



**Badan Peguam Malaysia
Malaysian Bar**

www.malaysianbar.org.my

Wisma Badan Peguam Malaysia
2 Leboh Pasar Besar
50050 Kuala Lumpur, Malaysia
Tel : +603-2050 2050
Fax : +603-2050 2019
Email : council@malaysianbar.org.my

**Circular No 388/2026
Dated 23 Oct 2026**

To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 19/2026)

The Publications Committee is pleased to circulate the 19th edition of this case note series for the year.

The cases covered in this edition are as follows:

(1) Ng Mee Yee & Anor v Public Prosecutor (FC)

Criminal law – Whether double presumption invoked by trial judge – Failure to call witness – Whether statement under section 112 of the Criminal Procedure Code was hearsay evidence – Adequacy of investigations

Written by Nezwan Helmy Hamzah

(2) Siva Kumar Jeyapalan & Anor v Firwas Sdn Bhd & Ors & Another Appeal (CA)

Civil procedure – Pleading fraud and conspiracy – Judicial notice of unpleaded point on illegality / contract law – Formation of contract – Essential terms / land law – Section 326 of the National Land Code – Removal of caveat – Res judicata and issue estoppel – Fiduciary duties of real estate agents / remedies – Exemplary and aggravated damages

Written by Corina Robert Mangharam

(3) Extra Excel (M) Sdn Bhd v Quek Peck Keow (P) & Other Appeals (CA)

Arbitration – Section 10(1) of the Arbitration Act 2005 – Amended arbitration agreement – Powers of arbitral tribunal under section 18(1) of the Arbitration Act 2005 to rule on its own jurisdiction

Written by Dr Sivasangaran Nadarajah

The case notes may be accessed [here](#) (see page 2 onwards).

Sincerely,

**Gregory Das
Co-Chairperson
Publications Committee**



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Highlights from the Appellate Courts

Ng Mee Yee & Anor v Public Prosecutor (FC)

Criminal law – Whether double presumption invoked by trial judge – Failure to call witness – Whether statement under section 112 of the Criminal Procedure Code was hearsay evidence – Adequacy of investigations

Panel:

Wan Ahmad Farid Wan Salleh, CJ
Collin Lawrence Sequerah, FCJ
Azimah Omar, FCJ

Overview

The Federal Court decision in **Ng Mee Yee & Anor v Public Prosecutor** (Criminal Appeal No. 05(L)-14-02/2025(W)) concerned an appeal against the appellants' convictions for trafficking in 777.3g of methamphetamine (hereinafter referred to as "**the drugs**") under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("**DDA**"), read with s. 34 of the Penal Code. The drugs were found on the top shelf of a wardrobe in an apartment unit occupied by the appellants in Kuala Lumpur on 11 October 2018. The High Court convicted both appellants and sentenced them to death. The Court of Appeal affirmed their convictions but substituted the death sentences with life imprisonment for 30 years from the date of arrest, with the second appellant also sentenced to 12 strokes of whipping.

The appellants challenged the safety of their convictions on three main grounds, namely:

- (1) whether the trial judge had impermissibly invoked the double presumption under ss. 37(d) and 37(da) of the DDA to establish possession and trafficking;
- (2) whether the prosecution's failure to call Alam (a Bangladeshi national), the apartment's management agent, was fatal to its case and whether his statement recorded under s. 112 of the Criminal Procedure Code ("**CPC**") constituted hearsay evidence, and;
- (3) whether the investigation was incomplete due to the absence of fingerprint and DNA testing evidence.

The Federal Court unanimously dismissed the appeal and affirmed the decision of the Court of Appeal. The Federal Court held that the trial judge had invoked only the presumption of possession under s. 37(d) of the DDA and had independently found that the elements of trafficking were satisfied under the definition of trafficking in s. 2 of the DDA. The Federal Court further held that Alam was not a material witness, his s. 112 statement was properly admitted under s. 32(1)(i) of the Evidence Act 1950 ("**EA**"), and the investigation was complete notwithstanding the absence of fingerprint and DNA evidence.

Decision of the Federal Court

1st Issue: Whether the trial judge had invoked the double presumption

The appellants contended that the trial judge had purportedly invoked the double presumption by relying on s. 37(d) of the DDA to establish possession and knowledge of the drugs, and thereafter invoking s. 37(da) of the DDA to presume trafficking of the drugs.

