A

Saravanan a/l Thangathoray v Subashini a/p Rajasingam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–955 OF 2006 AND W–02–1041 OF 2006

B GOPAL SRI RAM, SURIYADI, AND HASAN LAH JJCA

13 MARCH 2007

Civil Procedure — Injunction — Jurisdiction to grant, scope of — Injunction to restrain respondent from continuing with proceedings in Syariah Court — Injunction addressed to respondent and not to Syariah Court — Whether injunction merely acts upon respondent and not upon any Syariah Court — Whether injunction could be granted by Civil Court — Whether s 54 was applicable to interlocutory injunction — Specific Relief Act 1950 s 54(b)

C

D

Family Law — Divorce — Conversion to Islam — Conversion of one party in civil marriage to Islam — Premature filing of petition — Determination of date of conversion — Whether certificate of conversion to religion of Islam was conclusive proof of date of conversion — Administration of the Religion of Islam (State of Selangor) Enactment 2003 s 112(2)

E

Family Law — Divorce — Conversion to Islam — Conversion of one party in civil marriage to Islam — Whether petition for divorce must be presented after expiration of three months from the date of husband's conversion and not earlier — Whether premature petition must fail — Law Reform (Marriage and Divorce) Act 1976 s 51

F

Family Law — Divorce — Conversion to Islam — Conversion of one party in civil marriage to Islam — Whether Syariah Court had jurisdiction to decide on dissolution of marriage and custody of child of marriage — Law Reform (Marriage and Divorce) Act 1976 s 51

G

Islamic Law — Jurisdiction — Syariah Court — Conversion of one party in civil marriage to Islam — Whether Syariah Court had jurisdiction to decide on dissolution of marriage and custody of child of marriage — Law Reform (Marriage and Divorce) Act 1976 s 51 — Islamic Family Law (Federal Territories) Act 1984 s 46(2)

H

Islamic Law — Jurisdiction — Syariah Court — Whether Syariah Court had jurisdiction when not all parties were Muslims — Whether Syariah Court had jurisdiction over matters not conferred by State or Federal law but provided for in Second List — Federal Constitution, Ninth Schedule, Second List — Administration of Islamic Law (Federal Territories) Act 1993 s 46

I

The parties were husband and wife. They were married pursuant to a civil ceremony of marriage that was registered on 26 July 2001 pursuant to the Law Reform

(Marriage and Divorce) Act 1976 ('the 1976 Act'). Both were Hindus at the date of their marriage. There were two children of the marriage, aged three and a year old. By the latter part of 2005, the marriage was on the rocks. Later, the wife received a notice dated 14 July 2006 from the Registrar of the Syariah High Court, Kuala Lumpur informing her that the husband had commenced proceedings in that court for the custody of their elder son. The notice went on to say that the case had been set down for hearing on 14 August 2006. It appeared from the face of the notice that the husband had converted himself and the elder son to Islam. It was the wife's pleaded case that the son's conversion was carried out without her knowledge and consent. After she had presented her petition, the wife applied ex parte to the High Court for injunctions restraining the husband from: (1) converting either child of the marriage to Islam; and (2) commencing or continuing with any proceedings in any Syariah Court with regard to the marriage or the children of the marriage. The High Court granted an ex parte injunction but later dissolved it after an inter partes hearing. However, the High Court granted an interim injunction in terms of the wife's summons pending the hearing of an appeal to this court.

The learned judicial commissioner held that she had no jurisdiction to grant the kind of injunction sought by the wife for two reasons. First, because the injunction though addressed at the husband was in effect a stay of proceedings in the Syariah Court from further hearing and determining the applications placed before it by the husband. She went on to refer to s 54(b) of the Specific Relief Act 1950 which she said specifically disallows injunctions from being granted to stay proceedings in a court not subordinate to that from which the injunction is sought. The wife appealed against the order dissolving the injunction while the husband appealed against the grant of the *Erinford* injunction.

The husband argued that the High Court had no jurisdiction to grant the interlocutory relief sought here, because, first, the Syariah Court has, apart from statute, subject matter jurisdiction which enables it to deal with a case as the present thereby excluding the jurisdiction of ordinary courts established by art 121 of the Federal Constitution. Secondly, by virtue of art 3(1) of the Federal Constitution, since Islam is the religion of the Federation, principles of Islamic law must *ex necessitae rei* override the express provision made by Parliament in s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) ('the 1984 Act'). Under Islamic law, the conversion of a spouse to a non-Muslim marriage, without more, puts an end to the previous marriage. Since s 46(2) of the 1984 Act is inconsistent with the Islamic law doctrine, the former must give way to the latter.

Learned counsel for the husband also sought to argue a point of law not taken in the court below. He referred to the proviso to s 51(1) of the 1976 Act and submitted that the wife must fail in any event because she had presented her petition before the expiration of three months from the date of the husband's conversion. According to the learned counsel for the husband, the husband's conversion to Islam took place on 18 May 2006 and the wife's petition was filed on 4 August 2006, which was two months and 18 days after the husband's conversion. On this issue the learned counsel for the wife submitted that the date of the husband's conversion was a disputed fact and as such it is a matter that should be determined at the trial proper. Another important issue was whether the injunction sought by the wife was in contravention of the provision of s 54(b) of the Specific Relief Act 1950.

Held, by majority dismissing the wife's appeal:

(1) (per **Gopal Sri Ram JCA**, dissenting) The learned judicial commissioner erred in holding that s 54(b) deprived her of jurisdiction to grant the injunction sought by the wife; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 followed. The injunction sought merely acts upon the person of the husband and not upon any Syariah Court. Hence, s 54(b) does not apply to the facts of this case; *Milton & Co v Oiha Automobile Engineering Co* AIR 1931 Cal 279 followed (see paras 7 & 9).

(2) (per **Gopal Sri Ram JCA**, dissenting) The subject matter in the Second List of the Ninth Schedule of the Federal Constitution by themselves, whether taken individually or as a whole do not confer jurisdiction upon a Syariah court to hear and determine a cause or matter. A written law by the appropriate law making organ of the State is necessary to confer jurisdiction upon a Syariah Court. So, when Item 1 of the Second List says 'the constitution, organization and procedure of Syariah Courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph', what it means is that the Legislature of a State may pass written law that governs the constitution of a Syariah Court. And it also means that such legislation may only make provision for a Syariah Court: (i) to have jurisdiction only over Muslims; and (ii) only in respect of the subjects of succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; *wakafs* and those other subjects set out in Item 1. Therefore, if a State enactment or, in an Act of Parliament, in the case of the Federal Territories, passes a law that confers jurisdiction on a Syariah Court over non-Muslims or in respect of a subject not within Item 1 of Second List, such a law would be ultra vires the Constitution and to that extent will be void. And that is why, in order to be intra vires the Federal Constitution, s 46 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) ('the 1993 Act') confers jurisdiction on a Syariah High Court in civil matters only where all the parties are Muslims (see para 20).

(3) (per **Gopal Sri Ram JCA**, dissenting) On a true interpretation of the Constitution, a Syariah Court, whether in a State or in a Federal Territory only has such jurisdiction as may be conferred upon it by State or Federal law. Hence the jurisdiction of the Syariah Court, on the facts of the present case, is governed exclusively by s 46(2)(b)(i) of the 1993 Act and not by the Second List in the Ninth Schedule. Any other interpretation would produce a manifest absurdity and visit an injustice upon non-Muslim spouses, in particular upon the wife in the present instance; *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 not followed; *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705, *Mohamed Habibuilah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, *Soon Singh v Pertubuhan Kebajikan Malaysia Kedah* [1994] 1 MLJ 690 distinguished; *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] MLJU 500 followed (see para 22).

(4) (per **Gopal Sri Ram JCA**, dissenting) It follows from the dichotomous approach that our Constitutional jurisprudence is secular and that all a court

of law is obliged to do in a dispute such as the present is to interpret written law, namely, the Federal Constitution, Acts of Parliament, State Enactments and all forms of subordinate legislation to determine all questions submitted to it. As such, it is not open to this court to go outside the terms of s 46(2) of the 1984 Act. That subsection is a well-drafted provision for it implicitly pays regard to the terms of the Constitution and to s 51 of the 1976 Act. Put shortly, the effect of s 46(2) of the 1984 Act is this, according to the Hukum Syara', the act of one spouse to a non-Muslim marriage converting to Islam puts an end to the previous marriage. Section 46(2) alters this result by requiring the Syariah Court to confirm the fact of dissolution. This is a mere administrative act. And the way in which confirmation must take place is by production to the Syariah Court of the decree granted by the High Court acting under s 51 of the 1976 Act. Accordingly, on the facts of the present case, the learned judicial commissioner having held, quite correctly, that she did have jurisdiction to entertain the wife's petition by reason of s 51 of the 1976 Act, was in error when she declined jurisdiction over the interlocutory summons for an injunction (see para 31).

(5) (per **Gopal Sri Ram JCA**, dissenting) The husband's case was that he converted to Islam less than three months before the wife presented her petition which was dated 4 August 2006. But this fact was seriously contested by the wife who alleged that her husband informed her on 11 May 2006 that he had converted to Islam. So, the issue as to whether the petition was premature was one on which the evidence was in serious conflict. As such, it must be tried by the High Court like any other question of fact (see para 36).

(6) (per **Suriyadi JCA**) In a normal case of this nature, a spouse that has not converted is not prevented from seeking dissolution and to pray for certain ancillary orders at the High Court under the 1976 Act. Painfully for the wife, not only had she been pre-empted by the respondent's Syariah Court's applications, but her elder son is already a Muslim. Even if the wife were to fail to have her day at the Syariah Court, due to her belief that this institution is only for Muslims, that does not automatically make the jurisdiction exercisable by the civil court; *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 followed (see para 64).

(7) (per **Suriyadi JCA**) Allowing the injunction, would inevitably witness the interference and invasion of one jurisdiction, by another creature of statute. The fact that the substratum of the wife's case had been whittled away either by factor of time, or by her own act of abandonment of certain issues, did not help either. Having considered the matter in its entirety, a serious question having been established was yet to be made out by the wife (see para 66).

(8) (per **Hasan Lah JCA**) The word 'shall' in the proviso of s 51 of the 1976 Act must be construed as mandatory in nature. The wife could only file the petition after the expiration of three months from the date of the husband's conversion (see para 76).

(9) (per **Hasan Lah JCA**) It was clear in the evidence adduced by the husband that his conversion took place on 18 May 2006. Therefore the date of the husband's conversion was not a disputed fact. Moreover, s 112(2) of the Administration

of the Religion of Islam (State of Selangor) Enactment 2003 clearly provides that the Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated therein. In the instant case it was stated in the husband's certificate that his date of conversion to Islam was on 18 May 2006. Under that s 112(2) that fact was therefore conclusive. Furthermore, the Registrar of Muallafs had determined the date of the husband's conversion. As such the Civil Court has to accept that decision and it is not for the Civil Court to question that. Therefore, the wife's petition was filed in contravention of the requirement under the proviso to s 51(1) of the 1976 Act. It was therefore premature and invalid and the summons in chambers filed therein were also invalid (see paras 77, 81, 83–84).

(10) (per **Hasan Lah JCA**) The learned judicial commissioner was right in her conclusion that s 54(b) of the Specific Relief Act 1950 was applicable in this case as s 54 of the Specific Relief Act 1950 is also applicable to interlocutory injunction; *Han Chuang Associated Chinese School Association v National Union of Teachers In Independent Schools, West Malaysia* [1988] 1 MLJ 302 followed (see para 89).

(11) (per **Hasan Lah JCA**) It is fallacious to say that the purpose of such injunction was to only restrain the husband. It is also in effect to restrain the Kuala Lumpur Syariah Court from hearing the applications filed by the husband. This was supported by the fact that the solicitor for the wife had sent a letter dated 11 August 2006 to the 'Pendaftar, Mahkamah Tinggi Syariah, Wilayah Persekutuan, Kuala Lumpur' and 'Setiausaha kepada Yang Arif Hakim Mahkamah Tinggi Syariah 6, Wilayah Persekutuan, Kuala Lumpur' informing them an interim injunction had been obtained by the wife from the Civil High Court against the husband. Furthermore, the wife only applied for the interim injunction in the Civil High Court after the husband had obtained an interim injunction from the Syariah High Court of Wilayah Persekutuan on 23 May 2006 and after the husband had filed his application in the Syariah lower court to dissolve the marriage (see paras 91 & 93).

(12) (per **Hasan Lah JCA**) Under s 51 of the 1976 Act, the wife is given the right to file petition for divorce in the Civil Court and the Civil Court has the power to make provision for the wife and for the support, care and custody of the children. However under s 54(b) of the Specific Relief Act 1950, the Civil Court cannot issue injunction to stay proceedings in the Syariah Court. Be that as it may the wife, is not without a recourse here. That recourse can be found in s 53 of the 1993 Act which enable the wife to apply to the Syariah Appeal Court to exercise its supervisory and revisionary powers to make a ruling on the legality of the husband's application and the interim order obtained by the husband on the ground that the Syariah Court had no jurisdiction over the matter as she is not a person professing the religion of Islam. The wife could have done that rather than asking the Civil Court to review the Syariah Court's decision (see para 94).

