IN THE FEDERAL COURT OF MALAYSIA

CRIMINAL APPEAL NO. 05(L)-101-09/2020(C)

BETWEEN

TETUAN WAN SHAHRIZAL, HARI & CO … APPELLANT

AND

PENDAKWA RAYA … RESPONDENT

CORAM

ABDUL RAHMAN SEBLI, FCJ

HASNAH MOHAMMED HASHIM, FCJ

MARY LIM THIAM SUAN, FCJ

MAJORITY JUDGMENT

[1] This appeal concerns a claim by a law firm for its legal fees to be paid from money that has been seized under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the Act").

[2] Having given careful consideration to the arguments of the parties, both written and oral, we dismissed the appeal by a majority decision. My learned sister Justice Hasnah Mohammed Hashim and I were in favour of dismissing the appeal and affirming the decision of the Court of Appeal whilst my learned sister Justice Mary Lim Thiam Suan was in favour of allowing the appeal and setting aside the decision of the Court of Appeal. These then are the majority grounds of decision.

[3] The facts are simple and straightforward. On 9.6.2016, police investigation was carried out against one Amar Asyraf bin Zolkepli

("Amar") for offences under sections 124 and 130 of the Penal Code and section 5 of the Computer Crimes Act 1997. The investigation revealed that Amar possessed a computer software which enabled access to the MYIMM system of the Immigration Department without the need for a password or finger print.

[4] Amar then provided the software to a syndicate which used it to unlawfully approve the *"Pas Penggajian Pengurusan Pegawai Dagang"* and *"Pas Penggajian Pegawai Dagang"*. He would be paid RM1,000.00 for every such approval.

[5] In a follow up action, the respondent (Public Prosecutor) on behalf of the Federal Government issued a seizing order pursuant to subsections 50(1) and 51(1) of the Act against the following properties belonging to Amar:

(i) RM192,147.79 in savings account number 106062056732 at Malayan Banking, Genting Highlands Branch, Pahang;

(ii) RM259,681.45 in savings account number 4835919335 at Public Bank Berhad, Taman Maluri Cheras, Kuala Lumpur;

(iii) RM102,089.20 in a fixed saving account number 1804354928 at Public Bank Berhad, Petaling Jaya, Selangor;

(iv) An apartment at Batu Caves, Selangor;

(v) A car Audi S Line TFSI CVT(A) with registration number JRC 80.

[6] Subsequently, and having satisfied himself that the properties were proceeds of an unlawful activity, the respondent applied to the High Court for forfeiture of the properties under section 56(1)(c) of the Act, which provides as follows:

"56(1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is –

(c) the proceeds of an unlawful activity;"

[7] On its part the appellant, in purported exercise of its rights as a *bona fide* third party under section 61(4) of the Act, claimed a sum of RM398,722.00 from the seized properties which the respondent intended to forfeit. The basis for the claim was that it had a legitimate legal interest in the RM398,722.00, being legal fees for the legal services that it rendered to Amar from the day he was detained by the police up to the time of the forfeiture proceedings under section 56(1). Section 61 of the Act is reproduced below:

"**Section 61. Bona fide third parties**

(1) The provisions of this Part shall apply without prejudice to the rights of bona fide third parties.

(2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that –

(a) the claimant has a legitimate legal interest in the property;

(b) no participation, collusion or involvement with respect to the offence under subsection 4(1) which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under the circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property."

[8] The appellant's claim was allowed by the Temerloh High Court but reversed by the Court of Appeal in a unanimous decision, hence the present appeal before us.

[9] In his grounds of judgment, the learned judge of the Temerloh High Court gave the following reasons for releasing the RM398,722.00 to the appellant under subsection 61(4) of the Act:

"[34] Berkaitan dengan tuntutan Pencelah untuk baki yuran guaman mahkamah berpuas hati berdasarkan keterangan lisan dan keterangan dokumentar yang dikemukakan di Jilid 1 dan Jilid 2, Pencelah telah berjaya membuktikan mereka adalah firma guaman yang mewakili Responden. Tuntutan mereka disokong oleh jumlah bil yuran guaman yang dikemukakan tanpa bantahan oleh Pemohon.

[35] Perlantikan Tetuan Wan Shahrizal, Hari & Co untuk mewakili Responden adalah hak-hak yang termaktub di bawah Perkara 5(3) Perlembagaan Persekutuan, justeru firma guaman itu berhak untuk menuntut dan menerima fi guaman daripada Responden.

[36] Untuk tuntutan ini Peguam Pencelah telah merujuk dan melampirkan kes yang diputuskan oleh mahkamah Rayuan di mana mahkamah telah membenarkan tuntutan beberapa firma peguam di antaranya Tetuan Isharidah Chong & Menon, Tetuan Stanley Agustine & Co dan Tetuan Haresh Mahadevan & Co yang menuntut bayaran guaman dari harta yang disita iaitu kes ***Md. Sukri bin Shahudin dan 10 yang lain*** PR, Rayuan Jenayah: W-09-432-11/2016. Kes rayuan ini bermula dari Mahkamah Sesyen dan Peguam Kanan Persekutuan yang mengendalikan kes Pemohon dengan jujur mengakui beliau sedia maklum dengan keputusan kes rayuan ini kerana beliau terlibat dengan kes tersebut di Mahkamah Sesyen dan Mahkamah Tinggi. Justeru walaupun tiada penghakiman bertulis, mahkamah

berpendapat fakta dalam kes rayuan tersebut adalah sama dengan kes ini untuk isu tuntutan bayaran firma guaman.

