KERAJAAN MALAYSIA & ANOR

v.

AMINAH AHMAD (MENYAMAN ATAS KAPASITI PERIBADINYA DAN BAGI PIHAK 56 PESARA PERKHIDMATAN AWAM)

Court of Appeal, Putrajaya
Lim Chong Fong, Azhahari Kamal Ramli, Meor Hashimi Abdul Hamid JJCA
[Civil Appeal No: W-01(A)-42-01-2025]
9 March 2026

Civil Procedure: *Judicial review — Appellants appealing against High Court's decision allowing judicial review application by respondent, for mandamus to compel adjustment of pension entitlement under ss 3 and 6 of the Pensions Adjustment Act 1980 prior to its amendment under ss 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 — Same issue previously determined against respondent in earlier originating summons proceedings — Whether respondent's judicial review application barred by issue estoppel — Whether judicial review application amounted to abuse of process of court — Whether issue of respondent's entitlement to pension adjustment based on service circular ought to have been raised in earlier originating summons proceedings*

The respondent was a pensioner who retired from public service in 2002, and whose pension, as well as those of other retirees, was governed by the Pensions Act 1951 and the Pensions Adjustment Act 1980 ("PAA 1980"). On 28 April 2017, the respondent filed an originating summons ("2017 OS") seeking declarations that ss 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 ("2013 Amendment Act") were *ultra vires* art 147 of the Federal Constitution ("Constitution"); that the deleted ss 3 and 6 of the PAA 1980 be restored accordingly; and consequential orders for retrospective pension adjustment and payment of any shortfall. The respondent's case was that the amendments made by the 2013 Amendment Act were less favourable to the position prior to the amendments made to the PAA 1980. The High Court dismissed the 2017 OS. Upon appeal, the Court of Appeal reversed the High Court's decision and held *inter alia,* that the impugned amendments had resulted in a situation 'less favourable' to the respondent when compared to the scheme prior to the amendments, declared ss 3 and 7 of the 2013 Amendment Act null and void for contravention of art 147 of the Constitution and directed that the declarations take effect prospectively from the date of its decision. The Court of Appeal however, declined to order retrospective adjustment or payment of arrears for want of proof of actual loss. The respondent did not appeal on the order of the prospective effect of the Court of Appeal's decision, nor had she appealed against the High Court's decision on the issue of loss suffered from the amendment to ss 3 and 6 of the PAA 1980. The appellants' appeal to the Federal Court against the Court of Appeal's decision was

dismissed. The Federal Court's decision was to the effect that the respondent had obtained a declaration of right against the appellants that she was entitled to receive her pension according to the formula in the original ss 3 and 6 of the PAA 1980. Thereafter, by letter dated 6 October 2023 to the Minister in the Prime Minister's Department in charge of Law and Institutional Reform, the respondent demanded that the appellants adjust her pension using the pre-2013 formula from 13 January 2022. A similar letter was sent on the same day to the Director General and Chief Secretary to the Government. The Director General refused, maintaining, *inter alia* that there was no order of court made for retrospective adjustments and for any shortfall to be paid, and no pension adjustment could be made since there had been no change in the salary scale since 2013. The respondent then commenced judicial review proceedings against the appellants in her personal capacity and on behalf of 56 other public service retirees, seeking an order of *mandamus* for, *inter alia*, the adjustment of her pension entitlement amounts in accordance with the formula contained in ss 3 and 6 of the PAA 1980 prior to its amendment with effect from 1 January 2013 by ss 3 and 7 of the 2013 Amendment Act, which resulted in a change in the formula for adjusting the pensions of those who had retired prior to 1 January 2013; and for payment of arrears. The High Court allowed the application, holding that the application was not caught by *res judicata* and that the respondent was entitled to pursue *mandamus* because the 2017 OS concerned the constitutionality of the 2013 Amendment Act and not the respondent's actual pension adjustment which was never determined; that *mandamus* was not an issue then, as the conditions for seeking the same had not arisen; that *mandamus* only became available after the amendments were declared invalid and the Director General refused the respondent's demand for adjustment of her pension; and that the Pekeliling Perkhidmatan Bil 1 Tahun 2016 amounted to a salary revision entitling the respondent to a corresponding adjustment. The High Court accordingly granted the order of *mandamus* and ordered payment of the back-dated pension. Hence the instant appeal. The issue before the Court of Appeal was whether the High Court was correct in holding that the judicial review application was not *res judicata*, and in granting the order of *mandamus*.

