RAPHAEL PURA v. INSAS BHD & ORS
FEDERAL COURT, KUALA LUMPUR
STEVE SHIM, CJ (SABAH & SARAWAK); ABDUL MALEK AHMAD, FCJ; ABDUL HAMID MOHAMAD, JCA
CIVIL APPEAL NO: 02-6-2001(W)
17 DECEMBER 2002
[2003] 1 CLJ 61

***CIVIL PROCEDURE**: Appeal - Appeal to Federal Court - Appellate jurisdiction - Appeal for leave granted - Whether question posed fell outside of ambit of issues raised in courts below - Whether court seised with jurisdiction to grant leave to hear appeal - Courts of Judicature Act 1964, s. 96(a)*

The plaintiffs had commenced an action, seeking damages for libel and slander, against the defendant in relation to an article published in a magazine. Before the trial commenced, the defendant applied to the trial judge to amend his defence on three occasions but these were refused on the ground of delay. After the third attempt failed, the defendant appealed to the Court of Appeal which however upheld the trial judge's decision and stated that the application lacked *bona fides*. The defendant proceeded to seek leave from the Federal Court to appeal thereto. The Federal Court granted the defendant's application and it sought to consider the proper test the court should apply in defamation cases where application for amendments were made to include a plea of justification in the defence when the evidence relating to the particulars were discovered after the pleadings were closed.

Before the appeal was heard, the plaintiffs raised the following preliminary objections:

> i) the question/issue for which leave was granted was not one that arose or was decided by the High Court in the exercise of its original jurisdiction and/or by the Court of Appeal;
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> ii) consequently, the Federal Court did not have the jurisdiction to grant leave. Accordingly, the leave granted should be withdrawn/set aside and/or the aforesaid appeal should be dismissed;
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> iii) the question for which leave was granted was hypothetical and/or academic; and
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> iv) consequently, the Federal Court should decline to answer the question and the aforesaid appeal ought to be dismissed.

Held:

Per Abdul Hamid Mohamad JCA (majority)

> **[1]** Generally, where the Federal Court has granted leave to appeal, it is not open to the party to re-litigate this issue. It is *res judicata*. In the interest of

consistency, a new panel of this court should not be reversing the decision of the earlier panel of the same court. However, where the granting of the leave is challenged on the ground of lack of jurisdiction, then this may still be challenged even at the hearing of the appeal.

[2] The defendant's main purpose to amend his defence was to separate the roll-up plea of justification and fair comment. The question posed by the Federal Court did not reflect the issues discussed by the High Court and the Court of Appeal in dismissing the defendant's application to amend his defence. Instead, it related to the test applicable where evidence relating to the particulars were discovered after the pleadings were closed. Based on the Federal Court's decision in *The Minister for Human Resources*, this court should decline to answer the question posed.

[3] The question posed did not relate to the facts of the case and was therefore rendered academic. Based on the defendant's own affidavit, it was clear that the particulars were not discovered after the pleadings were closed.

[4] The defendant did not come to this court to know what the law is in this country on a hypothetical issue. He sought for the proposed amendments to be admitted. However, this court would not be able to grant the order sought by the defendant as the facts of the case were materially different from the facts that formed the basis of the answer to the posed question.

[Preliminary objection allowed; appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pihak plaintif telah memulakan suatu tindakan, bagi mendapatkan pampasan untuk libel dan slander, terhadap defendan berkenaan suatu artikel yang telah diterbitkan dalam suatu majalah. Sebelum perbicaraan dimulakan, defendan telah memohon tiga kali kepada hakim perbicaraan untuk membuat pindaan kepada penyata pembelaannya tetapi ianya telah ditolak atas alasan kelengahan. Selepas percubaan ketiganya gagal, defendan telah membuat rayuan ke Mahkamah Rayuan yang sebaliknya telah mengesahkan keputusan hakim perbicaraan dan menyatakan bahawa permohonan tersebut berkurangan *bona fides*. Defendan menuju ke Mahkamah Persekutuan untuk mendapatkan kebenaran merayu kepadanya. Mahkamah Persekutuan telah membenarkan permohonan defendan dan ia mengimbang ujian yang patut dipakai oleh mahkamah dalam kes-kes fitnah di mana permohonan untuk pindaan dibuat untuk suatu akuan justifikasi dalam pembelaan bilamana bukti berkenaan dengan butir-butir ditemui selepas pliding ditutup.

Sebelum rayuan tersebut dibicarakan, pihak plaintif telah mengutarakan bantahan-bantahan awal berkenaan:

i) soalan/isu dimana kebenaran diberikan adalah bukan suatu yang timbul atau telah diputuskan oleh Mahkamah Tinggi dalam menjalankan bidangkuasa asalnya dan/atau oleh Mahkamah Rayuan;

ii) oleh yang demikian, Mahkamah Persekutuan tidak mempunyai bidangkuasa untuk memberi kebenaran. Berikutan ini, kebenaran yang

diberikan patut ditarikbalik/diketepikan dan/atau rayuan yang dimaksudkan sebelum ini harus ditolak;

iii) soalan yang mana kebenaran diberikan adalah andaian dan/atau akademik; dan

iv) oleh yang demikian, Mahkamah Persekutuan harus menolak untuk menjawab soalan tersebut dan rayuan yang dimaksudkan sebelum ini harus ditolak.

