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Civil Procedure

IMBUE PROBLEM SOLVING SKILLS IN LAW SCHOOL CURRICULUM TO OFF-SET ADVERSARIAL 'HIRED-GUN' MIND-SET*

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Introduction

Alternative modes of dispute resolution such as mediation and conciliation are, in most circumstances able to improve the strain relationship between the disputants. Only when the parties are unable to resolve the dispute amicably would adjudication before the court become necessary as the last resort. To this end, members of the legal fraternity would have to place their clients' interests above their own, and to discard their litigation-based mindset, promoting mediation although it may lead to less revenue. Individual lawyers who earn a living from the fee he/she charges the client may not be receptive of mediation because there would be a lesser role for them if it was implemented. Hence, this adversarial 'hired-gun' mindset should be steered away from. This paper aims to propose a change in the law school curriculum which would shift away from the adversarial nature of teaching and training of lawyers and to place an emphasis on dispute settlement as opposed to litigation. Would-be lawyers ought to be taught the basic concept of alternative dispute resolution at the earliest stage of their legal education. At the same time, mediation skills should be integrated into substantive law subjects and to be reflected in the curriculum via teaching and examinations. By having such a programme, it is submitted that the would-be lawyers should be inclined towards solving client's problem through alternative modes instead of litigating disputes.

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Settlement of disputes in adversarial system

Disputes or conflicts are common in different places and circumstances and may arise among workers, customers and suppliers, between organisational units, departments and even across international borders. Disputes between husband and wife, parent and child, neighbours and commercial disputes ought to be resolved amicably. Achieving this would ensure that the relationship would continue to work, this would benefit the parties involved and it would maintain social harmony and cohesion. Unresolved disputes or conflicts on the other hand may have an adverse impact on the relationship between the disputants as well as other effects such as their productivity and commitment towards their work or organisation. The dispute settlement mechanism would include negotiation, mediation, conciliation, arbitration, and judicial settlement.

Judicial settlement in the common law system is of an adversarial nature. This would involve the filing of the dispute with the court for relief and with that the parties would be subjected to the stringent procedural rules of the court. In a civil dispute, parties are required to file pleadings and other originating documents in court thereafter serving these documents to the other party either by personal or non-personal service. When service of the document in the ordinary form appears to be impracticable for any reason, such as for example, the defendant's whereabouts are unknown or they could not be traced or the defendant refused to accept the delivery or evading service, among others, then substituted service may be obtained. Part of the litigation proceedings will include 'discovery' and 'interrogation', the former involves the request for the production of important documents while the latter involves the request of pertinent information by written questions. Thereafter, case management meetings will be fixed by the court to give directions to the parties as to the future conduct of their actions in order to ensure just, expeditious and economical disposal of the dispute.

The hearing of the dispute will be held in open court with the public and the press having access to the proceedings. However, in certain exceptional circumstances, proceedings may be held in camera. The court may make such reservation, for example, where they are satisfied that it is expedient in the interests of justice, public safety, public security or

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propriety as well as other sufficient reason to do so, including where it is necessary to protect the identities of victims or interested witnesses.[1] The parties would have control over the course of the trial through their advocate. They may decide on the evidence that would be adduced to support their case or claim as long as the evidence is relevant and admissible. The admissibility of evidence along with the mode of its production is regulated by The Evidence Act 1950. Section 137 of the same act governs the manner in which witnesses are produced and examined in court. The parties are given the freedom to present their case and set forth their points of view though subjected to the existing laws relating to procedure and trial. Ultimately, the decision of the case will rely on the presentation of the evidence.

Upon hearing all parties concerned along with the evidence presented, the court will then make a decision. In deciding on the matter, the court would have to consider and weigh all questions that were raised and the decision would have to be based on the evidence collected and heard. The judge must thoroughly elucidate the facts and issues of the case in hand and thereafter make a decision that attains a reasonable degree of certainty. Generally, the judge is expected to deliver written grounds of judgment which 'should contain a narration of facts of the case, the issues to be adjudicated upon, a discussion on evidence, such as contradictions, inconsistencies, corroboration, warnings, accomplice's evidence, etc, the findings of facts, a statement of law to be applied to the facts so found and finally the conclusion'.[2]

The decision of the court however, may not necessarily be the final say. The party who are dissatisfied with the decision of the trial court may, subject to the fulfilment of the requirements of the relevant law, file an appeal against it in the superior courts. Decision from the Magistrates' court and Sessions court would proceed to the High Court. Appeals must adhere to the court's hierarchy. For example, an appeal to the Court of Appeal would be against the decision of the High Court exercising its original jurisdiction, appellate or revisionary jurisdiction for the matter that was decided by the Sessions Court.[3] If the appeal was against the decision of the Magistrates' court, an appeal to the Court of Appeal may lie from the decision of the High Court exercising appellate or revisionary jurisdiction although it would be restricted on question of law which had arose during the course of appeal or revision.[4] The Federal Court, the apex court, will hear appeals from the Court of Appeal which had been heard and decided by the High Court exercising original jurisdiction.[5] All appeals to the Federal Court must be with the leave of the Federal Court.[6] The procedure governing appeals to the superior courts as well as the machinery for obtaining satisfaction or compelling compliance of a judgment is contained in the Rules of Court 2012.

From the above, it is apparent that the administration of justice in the civil courts adheres to common law precedents and statutes. Many of the problems associated with the process of litigation are common to the adversarial process adopted by the legal systems of colonies which had inherited the common law and the English legal procedure. It is common knowledge that litigation of disputes in the courts are costly, time-consuming with unpredictable outcomes and above all, creating irreversible damage to the relationships between the parties, particularly in matrimonial or labour disputes. There are many disputes that may be resolved outside the framework of conventional litigation, with the courts' role as a last resort after alternative modes had been exhausted yet the parties failed to reach an amicable solution.

Mediation: An effective mode of dispute settlement

Today, mediation is a widely adopted mode of dispute resolution as it only takes a fraction of the time of a trial or hearing, and it is a cost-effective method of resolving dispute. Mediation will cost the parties a smaller fraction compared to what they would have incurred if the case had been brought to court. Aside from the above, mediation is held in a private setting, in other words 'behind closed doors'. What this means is that members of the public and journalists will not be allowed to attend the mediation process except with the consent of the disputing parties. Thus preserving the secrecy and confidentiality of information that had transpired at the mediation.

Basically, mediation promotes compromise or collaboration where the mediator would assist the parties in reaching an amicable settlement.

1 See the Courts of Judicature Act 1964 s 15 and the Child Act 2001 (Act 611) s 12. See also the cases of *PP lwn KK* [2007] 6 CLJ 367; *Pendakwaraya lwn Shahareeil Said* [2007] 6 MLJ 567, [2007] 4 CLJ 405.

2 Tun Mohd Salleh Abas, 'Judgments/Grounds of Judgments of Subordinate Courts' [1984] 2 CLJ 142.

3 Section 50 Courts of Judicature Act 1964.

4 ibid, section 50(2A).

5 ibid, section 87(1).

6 ibid, section 96 (a).

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The mediator would listen to the arguments forwarded by the parties. He may ask questions to guide the disputants and help them understand the issues. Furthermore, he would encourage the parties to develop a mutually acceptable solution. The mediator would also maintain a safe and respectful atmosphere. He may offer suggestions, recommendations and alternatives for consideration by the parties as a means of resolving the dispute. The process works because the parties are given the power and obligation to seek solutions that meet their own needs and interests. The disputing parties are able to speak for themselves, and work together to find a lasting solution to their conflict under the guidance of the mediator. Undoubtedly, mediation can assist the disputing parties to re-establish trust and respect, prevent damage to an on-going relationship unlike conventional litigation. If termination of a relationship is the option, mediation can make the termination more amicable.