Held (allowing the appellants' appeal):

(1) The respondent clearly, in both the judicial review application and the 2017 OS had sought arrears of the pension adjustment, and the issue of her pension entitlement and entitlement to arrears which was the subject matter of the 2017 OS had been determined by the Court of Appeal which held that the declaratory orders took effect prospectively only from 13 January 2022 and that the respondent had not proved that she had suffered any actual loss; and the respondent had not appealed against that finding. The prospective effect of the said order meant that the respondent was not entitled to the arrears. Hence, issue estoppel prevented the respondent from relitigating the same issue in her judicial review application, and her prayers for arrears in the pension

adjustment were unsustainable based on the decisions of the Court of Appeal and the Federal Court. (paras 36, 38, 40, 41, 42, 43, 44, 45 & 46)

(2) The High Court had erred in merely considering the applicability of the doctrine of *res judicata* only, without considering the doctrine of abuse of process. The issue of the respondent's entitlement to pension adjustment based on the pre-2013 formula, and especially the Pekeliling Perkhidmatan Bil 1 Tahun 2016, belonged to the claim in the 2017 OS and ought to have been raised therein but were not, whether due to negligence, inadvertence or accident. In the circumstances, the judicial review application was prohibited by *res judicata* as issue estoppel, and the filing of the same was an abuse of process intended to relitigate the issue of payment of arrears in the pension adjustment. (paras 47, 50, 51 & 52)

Cases referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 1 MLRA 611 (folld)

Government Of Malaysia & Anor v. Aminah Ahmad (Suing In Her Personal Capacity And On Behalf Of 56 Retired Members Of The Public Service) [2023] 5 MLRA 498 (refd)

Henderson v. Henderson [1843] 3 Hare 100 (folld)

Kerajaan Malaysia v. Mat Shuhaimi Shafiei [2018] 2 MLRA 185 (folld)

Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor [1987] 1 MLRA 285 (folld)

Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 MLRA 131 (folld)

Legislation referred to:

Courts of Judicature Act 1964, s 25, Schedule, Item 11

Federal Constitution, art 147

Pensions Adjustment (Amendment) Act 2013, ss 3, 7

Pensions Adjustment Act 1980, ss 2, 3(1), (2), 3A, 3B, 6

Counsel:

For the appellants: Ahmad Hanir Hambaly @ Arwi (Mohamad Salehuddin Md Ali with him); AG's Chambers

For the respondent: Baljit Singh Sidhu (Gurpreet Kaur Pannu Karam Singh with him); M/s Shukor Baljit & Partners

[For the High Court judgment, please refer to *Aminah Ahmad v. Kerajaan Malaysia & Anor* [2025] MLRHU 131]

JUDGMENT

Azhahari Kamal Ramli JCA:

Introduction

[1] This is an appeal by the appellants against the decision of the learned High Court Judge (HCJ) in allowing the respondent's (applicant in the High Court) judicial review application for an order of *mandamus*, among others, as follows:

(i) To adjust the pension entitlement amounts in accordance with the formula contained in ss 3 and 6 of the Pensions Adjustment Act 1980 (the PAA 1980) prior to its amendment under ss 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 (the 2013 Amendment Act); and

(ii) Within 14 days or such time as this Honourable Court may determine, execute the payment of pension arrears ("the pension arrears") in favour of the applicant in accordance with the formula contained in ss 3 and 6 of the PAA 1980 prior to its amendment under ss 3 and 7 of the 2013 Amendment Act.

Factual Matrix Of The Case

[2] The facts of the case have been neatly summarised by the learned HCJ in his grounds of judgment, which we would now reproduce with some modifications.

[3] The applicant, Aminah Ahmad, is a pensioner. She retired from public service in 2002. In the judicial review proceeding, she is suing the respondents, i.e., the Government of Malaysia and the Director General of the Public Service (the Director General), respectively, for the abovementioned reliefs in her personal capacity and on behalf of 56 retired members of the public service ("the applicant"). The Director General is the authority empowered under the PAA 1980 to determine the calculation of pension on behalf of the Government.

[4] The pension received by Government employees who had retired from public service is regulated by the Pensions Act 1951 and the PAA 1980. In 2013, the PAA 1980 was amended by ss 3 and 7 of the 2013 Amendment Act. The amendment deleted ss 3 and 6 and the definition of "corresponding last drawn salary" in s 2 of the PAA 1980. Two new sections were introduced, namely, ss 3A and 3B of the PAA 1980, respectively. The above amendments came into effect on 1 January 2013. The direct effect of the amendment resulted in the change in the formula for adjusting the pension of Government employees who had retired prior to 1 January 2013.