[37] Kedudukan undang-undang jelas iaitu mahkamah bawahan terikat dengan keputusan mahkamah yang lebih tinggi. *Dalip Bhagwan Singh v PP* [1997] MLRA 653, *Timbalan Menteri Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 2 MLRH 283."

[10] It is clear from the reasons given that the decision by the learned judge to allow the appellant's claim was premised on the following four grounds:

(1) The appellant had a right under Article 5(3) of the Federal Constitution to represent Amar and therefore entitled to its legal fees;

(2) The appellant had proved that it was the law firm representing Amar;

(3) The appellant's claim for the RM398,722.00 in legal fees was supported by oral and documentary evidence, i.e. the bills that the appellant firm issued to Amar;

(4) The learned judge was bound by the decision of the Court of Appeal in *Md. Sukri bin Shahudin dan 10 yang lain* where, in his Lordship's view, the facts are similar ("*..mahkamah berpendapat fakta dalam kes rayuan tersebut adalah sama dengan kes ini..*")

[11] With due respect to the learned judge, none of the grounds constitute valid reasons for allowing the claim. The Court of Appeal was absolutely correct in reversing the decision. First of all, the learned judge was wrong in holding in paragraph 37 that he was bound by *stare decisis* to follow the decision of the Court of Appeal in *Md. Sukri bin Shahudin dan 10 yang lain* [Rayuan Jenayah: W-09-432-11/2016] (*"Md. Sukri*"), which allowed the claims by several law firms, among them the law firms of Messrs Isharidah Chong & Menon, Messrs Stanley Agustine & Co and Messrs Haresh Mahadevan & Co for their legal fees to be paid from the seized properties. As confirmed by the learned judge himself, no written grounds were delivered by the Court of Appeal in that case.

[12] Without the benefit of the written grounds, there was no way that the learned judge could have known of the actual reason or reasons why the Court of Appeal decided the way it did in that case. In any case, it was wrong for him to have engaged in guesswork on the basis for the unwritten decision, which undoubtedly had weighed heavily in his mind in deciding whether or not to allow the appellant's claim.

[13] What binds the lower courts under the *stare decisis* doctrine is the *ratio decidendi* of the case and not mere similarity in the facts or in the law, or in the arguments of counsel, nor the *obiter dicta* of the case.

[14] A lower court relying on an earlier unwritten decision of an appellate court must not assume that by affirming the decision of the lower court, the appellate court must have affirmed every

finding of fact and law that the lower court had decided in favour of the winning party. Experience will tell that it is not uncommon for an appellate court to affirm or reverse the decisions of the lower courts on grounds other than those relied on by the lower courts.

[15] Nor must the court, in the absence of the written grounds, accept the argument that the appellate court in the earlier case decided the way it did because it accepted counsel's argument, even where the earlier case involved the same counsel. Such acceptance of counsel's argument must be reflected in the written grounds of judgment. The role of counsel is to assist and the court to decide.

[16] *Ratio decidendi* is Latin for "the rationale for the decision". The term refers to a key judicial point or chain of reasoning in a case that drives the final judgment. It is "the principle or rule of law on which a court's decision is founded" (*Black's Law Dictionary* 11th edition) or "the principle that the case establishes" (*Barron's Law Dictionary* 2nd edition).

[17] Obviously therefore, a decision that is delivered without the written grounds does not establish any principle or rule of law on which the decision is founded. The decision is therefore devoid of any *ratio decidendi* (rationale for the decision). It has no value as precedent. There may be instances where the court, either in its original or appellate jurisdiction, delivers a reasoned oral decision *ex tempore* but in that situation, the reasons must be reduced into writing in order for the decision to have any binding effect on the lower courts.

[18] We are not aware of any principle of law, nor have we been referred to any authority to say that the lower courts are bound by *stare decisis* even where the higher courts do not provide written grounds for their decisions. The following explanatory note on the doctrine, which can be found in *Black's Law Dictionary*, is relevant:

"The doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination, or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases."

[19] Thus, where there are no grounds written, there is no point or principle of law that can officially be decided or settled by the ruling of a competent court. The correct position of the law is that an unwritten decision of a higher court, whether sitting in its original or appellate jurisdiction, binds the parties to the action but is not authority for any principle or rule of law and does not bind the lower courts. This is where the learned judge in the present case fell into error when he said that he was bound by *stare decisis* to follow the unwritten decision of the Court of Appeal in *Md. Sukri.*

[20] Presumably, the learned judge was not alerted to the decision of this court in *Vishnu Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 177 where David Wong Dak Wah CJ (Sabah and Sarawak) delivering the unanimous decision of the court said:

"[40] The respondents argued that the Federal Court there had heard a similar argument on this point and refused the detainee a writ of *habeas corpus*. As at the date of our decision in this appeal, no written grounds had been delivered in respect of that case and so we are therefore unable to glean any reasons why such a decision was made. Therefore we did not see how the said judgment lent any support to the respondent's case. Surely, in arriving at our decision, we had to consider and apply the law according to the facts and circumstances of this case."

