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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 12/2024)

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

The cases covered in this edition are as follows:

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Written by Lucy Lee Zhe Hui

(2) **Public Prosecutor v Mohd Rozani Bin Yahaya (FC)**
Criminal law – Procedure of trial court when addressing defence of insanity – Acquittal at close of prosecution's case – Standards for defence of insanity – Sections 84 and 85 of the Penal Code
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Written by Arif Umar b Faiz

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

Thank you.

Gregory Das
Chairperson
Publications Committee

Highlights from the Appellate Courts

Chen Boon Kwee v. Berjaya Sompo Insurance Berhad (FC)
Insurance law – Motor insurance – Section 91 of the Road Transport Act 1987 – Exclusion of statutory liability under Section 96 of the Road Transport Act 1987 – Right of beneficiary of judgment against insured to directly enforce against insurer

In ***Chen Boon Kwee v Berjaya Sompo Insurance Berhad*** [Civil Appeal No. 02(f)-32-04/2023(J)], the Federal Court clarified two key issues under the Road Transport Act 1987 ("**RTA**"): whether s. 96(1) necessitates a separate recovery action to enforce a judgment against an insurer and the interpretation of "contract of employment" in s. 91(1)(b)(bb).

Background

The Appellant was a passenger in a Toyota Camry ("**Vehicle**") owned by his wife, Tan Saw Kheng ("**Appellant's Wife**"). One Masri Tamin, the Appellant's work colleague, drove the Vehicle with the Appellant as passenger to Desaru on work-related travel. During the journey, the Vehicle was involved in a road accident, causing injuries to the Appellant.

The Appellant instituted proceedings against Masri Tamin, his wife (as the owner of the Vehicle) as well as owner and driver of another vehicle involved in the accident.

The Sessions Court, the High Court and the Court of Appeal all found Masri Tamin 100% liable for the accident and the Appellant's Wife vicariously liable on the ground that Masri Tamin was her authorised agent ("**Sessions Court Judgment**").

As the Appellant's Wife was the policy-holder of a third-party motor insurance policy issued by Berjaya Sompo Insurance Berhad ("**Insurer**"), the Appellant sought to enforce the judgment against the Insurer.

The Insurer denied liability, arguing that the claim fell outside the scope of coverage defined by both the insurance policy and the provisions of the RTA. The Insurer contended that, due to the exception to liability clause, it was not liable to indemnify the Appellant unless a separate recovery judgment was obtained against it.

No necessity for a recovery action

The Federal Court held that a separate recovery action is not necessary for a judgment to be enforced under s 96(1) of the RTA.

S. 96(1) of the RTA mandates an insurer to satisfy any judgment obtained by a third party against an insured person if the liability arises from death or bodily injury to the third party caused by the use of a motor vehicle covered under the policy. The Court reaffirmed its earlier decision in ***AMGeneral Insurance Berhad v. Sa'amran a/l Atan & 2 Ors*** [2022] 8 CLJ 175, which held that a recovery action is not necessary for enforcing a judgment on tortious liability against an insurer.

Thus, the Appellant, having obtained the Sessions Court Judgment against the insured/policyholder, was entitled under s. 96(1) to enforce that judgment against the Insurer without filing a separate recovery action.

Challenging Insurer's statutory liability under s. 96(1)

The Federal Court also clarified the avenues available to insurers intending to contest liability under Section 96(1) of the RTA.

If the Insurer intends to challenge its liability to pay on grounds that the claimant does not fall under the class of persons listed in s. 91(1) or that the policy or insurance is void or unenforceable, the Insurer may:

(i) obtain a timely declaration binding the third party under s. 96(3) of the RTA before the issue of liability is determined in the tortious claim; or

(ii) apply to intervene in the tortious liability suit and have the policy liability issue determined at the trial of the tortious claim.

Absent the relief above, the Insurer's liability to pay is immediate and mandatory under s. 96(1) of the RTA, after judgment had been obtained against the insured.

S. 91(1)(b)(bb) and the Insurer's liability

The Insurer submitted that passenger liability was excluded under the policy, as it did not include claims by household members of the insured unless the passenger was traveling in the Vehicle pursuant to a contract of employment with the insured or the insured's authorised driver. The Insurer also relied on s. 91(1)(b)(bb) of the RTA, asserting that the circumstances of the claim fell outside its statutory liability.

The Federal Court, referring to ***The People's Insurance Company (Malaysia) Bhd v Ting Tiew Kiong*** [2007] 5 CLJ 225 and ***Malaysian Motor Insurance Pool v Tirumeniyar Singara Veloo*** [2019] 10 CLJ 731, clarified that the term "*contract of employment*" referred to in the clause or the RTA is not confined to the employment of the insured and includes a passenger employed by a third party.

The Federal Court concluded that any passenger travelling pursuant to his employment is intended by Parliament to be a 'third party' which the RTA protects. Since the Appellant was travelling in the Vehicle pursuant to his contract of employment, he was a 'third party' victim under the RTA. The Insurer is bound by the law to satisfy the Sessions Court Judgment obtained against the insured.

Conclusion

The Federal Court reaffirmed that an insurer is statutorily liable to satisfy a judgment obtained against an insured person without a need for a further judgment directly against the insurer by way of a recovery action. The Federal Court upheld that third-party insurance under the RTA affords protection to third-party passengers carried in the vehicle for work purposes.

