.S.C. O.5 rr. 1, 11.

[21] Ibid., O5 rr. 11, 12, 13.

[22] Ibid., O.9 r.1.

[23] Ibid., O.9. r.2.

his presence and offer the Writ to him is deemed to be sufficient and effective personal service.[24] However, the mere putting of a copy of a Writ through a crevice in the door of the defendant's house is no service at all.[25]

Service can only be effective if it is made within twelve months from the day the Writ is issued; however the period of service may be extended by the Court for a further six months.[26] To show that the Writ has been duly served, the person who serves it must indorse on it the date of service within three days after service.[27]

(b) Substituted Service

The Court has the power to dispense with personal service[28] if the plaintiff can show that the defendant evades service. In consequence, personal service cannot be effected despite the various genuine but unsuccessful attempts of the plaintiff to serve the Writ.[29] If the application for substituted service made by the plaintiff is granted, the Court may order service by posting and to have the Writ affixed on the door of the defendant's house or on the Court's notice board.

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[24] Thompson v. Pheney 1 Dowl. 443.

[25] Christmas v. Eicke (1848) 6 D & L. 156.

[26] R.S.C. O.8 r.1.

[27] Ibid., O.9 r.15.

[28] Ibid., O.10 5. 1, O.67 r.6.

[29] Re a Judgement Debtor [1937] Ch. D. 137.

Alternatively service may be done by public advertisement which is rarely resorted to because of the amount of expenses involved.[30] However, service by public advertisement will only be allowed in exceptional cases where it is not possible to name any person to effect good service and there is good reason to believe that service by advertisement will give adequate notice to the defendent or defendants concerned.[31]

In certain cases, a Writ cannot be duly served on the defendent who resides out of the jurisdiction of the Court. In this connection, the plaintiff may apply to the Court for an order to serve the Writ out of its jurisdictions if the case satisfies the requirements laid down in Order 11 rule 1.

Avoidance of service is often resorted to by the defendant to gain time and to delay the proceedings for their own convenience. The action cannot proceed if the Writ cannot be effectively served. In such an event, the plaintiff is forced to apply for substituted service which may delay and prolong the proceedings further.

3. Entry of Appearance

After the Writ has been duly served, the defendent is required to file a memorandum of appearance which must be sealed and signed at the appropriate registry within eight days after the day of service.[32] If the defendent failed to do so, he may be deprived of the chance to make his defence although he may be allowed to enter appearance at any time before judgement.[33]

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[30] W.R. Odgers, op.cit. n. 15, p. 53.

[31] Mallal, Supreme Court Practice (Volume II), First Edition, Malayan Law Journal, Singapore, 1961.

[32] R.S.C. O.2, r.9.

[33] Ibid., O.12 r.22.

The legal implication of an unconditional appearance is threefold, in that the defendent intends to submit himself to the jurisdiction of the Court; he intends to contest the claim and he waives any irregularity of the Writ so served upon him.[34] The defendent's waiver will not apply when the service is a nullity.[35]

On the other hand, the defendant can choose to enter a conditional appearance and to reserve for himself the right to set aside the writ or services which are irregularly carried out.[36] Once the defendant has entered appearance to a Specially Indorsed Writ, the dispute may be disposed of if the plaintiff is able to obtain judgement summarily under Order 14. This will help to reduce any possibility of delay by obstinate defendants who have no valid defence at all.

If the plaintiff's claim is vexatious and frivolous the defendant may apply to the court once he has entered appearance to have the claim struck out on the ground that the claim bears no reasonable cause[37] or that the claim is intentionally instituted to prejudice, embarrass or delay the fair trial of the action.[38]

4. (a) Discovery And Close Of Pleadings

Pleadings are formal, written documents exchanged between the

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[34] Re Orr Ewing / 1882 / 22 Ch. D. 463.

[35] Valliammai Achi v. Nachiappa Chettiar / 1957 / M.L.J. 27.

[36] W.B. Odgers, op.cit. n. 15 p.54.

