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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 4/2025)

The Publications Committee is pleased to circulate the fourth edition in this case note series for 2025.

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Sincerely,

Gregory Das
Chairperson
Publications Committee

Highlights from the Appellate Courts

Martin Bencher (Malaysia) Sdn Bhd v. Sapura Energy Berhad & Ors (CA)

Insolvency law – Scheme of arrangement – Restraining order – Sections 366 and 368 of the Companies Act 2016

The Court of Appeal in ***Martin Bencher (Malaysia) Sdn Bhd v. Sapura Energy Berhad & Ors (Civil Appeal No.: W-02(IM)(NCC)-1879-11/2023)*** had to deal with an appeal against the High Court's decision that dismissed the Appellant Creditor's application to be excluded from a proposed scheme of arrangement between the three Respondent debtor companies and their creditors.

In essence, the Appellant Creditor raised two main grounds of appeal to challenge the High Court's decision. Firstly, the Appellant argued that the scheme of arrangements proposed by the Respondents constituted a multiplicity of proceedings owing to the existence of an earlier proposed scheme application by the Respondents.

Secondly, the Appellant argued that the Appellant's debts fell outside the specified cut-off date for the filing of a proof of debt in view of a settlement agreement entered between both parties.

On the first issue, the Court of Appeal was not in favour of the Appellant's position. It was held that the provisions of section 366 of the Companies Act 2016 do not prohibit consecutive or fresh applications for convening orders. Premised on the wording of section 366, there is nothing to restrict the Court from granting a fresh convening order after the earlier one has lapsed (after the expiry of the time limit of 12 months). The second proposed scheme application by the Respondent is not deemed as an extension of the earlier proposed scheme application but it was in fact and law, a fresh set of orders altogether.

In furtherance, the Court of Appeal held that sections 366 and 368 of the Companies Act 2016 ought to be interpreted liberally to facilitate companies who are facing financial difficulties. The Court of Appeal also accepted that previous schemes could have failed for a number of reasons such as inadequate information in the explanatory statement.

In relation to the second issue, the Court of Appeal found that the Appellant creditor had filed its proof of debts for the purpose of the proposed scheme in the first place and was therefore estopped from excluding itself from the proposed scheme on this premise.

The Appeal was accordingly dismissed.

Written by
Ryan Chu
Member, Publication Committee

Ng Mee Yee & Anor v Pendakwa Raya (CA)

Criminal law – Drug trafficking – Section 39B(1)(a) of the Dangerous Drugs Act 1952 – Exclusive possession – Corroborating finger print evidence – Double presumption

FACTS

In **Ng Mee Yee & Anor v. Pendakwa Raya (Criminal Appeal No.: W-05(M)-128-03/2022)**, the Appellants were charged under Section 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) for trafficking 777.3 grams of methamphetamine on 11 October 2018 at a studio apartment in Kuala Lumpur.

The police raided an apartment unit at which both appellants resided. It was the First Appellant who opened the locked door to the apartment unit to allow the police officers in. During the raid, the police found the drugs concealed in a blue plastic packet in a wardrobe. The prosecution argued that the Appellants had exclusive possession and knowledge of the drugs.

The High Court found that the prosecution had proven the nature and weight of the impugned drugs, and that there was no fatal break in the chain of exhibits. The High Court judge further found that the Appellants were in possession of the drugs given that the Appellants were the only occupants of the apartment at the time of the raid, and that they both had access to the apartment unit. The Appellants were also found to have knowledge of the drugs' existence given that they appeared scared and nervous during the raid, where the Second Appellant even knelt down and begged the police not to arrest him when the drugs were found. The High Court judge also decided that the trafficking element was satisfied given that the Appellants were keeping or concealing the drugs. As such, the High Court ordered the Appellants to enter their defence.

The Appellants essentially claimed they had no knowledge of the drugs. They argued that they had just moved into the apartment and that the drugs could have been left by previous tenants or others who had access to the apartment. They also claimed that the apartment was dirty and contained clothes belonging to others, which they had not removed. The High Court eventually found that the prosecution had proven a case beyond reasonable doubt, and sentenced both Appellants to death. This was the Appellants' appeal against said conviction and sentence.