However, the Federal Court found that the trial judge had not invoked the presumption of trafficking under s. 37(da) of the DDA. The trial judge had expressly invoked s. 37(d) of the DDA to establish the appellants' possession and knowledge of the drugs, and thereafter relied on the definition of trafficking under s. 2 of the DDA, which includes the acts of "keeping" and "concealing", to complete the elements of the offence.

The Federal Court held that the trial judge's findings were supported by a number of pieces of supporting evidence, *inter alia*, the drugs were found in a wardrobe used by the appellants, their clothing had been placed in the wardrobe, and the drugs were sufficiently visible that the appellants could not reasonably have overlooked them.

Accordingly, the trial judge had not invoked the double presumption in convicting the appellants.

2nd Issue: Whether the failure to call Alam was fatal to the prosecution's case and whether his s. 112 statement constituted hearsay

The appellants contended that the prosecution's failure to call Alam, the rental agent who had assisted them in renting the apartment unit, was fatal to the prosecution's case. The appellants further argued that Alam's statement recorded under s. 112 of the CPC constituted hearsay evidence, and ought not to have been admitted by the trial judge.

The Federal Court held that the trial judge had not erred in admitting Alam's s. 112 statement pursuant to s. 32(1)(i) of the EA. The Federal Court further agreed with the learned trial judge (as affirmed by the Court of Appeal) that Alam was not a material witness who could unravel the narrative of the case. His role was nothing more than that of a house agent who assisted the appellants in finding an apartment unit to occupy. The Federal Court also noted that Alam had left Malaysia by the time the trial commenced, and the prosecution had undertaken diligent searches and reasonable efforts to procure Alam.

The Federal Court therefore held that the learned judge was correct in admitting s. 112 statement by Alam and that Alam's non-attendance was not fatal to the prosecution's case. There was no evidence of suppression of evidence by the prosecution to invoke the application of s. 114(g) of the EA.

3rd Issue: Whether the investigation was incomplete

The appellants contended that the investigation was incomplete because the investigating officer had failed to conduct fingerprint dusting and DNA testing on the packets containing the drugs.

The Federal Court observed that there was no provision in the DDA requiring fingerprint or DNA evidence to secure a conviction for drug possession. The Federal Court reiterated that the absence of such evidence did not necessarily mean that possession of the drugs had not been established, particularly where there is ample other evidence linking the appellants to the drugs.

The Federal Court further relied on the circumstances in which the drugs were discovered. The appellants had occupied the apartment unit and used the wardrobe in which the drugs were found. The Federal Court also considered the second appellant's conduct during the raid, when he knelt and pleaded with the police not to seize the drugs.

In light of the totality of the evidence, the Federal Court held that the investigating officer's investigation was full and complete.

Conclusion

The Federal Court unanimously dismissed the appeal and affirmed the decision of the Court of Appeal.

The Federal Court held that the trial judge had correctly applied the presumption of possession under s. 37(d) of the DDA without invoking double presumption; that Alam's s. 112 statement was properly admitted and his non-attendance was not fatal to the prosecution's case; and that the investigation was complete.

The convictions of the appellants were accordingly upheld, as were the sentences imposed by the Court of Appeal.

Written by
Nezwan Helmy Hamzah
Member, Publications Committee

Siva Kumar Jeyapalan & Anor v Firwas Sdn Bhd & Ors & Another Appeal (CA)

Civil procedure – Pleading fraud and conspiracy – Judicial notice of unpleaded point on illegality / contract law – Formation of contract – Essential terms / land law – Section 326 of the National Land Code – Removal of caveat – Res judicata and issue estoppel – Fiduciary duties of real estate agents / remedies – Exemplary and aggravated damages

Panel:

Azhahari Kamal Ramli, JCA
Ahmad Kamal Md Shahid, JCA
Ong Chee Kwan, JCA

Overview

The case of ***Siva Kumar Jeyapalan & Anor v Firwas Sdn Bhd & Ors & Another Appeal*** (Civil Appeal No.: W-02(NCvC)(W)-144-01/2024) concerned a failed attempt to sell a parcel of agricultural land in Plentong, Johor Bahru ("**Land**"), of which Firwas Sdn Bhd ("**Firwas**") was the registered proprietor.

The matter consisted of two consolidated appeals arising from the High Court judgment dated 22-1-2024, namely:

- (1) an appeal ("**Appeal 144**") brought by Siva Kumar Jeyapalan ("**Siva**") and Ammsa Property Sdn Bhd ("**Ammsa**"); and
- (2) an appeal ("**Appeal 274**") brought by Thevan.

