



**Majlis Peguam
Bar Council**

www.malaysianbar.org.my

Wisma Badan Peguam Malaysia
2 Leboh Pasar Besar
50050 Kuala Lumpur, Malaysia
Tel : +603-2050 2050
Fax : +603-2050 2019
Email : council@malaysianbar.org.my

Circular No 228/2024

Dated 2 Aug 2024

To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 4/2024)

The Publications Committee is pleased to circulate the fourth edition in this case note series.

The cases covered in this edition are as follows:

- (1) **Abdul Rashid Bin Mohamad Isa v. PTT International Trading Pte. Ltd. (FC)** *Insolvency law – Withdrawal of creditor’s petition – Termination of bankruptcy proceedings*
Written by Marian Lee Lai Sim
- (2) **M.P.P.L. & Anor v. C.A.S (FC)**
Family law – Concepts of legitimacy and paternity / Evidence – Section 112 of the Evidence Act 1950 – Section (3) of the Evidence Act 1950 and the powers of the Court to order a DNA test
Written by Lucy Lee Zhe Hui
- (3) **The Government of Malaysia & Anor v. Ian Chin Hon Chong For Himself And On Behalf of All Affected Judges Who Were Appointed To The High Court In Sabah & Sarawak Before 1 July 2015 And Receiving Their Pensions And On Behalf of All Persons Who Are Receiving Their Derivative Pensions On Account Of The Death Of Such Judges (CA)**
Administrative law – Judges remuneration and pensions / Statutory interpretation – Reliance on Hansard – Interpretation of subsidiary legislation
Written by Sandhya Saravanan
- (4) **Yi Sha v. Public Prosecutor (CA)**
Criminal law – Section 39B(1)(a) of the Dangerous Drugs Act 1952 – Defence of an “innocent carrier” – Doctrine of willful blindness
Written by Iffah Afrina binti Saleh
- (5) **Obata-Ambak Holdings Sdn. Bhd. v. Prema Bonanza Sdn. Bhd. & Other Appeals (FC)**
Housing law – Limitation periods in claims for liquidated ascertained damages – Second actor theory – Prospective overruling principle – Unjust enrichment
Written by Gregory Das

The case notes may be accessed from [page 2 onwards](#).

Thank you.

**Gregory Das
Chairperson
Publications Committee**

Highlights from the Appellate Courts

Abdul Rashid bin Mohamad Isa v. PTT International Trading Pte. Ltd. (FC)

Insolvency law – Withdrawal of creditor’s petition – Termination of bankruptcy proceedings

The core issue for the Federal Court to determine in **Abdul Rashid Bin Mohamad Isa v. PTT International Trading Pte. Ltd. (Civil Appeal No. 03-2-11/2023(B))** was whether the withdrawal of a Creditor’s Petition will terminate all bankruptcy proceedings including the bankruptcy notice.

The appeal arose out of the following salient facts. The bankruptcy notice was issued on 17 December 2018 and the act of bankruptcy would have occurred on 25 December 2018. The Appellant/Judgment Debtor filed an application to set aside the bankruptcy notice under Rule 93 of the Insolvency Rules 2017. The Registrar ruled that the application to set aside the notice was inadequate because it was not accompanied by an affidavit in support. Instead, the Registrar held that an act of bankruptcy occurred on 25 December 2018, as if the application to set aside the notice had not filed before the Court.

The Respondent/Judgment Creditor then proceeded to file a Creditor’s Petition whilst the Appellant appealed to the High Court. The High Court set aside the Registrar’s declaration of bankruptcy on the ground that under Rule 93 no act of bankruptcy could occur since the setting aside application had not been heard.

At the hearing of the Creditor’s Petition, the Registrar allowed the Respondent to withdraw the Creditor’s Petition with liberty to file afresh but also ruled that all bankruptcy proceedings stood terminated solely by reason of the withdrawal.

At this juncture, the Federal Court highlighted two glaring issues requiring clarification. First, whether an act of bankruptcy could be declared despite the failure to dispose of the application to set aside the bankruptcy notice, and secondly whether the Creditor’s Petition could be withdrawn with liberty to file afresh, given that it had been filed as a consequence of the earlier erroneous ruling by the

Registrar that an act of bankruptcy had occurred (which ruling was correctly reversed by the High Court).