It may be added that for mediation to be effective, the mediator must possess unquestionable reputation and integrity. At the same time, he must have good knowledge of the subject matter of the dispute between the parties and the personal values of the parties. A mediator should have the ability to analyse the issues effectively before he can guide the parties towards a settlement. They must have patience and tact in creating and maintaining rapport with the disputants, enhancing the success of the process. By displaying impatience, the mediator may jeopardize the mediation, causing the disputant to think that if he remains unresponsive for a little longer, the process will end. This could cause the disputant to lose respect for the mediator, thereby reducing the mediator's effectiveness.

It is also important to convince the parties that mediation would be a better mode of settlement and the parties must be made aware of the tedious process of the court. The parties must be strongly urged to settle their differences through mediation where the out-of-court settlement would arrive at a win-win solution and their harmonious relationship would continue as opposed to a judgment of the court where the adversarial nature of 'winner takes all' would undoubtably poison the relationship between the parties and this would lead to the deterioration of the relationship.

Mediation however is not, and should never assume to be, a substitute for the judicial system. It is only an alternative mode of dispute resolution and, where mediation failed to amicably resolve the dispute, it will be referred to and adjudicated in court. The Law Reform (Marriage Divorce) Act 1976,[7] Industrial Relations Act 1967,[8] Housing Development (Tribunal for Homebuyer Claims) Regulations 2002,[9] Legal Aid Act 1971[10] and Syariah Court Civil Procedure (Federal Territories) Act 1998,[11] among others contains provision on mediation as a mode of dispute settlement.

Mediation in the courts

Undoubtedly, the courts in many countries are burdened with the ever-increasing volume of cases. The disposal of cases in the courts would normally take many years and this inevitable would have a negative impact on the very essence of justice as the famous legal maxim encapsulates, 'justice delayed is justice denied'. In order to relieve the courts' burden, various alternative dispute resolution mechanisms have been introduced. Mediation undoubtedly could ease part of the judiciary's workload, streamline the judicial process and ultimately preserve the quality of the judicial system. In order to promote mediation in the civil courts without going through the trial and appeals process, the Chief Justice of Malaysia introduced the Practice Direction No. 4 of 2016. It provides that judges may, with the consent of the parties, use mediation to resolve the dispute and this can be carried out at any stage, whether it is before a trial, at the pre-trial case management, after the trial has commenced or even when the case had reached the appeal stage.

The parties are allowed to choose either a judge-led mediation or a mediator agreeable to both the parties. The mediation opted by the parties must be completed within a period of 3 months from the date the case is

7 Act 164. See ss 55(1) and 106 where reconciliation is a prerequisite for the filing of a divorce petition under this Act. See also Divorce and Matrimonial Proceedings Rules 1980. Generally, 'conciliation' and 'mediation' are used interchangeably although some have argued the existence of some difference in the functioning of the two especially in relation to their role as a neutral third party.

8 Act 177. See s 20.

9 PU (A) 476/2002. For example, reg 23(1), which deals with negotiation for settlement, provides: 'At the hearing, the Tribunal shall, where appropriate, assist the parties to effect the settlement of claim by consent.

10 Act 26. See Part VA (ss 29A to 29F) of the said Act. See also Legal Aid (Mediation) Regulations 2006 (PU (A) 163/2006).

11 Act 585. Section 99 of the said Act provides: 'The parties to any proceedings may, at any stage of the proceedings, hold *sulh* to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with *Hukum Syarak*.' See also the Syariah Court Civil Procedure (*Sulh*) (Federal Territories) Rules 2004, (PU (A) 18/ 2004).

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referred to for mediation. The period may however be extended with the approval of the Court. The objective of the practice direction is to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal. Mediation is also employed to solve matters at the appellate stage in the Court of Appeal and the Federal Court.[12]

It may be added that the Practice Direction No. 2 of 2013 entitled 'Mediation Process for Road Accident Cases in Magistrate's Courts and Sessions Courts' requires all personal injury claims arising from motor vehicle accident to undergo a compulsory mediation before a Court Mediation Officer (who is either a Session Court Judge or a Magistrate, other than the presiding Sessions Court Judge or Magistrate who is handling the matter).[13] The mediation is required to take place once the pleadings are closed and not later than 10 weeks after the claim has been filed, along with the basic documents such as initial medical report, sketch plan prepared by the police investigating officer, police reports lodged by parties, photos (if available) as well as other supporting documents. The 2013 Practice Direction is not affected and unperturbed by the issuance of the Practice Direction No. 4 of 2016.

It is noteworthy that Order 34 rule 2 (2) of the Rules of Court 2012[14] specifically states that "the Court may, at a pre-trial case management consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including a mediation in accordance with any practice direction for the time being issued." Again, Order 59 rule 8(c) of the Rules of Courts 2012 states that in the exercise of discretion as to costs, the court "shall, to such extent, if any, as may be appropriate in the circumstances, take into account – the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution."

12 Azmi, Tun Zaki, "Opening Address – 2nd Asian Mediation Association Conference" (speech, Kuala Lumpur, 24 February 2011).

13 Accident claims are tried in either Magistrate Court or Sessions Court, where the former for claim less than or at RM100,000, while Sessions Court has unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents. See section 65 and section 90 of Subordinate Courts Act 1948.

14 (P.U. (A) 205/2012)

Alongside with the practice directions, the Kuala Lumpur Court Mediation Centre was established which was to provide free-of-charge mediation services conducted by judges or judicial officers. An eight-page document issued by the Centre contains the guideline on mediation services offered by the Centre. The Centre has since changed its name to the Court-Annexed Mediation Centre Kuala Lumpur which is situated inside the Kuala Lumpur Court Complex.[15] A brochure entitled 'The Court-Annexed Mediation Centre Kuala Lumpur – a positive solution' replaced the previous eight-page document.[16] In June 2016, the Federal Court Mediation Division was established under the supervision of the Chief Registrar of the Federal Court of Malaysia. The existence of mediation alongside with conventional adversarial adjudication provides opportunity for the disputants to reach an amicable settlement even when a claim is filed at court. However, the adversarial nature of the court would more likely than not leave the parties bitter at its judgment.

Singapore Mediation Convention

On 20 December 2018, the United Nations General Assembly had adopted the Convention on International Settlement Agreements Resulting from Mediation which is also known as the Singapore Mediation Convention. The Convention is primarily aimed at promoting mediation as an alternative and effective method of resolving commercial disputes with the exclusion of consumer transactions for personal, family or household purposes, inheritance and employment law. The official signing of the Convention was held in Singapore on 7 August 2019 with 46 states signing it and the Convention will enter into force after a lapse of 6 months from the official signing date. This Convention is similar to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is also known as the New York Arbitration Convention adopted on 10 June 1958 which provides the framework for the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.

The Singapore Mediation Convention would impose an obligation to the parties with respect to both enforcement of a settlement agreement and the right of a disputing party to invoke a

15 Court-annexed mediation refers to situation where a judge and judicial officers act as mediator to litigating parties after they have filed their action in the court.

16 'Kuala Lumpur Court Mediation Centre Court – Annexed Mediation' see https://www.aseanlawassociation.org/11GAdocs/workshop5-malaysia.pdf

settlement agreement covered by the convention. Pursuant to the convention, the settlement agreement has cross-border enforcement where the agreement arrived thereto can be enforced in another convention State, where foreign parties are involved. All that is required is that the disputing party shall supply to the competent authority the settlement agreement signed by the parties and evidence that the settlement agreement results from mediation. Additional document may be requested by the competent authority to satisfy itself that the requirements of the convention have been complied.