Written by
Lucy Lee Zhe Hui
Member, Publications Committee

Public Prosecutor v. Mohd Rozani Bin Yahaya (FC)
Criminal law – Procedure of trial court when addressing defence of insanity – Acquittal at close of prosecution's case – Standards for defence of insanity – Sections 84 and 85 of the Penal Code

The Federal Court in ***Public Prosecutor v. Mohd Rozani Bin Yahaya*** **(MPRJ No: 05(LB)-117-11/2023(D))** was required to address whether a trial judge could acquit an accused person at the close of the Prosecution's case where a defence of insanity has been raised.

The Respondent was charged for the murder of a 68-year-old man in Jajahan Pasir Mas, Kelantan. The Respondent raised the defence of insanity.

The High Court acquitted the Respondent at the close of the Prosecution's case. At the trial, a medical consultant in forensic psychiatry testified to the mental condition of the Respondent and explained that the Respondent had been treated for schizophrenia. The medical consultant nevertheless concluded that the Respondent was of sound mind and understood the nature and consequences of his actions at the time of the incident. However, the trial judge expressed doubts on the conclusiveness of the medical consultant's evidence and further held that the consultant had given evidence that the Respondent's mental condition could have been influenced by drug use. The High Court also placed reliance on the evidence of a police officer who was familiar with the Respondent and testified that the Respondent had mental health issues and caused disturbances in the community.

The Court of Appeal affirmed the decision of the High Court. The appellate court held that the trial judge properly considered the evidence of the medical consultant. The Court of Appeal proceeded to find that it was appropriate to acquit the Respondent based on the defence of insanity as the evidence of the Prosecution showed the Respondent not to be of sound mind at the material time.

The principal issue at the Federal Court was whether, in light of the Respondent's defence of insanity, the trial judge could order the acquittal of the Respondent at the close of the Prosecution's case without the defence being called.

The Federal Court first noted that the Court of Appeal had conflated the concepts of insanity under sections 84 and 85(2)(b) of the Penal Code. Section 84 codifies a defence of "*…unsoundness of mind*" where a person "*is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law*". Section 85(2) provides for the defence of intoxication, which applies where "*the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission*". The Federal Court observed that "*Both these sections are distinct, in that, they deal with 2 different concepts of insanity*".

Zabariah Mohd Yusof FCJ then proceeded to explain the difference between the concepts of "*medical insanity*" and "*legal insanity*". It was noted that "*medical insanity*" concerned a "*disorder of the mind which covers a whole range of mental health conditions which may impair one's cognitive or emotional functions*". Examples of such conditions are anxiety and depression. However, it was observed that these conditions "*do not necessarily render one as legally insane under section 84 of the Penal Code, so as to accord a complete defence in criminal law*". In contrast, "*legal insanity*" was explained to involve "*a distinct set of criteria and considerations within the framework of the legal system…legal insanity goes beyond mental health and pertains to one's legal capacity and responsibility for their actions…It entails assessments by mental health experts and legal professionals to analyse and evaluate the accused's mental state at the time of the alleged offence committed*". Importantly, it was noted that "*The consequences of legal insanity may result in the accused being declared not criminally responsible or being committed to a psychiatric institution instead of facing traditional criminal penalties*".

The Federal Court then observed that a two-stage process would arise when the defence of insanity is raised. The first stage involves a determination of whether "*the accused was medically insane at the time when he committed the alleged offence*". The first stage is premised on the evidence of medical experts. The second stage involves an assessment of "*whether the accused, by reason of his psychiatric condition, has lost his cognitive faculties to a degree that he is incapable of know the nature of his act or that what he is doing is wrong or contrary to law*". The second stage requires a determination by the Courts based on the evidence adduced at trial.

The apex court proceeded to evaluate the trial judge's treatment of the evidence in the Prosecution's case. It was noted that the evidence of the medical consultant was rejected because of the delay in the consultant's examination of the Respondent (which occurred 9 months after the incident) and that the consultant had no immediate medical records of the Respondent's condition from the day of the crime. The Federal Court held that "*such "delays" per se, do not invalidate the conclusions drawn by a medical professional. More so, in the present appeal, SP 9 [the medical consultant] was able to make reliable inferences based on medical records and other evidence*".

Emphasis was placed by the Federal Court on the need for expert medical evidence to substantiate the defence of insanity. It was ruled that "*In the present appeal, what was before the court was the evidence of SP 9 which established the mental state of the accused at the time of the offence, namely, that the accused was of sound mind at the material time. Expert medical evidence is necessary as the question of whether he was medically insane at any particular time is in the realm of forensic science. It is not something that the court can determine without the benefit of expert opinion*".

On the contention of intoxication, it was ruled that "*there was no scientific evidence to support the contention…As the defence was not called, there was no evidence from the accused to show that by reason of the drug intoxication, he was temporarily insane at thee time he attacked the deceased and that could not have formed the intent to cause bodily injuries to the deceased*".

The Federal Court then held that the Court of Appeal had erred in electing not to follow the principle in ***PP v. Lim Poo Teck*** [2024] 1 MLJ 337 that "*acquittals should not occur prematurely based solely on medical testimony without hearing the defence. Legal insanity has to be proven by the defence before the defence of insanity under section 84 applies*".

It was ultimately held that "*Acquitting the accused before the defence is called, is acquitting the accused before the defence of legal insanity (be it under section 84 or 85(2)(b) of the Penal Code) is proven, which is a serious error of law*".

The Federal Court allowed the Prosecution's appeal and remitted the matter to the High Court for continued trial and for the Respondent to be called to enter his defence.

