

to produce, promote, advertise, and sell the same exact products of his employer, under his own brand name.

[2] The Defendant has failed to file any defence or counter-claim in compliance with the Court's direction.

[3] It must be noted here that the crux of the Defendant's defence is not so much of disputing the similarities between the Plaintiff's works and the Defendant's plagiarism but on the other hand, the Defendant alleges that the Plaintiff from the outset has no valid copyright claims over its works.

[4] The Plaintiff has filed an application vide Enclosure 4 to enter a judgment in default of defence (**JID**) under **Order 19 rule 7 of the Rules of Court 2012 ("the Rules")**. Even though on the surface, this case can be disposed of because of this technicality namely; no defence is filed by the Defendant. Nevertheless, this Court will proceed to discuss the merits of the Defendant's defence and elaborate on the Defendant's contention. It must also be noted that the Defendant's total lack of defence is relevant to the present case as the Defendant also applied for an extension of time to file his defence and counterclaim under **Order 3 rule 5 of the Rules**

of Court 2012. The gist of the Defendant's defence is that the Defendant ought to be given an opportunity to dispute the Plaintiff's claim in a full trial on the account that the Defendant has good defence on merits.

[5] It must also be noted that the Defendant had failed to file its defence and counterclaim in time and had also filed its affidavit in reply to the Plaintiff's application at least one month out of time.

[6] The Plaintiff, Reka Setia Playground Sdn Bhd ("**Reka**") is a company incorporated in Malaysia whose principal business is designing, developing, manufacturing and selling playground equipment since the year 2000.

[7] The Defendant, Siow Mee Hong was once Reka's own employee, who the Plaintiff has hired since 2008. The Defendant had tendered his resignation from Reka on 2.7.2013.

[8] The salient employment terms between Reka and the Defendant were that;

- i. the Defendant should not carry out any other business or employment other than the employment with the Plaintiff during the Defendant's tenure with the Plaintiff;
- ii. the Defendant should not conduct itself in conflict with Reka's interest or in a manner which jeopardises Reka's interest;
- iii. the Defendant is barred from disclosing any of Reka's information inclusive of the Reka's drawing, quotation, price, etc to any other people.

[9] The resignation of the Defendant is not a mere coincidence. The Defendant was in clear breach of the employment contract, and Reka's copyrights. The Defendant has wrongfully used, plagiarised and replicated Reka's copyrighted designs of which are Reka's trade secrets. As a matter of fact, the Defendant during his tenure with Reka has set up another sole proprietorship business under the alias of AZ Playground Builder, a company who also sells the same products as Reka. In fact, the Defendant's replicas are exactly replicas designed by Reka and these replicas were advertised on the internet on the Defendant's website.

[10] This Court has in fact compared and contrasted the Defendant's webpage images with Reka's copyrighted design sheets. The Defendant had in fact incorporated the exact same image from Reka's designs sheets into his webpage. The copy and paste works by the Defendant were either colored differently or were 'mirrored' (twisted horizontally). Not only that, the Defendant has even use the same names in which Reka has affixed on its designs. All of the Defendant's replicas were named after the design names set by the Plaintiff. All of these infringements have been itemized and categorized by Reka vide its affidavits.

[11] The Plaintiff has filed its writ and statement of claim on 21.10.2015. The Defendant had entered his appearance on 17.11.2015. The Defendant was directed by the Court to file his defence or counterclaim (if any) by 4.12.2015. By 9.12.2015 when Reka filed Enclosure 4, the Defendant still fails to file any defence or counterclaim.

B. NO MERITORIOUS DEFENCE AGAINST THE PLAINTIFF'S CLAIMS

[12] The underlying rules and principle of a JID of defence is similar to an application to set aside a JID. Upon this Court's discretion in determining the propriety of the JID of defence, this Court may consider the Defendant's contention, ascertaining whether or not the Defendant indeed has meritorious defence against the Plaintiff's claim. This principle is echoed in the case of ***Microsoft Corporation v PC House (IMBI) Sdn Bhd [1998] 2 MLRH 863:***

*“Clearly the principles upon which a court need to apply in an application for judgment in default of defence **are much the same as those relating to setting aside of a default judgment.** This was what **Lord Denning MR** said in *Wallersteiner*:*

*... A judge in chambers has a discretion which he will exercise on the same lines as he will set aside a judgment in default. **He will require the party to show that he has a good defence on the merits. This is a time-hallowed phrase going back for a hundred years...**”*

[13] This Court shall proceed to examine the merits of the Defendant's defence.

