

**IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(CIVIL APPEALS NO. 02-19-2007(W), NO. 02-20-2007(W), NO. 02-21-2007(W))**

BETWEEN

SUBASHINI A/P RAJASINGAM

... APPELLANT

AND

SARAVANAN A/L THANGATHORAY

... RESPONDENT

**APPEALS FROM COURT OF APPEAL MALAYSIA
(CIVIL APPEALS NO. W-02-955-2006, W-02-1041-2006)**

CORAM

**NIK HASHIM BIN NIK AB. RAHMAN, FCJ
ABDUL AZIZ BIN MOHAMAD, FCJ
AZMEL BIN HAJI MAAMOR, FCJ**

27 December 2007

Judgment of Nik Hashim Nik Ab. Rahman, FCJ

Background

1. There were three appeals (02-19-2007(W), 02-20-2007(W) and 02-21-2007(W)) before us and with the agreements of the parties, they were heard together.

2. The parties to the three appeals were originally Hindus husband and wife; they were married pursuant to a civil ceremony of marriage that was registered on 26 July 2001 pursuant to the Law Reform (Marriage and Divorce) Act 1976 (the 1976 Act). There were two children of the marriage, both boys: Dharvin Joshua aged 4 and Sharvin aged 2. The husband converted himself and the elder son to Islam on 18 May 2006. Later, the wife received a notice dated 14 July 2006 from the Registrar of the Syariah High Court Kuala Lumpur informing her that her husband had commenced proceedings in the Syariah High Court for the dissolution of the marriage and custody of the elder son. He filed the application in the Syariah High Court on 23 May

2006. An interim custody order in respect of the converted son was issued to the husband by the Syariah High Court. On 4 August 2006, which was 2 months and 18 days after the husband's conversion and knowing that the husband had taken proceedings in the Syariah High Court, the wife filed a petition for the dissolution of the marriage pursuant to section 51 of the 1976 Act coupled with an application for custody and ancillary reliefs in the High Court. The wife did not object to the husband's conversion to Islam.

3. Meanwhile, the wife applied for and obtained an ex-parte injunction against the husband. The husband then filed an application to set aside the said injunction. Pursuant to an inter-partes hearing, the High Court dismissed the wife's application and allowed the husband's application and set aside the said injunction. However, the High Court granted an interim Erinford injunction pending an appeal to the Court of Appeal. (See **(2007) 7 CLJ 584**).

4. On 13 March 2007 the Court of Appeal by a majority upheld the High Court decision to dismiss the application by the wife for an injunction but allowed the husband's appeal against the grant of the Erinford injunction by the High Court. Thus, there are two appeals (No. 02-19-2007(W), No. 02-21-2007(W)) by the wife against these decisions of the Court of Appeal (see **(2007) 2 CLJ 451**).

5. On 30 March 2007 on a motion by the wife, the same panel of the Court of Appeal by a majority allowed an Erinford injunction pending her application for leave to appeal to the Federal Court against the decision of the Court of Appeal. This decision is the subject matter of the husband's appeal before this Court in Civil Appeal No. 02-20-2007(W). (See **(2007) 3 CLJ 209**).

The Questions

6. On 17 May 2007 the Federal Court unanimously granted leave to appeal on the three appeals and continued the Erinford injunction until the disposal of these appeals.

The main questions for determination by the Federal Court are as follows :

- “(1) Whether in an application for an interim injunction a Court can make a final determination on issues of law, in particular, where it refers to a question of jurisdiction, as opposed to a consideration of only the existence of a serious issue of law to be determined?
- (2) If the answer to question number 1 is in the affirmative, then :
 - (2.1) In situations where one spouse in a marriage solemnized under the Law Reform (Marriage and Divorce) Act 1976 (a “Law Reform Marriage”) converts to Islam and the other does not, does the High Court or the Syariah Court have exclusive jurisdiction to grant decrees of divorce of such Law Reform Marriages and to make all other orders in respect of the division of matrimonial assets, the maintenance of spouse and of the children of the Law Reform Marriage (“children of the Law Reform Marriage”), the custody, care and control of the children of the Law Reform Marriage and all other matters incidental thereto?

