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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 1/2025)

The Publications Committee is pleased to circulate the first edition in this case note series for 2025.

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Written by Farez Jinnah

The case notes may be accessed here (see page 3 onwards).

Sincerely,

Gregory Das
Chairperson
Publications Committee

Highlights from the Appellate Courts

Muhammad Fitri Bin Saad v Timbalan Menteri Dalam Negeri Malaysia & Ors (CA)
Administrative law – Judicial review – Challenge against Restriction Order issued under Section 6(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 – Reasons for decision

In ***Muhammad Fitri Bin Saad v Timbalan Menteri Dalam Negeri Malaysia & Ors*** [Civil Appeal No. A-01(A)-335-07/2023], the Court of Appeal was required to decide whether a restriction order was validly issued under s. 6(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("**Act**").

Background

The Appellant was arrested pursuant to s. 3(1) of the Act. Subsequently, the Deputy Minister of Home Affairs issued a restriction order against the Appellant under s. 6(3) of the Act ("**Restriction Order**"), which imposed a two-year restriction confining the Appellant to Mukim Sungai Petani, Daerah Kuala Muda, Kedah.

Issues raised

The Appellant applied to the High Court by way of judicial review to set aside the Restriction Order issued against him on two grounds:

(i) The Restriction Order was invalid and bad in law due to the lack of accompanying grounds and allegations of fact. This omission amounted to a breach of the procedural requirements under the Act and indicated that the Appellant's involvement in drug trafficking activities was not adequately established; and
(ii) There was insufficient evidence of the Appellant's involvement in drug trafficking activities with a "substantial body of persons" justifying the setting aside of the order.

The High Court dismissed the judicial review application. The Appellant appealed to the Court of Appeal.

Findings of the Court of Appeal

The Court of Appeal held that:

(i) There was no procedural non-compliance in the issuance of the Restriction Order; and
(ii) There was sufficient evidence of the Appellant's involvement in drug trafficking activities with a "substantial body of persons".

No procedural non-compliance

The Court of Appeal rejected the Appellant's argument that the absence of grounds and allegations of fact invalidated the Restriction Order and held that there was no requirement under the Act to provide such grounds and allegations of fact in issuing the order under s. 6(3) of the Act.

The Court highlighted the distinction between detention orders under s. 6(1) and restriction orders under s. 6(3) of the Act.

For detention orders, grounds and allegations of fact are required to enable representation before an Advisory Board (pursuant to Section 9 of the Act and Article 151 of the Federal Constitution).

For restriction orders, unlike detention orders, there is no statutory requirement to furnish such information, as the affected individual does not make representations to an Advisory Board as stipulated in s. 9 of the Act.

The Court of Appeal referred to ***Lee Kew Sang v Deputy Minister of Home Affairs*** [2005] 3 CLJ 914, which held that judicial review is limited to examining procedural compliance and does not allow courts to impose additional requirements beyond those expressly provided by law. Therefore, the absence of accompanying reasons and allegations of fact did not constitute procedural non-compliance, and the Restriction Order was validly issued.

The Appellant's involvement with a substantial body of persons

The Appellant claimed that there was insufficient evidence of his involvement with a group of persons trafficking in dangerous drugs. The Court of Appeal examined the ingredients under s. 6 of the Act and referred to ***Selva Vinayagam Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors*** [2021] 2 CLJ 29. In the case, the Federal Court clarified that the term "substantial body of persons" involves a large number of individuals acting together in the trafficking in dangerous drugs and the involvement of an individual with the group must be sufficiently established.

The Court examined the affidavits affirmed by the Deputy Minister of Home Affairs, the investigating officer, as well as the inquiry officer. The Court found that the Deputy Minister of Home Affairs, before issuing the Restriction Order, was satisfied of the Appellant's involvement with a substantial body of persons engaged in drug trafficking. The affidavits demonstrated that the Appellant was not acting alone but was a participant in an organised drug-trafficking operation.

The Court concluded that the evidence was sufficient to establish the Appellant's involvement with a substantial body of persons, satisfying the requirements under s. 6(3) of the Act.

Conclusion

The Court of Appeal upheld the High Court's decision, finding that the Restriction Order complied with the procedural requirements of the Act and was supported by sufficient evidence. The appeal was dismissed, and no order was made as to costs.

Written by
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Member, Publications Committee

Public Prosecutor & Ors v Wong Ong Hua & Another W-01(A)-66-02/2023 (CA)
Constitutional law – Article 121(1) of the Federal Constitution – Doctrine of the separation of powers – Extradition Act 1992 – Provisional warrant of apprehension

The issue before the Court of Appeal in ***Public Prosecutor & Ors v Wong Ong Hua & Another ("Wong Ong Hua")*** was whether section 4 read together with section 20 of the Extradition Act 1992 ("**EA**") were unconstitutional, null, void and of no effect for being in contravention of Articles 4(1), 5(1) and (2), 8(1) and (2), 9(1) and (2), and 121(1) of the Federal Constitution.

The High Court had found in the affirmative and granted orders to that effect. However, the Court of Appeal disagreed, and allowed the appeal for the reasons explained below.

Background Facts

The respondents, who were suspected to be fugitive criminals, were arrested by the police who were executing a Provisional Warrant of Apprehension ("**PWA**") issued by the Kuala Lumpur Magistrates Court pursuant to section 13(1)(b) EA. The PWA was issued at the request of the Government of the United States of America ("**USA Government**") to the Government of Malaysia ("**GOM**").

