ROBINDER SINGH JAJ BIJIR SINGH

v.

JASMINDER KAUR BHAJAN SINGH

Federal Court, Putrajaya
Zabariah Mohd Yusof, Mary Lim Thiam Suan, Harmindar Singh Dhaliwal FCJJ
[Civil Appeal No: 02(i)-48-08-2023(N)]
9 February 2024

Civil Procedure: *Language — Matrimonial proceedings — Judicial separation or divorce — Whether cause papers filed under Law Reform (Marriage & Divorce) Act 1976 read with Divorce and Matrimonial Proceedings Rules 1980 might be filed in English language without accompanying translation in National language in view of Registrar's Circular No. 5 of 1990 — Order 92 Rules of Court 2012, whether applicable*

Family Law: *Divorce — Matrimonial proceedings — Whether cause papers filed under Law Reform (Marriage & Divorce) Act 1976 read with Divorce and Matrimonial Proceedings Rules 1980 might be filed in English language without accompanying translation in National language in view of Registrar's Circular No. 5 of 1990 — Order 92 Rules of Court 2012, whether applicable*

The three questions of law for which leave to appeal was granted revolved around the issue of whether cause papers, from petition to interlocutory applications and associated affidavits, filed under the Law Reform (Marriage & Divorce) Act 1976 ["Act 164"] read with the Divorce and Matrimonial Proceedings Rules 1980 ["DMPR"], might be filed in the English language without an accompanying translation in the National language in view of Registrar's Circular No. 5 of 1990 ["Registrar's Circular"]. The three questions of law were: (i) whether petitions for judicial separation or divorce (matrimonial proceedings) filed pursuant to the provisions of Act 164 and the DMPR might be filed in the English language only; (ii) if so, whether all other cause papers filed in the matrimonial proceedings might be filed in the English language only; and (iii) if the answers to either one or both of the questions above were in the negative, whether the filing of the documents in English only was an irregularity that could be cured with the necessary directions by the Court that the said cause papers be filed in Bahasa Malaysia. In this instance, the appellant's application at the High Court ["encl 20"] was dismissed because there was no translation of the cause papers into the National language. The High Court Judge, relying on O 92 rr 1(1) and (4) of the Rules of Court 2012 ["ROC"], held that encl 20 had to be translated. The Court of Appeal found no merit in the appellant's subsequent appeal premised on O 92 rr 1(1) and (4) of the ROC coupled with the Registrar's Circular being administrative in nature, and that the Registrar's Circular could not possibly prevail over the language requirement in O 92 r 1(1) of the ROC. Hence, the present appeal.

Held (allowing the appeal):

(1) It was quite clear that O 92 r 1 of the ROC was applicable where the document(s) filed in Court were for use in pursuance to "these Rules"; these Rules being the ROC. But the ROC did not apply to matrimonial proceedings under Act 164 and the DMPR. This was clearly provided in O 1 r 2(2) of the ROC which seemed to have escaped the attention of the Courts below. Order 1 r 2(2) specifically recognised that the ROC would not have any effect on those proceedings where separate rules had already been made or might be made under written law specifically for the purpose of such proceedings. This was an express provision for the operation of the maxim *generalia specialibus non derogant*. There was also O 94 r 2 of the ROC. Under r 2(1), O 5 r 1 which dealt with the mode of commencement of proceedings was expressly excluded from application to those proceedings initiated under the written laws listed in Appendix C, except as provided under the ROC itself. Appendix C was amended *vide* the Rules of Court 2012 (Amendment) 2018. Order 94 r 2(2) provided that in the event there was any inconsistency between any of the Rules made under the specific written law and the ROC, the former would prevail. In the list of exempted written laws set out in Appendix C was item 5 dealing with matrimonial proceedings under Act 164. It could not be any clearer that the Rules enacted under written laws were to apply to those subject matters mentioned in Appendix C. If the ROC were to apply, it was only where it was expressly provided in the ROC. This reemphasised the significance and application of the specific rules enacted under written law. In the present appeal, it would be the DMPR itself which contained comprehensive provisions on the commencement and conduct of matrimonial proceedings, including applications for judicial separation under Act 164. All this therefore meant that the ROC and in particular O 92 did not apply to the matrimonial proceedings at hand. (paras 35-39)

(2) While practice directions and circulars were issued for the proper and better administration of justice, and they were generally effective in that regard, the Courts who were responsible for the issuance of these directions and circulars must guard against adherence that could result in injustice. The circumstances and conditions in this appeal illustrated this unfortunate outcome, with the appellant complying with the Registrar's Circular but indirectly faulted by the High Court for having done so. The relevant direction or circular must be carefully examined and appreciated in context. Having held out to the public that their cause papers might be filed in the English language, it did not hold any sense to then castigate a party for not having complied with the ROC and reasoning that the direction and circular was in fact worth naught. The dismissal of encl 20 had the effect of depriving the appellant access to justice and equal protection of the law as embodied in arts 5 and 8 of the Federal Constitution. (paras 51-53)

(3) The Court of Appeal had found the circular to be in conflict with the ROC, particularly O 92 r 1(1). There was, however, no analysis as to how the conflict

arose, if at all there was one, since the intent of the Registrar's Circular was really at the end of the day to defer the operation of the ROC to such time as when, for the purposes of this appeal, the DMPR had been translated and gazetted. From the above analysis, it was evident that the ROC did not apply to matrimonial proceedings filed under Act 164 and the DMPR, in which case the matter of conflict did not even arise. (para 56)

(4) In the upshot, this Court answered the first two questions of law posed in the affirmative and declined to answer the third as it was no longer necessary. (para 57)

