

Legal Avenue in Malaysia for Recovering Unlawful Money in Business Transactions

Nurazlina Abdul Raof *

*Faculty of Law, Universiti Teknologi MARA, Shah Alam,
PhD Candidate, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Gombak
Email: nurazlina@uitm.edu.my*

Norazlina Abdul Aziz

Faculty of Law, Universiti Teknologi MARA, Shah Alam

** Corresponding Author*

Abstract

Purpose: The monetary transaction is significant in business activity, however, it might inadvertently involve unlawful money, such as bribery, which is an offence under the Malaysian legislation. The article discusses the difficulties of recovering them and the legal exceptions for businesses. This analysis critically evaluates the Malaysian civil forfeiture laws to assess the effectiveness and deficiencies of the legal framework in reclaiming unlawful money involved in business transactions.

Design/methodology/approach: By utilising the doctrinal approach, this paper critically examines the application of civil forfeiture provisions in the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA 2001) in recovering unlawful money in business transactions. Relevant practices, rules and regulations and legal cases in Malaysia support the analysis. The data collected were analysed using content and thematic analysis with specific coding and themes.

Findings: The study unravels the impediments to the effective implementation and enforcement of the said provisions.

Research limitations/implications: The research examines the AMLATFPUAA legislation and case laws.

Practical implications: The probability of unsuccessful civil forfeiture action is high if a business entity accepts payment in good faith without knowledge of the funds' illegal origin.

Originality/value: The study findings may assist policymakers in comprehending the challenges and impracticalities of current legal requirements in retrieving unlawful money in business transactions.

Keywords: Civil Forfeiture, Unlawful Money, Business Transactions, Good Faith, Innocent

Introduction

Money laundering is a perpetual occurrence. According to the Global Financial Integrity (GFI), a Washington-based think tank 10-year analysis, illegal financial flows to and from 148 Developing Countries: 2006-2015, Malaysia lost between US\$22.9 billion (RM94.22 billion) and US\$33.7 billion (RM138.66 billion) in illicit outflows between 2006 and 2015 (Kader, 2021). Malaysia ranks in the top ten countries attractive to money launderers seeking to cleanse their unlawfully obtained assets (Wahaj Ahmed Khan et al., 2021). In addition, GFI placed Malaysia third out of 147 countries in illicit financial outflows, according to data compiled by the International Monetary Fund and the United Nations (Kader, 2021). The business climate in Malaysia is meanwhile favourable (PricewaterhouseCoopers (PwC), 2022). The

International Institute for Management Development (IMD) World Competitiveness Ranking 2022 ranks Malaysia as the 32nd most developed and competitive nation worldwide and the second most developed and competitive in Southeast Asia (PricewaterhouseCoopers (PwC), 2022). In reality, not all glitter is gold. Proceeds from illicit practices such as bribery, corruption, theft, and fraud can be laundered, either directly or indirectly (Ekwueme, 2021), by utilising business transactions to integrating illegally transferred money into the market, providing them with a legitimate appearance. While the legislation allows for the recovery of illicit funds utilised in these economic transactions, the question remains whether such efforts can be effectively implemented.

Money laundering consists of placement, layering and integration to convert the illegal money to legal currencies in the market. By and large, money laundering transforms the proceeds of unlawful activities into legitimate capital (Al-Rashidi, 2021). According to the Australian Institute of Criminology (Graycar & Grabosky, 1996), money laundering refers to concealing criminal proceeds utilising a series of financial transactions, creating the false impression that the money seems to have originated from a lawful source. To avoid tracing, these culprits may place the unlawful monies in financial transactions, layer them in many bank accounts and utilise them as consideration for purchasing goods or services in business transactions, thus integrating them into the market as clean monies and being able to circulate in the legal economy. One of the mechanisms to ensure criminals do not enjoy the proceeds of unlawful activities and restrict the financial ability of the criminals to continue criminal operations is forfeiting the gains.

Section 56 AMLATFPUAA 2001 permits forfeiture of proceeds of unlawful activities without prosecution or civil forfeiture upon the satisfaction of all elements therein. The unlawful gains can be subject to forfeiture under the AMLATFPUAA 2001, either with or without prosecution. However, the ability of the prosecutor/government to recover the illicit money through the civil forfeiture mechanism provided in Section 56 AMLATFPUAA 2001 if the laundered money is received as payment consideration in business transactions by the business entity, who is unaware of the origin of the money, remains unresolved.