[21] The decision of this court referred to in the above passage is the unreported case of *Kamal Azam Borddin v Timbalan Menteri Dalam Negeri & Ors* [Criminal Appeal No. 05(HC)-133-05-2018(B)]. In that case, a five member bench headed by Richard Malanjum CJ unanimously dismissed the appellant's appeal against the decision of the High Court dismissing his application for *habeas corpus* without giving any reason, written or otherwise, after hearing arguments by the parties.

[22] In fact a similar decision was reached in an earlier decision of this court in *Malaysian Motor Insurance Pool v Tirumeniyar Singara Veloo* [2019] 10 CLJ 731; [2020] 1 MLJ 440. This is what the court said at paragraph 82 (CLJ):

"[82] Without the written judgment the Federal Court's reasons for allowing the appeal as alluded to in the editorial note, is in our view purely speculative, and cannot be regarded as authoritative and/or binding. We would therefore disagree with the plaintiff that the Court of Appeal erred and *"was in breach of stare decisis"* when it did not consider itself bound to follow *Saw*."

[23] Applying the above *ratio* to the present case, the learned judge would not have been in breach of *stare decisis* if he had

chosen not to follow the decision of the Court of Appeal in *Md. Sukri*. What was required of him was to consider and apply the law according to the facts and circumstances of the case before him (*Vishnu Telagan, supra*) instead of tying his own hands to the unwritten decision of the Court of Appeal.

[24] Having formed his opinion that the facts of the present case were similar ("*sama*") to the facts in *Md. Sukri,* the learned judge went on to rule that the bills produced by the appellant were sufficient proof that it is a *bona fide* third party and therefore entitled to the RM398,722.00 seized from Amar, without directing his mind to the question whether the appellant had a legitimate legal interest (not just any interest) in the RM398,722.00, which is the proceeds of an unlawful activity.

[25] This is a serious misdirection by way of non-direction which renders the judgment defective and liable to be set aside. The bills that the appellant produced in support of its claim are not proof that it is a *bona fide* third party and has a legitimate legal interest in the RM398,722.00. The fact that there was no objection to the production of the bills as evidence is of no consequence because all that the bills established was that Amar had been charged RM398,722.00 in legal fees by the appellant for the legal services that it rendered to him.

[26] Unquestionably the RM398,722.00 is money owing to the appellant by Amar, which he is at liberty to pay using any property at his disposal but not from the seized property, which we reiterate

is illegal property. Illegal property does not become legal property by using it to pay legal fees.

[27] If this court were to endorse the learned judge's reasoning and accede to the appellant's argument, we would be setting a dangerous precedent whereby a law firm which represents a client in forfeiture proceedings under the Act would as a matter of right be entitled to be paid its legal fees using illegal property, i.e. proceeds of an unlawful activity, which is not even the client's rightful property which he can use any which way he likes after its seizure under subsections 50(1) and 51(1) of the Act.

[28] And if that were to be allowed, all that a law firm needs to do to succeed in its claim under section 61(4) is simply to produce the bills for the legal services that it rendered to its client, as done by the appellant in the present case. That will be as good as returning the seized property to the person proceeded against under section 56(1) and allowing him to use the property in a way that allows him to enjoy the benefits of his crime. Clearly, it will be against the spirit of the Act to allow such property to be used in such manner. This is the kind of mischief that paragraph (d) of section 61(4) aims to strike down.

[29] The object of section 56 is explained in the following terms in paragraph 60 of the Explanatory Statement to the Act:

"60. Clause 56 seeks to empower the Public Prosecutor, where there is no prosecution or conviction for an offence, to apply to a court for the forfeiture of any property that he is satisfied has been obtained as a result of, or in

connection with such offence. If there is no conviction or forfeiture, the property seized shall be released to the person from whom it was seized. This is to ensure that even if there is no conviction but the court is certain that property has been obtained as a result of the offence the money launderers do not enjoy the benefits of their crimes."

[30] It is important to bear in mind that in proceedings under section 61(4), the burden is on the person claiming to be a *bona fide* third party and having a legitimate legal interest in the property to show cause as to why the property should not be forfeited. It is not for the respondent to prove in the negative that the claimant is not a *bona fide* third party and has no legitimate legal interest in the property. In order to succeed, the third party claimant must prove on the balance of probabilities (see section 70(1) of the Act) that the requirements of paragraphs (a), (b), (c), (d) and (e) of the subsection, which are to be enforced cumulatively (and not disjunctively), have all been fulfilled.

[31] As to what constitutes sufficient proof on the balance of probabilities, Lord Denning said in *Miller v Minister of Pensions* [1947] 2 All ER 372:

"If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not".