Case(s) referred to:

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

Bar Council Malaysia v. Tun Dato Seri Arifin Zakaria & Ors & Another Reference; Persatuan Peguam-Peguam Muslim Malaysia (Intervener) [2018] 5 MLRA 345 (refd)

Citibank Bhd v. Malwira Manufacturing Sdn Bhd [2012] 3 MLRA 508 (refd)

Costellow v. Somerset County Council [1993] 1 WLR 256 (refd)

Dato Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2012] 5 MLRA 275 (refd)

Emrail Sdn Bhd & Ors v. Kuwait Finance House (Malaysia) Berhad [2022] 1 MLRA 293 (refd)

Export-Import Bank of Malaysia Berhad v. TFT Display (M) Sdn Bhd [2021] MLRHU 944 (refd)

Kerajaan Malaysia v. Mudek Sdn Bhd [2017] 6 MLRA 25 (refd)

Lau Keen Fai v. Lim Ban Kay & Anor [2012] 1 MLRA 212 (folld)

Megat Najmuddin Dato Seri Megat Khas v. Bank Bumiputera (M) Bhd [2002] 1 MLRA 10 (refd)

Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor And Another Appeal [1995] 2 MLRA 55 (refd)

Protasco Bhd v. Tey Por Yee & Anor & Other Appeal [2021] 6 MLRA 370 (folld)

R v. Secretary of State for the Home Department, Ex parte Salem [1999] AC 450 (refd)

Scientequip (M) Sdn Bhd v. Properties Review Sdn Bhd [2006] 1 MLRH 570 (refd)

SPIND Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor [2018] 2 MLRA 281 (refd)

Sunlife Assurance of Canada v. Jervis [1944] AC 111 (refd)

Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 1 MLRA 192 (refd)

Walley Metal Works Sdn Bhd v. Safety Development Corporation Sdn Bhd; Pegawai Penerima (Applicant) & Ler Cheng Chye (Liquidator) [2015] 4 MLRH 170 (refd)

Witech Sdn Bhd & Ors v. BHR Group Ltd [2010] 2 MLRA 521 (folld)

Zainun Hj Dahan v. Rakyat Merchant Bankers Bhd & Satu Lagi [1997] 2 MLRH 40 (refd)

Legislation referred to:

Courts of Judicature Act 1964, ss 17, 17A, 96

Divorce and Matrimonial Proceedings Rules 1980, rr 3, 61(1), 91, 105

Federal Constitution, arts 5, 8, 152(1)

Law Reform (Marriage & Divorce) Act 1976, s 108(1)

National Language Acts 1963/67, ss 2, 8

Rules of Court 2012, O 1 r 2(2), O 5 r 1, O 29 r 1, O 92 rr 1(1), (4), 3B, O 94 r 2(1), (2)

Rules Of Court 2012 (Amendment) 2018, Appendix C, Item 5

Subordinate Courts Rules Act 1955, s 4

Counsel:

For the appellant: Honey Tan Lay Ean (Tay Kit Hoo with her); M/s Seira & Shahrizad

For the respondent: Harpal Singh Grewal (Dhanesh Subramaniam Nair & Sharanpreet Kaur Parmjit Singh with him); M/s AJ Ariffin, Yeo & Harpal

For the amicus curiae: Malik Imtiaz Sarwar (Wong Ming Yen with him); M/s Malik Imtiaz Sarwar

JUDGMENT

Mary Lim Thiam Suan FCJ:

[1] The three questions of law for which leave to appeal was granted under s 96 of the Courts of Judicature Act 1964 [Act 91] revolve around the issue of whether cause papers, from petition to interlocutory applications and associated affidavits, filed under the Law Reform (Marriage & Divorce) Act 1976 [Act 164] read with the Divorce and Matrimonial Proceedings Rules 1980 [DMPR] may be filed in the English Language without an accompanying translation in the National Language in view of Registrar's Circular No 5 of 1990 [Registrar's Circular]. The three questions of law are:

i. Whether petitions for judicial separation or divorce (matrimonial proceedings) filed pursuant to the provisions of the Law Reform (Marriage & Divorce) Act 1976 [Act 164] and the Divorce and Matrimonial Proceedings Rules 1980 [DMPR] may be filed in the English Language only.

ii. If so, whether all other cause papers filed in the matrimonial proceedings may be filed in the English Language only.

iii. If the answers to either one or both of the questions above are in the negative, whether the filing of the documents in English only is an irregularity that can be cured with the necessary directions by the Court that the said cause papers be filed in Bahasa Malaysia.

[2] We answered the first two questions in the affirmative leaving the third question unnecessary for determination. Aside from counsel representing the respective parties, the Malaysian Bar appeared as *amicus curiae*. We place on record our appreciation for all submissions made.

[3] We must point out the fact that even before we started with the hearing of the substantive appeal, we were urged by the respondent to strike out the appeal on the basis that it was academic. The respondent had filed an application to this effect – encl 6. According to the respondent, the parties had withdrawn the petition for judicial separation, proceeded to file a joint petition for divorce and had obtained a *decree nisi* with the necessary orders for custody and guardianship of the child from the marriage. Given these circumstances, the Federal Court was said to be without jurisdiction to hear the appeal as the matter was now academic; essentially because there was no longer any lis pending in the Courts below.