[37] R.S.C. O.25 r 4.

[38] Ibid., O.19 r 27.

parties after the service of the Writ and before the close of pleadings. Pleadings include the statement of claim, the defence, the reply and other related documents and letters exchanged between the parties. The cardinal rules must be observed in drafting the pleadings. They include material facts necessary for the formulation of a complete cause of action, preciseness and accuracy in defining the issues in dispute. The pleadings must contain only facts, thus excluding any points on law or evidence.[39]

Pleadings is one of the most important stages in the whole litigation process. At this stage, the issues in dispute are narrowed down and the ambit of controversies are defined. This is intended to eliminate surprise and to prevent the parties from diversifying their issues in dispute in the course of the proceedings which can consequently give rise to dilatoriness. Pleadings form the basis upon which the range of discovery and the evidence to be tendered are limited. It also helps to settle the questions as to who should bear the burden of proof and what manner of relief is required. Besides, the pleadings also serve as a written record upon which the defence of res judicata can be raised. In theory, the pleadings are supposed to save the time and expenses of the court and the parties in the disposition of civil proceedings.[40] However, in practice this is rarely the case as we shall see later.

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[39] W.B. Odgers, op. cit. n. 15, p. 84.

[40] Master I.H. Jacob, "The Present Importance Of Pleadings", Current Legal Problems (1960) p. 171.

(b) Exchange of Pleadings

In the case of a Generally Indorsed Writ, the statement of Claim must be delivered within ten days after appearance.[41] If the defendant intends to defend against the allegations made against him, he must file a Statement of Defence wherein he can either set-off or counter-claim against the plaintiff's claim within fourteen days from the time limited for appearance or from the delivery of the statement of claim whichever is the later[42]. A general statement in the Statement of Defence to express the defendant's denial of the plaintiff's claim is not a sufficient traverse.[43] The defendant must state specifically in his statement of defence which allegations of facts he admits or deny. He can set-off or counter-claim against the plaintiff's claim. In the absence of any specific denial, the defendant would be deemed to have admitted all the allegations of facts contained in the Statement of Claim.

The plaintiff may desire to deliver a reply against the allegations of facts in the defendant's Statement of Defence within seven days from the delivery of the defence.[44] However, this is not a mandatory on the part of the plaintiff. Failure to put a reply will not prejudice the plaintiff in anyway. In fact, in the absence of a reply will cause the material facts in the defence to be put in issue. The plaintiff must reply the allegations of facts made in a counter-claim otherwise he will

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[41] R.S.C. O.20 r (1) (b).

[42] Ibid., O.21 r. 6.

[43] M.E. Odgers, op.cit. n. 13, p. 195.

[44] R.S.C. O.23 r 1.

be deemed to admit all the allegations of facts alleged therein.[45]

(c) Amendment Of Pleadings

Amendments of pleadings may be allowed by the court at any stage of the proceedings if such amendments are deemed necessary for determining the real questions in dispute.[46] However, if the proposed amendment will cause undue delay or will unfairly prejudice the other party or that it is irrelevant or frivolous the court has the discretion to refuse the amendments.[47]

The parties may amend their pleadings without leave at any time before the close of pleadings,[48] and any costs occasioned by such amendment shall be borne by the party who makes it.[49] Every amendment so made must be served to the opposent party who must be duly informed.

In practice, pleadings are liberally amended at any time of the proceedings. Sometimes, applications for amendments are made at the commencement and in the course of the trial itself. Subsequently, the parties are inconveniently affected[50]. As a result, the trial proceedings may have to be adjourned to ensure that fairplay prevails.

(d) Close of Pleadings

Normally, the pleadings are deemed to be closed at the expiration of seven days from the delivery of the defence or reply. However,

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[46] Ibid., O 23 r.2.

[48] W.B. Odgers, op.cit. s. 15, p. 170.

[49] R.S.C. O.28 rr 2, 3.

[49] Ibid., O.20 r. 13.

