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Article

*156 Leave to Appeal – To Seek or Not to Seek?

SV Namasoo[*]

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***156 Leave to Appeal – To Seek or Not to Seek?**

Abstract

This article explores the long-standing issue of the basis or factor that determines whether leave is required before an appeal can be lodged in the Court of Appeal from the decisions of lower courts (Magistrates' and Sessions Court) when monetary value is attached to a claim. The relevant section, namely s 68(1)(a) of the Courts of Judicature Act 1964 ("the CJA"), and in particular the relevant phrase "the amount or value of the subject – matter of the claim" therein, although couched in simple language has unfortunately given rise to different interpretations depending on the factual matrix of the case concerned. The focus of this article is to explore how the Court of Appeal and Federal Court have interpreted the aforesaid phrase and whether such interpretations have created clarity and certainty to enable litigants and counsels alike, to determine with ease if, a claim has satisfied the monetary threshold so that an appeal can be filed without leave being first obtained. If uncertainty exists, is legislative intervention necessary to amend the relevant phrase in the said section to make it more precise?

Introduction

On the question of whether leave is needed to lodge an appeal in the Court of Appeal from the decisions of the lower courts, the oft-quoted line from Shakespeare's Hamlet comes to mind "To be, or not to be, that is the question". However, as regards leave to appeal, the poser is "To seek (leave) or not to seek, that is the question". It has and still continues to vex counsels when the need to appeal to the Court of Appeal arises.

The need to seek leave before filing an appeal to the Court of Appeal in certain circumstances is statutorily mandated by s 68(1)(a) of the CJA. The said section was enacted with the noble intention of filtering frivolous and undeserving appeals from reaching the Court of Appeal and thereafter to the Federal Court, being the apex courts as stated by his Lordship Mohamed Dzaiddin FCJ in Lam Kong Company Ltd v Thong Guan Co Pte Ltd. [1]

The legal implication of failure to obtain leave to appeal, if so required, is profound because it goes to jurisdiction and it is not something that can be waived by the parties.[2] Also, the Court of Appeal can dismiss the appeal on **157* its own volition if leave had not been obtained.[3] Furthermore, the Federal Court has no power to grant leave for the purpose of lodging an appeal in the Court of Appeal because the decision of the Court of Appeal to refuse or grant leave to appeal is not a judgment or order within the meaning of s 96(a) of the CJA. In other words, failure to obtain leave from the Court of Appeal is unappealable.[4]

Although the monetary threshold requirement in s 68(1)(a) of the CJA below which leave is required to appeal is clear, but whether in any given case the said threshold has been reached abounds with uncertainty as it depends on the meaning to be placed on the phrase "amount or value of the subject-matter of the claim" preceding the said threshold.

Statutory provision

Under the heading "Non-Appealable Matters", s 68(1) of the CJA reads as follows:

No appeal shall be brought before the Court of Appeal in any of the following cases:

From the subsection, as stated earlier, the monetary threshold is crystal clear, that is, leave to appeal must be sought where the claim (exclusive of interest) is less than RM 250,000. However, the monetary threshold will have to be deduced from the "amount or value of the subject-matter of the claim" before the court. In common parlance, the words "amount" or "value" refers to the worth of something in monetary terms. Although the said words seem unambiguous and couched in layman's language, the basis for determining the "amount or value of the subject matter of the claim", especially in cases involving unliquidated monetary claims can pose a problem.

Therefore, before discussing the judicial decisions involving this area, a recapitulation of the kinds of monetary claims in civil law would be pertinent.

Kinds of monetary claims in civil law

Leaving aside non-monetary reliefs in civil law, all forms of monetary claims can generally be classified into liquidated or unliquidated claims.

158 In the case of liquidated claims, the amount to be claimed will be an ascertained amount or ascertainable by the claimant at the date of filing and can be endorsed on the writ. Therefore, in such cases, whether the monetary threshold has been satisfied or not can be easily determined from the pleadings. Examples of such liquidated claims would in the case of goods sold and delivered where the amount claimed would be the price of the goods and in a suit by a bank for money lent would be the loan amount or in a breach of contract scenario where the amount to be claimed is pre-estimated as per the agreed damages clause.