[5] Some four years later, on 28 April 2017, the applicant filed an originating summons ("the 2017 OS") with the following main declaratory orders:

(i) That ss 3 and 7 of the 2013 Amendment Act are *ultra vires* art 147 of the Federal Constitution;

(ii) that the deleted ss 3 and 6 of the PAA 1980 be restored accordingly; and

(iii) a consequential order that adjustments be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post 1 January 2013 formula and any shortfall resulting therefrom be paid to the respective recipients accordingly.

[6] The applicant's case, in a nutshell, was that the amendments made by the 2013 Amendment Act were less favourable to the position prior to the amendments made to the PAA 1980. On the restoration of the deleted ss 3 and 6, the applicant sought adjustments of the pension under the pre-2013 formula and to be paid to her.

[7] On 9 January 2020, the High Court dismissed the declarations sought by the applicant. In deciding so, the High Court made, *inter alia*, the following observations and findings:

(a) Section 3(1) of the PAA 1980 as amended by the 2013 Amendment Act changed the criteria by which pension is adjusted under the PAA 1980. It changed the statutory mechanism for the adjustment of pension from one that is based on the latest revision of an applicable salary scale to an adjustment mechanism that is based on a fixed rate of increment of 2% per annum;

(b) Parliament was aware that the amendments made would change the variable rate of pension adjustment pegged to the latest revision of the applicable salary scale to a fixed rate adjustment of 2% per annum, which could result in pensioners being put in a position that is less favourable than that prior to the amendments coming into effect;

(c) To ensure that the guarantee provided in art 147 of the Federal Constitution is preserved and to protect against the likelihood of situations where pensioners are put in a less favourable position because of the change to the annual fixed rate pension adjustment, Parliament had provided a safeguard in s 3(2) of the PAA 1980. The safeguard caters for the event that the fixed rate of 2% results in a situation that is less favourable by providing a provision empowering His Majesty the Yang di-Pertuan Agong to prescribe a higher percentage of increment to an officer appointed before 1 January 2013;

(d) Sections 3 and 7 of the 2013 Amendment Act are not *ultra vires* art 147 of the Federal Constitution.

[8] The applicant, by Notice of Appeal dated 3 February 2020, appealed against the decision of the High Court. The Court of Appeal in its judgment dated 13 January 2022 stated that the appeal concerned the validity of the amendments made to the PAA 1980. The Court of Appeal concluded by reversing the decision of the High Court and holding that the impugned amendments resulted in a situation "less favourable" to the applicant when compared with the preceding retirement adjustment scheme under the PAA 1980, i.e., the scheme prior to the amendments.

[9] The Court of Appeal allowed the appeal and granted the following declarations which the court said were not inconsistent with the actual declarations sought by the applicant in the 2017 OS:

(i) that ss 3 and 7 of the 2013 Amendment Act are null and void being in contravention of art 147 of the Federal Constitution;

(ii) that ss 3 and 6 of the PAA 1980 as amended by ss 3 and 7 of the 2013 Amendment Act and in force since 1 January 2013 are null and void being in contravention of art 147 of the Federal Constitution; and

(iii) an order that the above declarations are to take effect prospectively from the date of the Court of Appeal's decision, i.e., 13 January 2022.

[10] The Court of Appeal, however, declined to make any order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid to the appellant on the ground that it has not been proven that any actual loss has been suffered by the appellant.

[11] The Government and the Director General were granted leave by the Federal Court to appeal against the decision of the Court of Appeal. The following questions for determination by the Federal Court were determined as follows:

(i) The question of whether ss 3 and 6 of the PAA 1980 as amended by ss 3 and 7 of the 2013 Amendment Act contravene art 147 of the Federal Constitution when a pensioner fails to prove that the adjusted pension received is actually financially less favourable when it is compared to the former law was answered in the affirmative;

(ii) the question of whether: (a) the pre-amendment law is revived by itself with the striking down of the impugned provisions by the court; and (b) if the answer to question (a) is in the affirmative, whether the schedule to the pre-amendment law which has been deleted by Parliament with the coming into effect of the impugned provision, is likewise revived automatically, were both answered in the affirmative.

[12] The decision of the Federal Court was to the effect that the applicant obtained a declaration of right against the Government and the Director General that she is entitled to receive her pension according to the formula in the original ss 3 and 6 of the PAA 1980.

Events Leading To The Instant Judicial Review Application

[13] Pursuant to the decision of the Federal Court, the applicant, in the letter dated 6 October 2023, to the Minister in the Prime Minister's Department in charge of Law and Institutional Reform, demanded that the Government and the Director General carry out the pension adjustment using the pre-2013 formula from 13 January 2022. A similar letter, dated the same day, was also sent to the Director General and Chief Secretary to the Government.

