

## 'CULLING' THE FILTER OF APPEAL

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*This article explores, purely from the perspective of civil law and procedure, the amendment to s. 3 of the Courts of Judicature Act, 1964 and the apparent 'culling' of the 'filter' provided by the amended section as a consequence of the decisions in Sitrac and Takang Timber together with an analysis of the propriety of the 'filter' against the backdrop of relevant legislative instruments.*

### A. INTRODUCTION

On 1<sup>st</sup>. August, 1998, the phrase 'decision' in the *Courts of Judicature Act, 1964* which previously only meant 'judgment, sentence or order' was amended to add the following exclusionary words:

"decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

Broadly speaking, the effect of the amendment was purely temporal in nature in that it merely sought to regulate WHEN a party can appeal and that too only for rulings caught by the exclusionary words.

In essence, section 3 operates as a filter to "stem the tide created by interlocutory appeals" save that:

"The efficacy of the filter has become seriously compromised, if not actually busted ..."<sup>2</sup>

pursuant to the decision of the High Court in *Sitrac*<sup>3</sup> and the Court of Appeal in *Takang Timber*.<sup>4</sup>

### B. A CONSPECTUS OF THE RELEVANT CASES : THE STORY SO FAR

Assuming that *Sitrac* and *Takang Timber* decisions are ignored for the time being, the following cases reveal the trend of subject matters which the Courts have determined as appealable and vice versa:

NO.	APPEALABLE/ NON-APPEALABLE	SUBJECT MATTER	APPELLANT
a.	Appealable	Decision of Registrar allowing an application to set aside judgment in default <sup>5</sup>	Plaintiff
		Decision of Magistrate denying an application to amend a statement of claim <sup>6</sup>	Plaintiff
		Decision of Sessions Court judge in dismissing a striking out application <sup>7</sup>	Defendant
		Decision of Registrar dismissing an	Plaintiff

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<sup>2</sup> <http://www.lexisnexis.com.my/free/articles/andrewchew.htm>

<sup>3</sup> *Sitrac Corporation Sdn. Bhd. v. Lim Siew Eng* [2002] 4 CLJ 463

<sup>4</sup> *Syarikat Tingan Lumber Sdn. Bhd. v. Takang Timber Sdn. Bhd.* [2003] 2 CLJ 177

<sup>5</sup> *Sin Matu Syipyard Sdn. Bhd. v. Labuan Maritime Services Sdn. Bhd. & Ors* [2006] 7 CLJ 642 (HC)

<sup>6</sup> *Wood View Engineering Sdn. Bhd. v. Lim Chan Kwang* [2006] 5 CLJ 62 (HC)

<sup>7</sup> *Ng Chee Yew Sdn. Bhd. v. Ng Kim Seong* [2005] 1 LNS 266 (HC)

		application for <b>summary judgment</b> <sup>8</sup>	
		Decision of Sessions Court judge in dismissing an application to strike out certain paragraphs of a statement of claim <sup>9</sup>	Defendant
		Decision of Registrar allowing an application to amend an application for summary judgment <sup>10</sup>	Defendant
		Decision of High Court judge striking off an application to set aside an <i>ex-parte</i> interim injunction which had lapsed <sup>11</sup>	Defendant
b.	Non-Appealable (until conclusion of case)	Decision of Registrar to extend time for a bidder to offer a bid at a public auction <sup>12</sup>	Intervener
		Decision of <b>Sessions Court</b> judge in dismissing an application for <b>summary judgment</b> <sup>13</sup>	Plaintiff
		Decision of Registrar dismissing preliminary objections raised in summary judgment proceedings <sup>14</sup>	Defendant
		Decision of Registrar dismissing an application to produce documents <sup>15</sup>	Defendant
		Decision of Registrar dismissing a preliminary objection against a notice of taxation and bill of costs <sup>16</sup>	Defendant
		Decision of Sessions Court judge dismissing an application to strike out the Defendant's defence <sup>17</sup>	Plaintiff
		Decision of Registrar allowing an application to set aside an order granting leave for substituted service <sup>18</sup>	Plaintiff

<sup>8</sup> *Shorga Sdn. Bhd. v. Amanah Raya Bhd* [2004] 1 CLJ 417 (HC), cf. *Syarikat Tingan Lumber Sdn. Bhd. v. Takang Timber Sdn. Bhd.* [2003] 2 CLJ 177 (CA) in relation to whether s. 3 CJA applies in cases of appeals from the decision of a Registrar to the judge.