Subsequently, the Minister of Home Affairs ("**Home Minister**") issued the following orders:-

(i) As the US Government had made a requisition for the return of the respondents pursuant to section 12 EA;
(ii) Pursuant to section 4 EA, the Sessions Court Judge was directed that the procedures under Section 20 EA were to be applied to the extradition proceedings ("**Prima Facie Exclusion Order**").

Thereafter, the respondents instituted an Originating Summons in the High Court to declare sections 4 and 20 EA to be unconstitutional, null, void and of no effect.

Relevant EA Statutory Provisions

Section 4 EA

> *"Where the binding arrangement which has been entered into between Malaysia and any country for the extradition of fugitive criminals contains a provision for the prima facie requirement to be dispensed with either generally or in relation to a class or classes of offences, the Minister may give a direction in writing that the procedure specified in section 20 shall apply to such cases."*

Section 19 EA

> *"(1) Where the fugitive criminal is brought before the Sessions Court, the Sessions Court shall receive any evidence tendered by or on behalf of the fugitive criminal to show-*
>
> *(a) that he did not do or omit to do the act alleged to have been done or omitted by him;*
> *(b) that he is not the person against whom the warrant was issued in the country which seeks his return;*
> *(c) that the alleged act or omission is not an extradition offence in relation to the country which seeks his return;*
> *(d) that the offence is of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;*
> *(e) that the offence is an offence under military law which is not also an offence under the general criminal law;*
> *(f) that the alleged act or omission does not constitute an offence under the law of Malaysia;*
> *(g) that his return would not be in accordance with the provisions of this Act;*
> *(h) that he has been previously convicted or acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia in respect of the alleged act or omission; or*
> *(i) that the request for his surrender was made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions, or that he might be prejudiced at his trial or punished or imprisoned by reason of his race, religion, nationality or political opinions.*
>
> *(2) Nothing in this section shall limit the power of the Sessions Court to receive any other evidence that may be tendered to show that the fugitive criminal should not be returned.*
>
> *(3) For the purposes of paragraph (2)(d), the Sessions Court may receive such evidence as in its opinion may assist it in determining the truth, whether or not such evidence is otherwise legally admissible in a court of law.*
>
> *(4) If the Sessions Court is of the opinion that a prima facie case is not made out in support of the requisition of the country concerned, the Court shall discharge the fugitive criminal.*
>
> *(5) If the Sessions Court is of the opinion that a prima facie case is made out in support of the requisition of the country concerned, the Court shall commit the fugitive criminal to prison to await the order of the Minister for his surrender, and shall report the result of its inquiry to the Minister; and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of the Minister."*

Section 20 EA

> *"(1) Where a direction has been given by the Minister under section 4, the Sessions Court shall-*
>
> *(a) after hearing any representation made in support of the extradition request;*
> *(b) upon the production of supporting documents in relation to the offence;*
> *(c) upon being satisfied that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia;*
> *(d) if the fugitive criminal does not satisfy the Court that there are substantial grounds for believing that-*
> *(i) the offence is an offence of a political character, or that the proceedings are being taken with a view*

to try or punish him for an offence of a political character;

(ii) prosecution for the offence in respect of which his return is sought is barred by time in the country which seeks his return;

(iii) the offence is an offence under military law which is not also an offence under the general criminal law;

(iv) the fugitive criminal has been acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia;

(v) he fugitive criminal has undergone the punishment provided by the law of the country which seeks his return or of Malaysia in respect of the extradition offence or any other offence constituted by the same conduct as that which constitutes the extradition offence;

(e) upon being satisfied that the fugitive is not accused of an offence, nor undergoing a sentence in respect of an offence, in Malaysia, other than the extradition offence in respect of which his return is sought,

commit the fugitive criminal to prison to await the order by the Minister for his surrender.

(2) In the proceedings before the Sessions Court under subsection (1) the fugitive criminal is not entitled to adduce, and the Court is not entitled to receive, evidence to contradict the allegation that the fugitive criminal has done or omitted to do the act which constitutes the extradition offence for which his return is sought.

(3) In this section, "supporting documents" means-

(a) any duly authenticated warrant for the arrest of the fugitive criminal issued by the country which seeks his return or any duly authenticated copy of such warrant;

(b) any duly authenticated document to provide evidence of the fugitive criminal's conviction or sentence or the extent to which a sentence imposed has not been carried out;

(c) a statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence."

High Court Decision

The Learned High Court Judge, in allowing the Originating Summons, found that:-

(i) Section 20 EA grants the Sessions Court a judicial, not merely an administrative role, particularly on complex matters;

(ii) However, the use of the word "shall" in the said provision denotes a mandatory requirement which restricts judicial discretion, particularly in determining whether to commit a fugitive criminal to prison or not based on the Home Minister's direction; and

(iii) Therefore, this had resulted in a breach of the doctrine of separation of powers under Article 121 FC as it results in the Home Minister being able to give directions to the Judiciary; and

(iv) Accordingly, Section 20 EA was held to be unconstitutional as it encroached upon on judicial independence.

Court of Appeal Decision

The Court of Appeal framed the issue in the appeal to be whether the applicable procedures in dealing with the extradition request were those under section 19 or section 20 EA. The distinction between the provisions were as follows:-

(i) Under section 19(5) EA, the Sessions Court must determine if there was enough evidence (a *prima facie* case) to support the requesting country's requisition. If a *prima facie* case has been made out, the court will imprison the fugitive criminal until the issuance of the Home Minister's extradition order. If a *prima facie* case is not made out, the fugitive criminal must be discharged. The court must also report the findings to the Minister and submit any statement from the fugitive criminal for review; and

(ii) On the other hand, section 20 EA prevents the Sessions Court from considering evidence contradicting the allegations made against the fugitive criminal. If the requirements in subsections 20(1)(a) to (d) are met, the court must order the committal of the fugitive criminal to prison, pending the decision on whether to surrender the fugitive criminal to the requesting country.