[14] On 17 October 2023, the Director General responded stating *inter alia* as follows:

(i) The court's decision did not make any order for retrospective adjustments and for any shortfall to be paid. Paragraph [49] of the judgment of the Court of Appeal was referred to, which stated:

> We however, decline to make any order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid to the appellant on the ground that it has not been proven that any actual loss has been suffered by the appellant. This was the finding of fact by the learned judge and in respect of which we find no appealable error.

(ii) Accordingly, based on the revived provisions and the definition of "current salary scale" in PAA 1980, the pension adjusted prior to 1 January 2013 is premised on changes in any salary scale, and since there was no change in the current salary scale from the year 2013, no pension adjustments can be made;

(iii) Since the applicant falls within the category of officers who retired prior to 2013, their pension is reverted to the amount as per December 2012 based on the last salary revision for public servants implemented in 2012;

(iv) This last salary revision for serving public servants is reflected in Pekeliling Perkhidmatan Bil. 1 Tahun 2012.

[15] The applicant responded by stating that the order for a back-dated pension is not an issue and that adjustment to the pension ought to be made from the date the original provisions were revived. The applicant also refuted the claim by the Director General that there was no salary revision and referred to the following service circulars which would entitle the applicant to pension adjustment:

(i) Pekeliling Perkhidmatan Bil. 1 Tahun 2012;

(ii) Pekeliling Perkhidmatan Bil. 2 Tahun 2013;

(iii) Pekeliling Perkhidmatan Bil. 36 Tahun 2013; and

(iv) Pekeliling Perkhidmatan Bil. 1 Tahun 2016.

[16] The applicant contended that the said service circulars had made changes to the salary scale although the words improvements or rationalization are used. However, in a letter dated 12 December 2023, the Director General maintained the position taken in his letter dated 17 October 2023.

Summary Of The Learned HCJ's Decision

[17] The learned HCJ held that the present Judicial Review Application (JR Application) is not caught by *res judicata* because the 2017 OS concerned the constitutionality of the 2013 Amendment Act, not the applicant's actual pension adjustment, which was never determined. The learned HCJ said *mandamus* was not an issue then, as the conditions for seeking it had not arisen. The remedy of *mandamus* only became available after the amendments were declared invalid and the 2nd Respondent refused to adjust the pension. Therefore, the current judicial review is not an abuse of process, and the applicant is entitled to pursue *mandamus.*

[18] In this regard, the learned HCJ found that the main relief sought in the 2017 OS was on the constitutionality of ss 3 and 7 of the 2013 Amendment Act which had substituted pension adjustments based on current salary scale with a fixed 2% increment annually. The relief that the Court of Appeal declined to make was the retrospective adjustments and shortfall, which were said not to be proven by the Applicant. The learned HCJ further held that what was not proven was whether there was an actual loss in pensions after the impugned amendments for the main relief to be granted. The High Court and the Court of Appeal did not make a finding on the actual pension adjustment of the applicant.

[19] The learned HCJ further held that since *mandamus* was not an issue and was not determined by the courts in the 2017 OS, an order of *mandamus* lies where a public officer has a statutory duty to act. Under the PAA 1980, pensions must be adjusted whenever there is a salary revision for serving officers.

[20] With regard to the status of the Pekeliling Perkhidmatan, the learned HCJ held that Pekeliling Perkhidmatan Bil. 2 Tahun 2013 and Bil. 36 Tahun 2013 were structural enhancements to the salary scale and did not constitute salary revisions. However, Pekeliling Perkhidmatan Bil. 1 Tahun 2016 amounted to a salary revision by granting one automatic annual increment *(*Kenaikan Gaji Tahunan, "KGT") to serving officers, entitling pensioners to corresponding adjustment. Connected with this finding, the learned HCJ made a further finding that the criteria for seeking the remedy of *mandamus* only crystallizes

when the Director General refused the applicant's demand to make the necessary adjustments to her pension after the 2013 Amendment Act was declared invalid and the original provisions were restored. According to the learned HCJ, it was not competent for the applicant to seek the remedy of *mandamus* in the 2017 OS.

[21] Having heard the parties before him, the learned HCJ made the following orders:

(i) Pekeliling Perkhidmatan Bil. 2 Tahun 2013 and Pekeliling Perkhidmatan Bil. 36 Tahun 2013 do not concern a salary revision; and

(ii) Pekeliling Perkhidmatan Bil. 1 Tahun 2016 concerns a salary revision, especially the one KGT.