The competent authority may refused enforcement of the settlement agreement under limited circumstances such as where there was lack of capacity of either party to the settlement agreement, the settlement agreement had been rendered null and void, inoperative or incapable of being performed, or there had been a serious breach of conduct on the part of the mediator, or the granting of relief was contrary to the public policy of that State or if the subject matter of the dispute is not capable of settlement by mediation under the law of that State.

Mediation skills among would-be lawyers

An early involvement in the dispute settlement can lead to strengthening relationships and this builds teamwork, other than that, it encourages open communication and cooperative problem-solving, resolves disagreements quickly and concentrates on win-win resolutions. Mediation promotes compromise or collaboration as people learn how to work harmoniously, develop creative solutions to problems and reach outcomes that mutually benefit those involved. As seen above, the judiciary is proactive in promoting mediation as a mode of dispute settlement of civil matters, making court appearances as a last resort. The obvious reason being that the traditional court process is costly, lengthy, and antagonistic; all of which would lead to a disillusionment with the state's legal process. Mediation is also extensively promoted at the international level and this is evident with the recent signing of the Singapore Mediation Convention. Hence, the members of the legal fraternity would have to take the lead by encouraging their clients to seek mediation as an early resolution of their disputes including utilising the court-annexed mediation which is provided without any additional fee on the parties.

There are many disputes which should ideally be resolved through collaborative and less confrontational such as the workplaces and matrimonial disputes. Apart from providing fast, creative and mutually satisfactory resolutions, mediation has the potential of preserving the relationship between the parties. Mediation can mend and preserve frayed working relationships, even when the parties are extremely angry. Moreover, mediation fosters mutual respect through improved communication. The importance of mediation is also stressed in the matrimonial cases whereby the trust and preservation of family and keeping it together would be important. If the parties insist on their legal rights to be enforced by court or if the chances of getting an amicable and just solution by way of mediation are slim, the parties could then be referred to the court. Mediation has also been found to be a very useful mean for dispute settlement in the Legal Aid Department. Majority of the cases handled by the Legal Aid Department are matrimonial cases and mediation has been found to be a very useful mechanism for settlement of those cases.

The success of mediation depends on several factors and this includes the support shown by the legal advisers alongside the commitment of the disputants. To this end, legal advisers must play an important role by encouraging their client to consider mediation at the preliminary stages of a dispute. In fact, a good lawyer must not only be able to assist clients in articulating their problems but they must also be able to generate, assess, and implement alternative mode of solving disputes. They have to place the clients' interests above their own, discard the litigation mindset and promote mediation, although it may lead to less revenue. Individual lawyers earning a living from the fee he/she charges the client, may not be receptive to mediation because there would be a lesser role for them if mediation is implemented. However, the misconception of the reduction of the role of lawyers because of mediation is not entirely correct. Through this process, more disputes can be resolved in lesser time leading to an increase in productivity.

The adversarial 'hired-gun' mindset i.e., the 'litigation' approach, must be discarded and more amiable problem-solving skills must be imbued into the would-be lawyers. To ensure the successful adoption of alternative dispute resolution, the law school curriculum must give preference to conflict resolution skills rather than to advocacy or litigation skills. In mediation for example, the mediator has to guide the parties through the negotiation process; advising, listening, and helping them towards a win-win solution or at least one that all parties are satisfied with. A mediator must have the requisite skills and knowledge in terms of understanding the parties' desires, collecting information, facilitating communication, facilitating agreement and the

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ability to manage cases and documents. The mediator's ability to be creative, to be able to deal with strong emotions, sensitivity, reasoning, emotional stability, analytical skills, interviewing techniques, and a sense of commitment to the whole exercise of mediation is equally important.

The would-be lawyers must be imbued with these skills at the earliest stage of their legal education. This could be done by integrating those skills into the substantive law subjects and has to be reflected in the curriculum, teaching and examination. By having these skills into mainstream law subjects, future lawyers would be more likely drawn into dispute resolution rather than the state *court* system. It is interesting to note that the alternative dispute resolution has now been made a compulsory subject at the local law schools. By familiarising this subject to the students it would create an increase in awareness of the alternative dispute resolution mechanism and to facilitate the development of alternative dispute resolution skills within the law school community.

It is worth noting that the Mediation Act 2012[17] provides that a person who possesses the relevant qualifications, knowledge or experience in mediation through training or formal tertiary education or satisfies the requirements of an organisation which provides mediation services, can be appointed as a mediator under the Act.[18] Certification or accreditation involves nothing more than an individual taking one or more training programmes with a reputable or known training body which subsequently certifies the individual as accredited mediator. The certifying bodies in Malaysia includes the Malaysian Mediation Centre (MMC),[19] the Asian International Arbitration Centre (AIAC) and the Constructions Industry Developments Board (CIDB), among others. The universities with a pool of experts among their staff should also be encouraged and given the task of conducting mediation training and certifying mediators through collaborative efforts with the above bodies.

It may be added that mediation would be more effective if disputants are made aware of the better value that mediation can offer, such as its ability to save costs and its potential for repairing relationships. The parties must be told that litigating disputes in the courts is costly, time-consuming and unpredictable in its outcome. And above all this, the 'winner takes all' hostile nature of the court would inevitably damage the relationships between the disputants. Apart from that, the delay in the disposal of cases due to the backlog and the costs for litigating disputes in court would be substantial, not to mention the tremendous costs the parties may incur paying to legal representatives. Hence, necessary steps should be taken at the grassroots to increase public awareness and knowledge of mediation. This may be done through writing in the mass media or through specific programmes organised by the law schools in collaboration with the legal profession bodies.

Conclusion

Mediation is an effective and affordable mode of dispute resolution. Through this mode, the disputants would be self-empowered to find better ways to deal with their dissatisfaction and needs under the guidance of the mediator. In this manner, apart from being economic and saving the judicial precious time, the process would be able to maintain a harmonious relationship between the parties which is vital for the progress and development of the nation without any impediments. The adversarial 'hired-gun' mindset must be discarded, and the law school curriculum must play an important role by emphasising the importance of conflict resolution skills as opposed to advocacy or litigation skills. By adding these skills into mainstream law subjects, it is hoped that in turn, this would foster future lawyers who would place their clients' interest above their own and would be more inclined towards solving the client's problem at the preliminary stages *vide* the alternative modes. The judicial settlement would be resorted only after all the peaceful resolution avenues have been exhausted and they have failed to achieve the desired results.

17 Act 749.

18 The Mediation Act 2012 provides inter alia, that the mediation agreement must be in writing (s 6(2)), the appointment of mediators shall be by way of agreement (s 7(4)), the parties can obtain assistance from an institution for the appointment of mediators (s 7(3)), parties can terminate the appointment if the mediator no longer satisfies the requirement of the institution, has pecuniary interest in the dispute or is found to have obtained appointment by fraud (s 8), confidentiality and privileged communication during mediation (ss 15-16), costs of mediation to be borne equally by the parties (s 17) and if the mediation is successful, the settlement agreement entered into shall bind the parties (ss 13-14).

19 The Malaysian Mediation Centre is a body established in 1999 under the auspices of the Bar Council of Malaysia with the objective of promoting mediation as a means of alternative means of dispute resolution.