Pursuant to section 4 EA, the Minister is allowed to give a direction in writing to apply the modified procedure under section 20 EA, but only where there is a binding arrangement between the GOM and another country that provides for the *prima facie* requirement to be dispensed with. This was the case herein in respect of the extradition treaty between GOM and the US Government.

At the outset, the Court of Appeal noted that the High Court had made the extensive orders, referred to above, despite having only made a finding that the impugn sections offend only article 121(1) of the Federal Constitution. The Court of Appeal therefore limited their consideration solely to whether section 4 EA read together with section 20 EA was *ultra vires* Article 121 (1) of the Federal Constitution.

The Court of Appeal noted that the Learned High Court Judge had distilled the issue as to whether the role of the Sessions Court under section 20 EA was purely administrative or judicial. The High Court Judge had then relied on the Federal Court case of ***Semenyih Jaya Sdn Bhd v Pentadbir Tanah Dearah Hulu Langat & Another Case*** **[2018] 3 MLJ 561** and found that section 20 EA would result in a non-judicial Home Minister being able to direct a Sessions Court Judge to commit a fugitive criminal to prison to await the said Minister's surrender order without having much room to independently assess or exercise its judicial discretion to determine whether to do so. This was therefore *ultra vires* Article 121 of the Federal Court.

However, the Court of Appeal took a different approach. It relied on the Federal Court decision in ***Said Mir Bahrami v Pengarah Penjara Sungai Buloh, Selangor*** **[2013] 2 MLJ 478** which had previously decided on whether the role of the Sessions Court under section 20 EA was purely administrative or judicial. The High Court Judge had earlier distinguished this case on the basis that the constitutionality of the impugned section of the EA was not determined by the Federal Court therein.

The Court of Appeal accepted that the issue of constitutionality was not one which was canvassed in ***Said Mir Bahrami***. However, it recognised that one of the issues there was whether the dispensing of the prima facie rule pursuant to section 20 EA amounted to a deprivation of the appellant's fundamental right to a fair trial. The Federal Court held that this was not the case as extradition proceedings were based on comity and reciprocity, serving as a committal process rather than a full trial. It served only to determine whether the evidence adduced was sufficient to commit the fugitive criminal for the purpose of extradition, and not to determine his/her guilt.

Accordingly, the Court of Appeal found that since extradition proceedings were not a form of trial, it was not an exercise of judicial power. Therefore, section 4 EA read together with section 20 EA was not *ultra vires* Article 121(1) of the Federal Constitution.

However, the Court of Appeal did note that the fugitive criminal was not left without protection. This was as the rules and procedures under section 20 EA would still ensure fairness by allowing:-

(i) The prosecution and defence to present their respective cases;

(ii) The prosecution to provide supporting documents and mandates that the alleged act, if committed in Malaysia, must constitute an offence under Malaysian law; and

(iii) The fugitive criminal to raise defences against the extradition request as set out in section 20(1)(d) EA.

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Transferwise Ltd v. Public Bank Berhad W-02(IPCv)(A)-1095-06/2022 (CA)
Intellectual property – Section 46 of the Trademark Act 2019 – Trademark registration revocation – Banking accounts

In ***Transferwise Ltd v. Public Bank Berhad***, the Court of Appeal reversed the decision of the High Court in respect of the Appellant's application pursuant to subsections 46(1)(a) and 46(4) of the Trademarks Act 2019 ("**TMA 2019**") to partially revoke the Respondent's Trademark Registration No. 97021886 ("**PBB Registered Wise Mark**").

Background Facts

The Respondent is one of the largest banking groups in Malaysia and is the registered proprietor of the PBB Registered Wise Mark in Class 36 registered on 23 December 1997, which consists of a combination of:

(a) A graphic depicting a piggy bank in the form of a child wearing a cap emblazoned with the word "wise" and a coin; and
(b) The words "Akaun Simpanan""Savings Account""WISE – wisdom in saving early".

The PBB Registered Wise Mark was registered in respect of the provision for the following services:

> *"banking, financial, insurance and investment services; real estate; securities brokerage; stock brokerage; computerised financial services; issuing letters of credit and travellers cheques; financing of loans; safe deposit and surety services; issuing statements of accounts; mortgage and purchase financing; money exchange services; automatic cash dispensing services; electronic funds transfer and automated payment services; credit and cash card services; trustee services, commodities and futures brokerage, management services for loan related transactions and financial planning services; all included in class 36"*
>
> (the "**Registered Services**").

The Respondent had been providing savings account specifically targeted for children using the PBB Registered Wise Mark in Malaysia since 1997.

The Appellant is a private limited company incorporated in England and Wales on 31 March 2010 under the name Exchange Solutions Ltd. On 3 August 2012, the Appellant carried out its first name change to TransferWise Ltd. On 25 June 2021, the Appellant's name was changed for the second time to its current name, Wise Payments Ltd.

The Appellant initially offered foreign currency transfers, electronic money transfers, and currency exchange services in the UK. From 2012 to 2019, they expanded to include e-money accounts and multi-currency debit cards. Currently, the Appellant's services comprise foreign currency transfers, electronic money transfers, currency exchange, e-money accounts, and multi-currency debit cards ("**Currency Exchange and Transfer Services**").