[50] See Appendix B. p. 117 - 120.

the Court may grant an extension of time to the parties to file any pleadings subsequent to reply.[51]

Unfortunately, there has been much delay caused by the solicitor's inability to file the agreed bundles and documents within the time period prescribed.[52] This occurs despite the fact that the agreed Statement of Facts must be filed 30 days after the Close of Pleadings. It often happens that the pleadings are filed just before or even on the very day fixed for hearing. Consequently, the hearing of cases is delayed and thus leaving a considerable gap in time between the initial and continued hearing. Furthermore, the pleadings are rarely drafted with certainty and preciseness. The Court seldom finds it easy to elicit the issues and the court has to act like a 'roving commission' in trying to sort out the maze of facts. There is a tendency among solicitors to plead irrelevant facts which tend to obscure the issues in disputs. Wide and superfluous defences are sometimes made so as to prevent the plaintiff from obtaining judgement in default of defence.

It is observed that even though the R.S.C. do provide specific time limits for the exchange of pleadings; at each stage, these time limits are not strictly enforced. The R.S.C. empowers the Court to exercise an overriding discretion[53] to extend the time limits which can stretch to a considerable interval of months. Small wonder that the close of pleadings is often unnecessarily prolonged.

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[51] R.S.C. O.27 r.13.

[52] Practice Note No.1 of 1969 [1969] 1 M.L.J. p. xii.

[53] R.S.C. O.20 r(1)(b); O.21 r.6; O.27 r.13.

5. Discovery And Inspection Of Documents

Upon the Close of Pleadings, the Discovery of Documents must be conducted within ten days after notice requiring the same.[54] The discovery process enables the parties to have access to those documents which are known to be in the possession of the opponent. The three stages of discovery of documents include the disclosure of what documents exist whether privileged or unpriviledged; the inspection of those documents and interrogatories. Interrogatories are numbered questions to be answered on oath and which can be used as evidence at the trial. Interrogatories may be delivered only by leave of the Court.[55]

If the recalcitrant party fails to produce or allow the inspection of documents, the other party can apply for a Court Order to direct that the required documents to be produced. Non-compliance of such Court orders may cause the action or the defence to be struck out. However, the court is often reluctant to exercise this discretion which is curtailed by such considerations concerning the fair disposal of the action, costs saving or whether the discovery is necessary at all.

Full disclosure is rarely obtainable by way of the discovery process. There is a tendency of the parties to conceal their evidence and other informative particulars with which they use to surprise and even to weaken their opponent's claim at the trial. Such tendencies are

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[54] Ibid., O.30 5.(1)(b)

[55] Ibid., O.31 r.1.

[56] Minority Report of the (Winn) Committee on Personal Injuries Litigation, 1968, Cmnd 369.

an inevitable consequence of a system of civil litigation based on the adversary principle. Full disclosure of facts has been found to operate harshly against aggrieved litigants in personal injury cases. The insurance companies tend to delay the settlement of accident claims so that meanwhile more information relating to the weaknesses of the opponent can be obtained. This is done with the view that they could settle the claims as cheaply as possible.[56]

6. The Trial

Before the actual trial, a variety of interlocutory proceedings would have been applied for to settle various minor issues in dispute which need not be proved. This also includes amendments of pleadings, counter amendments or the application for interrogatories to be administered.

Both the plaintiff and the defendant may give notice of trial; however if the plaintiff fails to do so within six weeks after the time when he first becomes entitled to do so, the defendant may apply to the Court to have the action dismissed for want of prosecution.[57] The trial shall take place at the date and place as prescribed in the notice of trial.[58]

In many civil cases, the trial cannot proceed because there has been no notice of trial given or that no dates have been made available.[59] The parties are supposed to be prepared and ready for the

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[57] R.S.C. O.36 rr. 11, 12.

[58] Ibid., O.36 r. 13.