CIVIL PROCEDURE

[1] Civil Procedure — Summary judgment — Application for — Whether application for summary judgment should be allowed — Whether amount of claim correct — Whether plaintiff entitled to claim interest for late payment — Whether defendant agreed to fix exchange rate — Whether defendant's counterclaim should be allowed — Rules of Court 2012 O 14

This was an application by the plaintiff for summary judgment on its claim against the first and second defendants. The claim against the first defendant, the buyer, was for the price of goods sold and delivered, and the claim against the second defendant was based on a guarantee dated 22 December 2014. The plaintiff sold and delivered floor tiles ('the goods') to the first defendant from time to time pursuant to orders made by the latter. Invoices and monthly statements of account were issued to the first defendant in respect of the goods delivered. The invoices required payment within 60 days from the date on the invoice. The first defendant confirmed as correct the monthly statements of account for the months of January-August 2017. By letter dated 19 April 2017, the plaintiff sought payment of the sum of RM1,227,431.86 as acknowledged by the first defendant as correct as at 31 March 2017. By the same letter the plaintiff notified the first defendant that in view of its delay in making payments, it had no alternative but to impose late payment interest at the rate of 1.5% per month with effect from 1 May 2017. The plaintiff received no payments from the first defendant after September 2017. On 12 March 2018, the plaintiff instituted this action claiming a sum of RM1,085,219.23 and late payment interest at the rate of 1.5% per month from the first defendant and USD184,000 and late payment interest at the rate of 1.5% per month from the second defendant based on the letter of guarantee dated 22 December 2014. The defendants filed a defence denying liability to pay the sum claimed. The first defendant also filed a counterclaim alleging that the plaintiff had breached an implied agreement between them to share profits from the sale of the goods and sought a sum of RM3m as special damages. The plaintiff filed the present application for summary judgment on 1 June 2018. The defendants resisted the application on four main grounds contending that there were triable issues as to: (a) whether the amount claimed was correct; (b) whether the plaintiff was entitled to claim late payment interest; (c) whether the plaintiff and the second defendant had agreed to fix the exchange rate at USD1 to RM3.35 when they signed the guarantee; and (d) whether the first defendant had a plausible and bona fide counterclaim.

Held, allowing the plaintiff's application with costs of RM5,000:

(1) On the issue of the alleged payment to the plaintiff of RM10,000 on 31 October 2017, the court agreed that in the absence of any credible evidence to support the payment allegedly made, it could not be argued that this constituted a triable issue.

(2) The court agreed with the defendants that the plaintiff's claim for late payment interest was a triable issue as it was trite law that a seller could not impose late payment interest unless it was made known to and agreed by the buyer. The fact that the first defendant acknowledged as correct the sum claimed in the monthly statements of accounts as correct did not preclude it from disputing the plaintiff's claim for late payment interest.

(3) The court agreed with the plaintiff's contention that the allegation that the parties had agreed on the exchange rate was without basis and if indeed there was so, it would have been mentioned in the guarantee. Further, there would have been no need to peg the guarantee in USD. The court found that this was a completely hopeless argument by the defendants.

(4) The contents of the defendant's letter supported the inference that the counterclaim raised in these proceedings was nothing more than an afterthought by the defendants to concoct a defence to defeat the summary judgment application. It is elementary law that if a defendant puts forward a counterclaim which is bona fide and plausible, then that is a valid ground for unconditional leave to defend. The counterclaim in the present case did not meet the criterion of being either bona fide or plausible. From the point of view of O 14, it did not have the merit which entitled it to be taken into account in order to defeat the plaintiff's clear entitlement to an O 14 judgment on the outstanding principal amount.

Nissha Industrial and Trading (M) Sdn Bhd v Coco Floor Sdn Bhd & Anor [2019] 9 MLJ 170

[**Annotation**: *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd).

Rules of Court 2012 O 14.]

[2] Civil Procedure — Interest — Judgment interest — Plaintiff obtained judgment and order for damages against

Digests

defendants — Judgment and order silent on interest — Whether interest on judgment debts needed to be specifically ordered and spelt out in judgment — Whether interest on judgment debts began to run from date of entry of judgment or date of assessment of damages — Whether rate of interest 8% or 5%pa

This was an appeal by the plaintiff against the decision of the learned senior assistant registrar of 28 March 2018 in having allowed the second defendant's application to set aside a writ of seizure and sale with costs of RM2,000. On 26 August 2011, the plaintiff obtained judgment on liability against both the first and second defendants. Damages were finally assessed at RM100,000 on 21 January 2017 and an order was entered bearing that date. The judgment of the court of 26 August 2011 and the order of the court of 21 January 2017 did not state that interest would be payable on the judgment or on the amount of damages assessed and, accordingly, no rate of interest was mentioned. On 24 November 2017, the plaintiff took out a writ of seizure and sale and claimed the sum adjudged to be payable ie RM100,000 plus interest at the rate of 8% per year from 26 August 2011-25 August 2017. Therefore, the interest claimed was interest on the judgment debt and not pre-judgment interest under s 11 of the Civil Law Act 1956. The second defendant applied to set aside this writ of seizure and sale. The second defendant maintained that since no interest was ordered in the judgment or the order of the court after assessment of damages, and no rate of interest provided for, the plaintiff was therefore not entitled to any interest on the judgment sum. The learned senior assistant registrar allowed the application and hence this appeal.

Held, allowing the appeal with costs of RM500 subject to 4% allocatur:

(1) Under both O 42 r 12 of the Rules of the High Court 1980 and the Rules of Court 2012, it was expressly stated that 'every judgment debt shall carry interest'. While the rate of interest may be the subject of agreement between the parties; that every judgment debt shall carry interest was nevertheless expressly stated. As expressed, interest on a judgment debt need not be specifically ordered. The position was simply that every judgment debt shall carry interest without more. Interest was statutorily conferred on all judgment debts. It was a right conferred and not merely an entitlement to be claimed.

(2) In so far as interest on judgment debts were concerned, under O 42 r 12 of the Rules of Court 2012, the court had the power to award interest at such rate as may had been agreed between the parties. The court may also award interest at a lower rate than the rate determined by the Chief Justice. However, if there was neither an agreed rate nor a lower rate of interest ordered, the default rate of interest on a judgment debt was the rate determined by the Chief Justice. The same conclusion was arrived at under O 42 r 12 of the Rules of the High Court 1980, save that the default rate of interest provided was 8%pa.

(3) The plaintiff was adjudged as having the right to damages on 26 August 2011, at the time when the Rules of the High Court 1980 were applicable. The plaintiff was entitled to interest on the damages assessed from the date that judgment was entered ie 26 August 2011 and not from the date damages were assessed, which was on 21 January 2017. The plaintiff had secured a substantive right to damages on 26 August 2011 and the prevailing default rate of interest then was 8%pa. To hold that interest on the judgment debt should be 5%pa, that being the applicable rate at the time damages was assessed, would be unfair, unjust and inconsistent with the principles enunciated. Such would be to allow a prior substantive right acquired to be diminished by a subsequent rule of procedure albeit by way of subsidiary legislation. No other rate being specified either under the judgment or the order after assessment of damages, the applicable interest rate would be the default rate under the Rules of the High Court 1980 ie 8%pa.