[4] We disagreed. Although the general principle is that the court does not answer academic questions [see *Bar Council Malaysia v. Tun Dato' Seri Arifin bin Zakaria & Ors & Another Reference; Persatuan Peguam-Peguam Muslim Malaysia (Intervener)* [2018] 5 MLRA 345, applying *Sun Life Assurance Co of Canada v. Jervis* [1944] AC 111 and *Ainsbury v. Millington* [1987] 1 All ER 929], there are exceptions. In *R v. Secretary of State for the Home Department, Ex parte Salem* [1999] AC 450, the House of Lords explained that it will exercise its discretion to hear the appeal on a question of public law, even though by the time of the appeal, there was no longer an issue which will directly affect the rights and obligations of the parties concerned in the appeal.

[5] Two instances of such exception are illustrated in *Kerajaan Malaysia v. Mudek Sdn Bhd* [2017] 6 MLRA 25 and *SPIND Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor* [2018] 2 MLRA 281. In *Mudek*, the parties had reached an amicable settlement with each other before the appeal was heard. Yet, the Federal Court proceeded to hear the appeal, troubled with the majority decision of the Court of Appeal which "would remain on record, and unless dealt with, would cause confusion to parties and legal advisers alike as it does not reflect the correct position of the law".

[6] Care and caution must, of course, be exercised when considering whether a given set of circumstances warrant the exercise of this sparingly used discretion. In this regard, we found that in order to deal with the questions of law for which leave had already been granted, a detailed consideration of facts will not be required. More importantly and even more critically, we take judicial notice of the fact that there is a substantial number of matrimonial proceedings not only pending but are anticipated to be filed in the Courts below. For those cases, the decision of the Court of Appeal on the application of the Registrar's Circular will apply by virtue of the doctrine of *stare decisis.*

[7] There is also a lack of uniformity of practice in matrimonial proceedings. The High Court sitting respectively in Kuala Lumpur and Penang are said to

accept cause papers in matrimonial proceedings which are filed only in the English Language while the High Court sitting in Malacca has rejected papers which do not have the National Language translation.

[8] Aside from matrimonial proceedings, the decision of the Court of Appeal has implications to a wider field of cases, to winding up petitions since the Circular in question applies equally to proceedings for the winding up of companies under the Companies (Winding-Up) Rules of 1972. We understand that a body of case law has consistently applied the Registrar's Circular and allowed the winding-up petitions to be filed only in the English Language as the Company (Winding-Up) Rules 1972 are yet to be translated and gazetted – see *Export-Import Bank of Malaysia Berhad v. TFT Display (M) Sdn Bhd* [2021] MLRHU 944; *Walley Metal Works Sdn Bhd v. Safety Development Corporation Sdn Bhd; Pegawai Penerima (Applicant) & Ler Cheng Chye (Liquidator)* [2015] 4 MLRH 170; *Citibank Bhd v. Malwira Manufacturing Sdn Bhd* [2012] 3 MLRA 508; and *Scientequip (M) Sdn Bhd v. Properties Review Sdn Bhd* [2006] 1 MLRH 570.

[9] It is thus quite clear that a proper resolution by this Court is absolutely necessary. Leave was granted on the basis that the questions of law posed fulfilled the high threshold under s 96 of the Courts of Judicature Act 1964 [Act 91]. In this appeal, there was and there remained a strong and overwhelming element of public interest and public importance in the issue(s) raised. The decision in the High Court which was affirmed on appeal and for which grounds have been provided by the Court of Appeal, serve as binding precedent for other cases to follow. It was therefore imperative that for the proper administration of family justice, we, as the apex Court must proceed to deliberate and deliver our views on this most pressing issue.

[10] With those considerations, the objections of the respondent were overruled and the application in encl 6 was dismissed.

Factual Background

[11] Some factual background for context. Both parties to the marriage agreed that their marriage had unfortunately irretrievably broken down. On 7 January 2022, the respondent filed an *ex parte* application at the High Court for *inter alia* interim sole custody, care and control of a son from the marriage [enclosure 6]. On 24 January 2022, the High Court granted certain orders in encl 6. The order was however not served on the appellant. Consequently, it lapsed after 21 days from the date of the order. The interlocutory application was also not fixed for *inter partes* hearing within 14 days from grant of the order.

[12] On 27 January 2022, the respondent filed yet another application bearing similar terms to encl 6. On 24 March 2022, the appellant filed an application to set aside the *ex parte* order granted on 24 January 2022 – encl 20. In this application, the appellant contended that there were no urgent circumstances warranting the application in encl 6 to be filed on an *ex parte* basis, that the respondent had failed to disclose material facts, that there was a failure to comply with O 29 r 1 of the Rules of Court 2012, rr 61(1) and 91 of the DMPR,

and an assertion that the appellant had suffered damage and costs by reason of the *ex parte* order.

[13] On 18 April 2022, the appellant filed an application for *inter alia* interim guardianship, custody, care, control and access – encl 26. The parties recorded a consent order to encl 26. Thereafter, the appellant asked for encl 20 to be heard. The respondent had actually agreed to this application, the only matter then outstanding was the matter of whether damages ought to be granted.

[14] At this point, the High Court dismissed encl 20 on the ground that the appellant had failed to file the translation of this application within the time ordered. This was despite the appellant's protestations and claims that the requirement did not arise in the proceedings. The appellant's appeal to the Court of Appeal was dismissed.

Decision Of The High Court

[15] In the written grounds of decision, several reasons were articulated for the dismissal of encl 20.

[16] First, the insistence of the appellant that encl 20 need only be filed in the English Language despite being directed to provide a translation into the National Language within two weeks. The learned Judge disagreed. Relying on O 92 rr 1(1) and (4) of the Rules of Court 2012, His Lordship held that encl 20 had to be translated.