However, in contrast, an unliquidated claim is where the amount or value of the claim cannot be pre-estimated or precisely determined at the date of filing and can only be determined after an evidentiary hearing. One common species of such unliquidated damages would be general damages in personal injury cases which, inter alia, would encompass non-pecuniary losses such as pain and suffering, loss of amenities, emotional harm, loss of earning capacity or loss of future earnings. In fact, Order 18 r 12(1A) of the Rules of Court 2012 which deals with "Particulars of Pleading" clearly states that:

No party shall quantify any claim or counterclaim for general damages,…

It means the amount claimed cannot be endorsed on the writ. This situation can also be found in other areas of the law, such as, in a construction contract where the parties have not fixed an agreed liquidated amount as damages in the event of breach or non-fulfilment of the contract. In other words, the sum to be paid as compensation is said to be "at large" and is determined by trial after the breach occurs. Since the amount to be claimed is dependent on an evidentiary hearing, it would be impossible to endorse it on the writ. Only the facts that would enable the claim to be ascertained by the court will be pleaded. Ultimately, the claim is determined based on oral or documentary evidence adduced.

Since the amount or value of the claim cannot be endorsed on the writ or pleaded with certainty in unliquidated claims, the question is what would be the basis to determine if the monetary threshold has been satisfied.

Judicial interpretation of the said phrase

A discussion of the judicial decisions herein below will reveal that there is no uniformity as regards the meaning to be given to the said phrase in s 68(1)(a) of the CJA upon which hinges whether leave is required to file an appeal to the Court of Appeal. In some cases, the courts have defined the said phrase to mean the amount or value of the claim filed in the civil suit and not the adjudged sum whereas in other cases it has been defined to mean the adjudged sum and not the amount claimed. The judicial decisions in support of both interpretations are discussed as follows:

(1) Leave is based on the amount or value of the claim filed in the civil suit

(i) Teresa Monohary a/p Thairiyam & Anor v Tan Ah Lek [1995] 3 AMR 3146; [1996] 1 CLJ 149, CA

This case involved a running down matter. The claim of the plaintiff was not quantified in the writ or action. The claim was filed in the High Court in 1993 which means the quantum of damages claimed was in excess of RM100,000 because the jurisdiction of the Sessions Court at that time was up to RM100,000.[5]

At the end of the trial, the plaintiff was held 25% liable for contributory negligence. On the basis of 100% liability, the plaintiff's claim was assessed at RM250,050.34 and taking into account contributory negligence, the damages awarded to the plaintiff was RM187,537.84.

The defendant was of the view that since the amount recoverable by the plaintiff was less than RM250,000 after taking into consideration contributory negligence, he filed a notice of motion for leave to appeal. By the time the motion came up for hearing, the period of one month from the date of decision to file the notice of appeal had expired. The plaintiff's counsel contended that since the trial judge had found the total sum recoverable to be more than RM250,000 that was "the value of the subject – matter of the claim" and no leave was required. Notwithstanding the plaintiff counsel's objection, his Lordship Mahadev Shankar JCA gave an extension of time to file the notice of appeal on the grounds that:

The section as it stands is unsatisfactory because it is not precise.

Although no precise reason was given by his Lordship as to why no leave was required in this case, the most

likely basis or determinant factor, why leave was not required from the statement of his Lordship (reproduced below), was the monetary jurisdiction of the court the case was filed in, namely the High Court:

We propose to assume for the purpose of this judgment that on the basis of 100% liability the plaintiff hoped to recover a sum in excess of RM250,000.

(Emphasis added.)

As the plaintiff had filed the matter in the High Court, the presumption was that the plaintiff intended to claim more than RM250,000 and therefore no leave was required.

(ii) Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anor [1997] 1 AMR 785; [1997] 2 CLJ 68, FC

The appellant had claimed over RM4 million as general and special damages (the pleaded amount) as a result of an accident between his motorcar and a lorry belonging to the first respondent. The respondents were found to be wholly liable but the appellant was only awarded damages totalling RM62,400.[6]

The counsel for the respondents raised a preliminary objection that the appellant must first obtain leave pursuant to s 68(1)(a) of the CJA as the amount awarded by the trial judge was less than RM100,000.[7] Counsel further argued that the "amount or value of the subject matter of the claim" had crystallised in the judgment of the trial court and therefore in determining if leave was necessary the court must consider the value of the judgment relying on the case of Yap Fook Cheong & Anor v Burkill (Malaya) Sdn Bhd & Anor[8] which was, in turn, decided based on the English case of Studham v Stanbridge .[9]