Vathemurthy a/l Arumugam & Anor v RS Thanenthiran a/l Raman Kutty & Anor [2019] 9 MLJ 212

[**Annotation**: *Ab Lah bin Ali v Yong Wah Sing* [2003] 6 MLJ 555, HC (refd); *Bandar Teknik Sdn Bhd & Ors v Desa Samudera Sdn Bhd* [2017] MLJU 1097, HC (refd); *Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Juruukur Berjasa) & Anor* [2017] 3 MLJ 394; [2017] 6 CLJ 251, CA (folld); *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583, SC (refd); *Hunt v RM Douglas (Roofing) Ltd* [1990] 1 AC 398, HL (refd); *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276, FC (refd); *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156; [1982] CLJ Rep 190, FC (refd); *Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v Balakrishnan a/l Kaliannan* [2013] 6 MLJ 149, FC (refd); *Simcoe v Jacuzzi UK Group Plc* [2012] 2 All ER 60; [2012] EWCA Civ 137, CA (refd).

Civil Law Act 1956 s 11; Rules of Court 2012 O 37, O 37 r 1(1), O 42 rr 12, 12A; Rules of the High Court 1980 O 42 r 12.]

LexisNexis

[3] Civil Procedure — Pleadings — Failure to plead — Cause of action — Unpleaded causes of action — Whether plaintiffs entitled to rely on unpleaded causes of action — Whether plaintiffs could claim for patent infringement and copyright infringement — Rules of Court 2012 O 18 rr 7(1), 12(1), O 34 r 2(2)(k)

Contract — Agreement — Breach — Whether there was breach of contract by defendant

Copyright — Infringement — Ownership of copyright — Claim for infringement of copyright — Whether plaintiffs had copyright — Whether plaintiffs entitled to claim for infringement of copyright — Copyrights Act 1987 s 38(3) & (9)

Patents — Infringement — Action for — Claim for patent right — Whether plaintiffs had patent right — Patents Act 1983 s 31(2)(a) & (b)

The present suit was initially filed by Darul Fikir, a partnership against Dewan Bahasa dan Pustaka ('DBP'). Darul Fikir applied for an interlocutory injunction against DBP pending the disposal of the present suit. The application of Darul Fikir was dismissed on the ground that Darul Fikir should have sued the Board of Control of DBP ('the board') and not the DBP itself. After the dismissal of Darul Fikir's application, the statement of claim in the present case was amended where all the partners of Darul Fikir became the plaintiff and the board substituted DBP as the defendant. The plaintiffs were in the business of publishing, printing and distributing religious books. Dr Eng Subhi Taha ('Dr Taha') was the owner of patent and copyright in the colour code of an Islamic religious book, Mushaf Al-Quran Bertajwid dan Berwarna ('the book'). Dr Taha owned Dar Al Maarifah, a Syrian company ('the Syrian company'). Darul Fikir and the Syrian company entered into a memorandum of agreement on 1 November 2007 wherein the Syrian company granted exclusive rights to Darul Fikir to publish, print and distribute the book in Malaysia, Singapore, Thailand, Brunei, India, China and Japan. On 2 September 2016, Darul Fikir entered into a contract with the board to print, supply and distribute the book ('the contract'). The board was alleged to have breached cl 15.3 of the contract when the board issued an open tender on 18 September 2017 to invite Bumiputera book suppliers to bid for a contract to print, bind and supply the books for 2018 without obtaining Darul Fikir's written consent. The issues for determination were: (a) whether the plaintiffs could rely on the unpleaded causes of action; (b) whether the plaintiffs or Dr Taha had any patent right in the colour code; (c) whether the plaintiffs could claim ownership of copyright in the colour code; and (d) whether there was breach of contract by the board.

Held, dismissing the plaintiffs' suit with costs:

(1) The plaintiff was mandatorily required by O 18 rr 7(1) and 12(1) of the Rules of Court 2012 to plead necessary particulars of the cause of action relied on by the plaintiff against the defendant. The mandatory requirement was in the interest of justice — to inform a defendant of the cause of action pleaded by the plaintiff against the defendant and would enable the defendant to make adequate preparation to defend the suit. The plaintiffs could only claim one cause of action as pleaded namely the board's breach of contract. The plaintiffs were barred from relying on patent infringement and copyright infringement.

(2) The plaintiff had not adduced any evidence regarding any patent in the colour code which was granted by the Registrar of Patents and recorded in the Register of Patents under s 31(2)(a) and (b) of Patents Act 1983 ('the PA'). The copyright and patent in the colour code were owned by Darul Fikir due to the fact that Darul Fikir was the exclusive distributor of the book. If a patent was not granted by the registrar and was not registered in the register, any patent right could not be conferred on the plaintiffs, Dr Taha and any other person. The plaintiffs and Dr Taha had no rights in the colour code which was enforceable under the PA.

(3) There was no evidence that Dr Taha had signed an exclusive licence in favour of the plaintiffs concerning the colour code. The plaintiffs could not sue the board for copyright infringement regarding the colour code. Even if it was assumed that Dr Taha had signed an exclusive license for the benefit of the plaintiffs regarding the colour code, the plaintiffs shall not be entitled to institute a copyright infringement suit against the board except for two circumstances namely when the plaintiffs joined Dr Taha as co-plaintiff or a co-defendant or the court had granted leave for the plaintiffs to commence the present suit without the joinder of Dr Taha. The two circumstances had not been fulfilled by the plaintiffs hence the plaintiffs could not claim for infringement of Dr Taha's copyright in the colour code against the board.

(4) It was found that the board had not breached the contract. The contract had lapsed after the expiry of one-year duration and no supplemental contact had been signed by the

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plaintiffs and the board. The price had been paid in full by the board to the plaintiffs and as the contract was fully performed, there was no provision in the contract which barred the board from issuing the tender.

Mohamad bin S Ahmad & Ors v Lembaga Pengelola Dewan Bahasa dan Pustaka [2019] 9 MLJ 315

[**Annotation**: *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (folld); *Chuah Aik King (sole proprietor of Sykt B Three Technology) v Keydonesoft Sdn Bhd* [2019] 8 MLJ 515; [2018] 10 CLJ 354, HC (refd); *Darul Fikir v Dewan Bahasa dan Pustaka* [2018] 10 MLJ 693; [2018] 5 AMR 392, HC (refd); *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, SC (refd); *Kedah Cement Sdn Bhd v Masjaya Trading Sdn Bhd* [2007] 3 MLJ 597, FC (refd); *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585; [2005] 2 CLJ 596, CA (refd); *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (refd); *Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan* [2007] 7 MLJ 289; [2007] 6 CLJ 192, CA (refd); *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC (refd).

Copyright (Application to Other Countries) Regulations 1990 regs 2, 3(a), (e); Copyright Act 1987 ss 3, 3(a), 6, 7(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (3)(a), (3)(b), 10(1), (2)(a), (3), 36(1), 38(1), (2), (3), (9), 59A, 59A(1); Dewan Bahasa dan Pustaka Act 1959; Evidence Act 1950 ss 91, 92; Patents Act 1983 ss 3(1), 31(2), (2)(a), (2)(b), 36(1), (2), 58; Rules of Court 2012 O 18, O 18 rr 7(1), 12(1), O 20 r 5(1), (2), (5), O 34 r 2(2)(k).]