PRINCIPLES

Exclusive Possession

The Court of Appeal found that the prosecution had established exclusive possession of the drugs by the Appellants. The Appellants were the only occupants of the apartment at the time of the raid, and the drugs were found in a wardrobe used by them. Further, the Court of Appeal rejected the Appellants' argument that others could have accessed the apartment, noting that there was no evidence to suggest that anyone else had placed the drugs there. The Court also emphasized that the burden was on the prosecution to exclude the possibility of access by others, and it had done so. The Court also noted that the Appellants had not raised the issue of the apartment being

dirty or containing clothes belonging to others during the police investigation or the prosecution's case. This argument was only introduced at the defence stage, which the court viewed as an afterthought.

Knowledge

As to the Appellants' contention that they had no knowledge of the drugs, the Court rejected this contention due to the Appellants' conduct during the raid - the Second Appellant knelt down and begged the police not to seize the drugs, while both Appellants appeared scared and nervous. The Court of Appeal found this conduct consistent with having knowledge of the drugs. The Court also noted that the drugs were found in a wardrobe used by the Appellants, and the large quantity (777.3 grams) made it unlikely that the drugs were placed there without their knowledge.

Credibility of Police Witnesses

It was also contended by the Appellants that the police had fabricated the story that the Second Appellant knelt down and pleaded or cried upon the discovery of the drugs. The Court of Appeal however rejected this as it found the police witnesses' evidence to be credible and that they had no mala fide intention against the Appellants. The Court further noted that there was no reason for either of the police officers to frame the Appellants, and that the Appellants themselves did not lodge a police report that they had been framed. The Court further observed that the police could not have framed them since the police came to the unit to investigate a commercial crime offence (i.e. counterfeit money) but stumbled upon the drugs.

Absence of Corroborating Fingerprint or DNA Evidence

The Appellants argued that the prosecution failed to tender any evidence of the Appellants' finger print or DNA to sustain the inference that the Appellants knew of the drugs in the unit. However, the Court of Appeal held that the investigating officer had testified that the dusting exercise could not be done as the packets had an uneven surface, which in her experience, always produced invalid results. The Court of Appeal further stated that there is no rule of law that DNA evidence is mandatory to secure conviction for drug trafficking offences. Moreover, notwithstanding the absence of DNA evidence, other evidence have the effect of connecting the Appellants to the drugs – the Appellants had exclusive possession of the apartment unit.

Visibility of Drugs

The Appellants argued that as the drugs were not visible, this shows that the Appellants themselves were not aware of the drugs' presence. The Court rejected this argument, noting that the blue packet containing the drugs was visible to the raiding officer when he looked up at the wardrobe. The Court also observed that the Appellants could not have overlooked the box containing the drugs at the top shelf of the wardrobe since they had placed their items of clothing in the wardrobe.

Possible Involvement of Others

The Appellants also contended that the prosecution failed to call the apartment agent as a witness and merely attempted to exhibit his Section 112 statement, which deprived them of the opportunity to cross-examine him on crucial questions, such as who had access to the apartment. They also claimed that the apartment was dirty and contained items belonging to previous tenants, which further supported their argument that others could have accessed the apartment. Therefore, these factors undermine the claim that the Appellants had exclusive possession of the apartment unit.

The Court noted that the apartment agent was unavailable to testify in person because he had returned to Bangladesh and was unable to return to Malaysia due to the COVID-19 pandemic. As such, the apartment agent's Section 112 statement was ruled to be admissible under s. 32(1) of the Evidence Act 1950, i.e. that statements made by a person who cannot be produced as a witness is admissible.

The Court also noted that the apartment agent's Section 112 statement indicated that the Appellants were the only individuals who had access to the apartment after they moved in. Further, the Court observed that the Appellants had not specifically alleged who exactly had placed the drugs in the apartment. Their argument was based on mere speculation, which was insufficient to rebut the presumption of possession.