Diputuskan:

[Bantahan awal ditolak; rayuan dibenarkan; defendan diarahkan membayar pihak plaintif kos atas pindaan.]

Oleh Abdul Hamid Mohamad HMR (majoriti)

[1] Pada amnya, dimana Mahkamah Persekutuan telah memberi kebenaran untuk membuat rayuan, ia tidak terbuka kepada suatu pihak untuk melitigasikan semula isu ini. Ia adalah *res judicata*. Dalam kepentingan ketekalan, suatu panel yang baru mahkamah ini tidak harus mengakaskan keputusan panel sebelum ini dari mahkamah yang sama. Akan tetapi, di mana pemberian kebenaran dicabar atas alasan kekurangan bidangkuasa, maka ini masih boleh dicabar walaupun pada masa rayuan ini dibicarakan.

[2] Tujuan utama defendan meminda pembelaannya adalah untuk mengasingkan akuan "roll-up" justifikasi dan komen berpatutan. Soalan yang ditimbulkan oleh Mahkamah Persekutuan tidak membayangkan isu- isu yang dibicarakan oleh Mahkamah Tinggi dan Mahkamah Rayuan dalam menolak permohonan meminda pembelaannya. Sebaliknya, ia bersangkut-paut dengan ujian yang terpakai di mana bukti berkenaan dengan butir-butir ditemui selepas pliding ditutup. Berdasarkan keputusan Mahkamah Persekutuan dalam *The Minister for Human Resources*, mahkamah ini seharusnya menolak menjawab soalan yang ditimbulkan.

[3] Soalan yang ditimbulkan tidak merujuk kepada fakta-fakta kes tersebut dan oleh itu menyebabkannya menjadi akademik. Berdasarkan kepada afidavit defendan sendiri, adalah jelas bahawa butir-butir tidak dizahirkan selepas pliding ditutup.

[4] Defendan tidak datang ke mahkamah ini untuk memaklumkan undang-undang di negara atas isu andaian. Beliau memohon untuk usul pindaannya diterima. Walau bagaimanapun, mahkamah ini tidak boleh membenarkan permohonan yang dikehendaki oleh defendan kerana terdapat perbezaan ketara antara fakta kes dengan fakta yang membentuk asas kepada soalan yang ditimbulkan.

Bantahan awal dibenarkan; rayuan ditolak dengan kos.]

[Appeal from Court of Appeal, Civil Suit No: W-02-720-1999]

Reported by M Maheswaran

Case(s) referred to:

Ainsbury v. Millington [1987] 1 All ER 929 ***(refd)***

Associated Leisure Ltd & Ors v. Associated Newspapers Ltd [1970] 2 All ER 754 ***(refd)***

Atkinson v. Fitzwalter & Ors [1987] 1 All ER 483 ***(refd)***

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 ***(refd)***

Capital Insurance Bhd v. Aishah Abdul Manap & Anor [2000] 4 CLJ 1 ***(dist)***

Christopher Neville Williams v. Mirror Group Newspapers (1986) Ltd ***(refd)***

Kiam v. MGN Ltd (No 2) [2002] EWCA Civ 66 ***(refd)***

Lam Kong Company Ltd v. Thong Guan Co Pte Ltd [2000] 4 CLJ 769 ***(dist)***

Loknath Padhan v. Birendra Kumar Sahu [1974] AIR 505 ***(refd)***

Lucas-Box v. News Group Newspaper Ltd; Same v. Associated Newspapers Group PLC & Ors [1986] 1 WLR 147 ***(refd)***

Lownds v. Home Office [2002] EWCA Civ 365 ***(refd)***

McDonald's Corp & Anor v. Steel & Anor [1995] 3 All ER 615 ***(refd)***

McPhilemy v. Times Newspapers Ltd & Ors [1999] 3 All ER 775 ***(refd)***

Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645; [2002] CLJ JT(2) ***(dist)***

Sun Life Assurance Company & Canada and Jervis (1994) The Law Reports Appeal Cases, p 111 ***(refd)***

Sutherland & Ors v. Stopes [1925] AC 47 ***(refd)***

Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors And Another Application [1999] 1 CLJ 325 ***(refd)***

The Minister of Human Resources v. Thong Chin Yoong & Another Appeal [2001] 3 CLJ 933 ***(foll)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ

(Rep) 428 ***(refd)***

Wright Norman & Anor v. Oversea-Chinese Banking Corp Ltd [1994] 1 SLR 513 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)

Courts of Judicature Act 1964, ss. 68(1)(a), 96(a)

Industrial Relations Act 1967, s. 20(3)

Rules of the Court of Appeal 1994, rr. 18(4)(d), (7)

Rules of the High Court 1980, O. 18 r. 20, O. 20 r. 5(5)

Counsel:

For the appellant - Geoffrey R Robertson (Dato' Muhammad Shafee Abdullah, Leena Ghosh & Rishwant Singh); M/s Shafee & Co

For the respondents - V Sithambaram (Dato' V Sivaparanjothi, R Thayalan & Wong Kee Them); M/s Siva & Partners

Case History:

High Court : [1999] 4 CLJ 784
Court Of Appeal : [2000] 4 CLJ 830

JUDGMENT

Abdul Hamid Mohamad JCA:

Background Of The Case

The appellant before this court was the appellant in the Court of Appeal (W-08-720-99) and the defendant in the High Court (S2-23-42-1996). The respondents (respondents in the Court of Appeal and the plaintiff in the High Court) had filed a suit against the appellant for damages for libel and slander arising from a publication in the International Commercial Litigation Magazine, November 1995 issue, entitled "Malaysian Justice on Trial."

