ABUSEMAN JAMALUDDIN

v.

ETIQA TAKAFUL BHD

Court of Appeal, Putrajaya
Badariah Sahamid, Rhodzariah Bujang, Nor Bee Ariffin JJCA
[Civil Appeal No: Q-02(A)-2351-11-2017]
9 July 2020

Insurance: *Motor insurance — Third party risks — Duty of insurer to satisfy judgments against insured person in respect of third party risks — Whether insurer might void policy and repudiate liability on basis of breach of policy conditions — Whether trial judge erred in construing s 96(1) and (3) Road Transport Act 1987 without considering s 94 thereof — Road Transport Act 1987, ss 94, 96*

Road Traffic: *Insurance — Third party risks — Duty of insurer to satisfy judgments against insured person in respect of third party risks — Whether insurer might void policy and repudiate liability on basis of breach of policy conditions — Whether trial judge erred in construing s 96(1) and (3) Road Transport Act 1987 without considering s 94 thereof — Road Transport Act 1987, ss 94, 96*

The appellant was severely injured in a motor accident involving a motorcar insured by a policy issued by the respondent ("Insurer"). The appellant commenced a civil suit against the driver of the said motorcar ("Driver") in the Sessions Court. Whilst the civil suit was ongoing in the Sessions Court, the Insurer applied to the High Court through encl 1: (i) for a declaration declaring the policy void and unenforceable; and (ii) for a declaration that the Insurer was not responsible to comply with any orders made in the civil suit at the Sessions Court arising from the accident. The Insurer sought to void liability and responsibility to pay on the policy on the basis of the Driver's failure to comply with the terms and conditions of the policy. The terms and conditions were alleged to be conditions precedent to any liability or coverage arising under the policy. By a judgment pronounced on 30 August 2017, the trial judge allowed the declarations sought by the Insurer. The trial judge also held that the appellant was not entitled to claim against the Insurer. The appellant made further submissions on whether the declarations would disentitle the appellant of his third-party statutory rights under s 96(1) of the Road Transport Act 1987 ("RTA"). The appellant submitted that s 94 RTA strictly prohibited an insurer from repudiating its liability to a third party on the premise of a breach of the contract of insurance pursuant to s 96(3) RTA. In her written judgment dated 27 October 2017, the trial judge maintained her earlier decision delivered on 30 August 2017 as she was on the view that since the judgment to allow encl 1 had been pronounced on 30 August 2017 and further submissions on the effect of s 94 RTA were only made thereafter on 8 September 2017, she "ought not

reverse the judgment pronounced on 30 August 2017". She had made a final order and thus, the matter could not be re-opened for further consideration of s 94 RTA. On 27 November 2011, the Sessions Court held that the Driver was wholly liable for causing the accident. The appellant appealed against the High Court's judgment. The appellant contended that the trial judge had erred in declaring the policy as void or unenforceable since it would disentitle the appellant of his third-party statutory rights under s 96(1) RTA.

Held (allowing the appellant's appeal with costs):

(1) Points of law might be raised at any time. It was entirely proper for arguments on s 94 RTA to be considered in the instant appeal, even if they were only raised very late in the day by appellant and were disregarded by the trial judge as she had by then already delivered her decision on encl 1 and felt bound to adhere to her earlier decision. (para 25)

(2) Although the trial judge was correct in her interpretation of s 96(1) and (3) RTA, the trial judge erred in construing the section on a stand-alone basis and without giving due consideration to how s 94 RTA would impact s 96. The trial judge felt legally bound not to consider s 94 RTA on the basis of her earlier decision to grant the declarations sought by the Insurer. Section 96 RTA must be read with s 94 of the same. (paras 30, 31 & 38)

(3) Section 94 RTA strictly prohibited the Insurer from repudiating its liability to the Insured on the grounds that the Insured had breached specific conditions of the insurance policy. Consequently, the appellant could proceed to execute his rights under s 96(1) RTA and claim against the Insurer. The appellant's statutory rights under s 96(1) RTA were fully preserved notwithstanding the Declaratory Order of the trial judge against the Driver. (para 37)

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Berhad [2015] 6 MLRA 523 (refd)

Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Berhad [2018] 4 MLRA 267 (refd)

Malaysia National Insurance Sdn Bhd v. Lim Tiok [1997] 1 MLRA 43 (refd)

Muhamad Haqimie Hasim v. Pacific & Orient Insurance Co Bhd [2018] MLRAU 184 (refd)

Pacific & Orient Insurance Co Berhad v. Kamacheh Karuppen [2015] 3 MLRA 278 (refd)

Legislation referred to:

Road Transport Act 1987, ss 91(1)(b), (4), 94, 95, 96(1), (2), (3)

Road Traffic Ordinance 1958, s 80(4)

Counsel:

For the appellant: Sarbjit Singh Khaira (Catherine David with him); M/s Khaira & Co

For the respondent: Allan Lao (Shally Heng & David John Au with him); M/s David Allan Sagah & Teng

JUDGMENT

Introduction

Badariah Sahamid JCA:

[1] This is an appeal against the High Court's decision dated 27 October 2017 where the learned Judge had allowed the applicant's ('Etiqa Takaful Bhd') application for a declaration that the contract of insurance through Certificate No TGPC-PC 195025 ('the said policy') which covers a motorcar bearing Registration No QAU 1314 for the period of 30 July 2012 to 29 July 2013 was void and unenforceable in respect of coverage of an accident which allegedly occurred on 2 September 2012 between a motorcar bearing Registration No QAU 1314 and a motorcycle bearing Registration No QAR 2278.

[2] The learned Judge further granted a declaration that the applicant is not responsible to comply with any orders following the civil action in the Sessions Court of Kota Samarahan Suit No KSN A53KJ-26-2-2016 and/or any other claims which arise from the road accident which allegedly occurred on 2 September 2012 between a motorcar bearing Registration No QAU 1314 and a motorcycle bearing Registration No QAR 2278.

[3] After the learned Judge had granted the abovementioned declarations against the 1st respondent ('Ambrose anak Jewon) on 30 August 2017, learned counsel for the 2nd respondent (Abuseman Jamaluddin) requested to make further submissions on the issue of whether the abovementioned declaratory order against the 1st respondent would disentitle the 2nd respondent of his third party statutory rights under s 96(1) of the Road Transport Act 1987 ('RTA 1987').

[4] On 27 October 2017, the learned Judge maintained her earlier decision delivered on 30 August 2017 in respect of the declaration against the 1st respondent. The learned Judge further declared that the applicant is not responsible to comply with any orders following the civil action pending in the Sessions Court and/or any other claims which arise from the road accident which allegedly occurred on 2 September 2012 between a motorcar bearing Registration No QAU 1314 and a motorcycle bearing Registration No QAR 2278.

[5] In this appeal by the 2nd respondent against the applicant, the contention of the 2nd respondent is that the learned Judge had erred in declaring the said policy as void and/or unenforceable against the 2nd respondent and the 2nd respondent is disentitled to claim from the applicant any judgment following

the civil action in the Sessions Court and/or any claims which arise from the alleged accident. Such a declaration would disentitle the 2nd respondent of his third-party statutory rights under s 96(1) of the RTA 1987.

Background Facts

[6] The applicant is a company licensed under the Insurance Act 1966 to carry out the business of general insurance and is the insurer of the said policy in respect of a car bearing Registration No QAU 1314.

[7] The 1st respondent is at all material times the registered owner and driver of the motorcar bearing Registration No QAU 1314, insured by the said policy which was issued by the applicant.

[8] The 2nd respondent is the rider of the motorcycle bearing Registration No QAR 2278, who had sustained severe injuries due to an accident involving the 1st respondent, which was alleged to have occurred on 2 September 2012.

[9] Subsequently, the 2nd respondent had commenced a civil suit against the 1st respondent at the Sessions Court in Kota Samarahan to claim for general and special damages arising out of the alleged accident.