The respondents for Appeal 144 were Firwas, Thevandran K Ragavan ("**Thevan**") and Shoba Govindasamy ("**Shoba**"). Firwas also cross-appealed on the computation period for damages awarded to them by the High Court. The respondents for Appeal 274 are Firwas, Jasim Sura Puthuchearu ("**Jasim**"), Siva, Ammsa and Shoba.

The Grounds of Judgment addressed common issues raised in Appeal 144, Appeal 274 and Firwas' cross-appeal.

Background

In 2017, Firwas retained Thevan and his sole proprietorship as its real estate agent to market the Land. In January 2018, Thevan placed before Jasim, being Firwas' director, a proposal purportedly from Siva to purchase the Land for RM60m to be paid in three tranches. Firwas agreed in principle, though the mechanism for payment of the third tranche proved central to this dispute.

On 2-3-2018, Thevan handed Jasim a temporary receipt dated 5-2-2018 pre-signed by Siva which stated the purchase price to be RM40m with an earnest deposit of RM1.2m and required a formal sale and purchase agreement ("**SPA**") to be executed, subject to terms and conditions to be mutually agreed. Jasim signed the temporary receipt on Firwas' behalf. Thevan also undertook to procure payment of a third tranche of RM20m.

Thevan then introduced Firwas to a person operating under the name Maragatham Karuppiah ("**Usha**"), who held herself out to be an advocate and solicitor practising at a law firm of which Shoba is a partner ("**Firm**"). Firwas appointed the Firm to prepare the SPA following the signing of the Temporary Receipt, through which Usha acted, while Siva appointed Messrs Adha Selvi & Associates ("**Adha Selvi**").

Adha Selvi wrote to the Firm confirming that the purchase price of the Land was RM40m and that the purchaser and/or his

nominees were entitled to lodge a private caveat upon execution of the receipt of sale. Jasim signed the letter, confirming and accepting its content on Firwas' behalf.

All subsequent drafts prepared by the Firm and Adha Selvi consistently stated RM40m to be the purchase price. Jasim never asked in writing for it to be changed to RM60m.

By May 2018, Firwas had grown dissatisfied with the progress of the negotiations and lost confidence in Usha's ability to prepare a compliant SPA. During trial, Usha emerged as a clerk who forged her professional qualifications and abused the qualifications of her firm's actual partners.

Firwas then revived an earlier buyer, Eastern Titan Sdn Bhd ("**Eastern Titan**"), which paid a RM5.8m deposit for the Land on 12-6-2018. On 18-6-2018, Thevan and Usha were told, not by Jasim, that the deal with Siva was off. Usha acknowledged this in writing, and negotiations were unequivocally terminated on 18-6-2018. Firwas proceeded to sign a separate SPA with Eastern Titan on 22-6-2018 for RM58m in cash. Jasim admitted during trial that he had delayed telling Thevan and Usha until Eastern Titan's cheque cleared.

Events after the negotiations between Firwas and Siva were terminated:

- **20-6-2018:** Usha told Selvi the drafts were "good to go" and Siva signed the SPA.
- **26-6-2018:** Siva signed and affirmed his caveat papers (Form 19B and statutory declaration).
- **26 to 27-6-2018:** Siva sent WhatsApp messages showing he knew the Land had been sold to Eastern Titan.
- **2-7-2018:** Selvi delivered the SPA, signed only by Ammsa, together with a RM4.8 million cheque. The covering letter said the cheque was not to be released until Firwas executed the SPA.
- **5-7-2018:** Siva lodged a private caveat over the Land.

Firwas applied for the removal of the caveat in the Johore Bahru High Court, which was dismissed on 19-2-2019 ("**Johore OS**"). Firwas did not appeal against the decision.

Decision of the High Court

Siva and Ammsa sued for specific performance of the SPA. Firwas counterclaimed for removal of the caveat, damages under Section 329 of the National Land Code ("**NLC**"), and exemplary and aggravated damages. Thevan also counterclaimed for 3% commission on RM40m.