His Lordship Chong Siew Fai CJ (Sabah and Sarawak) held as follows:

In my view no leave of court was required for this particular appeal. Section 68(1)(a) of the Act used the phrase "amount or value of the subject matter of the claim". The phrase must be read as whole. In the instant appeal, the subject matter is the road traffic accident and the claim of the first plaintiff/appellant is for an amount far in excess of RM100,000 . That being so, the amount adjudged at the trial assumes little or no significance .

(Emphasis added.)

Among the cases relied on by his Lordship Chong Siew Fai CJ was the case of Chan Kee Beng v Ramasamy Naidu[10] which involved the construction of s 56 of the Johor Courts Enactment where it was stated that no appeal shall lie "in any civil suit the amount or value of the subject-matter whereof does not exceed one hundred dollars". The plaintiff claimed RM250 but the magistrate gave judgment for RM100 only. Therefore, the issue was whether the determining factor was the amount or value of the subject-matter of the appeal (as adjudged) or the amount or value of the subject matter of the civil suit (as claimed). Mills J held that "the determining factor is not the amount or value of the subject-matter of the appeal, but the amount or value or subject-matter of the civil suit", that is the "that the amount was determined ****161*** not by the award handed down by the trial court but by the amount of the subject- matter of the suit".

His Lordship Chong Siew Fai CJ was not inclined to rely on Yap Fook Cheong (supra) because that case was decided based on the English case of Studham (supra) which was as regards Order 50 r 12 of the County Court Rules 1889 where the "subject matter" was specifically defined as "the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged". In other words, unlike s 68(1)(a) of the CJA, in Order 50 r 12 of the County Court Rules 1889 it is expressly stated that damage adjudged can be taken into consideration in deciding if leave is required.

However, for reasons best known, in conclusion, his Lordship Chong Siew Fai CJ stated that "There might well be cases where the sum adjudged may be validly taken into account …" without elaborating what those circumstances might be.

(iii) Malayan Banking Bhd v Basarudin Ahmad Khan [2004] 6 AMR 30; [2004] 4 CLJ 596, CA

The matter involved a breach of an employment contract where the defendant/respondent was in the employment of the plaintiff/appellant. The defendant, inter alia, raised the objection that the subject matter was below the limit of RM250,000 and the appeal must be dismissed. His Lordship Gopal Sri Ram CJA in dismissing the objection stated:

The value of a claim, in the context of s 68(1)(a) is to be viewed from an appellant's standpoint . Here the pleaded value of the plaintiff's claim exceeds the statutory trigger.

(Emphasis added.)

(iv) Harcharan Singh Sohan Singh v Ranjit Kaur S Gean Singh [2011] 5 AMR 307; [2011] 3 CLJ 593, FC

The Court of Appeal had struck out the appellant's appeal on the grounds that he had failed to obtain leave under s 68(1)(a) of the CJA as, inter alia, the value of the subject matter was allegedly less than RM250,000 based on the objection by the respondent.[11]

Among others, the appellant submitted that s 68(1)(a) of the CJA did not apply because the subject matter of the appeal was a declaration relying on the Court of Appeal Practice Direction No. 2 of 1996 (which unfortunately was only in respect of subject matter that has no value attached to them or those with values that cannot be quantified) coupled with ancillary reliefs and therefore no leave was required. The appellant had claimed for a ***162*** declaration that he is the beneficial owner of the half undivided share in a property with a house erected thereon belonging to his brother, since deceased, on the grounds that he had jointly purchased it and that later he had bought the deceased brother's half share during his lifetime.

Two questions were posed to the Federal Court which is reproduced in their entirety:

(i)

What is the true meaning and effect of s 68(1)(a) which provides that no appeal shall be brought to the Court of Appeal when the amount or value of the subject matter of the claim (exclusive of interest) is less than RM250,000, except with the leave of the Court of Appeal?;

(ii)

Further and/or in the alternative, at which point of time is the amount or value of the subject matter of the claim (exclusive of interest) to be determined for the purpose of s 68(1)(a)?