[59] See "Overcoming the Backlog of Cases", [1975] 2 M.L.J. p. lxxii

trial on the day so fixed. However, it often occurs that although the day of hearing has been fixed, the solicitor concerned may not be available or that the Bundles of Documents have not been duly filed.[60] This consequently leads to unnecessary postponements and delay in the proceedings.

The trial proper consists of three main stages which include the examination-in-chief, cross-examination and re-examination. Briefly, the object of the trial process is to enable the solicitors concerned to guide the parties and the witnesses to present their cases to the Court favourably. In cross-examination, the opposing solicitor will try to challenge and destroy the reliability of the evidence tendered by the witnesses. Finally, in re-examination, whatever evidence which has been tendered in the examination-in-chief in addition to other related evidence will be reasserted.

The technique of cross-examination is supposed to help sift and test the reliability of the evidence tendered in court. However, in practice, this technique tends to be carried out to the extreme. More often than not, the witnesses are shaken out of their confidence under the cold stare of the solicitor and the judge; and they often find it difficult to give evidence properly or even accurately. Inevitably, the trial includes a summary of the evidence tendered in the course of the trial and the solicitors' submissions of law.

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[60] See Appendix B. p. 117 - 120.

C. The Subordinate Court Procedure

Basically, the procedural steps provided in the S.C.R. are quite similar to that of the Writ of summons procedure found in the R.S.C. Comparatively speaking, the civil proceedings of the Subordinate Courts are conducted in a summary form which is less formalistic and less complex.

The basic procedural steps are as follows :-

(a) Issue of Summons.

(b) Service of Summons.[61]

(c) Delivery of Defence.[62]

(d) Reply[63].

(e) Discovery and Inspection.[64]

(f) Trial.[65]

It is worthy to note that certain distinguishing procedural features are peculiar to the Subordinate Courts rules of civil procedure. Instead of a Writ, civil actions in the Subordinate Courts are commenced by way of a Summons which has a statement of claim endorsed at the back of the form.[66] There is no necessity of a formal entry of appearance on the part of the defendant to file a memorandum of appearance.[67] If

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[61] S.C.R. O. VI r 3.

[62] Ibid., O.X r.6.

[63] Ibid., O.X. r. 10.

[64] Ibid., O.XIII r.1(1).

[65] Ibid., O. XIX r.1, 2.

[66] Ibid., O.VI r(1) and (2)

[67] S.C.R. O.X. r.6.

the defendant desires to defend the whole or any part of the claim, he shall, not less than two days before the return date given in the Summons or within such further time as the Court may allow, file and cause to be served on the plaintiff a defence.[68] By virtue of Form No.2 of the Summons, the defendant is required to 'appear in person' at the mention date so fixed by the Court. The element of physical appearance is lacking in the R.S.C. 1957. The cardinal principles which govern the High Court procedure of service, exchange of pleadings and the trial process are similarly adopted in the S.C.R. 1950. There are many variations of the rules peculiar to the R.S.C. 1957 which are absent in the S.C.R. 1950. These include the various interlocutory procedures of Summons for Directions which the High Court judge is empowered to give. On the other hand, matters relating to civil proceedings must be specifically applied for in the Subordinate Courts.

D. A Brief Study Of Some Speedy Methods Of Disposal

1. Summary Judgement Under Order 14.

The purpose of Order 14 is to enable the plaintiff to obtain quickly and summarily a judgement without the expense and delay of a trial. In the words of The Lord Chancellor Halsbury in Jacobs v. Booth's Distillery Co.[69] the function of Order 14 is well summarised as below :-

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[68] S.C.R. O.X. r.6.

[69] (1901) 85 L.T. 262. H.L.

> 'There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, Order 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.'

When the defendant has entered appearance to a Specially indorsed Writ, the plaintiff may at liberty to apply to the court to enter judgement in his favour.[70] The application must be made promptly and the plaintiff is required to explain to the Court satisfactorily if the application is delayed until after the delivery of the defence.[71] The application must be supported by an affidavit swearing positively to the facts verifying the cause of action and the amount claimed. In addition the plaintiff must state that in his belief there is no defence available to the defendant.