[22] The learned HCJ also made the following consequential orders:

(i) An order of *mandamus* compelling the Director General to make the necessary corresponding adjustments of one KGT for the purpose of computing the pension in favour of entitled pensioners under ss 3 and 6 of the PAA 1980;

(ii) In view of the decision of the Federal Court in *The Government Of Malaysia & Anor v. Aminah Ahmad (suing In Her Personal Capacity And On Behalf Of 56 Retired Members Of The Public Service)* [2023] 5 MLRA 498, the back-dated pension is to be paid beginning January 2022 until the next salary revision; and

(iii) The payment of the back-dated pension is to be paid to the entitled pensioners within 3 months from the date of judgment.

[23] Hence the present appeal.

Our Analysis And Finding

[24] In the appeal before us, both the appellants and the respondent maintained their position in the High Court. For the appellants, it was impressed upon us that the JR application was unsustainable because of the principle of *res judicata*. It was contended that the learned HCJ had erred in fact and in law in holding that the JR application is not caught by *res judicata*, issue estoppel and abuse of the Court's process.

[25] Hence, the central issue in this appeal, in our view, is whether the learned HCJ was correct in holding that the JR application is not *res judicata*. In this context, it is imperative that we should examine the decision of the courts in the 2017 OS and its effect on the JR application.

[26] The law on *res judicata* is well settled. There are numerous case law authorities on this subject which were published in the law reports in this

country. However, since this issue is the crux of the dispute between the parties, it is appropriate for us to restate the law and apply it to the facts of the case. In Malaysia, the doctrine of *res judicata* has been incorporated in s 25 of the Courts of Judicature Act 1964, which confers additional power on the High Court to deal with *res judicata* in item 11 of the Schedule.

[27] *Res judicata* simply means "a matter adjudged". In this respect, we can do no better than referring to the speech of Peh Swee Chin SCJ in the Supreme Court case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 1 MLRA 611, which was accepted by the Federal Court case of *Kerajaan Malaysia v. Mat Shuhaimi Shafiei* [2018] 2 MLRA 185, where at p 194, Ahmad Maarop CJM stated:

> "[19] The Latin term of "*res judicata*" literally translated means 'a matter adjudged'. The full maxim is *res judicata pro veritate accipitur* which means 'a matter adjudged is taken as the truth'. In explaining what is *res judicata*, in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 1 MLRA 611, the Supreme Court said:
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> > "What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as a truth, *res judicata pro veritate accipitur*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
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> > > Since a *res judicata* creates an estoppel per *rem judicatum*, the doctrine of *res judicata* is really a doctrine of estoppel per *rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel per *rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.
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> > The starting point ought to be the celebrated passages by Wigram VC in the case of *Henderson v. Henderson* [1843] 3 Hare 100 at p 115 which is:
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> > > The plea of *res judicata* applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence might have brought forward at the time"
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> [20] There are in fact two kinds of estoppel per *rem judicatum*. The first is cause of action estoppel and the second is issue estoppel, which is the development from the first. Explaining on the two types of estoppel, the court said:

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular right action in court for the particular remedy are determined in a final judgment and such right of action, i.e., the cause of action, merges into the said final judgment, in a layman's language, the cause of action may not be relitigated between the same parties because it is *res judicata*.

In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *res judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence... On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nut shell, from a consideration of case law, means in law a lot more, i.e., that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v. Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel...prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action'

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment... There is one school of thought that issue estoppel applies only to issue actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and were not brought as described, though not actually decided by the court, are still covered by the doctrine of *res judicata*, i.e., doctrine of estoppel *per res judicatum*.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents, for one thing, a correct even though through broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel per *rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation."

[28] With regard to issue estoppel, it may be applicable even if the cause of action in the two actions are not the same. In the case of *Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor* [1987] 1 MLRA 285, the Supreme Court stated:

> "We agree with the learned judge that 'issue estoppel' can arise even where a plea of *res judicata* cannot be established because the causes of action are not the same.
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> *Halsbury's Laws of England* — 4th ed Vol 16 paragraph 1530 succinctly sets out the law, which cited hereunder:
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> > 'A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the object of the first and second actions are different, the finding on the matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in the second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proceedings; (2) the judicial decision said to create the estoppel is final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised or their privies. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent can either plead the estoppel and leave the matter to be dealt with at the trial, or he can attempt to have the offending plea struck out."

[29] Besides the doctrine of *res judicata*, the doctrine of abuse of process is also often applied in preventing a party from raising an issue which he could and should have raised in the earlier proceeding. In *Kerajaan Malaysia v. Mat Shuhaimi Shafiei (supra),* the Federal Court referred to the landmark case of *Henderson v. Henderson* [1843] 3 Hare 100, at pp 114-115 as follows:

> "I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, 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."

