Protasco Bhd v Pt Anglo Slavic Utama & Ors [2020] MLJU 1413

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

LIZA CHAN SOW KENG, JC

SUIT NO. WA-22NCC-362-09/2014

10 September 2020

S. Sivaneindiren (Peter Skelchy and Joycelyn Teoh with him) (Cheah Teh & Su) for the Plaintiff.
*Sri Gopal Sri Ram (Alfirdaus Sharul Naing, **Chelvakumar** Thrujaram, Margaret Tan, Yasmeen Soh, R Jayasingam, Atiqah Adena and Ng Keng Yang with him) (B H Lawrence & Co) for the and Defendants.*

Liza Chan Sow Keng JC:

GROUNDS OF JUDGMENT

Introduction

[1] Enclosure 407 is the 2nd and 3rd Defendants' application made pursuant to Order 18 Rule 19 (1) (b) and/or (c) and/or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of the Court that the action as against the 2nd and 3rd Defendants be struck out and for costs.

Background

[2] The Plaintiff is a publicly listed company. The 2nd and 3rd defendants are former directors of the Plaintiff.

[3] On 22 September 2014, the Plaintiff instituted this action alleging that the 2nd and 3rd Defendants had fraudulently caused the Plaintiff to enter into a transaction to acquire shares from the 1st Defendant in a company which through its group of companies, reportedly owned rights to develop and produce oil and gas in Indonesia. The Plaintiff's cause of action against the 2nd and 3rd Defendants is grounded on breach of fiduciary duties as directors of the Plaintiff, deceit, fraud, conspiracy to defraud/injure and contravention of *section 132* and *section 131* of the *Companies Act 1965* ('CA'). The Plaintiff further pleads that as a consequence of the 2nd and 3rd Defendants' involvement in the acquisition, it has suffered loss and damage in the sum of USD27 million. As such, it contends that the amended and restated sale and purchase between itself and the 151 Defendant is null and void or illegal.

[4] For the purpose of this judgment, I need only to set out in summary the relief claimed by the Plaintiff against the 2nd and 3rd Defendants as contained in its statement of claim:

(i) compensate the Plaintiff in equity for the breach of fiduciary duties;

(ii) account to the Plaintiff for the monies misappropriated by them;

(iii) account to the Plaintiff for secret profits received by them;

(iv) hold all such sums received as constructive trustees in favour of the Plaintiff;

(v) reconstitute those assets held on trust for the Plaintiff;

(vi) damages for fraud and conspiracy; and

(vii) general damages, aggravated and exemplary damages.

[5] In essence, the 2nd and 3rd Defendants is to compensate the Plaintiff losses in the sum of USD27,000,000 suffered due to their actions.

[6] The case has a long history. Part of this history includes a police report made by the Plaintiff against all 3 Defendants on the same day as the suit was filed premised on the allegations in the suit.

[7] Based on the contents of a police investigation paper, the Plaintiff obtained on 01.04.2016 an ad interim Mareva injunction on 01.04.2016 against the 2nd and 3rd Defendants over their assets and properties up to a value RM60,000,000. On 11.04.2018 parties entered into a consent order for a Mareva injunction for like amount.

[8] Arising from police investigations, both the 2nd and 3rd Defendants were arrested and charged under *section 181*, and *420* of the *Penal Code* and *section 131(1)* of the *Companies Act 1965*; the 3rd Defendant was also charged under *section 409* of the *Penal Code* ("the criminal charges").

[9] Pursuant to *section 50(1)* of the *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA 2001")*, both the 2nd and 3rd Defendants had freezing and seizure orders made with regard to their assets and properties culminating in a forfeiture of property application made by the Public Prosecutor pursuant to *section 56 (1)* *AMLA 2001*.

[10] The Public Prosecutor withdrew the criminal charges following a representation made by both the 2nd and 3rd Defendants. Unhappy with the discharge not amounting to an acquittal ordered, the 2nd and 3rd Defendants filed an application to the High Court of Malaya at Shah Alam and were acquitted of all the criminal charges on 28.3.2019.

[11] The High Court ordered the release of the assets belonging to the 2nd and 3rd Defendants after the Public Prosecutor withdrew the forfeiture application on 29.11.2018.

[12] Enc. 407 was filed on 20.9.2019 by the 2nd and 3rd Defendants.

[13] For ease of reference, the chronology of events that had transpired prepared by the Plaintiff and which is not disputed is produced.

NO.	DATE	EVENT(S)
1.	**22.09.2014**	Plaintiff **(PB)** filed Civil Action at the Kuala Lumpur High Court against 1st Defendant **(PT ASU),** 2nd Defendant **(TPY)** and 3rd Defendant **(OKA)**
2.	**28.10.2014**	TPY and OKA filed **Statement of Defence**
3.	Jan 2015 – May 2015	**Freezing and Seizure Orders** made under *Section 50(1)* *AMLA 2001* in relation to TPY and OKA's assets and properties
4.	**09.10.2015**	**Forfeiture Application** filed by the Public Prosecutor **(DPP)** pursuant to *Section 56(1)* *AMLA 2001* at the Kuala Lumpur High Court
5.	15.01.2016	**TPY** being charged at the Kajang Sessions Court under *Sections 181*, *409* and *420* of the *Penal Code* (1st **Criminal Charges)**
6.	03.02.2016	**OKA** being charged at the Kajang Sessions Court under *Sections 181* and *420* of the *Penal Code* (1st **Criminal Charges)**
7.	25.02.2016	Civil Action against **PT ASU** is stayed pending arbitration proceedings between PB and PT ASU at KLRCA
8.	25.03.2016	TPY & OKA filed an application to stay proceedings against themselves (i)

		pending outcome of the arbitration proceedings between PB and PT ASU; (ii) pending outcome of the criminal proceedings at Kajang Sessions Court
9.	29.03.2016	PB filed Notice of Application (Ex-Parte) for Mareva Injunction against TPY & OKA [En.158]
10.	01.04.2016	**Ad Interim Order** for Mareva Injunction granted against TPY & OKA until final disposal of En.158 – RM60million
11.	19.05.2016	TPY & OKA filed **1" Expungement** application to expunge En.159 (i.e. PB's affidavit in support of Mareva Injunction) **PB only served with Notice of Application. No supporting affidavit.
12.	11.07.2016	**OKA** being charged at the Kajang Sessions Court under *Section 131(1)* of the *Companies Act 1965* (2nd **Criminal Charges)**
13.	11.07.2016	**TPY** being charged at the Kajang Sessions Court under *Section 131(1)* of the *Companies Act 1965* (2nd **Criminal Charges)**
14.	17.08.2016	TPY & OKA's 1st Expungement application were struck out with no order of costs and with liberty to file afresh
15.	**20.12.2016**	Kuala Lumpur High Court granted a **Stay** of Proceedings against TPY & OKA
16.	26.01.2017	TPY filed **2"0 Expungement** application via **En.215** to expunge certain paragraphs and documents in En.158 (i.e. cause papers of Forfeiture Proceedings)
17.	06.02.2017	OKA filed **2"0 Expungement** application via **En.218** to expunge certain paragraphs and documents in En.158 (i.e. cause papers of Forfeiture Proceedings)
18.	**26.09.2017**	Discharge Not Amounting to an Acquittal ordered by the Kajang Sessions Court (upon DPP'sapplication) **("DNAA")**
19.	25.10.2017	En.215 & 218 **(Expungement Applications)** dismissed by YA Tuan Azizul Azmi bin Adnan. TPY & OKA consented not to appeal against the dismissal of their Expungement Applications (Consent Order dated 11.04.2018)
20.	**29.01.2018**	High Court Order for a **Stay** of Proceedings **lifted** by the Court of Appeal - Civil Action against TPY and OKA to proceed for trial expeditiously
21.	08.02.2018	TPY and OKA applied at the Shah Alam High Court for an outright acquittal of the criminal charges (**as alleged in paragraph 13 of Tey Por Yee's Affidavit (ENG) without any supporting documents)
22.	30.03.2018	Case Management before YA Tuan Azizul Azmi bin Adnan – **Trial dated fixed on 18 – 28 February 2019 and 1 March 2019**
23.	11.04.2018	Consent Order entered between PB, TPY and OKA
24.	11.04.2018	**Mareva Injunction Order** obtained against TPY & OKA
25.	07.05.2018	TPY & OKA filed an application to **Amend** their Statement of Defence allowed by the High Court
26.	25.06.2018	TPY & OKA's application to Amend theirStatement of Defence allowed by the High Court (with no objection by PB)
27.	**25.06.2018**	High Court allowed PB's application under Bankers' Books (Evidence) Act 1949 **("BBEA")** for an order to inspect and take copies of all entries in the books of the Bank (1st **BBEA Order)**