[32] Whether or not the requirements have been fulfilled is purely a question of fact, and such requirement for proof must be fulfilled by all third parties claiming entitlement to the property, law firms included. In the present case, the burden has not been discharged by the appellant as no such evidence was produced before the

court. In any case, we have not been shown the evidence save for the bills charged to Amar as legal fees, which we repeat merely shows that Amar owes that sum of money to the appellant.

[33] The appellant in its Petition of Appeal proffered 5 grounds for impugning the decision of the Court of Appeal, as follows:

(1) The Court of Appeal judges erred in law and fact when making an interpretation of the Act based on the intention of Parliament without taking into consideration that section 61 of the Act is an exception to section 56(1) of the same Act;

(2) The Court of Appeal judges erred in law and fact when they failed to take into consideration that the burden provided under section 61(4) of the Act is on the balance of probabilities and that the appellant had successfully proven that they are *bona fide* third party under the Act.

(3) The Court of Appeal judges erred in law and fact when they made a finding that “there is no express provisions under the Act that allow the proceeds of the unlawful activity to be used for payment of legal fees” without taking into consideration of section 44 of the Act that allows payment of legal fees;

(4) The Court of Appeal judges erred in law and fact when they failed to make a finding that it is against the right to counsel under Article 5(3) of the Federal Constitution to deny the appellant's claim for legal fees over the seized properties;

(5) The Court of Appeal judges erred in law and fact when they failed to take into consideration that the appellant's client has been detained under the Prevention of Crime Act 1959 and was released by way of a *habeas corpus* application. This shows that there was criminal proceedings against their client and thus, an action under section 56(1) has been wrongly instituted.

[34] At the hearing before us, learned lead counsel for the appellant, Datuk Seri Gopal Sri Ram, amplified the grounds of appeal by advancing the following arguments in his "Speaking Note":

(1) The Court of Appeal was wrong in construing section 61 of the Act against the appellant who had appeared for and represented Amar in these proceedings;

(2) The right to be represented by a counsel of choice is a guaranteed fundamental right under Article 5(3) of the Federal Constitution and that the way the Court of Appeal construed section 61 of Act renders that right illusory;

(3) The right to personal liberty will be rendered illusory if lawyers are expected to appear free of charge and that there is an implied duty to pay legal fees and no lawyer is going to appear for free. The Court of Appeal judgment does not meet the realities;

(4) A consequence of the decision of the Court of Appeal is that lawyers will refuse to act in such cases because there is no hope of payment. The right of representation has the corresponding right to livelihood on the part of lawyers.

(5) Section 61 of Act should be interpreted to ensure its constitutionality;

(6) An interpretation of a statute that renders a fundamental right illusory has the effect of making that statute unconstitutional (*Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697, 712);

(7) If two interpretations of a statute are possible, one that will render it unconstitutional, and another that will render it constitutional, the latter will be preferred by the court (*Kedar Nath Singh v State of Bihar* Criminal Appeal No. 169 of 1957, decided on 20.1.1962); *M.L. Kamra v The Chairman-cum-Managing Director, New India Assurance Co. Ltd. and another* (1992) 2 SCC 36 at p. 41);

(8) There is a presumption that Parliament will not enact a statute that violates the rule of law (*Pierson* [1997] 3 All ER 577, 607);

(9) There is a presumption that Parliament does not legislate in violation of fundamental rights (*Ex parte Simms* [2000] 2 AC 115, 130);

(10) There is a presumption that Parliament will not enact an unjust law (*Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee* [1971] 2 MLJ 30, 31];

(11) The provisions of a statute should be read harmoniously with fundamental rights (*Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751, 763);

(12) By interpreting section 61 harmoniously with the Federal Constitution and bearing in mind the rule of law embedded in Article 5(1), section 61 should be read to enable lawyers who had entered legal services to be paid fairly and reasonably;

(13) The Court of Appeal overlooked this important point of law and fell into error. Though the label the Court of Appeal used was *purposive*, it actually employed the *literal* approach. It failed to give a constitutional compliant interpretation, as can be seen from the following paragraphs of the judgment:

> "[25] In relation to this provision, it was the intention of the Parliament that money launderer which includes any person that acquires proceeds of an unlawful activity, should not enjoy the benefit of their crime even though there is no prosecution made or conviction obtained for an offence.
>
> [27] The scheme of the Act and its purposes as can be gleaned from the provisions mentioned above, the Explanatory statements and the explanation by the Deputy Finance Minister when tabling the Bill, is

clear, among others, that no person should receive any benefit from the proceeds of an unlawful activity and in particular the person who directly involves in the said unlawful activity.

[33] As alluded to earlier, the scheme and purpose of the Act is to prevent money laundering and forfeiture of proceeds from an unlawful activity as specified under the Act. This also includes preventing any person or body from obtaining any benefit from the proceeds of the unlawful activity. In the circumstances, the purposive approach must be taken in interpreting the provision of section 61(4) of the Act. This too, is in consonant with section 17A of the Interpretation Acts 1948 which provides as follows…

[35] Coming back to the present case, the words 'legitimate legal interest' in subsection 61(4)(a) is not defined under the Act. This imports contradictory interpretation by parties involved as happened in this case. Hence, it is appropriate for the application of the purposive approach and to have regard to the intention of the legislature *inter alia* that no one should enjoy the proceeds of an unlawful property. This includes, the payment of the respondent's legal fees to the Intervener. Moreover, there is no express provision under the Act that allow the proceeds of the unlawful activity to be used for payment of legal fees.