[17] According to the learned Judge, even in urgent cases, O 92 r 1(4) required a translation of the documents to be filed within 2 weeks or within such extended time as allowed by the Court. Insofar as the Registrar's Circular No 5 of 1990 was concerned, the High Court held that encl 20 was dismissed not because it was filed in the English language but because no translation was filed within the time directed and under the mandatory requirements of O 92 r 1 of the Rules of Court 2012. In fact, the learned Judge found that the appellant had failed to do so despite the lapse of three months. The decision of *Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 1 MLRA 192 on the compliance with O 92 was cited in support.

[18] The failure to file a translation in the National Language was an irregularity which, according to the High Court, ought to have been remedied by the appellant – see *Emrail Sdn Bhd & Ors v. Kuwait Finance House (Malaysia) Berhad* [2022] 1 MLRA 293.

[19] His Lordship was also of the view that the unavailability of a translation of the DMPR into the National Language should not have been used as a reason for not filing a translation of encl 20 and its related cause papers as the amendments to s 8 of the National Language Act had been in force for over 30 years since 1 June 1990. The decisions in *Dato Seri Anwar bin Ibrahim v. Tun Dr Mahathir bin Mohamad* [2012] 5 MLRA 275 and *Zainun bte Hj Dahan v. Rakyat Merchant Bankers Bhd & Satu Lagi* [1997] 2 MLRH 40 were cited in support.

Decision Of The Court of Appeal

[20] The principal ground for the decision of the Court of Appeal was on the applicability of the Registrar's Circular. At paragraph [15], the Court of Appeal "found no merit in the appeal premised on O 92 r 1(1) and (4) RC 2012 coupled with the Registrar's Circular being administrative in nature" and at paragraph [27], that it, the Registrar's Circular "cannot possibly prevail over" the language requirement in O 92 r 1(1) of the Rules of Court 2012.

[21] The Court relied on *Megat Najmuddin bin Dato Seri Megat Khas v. Bank Bumiputera (M) Bhd* [2002] 1 MLRA 10, that where the directions conflict with statutory rules of court, the directions "are of no legal effect". The Court of Appeal further relied on *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor And Another Appeal* [1995] 2 MLRA 55 where the Supreme Court explained:

> "Practice directions are intended to be no more than a direction for administrative purpose..."

Our Analysis & Determination

[22] The appellant had filed his cause papers in the matrimonial proceedings at the High Court in English. There was no translation of the same. For this, the appellant relied on the Registrar's Circular which states:

> **Pekeliling Pendaftar No 5 Tahun 1990**
>
> Sebagaimana yang telah dimaklumkan bahawa Pelaksanaan Penggunaan Bahasa Malaysia di Mahkamah telah berkuatkuasa mulai dari 1 hb Jun 1990. Sehubungan dengan itu satu Arahan Hakim Besar Malaya No 2 Tahun 1990 telah dikeluarkan.
>
> 2. Sebagai garis panduan lanjut, YAA Hakim Besar Malaya telah mengarahkan bahawa mana-mana petisyen berkaitan dengan Penceraian dan Prosiding Hal-Ehwal Suami Isteri, Kebankrapan dan Penggulungan Syarikat, **dibenar difailkan dalam Bahasa Inggeris sehingga kaedah-kaedah berkenaan dengannya selesai diterjemah dan diwartakan.**
>
> 3. Arahan ini berkuatkuasa dengan serta merta sehingga diberitahu kelak.
>
> (Mohd. Ghazali Bin Mohd Yusoff)
> Ketua Pendaftar
> Mahkamah Agung
>
> [Emphasis Added]

[23] In 2019, the Bar Council Family Law Committee met with the Managing Judge of the High Court in Kuala Lumpur over the application of this Circular. Circular No 153/2019 captioned "Filing of Documents in English for Family Law Matters" and dated 6 August 2019 was issued following that meeting. In that circular, the Managing Judge confirmed that the Registrar's Circular "remains valid, as far as matrimonial proceedings are concerned. As the

Bahasa Malaysia translation of the Divorce and Matrimonial Proceedings Rules 1980 has yet to be gazetted, all cause papers may be filed in English". This practice of filing documents in English for family or matrimonial matters has thus carried on till today. The current appeal is no exception.

[24] In dealing with the questions of law posed, it is useful to go back a little in time to why and how this Registrar's Circular came to pass. This requires us to appreciate and understand the juxta-positioning of several events, legislations and various rules and directions issued over the relevant passage of time.

[25] First, divorce and matrimonial proceedings. Such proceedings including judicial separations and matters related to matrimonial proceedings are governed by the Law Reform (Marriage & Divorce) Act 1976 [Act 164] and the Divorce and Matrimonial Proceedings Rules 1980 [DMPR]; the DMPR being Rules made pursuant to s 108(1) of Act 164. The DMPR contains extensive provisions regulating how proceedings for the dissolution of marriage or obtaining of divorce decrees and the related ancillary reliefs concerning children are to be initiated and conducted.

[26] Although there is a National Language translation of Act 164, the authoritative text is the English Language version of the Act — see PU(B) 127/1976. The DMPR, enacted in English, however, remains untranslated till today for reasons which are irrelevant for this appeal.

[27] Then, there are the Rules of the High Court 1980 and later Rules of Court 2012. These Rules, enacted under s 17 of the Courts of Judicature Act 1964 [Act 91] and s 4 of the Subordinate Courts Rules Act 1955 [Act 55], regulate procedure and proceedings before the High Court and subordinate Courts. Effective from 1 August 2012, the Rules of Court 2012 apply to both the High Court and subordinate Courts.

[28] Next, The National Language Acts 1963/67 (Revised 1971) [Act 32] was revised in 1971. In that revision exercise, the two Acts, the National Language Act of 1963 and the National Language Act of 1967 were consolidated into a single Act with effect from 1 July 1971. The Acts came into force in the States of Sabah and Sarawak on different dates.