The Federal Court declared that the High Court and the Court of Appeal had correctly held that the setting aside application under Rule 93 had to be heard, and that the Registrar’s declaration that an act of bankruptcy had occurred on 25 December 2018 was erroneous. As a result, it was held that there was no act of bankruptcy on which any Creditor’s Petition could be premised, and therefore the Respondent had correctly sought the withdrawal of the bankruptcy proceedings.

The Federal Court went on to observe as follows on the purpose and intent of the Insolvency Act and its Rules and held that [at para 10]:

“...to require a judgment creditor to embark on the whole process of initiating bankruptcy proceedings afresh, by reason of a typographical or inadvertent error does not serve the purpose and intent of the Act, but conversely, results in considerable delay and expense and more significantly dissipation of the judgment debtor’s estate, leaving little to no recourse for other creditors...”

Therefore, the Federal Court held that the Creditor’s Petition in this appeal was a non-starter as there could be no commencement of bankruptcy proceedings without an act of bankruptcy subsisting. Further, as the setting aside application has not been heard, any declaration of an act of bankruptcy was invalid and in contravention of the Insolvency Act and Insolvency Rules.

It was held that it was unnecessary to answer the questions of law that were admitted and the Federal Court

dismissed the appeal with costs to the Respondent on the ground that it had no merits. In doing so, Nallini Pathmanathan FCJ relied on the Supreme Court decision of **Datuk Lim Kheng Kim v Malayan Banking Berhad [1993] 2 MLJ 298**, which read:

“In passing, we wish to emphasize that, contrary to what had been expressed in *Soh Bok Yew (supra)*, if a bankruptcy petition is to be founded on an act of bankruptcy based on a failure to comply with a bankruptcy notice, it is self-evident that such a petition can only be filed after the application to set aside the bankruptcy notice is heard and dismissed.”

Written by
Marian Lee Lai Sim
Member, Publications Committee

M.P.P.L. & Anor v C.A.S. (FC)

Family law – Concepts of legitimacy and paternity / Evidence – Sections 112 and 4(3) of the Evidence Act 1950 – Presumption of legitimacy – power of the Court to order a DNA test

The law presumes that a child born from a valid marriage is the legitimate child of the husband, unless sexual access is proven to be absent. This statutory presumption is embodied in s. 112 of the Evidence Act 1950.

If a child is born from a valid marriage, could the Court order a deoxyribonucleic acid (DNA) test to be conducted on the child to ascertain his or her biological father?

The Federal Court considered this issue in **M.P.P.L. & Anor v C.A.S. (Civil Appeal No. 02(f)-49-08/2023(W))**.

Brief Facts

The Appellants are husband and wife. In the course of their marriage, the wife gave birth to a child (**anonymized as “C”**). The husband was registered as the father of C in C’s birth certificate (**“Registered Father”**).

The Respondent (**“Alleged Father”**) claimed to be C’s biological father due to his sexual relationships with the Appellant wife before and during her marriage to the Registered Father, where he had unprotected sexual intercourse with the Appellant wife during C’s conception period. He also relied on the fact that he had access to C for approximately 5 years since C’s birth and that he provided maintenance to the Appellant wife for C for several years.

Proceedings in the High Court and Court of Appeal

The Alleged Father filed an Originating Summons (**“OS”**) at the High Court, seeking for an order that a DNA test to be conducted on C to determine the paternity of C. In the event C’s biological father was the Alleged Father, a declaration was sought to reflect such status and that the Alleged Father be granted access to C as well as to maintain C.

The High Court allowed the application by the Alleged Father and granted, amongst others, an order to compel a DNA test to be conducted on C to determine the paternity of C. On appeal, the Court of Appeal affirmed the decision of the High Court.

Federal Court

The Appellants husband and wife appealed. The Federal Court unanimously allowed the appeal. The orders of the High Court and Court of Appeal for a DNA test were set aside. The reasons were as follows.