[14] The Plaintiff's case rests squarely on its copyrights over its numerous designs and works in which have been wrongfully replicated by the Defendant. Reka's works and designs consist of arts and images of drawn designs as well as graphics of playground equipment. These works are intended to be crafted, translating the same artistic and crafting values of the designs into actual equipment. Since the works consist of designs for playground equipment, the designs contain motif, artistic value and craftsmanship that would suit, excite, and intrigue children. The Plaintiff's drawings themselves are copyrighted artistic works even without any technical or engineering specifications. These works and designs fall squarely in the definition of Artistic Works under **Section 3 of the Copyright Act 1987** which reads:

“... “Artistic Work” means-

- (a) a **graphic work**, photograph, sculpture or collage, **irrespective of artistic quality**;*
- (b) a work of architecture being a building or a model for a building, or;*
- (c) a **work of artistic craftsmanship**...”*

[15] Thus, Reka’s works and designs are copyright protected, and Reka holds propriety rights over the same under **Section 7(1) of the Copyright Act 1987.**

[16] Reka has categorically itemised the mass of copyright infringements of the Defendant in its affidavits. This Court has closely scrutinised and examined all accounts of copyright infringements alleged, and finds that indeed in varying degrees, the Defendant has abused and replicated the copyrighted designs and works of Reka.

TOTAL PLAGIARISM AND REPLICATION OF REKA’S DESIGNS IN DEFENDANT’S WEBSITE – Here the Defendant has simply wrongfully copy and pasted Reka’s works into the Defendant’s website	
Reka’s designs	Defendant’s plagiarism
MULTI SEESAW	MULTI SEESAW 4 SEATER
CUSTOM SWING 2 SEATER	L SWING 2 SEATER
VOULT BAR	VOULT BAR
SURF BOARD	SURF BOARD

TOTAL PLAGIARISM AND REPLICATION OF REKA’S DESIGNS IN DEFENDANT’S WEBSITE WITH IMAGE ‘MIRRORING’ – Here the Defendant has simply wrongfully copy and pasted Reka’s works into the Defendant’s website but

with image 'mirroring' (horizontal twisting) to cloak the infringement

Reka's designs	Defendant's plagiarism
VERTICAL LADDER	VERTICAL LADDER

TOTAL PLAGIARISM AND REPLICATION OF REKA'S DESIGNS WITH COLOR

VARIATIONS– Here the Defendant has simply wrongfully copy and pasted Reka's works into the Defendant's website but with color variations to cloak the infringement. There are no material differences. The designs are identical, but only with different colorations.

Reka's designs	Defendant's plagiarism
ARCH SWING 2 SEATER BELT SEAT	ARCH SWING 2 SEATER BELT
DOUBLE SEATED CHEST PRESS STATION	DOUBLE CHEST PRESS STATION
AIR WALKER	AIR WALKER
WEIGHT LIFT	WEIGHT LIFT
ELEPHANT SPRING RIDER	ELEPHANT SPRING RIDER
SEAHORSE SPRING RIDER	SEAHOUSER SPRING RIDER
CHICKEN SPRING RIDER	CHICKEN SPRING RIDER
REKA - RS 1098a	AZ-02-0005
REKA – RS1184a	AZ-02-0007
REKA – RS1171a	AZ-01-0019
RIA 1084b	AZ-01-0018

TOTAL PLAGIARISM AND REPLICATION OF REKA’S DESIGNS WITH COLOR VARIATIONS AND IMAGE ‘MIRRORING’– Here the Defendant has simply wrongfully copy and pasted Reka’s works into the Defendant’s website but with color variations and image mirroring to cloak the infringement

Reka’s designs	Defendant’s plagiarism
TRIPLE TWISTER	TRIPLE TWISTER
TAIJI WHEEL	TAIJI WHEEL

[17] It is overwhelmingly that the Defendant has plagiarised, replicated and breached Reka’s numerous copyrights based on the table above and the exhibits adduced by Reka. There are at least 18 counts of plagiarism and copyright infringements based on the tables above alone. The infringement is blatantly clear to the extent that the Defendant did not even bother to use or change a large majority of the names of Reka’s copyrighted works and designs. The Defendant has outrightly used the same names of Reka’s designs and works apart from using the exact same drawings of Reka’s designs and works.