28.	**29.11.2018**	DPP **withdrew the Forfeiture Application;** Assets and properties seized returned back to TPY and OKA respectively
29.	07.12.2018	TPY & OKA filed an application to **Re-amend** their Amended Statement of Defence
30.	**07.01.2019**	High Court allowed PB's 2nd application under Bankers' Books (Evidence) Act 1949 **("BBEA")** for an order to inspect and take copies of all entries in the books of the Bank (2nd **BBEA Order)**
31.	10.01.2019	TPY & OKA's application to **Re-amend** their Amended Statement of Defence allowed by the High Court with costs of RM20,000.00 to be paid to PB
32.	**18.02.2019**	1st **Day Full Trial** against TPY and OKA commenced – PB started its case by calling its first witness. Objection raised by TPY & OKA on admissibility of the banking documents obtained by PB under Bankers' Books (Evidence) Act 1949 (1st BBEA Order and 2nd BBEA Order) to be tendered as evidence at trial. Trial adjourned to be continued on **18-29 November 2019.**
33.	**28.03.2019**	**Outright Acquittal** ordered by the High Court at Shah Alam
34.	18.09.2019	**Hearing** of the appeals filed at the Court of Appeal in relation to matters related to application under Bankers' Books (Evidence) Act 1949
35.	**20.09.2019**	TPY & OKA filed **Striking Out Application**
36.	30.09.2019	**Continued Hearing** of the appeals filed at the Court of Appeal in relation to matters related to application under Bankers' Books (Evidence) Act 1949
37.	11.11.2019	Case Management before YA Tuan Azizul Azmi bin Adnan – This action will be heard before a new Judge. Previous trial dates on 18 – 29 November 2019 is vacated. **New trial dates fixed on 3 – 14 August 2020**
38.	07.02.2020	Case Management before YA Puan Wong Chee Lin – Previous trial dates on 3 – 14 August 2020 is vacated. **New trial dates fixed on 18, 19, 21, 24 – 28 August 2020 and 1, 2 and 4 September 2020**.
39.	06.03.2020	**Decision** of the appeals filed at the Court of Appeal in relation to matters related to application under Bankers' Books (Evidence) Act 1949 – Court of Appeal allowed TPY & OKA's appeals – documents obtained by PB under 1st BBEA Order and 2nd Order are inadmissible.
40.	21.05.2020	Case Management before Deputy Registrar Puan Siti Faraziana binti Zainuddin – Previous trial dated fixed on 18, 19, 21, 24 – 28 August 2020 and 1, 2 and 4 September 2020 is vacated pending the disposal of matters related to application under Bankers' Books (Evidence) Act 1949.
41.	29.07.2020	**Hearing** of the Striking Out Application**Case Management** of the Main Action
42.	25.08.2020	**Hearing** of the application for leave to appeal to the Federal Court – matters related to theapplication under Bankers' Books (Evidence) Act 1949

2nd and 3rd Defendants' contentions

[14] The 2nd and 3rd Defendants' argued that forfeiture proceedings under *s 56 AMLA 2001* are civil proceedings and relied on *PP v Sham Bokhari (FC)* [2018] 1 CLJ 305*, PP v Kuala Dimensi Sdn Bhd & ors (GOA [2018]6 MLJ 37 and UMNO Bahagian Pekan v PP* [2020] 2 CLJ 272*.*

[15] The principal arguments asserted by the 2nd and 3rd Defendants to justify their striking out application are hinged in short on:

(i) the subject matter of the forfeiture proceedings being civil in nature overlaps with the present action;

(ii) The present action and the AMLA proceedings are not distinct actions – the allegations and facts relied upon by the Plaintiff in the present suit are founded on the same subject matter as follows:

(a) the present suit and the AMLA freezing, seizure and forfeiture proceedings against the 2nd and 3rd Defendants' properties under *section 40*, *50* and *56 AMLA 2001* were predicated on the same allegations of cheating and breach of fiduciary duties by the 2nd and 3rd Defendants;

(b) the subject matter of the reliefs sought by the Plaintiff, particularly on tracing and accounting of all the assets and properties received and/or obtained by both the 2nd and 3rd Defendants as a result of the said breaches, involve assets and properties that were the subject matter of the Freezing and seizure orders under *section 44* and *50* of *AMLA 2001*;

(c) part of the assets sought by the Plaintiff in its Mareva injunction application is also the subject matter of the Forfeiture Application by the Public Prosecutor under *section 56(1)* of the *AMLA*;

(iii) The Plaintiff ought to have entered appearance in the Forfeiture Proceedings as a bona fide third party pursuant to *section 61(1)* of *AMLA* to claim for the same properties and assets, and/or other reliefs against the 2nd and 3rd Defendants but opted to maintain this parallel suit for the same purpose; thus it is barred from pursuing the present suit on grounds of estoppel by conduct due to its failure or refusal to enter appearance as well as challenge the return of properties and assets to the 2nd and 3rd Defendants and cited *Nana Ofori Atta II, Omanhene of Akyem Abuakwa and another v Nana Abu Bonsra II as Adansehene, and as representing the stool of Adanse, and another (PC)* [1957] 3 All WER 559*; which was cited with approval by the COA in Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* *[1995] 1 MLJ 668*

(iv) The doctrine of res judicata operates against the maintenance of the present suit as the High Court through Collin Lawrence Sequerah J had on 29.11.2018 ordered the release and return of the properties and assets to the 2nd and 3rd Defendants;

(v) Even if the reliefs sought by the Plaintiff is not exclusive to the properties and assets of the 2nd and 3rd Defendants but includes declarations concerning the 2nd and 3rd Defendants' fiduciary duties, the present suit is still caught by issue estoppel in its amplified and wider sense and constructive res judicata – in support, cited *Asia Commercial Finance (M) Berhad v Kawai Teliti Sdn Bhd* *[1995] 3 MLJ 189* and *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* *[1996] 2 MLJ 57* and *Public Prosecutor v Dato' Zainal Abidin bin Md nor & Ors* [2019] 1 LNS 821, in the later case, the court had granted specific orders to preserve the bank's legal rights as charge over the immovable property ; and

(vi) The Plaintiff. did not have the mandatory consent of the Public Prosecutor to maintain and/or continue this action under *section 54(3)* of *AMLA 2001* and thus the claim is liable to be struck out – *Genneva Malaysia Sdn Bhd v Abdul Ghani Sher Mohd* [2018] 5 CLJ 472*; Daud bin Mohamad & 8 Ors v Genneva Malaysia Sdn Bhd* (KLHC Suit No. 22NCVC-1490-12/2012).

Some principles on the law on striking out

[16] As the application to strike out is made under O 18 r 19(1), I propose to set it out for convenience:

> 19. Striking out pleadings and endorsements (O. 18 r. 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[17] In an application under this provision of the 2012 rules, I am guided by a catenation of cases on the subject. The court will only strike out a claim in a plain and obvious case or that the claim is obviously unsustainable –

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Berhad [1993] 3 MLJ 36 where the Supreme Court clearly held at p 43 and 44:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. If is only in plain and obvious cases that recourse should be had to the summary process under this rule ... and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' ...
>
> ....
>
> This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v Lawson and Wenlock v Moloney & Ors*).

[18] In *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (Formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1969] 1 MLJ 309, Siti Norma JCA (as her ladyship then was) explained the approach when dealing with an application under O 18 r 19(1) of the Rules of the High Court 1980:

> The discretionary power to dismiss an action summarily under O 18 r 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1.) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166;; [1982]2 AllER 771;; [1982]2 WLR 890.)
>
> > When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

[19] The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 CLJ 235;; [1985] CLJ (Rep) 45;; [1985] 1 MLJ 347 per Seah FJ exhorted:

> The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution [per Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1. In *Lawrance v Norreys* (1890) 15 App Cas 210, 219 Lord Herschell said words to the same effect that "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". (emphasis added).

[20] The judgment of Eusoffe Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 *at pp 498-499* is authoritative:

> There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppel per rem judicata has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by *Lord Wilberforce in Brisbane City Council and another v Attorney General for Queensland* [1979] AC 411 at p 425:
>
> > The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense,

> according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
>
> ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

[21] In exercising utmost caution so as not to deprive the Plaintiff from its day in court, this court in considering the 'bound to fail' or 'obviously unsustainable' or that the fact that the case is 'weak and not likely to succeed at the trial is no ground for the pleading to be struck out' tests is entitled where the application does not concern limb (a) of Order 18 r 19(1), to examine not just the statement of claim but the affidavit evidence critically as was done by the Privy Council in *Tractors Malaysia v Tio Chee Hing* [1975] 2 MLJ 1.