If the defendant chose not to contest the application, judgment will be given to the plaintiff. However, the defendant may show cause against the application by stating in his affidavit that there are triable issues involved.

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[70] R.S.C. O.14 r 1(a).

[71] McLardy v. Slateum (1890) 24 Q.B.D. 504.

Upon the defendant's application, the Court may give leave to defend conditionally or unconditionally. However, leave to defend ought to be given if triable issues are involved although the defendant is not likely to succeed.[72] Conditional leave may be given upon the payments of costs for security by the defendant.[73] This is to assure that the plaintiff will not be prejudiced if the defendant's assets will be dissipated or if injustice will be occasioned by the defendant's delay.

In The Subordinate Courts, summary judgment under Order 14 is not specially provided in the S.C.R. 1950. However, a similar and simpler version of summary judgment is obtainable under Order X rule 7. In the event of the defendant's failure to file a defence or defence to counterclaim in time or in proper form, the Court may preclude the defendant from defending the claim. In this connection, judgement in default of defence will be entered in the plaintiff's favour.

2. The Short Cause List

This method is useful for a speedy disposal of cases where there are no witnesses involved or where the case requires not more than 1½ hours long of hearing time. Upon the application of the parties or on the Registrar's own motion, the case can be entered into the Short

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[72] W.S. Odgers, op.cit. n. 15, p. 65.

[73] Ibid., p. 66.

Cause List.[74] The plaintiff or defendant may set the case down for trial within fourteen days after entry into the Short Cause List. If the plaintiff failed to set the cases down for trial the defendant may apply to the Court to have the action dismissed for want of prosecution.[75] The Registrar has been directed to make the Short Cause List easily available to the parties and that the judges should try to dispose of these cases wherever they have the spare time.[76]

Nevertheless, the Short Cause List is not fully utilised. It happens often that on fixing days the lawyer on record do not appear personally and another lawyer who appears on his behalf is often not well-versed with the facts of the case. The representing lawyer is therefore not in a position to state precisely the time required for hearing. As a result, the Short Cause List fixing schedule cannot be maintained because the lawyers fail to give proper consideration of time to the Registrar concerned.[77]

The usefulness of this method depends heavily on the co-operation of the lawyers. Their initiative to use this method will help to prevent delay in the disposition of civil actions.

3. Disposal Of Points Of Law Before Trial

If the allegations of facts in the Statement of Claim discloses no cause of action, the defendant may apply to the Court to have the proceedings disposed of. In this connection, any points of law by any

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[74] R.S.C. O.36 r.1. (A)

[75] Ibid., O.36 r 11 (A)

[76] Practice Note No.1 of 1969 [1969] 1 M.L.J. p. xii.

[77] See Appendix B.p. 117 - 120.

party in the pleadings may be set down for hearing and disposed of by the Court upon the application of the defendant or the plaintiff.[78] If the disposal of the points of law can decisively dispose of the whole action, the action may be dismissed at the close of pleadings or shortly afterwards.[79] The Court may order any pleadings which does not show any reasonable cause of action to be struck out.[80]

This method of disposal is not commonly used since it relates to the disposal of law only. Most civil cases involves the trial of controversial facts in dispute and therefore it is difficult to dispose of the case in points of law only.

4. Settlement And Discontinuance

After an action has been entered for trial, the action may be withdrawn by consent in writing as agreed upon by the plaintiff and defendant.[81] If the plaintiff wishes to withdraw the action, he may do so at any time before receipt of the defendant's Defence or after receipt of the Statement of Defence but without taking further action to proceed.[82] Leave of the Court must be obtained by the plaintiff to withdraw the action unless it is otherwise provided by the R.S.C. On the other hand, the S.C.R. allows withdrawal of an action either by the plaintiff or the defendant after having given notice of his intention

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[78] R.S.C. O.25 r 2.

