



A summary of the Federal Court’s decision in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] MLJU 54* [Federal Court Civil Appeal No. 02(i)-91-10 of 2018 (W)]

*The right to appeal to the Court of Appeal in civil matters under s 67 of the Courts of Judicature Act 1964 (“CJA”) is subject to the definition of ‘decision’ as found in s 3 of the CJA*

#### BACKGROUND FACTS

On 6.2.2014, Asia Pacific Higher Learning Sdn. Bhd., the Appellant/Plaintiff [**“Asia Pacific”**], which owns and operate Lincoln University College, filed a civil suit against Majlis Perubatan Malaysia [**“MPM”**] and Prof. Dato’ Dr. Wan Mohamed Bebakar, the first and second Respondents/Defendants.

Asia Pacific sought against the Respondents, general damages for the torts of negligence, breach of statutory duty and misfeasance in public office in the carrying out of its accreditation survey

and evaluation of the medical degree programmes offered by Asia Pacific.

On the same day, Asia Pacific had also filed a judicial review application against MPM’s decision. Subsequently, in 2016, Asia Pacific filed a civil suit against MPM, the Minister of Health and the Government of Malaysia.

On 13.3.2017, when the trial of the instant action was already heard in midstream in which 6 witnesses out of 8 had already testified at the relevant time, Asia Pacific moved an application to amend its Re-amended Statement of Claim to add the following claims<sup>1</sup>:

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<sup>1</sup> *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Ors and another suit* [2017] MLJU 1038, at paragraph 37

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(a) a claim for additional damages to compensate it for the costs it had incurred in appointing lecturers for the pre-enrolment visit carried out by MPM's evaluation panel in May 2011.

Previously, Asia Pacific claimed RM450,000 for the costs of transporting, boarding and lodging the lecturers who had to be engaged for the pre-enrolment visit in May 2011 as well as their associated professional allowances. In its proposed amendment, it now seeks to reduce this amount to RM399,000, and to recover the costs that it had incurred in engaging such lecturers for three years from 2011, in the amount of RM4,938,000;

(b) a claim for damages in connection with the decision of MPM to cancel the MQA/PA 1561, 1562 and 1049 programmes on 10 October 2013. Having obtained judgment in its favour in the judicial review application, Asia Pacific now seeks to amend its statement of claim in Suit No. 51 to include a prayer for damages.

### HIGH COURT'S DECISION

The High Court disallowed Asia Pacific's amendment application with regard to claim (a) as the learned judge was of the opinion that the explanation proffered that the amendment could only be made after the results of the internal audit report over MQA/PA 0927 local medical programme were obtained does not afford adequate justification for the delay.



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Further, the learned judge observed that the amendment introduces a new head of claim for damages that did not previously exist

As for Asia Pacific’s amendment application with regard to claim (b), the High Court allowed it for the following reasons:

(a) it was a legitimate course of action for Asia Pacific to not seek damages in the judicial review application as the claim of damages was one that was more appropriately pursued in a trial, rather than by way of affidavit evidence<sup>2</sup>;

(b) no actual delay has been caused to the proceedings, for the reason that Asia Pacific has yet to close its case and the Respondents have yet to commence theirs. The Respondents would therefore be able to cross-examine Asia Pacific’s witnesses, through whom the evidence of the damage suffered by Asia Pacific would be tendered.<sup>3</sup>

The Respondents then appealed against the High Court’s decision.

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<sup>2</sup> *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Ors and another suit* [2017] MLJU 1038, at paragraph 52

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<sup>3</sup> *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Ors and another suit* [2017] MLJU 1038, at paragraph 55

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### COURT OF APPEAL'S DECISION

The Court of Appeal allowed the Respondents' appeal on *inter alia* the following grounds<sup>4</sup>:

- (a) the explanation afforded by Asia Pacific to justify the application for the amendment being made at this late stage does not on the facts, for the reasons stated above, amount to a cogent or reasonable explanation;
- (b) the application appears to amount to a tactical manoeuvre;

- (c) the particulars establishing liability which Asia Pacific itself admits from the judicial review application which is *res judicata* is not properly brought in this suit;
- (d) the application has been made at an extremely late date. The reasons given are less than persuasive;
- (e) the quantum of the claim sought to be brought in at this stage gives rise to considerable prejudice to the opposing parties namely it alters the nature of the claim from one character to another;
- (f) the new claim for sizeable special damages amounting to RM579.9m is not particularised;

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<sup>4</sup> *Majlis Perubatan Malaysia & Anor v Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College)* [2019] 1 MLJ 471, at paragraph 68



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(g) such an amendment mid-trial also has the undesirable effect of taking the opposing party very much by surprise;

(h) Asia Pacific is seeking to rectify a mistake or omission namely the failure to claim damages in the judicial review application by amending the claim in this suit to seek damages.

Dissatisfied with the decision, Asia Pacific applied for leave to appeal to the Federal Court. Leave was granted on 2 questions of law.<sup>5</sup>

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<sup>5</sup> *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] MLJU 54*, at paragraph 19

### **FEDERAL COURT’S DECISION**

At the outset, learned counsel for the Appellant raised a preliminary issue as to whether the order made by the High Court on 13.6.2017 in allowing the appellant’s application to amend the Re-amended Statement of Claim is appealable.

Idrus Harun FCJ, in delivering the majority decision, agreed with the position taken by the Court of Appeal in *Datuk Seri Tiong King Sing v. Datuk Seri Ong Tee Keat & Anor [2015] 1 MLJ 847* and the Federal Court in *Kempadang Bersatu Sdn Bhd v Perakayuan OKS No.2 Sdn Bhd [2017] MLJU 2433*.<sup>6</sup>

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<sup>6</sup> *Kempadang Bersatu Sdn Bhd v Perakayuan OKS No.2 Sdn Bhd [2017] MLJU 2433*, at paragraph 44



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His Lordship held that “the scope of a ‘decision’ in section 3 of the [Courts of Judicature Act 1964] is not excluded from subsection 67(1) and that both sections must be read together.”<sup>7</sup>

What this means is that, “... a ‘decision’, ‘judgment’ or ‘order’ excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties.”<sup>8</sup> Such rulings, would therefore not be appealable.

His Lordship went on to decide that “an appeal does not lie against a decision in an amendment application made in the course

of trial.”<sup>9</sup> Therefore, the appeal to the Court of Appeal was incompetent in limine and as such could not have been laid before the Court of Appeal.<sup>10</sup>

Accordingly, Asia Pacific’s appeal was allowed and the Court of Appeal’s decision was set aside.

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<sup>7</sup> *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] MLJU 54*, at paragraph 41

<sup>8</sup> *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] MLJU 54*, at paragraph 31

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<sup>9</sup> *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] MLJU 54*, at paragraph 61

<sup>10</sup> *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] MLJU 54*, at paragraph 66

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