<sup>9</sup> *Mechunma Sdn. Bhd. v. Lau Tiong Ik Construction Sdn. Bhd.* [2003] 3 CLJ 563 (HC)

<sup>10</sup> *Thong Guan Construction Sdn. Bhd. v. Shencourt Properties Sdn. Bhd.* [2001] 5 CLJ 244 (HC)

<sup>11</sup> *Tycoon Realty v. Senwara Development Sdn. Bhd.* [1999] 3 CLJ 377 (CA)

<sup>12</sup> *Eon Bank Berhad v. BH Steel Sdn. Bhd.; Guan Seng Steel Sdn. Bhd. (Intervener)* [2004] 7 CLJ 422 (HC)

<sup>13</sup> *United Orix Leasing Bhd v. Kilang Papan Agathis Sdn. Bhd. & Ors* [2004] 5 CLJ 423 (HC), *Hong Hock Trading Co. v. Carseng Manufacturing (M) Sdn. Bhd.* [2003] 1 CLJ 325 (HC), *Seabance GE Capital Sdn. Bhd. v. Dynabuilders Sdn. Bhd. & 1 Ors* [2001] 1 LNS 98 (HC)

<sup>14</sup> *OCBC (Bank) Malaysia Berhad v. Stephen Hansford Sales (M) Sdn. Bhd. & Ors & Anor Suit* [2004] 1 CLJ 51 (HC), *Chai Koh Shin v. Lam Guan Chan Pte. Ltd.* [2002] 1 LNS 31 (HC)

<sup>15</sup> *Syarikat Ying Mui v. Yeh Ying Sdn. Bhd. & Anor* [2003] 8 CLJ 741 (HC)

<sup>16</sup> *Re Abu Bakar PC Kuaya; Ex P Navaratnam Sivasambo* [2002] 6 CLJ 381 (HC)

<sup>17</sup> *Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn. Bhd.* [2001] 5 CLJ 194 (HC)

<sup>18</sup> *Teoh Poh Keong Sdn. Bhd. v. Shinhan Engineering & Construction Co Ltd* [2001] 2 CLJ 440 (HC)

		Decision of Magistrate dismissing a preliminary objection prior to the commencement of the trial <sup>19</sup>	Defendant
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### C. BEYOND QUESTIONING THE EFFICACY OF THE 'FILTER'

From the above, it appears that the 'filter' is functioning to regulate the tide of appeals heading towards the appellate courts. And for that reason, it is relatively unsurprising to find remarks such as that made by the learned Gopal Sri Ram, J.

“Now, let me say at once that **it is the usual practice of this court to refuse to entertain appeals against the refusal of summary judgment.**”<sup>20</sup>

Be that as it may, the efficacy of the 'filter' in s. 3 of the CJA may be in question as a consequence of the decisions in the following cases:

- a. *Sitrac Corporation Sdn. Bhd. v. Lim Siew Eng* [2002] 4 CLJ 463 where, in relation to an appeal against the dismissal of a striking out application by a Sessions Court judge, the High Court held that since the decision was made AFTER hearing the application and not DURING the course of hearing of the application, the dismissal is appealable. In essence the 'filter' in s. 3 of the CJA does not apply in relation to a decision made AFTER hearing of a formal application.
- b. *Syarikat Tingan Lumber Sdn. Bhd. v. Takang Timber Sdn. Bhd.* [2003] 2 CLJ 177 where, in relation to an appeal against the decision of a High Court judge upholding a preliminary objection raised against the competency of an appeal from the Registrar's decision precluding admissibility of documents in the course of a hearing for assessment of damages, the Court of Appeal similarly ruled against the competency of the appeal and held that equal weight should be attached to the entire sentence of the amended s. 3 CJA. In essence, the apt question would be to ask whether (1) Was the ruling made in the course of a trial or hearing of any cause or matter?; AND (2) Did the ruling dispose of the final rights of the parties? If EITHER is answered in the negative, the matter is not appealable.