[22] I hasten to add that the decision in *Tractors Malaysia* to examine the affidavit evidence critically was followed by the former Supreme Court in the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 in a judgment dated 29 July 1993 delivered by Peh Swee Chin, SCJ sitting with Abdul Hamid Omar, LP and Mohamed Dzaiddin, SCJ. In the *Bandar Builder case (supra),* a judgment dated 20 days earlier on 9 July 1993 delivered by Mohamed Dzaiddin, SCJ sitting with Abdul Hamid Omar, LP and Eusoff Chin, SCJ, the former Supreme Court, however, held that the Court should not embark on a minute protracted examination of the evidence.

[23] In my respectful view, where there is manifestly conflict in decisions of the same apex court, the principles in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 offers guidance, that the latter decision should prevail suffice to say that it is trite that the court should not examine the evidence in such a way as to amount to conduct a trial on the conflicting material affidavit evidence. I am also mindful of the pronouncement of the Privy Council in *Eng Mee Yang v Letchumanan* [1979] 2 MLJ 212:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

[24] I now move on to consider the issues in the application, namely:

(i) whether this action is caught by constructive res judicata, cause of action estoppel, issue estoppel and abuse of court process due to the Plaintiff's failure to avail itself of remedies under section 60 and 60(1) of *AMLA 2001*;

(ii) whether failure to obtain consent of the Public Prosecutor pursuant to section 54(3) *AMLA 2001* bars this action;

(iii) whether the 2nd and 3rd Defendants' delay in filing the striking out application is fatal.

I propose to deal with the 3rd issue first.

Is the 2nd and 3rd Defendants' delay in filing the striking out application fatal?

[25] In *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as a public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145, the Federal Court said:

> [8] It is our view that O 18 r 19(1) of the RHC 1980 does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial *(see the case of Bank Bumiputra Malaysia Berhad & Anor v Lorrain*

Esme Osman & Ors [1987] 2 MLJ 633;; [1987] CLJ (Rep) 472). Since the second suit has not been set down for trial, the defendant in the present case in our view can still apply to strike out the second suit on the ground of abuse of the process of the court. (emphasis added)

[26] Notwithstanding that the trial in this matter has started 18 months ago on 18.2.2019, with the Plaintiff having called its first witness, it is my respectful view that the very words in Order 18 r 19 (1) *"The Court may at any stage of the proceedings order to be struck out or amended*.." appears not to handcuff this Court from considering the striking out application at this stage if it is a fit and proper case to do so.

[27] However, I have no wish to impinge upon the doctrine of *stare decisis,* where a decision by a higher court constitutes a binding precedent on a lower court. I am duty bound and in fact *stare decisis* demands that I observe the decision of the Federal Court in *Boo Are Ngor.*

[28] I ought to explain my reverence to precedents of the courts superior to this court.

[29] To appreciate the fundamental importance of fidelity to the doctrine of stare decisis, allow me to refer to *Cassell & Co Ltd v Broome & Anor* [1972] 1 All ER 801 (cited with approval by the Federal Court in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113) where Lord Hailsham said at p 809:

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said:
>
> > Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

[30] As such, it is unarguable that decisions of the Federal Court must be followed and such decisions of the Federal Court can only be reviewed by another panel of the Federal Court as for eg. in 2010, Zaki Azmi CJ in *Tan Ying Hong v Tan Sian San* [2010] 2 MLJ 1, ; [2010] 2 CLJ 269 stated that the error in the Federal Court's case of *Adorna Properties v Boonsoom Boonyanit* [2001] 1 MLJ 241;; [2001] 2 CLJ 133 was obvious and blatant, thus, affirming Gopal Sri Ram JCA's decision in *Boonsoom Boonyanit v Adorna Properties* [1997] [1997] 2 MLJ 62;; [1997] 3 CLJ 17.

[31] In *Periasamy s/o Sinnappen v Public Prosecutor* [1996] 2 MLJ 557 at p 582, Gopal Sri Ram JCA (as he then was) recognised the importance of conforming with the doctrine of stare decisis. His Lordship said forcefully:

> Lastly, the learned appellate judge did not sufficiently address his mind to the decision in Khoo Hi Chiang. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did.
>
> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisions.
>
> We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

[32] In the present case, not only has the matter been set down for trial, but the delay is more serious - the case has remained in the Court's docket for well-nigh 6 years as the chronology at paragraph 13 has made evident and the trial in fact has commenced. On these 2 grounds alone, following *Boo Are Ngor,* the striking out application which was filed on 20.9.2019, 7 months after trial has commenced is a non starter. Worse when there is no explanation for such delay.

[33] Delay in filing a striking out application is not to be countenanced as it is anthithetical to the very process of a summary procedure for justice to be dispensed in cases that are plain and obvious and in the process, eliminate unendurable delays in the law, thus saving costs and time. Delay invariably scandalizes the fundamental ethos of the court process. Even Shakespeare hundreds of years ago, wrote about the law's delay:

> For who would bear the whips and scorns of time, The oppressor's wrong, the proud man's contumely, The pangs of despised love, the law's delay, ..."
>
> Shakespeare's Hamlet : Act 3 Scene 1

[34] Charles Dickens too was inspired to write about the spectacular delay of the chancery court system in the fictional case of *Jarndyce v Jarndyce* in his novel "Bleak House":

> This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honorable man among its practitioners who would not give—who does not often give—the warning, "Suffer any wrong that can be done you rather than come here!"

[35] For completeness's sake, I will also address the rest of the 2nd and 3rd Defendant's grounds for striking out.
Whether the Plaintiff's claim is barred by constructive res judicata, cause of action estoppel, issue estoppel and abuse of court process

[36] In the instant application, learned counsel for the 2nd and 3rd Defendants argued that arising from the Plaintiff's failure to make a claim as a bona fide third party in the forfeiture proceedings pursuant to *section 61* of *AMLA 2001* due to the decision of the Public Prosecutor to withdraw the Forfeiture application, the subsequent release of assets to the 2nd and 3rd Defendants on 29.11.2018 as well as withdrawal of charges arising from the Plaintiff's police report ending in an outright acquittal on 28.03.2019 for the criminal charges, constructive res judicata, cause of action estoppel and issue estoppel applies to bar the Plaintiff from proceeding with the present action.

[37] The 2nd and 3rd Defendants stressed that the present action is a collateral attack on the Attorney General's decision not to prosecute the 2nd and 3rd Defendants and as such is an abuse of court process as the Plaintiff ought to seek a judicial review against the decision of the Attorney General and relied on the cases of:

(i) *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Char Seng Thuan) and another appeal* *[2019] 3 MLJ 443* which recently held that the exercise of discretion by the Attorney General is reviewable; and

(ii) *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 CLJ 548 where at pg 497 it was stated:

> The respondent by these proceedings is in our view in effect attempting to circuitously challenge the exercise by His Majesty of his powers of clemency in this case under article 42 of the Constitution which he is expressly precluded from doing by virtue of the provisions of article 32(1) of the Constitution which stipulate that His Majesty shall not be liable to any proceedings whatsoever in any court. The High Court of Australia in *Horwitz v Connor* (1908) 6 CLR 38 40 held (at page 40) that no court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy, and a similar attitude toward the royal prerogative of mercy was adopted by the English Court of Appeal in *Hanratty v Lord Butler of Saffron Walden* (1971) 115 SJ 386*; The Times May 13.* In relation to the question of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would be dependent on its nature or subject matter, and we find support for this view in the decision of the House of Lords in *Council of Civil Service Unions & Ors v Minister for the Civil Service* *[1985] AC 374* where Lord Scarman in his speech (at page 407) says that it can be said with confidence the exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say, if it is a matter upon which the court can adjudicate, and again in the speech of Lord Roskill (at page 418) where he refers to examples of prerogative powers which he did not think could properly be made the subject of judicial review, such as inter alia that relating to the prerogative of mercy, because their nature and subject matter are such as not to be amenable to the judicial process.

[38] To digress a little, in *Sim Kie Chon's case,* the respondent was tried, convicted on a charge under section 57(1) of the *Internal Security Act, 1960* and sentenced to death by the High Court at Kuala Lumpur on June 14, 1983. His appeal to the Federal Court was dismissed. Thereafter his application for clemency to His Majesty the Yang di-Pertuan Agong was rejected. He then commenced an action on July 2, 1985 against the first and third appellants and the Pardons Board, Malaysia for declarations impugning the rejection of clemency on the ground of discrimination in breach of article 8 of the Constitution. Hashim J. initially granted a stay of execution of the sentence but this was later lifted and the action struck out on an application by the defendants thereto. An application for a stay and appeal against that decision were heard together and dismissed by the Supreme Court on July 23, 1985. See [1985] 2 MLJ 385.

