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To Members of the Malaysian Bar

**Highlights from the Appellate Courts (No 15/2026)**

The Publications Committee is pleased to circulate the 15th edition of this case note series for the year.

The cases covered in this edition are as follows:

**(1) Bank Kerjasama Rakyat Malaysia Berhad v Kamuja Hartamas Sdn Bhd (CA)**
*Contract — Wrongful termination of financing facilities — Assessment of damages — Loss of profits — Causation and foreseeability — Deductions for land-sale proceeds and income tax — Interest*
Written by Aiman Abd Gaffar

**(2) Ng Bee Hui & Ors v Nanopac Innovation Limited & Ors (CA)**
*Practice and procedure – Order 34 Rule 1 of the Rules of Court 2012 – Pre-trial case management – Compliance with pre-trial directions – Penalty for non-compliance*
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**(3) Berjaya Hills Resorts Berhad v Pengarah Negeri Pejabat Pengarah Tanah Dan Galian Negeri Pahang & Other Appeals (CA)**
*Land law – Sections 14(1)(e) and 101(5) of the National Land Code – Power to determine and impose quit rent – Duty and functions of the National Land Council – Section 11(d) of the National Land Code – Declaration and publication of gazettes of administrative areas*
Written by Nezwan Helmy Hamzah

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Sincerely,

**Gregory Das**
**Co-Chairperson**
**Publications Committee**



# Highlights from the Appellate Courts

***Bank Kerjasama Rakyat Malaysia Berhad v Kamuja Hartamas Sdn Bhd (CA)***
*Contract — Wrongful termination of financing facilities — Assessment of damages — Loss of profits — Causation and foreseeability — Deductions for land-sale proceeds and income tax — Interest*

**Panel:**
Ismail Brahim, JCA
Lim Hock Leng, JCA
Evrol Mariette Peters, JCA

## Overview

In **Bank Kerjasama Rakyat Malaysia Berhad v. Kamuja Hartamas Sdn Bhd** (Civil Appeal No.: W-03(IM)(MUA)-2-01/2024), the Court of Appeal ("the COA") considered an appeal and cross-appeal arising from the assessment of damages following Bank Kerjasama Rakyat Malaysia Berhad's ("**the Bank**") wrongful termination of Islamic bridging finance granted to Kamuja Hartamas Sdn Bhd ("**Kamuja**") for a housing development. Liability had been determined in an earlier appeal.

The COA upheld the finding that the termination caused the project's failure and that the loss of profits under Kamuja's revised development proposal was within the parties' reasonable contemplation under section 74 of the Contracts Act 1950. It also upheld the gross assessment of RM15,140,156.15, calculated by deducting the Gross Development Cost ("**GDC**") from the Gross Development Value ("**GDV**"). However, it substituted the High Court's RM4 million deduction for the project land with RM4.22 million, being the net benefit after accounting for the land cost already included in the GDC. After a further 24% income tax deduction, the final award was RM8,299,318.67, with interest at 5% per annum from 6 June 2016 until payment. The Bank's appeal was allowed to that limited extent and Kamuja's cross-appeal was dismissed.

## Background

The Bank granted Kamuja facilities totalling RM9.846 million in three tranches for land, infrastructure works and construction costs. The original project comprised 110 terrace houses and 34 semi-detached houses, but only the RM3.346 million land-purchase tranche was disbursed. After difficulties in obtaining a development order, Kamuja sought restructuring and submitted its fourth proposal in 2012, revising the development to 66 semi-detached houses, with 40 units in Phase 1. Kamuja subsequently obtained a development order for Phase 1.

The Bank terminated the facilities on 6 June 2013 for Kamuja's alleged failure to comply with proposed restructuring terms. In the earlier liability appeal, the COA held that the notice did not identify the terms breached, whilst the Bank maintained inconsistently that no restructuring agreement had been concluded. Damages were remitted for assessment.

The Deputy Registrar awarded nominal damages of RM5,000, finding that causation had not been proved and that the revised proposal was not within the parties' contemplation. On appeal, the High Court assessed gross loss of profits at RM15,140,156.15, based on a GDV of RM49.66 million less a GDC of RM34,519,843.85. After deducting 24% income tax and RM4 million for the subsequent land sale, the award stood at RM7,506,518.67.