The High Court dismissed the claim and allowed Firwas' counterclaim. The High Court also ordered Siva and Ammsa to pay RM14,244,169.50 in general damages (8% per annum on RM52.2m from 22-9-2020 to 19-2-2024) for the wrongful caveat

lodged ("**Judgment Sum**"). Additionally, Thevan and Shoba were held jointly and severally liable for the Judgment Sum for breach of fiduciary duty, fraud and conspiracy. The court also:

- awarded RM100,000.00 each in exemplary and aggravated damages against Siva, Thevan and Shoba;
- ordered indemnity costs against them jointly and severally;
- directed the RM1.2m deposit held by Thevan to be paid to Firwas in part satisfaction of the Judgment Sum; and
- dismissed Thevan's counterclaim with indemnity costs.

Decision of the Court of Appeal

(1) *The learned HC judge exceeded the pleaded case by making findings of fraud and conspiracy against the Appellants*

It was noted that parties are bound by their pleadings and an exception to the rule is where substantial evidence on an unpleaded cause of action is admitted without objection, and the parties share a common understanding that the issue is being contested as an independent cause of action. Where evidence is equally consistent with the pleaded causes of action, no inference of consent to a distinct unpleaded cause of action can be drawn.

Here, the claim against Siva was for wrongful caveat absent a valid agreement. The claim against Thevan and Shoba was for breach of contract and fiduciary duty, with particulars of dishonest conduct. Fraud and conspiracy were not pleaded, and nothing suggested Siva understood he was defending such claims.

The Federal Court in **Letchumanan Chettiar Alagappan v Secure Plantation Sdn Bhd** [2017] 4 MLJ 697 ruled that the word "fraud" may be dispensed with only where the fraud-constitutive facts are pleaded. No such facts were pleaded against Siva. Nor were conspiracy's elements subsumed in any pleaded cause of action.

The Federal Court in **Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah** [2015] 5 MLJ 619 ruled that a court may notice unpleaded illegality only where it appears on the face of the claim or instrument, without extrinsic evidence. A land sale agreement is not illegal on its face.

(2) *There was no concluded contract for the sale of the Land*

The Court of Appeal affirmed the learned HC Judge's finding of fact that there was no concluded contract for the sale of the Land, including, but not limited to, Siva's inability to identify with certainty when the alleged contract was concluded, and the parties' inability to agree on fundamental terms. The Land's purchase price agreed between Firwas and Siva was RM60m, not RM40m. A document issued by one party's solicitors confirming terms that do not reflect the true price negotiated cannot amount to a binding acceptance by the other party. Furthermore, Siva had direct actual knowledge that Firwas had already sold the Land to Eastern Titan and knew that negotiations terminated on 18-6-2018.

The remedy for a party wrongfully denied a concluded contract, if at all, is damages, not specific performance. The alleged SPA was neither executed by Firwas nor sanctioned by any person with authority to bind it. It is accordingly unenforceable.

(3) *The dismissal of the Johor OS does not preclude a subsequent award of damages for the caveat's wrongful lodgement at trial*

Siva argued that the dismissal of the Johor OS on 19-2-2019 determined that he had a valid caveatable interest, barring damages for wrongful lodgement. He relied on **Kumpulan Sua Betong Sdn Bhd v Ezan Sdn Bhd & Anor** [1993] 2 MLJ 289 (SC) ("**Kumpulan Sua Betong (No. 2)**"), which states that "since this court had held that the caveat had been properly entered by the appellant, no damages should be allowed on account of the caveat". This was an unreasoned end-of-judgment observation, not *ratio decidendi*.

The Court of Appeal rejected the argument for three reasons:

- (1) A removal application under **Section 326 NLC** is decided on affidavit evidence and asks only whether the caveator has a reasonably arguable case, not whether the interest had been conclusively established (**Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor** [1995] 1 MLJ 719 (CA)). A private caveat is akin to an interlocutory injunction, not a final assessment of the merits (**Eng Mee Yong & Ors v Letchumanan** [1979] 2 MLJ 212 (PC)).
- (2) There was no *res judicata* or issue estoppel. The Johor OS decided whether there was an arguable claim, but the trial decided whether a concluded agreement existed upon full evidence at trial. Issue estoppel cannot arise where the issue decided at the earlier proceedings is not the same as the issue now in contention (**Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd** [1995] 3 MLJ 189 (FC)).
- (3) A caveatable interest must exist when the caveat is lodged. As no contract ever existed, an interlocutory dismissal cannot retroactively validate the caveat. Otherwise, caveators surviving removal applications would be immune from damages, subverting **Section 329 NLC**. Additionally, the caveat papers were prepared before the alleged SPA existed.

