DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN, MALAYSIA

(BAHAGIAN DAGANG)

SAMAN PEMULA NO: WA-24NCC-193-05/2020

Dalam Perkara Seksyen 96(1) dan (3) Akta Pengangkutan Jalanraya 1987;

DAN

Dalam Perkara Seksyen 41 Akta Relif Spesifik 1950;

DAN

Dalam perkara Sijil Polisi No. 0750119TMA067773 yang melindungi motorcar No. WEG 1591 bagi tempoh dari 20.3.2019 jam 11:04:55 pagi hingga 19.3.2020;

DAN

Dalam Perkara kemalangan jalanraya yang dilaporkan berlaku pada 20.3.2019 jam lebih kurang 10.00 pagi di atau berhampiran Simpang Masjid Batu Balai – Cucuh Puteri, Kuala Krai, Kelantan Darul Naim melibatkan m/sikal No. DBL 2506 dan motorcar No. WEG 1591;

DAN

Dalam Perkara Guaman Sivil Mahkamah Sesyen Kota Bharu No. DA-A53KJ-744-11/2019.

ANTARA

TUNE INSURANCE MALAYSIABERHAD
(No. Syarikat: 30686-K) **… PLAINTIF**

DAN

1. **TUAN SOM BINTI TUAN KADIR**
   (No. K/P: 521114-03-5150)

2. **ZURINA BINTI OTHMAN**
   (No. K/P: 750803-02-5284)

3. **MOHD SUHAIRI BIN ALIAS**
   (No. K/P: 900722-03-5701)
   (Seorang kurang upaya dan membawa tindakan ini melalui Ibu yang sah dan sahabat wakil beliau iaitu Pemohon/Pencelah Kedua)

4. **RASMAWATI BINTI YAACOB**
   (No. K/P: 700305-03-5034) **… DEFENDAN-DEFENDAN**

JUDGMENT

[1] The was an application by the Plaintiff via Originating Summons essentially for a declaration in respect of the enforceability of an insurance policy under section 96(3) of the Road Transport Act 1987 ("**RTA**") ("**this Application**").

[2] The 1st and 2nd Defendants in this action did not file any affidavit in respect of this Application and neither have either of them appeared in person or by way of legal representation.

[3] Therefore, the opposition to this Application was only from the 3rd and 4th Defendants.

A] SALIENT BACKGROUND FACTS

[4] A motor vehicle accident had occurred on **20.3.2019** at about **10:00am** near Simpang Masjid Batu Baiai - Cucuh Puteri, Kuala Krai, Kelantan Darul Naim involving a motorcycle bearing registration number DBL 2506 which was ridden by the 3rd Defendant and a motorcar bearing registration number WEG 1591 ("**motorcar**") driven by the 1st Defendant ("**the Accident**").

[5] The 4th Defendant is the mother and the litigation representative of the 3rd Defendant in respect of the 3rd and 4th Defendants' claim against the 1st and 2nd Defendants pertaining to the Accident vide Sessions Court at Kota Bharu Suit No: DA-A53KJ-744-11/2019 ("**the Accident Suit**").

[6] The 2nd Defendant is the owner of the motorcar.

[7] On 20.3.2019 at **10:22pm**, the 1st Defendant lodged a police report stating, inter alia, that the Accident occurred at around **10am** ("**D1's First Police Report**").

[8] On 20.3.2019, upon the application of the 2nd Defendant as owner of the motorcar, the Plaintiff issued an insurance policy no. 0750119TMA067773 ("**Insurance Policy**") for the said motorcar at **11:04:55am**. The time of issuance of this Insurance Policy is stated in the schedule to the Insurance Policy entitled "*Private Car Schedule / Jadual Kenderaan Persendirian*" ("**Cover Note**"). It is stated in the Cover Note that the Insurance Policy covers the period from 20.3.3019 to 19.3.2020.

[9] A search was conducted at Road Transport Department ("**JPJ**") and the JPJ's search result dated **4.4.2019** shows that the motorcar was insured by the Plaintiff from 20.3.2019 to 19.3.2020 ("**JPJ Search**").

[10] On **29.4.2019**, the sister of the 3rd Defendant, Norsuziani binti Alias, lodged a police report stating, inter alia, that she received a telephone call on **20.3.2019** at around **10:30am** from a person unknown to her regarding the Accident involving the 3rd Defendant. She further reported that the 3rd Defendant was hospitalised and was discharged on **26.4.2019** ("**D3's Sister's Police Report**").

[11] The 3rd and 4th Defendants' solicitors subsequently served on the Plaintiff a notice of commencement of proceeding pursuant to section **96(2) RTA** in order to enforce any judgment obtained for the bodily injury sustained in the Accident against the Plaintiff, on the basis that the Plaintiff was the insurer of the motorcar at the time of the Accident ("**the s. 96(2) Notice**").

[12] In **November, 2019**, the 3rd and 4th Defendant filed the Accident Suit.

[13] On **1.6.2020**, the 1st Defendant made a Statutory Declaration ("**D1's Statutory Declaration**"), inter alia, declaring that the motorcar did not have insurance protection and that the motorcar's road tax had expired.

[14] In **22.10.2020** the 1st Defendant lodged a second police report to add to D1's First Police Report, inter alia, that the motorcar did not have insurance protection, the motorcar's road tax had expired and that the 1st Defendant only purchased the Insurance Policy **after** the Accident ("**D1's Second Police Report**").

B] WHETHER THERE WAS AN ENFORCEABLE INSURANCE POLICY AT THE TIME OF THE ACCIDIENT

[15] In challenging this Application, the 3rd and 4th Defendants have raised several issues but the primary and main issue is whether there was in existence an enforceable insurance policy on the motorcar at the time of the Accident.

[16] In my respectful view, this is the determining issue of this Application and it comes in 2 parts:

i) The date and time when the Insurance Policy comes into force;

ii) The applicable legal principles that determines when the Insurance Policy comes into effect and is enforceable.

C] THE DATE AND TIME THE INSURANCE POLICY WAS PURCHASED AND WHEN IT CAME INTO EFFECT

[17] It was argued on behalf of the 3rd and 4th Defendants that this Application cannot be determined by affidavit evidence as there are serious disputes of facts which require viva voce evidence. In connection with this, learned counsel for the 3rd and 4th Defendants' referred to the Court of Appeal case of **Aqmal Dakhirrudin v. Azhar Ahmad & Anor [2019] 1 LNS 492** which in turn referred to the Supreme Court case of **Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217** as follows:

[43] Reference should be made to the Supreme Court case of Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 2 MLJ 212 where the Court held as follows:

> *"(2) The conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidence which, however, was not possible in proceedings begun by originating summons. In any case, it was most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence."*

[18] Whilst the principle laid down in **Ting Ling Kiew** (supra) is clear, nevertheless, it does not detract from the question of whether there are actually disputes as to facts and more so whether they are material.