(13) (per **Hasan Lah JCA**) Article 121(1A) of the Federal Constitution provides that the Civil Court has no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts. The Federal Constitution therefore recognizes the co-existence of the two systems of courts in the administration

of justice in this country and each court has its own role to play. As such the two courts must be regarded as having the same standing in this country (see para 96).

[Bahasa Malaysia summary

Pihak-pihak adalah suami dan isteri. Mereka telah berkahwin menurut majlis perkahwinan sivil dan telah didaftarkan pada 26 Julai 2001 menurut Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976'). Kedua-duanya adalah beragama Hindu pada tarikh perkahwinan mereka. Terdapat dua orang anak hasil daripada perkahwinan tersebut yang berumur tiga dan satu tahun. Dalam tahun 2005, perkahwinannya sudah retak. Kemudian, si isteri telah menerima satu notis bertarikh 14 Julai 2006 daripada Pendaftar Mahkamah Tinggi Syariah Kuala Lumpur memberitahunya bahawa si suami telah memulakan prosiding dalam mahkamah tersebut untuk penjagaan anak sulung mereka. Notis tersebut menyatakan bahawa kes telah ditetapkan untuk pendengaran pada 14 Ogos 2006. Ianya terpapar daripada mukasurat notis bahawa si suami telah menukar agama dirinya dan anak sulung kepada Islam. Ianya adalah kes rayuan si isteri bahawa pertukaran agama anaknya telah dilakukan tanpa pengetahuan dan kebenarannya. Selepas beliau mengemukakan petisyennya, si isteri telah memohon secara ex parte kepada Mahkamah Tinggi untuk satu injunksi menghalang si suami daripada: (1) menukarkan agama kedua-dua anak dalam perkahwinan kepada Islam; dan (2) memulakan atau menyambung dengan apa-apa jua prosiding di mana-mana Mahkamah Syariah yang berkenaan dengan perkahwinan atau anak-anak dalam perkahwinan. Mahkamah Tinggi membenarkan ex parte injunksi tetapi kemudian membubarkannya selepas pendengaran inter parte. Tetapi Mahkamah Tinggi membenarkan injunksi sementara seperti yang dipohon si isteri sementara pendengaran rayuan di mahkamah ini.

Pesuruhjaya Kehakiman yang bijaksana memutuskan bahawa beliau tidak mempunyai bidang kuasa untuk membenarkan injunksi yang diminta oleh si isteri atas dua sebab. Pertama, kerana injunksi walaupun ditujukan kepada si suami sebenarnya adalah satu penangguhan prosiding di Mahkamah Syariah daripada terus mendengar dan menentukan permohonan yang diletakkan di hadapannya oleh si suami. Beliau seterusnya merujuk kepada s 54(b) Akta Relief Spesifik 1950 yang mana beliau menyatakan secara spesifik tidak membenarkan injunksi daripada dibenarkan untuk menangguhkan prosiding di dalam satu mahkamah yang bukan bawahannya daripada injunksi tersebut diperolehi. Si isteri merayu terhadap perintah pembubaran injunksi manakala si suami merayu terhadap kebenaran injunksi *Erinford*.

Si suami menegaskan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk membenarkan relif interlokutori yang diminta di sini, kerana, pertama, Mahkamah Syariah mempunyai, selain daripada statut, perkara berkenaan dengan bidang kuasa yang mana membolehkannya untuk berurusan dengan kes seperti sekarang dan dengan itu tidak termasuk bidang kuasa mahkamah biasa yang ditetapkan oleh perkara 121 Perlembagaan Persekutuan. Keduanya, berdasarkan perkara 3(1) Perlembagaan Persekutuan, memandangkan Islam adalah agama Persekutuan, prinsip Undang-Undang Islam mestilah *ex necessitae rei* mengatasi peruntukan jelas yang dibuat oleh Parlimen dalam s 46(2) Akta Undang-Undang

Keluarga Islam (Wilayah-Wilayah Persekutuan) 1984 (Akta 303) ('Akta 1984'). Di bawah undang-undang Islam, pertukaran agama pasangan kepada satu perkahwinan bukan Muslim, tidak lebih, menjadikan berakhirnya perkahwinan sebelumnya. Memandangkan s 46(2) Akta 1984 adalah tidak selaras dengan doktrin undang-undang Islam, yang lepas mestilah memberikan laluan kepada yang terkini.

Peguam si suami yang bijaksana juga meminta untuk menghujahkan perkara undang-undang yang tidak diambil kira mahkamah bawahan. Beliau merujuk kepada proviso s 51(1) Akta 1976 dan menghujahkan bahawa, si isteri mesti gagal di dalam apa jua keadaan kerana beliau telah mengemukakan petisyennya sebelum habisnya tempoh tiga bulan daripada tarikh pertukaran agama si suami. Menurut peguam si suami yang bijaksana, pertukaran agama si suami kepada Islam berlaku pada 18 Mei 2006 dan petisyen si isteri telah difailkan pada 4 Ogos 2006, yang mana dua bulan 18 hari selepas pertukaran agama si suami. Ke atas isu ini peguam si isteri yang bijaksana menghujahkan bahawa tarikh pertukaran agama si suami adalah pertikaian fakta dan oleh itu perkara tersebut seharusnya ditentukan semasa perbicaraan. Isu penting yang lain sama ada injunksi yang diminta oleh si isteri adalah menyalahi peruntukan s 54(b) Akta Relief Spesifik 1950.

Diputuskan, majoriti menolak rayuan si isteri:

(1) (oleh **Gopal Sri Ram HMR**, menentang) Pesuruhjaya Kehakiman terkhilaf dalam memutuskan bahawa s 54(b) melucutkan bidang kuasanya untuk membenarkan injunksi yang diminta oleh si isteri; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 diikut. Injunksi yang diminta hanyalah tindakan terhadap seseorang terhadap si suami dan bukannya terhadap mana-mana Mahkamah Syariah. Oleh yang demikian, s 54(b) tidak terpakai kepada fakta kes ini; *Milton & Co v Oiha Automobile Engineering Co* AIR 1931 Cal 279 diikut (lihat perenggan 7 & 9).

(2) (oleh **Gopal Sri Ram HMR**, menentang) Perkara di dalam Senarai Kedua Jadual Kesembilan Perlembagaan Persekutuan melaluinya, sama ada diambil secara individu atau secara keseluruhan tidak memberikan bidang kuasa kepada Mahkamah Syariah untuk mendengar dan menentukan satu-satu sebab atau perkara. Undang-undang bertulis oleh badan penggubal undang-undang negeri yang sesuai adalah penting untuk memberikan bidang kuasa terhadap Mahkamah Syariah. Oleh yang demikian apa bila Item 1 Senarai Kedua menyatakan 'perlembagaan, organisasi dan tatacara Mahkamah Syariah yang mana mempunyai bidang kuasa hanya kepada orang yang menganut agama Islam dan hanya berkenaan dengan perkara yang termasuk dalam perenggan ini', apa yang dimaksudkan adalah badan perundangan negeri boleh meluluskan undang-undang bertulis yang mentadbir perlembagaan Mahkamah Syariah. Dan ianya juga bermaksud perundangan tersebut mungkin hanya membuat peruntukan untuk Mahkamah Syariah: (i) untuk mempunyai bidang kuasa hanya terhadap orang Muslim; dan (ii) hanya tertakluk kepada perkara pewarisan, peninggalan wasiat dan tidak berwasiat, pertunangan, perkahwinan, perceraian, mas kahwin, nafkah, pengangkatan, kesahan, penjagaan, pemberian, pembahagian, amanah bukan amal; wakaf dan perkara lain yang dinyatakan di dalam Item 1. Oleh yang demikian, jika

enakmen negeri atau akta parlimen, dalam kes Wilayah-Wilayah Persekutuan, meluluskan undang-undang yang menganugerahi bidang kuasa kepada Mahkamah Syariah ke atas bukan Muslim atau berkenaan dengan perkara yang tidak di dalam Item 1 Senarai Kedua, undang-undang tersebut adalah ultra vires Perlembagaan dan setakat itu adalah tidak sah. Dan disebabkan itulah, untuk menjadikan intra vires perlembagaan, s 46 Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 (Akta 505) ('Akta 1993') memberikan bidang kuasa ke atas Mahkamah Tinggi Syariah di dalam perkara sivil hanya mana kesemua pihak adalah Muslim (lihat perenggan 20).

(3) (oleh **Gopal Sri Ram HMR**, menentang) Ke atas pentafsiran sebenar Perlembagaan, Mahkamah Syariah, sama ada di dalam negeri atau di dalam Wilayah Persekutuan hanya ada bidang kuasa tersebut yang mungkin dianugerahkan ke atasnya oleh undang-undang negeri atau persekutuan. Oleh itu, bidang kuasa Mahkamah Syariah, berdasarkan fakta kes ini ditadbir secara eksklusif oleh s 46(2)(b)(i) Akta 1993 dan bukannya oleh Senarai Kedua di dalam Jadual Kesembilan. Pentafsiran yang lain akan menghasilkan kebenaran yang tidak munasabah dan ketidakadilan terhadap pasangan bukan Muslim, secara khasnya terhadap si isteri di dalam kes ini (lihat perenggan 22); *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 tidak diikut; *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705, *Mohamed Habibuilah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, *Soon Singh v Pertubuhan Kebajikan Malaysia Kedah* [1994] 1 MLJ 690 dibeza; *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] MLJU 500 diikut.

(4) (oleh **Gopal Sri Ram HMR**, menentang) Ianya daripada pendekatan dikotomi bahawa jurisprudens perlembagaan Malaysia adalah sekular dan kesemua mahkamah adalah wajib melakukan di dalam satu pertikaian seperti sekarang untuk mentafsir undang-undang bertulis iaitu Perlembagaan Persekutuan, Akta Parlimen, Enakmen Negeri dan kesemua jenis perundangan bawahan untuk menentukan kesemua persoalan tertakluk kepadanya. Oleh itu, ianya tidak terbuka kepada mahkamah ini untuk mentafsir terma s 46(2) Akta 1984. Subseksyen tersebut adalah peruntukan yang didraf dengan baik kerana secara tersiratnya berkenaan dengan istilah Perlembagaan dan s 51 Akta 1976. Secara ringkasnya, kesan s 46(2) Akta 1984 adalah berikut, menurut Hukum Syarak, tindakan pasangan kepada perkahwinan bukan Muslim menukar agama kepada Islam menjadikan berakhirnya perkahwinan sebelumnya. Seksyen 46(2) mengubah keputusan ini dengan memerlukan Mahkamah Syariah untuk mengesahkan fakta pembubaran. Ini hanyalah tindakan pentadbiran. Dan cara bagaimana pengesahan mesti dilakukan adalah dengan mengemukakan kepada Mahkamah Syariah dekri yang diberikan oleh Mahkamah Tinggi di bawah s 51 Akta 1976. Sewajarnya, berdasarkan fakta kes ini, pesuruhjaya kehakiman yang bijaksana telah memutuskan, agak benar, bahawa beliau mempunyai bidang kuasa untuk melayan petisyen si isteri disebabkan s 51 Akta 1976, adalah kesilapan apabila beliau menolak bidang kuasa ke atas saman interlokutori untuk satu injunksi (lihat perenggan 31).

(5) (oleh **Gopal Sri Ram HMR,** menentang) Kes si suami adalah beliau menukar agama kepada Islam kurang dari pada tiga bulan sebelum si isteri mengemukakan petisyennya yang bertarikh 4 Ogos 2006. Tetapi fakta ini adalah dipertikaikan dengan serius oleh si isteri yang mengatakan mendakwa bahawa si suami memberitahunya pada 11 Mei 2006 bahawa beliau telah menukar agama kepada Islam. Oleh itu, isu berkenaan dengan sama ada petisyen adalah pra matang satu-satunya yang mana bukti adalah di dalam konflik yang serius. Oleh yang demikian, ianya mestilah dibicarakan oleh Mahkamah Tinggi seperti mana persoalan fakta yang lain (lihat perenggan 36).

(6) (oleh **Suriyadi HMR**) Di dalam kes yang normal dalam keadaan ini, pasangan yang tidak bertukar agama adalah tidak dihalang daripada mendapatkan pembubaran dan memohon untuk perintah sampingan yang tertentu di Mahkamah Tinggi di bawah Akta 1976. adalah menyakitkan bagi si isteri, bukan saja beliau terhalang oleh permohonan responden di Mahkamah Syariah, tetapi anak sulung lelakinya telah sudah pun Muslim. Walaupun, jika si isteri gagal di Mahkamah Syariah disebabkan beliau percaya bahawa institusi ini hanya untuk Muslim, ianya tidak secara automatik membuatkan bidang kuasa boleh digunakan oleh Mahkamah Sivil; *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 diikuti (lihat perenggan 64).

(7) (oleh **Suriyadi HMR**) Membenarkan injunksi, akan pasti berlaku campur tangan saksi dan pelanggaran satu-satu bidang kuasa, oleh alat statut yang lain. Secara faktanya adalah asas kes si isteri telah terhakis sama ada oleh faktor masa, atau oleh tindakannya sendiri dalam meninggalkan beberapa isu juga tidak dapat menolong. Dengan mempertimbangkan perkara ini secara menyeluruh, persoalan yang serius yang diwujudkan belum lagi dibuat oleh si isteri (lihat perenggan 66).