The Federal Court answered both questions as follows:

(i)

Based on the decision in Yai Yen Hon (supra), the Federal Court reaffirmed that the phrase "amount or value of the subject matter of the claim" must be " read as the amount or value of the claim filed in the civil suit and not the judgment amount granted against . That would be the determinant factor in deciding whether leave was necessary".[12]

(ii)

(Emphasis added).

(v) Utusan Melayu (M) Bhd v Lim Guan Eng [2015] AMEJ 1227; [2013] 3 MLJ 689, CA

The plaintiff/respondent brought an action for libel against the defendant/appellant. At the end of trial, the High Court found the defendant liable and ordered the defendant to pay RM200,000 as damages with interest. Aggrieved by the decision, the defendant appealed to the Court of Appeal. A notice of appeal was duly filed along with an application for leave to appeal against the decision of the High Court.

At the outset, when the court inquired from the counsel for the defendant why the necessity of filing a notice of appeal and an application for leave, the ***163*** learned counsel replied that the application was filed through "abundance of caution" in view of the prevailing conflicting positions taken by different panels of the Court of Appeal in respect of the decision of the Federal Court in Harcharan Singh (supra).

However, his Lordship Raus Sharif CJA was of the view that there was no such ambiguity with regard to the decision of Harcharan Singh (supra) and reiterated that the time for determining the current value of the subject matter of the claim (exclusive of interest) is at the time of filing the claim and not the judgment amount granted. His Lordship went further to hold that:

In the case, it is not in dispute that the plaintiff was claiming in excess of RM250,000. As such there was no necessity for the defendant to apply for leave pursuant to s 68(1)(a) of the CJA, even though the judgment granted against the defendant was only RM200,000.

Unfortunately, his Lordship did not state the basis of his conclusion on how the plaintiff was deemed claiming more than RM250,000 and it can only be assumed that it must have been from the pleadings.

(2) Leave should be based on the adjudged sum and not the sum claimed

(i) Perumal Angamuthu v Sowntharakowry Shanmugam [1999] 4 AMR 3921; [1999] 4 CLJ 12, CA

This case involved an appeal from the decision of the High Court granting vacant possession and arrears of rent of RM1,200 per month to the respondent from August 1, 1991, until the handing over of vacant possession. Counsel for the respondent objected that the appeal was incompetent as no leave was obtained. The Court of Appeal held that the High Court had attached a value to the matter appealed against, by making an order for arrears of rent, although originally there was no value attached to the claim, leave to appeal is required and the

appeal was struck off.

Therefore based on this case, if the High Court attaches a value to the matter appealed against it will become the adjudged sum. If the adjudged sum is below the statutory trigger, leave to appeal must be obtained unless it comes within any of the exceptions in the Practice Direction 1 of 2008 (Part II(3)) of the Court of Appeal which came into effect from August 1, 2008 (replacing Practice Direction 2 of 1996).

(ii) Amer Mohideen Dawood v Sneh Bhar w/o Ter Binder Singh [1996] 2 AMR 1777; [1996] 2 CLJ 955, CA

By a contract in writing, the respondent (plaintiff) bought a piece of land from the appellant (defendant) for RM99,000. The High Court ordered specific performance of the contract. The appellant appealed but omitted to apply for leave. Apparently, in his pleading, the appellant claimed for a sum in excess of RM250,000, details of which are unknown. The respondent ****164*** applied to strike out the appeal on the ground that the subject matter of the appeal was less than RM250,000.

His Lordship NH Chan JCA stated:

"The amount of the claim" has to mean the total amount or sum of the claim in the action which has been adjudged to be payable and, if it is not a money claim, it is "the value of the subject matter of the claim" in the action which has been adjudged as recoverable because it is only against the judgment (and not against the claim made by claimants in their pleadings) that the appeal could be brought.

His Lordship went on further to state that:

If "the amount of the claim" or "the value of the subject matter of the claim" is to be based on the claim as pleaded in the statement of claim and not on the judgment, then the purpose of s 68(1)(a) of the Act could be circumvented quite easily by claimants merely stating in their pleadings, in every case that they are claiming for more than RM250,000. This easy way to get around the need to obtain leave makes the entire provision of s 68(1)(a) of the Act superfluous. This is how it was put by Shankar JCA in Teresa Monohary a/p Thairiyam & Anor v Tan Ah Lek [1995] 3 AMR 3146 at 3149; [1995] 3 MLJ 365 at 368:

"Such an approach … could side-track the purpose of s 68(1)(a) because claimants could get around the need to obtain leave merely by stipulating in their pleadings that they are claiming for more than RM250,000 in every case."