[37] Clearly, the law in Singapore and Malaysia has no such provision as the South African POCA which allows for the payment of the legal expenses from the seized property. Therefore, the High Court judge in the instant case erred in allowing the Intervener's application for the legal fees to be paid from the respondent's seized properties as there was no express provision allowing the said application and it was against the intention of the legislature in enacting the Act."

(14) The Court of Appeal judgment departs from realities and is reflected in the following paragraphs 46 and 47 of the judgment:

> "[46] Our point here is that the respondent's legal fees can still be paid by him from his properties which were not proceeds of an unlawful activity. Here, the issue of rights to counsel raised by the counsel for the intervener is untenable.
>
> [47] On the same issue, the contention by counsel for the Intervener that Article 5(3) of the Federal Constitution indirectly imposes responsibility on the respondent to pay his legal fees is misconceived. Nothing in Article 5(3) or other related Articles that can be discerned to impose the responsibility to pay the legal fees."

(15) The alternative remedy suggested by the Court of Appeal in the following paragraphs 40 and 41 of its judgment also has the effect of rendering the right of representation illusory:

> "[40] Reverting to the instant case, firstly, there was a contractual relationship between the Intervener and the respondent…
>
> [41] In the circumstances, the intervener has the recourse to take legal action against the respondent for the unpaid legal fees under the said contract. This action is an action *in personam* and no proprietary interest can be attached to the respondent's seized properties which is the proceeds of an unlawful activity. This is applicable only if judgment has been obtained against the respondent for the payment of the legal fees, which is none in the present case.

(16) The existence of an alternative remedy is not contemplated by statute. Second, if every time a lawyer has to sue the

client for his fees and to incur unnecessary expenses therein, the result may be that he would only obtain a paper judgment. The right to legal counsel is to be paid in advance, and not as a debt collected from the client. As such, the suggestion by the Court of Appeal would burden the judicial system with unnecessary litigation.

(17) As an officer of the court, a lawyer is a *bona fide* third party.

[35] The proposition in the last ground above is fascinating and has far reaching consequences. For all intents and purposes, it suggests that being a *bona fide* third party by default (as an officer of the court), a lawyer is entitled to be paid his legal fees using property seized under subsections 50(1) and 51(1) without having to show cause under section 61(4) as to why the property should not be forfeited but to be released to him as a matter of right. All that he needs to do is to show that he is the lawyer representing the person whose property has been seized under the Act. Once that is shown, the *bona fide* of his claim would have been established.

[36] Effectively this will, as against lawyers, render subsection 56(2)(a) of the Act completely redundant and bereft of all meaning, a major impediment to the Government's effort to combat money laundering, as illegal money seized under the Act could then be cleansed by using it to pay for lawyers fees. The provision reads as follows:

"(2) The judge before whom an application is made under subsection (1) shall make an order for forfeiture of the property if he is satisfied –

(a) that the property is –
    (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
    (ii) terrorist property;
    (iii) the proceeds of an unlawful activity; or
    (iv) the instrumentalities of an offence;"

[37] There can be no argument that the properties seized from Amar, including the RM398,722.00 claimed by the appellant as its legal fees, are the proceeds of an unlawful activity. In any event, it is not the appellant's case that the RM398,722.00 is not the proceeds of an unlawful activity. It's case simply is that it has a legitimate legal interest in the money and therefore entitled to it.

[38] Amar it will be noted was not prosecuted for an offence under section 4(1) or a terrorism financing offence. What the respondent did was to proceed under section 56(1)(c) against his properties. For austerity, section 4(1) of the Act is reproduced below:

"4. (1) Any person who –

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or use proceeds of an unlawful activity or instrumentalities of an offence;

(c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of the offence at the time the offence was committed or five million ringgit, whichever is higher."

[39] Of the several grounds raised by the appellant in attacking the decision of the Court of Appeal, it is clear that the main thrust of its argument is that the Court of Appeal erred in not applying the purposive approach in interpreting section 61 of the Act. Instead it applied the literal approach.

[40] The contention by Datuk Seri Gopal Sri Ram was that the Court of Appeal failed to interpret section 61 harmoniously with Article 5(1) of the Federal Constitution ("No person shall be deprived of his life or personal liberty save in accordance with law") to enable lawyers who have rendered legal services to be paid fairly and reasonably.

[41] With the greatest of respect to the learned counsel, nothing can be further from the truth. On a careful reading of the judgment, one can only conclude that the Court of Appeal applied the purposive approach in interpreting section 61 and not the literal

approach as alleged by counsel. It is clear from paragraph 33 of the judgment that the Court of Appeal was alive to the need to interpret section 61(4) purposively, where Nordin Hassan JCA (now FCJ) speaking for the court said:

"[33] As alluded to earlier, the scheme and purpose of the Act is to prevent money laundering and forfeiture of proceeds from an unlawful activity as specified under the Act. This also includes preventing any person or body from obtaining any benefit from the proceeds of the unlawful activity. In the circumstances, the purposive approach must be taken in interpreting section 61(4) of the Act. This too, is in consonant with section 17A of the Interpretation Acts 1948 which provides as follows:

Section 17A

17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

[42] It is therefore incorrect in the circumstances for learned counsel to make the striking allegation that "Though the label the Court of Appeal used was *purposive*, it actually employed the *literal* approach". It is a discreet way of saying that the three Court of Appeal judges did not know the difference between the purposive and literal approach. With all due respect, the allegation is not only baseless but goes against the grain and basic structure of the judgment.