[19] Alleging there are disputes as to facts does not necessarily mean there are actually such disputes. Therefore, the Court will need to determine whether there is a material factual dispute based on the evidence before the Court and whether viva voce evidence is required.

[20] In **Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303** which pertained to an Order 81 of the Rules of Court 2021 ("**ROC**") application which is substantially the same as an Order 14 ROC application, the Court of Appeal held:

*"In other words, **the issue in dispute must be critically investigated and be determined as genuine**. This is what a defendant needs to prove to be entitled to a trial of that disputed issue."*

(own emphasis added)

[21] Similarly, in **Bank Negara Malaysia v. Mohd. Ismail Ali Johor & Ors [1992] MLRA 190** Supreme Court explained the term "triable issue" as follows:

"Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other ***on affidavit****. Where such assertion, denial or dispute is equivocal, or* ***lacking in precision*** *or is* ***inconsistent with undisputed contemporary documents*** *or other statements by the same deponent or is inherently improbable in itself, then* ***the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable****. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue"*

(own emphasis added)

[22] Amongst the arguments raised by learned counsel for the 3rd and 4th Defendants, Mr G.K. Ganesan, regarding alleged disputes of facts are as follows:

i) The terms of the Insurance Policy was not placed before the Court and the timing of the risk can only explained in the policy.

ii) The Road Transport Department's "Maklumat Insurans Kenderaan" (exhibit "JS-4" in the Plaintiff Affidavit in Support) ("**JPJ Search**") is not clear on the "*Tarikh Luput*", that is the status of the motorcar's insurance coverage between "7.1.2019" to "19.3.2020".

iii) As the 1st Defendant only lodged D1's First Police Report at 10:22pm, could it mean that the Accident occurred at night and that the 1st Defendant actually meant 10**pm** and not **am**.

iv) D1's Statutory Declaration was not placed in the Plaintiff's Affidavit in Support affirmed on 15.5.2020 and was only introduced in the Plaintiff's Affidavit In Reply dated 21.10.2020.

v) The statement, "*kenderaan milik saya*" by the 1st Defendant in D1's Statutory Declaration is inconsistent with the JPJ Search which shows that the 2nd Defendant is the owner of the motorcar.

vi) D1's Statutory Declaration contains 2 declarations: i) that there was no valid insurance or road tax at the time of the Accident; and ii) that she was "advised" by the police to renew these documents after the Accident. The 1st Defendant alleged that the police advised her to get the road tax and insurance policy renewed "after the accident". She lodged the police report at 10.22pm. How could she have been advised by the police to renew the insurance policy if the policy was already issued in the morning and she met the with police in the night of the date of the Accident.

vii) The information on the time and date of the issuance of the policy was available to the Plaintiff when they received the s. 96(2) Notice. What made the Plaintiff wait till mid 2020 to apply for the declaration? The veracity of the Plaintiff's documents ought to be tested along with the 1st Defendant altered version during trial at the Sessions Court. That this Court may dismiss the application and allow the issue to be determined at the trial court.

[23] With all due respect, I am of the considered view that the above arguments raised on behalf of the 3rd and 4th Defendants are a mix of speculation and conjecture. These issues can be explained by reviewing the totality of the evidence before the Court and looking at it as a whole.

The Cover Note

[24] The Cover Note contains the necessary information for the purpose of this Application namely the **date** and **time** the Insurance Policy was issued, being the main issue of contention. The Cover Note is further supported by the Confirmation of Purchase of Insurance to show when the Insurance Policy was purchased and payment details. The legal arguments pertaining to when exactly the Insurance Policy came into effect will be dealt with below in the next section of this judgment regarding the JPJ Search.

[25] The date and time stated in both the Cover Note and the Confirmation of Purchase of Insurance is **20.3.2019** and **11:04:55am**.

The JPJ Search

[26] There is no ambiguity in the JPJ Search which is a standard format used by the JPJ and it covers, inter alia, the current insurance information on a vehicle and its insurance history. In this regard the JPJ Search clearly states the dates the respective insurance policies took effect or "*Tarikh Mula*" and when it ends or "*Tarikh Luput*". In this case the motorcar was last insured from **8.1.2018 to 7.1.2019** by the insurance company, The Pacific Insurance Berhad. Thereafter, there is **no** insurance coverage stated in the JPJ Search from **8.1.2019 to 19.3.2019**. It is also pertinent to note that the 2nd Defendant did **not** maintain a continuous insurance coverage over the motorcar and there were several gaps between the time a particular insurance policy on the motorcar lapsed and when a new insurance policy or a renewal policy took effect. This can be seen from the motorcar's insurance history from the JPJ Search below:

MAKLUMAT INSURANS

Syarikat Insurans 1	***TUNE INSURANCE MALAYSIA BERHAD***	*Polisi*	***0750119TMA067773***
Tarikh Mula	***20/3/2019***	*Tarikh Luput*	***19/03/2020***
Syarikat Insurans 1		*Polisi*	
Tarikh Mula		*Tarikh Luput*	

MAKLUMAT SEJARAH INSURANS

No	*Syarikat Insuran*	*Polisi*	*Tarikh Mula*	*Tarikh Luput*
1	*THE PACIFIC INSURANCE BHD*	*V5101471*	***08/01/2018***	*07/01/2019*
2	*UNI ASIA GENERAL INSURANCE*	*PMMA-613027*	***03/10/2016***	***02/10/2017***
3	*ETIQA*	*K6005746*	***24/06/2015***	***23/06/2016***
4	*MALAYSIAN MOTOR INSURANCE POOL*	*21320139225548*	*28/12/2013*	***27/12/2014***
5	*ALLIANZ GENERAL INSURANCE*	*AEKB0118526*	*28/12/2012*	*27/12/2013*

(own emphasis added)

[27] It was further argued for the 3rd and 4th Defendants' that the Insurance Policy which period of insurance was from 20.3.2019 to 19.3.2020 starts from **12am on 20.3.2019** or in other words the Insurance Policy ought to cover the entire day on 20.3.2019 based on the following:

i) the JPJ Search states "*Tarikh Mula*" as 20.3.2019 which must mean the Insurance Policy covers the whole day on 20.3.2019. There is no *time* when the Insurance Policy commences in the JPJ Search.

ii) the JPJ Search states "*Tarikh Luput*" as 19.3.2019 and again there is no *time* stated on when the Insurance Policy would expired. Therefore, as there is 24 hours in a day the Insurance Policy must cover the entire day on 20.3.2019 and end at midnight on 19.3.2020.

[28] In response to this argument, learned counsel for the Plaintiff, Mr Satvinder Singh Gill, relied on **Section 84 of the Financial Services Act 2013** ("**FSA**") which provides as follows:

> *"(1)* ***No licensed insurer shall assume any risk*** *in respect of such description of policy as may be prescribed by the Bank* ***unless and until the premium payable is received*** *by the licensed insurer in* ***such manner*** *and* ***within such time*** *as may be prescribed by the Bank."*
>
> (own emphasis added)

[29] It was further submitted on behalf of the Plaintiff that the Confirmation of Purchase of Insurance clearly shows that the policy was **purchased** and issued at 11:04:55 a.m. on 20.3.2019. Therefore, in law the Plaintiff can only assume risk under the Insurance Policy from 11:04:55 a.m. on 20.3.2019 after it was purchased and the premium paid.