(8) (oleh **Hasan Lah HMR**) Perkataan 'shall' di dalam proviso s 51 Akta 1976 mestilah ditafsirkan secara mandatori. Si isteri hanya memfailkan petisyen selepas tempoh tamat tiga bulan daripada tarikh penukaran agama si suami (lihat perenggan 76).

(9) (oleh **Hasan Lah HMR**) Ianya adalah jelas dalam bukti yang dikemukakan oleh si suami bahawa pertukaran agamanya berlaku pada 18 Mei 2006. Oleh yang demikian tarikh penukaran agama si suami bukanlah fakta yang dipertikaikan. Tambahan pula, s 112 Enakmen Pentadbiran Undang-Undang Islam (Negeri Selangor) 2003 dengan jelas menyatakan bahawa Sijil Pemelukan Ke Agama Islam seharusnya menjadi bukti fakta yang kukuh yang tercatat di dalamnya. Dalam kes ini, adalah dinyatakan di dalam sijil si suami bahawa tarikh penukaran agama kepada Islam adalah pada 18 Mei 2006. Di bawah s 112(2) fakta tersebut adalah kukuh. Selanjutnya, Pendaftar Mualaf telah menetapkan tarikh penukaran agama si suami. Oleh yang demikian Mahkamah Sivil perlu menerima keputusan tersebut dan ianya bukannya untuk Mahkamah Sivil untuk mempersoalkannya. Oleh itu, petisyen si isteri yang telah difailkan menyalahi syarat di bawah proviso s 51(1) Akta 1976. Ianya juga adalah pra matang dan tidak sah dan saman dalam kamar yang difailkan juga tidak sah (lihat perenggan 77, 81, 83–84).

(10) (oleh**Hasan Lah HMR**) Pesuruhjaya kehakiman yang bijaksana adalah benar dalam kesimpulannya bahawa s 54(b) Akta Relief Spesifik 1950 adalah terpakai di dalam kes ini yang mana s 54 Akta Relief Spesifik 1950 juga terpakai kepada injunksi interlokutori; *Han Chuang Associated Chinese School Association v National Union of Teachers In Independent Schools, West Malaysia* [1988] 1 MLJ 302 diikut (lihat perenggan 89).

(11) (oleh **Hasan Lah HMR**) Adalah salah anggapan untuk mengatakan bahawa tujuan injunksi tersebut hanyalah untuk menghalang si suami. Ianya juga memnerikan kesan untuk menghalang Mahkamah Syariah Kuala Lumpur daripada mendengar permohonan yang difailkan oleh si suami. Ini disokong oleh fakta bahawa peguam si isteri telah menghantar sepucuk surat yang bertarikh 11 Ogos 2006 kepada 'Pendaftar Mahkamah Tinggi Syariah, Wilayah Persekutuan Kuala Lumpur' dan 'Setiausaha kepada Yang Arif Hakim Mahkamah tinggi Syariah 6, Wilayah Persekutuan, Kuala Lumpur' memberitahu mereka injunksi interim telah diperolehi oleh si isteri daripada Mahkamah Tinggi terhadap si suami. Selanjutnya, si isteri hanya memohon injunksi interim di Mahkamah Tinggi selepas si suami telah mendapat injunksi interim daripada Mahkamah Tinggi Syariah Wilayah Persekutuan pada 23 Mei 2006 dan selepas si suami telah memfailkan permohonannya di Mahkamah Rendah Syariah untuk membubarkan perkahwinan (lihat perenggan 97 & 93).

(12) (oleh **Hasan Lah HMR**) Di bawah s 51 Akta 1976, si isteri diberikan hak untuk memfailkan petisyen untuk perceraian di Mahkamah Sivil dan Mahkamah Sivil mempunyai kuasa untuk memperuntukkan kepada si isteri dan untuk bantuan, perhatian dan penjagaan anak-anak. Tetapi di bawah s 54(b) Akta Relief Spesifik 1950, Mahkamah Sivil tidak boleh mengeluarkan injunksi untuk penangguhan prosiding di Mahkamah Syariah. Dengan itu ianya bagi si isteri bukanlah tanpa jalan keluar di sini. Jalan penyelesaian boleh didapati di dalam s 53 Akta 1993 yang membolehkan si isteri untuk memohon kepada Mahkamah Rayuan Syariah untuk menggunakan kuasa penyeliaan dan penyemakan untuk membuat keputusan ke atas kesahan permohonan si suami dan perintah interim yang diperolehi oleh si suami atas alasan bahawa Mahkamah Syariah tidak mempunyai bidang kuasa terhadap perkara tersebut yang mana beliau bukanlah seorang yang menganut agama Islam. Si isteri boleh melakukannya daripada meminta Mahkamah Sivil untuk mengkaji semula keputusan Mahkamah Syariah (lihat perenggan 94).

(13) (oleh **Hasan Lah HMR**) Perkara 121(1A) Perlembagaan Persekutuan menyediakan bahawa Mahkamah Sivil tidak mempunyai bidang kuasa berkenaan dengan perkara di dalam bidang kuasa Mahkamah Syariah. Perlembagaan Persekutuan dengan ini mengenal pasti kewujudan bersama dua sistem mahkamah di dalam pentadbiran keadilan di negara ini dan setiap mahkamah mempunyai peranan untuk dimainkan. Oleh yang demikian kedua-dua mahkamah mestilah dianggap mempunyai tahap yang sama di dalam negara ini (lihat perenggan 96).]

Notes

For a case on injunction, jurisdiction to grant, scope of, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 3057.

For cases on divorce generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3065–3310.

For cases on jurisdiction of Syariah Court, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 561–589.

Cases referred to

American Cyanamid v Ethicon Ltd [1975] AC 396 (refd)

Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor [1995] 2 MLJ 734 (refd)

Bank of New South Wales v Commonwealth [1948] 76 CLR1 (refd)

Calcutta Gas Co (Proprietary) Ltd v State of West Bengal AIR 1962 SC 1044 (refd)

Cheng Hay Gun & Ors v Perumahan Farlim (Pg) Sdn Bhd [1983] 1 MLJ 348 (refd)

Che Omar bin Che Soh v PP [1988] 2 MLJ 55 (refd)

Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448 (refd)

Government of Pakistan v Seng Peng Sawmills Sdn Bhd & Ors [1979] 1 MLJ 219 (refd)

Han Chuang Associated Chinese School Association v National Union of Teachers In Independent Schools, West Malaysia [1988] 1 MLJ 302 (folld)

Hee Nyuk Fook v PP [1988] 2 MLJ 360 (refd)

Jilubhai Nanbhai Khachar v State of Gujarat AIR 1995 SC 142 (refd)

Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan satu lagi [2005] 1 MLJ 197 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (folld)

Kenidi bin Sima v The Government of the State of Sabah & Anor [1988] 1 MLJ 454 (refd)

Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor [1996] MLJU 500 (folld)

Lily Thomas v Union of India AIR 2000 SC 1650 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119 (refd)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 (folld)

Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 2 MLJ 424 (refd)

Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681 (folld)

Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (refd)

Milton & Co v Oiha Automobile Engineering Co AIR 1931 Cal 279 (folld)

Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (refd)

Nenduchelian v Uthiradam v Nurshafiqah Mah Singai Annal & Ors [2005] 2 CLJ 306 (refd)

Penang Han Chuang Associated Chinese School Association v National Union of Teachers In Independent Schools, West Malaysia [1988] 1 MLJ 302 (folld)

Rediffusion (Hong Kong) Ltd v A–G of Hong Kong [1970] AC 1136 (refd)

Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai [1997] 3 MLJ 281 (refd)

Sia Kwee Hin v Jabatan Agama Islam Wilayah Persekutuan [1999] 1 MLJ 504 (refd)

Soon Singh v Pertubuhan Kebajikan Malaysia Kedah [1994] 1 MLJ 690 (distd)

Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 2 MLJ 241 (refd)

Tang Sung Mooi v Too Miew Kim [1994] 3 MLJ 117 (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 ss 46, 95
Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 2, 110, 111(3), 112(2)
Criminal Procedure Code s 158(ii)
Federal Constitution arts 3, 4(1), 11, 74, 73, 121(1), (1A)
Islamic Family Law (Federal Territories) Act 1984 s 46(2)
Law Reform (Marriage And Divorce) Act 1976 s 51
National Land Code s 300(1)(a)
Specific Relief Act 1950 s 54(b)
Specific Relief Act 1877 [India] s 56(b)

Appeal from: Divorce Petition No S8–33–994 of 2006 (High Court, Kuala Lumpur)

Mohamed Haniff Khatri Abdulla (Zainul Rijal Abu Bakar, Wan Khairuddin Wan Montil and Mohd Tajuddin Abd Razak with him) (Zainul Rijal Talha & Amir) for the appellant in W–02–955 of 2006 and as respondent in W–02–1041 of 2006.

Malik Imtiaz Sarwar (Haris Mohd Ibrahim, K Shamuga and Fahri Azzat with him) (Kanesalingam & Co) for the respondent in W–02–955 of 2006 and as appellant in W–02–1041 of 2006.

Meera Samanther (Women's Aid Organisation, Women's Development Collective, Women's Center for Change & Sisters in Islam) watching breif.

YN Foo (Steve Thiru with him) (Bar Council) watching brief.

Gopal Sri Ram JCA:

[1] The parties to these appeals are husband and wife. They were married pursuant to a civil ceremony of marriage that was registered on 26 July 2001 pursuant to the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act'). Both were Hindus at the date of their marriage. There are two children of the marriage. They are both boys. One is aged three, the other is a year old. By the latter part of 2005, the marriage was on the rocks. This is how the wife describes it in her divorce petition which she presented on 4 August 2006:

> 6. The respondent had on or about October 2005 started to leave the marital home and moved out since February 2006. On 11 May 2006, the respondent informed the petitioner that the respondent had converted to Islam and threatened to kill the petitioner if the

petitioner did not leave the house and the said marriage. Therefore, the petitioner believes the respondent had converted to Islam in February 2006 or before that.

[2] Later, the wife received a notice dated 14 July 2006 from the Registrar of the Syariah High Court, Kuala Lumpur informing her that the husband had commenced proceedings in that court for the custody of their elder son. The notice went on to say that the case has been set down for hearing on 14 August 2006. It appears from the face of the notice that the husband had converted the elder son to Islam because his son's name is given as Dharvin Joshua a/l Saravanan @ Muhammad Shazrul Dharvin bin Muhammad Shafi. It is the wife's pleaded case that the son's conversion was carried out without her knowledge and consent. Learned counsel for the wife advised us from the Bar that the son's conversion is presently the subject matter of pending judicial review proceedings.

[3] After she had presented her petition, the wife applied ex parte to the High Court for injunctions restraining the husband from: (i) converting either child of the marriage to Islam; and (ii) commencing or continuing with any proceedings in any Syariah Court with regard to the marriage or the children of the marriage. In so far as the elder child was concerned, the first injunction sought by the wife was academic as the husband had already purported to effect a conversion. Not so, of course, so far as the younger child was concerned. The subject matter of the second injunction was very much a live issue. The High Court granted an ex parte injunction but later dissolved it after an inter partes hearing. However, the High Court granted an interim injunction in terms of the wife's summons pending the hearing of an appeal to this court. This is what the profession refers to as an '*Erinford* injunction' because it takes its label from the case in which such an injunction was granted, although not for the first time (see *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448). The wife's appeal to us is directed against the order dissolving the injunction. The husband has appealed against the grant of the *Erinford* injunction.

[4] In a well written and carefully considered judgment, the learned judicial commissioner held that she had no jurisdiction to grant the kind of injunction sought by the wife for two reasons. First, because the injunction 'though addressed at the respondent [husband] is in effect a stay of proceedings in the Syariah Court from further hearing and determining the applications placed before it by the respondent'. She went on to refer to s 54(b) of the Specific Relief Act 1950 which she said 'specifically disallows injunctions from being granted to stay proceedings in a court not subordinate to that from which the injunction is sought'. The other reason advanced by the learned commissioner is as follows:

> Applying the subject matter approach, what then is the subject matter of the ex parte injunction sought by the petitioner upon which the order dated 11 August 2006 was granted and which the respondent now seeks to set aside? The petitioner's first prayer seeks to stop the respondent from converting his children (at the time this matter was heard, the petitioner's counsel confined his submissions in respect of the younger child only). Through the second prayer the petitioner seeks to stop the respondent from pursuing or continuing with his proceedings in the Syariah Court in respect of any matters pertaining to his non-Muslim marriage and/or to either of his children.

In respect of the first prayer, I refer to Part IX of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). This part deals with the subject matter of conversion to Islam. Section 95 deals with capacity to convert into Islam in respect of those who have attained the age of eighteen years and those who have not. In the case of minors, the section confers authority on his parent or guardian to give consent. In respect of the second prayer, s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) provides that the conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court. Therefore the Syariah Court can make an order confirming the dissolution of the respondent's non-Muslim marriage. In Part VII of Act 303 are provisions relating to matters of guardianship and custody. Therefore following the case of*Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai* [1997] 3 MLJ 281 I find that the subject matter of the petitioner's application are matters that are expressly provided for in the laws conferring jurisdiction on the Syariah Court thereby excluding the jurisdiction of this court.