## Decision and Reasoning

### *The earlier liability judgment did not bar the loss-of-profits claim*

The Bank argued that the earlier COA had conclusively found that Kamuja lacked the financial capacity to complete the project and was therefore barred by res judicata from claiming loss of profits. The COA rejected this reading. The earlier panel had identified evidential difficulties, but had not finally determined the issue. Its order remitting damages for assessment required causation and financial capacity to be examined, and its observations could not be read in isolation as foreclosing the claim.

### *Causation and foreseeability under section 74*

The COA held that the termination was the effective cause of the project's failure. Kamuja's attempts to redeem the land and obtain alternative funding arose from the Bank's demands and threat of foreclosure does not amount to an intention to abandon the project. Its later land sale in 2018 was likewise not an independent abandonment. The project had stalled for years, costs had increased and the Bank, as chargee, had withheld the consent required for subdivision and development approvals.

The contention that the remaining RM6.5 million could not fund the development also misconstrued the financing structure. The Bank's feasibility study contemplated that 61% of funding would come from purchasers and end-financiers, with its facilities serving as bridging finance. Kamuja's RM3,684,694.25 cash payment to redeem the land also exceeded the RM2.636 million internal funding identified in the study and approximately 10% of the GDC for Phase 1. Kamuja therefore had the capacity to undertake that phase.

The losses under the fourth proposal were within the second limb of section 74. The revised proposal, supporting documents and cash-flow projections had been provided to the Bank before termination. It did not object and stood by whilst Kamuja pursued and obtained the development order. The Bank was therefore estopped from treating the revised proposal as outside the operative development model. Once loss of profit as a damage was foreseeable, the Bank was liable for its full extent although it had not conducted a final feasibility study on the revised proposal, which remained a housing development.

### *Assessment of loss and deductions*

The COA found no appealable error in the conventional GDV-minus-GDC method. The RM49.66 million GDV was

supported by comparable developments and market conditions. The Bank's valuer accepted the methodology and no competing valuation was produced. The RM34,519,843.85 GDC was supported by detailed costing which the Bank's witnesses accepted was more detailed and conservative than its internal estimates. The RM15,140,156.15 loss was therefore evidence-based despite Kamuja's lower projection in earlier correspondence.

The land sale nevertheless had to be brought into account to prevent double recovery. The COA rejected the RM4 million sale figure because it rested on uncertain oral testimony, lacked transactional documents and conflicted with Kamuja's own RM9 million valuation. Incomplete challenge did not oblige the COA to accept evidence which was inherently doubtful or contradicted by objective evidence. As the RM4.78 million acquisition cost was already included in the GDC, the deductible net benefit was RM4.22 million.

The COA upheld the 24% income tax deduction. Applying English House of Lords case of British Transport Commission v Gourley and our Federal Court case of Daishowa (M) Wood Products Sdn Bhd v Kepong Wood Products Sdn Bhd, damages had to reflect the claimant's actual net loss. Although taxation was not pleaded and raised only at submissions, there was a single head of loss and the established GDV and GDC provided a sufficient basis to assess the tax consequence.

Finally, interest on damages to be assessed generally runs from the judgment establishing liability, not the later assessment. Interest after the earlier liability judgment was therefore post-judgment interest. The High Court nevertheless had discretion under Order 42 rule 7(2) of the Rules of Court 2012 to select a later date. Its choice of 6 June 2016 reflected the evidence that the project would have taken three years from termination to complete.

**Key Takeaways**

The decision shows that a developer's inability to fund an entire project from its own resources or the undisbursed balance of bridging finance is not of its own fatal to causation. The court must examine the contemplated financing structure, including purchaser funding and progressive drawdowns. A revised development may also fall within section 74 where the financier knew of it, received its projections and allowed the borrower to proceed without objection.

The assessment remains compensatory. Projected profits require reliable valuation and costing evidence, whilst benefits retained or realised after the breach must be deducted to prevent double recovery. Lost profits may also require an income tax deduction where the evidence permits the claimant's actual net loss to be assessed.