[30] In addition to this, the 1st Defendant in D1's Statutory Declaration confirmed that the Insurance Policy was purchased after the Accident.

[31] Learned counsel for the Plaintiff then cited the Federal Court case of **Pacific & Orient Insurance Co Bhd v. Hameed Jagubar bin Syed Ahmad [2018] 12 MLJ 1** where it was held as follows:

> *"****[29]*** *Insurance is a contract based upon speculation (per Lord Mansfield in* Carter v Boehm *[1558-1774] All ER Rep 18; (1766) 3 Burr 1905). Like any contract, an insurance contract requires the elements of offer, acceptance and consideration (see* Halsburys Laws of Malaysia *Vol 20, 2006 Reissue).* ***Under the contract, the insurer assumes his obligation to the insured in return for a money consideration, called the premium*** *(per Gibbs J in* R v Cohen; Ex parte Motor Accidents Insurance Board *(1979) 141 CLR577; 53 ALJR719; 27ALR 263. We find that this principle is reflected in* ***s 141 of Act 553*** *which* ***specifically prohibits assumption of risk unless premium is paid****."*

.....

*"**[40]** Adopting the approach taken by the Supreme Court of India, we find that the policy under consideration in this appeal where the **date and time** of issue are **mentioned** in the **cover note** is a 'special contract'.*

***[41]** Reverting to the questions posed, our answer to the first question is that **an insurance policy will take effect from the time of issuance of cover**."*

(own emphasis added)

[32] The case of **Hameed Jagubar** (supra) was based on **Section 141 of the Insurance Act 1996** (**Act 553**) which has been repealed by the FSA. Nevertheless, section 141 of Act 553 is in *pari materia* with section 84 FSA. Section 141 of Act 553 states as follows:

*"(1) **No licensed general insurer shall assume any risk** in respect of such description of general policy as may be prescribed **unless and until the premium payable is received by the licensed general insurer** in **such manner** and **within such time** as may be prescribed."*

(own emphasis added)

[33] Therefore, the Insurance Policy would rightfully commence from the date the Insurance Policy was purchased which date and time is the same as its issuance that is on 20.3.2019 at 11:04:55 a.m.

[34] The JPJ Search does not state the time which the Insurance Policy takes effect, only its date. The JPJ Search is **not** by itself conclusive evidence to determine when the Insurance Policy takes effect and should be read together with other documents such as the Cover Note. This is because, amongst other reasons, an insurance policy may cease to take effect due to it being cancelled by the insurer prior to its expiry and the JPJ Search may not capture or be updated to include these information.

[35] In this regard it was held in **Selvaraju a/l Velasamy & Anor v Abdullah All Kutty & Ors [2009] 8 MLJ 267** as follows:

*"It is also pertinent to note that notwithstanding that a JPJ search may contain the particulars of an insurance policy, the **insurance policy** in question may at any time be **cancelled or avoided by the insurer**."*

(own emphasis added)

[36] I further note that in **Hameed Jagubar** (supra) the Federal Court was very clear in its reference to the insurance policy's **cover note** to ascertain the date and time of issuance of the policy. Therefore, I find that the Cover Note is sufficient to show the date and time the Insurance Policy takes effect which is further supported by the Confirmation of Purchase of Insurance. Thus, it is not necessary for the entire Insurance Policy to be exhibited as argued by learned counsel for the 3rd and 4th Defendants.

D1's First Police Report

[37] There is also no ambiguity in D1's First Police Report where she stated that the Accident occurred at around **10am**. The words, "*lebih kurang*" means the time is an approximate, give or take few minutes. That is the plain and ordinary meaning of the words and should not be construed to mean 11am since that is not what is says and is a difference of an hour.

D3's Sister's Police Report

[38] D1's First Police Report is further corroborated by D3's Sister's Police Report where she stated that she received a telephone call at around **10:30am**. Again, the words, "*lebih kurang*" was used and means approximate. It is ironic that the 3rd and 4th Defendants are trying to

raise doubt on D3's Sister's Police Report since as the 3rd Defendant's own sister she could have easily affirmed and filed an affidavit in this Application to clarify her statement if there was any ambiguity in it or if it required explanation. As she did not do so, there is no reason not to accept her statement in D3's Sister's Police Report as accurate.

[39] The fact that the 3rd Defendant's sister received a call at about **10:30am** regarding the accident corroborates D1's First Police Report that the accident in fact occurred at around **10am**.

[40] At this juncture it must be highlighted that the D1's First Police Report and D3's Sister's Police Report are in fact police reports regarding the Accident for which investigation would have been carried out by the police. Further, it is a criminal offence for either of these persons to make false police reports (**Allianz General Insurance Company (M) Bhd v. Mohd Fazdli bin Mohd Salleh & Ors [2018] MLJU 900**).

D1's Statutory Declaration

[41] The main contents of D1's Statutory Declaration are as follows:

"Saya Tuan Som Binti Tuan Kadir, No K/P 521114-03-5150 yang beralamatdi 1449, Kampung Kenor, 18000, uala Krai dengan sesungguhnya berikrar bahawa kenyataan yang diberi dibawah adalah ***benar dan tiada paksaan*** *daripada mana mana pihak.*

i) Pada 20/03/2019, jam lebih kurang 9.30 pagi, ***saya telah memandu*** *motorkar nombor pendaftaran WEG 1591 dari rumah saya beralamat seperti atas dan menuju ke Kampung Batu Balai atas urusan pembayaran Amanah Ikhtiar sesi kedua yang bermula jam 10 pagi.*

ii) Semasa sampai di simpang Masjid Batu Balai, saya telah membelok ke kanan untuk masuk ke simpang masjid dan ketika itu, sebuah motorsikal yang datang dari arah bertentangan bernombor DBL 2506 ditunggang oleh seorang lelaki telah merempuh kenderaan saya di sebeiah kiri.

iii) ***Pada masa tersebut, kenderaan milik saya itu tidak mempunyai perlindungan insurans dan cukai jalan yang tamat tempoh****.*

iv) ***Setelah kemalangan*** *tersebut berlaku, saya dinasihati oleh pihak polis untuk memperbaharui perlindungan insurans dan cukai jalan.*

v) Disini ingin saya tegaskan bahawa ***semasa kemalangan*** *itu, kenderaan* ***milik saya*** *bernombor WEG 1591 jenis Perodua Kancil* ***tidak mempunyai sebarang perlindungan insurans dan cukai jalan yang telah tamat tempoh****.*

Saya membuat surat akuan berkanun ini dengan kepercayaan bahawa apa-apa yang terkandung didalamnya adalah benar, serta menurut Akta Akuan Berkanun 1960."