[29] Section 2 of Act 32 provides that the National Language shall be used for official purposes "Save as provided in this Act and subject to the safeguards contained in art 152(1) of the Constitution relating to any other language and the language of any other community in Malaysia". Even for official purposes, s 4 provides that the Yang di-Pertuan Agong may permit the continued use of the English language as may be deemed fit.

[30] In the matter of proceedings in Court, s 8 [as amended *vide* Act A765/1990 with effect from 30 March 1990] permits the continued use of the English Language in the interests of justice:

8. All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language:

Provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

[31] To facilitate the amendment to s 8 of Act 32, Practice Direction No 2 of 1990 [PD No 2/1990] was issued under the authority of the Chief Judge of Malaya on 10 May 1990. PD No 2/1990 deals specifically with all urgent and pending proceedings:

"Adalah memang dijangkakan bahawa beberapa kesulitan praktikal akan dihadapi dalam tempoh sementara pelaksanaan pindaan kepada s 8 Akta Bahasa Kebangsaan melalui Akta Pindaan A765. Bagi mengatasi kesulitan-kesulitan tersebut, arahan berikut hendaklah terpakai dalam tempoh sementara ini.

1. Dalam kes-kes kedesakan, prosiding boleh dimulakan atau dijalankan sebahagiannya dalam Bahasa Kebangsaan dan sebahagiannya dalam Bahasa Inggeris atau kesemuanya dalam Bahasa Inggeris dengan syarat bahawa:

   (i) suatu sijil kedesakan yang menjelaskan kedesakan perkara itu dalam Bahasa Inggeris difailkan oleh peguamcara berkenaan; dan

   (ii) salinan semua dokumen tersebut dalam Bahasa Kebangsaan hendaklah difailkan dalam tempoh dua minggu atau dalam tempoh yang dilanjutkan sebagaimana yang dibenarkan oleh mahkamah.

2. Prosiding-prosiding yang telah dimulakan sebelum 1 Jun 1990 boleh, atas budi bicara mahkamah, diteruskan sebahagiannya dalam Bahasa Kebangsaan dan sebahagiannya dalam Bahasa Inggeris atau kesemuanya dalam Bahasa Inggeris.

3. Mengikut Aturan 92(1) Kaedah-Kaedah Mahkamah Tinggi 1980 dan Aturan 53(5) Kaedah-Kaedah Mahkamah Rendah 1980, mana-mana dokumen yang pada asalnya dalam Bahasa Inggeris bolehlah digunakan sebagai ekshibit, dengan atau tanpa terjemahannya dalam Bahasa Kebangsaan.

4. Sekiranya terdapat apa-apa pertikaian atau kesulitan dalam pelaksanaan Akta Pindaan A765 seperti yang disebut terdahulu, yang tidak diliputi oleh Arahan ini, Mahkamah boleh, atas permohonan lisan oleh Peguam bagi mana-mana pihak atau atas permohonan dengan cara Saman dalam Kamar secara *ex parte* atau Saman Pemula atau atas kehendaknya sendiri, memberi apa-apa arahan sebagaimana yang dikehendaki demi kepentingan keadilan."

[32] As can be seen, the substance of PD No 2/1990 is substantially reflected in the amended s 8, except that the discretion on the use of cause papers in the English language was no longer restricted to urgent circumstances.

[33] Shortly after PD No 2/1990 was issued, Registrar's Circular No 5 of 1990 the contents of which have already been set out, was issued on 28 July 1990. This Circular deals specifically with divorce petitions and proceedings related to matrimonial affairs, bankruptcy and winding-up proceedings. This Circular essentially allows the cause papers relating to divorce and matrimonial proceedings, insolvency and winding up proceedings to be filed in English until such time as the relevant Rules are translated into the National Language and the translations are gazetted. We have used the word "allows" because the Registrar's Circular is still in effect today as the DMPR, relevant to this appeal, have yet to be translated and gazetted.

[34] Enclosure 20 at the High Court was dismissed because there was no translation of these cause papers into the National Language. Order 92 r 1 operated on the mind of the learned Judge and it reads as follows:

> (1) Subject to paragraph (2), **any document required for use in pursuance of these Rules shall be in the national language** and may be accompanied by a translation thereof in the English language, except that the translation for the purpose of O 11, r 6(4) and r 7(1) shall be prepared in accordance with r 6(5) of that Order:
>
> Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.
>
> (2) For Sabah and Sarawak, any document required for use in pursuance of these Rules shall be in the English language and may be accompanied by a translation thereof in the national language except that the translation for the purpose of O 11 r 6(4) and r 7(1) shall be prepared in accordance with r 6(5) of that Order.
>
> (3) ...
>
> (4) In cases of urgency, proceedings may be commenced or conducted partly in the English language or wholly in the English language provided that:
>
> (a) a certificate of urgency explaining the urgency of the matter is filed by the solicitor; and
>
> (b) copies of all such documents in the national language shall be filed within two weeks or within such extended period as the Court may allow:
>
> Provided that:

(a) any document in the national language may be used as an exhibit, with or without a translation thereof in the English language; and

(b) any document in the English language may be used as an exhibit, with or without a translation thereof in the national language."

[Emphasis Added]

[35] It is quite clear that O 92 r 1 is applicable where the document(s) filed in Court are for use in pursuance to "these Rules"; these Rules being the Rules of Court 2012. But, Rules of Court 2012 do not apply to matrimonial proceedings under Act 164 and the DMPR. This is clearly provided in O 1 r 2(2) which seems to have escaped the attention of the Courts below:

Application (O 1, r 2)

2.(1) Subject to paragraph (2), these Rules apply to all proceedings in:

(a) the Magistrates' Court;

(b) the Sessions Court; and

(c) the High Court.