Written by
Gregory Das
Chairperson, Publications Committee

Pemungut Duti Setem v. Ann Joo Integrated Steel Sdn. Bhd. (CA)
Stamp duty – Case stated under Section 39 of the Stamp Act 1949 – Whether letter of offer is within a Remission Order – Instruments under Item 22(1)(b) of the First Schedule of the Stamp Act 1949

The core issue for the Court of Appeal to determine in ***Pemungut Duti Setem v. Ann Joo Integrated Steel Sdn. Bhd. (Civil Appeal No. W-01(A)-227-04/2022)*** was whether a Letter of Offer dated 27.12.2018 issued by Alliance Bank Malaysia Berhad ("Letter of Offer") to Ann Joo Integrated Steel Sdn. Bhd. ("the Respondent") was an instrument under Item 22(1)(a) or 22(1)(b) of the First Schedule of the Stamp Act 1949 ("the Act"). The Letter of Offer offered various credit facilities (comprised of various trade facilities up to the limit of RM100,000,000.00 and Forward Foreign Exchange up to the limit of RM5,000,000.00) totalling RM105,000,000.00. Whether the Letter of Offer was an instrument under the said provisions of the Act was relevant as Stamp Duty (Remission) (No. 2) Order 2012 ("Remission Order") only applied to an instrument upon which stamp duty payable under item 22(1)(b) of the First Schedule of the Act.

The appeal arose from the following salient facts. The Respondent filed an appeal to the High Court by way of case stated pursuant to s. 39(1) of the Act to appeal against the decision of the Appellant ("the Collector") on 8.3.2021 to reject the Respondent's notice of objection dated 16.11.2020 in relation to a Notice of Assessment of Stamp Duty dated 13.2.2019 ("Assessment Notice") on the Letter of Offer. Based on the Assessment Notice, the stamp duty payable was RM525,000.00. The Respondent claimed that the amount of stamp duty payable pursuant to the Remission Order was 0.1% of the amount of RM105,000.000.00, that was RM105,000.00 only because the various credit facilities amounts were not a fixed term loan with fixed amount of repayment over a fixed period of time. However, the Collector opined that the amount of stamp duty payable fell under item 22(1)(a), instead of 22(1)(b) of the First Schedule of the Act, and maintained that the stamp duty payable was RM525,000.00. Further, the Collector insisted that the Remission Order was not applicable to the Respondent because the credit facilities granted to the Respondent was for a definite and certain period.

The High Court judge allowed the Respondent's appeal on the ground that that it was entitled to benefit from the Remission Order for a remission of the stamp duty payable under item 22(1)(b) of the First Schedule of the Act. As a consequence, the Collector's Assessment Notice was set aside and the High Court declared that the applicable stamp duty chargeable upon the Letter of Offer amounted to RM105,000.00 and ordered that RM420,000.00 (being the excess stamp duty which has been paid to the Collector as a result of the erroneous Assessment Notice) be refunded to the Respondent within 14 days from the date the order with interest accruing at the rate of 8% on the said sum from the date the payment was made to the Collector. The Collector appealed to the Court of Appeal against the findings of the High Court,.

The Court of Appeal highlighted two issues which were not in dispute. First, the Letter of Offer was an instrument chargeable with duty. Second, the sum of RM105,000,000.00 was the amount chargeable for stamp duty. Therefore, the core issue in dispute was the amount of stamp duty payable on the amount chargeable for stamp duty.

The Court of Appeal delivered a unanimous decision and held the Letter of Offer was an instrument that fell under item 22(1)(b) of the First Schedule of the Act and that all four conditions to qualify for the Remission Order had been met. The conditions were that the stamp duty was chargeable under item 22(1)(b) of the First Schedule of the Act, whether it was a loan agreement or loan instrument, the entire loan sum or credit facility was not secured with any security, and lastly, the sum(s) or money owing was repayable on demand or in single bullet repayment.

Whilst the Court of Appeal agreed with the High Court that the Respondent was entitled to enjoy the benefit of the Remission Order based on the terms and conditions in the Letter of Offer, Choo Kah Sing JCA pointed out that the High Court had incorrectly ordered the sum of RM420,000.00 as the excess amount to be refunded. The Court of Appeal set out the correct tabulation of the stamp duty payable based on item 22(1)(b) of the First Schedule of the Act and the application of the Remission Order as follows:

The amount chargeable for duty	RM105,000,000.00
The proper stamp duty that is chargeable (or payable) based on item 22(1)(b) of the First Schedule of the Act – for every RM100.00 and also for any fractional part of RM100.00 of the annuity or sum periodically payable is RM1.00	1%
The stamp duty payable based on item 22(1)(b) of the First Schedule of the Act	RM1,050,000.00
The amount of stamp duty that is chargeable which in excess of 0.1% is remitted (the amount to be remitted if it is based on the above tabulation)	RM1,048,950.00
Therefore, the stamp duty payable (after remission) is:	**RM1,050.00**

In addition, the Court of Appeal referred to s. 11 of the Civil Law Act 1956 and went on to observe that the appeal at the High Court was not a suit brought before the court for recovery of any debt or damages in which a court could give interest at such rate as it thinks fit on the whole or any part of the debt or damage. It was a stamp duty appeal under s. 39(1) of the Act. Therefore, the High Court Order in granting accrued interest of 8% on the sum of RM420,000.00 ought to be set aside and amended accordingly.

The Court of Appeal also held that the applicable stamp duty chargeable for the Letter of Offer was RM1,050,000.00. However, since there was no cross-appeal by the Respondent for the correct amount to be refunded, the sum of RM420,000.00 as ordered to be refunded to the Respondent by the Collector by the High Court Order was to be maintained.