[39] The respondent then instituted another suit against the first three appellants three weeks later. His application for a stay of execution of the sentence was refused but the Yang di-Pertuan Agong in the exercise of the powers of clemency vested in him granted a respite pending the final disposal of his appeal. The first three appellants applied to strike out the second appellant as a party and to set aside the action as an abuse of the process of the court. Hashim J. dismissed the application and such decision was reversed on appeal on among others that the exercise of prerogative of mercy by Yang di-Pertuan Agong is non – justiciable and on the grounds of res judicata where the judgment of Eusoffe Abdoolcader, SCJ held:

> There is more over the inherent jurisdiction of the Court in cases where *res judicata* is not strictly established, and where *estoppel per rem judicatam* has not been sufficiently pleaded, or made ***out,*** but nevertheless the circumstances are such as to render any re-agitation of the questions formally adjudicated upon a scandal and an abuse, the Court will not hesitate to dismiss the action, or stay proceedings therein, or ***strike out*** the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland* *[1979] AC 411* (at p. 425):
>
> > The second defence is one of *'res judicata'.* There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut ***out*** from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wig ram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* *[1926] Ac 155*. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* *[1975] AC 581*. It was, in the judgment of the Board, there described in these words:
> >
> > > ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings'. (p. 590).
>
> The attempt by way of the instant proceedings to re-litigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the Court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police and Ors.* *[1982] AC 529* (at page 542).

[40] The 2nd and 3rd Defendants' counsel asserted that *section 60* and *61* of the *AMLA 2001* provided a specific remedy which should have been pursued by the Plaintiff in the forfeiture proceedings. Where there is a specific remedy available, this court must decline relief, citing:

(a) *Electrical Industry Workers Union v Registrar of Trade Unions & Anor* *[1976] 1 MLJ 177*, FC;

(b) *Wilkinson v Barking Corporation* *[1948] 1 KB 721*;

(c) *Manggai v Government of Sarawak* *[1970] 2 MLJ 41*.

[41] Counsel for the 2nd and 3rd Defendants posited that the Plaintiff's civil and commercial rights are co-existent with the criminal complaint. As such, the Attorney General's withdrawal of the criminal charges and forfeiture proceedings has a bearing on the civil proceedings.

[42] Counsel for the 2nd and 3rd Defendants further contended that abuse of process can take place at

commencement of an action or can happen after commencement of an action because of subsequent events that make maintaining an action an abuse of court process. In rounding up his submissions, he quoted the judgment of Ahmad Maarop CJ (Malaya) in *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* *[2018] 2 MLJ 133*:

> [29] At this juncture, it is opportune to add that in the *Government of Malaysia v Dato Chong Kok Lim* *[1973] 2 MLJ 74*, the wider rule of res judicata as expanded in *Henderson* which sometimes is referred to constructive res judicata, was succintly explained by Sharma J at p 76 in the following manner:
>
> > The rule is that a matter *which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue.* A matter *which might and ought to* have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of res judicata deemed to have been a matter directly and substantially in issue in the former application, that is to say, though *it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made.* The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision *cannot be constructively res judicata. The rule of constructive res judicata is really a rule of estoppel.*
>
> [35] Lord Bingham referred to *Hunter,* and several authorities which explored the forms of the abuse of the process doctrine which had its root in *Henderson v Henderson* to demonstrate the development of the doctrine in recent years, at the end of which His Lordship made the following crucial speech on the issue at p 31 which contained instructive approach in considering whether there is an abuse of the process:
>
> > But *Henderson v Henderson* abuse of process, as now understood, although *separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.* This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. *The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus* being on the party alleging abuse) *that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive,* and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to *what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.* As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, *it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse* than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice ...

[43] The Plaintiff's counsel argued that the striking out application does not hold water. The Plaintiff asserted:

(i) A construction of *section 54* and *56* of the *AMLA 2001* and the effect of the provisions therein undisputedly reveal that the said AMLA 2001 provisions have no application whatsoever on the Plaintiff's claim and cannot in law form the basis of an application to strike the Plaintiff's said claim;

(ii) The Plaintiff's present pleaded claim is a sustainable, separate and distinct civil claim from the criminal charges and/or forfeiture proceedings under AMLA 2001. The reliefs claimed by the Plaintiff is not for the assets and properties of the 2nd and 3rd Defendants seized under AMLA 2001 that was commenced against the 2nd and 3rd Defendants;

(iii) The forfeiture application was withdrawn by the Public Prosecutor without it being heard and/or adjudicated by the High Court. None of the issues pleaded by the Plaintiff in the civil action herein was adjudicated upon by the High Court in the forfeiture proceedings;

(iv) The 2nd and 3rd Defendants were acquitted from criminal charges by the High Court at a case management without trial and/or the hearing of evidence. Again, none of the issues pleaded by the Plaintiff in the civil action herein were adjudicated upon by the criminal court. Therefore, the criminal convictions and/or discharge are irrelevant for the purposes of the present civil proceedings. The acquittal order has no bearing on the present civil action.

[44] In my view, it is imperative to note that the Plaintiff's claim against the 2nd and 3rd Defendants is based on breach of fiduciary duties as directors of the Plaintiff and for conspiracy to defraud. In this regard, the statement of claim in:

(i) paragraphs 39 to 44 describes the representations made to the board of directors of the Plaintiff favouring the amended and restated sale and purchase agreement and urging the Board to complete the proposed acquisition;

(ii) paragraphs 45 to 48 sets out the deception practised on the Plaintiff into parting with USD27 million;

(iii) paragraphs 50 to 59 details the fraud and deception;

(iv) paragraphs 60 to 65 enumerates the breaches of duties as directors of the Plaintiff with para 63 asserting that the losses of usd27 million resulted from the breach of fiduciary duties; and

(v) paragraphs 66 to 67 details the conspiracy to defraud /injure the plaintiff.

[45] I am inclined to agree with the Plaintiff's submission that the 2nd and 3rd Defendants' striking out application is premised on a misconception and misapplication of the effect and ambit of the provisions of *Section 54(3)*, *56(1)*, *Section 60* and *Section 61* of *AMLA 2001*.

[46] For starters, the list of assets and properties of the 2nd and 3rd Defendants that were seized under *Section 50(1)* of *AMLA 2001* between January 2015 to May 2015 are:

(a) 2nd Defendant

1) CDS Account (Account No.:079-001-055315899)

2) CDS Account (Account No.:076-001-055361141 (M0680)

3) CDS Account (Account No.:051-001-033645839 (ZTE0577)

4) Maybank Islamic Bank (Account No.:162311616872)

5) Maybank Banking Berhad (Account No.:514196572869)

6) CDS Account (Account No.:076-001-056339864)

7) CDS Account (Account No.:076-001-055361141)

(b) 3 rd Defendant

1) CIMB Bank Berhad (Account No.:12460001143057/8003146490)

2) HSBC Bank Malaysia Berhad (Account No.:316123231132)

3) CIMB Islamic Bank Berhad (Account No.:5800059751)

4) CDS Account (Account No.:076-001-056607088 and 087-011-055670533 (DM1762

[47] Prior AMLA 2001, financial crimes were dealt with under the Penal Code, the Companies Act 1965, and the Dangerous Drugs (Forfeiture of Property) Act 1988 and the Anti Corruption Act 1997.

[48] The very purpose of AMLA is stated in its preamble – "An Act to provide for the offence of money laundering,

the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of property involved in or derived from money laundering and terrorism financing offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence, and for matters incidental thereto and connected therewith."

[49] I think it is significant to note here the clear underlying object of AMLA2001.

[50] *Section 17A* of the *Interpretation Acts 1948 and 1967* (consolidated and revised 1989) ('the Interpretation Acts') reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act [whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[51] *Section 56* of *AMLA 2001* reads:

> 56. Forfeiture of property where there is no prosecution.
>
> (1) Subject to *section 61*, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under *subsection 4(1)* or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is -
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.
>
> (2) The judge to whom an application is made under *subsection (1)* shall make an order for the forfeiture of the property if he is satisfied –
>
> (a) that the property is –
>
> (i) the subject-matter or evidence relating to the commission of an offence under *subsection 4(1)* or a terrorism financing offence;
>
> (ii) terrorist property;
>
> (iii) the proceeds of an unlawful activity; or
>
> (iv) the instrumentalities of an offence; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
>
> (3) Any property that has been seized and in respect of which no application is made under *subsection (1)* shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
>
> (4) In determining whether the property is –
>
> (a) the subject-matter or evidence relating to the commission of an offence under *subsection 4(1)* or a terrorism financing offence;
>
> (b) terrorism property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence,
>
> the court shall apply the standard of proof required in civil proceedings.