[4] Civil Procedure — Striking out — Appeal against order allowing striking out — Sessions court allowed defendants' striking out application — Plaintiff appealed against decision of sessions court — Whether Industrial Court's jurisdiction and function were separate and distinct from sessions court — Whether plaintiff's claims in Industrial Court and sessions court based on different causes of action — Whether parties in plaintiff's claim in Industrial Court and sessions court were different — Whether plaintiff's claims led to unjust enrichment — Rules of Court 2012 O 18 r 19(1)(b) & (d)

This was the plaintiff's appeal against the sessions court's decision dated 13 February 2018 allowing the defendants' application to strike out the plaintiff's statement of claim essentially on the argument of duplicity of action by the plaintiff as notwithstanding his action against the first and the second defendants in the Industrial Court under s 20 of Industrial Relations Act 1967, the plaintiff had also instituted the action before the sessions court against the same two defendants together with five other defendants. The defendants' application was made under O 18 r 19(1)(b) and (d) of the Rules of Court 2012. Their averment was that the plaintiff's claim overlapped with his claim in the Industrial Court against the first and the second defendants. The plaintiff was under the employment of the second defendant and the first defendant owned 100% of the second defendant. The first and the second defendants operated as one unit. Arising from the plaintiff's excellent performance, he was appointed as the acting head of procurement in August 2016 and subsequently promoted as the acting head of procurement on 1 November 2016. The third to seven defendants were the employees of the first and second defendants, each heading separate departments. The third to the seventh defendants unlawfully conspired with each other and other persons whose identities were uncertain as well as the second defendant to oust the plaintiff from his position as the acting head and thereafter as the head of procurement and damaged or destroyed the plaintiff's employment with the predominant purpose of injuring the plaintiff. On 2 December 2016, the plaintiff was forced to leave his job immediately in an utmost stressful and embarrassing atmosphere watched by his team members and other staffs of the second defendants. His dignity and reputation were destroyed as he lost his employment and livelihood at the age of 43. The plaintiff also suffered damage to his economic expectations, loss of reputation, stress, anxiety and inconvenience as well as injury to his feeling. The plaintiff lodged a complaint with the Industrial Relations Department for wrongful and unfair dismissal pursuant to s 20 of the Industrial Relations Act 1967 on 20 December 2016. The defendants retaliated maliciously and destroyed the plaintiff's opportunity to obtain permanent job with Dell Computers. The plaintiff filed the suit in the sessions court in August 2017 and claimed for conspiracy, including exemplary damages and aggravated damages against all the defendants jointly and severally. He also claimed for damages against the first and second defendants for negligence. On 13 February 2018, the sessions court allowed the defendants' application to strike out the plaintiff's statement of claim,hence, the present appeal. The plaintiff argued that the plaintiff's claim was not obviously unsustainable

with the defendants' allegations of duplicity of proceeding being misconceived. The issues arose were: (a) whether the Industrial Court's jurisdiction and function were separate and distinct from the sessions court; (b) whether the two claims were based on different causes of action; (c) whether the parties in the two claims were different; and (d) whether the claims led to unjust enrichment.

Held, allowing the plaintiff's appeal; setting aside decision of the sessions court; and reinstating the plaintiff's claim in the sessions court:

(1) From the statement of claim of the present case, the plaintiff's claim in the session court was for the damages for conspiracy and negligence, both of which were causes of action in tort which the Industrial Court had no jurisdiction to grant damages to the plaintiff for such claim. In allowing the striking out, the sessions court failed to appreciate that the plaintiff did not claim damages for wrongful dismissal in his statement of claim. The plaintiff was not seeking for common law remedy for his wrongful dismissal in the sessions court whereby his claim was for damages for conspiracy and negligence which were causes of action in tort. Hence, the plaintiff's claim in the sessions court was distinct from the Industrial Court case.

(2) The plaintiff's cause of action in the Industrial Court was for wrongful and unfair dismissal. The issues involved were whether the purported retrenchment was genuine and whether the termination of the plaintiff's employment was with or without just cause. The plaintiff's cause of action in the sessions court were tort of conspiracy and negligence. The elements needed to be established and the issues involved were completely different from that of the Industrial Court case. There was no duplicity of proceedings just by the reason of the two suits sharing the same underlying facts. The causes of action were different in nature and the remedies sought for were entirely different.

(3) It was trite law that when a wrong had been done by several parties either jointly or jointly and severally to another party, that party was entitled to file a claim against all or any one or more of the wrong doers. Since the third to seventh defendants could not be joined as parties in the Industrial Court, it was apt that a separate action was brought against them in a civil court.

(4) The issue of overlapping damages would not arise as the damages to be awarded in the present suit arose from a different cause of action in the Industrial Court proceedings. In any event, it was trite law that the plaintiff must prove his damages. If there were overlapping damages as alleged, the court in assessing damages could always take into account the award granted in another case and made such necessary deduction or adjustment to avoid double recovery. In the Industrial Court, until the present appeal was argued, the plaintiff had not filed a statement of case. There was therefore completely no legal or factual basis for the defendants to content that there was a duplicity of proceedings thus such contention was purely conjecture.

Ng Chia Wei v Air Asia Bhd & Ors [2019] 9 MLJ 332

[**Annotation**: *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773; [2008] 6 CLJ 473, CA (refd); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 2 AMR 1969, SC (refd); *Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors* [1987] 2 MLJ 633; [1987] CLJ Rep 472 (refd); *Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors* [2013] 10 MLJ 1; [2013] 5 CLJ 488, HC (refd); *Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521; [2011] 5 CLJ 481, FC (refd); *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, FC (refd); *Edward Goh Geok Seng v Dunstan Dumpangol & Ors* [1989] 2 MLJ 119, HC (refd); *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, FC (refd); *HT Maltec Consultants v Malaysian Resources Corporation Berhad & Ors* [2015] 5 AMR 607, HC (refd); *KMS Builders Sdn Bhd v Hazama Corporation* [2002] 8 CLJ 553, HC (refd); *Kempas Edible Oil Sdn Bhd v Prabdhial Singh Dardara Singh* [2015] 7 CLJ 203, CA (refd); *Koperasi Pos Nasional v Hafsah bte Mohd Tahir* [2002] 6 MLJ 691; [2003] 8 CLJ 209, HC (refd); *Maybank Investment Bank Berhad v Hamzah Mahmood & Anor* [2011] 1 LNS 643, HC (refd); *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd); *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87 (refd); *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1, CA (refd); *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; [1999] 2 CLJ 886, HC (refd);*Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd); *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 2 AMR 301; [2010] 3 CLJ 507, FC (refd); *Tuan Haji Ishak bin Ismail & Ors v*

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Leong Hup Holdings Bhd and other appeals [1996]1 MLJ 661; [1996] 1 AMR 300, CA (refd); *Yeoh Eng Kong v Choo Kok Yeow & Anor* [2016] MLJU 1722; [2016] 3 CLJ 794, CA (refd).

Federal Constitution art 5(1); Industrial Relations Act 1967 s 20; Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d).]

[5] Civil Procedure — Discovery — Discovery of documents — Application for order pursuant to s 7 of the Bankers' Books (Evidence) Act 1949 — Whether application for inspection of banker's books ought to be allowed — Whether test of relevancy fulfilled — Whether application an abuse of process — Whether court had jurisdiction to grant orders prayed for — Whether application for discovery fishing expedition — Whether legal burden of proof shifted

Evidence — Documentary evidence — Bankers' books — Discovery and admissibility of — Application for order pursuant to s 7 of the Bankers' Books (Evidence) Act 1949 — Discovery and admissibility of documents obtained under s 7 of the Bankers' Books (Evidence) Act 1949 — Whether copies of bankers' books to be admissible subject to ss 4 and 5 of the Bankers' Books (Evidence) Act 1949 and the rules relating to relevancy and admissibility — Bankers' Books (Evidence) Act 1949 ss 4, 5 & 7

Words and phrases — Bankers' Books (Evidence) Act 1949 — Definition of 'banker's books' under Bankers' Books (Evidence) Act 1949 — Whether document sought to be adduced came within definition of 'banker's books'