Written by
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Member, Publications Committee

Teo Chee Cheong v. Cham Siew Moi (CA)
Family law – High Court's powers under Section 76 of the Law Reform (Marriage and Divorce) Act 1976 on the division of assets between married couple

The issues in the appeal of **Teo Chee Cheong v. Cham Siew Moi (Civil Appeal No. W-02(W)(-1034-05/2021)** were in relation to the High Court's powers under section 76 of the Law Reform (Marriage and Divorce) Act 1976 ("**section 76 LRA**") on the division of assets between a married couple whom the Court had decreed a judicial separation.

Background Facts

The material facts were as follows:

a) The Respondent husband (RH) worked as a proprietary trader and the petitioner wife (PW) was an air stewardess but resigned before marrying RH;
b) RH and PW registered their marriage on 18.1.1997 and had 2 sons;
c) On 23.10.2015, after filing her judicial separation petition, PW left the matrimonial home with her 2 children;

The Decision

A) What assets can be divided and/or sold under section 76 LRA

If an asset does not fall within the ambit of section 76(1) and (5), the court has no power to divide the assets. The Court of Appeal further observed that there is no definition of "matrimonial assets" in section 76. The definition of 'property' in section 102(2) ***LRA*** only applies for the purposes of section 102(1) and therefore could not be applied to section 76.

The Court of Appeal viewed that section 76(1) confers a discretion on the High Court judge to divide and/or sell "any assets acquired…during the marriage". The Court of Appeal did not consider "matrimonial assets" to be part of the assets referred to in section 76(1) for the following reason:

a) The terms is not used in section 76(1), (2) and (5);
b) The assets in section 76(5) includes any assets owned before a marriage if either one of the conditions is proven:
    i. There is substantial improvement of the pre-marriage asset during the marriage by the spouse;
    ii. The pre-marriage asset has been substantially improved during the marriage by the joint efforts of both spouses; **("2 alternative conditions")**

If a pre-marriage asset satisfies either of the 2 alternative conditions:

a) It will fall within the ambit of assets which can be divided and/or sold by the court pursuant to section 76(1);
b) A spouse cannot allege that the pre-marriage asset is the subject matter of a resulting trust to be excluded under section 76(1) (see the case of ***Balakrishnan v Shameena [2019] 5 MLJ 661*** at paragraphs 9 and 10); and
c) A spouse cannot claim that a pre-marriage asset is a gift to be excluded under section 76(1) (see the case of ***Lim Bee Cheng v Christopher Lee Joo Peng [1996] 2 CLJ 697***, at 702, 703 and 707);

On this point, the Court of Appeal further decided that the judgment in ***Yap Yen Piow v Hee Wee Eng [2017] 1 MLJ 17*** regarding the distinction between "matrimonial property" and "non-matrimonial property" at paragraphs 34 and 35 of the judgment is per incuriam of section 76 ***LRA*** for the following reasons:

a) The distinction of the said terms are not supported by the wordings in section 76(1), (2) and 5; and
b) The case was decided before the enforcement of Act A1546 (deleted section 76(3) of LRA)

B) Can the court divide a spouse's EPF funds under section 76

The Court of Appeal viewed that:

a) A spouse's EPF funds which have been accumulated after marriage form part of the assets which can be divided by the court as it falls within the meaning of "*any assets acquired during the marriage*";
b) EPF funds accumulated before marriage constitute pre-marriage assets if either of the 2 alternative conditions is proven; and
c) Section 53A(1) of the ***Employees Provident Fund Act 1991*** does not empower the court to divide pre-marriage EPF funds pursuant to section 76(1);

On the point of whether cases decided in the UK can be referred to, the Court of Appeal was of the contrary view since section 76 is different from the statutory provisions in the UK (see the case of ***Sivanes v Usha Rani [2002] 3 MLJ 273*** at 279).

C) Nature of Court's discretionary power to divide and/or sell assets

The Court of Appeal viewed that:

a) Considerations on the division of assets do not include who has caused the breakdown in the marriage and, therefore, is not an assessment of damages or compensation to be paid by one spouse to the other;
b) The court should adopt a "broad brush" approach as adopted in the Singaporean case of ***Koh Kim Lan Angela v Choong Kian Haw [1994] 1 SLR 22*** and consistent with the case of ***Sivanes*** and followed in ***Koay Cheng Eng v Linda Herawati Santoso [2008] 4 MLJ 863***, at 886 and 887;
c) The court has an implied power under section 76(1) read with section 40(1) of the ***Interpretation Act*** to divide and/or sell the assets:
    i. Based on a particular date (including the date when the court decrees divorce) ("Particular Date"); and
    ii. Premised on different dates for different assets ("Different Dates")

    as long as reasons why the dates are chosen are provided;
d) The court ought to divide the assets on an individual basis because different considerations may apply to different assets; and

e) After the court has granted a decree of divorce, the court has no power to order a division of the assets (see the Federal Court case of ***Manokaram v Ranjid [2008] 6 CLJ 209*** at [9] and the case of ***Chew Ling Hang v Aw Ngiong Hwa [1997] 3 MLJ 107*** at 112 and 113).

D) Burden of Proof

Pursuant to sections 101(1) and (2) of the ***Evidence Act 1950*** and on the issue of burden of proof, the Court of Appeal viewed that the petitioner has:

a) The Overall Legal Burden;
b) The Overall Evidential Burden to prove on a balance of probabilities:
   i. What are the assets;
   ii. Should the assets be sold;
   iii. Whether the court should adopt a Particular Date or Different Dates; and
   iv. What is the ratio to be imposed on the division of assets bearing in mind starting point of equal division and considerations in section 76(2).