[43] The rationale for counsel's contention was that the right to be represented by counsel of one's choice is a guaranteed fundamental right under Article 5(3) of the Federal Constitution and

that the way the Court of Appeal construed section 61 of the Act renders that right illusory.

[44] According to counsel, there is an implied duty to pay legal fees. He went so far as to say that a consequence of the Court of Appeal's decision is that lawyers will refuse to act in such cases because there is no hope of payment. He pointed out that legal fees are to be paid in advance and is not a debt to be collected by a lawyer from his client. He lamented that if the lawyer has to sue for the debt, it would burden the judicial system with unnecessary litigation.

[45] Learned counsel went on to argue that the Court of Appeal judgment does not meet the realities as "no lawyer is going to appear for free". We are not sure how far that is true but what we can say without fear of contradiction is that there are conscientious lawyers out there who act *pro bono* for their clients. It surprises us that learned counsel appears to be completely unaware of this fact.

[46] Anyway, the guaranteed fundamental right to be represented by counsel of one's choice under Article 5(3) of the Federal Constitution has no bearing on the issue before the court, which is whether the counsel of one's choice is entitled to be paid his legal fees using money that is the proceeds of an unlawful activity.

[47] For this reason, counsel's contention that the Court of Appeal's interpretation of section 61(4) has rendered the right to counsel illusory is a total misconception and failure to comprehend

the purpose behind the forfeiture provisions. Counsel's argument if accepted will defeat the legislative object of the Act rather than to put its object into effect.

[48] It was also the appellant's contention that the Court of Appeal erred in law and fact in finding that "there is no express provisions under the Act that allow the proceeds of the unlawful activity to be used for payment of legal fees" without taking into consideration section 44 of the Act which allows for payment of legal fees, an obvious reference to subsection 44(3)(c) of the Act. For context, we reproduce section 44 in its entirety:

"**Freezing of property**

44. (1) Subject to section 50, an enforcement agency may issue an order to freeze any property of any person, or any terrorist property, as the case may be, wherever the property may be, and whether the property is in his possession, under his control or due from any source to him, if –

(a) an investigation with regard to an unlawful activity has commenced against that person; and

(b) either –

(i) the enforcement agency has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been or is being or is about to be committed by that person; or

(ii) the enforcement agency had reasonable grounds to suspect that the property is the proceeds of an unlawful activity or the instrumentalities of an offence.

(2) An order under subsection (1) may include –

(a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order;

(b) an order to authorize any of its officers to take custody and control of the property, or such part of the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require;

(c) where custody and control of the property is taken under paragraph (b), an order to authorize any of its officers to sell any frozen moveable property by a public auction or in such other manner as may be practicable if the enforcement agency is of the opinion that the property is liable to speedy decay or deterioration;

(d) an order to authorize any of its officers to hold the proceeds of the sale, after deducting therefrom the costs and expenses of the maintenance and sale of the property sold under paragraph (c); and

(e) an order as to the manner in which the property should be administered or dealt with.

(3) In making an order under subsection (1), the enforcement agency may give directions to the person named or described in the order relating to the disposal of the property for the purpose of –

(a) determining any dispute as to the ownership of or other interest in the property or any part of it;

(b) its proper administration during the period of the order;

(c) the payment of the costs of that person to defend criminal proceedings against him.

(4) An order made under subsection (1) may direct that the person named or described in the order shall –

(a) be restrained, whether by himself or by his nominees, relatives, employers or agents, from selling, disposing of, charging, pledging, transferring or otherwise dealing with or dissipating his property;

(b) not remove from or send out of Malaysia any of his money or property; and

(c) not leave or be permitted to leave Malaysia and shall surrender any travel documents to the Director-General of Immigration within one week of the service of the order.

(5) An order made under subsection (1) shall cease to have effect after ninety days after the order, if the person against whom the order was made has not been charged with an offence under this Act or a terrorism financing offence, as the case may be.

(6) An enforcement agency shall not be liable for any damages or cost arising directly or indirectly from the making of an order under this section unless it can be proved that the order under subsection (1) was not made in good faith.

(7) Where an enforcement agency directs that frozen property be dealt with, the person charged with the administration of the property shall not be liable for any loss or damage to the property or for the cost of proceedings taken to establish a claim to the property or to an interest in the property unless the court before which the claim is made finds that the person charged with the administration of the property has been negligent in respect of the administration of the property.

(8) The enforcement agency effecting any order to freeze any property under this section shall send a copy of the order and a list of the frozen property to the Public Prosecutor forthwith.