This was a decision of the learned High Court judge in relation to two applications made by the plaintiff. The first being encl 307 to inspect and obtain copies of certain documents in the possession of Malayan Banking Bhd, CIMB Bank Bhd, and CIMB Islamic Bank Bhd ('the banks'). The second being encl 395 being an application for the court to determine the admissibility of documents disclosed pursuant to the orders made. The plaintiff was a publicly listed company, the second and third defendants were former directors of the plaintiff. The plaintiff alleged that the second and third defendant had fraudulently caused the plaintiff to enter into a transaction to acquire shares in a company that purportedly owned oil exploration rights in Indonesia from the first defendant. The second and third defendant had personal interest in the first defendant which they failed to disclose to the plaintiff in breach of the fiduciary duties as directors. Shortly after this suit was commenced, a company known as Kingdom Seekers Ventures Sdn Bhd sued the plaintiff. In its statement of claim, Kingdom Seekers pleaded that certain companies were related. The plaintiff contended to be the second defendants' corporate vehicle. The second defendant held a press conference where he stated that monies paid by the plaintiff in the share acquisition had been paid to some of those related and associate companies. Acting on the information in the press conference and the statement of claim, the plaintiff sought and obtained an order pursuant to s 7 of the Bankers' Books (Evidence) Act 1949 ('the Act'). The information obtained from the first s 7 order led the plaintiff to make a further application being encl 307. The second and third defendant were resisting encl 307 on the grounds that: (a) it was misconceived and an abuse of process, as the court did not have jurisdiction to grant the orders prayed for; (b) the application was a fishing expedition; and (c) the application sought to reverse the burden of proof which was impermissible in law.

Held:

(1) The scope of the Act was limited to 'banker's book' which was defined in a non-exhaustive way, but it was clear that the words 'other book' must be read ejusdem generis with 'ledger', 'day book', 'cash book', and 'account book'. The court took an expansive view of the word 'books' within the definition of 'banker's books' under the Act. The expression was wide enough to encompass any matter coming within the definition of 'document' within the meaning of the Evidence Act 1950. For a document to come within the meaning of banker's book it: (a) must comprise any transaction record that was generated by the bank; or (b) must be a document which the bank maintained; for the purposes of accounting, audit, reconciliation or reporting.

(2) The principal test in granting a s 7 order was one of relevancy. The plaintiff's assertions must be assumed to be true in assessing the relevance of the information sought to be obtained by the order of discovery or inspection. Applying the test of relevancy to the facts of the application in encl 307, the court was of the view that the inspection of the banker's books ought to be allowed, as it would go towards establishing the plaintiff's case against the second and third defendants. The information obtained from an inspection

of the accounts and other books held by the banks would establish the money trail and would determine whether or not the money paid by the plaintiff under the share acquisition had found its way back into the accounts controlled by the second and third defendants. For this reason, the court allowed encl 307.

(3) The plaintiff here was well entitled to seek inspection of the banker's books, and to make copies of entries in such books, in order to prove its assertion regarding the flow of funds back to the second and third defendants. This construction was supported by the plain words of s 7 of the Act, which in no uncertain terms provide for the right to inspect banker's books and to take copies of entries in such books. If the document that was sought to be discovered did not come within the definition of banker's books the applicant must apply for third party discovery against the bank in question, or to subpoena an officer of the bank at trial. If what was sought was comprised within the definition of banker's books, then the only way in which the plaintiff was able to obtain a copy of that document was by way of an application under s 7. For the above reasons, the court disagreed that the court did not have the jurisdiction to grant the orders prayed for in encl 307.

(4) Having examined the statement of claim, the court was of the view that there were sufficient pleaded facts to show that the plaintiffs did in fact had a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery was not a mere fishing exercise. In addition, the order sought after under s 7 of the Act was not sought against the defendants, but rather third parties. If it was not the defendants who would be subjected to the court order, then it could never be said that the legal burden of proof had shifted.

(5) In relation to the question of admissibility of the documents received pursuant to an order under s 7 of the Act, the court could not allow the relevant documents to be admitted into evidence without first addressing the following matters: (a) the court must first make a determination whether a document sought to be adduced came within the definition of 'banker's books'. Evidence may well have to be led as to the purpose for which the bank had generated, or maintained a record of, the document in question; and (b) the plaintiff must satisfy the court that: (i) in the case of a copy of an entry in a bankers book, the requirements of ss 4 and 5 of the Act have been fulfilled; and (ii) in any other case, the requirements relating to proof of a document and its relevancy and admissibility have been fulfilled.

Protasco Bhd v PT Anglo Slavic Utama & Ors [2019] 9 MLJ 417

[**Annotation**: *Arnott v Hayes* (1887) 36 Ch D 731, CA (refd); *Barker v Wilson* [1980] 1 WLR 884, QBD (refd); *Douglas v Pindling* [1996] AC 890, PC (refd); *Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors* [2010] MLJU 1608; [2011] 10 CLJ 186; [2010] 11 MLRH 820, HC (refd); *Idiots' Asylum v Handysides* (1906) 22 TLR 573, CA (refd); *Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors* [2003] 5 MLJ 276; [2003] 2 AMR 70; [2003] 5 CLJ 436; [2002] 3 MLRH 877, HC (distd); *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (T/A JB International)* [1990] 2 MLJ 282; [1989] 3 MLRH 223, HC (refd); *Howglen Ltd, Re* [2001] 1 All ER 376, Ch D (folld); *South Staffordshire Tramways Company v Ebbsmith* [1895] 2 QB 669, CA (consd); *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559, FC (distd); *Williams v Williams* [1988] 1 QB 161, CA (refd); *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581; [1993] 4 MLRH 380, HC (refd).

Bankers' Book (Evidence) Act 1949 ss 3, 4, 5, 6, 7; Bankers' Book Evidence Act 1879 [UK] s 6; Evidence Act 1950 ss 17, 21, 62, 90A, 90A(2), 130(3); Rules of Court 2012 O 24 r 7A, O 24 r 7A(2).]

[6] Civil Procedure — Judicial review — Application for — Decision to issue letters of agreement and bond compelling appearance before Shariah Court — Freedom of religion — Whether Shariah Courts in Selangor had jurisdiction over offence under s 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('ARIE') — Whether Shariah Courts in Selangor had jurisdiction over groups of people declared to be non-Muslims by virtue of a fatwa — Legal position of fatwa — Powers of Chief Syarie Prosecutor — Powers of Chief Religious Enforcement Officer — Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 61, 62, 74, 78, 79 & 97 — Federal Constitution arts 11, 74 & Ninth Schedule

Islamic Law — Jurisdiction — Shariah Court — Whether Shariah Courts in Selangor had jurisdiction over offence under s 97(2) of the Administration of the Religion of Islam (State of Selangor)

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Enactment 2003 — Whether Shariah Courts in Selangor had jurisdiction over groups of people declared to be non-Muslims by virtue of fatwa

This was a judicial review application of the applicants against the decision of the second respondent who issued letters of agreement and bond compelling them to appear before the Shariah Court on pain of monetary penalty in respect of an offence under s 97(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the ARIE') which was instituted by the fifth respondent. Pursuant to s 84 of the Courts of Judicature Act 1964, two constitutional questions were transmitted to the Federal Court being: (a) whether the Shariah Courts in the state of Selangor did not have jurisdiction in respect of the offence in s 97(2) of the ARIE; and (b) if the above question was answered in the negative, whether the Shariah courts in the State of Selangor did not have jurisdiction over members of the Ahmadiyya Muslim Jama'at religious group including the applicants. The Federal Court had, without answering the two constitutional questions, remitted the reference back to the High Court on the basis that the High Court had jurisdiction to hear and dispose of the aforementioned issues. The parties were in agreement that the two constitutional questions would dispose of the judicial review. The applicants submitted: (i) s 97(2) of the ARIE was an exercise of legislative power under Item 9 of the State List was not a precept offence but was in pith and substance an offence in respect of mosques or any Islamic places of worship, therefore it was an offence which could only be tried by the magistrate's court and instituted by the Attorney General. The respondents submitted: (1) s 97(2) of the ARIE came under the category of offences against the 'precepts of Religion of Islam'. The term 'precepts of Religion of Islam' was not merely confined to the basic tenets, but had a much wider meaning that included the teachings in the Al-Quran, the Sunnah of the Prophet of Islam, the consensus of the religious scholars and the authoritative rulings of legitimate religious authorities, for the purpose of ensuring, preserving and/or promoting rights beliefs, right attitudes, right actions and right conduct amongst the follower of Islam; and (2) the Shariah High Court in Selangor had the jurisdiction to declare that a person was no longer a Muslim, hence the applicants must first apply to the Shariah High Court for such a declaration, before any challenge to the jurisdiction over the Shariah Court over the applicants was brought.