Written by
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***Ng Bee Hui & Ors v Nanopac Innovation Limited & Ors (CA)***
*Practice and procedure – Order 34 Rule 1 of the Rules of Court 2012 – Pre-trial case management – Compliance with pre-trial directions – Penalty for non-compliance*

**Panel:**
Mohamed Zaini bin Mazlan, JCA
Faizah binti Jamaludin, JCA
Aliza binti Sulaiman, JCA

**Overview**

The Court of Appeal decision in **Ng Bee Hui & Ors v Nanopac Innovation Limited & Ors (Civil Appeal No.: B-02(IM)(NCC)-1488-08/2025)** concerned an appeal against a High Court order striking out, on the first day of trial, the claims of thirteen (13) of thirty-two (32) plaintiffs in a share subscription misrepresentation suit, for non-compliance with pre-trial case management ("**PTCM**") directions to file witness statements. Of the thirteen (13) plaintiffs whose claims were struck out, only five (5) appealed ("**the Appellants**"). Significantly, unlike the other plaintiffs whose claims were struck out, the Appellants had filed their witness statements before the commencement of trial, albeit out of time and without first obtaining leave of Court. The Court of Appeal held that, while Order 34 rule 1(3) of the Rules of Court 2012 empowers striking out for non-compliance with PTCM directions without a prior unless order, the sanction must be proportionate. As the High Court had not considered the distinction between the Appellants and the other struck-out plaintiffs, the absence of any prior warning, or the availability of lesser sanctions, the striking out order was disproportionate. The appeal was allowed and the Appellants' claims reinstated, subject to strict conditions and costs.

**Background**

The action was commenced on 17.3.2020 by thirty-two (32) plaintiffs against six (6) defendants, arising from alleged misrepresentations in connection with the plaintiffs' subscription for shares in the 1st Defendant. The first direction requiring the filing of witness statements was issued on 25.5.2021, with compliance due by 25.8.2021. Despite subsequent directions and extensions granted over a period of more than five (5) years, compliance remained incomplete. As at 28.4.2025, thirteen (13) witness statements were still outstanding, and the matter was thereafter fixed for trial on 7.7.2025 and 29.7.2025.

On the first day of trial, six (6) new witness statements were filed, to which the defendants objected. The High Court then struck out the claims of the thirteen (13) plaintiffs who were treated as non-compliant, with no order as to costs. The five (5) Appellants, namely the 18th, 20th, 23rd, 24th and 27th plaintiffs, had in fact filed their witness statements on 26.6.2025, before the commencement of trial, albeit out of time and without first obtaining leave of Court.

In striking out the claims, the High Court relied on ***Sunway PMI-Pile Construction Sdn Bhd v Pembinaan Chan & Chua Sdn Bhd [2002] 7 MLJ 538 ("Sunway PMI-Pile Construction")*** and ***Ho Shee Jan v Emas Nominees Sdn Bhd & Ors [2002] 3 MLJ 374 ("Ho Shee Jan")***, found a "nonchalant attitude" and concluded that striking out was the only option.

**Decision of the Court of Appeal**

*Issue 1: Whether the High Court had power under Order 34 rule 1(3) to strike out the Appellants' claims*

The Court of Appeal held that there was no dispute the High Court possessed the power under Order 34 rule 1(3) of the ROC 2012 to dismiss an action, strike out a defence or counterclaim, or make such other order as it thought fit, where a party failed to comply with PTCM directions. The authorities relied upon by the High Court, ***Sunway PMI-Pile Construction and Ho Shee Jan***, established that the Court was entitled to act firmly against non-compliance, consistent with the Federal Court's observation in ***Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461** ("***Syed Mohamed***") that Order 34 vests the Court, rather than the parties, with control over the pace of litigation. However, the existence of that power did not mean that striking out followed automatically upon every breach; the sanction imposed still had to be justified on the facts.

*Issue 2: Whether, absent a prior warning, unless order or peremptory order, striking out was a proportionate sanction*

The Court of Appeal accepted that Order 34 rule 1(3) does not make an unless order a precondition to striking out, and that in a sufficiently serious, deliberate or contumelious case, the Court may strike out without further warning. However, applying ***Dr Sim Kui Hian v Chong Chieng Jen and Other Appeals* [2021] MLJU 562** ("***Dr Sim Kui Hian***") and ***Hatara (M) Sdn Bhd v Petroliam Nasional Bhd (Petronas) & Anor* [2010] 4 MLJ 17** ("***Hatara***"), the Court regarded a peremptory or unless order as a measure of last resort, and emphasised that, before imposing a sanction on a defaulting party, the Court must consider all the circumstances of the case, and, in particular, whether the default was intentional and contumelious.

Subsequently, the Court of Appeal acknowledged that the Appellants' non-compliance was serious, given the lengthy delay, repeated missed deadlines, failure to obtain leave before filing their witness statements out of time, and absence of a satisfactory explanation for the delay. The fact that the proceedings involved multiple parties did not excuse their non-compliance, and the proper course would have been to seek leave or an extension of time. Nonetheless, a material distinction had to be drawn between the Appellants, who had filed witness statements before trial (albeit late and without leave), and the other struck-out plaintiffs, who had filed none at all.