[5] Before us learned counsel for the wife criticised both grounds relied on by the learned judicial commissioner for dissolving the injunction. Two points arise in respect of the first ground. The first of these has to do with the applicability of s 54(b) of the Specific Relief Act 1950 to the facts of this case. That section appears in Chapter X of Part III of the Specific Relief Act which speaks of perpetual injunctions. It provides as follows:

An injunction cannot be granted:

(b) to stay proceedings in a court not subordinate to that from which the injunction is sought;

[6] In *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, this court held that s 54(d) of the Act is confined to perpetual or final injunctions and has no application to temporary injunctions which are governed by s 51 of the Act. In my judgment, the same is true of s 54(b). As such, the learned judicial commissioner, in my respectful view, erred in holding that that section deprived her of jurisdiction to grant the injunction sought by the wife. The second point has to do with the terms of the injunction sought. As earlier observed, the learned judicial commissioner thought that the wife's injunction was directed against the Syariah Court. But, according to the very terms of the injunction, it is directed at the husband and not at the court. So, even if s 54(b) is relevant and applicable (which it is not), what it prohibits are injunctions directed against a court and not against an individual.

[7] The point at issue here was well brought out in *Milton & Co v Oiha Automobile Engineering Co* AIR 1931 Cal 279 which dealt with s 56(b) of the Indian Specific Relief Act 1877 which is in pari materia with our s 54(b). In that case, Lort-Williams J said:

Secondly, he says that s 56 (b) Specific Relief Act, prohibits an injunction to stay proceedings in a Court not subordinate to that from which the injunction is sought. In my opinion, this s 56 contemplates injunctions directed to the court itself and does not prevent

A any court from making an order in personam, forbidding an individual from prosecuting proceedings in another court even if such person be outside the jurisdiction of the court: *Cohen v Rothfield (2)*; Scrutton LJ at p 413.

[8] So too here. The injunction sought merely acts upon the person of the husband B and not upon any Syariah Court. Hence, it is my judgment that s 54(b) does not apply to the facts of this case.

[9] I must now turn to deal with the other jurisdictional objection that found favour with the learned judicial commissioner. But before I do so, there are two matters which I must make mention of. The first is the approach that a court must C adopt when considering a jurisdictional point. It is settled law that when a court is faced with a challenge to, its jurisdiction to hear and determine a cause, it must, for the limited purpose of deciding whether it has jurisdiction, assume that all the facts alleged in the complainant's pleaded case to be true. Thus in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, Lord Diplock said:

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> Since lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the court to grant to the plaintiff the relief sought, the jurisdiction summons can succeed only if it is shown that *no matter what were the facts that the plaintiff would be able to establish*, relating to the subject matter of the dispute, the court would have no power to grant relief of the kind sought E against the defendant. (Emphasis added.)

See also the decision of this court in *Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424, paras 15 & 16.

[10] Next are the three interlocking statutory provisions that are relevant to this F part of the case. These need to be looked at fairly closely. They are s 51 the 1976 Act, s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 ('the 1984 Act') and s 46(2)(b)(i) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the 1993 Act'). These sections read as follows:

(i) Section 51 of the 1976 Act:

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> (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:
>
> Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.

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

> (3) Section 50 shall not apply to any petition for divorce under this section. I

(ii) Section 46(2) of the 1984 Act:

> (2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.

(iii) Section 46(2)(b)(i) of the 1993 Act:

(2) A Syariah High Court shall:

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:

(i) betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*), *nusyuz*, or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife.

[11] Now, it is clear from the terms of s 51(1) of the 1976 Act that the High Court had jurisdiction to hear the wife's petition despite the husband's conversion to Islam. See, *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117. Section 46(2)(b)(i) of the 1993 Act on the other hand confers jurisdiction upon the Syariah Court over matrimonial matters only where all the parties to the proceedings before it are Muslims. It would therefore appear that in the present case the husband being a Muslim and the wife being a Hindu, the Syariah Court is not seised of jurisdiction in a case as the present. Yet, it is the husband's argument — an argument that found favour with the court below — that the High Court had no jurisdiction to grant the interlocutory relief sought here. The husband's submission is founded on two grounds. First, that the Syariah Court has, apart from statute, subject matter jurisdiction which enables it to deal with a case as the present thereby excluding the jurisdiction of ordinary courts established by art 121 of the Federal Constitution. Second, by virtue of art 3(1) of the Federal Constitution, since Islam is the religion of the Federation, principles of Islamic law must ex necessitae rei override the express provision made by Parliament in s 46(2) of the 1984 Act. Under Islamic law, the conversion of a spouse to a non-Muslim marriage, without more, puts an end to the previous marriage. Since s 46(2) of the 1984 Act is inconsistent with the Islamic law doctrine, the former must give way to the latter.

[12] In support of the first argument, learned counsel for the husband relies on two cases. *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 is the first. There, the plaintiff who was born a Buddhist converted to Islam and assumed the name of Md Hakim Lee. Later, by a deed poll and a statutory declaration, he claimed that he had renounced Islam and showed an intention to use the name Lee Leong Kim. Later still, he claimed a declaration against the defendant to the effect that his act of exiting Islam was guaranteed by art 11 of the Federal Constitution and that no authority or body can limit or hinder this freedom. The defendant objected to the proceedings on the ground that the High Court had no jurisdiction to entertain the plaintiffs action by reason of art 121(1A) of the Constitution. That article provides that the courts established by art 121(1) 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.' In upholding the defendant's objection to jurisdiction, Abdul Kadir Sulaiman J (as his Lordship then was) held that Syariah Courts had exclusive jurisdiction over the subjects listed under paragraph 1 of List II, that is to say the State List in the Federal Constitution even if particular State Legislatures have not as yet enacted any law in that respect. This is how his lordship put it:

To my mind, the language of art 121(1A) used by the legislature is clear and without any ambiguity. The civil courts, in this case, the High Court, has no jurisdiction in respect of any matter that is within the jurisdiction of the Syariah courts. What then is the matter that is within the jurisdiction of the Syariah courts? Is the matter of the declaration sought by the plaintiff by his application a matter within the jurisdiction of the Syariah courts and therefore, this court is prevented by art 121(1A) of the Federal Constitution from adjudicating? Having determined the matter, the necessary question that follows is what is the jurisdiction of the syariah courts? Is it confined only to those express jurisdiction given by the relevant state enactment or the wider jurisdiction of the courts which include those jurisdiction which is not so expressly enacted but inherent in the courts itself.

According to the Ninth Schedule to the Federal Constitution, Islamic law and personal and family law of persons professing the religion of Islam is included in paragraph 1 of List II which is called the State List. The said paragraph 1 states:

> Except with respect to the Federal Territories of Kuala Lumpur and Labuan, *Islamic law and personal and family law of persons professing the religion of Islam*, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, *creation and punishment of offences by persons professing the religion of Islam against precepts of that religion*, except in regard to matters included in the Federal List; *the constitution, organization and procedure of syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph*, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; *the determination of matters of Islamic law and doctrine and Malay custom*. (Emphasis added.)

To my mind, having considered art 74 and paragraph 1 of the State List in the Constitution, the jurisdiction of the Syariah court is much wider than those expressly conferred upon it by the respective state legislature. The Syariah court shall have jurisdictions over persons professing the religion of Islam in respect of any of the matters included in paragraph 1 thereof. It is not to be limited only to those expressly enacted. The matters include Islamic law and personal and family law of persons professing the religion of Islam. They include cognizance over offences by persons professing the religion of Islam against precepts of that religion. The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that those matters are within the jurisdiction of the Syariah court within the contemplation of paragraph 1 of the State List and which jurisdiction is ousted from the courts mentioned in art 121(1) of the Constitution. If the state legislature has not as yet legislated specifically on the matter, it is within its competency to do so in the future by virtue of the powers given under art 74 of the Federal Constitution. Therefore, when these matters are in issue, the jurisdiction is clothed in the Syariah court and not in the courts mentioned in art 121(1), notwithstanding the absence of express provisions in the state enactments at the time the issue arises. That is the intention of art 121(1A) when it states in no uncertain term that the civil courts in art 121(1), which include the High Courts, shall not have jurisdiction over the matter. The fact that the Syariah courts have not been expressly conferred with the jurisdiction to adjudicate on the issue raised, by the state legislature, does not mean that the jurisdiction must be

exercised by the courts in art 121(1). The issue is not one whether a litigant can get his remedies but one of jurisdiction of the courts to adjudicate — the threshold jurisdiction to be seised of the matter.

[13] Now, art 74 appears under Chapter 1 in Part VI of the Constitution which is titled 'Relations between the Federation and the States'. Chapter 1 itself is titled 'Distribution of legislative powers'. Article 73, which also appears under Chapter 1 of Part VI reads as follows:

> In exercising the legislative powers conferred on it by this Constitution:
>
> (a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation;
>
> (b) the Legislature of a State may make laws for the whole or any part of that State.

Article 74 is as follows:

> (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule or the Concurrent List.
>
> (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.
>
> (4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[14] What art 73 has done is to act according to federal principles and divide the law making power of the Federation between the Federal and State Governments. There is nothing unusual about this. You will find it in all countries that practise a federal system of Government. The United States, Canada, India and Australia are all countries that have such a system. In each of these countries too you will see a division of legislative power between the Centre and the States or (in the case of Canada) the Provinces. Article 74(1) empowers Parliament to make laws on those subjects in the First and Third Lists through the use of the words 'Parliament *may* make laws'. Article 74(2) empowers the State Legislature of each state to make laws in respect of the subjects appearing in the Second and Third Lists. The words used are: 'the Legislature of a State *may* make laws' indicating once again the conferment of a power to make laws. This kind of empowerment, whether of a State Legislature or of the Federal Parliament, is sometimes referred to as 'legislative competence'. Put differently, the power to legislate is conferred by art 73 read with art 74 of the Federal Constitution but the entries in the Second List are merely the legislative heads over which the respective Federal and State law-making organs may operate. I draw support for my view from the decision of the Indian Supreme Court in

Calcutta Gas Co (Proprietary) Ltd v State of West Bengal AIR 1962 SC 1044, where, Subba Rao J when dealing with the equipollent article of the Indian Constitution said:

> The power to legislate is given to the appropriate Legislatures by art 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate Legislatures can operate.

[15] Again in *Jilubhai Nanbhai Khachar v State of Gujarat* AIR 1995 SC 142, the Indian Supreme Court said:

> It is settled law of interpretation that *entries in the Seventh Schedule are not powers but fields of legislation*. The legislature derives its power by art 246 and other related Articles of the Constitution. Therefore, the power to make the Amendment Act is derived not from the respective entries but under art 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the Government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude. (Emphasis added.)

[16] Lastly, in *Bank of New South Wales v Commonwealth* [1948] 76 CLR1, at p 333 Dixon J said:

> The purpose of the enumeration of powers in s 51 is not to define or delimit the description of law that the Parliament may make upon any of the subjects assigned to it. Speaking generally, the legislative power so given is plenary in its quality. *The purpose of the enumeration is to name a subiect for the purpose of assigning it to that power*. The names or descriptions employed are usually of the briefest kind. It is true that certain powers do involve a description amounting almost to a formal definition;... But more often they are the most general names of general topics.
>
> To borrow the words of Gray J delivering the opinion of the Supreme Court in *Juilliard v Greenman* [1884] 110 US 421, at p 439 (28 Law Ed 204, at p 211): 'the Constitution... by apt words of designation or general description, marks the outlines of the powers granted to the National Legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. (Emphasis added.)

In my judgment, these words apply with equal force to our Constitution.

[17] Thus, the upshot of arts 73 and 74 is that if Parliament makes a law with respect to any subject in List II, such a law is invalid and may be challenged in accordance with the procedure laid down in arts 4(3) and 4(4). In *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, the validity of s 298A of the Penal Code was challenged on the ground of legislative competence on the part of Parliament to enact the section. The Supreme Court by a majority of 3:2 struck down

the provision as being beyond the legislative competence of Parliament. Mohamed Azmi SCJ and Seah SCJ in their joint judgment said (at p 125):

> As far as Islamic religion is concerned, they come under the classification of either the general subject of Islamic law, or the specific subjects of creation and punishments of offences by persons professing the religion of Islam against precepts of that religion, or the control of propagating doctrines and beliefs amongst persons professing the religion of Islam, or the determination of matters of Islamic law and doctrines, all of which are reserved expressly for legislation by the State Legislatures. Surely, the subject matter of whether a person or group of persons has ceased to profess his or their religion is a purely religious matter, and to create an offence for making an imputation concerning such subject matter is well within the legislative competence of the State Legislatures and not that of Parliament. So is the act of refusing to bury the dead in a cemetery allocated for people professing a particular religion. It is the same with the act of performing the function of authorised religious officials by a person who is not so appointed. The fact that the Administration of Muslim Law Enactment of the states has yet to provide specifically for punishment against such acts cannot, in the absence of express provision in the Constitution, confer Parliament with the power to legislate over such religious matters, and that is why the Muslim Courts (Criminal Jurisdiction) Act 1975 has been enacted to confer on state religious courts jurisdiction over offences against precepts of the religion.