(own emphasis added)

[42] Before dealing with the alleged discrepancies raised by the 3rd and 4th Defendants regarding D1's Statutory Declaration, it is useful to also refer to **D1's Second Police Report** which states:

"BERKAIT TRAFIK KUALA KRAI REPOT NO: 289/19

PADA 20/03/20 JAM LEBIH KURANG 10.00 HRS, SAYA MERUJUK KEPADA LAPORAN POLIS SAYA IAITU TRAFIK .. KUALA KRAI N0:000289/19 DAN INGIN MEMBUAT PENAMBAHAN RPEOT DENGAN MENYATAKAN BAHAWA PADA 20/03/2019 ***SEMASA KEMALANGAN*** *DENGAN M/SIKAL PENDAFTARAN NO: (DBL 2506) DENGAN M/KAR PENDAFTARAN NO: (WEG 1591)* ***TIDAK MEMPUNYAI SEBARANG PERLINDUNGAN INSURAN DAN CUKAI JALAN JUGA TELAH TAMAT TEMPOH****.* ***SAYA HANYA MEMBELI PERLINDUNGAN INSURAN BAGI M/KAR NO. PENDAFTARAN NO: (WEG 1591) SELEPAS KEJADIAN KEMALANGAN TERSEBUT****.*

SAYA DATANG KE BALAI BUAT LAPORAN MAHU RUJUK PIHAK INSURAN. SEKIAN LAPORAN SAYA."

(own emphasis added)

[43] There seems to be some confusion in the D1's Statutory Declaration in the use of the words, "*kenderaan milik saya*" whereas the 2nd Defendant is the owner of the motorcar based on the JPJ Search which states the 2nd Defendant as the owner.

[44] It is entirely possible that this was a typographical error and a confusion in the 1st Defendant's refence to her being the driver of the motorcar and its owner. It is not uncommon for a driver of a vehicle to mistakenly refer to himself/herself as the owner of the vehicle simply because he/she is in control of the car as its driver. Notwithstanding this and in any event, the statement does not detract from the more important point and that is the 1st Defendant's unequivocal and consistent statements in D1's Statutory Declaration and D1's Second Police Report that the motorcar was not insured at the time of the Accident and that the road tax had expired. Further, in D1's Second Police Report, she also stated that the Insurance Policy was purchased **after** the Accident.

[45] These statements make it clear that the motorcar was not insured at the time of the Accident in that Insurance Policy was purchased after the Accident.

[46] The argument regarding paragraph (iv) of D1's Statutory Declaration that was raised by learned counsel for the 3rd and 4th Defendants does not change the fact that the Insurance Policy was purchased after the Accident and that the motorcar was not insured at the time of the Accident.

[47] When exactly the 1st Defendant received the "advice" from the police to renew the insurance and road tax is not material for the purpose of determining whether the Insurance Policy was in force and enforceable at the time of the Accident. In any event the 1st Defendant did not state when exactly she received the said "advice" and therefore anything suggested beyond her actual statement is conjecture.

[48] In order to determine the veracity of the statements made in D1's First and Second Police Reports and D1's Statutory Declaration that the motorcar was not insured at the time of the Accident and that the Insurance Policy was purchased after the Accident, the effect of those statement in themselves must be considered.

[49] By making these statements the 1st and 2nd Defendants would have **lost** their right to be protected by the Insurance Policy in respect of the Accident. If liability is established against the 1st and/or 2nd Defendants in the Accident Suit, they will not be covered by the Insurance Policy and have thus exposed themselves to liability.

[50] It does not stand to reason why the 1st and 2nd Defendants would want to do this as it would be in their interest and benefit to be indemnified for the Accident if they are found liable.

[51] On the other hand, if indeed the Insurance Policy was purchased **prior** to the Accident then there is **no** reason why the 1st and 2nd Defendants would want to deliberately deprive themselves of the benefit of the Insurance Policy.

[52] Therefore, the reasonable conclusion that can be arrived at is that the 1st and 2nd Defendants are being truthful.

[53] Another issue that must be emphasised is that the 1st and 2nd Defendants have not opposed this Application despite being served with the cause papers. Their stand in this Application is crucial.

[54] The 2nd Defendant, especially, being the owner of the motorcar and the person insured under the Insurance Policy is not challenging this Application.

[55] The 1st Defendant as the person who lodged D1's First and Second Police Reports and the maker of D1's Statutory Declaration has not come forward to oppose or otherwise provide a different position than the Plaintiff's version of the facts based on, inter alia, the documents exhibited in the Plaintiff's Affidavits filed in this Application.

[56] It is thus an uphill task for the 3rd and 4th Defendant who is **not** privy to the contract of insurance and the dealings between the 2nd Defendant and the Plaintiff to challenge the Plaintiff's version when the 1st and 2nd Defendants themselves have not.

[57] In this regard a case directly on point is **Allianz General Insurance Company (M) Bhd v. Vijindran a/l Kalaichelvan & Ors [2017] MLJU 2177**, a case which is similar to the present case where the owner and driver of the vehicle also being the 1st and 2nd defendants there did not challenge a similar application under section 96(3) RTA in which their police reports and statutory declaration were used in the said application, the High Court held as follows:

*"**[14]** The Plaintiff had filed the requisite affidavit of service of the cause papers pertaining to the instant application to the First and Second Defendants. **Neither has responded to the application by the Plaintiff for the declaration**. At the hearing, the counsel for the Plaintiff again confirmed that*

the First and Second Defendants had also been informed of the hearing date. ***Clearly, they chose not to attend Court to contest the application. They must be taken to admit of the averments of the Plaintiff as supported by the documents signed by the First Defendant****."*

……

*"****[24]*** *As such, it is quite clear that when the issue is simply one of whether the motor vehicle subject to the insurance policy and an affidavit with the requisite substantiation denying the collision and alleging breach of the duty of utmost good faith is* ***unrebutted by the insured or his agent****,* ***the case for the insurer for a declaration to avoid the insurance coverage is nothing less than compelling. In that context, the affidavits by the Fourth Defendant, denying the contents of the statutory declaration of the First Defendant on the Accident is less of an issue in the instant application*** *and* ***should not in any substantive manner be taken to render the unchallenged affidavit exhibiting the statutory declaration of the Second Defendant less than reliable****."*

……

[27] *As such, I agree that the cases cited by the Plaintiff on this point are of real support. Thus in* Pacific & Orient Insurance Co Bhd v Vigneswaran a/l Rajarethinam & 2 Ors [2013] 2 AMCR 736, *concerning facts not so dissimilar to the present case, it was stated by the High Court that:-*

> *"A contract of insurance is between an Insured and his insurer.* ***Now the insured is telling the insurer categorically that I'm NOT involved in this accident. It is a scam! Why the insurers should not act on his statement and avoid the policy?***