(2) **These Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings** or in relation to any criminal proceedings.

[Emphasis Added]

[36] Order 1 r 2(2) specifically recognises that the Rules of Court 2012 will not have any effect in or to those proceedings where separate rules have already been made or may be made under written law specifically for the purpose of such proceedings. This is an express provision for the operation of the maxim *generalia specialibus non derogant*. In *Lau Keen Fai v. Lim Ban Kay & Anor* [2012] 1 MLRA 212, this Court held that this maxim applied to exclude the operation of the general law on appeals under the Legal Profession Act 1976 [Act 166] as that Act had specific provisions on appeal. Similarly, in the recent decision of *Protasco Bhd v. Tey Por Yee & Anor & Other Appeal* [2021] 6 MLRA 370, the Federal Court held that it is the specific law in the form of the Bankers' Books (Evidence) Act 1949 which applied to banking documents and not the general provisions of the Rules of Court 2012.

[37] There is also O 94 r 2 of the Rules of Court 2012. Under r 2(1), O 5 r 1 which deals with the mode of commencement of proceedings is expressly excluded from application to those proceedings initiated under the written laws listed in Appendix C, except as provided under the Rules themselves. Appendix C was amended *vid*e Rules of Court 2012 (Amendment) 2018 [PU(A) 24/2018]. Order 94 r 2(2) provides that in the event there is any inconsistency between

any of the Rules made under the specific written law and the Rules of Court 2012, the former shall prevail:

Exception (O 94, r 2)

2.(1) O 5, r 1 shall not apply to the proceedings under the written laws listed in Appendix C, except as provided under these Rules.

(2) In the event of any inconsistency, **the rules under the written laws in Appendix C shall prevail over these Rules.**

(3) Any application under any written law, other than those listed in Appendix C, which is by way of a mode other than originating summons or writ, shall be construed to be by way of originating summons in accordance with these Rules.

[Emphasis Added]

[38] In the list of exempted written laws set out in Appendix C is item 5 dealing with matrimonial proceedings under Act 164:

APPENDIX C

LIST OF EXEMPTED LAWS

(1) Item	(2) Proceedings	(3) Written law
1.	Bankruptcy proceedings	Bankruptcy Act 1967
2.	Proceedings relating to the winding up of companies and capital reduction	Companies Act 2016 [Act 777]
3.	Criminal proceedings	Criminal Procedure Code [Act 593]
4.	Proceedings under the Elections Offences Act1954	Elections Offences Act 1954 [Act 5]
5.	Matrimonial proceedings	Law Reform (Marriage and Divorce) Act 1976 [Act 164]
6.	Land reference	Land Acquisition Act 1960 [Act 486]
7.	Admission to the Bar	Legal Profession Act 1976 [Act 166] Advocates Ordinance of Sabah [Sabah Cap. 2] Advocates Ordinance of Sarawak [Sarawak Cap. 110]
8.	Proceedings under the Income Tax Act 1967	Income Tax Act 1967 [Act 53]

9.	Proceedings under the Sabah Trustees (Incorporation) Ordinance 1951	Sabah Trustees (Incorporation) Ordinance 1951 [Cap. 148]
10.	Proceedings under the Sabah Probate and Administration Ordinance 1947	Sabah Probate and Administration Ordinance 1947 [Cap. 109]
11.	Proceedings under the Real Property Gains Tax Act 1976	Real Property Gains Tax Act 1976 [Act 169]
12.	Proceedings under the Petroleum (Income Tax) Act 1967	Petroleum (Income Tax) Act 1967 [Act 543]
13.	Proceedings under the Development Financial Institutions Act 2002	Development Financial Institutions Act 2002 [Act 618]
14.	Proceedings under the Trust Companies Act 1949	Trust Companies Act 1949 [Act 100]
15.	Proceedings under the Kootu Funds (Prohibition) Act 1971	Kootu Funds (Prohibition) Act 1971 [Act 28]

[39] It cannot be any clearer that the Rules enacted under written laws are to apply to those subject matters mentioned in Appendix C. If the Rules of Court 2012 are ever to apply, it is only where it is expressly provided in the Rules of Court 2012. This reemphasises the significance and application of the specific rules enacted under written law. In the present appeal, it would be the DMPR themselves which contain comprehensive provisions on the commencement and conduct of matrimonial proceedings, including applications for judicial separation under Act 164. All this therefore means that the Rules of Court 2012 and in particular O 92 do not apply to the matrimonial proceedings at hand.

[40] In any case, there is also r 105 of the DMPR which provides for the issuance of directions for the purpose of ensuring uniformity of practice and observance of the statutory requirements in matrimonial proceedings:

> 105. Practice to be observed in registries and divorce courts
>
> The Chief Justice may issue directions for the purpose of securing in the registries and the divorce courts due observance of statutory requirements and uniformity of practice in matrimonial proceedings.

[41] There is a similar power in s 17A of the Courts of Judicature Act 1964 [Act 91] for the issuance of Practice Directions and in O 92 r 3B; the directions seen as "necessary for the better carrying out or giving effect" to the provisions of the Rules of Court 2012.

[42] There is nothing in the Registrar's Circular to suggest that it was issued pursuant to r 105. However, it would be reasonable to say that the contents of this circular accords with the purpose why any directions would be issued under r 105, that it was issued in order to ensure uniformity of practice and due observance of the statutory requirements in Act 164 and the DMPR.