With regards to Rule 61 of the ***Divorce and Matrimonial Proceedings Rules 1980***:

a) If a particular spouse is illiterate or wholly dependent on the other spouse or does not have any knowledge of the spouse's assets, the spouse may apply to court for an order that the spouse file an affidavit containing full particulars of the spouse's property ("full disclosure affidavit");
b) The filing of the full disclosure affidavit does not displace the Overall Legal Burden imposed on the Petitioner;
c) If the spouse does not comply with the filing of the full disclosure affidavit, the spouse may file committal proceedings;
d) If the full disclosure affidavit is false, the spouse may lodge a police report that the deponent has committed an offence of giving false evidence, punishable under section 193 of the ***Penal Code***.

E) Bank Accounts in RH's name

The Court of Appeal observed that there were 4 legal errors made as follows:

a) The High Court judge failed to ascertain if the Total Sum in RH's bank accounts consisted of assets acquired during the marriage;
b) The High Court judge failed to decide whether any part of the Total Sum consisted of income derived before marriage and whether there was compliance of the 2 alternative conditions;
c) The High Court judge failed to give effect to section 76(2)(a) by not deducting RH's cost of acquisition of the assets from the Total Sum; and
d) The High Court judge chose 6.5.2021 as date for the division of assets but no reasons were provided – High Court judge had unlawfully considered an additional period of 5 years and 5 months from 23.10.2015 during which PW was not contributing to the marriage;

The Court of Appeal observed that there are 2 plain factual errors made as follows:

a) The High Court judge used the Total Sum without accepting RH's net income which meant that RH had to pay PW in excess of RH's net income; and
b) The High Court judge failed to deduct RH's monetary contributions made by RH towards the acquisition of assets when there is evidence of RH's contributions.

The Court of Appeal viewed that the 30% ratio in favour of PW was not plainly wrong.

Therefore, the calculation was as follows:

RM51,175,966.13 (RH's net income during marriage) – RM24,793,314.00 (RH's monetary contribution) = **RM26,382,652.13**

30% of RM26,382,652.13 = **RM7,914, 795.63**

F) 2 Properties (sold during marriage)

The Court of Appeal observed that the High Court had committed a plain factual error when awarding 50% of the Sales Proceeds after deducting loan repayment, expenses and RM80,000.00 previously given by RH to PW as this meant double accounting.

PW had the Overall Legal Burden to satisfy the court that the sale proceeds:

a) Had not been credited into the Bank Accounts; and
b) Did not form part of RH's net income.

G) Sale Proceeds (Shares in PW's name)

Similarly, PW had the overall legal burden to satisfy the court that the sale proceeds:

a) Had not been credited into the Bank Accounts; and
b) Did not form part of RH's net income.

Additionally, the High Court judge failed to consider the loss suffered by RH in selling the shares in PW's name and PW did not adduce any evidence to show RH's losses had not been incurred.

H) Motor Vehicles

The High Court judge failed to deduct the sum from the sales proceeds from the motor vehicles sold by PW and kept by PW.

I) Shares in Astralnet Technology Sdn Bhd (ATSB), company incorporated by RH

The division ration for the same for PW was plainly erroneous since the High Court judge failed to take into account the following:

a) RH contributed solely in terms of money and effort in incorporating ATSB and the purchase of land in the name of ATSB;
b) RH manages ATSB's operations and affairs; and

c) PW's contribution to the welfare of the family can be considered but does not support a 30% apportionment to PW.

Instead, 20% of the net value of ATSB's shares to PW was ordered.

J) RH's EPF account

The Court of Appeal viewed that in light of the withdrawal of RM500,000.00 made by RH when the case was still pending i.e. RH's contumelious conduct to defeat PW's lawful claim, entitlement of the EPF was increased to 40%.

K) Division of 5 properties

The High Court's division of 40% of the reduced value of the properties to PW is not plainly wrong.

L) Son's policy payout from PW's entitlement to division of assets

The Court of Appeal viewed that the son's policy payout need not be deducted from the division of assets since the division of assets under section 76 is not a detailed accounting or auditing process.

M) PW's spousal maintenance sum

The High Court had not committed a plain error of fact in awarding RM20,000.00 per month since:

a) RH is a person of considerable financial means and the monthly maintenance is not beyond RH's financial means;
b) PW had resigned from her job and had no financial means to support herself; and
c) RH had given PW a luxurious lifestyle and cannot now deny PW such monthly maintenance.

N) Should the Court release RH from his obligation to pay PW's monthly spousal maintenance?

In February 2022, pending the disposal of RH's appeal and PW's cross-appeal, RH paid PW a sum of RM38,851,440.37. As RH already paid the division award, RH is no longer obliged to pay PW's monthly spousal maintenance since PW can thereafter maintain her lifestyle without any spousal maintenance from RH (see the case of ***Sivajothi v Kunathasan [2000] 6 MLJ 48)***. The parties agreed that RH should be released from his obligation to pay PW's monthly spousal maintenance sum.

Since RH's appeal was largely successful, the Court of Appeal ordered PW to pay an amount of RM50,000.00 as costs to RH.

The table below summarises the awards.