[18] A reading of all their Lordships' judgments in that case, including the passage quoted above makes it clear that art 74 is an empowering provision and that the subject matter that are set out in the three Legislative Lists themselves merely demarcate the legislative competence of the Federal Parliament and the State Legislatures respectively. In this context, I need do no more than quote from the dissent of Abdoolcader SCJ:

> In a federal structure which is based upon the distribution of legislative powers between the Central or Federal Legislature (Parliament) and Provincial or State Legislatures, the powers of the legislatures are limited by the Constitution. A legislative act would be unconstitutional and invalid if not warranted by the items of legislative power in the appropriate legislative list. When a controversy arises whether a particular legislature is not exceeding its own and encroaching on the other's constitutional power, the court has to consider the real nature of the legislation impugned, its pith and substance, to see whether the subject dealt with is in the one legislative list or in the other. When a legislature purports to enact legislation with reference to a particular head of legislative power, it has to comply with the conditions circumscribing that power. A nominal compliance with such conditions while the real attempt is to circumvent them would be regarded as a colourable exercise of the legislative power and will be struck down as unconstitutional.
>
> It is a consequence of the doctrine of pith and substance that once a law 'in pith and substance' falls within a legislative entry, an incidental encroachment on an entry in another list does not affect its validity. Thus in *Gallagher v Lynn* [1937] AC 863 it was held by the Privy Council (at p 870) that the impugned statute was in pith and substance one to protect the health of the inhabitants of Northern Ireland, and, though incidentally it affected trade, it was not passed in respect of trade and was therefore not subject to attack on that ground. Similarly, in *Prafulla Kumar Mukherjee v Bank of Commerce Ltd, Khulna* [1947] 74 IA 23; AIR 1947 PC 60, the Judicial Committee held that the Bengal Money Lenders Act 1940 was in pith and substance a law in respect of money lending and money lenders (entry 27, List II, Government of India Act 1935) and was valid even though it trenched incidentally on 'promissory notes' and 'banking' (entries 28 and 31, List I in that Act).

[19] It follows from what I have said thus far that the subject matter in List II by themselves, whether taken individually or as a whole do not confer jurisdiction upon a Syariah court to hear and determine a cause or matter. A written law by the appropriate law making organ of the State is necessary to confer jurisdiction upon a Syariah court. So, when Item 1 of the Second List says 'the constitution, organization and procedure of syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph', what it means is that the Legislature of a State may pass written law that governs the constitution of a Syariah court. And it also means that such legislation may only make provision for a Syariah court: (i) to have jurisdiction only over Muslims; and (ii) only in respect of the subjects of succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and those other subjects set out in Item 1. Therefore, if a State enactment or, in an Act of Parliament, in the case of the Federal Territories, passes a law that confers jurisdiction on a Syariah court over non-Muslims or in respect of a subject not within Item 1 of List II, such a law would be ultra vires the Constitution and to that extent will be void. And that is why, in order to be intra vires the Federal Constitution, s 46 of the 1993 Act confers jurisdiction on a Syariah High Court in civil matters only where all the parties are Muslims.

[20] There is a further point. The court in *Md Hakim Lee* appears to have considered art 121(1A) in isolation and given it a literal interpretation. With respect, I am unable to agree with this approach. In my judgment, art 121(1A) must be read with art 121(1), regard being had to the legislative purpose for introducing the former Article into the Federal Constitution. I am also of the view that these two clauses of art 121 should be interpreted purposively so as to avoid unfairness or injustice and so as to produce a smooth working of the system which the Article creates and regulates. That this is the proper approach to the interpretation of art 121(1A) was authoritatively decided by the Federal Court in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241. The accused in that case was charged with an offence under s 377D of the Penal Code. It was argued for the accused that by reason of art 121(1A), the sessions court had no jurisdiction to try the accused because the offence of 'liwat' was triable by the Syariah court. This is what Eusoff Chin CJ said when rejecting that argument:

> We agree with the views expressed by the Court of Appeal on the necessity of cl (1A) being introduced into art 121 of the Federal Constitution. It was to stop the practice of aggrieved parties coming to the High Court to get the High Court to review decisions made by syariah courts. Decisions of syariah court should rightly be reviewed by their own appellate courts. They have their own court procedure where decisions of a court of a kathi or kathi besar are appealable to their Court of Appeal.
>
> Since the syariah courts have their own system, their own rules of evidence and procedure which in some respects are different from those applicable to the civil courts, it is only appropriate that the civil court should refrain from interfering with what goes on in the syariah courts. This policy on non-interference is reciprocated by the syariah courts.

We are of the view that cl (1A) of art 121 should not be construed literally because a literal interpretation would give rise to consequences which the legislature could not possibly have intended. Parke B in *Becke v Smith* [1836] 2 M & W 191 at p 195 stated:

> It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself or leads to any manifest absurdity or repugnance, in which case, the language may be varied or modified so as to avoid such inconvenience but no further.

Brett MR in *R v Tonbridge Overseers* [1884] 13 QBD 339 at p 342 said:

> ... if the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should *not* read it according to its ordinary grammatical meaning. (Emphasis added.)

We would, therefore prefer to construe both cll (1) and (1A) of art 121 together and *choose a construction which will be consistent with the smooth working of the system which this article purports to regulate, and reject an interpretation that will lead to uncertainty and confusion into the working of the system*. Since cl (1) of art 121 and the provisions of federal law referred to earlier confer jurisdiction on a sessions court to try offences in the Penal Code (other than those punishable with death) and has been doing so for a very long time, it would lead to grave inconvenience and absurd results to now say that the sessions court should not try an offence under s 377D because the accused is a person professing the religion of Islam. (Emphasis added.)

[21] For the reasons I have expressed hereinbefore, I must with great respect and regret express my inability to agree with the view expressed in the passage already quoted from the judgment *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur*. In my judgment, on a true interpretation of the Constitution, a Syariah Court, whether in a State or in a Federal Territory only has such jurisdiction as may be conferred upon it by State or Federal law. Hence, it is my respectful view, that the jurisdiction of the Syariah Court, on the facts of the present case, is governed exclusively by s 46(2)(b)(i) of the 1993 Act and not by the Second List in the Ninth Schedule. Any other interpretation would, in my respectful view, produce a manifest absurdity and visit an injustice upon non-Muslim spouses, in particular upon the wife in the present instance. And here I would pray in aid the judgment of Chief Justice Ahmad Fairuz in *Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan satu Lagi* [2005] 1 MLJ 197 where his Lordship held that held that a person who converted to another religion was not absolved from fulfilling his obligations under his former personal law. In so holding, the learned Chief Justice cited with approval the following passage in the judgment of Saghir Ahmad J in *Lily Thomas v Union of India* AIR SC 1650:

> ... a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce his previous marriage and desert his wife, cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited.

[22] With respect, the approach of the learned Chief Justice clearly points to the avoidance of an unjust solution to the problem of non-Muslim wives whose husbands convert to Islam.

[23] Learned counsel for the husband however says that this court has no choice but to follow the decision in *Md Hakim Lee* and apply it to the facts of this case because it was approved by the Federal Court in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705. With respect, I do not think that that submission is correct for two reasons. First, taking *Shaik Zolkaffily*'s case as establishing the proposition that Item 1 of List II by itself and without more can confer jurisdiction upon a Syariah court in the absence of any specific State legislation on the matter, it is clearly in conflict with the decision in *Mamat bin Daud* and indeed with the terms of arts 73 and 74 as it has equated a field of legislative competence with legislation proper. Second, the Federal Court appears to have taken a literal approach to art 121(1A) and as such is inconsistent with the decision of that court in *Sukma Darmawan*. In view of the glaring error committed by the Federal Court in *Shaik Zolkaffily*. I think that this court is entitled to rely on the earlier decisions as a matter of choice. As Professor Dias says in his authoritative work *Jurisprudence* (1985 Ed):

> If the reasoning behind a decision is shown to have been faulty by a higher court, or even by a court of co-ordinate authority, that decision may again be disregarded

[24] Accordingly, it is my judgment that notwithstanding the decision in *Shaik Zolkaffily*, a Syariah court doest not possess the so-called 'subject matter jurisdiction' contended for by learned counsel for the husband.

[25] In any event, even if this court is bound by the decision in *Shaik Zolkaffily*, the particular subject matter of the dispute before the court was wakaf land and the parties to the dispute were Muslims. Accordingly, the Syariah court had jurisdiction. In the present case, no issue of *wakaf* arises. Also, one of the parties to the dispute is a non-Muslim. Hence, the facts of the present instance are clearly distinguishable from those of *Shaik Zolkaffily*.

[26] So too are the other authorities relied on by the husband. *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 was a case that involving domestic violence. Although the correctness of that decision is doubtful, it is to be noted that there both parties to the dispute were Muslims. That is not the case here. Next there is *Soon Singh v Pertubuhan Kebajikan Malaysia Kedah* [1994] 1 MLJ 690. That was a case involving the renunciation of Islam by a convert. The issue was whether the appellant there continued to be a Muslim. The Supreme Court held that the Syariah court had exclusive jurisdiction to deal with such matters. In the case at hand, no question of renunciation of the Islamic faith arises. *Sia Kwee Hin v Jabatan Agama Islam Wilayah Persekutuan* [1999] 1 MLJ 504 was also a case involving a plaintiffs claim that he was no longer a Muslim and is therefore distinguishable for that reason.

[27] I would, before leaving this part of the case, refer to the decision in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] MLJU 500. There, two Muslims sought a declaration that they had effectively renounced Islam. It was there held:

> The Syariah Court is not a creature of the Syariah Law (Hukum Syarak). Rather it owes its existence to the written laws of Parliament and State Legislatures, ie vide the Federal Constitution, Acts of Parliament and the State Enactments. This being the case, to ascertain the question of jurisdiction of the Syariah Court, it is incumbent that reference be made to these laws and see whether jurisdiction over the particular matter is given to the Syariah Court or the Civil Court. By itself, art 121(1A) of the Federal Constitution does not automatically confer jurisdiction to the Syariah Court, even in respect of matters that fall under the State List of the Ninth Schedule therein. To confer such jurisdiction, the State Legislature must first act upon the power given it by arts 74 and 77 and the said State List, and accordingly enact laws conferring the jurisdiction. Only then will the matter come under the jurisdiction of the Syariah Court to the exclusion of the Civil Court.

Lim Chan Seng was criticised by the court in *Md Hakim Lee* and the latter case was, as I have already said, preferred by the Federal Court in *Shaik Zolkaffily*. However, I am, for the reasons, already given, of the respectful view that the views expressed in *Lim Chan Seng* are correct.

[28] With that, I now turn to the husband's second argument. To recall, it is this. Islam is the religion of the Federation as declared by art 3(1) so that principles of Islamic law must *ex necessitae rei* override the express provision made by Parliament in s 46(2) of the 1984 Act. In my judgment this submission is completely devoid of any merit. A complete answer to it is to be found in the judgment of Salleh Abas LP in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 where he said (at p 56):

> Before the British came to Malaya, which was then known as Tanah Melayu, the sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law. Under such law, the Sultan was regarded as God's vicegerent (representative) on earth. He was entrusted with the power to run the country in accordance with the law ordained by Islam, ie Islamic law and to see that law was enforced. When the British came, however, through a series of treaties with the Sultans beginning with the Treaty of Pangkor and through the so-called British advice, the religion of Islam became separated into two separate aspects, viz the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's vicegerent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, ie to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat. Although theoretically because the sovereignty of the ruler was absolute in the sense that he could do what he likes, and govern according to what he thought fit, the Anglo/Malay Treaties restricted this power. The effect of the restriction made it possible for the colonial regime under the guise of 'advice' to rule the country as it saw fit and rendered the position of the ruler one of continuous process of diminution. For example, the establishment of the Federated Malay States in 1895, with the subsequent establishment of the Council of States

A and other constitutional developments, further resulted in the weakening of the Ruler's plenary power to such an extent that Islam in its public aspect had become nothing more than a mere appendix to the ruler's sovereignty. Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state. The law was only applicable to Muslims as their personal law. Thus, it can be seen B that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only (see MB Hooker, *Islamic Law in South-East Asia,* 1984.)

C In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of art 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, art 162, on the other hand, purposely preserves the continuity of 'secular law prior to the Constitution, unless such law is contrary to the latter.

D

[29] It follows from the dichotomous approach adverted to by Lord President Salleh Abas that our Constitutional jurisprudence is secular and that all a court of law is obliged to do in a dispute such as the present is to interpret written law, namely, the Federal Constitution, Acts of Parliament, State Enactments and all forms of E subordinate legislation to determine all questions submitted to it. As such, it is not open to us to go outside the terms of s 46(2) of the 1984 Act. That subsection is a well-drafted provision for it implicitly pays regard to the terms of the Constitution and to s 51 of the 1976 Act. Put shortly, the effect of s 46(2) of the 1984 Act is this. According to the Hukum Syarak, the act of one spouse to a non-Muslim marriage converting to Islam puts an end to the previous marriage. Section 46(2) alters this F result by requiring the Syariah court to confirm the fact of dissolution. This, all before us are agreed, is a mere administrative act. And the way in which confirmation must take place is by production to the Syariah court of the decree granted by the High Court acting under s 51 of the 1976 Act. Accordingly, on the facts of the present case, the learned judicial commissioner having held, quite correctly, that she G did have jurisdiction to entertain the wife's petition by reason of s 51 of the 1976 Act, was, with respect, in error when she declined jurisdiction over the interlocutory summons for an injunction.