As for the Appellants' argument regarding the items purportedly belonging to others in the apartment, the Court held that this argument was introduced only at the defence stage and was not raised during the police investigation or the prosecution's case. The court viewed this as an afterthought and gave it little weight. In fact, the court also noted that the police had conducted a fitting exercise on some of the clothing found in the wardrobe, and the results showed that the clothing belonged to the Appellants. The court found no evidence to suggest that the clothing not seized by the police belonged to others.

CONCLUSION AND SENTENCE

Ultimately, the Court of Appeal upheld the conviction of the Appellants for drug trafficking under Section 39B(1)(a) of the DDA. The Court found that the prosecution had proven its case beyond a reasonable doubt and that the Appellants had failed to rebut the presumption of possession. The Court substituted the mandatory death sentence with life imprisonment (minimum 30 years from the date of arrest) for both Appellants, in light of the Abolition of Mandatory Death Penalty Act 2023. Additionally, the Second Appellant was sentenced to 12 strokes of whipping, while the First Appellant was exempted from whipping as she is female.

Written by
Iqbal Harith Liang
Member, Publications Committee

Mohd Azman bin Yaacob v. Tenaga Nasional Berhad (CA)

Electricity law – Compliance of statutory procedure under Section 53 of the Electricity Act 1949 (now Section 11 of the Electricity Supply Act 1990) to obtain and maintain wayleave

The Court of Appeal in **Mohd Azman bin Yaacob v. Tenaga Nasional Berhad (Civil Appeal No.:**

D-02(NCVC)(W)-673-04/2023) was invited to consider if the national supplier of electricity had complied with statutory procedures for the obtaining and maintenance of a wayleave for the construction of an electrical tower and transmission lines in a trespass claim filed by a subsequent proprietor of the land in question.

The Appellant was the subsequent landowner and the Respondent was the national supplier of electricity (Tenaga Nasional Berhad). The subject land was in Machang, Kelantan. The Appellant filed a claim in trespass against the Respondent and alleged that the latter had not lawfully obtained a wayleave under sections 53 and 56 of the Electricity Act 1949 ("**EA 1949**") (now sections 11 and 15 of the Electricity Supply Act 1990 ("**ESA 1990**") for the construction of an electrical transmission tower and transmission lines on the subject land. The Respondent denied the claim and argued that it had correctly obtained a wayleave from the previous landowner approximately 38 years before the Appellant's registered proprietorship over the land and in accordance with applicable legislative provisions.

In 1978, the Respondent commenced a project in the region between Machang and Pasir Puteh, Kelantan for the provision of basic electricity supply to the public. Rural areas in the said region were to be the principal beneficiaries of the project. In compliance with the applicable guidelines, the Respondent took steps to obtain the requisite statutory wayleave under section 53 of the EA 1949 by way of a notification (as opposed to the other available procedure, which was by way of a wayleave agreement under section 56 of the EA 1949). Following the absence of objections by any landowners, the State Authority informed the Respondent (then known as Lembaga Letrik Negara) that the latter was deemed to have legally obtained a right of entry and right for a wayleave over the lots affected by the earlier referenced project. At the time the wayleave was obtained in 1979, the law did not require that the wayleave be endorsed onto the instrument document title of the subject land.

The Appellant became the registered proprietor of the subject land approximately 38 years after the wayleave had been obtained. At the time the Appellant took proprietorship over the land, an electrical tower and transmission lines had been erected on the land.

The Appellant applied for planning permission for the proposed development of 9 units of terraced houses on the land. The Planning Authority informed the Appellant of its conditional approval of the planning permission with a condition that the Respondent's electrical tower and transmission lines (obtained by the wayleave) be preserved. The Appellant appealed to the Respondent to request that it reduce the area in which the wayleave operated. The Respondent rejected the Appellant's request.

The Appellant then initiated a claim in trespass against the Respondent and alleged that the wayleave had not been lawfully obtained. The High Court dismissed the Appellant's claim. The Court of Appeal unanimously affirmed the High

Court's decision.