[30] Based on the authorities, a matter is *res judicata* if it can be shown that:

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit;

(ii) The former suit must have been a suit between the same parties under whom they or any of them claim;

(iii) The parties aforesaid must have litigated under the same title in the former suit;

(iv) The court which decided the former suit must have been a court of competent to try the subsequent suit or the suit in which such issue is subsequently raised;

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

[31] Keeping the principle of law in mind, we will now consider the arguments before us.

[32] To begin with, it is pertinent to appreciate what reliefs are sought by the applicant in the JR application. In so far as the order for *mandamus* is concerned, the applicant sought to compel the respondents:

(i) To immediately make adjustments to the pension entitlement amounts in accordance with the formula contained in ss 3 and 6 of the PAA 1980 prior to its amendment under the 2013 Amendment Act; and

(ii) Within 14 days or such time as the Court may determine, execute the payment of pension arrears towards the applicant in accordance with the formula contained within ss 3 and 6 of the PAA 1980 prior to its amendment under the 2013 Amendment Act.

[Emphasis Added]

[33] In allowing the JR application, the learned HCJ ordered that:

(i) An order of *mandamus* compelling the Director General to make the necessary corresponding adjustments of one KGT for the purpose of computing the pension in favour of entitled pensioners under ss 3 and 6 of the PAA 1980;

(ii) In view of the decision of the Federal Court in *Government of Malaysia & Anor v. Aminah Ahmad (supra)*, the back-dated

pension is to be paid beginning January 2022 until the next salary revision; and

(iii) The payment of the back-dated pension is to be paid to the entitled pensioners within 3 months from the date of judgment.

[Emphasis Added]

[34] It is to be noted that the learned HCJ had ordered that the applicant be paid the back-dated pension from the beginning of January 2022 until the next salary revision.

[35] Against the said order in the JR application, let us examine the applicant's case in the 2017 OS. The reliefs sought by the applicant in the 2017 OS are:

(i) Declaratory order that ss 3 and 7 of the 2013 Amendment Act are *ultra vires* art 147 of the Federal Constitution;

(ii) Declaratory order that ss 3 and 6 of the PAA 1980 as amended by ss 3 and 7 of the 2013 Amendment Act and in force since 1 January 2013 are *ultra vires* art 147 of the Federal Constitution;

(iii) The provisions of ss 3 and 6 of the PAA 1980, prior to the amendments by ss 3 and 7 of the 2013 Amendment Act, be restored accordingly; and

(iv) Proper adjustment be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post 1 January 2013 formula, and any shortfall resulting therefrom be paid to the respective recipients accordingly.

[Emphasis Added]

[36] Clearly, in both the JR application and the 2017 OS, even though differently worded, the applicant sought the arrears of the pension adjustment. In this regard, it is pertinent for us to examine the orders made by the learned HCJ in the 2017 OS. As this appeal focuses on the issue of the arrears in the pension adjustment, we will not refer to the order pertaining to the constitutionality of the 2013 Amendment Act. In so far as the arrears of the pension adjustment, the learned HCJ in the 2017 OS dismissed that prayer and ruled that the applicant's computation/comparison in the pension adjustment made by the 2013 Amendment Act, purportedly showing that she had suffered loss, was incorrect. In paras [28] and [29] of the grounds of judgment in the 2017 OS, the learned HCJ stated:

"[28] As regards the officer who retired at grade "Jusa C" used by the applicant in Plaintiff's Affidavit (2) to illustrate her point that the amendment to s 3 of the PAA 1980 by the 2013 Amendment Act resulted in a less favourable position to the plaintiff and her fellow pensioners, I must point out that sub s 3A(2)(a)

of the PAA 1980 stipulates that the basis for the first of his adjustment under subsection 3(1) shall be his pension that had been adjusted on 1 January 2012, which in the plaintiff's example is RM7,200.00. The plaintiff says that the pensioner was drawing a pension of RM4,763.47 on 31 December 2011 and claims that based on the amendment to s 3 of the PAA 1980 of an annual increment of two percent (2%) per annum, it would have taken 10 years for the "Jusa C" officers' pension to be adjusted to RM7,200.00.

[29] With respect to the plaintiff, her claim is incorrect. Based on the provision in the new subsection 3A(2)(a) of the PAA 1980, the pension of the "Jusa C" officer in her example would be adjusted at the rate of 2% per annum from 1 January 2013 based on the pension sum that was adjusted on 1 January 2012 i.e., RM7,200.00 and not RM4,763.47. Therefore, the plaintiff's averment that it will take 10 years from 1 January 2013 for the officer's pension to be adjusted to RM7,200.00 by reason of the amendments made to the PAA 1980 by the 2013 Amendment Act is erroneous."