……

*"****[33] Section 96(3) of the RTA*** *plainly* ***confers on the third party like the Third and Fourth Defendants herein*** *such right to contest the declaration despite the* ***patent absence of any contractual relationship*** *between the Plaintiff as the Insurer and the Third/Fourth Defendant as the third party."*

……

*"**[35]** But in the circumstances of the case **where the affidavit evidence of a patent breach by the Second Defendant is unrebutted,** it is difficult to see in what manner the Third or Fourth Defendants, even if it is assumed that she was a genuine claimant, could succeed in his claim for indemnity against the Plaintiff."*

……

*"**[37]** These third parties, like the Third/Fourth Defendants herein, **not vested with the requisite contractual nexus**, are therefore bereft of any basis in law to oppose the insurer's action, like the Plaintiff herein, for a declaration to avoid liability and cancel the Policy following the breaches entitling repudiation of the same. This is also true **in the instant proceedings since it is in the nature of a clear cut case as suggested in Chu Chu, where the affidavit of the Plaintiff is not denied by the insured.** Without more, and sans other material issues of dispute and controversy, the defence of the Third and Fourth Defendants is insufficient to deny the application for declaration under Section 96 of the RTA. **This is not a proper case to be ordered to be heard together or after the Writ Action. The Plaintiff's case, I reiterate, is unchallenged."***

[38]** Neither can this action by the Plaintiff be construed as being premature in that the **Writ Action** should be heard first to determine whether the First/Second Defendants are indeed liable for the alleged Accident. This is because **the law is settled that in the scheme of Section 96 of the RTA, any such declaration to avoid a policy based on the language of Section 96(3) must be obtained prior to any judgment is declared against the insured in the liability proceedings."

(own emphasis added)

[58] Similarly, in **Mohd Fazdli** (supra), the High Court held as follows:

*"**[25]** It is common in other similar proceedings that the insured filed no affidavits but had earlier furnished statutory declarations to support the application by the insurer seeking a declaration to avoid the insurance policy. Similarly in this case, the First and Second Defendants had no further*

discernible interest or benefit in getting involved in this proceedings. ***Both confirmed in their respective statutory declaration and police reports of the non-involvement of the Vehicle in the Accident. There was nothing for the insurers, the Plaintiff herein to indemnify.***

[26] *The* ***statutory declaration*** *by the First Defendant,* ***I must emphasise, was affirmed pursuant to the Statutory Declaration Act 1960. It is clear under Section 199 of the Penal Code that any false statement made in this declaration, just like false averments in affidavits, is a criminal offence.*** *And there is in any event no suggestion by the Third Defendant that the declaration is not genuine or authentic."*

(own emphasis added)

[59] Therefore, I find that there is no dispute as to material facts which facts are consistent with contemporaneous documents. Looking at the totality of the evidence I am satisfied factually that:

i) The Accident occurred on 20.3.2019 at around **10am**;

ii) The Insurance Policy was purchased and issued on is 20.3.2019 at **11:04:55am <u>after</u>** the Accident had occurred.

[60] Hence, this Application is a clear-cut case that can be decided by way of affidavit evidence (**Vijindran** (supra)).

[61] On the issue of whether there is a delay by the Plaintiff in making this Application, the position of the law is clear that the Plaintiff is entitled to make this Application **before** judgment is entered pursuant to section 96(3) RTA. In **Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821** the Court of Appeal held as follows:

*"**[69]** Having perused all the cases, it is my considered view that the words that I referred to earlier must mean that **the respondent is entitled to obtain a declaration from court that its policy was void and/or unenforceable before judgment was entered against the respondent which in our view is when liability will be incurred by the respondent.** If s. 96(1) of the said Act is looked at, particularly the words "judgment in respect of any such liability ; as is required to be covered by a policy under para. 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy" supports that proposition. In our present case the learned judge followed Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd (Shah Alam High Court OS 24-2979-12-2011) and the judgment of the Ladyship Hadhariah J whose reasoning I agree. ....."*

.....

[72] The liability of the defendant (insured) only arises when judgment is obtained against tire defendant (insured). *The case cited s. 80(1) of the Road Traffic Ordinance which is similar in terms to the said Act. How can it be said that liability arises immediately upon issuance of a policy when the purpose of the same was to cover a third party claim against the defendant (insured) when and only when judgment is entered against the defendant (insured).* ***So it follows as alluded to in the cases cited, that obtaining of the judgment is a condition precedent to liability and therefore the words should be interpreted to read that the respondent was entitled to make the application to declare the insurance policy void and unenforceable before judgment was entered against the defendant (insured)****.*

(own emphasis added)

[62] I would further add that the usual industry practice is for the insurer or the insurance company to act initially to almost automatically defend the insured and itself whilst it appoints its adjusters to investigate the accident. This is also to prevent any judgment in default from being entered (**AmGeneral Insurance Bhd v. Iskandar Mohd Null [2016] 2 CLJ 1** (COA)). It is also not uncommon for the insurer to appoint solicitors to defend the insured in this initial stages.

[63] This does not necessarily mean that the insurer has agreed to indemnify the insured. Bearing in mind that the insurer only comes into the picture after the accident has occurred when it receives the section 96(2) RTA notice from the third party or notice is given or a claim is submitted by the insured. The insurer will then need to conduct its own investigation into the accident and wait for its adjustor's findings or report.

[64] Therefore, there is no delay in making of this Application by the Plaintiff nor was there any admission by the Plaintiff to indemnify the insured by virtue of it appointing solicitors to defend the Accident Suit.

D] OTHER LEGAL ARGUMENTS RAISED ON BEHALF OF THE 3RD AND 4TH DEFENDANTS

[65] There are 2 other main legal arguments raised on behalf of the 3rd and 4th Defendants' and they can be summarised as follows:

i) An insurer does not retain an automatic right to a declaration by relying in misrepresentation. In order to succeed in a section 96(3) RTA application, an insurer who **relies** on breach of *uberrimae fidei* duty or misrepresentation by the insured, must first comply with Schedule 9 of the Financial Services Act 2013 ("**FSA**"). The Plaintiff did not comply with Schedule 9 FSA;

ii) This Application for declaration deprives the 3rd and 4th Defendants' constitutional right under Article 8 of the Federal Constitution to be treated equally under the law.

[66] Both the above issues will be dealt with individually below is separate sections of this judgment.

E] MISREPRESENTATION, *UBERRIMAE FIDEI* AND THE BURDEN IMPOSED BY THE FINANCIAL SERVICES ACT 2013 READ TOGETHER WITH THE ROAD TRAFFIC ACT 1987

[67] First and foremost, the Plaintiff is **not** relying on misrepresentation or the breach of the principle of *uberrimae fidei* in this Application.

[68] However, learned counsel for the 3rd and 4th Defendants argued that the issue of the breach of the principle of *uberrimae fide* was raised in paragraph 12 of the Plaintiff's Affidavit in Support and in the Plaintiff's solicitors' letter dated 8.5.2020 exhibited in Exhibit "JS-4" of the Plaintiff's Affidavit In Support.