Written by
Sandhya Saravanan,
Member, Publications Committee

Assets	As awarded by the High Court to PW (including apportionment to PW)	As varied by the Court of Appeal to PW (including apportionment to PW)
Matrimonial home	RM1,000,000.00 / 50%	RM1,000,000.00 / 50%
5 Properties	RM5,065,737.44 / 40%	RM5,065,737.44 / 40%
5 Properties (PW's name)	RM587,100.00 / 60%	RM587,100.00 / 60%
Total Sum (Bank Accounts in RH's name)	RM66,744,860.12 / 30%	RM7,914,795.63 (calculation as above) 30%
Total Sum (Bank Accounts in PW's name)	RM501,971.44 / 70%	RM501,971.44 / 70%
2 Properties (sold during marriage)	RM3,722,349.03 / 50%	RM0
Sale Proceeds (Shares in PW's name)	RM3,894,945.48 / 30%	RM0
Total value (Motor Vehicles)	RM343,200.00 / 40%	RM343,200.00– RM145,000= RM198,200.00 / 40%
Net Value (ATSB's shares)	RM5,240,371.80 / 30%	RM3,493,581.20 / 20%
RH's EPF Account	RM131,323.19 / 30%	RM175,097.59 / 40%
Joint Bank Account	RM1,030,361.05 / 50%	RM1,030,361.05 / 50%

Perspektif Masa Sdn. Bhd. V Sabah Development Bank Berhad (CA)
Banking law – Bank guarantee – Requirement to pay once beneficiary makes demand under bank guarantee Civil procedure – Interlocutory injunction – Bona fide serious question to be tried – Unconscionable conduct

The Court of ***Appeal in Perspektif Masa Sdn. Bhd. V Sabah Development Bank Berhad*** (Civil Appeal No: B-02(IM)(NCVC)-549-04/2024 had occasion to decide issues related to an injunction application to restrain a financier (Respondent) from enforcing a loan and security documents against a borrower (Appellant) after a default.

The Appellant was a developer of a housing and commercial development project and the Respondent provided credit facilities to the Appellant for the purpose of this project. In November 2023, the Respondent through its solicitors issued a letter of demand to the Appellant demanding for the payment of RM936,644,754.19, being the outstanding payment of the Respondent's loan facilities owing by the Appellant and failing which, the Respondent would proceed to take necessary steps to recover those sums and enforce all of its security documents.

On 29.11.2023, the Appellant commenced legal proceedings against the Respondent and in the meantime, filed an application for an interim injunction against the Respondent to restrain the Respondent from enforcing the security agreements and documents entered into between both parties. The High Court dismissed the injunction application at the *inter-parte* stage. The Appellant thereafter filed an appeal in the Court of Appeal.

The Court of Appeal found that the Appellant had failed to satisfy the test of *bona fide* serious question to be tried. The Court found to be untenable the purported question raised by the Appellant of whether the Respondent must investigate the propriety of any claim made under the bank guarantee before releasing it.

The Court of Appeal also found that the Appellant failed to make full and frank disclosure to the High Court when the Appellant applied for the injunction application on an *ex-parte* basis. The Appellant's failure to disclose to the High Court that facility agreement in question had an express provision that provides that the bank guarantees were unconditional and were on-demand bank guarantees, was also not done in good faith.

The appeal was accordingly dismissed.

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Ganad Media Sdn. Bhd. v Big Tree Outdoor Sdn. Bhd. and another appeal (CA)
Land Law – Section 68 of the National Land Code 1965 - Temporary Occupation Licenses – Assessment of Damages – Damages for trespass – Civil procedure – Judicial admission – Whether Court of Appeal functus officio to set aside or vary decision on interest

This case involved two appeals (Civil Appeal Nos.: W-03(IM)-5-01/2021 and W-03(IM)-71-09/2021) brought by the Appellant, Ganad Media Sdn. Bhd. ("Ganad Media"), in respect of its dispute with the respective Respondents, namely Big Tree Outdoor Sdn. Bhd. ("Big Tree Outdoor") and Metramac Corporation Sdn. Bhd. ("Metramac").

Background Facts

The dispute between the parties involved a piece of land in Mukim Petaling ("the Land"), which was the subject of a concession agreement entered into between Metramac and Dewan Bandaray Kuala Lumpur ("DBKL") in February 1992 whereby Metramac was given the right to deal with the Land. In May 1995, Metramac then granted a license to Big Tree Outdoor to manage, operate and maintain any advertising hoardings or matters related to the concession area, including the Land.

In 2002, the Land Administrator granted a temporary occupation license ("TOL") to Ganad Media in respect of the Land, which was effective between 2002 to 2005 and again from 2011 to 2015. Pursuant to the TOL, Ganad Media attempted to enter the land on 15 June 2002 to construct a unipole sign on it, but was prevented from doing so by Metramac on the basis that Big Tree Outdoor was occupying the land. Metramac continued to prevent Ganad Media's attempts to enter the land in subsequent years.

High Court Suit brought by Ganad Media

In 2003, Ganad Media commenced a suit in the High Court against Metramac and Big Tree Outdoor as a result, seeking declaratory and injunctive relief on the basis that it was the licensee of the Land pursuant to section 68 of the National Land Code 1965 ("NLC 1965") and that Metramac and Big Tree Outdoor had infringed its statutory right and trespassed on the Land. Ganad Media also sought damages from Metramac and Big Tree Outdoor for its loss of profits during the periods which Ganad Media possessed the TOL.

In 2005, Metramac brought third-party proceedings against the Land Administrator for issuing the TOL to Ganad Media, contending that the Land Administrator had no jurisdiction to do so. During the pendency of the dispute, there was no operative TOL to Ganad Media over the Land during the period of 2006 to 2010.