[30] Before concluding, I must say that a detailed submission was made on the H wife's behalf on the approach to be taken by a court when considering the rights of a non-Muslim wife in respect of custody of her child and to have a say in determining his or her religion. The arguments were formidable and not without merit. But I must resist the temptation to discuss them. They must be addressed to the court that will hear the injunction summons on its merits.

I

[31] One final point. In an eleventh hour desperate move, learned counsel for the husband sought to argue a point of law not taken in the court below. He referred us to the proviso to s 51(1) of the 1976 Act and submitted that the wife must fail in any event because she had presented her petition before the expiration of three months from the date of the husband's conversion. In support of his argument to admit the

point, learned counsel for the husband relied on *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 where I stated the governing principle so far as an appellant is concerned to be as follows (at p 739):

> ... an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[32] In so far as a respondent is concerned, the applicable principle was formulated by Edgar Joseph Jr FCJ in *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 as follows (at p 352):

> As a matter of principle, there can be no justification whatsoever for depriving a respondent to an appeal of his general right to take any point open to him in order to hold his judgment (see *Viking Askim Sdn Bhd v NUECM* [1990] 2 ILR 634 at p 638; *Waller & Son, Ltd v Thomas* [1921] 1 KB 541; *Property Holding Co Ltd v Clark* [1948] 1 KB 630 at p 637 (CA); *Errington v Errington & Woods* [1952] 1 KB 290 at p 300 (CA)).

[33] It follows from the foregoing discussion that learned counsel's reliance on Luggage Distributors is misconceived. The husband being the respondent to the appeal in which the point is sought to be argued, the relevant principle is that stated in *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia*. Hence, it is open to the husband to support the judgment under appeal by relying on the proviso to s 51 of the 1976 Act.

[34] The husband's case is that he converted to Islam less than three months before the wife presented her petition which is dated 4 August 2006. But this fact is seriously contested by the wife who alleges that her husband informed her on 11 May 2006 that he had converted to Islam. So, the issue as to whether the petition was premature is one on which the evidence is in serious conflict. As such, it must be tried by the High Court like any other question of fact. Accordingly, there is no merit in the husband's argument on this point.

[35] For the reasons already given, I would allow the wife's appeal and set aside the orders made by the High Court. The wife's injunction summons is restored to file and remitted to the court below for determination on merits. The husband must pay the costs of the wife's appeal and those incurred in the High Court. The deposit shall be refunded to the,wife. The husband's appeal must, for the same reasons already advanced, fail. I would dismiss it with costs. The deposit in court shall be paid out to the wife to account of her taxed costs.

Suriyadi JCA:

[36] On 26 July 2001, the appellant and the respondent who were both practicing Hindus, had their marriage solemnized and registered under the Law Reform (Marriage and Divorce) Act 1976 (Act 164), subsequently to be blessed by two

children. The children were Dharvin Joshua and Sharvind, respectively three years and one year of age, at the time of the filing of the divorce petition. Cracks had appeared in the marriage which had led to the filing of that petition by the appellant, In the divorce petition dated 4 August 2006, the appellant had sought, inter alia, for the dissolution of the marriage, custody of both children and an injunctive order that the respondent be injuncted from converting the children into the religion of Islam unless permitted by her.

[37] She also had filed at about the same time an ex parte summons in chambers at the High Court on 4 August 2006, praying for the same type of injunctive order to prevent the respondent, or through, his representatives, from converting the children, and preventing him from continuing with any form of proceedings at the Syariah Court pertaining to the marriage or pertaining to the children of the marriage. The grounds relied upon by the appellant were that the respondent had abused the Syariah Court legal processes en route to obtaining a right of custody order of the children whence the appellant was deprived of any right to appear at that court. This injunction was also to prevent any multiplicity of proceedings and injustice on the appellant due to her dearth of locus at the Syariah Court. The decision of the Syariah Court would also not be in the interest of the child. She was successful in the ex parte injunction application. The court then fixed a date for the inter parte application.

[38] Being dissatisfied with that ex parte order, the respondent had applied for its setting aside before the same judicial commissioner on the grounds, amongst others, that:

(a) he already had initiated a marriage dissolution proceedings at the Wilayah Persekutuan Syariah Court through Application No 14005–013–0282–2006 before the appellant's application was filed at the High Court;

(b) he already had obtained an ex parte interim custody order for Dharvin Joshua at the Syariah High Court of Wilayah Persekutuan through application No 14600–038–0107–2006 hence making the ex parte injunctive order void;

(c) he already had filed for a permanent custody order of Dharvin Joshua at the same Syariah Court as per case number 14600–028–0112–2006.

(*In a gist, all the three separate applications at the Syariah Court had preceded the appellant's injunction application, hence the respondent's allegation that any application or order after his applications was void or bad in law*);

(d) there was no full and frank disclosure of relevant facts by the appellant in the like of the above 'preceded' applications at the Syariah Court. The respondent had submitted that in the course of applying for the ex parte injunction, the appellant had received a 'Notis Pemakluman' from the Kuala Lumpur Syariah High Court notifying her that the respondent was in the process of applying for the custody of Dharvin at the Syariah court;

(e) the Civil High Court had no jurisdiction to issue any injunction to bar the jurisdiction of the Syariah Court pursuant to art 121(1A) of the Federal Constitution;

(f) he and Dharvin Joshua were officially converted to Islam on 18 May 2006. The Muslim name of the son was Muhammad Shazrul Dharvin bin Muhammad Shafi;

(g) the civil High Court, pursuant to art 121(1A) of the Federal Constitution, did not have any authority to deliberate and decide on the issue of custody of Dharvin Joshua as he already was a Muslim; and

(h) the interim ex parte injunction was an abuse of the process of the court.

[39] The High Court had heard simultaneously the enclosures pertaining to the setting aside application of the ex parte injunction (encl 10) and the inter parte application for an interim injunction (encl 6) on 11 August 2006: On 25 September 2006, the decision was meted down wherein the respondent succeeded in his setting aside application, and the appellant correspondingly failing in her inter parte application. Being dissatisfied she had filed a notice of appeal hence the hearing before us (NB: After the learned judicial commissioner had made her decision the appellant had applied for an *Erinford* injunction. The court had granted the application and the respondent had filed an appeal against it. But that is another appeal and shall be dealt with accordingly later).

[40] As the memorandum of appeal of the appellant, regarding the rejection of the injunction application is too voluminous and repetitive, suffice if I merely lay down the main grounds, viz:

(i) that the learned judicial commissioner had erred in law in finding that the Syariah Court had jurisdiction to entertain applications by the respondent in respect of a confirmation of the dissolution of the marriage between the appellant and the respondent, the custody, care and control of the children of the said marriage and the conversion of the children of the marriage;

(ii) that the learned judicial commissioner had erred in law in finding that the said Syariah applications were within the Syariah court's jurisdiction, and failing to appreciate and apply the vital opening words of s 46(2) of the Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505') and/or the requirements of Item 1, List II, Schedule 9 of the Federal Constitution (read together with Item 6(e), List I, Schedule 9 in respect of the Federal Territories) ('Item 1, State List, Federal Constitution'), which grant Syariah Court jurisdiction only when all parties before it are persons professing the religion of Islam;

(iii) that the learned judicial commissioner had erred in law and in her finding of fact in determining that the subject matter of the injunction orders sought by the appellant was within the jurisdiction of the Syariah court and/or that the Syariah courts had jurisdiction to entertain the said Syariah applications by the respondent when she was not a Muslim;

(iv) that the learned judicial commissioner had erred in law in holding that the effect of Part VII of Act 303 was to exclude the jurisdiction of the civil High Court from hearing the matter of the appellant's application for injunctive relief; and

(v) that the learned judicial commissioner had erred in law and in finding of fact in determining that s 95 of Act 505 permitted one parent or guardian alone to convert his child without considering that that the consent of both parents of a child must be obtained before such a conversion is effected pursuant to a proper reading of ss 5 and 11 of Act 351 and arts 8 and 12(4) of the Federal Constitution.

[41] This was another 'conversion' case, which had to be dealt with by the court rather gently but firmly. Well-intentioned third parties, championing certain views did not contribute much to the. proceedings before us due to their ill-preparedness. In the course of the hearing, I had occasion to remark that I wanted to hear parties sticking closely only to the law and facts before them, and nothing more.

[42] I now zero in on the applications proper as they could be dealt with simultaneously (encls 6 and 10). The summons in chambers of the appellant applying for the injunction reads:

(i) the respondent by himself or through his solicitors, peguam syarie, agents or otherwise howsoever be restrained and prohibited from converting to Islam the children of the marriage DHARVIN JOSHUA or SHARVIND or either of them; and

(ii) the respondent by himself or through his solicitors, peguam syarie, agents or otherwise howsoever be restrained and prohibited from commencing or continuing with any form of proceedings in any syariah court in respect of the marriage between the petitioner and the respondent or in respect of the children of the marriage the children of the marriage DHARVIN JOSHUA or SHARVIND or either of them.

[43] As stated earlier, as far as I was concerned, the court should only focus on the case based on the facts and the law connected to them, and not to be side-tracked by red-herrings in the course of the determination. As a starter, a perusal of the above prayers made it necessary for me to reflect on the premise of the injunction application, in particular whether the legal and factual basis (hereinafter referred to as the substratum of the injunction application) were sufficiently persuasive for the court to consider.

[44] It must be borne in mind that an injunction is a remedy available to an applicant to prevent the respondent from performing an act or carrying out certain acts. This relief, which is granted at the discretion of a court, must exercised in accordance with established principles. It invariably is negative in form as it is restraining in effect. Needless to say it effectively preserves the status quo until the recognizable rights of the parties have been determined in the subsequent action (*Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor* [1995] 2 MLJ 734; *Cheng Hay Gun & Ors v Perumahan Farlim (Pg) Sdn Bhd* [1983] 1 MLJ 348).

[45] Part of the established principle is that the applicant, in this case the appellant, must satisfy the court that she has rights recognized by law and those rights have been violated or might be violated. Succinctly put, she must satisfy the court that there is

a serious question to be tried before the court. If she fails the matter ends there (*Government of Pakistan v Seng Peng Sawmills Sdn Bhd & Ors* [1979] 1 MLJ 219). If the appellant overcomes that 'serious question to be tried' element the next step would be to consider the factor of adequacy or inadequacy of damages to either side. Generally an injunction would not be granted to the applicant if damages would be the appropriate remedy in the circumstances of the case (*Kenidi bin Sima v The Government of the State of Sabah & Anor* [1988] 1 MLJ 454; *American Cyanamid v Ethicon Ltd* [1975] AC 396); *Injunctions & Companies* by Nasser Hamid). Once there is doubt as to the adequacy of damages to either side the question of balance of convenience will arise whether to grant or not the interlocutory relief.

[46] To ensure whether there is an identifiable 'serious question to be tried' I now scrutinize the substratum of the injunction application, in particular the first prayer. In the course of the hearing here and below the court was informed that Dharvin Joshua had already been converted to Islam (see exh ST–1B at AR 207). So, could we still say part of the substratum, for which the injunction was intended, still exists? Perhaps realizing this, the appellants had not actively submitted on the religious status of Dharvin Joshua, in the course of the appeal. The learned judicial commissioner was not unaware too of the appellant abandoning the issue of Dharvin Joshua's conversion as she authored:

> At the inter partes hearing counsel for the petitioner informed the court that they are not pursuing the issue of the conversion of the elder child in this proceeding though, they dispute his conversion. They have also not disputed that the Respondent had converted to Islam (AR 41).

That being so, the scope of the fear of conversion was now restricted to the youngest child. The court had recognized this approach as at AR 49, even the learned judicial commissioner had stated:

> The petitioner's first prayer seeks to stop the respondent from converting his children at the time this matter was heard, the petitioner's counsel confined his submissions in respect of the younger child only.

[47] Even here the appellant was not having her way as Sharvind held no interest to the respondent. His conversion was unlikely, with no possibility of the respondent wanting to convert him, as he had refused to acknowledge him as his natural son. In fact the source of this very allegation was the appellant herself as affirmed in her affidavit at AR 214 para 7 and reconfirmed in open court (AR 87). If he was so minded to convert Sharvind surely the respondent could have done that when he was in the process of converting Dharvin Joshua. The learned judicial commissioner's factual finding merely confirmed the elimination of this part of the substratum as one of the purposes of obtaining the injunction.