[69] Since the Plaintiff has taken the position that it is not relying on the issue of breach of the principle of *uberrimae fidei*, this becomes a **non-issue** and nothing more needs to be said on the matter.

[70] Nevertheless, for the purpose of completeness, it ought to be made clear why the Plaintiff had initially raised this issue of breach of the principle of *uberrimae fidei* in the Plaintiff's Affidavit In Support and in the Plaintiff's solicitors' letter dated 8.5.2020.

[71] Learned counsel for the Plaintiff highlighted to the Court the following chronology which would in itself explain the reason the issue was initially raised but then subsequently dropped by the Plaintiff:

i) The Plaintiff's solicitors' letter dated **8.5.2020** was issued after the Plaintiff received the s.96(2) Notice.

ii) The Plaintiff's Affidavit In Support was then affirmed on **15.5.2020**.

iii) D1's Statutory Declaration was made on **1.6.2020**.

iv) D1's Second Police Report was lodged on **22.10.2020**.

v) The 1st and 2nd Defendants did not oppose this Application after it was filed and served on them.

[72] While the Plaintiff was certain as early as 8.5.2020 that the Insurance Policy was purchased and issued after the Accident, the Plaintiff could not have known how the 1st and 2nd Defendants were going to react when this Application was filed.

[73] It was only later **after** this Application was filed did the 1st and 2nd Defendants **admit** to the fact that the Insurance Policy was purchased after the Accident via D1's Statutory Declaration and D1's Second Police Report.

[74] Having made this admission there was no longer an issue of breach of the principle of *uberrimae fidei* or misrepresentation by the 2nd and/or 1st Defendant. Hence, this is a non-issue.

[75] Learned counsel for the 3rd and 4th Defendants then cited section 96(2) RTA and argued that based on this section an insurer may avoid making payment under an insurance contract in **three** limited circumstances.

[76] However, there is a fourth circumstance in which an insurer may avoid making payment and that is under section 96(3) RTA.

[77] **Sections 96(1), (2) and (3) RTA** provides as follows:

> *(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer* ***may be entitled to avoid or cancel, or may have avoided or cancelled the policy****, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.*
>
> *(2)* ***No sum shall be payable*** *by an insurer* ***under subsection (1)****-*
>
> (a) *in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;*
> (b) *in respect of any judgement, so long as execution thereon is stayed pending an appeal; or*
> (c) *in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy* ***was cancelled*** *by mutual consent* ***or*** ***by virtue of any provision contained therein*** *and either-*
>
> (i) *before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;*
> (ii) *after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the*

person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) *either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.*

(3) ***No sum shall be payable*** *by an insurer* ***under subsection (1)*** *if before the date the liability was incurred, the insurer had* ***obtained a declaration from a court that the insurance was void or unenforceable****:*

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(own emphasis added)

[78] The requirements under section 96(2) and 96(3) RTA are summarised in the case of **Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen [2015] 4 CLJ 54** by the Court of Appeal held as follows:

*"**[39]** The appellant as **the insurer would only be able to avoid the payment obligation** under the **circumstances and conditions** mentioned in **sub-s 2 and 3 of s 96 of the RTA 1987**, that is to say, where the requisite **notice of the proceedings was not given** to the insurer before the commencement of the proceedings; where **there is a stay of the judgment pending appeal**; **where the policy of insurance respecting the liability had been cancelled**; and where **the insurer had obtained a declaration from the court that the insurance was void or unenforceable**."*

(own emphasis added)

[79] It was further argued by counsel for the 3rd and 4th Defendants that there is only a single and watertight ground to not pay the judgment sum, that is where the insurance policy was cancelled by mutual consent before the accident but where the accident has already occurred the avenues for the insurer to avoid liability cannot be significantly greater. If so, this would defeat the RTA's policy, statutory duty and the intention of parliament.

[80] With respect, I am unable to accept learned counsel for the Plaintiff's above argument for the following reasons:

i) Sections 96(2) and 96(3) RTA provide for **separate and distinct** grounds for an insurer to avoid making payment under the insurance contract or policy.

ii) Section 96(2) RTA refers to where "*the policy **was cancelled** by mutual consent or by virtue of any provision contained therein and either"* one of the circumstances stated in sub-paragraphs (i) to (iii) of section 96(2) RTA. What is clear is that this section refers to a cancellation of the policy whereas sec 96(3) RTA deals with the insurer's right to obtain a declaration from the Court "*that the insurance was **void or unenforceable***".

iii) Therefore, there is no issue that section 96(3) RTA cannot provide greater avenue than section 96(2) RTA for the insurer to avoid payment under the insurance policy as they are simply different grounds and it is not about the equality of these two provisions.

[81] The next issue raised on behalf of the 3rd and 4th Defendants is regarding Schedule 9 FSA which provides as follows:

"(3) For the purposes of obtaining a declaration under subsection 96(3) of the Road Transport Act 1987 [Act 333], ***this Schedule shall apply*** *to determine if a consumer insurance contract which provides cover for third party risks may be* ***avoided*** *by a licensed insurer* ***for misrepresentation***."

(own emphasis added)

[82] Learned counsel for the 3rd and 4th Defendants submitted at length on this provision and the reason why the full terms of the Insurance Policy must be placed before the Court. Reference was also made to the case of **Balamoney Asoriah v. MMIP Services Sdn Bhd [2020] 1 CLJ 476**.

[83] However, again, with all due respect to learned counsel for the 3rd and 4th Defendants, the simple fact is that the Plaintiff is **not** relying on misrepresentation or the breach of the principle of *uberrimae fidei*.

[84] Further, I accept the distinction made by learned counsel for the Plaintiff in respect of the **Balamoney** (supra) case that there at the time of accident the policy in question was operative and the insurer then discovered that the owner of the motor van one Selvamani had passed away **prior** to the renewal of the policy. As such, the insurer sought a declaration that the policy was null and void by reason of a fundamental breach of the principle of *uberrimae fidei* or duty of utmost good faith. The provisions of Section 129 and Schedule 9 FSA were considered in **Balamoney** (supra) but they are not relevant in the present case.

[85] As I have earlier stated and decided the documents exhibited in the affidavits before the Court in this Application are sufficient to determine the date and time the Insurance Policy was purchased and issued, namely, the Cover Note (**Hameed Jagubar** (supra)) and the Confirmation of Purchase of Insurance (see also **Liberty Insurance Bhd v. Marrison ak Sidai & Anor [2019] 12 MLJ 763)**.

[86] Further, D1's Statutory Declaration and D1's Second Police Report clearly show that the Insurance Policy was purchased after the Accident.

[87] Based on section 84 FSA and the case of **Hameed Jagubar** (supra) the Insurance Policy takes effect from the date and time the Insurance Policy was purchased and issued. The Insurance Policy does **not** take effect **retrospectively (Marrison** (supra)).