Proceedings At The High Court

[10] Meanwhile, while the Sessions Court suit was still ongoing, the applicant filed an Originating Summons in the High Court (encl 1) on 23 March 2017, which sought *inter alia* the following declarations:

a. Contract of insurance through Certificate No TGPC-PC 195025-BRTQKVCH which covers a motorcar bearing Registration No QAU1314 for the period of 30 July 2012 to 29 July 2013 is void and unenforceable to cover an accident which allegedly occurred on 2 September 2012 between a motorcycle bearing Registration No QAR 2278 and a motorcar bearing Registration No QAU 1314;

b. Furthermore, the applicant is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Suit No KSN A53KJ-26-2-2016 and/or any other claims which arise from the road accident which allegedly occurred on 2 September 2012 between a motorcycle bearing Registration No QAR 2278 and a motorcar bearing registration No QAU 1314.

[11] The grounds relied on by the applicant in encl 1 were as follows:

(i) Failure to comply with the terms and conditions of the Insurance Certificate No TGPC-PC 195025-BRTQKVCH which are as follows:

a. Failure to notify the Applicant of the said accident in accordance to the terms and conditions as stipulated within the said Insurance Policy;

b. Failure to notify the police of the said accident in accordance to the terms and conditions as stipulated within the said Insurance Policy; and

c. Entered negotiation with the third-party rider for the purpose of settlement without any written consent from the Applicant.

[12] The relevant terms and conditions of the said Policy relied on by the applicant are reproduced as follows:

Private Car Certificate

"All accidents must be reported to the Police within 24 hours"

Conditions -These Apply To The Whole Certificate

2. Accidents and Claims Procedures

(a) The insurer must be notified in writing or by phone in either case with particulars of the vehicles involved, date of accident and, if possible, a brief description of the circumstances of the accident within the specific time frame as follows after an event which may become the subject of a claim under this policy:

(i) Within seven (7) days if the insured is not physically disabled and hospitalised as a result of the event.

(ii) Within thirty (30) days or as soon as practicable if the Insured is physically disabled and hospitalised as a result of the event.

(iii) Other than (i) and (ii), a longer notification period may be allowed subject to specific proof by the Insured.

...

...

(e) No negotiation, admission or repudiation of any claim may be entered without our prior written consent.

[13] The applicant contends that reading Condition 2(a) together with Condition 7(a) of the Policy demonstrates that Condition 2(a) is a condition precedent to any liability that may arise under the said Policy. Condition 7(a) of the said Policy states:

7. Other matters

This Certificate will only be operative if:

(a) Any person claiming protection has complied with all its terms, Conditions, Endorsements, Clauses or Warranties.

Decision Of The High Court

[14] The learned Judge allowed encl 1 and held the said policy to be void and unenforceable for breach of conditions precedents in the said policy by the insured (1st respondent). Her Ladyship had stated as follows (at para 35 of 'Grounds of Decision'):

> "In the light of the authorities cited above, (amongst them: *Chong Kok Hwa v. Taisho Marine & Fire Insurance Co Ltd* [1975] 1 MLRH 188; *Anuar Ismail v. Tan Sri Tan Chin Tuan & Anor* [1991] 1 MLRH 539, *Pioneer Concrete (UK) Ltd v. National Employers Mutual General Insurance Association Ltd* [1985] 2 All ER 395; *Putra Perdana Construction Sdn Bhd v. AMI Insurans Bhd & Ors* [2004] 2 MLRH 704) failure on the part of the 1st respondent in notifying the applicant of the said accident within the stipulated period of seven days from the date of the accident is a breach of Condition 2(a) of the said Policy. Such breach when read with Condition 7(a) of the said Policy entitled the applicant to void the policy in respect of the claim."

[15] In addition, the learned judge (in para 67) also granted Declaration (2) as per prayer 3 which reads as follows:

> "Furthermore, the applicant is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Suit No: KSN A53KJ-26-2-2016 and/or any other claims which arises from the road accident which allegedly occurred on 2 September 2012 which allegedly involved between a motorcycle bearing registration number of QAR 2278 and a motorcar bearing registration number of QAU 1314."

[16] As a consequence of the above, the learned Judge held that the 2nd respondent, a third party to the said policy is not entitled to claim against the applicant. Her Ladyship stated as follows (in para 68):

> "It is plain from the granting of declaration (2) that declaration (1) has disentitled the 2nd respondent from claiming the judgment which may be made in the 2nd respondent's favour in the SC Suit."