The Defendant’s Art Search instead proves the Defendant’s own insidious plagiarism and copyright infringements

[18] As mentioned earlier, the Defendant's primary defence is that Reka has no copyright claims over the designs and works. The Defendant did not deny the plagiarism, copying and pasting of Reka's designs and works.

[19] The Defendant in his attempt to prove that Reka has no valid copyright claims over the works (the Defendant has plagiarised, copied and pasted), has referred to purportedly a Prior Art Searches Report **dated 18.12.2015 ("Search Report")**.

[20] This Court must mention here that the said Search Report has utilised the *Google Search Results* as a gauge or yard stick to determine whether or not there are contradicting copyright claims.

[21] Firstly, this Court opines that Google cannot be a credible copyright database. Google is merely an internet search engine and cannot be a determinant of any copyright claims or contradictions. Therefore, this Court shall not take into account any portions of the Search Report pertaining to *Google Search Results*.

[22] Secondly, the majority contents of the Search Report actually proves that nothing identical to Reka's copyrighted works and designs has ever been designed, drawn, or ever produced. The two columns of Industrial Design Searches and Patent Searches have come up negative. A digest of the Search Report would simply be that, the majority of the search reports would result in the following findings:

- i. Industrial Design Search - "**Nothing identical** but similar"
- ii. Industrial Design Search – "**No equivalent industrial design/industrial design application could be located**"
- iii. Patent Search – "**Nothing identical** but similar"
- iv. Patent Search – "**No equivalent patent/patent application could be located**"

[23] Thirdly, in fact the search report works in favour of the Plaintiff and not the Defendant. It actually proves that Reka's designs are altogether unique with no other equivalent designs and/or patents. The search results go along the lines of nothing identical or no equivalent patent or industrial designs.

[24] Fourthly, in its affidavit, Reka has listed at least 24 counts of copyright infringements, however the Search Result only addresses a total of 17 designs and works. These 17 searches prove Reka's copyrights. Here, the Defendant did not even bother to address all the 24 of Reka's allegations of copyright infringements.

[25] It is trite principle in intellectual property law that registration is never any requisite for a proprietor to prove or claim copyrights over his works or designs.

[26] The Defendant's contention on Reka's registration of copyrights is in fact a non-starter and a mere contention which is nothing close to a meritorious defence. Relating to this search report also, this Court must highlight two pertinent facts:

- i. the Defendant had only waited after this case was commenced to make this search. At all material times when the Defendant was setting up the business, the Defendant has no interest at all to abide by any copyrights, especially the copyrights of the Plaintiff.

- ii. if the Defendant is innocent and honest in 'using' Reka's copyrighted designs, the Defendant should/would have conducted this search even before using the Reka's drawings, works and designs in his business.

- iii. in the Defendant's application for extension of time to file his defence, the Defendant's excuse was that he needed time to obtain the Search Report. Based on the facts i. and ii., the excuse is obviously is an after-thought.

[27] Thus, it is clear here that Reka indeed has valid copyright claims over the designs and works which were infringed, plagiarised and replicated by the Defendant. The Search Report is clearly, merely an after-thought to deny and delay the inevitable ends of justice for the Plaintiff.

The Defendant cannot now dispute the abuse of Reka's trade secrets and information

[28] In his affidavit, the Defendant had also claimed that he had not accessed or abused the Plaintiff's confidential information and industrial drawings. The Plaintiff replies that all of these

confidential information and industrial drawings (inclusive of the Reka's copyrighted works and designs) are all kept in a centralised shared file server which is accessible to all of Reka's staff.

[29] On this contention, it is this Court's considered view that the Defendant being an employee to Reka who had access to Reka's confidential information and industrial designs, was able to copy and paste Reka's copyrighted works and designs into his website.

[30] Based on aforementioned reasons and findings, it is this Court's decision that the Defendant has ultimately failed to prove any meritorious defence. The Plaintiff's application in Enclosure 4 is therefore allowed with costs of RM8000.00. In view of this Court's decision allowing the Plaintiff's application, the Defendant's application in Enclosure 6 (for extension of time to file his defence and counter-claim) is hereby struck out.

t.t.

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(DATUK AZIMAH BINTI OMAR)

Judicial Commissioner

High Court Shah Alam

Selangor Darul Ehsan

Dated the 3rd February 2016

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Miss K. Parameswari

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