In this regard, the High Court failed to consider the distinction between the Appellants and the other defaulting plaintiffs, the absence of any prior warning or unless order, and the availability of lesser sanctions. The Court of Appeal therefore held that the

failure to assess proportionality was material and that striking out the Appellants' claims was disproportionate.

*Issue 3: Whether the Respondents' prejudice, including the continued progress of the trial, precluded reinstatement*

The Respondents argued that the trial had already proceeded for four (4) days on the basis that only nineteen (19) plaintiffs remained, and that reinstatement would prejudice their trial strategy. The Court of Appeal accepted that this was a serious concern, but held that subsequent developments could not retrospectively justify a striking out order that was disproportionate when made. Any prejudice could instead be addressed through appropriate conditions and costs, and reinstatement would not make a fair trial impossible.

Applying ***Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd*** **[2014] 1 MLJ 80** ("***Conlay Construction***") on appellate restraint and ***Syed Mohamed*** on the Court's control over the progress of litigation, the Court nonetheless found that reinstatement would not render a fair trial impossible, as any prejudice to the Respondents could be adequately addressed through strict case management directions and costs.

*Issue 4: Whether appellate intervention was warranted*

The Court of Appeal recognised that the striking out order was discretionary and that, applying ***Conlay Construction***, an appellate court should not interfere merely because it would have exercised the discretion differently. However, intervention is warranted where the discretion was exercised on a wrong principle, relevant considerations were omitted, or the decision resulted in injustice.

Accordingly, applying **Dr Sim Kui Hian** and ***Hatara***, the Court of Appeal held that appellate intervention was warranted as striking out was disproportionate in the particular circumstances. The Court nevertheless emphasised that its decision did not excuse non-compliance with PTCM directions, which may justify striking out in an appropriate case.

*Issue 5: The appropriate consequential orders*

Having found appellate intervention warranted, the Court of Appeal reinstated the Appellants' claims, but subject to strict conditions. The Appellants were confined to the witness statements filed on 26.6.2025 and could not file further witness statements or call additional witnesses without leave. Any application to recall witnesses was to be determined by the High Court, which was also empowered to give further directions necessary to ensure the fair and orderly continuation of the trial.

The Appellants were further ordered to bear costs thrown away arising from their non-compliance, and to pay RM40,000.00 in costs for the appeal, subject to allocatur, before the next High Court trial date.

**Conclusion**

The Court of Appeal emphasised that its decision was not a licence to disregard PTCM directions: a party who defaults takes a serious risk, and striking out may well be justified on different facts. The outcome here turned on the particular circumstances that the Appellants had filed witness statements before trial, that there was no prior unless order or express warning, that the High Court's grounds did not show consideration of lesser sanctions, and that the prejudice to the Respondents, though real, was capable of being addressed by strict terms and costs.

Written by
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***Berjaya Hills Resorts Berhad v Pengarah Negeri Pejabat Pengarah Tanah Dan Galian Negeri Pahang & Other Appeals (CA)***
*Land law – Sections 14(1)(e) and 101(5) of the National Land Code – Power to determine and impose quit rent – Duty and functions of the National Land Council – Section 11(d) of the National Land Code – Declaration and publication of gazettes of administrative areas*

**Panel:**
Ravinthran Paramaguru, JCA
Choo Kah Sing, JCA
Ahmad Fairuz Zainol Abidin, JCA

**Overview**

The Court of Appeal decision in ***Berjaya Hills Resorts Berhad v Pengarah Negeri Pejabat Pengarah Tanah Dan Galian Negeri Pahang & Other Appeals*** **(Civil Appeal No. C-01(A)-590-09/2024 & Ors)** concerned challenges by the registered proprietors of 330 parcels of land in Bentong, Pahang against the substantial increase in quit rent rates for 2023 by the Director General of Lands and Mines of the State of Pahang, which were also applied retrospectively to the years 2020, 2021 and 2022. The appeals arose from the dismissal by the High Court of the appellants' respective applications for judicial review against the issuance of the revised quit rent bills.
The appellants contended that the revised quit rent rates were unlawful and void on four grounds, namely:

(1) the failure to obtain the prior approval of the National Land Council under s. 101(5) of the National Land Code 1965 ("**NLC**");

(2) the declaration of the "Subdistrict of Genting" as "Town Land" under s. 11(d) of the NLC before the completion of the survey;

(3) the failure to endorse the revised rent rates on the documents of title as required under s. 101(6) of the NLC; and

(4) the retrospective amendment of rule 22 of the Pahang Land Rules 1992 by the Pahang Land (Amendment) (No. 8) Rules 2022.