Determination of paternity may illegitimise the child

S. 112 of the Evidence Act 1950 presumes that a father in a lawful marriage is both the biological and legal father of the child.

The Alleged Father sought to distinguish the concepts of “legitimacy” and “paternity” and submitted that whilst s. 112 provides conclusive proof of legitimacy of C, it does not bar enquiries into paternity. He sought a declaration of his status as the biological father and for other orders relating to maintenance and access.

The Federal Court found that the relief sought by the Alleged Father were rights, benefits and obligations which persist in legitimacy as recognised under the law. To allow for legal rights, benefits and obligation to flow from a determination of biological paternity would be to allow a collateral attack on C’s legitimacy. A collateral attack or challenge on legitimacy should not be allowed in this case.

Conclusive presumption of legitimacy under s. 112 not rebutted

The Federal Court held that the conclusive proof in s. 112 bars the admissibility of scientific evidence to prove the paternity of a child born from a valid marriage. S. 4(3) of the Evidence Act 1950 indicates that as the presumption in s. 112 uses the phrase “conclusive proof”, the Court is not allowed to admit evidence to rebut the presumption. In this regard, the Court referred to the pronouncement in **Tenaga Nasional Berhad v Evergrowth Aquaculture Sdn Bhd & Ors [2021] MLJU 1742** on “conclusive

proof” where the Federal Court observed that irrebuttable presumptions are presumptions of law which are found to be conclusive in nature and cannot be overturned by contrary evidence.

The only rebuttable facts permissible by s. 112 and which can be admitted by the Court is evidence of “no access” between the husband and wife.

Since C was born into a valid marriage between the Appellants, and there was no evidence to show that the Appellants did not have access to each other, the conclusive presumption of legitimacy was still in place. The Federal Court was not persuaded that there existed an overriding consideration to support a rebuttal of the s. 112 presumption.

No power to compel DNA test

The Federal Court held that there was no specific statutory provision or common law rule according power to the courts to order any person to undergo a DNA test in civil proceedings.

Best interest and welfare outweighed the right to know biological parents

The Federal Court held that the right of C to know her birth parents should be assessed holistically against her best

interest and welfare. The right to know is not the paramount consideration in such an assessment.

The Court found that the DNA order:

- i. would be damaging to C;
- ii. may disrupt C’s status quo and impact C’s existing legitimate relationship with the Appellants;
- iii. put into question the reality C has known for over the past 15 years of her life that the Appellants are her parents; and
- iv. may expose C to odium and humiliation if found to be born out of her mother’s extramarital affair.

The Federal Court concluded that C’s welfare was the determinative question of the appeal. The negative impact in compelling a DNA test to be done on C outweighed other considerations. Thus, it was not in C’s best interests for the Court to order a DNA test.

Written by
Lucy Lee Zhe Hui
Member, Publications Committee

The Government of Malaysia & Anor v. Ian Chin Hon Chong For Himself And On Behalf of All Affected Judges Who Were Appointed To The High Court In Sabah & Sarawak Before 1 July 2015 And Receiving Their Pensions And On Behalf of All Persons Who Are Receiving Their Derivative Pensions On Account Of The Death Of Such Judges (CA)
Administrative law – Judges remuneration and pensions / Statutory interpretation – Reliance on Hansard – Interpretation of subsidiary legislation

The key issue in the appeal of ***Government of Malaysia & Anor v Ian Chin Hon Hong, for himself and on behalf of all the affected judges who were appointed to the High Court in Sabah & Sarawak before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions on account of the death of such judges (Civil Appeal No.: S-01(NCVC)(A)-10-01/2023)*** was whether the Judges Remuneration (Amendment) Act 2014 ("**Act A1462**") which amended the Judges Remuneration Act 1971 ("**Act 45**") violates Article 125(7) of the Federal Constitution.

A. Background Facts

The Respondent was appointed as a Judicial Commissioner on 1.3.1992 and subsequently a Judge of the High Court of Borneo in 1993. He retired on 1.12.2009 after serving 16 years and 89 months in the judiciary. Under the law as it was then, the pension of a retired Judge and the derivative pension were subject to adjustments based on the current salary under the formula provided in the Third and Fourth Schedules of Act 45. With the deletion of the Third and Fourth Schedules pursuant to Act A1462 and insertion of the new section 15B(1), Judges' pensions and derivative pensions would be adjusted by a flat rate of a 2% percent increase at the beginning of each year.