[43] PD No 2/1990 was issued following the application of the National Language to proceedings in Court. Even then, there was cognizance of the importance of interests of justice, that such interests must never be compromised in the course of implementing procedures for the better administration of justice. PD No 2/1990, as is with other Practice Directions is directed at the judges who will hear the applications under the relevant laws.

[44] PD No 2/1990 was directed at all the Judges and Judicial Commissioners of the High Court of Malaya, Sessions Court Judges, Deputy and Senior Assistant Registrars and Magistrates in West Malaysia. This PD was copied extensively to everyone who mattered or was concerned with the administration of justice, namely, the Chief Justice, Chief Judge of Sabah & Sarawak [for information], judges of the Federal Court, Attorney General, Chief Registrar of the Federal Court, Registrar of the High Court, President of the Bar Council of Malaysia, Editor General of the Malayan Law Journal, Malayan Law Journal and the Senior Editor at Dewan Bahasa & Pustaka. Ultimately, the public, the users of the system of justice will get wind of the details in the direction.

[45] The same may be said of the Registrar's Circular. It was directed at all the Senior Assistant Registrars and Registrars in West Malaysia.

[46] But, it is the recipients of PD No 2/1990 and the Registrar's Circular that we must have regard to and not so much who was copied in on the direction or the fact that the public will come eventually to be aware of the directions. The direction is given to these recipients so that they know what to do when confronted with the particular circumstance. What the administrators who man the registries have to do is to comply with the Registrar's Circular and accept any cause papers which is filed only in the English Language [dibenar difailkan dalam Bahasa Inggeris sehingga kaedah-kaedah berkenaan dengannya selesai diterjemah dan diwartakan].

[47] As for the users who may have reason to be in Court, they would have the confidence to know what the particular practice will be. In other words, any litigant taking proceedings under Act 164 including filing an application such as encl 20, can expect that it will be "business as usual" and may proceed to file the application only in the English language; particularly since the DMPR have yet to be translated and the translation, gazetted. A litigant such as the appellant here can expect their cause papers to be accepted not just by the registry but by the learned Judge without any issue since there is clear permission for a filing of related documents in English.

[48] This expectation would be quite legitimate and fair since the litigant or appellant in this appeal, cannot use the Rules of Court 2012 simpliciter as the Rules themselves have excluded its application to matrimonial proceedings under Act 164 [Order 94 r 2 and Appendix C item 5]. To complicate matters, the existing DMPR have yet to be translated.

[49] Here, we must address r 3 of the DMPR which reads as follows:

> (1) Subject to these Rules and to any other written law, the Subordinate Courts Rules 1980 and the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Sessions Court in West Malaysia or the First Class Magistrate's Court in East Malaysia and in the High Court respectively.
>
> (2) For the purpose of paragraph (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were, in the case of proceedings pending in the High Court, a provision of the Rules of the High Court 1980.

[50] Although r 3 provides for the application of the then Rules of the High Court 1980 and now the Rules of Court 2012, it categorically states that the application is "Subject to these Rules" and that the application is "with necessary modifications". However, as we have seen, the Rules of Court 2012 themselves have excluded its application to matrimonial proceedings.

[51] While practice directions and circulars are issued for the proper and better administration of justice, and they are generally effective in that regard, the Courts who are responsible for the issuance of these directions and circulars must guard against adherence that result in injustice. The circumstances and conditions that present in this appeal illustrates this unfortunate outcome, with the appellant complying with the Registrar's Circular but indirectly faulted by the High Court for having done so.

[52] In *Witech Sdn Bhd & Ors v. BHR Group Ltd* [2010] 2 MLRA 521, the Court of Appeal acknowledged the "importance of the Registrar's Circular as a practice direction", as highlighted by Sir Thomas Bingham MR in *Costellow v. Somerset County Council* [1993] 1 WLR 256. However, the Court of Appeal opined that-

> "Defendants must be protected from the injustice that they might incur if a judgment is entered against them in contravention of the relevant procedural rules or in some other way that might prevent them from exercising their right to defend the action".

[53] We agree. The relevant direction or circular must be carefully examined and appreciated in context. Having held out to the public that their cause papers may be filed only in the English Language, it does not hold any sense to then

castigate a party for not having complied with the Rules of Court 2012 and reasoning that the direction and circular is in fact worth naught. The dismissal of encl 20 have in our opinion the effect of depriving the appellant access to justice and equal protection of the law as embodied in arts 5 and 8 of the Federal Constitution.

[54] In the course of this judgment, we have deliberately referred to the cause papers filed under Act 164 as opposed to the petition alone. It makes sense that our deliberations extend and include all cause papers filed in relation to the petition.

[55] Earlier, we had also pointed out the existence of a consistent line of authorities from the High Court on the application of the same Registrar's Circular in the context of winding-up proceedings. From the above deliberations, the interpretation in those decisions is correct.

[56] The Court of Appeal had found the circular to be in conflict with the Rules of Court 2012, particularly O 92 r 1(1). There was however, no analysis as to how the conflict arose, if at all there is one since the intent of the Registrar's Circular is really at the end of the day to defer the operation of the Rules of Court 2012 to such time as when, for the purposes of this appeal, the DMPR have been translated and gazetted. From the above analysis, it is evident that the Rules of Court 2012 do not apply to matrimonial proceedings filed under Act 164 and DMPR in which case, the matter of conflict does not even arise.

[57] For all the reasons adumbrated above, we allowed the appeal and set aside the decisions of the Courts below. We answered the first two questions of law posed in the affirmative and decline to answer the third as it is no longer necessary with the development of the case, as confirmed by learned counsel for the appellant.