Civil law mechanism supplements criminal sanctions in regaining illegal assets (de Willebois & Brun, 2013; International Bank for Reconstruction and Development / The World Bank, 2015; Sotiropoulou, 2015). Civil forfeiture allows for the restraint, seizure, and forfeiture of stolen assets without the need for a criminal conviction. Civil forfeiture is an essential tool for recovering the proceeds and instruments of corruption (Tromme, 2019). The confiscation of assets is crucial to the battle against unlawful activities as it is a deterrent and reduces the incentive to engage in unlawful activities. Furthermore, it incapacitates individuals engaged in illicit activities by confiscating their assets and tools of wrongdoing. Ideally, these seized assets are allocated towards fostering economic growth and development within the respective nation (Ferguson, 2018). The total quantity of forfeited assets in Malaysia last year was reported to be RM149,695,341.49 (Bernama, 2023). Research on the effectiveness of civil forfeiture in Malaysia is, however, limited (Aurasu & Abdul Rahman, 2016). Law enforcement organisations face difficulties in obtaining significant evidence and recovering criminal proceeds within the appropriate period as stipulated by the statutes (Zolkafllil, 2020). Hence, the primary objective of this research is to fill the current gap in knowledge by examining the effectiveness of the civil forfeiture mechanism outlined in Section 56 AMLATFPUAA 2001 in recovering the illegal money transferred from buyers to unsuspecting sellers as payment consideration in business transactions. The aim is to shed light on the merits and limitations of

the legal framework in Malaysia. The results of this study hold significant implications for various stakeholders, including government, practitioners, and business sectors. These impacts arise from the valuable insights the study provides, where the current implementation of civil forfeiture laws in business-related situations can be improved.

Literature Review

Phases of money laundering

Money laundering is a manoeuvre employed by criminals to obscure the origins of illicit funds, preventing their seizure and facilitating their subsequent utilisation (Parlimen Malaysia, 2014). Mohd Yasin identified three distinct phases associated with the process of money laundering, specifically referred to as placement, layering, and integration (Yasin, 2002). A multitude of researchers have conducted investigations in the domain of money laundering. Nevertheless, research on money laundering is currently ineptly constrained. This is primarily due to the underlying clandestine nature of illicit acts carried out by organised criminal groups (Gilmour, 2020).

Misuse of private sector for money laundering purposes

The proceeds obtained from criminal activities, such as fraud, theft, and drug trafficking, are discreetly converted to appear as if they were earned through legal means. This is often done by transforming them into assets that seem legitimate, such as bank accounts, real estate properties, or luxury goods (Esoimeme, 2015). Aurasu asserted that money laundering activities can influence the private sector (Anusha Aurasu, 2018). The money launderers leverage their positions to manipulate legitimate businesses and establish monopolistic control (Anusha Aurasu, 2018). Further, the money launderers usually conceal the revenues of illegal activity through legal entities, both domestic and foreign. The analysis conducted by the Stolen Asset Recovery Initiative (StAR) discovered that in 128 out of the 150 instances of grand corruption examined, companies were employed to obscure the illicit gains obtained through corrupt practices (de Willebois et al., 2011).

Civil law remedies

Willebois and Brun (de Willebois & Brun, 2013) highlighted the potential of civil law remedies to supplement criminal sanctions by targeting the economic foundations of corrupt practices. Sotiropoulou (Sotiropoulou, 2015) corroborated the perspective, underscoring the merits of civil law as a convenient and efficient alternative in situations where criminal law remedies are inaccessible. Studies (A. Rahman, 2022; Hamin et al., 2015; Hamin, Omar, et al., 2017) have discussed the importance of the civil forfeiture system in Malaysia in regaining illegal proceeds from money laundering and serious crimes. Hamin et al. (Hamin, Hashim, et al., 2017) and Rahman (A. Rahman, 2022) acknowledged the consequences of the AMLATFPUAA 2001 concerning third-party rights to illegal assets under the civil forfeiture system. A comprehensive examination of legal proceedings indicates that law enforcement agencies continue encountering challenges in effectively implementing the civil forfeiture system (A. Rahman, 2022). In this respect, Bekhouche emphasised the necessity of conducting a comprehensive examination of significant deficiencies of the money laundering framework in Malaysia, considering both legislative and implementation perspectives (Bekhouche, 2018).

Research gap

Prior research has mostly examined the significance of the civil forfeiture process in reclaiming illicit gains without legal action, while also safeguarding the rights of third parties. Consequently, there was no particular focus on the deficiencies in the legal structure governing

the process of civil forfeiture, which is used to reclaim illegally obtained funds collected by unwary sellers through commercial dealings. This study examined legal cases in which vendors were identified as respondents who received payments from customers that were made using illegal funds. The findings will enhance the comprehension of the current application of AMLATFPUAA 2001 in regulating business transactions, identify the obstacles to achieving effective implementation of AMLATFPUAA 2001, and propose recommendations for enhancing implementation.