(9) Where the frozen property is in the possession, custody or control of a financial institution, the enforcement agency shall notify the relevant regulatory or supervisory authority (if any), as the case may be, of such order.

(10) Any person who fails to comply with an order of the enforcement agency issued under subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding five times the sum or value of the frozen property at the time the property was frozen or five million ringgit, whichever is higher, or to imprisonment for a term not exceeding seven years or to both."

[49] We are in agreement with the learned Deputy Public Prosecutor on this point, that section 44 of the Act has no application as the provision deals with the freezing of property and not with forfeiture. The procedure laid down by section 44 is to preserve the status quo of the seized property during the course of police investigation. It has no application to proceedings for forfeiture under section 56(1), nor to proceedings for the return of seized property by third parties under section 61(4).

[50] It is pertinent to note that both under section 56(1) and under section 61(4), no criminal proceedings are instituted against any person for any serious offence or foreign serious offence. "Criminal proceedings" is defined by section 3(1) as follows (unless the context otherwise requires):

"a trial of a person for a serious offence or foreign serious offence, as the case may be, and includes any proceedings to determine whether a particular person should be tried for the offence."

[51] The *Hansard* dated 9.5.2021 recorded the Deputy Minister of Finance as having made the following statement when tabling the bill on the proposed section 44:

"Fasal 44, menjelaskan kuasa-kuasa sesuatu agensi penguat kuasa untuk mengeluarkan sesuatu perintah pembekuan ke atas harta seseorang yang disyaki melakukan suatu kesalahan pengubahan wang haram. Namun begitu, perintah itu akan terhenti berkuat kuasa jika ia tidak dipertuduhkan dengan mana-mana kesalahan di bawah Akta ini."

[52] Therefore, where a person is not on trial for a serious offence or foreign serious offence, the question of payment of costs by the person whose property is frozen to defend criminal proceedings against him as contemplated by subsection 44(3)(c) does not arise in proceedings under subsection 61(4). The question would only arise if criminal proceedings has been instituted against him under the Act.

[53] In the present case no criminal proceedings has been instituted against Amar under the Act and he is not on trial for any serious offence or foreign serious offence. The proceedings against him was only for forfeiture of his properties under section 56(1) and not for committing any criminal offence although he was investigated for offences under sections 124 and 130 of the Penal Code and section 5 of the Computer Crimes Act 1997.

[54] On a related issue, the Court of Appeal referred, appropriately in our view, to the following passages in the judgment of the Singapore Court of Appeal in *Centillion Environment & Recycling Ltd (formerly known as Citiraya Industries Ltd) v Public Prosecutor and others and another appeal* [2012] SGCA 65 where the apex court pointed out the difference between the Singapore Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") and the South African Prevention of Crimes Act 1998:

"The ABSA Bank cases involved an application by a bank which was a judgment creditor of one Trent Gore Fraser ("Fraser"). Fraser was indicted of charges relating to racketeering and drug trafficking, and a restrain order was granted in relation to Fraser's property under the South African POCA. Fraser then took out an application under s 26(6) of the South African POCA seeking an order for the curator bonis of the restrained property to sell a portion of his property to pay legal expenses in his criminal trial. The bank applied to intervene and oppose Fraser's application on the basis of judgment it had obtained against Fraser. The Supreme Court of South Africa held (at [21]) of ABSA Bank (Supreme Court) that s 31 of the South African POCA authorised the High Court to direct "such payment" out of the realised proceeds of the defendant's property before the proceeds are applied in satisfaction of the confiscation order. The intention of this provision was to provide creditors with the means of bringing their claims to the court's attention to be taken into account before satisfaction of the confiscation order, and the High Court must accordingly retain the power to entertain applications by such creditors with claims in the restrained property (at [22]) of ABSA Bank (Supreme Court). This power was equally exercisable when the court exercise its wide discretion under s 26(6) to release restrained property to meet legal expenses incurred by the defendant (at [28]) of ABSA Bank (Supreme Court). The

decision of the Supreme Court was thus premised on the South African POCA, which differs materially from CDSA."

[55] There the court was dealing with subsections 13(1) and (2) of the CDSA, which we are mindful are not exactly similar to subsection 61(4) of the Act, and which provide as follows:

"**Protection of rights of third party**
13-(1) Where an application is made for a confiscation order under section 4 or 5, a person who asserts an interest in the property may apply to the court, before the confiscation order is made, for an order under subsection (2).

(2) If a person applies to the court for an order under this subsection in respect of his interest in property and the court is satisfied –

(a) that he was not in any way involved in the defendant's drug trafficking or criminal conduct, as the case may be; and

(b) that he acquired the interest –

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, property that was involved in or derived from drug trafficking or criminal conduct, as the case may be,

the court shall make an order declaring the nature, extent and value (as at the time the order is made) of his interest."

[56] Of relevance to note is that the subsection uses the word "interest" which subsection 2(1) of the CDSA defines as "in relation

to property, includes any right", whereas subsection 61(4)(a) of the Act uses the words "legitimate legal interest". The requirements of subsection 61(4) of the Act appear to be more stringent than the requirements of subsection 13(2) of the CDSA.