The salary of serving judges was increased with effect from 1.7.2015 vide Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 ("**P.U. (A) 59/2016**"). Under the old Third Schedule, the Respondent's pension would have accordingly increased since it calculated the Judges' pension based on the current salary of a serving Judge as opposed to the last drawn salary of the retired Judge. The Respondent contended

that the flat increment of 2% percent at the beginning of the year under the new law put the Respondent in a disadvantageous position as he receives a smaller increment than he would have received under the old law.

B. Decision of the High Court

The High Court ordered the Appellants to pay the Respondent and other named Judges a sum representing the shortfall in pensions between July 2015 and February 2022, the sum to the Respondent being RM301,768.60 ("**short-paid sum**"). It was also ordered that a 2% increment already paid should be deducted from the short-paid sum. With regards to the unnamed Judges, it was declared that they were at liberty to apply for consequential orders to give effect to the judgment as the payments for the same were not stated in the affidavits. The Appellants and the Respondents respectively appealed against the High Court's decision.

At the Court of Appeal, Justice Ravinthran Paramaguru wrote the majority judgment with Justice Azimah binti Omar in agreement. Justice Lim Chong Fong dissented and wrote a dissenting judgment. Both judgments will be addressed below.

C. Majority Judgment

(a) Whether Judges' pension is a right or an ex gratia payment

On this point, the Judges agreed with the decision of the High Court. Section 14 of Act 45 provides that the Judges' pension were decoupled from the Pensions Ordinance 1971 ("**Pensions Ordinance**") which continued to apply to civil service pensions until the Pensions Act 1980 ("**Act 227**") came

into force. It was also observed that sections 3 (right to pension) and 4 (computation of pension) of Act 45 employ the imperative "shall" in the provisions.

Referring to the case of ***Haji Wan Othman v Government of the Federation of Malaysia [1965] 2 MLJ 31***, section 5 of the Pensions Ordinance states that pension is not an absolute right (repeated in section 3 of Act 227) whilst in Act 45, the right to pension is not qualified in any manner. As such, the argument that the Judges' pensions are ex gratia payment is untenable.

(b) Whether the Judges' pension is a right or merely an additional assistance

On this point, the Appellants referred to the Hansard reports concerning the Pensions Adjustment Act 1980 in which it was stated that instead of giving special additional pension payments on an ad hoc basis for the welfare of pensioners due to the rise in the cost of living, the government decided to streamline the said payments by pegging pension adjustments to the current salary of a serving officer. In other parts of the speech, the Minister referred to pension adjustments as a form of assistance to pensioners. As such, the Appellants took the argument that pension adjustments, being dependent on many factors including changes to the underlying salary scheme, is not a vested right but an additional assistance to pensioners. Similarly, in the Minister's speech when tabling the Judges' Remuneration (Amendment) Act 1984 ("**Act A609**") that amended Act 45 and introduced the Third and Fourth Schedules (formula on computations of

pensions), he had stated that the purpose of Act A609 was to maintain uniformity between civil service pensions and Judges' pensions on the matter of adjustments.

The Court of Appeal observed the Hansard could not be relied upon after referring to the case of *Pepper v Hart* in which it was held that Hansard may be used only as an aid to statutory construction where the written law is ambiguous or obscure or if construed literally might lead to an absurdity. Section 15B(1) of Act A609 was unequivocal in granting a right to retired Judges to expect an increment in their pensions whenever the salary of a serving Judge is revised upwards. As such, the Hansard cannot detract from the fact that the prevailing law vested a right for pension adjustment on the Respondent and not merely a discretionary benefit. Since 'pension rights' under Article 125(7) of the Federal Constitution are stated in the plural, the Court of Appeal viewed that the mode of pension adjustments was a protected pension right that cannot be altered to one's disadvantage by a later law.