From 2011 to January 2021, the Currency Exchange and Transfer Services were provided by the Appellant either directly or through its affiliates, subsidiaries, licensees and/or associated companies in the United Kingdom and in various other jurisdictions employing the following marks:-

(a) The word "TransferWise" (the "**TransferWise Word Mark**"); and

(b) A combination of the word "TransferWise" and a flag to the left of the word (the "**TransferWise Combination Mark**").

The Appellant rebranded itself in February 2021 and changed its name to Wise Payments Ltd in June 2021. The Appellant and its affiliates and subsidiaries began providing the Currency Exchange and Transfer Services using the following marks:

(a) The word "Wise" ("**Wise Word Mark**"); and

(b) A combination of the word "Wise" and a flag to the left of the word ("**Wise Combination Mark**")

In Malaysia, the Appellant began offering the Currency Exchange and Transfer Services (excluding e-money accounts and multi-currency debit cards) in 2017 through ta third party using the TransferWise Word Mark. In November 2019, the Appellant began providing these services through its wholly-owned subsidiary, Wise Payments Malaysia Sdn Bhd ("**Wise Payment Malaysia**"), under the same mark.

Following the global rebranding in February 2021, the Appellant, via Wise Payments Malaysia, had been providing the services using the Wise Word Mark and Wise Combination Mark ("**Wise Marks**"). On 8 December 2021, the Appellant began providing e-money accounts and multi-currency debit cards in Malaysia using the Wise Marks.

Between 2018 to 2021, the Appellant had filed for the registration of its TransferWise Word Mark and TransferWise Combination Mark, and Wise Word Mark and Wise Combination Mark in Malaysia.

The Appellant then filed an application in the High Court pursuant to subsection 46(1)(a) read together with subsection 46(4) of the TMA 2019, seeking the following relief:

(a) PBB Registered Wise Mark registered in the name of the Respondent be expunged and removed from the Register of Trademarks Malaysia, save and except in relation to 'Children's' Savings Account'; or
(b) Alternatively, the specification of services for the PBB Registered Wise Mark be limited to 'banking accounts.'

The High Court Proceedings

In dismissing the Appellant's application at the High Court, the learned Judge found as follows:

(a) Firstly, on the issue of standing, the High Court found that the Appellant was not an aggrieved person as the services using the Wise Marks are provided in Malaysia by its Malaysian subsidiary, Wise Payments Malaysia and not the Appellant. The Appellant cannot use the Wise Marks as it

has not been issued with the necessary license by Bank Negara Malaysia. Therefore, the Appellant is not an aggrieved person within the meaning of s. 46 of the TMA 2019 and did not have any locus standi to institute this action against the defendant;

(b) Secondly, on the Appellant's contention that the Respondent's trademark registration should be revoked for non-use, the learned Judge made a finding that the Appellant had failed to discharge its burden to prove non-use as the Respondent had adduced evidence of use of the registered marks. The learned Judge also found that the Respondent's Trademark was in actual fact being actively used by the Respondent and it is used for the very intent and purpose of that Trademark – the Public Bank's children savings accounts;

(c) Although subsection 46(4) of the TMA 2019 allows for partial revocation, the learned Judge rejected the Appellant's argument that banking and financial services can be easily separated as proposed. While the PBB Registered Wise Mark currently focuses on children's banking services, including savings accounts, the learned Judge held that the intent of subsection 46(4) must be considered in the context of the highly-regulated banking sector. The court also made a finding that the services listed under the trademark in question are relevant to both its current and future services; and

(d) Further, the learned Judge also took note that even if it grants the Appellant's request and registers the "Wise Word Mark" and "Wise Combination Mark" under Class 36 in the Appellant's name, the Appellant would not be able to use the trademark for the specified services because it lacks the required license from Bank Negara Malaysia. This was because currently, only Wise Payments Malaysia is legally authorised to provide those services, not the Appellant.

The Court of Appeal Findings

The Court of Appeal reversed the High Court's findings and made an order that the specifications of services for which the PBB Registered Wise Mark was registered is to be limited to "banking" and "financial" services.

(i) Locus Standi

On the issue of locus standi, the Court of Appeal found that the Appellant is an "aggrieved person" within the meaning of section 46 of the TMA 2019 and thus has the necessary locus standi to make the application pursuant to subsection 46(1)(a) and 46(4) of the TMA 2019. This was on the basis that the Appellant's Wise Marks (and previously its TransferWise Marks) have been used in Malaysia and are currently used in Malaysia in respect of Currency Exchange and Transfer Services by its subsidiary Wise Payments Malaysia since February 2021. Wise Payment Malaysia is duly licensed to carry its business by Bank Negara Malaysia under the Money Services Business Act 2011.

The Court of Appeal further found that although the use of the Appellant's Wise Marks in Malaysia is carried out by its Malaysian subsidiary, the use of the said trademarks accrues to the Appellant, being the owner of the Appellant's Wise Marks.

Therefore, the permitted use of a mark through either a subsidiary or licensee, accrues to the proprietor of the mark and the proprietor of the mark is an aggrieved person within the ambit of section 46.

This was because the Appellant, as the proprietor, holds the rights to the mark Wise Payments Malaysia does not own. Thus, if another registered trademark affects its use, it is the Appellant who is impacted. Thus, the fact that the license is granted to the Malaysian subsidiary for the commercial transactions by Bank Negara is not relevant to the issue of ownership of the Appellant's Wise Marks.

The Court of Appeal also found that the Appellant has a genuine and present intention to use the Wise Marks for its Currency Exchange and Transfer Services in Malaysia.

Finally, given that both the Wise Marks and the PBB Registered Wise Mark comprise the word 'Wise', the presence of the PBB Registration on the Register of Trademarks may substantially affect the Appellant.