Method

A thorough literature review established the foundation of the study. The literature review phase involves a content analysis of pertinent publications, referencing appropriate authoritative texts, and examining relevant case studies utilising library-based research. In a broader methodological technique, the study used doctrinal research to explore two main issues, which are the ability of the government authority to forfeit the illicit property gained by a business entity and the legal avenues for it to do so. Doctrinal study assists most legal scholars to infuse their reasoning to bolster their reform recommendations. The analysis was made to the primary sources namely the AMLATFPUAA 2001, relevant regulations and case laws. Extensive searches were performed on the secondary sources assessed through the Lexis and Current Law Journal (CLJ) Law databases to locate Malaysian cases pertaining to civil forfeiture of illicit proceeds from business entities. The search terms used included "civil forfeiture company/companies" and "civil forfeiture without prosecution" to ensure a comprehensive exploration of judicial decisions in this domain. Secondary legal sources supplemented the data obtained from the primary legal sources. The acquisition of vital information was facilitated by compiling relevant legal reports, papers, journals, websites, blogs, web pages, and books. This compilation which was done manually deepens the comprehension of the legal recourse accessible in Malaysia to recover unlawful funds in commercial transactions. The analysis applied a thematic and content analysis approach to the data acquired from the literature review and doctrinal study. It entails developing codes and categories and gleaning patterns from both venues.

Findings

Money laundering offence in Malaysia

The preamble to the AMLATFPUAA 2001 stated that the AMLATFPUAA 2001 provides for the offence of money laundering and the measures required for the prevention of money laundering, and provides for the forfeiture of property involved in or derived from money laundering offence and proceeds of unlawful activity and instrumentalities of an offence. Four types of money laundering offences are described under Section 4(1) AMLATFPUAA 2001 and are summarised in Table 1 as follows:

No.	Activities	The provisions
1.	Engage	Any person who engages, directly or indirectly, in a transaction that involves the proceeds of any unlawful activity or instrumentalities of an offence.
2.	Acquiring	Any person who acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence.
3.	Removing	Any person who removes from or brings into Malaysia, proceeds of an unlawful activity or or instrumentalities of an offence

4.	Concealing	Any person who conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity or instrumentalities of an offence
----	------------	--

Table 1: Types of Money Laundering

Section 4(1) above described the interpretation of the prohibited activities that may be construed to be acts of money laundering punishable under the AMLATFPUAA 2001. Among the four activities, the word 'engage' opens a potential for the business entity/seller who has traded with good faith and without knowledge of the illegal gain to be prosecuted.

Section 4(2) AMLATFPUAA 2001 may be inferred from any objective factual circumstances as Table 2 below:

No	Act	The provisions
1.	Person with knowledge	the person knows, has reason to believe, or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence
2.	Person who acted recklessly	the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence

Table 2: Inference from objective factual circumstances

The two persons described under Section 4(2) AMLATFPUAA 2001 above are differentiated using their intention. When a person knows activities that lead to the gain of unlawful property, it is clear that he intends to commit or assist in the committing of money laundering. Section 4(2) AMLATFPUAA 2001 further provides for another potential offender that has no knowledge but acted recklessly or without diligence in dealing with gain from unlawful activities.

Money laundering is principally concerned with the proceeds from unlawful activity, that is any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence (*Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37). As this is a criminal offence, the burden of proof is beyond reasonable doubt (Section 70(2) AMLATFPUAA 2001), where the prosecutor holds the duty to discharge the burden of proof.

Under the statute, the proceeds of unlawful activity can be forfeited with (Section 55 AMLATFPUAA 2001) or without prosecution (Section 56 AMLATFPUAA 2001). The "proceeds of unlawful activity" is explained in the statute as any property or any economic advantage or economic gain from such property, within or outside Malaysia. Section 3 of AMLATFPUAA 2001 provides the proceeds may include:

- (a) which is wholly or partly-
 - (i) derived or obtained, directly or indirectly, by any person from any unlawful activity;
 - (ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or
 - (ii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or
- (b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was

acquired, or its proximity to other property referred to in subparagraph (a)(i) or (ii), can be reasonably believed to be property falling within the scope of subparagraph (a)(i), (ii) or (iii).

Section 3 AMLATFPUAA 2001 further defines 'property' as (a) assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, however, acquired; or (b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including currency, bank credits, deposits and other financial resources, traveller's cheques, bank cheques, money orders, capital market products, drafts and letters of credit, whether situated within or outside Malaysia, and includes a legal or equitable interest, whether full or partial, in any such property (*Public Prosecutor v Multi Electrical Supply & Services & Ors* [2022] MLJU 600).

The "unlawful activity", meanwhile, is defined in Section 3 AMLATFPUAA 2001 as any activity which constitutes a serious offence or one which is of such a nature or occurs in such a circumstance that leads to the commission of a serious offence regardless of whether such activity, wholly or partly, takes place within or outside Malaysia. The unlawful activity serves as the predicate offence for the forfeiture application (*Badan Perhubungan Umno Negeri Pahang v Public Prosecutor and other appeals* [2022] 2 MLJ 572; [2022] CLJ 364). The predicate offences refer to the serious offences under the Second Schedule AMLATFPUAA 2001 (*Public Prosecutor v Habib Jewels Sdn Bhd* [2020] MLJU 897). A "serious offence" means any of the various and many offences listed in the Second Schedule to AMLATFPUAA 2001, an attempt to commit the offences or the abetment of any of the offences (Section 3 AMLATFPUAA 2001).