[79] Per Romer L.J. in Everett v. Ribbands [1952] 2 Q.B. 198.

[80] R.S.C. O.25 r. 4.

[81] Ibid., O.25 r. 2.

[82] Ibid., O.26 r 1.

to do so to the other parties.[83] Leave of the Court is not required. While in the S.C.R., withdrawal of an action is a defence by way of res judicata generally,[84] in the R.S.C., it is not to be a defence to any subsequent action.[85]

An action may be settled by agreement of the parties and the Court may record the settlement or its terms as the case may be.[86] If the settlement has been recorded by the Court, two repercussions follow. Firstly, the settlement will be in the nature of a contract whereby both parties agreed to abandon the former claims and contentions in consideration of immunity from future prosecution on the same matter. Secondly, upon such an agreement to settle, the Court will order the taxation of costs as the case may be.[87]

Settlement of disputes is brought about due to the lack of finances and the heavy expenses involved in litigation. Where delay and a backlog of cases prolong the trial proceedings, there is a tendency on the part of the parties to compromise to save time and expenses. In certain cases, the parties readily agree to settle their claims when they are made aware of the strength and weaknesses of their case after the discovery stage; such that further prosecution will not bring about any beneficial result.[88] In practice, more than 50% of the cases filed in the Court are settled due to one reason or another. In

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[83] S.C.R. O.XVI r.r.(1) and (5).

[84] Ibid., O XVI r.3.

[85] R.S.C. O. 26 r 1.

[86] S.C.R. O. XVI r. 6.

[87] W.S. Odgers, op.cit. n. 15, p. 326

[88] Ibid., p. 251.

Timberline Development Sdn. Bhd. v. Guan Guan Sawmill Sdn. Bhd.[89]

Mr. James Loh, the Senior President of the Sessions Court, Kuala Lumpur succinctly states the reasons for the settlement of actions :-

> "Solicitors know only too well that a compromise is arrived at not necessarily because one partly is quite convinced it is at fault or admits to be so; there are many and varied practical considerations wanting to compromise; for example there may be related or pending cases and a rough and ready balance may be struck; the parties may not want to risk litigation on questions of credibility which are generally not capable of success in an appeal unless the Court is plainly wrong, or litigation is not worth the effort and expense because it would spoil business goodwill; or the defendants may agree to pay up simply because of past favours done to him."

5. Payment Into Court

Payment into Court is another device which is intended to avoid further litigation. It enables the speedy disposal of an action for a debt or damages[90] where the defendant concedes liability but where the defendant feels that the sum claimed is excessive. The defendant may pay a sum in satisfaction of the whole claim or part thereof. The plaintiff is encouraged to take out the sum paid if the sum is a reasonable one[91] in relation to his cause of action.

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[89] [1973] 2 M.L.J. p. xlviii.

[90] Per Somervell L.J. in Findlay v. Railway Executive [1950] 2 All. E.R. 969.

[91] R.S.C. O.22 r.1.

Upon the receipts of the defendant's notice of payment in Court, the plaintiff can elect to proceed on with the trial or to accept the sum so tendered in satisfaction of his claim. If the plaintiff goes on and obtains a sum of damages smaller than or equal to the sum so paid in by the defendant, the plaintiff will be penalised in respect of costs.[92] He will have to bear the costs incurred after the date of notice of payment in Court. The rationale of such a penalty appears to discourage the plaintiff from pursuing on a claim which should have ceased when the defendant offers to concede liability. This device also seeks to avoid unnecessary litigation.

E. Probable Delays And Costs

Further delays may be encountered when the process of appeal is set in motion. Any litigation can appeal against a decision of the Subordinate Courts to the High Court. To do so, the litigant must file within fourteen days from the day on which the decision was pronounced a notice of appeal to the Subordinate Court which is required to prepare the Appeal Record.[93] Inordinate delay may be caused by the slowness of the Magistrates or the shortage of clerical staff in preparing the Appeal Record. Delay may also be caused by the lawyer's inability to file the memorandum of appeal within fourteen days after due notification that the appeal is ready to the Court Registry.[94] In addition, the processing of

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[92] S.C.R. O. XI r.5.