[17] In addition, the learned Judge had considered s 96 RTA 1987, in particular subsections (1) and (3) and concluded that on satisfaction of the requirements under 96(3) an insurer is entitled to avoid his liability against third parties who institute proceedings against the insurer pursuant to s 96(1) RTA 1987. Her Ladyship had stated (at para 53) as follows:

> "From my reading and understanding of plain language in s 96(3) of the RTA 1987, an insurer may void its liability under insurance policy to satisfy the judgment which a third party may obtain in actions involving the insured vehicles for as long as the insurer has fulfilled the two crucial pre-requisites and complied with the proviso of s 96(3) of the RTA 1987. In other words, upon satisfying the same, s 96(3) of the RTA 1987 will act as a complete

defence against any recovery proceedings by the third party under s 96(1) RTA 1987."

[18] In her 'Grounds of Decision', Her Ladyship had referred to the counter-argument of learned counsel for the 2nd respondent that s 94 RTA 1987 strictly prohibits an insurer from repudiating its liability to a third party on the premise of a breach of the contract of insurance pursuant to s 96(3) of the RTA 1987. However, Her Ladyship had declined to make any finding in respect of the above argument. The position taken by Her Ladyship was that since the judgment to allow encl 1 had been pronounced on 30 August 2017 while submissions on the effect of s 94 RTA 1987 were made thereafter on 8 September 2017, she "ought not reverse the judgment pronounced on 30 August 2017", as Her Ladyship had made a final order and thus, the matter could not be re-opened for further consideration of s 94 RTA 1987.

[19] It is to be noted that the decision of the Sessions Court suit was still pending when the High Court delivered its decision on 27 October 2017. The decision in respect of the Sessions Court Suit was delivered subsequently on 27 November 2017, wherein the Sessions Court Judge held the 1st respondent, ie Ambrose anak Jewon was wholly liable for causing the said accident.

Grounds Of Appeal

The 2nd Respondent's Submissions

[20] The 2nd respondent relies on s 94 to be read with s 96(1) and (2) of the Road Transport Act 1987 ('RTA 1987'). The primary grounds of appeal of the 2nd respondent against the decision of the learned judge may be summarised as follows:

1. The learned Judge had erred in its decision in holding that the respondent, ie Etiqa Takaful Bhd is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Writ No: KSN-A53KJ-26-2-2016 and/or any other claims which arise from the road accident which occurred on 2 September 2012 involving a motorcycle bearing registration number QAR 2278 and a motorcar bearing Registration No QAU 1314.

2. The learned Judge had erred in law and had misdirected herself when she failed to consider the provision of s 94 of the Road Transport Act 1987 ('RTA 1987') which disentitles the insurer, ie the 1st respondent to obtain the said declaratory order against the 2nd respondent.

3. Section 94 RTA 1987 provides that conditions in policy of insurance are deemed to be of no effect by operation of law in relation to the liability of the insurer to a third party, ie the 2nd respondent. Section 94 was intended to prevent insurance

companies from contracting out the RTA 1987 by repudiation of liability to third parties on the ground that the insured (1st respondent) had breached the insurance policy.

4. The 2nd respondent's statutory rights under s 96(1) RTA 1987 should be fully preserved notwithstanding the declaratory order against the 1st respondent.

5. The 2nd respondent had subsequently obtained a judgment against the 1st respondent in the Sessions Court suit on 27 November 2017 whereby the 1st respondent was held to be wholly liable for causing the said accident. In the circumstances, the 2nd respondent can proceed to execute his rights under s 96(1) RTA 1987 and claim against the insurer, Etiqa Takaful Bhd (applicant).

6. Section 94 RTA 1987 enables the applicant to enforce a policy provision to recover from the 1st respondent any sums which the applicant may have had to pay to the 2nd respondent.

The Applicant's Submissions

[21] Learned counsel for the applicant took the position that the applicant is lawfully entitled to avoid the said policy and/or any relevant claim made in respect thereof. Thus, the said policy is void and unenforceable against the insured (the 1st respondent) as well as any third party claiming thereunder (in this case, the 2nd respondent) on the following grounds:

1. The 1st respondent had breached Condition 2(a) of the said policy in his failure to notify the applicant of the said alleged accident within the stipulated period of seven days from the alleged accident, which allegedly occurred on 2 September 2012.