The extent of money laundering in Malaysia is extensive according to the AMLATFPUAA, which was enacted in 2001. Several advancements and technologies have arisen, leading to the revision of the AMLATFPUAA 2001 in 2015. This revision specifically added the provision for the forfeiture of proceeds from unlawful activities and instrumentalities of an offence, as outlined in Section 56 of the AMLATFPUAA 2001.

Civil forfeiture under the AMLATFPUAA 2001

The civil forfeiture provision, Section 56 (Forfeiture of property where there is no prosecution), has two components, namely, the requirements to be satisfied by the prosecutor under Section 56(1) AMLATFPUAA 2001 and the requirements to be satisfied by the judge under Section 56(2) AMLATFPUAA 2001. According to Section 56(1) AMLATFPUAA 2001, the Public Prosecutor can apply to the High Court within twelve months from the date of the seizure or freezing order for a forfeiture order when there is no prosecution for a money laundering offence under Section 4(1) AMLATFPUAA 2001 if he is satisfied that the property is the proceeds of an unlawful activity (Section 56(1)(c) AMLATFPUAA 2001). In connection to that, the High Court in *Public Prosecutor v Multi Electrical Supply & Services & Ors* [2022] MLJU 600 stated there are four pre-conditions to the application for the forfeiture of properties seized under Section 56(1) AMLATFPUAA 2001, which have to be satisfied, which are: (a) a Gazette according to Section 61 AMLATFPUAA 2001 (bona fide third parties) has been published; (b) there is no prosecution or conviction for an offence under Section 4(1) of AMLATFPUAA 2001 ...; (c) the application is made before the expiry of 12 months from the date of seizure and if there is a freezing order before expiry of 12 months from the date of the freezing order; and (d) there is no claim by bona fide third parties to the subject matter of the forfeiture.

Subsequently, three conditions are required to be fulfilled by the prosecution under Section 56 AMLATFPUAA 2001 on the balance of probabilities, as stated by the Federal Court in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2021] MLJU 14 namely (a) the existence of a predicate offence, the evidence and basis upon which the commission of the offence has been established; (b) identify the proceeds or “the subject-matter of” the predicate offences; and (c) the manner the respondents have abetted or participated in the commission of the predicate offence.

As regards the predicate offence, the Court of Appeal in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [218] 6 MLJ 37 cited the High Court decision in that case, which stated the predicate offence must be proven beyond a reasonable doubt. The Court of Appeal in *Simplex Sdn Bhd & Ors v Public Prosecution* [2021] MLJU 322 referred to Section 70(2) AMLATFPUAA 2001 on the standard of proof and stated that the predicate offence must be proven beyond a reasonable doubt. Once the predicate offence is proved beyond a reasonable doubt, the proceeds derived from the predicate offence, namely the movable and immovable properties sought to be forfeited, must be proved on a balance of probabilities.

Another component under Section 56 AMLATFPUAA 2001 refers to a forfeiture order to be made by the judge. The forfeiture under Section 56 AMLATFPUAA 2001 can only be made by the Court if the property sought to be forfeited among others, the subject matter of a money laundering offence (Section 56(2)(a)(i) AMLATFPUAA 2001) or proceeds of unlawful activity (Section 56(2)(a)(iii) AMLATFPUAA 2001), and there must also be no purchaser in good faith for valuable consideration in respect of the property (Section 56(2)(b) AMLATFPUAA 2001).

Based on the Court of Appeal in *Ong Ban Chai & Ors v Seah Siang Mon* [1998] 3 MLJ 346 and *Tg Abdullah Ibni Almarhum Sultan Abu Bakar v Mohd Latif b Shah Mohd* [1996] 2 MLJ 265, common characteristics of a good faith or bona fide purchase may include absence of fraud, deceit or dishonesty, undue influence and a contract which was entered in good faith for valuable consideration (Mohamad, 2004). Before making a forfeiture order, Malaysian law permits the Court to call upon any third party claiming an interest in the property to appear before it and explain why the property should not be forfeited. This third party may include the property's legitimate proprietor (Government of Malaysia, 2016). Section 56 AMLATFPUA 2001 recognise the third party's interest in the property seized. The Court will not make a forfeiture order if a purchaser is in good faith for valuable consideration regarding the property (Section 61 AMLATFPUAA 2001). The Court would require any bona fide third party to prove their claims against the assets and also to show cause why the assets should not be forfeited (Hamin, Hashim, et al., 2017). In determining the estimation of the value concerning criminal proceeds, Section 59 AMLATPFUAA 2001 empowers enforcers to recover the number of ill-gotten gains via a pecuniary penalty order (A. Aurasu & Abdul Rahman, 2016).