A brief chronology of the proceedings may be useful to get an overall picture of the case.

Writ and statement of claim was filed on 13 June 1996. On 9 September 1996 the appellant filed and served his defence. On 23 September 1996 the respondents filed and served their

reply to the defence. In 1997, the respondents took out a summons for direction which was heard and disposed of by October 1997. On 19 March 1999, 20 May 1999 and 7 June 1999 learned counsel for both sides appeared before the learned judge for case management. Directions were given and the matter was fixed for trial starting from 1 September 1999.

On 14 August 1999 the appellant filed an application (the first application, encl. 23) to amend his defence. This application was subsequently withdrawn as it was not supported by an affidavit and also on the grounds that there were some additional minor amendments to be included. On 21 August 1999, a second application to amend the defence was filed (encl. 31A). It was fixed for hearing on 1 September 1999.

During this period the appellant had also made an application to disqualify the judge from hearing the suit. That application was dismissed by the learned judge on 30 August 1999.

On 1 September 1999 the appellant filed a summons in chambers to amend the prayers in encl. 31A. This was fixed for hearing on the same day as encl. 31A.

On 1 September 1999, the learned judge dismissed the summons in chambers. Learned counsel for the appellant then made an oral application similar to that contained in the summons in chambers that had been dismissed. This too was dismissed by the learned judge. Following that the learned judge dismissed the second application to amend the defence.

On 3 September 1999, the appellant filed a fresh summons in chambers (the third application, encl. 43) to amend the same defence. This happened three days before the trial was scheduled to begin. On 6 September 1999, the day the trial was to begin, learned counsel for the appellant made an application for an adjournment of the trial, one of the grounds for which was that encl. 43 should be determined before the trial commenced. The application was refused by the learned judge. The trial commenced and continued on the following day. On that day (7 September 1999), in the course of the cross-examination of the respondents' third witness it became apparent to the court that it was necessary for the application for amendment (encl. 43) to be heard first. The learned judge fixed encl. 43 for hearing on the following day. So, on 8 September 1999 encl. 43 was heard and dismissed with costs. The appellant appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal on 23 September 2000. On 28 March 2001, the Federal Court granted the appellant leave to appeal to this court. The court also gave leave to the appellant to file and serve a notice of appeal within seven days of the order and that all proceedings in the High Court action be stayed pending the hearing and final disposal of the appeal.

The appeal was fixed for hearing on 13 May 2002.

Notice Of Motion

On 9 March 2002, the respondents filed a notice of motion, praying for orders, *inter alia*, that the order of the Federal Court dated 28 March 2001 granting leave to the appellant to appeal to the Federal Court be set aside, that the said application for leave be reheard by a newly and differently constituted panel of the Federal Court.

However, on the day fixed for the hearing the notice of motion and the appeal (13 May

2002), the respondent withdrew the application. We allowed the application to withdraw the notice of motion. However, after hearing learned counsel for the appellant and the respondents we reserved our decision on the issue of costs.

On costs of the notice of motion, Dato' V. Sivaparanjothi for the respondents informed the court that the respondents had, by a letter dated 7 May 2002 (six days before the date fixed for the hearing of the notice of motion) written to the registrar of the Federal Court, with a copy to the appellant's solicitors, that the respondents were withdrawing the notice of motion. Learned counsel for the respondent submitted that the proper order for the court to make regarding costs is that the costs be taxed and paid to the appellant.

However, Dato' Muhammad Shafee Abdullah, the learned counsel for the appellant asked the court to award costs on "indemnity basis". He cited the case of *Lownds v. Home Office* [2002] EWCA Civ. 365. That is a decision of the Court of Appeal of England (Civil Division).

Another decision of the same court, *Kiam v. MGN Ltd. (No. 2)* [2002] EWCA Civ. 66; [2002] 2 All ER 242 was also referred to by the learned counsel.

It is very clear from the judgment of Woolf CJ (delivering the judgment of the court) in *Lownds v. Home Office*, that the judgment was based on the specific provision of the (English) Civil Procedure Rules 1998. As the judgment clearly says:

> Part 44.4 provides for two basis of assessment. The first is the standard basis and the second is the indemnity basis.

The factors which the court may take into account when assessing costs on the standard basis and on the indemnity basis are specifically provided in Part 44.5.

As this court is not governed by those provisions in the (English) Civil Procedure Rules 1998, I do not think it is necessary to reproduce those provisions and discuss them in detail. All that need be said, perhaps, is the distinction between the two. In assessing costs on the standard basis only "costs which are proportionate" are allowed. On the other hand, when costs are assessed on an indemnity basis there is no requirement of proportionality.

It was not shown to us, neither could I find a similar provision in either the Rules of the Court of Appeal 1994 (RCA 1994) or the Rules of the High Court 1980 (RHC 1980).

In my view, this court is bound by the provisions of our own Rules and not that of any other country. It is a matter for the Rules Committee established under s. 17 of the Courts of Judicature Act 1964 whether or not to make such rules. It is not for this court to usurp the functions of the Committee.