In conclusion, his Lordship stated:

Since the value of the subject matter of the order for specific performance is the price paid for the said land, namely, RM99,000, this appeal is therefore incompetent as no leave to appeal was obtained from the Court of Appeal.

In reaching the above conclusion, his Lordship relied on the case of Allan v Pratt .[13] The Earl of Selborne, giving the judgment of the Privy Council (consisting of the Earl of Selborne, Lord Watson, Lord Hobhouse and Sir Barnes Peacock), said this, at pp 781-782:

Their Lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the question of the right of appeal is , in their judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought . Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of Macfarlane v Leclaire 15 Moore, PCC 181, that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of ****165*** value at all, that seems evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do something as defendant . It may be that the value to the defendant of an adverse judgment is greater than the value laid by the plaintiff in his claim. If so, which was the case in Macfarlane v Leclaire, it would be very unjust that he should be bound, not by the value to himself but by the value originally assigned to the subject-matter of the action by his opponent. The present is the converse case. A man makes a claim for much larger damages than he is likely to recover. The injury to the defendant, if he is wrongly adjudged to pay damages, is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side.

Therefore in principle, their Lordships think the case is governed by Macfarlane v Leclaire, upon the question of value, and they do not think it is at all affected by the circumstance that the court below did not give effect to that objection, but gave leave to appeal. It has been decided in former cases that leave so given does not make the thing right, if it ought not to have been done.

(Emphasis added.)

Therefore, the case of Amer Mohideen clearly states that the determining factor or the basis is the adjudged sum.

(iii) Datuk Aziz bin Ishak & Anor v Yb Haji Khalid bin Abdul Samad [2014] 1 AMR 193, CA

The respondent had brought a defamatory suit against the appellant. Having found the appellant liable, the High Court ordered the appellant to pay damages of RM60,000 to the respondent. The appellant filed a notice of appeal against the finding and the respondent, in turn, filed a notice of motion to have the appeal dismissed on the grounds that no leave to appeal has been obtained prior to the filing of the appeal. The appellant contended that leave was not required as the damages claimed in the statement of claim was for an unspecified sum, namely, general, exemplary and aggravated damages and that for purposes of leave, the court should look at the amount claimed in the statement of claim and not at the adjudged sum. The appellant's counsel relied on the two Federal Court authorities of Yai Yen Hon (supra) and Harcharan Singh (supra).

However, his Lordship Hishamudin Mohd Yunus JCA took a different view and stated:

In our judgment, in the context of the present case, considering that it is defendants who are appealing, and not the plaintiff , the "amount or value of the subject-matter of the claim" for the purpose of s 68(1)(a) of the Courts of Judicature Act 1964, ought to be adjudged sum of RM60,000, and not the pleaded sum . We find support for the position that we take in the judgment of the ***166*** Court of Appeal in Amer Mohideen Dawood v Sneh Bhar w/o Ter Binder Singh [1996] 2 AMR 1777; [1996] 2 MLJ 329.

(Emphasis added.)

Further, his Lordship Hishamudin Mohd Yunus JCA went on to distinguish the Supreme/Federal Court cases of Yai Yen Hon (supra) and Harcharan Singh (supra) as follows:

We are mindful of the fact that Yai Yen Hon is a decision of the Supreme Court. However, that case can be distinguished in that in that case it was the plaintiff who was appealing, whereas in the instant case, just as in the case of Amer Mohideen , it is the defendant who is appealing. We take the position that where it is the defendant who is appealing (as opposed to the plaintiff being the appellant), then, the Amer Mohideen principle must prevail and that the adjudged sum must be the determining factor and not the sum claimed in the statement of claim; and if the adjudged sum is less than RM250,000, the defendant must obtain leave in order to appeal. We note with dismay that the well-reasoned judgment of the Court of Appeal in Amer Mohideen was not considered by the Supreme Court in Yai Yen Hon . It is highly probable that Amer Mohideen was somehow inadvertently not brought to the attention of the Supreme Court. Be that as it may, the Supreme Court in Yai Yen Hon , nevertheless, did say:

"There might well be cases where the sums adjudged may be validly taken into account: the instant appeal before us, is not one such case."