[88] The date of issuance of an insurance policy is of crucial importance and it is why the time right to the second is usually mentioned in the cover note. This is the intended date and time the Insurance Policy is to take effect.

[89] It is simply illogical for the Plaintiff to agree to insure the motorcar retrospectively to cover the Accident when such a disclosure would have been material in making its decision to insure. In this regard **paragraphs 5(1), (2) and (8) of Schedule 9 FSA** states as follows:

"(1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.

*(2) It is the duty of the **consumer** to take reasonable care **not to make a misrepresentation** to the licensed insurer when answering any questions under subparagraph (1)."*

……

*"Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that **he knows to be relevant to the decision of the insurer on whether to accept the risk or not** and the rates and terms to be applied.*

(own emphasis added)

[90] Arising from the above provisions the question then arises as to whether paragraph 5(8) of Schedule 9 FSA would apply where no specific questions were asked by the insurer under paragraphs 5(1). A case on point is **AmGeneral Insurance Berhad (44191-P) v. Shahrul Aziman bin Abd Aziz & Anor [2019] MLJU 671** where the insurance policy was purchased after the accident and in allowing the insurer's application under section 96(3) RTA the High Court held as follows:

*"**[32]** What if the licensed insurer does not ask the proposer any question and the coverage is provided in silence? Then it is clearly spelt out in sub-paragraph (5) of the said Schedule that if the "licensed insurer does not make a request in accordance with subparagraph (1) and (3)" of the said Schedule then the need to disclose "has been waived by the insurer". **However, it is provided in subparagraph 8 that "Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied."** This provision seems to contradict the provision in subparagraph 5. Subparagraph 5 seems to indicate that a proposer's duty only extends to the answering of specific questions posed to him by the insurer whereas subparagraph 8 seems to indicate that his duty of disclosure extends beyond that of simply answering the specific questions posed to him. **The way I would reconcile the 2 provisions is to construe the position to be such that when a specific question is not posed to the proposer by the insurer and the proposer keeps silent, then the matter shall be deemed to be waived by the insurer unless the proposer knew for a fact that the matter is relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied**.*

……

*"**[34]** Since the insurance policy issued to the 1st Defendant in this case specifically referred to Schedule 9 paragraph 5 which relates to the 'pre-contractual duty of disclosure for consumer insurance contracts' it can be deemed that the insurance policy issued to the 1st Defendant was a consumer insurance policy. Since there was no evidence before the Court that the 1st*

Defendant had been asked any question regarding whether he was involved in an accident prior to the application for insurance, I agree with the 2nd Defendant that the 1st Defendant did not breach his duty of disclosure which is deemed waived under sub-paragraph 5 of Schedule 9 unless he knew that his involvement in an accident at 7.30 am on the day he applied for the insurance was relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied. I am of the view that the 1st Defendant only applied for insurance after the accident on 8.8.2017 because he had been involved in the accident earlier in the day. ***He must have known that his involvement in the said accident would be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied****. Accordingly, I am of the view that the 1st Defendant had breached his duty of disclosure to the Plaintiff when obtaining the insurance on 8.8.2017 and the Plaintiff can avoid the policy on this ground.*

[35] *However, even assuming that the 1st Defendant did not breach his duty of disclosure,* ***there is still the fact that the insurance policy had not taken effect at the material time of the accident****. Since the Plaintiff was not the insurer of the 1st Defendant's motorcycle at the material time of the accident, the Plaintiff is entitled to the orders sought and I accordingly make an order in terms of the prayers sought in the Originating Summons."*

(own emphasis added)

F] WHETHER THIS APPLICATION DEPRIVES THE 3RD AND 4TH DEFENDANTS' CONSTITUTIONAL RIGHT TO BE TREATED EQUALLY

[91] **Article 8 of the Federal Constitution** provides as follows:

"(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit -

(a) any provision regulating personal law;

(b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays."

[92] The argument advanced on behalf of the 3rd and 4th Defendants is that although the broad classification under RTA seems justified but the 2 starkly different interpretations of section 96(3) RTA lead to unequal and unfair treatment of 2 different victims in the same situation, that is where the issue in question should rightfully be decided in a trial court by the court and the law.

[93] Firstly, the 3rd and 4th Defendants, though not privy to the contract of insurance between the Plaintiff and the 2nd Defendant, are allowed to oppose this Application and have been given the right to be heard.

[94] Secondly, both the RTA and SRA are Acts of Parliament and if the 3rd and 4th Defendants are challenging the constitutionality of the RTA then they have not raised it in their submissions or by way of proper application.

[95] The argument raised by learned counsel for 3rd and 4th Defendants is that the 3rd and 4th Defendant ask for a day in Court with all parties involved.

[96] Again, with all due respect to learned counsel for the 3rd and 4th Defendants, section 96(3) RTA allows the Plaintiff to seek a declaration that the Insurance Policy is unenforceable insofar as the Accident is concerned. The declaration can only be obtained before judgment is entered (**Ahmad Nadzrin** (supra)).

[97] If the Plaintiff does not succeed in this Application then it would continue in the Accident Suit. The issue of whether there is sufficient material or evidence before this Court to determine this Application has already been dealt with earlier in this judgment.

[98] The case cited by learned counsel for the 3rd and 4th Defendants, **Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council, intervener) [2004] 2 MLJ 257** is in respect of **Section 72 Pengurusan Danaharta Nasional Act 1998**.

[99] In **Danaharta** (supra) the Federal Court held:

*"**[36]** Thus what art 8(1) means is that there must be a subjection to equal laws applying alike to all persons in the same situation (see Vide Southern Railway Co v Greene 216 US 400). **The validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the same group. This can only be ascertained by the application of the doctrine of classification**. In support reference is made to Constitutional Law of India by Seervai (4th Ed) Vol 1 at p 439: ....."*

*__[37]__ The corollary is that the doctrine of reasonable classification is the only method of determining **whether a law applies alike to all persons who are similarly circumstanced**. It is therefore an integral part of art 8(1)."*

.....

__[59]__ As the Act itself indicates its object in the preamble and the basis of the classification is evident from the language of s 72 it falls within the first category as classified in Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors *AIR 1958 SC 538. It is clear that the Act was required in the public interest to promote the revitalization of the nation's economy. Denial of injunctive relief is absolutely necessary to ensure that the object of the Act is not frustrated. That clearly is the purpose of s 72 which **applies to all persons in the same position as the respondent**. **Thus, it applies equally to all persons who are similarly circumstanced.** This is a reference to all persons whose assets and liabilities have been acquired by the appellant pursuant to the Act. **Surely, it cannot include the appellant itself for reasons which are too plain to state**. Yet the Court of Appeal found that s 72 contravenes art 8(1) '... ... ... because it denies the appellant an opportunity to protect his immovable property by means of a temporary injunction under any circumstances whilst not placing any fetter upon the power to grant the same relief in the respondent's favour.' The law that we have referred to thus far makes it clear beyond doubt that there will be a violation of art 8(1) only if a legislation does not apply to a person who is similarly circumstanced as the other persons in the classification — and not to someone like the appellant outside it. The conclusion of the Court of Appeal is*

therefore wholly unsustainable as it is a total deviation from the law regulating art 8(1). It is therefore our unanimous view that there is a rational basis between the classification in s 72 and its object in relation to the Act. Section 72 therefore satisfies the requirements of the reasonable classification test and is not unconstitutional. This makes it unnecessary for us to answer the second question.