2. The 1st respondent had also breached Condition 2(e) of the said policy by entering into negotiation with the Third Party without the prior written consent of the applicant.

3. The 1st respondent had breached Condition 7(a) of the said policy which is a condition precedent to the operation of the said policy by failing to comply with all the terms, conditions, endorsements, clauses or warranties of the said policy.

4. Pursuant to s 96(3) RTA 1987, where the insurer has obtained a declaration from a court that the insurance was void or unenforceable, the insurer is not liable to pay as the insurer is entitled to the benefit of the declaration obtained (*Pacific & Orient Insurance Co Berhad v. Kamacheh Karuppen* [2015] 3 MLRA 278; and *Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Berhad* [2018] 4 MLRA 267). Thus, the applicant is not liable to pay for any judgment sum following the Sessions Court suit and/or any

other claims which arise from the said alleged accident in view that the said policy had been declared void and unenforceable by the High Court.

5. The 2nd respondent is disentitled to claim from the applicant because s 96(3) of the RTA 1987 is an express statutory exception to the statutory liability of an insurer under s 96(1) of the RTA 1987.

7. The 2nd respondent's statutory rights and interest under s 96(1) and (3) of the RTA 1987 have yet to be crystallised and/or were enforceable as against the applicant as the 2nd respondent had yet to prove his claim and/or to obtain a judgment in the Sessions Court suit when the applicant filed the Originating Summons in the High Court.

8. The 2nd respondent's appeal premised on s 94 of the RTA 1987 ought to be disregarded as the Originating Summons had already been granted by the High Court Judge in favour of the applicant when arguments based on s 94 were raised. The learned Judge was right to disregard the 2nd respondent's submissions on s 94 RTA 1987.

9. Thus, the applicant is entitled under the law to a declaration that the said policy is void and/ or unenforceable against the 2nd respondent.

Our Decision

[22] After careful consideration of learned counsel' oral and written submissions, the Appeal Records and in particular, relevant sections of the RTA 1987, we are of the considered view that there are merits in the 2nd respondent's appeal that warrant appellate intervention. We therefore allowed the appeal and set aside the Order of the High Court in respect of the 2nd respondent with costs. The grounds of our decision are stated below.

[23] The learned Judge had allowed the applicant's prayer for a declaration that the said policy was void and unenforceable against the insured (1st respondent) for breach of conditions stipulated in the said policy. In this respect we affirmed the decision of the learned Judge and dismissed the appeal of the 1st respondent. This appeal before us is in respect of the 2nd respondent, the third party against the applicant.

[24] The crux of this appeal is premised on the statutory interpretation of relevant sections of the RTA 1987, in particular where it relates to third parties to an insurance contract, as is the case of the 2nd respondent in this appeal. The gist of the contention of the 2nd respondent is that s 96 of the RTA 1987 should be read with s 94 of the RTA 1987. Section 94 in effect renders any condition excluding insurers from liability under the policy to third parties to

be inoperative. Such a reading, it was further submitted, would enforce the spirit of the RTA 1987 which is essentially a social legislation which seeks to preserve the rights of third parties in the event that a policy is repudiated by an insurer due to breaches of the policy by the insured. Any such breach or breaches of the insurance contract by the insured (the 1st respondent) can only be grounds for repudiation *inter partes* against the insured but is inoperative against any third parties as expressly stipulated in s 94 RTA 1987.

[25] It is trite that points of law may be raised at any time. Thus we are of the view that it is entirely proper that arguments on s 94 RTA 1987 be considered in this appeal before us, even if they were only raised very late in the day by the 2nd respondent's counsel, and were disregarded by the learned Judge as Her Ladyship had by then already delivered her decision on encl 1 and felt herself bound to adhere to her earlier decision.