The Court of Appeal held, inter alia, that the approval of the National Land Council under s. 101(5) of the NLC relates to the time at which the State Authority may exercise its power to revise rent, and not to the quantum of the revised rent rates. The Court of Appeal further held that the subsequent rectification of the "Town Land" declaration did not invalidate the revision exercise; that the endorsement contemplated by s. 101(6) of the NLC was merely a subsequent administrative act which did not affect the validity of the rent revision; and that the retrospective amendment to rule 22 of the Pahang Land Rules 1992 was corrective in nature and did not render the revised quit rents ultra vires.

**Decision of the Court of Appeal**

**1st Issue: Whether the revised quit rent rates were invalid for failure to comply with s. 101(5) of the NLC**

The appellants argued that the revised rates required specific approval by the National Land Council. The Court of Appeal rejected this argument. The Court of Appeal considered the constitutional and statutory functions of the National Land Council. The Court of Appeal held that the National Land Council's role was principally to formulate national land policy and provide advice concerning the administration of the NLC.

The Court of Appeal held that the National Land Council's approval under s. 101(5) of the NLC relates to the time at which the State Authority may undertake a rent revision. The power to determine the quantum of rent, however, remains with the State Authority under ss. 14(1)(e) and 101(3) of the NLC.

The Court of Appeal therefore found no procedural impropriety. The National Land Council had, in any event, approved the rent revision in 2014.

**2nd Issue: Whether the declaration of "Town Land" was invalid under s. 11(d) of the NLC**

It was undisputed that the State Authority had declared the relevant land as "Town Land" by Gazette No. 2501 dated 21.11.2019 before the final survey plan was endorsed by the Director of Survey and Mapping. The survey plan was subsequently endorsed on 20.2.2020. A Corrigendum Gazette dated 12.4.2020 was then issued to rectify the earlier gazette by including the survey plan number.

The Court of Appeal held that the State Authority's power to amend, rectify or correct shortcomings in the exercise of its powers under the NLC could not be unduly restricted. The error did not adversely affect the appellants' rights or proprietorship of the land.

The Court of Appeal further held that the declaration under s. 11(d) was a distinct exercise from the State Authority's power under s. 14(1)(e) to determine the revised rent rates. Accordingly, the technical error in the exercise of the s. 11(d) power did not, by itself, invalidate the separate exercise of power under s. 14(1)(e) of NLC.

In any event, the error had been rectified by the Corrigendum Gazette. The declaration had been based on the earlier draft plan, which was subsequently endorsed as the final plan, and there was no material discrepancy between the draft and final plans. The Court of Appeal therefore found that the error did not amount to procedural impropriety or result in any miscarriage of justice.

**3rd Issue: Whether failure to amend the documents of title under s. 101(6) of the NLC invalidated the revised rent rates**

It was held that the requirement under s. 101(6) of the NLC to amend the amount of rent endorsed on the document of title was held to be a subsequent administrative action to be undertaken by the Land Administrator. It did not affect the validity of the State Authority's exercise of its power to revise the rent rates. The Court of Appeal further noted that the NLC prescribed no specific time within which the amendment had to be made.

Accordingly, the failure to make the endorsement did not constitute procedural impropriety warranting judicial review.

**4th Issue: Whether the retrospective amendment to rule 22 of the Pahang Land Rules 1992 was ultra vires**

This concerned the removal of the word "new" from rule 22(1) of the Pahang Land Rules 1992 through the Pahang Land (Amendment) (No. 8) Rules 2022, which was gazetted on 1.2.2023 but deemed to have retrospective effect from 1.1.2020.

The Court of Appeal considered that the original wording referring to "new alienation of lands" was intended in substance to apply to existing alienated lands. If the revised rates applied only to future alienations, the entire rent revision exercise under ss. 101 and 14(1)(e) of the NLC would be rendered ineffective for existing lands and would result in two different rent rates applying to lands of the same classification.

Although the amendment operated retrospectively, The Court of Appeal found that it did not prejudice the appellants' interests and could not be construed as ultra vires the State Authority's power.

**Conclusion**

In view of the foregoing, the Court of Appeal unanimously dismissed the appeals. The appellants were ordered to pay costs of RM20,000.00 in each appeal to the respondent, subject to allocatur.

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