

**Malaysian Civil Litigation Series.
Volume 6:
Stopping Midway: Strike Outs**

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1. Introduction

In our previous edition, we explored the avenues for a Plaintiff in obtaining a judgment without going to court. Namely, via an application for Summary Judgment or a Judgment in Default. But then it begs the question: how about the Defendant? In this edition we will look into the application that strikes out a case before it goes to a trial, literally called a “Strike Out”.



2. What is a Strike Out?

In order to better explain what a Strike Out is, it is best we first refer to the origin of the same under the Rules of Court 2012 (“ROC”). Order 18 Rule 19 (1) of the ROC provides that, parties may, at any stage of the proceedings, make an application to the Court to strike out pleadings on grounds that the pleadings:

- (a) discloses no reasonable cause of action or defence, as the case may be;
- (b) is scandalous, frivolous or vexatious;
- (c) may prejudice, embarrass or delay the fair trial of the action; or
- (d) is otherwise an abuse of the process of the Court.

As explained in past editions, pleadings shall refer to the Statement of Claim, Defence (and Counterclaim) and Reply (and Defence to Counterclaim, if necessary). They are the documents where the parties are pleading their story, hence the origin of the name. As such, both the Plaintiff and Defendant can apply for a Strike Out.

Having said that, a Strike Out is usually filed by a Defendant due to the nature of how a case unfolds. This is because a Plaintiff normally would not strike out a Defence. If a Defence has no reasonable cause or is unbelievable, it is more likely that a Summary Judgment could be applied and granted. It is also important to note that “partial Strike Outs” are also possible although not commonly used.

3. How to Apply for A Strike Out?

Like most applications, the process begins with a Notice of Application supported by an Affidavit. In this affidavit, it must refer to one of the four grounds under Order 18 Rule 19(1). Such an Application must be made timely and may be refused in the case is already

fixed for trial¹. It is possible for the Application to refer to more than one ground, as long as the grounds that are used do not contradict or cause a cross effect with each other. For a better understanding, here are some examples to illustrate this based on the grounds above.

3.1 No reasonable cause of action under Rule 19(1)(a)

A reasonable cause of action means simply, the existence of a matter which entitles one person to obtain from the court a remedy against another person². Although this is a simple definition and is somewhat obvious, it provides guidance for litigants as it explains the high threshold that the Courts will rely on.

It also means that what is not a reasonable cause of action is not exhaustive. Examples of cases that are struck out under this basis are cases which involve legal technicalities such as a *res judicata* event (ie: when a decision is already made for a case)³, or that there is a change to the responsible party leading to a different defendant that should be sued against⁴, among others. In other words, a party can rely on a strike out application in the event the entitlement of a remedy does not exist.

3.2 Scandalous, frivolous, and vexatious under Rule 19(1)(b).

In the case of *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor*⁵, it has defined "scandalous" to mean wholly unnecessary and irrelevant and not just unpleasant allegations and "frivolous" or "vexatious" to mean that the pleadings are obviously unsustainable. This can sometimes tie into the first ground for no reasonable cause of action, since a basis of a suit that is totally scandalous could result in a cause of action that is not reasonable. However, it should be noted that as long as the pleadings disclose some course of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is not a ground for a strike out⁶.

3.3 May prejudice, embarrass or delay the fair trial of the action under Rule 19(1)(c) and/or an abuse of process Rule 19(1)(d).

This is usually seen as a "catch-all clause" for grounds for a strike out as it is usually meant to include considerations of public and interest of justice⁷. It should be noted that grounds under Order 18 Rule 19 (1) (c) and (d) are usually used alongside each other due to their similarities.

4. Final Steps for the Application.

Once the grounds have been explained in the supporting affidavit, the applicant would then need to file its application into Court and serve to the other party, usually a Plaintiff, as soon as possible. The other party would then be required to respond to that affidavit. This shall be referred to as the "exhaustion of affidavits", which means the process of parties responding to each other's allegations via affidavits for the strike out. The exhaustion of affidavits has been explained in our previous edition on Summary Judgments and Judgments in Default. As such, we recommend that reference is made to that edition as it goes much deeper.

¹ *Jamir Hassan v Kang Min* [1992] 2 MLJ 46

² *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651

³ *Superintendent of Pudu Prison & Ors v Sim Kie Choon* [1986] 1 MLJ 494

⁴ *Roslan bin Abdullah v NZ Insurance Co Ltd* [1981] 2 MLJ 324

⁵ *Supra* note 2

⁶ *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC

⁷ *Gabriel Peters & Partners v. Wee Chong Jin* [1998] 1 SLR 374

Once the parties have exhausted the affidavits, a hearing will be held to determine the matter. If the Defendant can prove that the grounds explained in its affidavits are justified, then a strike out would be granted. However, if the Courts determine that the grounds are not supported, then the Judge will reject the application and fix the matter for trial proper. It is also possible for the Court to provide for a “partial strike out”, where only one part of the pleadings is struck out while the rest is left for trial.

5. Conclusion

We hope the above has provided some guidance as to the tools of what a Defendant can do in preventing a claim from going to trial. However, we take note that the factors that could justify a strike out can be on a case-by-case basis. As such, feel free to contact us if you would like specific advice that is tailored to your needs.

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