Therefore, the learned Judge has committed an appealable error in his finding that the Appellant is not an aggrieved person within the meaning of section 46 of the TMA 2019.

(ii) Non-Use of the Registered Mark

On the issue of non-use of the registered mark, subsection 46(1)(a) of the TMA 2019 provides that on an application by an aggrieved person, a registered trademark may be revoked where within the three-year period from the notification of registration, the trademark had not been put to use in good faith in Malaysia. For the purpose of this provision, "notification of registration" refers to the notification by the Registrar to the successful applicant or proprietor, pursuant subsection 36(2) of the TMA 2019 or the issuance of a certificate of registration under subsection 36(3).

The Court of Appeal stated that the onus was on the Appellant to establish prima facie evidence that the PBB Registered Wise Mark had not been used in good faith in Malaysia for a period of three years from 9 January 2002 to 9 January 2005. Once this was done, the burden falls upon the Respondent as the registered proprietor of the impugned trademark to show evidence of use during the material period of time.

The Court of Appeal accepted that the Appellant had discharged its burden of proof by adducing two investigation reports to show prima facie non-use of the PBB Registered Wise Mark for any services, other than children's savings accounts, during the relevant statutory period.

Since the Appellant has establish a prima facie case of non-use of the PBB Registered Wise Mark for any services, other than children's savings accounts, during the relevant statutory period, the burden then shifted to the Respondent as the registered proprietor to show evidence of use during the material period of time. The Court of Appeal found that the Respondent had failed to rebut the evidence and to establish use of the of the PBB Registered Wise Mark in services other than 'children's savings accounts.

(iii) Partial Revocation

The Court of Appeal also found that the learned Judge had erred in fact and in law in holding that the services related to banking and finance could not be easily severed and compartmentalised, that the services for which the PBB Registered Wise Mark was registered were directly relevant to the services provided by the Respondent and for future services.

Since it had been clearly established that the PBB Registered Wise Mark was only used for "children's savings accounts.", the learned High Court Judge should have partially revoked the registration PBB Registered Wise Mark, limiting it to "banking" and "financial" services only, as 'children savings account' falls within these two services.

Therefore, the Court of Appeal reversed the decision of the High Court and ordered partial revocation of the PBB Registered Wise Mark by removing from its registration all other words in the Registered Services, save and except for "banking" and "financial".

Written by
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Merimen Online Sdn. Bhd. v Ketua Pengarah Hasil Dalam Negeri Malaysia (CA)
Revenue law – Income Tax Act 1967 – Appeal by way of case stated from the Special Commissioners of Income Tax – Promotion of Investments Act 1986 – Whether Director General of Income Tax was correct in imposing penalties under Section 113(2) of the Income Tax Act 1967

The key issues in the appeal of ***Merimen Online Sdn. Bhd. v Ketua Pengarah Hasil Dalam Negeri Malaysia*** **(Civil Appeal No. W-01(A)-53-02/2023)** were:

a) Whether Form JA for the year of assessment (YA) 2009 dated 27.6.2016 and Form J for YA 2010 dated 27.6.2016 are time-barred under section 91 of the ***Income Tax Act 1967*** ("**ITA**") ("**Issue 1**");
b) Whether the Appellant's income during the pioneer period for YA 2009 to 2016 is value-added income pursuant to the ***Promotion of the Investments Act 1986*** ("**PIA**") ("**Issue 2**"); and
c) Whether the Director General of Inland Revenue (DGIR) was correct in imposing penalties under section 113(2) of the ***ITA*** for the Yas 2009 to 2013 ("**Issue 3**").

The Court of Appeal allowed the appeal, setting aside the decision of the Special Commissioners of Income Tax (SCIT) and the High Court for the following reasons.

Background Facts

The material facts were as follows:

a) The Appellant is a company incorporated in Malaysia and was granted a Multimedia Super Corridor Malaysia pioneer status tax incentive under section 6(1AB) of ***PIA***;

b) A pioneer certificate was subsequently issued by the Ministry of International Trade and Industry (MITI) with the pioneer period granted from 31.7.2008 to 30.7.2013 and extended from 31.7.2013 to 30.7.2018;

c) It was an agreed fact that the Appellant's financial period ended on 30th June every year. The Appellant had filed its tax returns for the YAs 2009, 2011 and 2013 to 2017;

d) In a letter dated 29.10.2012, the Appellant's tax agent, Ernst & Young, requested a ruling from the DGIR to confirm that 100% of the Appellant's statutory income during the pioneer period was exempted from the income tax pursuant to section 21C of the ***PIA***;

e) In a letter dated 11.3.2014, the DGIR replied that section 21C(2A) of the ***PIA*** was to be read together with the proviso in section 21C(2A) of the ***PIA*** and the difference between the statutory income and value-added income was subject to income tax;

f) In a letter dated 1.4.2015, Ernst & Young replied stating that the ruling was disputed and that the Appellant would appeal against the ruling. It also enclosed the amendments made to the tax returns of the Appellant from the YAs 2009, 2010, 2011, 2012 and 2013;

g) The DGIR subsequently issued the following notices:
   i. Notice of additional assessment (Form JA) dated 27.6.2016 for the YA 2009;
   ii. Notice of assessment (Form J) dated 27.6.2016 for the YA 2010 and the YA 2011;
   iii. Penalties imposed pursuant to section 113(2) of the ITA; and
   iv. Form J dated 28.6.2016 for the YAs 2012 and 2013.

h) The SCIT and High Court decided in favour of the Respondent and hence the appeal before the Court of Appeal.