Ganad Media applied under Order 14A of the Rules of Court 2012 for summary determination of its suit against Metramac and Big Tree Outdoor on points of law. In 2010, High Court Justice Lau Bee Lan (as she then was) allowed the Order 14A application and ordered as follows:

1. that as a holder of the TOL, Ganad Media was entitled to the uninterrupted possession of the Land together with its fixtures and fittings;

2. that Metramac and Big Tree Outdoor had infringed Ganad Media's statutory right under section 68 NLC 1965;

3. that Metramac and Big Tree Outdoor had trespassed into the Land during the tenure of the TOL;

4. that Ganad Media's entitlement to damages are to be assessed in terms of quantum and period, particularly whether Ganad Media is entitled to damages after 1 January 2006; and

5. that interest at the rate of 8% per annum from 15 June 2002 (the date of Ganad Media's first unsuccessful attempt to enter the land) until full realisation of the damages awarded by the Court.

Assessment of Damages at the High Court

At the assessment of damages stage, the learned Senior Assistant Registrar ("SAR") found, *inter alia*, as follows:

1. Ganad Media had obtained the TOL for the period of 2002 to 2005;

2. Ganad Media had not obtained the TOL for the period of 2006 to 2010; and

3. At all material times, the Metramac and Big Tree Outdoor were not entitled to occupy the land and had continuously trespassed on the land from 2002 to 2013 (a period of 138 months), during which time, they had obtained profits from this illegal occupation, noting that Metramac and Big Tree Outdoor continued to occupy the land even after being sued by Ganad Media. They were therefore liable to pay damages to Ganad Media for the period of trespass between 2002 to 2013.

On this basis, the learned SAR awarded damages of approximately RM 6 million to Ganad Media. In summary, the methodology used to compute the damages was as follows:

1. The loss of profits suffered by Ganad Media were derived by calculating the average of the profits which Ganad Media could have made during this period and multiplying it by the total duration of 138 months;

2. The average profits for the applicable period were derived by determining the profits made at the beginning of the period in 2002 and the profits made at the end of the period in 2013. For the former, the learned SAR used a figure of approximately RM 21k per month which was based on the monthly profits that Big Tree Outdoor was earning in 2003 from its billboard. For the latter, the SAR referred to two agreements ("MAL-TEL contracts") which Ganad Media had entered into in respect of the Land during 2011 to 2013, but which it could not perform, where the monthly profits were projected to be approximately RM 41k. Calculating the average between the two figures, the learned SAR arrived at an average profit per month during the applicable period of approximately RM 31k;

3. Based on this figure, and after deducting certain applicable costs, the learned SAR calculated the total nett amount of loss of profits suffered by Ganad Media during the applicable period of 138 months to be approximately RM 4.1 million; and

4. The learned SAR then awarded pre-judgment interest of 4% per annum, amounting to a total of approximately RM1.9 million, resulting in the award of damages totalling to approximately RM 6 million.

Appeal to the Judge in Chambers

Aggrieved by the award of damages by the learned SAR, Metramac and Big Tree Outdoor appealed to the Judge in Chambers. The High Court judge allowed the appeal and set aside the order of the learned SAR. Instead, the High Court Judge ordered that Metramac and Big Tree Outdoor pay Ganad Media nominal damages in the sum of RM 50,000 and interest at 5% per annum from the date the write was filed (26 December 2003) until full settlement.

In its findings (see paragraph 21 of the judgment), the learned High Court Judge held, *inter alia*, that the learned SAR had exceeded the scope of the judgment on liability handed down by the High Court Justice Lau Bee Lan (as she then was) on the basis that the Order in respect of the judgment in liability had directed the learned SAR to assess damages from 2002 until 2006 only, and that any damages after 2006 were subject to whether Ganad Media possessed a valid TOL for any subsequent years. Further, the High Court held that Ganad Media had not adequately proven the loss of profits it had alleged, finding that the learned SAR had premised its entire quantification of damages on "*mere projections*" based on the MAL-TEL contracts. As such, due to the lack of documentary evidence to support the quantification of damages put forward by the Ganad Media and accepted by the learned SAR, the learned High Court judge held that Ganad Media was only entitled to nominal damages.

Ganad Media's Appeal to the Court of Appeal

Against the backdrop summarised above, the Court of Appeal distilled two main issues for determination in the appeals brought by Ganad Media.

First Issue: The Period for which Ganad Media is Entitled to Damages to be Assessed

The Court of Appeal held that in finding that Ganad Media was only entitled to claim damages for the period when it had possessed a valid TOL (i.e. 2002 to 2006), the learned High Court Judge did not give proper judicial appreciation to the evidence on record, as there was clear evidence before the learned SAR that Ganad Media had possessed a valid TOL not only in 2002 to 2005, but also in 2011 to 2013. As such, the Court of Appeal held that Ganad Media was clearly entitled to damages for both periods.