Furthermore, this court too should be careful and slow to adopt the decisions of the courts in other countries, even on the basis that it forms parts of the common law of England, which on this point, it is not. Particular attention must be paid to the written law of this country. In other words, the provisions of s. 3(1) of the Civil Law Act 1956, must always be borne in mind.

In this case, applying the principles of taxation as embodied in our law, written and case law, the proper order that the court should make is that the costs arising from the filing the notice

of motion by the respondents should be taxed as provided for under our Rules and paid to the appellants.

The Appeal

The Proposed Amendments

So as not to lose our focus, it is important to state briefly the proposed amendments and the grounds relied on by the appellant in support of the application.

First, the proposed amendments. It is too long to reproduce it in this judgment. However, basically, as stated in the appellant's submissions, para. 18:

> ... the Appellant, would advance separate and district plea of justification and of fair comment in place of the "rolled-up plea". As such, by the proposed amendment, the Appellant seeks to plead justification under "new" paragraph 15 and fair comment under "new" paragraph 16."

In the new para. 15 which consists of 36 sub-paragraphs the appellant seeks to introduce particulars pertaining to the "*Ayer Molek* Case" and the *"Vincent Tan"* case.

In para. 16 which consists of 15 sub-paragraphs, the appellant seeks to introduce particulars pertaining to the "Wee Choo Keong" election petition; the contempt of court case against Wee Choo Keong by MBf Holdings Berhad and MBf Finance Berhad; particulars pertaining to the corruption charge against a former magistrate, Thavanathan; particulars pertaining to the failure to charge Tan Sri Abdul Rahim Thamby Chik ("Rahim"), the former Chief Minister of Malacca for having sex with an underaged girl and the fact that 15 other men were charged; particulars about the charges against Rahim for corruption that were subsequently withdrawn; particulars concerning the death of one Lee Quat Leong while under police detention in which, it was alleged, that "only 2 low ranking police officers were charged. Both police officers pleaded guilty and were given relatively light sentence".

The affidavit in support of the application for amendment was filed by the appellant. Regarding the proposed amendment to para. 15 of the defence, the appellant explained:

> Paragraph 15 under the proposed amendment to the Defence seeks to adumberate further particularisation in support of the justification meaning already present in the existing Defence. Furthermore, the proposed amendment also maintains separate defences of justification and fair comment instead of the rolled up plea forwarded in the existing Defence.
>
> As such, the proposed amendments to the Defence merely provide further particularisation and clarity in comparison to the existing Defence filed and does not propose to alter the character of the suit nor incorporate new facts in any manner inconsistent with the thrust of the existing Defence. The detailed particularisation of the factual representations in relation to the *Ayer Molek* case (as it appears in paragraph 15.1 to 15.27 of the Proposed Amended Defence) have in actual fact already been pleaded by the defendant in a previous suit related to this present suit involving the same Plaintiffs (Suit No: S4-23-44-1996 *Insas Bhd. & Anor. v. Tommy Thomas & Anor* (hereinafter

referred to as the "Previous Suit")) and hence does not take the Plaintiffs by surprise for they are aware of such particulars. Moreover, all documents in relation to the*Ayer Molek* case are already in contention since the Plaintiffs have made this an issue in this proceeding (as apparent in their alleged defamatory meaning attributable to the said words).

Regarding the delay in making the application, the appellant explained:

> (b) The delay in making this application to amend the Defence is attributable to the need to make careful comparisons and confirmation of the copies of the documents (related to the evidence in relation to the defences justification and the plea of qualified privilege) to the original documents. For purposes of safe-keeping some of the copies of the documents were kept overseas making access more difficult and slow. The need to make careful assessment of these documents before considering them as evidence to the pleas stated are obvious as the defences already raised earlier, especially on justification are rather serious in the light of the controversy relating to the Judiciary. Leading cases on this issue have often reiterated the principle that a pleading must not put a plea of justification (or indeed the other related pleas) on record lightly or without careful consideration of the evidence available or likely to become available.
>
> Moreover, there was also the need to confirm and confer some of these documents with the intended witnesses, who are in the country and abroad, confirmation of which has only recently been done as various Official and Non-Official Agencies are involved in certain on-going related investigations.
>
> Yet again, I wish to stress that these are not fresh evidence but documentary evidence in support of what was already pleaded in the existing Defence. However, in order to plead a more detailed Defence, I had to have sight of the documents. The documents have been incorporated into a List of Documents and have filed in this Honourable Court. A copy of it has already been served on the Plaintiffs on 14.8.1999.

The Executive Director of the plaintiffs filed an affidavit in reply. I shall only reproduce those parts which are more relevant to this judgment.

> 8(k)... the proposed amendments to the Defence in fact leads to new issues being raised by the Defendant.
>
> 9.....
>
> > (a)there is an inordinate delay in making the said Application by the Defendant which causes serious prejudice and detriment to the Plaintiffs;
> >
> > (b)the said Application for amendment is being made after the trial has commenced and the Plaintiffs' third witness (myself) is under cross examination by the Defendant's Counsel;

(c)the Defendant's explanation that the delay is attributable to the need to make comparisons and confirmation of the copies of the document to the original documents are mere allegations not supported by evidence. In any event a Defendant does not take more than three (3) years just to compare and confirm documents;

(d)it also does not take more than three (3) years to compare and confirm documents just because they are alleged to be kept overseas unless the place in which the documents are kept is inaccessible by modern transportation;