Civil forfeiture cases

The MACC issued civil forfeiture orders against 41 organisations in June 2019 for the forfeiture of monies allegedly belonging to 1 Malaysia Development Berhad (1MDB)(A. Rahman, 2022), including business entities. The monies sought to be forfeited are RM270 million, making this the most significant civil forfeiture process undertaken in Malaysia to date (A. Rahman, 2022). However, the prosecution lost all forfeiture cases against business entities

and appealed to the Court of Appeal against the decisions of the High Court. In these cases, the prosecution alleged that the seized monies were the subject matter or evidence from proceeds of an unlawful activity allegedly committed by the former prime minister under Section 4(1) AMLATFPUAA 2001 and Section 23 MACC Act 2009 (Bernama, 2022).

The Court of Appeal affirmed the High Court's decision not to allow the forfeiture in a 2021 judgment, stating that there were no flaws in the High Court's decision for the Court of Appeal to disturb and intervene in the matter (Yatim, 2023a). The three-member bench also dismissed the prosecution's appeal to forfeit from business entities such as Habib Jewels Sdn Bhd (RM100,000), K&Z Enterprise Sdn Bhd (RM138,359.60), Perano Sdn Bhd (RM337,634.78), Binsabi Sdn Bhd (RM827,25) and Hattatex Trading (RM111,590) (Yatim, 2021).

The prosecution appealed to the Federal Court. The Federal Court had fixed 7 February 2023 for the hearing of the appeal to forfeit the monies (Bernama, 2022). However, prior to the date, the prosecution had withdrawn its forfeiture appeal on 30 January 2023 against these legal entities, which include four business entities namely Jakel Trading Sdn Bhd (RM10,747,042.77), Jakel Trading (RM628,314), Mediaedge CIA (M) Sdn Bhd (RM4,631,602) and Aga Touch (M) Sdn Bhd (RM3,000,000) due to the facts of the case namely (Yatim, 2023b). On 2 February 2023, the prosecution withdrew all the forfeiture appeal cases at the Federal Court in connection with the 1MDB funds (Yatim, 2023a). The affected business entities were Habib Jewels Sdn Bhd (RM100,000), K&Z Enterprise Sdn Bhd (RM138,360), Perano Sdn Bhd (RM337,635), Binsabi Sdn Bhd (RM827,250) and Hattatex Trading Sdn Bhd (RM111,590) (Yatim, 2023a).

Hence, the analysis of the cases on forfeiture of the proceeds of unlawful activities will confine to only two cases as the allegations by the prosecution were similar, in that the property of these companies which were seized by the prosecution were proceeds of unlawful activities and the counter-arguments of the respondents were that they admitted receiving the monies in the course of their business transactions but were not in the know that the monies originate from unlawful activities. Hence, the analysis of the cases on forfeiture of the proceeds of unlawful activities will confine to only two cases as the allegations by the prosecution were similar, in that the property of these companies which were seized by the prosecution were proceeds of unlawful activities under Section 56(2)(a)(iii) AMLATFPUAA 2001 and the counter-arguments of the respondents were that they admitted receiving the monies in the course of their business transactions but were not in the know that the monies originate from unlawful activities.

In *Public Prosecutor v Mediaedge: CIA Malaysia Sdn Bhd* [2020]1 LNS 2135, the respondent received the sum of RM4,631,602.00 in its HSBC Bank Berhad current account vide AmIslamic Bank Berhad cheque No. 572000 dated 22.03.2013 issued from the First Account of Dato' Seri Najib Razak (DSNR). The respondent did not dispute this fact. After the respondent's HSBC Bank Berhad current account was frozen, the account balance was RM9,583,292.39 as of 13.05.2019. The respondent was registered on 05.08.1999 and carries on the business as a media communications services provider and provides services relating to the evaluation and planning of advertisement campaigns, media logistics and advertisement media.

According to the prosecution, the respondent's account balance or the total sum of the money in the respondent's account is not material. It is still categorised as proceeds from unlawful

activity and thus became the subject matter or evidence relating to the commission of the offence of money laundering as subparagraphs (a)(i) and (ii) in the definition of “proceeds from unlawful activity” in Section 3 AMLATFPUAA 2001 encompassing the money which has been obtained, either wholly or partly, from the unlawful activity (subparagraph (a)(i)) or from a disposal or other dealings with that property (subparagraph (a)(ii)). As such, irrespective of whether or not the respondent has completely spent the money it received from DSNR, the respondent is still bound to return it and have it forfeited by the Court. The prosecution also urged the Court to issue a pecuniary penalty order under Section 59 AMLATFPUAA 2001 against the respondent as a means to replace the money which the respondent claims to have been spent.