(own emphasis added)

[100] An application under section 96(3) RTA is available to all licensed insurers. In other words, "***it applies alike to all persons in the same group***".

[101] I cannot see how the 3rd and 4th Defendants are said to be treated unequally under the law in breach of Article 8 of the Federal Constitution.

[102] In this Application the Plaintiff sought to determine whether the Insurance Policy is enforceable insofar as the Accident is concerned under section 96(3) RTA whereas in the Accident Suit the issue before the Sessions Court is whether the 1st and 2nd Defendants are liable for the Accident.

[103] It cannot be denied or avoided that the only nexus between the Plaintiff and the 3rd and 4th Defendant arises from the purchase of the Insurance Policy and the issuance of the same to the 2nd Defendant.

[104] What must be appreciated here is that in this situation there are 2 separate issues. The issue of the enforceability of the Insurance Policy and the 3rd and 4th Defendants' claim against the 1st and 2nd Defendants in the Accident Suit.

[105] These are two **distinct and separate** issues. It cannot be avoided and is a fact the 3rd and 4th Defendants are not privy to the contract of

insurance between the Plaintiff and the 2nd Defendant. The contract of insurance like any other contract can be challenged by the contracting parties. The 3rd and 4th Defendants are only interested in the Plaintiff's involvement in the event liability is established against the 1st and 2nd Defendants in the Accident Suit.

[106] However, the section 96(3) RTA provides for an avenue for the Plaintiff to avoid making payment under the Insurance Policy by seeking a declaration that it is void or unenforceable.

[107] The 3rd and 4th Defendants will still, in any event, be entitled to proceed with the Accident Suit and the only issue is whether the Plaintiff will participate in the Accident Suit to indemnify the 2nd and 1st Defendants in the event they are found liable. Even without the Plaintiff's involvement, there are still avenues available to the 3rd and 4th Defendants ((**Ahmad Nadzrin** (supra)).

[108] Therefore, it cannot be said that this Application deprives the 3rd and 4th Defendants of their constitutional right to be treated equally under the law.

G] CONCLUSION

[109] The crux of the matter is ultimately whether the Insurance Policy was enforceable at the time of the Accident.

[110] The evidence is clear that the Insurance Policy was purchased after the Accident and based on section 84 FSA and **Hameed Jagubar** (supra) the Insurance Policy was not enforceable at the time of the Accident.

[111] Despite the 3rd and 4th Defendants' efforts, they cannot change the fact that the Insurance Policy was purchased after the Accident.

[112] In **Marrison** (supra), in dealing with a similar issue the High Court held:

> *"**[20] I do not think the argument of the second defendant that the policy started from midnight on 19 May 2016 because the time of 2.51pm mentioned in the cover note was not repeated in the certificate of insurance to be particularly convincing**. In the first place, it cannot be disputed that the **cover note is part of the policy**. Section 2 of the RTA states that 'certificate of insurance' includes a cover note. And s 89 of the same Act also provides that 'policy of insurance' includes the cover notes. Secondly, just because the certificate did not specify the time of 2.51pm, it does not necessarily follow that what was so definitively specified in the cover note is of no relevance. Thirdly, nowhere in the documents forming the policy is there mention that coverage became effective from midnight. In other words, the construction of the pertinent provisions in these documents do not aid the case of the second defendant.*
>
> .....
>
> *"**[56]** I must further add for emphasis that not only must the terms of an insurance contract as stated earlier be construed in their ordinary, plain and natural meaning, which **considering the cover note being part of the certificate of insurance must on this basis already lead to the conclusion that the policy became effective** from 2.51pm on that day **as so specifically stated in the cover note** and where the same time and date of signature of the proposal was factually repeated in the Schedule.*
>
> .....
>
> *"**[58]** As shown earlier, when considerations of the industry practice of 'cash before cover' are taken into account, and **the overriding public policy not to encourage road users to get insurance coverage only after the occurrence of accident** is properly appreciated, and to also avoid making mockery of the raison de etre or essence of motor vehicle insurance, one cannot but conclude that sound commercial and business sense must mean that the argument*

propounded by the second defendant in the instant case on ***the retrospective effectiveness of the policy from midnight of the day in question notwithstanding premium payment only effected later in the afternoon, to be entirely fallacious****."*

(own emphasis added)

[113] For the reasons stated above, I allowed the declarations sought by the Plaintiff in this Application and gave no order as to costs as the parties had agreed not to ask for costs.

Dated this 9th day of August, 2021

-SGD-

(**WAN MUHAMMAD AMIN BIN WAN YAHYA**)
Judicial Commissioner
High Court of Malaya,
Kuala Lumpur
(Commercial Division (NCC 3))

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LEGISLATION CITED

- Section 96(1), (2) and (3) of the Road Transport Act 1987
- Section 84 and paragraph 5(1), (2) and (8) of Schedule 9 of the Financial Services Act 2013
- Section 141 of the Insurance Act 1996 (Act 553)
- Article 8 of the Federal Constitution
- Section 72 Pengurusan Danaharta Nasional Act 1998

RULES CITED

- Order 81 and Order 14 of the Rules of Court 2021

CASES CITED

1. Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821
2. Allianz General Insurance Company (M) Bhd v. Mohd Fazdli bin Mohd Salleh & Ors [2018] MLJU 900
3. Allianz General Insurance Company (M) Bhd v. Vijindran a/l Kalaichelvan & Ors [2017] MLJU 2177

4. AmGeneral Insurance Berhad (44191-P) v. Shahrul Aziman bin Abd Aziz & Anor [2019] MLJU 671
5. AmGeneral Insurance Bhd v. Iskandar Mohd Null [2016] 2 CLJ 1
6. Aqmal Dakhirrudin v. Azhar Ahmad & Anor [2019] 1 LNS 492
7. Balamoney Asoriah v. MMIP Services Sdn Bhd [2020] 1 CLJ 476
8. Bank Negara Malaysia v. Mohd. Ismail Ali Johor & Ors [1992] MLRA 190
9. Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council, intervener) [2004] 2 MLJ 257
10. Liberty Insurance Bhd v. Marrison ak Sidai & Anor [2019] 12 MLJ 763
11. Pacific & Orient Insurance Co Bhd v. Hameed Jagubar bin Syed Ahmad [2018] 12 MLJ 1
12. Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen [2015] 4 CLJ 54
13. Selvaraju a/l Velasamy & Anor v. Abdullah All Kutty & Ors [2009] 8 MLJ 267
14. Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217
15. Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303