[93] Ibid., O. XXX IX r. 2 and 3.

[94] R.S.C. O. 59 r. 2.

the applications for appeal involves two registries which exist as different administrative organisations.

A close examiantion of the whole litigation process will show that at every stage of the proceedings delay has become an indispensable feature. A slight and supposedly excusable delay at the commencement of litigation can culminate in the course of the proceedings to an unpardonable prolongation of the trial.

There is no stringent measure to prevent delay but rather delay is allowed in certain cases where the parties are unduly hampered by extraneous circumstances to continue their prosecution. Extension of time may be allowed to ensure the achievement of just results as the Court deems it necessary.

The Registrar is empowered to report any undue delay and the Court may then require an explanation from the party who occasioned it. The Court can either order the party who occasioned the delay to bear additional costs or to make such orders necessary for the expedition of the proceedings.[95] It is difficult to keep track of the parties' compliance of the time-limits of the R.S.C. or the S.C.R. because the parties themselves can mutually agree in writing to delay the proceedings at their convenience.

The most the Court can do to prevent delay is to impose costs or disallow costs on the party who occasioned delay or undue prolixity.[96]

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[95] Ibid., O.33 rr 8A and 9.

[96] Ibid., O.33 r. 9; O.65 r. 55; O.2 r.2.

If the delay is solely caused by the fault of the Solicitor, the Court may require the Solicitor to bear the costs in lieu of his client. However, this is rarely done unless the Court has very good reason to find the Solicitor to be wholely blameworthy of the delay.

F. Conclusion

The High Court rules of Civil Procedure allows the Court to entertain cases delayed for one year.[97] Perhaps, this is allowed in the interests of justice when the parties are prevented from adjudicating their disputes due to unavoidable circumstances. Although the rules of Civil Procedure do provide for summary methods of disposal, unfortunately, they are not often resorted to except for Order 14.

Postponements and extensions of time always operate against the speedy disposition of cases. The exercise of the Court's discretion to grant postponements and extensions of trial depends on the personality and individual satisfaction of the presiding officer of a case.[98] In the High Court, this discretion is not so liberally exercised as the Court has to give due consideration to the circumstances of the case and the convenience of the parties involved. The effect of postponement will have to be taken out of the hearing list to the general fixing list. The hearing date of the case will have to be refixed and a lot of unnecessary waiting and waste of time will result.

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[97] Ibid., O. 64.

[98] Lewis Mayers, The American Legal System, First Edition, Harpers and Brothers, New York, 1955, p. 293. In America, delay in litigation is partly caused by lenient or indolent judges who too readily grants requests for adjournment or extensions of time.

Moreover, postponements of hearings are often mutually consented to be between the parties.[99] The Court is not empowered to interfere with such consensual postponements. On the other hand, in practice, delay is often caused by the flouting of the time limits prescribed by the rules of Civil Procedure. The incorrect and indiscriminate use of Motions and Summons in applying for interlocutory relief gives rise to a duplication of proceedings.[1] At each stage of the procedure, the time-limits are not followed strictly and consequently, discovery and the exchange of pleadings are not conducted accordingly as scheduled. For instance in Foong Weng Tat v. Vu Siew Chin,[2] a Specially Indorsed Writ was filed on the 22nd May 1972 and fifty-two days later on the 13th July 1972 the defendant entered appearance. Subsequently, the Defence was filed on 13th October 1972 when a total of ninety-two days had lapsed. Meanwhile, the plaintiff applied for summary judgement under Order 14 of the R.S.C. On the 18th October 1972 the Registrar gave leave to the defendant to defend the case whereupon the plaintiff appealed against the decision. On the 11th July 1973 after a lapse of more than seven months, the Judge decided against the plaintiff who again applied for further appeal.