Upon scrutiny, the Court found the prosecution had succeeded, on the balance of probabilities, in showing the evidence constituting the commission of the predicate offence under section 23(1) MACC Act 2009. Subsequently, the Court must determine whether the money frozen and seized by the MACC from the respondent consists of the proceeds of the unlawful activity. The respondent did not deny receiving the said money, totalling RM4,631,602.00 in its HSBC Bank Berhad current account, which was received as a part of the business of the respondent after the respondent invoiced the client. According to the respondent, the money had been utilised to make payments concerning the business as instructed by the client. The respondents had attached the relevant invoices and payment advice. As such, the amount currently in the bank account, amounting to RM9,583,292.39, consisted of payments from other parties. The prosecution did not rebut these averments.

On whether there was any purchaser in good faith for valuable consideration in respect of the seized property under Section 56(2)(b) AMLATFPUAA 2001, the Court stated the respondent was a purchaser in good faith for valuable consideration in respect of the sum of RM4,631,602.00 as the respondent provided the media services in the ordinary course of its business. The payment of RM4,631,602.00 was made for media services rendered according to the arrangement between the respondent and his client. The Court did not allow for a pecuniary penalty order against the respondent as the prosecution did not pray for the remedy in its application.

According to the Court, although the prosecution claimed that the forfeiture ought to be ordered as the respondent ought to be made to “repay” or “refund” the money which has been expended, the Court could not do so as an application under Section 56 AMLATFPUAA 2001 is not a tool for the prosecution to “recover” monies from the party who had received them and never meant to compel that party to “repay” or “refund” them in the event the monies have been spent or no longer resides in that party’s account.

In *Pendakwa Raya v Habib Jewels Sdn Bhd* [2020] MLJU 89, the respondent carries on the business of selling jewellery, gold and gemstones. In 2013 and 2014, DSNR purchased jewellery from the respondent. In November 2013 and June 2014, the respondent received two cheques from DSNR for the sale of jewellery from the respondent to DSNR amounting to RM90,000 and RM100,000, which were deposited into the respondent's two bank accounts. The prosecution sought to forfeit RM100,000 in one of the respondent's bank accounts as the prosecution alleged RM100,000 was part of the sum of RM190,000 paid by DSNR to the respondent via the two cheques and is the proceed of an unlawful activity committed by DSNR. The respondent contended that the two cheques were received by the respondent in good faith for valuable consideration for the sale and purchase of jewellery and showed two sale receipts.

The forfeiture application failed due to the fundamental reason that the respondent has successfully shown that the respondent's monies in the bank account which was seized and intended to be forfeited were monies or property which the respondent had received as valuable consideration in good faith for the sale of jewellery to DSNR in the course of the respondent's legitimate business as a jeweller. In addition, the respondent also did not know and had no reason to believe that the impugned monies received from DSNR were proceeds of any unlawful activity. In the affidavit evidence, the respondent stated that the sale and purchase transactions of jewellery above RM100,000.00 are prevalent in the respondent's line of business. The respondent has successfully discharged the burden of showing that the monies originated from legitimate sources during its business, and the applicant has failed to reply or rebut meaningfully with any evidence that such monies were not received by the respondent in good faith and for valuable consideration. The High Court stated that the "purchaser" must refer to the recipient of the property or proceeds of unlawful activity, which in this case was the respondent. Suppose the recipient respondent can show that the property is received in good faith in the context of a transaction as a valuable consideration. In that case, the Court will not grant a forfeiture order. According to the Court, the term "purchaser" cannot refer to any other party because such other party would, if any, come within the ambit of third-party claimants under Section 61 AMLATFPUAA 2001 in respect of whom a third-party notice had in the instant application been earlier issued to notify any potential parties who sought to stake a claim in the monies intended to be forfeited by the applicant to appear in Court for such purpose.

At the Court of Appeal, the Court stated that they agreed with all the findings of facts made by the High Court judges. The Court further stated that no law obligates the seller to investigate the payment source. As long as the transaction is not against the law, the seller is entitled to accept payment from anybody, including a third party who pays on behalf of the purchaser. In these cases, the respondents were dealing with DSNR's private secretary and the prime minister's office. In the circumstances, the High Court judges held that there was no reason for the respondents to suspect they would receive payments from illegal monies. The appellant's affidavit did not say that the respondents knew or had reason to suspect that the payments received were from an illegal source. To accede to the appellant's argument would result in losses to the respondents because they had delivered the goods and services. Whilst the objective of AMLATFPUAA 2001 is to prevent any person from gaining the proceeds of unlawful activity, the Court stated the AMLATFPUAA 2001 does not intend to cause injustice to a bona fide purchaser by forfeiting their legitimate hard-earned monies.

Discussion and Conclusion

The civil forfeiture mechanism targets the money laundering aspect of criminal activity by depriving the criminal of illicit profits. It is analogous to striking the criminal where he is most vulnerable. If illicit activity is no longer profitable, the criminal may cease his illegal activities. Once the unlawful moneys are forfeited, they will be vested in the Federal Government. Suppose a purchaser is in good faith for valuable consideration regarding the property. In that case, the Court will not issue a forfeiture order as the said purchaser will be entitled to the property.