[48] I refuse to acquiesce to the argument of the respondent that Sharvin had automatically become a Muslim upon the conversion of the respondent pursuant to s 95 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) (as opposed to the *hadith* and *ijma*). This provision merely provides the capacity and the conditions for a person who is not a Muslim, wishing to be converted, to adhere

to. For a person who has not attained the age of 18 years his parent or guardian has to consent to his conversion which entails certain initiation. The initiation will begin with the article of, faith of the syahadah or profession of faith (the first Pillar), purposefully to establish the ingredient of belief. Only later will that deceptively simple statement be supplemented by the four Pillars which include the ritual prayers. Section 95 by virtue of its brevity does not coyer what the respondent wanted to establish, as regards automatic conversion, as intended to be conveyed in his written submission (para 3.6.4).

[49] What then was left as a basis for her application? Let us now peruse the second prayer. Despite the haziness in the language of this prayer, it could be split up in this manner (let's call it sub-substratum):

(1) the respondent by himself or through his solicitors, peguam syarie, agents or otherwise howsoever be restrained and prohibited from commencing with any form of proceedings in any syariah court in respect of the marriage between him and the appellant;

(2) the respondent by himself or through his solicitors, peguam syarie, agents or otherwise howsoever be restrained and prohibited from continuing with any form of proceedings in any syariah court in respect of the marriage between him and the appellant;

(3) the respondent by himself or through his solicitors, peguam syarie, agents or otherwise howsoever be restrained and prohibited from commencing with any form of proceedings in any syariah court in respect of the children of the marriage DHARVIN JOSHUA or SHARVIND or either of them; and

(4) the respondent by himself or through his solicitors, peguam syarie, agents or otherwise howsoever be restrained and prohibited from continuing with any form of proceedings in any syariah court in respect of the children of the marriage DHARVIN JOSHUA or SHARVIND or either of them.

[50] Surely, the first sub-sub stratum must fail as this was a faulty one. How could the respondent be prevented from commencing any form of proceedings when they already had been commenced? To copy a phrase the ship had already slipped out of the port. Likewise, the second sub-substratum must also fail. This latter sub-substratum must pertain to the restraining of the respondent continuing with a pending proceeding praying for a declaration of dissolution of the marriage at the Syariah Court. From the Islamic point of view, the marriage between the appellant and the respondent had ended upon his conversion. The next step will be administrative in nature, ie a formal declaration of dissolution of that marriage.

[51] Under s 46(2) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) a Syariah High Court shall in its civil jurisdiction, hear and determine all actions and proceedings in which *all the parties are Muslims* and which relate inter alia, nullity of marriage, or other matters relating to the relationship between husband and wife or other matters in respect of which jurisdiction is conferred by any written law. Under s 46(2) of Act 303, coincident of similar numbering as that of Act 505, in the event of one party converting to Islam the

marriage is not dissolved automatically but must be administratively dissolved by a Syariah Court order. The corresponding civil law for the appellant to obtain dissolution of the marriage is s 51 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164). This provision reads:

> This Act shall not apply to a Muslim or to any person who is married under Muslim Law and no marriage of one of the parties which profess the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court before which petition for divorce has been made under s 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

[52] In a nutshell the appellant wanted to prevent the respondent from administratively ending the marriage between them, despite it having ended with the latter's conversion. At the same time she too wanted to dissolve the marriage at the High Court Malaya. With both wanting the same type of order ie dissolution of the marriage, the appellant's objection merely on the ground that the Syariah Court was constitutionally set up only for Muslims, made no sense. To grant an injunction based on her flimsy ground would certainly be an abuse of the costly process of court. Whether the Syariah Court has jurisdiction to declare the marriage of the appellant and the respondent as dissolved, when the appellant is not a Muslim, is a legal matter reserved for another day.

[53] The third sub-substratum suffers the same defect as the first sub-substratum, bearing in mind that the respondent had already commenced custody proceedings for Dharvin Joshua. As regards Sharvind the above argument of the respondent's lack of interest in him would still be applicable.

[54] The only viable substratum worthy of consideration before concluding that there are 'serious questions to be tried', or otherwise, is the forth sub-sub stratum. It was crystal clear that this sub-substratum was an attempt to prevent the respondent from taking up any proceedings at the Syariah Court as regards the two children, connected to custody matters. I now would like to touch on Dharvin Joshua' issue of custody first. It is a fact that an interim custody order was obtained from the Syariah Court on 23 May 2006, and it is also trite law that if an order is to be reviewed, the venue is the very institution that issued it. A variation order could be obtained from the originating court, or if dissatisfied with such order, to have it appealed against, in its respective appellate courts. Whether it was rightly given or otherwise is within the purview of that issuing institution. So long as the order 23 May 2006 is still valid, and in its original form, it is not for this court to challenge or injunct its execution (*Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara* [1999] 2 MLJ 241; *Nenduchelian v Uthiradam v Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306). Again as regards Sharvind the sub-substratum was a non-starter due to the earlier supplied reason.

[55] The respondent and Dharvin Joshua, now prima facie are Muslims, and certain legal niceties must be resolved first. Under art 3 of the Federal Constitution Islam is the religion of the Federation with other religions permitted to be practised

in peace and harmony. In the Ninth Schedule of List II (the State List) of the Federal Constitution, issues of Islamic family law, succession, testate and intestate, marriage, divorce, wakaf, etc are listed out, demarcated specifically to fall under the jurisdiction of the Syariah Courts. These are matters which relate to the Muslim way of life, and they reach out beyond that of Islamic rituals, to be administered by the respective State, and confined to its territorial jurisdiction. The subject matters within its jurisdiction, will depend on the State legislation, as in this case, the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). This Act was legislated to provide for the Federal Territories a law concerning the enforcement and administration of Islamic Law, the constitution and organization of the Syariah courts, and related matters. Islamic law here is defined as Islamic law according to any recognized Mazhab, and as such any litigated matter, which falls within this definition, may fall within the jurisdiction of the Syariah court. For clarification, Mazhab is one of the schools of Islamic law with the Shafii, the Hanafi, the Maliki and the Hanbali generally as the recognized ones. The abovementioned Islamic law is divine law, and commonly agreed by the recognized Mazhabs, as having the al-Quran and the hadith as the primary sources, of which God is the centre of that law. In Malaysia it is now ignominiously compartmentalized in that State List.

[56] In 1988 art 121(1A) of the Federal Constitution was promulgated, providing the amendment that the civil court shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court, whence previously the civil and Syariah Court had exercised concurrent jurisdiction on certain Islamic matters (*Islamic Banking in Malaysia: Legal Hiccups and Suggested Remedies* by Norhashimah Mohd Yasin). The amendment in a nutshell, restrains a civil court from adjudicating on a matter over a Muslim if the subject matter falls within the jurisdiction of the Syariah Court. Cases in the like of *Mohamed Habibullah bin Mahmood v Faridah bin Dato Talib* [1992] 2 MLJ 793 had clearly held that the intention of the latter Article was to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court. Come *Sukma Dermawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor* offenders of certain cases became less comfortable when the Federal Court ruled that where an offender commits an offence triable by the Syariah Court or the civil courts, he could be prosecuted by either of those courts. By implication, the effect is that the High Court could deal with matters that are within the jurisdiction of the Syariah Court, so long as they fall within the High Court's jurisdiction (see *IIUM Law Journal* vol 9 No 1 2001 p 87 by Abdul Aziz Bari). By the same breath and token, the Syariah Court is thus not prevented from adjudicating in certain cases, in particular family, divorce or inheritance matters in relation to Muslims, even if they may fall within the jurisdiction of the High Court, like the current case.

[57] It was crystal clear that the appellant faced an uphill battle in her attempts to stop the respondent from exercising his constitutional rights of choosing the Syariah Court over the civil court pertaining to matters connected to his marriage with her. To overcome her predicament the appellant had submitted that she was not injuncting the Syariah Court but only the respondent. It was sublime advocacy to submit in that manner but it was crystalline clear that the eventual effect was to shackle the Syariah Court.

[58] In fact taking the matter a step further, the argument that the injunction was directed at the respondent only could not hold water, as at AR 252 the appellant's solicitor had sent a letter to the 'Pendaftar, Mahkamah Tinggi Syariah, Wilayah Persekutuan' and the 'Setiausaha kepada Yang Arif Hakim, Mahkamah Tinggi Syariah 6, Wilayah Persekutuan Kuala Lumpur', which contained the information that an injunction had been obtained from the Civil High Court. They were not mere carbon copies supplied to the Syariah Court and the Syariah Court judge's secretary but direct letters meant for their eyes and consumption. The letter also contained the following paragraphs:

> Nampaknya jika Saravanan a/l Thangathoray (IC No 750930-14-5795) tersebut meneruskan dengan permohonannya di dalam tindakan tersebut di atas di Mahkamah Syariah, beliau akan akan melakukan perbuatan yang mengingkari perintah injunksi Mahkamah Tinggi Kuala Lumpur ini.
>
> *Klien juga telah dinasihati bahawa Mahkamah Syariah Kuala Lumpur tiada bidangkuasa untuk mendengar kes ini kerana ibu anak yang terlibat bukannya 'orang Islam'*, dan s 46 Akta Pentadbiran Undang-undang Islam (Wilayah-Wilayah Persekutuan) 1993 memberikan bidangkuasa kepada Mahkamah Syariah hanya apabila kesemua pihak terlibat adalah 'orang Islam'.

[59] How could the appellant now, without any compunction, state that she did not intend to injunct the Syariah Court whence her words carried a different message? How more brazen could a party be against a creature of the constitution, with such terms having been used when the matter of jurisdiction had yet to be resolved by the Syariah Court? The institution apart, respect too must be accorded to the specific Syariah Court judge who had received a copy of that letter. This judge, who must have practised syariah law and its jurisprudence, appreciative of all Islamic orthodoxy (correct interpretation of myths) and orthopraxy (correct interpretation of rituals), traditional teachings, theology, and naturally the Five Pillars, before being elevated to his posts, not only must boast experience, but also the scholarship to deal with issues that are infused with Islamic tenets. Surely that Syariah judge must be more than equipped to be given the confidence to deal with subject matters promulgated by Parliament. His position would squarely fall under these Quranic revelations:

> And We have set you on a road of Our Commandment (a Syariah, or a Sacred Law of Our Commandment, *Syaria'tin min al-amr*); so follow it, and follow not the whims of those who know not (45:18) (see also Islam: *A Sacred Law* by Feisal v Abdul Rauf).

[60] By so wanting the civil court to deal with her problems, the appellant had attempted to convince us that a civil court has the jurisdiction and knowledge to deal with her matter, even though imbued and intertwined with thick strands of Islamic elements. In short the appellant wanted the civil court to arrogate the function and duties of the Syariah Court, regardless of the litigant's right of choice, *let alone he already had made his decision*.

[61] In a normal case of this nature, a spouse that has not converted is not prevented from seeking dissolution and to pray for certain ancillary orders at the

High Court under the Law Reform (Marriage and Divorce) Act 1976 (Act 164). Painfully for the appellant not only has the appellant been pre empted by the respondent's Syariah Court's applications, but her elder son is already a Muslim. Even if the appellant were to fail to have her day at the Syariah court, due to her belief that this institution is only for Muslims, that does not automatically make the jurisdiction exercisable by the civil court (*Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705).

[62] It was obvious that she wanted her day in court; her motives that drove her, culminating in this action, were not frivolous. Without compromising the integrity of the court, in obiter, her dissatisfaction will not quietly just go away like that. Parliament has to cap any obvious lacuna promptly and as equitably as possible to harmonise the two systems. Justice is never irreconcilable. The universal concept of justice and equity, and Islamic law, is not dissimilar as the al-Quran in surah *An-Nisa*' had revealed that justice is *for mankind*.

[63] Regretfully from the above prognosis, allowing the injunction, would inevitably witness the interference and invasion of one jurisdiction, by another creature of statute. The fact that the substratum of her case had been whittled away either by factor of time, or by her own act of abandonment of certain issues, did not help either. Having considered the matter in its entirety, I must conclude that a serious question having been established was yet to be made out by the appellant. With that failure I see no necessity in going beyond this failed hurdle. I therefore dismiss this appeal with costs and order that the deposit be remitted to the respondent towards the account of his taxed costs.

[64] I now return to the *Erinford* appeal. As regards this appeal, as the facts and the legal problems are quite similar, especially in relation to the clash of jurisdiction, and primarily to save time and avoidance of duplication of the grounds of judgment, I shall decide on. the matter now. Having comprehensively considered the evidence and submissions of both parties I allow the *Erinford* appeal with costs. The deposit shall be refunded to the appellant. I therefore set aside that *Erinford* injunction.

Hasan Lah JCA:

[65] I have had the benefit of reading the judgments in draft of my learned brothers. The facts and issues in these appeals have been fully set out in their judgments. As such I am spared the burden of repeating a statement of facts and the issues raised in these appeals and I can straightaway deal with the law as I see it.

[66] There are several grounds of appeal. I think I need only deal with two of the grounds raised by the parties which may be summarised as follows:

(a) whether the petition was premature in view of the proviso to s 51(1) of the Law Reform (Marriage and Divorce) Act 1976; and

(b) whether the injunction sought by the appellant was in contravention of the provision of s 54 (b) of the Specific Relief Act 1950.

[67] With regard to the first ground the learned counsel for the respondent (the husband) submitted that the petition filed by the wife was premature and did not comply with the requirement stated in the proviso to s 51(1) of the Law Reform (Marriage and Divorce) Act 1976. That proviso reads:

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

[68] According to the learned counsel for the husband the husband's conversion to Islam took place on 18 May 2006 and the wife's petition was filed on 4 August 2006, which was two months and 18 days after the husband's conversion.