[52] *Section 60* and *61* of *AMLA* respectively deal with property seized and sets out the procedure for claims by bona fide third parties and is cast as follows:

60. Release of property seized

(1) Where property has been seized under this Act, an investigating officer other than the investigating officer who effected the seizure, may at any time before it is forfeited under this Act, with the consent of the Public Prosecutor release such property to such person as the Public Prosecutor determines to be lawfully entitled to the property if the Public Prosecutor is satisfied that such property is not liable to forfeiture under this Act or otherwise required for the purpose of any proceedings under the Act, or for the purpose of any prosecution under any other law, and in such event neither the officer effecting the seizure, nor the Federal Government, or any person acting on behalf of the Federal Government, shall be liable to any proceedings by any person if the seizure and release had been effected in good faith.

(2) The officer effecting any release of any property under *subsection (1)* shall make a record in writing in respect of such release, specifying in the record in detail the circumstances of, and the reason for, such release, and he shall send a copy of such record to the Public Prosecutor.

(3) For the purpose of *subsection (1)*, the Public Prosecutor may give any direction of an ancillary or consequential nature, or which may be necessary, for giving effect to, or for the carrying out of, such release of property.

61. Bona fide third parties

(1) The provisions in this Part shall apply without prejudice to the rights of *bona fide* third parties.

(2) The court making the order of forfeiture under *subsection 28L(1)* or *section 55* or the judge to whom an application is made under *subsection 28L(2)* or *56(1)* shall cause to be published a notice in the *Gazette* calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that –

(a) the claimant has a legitimate legal interest in the property;

(b) no participation, collusion or involvement with respect to the offence under *subsection 4(1)* or Part IVA, or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

[53] I agree with the Plaintiff's submission that the 2nd and 3rd Defendants' contention that the Plaintiff had not availed itself to the specific relief as provided under *section 60* and *61* of *AMLA 2001* of a bona fide third party making a claim to the assets seized is untenable in law.

[54] In this case, it must be appreciated that the Plaintiff's pleaded claim against the 2nd and 3rd Defendants relates to breach of fiduciary duties, as directors of the Plaintiff and for conspiracy to defraud. The claims do not pertain to the seized property of the 2nd and 3rd Defendants. In addition, the Forfeiture Application was withdrawn by the Public Prosecutor on 29.11.2018 even before the said application was heard and/or adjudicated upon by the High Court.

[55] As such, it is absolutely unrealistic and erroneous for the 2nd and 3rd Defendants to argue that the Plaintiff must avail itself of this specific remedy to make a third party claim when there was no order made by the High Court for publication of Gazette under *Section 61(2)* of *AMLA 2001*49 to call upon any third party who claims to have any interest on the property to attend before the Court to show cause as to why the property should not be forfeited.

[56] In *Zi Publications Sdn Bhd & Anor v Jabatan Agama Islam Selangor & Ors* [2020] MLJU 938, where a seizure under AMLA 2001 was challenged by way of judicial review, the CA considered s 50(1) of *AMLA* and opined:

> [24] **Thus it is clear to us that the seizure challenged by the appellant in its judicial review application was an act done by the respondents' officers in the exercise of a function in relation to a criminal investigation for an offence under Act 606. In our view such an exercise of power in the course of a criminal investigation is not open to review under** O 53 of the RHC. To hold otherwise would, to our mind, be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament. A balance has to be struck between the right of disgruntled persons such as the appellant, to seek redress in the form of damages for the alleged wrongful seizure of its property and the duty of the investigative agency through its officers to bring wrongdoers to face justice by arresting them and collecting, in the course of investigation, whatever evidence against them. In this connection the need to conduct prompt and unimpeded criminal investigation is well recognised by the Court (see *Ooi Ah Phua v Officer-in-charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116, *Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya, Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah* [2010] 3 MLJ 193). If decisions made and actions taken in the process of criminal investigation pursuant to the power given by law. such as the impugned seizure in this case are amenable to judicial review. then criminal investigative machinerv may not function smoothly and efficiently as it should be. In this regard, we would approve the decision on similar point made by the Kuala Lumpur High Court in *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581. In this case, the applicants sought leave to commence proceedings under O 53 r 3 of the RHC for an order of certiorari to quash an order dated 5 July 2004 made by the Deputy Public Prosecutor which was served on Hong Leong Bank Bhd and EON Bank Bhd. The orders sought to effect a seizure of, inter alia, movable property in the banking accounts of the applicants pursuant to s 50(1) of the *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA')*. The crucial question for determination of the Court was whether the said orders of the Deputy Public Prosecutor pursuant to s 50(1) of *AMLA* was reviewable by way of judicial review. In his judgment, dismissing the application for leave for an order of certiorari, Raus J (as His Lordship then was) said:
>
> > [11] From the above, it can be seen that the deputy public prosecutor's order was in pursuant to s 50(1) of *AMLA*. Section 50(1) of *AMLA* is in the following words:
> >
> > > (1) Where the Public Prosecutor is satisfied on information given to him by an investigation officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or evidence in relation to the commission of such offence, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.
> >
> > [12] Looking at the order of the deputy public prosecutor as well as the provision of s 50(1) of *AMLA*, I am of the view that the order of the deputy public prosecutor is not reviewable under O 53 of the RHC. To me, s 50(1) of *AMLA* is part and parcel of the investigation process into an offence under s 4(1) of the *AMLA*. It appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the public prosecutor the power to assist the investigating officer. Clearly, s 50(1) of *AMLA* was enacted to enable the public prosecutor or his Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders the deputy public prosecutor was merely exercising a function under AMLA.
> >
> > [13] It has been said before that not all decisions and action of a public officer is reviewable by the court. In *R v Sloan* [1990] 1 NZLR 474, Justice Hardie Boys said:
> >
> > > ... it is not every decision made under statutory authority that is subject to judicial review. A decision must go beyond what is merely administrative or procedural ... or the exercise of a function rather than a power... Quite plainly, the conclusions reached by the inspector here are of this kind and so are not reviewable. To hold otherwise would, as Mr Neave submitted, open up the investigation process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

> [[14] Similarly, in *Ahmad Azam bin Mohamed Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86, I held that the public officers exercising a function under the Cooperative Societies Act 1993, is not reviewable under O 53 of the RHC.
>
> [15] Likewise in this case, the order of the deputy public prosecutor under s 50(1) of *AMLA* is also not reviewable. This must be so, otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review. To borrow the words of Justice Hardie Boys in R v Sloan 'that cannot have been the intention of Parliament'.
>
> [16] It is submitted by learned counsel for all applicants that the issuing of the s 50(1) order, the deputy public prosecutor has crippled their business and has further failed to appreciate that the said orders would subject them and its directors and officers to liabilities resulting from their inability to utilize its funds. But as stated earlier, the s 50(1) order is to secure the evidence for the purpose of criminal prosecution under s 4(1) of *AMLA*. It is not an administration decision but a decision in relation to criminal investigation. Thus, the rights of all applicants in the four cases lies in the criminal, as well as civil law and not in an administration action. The deputy public prosecutor was performing his duties under s 50(1) of *AMLA* and cannot be made accountable by way of judicial review.
>
> [25] **Similarly in the present appeal, the seizure was made in the course of a criminal investigation of an offence under Act 606 pursuant to the powers conferred under the Act. Such seizure clearly is not amenable to judicial review. The Appellant was not without redress. It could have filed a private law writ action for damages**. Indeed, s 48 of Act 606 provides for a cause of action for recovery of damages if a seizure is made without reasonable cause.
>
> (emphasis added)

[57] As clearly explained in the above case, under section 50(1) of the *AMLA 2001*, the Public Prosecutor as part of his functions in the investigative process into whether an offence under section 4(1) of the *AMLA* has been committed is entitled to make an order of seizure of movable properties in the possession of the financial institutions belonging to persons such as the 2nd and 3rd Defendants here.

[58] Section 55 provides for the forfeiture of any property seized under the Act by the court where upon prosecution, an offence is proven under subsection 4(1) whilst section 56 *AMLA 2001* provides that where there is no prosecution or conviction of an offence under section 4(1) or a terrorism financing offence, the Court subject to section 61 may order seized property to be forfeited upon the application of the Public Prosecutor before the expiration of 12 months from the date of the freezing order or seizure order. Section 56(3) expressly provides for the release of the property to the person from whom it was seized upon the expiration of 12 months from the seizure.

[59] In my view, section 55, and section 56 of *AMLA 2001* are an adjunct to and part of the role of the Public Prosecutor and when read together with section 50(1), section 55 and section 56 are a corollary to the investigation process.

[60] As pertains this action, I am of the view that the Public Prosecutor in deciding to withdraw the Forfeiture Application was merely exercising a function under AMLA 2001 as part of the investigation process and following *Zi Publications Sdn Bhd & Anor v Jabatan Agama Islam Selangor & Ors,* the exercise of such a function as part of the investigation process is not amenable to judicial review. Section 60 and 61 in my judgment, are clearly not stand alone provisions and have to be read with the other provisions in AMLA 2001 dealing with freezing, seizure and forfeiture.