The above analysis of Section 56 AMLATFPUAA 2001 civil forfeiture cases involving business entities demonstrates that, although the Section is impartial, its enforcement is difficult. Under Section 56(2) AMLATFPUAA 2001, the prosecution must satisfy the High Court of the three elements with different standards of proof for the judge to grant a forfeiture order. The predicate crime must be proven beyond a reasonable doubt. The task is intricate and

weighty, necessitating robust proof devoid of any semblance of uncertainty (Ermaida & Lukman, 2021). Secondly, the link between the predicate offence and the proceeds of unlawful activity must be proven on the balance of probabilities. In this regard, the confiscated illicit funds must be derived exclusively from the underlying criminal activity. In the event of a disruption in the continuity of monies or if they have been expended or commingled with other monies within the account, it becomes challenging to establish that the confiscated funds originated from the illicit conduct or the predicate offence. The transparent display of the link is required within a maximum duration of twelve months, commencing from either the date of property seizure or the date of issuance of the freezing order. Thirdly, the prosecution must also prove on the balance of probabilities that the respondents have abetted or participated in the commission of the predicate offence. The law on abetment is in Section 107 Penal Code *Mohd Arif bin Ab Rahman & Anor v Public Prosecutor* [2021] MLJU 659. Under the Section, a person abets the doing of a thing who instigates any person to do that thing; commands any person to do that thing; engages with one or more other person or persons in any conspiracy for the doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or intentionally aids, by any act or illegal omission, the doing of that thing. The covert nature of a predicate offence presents significant difficulties in demonstrating abetment.

In addition, according to Section 56(2)(b) AMLATFPUAA 2001, the judge will only order forfeiture when there is no purchaser in good faith for valuable consideration regarding the property. The judicial cases indicated that the Court accepted that the vendor in the business transaction could be the said purchaser. According to the High Court's ruling, the term "purchaser" should refer to the individual who receives the property or proceeds derived from illegal activities. In this particular instance, this designation applies to the respondent.

The court cases yield several perceptive insights that can provide valuable information to the policymakers. It is imperative for the prosecution to promptly initiate the civil forfeiture process, as any delay may significantly diminish the likelihood of successfully recovering the illegal proceeds. The delay may result in the money in question having already been spent or no longer held within the designated account. Moreover, notwithstanding the respondent's acknowledgement of receiving the illicit funds, the prosecution could not reclaim them due to their subsequent expenditure. It is essential to establish the veracity of three fundamental components to recover the monetary worth of illicit gains as stipulated in the pecuniary penalty order under Section 59 AMLATFPUA 2001. Considering the utilisation of the funds, it prompts inquiry into how the connection between the initial criminal act, namely the predicate offence and the unlawfully obtained profits, can be ascertained. The investigation into the money trail may encounter challenges in recovering the illicit revenues. Thus, an analysis of court cases demonstrates indisputably that the enforcement authorities continue to face challenges in assuring the successful application of the civil forfeiture regime (A. Rahman, 2022). This concept is particularly applicable to business-related matters, as it is tough to retrieve illegally transferred money from buyers to unwitting sellers as payment considerations in commercial transactions. The identified vulnerabilities may indicate the urgent reform to the current civil forfeiture system by comparing it to other jurisdictions that have implemented similar systems successfully.

References

- A. Rahman, A. (2022). An analysis of the forfeiture regime under the anti-money laundering law. *Journal of Money Laundering Control*, 25(1), 50–62. <https://doi.org/10.1108/JMLC->