Further, the Court of Appeal found that the learned High Court Judge erred in finding that the learned SAR was not entitled to assess the Plaintiff's entitlement to damages post-2006. Based on a reading of the Order in respect of the High Court judgment on liability, the Court of Appeal found that the learned SAR was entitled to make this determination. The relevant term of the said Order, referred to by the Court of Appeal in paragraph 32 of its judgment, stated (emphasis in original):

"***DAN ADALAH SELANJUTYNA DIPERINTAHKAN*** *bahawa [Ganad Media] seterusnya diawadkan ganti rugi am dan ganti rugi khas untuk ditaksirkan dari segi kuantum dan* ***tempoh, iaitu samada Plaintif berhak untuk menuntut ganti rugi am selepas 1.1.2006***"

That said, the Court of Appeal did not agree with Ganad Media's submission that they could have and would have possessed the TOL from 2006 to 2010 but for the third-party proceedings against the Land Administrator, citing that the renewal of a TOL is not automatic and is at the sole discretion of the Land Administrator pursuant to section 67(1) and (3) NLC 1965. In this regard, the Court of Appeal took cognisance of the fact that the Plaintiff had attempted to renew the TOL for the period of 2006 to 2010 but was denied, and in fact wrote to the Land Administrator to suspend the granting of any TOLs pending the disposal of the said third-party proceedings in order to preserve its rights. This, to the Court of Appeal, was a contradiction of Ganad Media's submission that "*but for the Defendants' 3rd Party suit against the Land Administrator, [Ganad Media] could have and would have possessed the TOL for 2006 to 2010*".

In so finding, the Court of Appeal distinguished the present facts to those in the Federal Court case of ***Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701**, where the question before the Federal Court was related to the entitlement to damages where the victim of trespass was a registered owner of land, whereas on the current facts, Ganad Media was neither a registered owner nor a licensee under a TOL between 2006 to 2010.

Second Issue: Whether Ganad Media has Proved its Damages

The Court of Appeal held that there was no proper judicial evaluation of the evidence on record when the learned High Court Judge found that the learned SAR premised its calculation of damages to be awarded to Ganad Media on "*mere projections*" based on the MAL-TEL contracts.

In this regard, Big Tree Outdoor had questioned the authenticity of the MAL-TEL contracts for the first time in its written submissions filed in the Court of Appeal, seeking to rely on a decision of the High Court in ***Ganad Media Sdn. Bhd. & Anor v Sun Media Corporation Sdn. Bhd. & Ors [2015] 1 LNS 1064*** in which similar contracts were found to be fabricated. This attempted reliance was dismissed by the Court of Appeal, who found that the MAL-TEL contracts were properly admitted into evidence and any allegations of fabrication by Big Tree Outdoor were belated (see paragraphs 47 to 52).

The Court of Appeal was of the view that the MAL-TEL contracts were valid contracts entered into by Ganad Media and that the learned SAR was right in applying these contracts as a basis for calculating damages. Further, the Court of Appeal agreed with Ganad Media's submission that the non-performance of the MAL-TEL contracts did not disentitle Ganad Media from claiming for the loss of profits that they would have been entitled to, given that what had prevented the performance of the contracts was the occupation of the Land by Metramac and Big Tree Outdoor.

That said, the Court of Appeal held that the learned SAR was plainly wrong in using the MAL-TEL contracts as a basis for calculating the damages for the period of 2002 to 2005, given that the MAL-TEL contracts were only executed in 2011/2012 and were only indicative of market rates in 2011 and 2013. The Court of Appeal therefore found that, at best, the MAL-TEL contracts could only be used as a basis for computing damages for the period from 2011 to 2013.

As for the period of 2002 to 2005, the Court of Appeal agreed that the profits made by Big Tree Outdoor during that period was a sure foundation for calculating damages owed to Ganad Media during this period. The Court of Appeal noted that the Big Tree Outdoor had asserted their profits during this period in their pleaded counterclaim against Ganad Media, which the Court of Appeal held amounted to an admission.

As such, the Court of Appeal held that Ganad Media had proven its losses during the applicable in which it held a valid TOL, namely 2002 to 2005 and 2011 to 2013.

Accordingly, the appeals were allowed and the decision of the learned High Court Judge to grant only nominal damages was set aside. After deducting the relevant costs, the Court of Appeal at paragraphs 63 to 64 of its judgment, awarded total damages for the periods of 2002 to 2005 and 2011 to 2013 of approximately RM2.2 million to be paid to Ganad Media. The Court of Appeal also awarded interest at 5% per annum from the date the writ (26 December 2003) was filed by Ganad Media, to the date of full settlement.

Postscript: Metramac's Motion to vary / set aside the Court of Appeal's award of interest (addressed in paragraphs 67 to 79 of the Court of Appeal's judgment)

After the delivery of the Court of Appeal's Broad Grounds of Decision in May 2023, Metramac filed a Notice of Motion to vary / set aside the judgment of the Court of Appeal pertaining to the award of interest, particularly with regards to the calculation of interest commencing from the date the writ was filed (26 December 2003), contending that the damages assessed by the Court of Appeal (approx. RM 2.2 million) were not yet owed by Metramac to Ganad Media at the date of filing of the writ. Metramac initially sought a clarification of the terms of the Court of Appeal Order but filed this Notice of Motion in abundance of caution, as the date for clarification was fixed beyond the time limit for setting aside and/or varying an order, stipulated in Order 42 Rule 13 of the Rules of Court 2012.

Metramac's Notice of Motion was dismissed by the Court of Appeal on the grounds that the Court of Appeal was already *functus officio* and that the Notice of Motion did not fall under the exception enunciated in ***Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393***, stating that the principles in ***Badiaddin*** (supra) were "*in the context of an order made in contravention of statute to the extent of illegality and excess of jurisdiction*" whereas in the present case, Metramac's motion was "*premised on a mere dissatisfaction with the Court Order*". In this regard, the Court of Appeal noted that it had exercised its discretion under section 11 of the Civil Law Act 1956 in granting interest of 5% which ran from the date of the filing of the writ. The Court of Appeal consequently ordered that the time to file an appeal with regards to the Court of Appeal's decision would start from 29 November 2023, that is the date of the decision in respect of Metramac's Notice of Motion to vary / set aside the Order.

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