[61] As such, the 2nd and 3rd Defendants' contention that the Plaintiff has a specific remedy available to it under section 60 and 61 under the forfeiture proceedings by way of a judicial review fails and with it the arguments on constructive res judicata, cause of action estoppel, issue estoppel and abuse of court process.

[62] I also find merits in the Plaintiff's argument that:

(i) its present action is a distinct civil claim in contradistinction from the criminal charges and/or forfeiture proceedings brought by the Public Prosecutor under the AMLA 2001 provisions;

(ii) the Forfeiture Application was withdrawn by the Public Prosecutor on 29.11.2018 prior to the same being heard and/or adjudicated upon by the High Court. As the Forfeiture Application was withdrawn by the Public Prosecutor, none of the issues pleaded by the Plaintiff in the present civil action was adjudicated upon by the High Court in the Forfeiture Application,

(iii) the 2nd and 3rd Defendants on 28.03.2019 were acquitted by the Shah Alam High Court without there being a trial. None of the issues pleaded by the Plaintiff in the present civil action were adjudicated upon by the criminal court,

(iv) the principles of res judicata simply do not bite as none of the issues pleaded herein have been adjudicated upon by a previous court of law;

(v) it is germane to note that different standards of proofs apply to civil and criminal proceedings. In a criminal trial, in order to convict, the prosecution must lead evidence in order to prove the guilt of the accused beyond reasonable doubt. The standard of proof in civil cases is one of balance of probabilities.

[63] The Plaintiff's citation of 2 cases are apt and useful and I gratefully reproduce the submission in summary below:

(i) *Reebook International Ltd v Royal Corporation* [1989] 1 MLJ 209 which considered the applicability of the doctrine of res judicata after acquittal in a criminal case to a civil action. The Singapore High Court held:

(1) Three essential conditions must be present before the plea of res judicata and issue estoppel can be successfully raised. First, there must have been a final judgment or decision in the previous case; second, there must be an identity of subject matter or issue in the former and in the present litigation; and third, there must be identity of parties in both cases.

(2) There was no dispute that in so far as the matter prayed for in the criminal motion was concerned, a final judgment was given by the High Court to quash the search warrants because the complaints disclosed no offence, followed by two consequential orders.

(3) ...

(4) ...

(5) ...

(6) The question of different standards of proof is clearly a material consideration in regard to issue estoppel. The institution of the present civil action, where different standards of proof prevailed, was not an abuse of the process of the court and could not give rise to a plea of issue estoppel.

(7) The condition of an identity of subject matter or issue in the former and the present litigation was clearly not satisfied in the present case.

(8) ...

(9) There was no merit on the plea of res judicata or issue estoppel and there was nothing to preclude Reebok International from commencing the present suit. Neither did the commencement of such an action amount to an abuse of the process of the court.

(ii) *Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals* [2015] 4 MLJ 34 where the Court of Appeal held:

> A judgment in a criminal case could not be used as a proof of a fact in issue in a civil case for claim for damages. As to the appellant's defence of justification, the High Court was right to hold that section 43 of the *Evidence Act 1950* barred them from relying on the judgment, order or decree of another court proceeding, more so, a criminal proceeding.

Consent by Public Prosecutor necessary for maintaining this action?

[64] Section 54 of *AMLA* reads:

> 54. **Dealing with property after seizure to be void**
>
> (1) Where any property has been seized under this Act, and so long as such seizure remains in force, any dealing effected by any person or between any persons in respect of such property, except any dealing effected under

this Act by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government, or the Government of a State, or a local authority or other statutory authority, shall be null and void, and shall not be registered or otherwise be given effect to by any person or authority.

(2) *Subsection (1)*shall be in addition to and not in derogation of *subsection 51(3)* and *(4)*.

(3) For so long as a seizure of any property under this Act remains in force. no action. suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure. be maintained or continued in any court or before any other authority in respect of the property which has been so seized, and no attachment, execution or other similar process shall be commenced, or if any such process is pending immediately before such seizure, be maintained or continued, in respect of such property on account of any claim, judgment or decree, regardless whether such claim was made, or such judgment or decree was given, before or after such seizure was effected, except at the instance of the Federal Government or the Government of a State, or at the instance of a local authority or other statutory authority, or except with the prior consent in writing of the Public Prosecutor.

[65] It was argued by the 2nd and 3rd Defendant that this action cannot be maintained as the Plaintiff had not obtained the consent of the Public Prosecutor pursuant to *section 54(3)* of *AMLA* as confirmed in exhibit OKA-2 and relied on the decisions of Vazeer Alam Mydin Meera JC (now JCA) in *Daud Bin Mohamad & 8 ors. v Genneva Malaysia Sdn Bhd & 4 ors* in Kuala Lumpur High Court Civil Suit No. 22NCVC-1490-12/2012*) and* Lau Bee Lan J (now JCA) in *Genneva Malaysia Sdn Bhd v Abdul Ghani Bin Sher Mohamad* [2018] 5 CLJ 472,; *[2017] MLJU 1819*.

[66] The Plaintiff on the other hand contended such consent is unnecessary and relied on the decision of Mohd Ariff J (later JCA) in *Dato' Zahari Sulaiman v Geneva Sdn Bhd* [2011] 6 CLJ 219 amongst others.

[67] It has been said that these three High Court cases have given conflicting interpretations in regard to the scope of *section 54(3) AMLA 2001*.

[68] To put things in perspective, I find it necessary to embark on a brief analysis of the scope of *section 54(3)* which was considered in the 3 High Court cases to show that ultimately, the 2nd and 3rd Defendants' contention that the Plaintiff's action is obviously unsustainable is deeply flawed.

[69] In *Daud Bin Mohamad & 8 ors. v Genneva Malaysia Sdn Bhd & 4 ors.* (Kuala Lumpur High Court Civil Suit No. 22NCVC-1490-12/2012) Vazeer Alam Mydin Meera JC (now JCA) held in the following relevant passages:

[6] The 1st Defendant's main argument is that this suit is statutorily barred, as the prior written consent of the Public Prosecutor pursuant to *section 54(3) AMLA* has not been obtained. Counsel for the 1st, 2nd, 3rd and 5th Defendants ("Defendants' claim counsel") submits that the lack of consent is fatal to the Plaintiffs' claim herein as such a claim is prohibited under *section 54(3)* of *AMLA*. I find merit in that submission for the following reason.

[7] Now, *section 44(1)* and *(2)* of *AMLA* states that:

(1) Subject to *section 50*, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under *subsection 4(1)* or a terrorism financing offence has been, is being or is about to be committed by any person, it may issue an order freezing any property of that person or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.

(2) An order under *subsection (1)* may include –

(a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order; and

(b) an order to authorise any of its officers to take custody and control of the property, or such part of the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require.

[8] The 1st Defendant has produced an order dated 1.10.2012 issued by the Bank Negara Malaysia under *section 44* of *AMLA* ("the 1st Order'') (pages 71 - 74 of Bundle I) freezing the monies of the 1st Defendant's bank accounts. This would

include CIMB Bank Account Number 14560000662104 of the 1st Defendant into which the Plaintiffs allege having paid or deposited their monies ("the CIMB Account"), which monies they now claim under this suit. The 1st Order also restrains the 1st Defendant from disposing or dealing with any of its property. I agree with submissions of Defendants' counsel that the 1st Order under *section 44* of *AMLA* has the effect of freezing the monies in all the 1st Defendant's bank accounts and is prohibited from making any payment out of any of its bank accounts. The 1st Order was valid for a period of 90 days from the date of the Order.

[9] Subsequently, a further order was issued on 18.12.2012 by the Public Prosecutor under the provisions of *section 50(1)* of *AMLA* (pages 75-77 of Bundle I) freezing the monies in the 1st Defendant's bank accounts including the CIMB Account. *Section 50(1)* of *AMLA* reads:

> (1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under *subsection 4(1)* or a terrorism financing offence or evidence in relation to the commission of such offence or which is terrorist property, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

.....

[11] There is specific reference in both the 1st and 2nd Orders to the CIMB Account. In the 1st Order that reference is found in the Attachment to the order where the CIMB Account is specifically referred as being affected by the Order. And in the 2nd Order it is found in the body of the Order itself. It would be useful to reproduce the relevant part of the 2nd Order for ease of reference.