[26] The applicant had placed reliance on s 96 RTA 1987, in particular subsections (1) and (3) to repudiate liability under the contract of insurance in respect of the insured (1st respondent) as well as the third party (2nd respondent). Section 96 is reproduced below:

> "**Duty of insurers to satisfy judgments against persons insured in respect of third party risks**
>
> **96**. (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, **then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability**, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> (2) ...
>
> (3) **No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable**;
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respect any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to reply, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto."
>
> [Emphasis Added]

[27] From a plain reading of s 96(1) and (3) of the RTA 1987, we agree with the interpretation of the learned judge that s 96(1) provides statutory recognition of the preservation of third party rights notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the insurance policy. The insurer is therefore legally bound to satisfy any judgment sum in respect of liability upon being served with a certificate of insurance under subsection (4) of s 91 RTA 1987.

[28] Section 96(3) however, expressly exempts the liability of the insurer to pay pursuant to s 96(1) RTA 1987, "if before the date the liability was incurred the insurer had obtained a declaration from a court that the insurance was void or unenforceable". The insurer's entitlement to seek a declaration under s 96(3) RTA 1987 to avoid or cancel insurance policies has been duly recognised and endorsed by the Court of Appeal in the following recent cases: See *Pacific & Orient Insurance Co Berhad v. Kamacheh Karuppen* [2015] 3 MLRA 278; *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Berhad* [2015] 6 MLRA 523; and *Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Berhad* [2018] 4 MLRA 267.

[29] The learned judge took the position that since Her Ladyship had granted the declaration sought for by the applicant in encl 1 to avoid liability to the insured (1st respondent) under the said policy, in consequence thereof, subsection (3) of s 96 RTA 1987 can be invoked to exempt the applicant from liability to any other party, including the 2nd respondent.

[30] While the learned Judge was correct in her interpretation of s 96(1) and (3) RTA 1987, Her Ladyship had erred in her construction of the said section on a stand-alone basis and without giving due consideration to how s 94 of the RTA 1987 would impact s 96 RTA 1987. To be fair, Her Ladyship felt legally bound not to consider s 94 RTA 1987 on the premise of her earlier decision to grant the declaration sought by the applicant.

[31] We are of the considered view that s 96 RTA 1987 must be read together with s 94 RTA 1987 as it is trite that the Legislator does not expressly lay down provisions in vain. In addition, there is no express provision to stipulate that s 94 is subject to s 96 RTA 1987.

[32] Section 94 of the RTA 1987 is reproduced below:

> "**Certain conditions in policies or securities to be of no effect**
>
> **94. Any condition in a policy or security issued or given for the purposes of this Part providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall be of no effect in connection with such claims as are mentioned in para 91(1)(b)**
>
> Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to

repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

[Emphasis Added]

[33] The above s 94 refers to the claims mentioned in para 91(1)(b) which read as follows:

"Requirements in respect of policies

91. (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which:

(a) ...

(b) Insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road."

[34] The effect of s 96 read with s 94 RTA 1987 has been considered and pronounced in the following cases. In the case of *Malaysia National Insurance Sdn Bhd v. Lim Tiok* [1997] 1 MLRA 43, the Supreme Court endorsed the view that the underlying purpose of compulsory motor insurance against third party risks was to ensure that innocent third parties who were injured in vehicular accidents were given full and effective protection, regardless of the private insurance arrangement between the insurer and the insured.

[35] One of the issues raised before the Supreme Court in *Malaysian National Insurance (supra)* was whether s 80 of the Road Traffic Ordinance 1958 limits the liability of an insurer to pay to an injured third party an amount equal to the proportionate liability of the policy holder (insured). Edgar Joseph Jr FCJ had considered the effect of s 80(4) – now s 96(4) RTA 1987 and stated as follows:

"One effect of s 80(4) of the Ordinance is that since liability of insurers against third party risks under s 80(1) is unlimited, any kind of limitation, whether stipulating that the insured has to pay the first X RM of any liability or that the insurance company would not pay more than Y RM of any liability, or by means of a rateable contribution clause, would be void and ineffective as against a third party who can recover the full amount from the insurance company. But the insurance company may have a right of recovery of any excess from its insured. However, it could be objected that such a policy does not comply with the requirements of s 75(1) of the Ordinance (equivalent to s 9(1) of the Act).