(e)similarly it does not take a Defendant more than three (3) years to make assessment of documents. Further, there is no controversy relating to the judiciary as alleged by the Defendant in Paragraph 8(b) of the said Affidavit (page 9);

(f)it is true that it is a principle of law that a Defendant must not put a plea of justification on the record lightly or without careful consideration of the evidence available or likely to become available but that principle of law does not apply to the circumstances of our case;

(g)it also does not take more than three (3) years to confirm and confer documents with intended witnesses and the deponent of the said Affidavit had not disclosed the alleged "various Official and Non-Official Agencies" and the "certain on-going related investigations" as stated in Paragraph 8(b) of the said Affidavit (at page 9);

(h)further, the matters deposed to in Paragraph 8(b) of the said Affidavit are mere allegations not supported by evidence;

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(c) the alleged particulars the Defendant seek to include in the proposed Amended Defence are matters which allegedly took place in 1994 and 1995;

(d) therefore there is an inexcusable and inordinate delay on the part of the Defendant in filing the said Application. As stated in Paragraph 9 above, the purported reasons for the delay in filing the said application as stated in the said Affidavit are wholly misconceived and untenable in law. This is a clear tactical manoeuvre by the Defendant to delay and derail the trial of this action by filing an application at such a late stage of the proceedings to the serious detriment and prejudice of the Plaintiffs;

The Judgment Of The High Court

From the judgment of the learned High Court judge, it is clear that the learned judge dismissed the application because no exhibits were attached to the affidavit in support of the application. This is what the learned judge said:

> To a question by the Court whether the defendant had attached any exhibits to his affidavit to back up his allegations, Encik Shafee's response was there are no exhibits attached because there is no necessity...
>
> To my mind the defendant has failed to show a basis to seek the amendment. Whilst affirming an affidavit he has totally failed to exhibit any documents that support his prayer for amendment. Without the exhibits how is the Court to know the basis of the defendants' allegations. In his affidavit at para 2 the defendant has admitted having "records" to which he has access on which the affidavit was based. Where are those records? What are those records?... I hold the omission as deliberate because there are no such records or original records. If there were they would have been produced...

The second ground, which was dealt under "Merits" appears to have been summed up by the learned judge in the penultimate sentence of his grounds of judgment:

> There is total lack of merit in this application which lacks *bona fide.*

Why was there "a total lack of merits"? This appears to relate to the statement by the appellant that he had to keep some of the documents overseas for safe keeping. The learned judge viewed such a suggestion as "tarnishing the image of this beautiful country. It suggests that nothing is safe, when such is totally false and a mischievous suggestion at that to make."

The learned judge continued:

> Assuming this is true, i.e. that some documents were kept overseas, what were they. This Court must be shown the documents and they must be identified to satisfy the Court that the contention of the defendant that it is unsafe to keep these documents in this country is true. No such affidavit evidence has been led. Mr. Raphael Pura's allegation that it is not safe to keep documents in this country is a very serious accusation that must be met with the clearest evidence from him. Otherwise it could lead to a suggestion of *mala fide* on the part of the defendant.
>
> Now asuming the documents were top secret material that had to be secreted overseas for safe-keeping then clearly on the defendant's own admission such documents fall under the Official Secrets Act. No one can disclose these even in Court. So therefore any amendment sought that requires the admission of such documents will have no leg to stand on in any case.
>
> On the other hand, if the said documents do not fall under the OSA then what is so secret about these documents that they could not be produced much earlier during the case management stage. In any case if the defendant feared for the safety of the original documents, all that is needed during the case

> management is to only tender photostat copies of such documents. The defendant could have given an undertaking to the Court to produce the originals at the trial. If there is a will, there is always a way.
>
> In any case the defendant's own contradictory affidavit in support of this application shows the total lack of merit in this application. The defendant has admitted that what is sought to be admitted is not fresh evidence and that they have been raised in an earlier suit. Whilst the defendant has not identified the suit, I am satisfied that the defendant is satisfied that the amendments sought have been already raised in another suit. If that be the case then the defendant's earlier averment that he could not amend earlier because he had to interview the witness and compare documents and secrete the documents for safekeeping overseas are all untrue. There is total lack of merit in this application which lacks *bona fide*.

Those were the grounds on which the learned judge dismissed the application.

The Judgment Of The Court Of Appeal

It is important to note that before the appeal was heard by the Court of Appeal, a motion was filed by the appellant praying, *inter alia*, for an order that the appellant be granted an extension of time to file and serve a Supplementary Records of Appeal incorporating the documents within the Common Agreed Bundle of Documents marked as "CABD3" filed in the High Court. This application ("regarding "CABD3") was disallowed by the Court of Appeal.

The Court of Appeal then went on to consider the appeal on merits. The judgment of the Court of Appeal dealt with the law relating to amendments of pleadings. As it is not very long, for easy reference, perhaps it should be reproduced:

> The provision relating to amendment of the writ and pleadings is governed by Order 20 rule 5 of the Rules of the High Court 1980. It is trite that amendments can be made at any stage of the proceedings including at the trial. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. It is equally trite if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, the apex court of this country, had the occasion to consider and interpret Order 20 rule 5. It is the case of *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.[1983] 1 CLJ 191; [1983] CLJ (Rep) 428*; [1983] 1 MLJ 213 where the Federal Court set out three basic questions for consideration, *viz:*
>
> > (1)whether the application is *bona fide*;
> >
> > (2)whether the prejudice caused to the other side can be compensated by costs; and
> >
> > (3)whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent

character.