12-2020-0140

- Al-Rashidi, K. S. (2021). 'Indirect Method of Proof' and the Kuwaiti Anti-Money Laundering Law: A Lesson from the UK. *Criminal Law Forum*, 32(3), 405–433. <https://doi.org/10.1007/s10609-021-09415-3>
- Aurasu, A., & Abdul Rahman, A. (2016). Money laundering and civil forfeiture regime: Malaysian experience. *Journal of Money Laundering Control*, 19(4), 337–345. <https://doi.org/10.1108/JMLC-08-2015-0033>
- Aurasu, Anusha. (2018). *Anti-Money Laundering Law As A Legal Mechanism To Combat Corruption in Malaysia*. Doctor of Philosophy, Universiti Utara Malaysia (UUM).
- Bekhouché, I. E. (2018). Money laundering in Malaysia , regulations and policies. *International Journal of Law*, 4(2), 22–26.
- Bernama. (2022). *Federal Court sets 7 February next year for prosecution's 1MDB-related forfeiture appeal hearing*. Malaymail. <https://www.malaymail.com/news/malaysia/2022/10/18/federal-court-sets-feb-7-next-year-for-prosecutions-1mdb-related-forfeiture-appeal-hearing/34350>
- Bernama. (2023). *MACC has "special technique" for high-profile investigations, says Azam Baki*. The Star. <https://www.thestar.com.my/news/nation/2023/10/01/macc-has-039special-technique039-for-high-profile-investigations-says-azam-baki>
- de Willebois, E. van der D., & Brun, J.-P. (2013). Using civil remedies in corruption and asset recovery cases. *Case Western Reserve Journal of International Law*, 45(3), 615.
- de Willebois, E. van der D., Halter, E. M., Harrison, R. A., Park, J. W., & Sharman, J. C. (2011). *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*. 288.
- Ermaida, E., & Lukman, S. (2021). Crime Prevention Policy Through Depriving Illicit Enrichment and Unexplained Wealth. *Proceedings of the International Conference on Environmental and Energy Policy (ICEEP 2021)*, 583(Iceep), 130–134. <https://doi.org/10.2991/assehr.k.211014.029>
- Esoimeme, E. E. (2015). *The risk-based approach to combating money laundering and terrorist financing*. Eric Press.
- Ferguson, G. (2018). Chapter 5 Asset Recovery And Mutual Legal Assistance. In *Global Corruption: Law, Theory & Practice* (Third, pp. 386–533). University of Victoria. <https://dspace.library.uvic.ca/handle/1828/9253>
- Gilmour, N. (2020). Illustrating the incentivised steps criminals take to launder cash while avoiding government anti-laundering measures. *Journal of Money Laundering Control*, 23(2), 515–526. <https://doi.org/10.1108/JMLC-12-2019-0095>
- Government of Malaysia. (2016). *Response to the Human Rights Council (HRC) Advisory Committee on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation*. <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/AdvisoryCom/IllicitFunds/Malaysia.doc>
- Hamin, Z., Hashim, N., & Abdul Hakim, M. M. (2017). The ramifications of forfeiting property in money laundering cases: Some evidence from Malaysia. *Pertanika Journal of Social Sciences and Humanities*, 25(S), 71–80.
- Hamin, Z., Omar, N., & Abdul Hakim, M. M. (2017). Implications of forfeiting property in money laundering cases in Malaysia. *Journal of Money Laundering Control*, 20(4), 334–344. <https://doi.org/10.1108/JMLC-10-2015-0046>
- Hamin, Z., Omar, N., & Hakim, M. M. A. (2015). When Property is the Criminal: Confiscating Proceeds of Money Laundering and Terrorist Financing in Malaysia. In *Procedia*

- Economics and Finance* (Vol. 31, pp. 789–796). [https://doi.org/10.1016/s2212-5671\(15\)01168-5](https://doi.org/10.1016/s2212-5671(15)01168-5)
- International Bank for Reconstruction and Development / The World Bank, I. B. for R. and D. / T. W. (2015). *Public Wrongs, Private Actions Civil Lawsuits to Recover Stolen Assets*.
- Mohamad, N. A. (2004). A Bona Fide Purchaser for Valuable Consideration: A special creature under the Malaysian land law. *Proceedings of the International Real Estate Research Symposium (IRERS) 2004 Towards Enhancement of Knowledge Partnerships in Real Estate*, 427–436.
- Parlimen Malaysia. (2014). *Penyata Rasmi Parlimen Dewan Rakyat Parlimen Ketiga Belas Penggal Kedua Mesyuarat Kedua Bil. 27* (p. 131). Cawangan Penyata Rasmi Parlimen Malaysia 2014.
- PricewaterhouseCoopers (PwC). (2022). *Doing business in Malaysia 2022* (p. 74). <https://www.pwc.com/my/en/publications/2022/doing-business-in-malaysia-2022.html>
- Sotiropoulou, A. (2015). *Fighting corruption through the lens of civil law: the option of civil law remedies*. http://www1.worldbank.org/finance/star_site/ten_things.html
- Tromme, M. (2019). Waging War Against Corruption in Developing Countries: How Asset Recovery Can be Compliant with the Rule of Law. *Duke Journal of Comparative & International Law*, 29, 165–233. www.binghamcentre.biicl.org.
- Yasin, N. M. (2002). An Examination of the Malaysian Anti-Money Laundering Act 2001. *Current Law Journal*, 6, 1.
- Yatim, H. (2021). *Court of Appeal dismisses prosecution's eight appeals for forfeiture including RM192 million from central Umno*. The Edge Malaysia. <https://theedgemaalaysia.com/article/court-appeal-dismisses-prosecutions-eight-appeals-forfeiture-including-rm192-million-central>
- Yatim, H. (2023a). *Prosecution drops appeal to forfeit RM192 million in 1MDB-related funds from Umno*. The Edge Markets. <https://www.theedgemarkets.com/node/654308>
- Yatim, H. (2023b). *Prosecution drops forfeiture appeal for RM21.77 mil purportedly linked to 1MDB*. The Edge Malaysia. <https://www.theedgemarkets.com/node/653376>