(c) Whether Act A1462 is disadvantageous to the Respondent's pension rights

When Parliament enacted Act A1462, it must have known that any changes to the statutory formula in the now-deleted Third and Fourth Schedules could disadvantage Judges who joined the Judiciary before the date of enactment in 2014. This was evident from the new section 15B(2) which acknowledged that the annual flat rate pension increment of 2% may be detrimental to Judges who joined the Judiciary earlier and left it to the discretion of the government to

remedy the disadvantage. As such, Act A1462 which removed a pension right was disadvantageous within the meaning of Article 125(7) read with clause (9) of the Federal Constitution.

(d) Whether P.U.(A) 59/2016 applies to Judges' pensions

The Appellants referred to Minister's speech in the Parliament, Debate Notes, letter written to the Judicial Appointment Commission (JAC) and argued that P.U.(A) 59/2016 was not intended to apply to retired judges. It was submitted that the increment was granted to attract talent from the private sector to join the judiciary. It was also pointed out that the JAC did not object to the flat rate increase of 2% of the Judges' pension. However, the Court of Appeal observed that there was no evidence of assent on the part of the JAC either.

In the Federal Court case of Government of *Malaysia & Anor v Aminah Ahmad [2023] 8 CLJ 1* ("the *Aminah case*"), a similar challenge was mounted by the respondent, a retired civil servant, against the Pensions Adjustment (Amendment) Act 2013. The critical words in Article 125(7) "*shall not be altered to his disadvantage*" and in Article 147 (*applies to civil servants*) "*later law no less favourable*" were viewed by the Court of Appeal as similar. Thus, the issue in the present appeal and Aminah's case pivoted on the breadth of the protection of pension rights granted by the Federal Constitution. Following the doctrine of *stare decisis*, as the Federal Court held that the removal of the old formula that pegged the pension to the current salary infringed constitutionally protected pension rights, the Court of Appeal held that it is bound to rule similarly.

(e) Whether P.U.(A) 59/2016 rendered null and void if Act A1462 held to be void

The Court of Appeal viewed that P.U.(A) 59/2016 was not made under the authority of the amending law i.e. Act A1462 but rather under the principal law governing Judges remuneration and pensions which is Act 45. As such, the argument that P.U.(A) 59/2016 would be voided was held to be without merit.

(f) Respondent's cross-appeal

The Respondent argued that the learned High Court Judge erred in making the order to deduct a 2% increment from the short paid sum since it had already been deducted. The Appellants did not disagree with this.

(g) Decision of the majority

The appeal was dismissed and the cross-appeal of the Respondent and other named Judges was allowed to the extent that the sum representing a 2% increment in pensions as demonstrated in the affidavits was not to be deducted. The Court of Appeal did not vary the judgment of the High Court in respect of the unnamed Judges since that was not pursued by the Respondent in this appeal. No order was granted as to costs.

D. Dissenting Judgment

Justice Lim Chong Fong agreed with the majority that pension adjustment was a right and not an additional benefit. However, he viewed that the *Aminah case*, at best, was persuasive since it dealt with Article 147 of the Federal Constitution as opposed to Article 125. He further remarked that in

the Aminah case, the Pensions Adjustment (Amendment) Act 2013 was struck down because there was a risk or mere possibility that a less favourable situation might arise, implying that there was no necessity for the pensioner to prove actual loss. As such, Act A1462 could not be declared void for violating Article 125(7) read with Article 125(9) of the Federal Constitution on the basis of a mere possibility of a disadvantage. However, the Respondents had established actual loss which was the net difference between the amount of pension and derivative pension received by the Respondents from July 2015 to February 2022 computed based on Act 45 and the amount that would have been received by the Respondents computed based on Act 45 (and the salary revision as introduced by P.U.(A)59/2016 but disregarding Act A1462). It was undisputed that the purpose of Act A1462 was to solely adjust the retired judges' pension based on the Malaysian economic inflation annually at a fixed rate of 2% subject to a permissive adjustment by the government if the fixed rate was proven to be disadvantageous.