In any event, **Kumpulan Sua Betong (No. 2)** must be read with **Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd** [1992] 1 MLJ 263 (SC). There, the caveat was restored only after a reasoned assessment of the merits and the caveator's assurance to compensate. In this case, the Johor OS was dismissed without any recorded assessment of the merits.

However, the liability is not automatic upon the caveator's failure at trial. It requires an affirmative finding that the caveat was lodged wrongfully or without reasonable cause (**Antonina Marleen Yarendra v Chai Wei Chung** [2017] 5 MLJ 359 (CA)), which was done in this case.

(4) *Thevan breached his fiduciary duty to Firwas, which subsists even after the termination of his agency, and is liable for the wrongful caveat lodged by Siva*

Breach of fiduciary duty

As Firwas' agent, Thevan owed core fiduciary duties of undivided loyalty, full and candid disclosure of all material information bearing on the transaction, and acting within the authority conferred upon him (**Yasmin Binti Hussain v Lim Kim Meng**

[1990] 2 MLJ 83; **Bristol and West Building Society v Mothew** [1998] Ch 1 (CA)). He breached his fiduciary duties by:

- (1) instructing Usha to proceed with the SPA at RM40m even after Firwas terminated the negotiations;
- (2) asserting by letter dated 21-9-2018 to Firwas a concluded contract at RM40m, knowing the price was RM60 million; and
- (3) claiming commission he admitted was payable only upon execution of the SPA, which was not done.

Thevan argued that only a duty of confidentiality survived the termination of his agency on 18-6-2018. However, whether a fiduciary duty outlives the relationship is highly fact-sensitive (**Ratju v Conway** [2005] EWCA Civ 1302). In this case, Thevan continued dealing in the same transaction within two days, so his duties persisted. Additionally, having pleaded that his agency continued to claim commission, he could not rely on its termination to resist liability.

Liability for the wrongful caveat

Equitable compensation is not governed by remoteness or foreseeability. It requires only that the loss would not have occurred but for the breach (**Target Holdings Ltd v Redfern** [1996] AC 421 (HL); **Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd** [1996] 2 MLJ 265 (CA)). A fiduciary is liable for loss caused by a third party where that act falls within the risk the duty was designed to prevent (**Canson Enterprises Ltd v Boughton & Co** [1991] 3 SCR 534).

In this case, Thevan's conduct made the caveat inevitable, so it was not a *novus actus interveniens*. **Section 329 NLC** does not exclude concurrent equitable liability against a fiduciary whose breach caused the same loss.

(5) The aggravated and exemplary damages against Siva, Thevan and Shoba on the grounds of fraud and conspiracy are set aside, but exemplary damages against Siva and Thevan are still awarded for separate and independent grounds

Exemplary damages are warranted against Siva under the second category identified in **Rookes v Barnard** [1964] AC 1129 (HL), that is, where the defendant's conduct was calculated to make a profit for himself which may well exceed the compensation payable to the claimant. In this case, had Siva's specific performance claim succeeded, he would have acquired land worth RM58m for RM40m, a potential windfall of approximately RM18m.

Aggravated damages are warranted against Thevan because he counter-claimed for commission knowing full well that there was no concluded SPA, aligned himself with Siva's position that there was a concluded SPA for RM40m even though he personally structured the consideration for the Land to be RM60m through his undertaking, and sued his principal for commission on a transaction he knew was never authorised, instead of supporting his principal's interests.

(6) The damages computation period should be recalculated to be extended to the date of the Court of Appeal judgment

Firwas cross-appealed on the computation period, seeking to extend the terminal date from the expiry of one month from the date of the High Court judgment to the date of disposal of the appeal ("**Extended Period**"), on the ground that Firwas gave undertakings to the Court not to proceed with the transfer of title to Eastern Titan until the determination of the appeal as a condition for Siva's stay application being dismissed, which resulted in Siva being granted a *de facto* stay of execution. It did not matter that the undertaking was given voluntarily; an appellant who procures the preservation of the *status quo* pending an unsuccessful appeal does so at his own risk as to the continuing loss thereby caused to the respondent.

Therefore, the Judgment Sum is recalculated from 22-9-2020 to the date of the Court of Appeal judgment. However, Thevan is not jointly and severally liable for the damages during the Extended Period.

Conclusion

The Court of Appeal allowed Appeal 144 in part. The findings of fraud and conspiracy against Siva, Thevan and Usha were set aside, as was the declaration that the alleged SPA was illegal, fraudulent and void *ab initio*. However, the alleged SPA remains unenforceable, as there was no concluded agreement or authority binding Firwas.