> To:
>
> CIMB ISLAMIC BANK BERHAD
>
> Head Office Kuala Lumpur
>
> WHEREAS I, ANSELM CHARLES FERNANDIS, Deputy Public Prosecutor being satisfied on the information given to me by HUSEIN BIN ZAKARIA Investigating officer that the moveable property including any monetary instrument or any accretion to it, as set out below:
>
> (vi) GENNEVA MALAYSIA SON BHD (BUSINESS REG. NO. s92s76-A) Current Account No. 14560000662104 ...
>
> is the subject matter of an offence under *subsection 4(1)* of the *Anti Money Laundering and Anti-Terrorism Financing Act 2001 (the Act)* or evidence in relation to the commission of such offence.
>
> NOW PURSUANT to *subsection 50(1)* of the Act, it is hereby ordered that you, your employee or your agent are not to part with, deal in, or otherwise dispose of such property or any part of it until this Order is otherwise revoked or varied.
>
> TAKE NOTICE THAT failure to comply with this Order is an offence under the Act.
>
> Dated: 18 December 2012 (Signed)
>
> Deputy Public Prosecutor

[12] From a reading of *section 54* of *AMLA* it is clear that so long as a seizure of any property under this AMLA remains in force, no action/suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been so seized. At the time of institution of this suit and the trial of the action, the 2nd Order was still subsisting and therefore. the freezing of the 1st Defendant's CIMB Account was effective and in force.

[13] The Plaintiffs have not obtained the requisite prior consent of the Public Prosecutor, as required under *section 54(3)* of

AMLA. As such I find that the institution of this suit is contrary to the prohibition under the said section 54(3) of *AMLA* and the action cannot be maintained.(emphasis added)

[70] *In Genneva Malaysia Sdn Bhd v Abdul Ghani Bin Sher Mohamad* [2018] 5 CLJ 472,; [2017] MLJU 1819, Lau Bee Lan J (now JCA) referred to the case of *Daud Bin Mohamad & 8 Ors. v Geneva Malaysia Sdn Bhd & 4 Ors* (supra) and held as follows –

[47] With respect I am persuaded by the Defendant's argument that the Plaintiffs claim is premature and/or statute-barred for non-compliance of s.54(3) of the *AMLATFA* as the Plaintiff has not obtained the Public Prosecutor's consent to file this suit and its reliance on the decision of Vazeer Alam Mydin Meera JC (as he then was) in the case of *Daud Bin Mohamad & 8 Ors. v Geneva Malaysia Sdn Bhd & 4 Ors.* , KLHC Civil Suit No. 22NCVC-1490-12/2012 dated 30/4/2014. My reasons are these.

[48] I find the Plaintiffs submission that its claim is not against the seized assets but is for a breach of contract is with respect misconceived. It is my finding that there is no established contract. What the Plaintiff is in fact seeking (though not pleaded in that manner) is for the refund of the money which according to SP4 was deposited by the Plaintiff into the Defendant's bank account, CIMB Account no: 14560000662104. The Orders dated 1/10/2012 under s.44 *AMLATFA* and Order dated 18/12/2012 under s.50 *AMLATFA* showed that the monies in the CIMB Account have been frozen and have been seized. This will become apparent when I refer to the relevant parts of Vazeer JC's judgment in Daud Bin Mohamad's case.

[49] In my view the Defendant's reliance on Daud Bin Mohamad's case is appropriate as the facts of the present case is somewhat similar to the former. In Daud Bin Mohamad's case (supra) the plaintiffs were customers of the 1st defendant and had entered into individual contracts to invest in a gold investment scheme operated by the 1st defendant. 2nd to 3rd defendants were directors of the 1st defendant. The 1st defendant marketed and promoted the gold investment scheme as being syariah compliant. The plaintiffs alleged that they have individually paid monies to the 1st defendant to purchase the gold and invest in the scheme and that the gold was never delivered to them. The plaintiffs. amongst others, are seeking the refund of the monies they allege that they have paid to the 1st defendant and monies worth for the gold that they surrendered as part of the renewal of their investment with the 1st defendant." (emphasis added)

[71] In *Dato' Zahari Sulaiman v Geneva Sdn Bhd* [2011] 6 CLJ 219, the Plaintiff sold a used gold coin to the Defendant for a sum of RM647,400.00 to be paid by instalments. The Defendant paid only RM23,400.00. The Defendant failed to pay the balance sum of RM624,000.00. The Plaintiff sued the Defendant for the outstanding sum of RM624,000.00. The Plaintiff was then served with a seizure order under Section 50(1) of *AMLA 2001* and the Defendant's monies in several bank accounts were seized. Premised on the seizure in accordance with the AMLA provisions, the Defendant applied to strike out the Plaintiff's claim premised on Section 54(3) of *AMLA 2001*. Mohamad Arif Yusof J (later JCA) held:

Section 54, it is to be observed, is headed "Dealing with property after seizure to be void." It is obvious from this heading, and from the contents of the Section, that the reference to action, suit or proceeding of a civil nature has to be related to the property seized, in our case the numerous banking accounts of the various Banks seized. Section 54(3) cannot be read the way the Defendant wants it to be read, for to do so will interfere with the general fundamental right of a citizen to resort to court process and access to justice for the determination of his dispute. See e.g. *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 4 AMR 384 (Court of Appeal) for an express recognition of access to justice as a fundamental right. Such an outcome cannot be made dependent merely as an incidental interpretation of this statutory provision. If it is to be excluded, it will require clearer words that those appearing in Section 54(3). Such a reading of the statutory provision will be in keeping with the common law principle of statutory interpretation that requires courts to interpret statutes so as not to interfere with vested rights, unless the statute clearly states so. It will also be in line with Section 17A of our Interpretation Act which requires courts to adopt a purposive interpretation and adopt an interpretation that will promote the purposes and objects of the statute rather than the reverse. Therefore, with all respect due, the Defendant's argument is untenable. Section 54(3), as presently worded, cannot be reasonably interpreted as imposing a general restraining order on all suits, actions or proceedings as against all litigants or potential litigants, and irrespective of the properties seized. To read this provision as imposing a kind of restraining order on legal process generally will, in my view, fall foul of Section 17A of the Interpretation Act.

[72] Significantly however, the Court of Appeal in *Genneva Malaysia Sdn Bhd v Tio Jit Hong & Ors* [2020] MLJU 175 at paragraph 60 of the judgment approved of Mohamad Arif Yusof J (later JCA)'s construction of S 54(3) *AMLA*:

> [60] Be that as it may, having referred to the cases cited related to the issue, we were more inclined to agree with Mohamad Arif Yusof J in *Dato' Zahari Sulaiman v Genneva Sdn Bhd* (supra) which in our view is the correct interpretation of *section 54 (3)*. His Lordship in allowing summary judgment to be entered explained that *section 54(3)* of *AMLA* cannot be read the way the defendant wants it to be read, for to do so will interfere with the general fundamental right of a citizen to resort to court process and access to justice for the determination of his dispute. *Section 54(3)*, as presently worded, cannot be reasonably interpreted as imposing a general restraining order on all suits, actions or proceedings as against all litigants or potential litigants, and irrespective of the properties seized. To read this provision as imposing a kind of restraining order on legal process generally will, in my view, fall foul of *s.17A* of the *Interpretation Act*.

[73] In my view, a close reading of Lau Bee Lan J (now JCA)'s judgment in *Genneva Malaysia Sdn Bhd v Abdul Ghani Bin Sher Mohamad* in fact makes it manifest and quite plain that both Her Ladyship and His Lordship Vazeer Alam Mydin Meera JC (as he then was) in *Daud Bin Mohamad's case* in fact approved of Mohamad Arif Yusof J (later JCA)'s construction of *S 54(3)*:

> [51] I find the dicta of Mohamad Arif Yusoff J in the case of Dato' Zahari Sulaiman (supra) relied on by the learned Counsel for the Plaintiff which is referred to in paras 45 and 46 above has been considered by Vazeer JC at para 14 of His Lordship's judgment. **I agreed with the view expressed at para 15 by the learned JC –**
>
> > [15] I agree with the view of my learned brother that *section 54(3) AMLA* cannot be read as imposing a general restrain (sic) on legal process. **The restrained (sic) must be confined to the property seized**. On the facts of that case, it is not clear if the monies being claimed by the plaintiff therein were paid into the various bank accounts that were seized or frozen. However. in the context of the facts of the case before me now, there is evidence that the monies alleged to have been paid by the plaintiffs and now claimed by the plaintiffs were paid into the CIMB Account. which is frozen under the 2nd Order. Therefore, it relates to properties seized or frozen by order of the Deputy Public Prosecutor. In the premise. the verv subject of the present claim is covered under the 2nd Order. and as such. I am of the opinion that the clear stipulation of *section 54(3)* of *AMLA* requiring the prior written consent of the Public Prosecutor becomes operational. The Plaintiffs would have to seek the prior written consent of the Public Prosecutor before instituting this action. Alternatively. the Plaintiffs could avail themselves of the provisions of *section 60(1)* of *AMLA* to seek a return of their monies in the CIMB Account. (Emphasis added)

[74] The findings in the cases of *Genneva Malaysia Sdn Bhd v Abdul Ghani Bin Sher Mohamad and Daud Bin Mohamad* are distinguishable as the 2 cases were decided on the basis that the very monies the respective plaintiff sought in the 2 suits were the monies that were frozen which is not the case in the present action. The present action against the 2nd and 3rd Defendants is a claim for breach of fiduciary duties as directors of the Plaintiff and for conspiracy to defraud.