In Jamaluddin s/o Ibrahim v. Tan Peng Wong and another,[3] the plaintiff filed a Specially Indorsed Writ on the 18th May 1972; thirty-six

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[99] R.S.C. O. 64 r. 8.

[1] See Appendix B p. 117 - 120.

[2] Unreported High Court Civil Action No. 146 of 1972, Ipoh.

[3] Unreported High Court Civil Action, Ipoh.

days later after a series of correspondence between the parties the defendant filed a memorandum of appearance on the 23rd June 1972. On the 29th June 1972, the Statement of Defence was filed subsequently. Until the 8th March of 1976, the case has not been set down for hearing. Since the commencement of the action, there has been much extentions of time caused by the frequent change of Solicitors and prolix correspondence. Until now, the bundle of documents and the bundle of pleadings still are not fully ready for trial.

It is obvious from the above illustrations that the trial proceedings can be drastically prolonged and delayed at the convenience of the parties. One may be tempted to inquire where does the fault lies: Sir John Foster who headed the Advisory Committee of the Council of Justice made a critical study[4] of the rules of the Civil Procedure of the English System. The Committee found that many inherent principles of the rules of civil procedure are responsible for the defective operation of the procedural rules.

Firstly, the rules of civil procedure operates on the principle of party prosecution. The parties often apply or even abuse the rules to suit their convenience. Consequently, the parties reciprocally waive the precise time schedule that may be necessitated by the temporary non-availability of Counsel, witnesses or delayed communications. The rules of Civil Procedure encourage late investigations which are not desirable.

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[4] A Justice Report, "Going to Law - A Critique of English Civil Procedure", Stevens and Sons, London, 1974.

Vital and accurate evidence may not be obtainable due to the lapse of time. The Court rarely is given the opportunity to supervise the conduct of the parties. The dilatoriness of the proceedings gives rise to late settlements which do not reflect the true merits of the case. Besides, since the evidence is tendered at the instance of the parties, there is a possibility that incomplete facts constitute the basis upon which decisions are made.

Secondly, the rules of procedure operate as a 'closed' system whereby each party tries to hide essential evidence from each other. At the trial, more often than not, the parties are confronted with surprises with reference to the methods of proof and the production of evidence. Undesirable effects such as unnecessary work and expense, unfair settlements and the danger of cases tried on incomplete facts do affect the quality of justice meted out.

Finally, the procedural system is a cumbersome, formalistic and expensive process. The tedious process of examination and cross-examination and the presence of a stern Judge wigged and robed tend to shake the witnesses out of their confidence than to elicit the truth. It is also an inflexible approach to require every decision to be given at the end of the whole trial. This precludes the possibility of having separate trials for minor issues which can be disposed off speedily. The trial can be unnecessarily bogged down with multifarious minor issues.

Owing to the unpredictability of the duration of the trial, the trial itself becomes an expensive process in time, money and manpower. Litigants and witnesses of the day's trials will be kept waiting for

unnecessary prolonged periods of time caused by the slow and cumbersome trial process. If a settlement is reached before the trial, a dislocation of the Court's schedule for the day can result in a wastage of Judge time.

Although sometimes a Master may attempt to decide a procedural question based on the merits of the case, his decision will be overruled if he infringes upon any principles of technicality of the rules of Civil Procedure. Furthermore, the procedural rules can be subject to abuse when the parties intended to delay the trial by applying for interlocutory orders. For instance, the application for further and better particulars or specific discovery give rise to unnecessary extra work for the opponent party. The application for appeals is also another convenient method of delay allowed by the rules of Civil Procedure. Consequently, much work, time and expense are inevitably incurred.

It is submitted that delay in litigation is an occurrence allowable by the rules of Civil Procedure. In fact delay has become part and parcel of the whole litigation process. The Advisory Committee of the Council of Justice has made important findings which go to expose the source of evils inherent in the English rules of Civil Procedure from which our R.S.C. is derived. Needless to say, similar problems have arisen to hamper the administration of justice in both systems of civil litigation.