(2.2) Further to question (2.1) :

(2.2.1) are provisions such as s46(2)(b)(i) of the Administration of Islamic Law (Federal Territories) Act 1993 (the “1993 Act”) intended only to address marriages solemnized under the relevant State Islamic legislation (“Islamic marriages”);

(2.2.2) as such, is the jurisdiction and/or power vested by such provisions in the syariah courts limited to the granting of decrees of divorce and orders consequential to such decrees pertaining to inter alia maintenance, custody, and child support in respect of Islamic marriages?

(2.3) In the event, the answers to questions 2.2.1 and 2.2.2 are in the affirmative, is it an abuse of process for the converted spouse to file custody proceedings in the syariah courts in respect of the children of the Law Reform Marriage?

(2.4) Is it an abuse of process for a spouse of a Law Reform Marriage to unilaterally convert the religion of a minor child of the Law Reform Marriage without the consent of the other parent.

(2.5.1) Is the High Court empowered to grant interlocutory relief aimed at preserving status quo in the course of disposing a petition under section 51 of the Law Reform (Marriage and Divorce) Act 1976?

(2.5.2) If so, can the High Court grant interim injunctions to prevent abuses of process having the effect of undermining the petition filed under section 51 of the Law Reform (Marriage and Divorce) Act 1976?

(2.6) Does Article 121(1A) of the Federal Constitution prevent the High Court from granting such interim injunctions where the abuse of process is effected through the jurisdictionally incompetent and deficient

(2.6.1) filing or proceedings in the syariah courts and/or

(2.6.2) unilateral conversion of a minor child of the Law Reform

Marriage by the converted spouse?

(2.7) Can provisions such as section 53 of the 1993 Act be read as including within their ambit persons not professing the religion of Islam?"

Questions on Erinford injunction

7. Respecting the order of setting aside of the Erinford injunction by a majority decision of the Court of Appeal on 13 March 2007, and the order of granting the same on 30 March 2007 by a majority decision of the Court of Appeal pending an application for leave to appeal to the Federal Court, the Federal Court granted leave to appeal on two questions :

- (1) Where a court disallows an application for an interim injunction on the basis of a want of jurisdiction and the said decision is appealed, is the court disentitled from granting an Erinford type of injunction?
- (2) Does the Federal Court have exclusive jurisdiction to grant an Erinford type of injunction pending the hearing and disposal of an application for leave to appeal to the Federal Court or is it a concurrent

jurisdiction exercisable by the Court of Appeal in the first instance?

Main Question No. (1)

8. The question of whether a court, in an application for an interim injunction, should decide the issue of jurisdiction as opposed to a decision of only the existence of a serious issue, depends on the facts of each case. Where the evidence upon which challenge to jurisdiction is made is of such a quality that renders a trial unnecessary, a court may proceed to make findings based upon that evidence, if not, the court may order the matter to be tried (**Dato' Param Kumaraswamy v MBF Capital Bhd & Anor (1997) 3 MLJ 824 CA**). It must be noted that lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exists a state of facts which would entitle the court to grant to the applicant the relief sought. (See **Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong (PC) (1970) AC 1136**).

9. In the present case, the wife had obtained an ex-parte injunction. The husband applied to set aside the ex-parte injunction on the ground that the court was not seized with jurisdiction in light of Article 121 (1A) of the Federal Constitution (the FC). The wife contends that the Article is not applicable. In such a conflict, the High Court and the Court of Appeal were correct in dealing with the issue of jurisdiction as a threshold issue and the parties had agreed to that approach. As such, my answer to the question is in the affirmative.

Main Questions No. (2) – (2.7)

10. Section 51 of the 1976 Act provides for dissolution of marriage on the ground of conversion to Islam. However it must be noted that it only provides a ground for the other party who has not converted to petition for divorce. The section states :

- (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce :

Provided that no petition under this section **shall** be presented before the expiration of the period of **three months from the date of conversion**.

- (2) The court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may, attach any conditions to the decree of the dissolution as it thinks fit.

(emphasis added)

11. It was contended by learned counsel for the wife that the word 'shall' appearing in the proviso is directory. With respect, I do not agree. The proviso to section 51(1) of the 1976 Act clearly reflects the imperative requirement which must be complied with before a petition for divorce can be made. By its terms, the proviso imposes a caveat on the wife not to file the petition for divorce until a lapse of 3 months from the date of the husband's conversion to Islam. The 3 months period is incorporated into the proviso probably to provide for the 'iddah' period. Be that as it may, it is the duty of the court to give effect to the words used by the legislature. Thus, in my judgment, unless the proviso is

complied with, the High Court would not have the jurisdiction to entertain the wife's petition.