As we are here dealing with the application for the amendment of defence, question (1) above would be relevant for consideration. If it is allowed, if follows that the other party should be compensated by costs.

This court similarly had considered Order 20 rule 5 *Taisho Co. Sdn. Bhd. v. Pan Global Equities Bhd.* [1999] 1 MLJ 359. In *Taisho* 's case, the amendments relate to the amendment of the statement of claim. Be that as it may, the questions posed in Yamaha would still be equally applicable to the present appeal before us. If the application of the appellant, on the facts before the learned judge, showed lack of *bona fide* then he fails in his application altogether. It is then for the appellant asking the court to exercise a discretionary power in his favour to place some material and advance some cogent reasons to impel the court to lean on his side (see *Multi-Pak Singapore Pte. Ltd. (In receivership) v. Intraco Ltd. & Ors* [1992] 2 SLR 793; [1993] 2 SLR 113).

The learned judge in his judgment at page 45 of the Appeal Record ruled "There is total lack of merit in this application which lacks *bona fide* ". Lack of *bona fide* or put it another way, *mala fide* is very much a ground in considering an application for amendment under Order 20 rule 5 (see also *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] MLJ 230). We then need to examine the material placed before him and whether cogent reasons were advanced by the appellant for the court to exercise its discretionary power in his favour.

The court then considered the "*bona fide* issue" and concluded:

We may not wholly agree with the approach the learned Judge took in dealing with the application when he asked the appellant's counsel to address him on 5 issues. With respect, he should be guided by the principle set out in the Yamaha case. We may also not totally agree with his reasons on the bona fide issue. However, we agree with his conclusion on the lack of *bona fide* on the part of the appellant in his application. We were satisfied that on the affidavit evidence there was insufficient material placed before him and even if there was sufficient material no cogent reasons were advanced by the appellant. The learned Judge had, in our view, correctly exercised his judicial discretion in dismissing the application which borders on lack of *bona fide*. If the appellant fails on this ground, he fails altogether.

There were no compelling grounds for us to interfere with the exercise of his discretion with the exception of the amendment too the title, rewording of the parties and paragraphs 3.1 and 3.3, where we allowed them as they are merely formal. However, the appeal was dismissed with costs. The deposit to go to the respondents towards their taxed costs.

Leave Of The Federal Court

Pursuant to an application for leave to appeal to this court, this court, on 28 March

2002, made the following order:

> IT IS HEREBY ORDERED that the Application for leave to appeal to the Federal Court be allowed with costs on the second issue which is re-worded as follows:- "What is the proper test the Court should apply in defamation cases where application for amendments are made to include a plea of justification in the defence when the evidence relating to these particulars are discovered after the Pleadings are closed.

Preliminary Objection

The appeal was fixed for hearing on 13 May 2002. On 7 May 2002, learned counsel for the respondent wrote to the registrar informing the court that at commencement of the hearing of the appeal, the respondent would "take a preliminary objection and invite the honourable court to consider the following matters/issues:

> **(A)the question/issue for which leave was granted is not a matter/issue that arose or was decided by the High Court in the exercise of its original jurisdiction and/or by the Court of Appeal;**
>
> **(B)consequently, the Federal Court did not have jurisdiction to grant leave. Accordingly, the leave granted should be withdrawn/set aside and/or the aforesaid appeal ought to be dismissed;**
>
> **(C)the question for which leave was granted is hypothetical and/or an academic question; and**
>
> **(D)consequently, the Federal Court should decline to answer the question and the aforesaid Appeal ought to be dismissed.**

I shall now deal with the preliminary objection first.

Learned counsel for the respondents argued that the question posed by the Federal Court did not arise from or was not decided by the High Court or the Court of Appeal. Referring to the question posed by the Federal Court (reproduced earlier) he stressed on the words "when the evidence relating to these particulars are discovered after the pleadings are closed." The learned counsel submitted that the appellant's case at the High Court was quite opposite from the question posed by this court. The appellant had clearly stated in his affidavit that the proposed amended defence "are not fresh evidence but documentary evidence in support in what was pleaded in the existing defence". The appellant further admitted in the said affidavit that "the existing defence filed and does not propose to alter the character of the suit nor incorporate new facts in any manner inconsistent with the thrust of the existing defence. The detailed particularisation of the factual representations in relation to the *Ayer Molek* case (as it appears in paras. 15.1 to 15.27 of the proposed amended defence) have in actual fact already been pleaded by the defendant in a previous suit related to this present suit involving the same plaintiffs."

The learned counsel for the respondents went on to argue that this court had no jurisdiction to grant leave as per question posed and urged this panel to set aside the

leave granted by the earlier panel or, alternatively, to decline to answer the question posed as it is academic. The learned counsel for the respondents submitted that the question posed did not arise from the judgment of the Court of Appeal in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction. He referred to s. 96(a) of the Courts of Judicature Act 1964, the cases of *Lam Kong Co. Ltd. v. Thong Guan Co. Pte. Ltd.* [2000] 4 CLJ 769 FC, *Capital Insurance Bhd. v. Aishah bte. Abdul Manap & Anor* [2000] 4 CLJ 1 FC, *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 3 CLJ 933 FC, *Megat Najmuddin bin Dato' Seri (Dr.) Megat Khas v. Bank Bumiputra (M) Bhd.[2002] 1 CLJ 645; [2002] CLJ JT(2)*FC.