Moreover, in Harcharan Singh , like in Yai Yen Hon , it was the plaintiff who was appealing to the Court of appeal (and, subsequently, to the Federal Court) and not the defendant, and, like Yai Yen Hon , the Federal Court, in its brief judgment, did not consider Amer Mohideen .

(iv) Foong Yok Kok v Prudential Aussurance Malayasia Berhad [2020] 1 LNS 85, CA

This case involved a claim for various commissions as an agency manager by the appellant with the respondent, the insurance company. After a full trial, the High Court dismissed the appellant's claim and allowed the respondent's counterclaim for the sum of RM234,940.28. The respondent raised the issue of the incompetency of the appeal as the amount awarded by the court was less than RM250,000.

His Lordship Kamardin Hashim stated as follows:

We observed from the plaintiff's amended statement of claim that the subject matter of claim had been quantified and adjudged by the learned High Court judge as totalling RM234,940.28, the amount of the mistaken payment to the plaintiff. Besides, the plaintiff was also asking for a declaratory relief and damages to be assessed. The plaintiff's own pleadings never quantified the amount of damages.

167 We are of the view that damages to be assessed as prayed for by the plaintiff cannot be factored into the value of the claim because damages are consequential and not the subject matter of the claim (based on the decision of Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 1 AMR 699; [2002]1 MLJ 129; [2000] 1 CLJ 1, CA).

His Lordship in support of his decision that the instant appeal was incompetent for failure to obtain leave also

relied on the case of Amer Mohideen (supra) in arriving at the decision.

The current legal position

From the judicial decisions discussed above, it is apparent that there is no unanimity as regards the basis or the determinant factor for the statutory trigger to apply such that no leave will be required.

Simpliciter , it seems, if the intended appellant is a plaintiff, then the worth of his claim at the time of filing would be the determinant factor as to whether leave is required, with the inherent difficulty of discovering what would be the basis to determine the worth of the claim (which will be discussed later, in particular with regards to unliquidated claims). However, if the intended appellant is a defendant then it would seem to be the sum adjudged (presumably by the court of first instance).

However, an in-depth analysis seems to indicate it is far from simple. The cases of Yai Yen Hon (supra) and Harcharan Singh (supra) (both Federal Court) and the cases of Malayan Banking Bhd (supra) and Utusan Melayu (M) Bhd (supra) (both Court of Appeal) decided that the determinant factor in deciding whether leave is required or not was the worth of the plaintiff's claim irrespective of the party appealing. In fact in Malayan Banking Bhd, his Lordship Gopal Sri Ram CJA specifically stated the "value of a claim", in the context of s 68(1)(a) is to be viewed from an appellant's standpoint without making any reference to the party before the court. More importantly, notwithstanding that, the intended appellant was the defendant in Utusan Melayu (M) Bhd (supra), the same test was applied by the then Court of Appeal President, his Lordship Raus Sharif relying on Yai Yen Hon (supra) and Harcharan Singh (supra) and ruled no leave was required .

On the other hand, in arriving at the decision in Datuk Aziz bin Ishak (supra), his Lordship Mohd Hishamuddin Mohd Yunus JCA not only placed complete reliance on the decision of Amer Mohideen (supra) (which in turn was supported by the English Court of Appeal authority of Allan v Pratt and Privy Council case of Macfarlane v Leclaire) but also distinguished the cases of Yai Yen Hon (supra) and Harcharan Singh (supra) as being only applicable if the appellant was a plaintiff. Further, his Lordship Mohd Hishamuddin Mohd Yunus JCA stated:

We note with dismay that the well-reasoned judgment of the Court of Appeal in Amer Mohideen was not considered by the Supreme Court in Yai Yen Hon ***168*** (and also in Harcharan Singh). It is highly probably that Amer Mohideen was somehow inadvertently not brought to the attention of the Supreme Court .

(Emphasis added.)

The implication being that the decisions in Yai Yen Hon (supra) and Harcharan Singh (supra) might have been otherwise if the aforesaid case was referred to.