12. In the present case, it is clear from the evidence that the husband converted himself and the elder son to Islam on 18 May 2006. The certificates of conversion to Islam issued to them under section 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 conclusively proved the fact that their conversion took place on 18 May 2006. Thus, I respectfully agree with Hassan Lah JCA that the wife's petition was filed in contravention of the requirement under the proviso to section 51(1) of the 1976 Act in that it was filed 2 months and 18 days short of 3 months after the husband's conversion to Islam. It follows therefore that the petition was premature and invalid and the summons-in-chambers, ex-parte and inter parte based on the petition which were filed therein were also invalid.

13. Learned counsel for the wife also submitted that notwithstanding the finding that the petition for divorce was

invalid for failure to comply with the proviso to section 51(1) of the 1976 Act, the wife is still entitled to proceed with the application regarding custody pursuant to section 88 and ancillary reliefs under sections 77 and 93 of the 1976 Act. In my view, the wife is entitled to proceed with the rest of the application but it would be most appropriate if she files her petition for divorce afresh under section 51 coupled with an application for ancillary reliefs as the court would grant the reliefs under section 51(2) upon dissolution of the marriage.

14. On finding that the wife's petition for divorce was invalid, is it still necessary for this Court to answer the questions posed? I would answer the questions nevertheless as the questions are questions of importance upon which a decision of the Federal Court would be to public advantage.

15. Assuming that the wife's petition was properly before the Court i.e. it was filed 3 months after the conversion, then my view is that the High Court would have the jurisdiction to hear and determine the petition for divorce and the

application for ancillary reliefs under section 51 of the 1976 Act even though the husband had converted to Islam before her petition for divorce had been filed in the High Court and that he had already commenced the proceedings in the Syariah Court. In **Tan Sung Mooi (f) v Too Miew Kim (1994) 2 AMR 35, 1799** the then Supreme Court (Abdul Hamid, LP, Gunn Chit Tuan, CJ (Malaya), Edgar Joseph Jr, Mohd Eusoff Chin, Mohamed Dzaidin, SCJJ) at p1807 said:

“Under s 51, where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce and the court upon dissolving the marriage may make provision for the wife or husband and for the support, care and custody of the children of the marriage and may attach any condition to the decree of dissolution. The legislature, by enacting s 51, clearly envisaged a situation that where one party to non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs. Further, it would seem to us that Parliament, in enacting sub-section 51(2), must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert.”

16. It must be noted also that the High Court had exercised its civil jurisdiction in this matter under section 24(a) of the Courts of Judicature Act 1964 which states that the jurisdiction of the High Court shall include the jurisdiction under any written law relating to divorce and matrimonial causes. The phrase “any written law relating to divorce and matrimonial causes” must include the 1976 Act.

17. On the complaint by learned counsel for the husband that the provision under section 51(1) of the 1976 Act is unjust and ultra vires Article 8(1) of the FC and therefore void for it only allows the unconverted non-Muslim spouse to become the petitioner in a divorce petition and an applicant in ancillary relief applications, whereas the converted Muslim spouse under the provision is compelled to remain as a respondent in such petition or application, I am of the view that section 51(1) does not violate Article 8 of the FC and therefore is not void as complained. The classification created by section 51(1) is a reasonable classification as the

persons in the non-converting category are treated equally as are persons in the converting category (see **Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (2004) 1 CLJ 701**).

18. I agree with learned counsel for the wife that the status of the parties at the time of the marriage is the material consideration for the purpose of determining the question of jurisdiction. In **Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan Satu lagi (2005) 1 MLJ 197**, the appellants claimed by a statutory declaration that they were no longer Muslims in August 1998. They were sentenced to imprisonment on 5 October 2000 for failure to abide by the order of the Syariah Court of Appeal relating to the offence under Undang-Undang Majlis Agama Islam dan Adat Istiadat Melayu Kelantan which they had committed before August 1998. The appellants contended that as they were no longer Muslims, the Syariah Court had no jurisdiction over them. Therefore, the issue was whether the appellants must be Muslims when they were sentenced in October 2000. In

resolving the issue, the Federal Court (Ahmad Fairuz CJ, Mohd Noor Ahmad, P.S.Gill, Rahmah Hussain FCJJ and Richard Malanjum CJA (as he then was)) concluded that notwithstanding their claim to no longer being Muslims, the material time for determining the question of jurisdiction was the time when the offence were committed and at that time the appellants were Muslims. In concluding that the Syariah Court had the jurisdiction, the Federal Court observed :