[37] The applicant's appeal to the Court of Appeal was allowed, and the learned HCJ's decision in the 2017 OS was set aside. While declaring that ss 3 and 7 of the 2013 Amendment Act were null and void, it was explicitly declared that the order of this Court was that the declarations made are only to take effect prospectively from the date of this decision, i.e., 13 January 2022. This was reflected in minute (e) of the order of the Court of Appeal as follows:

"the declaratory orders in paras (c) and (d) above take effect prospectively from 13 January 2022."

[38] It must also be noted that the applicant did not appeal against the decision of the learned HCJ in dismissing the prayer for arrears of the pension adjustment. This is reflected in the Court of Appeal decision at para [49] as follows:

"[49] We however, decline to make any order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid to the appellant on the ground that it has not been proven that any actual loss has been suffered by the appellant. This was the finding of fact by the learned Judge and in respect of which we find no appealable error. In addition, no specific mention was made of this issue in the memorandum of appeal and this issue was not submitted on by the learned counsel for the Appellant, neither in his written submission nor his oral submission."

[39] The respondent's appeal to the Federal Court was dismissed. It is to be noted that while the Federal Court agreed with the Court of Appeal that there need not be actual loss or damages suffered by the applicant before a less favourable situation could arise, the whole appeal against the Court of Appeal decision, including the order for prospective effect of the declaratory order was dismissed. It must be noted that the applicant did not appeal on the order of the prospective effect of the Court of Appeal decision to the Federal Court.

[40] There are two important conclusions that arise from the Court of Appeal decision in the 2017 OS:

(i) the declaratory order made has no retrospective effect. As clearly ordered by the panel, the declaratory orders were taking effect prospectively from 13 January 2022; and

(ii) the applicant did not appeal against the decision of the learned HCJ on the issue of loss suffered from the amendment to ss 3 and 6 of the PAA 1980.

[41] Hence, it is our considered view that the applicant's prayers for the arrears in the pension adjustment are unsustainable based on the clear decisions of the Court of Appeal and the Federal Court.

[42] In this respect, as submitted by the applicant both here and below, the cause of action in the JR application differs from the action in the 2017 OS in that the cause of action for the JR only accrued after the amendments were declared invalid and the 2nd Appellant refused to adjust the pension.

[43] With due respect, we disagree. Firstly, the prospective effect of the Court of Appeal decision would only mean that the applicant's entitlement to the pension adjustment would be computed from the date of the decision, not retrospectively. Put in another way, the applicant is not entitled to the arrears. Consequently, the issue of the applicant's salary adjustment in the JR application is irrelevant.

[44] Secondly, this issue i.e., the applicant's entitlement to the arrears of the pension adjustment, also belonged to the 2017 OS. Assuming that the cause of action in the 2017 OS and the JR application is different, the doctrine of issue estoppel clearly applies. The same facts were relied upon by the parties in both litigations addressing the same issue that had been decided in the 2017 OS. In this regard, it is apt for us to reiterate the statement of Peh Swee Chin, SCJ in *Asia Commercial Finance (supra).*

> "...However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, i.e., neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of the previous final judgment in which they, or their privies, were parties... It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population, the increasing sophistication of the populace with the law and with the expanding resources of the court being found always one step behind resulting increase in litigation."

[45] Hence, in *Henderson v. Henderson (supra)* it was held that:

> "The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounced a judgment, but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time".

[46] As we have stated earlier, the applicant's pension entitlement and her entitlement to the arrears, which was the subject matter of the 2017 OS, had been determined by the Court of Appeal. Hence, issue estoppel would prevent her from relitigating the same issue at the JR application. Even if *res judicata* does not apply, the court should also consider whether the doctrine of abuse of process is applicable to the facts of the case.