Principles governing appellate intervention in appeals against decisions of SCIT

The Court of Appeal reiterated that it may only set aside the decision of the SCIT if the SCIT had acted either without any evidence or on a view of the facts which could not reasonably be supported (see the case of ***International Naturopathic Bio-tech (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2024] 2 CLJ 519)***.

Issue 1

It is trite that the Respondent may only raise an assessment beyond the time-bar period if it comes within section 91(3) of the ***ITA***. The following elements have to be proven before the said provision applies:

a) The taxpayer must have committed any form of fraud or wilful default or negligent; and
b) The loss of tax must be the proximate cause of the taxpayer's fraud, wilful default or negligence.

The burden to prove the above elements lies with the Respondent.

Having perused the evidence presented before the SCIT, the Court of Appeal observed that the Respondent contended that the Appellant was negligent in submitting and preparing its tax return for the YAs 2009 and 2010.

Therefore, the Court of Appeal found that the SCIT in holding the Appellant guilty of wilful default made a finding on an unpleaded issue. The legislation does not give the SCIT *suo moto* jurisdiction to apply section 91(3) of the ***ITA*** when the Respondent had not sought to apply it or decide on an issue that had neither been raised nor argued (see ***Seiwa Podoyo Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2022] CLJU 1226*** ("**Seiwa Podoyo**")).

Based on the facts and circumstances of the case, the Court of Appeal found that the Appellant could not have committed wilful default for the following reasons:

a) It had voluntarily written to the Respondent to request for a ruling of its tax treatment;

b) After the Respondent issued its reply in 2014, the Appellant amended its returns and computations for the YAs 2009 – 2013; and
c) For the subsequent YAs, the Appellant had filed its tax returns in accordance to the Respondent's view.

Based on the facts and circumstances of the case, the Court of Appeal found that the Appellant could not have also committed negligence for the following reasons:

a) It had voluntarily written to the Respondent to request for a ruling of its tax treatment;
b) The Respondent responded after two years and no reasons were given for the delay; and
c) The Respondent only issued the time-barred assessment on 21.6.2016.

The Court of Appeal further found that the SCIT failed to consider the legal principle that a taxpayer is not automatically said to have committed negligence by virtue of merely claiming for deductions that were not allowed by the DGIR (see the cases of ***Ketua Pengarah Hasil Dalam Negeri v Procter & Gamble (Malaysia) Sdn Bhd [2022] 1 LNS 754 and Seiwa Podoyo*** case). The test for negligence is "what a reasonable man would do or would not do".

Based on the foregoing, the Court of Appeal viewed that if there had been any loss of tax, this was not attributable to any negligence by the Appellant but rather the Respondent's own delay.

Issue 2

The Court of Appeal found that the SCIT and the learned High Court judge had committed a misdirection in law in their interpretation of section 21C(2) of the ***PIA*** as follows:

a) The SCIT held that the Appellant was only entitled to exemption on its 'value-added income' but did not appear to have considered the issue of whether the 'inflation-adjusted base income' was taxable income; and

b) The High Court appeared to have been cognisant of the SCIT's omission and sought to address it by holding that the "remaining statutory income is chargeable income for tax purposes" without justifying it.

Pursuant to section 3 of the ***ITA***, a liability to tax can arise only when income exists, and only when there is a liability to tax can the question of exemption arise (see the case of ***Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518***).

The Court of Appeal found nothing in the entire ***PIA*** or ***ITA*** to suggest that 'inflation-adjusted base income' is taxable income, or that section 21C(2) of the ***PIA*** is only for the computation of exempted income. The Respondent's submissions required the Court of Appeal to read into section 21C of the ***PIA*** the phrase "computation of detracted income", which the Court declined to do.

As such, it was held that section 21C of the ***PIA*** unequivocally provides that the income of the Appellant shall be the value-added income, it does not provide that the inflation-adjusted base income is the Appellant's income. There was no provision that stated that the inflation-adjusted base income was income. Therefore, the Court of Appeal viewed that no tax ought to be imposed on the Appellant.

The Court of Appeal also found that the MSC Status Certificate issued to the Appellant was signed by MITI and MOF which entitled the Appellant to 100% tax exemption.

Issue 3

Based on the findings on Issue 2, the Court of Appeal viewed it was unnecessary to address Issue 3.

The appeal was allowed.

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Lee Kam Lan v Lou Mai Chun & Ors (CA)
Wills – Administration of Estate – Deed of Family Arrangement – Civil Procedure – Order 14A of the Rules of Court 2012

In ***Lee Kam Lan v Lou Mai Chun and Others*** (Civil Appeal No.: W-02(IM)(NCvC)-1660-10/2023), the Court of Appeal reaffirmed the trite position that a will cannot be jettisoned by relying on a deed that goes against the wishes of the testator without leave or approval of the Court.

Brief Facts

In 1986, Lou Pak Hoi @ Kwan Wong Mah ("**LPH**") passed away, leaving a Will ("**LPH's Will**") bequeathing all assets to his wife, See Toong Looi ("**STL**"), and appointed her as sole executrix. Before obtaining a grant of probate, STL passed away, and left a Will ("**STL's Will**") bequeathing her inheritance to her children, including the Plaintiffs in the High Court below (her daughters), and appointing her sons, Loo Yu Pin @ Lou Yew Sing ("**LYP**") and Lou Ue Kuang @ Loo Yew Quing ("**LUK**"), as executors.

Ten years later, LPH and STL's children agreed not to obtain probate for either Will and agreed to distribute the estates in accordance with a Deed of Family Arrangement. In 1999, LUK passed away, and his wife, the Defendant in the High Court below, became administratrix of his estate thereafter.