“Oleh yang demikian, persoalan yang timbul ialah sama ada perkara-perkara perayu-perayu mestilah menganut agama Islam ketika hukuman-hukuman dijatuhi ke atas mereka dalam bulan Oktober 2000 itu adalah relevan atau penentu (crucial). Perlu diingat bahawa kesalahan terhadap mana perayu-perayu dihukum adalah dilakukan oleh perayu-perayu sebelum mereka membuatakuan berkanun mengisytiharkan mereka keluar dari agama Islam.”

The Federal Court then continued :

“.... Mahkamah berpendapat bahawa masa yang material untuk menentukan sama ada perayu-perayu adalah orang yang menganut agama Islam ialah masa ketika mana perayu-perayu melakukan kesalahan Jika pendekatan maksud tidak diambil, orang-orang Islam yang menghadapi tuduhan di Mahkamah Syariah boleh sewenang-wenangnya menimbulkan pembelaan yang

mereka bukan lagi seorang yang menganut agama Islam dan dengan demikian tidak tertakluk kepada bidang kuasa Mahkamah Syariah. Keadaan sebegini akan menjejaskan pentadbiran Undang-Undang Islam di Malaysia dan mungkin juga undang-undang agama lain.”

19. Thus, by analogy, the above principle applies to our case. The husband could not shield himself behind the freedom of religion clause under Article 11(1) of the FC to avoid his antecedent obligations under the 1976 Act on the ground that the civil court has no jurisdiction over him. It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore, the status of the husband and wife at the time of registering their marriage was of material importance, otherwise the husband’s conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect to divorce and custody of the children of the marriage, and thus, the

civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam.

20. But in the present case, the husband had converted to Islam and had filed the proceedings in the Syariah High Court for the dissolution of the marriage and the custody of the converted son. By embracing Islam, the husband and the son became subject to Muslim personal and religious laws and it is not an abuse of process if he, being a Muslim, seeks remedies in the Syariah High Court as it is his right to do so.

21. Section 46(2) of the Islamic Family Law (Federal Territories) Act 1984 (the 1984 Act) states :

“The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.”

The act of confirmation of the dissolution of the marriage under the section is not a mere administrative act as understood by the Court of Appeal, but a full judicial proceeding before the Syariah High Court as it

happened in **Dalam Perkara Permohonan Perisytiharan Pembubaran Perkahwinan Disebabkan Pertukaran Agama – Permohonan Siti Aisyah Janthip Aisam, JHXXI/11 (1427H) 262**, where the Syariah High Court Kuala Terengganu after evaluating the evidence and applying the Hukum Syarak, allowed the wife's application to dissolve her Buddhist civil marriage to the husband pursuant to section 43(2) Enakmen Undang-Undang Pentadbiran Keluarga Islam (Negeri Terengganu) 1985, which is equivalent to section 46(2) of the 1984 Act. It appears from the case that the husband did not contest the application and neither a decree of divorce granted under section 51 of the 1976 Act by the High Court was ever produced in the Syariah Court. To my mind, the dissolution order of the civil marriage by the Syariah High Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact of the dissolution of the marriage under the Islamic

law in accordance with Hukum Syarak. Thus, the non-Muslim marriage between the husband and wife remains intact and continues to subsist until the High Court dissolves it pursuant to a petition for divorce by the unconverted spouse under section 51(1) of the 1976 Act.

22. In the present case, there is no impediment for the converted spouse, i.e. the husband, to appear in the divorce proceeding in the High Court albeit as a respondent, as the jurisdiction of the High Court extends to him unlike the Syariah High Court which restricts its jurisdiction to persons professing the religion of Islam only, for example under section 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (the 1993 Act) where in its civil jurisdiction relating to (i) marriage and (iii) custody, the Syariah High Court shall have the jurisdiction to hear and determine the action in which all the parties are Muslims. Thus, the contentions that the wife could submit to the

jurisdiction of the Syariah Court and have recourse to section 53 of the 1993 Act are not quite correct as the 1993 Act limits its jurisdiction to Muslims only. The wife, being a non-Muslim, has no locus in the Syariah Court.