This new formula, in principle, was in parity with the pension adjustment applicable to all public servants. Without the introduction of Act A1462, the retired Judges would not be compensated for the annual economic inflation until the next salary adjustment is made, however, the timing of the subsequent salary adjustment has always been at large at the discretion of the government. As such, Act A1462 has been advantageous rather than disadvantageous to the Respondents. Justice Lim Chong Fong viewed that Article 125(7) read with Article 125(9) as well as Act 45, Act A1462 and P.U.(A) 59/2016 were nonetheless subject to Article 8 of the Federal Constitution, which provides for discrimination between persons if there was reasonable classification founded on intelligible differentia and had a rational relation or nexus with the policy or object sought to be achieved by the statute. It was clear that the object or purpose of Act A1462 and P.U.(A)59/2016 are distinct and different; the former addresses economic inflation whereas the latter targets attraction of talent into Judiciary. The category of persons

affected was also easily discernible in that Act A1462 applied to current and future retired judges whereas P.U.(A) 59/2016 applied to serving judges only. Therefore, there was a proper, proportionate and reasonable differentiation to discriminate against the Respondents by excluding them from the benefit conferred by P.U.(A)59/2016. It would have been different had P.U.(A)59/2016 served to benefit the serving Judges only. Additionally, prior to the enforcement of P.U.(A) 59/2016, the Respondents seemed content with the amendment brought by Act A1462, otherwise litigation would have been instituted by the Respondents much earlier. As such, the benefit conferred by P.U.(A) 59/2016 was inapplicable to the Respondents and accordingly, the Respondents have failed to prove there was actual loss suffered. It followed, it was held by the minority, that the Respondents had also not proved that there was any disadvantage sustained.

Written by
Sandhya Saravanan
Member, Publications Committee

Yi Sha v. Public Prosecutor (CA)

Criminal law – Section 39B(1)(a) of the Dangerous Drugs Act 1952 – Defence of an “innocent carrier” – Doctrine of willful blindness

In **Yi Sha v. Public Prosecutor (Criminal Appeal No.: B-05(M)-393-08/2018)**, the Court of Appeal examined the doctrine of willful blindness and a defence of an “innocent carrier” advanced by the Appellant, a Chinese national named Yi Sha, who was charged under Section 39B(1)(a) of the Dangerous Drugs Act 1952 (**“the Act”**) for trafficking 4,276.5 grams of Methamphetamine.

For context, the drugs were discovered through a security check at the airport. There were plastic wrappings containing shoes and women’s clothing in the Appellant’s bag. One of the shoes was cut open, and it revealed a black wrapping which contained a substance suspected to be Methamphetamine. There were altogether 14 pairs of shoes which contained similar substances.

History of Proceedings

The Appellant was first acquitted and discharged without her defence being called.

The Prosecution’s appeal to the Court of Appeal was successful and the Court of Appeal ordered the Appellant’s defence to be called.

The High Court then heard the defence. At conclusion of trial, the Appellant was convicted of the offence of trafficking in dangerous drugs and was sentenced to death.

The Appellant then appealed to the Court of Appeal to challenge the High Court decision.

The Defence

The gist of the defence was that the Appellant was an “innocent carrier” who had no knowledge of the drugs found in the bag. The Appellant claimed that the bag containing the drugs did not belong to her but belonged to one ‘Michael’ who gave her USD500 and a flight ticket to Malaysia. The Appellant was only told by her boyfriend ‘Blez’ and ‘Michael’ to bring clothing samples and shoes to Malaysia. She was also told that a person would

pick her up at the airport for her to deliver the bag to another person at Ibis Style Hotel in Balakong.

High Court Findings

The Appellant’s defence of an “innocent carrier” was rejected by the trial Judge as it was deemed to be a bare denial. The Appellant was held not to be an “innocent carrier” on the mere footing of purportedly choosing to be ignorant on a matter of fact that was clear, namely; that the shoes in the bag that she carried contained drugs. It was recognised that the Appellant had a chance and opportunity to examine the bag while the bag was in her possession, but the Appellant had failed to do so. The trial Judge held that the Appellant had not rebutted the presumption of possession under Section 37(d) of the Act on a balance of probabilities and had failed to raise a reasonable doubt on the Prosecution case.