The first question that arises from this submission is whether, the leave having been granted by this court and now that this court (this panel) is constituted to hear the appeal, this court (this panel) should allow the respondents to reopen the issue whether the leave should have been granted or not.

Generally speaking, it should not. The issue has been decided by this court. It is *res judicata*. A party should not be given a second bite of the cherry. A new panel of this court should not be reversing the decision of the earlier panel of the same court. There should be consistency in the judgment of the court.

However, where the granting of the leave is challenged on the ground of lack of jurisdiction, this court has held that the granting of the leave to appeal to this court may still be challenged even at the hearing of the appeal.

In *Capital Insurance Bhd*., during the hearing of the appeal from the High Court to the Court of Appeal, a preliminary objection was raised in the Court of Appeal that the record of appeal was bad in law and ought to be set aside for non-compliance with r. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. The Court of Appeal upheld the preliminary objection and dismissed the appeal. During the hearing of the application for leave to appeal to the Federal Court, a preliminary objection was raised that the application for leave was improper. The preliminary objection "was summarily dismissed." At the hearing of the appeal, the respondent raised a preliminary objection in respect of the jurisdiction of the Federal Court to hear the appeal. It was submitted that the subject matter of the appeal was not from the judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction. Mohamed Dzaiddin FCJ (as he then was) delivering the judgment of the court said, *inter alia* :

> Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at a leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application.

In *The Minister for Human Resources* the High Court issued an order of certiorari to quash the decision of the Minister made under s. 20(2) of the Industrial Relations Act 1967. The High Court held that the Minister erred in the exercise of his discretion under s. 20(3) of the Actin declining to refer the representations of the claimant to the Industrial Court. The Federal Court granted leave to appeal and framed the following question for its

determination: 'Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment'. At the hearing of the appeal the claimant raised a preliminary objection that the question as framed did not come within the meaning of s. 96(a) of the Courts of Judicature Act 1964('the CJA') and hence the appeal should be dismissed forthwith.

Held, allowing the preliminary objection:

> (1)The High Court and the Court of Appeal did not consider the issue of suspension except to say that it may be relevant for the purpose of determining whether the claimant was entitled to declare that he was constructively dismissed. This issue involved mixed questions of law and fact for the Industrial Court. Further, the question as framed seems to indicate that it was a point of law in which case then the proper forum to consider would be the Industrial Court. Hence, the Minister erred in the exercise of his discretion under s. 20(3) of the Act(see p 231C-D).
>
> (2)The Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that the court should make would be to decline to answer the question. It is best that the issue of suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse. In the circumstances of the case the court agreed with the preliminary objection that the question framed by this court for its determination did not come within the ambit of s. 96(a) of the CJA(see p 231E-G).

So, at least in those two cases this court has allowed the issue to be raised by way of a preliminary objection at the hearing of the appeal. In the circumstances I accept that the respondents in the present case may be allowed to raise this issue at this stage even for the first time.

So the question is whether this appeal falls outside the ambit of the provisions of s. 96(a) of the Courts of Judicature Act 1964?

In answering this question, the following points should be noted. In *Lam Kong Co. Ltd.*, the judgment under appeal was the decision of the Court of Appeal made in an application filed in the Court of Appeal. In other words the application itself originated in the Court of Appeal. In the present appeal the application for amendment was made in the High Court. Against the order of the High Court there was an appeal to the Court of Appeal. It is against the judgment of the Court of Appeal in that appeal from the High Court that the appellant appealed to the Federal Court. In that respect *Lam Kong Co. Ltd.* is distinguishable from the present appeal.

Capital Insurance Bhd. can also be distinguished on the same ground. There too a preliminary objection was raised in the Court of Appeal that the record of appeal had not complied with r. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. In other words,

the matter originated in the Court of Appeal.

It is the same with *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas.*

However, *The Minister for Human Resources* is different. It is in fact similar to this case. In that case, the matter (application for *certiorari*) originated in the High Court. There was an appeal to the Court of Appeal and subsequently to the Federal Court. But, it was the issue posed by the Federal Court in granting the leave to appeal to the Federal Court that was challenged as falling outside the ambit of s. 96(a) of the Courts of Judicature Act 1964, as the issue was not an issue decided by the High Court or the Court of Appeal. The issue determined by the High Court and confirmed by the Court of Appeal was whether the Minister had erred in the exercise of his discretion under s. 20(3) of the Industrial Relations Act 1967. However, the Federal Court, in granting leave to appeal framed a question on the right of the employer to suspend the employee pending the conclusion of an investigation against him. The Federal Court in that case declined to answer the question posed.

Initially, I thought that the Federal Court, being the highest court in the country, should have some flexibility to frame questions for the appeal when granting leave to appeal. By that I mean that this court is free to frame questions for appeal thereto so long as the questions are connected with or arising from the case (ie, the suit, application, etc.) that had commenced in the High Court and subsequently went on appeal to the Court of Appeal. In other words, it is not restricted to issues decided by the High Court. This is because, quite often, the case takes a different turn during the argument of the appeal at the Court of Appeal. However, this court, in *The Minister for Human Resources*, appears to have adopted the more restrictive view. I am quite reluctant to differ and I accept it as the law, first, for the sake of consistency and, secondly, there may be greater wisdom in it eg, it is more consistent with the principle that a party is bound by its pleadings.