[75] The Plaintiff's counsel correctly highlighted another Court of Appeal decision which makes the scope of *section 54(3]* crystal clear – the case of *Tetuan Khana & Co v Saling bin Lau Bee Chiang & Ors and other appeals [2019] 3 MLJ 258* where the Court of Appeal speaking through Hasnah Hashim JCA (Now FCJ) held:

(1) .....

(2) The 27 condominiums did not belong to Kanawagi but to the trust since they were purportedly bought by Kanawagi as a trustee for the benefit of the trust. The properties were also the subject matter of injunctions ordered by the High Court which still remained in force. As such, the properties did not fall within the ambit of the notice of seizure issued to Kanawagi under the AMLA. Based on a reasonable and purposive interpretation of *s 54(3)* of the *AMLA*, read together with *s 17A* of the *Interpretation Acts 1948 and 1967*. *s 54(3)* of the *AMLA* could not be interpreted the way the defendants wanted it to be interpreted, that is. that the plaintiffs were barred from continuing with Suit 106 and Suit 228 in the light of the notice of seizure. The purpose of the AMLA was to provide measures to prevent money laundering and terrorism financing offences – to prevent an accused from dealing with assets or property procured through money laundering or unlawful activities. The instant appeals, however, involved the enforcement of the trust and the allegation that the trustees had mismanaged the trust. The relevant provisions of the AMLA had to be interpreted in line with the purpose and objective of that Act as defined in its preamble. Hence, in the instant case, the High Court had jurisdiction to hear both Suit 228 and Suit 106 (see paras 53 & 56-58). (emphasis added)

[76] I agree with the Plaintiff that a plain interpretation of *section 54* means it prohibits firstly, any dealing with property forming the subject matter of a seizure under the Act. Secondly, whilst seizure of any property remains in force it prohibits the institution, maintenance and continuation of any claim in relation to the subject matter of the seizure without prior consent in writing of the Public Prosecutor; and thirdly, the provisions are property specific and not party specific and as such, the Plaintiff does not need the consent of the Public prosecutor to maintain the present action.

[77] *Lim Hui Jin v CIMB Bank Bhd & Ors* *[2018] 6 MLJ 724* is another Court of Appeal case that fortifies my decision that there is no statutory bar to the present action under *section 54(3) AMLA 2001* as the seizure of the 2nd and 3rd Defendant's bank accounts do not remain in force.

[78] In *Lim Hui Jin's* case, the appellant's mother was investigated for money laundering offences under *section 4(1)* of the Act. In the course of investigations, the appellant's bank account was frozen on under *section 44(1)* of the Act. The appellant's mother, but not the appellant, was charged with offences under the Act. The appellant commenced proceedings seeking the release of the monies and all the accrued interest in his bank account. One of the grounds in opposition raised by the respondents was that the Freezing Order and Seizure Order could not be reviewed by the Court in a civil proceeding by virtue of *section 54(3)* of the Act. The High Court dismissed his action. On appeal, the Court Of Appeal in allowing the appeal amongst others, ruled that *section 54(3)* did not apply to the case because the condition in the operative words *"For so long as a seizure of any property under this Act remains in force"* was not satisfied. The Seizure Order was no longer in force as it had expired by the time the appellant commenced proceedings in the High Court for the release of his bank account. The Court of Appeal elucidated on 2 scenarios:

(i) If there is any prosecution for an offence under the Act, *section 55* allows the Court to make an order for the forfeiture of property if the offence is proved against the accused, or if the offence is not proved against the accused, where the Court is satisfied that the accused is not the true and lawful owner of the property and that no other person is entitled to the property as a purchaser in good faith and for valuable consideration; or

(ii) If there is no prosecution for an offence under the Act, the Court may order seized property to be forfeited upon the application of the Public Prosecutor under *section 56* before the expiration of 12 months from the date of the freezing order or seizure order. This provision also expressly provides for the release of the property to the person from whom it was seized upon the expiration of 12 months from the date of the seizure.

[79] Likewise in the present case, it was also argued by the Plaintiff that even if assuming the damages sought for the breach of fiduciary duties against the 2nd and 3rd Defendants are the monies in the accounts (which it argued vehemently they were not), with the withdrawal of forfeiture proceedings and the monies in the accounts released by the High Court, the statutory bar in *section 54(3)* does not exist anymore.

[80] Unsurprisingly, counsel for the Plaintiff was wholly dismissive of the 2nd and 3rd Defendants' line of arguments on the relevant provisions of AMLA 2001 and politely termed their arguments as "astonishing".

[81] I find it unnecessary to say more. Suffice to say that I agree with the Plaintiff entirely and I find that the 2nd and 3rd Defendants' interpretation of *section 54 AMLA 2001* paid regard to the letter and not its intention.

[82] That being the position, in my judgment, having regard to the facts and circumstances of this case, the Plaintiff do not need the consent of the Public Prosecutor to proceed with this action.

[83] That is not all. I am also of the view whether there has been in fact a breach of fiduciary duties, fraud, deception or non disclosure of facts are matters which can only be decided after trial. This court further assumes what is stated in the Statement of Claim is true – *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals* *[1996] 1 MLJ 661,* at 679.

[84] Having therefore given careful consideration to the history of this unfortunate saga, and the discretion invested in this court in deciding an application of this nature which discretion is to be exercised judicially and not arbitrarily or capriciously, it is difficult to accept the line of arguments by the 2nd and 3rd Defendants that the action is scandalous, frivolous and vexatious or an abuse of the process of the court.

[85] 'Scandalous' in the context of O 18 r 19(1)(b), is taken to mean wholly unnecessary and irrelevant and not just

unpleasant allegations: see eg *Boey Oi Leng (Trading as Indah Reka Construction and Trading) v Trans Resources Corporation Sdn Bhd* [2001] 4 AMR 4807 (HC).

[86] 'Frivolous' or 'vexatious' means that the pleadings are obviously unsustainable: see eg. *Mohamed Nazri, Boey Ai Leng v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405 and *Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors* [2003] MLJU 7. *Technointan Holding Sdn Bhd v. Tetuan Tan Kim & Teh Hong Jet* [2007] 1 MLJ 163; an action raised with no prospect of success to embarrass or annoy the other party to the action.

[87] In the case of *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32 Raja Azlan Shah, J (as **HRH** then was) had made the following observation :

> No precise legal definition can be found as yet, as to the meaning of 'no reasonable defence' or 'frivolous or vexatious' or 'tending to delay the fair trial or the action', but as can be observed a pleading will not be struck out under this rule 'unless it is not only demurrable but something worse than demurrable', that is, such that no legitimate amendment can save it from being demurrable: per Chitty J, in Republic of Peru v Peruvian Guano Co.

[88] As for the meaning of 'an abuse of the process of the court' reference is made to the case of *Gabriel Peter & Partners (suing as a firm) v. Wee Chang Jin* [1998] 1 SLR 374 at p. 384:

> The term 'abuse of the process of the Court', in Order 18 rule 19(1) (d), has been given a wide interpretation by the Courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the Court must be used *bona fide* and properly and must not be abused. The Court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose... if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the Court.
>
> 31. Gopal Sri Ram JCA (as he then was) in the case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340*,* at 352 said this in regard to the doctrine of abuse of process):
>
> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

[89] The Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 pronounced that the court has an inherent jurisdiction to prevent an abuse of its process (SC).

[90] Indeed, Gopal Sri Ram, JCA (as he then was)'s judgment in the Court of Appeal case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346*,* at 356, 357 and 358 reminded that the res judicata doctrine is based on case law and should not be applied indiscriminately so as to cause an injustice.

[91] In my view, upon a careful scrutiny of the Plaintiff's statement of claim, it cannot be said to be so hopeless or unsustainable to be struck out but instead the Plaintiff ought to be given its day in court by way of a full trial to meet the ends of justice otherwise it will be inimical to what is just and reasonable.

[92] Having decided that the 2nd and 3rd Defendants have no basis to stifle the Plaintiffs claim summarily, I do not find it necessary to deal with the Plaintiff's argument on whether the 2nd and 3rd Defendants by having agreed to a consent order to a Mareva injunction in this action after being granted a discharge of the criminal charges is approbating and reprobating at the same time.

[93] I therefore dismiss the 2nd and 3rd Defendants' application made under O 18 r 19 (1) (b) and/or (c) and/or (d) of the Rules of the High Court 1980 with costs of RM25,000 subject to allocator.

[94] In writing this judgment, I hasten to state that I have relied considerably on the parties' counsel's meticulous research and submission which I find to be of great use and thank them for their assistance to the court.

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