In support of the distinguishing done, his Lordship referred to the parting words of his Lordship Chong Siew Fai CJ in Yai Yen Hon (supra) that:

There might well be cases where the sums adjudged may be validly taken into count;" the instant appeal before us, however, is not one such case.

It must be borne in mind, however, that at no time in Amer Mohideen (supra) the Court of Appeal came to the decision that the determinant factor was the adjudged sum based on the fact that the appellant, in that case, was the defendant, although coincidentally it was. Also, the case of Utusan Melayu (M) Bhd was totally not considered by the Court of Appeal.

At the end of the day, all the cases discussed herein so far involved around a single issue – the interpretation of a statutory provision, that is, the phrase "the amount or value of the subject – matter of the claim" in the context of the leave application. It is rudimentary that in interpreting a statutory provision, the primary task of the court is to decipher the intention of Parliament by applying the well-known canons of interpretation and strictly refrain from dabbling in judicial legislation. As it stands now, either the said phrase is so ambiguous that it has legitimately given rise to two interpretations or one or the other is seemingly a by-product of judicial legislation. Whatever may be the root cause of the conundrum, one thing is sure, that the said phrase lacks clarity. This has been echoed by his Lordship Mahadev Shankar JCA in Teresa Monohary when he granted an extension of time to file the notice of appeal on the grounds that:

The section as it stands is unsatisfactory because it is not precise. Because of this we did not think it right to penalise the applicant in the manner suggested.

(Emphasis added.)

Also in the case of Yai Yen Hon (supra), his Lordship Chong Siew Fai also echoed a similar sentiment as follows:

I agree with the Court of Appeal that the said s 68(1)(a), as it stands, is unsatisfactory; but any amendment thereto, if considered desirable, is outside the sphere of the court.

(Emphasis added.)

Outside the sphere of the court means, by way of legislative amendments.

169 To the contrary, the Federal Court in the case of Harcharan Singh (supra) agreed with the Court of Appeal's decision in Mohd Tahir b Mohd Mohd Sheriff v Ramlah bt Abdullah[14] that s 68(1)(a) of the CJA is clear and unambiguous.

Practitioner's dilemma

From the plethora of cases discussed above, it is evident that there is no concord among the judicial minds as to the meaning of the said phrase and also whether the phrase as it stands is clear or not. In this atmosphere of uncertainty, how should a practitioner approach this area of law?

(a)

If the plaintiff is applying for leave, and the amount claimed was an ascertained figure and it is pleaded (for instance, where the special damages alone are above RM250,000 even though coupled with general damages), then in all likelihood no leave will be required.

(b)

If the plaintiff is applying for leave, where the subject matter, notwithstanding that it falls under the exceptions in Practice Direction No. 1 of 2008, like specific performance or declaration but in granting the order, the judge attaches a monetary value to any part of the claim then it would be prudent to apply for leave if the amount is less than RM250,000. Interestingly, in Practice Direction No. 1 of 2008, it is stated that leave to appeal is not required in respect of "judgment for unliquidated damages/unliquidated amount".[15]

(c)

If the defendant is applying for leave, then there is a real conflict situation because of the decision in Utusan Melayu (M) Bhd (supra) which states that the guide is the worth of the plaintiff's claim as compared to Datuk Aziz bin Ishak (supra) where the court categorically had said the defendant must be guided by the adjudged sum. In this scenario, prudence dictates that if either, the worth of the claim or the adjudged sum is less than RM250,000 then "with abundance of caution" a notice of appeal and also an application for leave should be filed simultaneously. Further, if the adjudged sum is the basis, the practitioner would have to consider whether it would be the sum awarded by the court of first instance (which originally heard the matter) or the intermediate appellate court (High Court), in the event one of the awards was below the monetary threshold.

(d)

If the plaintiff is applying for leave involving an unliquidated claim, for example only general damages are being claimed or it involves a ***170*** mixture of special and general damages, where the special damages alone do not exceed RM250,000 (tortious claims for like accident or defamation suits) where Order 18 r 12(1A) of the Rules of Court 2012 expressly prohibits fixing a figure to the claim, what then becomes the determinant or basis to see if the statutory threshold has been satisfied? Definitely, it cannot be from the writ. Would it then be the amount submitted by the counsel for the claimant before the trial judge or the judgment sum awarded by the court of first instance per se or the judgment sum subject to liability as in tortious claims or the adjudged sum on appeal or based on any other evidence tendered in court in the form of documents per se? Again prudence dictates, with "abundance of caution" a notice of appeal and also an application for leave be filed within the time permitted if for any reason the judgment of the first instance or the adjudged sum upon appeal falls below the monetary threshold.