With LUK's passing, LYP became sole executor of STL's Will and obtained probate for her estate in 2019. As a grant of probate had not been obtained in respect of LPH's estate, his assets were not distributed to STL before her passing. In 2020, LYP obtained a Letter of Administration with Will Annexed for LPH's estate, with the Defendant later appointed as co-administrator. After LYP's death in 2021, the Defendant became sole administratrix of LPH's estate.

Proceedings in the High Court below

In 2022, the Defendant obtained a Distribution Order to distribute LPH and STL's assets under LPH's Will without the Plaintiffs' knowledge. The Plaintiffs unsuccessfully attempted to intervene and subsequently filed a citation under Order 72 rule 7 and rule 8 of the Rules of Court 2012. Pursuant to the citation, the High Court ordered, *inter alia*, that the Plaintiffs file a writ action.

The Plaintiffs did so, and sought, among others, a declaration that (i) the Deed of Family Arrangement is legal and valid, (ii) the Distribution Order obtained by the Defendant be set aside; and (iii) LPH and STL's assets be distributed in accordance with the Deed of Family Arrangement. Conversely, the Defendant filed a counterclaim seeking (i) a declaration that LPH's estate be distributed in accordance with the Distribution Order, (ii) a declaration that the Plaintiffs have without the authority of a grant of representation wrongly dealt or interfered with LPH's assets and (iii) an Order that the Plaintiffs surrender, deliver up and handover possession numerous documents related to the assets in question, including original documents of title, sale and purchase agreements, full and detailed accounts of both immovable and movable assets, full and detailed accounts of shareholdings, and others.

The Defendant applied for the disposal of the Plaintiffs' writ action on a point of law pursuant to Order 14A rule 1 of the Rules of Court 2012. The questions of law posed were as follows:

1. Whether the Deed prevails over LPH's Will and STL's Will; and

2. Whether the Plaintiffs, in their capacity as the beneficiaries of the late STL's estate, have the locus standi to set aside the Distribution Order.

The Order 14A application was dismissed by the High Court on the basis that the questions were not suitable for final and summary determination as there were factual matters that were seriously disputed by the parties requiring oral testimony in a full trial. The Defendant filed an appeal to the Court of Appeal.

Proceedings at the Court of Appeal

Applicability of Order 14A of the Rules of Court 2012

Contrary to the findings of the High Court, the Court of Appeal considered the Plaintiffs' writ action to be suitable for summary determination under Order 14A.

Acknowledging the trite position that the procedure under Order 14A may only be resorted to if (i) there is no dispute by the parties as to the relevant facts or (ii) the Court, upon scrutinising the pleadings, concludes that the material facts are not in dispute, the Court of Appeal found that there was no dispute regarding LPH's Will and STL's Will. Rather, the dispute revolved around whether LPH's estate ought to have been distributed in accordance with LPH's Will and STL's Will, as the Defendant contended, or in accordance with the terms of the Deed of Family Arrangement, as the Plaintiffs contended.

To the Court of Appeal, regardless of whether the validity of the Deed of Family Arrangement was disputed or not, the question of whether the Deed of Family Arrangement ought to prevail over the respective wills, as well as the question of the Plaintiffs' *locus standi* to set aside the Distribution Order, were inevitable questions that the court would have to, and did proceed to, determine.

Whether the Deed of Family Arrangement prevails over the Wills

With reference to sections 2, 17 and 18 of the Wills Act 1959, the Court of Appeal held that as the validity of LPH's Will and STL's Will was not disputed, the intention of the testators must be carried into effect. The Court of Appeal cited its decision in ***Lim Beng Chye v Sally Leong & Ors [1953] 1 MLJ 55*** which held, *inter alia*, that "*the first rule of construction in the case of a will is to give effect to the intention of the testator at the time he made the will.*"

In this regard, the Court of Appeal adopted the High Court decision in ***Saroja d/o MN Muthupallaniappa v Muthuraman s/o M Karuppiah & Ors [2012] 10 MLJ 411***, where Zakaria Sam

J (as he then was) pronounced as follows: "*Can the first and second defendants, who have had sworn and represented to this court that they would duly administer the estate of the deceased and distribute the properties of the said deceased as per the will, jettison the will and administer the estate of the said deceased against the wish and intention of the testator by relying on the said deed without leave or approval of the court?*" In answering this question, Zakaria Sam J referred to the decision in ***In re Snelling, Snelling v Hanna (1930) NZLR 426***, where the Supreme Court of Auckland held that "*Before* [the executors] *assume the obligations imposed upon them by the deed of family arrangement, they should be released from the duties imposed on them by the will.*"

In the present case, the Court of Appeal found that the Deed of Family Arrangement was executed between the beneficiaries to the late LPH and STL's estates without proper administration of their estates in accordance with their respective wills and without obtaining the approval of the Court or discharging the obligations under LPH's Will. As such, the Court of Appeal held that LPH's Will and STL's Will prevailed over the Deed of Family Arrangement.

Whether the Plaintiffs have locus standi to set aside the Distribution Order

The Court of Appeal then considered whether the Plaintiffs, in their capacity as the beneficiaries of the late STL's estate, had *locus standi* to set aside the Distribution Order, noting that the Plaintiffs were not beneficiaries named in LPH's Will.

Citing the trite position in law that a beneficiary has no interest or title in the property of a testator if the testator's estate has not been fully administered (see paragraph [51] of the judgment), the Court of Appeal held that the Plaintiffs did not have *locus standi* to set aside the Distribution Order until the administration of LPH and STL's estate was completed.

Accordingly, the Court of Appeal held that the learned High Court Judge below had erred in dismissing the Defendant's application, and allowed the appeal. As a result, the Court of Appeal dismissed the Plaintiffs' claim and allowed the Defendant's counterclaim, awarding global costs of RM 25,000 to the Defendant.