23. Both civil and Syariah courts are creatures of statutes such as the FC, the Acts of Parliament and the State Enactments. These two courts are administered separately and they are independent of each other. Although the Syariah courts are state courts they are not lower in status than the civil courts. I would say, they are of equal standing under the FC. This recognition of the Syariah courts was largely due to Article 121 (1A) of the FC which excludes the jurisdiction of the civil courts on any matter within the jurisdiction of the Syariah courts. The Article, which came into force from 10 June 1988, states :

“The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”

24. In **Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib (1992) 2 MLJ 793**, the Supreme Court ruled that Article 121 (1A) of the FC makes clear distinction between the jurisdiction of the Syariah and the civil courts by holding that :

“(1) The intention of Parliament by Article 121 (1A) of the Federal Constitution is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court.”

Therefore, with the separation of the jurisdictions, the respective court cannot interfere with each other's jurisdiction. In **Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor (1999) 2 MLJ 241** the Federal Court reminded at p245 :

“We agree with the views expressed by the Court of Appeal on the necessity of cl(1A) being introduced into art 121 of the Federal Constitution. It was to stop the practice of aggrieved parties coming to the High Court to get the High Court to review decisions made by Syariah Courts. Decisions of Syariah Court should rightly be reviewed by their own appellate courts. They have their own court procedure

where decisions of a court of a Kathi or Kathi Besar are appealable to their Court of Appeal.”

See also **Nedunchelian V Uthiradam v Norshafiqah Mah Singai Annal & Ors (2005) 2 CLJ 306** where I agree with Syed Ahmad Helmy JC (as he then was) when he said at p315 :

“Cases authorities have repeatedly stressed and established that the High Court in its civil jurisdiction cannot challenge and or dispute and/or vary, strike out or declare or injunct the execution of an order of the Syariah Court – see Sukma Darmawan Sasmitaat Madja lwn. Ketua Pengarah Penjara Malaysia (1999) 1 CLJ 481; Kamariah bt Ali v Kerajaan Negeri Kelantan, Malaysia dan Yang Lain (dan 3 Rayuan Yang Lain) (2002) 3 CLJ 766.”

Thus, the civil court cannot be moved to injunct a validly obtained order of a Syariah court of competent jurisdiction. The injunction obtained by the wife, although addressed to the husband, was in effect a stay of proceedings of the husband’s applications in the Syariah High Court and this amounts to an interference by the High Court of the husband’s exercise of his right as a Muslim to pursue his

remedies in the Syariah High Court. Obviously, the law does not permit such an interference.

Conversion

25. The wife complained that the husband had no right to convert either child of the marriage to Islam without the consent of the wife. She said the choice of religion is a right vested in both parents by virtues of Articles 12(4) and 8 of the FC and section 5 of the Guardianship of Infants Act 1961.

26. After a careful study of the authorities, I am of the opinion that the complaint is misconceived. Either husband or wife has the right to convert a child of the marriage to Islam. The word 'parent' in Article 12(4) of the FC, which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. In **Teoh Eng Huat v The Kadhi, Pasir Mas, Kelantan & Anor (1990) 2 CLJ 11**, Abdul Hamid Omar LP, delivering the judgment of the Supreme Court, said at p14 :

“In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the **parent** or guardian.”

Further down, His Lordship continued :

“We would observe that the appellant (**the father**) would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant.”
(emphasis added)

Therefore, Article 12(4) must not be read as entrenching the right to choice of religion in both parents. That being so, Article 8 is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in **Nedunchelian**, supra, and as such, the argument that both parents are vested with the equal right to choose is misplaced. Hence the conversion of the elder son to Islam by the husband albeit under the Selangor Enactment did not violate the FC. Also reliance cannot be placed on section 5 of the Guardianship of Infants Act 1961 which provides for equality of parental rights since section

1(3) of the same Act has prohibited the application of the Act to such person like the husband who is now a Muslim. (See **Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor (2004) 2 CLJ 416**).

Erinford injunction

27. There were two appeals in respect of Erinford injunction : one was against the order of setting aside by a majority decision of the Court of Appeal and the other was against the order of granting the same by a majority decision of the Court of Appeal pending the wife's application for leave to appeal to the Federal Court.