[69] On this issue the learned counsel for the wife submitted that the prohibition on presenting a petition within three months of conversion is merely a directory provision dealing with a procedural matter, and is not mandatory. In support of that the learned counsel relied on two decisions. In *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53, Hashim Yeop A Sani J (as he then was) held that the words shall not register in s 300(1)(a) of the National Land Code are on the facts of that case merely directory and not mandatory. In *Hee Nyuk Fook v Public Prosecutor* [1988] 2 MLJ 360, Syed Agil Barakbah SCJ held that on the facts and surrounding circumstances of that that case the word 'shall' in s 158(ii) of the Criminal Procedure Code is not imperative but directory.

[70] On this issue, the learned counsel for the wife also submitted that the date of the husband's conversion was a disputed fact and as such it is a matter that should be determined at the trial proper. It is the contention of the learned counsel for wife that obtaining a proper certificate of conversion is not the only way in which a person converts to Islam. It is only one of several ways under the law as it stands. According to him under the definition of a 'Muslim' in s 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, there is no need for a person to be formally registered as a Muslim before he is considered to have converted to Islam.

[71] With deepest respect, I am unable to agree with the submission made by the learned counsel for the wife that the word 'shall' in the proviso to s 51 of the Law Reform (Marriage and Divorce) Act 1976 is merely directory. In my view that word must be given its natural and proper meaning. The decisions in *Mohammad bin Buyong* and *Hee Nyuk Fook* were based on the facts and surrounding circumstances of those cases.

[72] In *Stroud's Judicial Dictionary* (5th Ed) the following explanation is given at p 2404:

> (8) Whenever a statute declares that a thing 'shall' be done, the natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to:
>
> (a) the time or formality of completing any public act, no being a step in a litigation, or accusation; or

(b) the time or formality of creating an executed contract whereof the benefit has been, or but for their own act might be, received by individuals or private companies or private corporations,

the enactment will generally be regarded as merely directory, unless there be words making the thing done void if not done in accordance with the prescribed requirements.

[73] It can be seen that s 51(1) of the Law Reform (Marriage and Divorce) Act 1976 deals with the right of the party who has not embraced Islam to make on application to dissolve the marriage. It does not therefore come under the category of cases as explained above whereby the enactment will generally be regarded as merely directory. I am therefore of the view that the word 'shall' in that proviso must be construed as mandatory in nature. The wife could only file the petition after the expiration of three months from the date of the husband's conversion.

[74] I am also unable to agree with the submission of the learned counsel for the wife that the date of the husband's conversion, on the facts and circumstances of this case, was a disputed fact. It is clear from the evidence adduced by the husband that his conversion took place on 18 May 2006. He stated that in his affidavit which was affirmed on 28 August 2006. Paragraph 5 of that affidavit reads:

5. Saya dan anak saya Dharvin Joshua a/l Saravanan telah memeluk Islam pada 18 Mei 2006 dan telah menggunakan nama Muhammad Shafi bin Abdullah seperti yang dinyatakan di perenggan 2 di atas dan anak saya Muhd Shazrul Bin Muhammad Shafi, masing-masing. Di lampirkan disini sesalinan Kad Perakuan Memeluk Agama Islam masing-masing dan ditandakan sebagai eksh 'ST–1A' dan 'ST–1B'.

[75] Exhibit 'ST-1A' is a letter issued by Pertubuhan Kebajikan Islam Malaysia ('PERKIM') dated 18 May 2006 certifying the fact that the husband's conversion took place on 18 May 2006 at the PERKIM's headquarters.

[76] The husband also has exhibited the 'Kad Perakuan Memeluk Agama Islam' which was issued by Registrar of Muallafs who was appointed by Majlis Agama Islam Selangor under s 110 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. It is written at the back of the said card that:

KAD INI DIKELUARKAN KEPADA ORANG YANG MEMELUK AGAMA ISLAM DAN DIDAFTARKAN DALAM PENDAFTARAN MUALLAF NEGERI SELANGOR BERDASARKAN SEKSYEN 111 & 112 BHG IX ENAKMEN PENTADBIRAN AGAMA ISLAM (NEGERI SELANGOR) TAHUN 2003 SEBAGAI SIJIL PEMELUKAN KE AGAMA ISLAM.

[77] What it means is that this card is a Certificate of Conversion to Religion of Islam issued to the husband under s 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. That s 112 reads:

112. (1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.

(2) A Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

[78] It is to be observed that s 112(2) clearly provides that that Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated therein. In the instant case it was stated in the husband's certificate that his date of conversion to Islam was on 18 May 2006. Under that s 112(2) that fact is therefore conclusive.

[79] It is also to be noted that the power to determine the husband's date of conversion to the religion of Islam is given to the Registrar of Muallafs under s 111(3) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. That s 111 provides:

111 (1) A person who has converted to the religion of Islam may apply to the Registrar in the prescribed form for registration as a muallaf.

(2) If the Registrar is satisfied that the requirements of section 107 have been fulfilled in respect of the applicant, the Registrar may register the applicant's conversion to the religion of Islam by entering in the Register of Muallafs the name of the applicant and other particulars as indicated in the Register of Muallafs.

(3) The Registrar shall also determine the date of conversion to the religion of Islam and enter the date in the Register of Muallafs.

(4) In order to satisfy himself of the fact and date of conversion to the religion of Islam by the applicant, and the other particulars to be entered in the Register of Muallafs, the Registrar may make such inquiries and call for such evidence as he considers necessary; but this subsection shall not be construed as precluding the Registrar from relying solely on the words of the applicant as far as the fact and date of conversion are concerned.

(5) If the Registrar is not satisfied that the requirements of s 107 have been fulfilled in respect of the applicant, he may permit the applicant to utter, in his presence or in the presence of any of his officers, the two clauses of the Affirmation of Faith in accordance with the requirements of that section.

[80] In the instant case, the Registrar of Muallafs has determined the date of the husband's conversion. As such, the Civil Court has to accept that decision and it is not for the Civil Court to question that. Under the circumstances, the Civil Court has to accept that the date of the husband's conversion is 18 May 2006.

[81] On the facts and circumstances of this case, I am of the view that the learned counsel for the husband is correct in saying that this petition was filed in contravention of the requirement under the proviso to s 51(1) of the Law Reform (Marriage and Divorce) Act 1976. It is therefore premature and invalid and the summons in chambers filed therein are also invalid. On this ground alone, I hold that it is sufficient to dismiss the wife's appeal.

[82] I turn now to the question as to whether the injunction sought by the wife was in contravention of s 54(b) of the Specific Relief Act 1950. It reads:

An injunction cannot be granted to stay proceedings in a court not subordinate to that from which the injunction is sought.

[83] The learned judicial commissioner was of the view that on the facts and circumstances of this case the injunction, though addressed at the husband, is in effect a stay of proceedings in the Syariah Court from further hearing and determining the applications placed before it by the husband. It was therefore in contravention of s 54 (b) of the Specific Relief Act 1950.

[84] On this issue the learned counsel for the wife submitted that the injunction sought for the wife was directed against the husband and not against the Syariah Court. It is his contention also that s 54 of the Specific Relief Act 1950 did not apply to an interim injunction. In support of that he cited the judgment of this court in *Keet Gerald Francis v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. Thirdly, he submitted that the Syariah Court is not of a similar standing to the Civil High Court.

[85] The learned counsel for the husband, on the other hand, submitted that the injunction applied by the wife was also directed at the Kuala Lumpur Syariah Court whereby the husband had filed his application for the dissolution of the marriage and had obtained an interim order for the custody of the first child.

[86] I am of the opinion that the learned judicial commissioner in the instant case was right in her conclusion that s 54(b) of the Specific Relief Act 1950 is applicable in this case. This is because the Supreme Court in *Penang Han Chuang Associated Chinese School Association v National Union of Teachers In Independent Schools, West Malaysia* [1988] 1 MLJ 302 has held that s 54 of the Specific Relief Act 1950 is also applicable to interlocutory injunction. The High Court is bound by that decision.

[87] I am also of the view that based on the facts and surrounding circumstances of the instant case the learned judicial commissioner was not wrong in her finding that the injunction, though addressed at the husband, was in effect a stay of proceedings of the husband's applications in the Kuala Lumpur Syariah Court. The injunction applied by the wife can be divided into three limbs, namely:

(a) to restrain and prohibit the husband from converting to Islam the second child of the marriage;

(b) to restrain and prohibit the husband from continuing with any form of proceedings in any Syariah court in respect of the marriage; and

(c) to restrain and prohibit the husband from continuing with any form of proceedings in any Syariah Court in respect of both the children of the marriage.

[88] In my view it is fallacious to say that the purpose of such injunction was to only restrain the husband. It is also in effect to restrain the Kuala Lumpur Syariah Court from hearing the applications filed by the husband. This is supported by the fact that the solicitor for the wife had sent a letter dated 11 August 2006 to the 'Pendaftar, Mahkamah Tinggi Syariah, Wilayah Persekutuan, Kuala Lumpur' and

'Setiausaha kepada Yang Arif Hakim Mahkamah Tinggi Syariah 6, Wilayah Persekutuan, Kuala Lumpur' informing them an interim injunction had been obtained by the wife from, the Civil High Court against the husband. The following paragraphs in that letter are relevant:

> Sesalinan perintah injunksi yang termeterai dilampirkan dengan ini untuk perhatian pihak Mahkamah Syariah dan Yang Arif Hakim Mahkamah Syariah.
>
> Nampaknya jika Saravanan a/l Thangathoray (IC No 750930–14–5797) tersebut meneruskan dengan permohonannya di dalam tindakan tersebut di atas di Mahkamah Syariah, beliau akan melakukan perbuatan yang mengingkari perintah injunksi Mahkamah Tinggi Kuala Lumpur ini.
>
> Klien juga telah dinasihati bahawa Mahkamah Syariah Kuala Lumpur tiada bidangkuasa untuk mendengar kes ini kerana ibu anak yang terlibat bukannya 'orang Islam', dan s 46 Akta Pentadbiran Undang-undang Islam (Wilayah-wilayah Persekutuan) 1993 memberikan bidangkuasa kepada Mahkamah Syariah hanya apabila kesemua pihak terlibat adalah 'orang Islam'.

[89] If the purpose of the injunction was to restrain the husband then the letter should have been addressed to the husband.

[90] It is also relevant to note that the wife applied for the interim injunction in the Civil High Court after the husband had obtained an interim injunction from the Syariah High Court of Wilayah Persekutuan on 23 May 2006 and after the husband had filed his application in the Syariah Lower Court to dissolve the marriage. Under the circumstances there is merit in the submission of the learned counsel for the husband that the effect of the injunction from the Civil High Court was also to restrain the Syariah Court from hearing the husband's application. On this point it is pertinent to take heed the observation made by the Eusoff Chin Cheif Justice in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 at p 245:

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

[91] The law is clear that under s 51 of the Law Reform (Marriage and Divorce) Act 1976 the wife is given the right to file petition for divorce in the Civil Court and the Civil Court has the power to make provision for the wife and for the support, care and custody of the children. However it is also clear that under s 54(b) of the Specific Relief Act 1950 the Civil Court cannot issue injunction to stay proceedings in the Syariah Court. The wife is therefore in a catch — 22 situation. Be that as it may the wife, in my view, is not without a recourse here. That recourse can be found in s 53 of the Administration of Islamic Law (Federal Territories) Act 1993 which provides that:

A 53(1) The Syariah Appeal Court shall have supervisory and revisionary jurisdiction over the Syariah High Court and may, if it appears desirable in the interest of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceedings, whether civil or criminal, in the Syariah High Court, call for and examine any records thereof and may give such directions as justice may require.

B (2) Whenever the Syariah Appeal Court calls for the records under subsection (1), all proceedings in the Syariah High Court on the matter or proceedings in question shall be stayed pending further order of the Syariah Appeal Court.

[92] I think the wordings in that section is wide enough to enable the wife to apply C to the Syariah Appeal Court to exercise its supervisory and revisionary powers to make a ruling on the legality of the husband's application and the interim order obtained by the husband on the ground that the Syariah Court had no jurisdiction over the matter as she is not a person professing the religion of Islam. The wife could have done that rather than asking the Civil Court to review the Syariah Court's D decision.

[93] I am also unable to accept the submission of the learned counsel for the wife that the Syariah Court is not of a similar standing to the Civil High Court. There is no substance in that. Article 121(1A) of the Federal Constitution provides that the Civil Court has no jurisdiction in respect of any matter within the jurisdiction of the E Syariah Courts. The Federal Constitution therefore recognizes the coexistence of the two systems of courts in the administration of justice in this country and each court has its own role to play. As such, the two courts must be regarded as having the same standing in this country.

F **[94]** For my part, I would therefore dismiss the wife's appeal with costs and affirm the orders made by the learned judicial commissioner. For the same reasons the husband's appeal in case No W–02–955–2006 is allowed with costs.

Wife's appeal dismissed with costs. Husband' appeal allowed with costs.

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Reported by Loo Lai Mee

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