[47] In the present appeal, the learned HCJ in the JR application did not consider the doctrine of abuse of process. In our view, the learned HCJ fell into error when he merely considered the applicability of the doctrine of *res judicata* only, without considering the doctrine of abuse of process. In this regard, we find support in our view from the decision of the Federal Court in *Kerajaan Malaysia v. Mat Shuhaimi Shafiei (supra)* where the court held:

> "[41] For reasons which we will set out shortly, we find that the Court of Appeal erred in not holding that Encl 1 was an abuse of the process. Indeed, it was clear that the crucial issue as to whether Encl 1 was an abuse of the process of the court was not considered at all by the Court of Appeal in its judgment. This must be done by the Court of Appeal, before embarking on the consideration of the merit of the motion. If, upon due consideration, Encl 1 was found to be an abuse of the process, then Encl 1 could not stand, and the appeal must be dismissed without the need of going to the merit of the substantive motion. The Court of Appeal had considered the issue of *res judicata*, but not the applicability or otherwise of the doctrine of the abuse of the process. On the law that we have set out at some length, *res judicata* [in the form of cause of action estoppel or issue estoppel], was separate and distinct from the doctrine of the abuse of the process although both rest on the same underlying public interest — namely, that there should be finality in litigation and that a party should not be vexed twice in the same matter [see *Johnson (supra)* per Lord Bingham of Cornhill at p 31, *Toronto (City) v. CUPE Local* 79 [2003] SCC 63]. The abuse of the process doctrine... "is untrammelled by the technicalities of estoppel." [see *House of Spring Gardens Ltd v. Waite* [1990] 2 All ER 990, at p 1000]. In *Bradford and Bingley Building Society v. Seddon* [1999] 1 WLR 1482, at pp 1490-1491, Auld LJ said:
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> > "In my judgment, it is important to distinguish clearly between *res judicata* and abuse of process not qualifying *res judicata*, a distinction delayed by the blurring of the two in the courts' subsequent application of the above *dictum* [of Sir James Wigram V-C in *Henderson v. Henderson* 3 Hare 100]. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances': see *Thoday v. Thoday* [1964] P 181, 197 — 198, per Lord Diplock LJ, and *Arnold v. National Westminster Bank plc* [1991] 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and the other not to be unjustly hounded given the earlier history of the matter... Thus, abuse of the process may arise where there has been no earlier decision capable of amounting to *res judicata* (either or both because the parties or the issue are different) for example, where liability between new parties and/or determination of new issues

should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue."

[48] In this respect, we are fortified in our view by the decision in *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 MLRA 131; where, on the issue of abuse of process, the Supreme Court stated:

> "There is moreover 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 reagitation of the question formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceeding 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 Centre Pty Ltd v. Attorney-General of Queensland* [1979] AC 411, 425.
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> "The second defence is one of '*res judicata*'. There has of course, been no actual decision in litigation between the 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 Wigram 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:
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> > '… there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of the process to raise it in subsequent proceeding matters which could and therefore should have been litigated in earlier proceeding.' (p 590)".
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> The attempt by way of the instant proceeding to relitigate and reopen 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 & Ors* [1982] AC 529, 542."

[49] At the risk of being repetitive, we reiterate that the applicant had not appealed against the decision of the learned HCJ in the 2017 OS that she had failed to prove her losses as a result of the 2013 Amendment Act. The learned HCJ had decided that the applicant's contention that the implementation of the 2% annual rate of pension increment is less favourable compared to the adjustment of pension based on salary revision prior to the amendment made under the 2013 Amendment Act was incorrect; hence, the issue of loss was not proven. In our view, the issue of loss that was raised in the 2017 OS was meant to support her prayer for the payment of the arrears of her pension.

[50] However, having failed to convince the court in the 2017 OS on her loss, the applicant, in the JR application, sought to rely on the Pekeliling Perkhidmatan referred to in para 14 of this judgment and contended that there should be a pension adjustment as there were purportedly salary increments under the said *Pekeliling Perkhidmatan.*

[51] In our opinion, the Pekeliling Perkhidmatan, especially the Pekeliling Perkhidmatan Bil. 1 Tahun 2016, should be raised in the 2017 OS. The issue of the applicant's entitlement to pension adjustment based on the pre-2013 Amendment Act belongs to the claim in the 2017 OS. It ought to have been brought forward as part of the subject matter in the 2017 OS, but they have not done so, probably due to negligence, inadvertence or accident. In the circumstances, under the law, the JR application is prohibited by *res judicata* as issue estoppel. We are also of the view that the filing of the JR application is an abuse of the process, intending to relitigate the issue of payment of arrears in the pension adjustment.

[52] On this ground alone, the issue of whether the Pekeliling Perkhidmatan referred to earlier constitutes salary revision among the civil servants, giving the applicant the right for pension adjustment, is irrelevant in this appeal.

[53] In the circumstances, we are of the opinion that this is an appropriate case where we should exercise appellate intervention to correct the plain error committed by the learned HCJ. This appeal is hereby allowed. We set aside the decision of the learned HCJ.

[54] Since this appeal is of wide public interest and concern, and for the avoidance of doubt, we wish to state that this decision affects the 57 respondents here only due to the way their applications were crafted and pursued in court.

[55] We make no order as to costs.