Court of Appeal Findings

The Appellant’s appeal was premised on the argument that the learned trial Judge had committed an error in failing to state whether his Lordship was making a clear finding of actual trafficking or invoking the presumption of trafficking under Section 37(da) of the Act.

The Court of Appeal found no merit to the Appellant’s argument. It was clear to the Court of Appeal that the learned trial Judge had adequately considered the Appellant’s explanation and story but ultimately held that it did not make sense and was highly improbable. The trial Judge also pointed out that:

- i. the Appellant was not an employee in Blez’s purported international business but was still delivering clothing samples to Malaysia for him;
- ii. the trip was entirely paid for and the Appellant was even paid USD500 just to deliver clothing samples which had no particular significance and

could have just been couriered out; and

- iii. the Appellant had no information on the recipient of the items when a reasonable person who was tasked to deliver a package would have known to whom the package should be delivered.

On the question of whether the drugs were for the purpose of trafficking, it was the learned trial Judge’s finding of fact that they were intended for that purpose. The mere fact that the Appellant was asked by someone to carry ‘anything whatsoever’ containing the drug, even if true, was irrelevant. The defence had failed to rebut the presumption under section 37(d) of the Act and failed to cast a reasonable doubt on the Prosecution’s case.

The Court of Appeal also agreed that the defence of “innocent carrier” had to be examined in light of the doctrine of willful blindness and referred to **Maria Elvira Pinto Exposto v Public Prosecutor [2020] 5 CLJ 1**, which amongst others stated that *“the law requires the accused to inspect or enquire when reasonable cause for obvious suspicion arises, and if the accused takes no step or effort to dispel this lingering suspicion then he or she is presumed to have known and accepted the risk of that suspicious endeavour.”*

The Court of Appeal held that the Appellant was rightly convicted under Section 39B(1)(a) of the Act and was satisfied that the Appellant was carrying the drugs for the purpose of trafficking. The Court of Appeal dismissed the appeal and affirmed the conviction and sentence.

Written by
Iffah Afrina binti Saleh
Member, Publications Committee

Obata-Ambak Holdings Sdn. Bhd. v. Prema Bonanza Sdn. Bhd. & Other Appeals (FC)

Housing law – Limitation periods in claims for liquidated ascertained damages – Second actor theory –

Prospective overruling principle – Unjust enrichment

The Federal Court in **Obata-Ambak Holdings Sdn. Bhd. v. Prema Bonanza Sdn. Bhd. & Other Appeals** (Civil Appeal No.: 02(i)-70-08/2022(W)) delivered its widely awaited judgment that sought to clarify the effect of its earlier ruling in **Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162** (“**Ang Ming Lee**”) on important aspects of the housing development laws in this jurisdiction.

This case note is premised on the detailed summary the Federal Court has released on its decision.

The Federal Court’s decision related to five appeals that were filed by a purchaser of a condominium unit and developers of housing projects. Four of the appeals arose from applications for the summary disposal of claims for, amongst others, liquidated ascertained damages (“**LAD**”) by purchasers against the housing developers. One of the appeals resulted from a judicial review challenge against a decision of the Tribunal of Homebuyer Claims on the LAD that was payable by a housing developer to a purchaser.

In **Ang Ming Lee**, the Federal Court ruled that the Housing Controller did not have the power to extend the time period for the delivery of vacant possession of housing parcels by a developer to a purchaser. This was in view of the finding that Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (“**the Regulations**”) (which empowered the Housing Controller to modify or vary the terms of a housing contract) was ultra vires the Housing Development (Control and Licensing) Act 1966 (“**HDA**”).

The **Ang Ming Lee** ruling had the effect of enlarging the time period for which LAD was to be computed for the late delivery of a housing parcel. Following the ruling,

the LAD that was payable was to be based on the original and un-amended time period for the delivery of vacant possession, which would result in the payment of a higher sum by the developer to the purchaser.

The **Ang Ming Lee** ruling resulted in a series of purchasers commencing claims against housing developers for the payment of LAD based on the Federal Court decision. Such claims included those in the **Obata-Ambak Holdings** dispute and the related appeals.