[57] The further argument advanced by the appellant which merits consideration is the contention that the Court of Appeal failed to take into account the fact that Amar was detained under the Prevention of Crime Act 1959 and was released by way of a *habeas corpus* application, which according to counsel shows that criminal proceedings had been instituted against Amar and thus, an action for forfeiture against him under section 56(1) was unlawful.

[58] We find nothing of substance to the argument as section 56(1) speaks of "prosecution" or "conviction" and not "criminal proceedings". We have in paragraph 50 above referred to the meaning of "criminal proceedings" given by section 3(1) of the Act.

[59] Before we conclude, we think it is appropriate for us to refer to the United States Supreme Court case of *Caplin & Drysdale, Chartered v United States* (1989) No. 87-1729 decided on June 22, 1989. Admittedly the facts are not on all fours with the facts of the present case, nor are the statutory provisions under consideration identical, but the case is instructive of the question whether a law firm can be paid its legal fees from the proceeds of an unlawful activity.

[60] For the facts of the case, it will suffice if we refer to the headnote which for convenience we shall break down into paragraphs and with the necessary modifications. In that case, one Christopher Reckmeyer ("Reckmeyer") was charged with running a massive drug importation and distribution scheme alleged to be a continuing criminal enterprise (CCE) in violation of 21 U.S.C. 848. Relying on a portion of the CCE statute that authorizes forfeiture to the Government of property acquired as a result of drug-law violations, 853, the indictment sought for forfeiture of specified assets in Reckmeyer's possession.

[61] The District Court, acting pursuant to 853(e)(1)(A), entered a restraining order forbidding Reckmeyer from transferring any of the potentially forfeitable assets. Nonetheless, he transferred $25,000 to the petitioner, a law firm, for pre-indictment legal services.

[62] The law firm continued to represent Reckmeyer after his indictment. Reckmeyer moved to modify the District Court's order to permit him to use some of the restrained assets to pay the law firm's fees and to exempt such assets from post-conviction forfeiture. However, before the court ruled on his motion, Reckmeyer entered a plea agreement with the Government in which, inter alia, he agreed to forfeit all of the specified assets.

[63] The court then denied Reckmeyer's motion and subsequently made an order forfeiting virtually all of his assets to the Government. The law firm, arguing that assets used to pay an attorney are exempt from forfeiture under 853 and, if they are not, that the statute's failure to provide such an exemption renders it

unconstitutional, filed a petition under 853(n) seeking an adjudication of its third-party interest in the forfeited assets.

[64] The District Court granted the relief sought. However, the Court of Appeal reversed the decision, finding that the statute acknowledged no exception to its forfeiture requirement and that the statutory scheme is constitutional.

[65] In affirming the decision of the Court of Appeal, it was *inter alia* held by the United States apex court as follows:

"The forfeiture statute does not impermissibly burden a defendant's Sixth Amendment right to retain counsel of his choice. A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney even if those funds are the only way that a defendant will be able to retain the attorney of his choice. Such money, though in his possession, is not rightfully his. Petitioner's contention that, since the Government's claim to forfeitable assets rests on a penal statute that is merely a mechanism for preventing fraudulent conveyances of the assets and is not a device for determining true title to property, the burden the statute places on a defendant's rights greatly outweighs the Government's interest in forfeiture is unsound. Section 853(c) reflects the application of the long-recognised and lawful practice of vesting title to any forfeitable assets in the hands of the Government at the time of the criminal act giving rise to forfeiture. Moreover, there is a strong governmental interest in obtaining full recovery of the assets, since the assets are deposited in a fund that supports law-enforcement efforts, since the statute allows property to be recovered by its rightful owners, and since a major purpose behind forfeiture provisions such as the CCE's is to lessen the economic power of organized crime and drug enterprises, including the use of such power to retain private counsel. The forfeiture statute does not upset the balance of power between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth

Amendment. The Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them. Such due process claims are cognizable only in specific cases of prosecutorial misconduct, which has not been alleged here."

[66] The significance of the case is that the court did not permit the defendant (Reckmeyer) to use some of the restrained assets to pay the law firm's legal fees and that the forfeiture statute does not upset the balance of power between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment, which states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

[67] The case is also relevant for the court's observation that a major purpose behind the forfeiture provisions in the CCE statute is to lessen the economic power of organized crime and drug enterprises, including the use of such power to retain private counsel. The observation applies with equal force to the forfeiture provisions in the Act.

[68] It was for all the reasons aforesaid that we dismissed the appeal and affirmed the decision of the Court of Appeal. My

learned sister Justice Hasnah Mohammed Hashim has read this judgment in draft and has agreed to it.

Signed

ABDUL RAHMAN SEBLI

Chief Judge of Sabah and Sarawak.

Dated: 31 January 2023.

For the Appellant: Datuk Seri Gopal Sri Ram, Wan Shahrizal bin Wan Ladin, How Li Nee and Marcus Lee of Tetuan Wan Shahrizal, Hari & Co.

For the Respondent: Dato' Mohd Dusuki bin Mokhtar and Mohd Khushairy bin Ibrahim, Deputy Public Prosecutors, of the Attorney General's Chambers.