So, the question is whether, in this case, the issue posed, is one that was decided in the High Court. To answer this question, we will have to go back to the application for leave to amend the defence, the affidavit in support of the application, the judgment of the learned High Court judge and the question posed.

As was reproduced earlier, the main purpose of the amendment was to separate the roll-up plea of justification and fair comment.

The High Court dismissed the application on the ground that no exhibits were attached to the affidavit in support of the application, that there was "a total lack of merits in this application which lacks *bona fide*." The Court of Appeal dismissed the appeal on the ground that "there was insufficient material placed before the learned judge and even if there was sufficient material no cogent reasons were advanced by the appellant"; and that there was a lack of *bona fide* on the part of the appellant. The question posed refers to no such issue. It relates to the test applicable where the evidence relating to the particulars are discovered after the pleadings are closed. So, on the authority of the judgment of this court in *The Minister for Human Resources*, this court should decline to answer the question posed.

However, in this case, there is yet another strong ground on which this court should also decline to answer the question posed. And, that is, the question posed does not relate to the facts of the case and is academic.

It must be remembered that the question posed is the proper test applicable "where the evidence relating to these particulars are **discovered after** the pleadings are closed." (emphasis added).

Was the evidence relating to the particulars of the proposed amended defence discovered after the pleadings were closed?

The respondents' reply to the appellants defence was filed on 23 September 1996. Pursuant to O. 18 r. 20 of the Rules of the High Court 1980pleadings are deemed to be closed at the expiration of 14 days after the service of the reply, in any event, as early as 1996.

The appellant's own affidavit in support of the application said in para. 8(a):

> ... the proposed amendments to the Defence merely provide further particularization and clarity in comparison to the existing Defence filed and does not propose to alter the character of the suit nor incorporate new facts in any manner inconsistent with the thrust of the existing Defence. The detailed particularization of the factual representations in relation to the *Ayer Molek* case (as it appears in paragraph 15.1 to 15.27 of the Proposed Amended Defence) have in actual fact already been pleaded by the Defendant in a previous suit related to this present suit involving the same Plaintiffs (Suit No: S4-23-44-1996 *Insas Bhd & Anor v. Tommy Thomas & Anor* [hereinafter referred to as the "Previous Suit"]) and hence does not take the Plaintiffs by surprise for they are aware of such particulars.

In para. 8(b):

> Yet again, I wish to stress that these are not fresh evidence but documentary evidence in support what was already pleaded in the existing Defence.

In para. 9:

> The Proposed Amended Defence in this application will cause no prejudice to the Plaintiffs for the reasons stated in paragraph 8 above, particularly that the Plaintiff's are already aware of the particulars under justification as it was pleaded in the Previous Suit and also the fact that the amendments are in actual fact further particulars of what has already been pleaded in the existing Defence in general terms. The proposed amendments do not seek to adduce fresh evidence in the proceeding for surely the same evidence can and will be adduced based on the existing Defence (which in any case should be anticipated by the Plaintiffs).

In para. 10(c):

> there is no likelihood of fresh evidence led on issues which may arise as a result of the amendments simply because the same issues do exist within the pleaded meaning of the existing Defence, *albeit* in a general manner.

(It should be noted that the statements contained in the affidavit of the appellant that some of the documents were kept abroad, that time was needed to make careful comparison and

confirmation of the copies of the documents with the original documents, the need to make careful assessment of the documents etc. are reasons given for the delay in making the application. They have nothing to do with discovery.)

So, from the appellant's own affidavit, it is clear that the evidence relating to these particulars were not discovered after the pleadings were closed. To answer the question would be purely an academic exercise. That is not the function of this court.

In *Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors. and Another Application[1999] 1 CLJ 325*; [1997] 1 MLJ 257 (FC), Edgar Joseph Jr. FCJ, said:

> Having said that, this Court does not sit to decide abstract or academic or hypothetical questions of law regarding which the parties are not in dispute. Thus, in *Ainsbury v. Millington* [1987] 1 All ER 929, Lord Bridge said this (at pp 930-931):
>
> It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

In *Sun Life Assurance Company & Canada and Jervis* (1994) The Law Reports Appeal Cases, p. 111, Viscount Simon LC, speaking for the House of Lords, said:

> ... I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties.

In *Ainsbury v. Millington* [1987] 1 All ER 929 (HL), Lord Bridge, having cited the passage by Viscount Simon LC above, said:

> It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

In *Loknath Padhan v. Birendra Kumar Sahu* [1974] AIR 505, the Supreme Court of India held:

> It is well-settled practice recognized and followed in India that if an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it.

Justice Bagwati, in his judgment, said:

> ... it would be clearly futile and meaningless for the Court to decide an academic question, the answer to which would no affect the position of one party or the other. The Court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the Court would properly decline to do so.

The appellant too does not come to this court to know what the law is in this country on a hypothetical issue. The appellant wants his proposed amendments to be admitted. But, even if this court were to answer the question posed in a way that he would like this court to answer, still this court would not be able to make the order that he requires. That is because the facts of the case, as stated by him, are materially different from the facts that form the basis of the answer.

In the circumstances, following, in particular the decision of this court in *The Minister for Human Resources* I would decline to answer the question. I would dismiss the appeal with costs without considering the merits.

My learned Chief Judge (Sabah and Sarawak) has seen this judgment in draft and agreed with it.