Conclusion

A judicial system must ensure that a deserving litigant's path in the quest for justice is not strewn with uncertainty such that it prevents the exhaustion of all possible avenues of appeal. As it stands, at times counsels "with abundance of caution" in mind, are compelled to file a notice of appeal and also an application for leave, to be on the safe side. This is not only a waste of the counsel and court's time but also results in undesirable additional costs for the litigants. It is the fervent hope, that the Legislature will make the necessary amendments to s 68(1)(a) of the CJA as expeditiously as possible. One such amendment was suggested by his Lordship Mahadev Shankar in the case of Teresa Monohary (supra) as follows:

We think it preferable that s 68(1)(a) should be reworded to provide that no appeal should be brought without leave where the judgment appealed against is for the payment of a monetary sum which is less than RM250,000 – exclusive of interest and costs.

Even the phrase, "the judgment appealed against" as suggested above, may give rise to doubt. Invariably, the claim will originate from the lower court and an appeal will be lodged in the High Court. For example, if the Sessions Court has awarded RM300,000 in damages and this is reduced upon appeal by the High Court to RM240,000. Which court's decision would be deemed "the judgment", is it the amount adjudged by the lower or the High Court? In one sense, the appeal is against the decision of the lower court but in another sense, the leave to appeal would be against the decision of the High Court. So any legislative amendment must specify the reference to "the judgment appealed against" refers to which court, the court of first instance or the intermediary appellate court.

***171** For sake of completeness, any legislative intervention in this area must also ensure the incorporation of the contents of Practice Direction 1 of 2008 (Part II(3)) into the CJA.

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1. [2000] 3 AMR 3304; [2000] 3 CLJ 769, FC.

2. Nagappa Rengasamy Pillai v Lim Lee Chong [1968] 2 MLJ 91, FC.

3. Shell Malaysia Trading Sdn Bhd v Collector of Stamp Duty Penang [2011] 5 AMR 307; [2011] 6 CLJ 407, CA.

4. Auto Dunia Sdn Bhd v Wong Sai Fatt & 3 Ors [1995] 2 AMR 1943; [1995] 3 CLJ 485, FC; Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd [2006] 3 AMR 725; [2006] 3 CLJ 177, FC.

5. The Sessions Court jurisdiction has since then been increased to RM250,000 by Act A887 on June 24, 1994 and as of March 1, 2013, the Sessions Court has unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accident by Act A1382.

6. The appellant appealed to the Supreme Court when notice of appeal was filed on March 19, 1994 but when the matter came up for hearing the Federal Court had come into existence on June 24, 1994.

7. The prevalent statutory imposed amount below which leave to appeal was required.

8. [1991] 3 MLJ 160; [1991] 3 CLJ 1711, SC.

9. [1985] 1 QB 870.

10. [1939] MLJ (Rep) 113.

11. The High Court had made a valuation of the disputed property to be RM248,500.

12. The respondent in her application for distribution of the deceased's estate under the Small Estate Distribution Ordinance 1955 had put a valuation of RM300,000 on the said half share but the estate duty valued the half share at only RM248,500. The respondent in her amended defence had pleaded RM248,500. The High Court and the Court of Appeal had accepted the value at RM248,500 and the Federal Court did not interfere with the said finding and dismissed the appeal.

13. (1888) 13 AC 780.

14. [2004] 6 AMR 165.

15. His Lordship Hishamudin JCA in delivering the dissenting judgment in Galaxy Energy Technologies Sdn Bhd v Timbalan Pemungut Duti Setem, Malaysia & Anor [2011] 2 AMCR 56; [2011]5 CLJ 829, CA was of the view that Practice Directions are mere guidelines and should be interpreted as being subject to the CJA 1964, an Act of Parliament, a higher law and his Lordship dismissed the said appeal merely on the grounds that the monetary threshold had not been met.