The Court of Appeal affirmed the following High Court orders:

- (1) declarations that there was no concluded agreement between Firwas and Siva, and that Firwas was entitled to sell the Land to Eastern Titan;
- (2) order for removal of the caveat, which has been complied with;
- (3) finding that Siva wrongfully lodged the caveat;
- (4) award of indemnity costs against Siva and Ammsa jointly and severally; and
- (5) exemplary damages of RM100,000.00 against Siva, with 5% post-judgment interest from the date of the High Court order.

Firwas' cross-appeal was allowed. The Judgment Sum is to be recalculated at 8% per annum on RM52.2m from 22-9-2020 to the date of the Court of Appeal judgment, with 5% post-judgment interest. Siva alone is liable for the period after one month from the High Court order. Siva and Ammsa were ordered to pay costs of RM80,000.00.

Appeal 274 was dismissed. The dismissal of Thevan's counterclaim for commission and the indemnity costs against him were affirmed. Thevan is jointly and severally liable with Siva and Ammsa for the Judgment Sum, as equitable compensation for his breach of fiduciary duty, up to one month from the High Court order. The RM1.2m earnest deposit is to be paid by Thevan to Firwas in partial satisfaction. Aggravated damages of RM100,000.00 were ordered against Thevan on independent grounds. The earlier aggravated and exemplary damages against Thevan and Shoba, based on fraud and conspiracy, were set aside. Thevan was ordered to pay costs of RM80,000.00.

Written by
Corina Robert Mangharam
Member, Publications Committee

Extra Excel (M) Sdn Bhd v Quek Peck Keow (P) & Other Appeals (CA)

Arbitration – Section 10(1) of the Arbitration Act 2005 – Amended arbitration agreement – Powers of arbitral tribunal under section 18(1) of the Arbitration Act 2005 to rule on its own jurisdiction

Panel:

Azhahari Kamal Ramli, JCA

Ong Chee Kwan, JCA

Nadzarin Wok Nordin, JCA

Overview

In **Extra Excel (M) Sdn Bhd v Quek Peck Keow (P) & Other Appeals** (Civil Appeal No.: J-04(IM)-122-03/2024), the Court of Appeal found that the arbitration clause amended unilaterally by the Appellant (allowed under the rulebook between the parties) could not apply to a dispute raised to the Courts before the amendment (as below). The Court of Appeal dismissed the appeals against the High Court's decision and, in so doing, (1) disallowed a stay of Court proceedings pursued under **s.10(1) Arbitration Act 2005** ("AA"); and (2) granted a declaration that no valid arbitration agreement exists and an injunction restraining the arbitration.

Background

- (1) The Appellant (a multi-level marketing company of its products) appointed the Respondent whose conduct as a distributor was governed by the Appellant's standard form rulebook, which the Appellant reserved the right to amend. This rulebook contained an arbitration agreement for resolving disputes. The Respondent disputed her suspension as a distributor by the Appellant by an Originating Summons commenced in the Sessions Court ("OS"). The Appellant applied to the Sessions Court to stay the OS pending arbitration under **s.10(1) AA**. It was unsuccessful. The High Court reversed this. The Court of Appeal, however, restored the Sessions Court's Order and held that the arbitration clause was inoperative as it had an unlawful time bar ("**April 2022 Decision**").
- (2) The Appellant, however, based on this High Court decision, commenced an arbitration on 25.11.2021 prior to the April 2022 Decision after unilaterally appointing a sole arbitrator pursuant to an amended arbitration clause; which amendments in June 2021 deleted the time bar and allowed "*E. Excel Malaysia*" to claim in arbitration when previously it only allowed disputes "*brought by a Distributor, or one other than E. Excel Malaysia*". The Respondent participated in this arbitration under protest, disputing the Arbitrator's jurisdiction and existence of the arbitration agreement.
- (3) Following the April 2022 Decision, the Sessions Court resumed the OS case against which the Appellant sought a stay under **s.10(1) AA** (the "**2nd Stay Application**"), but now based on the June 2021 arbitration clause, or alternatively for a stay until the disposal of the Respondent's Originating Summons filed at the High Court seeking a declaration that no valid arbitration agreement exists and for an injunction restraining the arbitration ("**OS2**").