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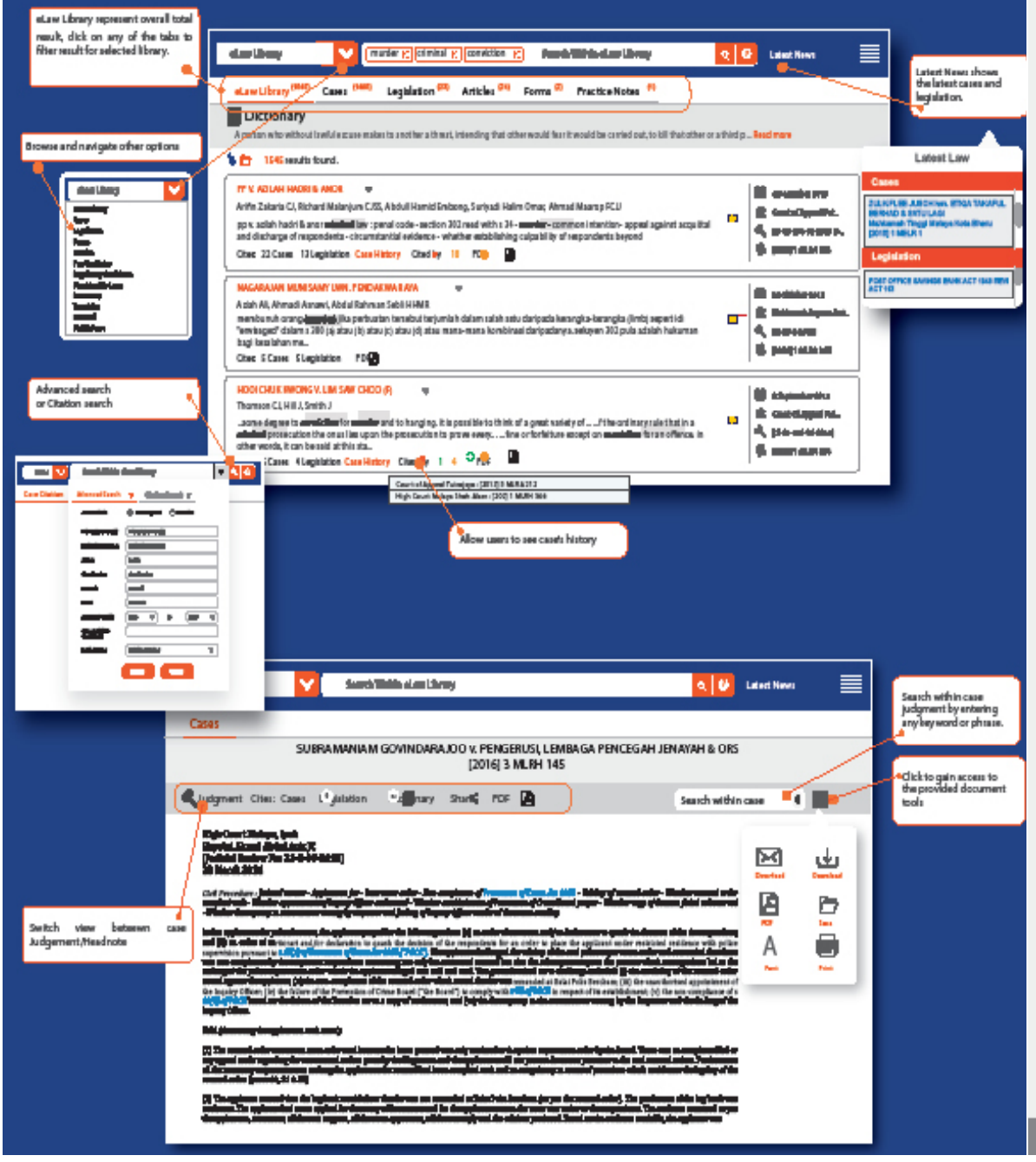

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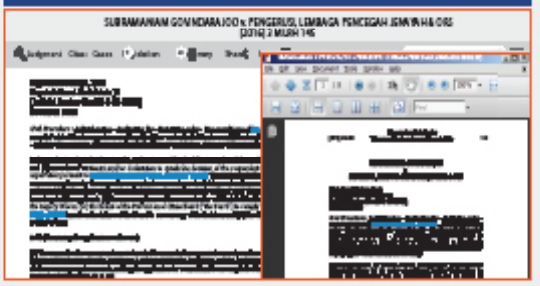

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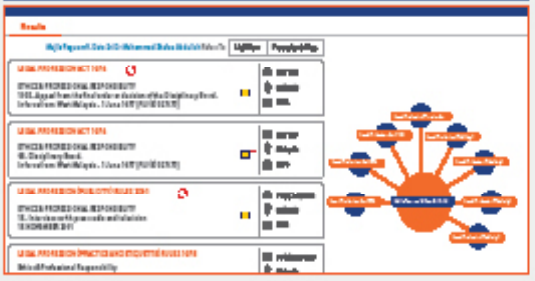

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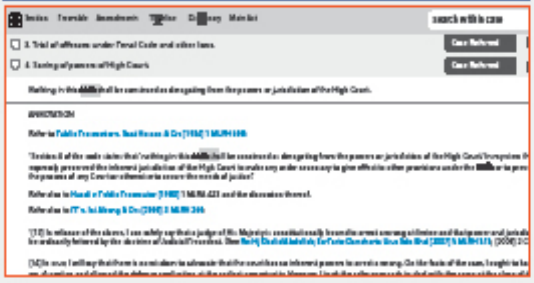

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