In **Obata-Ambak Holdings** and the related appeals, the Federal Court first decided on the question of limitation in claims for LAD based on the modified terms of the housing contracts. The purchasers claimed that the six-year time period to file the claim for breach of contract began from the date of delivery of vacant possession, which was in accordance with the terms of the housing contracts under the HDA. In contrast, the housing developers contended that time began from the date of the execution of the housing contracts which contained the modified terms for the delivery of vacant possession that the purchasers claimed to be ultra vires the HDA (this was on the argument that the purchasers had knowledge of the impugned modified term at the point of execution of the housing contract).

The Federal Court held that time to file the claims for breach of contract commenced from the date the housing contracts were executed. This was because the purchasers “...are in effect challenging the validity of the clauses, which are, clauses 25 and 27 of the SPA. Terms which they have agreed to when they signed the SPAs in 2012. In respect of limitation we are of the view that based on the law on limitation it is clear that time begins to run at the earliest point of time the

claimants, Obata and Vignesh could commence action. The cause of action would have accrued from the date of the execution of the SPAs or if there was any breach of the terms of the SPAs”.

The Federal Court then considered the application of the “*Second Actor Theory*” in one of the appeals. The essence of the theory was captured in the arguments by counsel for the developer (as summarised by the Federal Court) that “...an invalid decision by the first actor, the Controller, will not result in an ineffective act by the Second Actor, the developer. Sri Damansara obtained and had relied upon the approval of the extension before the SPA was executed...an administrative act by a public authority declared void will not invalidate that act done before the declaration. The EOT was granted five months before any SPA was executed. Therefore, the SPAs executed by Sri Damansara and the purchasers are valid”.

The Federal Court upheld the arguments of the developer and applied the “*Second Actor Theory*”, finding it to be “a principled and practical solution to resolve the question of the validity of a subsequent decision”. It was held that “The Controller had considered the application for extension and granted the extension as the law at that time was valid. The developer had relied on the decision of the Controller who had granted the extension. Accordingly, we have no difficulty in holding that the Second Actor Theory applies...”

It was also held that there was no scope for the purchasers to mount a collateral challenge against the decision of the Housing Controller to grant the extension of time to deliver vacant possession of the housing parcels through the claim for LAD. On this point, it was ruled that “As the 2nd and 3rd Respondents did not challenge the validity of the EOT approved by the Controller before the Tribunal, nor did they mount any challenge in the judicial

review proceedings, they cannot therefore initiate a collateral proceeding. The extended period was granted before the SPA was executed and both the Respondents were fully aware of the time of completion..."

The next issue that was considered was whether the prospective overruling principle ought to apply to the **Ang Ming Lee** decision. The prospective overruling doctrine serves to ensure that any overruling of a prior precedent applies prospectively and does not have retrospective effect to invalidate decisions premised on that precedent in the past.

After considering a series of principles on the doctrine, the Federal Court applied the prospective overruling principle and held that "...if **Ang Ming Lee** is to have retrospective effect there would be serious ramifications and repercussions to the housing industry in Malaysia in particular, the developers that had placed reliance on the existing law and diligently complied with the laws which were at the time valid...Therefore, based on the reasons we have stated above and the exceptional circumstances involved, the decision of **Ang Ming Lee** is prospective..."

The Federal Court concluded its decision by considering the application of the principle of unjust enrichment. The question was whether the purchasers could be said to be unjustly enriched from their receipt of the LAD sought in the claims. It was held that "...there would be injustice if the claims for LAD are allowed to be calculated retrospectively. The purchasers would be unjustly enriched if the claims are allowed". This was because "...the

*purchasers as house buyers were fully aware of the terms of the SPAs with the extended period with no objection, and had benefitted as vacant possession delivered and, LAD payment was accepted. The developers complied with the provisions of the law at the time and had not acted in any way unconscionably to the detriment of the interest of the purchasers. It was only after **Ang Ming Lee** that the claims were filed years after delivery of vacant possession and payment of LAD. **Ang Ming Lee** is not a carte blanche for purchasers to claim LAD retrospectively and to enjoy financial windfall".*

Written by
Gregory Das
Chairperson, Publications Committee