- (4) The Sessions Court dismissed the 2nd Stay Application by reason of *res judicata* and issue estoppel and on the same day the High Court allowed OS2 and restrained the arbitration. The Appellant appealed against both outcomes.
- (5) The High Court dismissed the appeal against the Sessions Court's dismissal of the 2nd Stay Application whilst holding that **s.10(1) AA** requires a court to scrutinise an impugned arbitration agreement and surrounding facts and not grant a stay on basis the document is labelled "arbitration agreement". It also held that the revised June 2021 arbitration clause could not apply to a dispute which had already occurred in March 2020 on an amendment unilaterally made "*to allow the Appellant a second bite*".
- (6) Accordingly, two appeals were raised in the Court of Appeal; against (1) the dismissal of the 2nd Stay Application and (2) OS2's affirmance. "*Both appeals turn on a single question: whether the June 2021 version of Clause 1.3 may be invoked by the Appellant against the Respondent, in respect of a dispute that crystallised in March 2020, more than a year before that version of the clause existed*".

Decision of the Court of Appeal

- (7) Both appeals were dismissed.

Key Findings

- (8) **Courts to determine the arbitration agreement's validity in s.10 AA application**
With respect to the Appellant's submission (at [15]) that Courts, through a light touch *prima facie* enquiry, should only ask whether there is an arbitration agreement and that only the Arbitral Tribunal has the exclusive right to decide on its jurisdiction under **s.18 AA** (relying on **Cockett Marine Oil (Asia) Pte Ltd v MISC Bhd and Another Appeal** [2022] 6 MLJ 786), in the present **Extra Excel** matter, the Court of Appeal held (at [23] & [52(a)]) that Courts must determine the arbitration agreement's validity pursuant to **s.10(1) AA**; enquiring only on whether the arbitration agreement exists and "*whether that agreement is null and void, inoperative or incapable of being performed*" (following the Federal Court's decision in **Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd** [2016] 5 MLJ 417 at [33] and [38]). **s.18 AA** "*applies only where a dispute has been referred directly to arbitration*" (at [24]). Whereas, OS2 (for a declaration and an injunction – see paragraph [3] above), was never a **s.10 AA** stay application – neither of which was appropriate for a straightforward light touch first instance stay application (at [26]).

(9) ***Res judicata* does not apply where the issues are not identical**

The Court of Appeal found (at [31]) that: "*Issue estoppel requires identity between the issue previously and finally decided and the issue now raised*"; the April 2022 Decision related to the unlawfulness of the time bar in the earlier arbitration clause; the June 2021 arbitration clause was different; and so *res judicata* was not made out as a bar against the 2nd Stay Application or OS2 (as also held at [52(b)]).

(10) **Only the party entitled in an asymmetric arbitration clause may initiate arbitration**

The Court of Appeal held (at [33]) that, if it is correct, the appeal may be disposed of on the ground of the construction of the original arbitration clause; which original arbitration clause read "*Any and all disputes... arising out of or in connection with the Agreement or the Malaysia Distributorship ... brought by a Distributor, or one other than E. Excel Malaysia, shall be referred to and resolved through final and binding arbitration and not by court or jury ...*" From this clause, the Court of Appeal found that the Appellant did not have the right to commence arbitration against the Respondent (which was sufficient for its decision – at [52(c)]) whilst the "*distributor could compel the Appellant to arbitrate a dispute*".

(11) **Arbitration agreement acts prospectively to a crystallised dispute**

The amendments the Appellant made to the arbitration agreement act *prospectively* and *not retrospectively* upon a dispute that has crystallised (at [40] & [52(d)]). Also "*Once a court is properly seised of a dispute, its jurisdiction to hear and determine that dispute is not liable to be divested except by the true agreement of both parties, directed at that specific dispute*" – subject to only any "*preexisting and applicable arbitration agreement, or to a subsequent agreement she herself joined in making*" (which the Respondent did not do - at [41] & [52(d)]). So, **s.10(1) AA** had nothing to operate on for the matter already before the Sessions Court in order to stay the Respondent's proceedings (at [48]).

(12) **A party to be allowed to explain itself if an inference of bad faith was being drawn**

An inference made by the High Court that the Appellant acted in bad faith, through undisputed documentary chronology without allowing the Appellant to explain itself, was not endorsed by the Court of Appeal (at [50], [51] & [52(e)]).

Written by
Dr Sivasangaran Nadarajah
Member, Publications Committee