28. The learned judicial commissioner in granting the Erinford injunction was of the view that on the balance of convenience it was desirable that the status quo of the parties be maintained pending appeal to the Court of Appeal to prevent the appeal from being rendered nugatory. In my judgment, the High Court was right. The High Court was entitled to grant an Erinford injunction even though it had

held that it had no jurisdiction to grant the substantive interim injunction. In **Erinford Properties Ltd v Cheshire County**

Council (1974) 2 All ER 448 Megarry J said at p454 :

“..... where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal”

So, in the light of the above, it is clear that even an objection is raised as to the jurisdiction of the Court this does not deprive the Court of its jurisdiction to preserve the status quo pending the appeal (see **Tun Datu Haji Mustapha bin Datu**

Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (1986) 2 MLJ 39).

See also **Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd (2003) 3 MLJ 178** where the above principle was applied in granting an Erinford injunction to restrain the defendant from taking further steps in a winding up petition pending hearing of the plaintiff's appeal to the Court of Appeal against the decision made by the High Court dismissing the plaintiff's application for an injunction to restrain the defendant from filing a winding up petition against the plaintiff.

Hence, the majority decision of the Court of Appeal setting aside the Erinford injunction was erroneous and to that extent the appeal must be allowed. The order of the Court of Appeal is therefore set aside and the order of the High Court granting the Erinford injunction is restored.

29. With regard to the granting of the Erinford injunction pending the wife's application for leave to appeal to the

Federal Court, I agree with the majority decision of the Court of Appeal that it had the jurisdiction to grant the wife's application. The issue concerning the jurisdictional point had been conclusively determined against the husband by the majority decision of the Court of Appeal in **Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No.2) (1998) 2 MLJ 661** where Abu Mansor JCA (later FCJ) considered it 'trite law that a court which has given judgment certainly has the power to order stay'. An Erinford injunction pending an appeal or an application for leave to appeal, like a stay of execution pending an appeal, is ordinarily granted by the court which made the decision that is the subject of the appeal. Certainly, the Court of Appeal has the jurisdiction to grant such an injunction pending an application for leave to appeal to the Federal Court. Thus, the majority decision of the Court of Appeal on 30 March 2007 applied the correct principles of law when it allowed the Erinford injunction pending the hearing and disposal of the wife's application for leave to appeal to the Federal Court.

30. The Federal Court too has the jurisdiction under section 80(1) of the Courts of Judicature Act 1964 to grant an Erinford injunction pending an application for leave to appeal to the Federal Court.

31. Accordingly, my answers to the main questions posed are as follows :

- (1) Yes.
- (2.1) Yes, but subject to the right of the converted spouse under the Islamic law.
- (2.2.1) Yes.
- (2.2.2) Yes.
- (2.3) No.
- (2.4) No.
- (2.5.1) Yes.
- (2.5.2) No.
- (2.6.1) Yes – Filing the proceedings in the Syariah Court is not an abuse of process.
- (2.6.2) Yes – unilateral conversion of a minor child of the Law Reform Marriage by the converted spouse is not an abuse of process.
- (2.7) No.

32. With regard to the questions on Erinford injunction my answers to the questions posed are as follows :

- (1) No.
- (2) Concurrent jurisdiction exercisable by the Court of Appeal.

Conclusion

In the circumstances, I make the following orders :

1. The wife's appeal in the Federal Court Civil Appeal No. 02-19-2007(W) (the dismissal of the inter partes injunction) is dismissed with costs here and below and the deposit be paid to the husband to account of his taxed costs. The majority decision of the Court of Appeal Civil Appeal No. W-02-955-2006 is upheld.
2. The wife's appeal in the Federal Court Civil Appeal No. 02-21-2007(W) (the setting aside of the Erinford injunction) is allowed with costs here and below and the deposit be returned to the wife. The majority decision of the Court of Appeal No. W-02-955-2006 is reversed.
3. The husband's appeal in the Federal Court Civil Appeal No. 02-20-2007(W) (the granting of the Erinford injunction pending appeal to the Federal Court) is dismissed with costs here and below and the deposit be paid to the wife to account of her taxed costs. The majority decision of the Court of Appeal Civil Appeal No. W-02-1041-2006 is upheld.

27 December 2007

(Dato' Bentara Istana Dato' Nik Hashim bin Nik Ab. Rahman)
Judge
Federal Court
Malaysia

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