Written by
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Fahri Azzat & Co and Anor v Lembaga Kelayakan Profesion Undang-undang (CA)
Legal Profession – Articled Clerkships – Sections 4, 5, 6, 7, and 20 to 26 of the Legal Profession Act 1976 – Legal Profession (Articled Clerks) Rules 1979 Rules 3 and 4 – Judicial Review – Consideration of subsequent reasons for decision

The parties to the case of ***Fahri Azzat & Co and Muhammad Kahirul Anwar bin Khairuddin v Lembaga Kelayakan Profesion Undang-undang*** **[Civil Appeal No. W-02(A)-1919-11/2023]**, include the1st Appellant (an advocate and solicitor the proposed "principal") and the 2nd Appellant (the applicant "articled clerk") and the Respondent as the body under the Section 4 LPA responsible for the supervision of the articled clerkship programme under Sections 20 to 25, Legal Profession Act 1976 ("**LPA**").

The judicial review application arose from the Respondent's act of refusing the 1st Appellant's application arising from a decision at the Respondent's Board Meeting on 8-1-1985 to abolish articled clerkship as a mode of entry into the legal profession. The Respondent conveyed this refusal by letter dated 5-8-2022 (para [6] pg 4) referring to its meeting on 8-1-1985 where it purportedly decided to abolish articled clerkship as a mode of entry into the legal profession (paras [24] and [25] pgs 9 to 10) (the "**1st reason**") .

Leave to pursue the judicial review in question was granted. Thereafter, approximately 6 months after the 1st reason (5-8-2022) was conveyed that led to the present application, the Respondent included a further reason in its affidavit in reply affirmed on 8-2-2023, where it was disclosed that a copy of the proposed articles ought to have been produced and not the signed or executed copy (para [7] pg 4 and para [64] pgs 25 to 26) (the "**2nd reason**").

On 16-11-2023, the High Court dismissed the application and levied costs against the Appellants (paras [8] to [22]). The Respondent raise the preliminary objection that the judicial review application was premature and defective as the Appellant had not exhausted the grievance procedure before resorting to judicial review (para [9] pg 5). Notably, the High Court considered reference to Section 26 (1) LPA, where "*Any person dissatisfied with any decision of the Board may apply to a judge for a review of the decision*".

The Court of Appeal disagreed with the High Court and dealt with the Appellants' appeal within the following two areas:-

(1) The Respondent's Preliminary Objection at the High Court, namely; whether Section 26 LPA is a bar to a judicial review application (paras [26] to [50]):-
   (i) In essence, Section 26 LPA does not apply, as the decision sought to be reviewed relates to the functions of the Respondent (para [33] pg 12) and not to an individual application within the scope of the relevant provisions (para [36] pg 13) (see Sections 21, 22, 23 LPA);
   (ii) The Respondent argued the reverse in *Loganathan PL Suppiah v Lembaga Kelayakan Profession Undang-undang Malaysia [1997] 3 CLJ 914, HC and Chan Kwai Chun v Lembaga Kelayakan* [2002] 3 CLJ 231, CA (applying *Loganathan*);
   (iii) The Court of Appeal found the present judicial review application dealt with a policy decision to do away with articled clerkship as a mode of entry into the legal profession and not matters within the scope of the LPA provisions, and that Section 26 was designed towards decisions on individual suitability and qualification (para [37] pg 14); and
   (iv) The filing of the judicial review application was suitable where the decision being challenged is not a decision within the meaning of Section 26 LPA (para [49] pg 20);

(2) The merits of the judicial review application, namely; decision of the Respondent not to exercise its statutory functions (paras [51] to [75]) and the two reasons:-
   (i) On the 1st reason, the Court of Appeal referred to the Respondent's Establishment and Functions per Sections 4 and 5(b) and (c) LPA, to facilitate the course of instructions and examination of articled clerks wishing to become qualified persons, further, Section 6 LPA to make rules to that effect;
   (ii) The Court of Appeal also found that by the Respondent's 1st reason, it went beyond its powers and duties conferred upon it by the LPA and to act within those powers. In this regard, it was held that the decision to abolish articled clerkship went beyond its powers (para [56] pg 23). Thus, the Respondent acted *ultra vires* (para [60] pg 24);
   (iii) Reference was also made to the LPA, noting it had been amended 7 times since 1985 and none touched on articled clerkship (para [57] pg 23);
   (iv) On the 2nd reason, the Court of Appeal did not side with the Respondent. Although a subsequent reason could be considered, and cannot be dismissed outright, the Court relied on the dicta in *R (on the application of B) v Merton Loodon Borough Council* [2003] 4 All ER 280, and pointed, *inter alia*, it was to be considered if the new reasons are consistent with the original reasons. In this regard, even if the 2nd reason was true and delayed, it only emerged 6 months later and was an afterthought;
   (v) The Court of Appeal also found that the crux of the 2nd reason would in fact mean that articled clerkship had not been abolished and this would be in turn contrary to the 1st reasons (para [72] pg 30); and
   (vi) The effect of the 2nd reason only means the Appellants will not be able to obtain a mandamus relief (prayer 6) to register the 2nd Appellant as an articled clerk, and the Respondent cannot be formed to accept an application which does not comply with the Legal Profession (Articled Clerks) Rules 1979 (para [74] pg 29).

In conclusion, the Court of Appeal allowed the appeal with order in terms of prayers 1 to 5 of Enclosure 8 (see para. [3] pgs 3 to 4), with costs here and below of RM10,000.00 to the Appellants subject to allocatur.

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