Section 80(4) also contemplates a situation where the policy is voidable at common law on the ground of non-disclosure or misrepresentation of material facts and the insurance company has not taken the necessary steps under s 80(3) to obtain a declaration as to non-liability on this ground in time

> or at all or if the policy is voidable, under a condition of the policy. In such a situation, the insurance company would still be legally obliged to pay a third party in enforcement proceedings brought under s 80(1) but it has a right of recovery against its insured.
>
> ... To recapitulate, as the language of s 80(1) expressly directs attention to the liability covered by 'the terms of the policy', in construing the subsection it is necessary to have regard to the terms of the policy (see *Bankers & Traders Insurance Co Ltd v. National Insurance Co Ltd* [1985] 1 MLRA 28, per Lord Scarman),subject to the statutory provisions rendering certain conditions or restrictions of no effect against third parties) (see ss 78 and 79 of the Ordinance-now ss 94 and 95 of the Act and derived from s 38 of the UK Road Traffic Act 1930 and s 12 of the UK Road Traffic Act 1934)."
>
> [Emphasis Added]

[36] In the recent decision of *Muhamad Haqimie Hasim v. Pacific & Orient Insurance Co Bhd* [2018] MLRAU 184, the Court of Appeal had occasion to consider the effect of *inter alia* s 94 of the RTA 1987, in circumstances where the registered owner of the insured vehicle had sold the vehicle to another person, although the insured's name remained on the registration card as the legal owner of the vehicle. The Court of Appeal held the registered owner remains the insured for the purposes of the accident and that the insurer is liable to compensate the plaintiff for any injuries suffered as a consequence of the accident. The Court of Appeal had stated as follows:

> "... (vi) We are fortified in our decision by ss 94 and 95 of the RTA which provide that conditions in a policy of insurance are deemed to be of no effect, again by operation of law, in relation to liability of insurers to third parties.
>
> (vii) Section 94 provides that any condition in a policy issued providing that no liability shall arise under that policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy shall be of no effect in connection with claims under s 91(1)(b).
>
> (viii) Section 91(1)(b) relates to third party claims such as the present."

[37] In view of the above, s 94 RTA 1987 strictly prohibits the applicant, Etiqa Takaful from repudiating its liability to the 2nd respondent on the grounds that the insured (1st respondent) had breached specific Conditions of the insurance policy. Consequently, the 2nd respondent can proceed to execute his rights under s 96(1) RTA 1987 and claim against the applicant. Thus the 2nd respondent's statutory rights under s 96(1) RTA 1987 are fully preserved notwithstanding the Declaratory Order of the High Court against the 1st respondent.

[38] In conclusion, we are of the considered view that the learned Judge had erred in law in her failure to consider the provision of s 94 RTA 1987 which disentitles the applicant insurer, Etiqa Takaful from obtaining the benefit of the said declaration order against the 2nd respondent. We therefore allowed the appeal of the 2nd respondent and set aside the Order of the High Court in respect of the declaration that:

"... the applicant is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Suit No: KSN A53KJ-26-2-2016 and/or any other claims which arises from the road accident which allegedly occurred on 2 September 2012 which allegedly involved between a motorcycle bearing registration number of QAR 2278 and a motorcar bearing registration number of QAU 1314."

[39] We therefore allowed the 2nd respondent's appeal with costs of RM5,000.00 to the appellant subject to allocatur. Deposit to be refunded to the appellant.