Held, allowing the application, with RM25,000 as costs:

(1) Pursuant to art 74(2) read together with the provisions of Item 1 of the State List, the Selangor State Legislative Assembly had powers to make laws with respect to mosques or any Islamic public places of worship, as well as creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion. Further, by virtue of the provisions of Item 9, the State Legislative Assembly had the power to make laws in respect of any of the matters included in the State List or dealt with by state law.

(2) In pith and substance, s 97(2) of the ARIE was related to the regulation of mosques. The offence created by s 97(2) was in substance an offence that was against the 'precepts of Islam' for worship or prayers was a fundamental tenet of the religion and the regulating of places of worship was necessary for the purpose of ensuring, preserving and/or promoting rights beliefs, right attitudes, right actions and right conduct amongst the followers of Islam.

(3) The doctrinal stand of the state religious authorities so far as the Ahmadis were concerned was that the Ahmadis were non-Muslims. However, in determining the constitutional issue, the court was not concerned to 'adjudicate on the truth of religious beliefs or on the validity of particular rites' of the Ahmadiyya Muslim Jama'at as 'disputes about doctrine or liturgy are non-justiciable if they do not as a consequence engage civil rights or interests or reviewable questions of public law'.

(4) Both the *fatwas* issued by the Mufti for Selangor pursuant to s 31(1) of the Administration of Islamic Law Enactment 1989 on 22 June 1998 and on 29 August 1999 were binding on all Muslims in the State of Selangor and shall be recognised and upheld by the Shariah Courts in the State of Selangor. The result of which an Ahmadi was considered a non-Muslim by the state even though an Ahmadi may consider himself to be a Muslim or a member of an Islamic sect. The effect of the fatwa was that the Ahmadis were considered followers of a separate and distinct religion removed from Islam. The court therefore accepted the contention that a distinctive religious sect like the Ahmadiyya Muslim Jama'at which has had religious rulings with the force of law against its members declaring that they were not Muslims, was to be treated as a distinct religious group equally entitled to rights under art 11 of the Federal Constitution.

(5) Article 11 of the Federal Constitution guaranteed the right to every person, including permanent residents, migrant workers, tourists, international students, asylum seekers and refugees, to religion. The right to freedom of belief was absolute, but the right of freedom to manifest belief was qualified.

(6) Pursuant to s 2 of the Shariah Courts (Criminal Jurisdiction) Act and s 74(1) of the ARIE, the Shariah Court did not have any jurisdiction over non-Muslims. The powers of the Chief Syarie Prosecutor was exercisable only in respect of any offence that the Shariah Court was competent to try, and that would necessarily mean only offences committed by a Muslim. Further, investigative powers conferred under ARIE to the Chief Enforcement Officer and Religious Enforcement Officers were statutorily circumscribed and were exercisable only on Muslims.

(7) Having declared the Ahmadis as non-Muslims, the state Islamic religious authorities could not continue to dictate the manner in which the Ahmadis carry out their religious practices or restrict the places in which they perform their prayers or religious rites.

Maqsood Ahmad & Ors v Ketua Pegawai Penguatkuasa Agama & Ors [2019] 9 MLJ 596

[**Annotation**: *Abdul Rahim bin Haji Bahaudin v Chief Kadi, Kedah* [1983] 2 MLJ 370 (refd); *Acharya Jagadishwaranada Avadhuta and Another v Commissioner of Police, Calcutta and Others* [1990] AIR Cal 336, HC (refd); *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; [1948] 1 KB 223, CA (refd); *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515, HC (refd); *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374, HL (refd); *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281; [2012] 4 CLJ 717, FC (refd); *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513, HC (refd); *Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* [2014] 6 MLJ 305; [2014] 8 CLJ 821, FC (refd); *Jenny bt Peter @ Nur Muzdhalifah Abdullah v Director of Jabatan Agama Islam Sarawak & Ors and other appeals* [2017] 1 MLJ 340; [2016] 1 LNS 1132, CA (refd); *Kamariah bte Ali dan Lain-lain lwn Kerajaan Negeri Kelantan dan Satu Lagi* [2005] 1 MLJ 197; [2004] 3 CLJ 409, FC (refd); *Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2005] 2 MLJ 493; [2005] 2 AMR 471; [2005] 2 CLJ 159, CA (refd); *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 5 CLJ 557, FC (refd); *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393, CA (refd); *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, SC (refd); *Mamat bin Daud & Ors v Government of Malaysia* [1986] 2 MLJ 192; [1988] 1 CLJ Rep 197, SC (refd); *Meeran Lebbaik Maullim & Anor v J Mohamed Ismail Marican and The Straits Printing Works* [1926] 2 MC 85 (refd); *Michael Lee Fook Wah v Minister Of Human Resources Malaysia & Anor* [1998] 1 MLJ 305, CA (refd); *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9, SC (refd); *Narantakath Avullah v Parakkal Mammu and Ors* AIR 1923 Madras 171 (refd); *PP v Mohd Noor bin Jaafar* [2005] 6 MLJ 745, HC (refd); *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 WLR 590, HL (refd); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC (refd); *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (refd); *SMC No 1 of 2014* [2015] 2 LRC 583 (refd); *Shergill and others v Khaira and others* [2014] 3 All ER 243, SC (refd); *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54, FC (refd); *Susie Teoh; Teoh Eng Huat v Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan, In Re* [1986] 2 MLJ 228 (refd); *Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara* [2000] 4 MLJ 167; [2000] 3 AMR 3048, CA (refd); *United States v Ballard* (1944) 322 US 78 (refd).

Administration of Islamic Law Enactment 1989 s 31(1); Administration of Muslim Law Enactment 1962 of Kedah ss 38(2), 41, 163(1); Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 2, 4, 49, 61, 61(3), (3)(b)(x), 62(2), 74, 74(2), 78(2), 79, 97, 97(2); Constitution of Pakistan art 20; Control of Islamic Religious Schools (Malacca) Enactment 2002 s 5(3); Courts of Judicature Act 1964 s 84; Federal Constitution arts 11, 11(1), (3), (4), (5), 74, 74(2), 145(3), Ninth Schedule, Federal List, State List, Items 1, 9; Penal Code [IND] s 494; Penal Code s 298A; Rules of Court 2012 O 53 r 2(3); Subordinate Courts Act 1948 ss 76, 82, 85, 87; Syariah Courts (Criminal Jurisdiction) Act 1965 s 2; Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 ss 10, 14; Syariah Criminal Offences Enactment (Selangor) 1995.]