However, in the humble view of the writer, the impact of those 2 cases are relatively mild compared to that of *Tycoon Realty v. Senwara Development Sdn. Bhd.* [1999] 3 CLJ 377 where, in relation to an appeal from a High Court's decision to strike out the Defendant's application to set aside an *ex-parte* interim injunction, the Court of Appeal held that since any appeal from a judgment/order of the High Court to the Court of Appeal is regulated by s. 67 of the Courts of Judicature Act AND the provision does NOT utilize the phrase 'decision', the 'filter' in s. 3 of the CJA DOES NOT apply.

In short, **the 'filter' is 'culled' to the extent that its efficacy is confined ONLY to those provisions, such as s. 28(1) CJA, which grants a right of appeal from a 'decision'.**<sup>21</sup>

### D. CONCLUSION : THE CONSTITUTIONALITY OF THE 'FILTER'

Even so, assuming for one moment that the 'filter' operates without any impediment, locally there may be a further dimension impacting upon any mitigation of the right of appeal.

This is so as the right is not a common law right but one granted by statute.<sup>22</sup> And within the Malaysian context, the principal statutes would be the *Courts of Judicature Act, 1964* and the *Federal Constitution*.

<sup>19</sup> *Tetuan J & S Holdings v. A Karim Hassan & Anor* [2000] 4 CLJ 152 (HC)

<sup>20</sup> *Lee Teng Siong v. Lee Kheng Lian & Ors* [2006] 4 CLJ 443 at 447 paragraphs F-G.

<sup>21</sup> Cf. the decision of the Court of Appeal in *Takang Timber* which came to a diametrically opposite conclusion and held that the phrase 'judgment' or 'order' inherits the definition of 'decision'.

<sup>22</sup> <http://www.lexisnexis.com.my/free/articles/andrewchew.htm>

Indeed, the relevant issues which stem from the *CJA* have already been canvassed above but that emanating from a consideration of the Federal Constitution is another matter particularly in instances where an enthusiastic application of the 'filter' may lead to ONE party possessing a right of appeal but NOT THE OTHER.

The injustice inherent in such an instance was rightly recognized and addressed by Sulong Matjeraie, J in *Sin Matu Syipyard Sdn. Bhd. v. Labuan Maritime Services Sdn. Bhd. & Ors* [2006] 7 CLJ 642 where the learned judge, in the context of an appeal by the Plaintiff against the decision of a Registrar allowing an application to set aside judgment in default, held as follows:

"... by applying the principle of equality as enshrined under art. 8(1) of the Federal Constitution I am of the opinion that **the plaintiff/appellant should NOT be denied the right to appeal.**"

That aside, other provisions in the *Federal Constitution* such as Article 121(1B) and Article 121(2) appear to grant the Court of Appeal and the Federal Court the requisite jurisdiction to deal with appeals *WITHOUT* the limitations imposed by s. 3 of the *CJA*.<sup>23</sup> This proposition seems all the more attractive when considered within the backdrop of s. 4 of the *CJA* which provides that:

"In the event of inconsistency or conflict between this Act and any other written law **other than the Constitution** in force at the commencement of this Act, the provisions of this Act shall prevail."

In essence, if such a right of appeal is already embodied in the Federal Constitution, it is evident that s. 4 allows for a further mitigation of the efficacy of the s. 3 'filter'.

Ultimately, the question of whether such inroads into the efficacy of the 'filter' are a good thing or a bad thing falls to be resolved by asking, as Finley Peter Dunne did and surely in keeping with his reputation as a great humorist, whether:

"An appeal is when you ask one court to show its contempt for another court."<sup>24</sup>

or whether the right of appeal is such a fundamental right that it should not be mitigated either in a temporal sense or otherwise.

Naturally, if the latter option is pursued, then a new 'filter' may have to be formulated to ensure such appeals are truly *bona fide* and not mere stratagems to pervert the course of justice.

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<sup>23</sup> The key phrase being "...jurisdiction to determine appeals from decisions ..." where decision is not defined in the Federal Constitution and is not limited by any exclusionary words.

<sup>24</sup> [http://en.wikipedia.org/wiki/Finley\\_Peter\\_Dunne](http://en.wikipedia.org/wiki/Finley_Peter_Dunne)