The Legal Review

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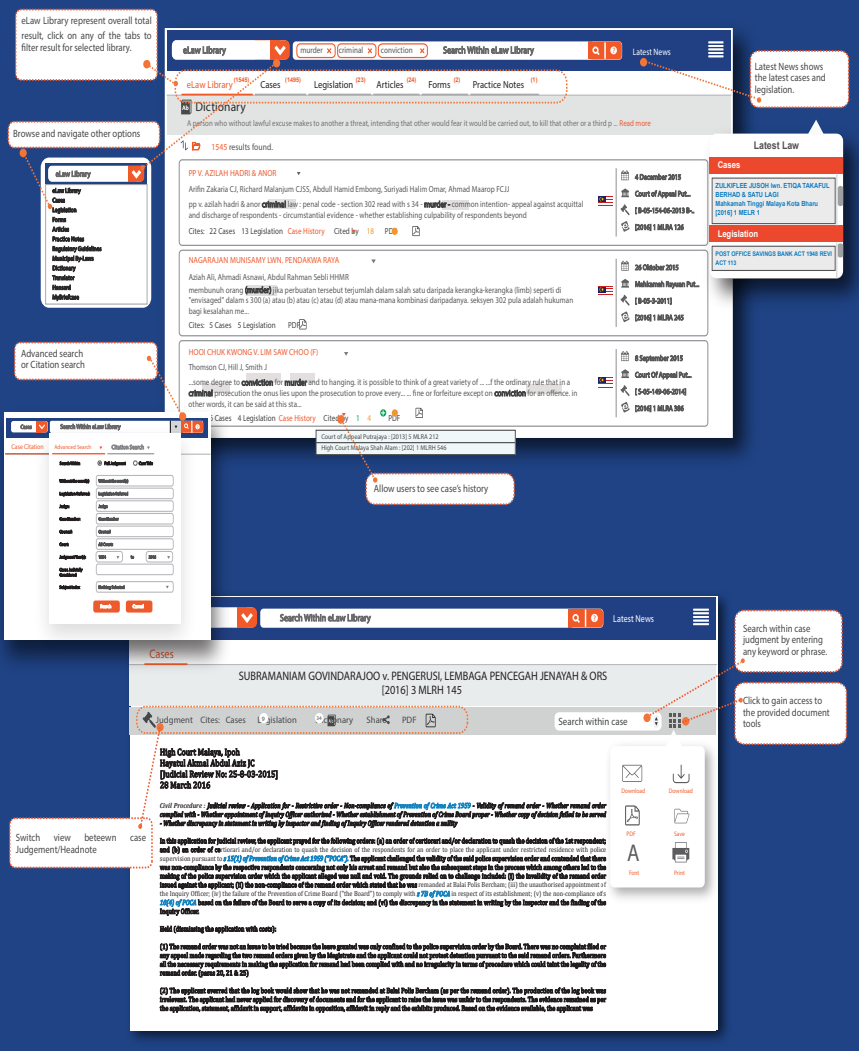
A Snapshot of Highlights



Our Features

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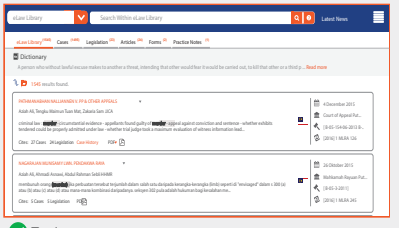

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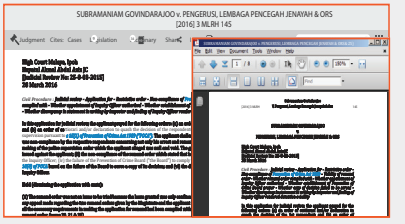

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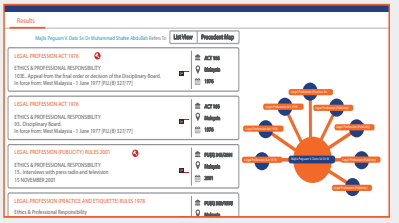

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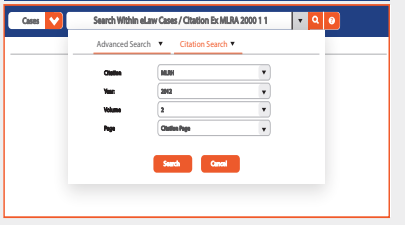

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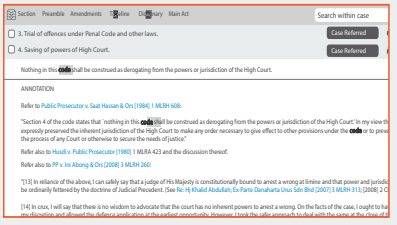

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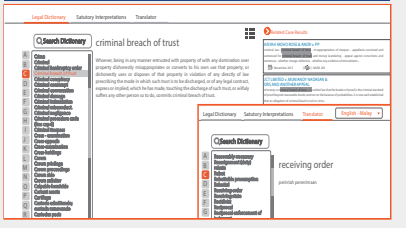

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