Azimah Omar JCA, who wrote for the Court of Appeal, expressed the principal issue in the appeal as follows:

"Whether the High Court was correct in finding that the Respondent duly complied with all of the requisites and statutory procedures under section 53 of the Electricity Act 1949 to obtain and maintain its Wayleave on top of the Appellant's subdivided lot"

The Court of Appeal first considered the manner a wayleave could be obtained. It was recognised that there were two available procedures to obtain a wayleave. One was by way of the section 53 EA procedure (by way of notification) and the other through the section 56 EA procedure (by way of a wayleave agreement). This resulted in the finding that *"...the Appellant's argument that a Wayleave was governed 'only' by section 56 of the Electricity Act 1949 is in our view, misplaced. The remedy provided under the two provisions was one and the same Wayleave. The only difference being the manner, method, and procedure for obtaining the Wayleave by the Respondent. If the Respondent pleads that it had opted for the Wayleave Procedure, then the Respondent bears the burden to prove due compliance with the procedures..."*.

It was then noted that the Respondent's pleaded case was that it had obtained a wayleave in accordance with section 53 of the EA. The Court of Appeal found that *"...the procedures undertaken by TNB with the cooperation and involvement of the State Authority were sufficiently proper and were in full compliance of section 53 of the Electricity Act 1949 at the time"*. This was premised on the acceptance that *"...since the State Authority itself via its Letters dated 4.1.1979 and 21.1.1979 had clearly confirmed that the Statutory Notices had been duly served to all of the affected Landowners (inclusive of the previous Landowners of the subject Land), it is reasonable to conclude that the Respondent had successfully and sufficiently proven that the Statutory Notice had been duly served to the previous owners of the Subject Land"*.

The Court of Appeal proceeded to reject the Appellant's contention that the wayleave was invalid on account of it not being endorsed or registered on the instrument document of title of the land. It was held that *"...the subject Wayleave in this case was obtained in 1979 prior to the enforcement of section 53(9A) which was added later via the Electricity (Amendment) Act 1984. Thus, at the material time, the law did not statutorily require for Wayleaves to be endorsed upon the instrument document title"*.

Importantly, the appellate Court affirmed the High Court's finding that the wayleave survived the changing of the ownership of the subject land. On this, it was ruled that *"Since the Respondent's entry into the subject land (and later subdivided lot) was statutorily justified under the prevailing Electricity Act 1949 at the time, it follows that the Respondent had not and could not have trespassed or continuously trespassed upon the Appellant's subdivided lot"*.

Written by
Gregory Das
Chairperson, Publications Committee

ESA Jurutera Perunding Sdn Bhd v. University Malaya (CA)

Arbitration – Section 10(1) of the Arbitration Act 2005 – Arbitration agreement – Step in the proceedings – Waiver of reference of dispute to arbitration

In **ESU JURUTERA PERUNDING SDN BHD v UNIVERSITI MALAYA (Civil Appeal No.: W-01(IM)(C)-105-03/2023)**, the Court of Appeal had to determine the interpretation of the phrase “*before taking any other steps in the proceedings*” as stipulated under s 10 (1) of the Arbitration Act 2005 (“**the said Act**”) to determine whether the Appellant’s actions constituted *steps in the proceedings* which would then waive the Appellant’s right to Arbitration under the said Act.

The Appellant (“**Defendant**”) was appointed by the Respondent (“**Plaintiff**”) as a civil and structural consultant on a project pursuant to a Memorandum of Agreement (“**MoA**”) dated 3.6.2008. Clause 2 of the MoA provides that the agreement between the parties consists of the MoA, the Conditions of Engagement and the Schedule to the Condition of Engagement (“**the said Agreement**”). Clause 4 of the Conditions of Engagement (which forms part of the said Agreement) provides for Arbitration as the mode of Settlement of Disputes (“**Clause 4**”). However, in breach of Clause 4, the Plaintiff filed a Writ and Statement of Claim against the Defendant in the Kuala Lumpur High Court on 6.10.2022.

Subsequently, the Defendant entered appearance on 17.10.2022 and was directed to file its defence by 3.11.2022. The Defendant then applied and the Plaintiff granted an extension of time to file the defence by 17.11.2022. On 14.11.2022, the Defendant applied for a second extension of time to file the defence which the Plaintiff granted. On 30.11.2022, the Defendant served on the Plaintiff a Notice to Produce Documents Referred to in Pleadings dated 24.11.2022 by email and in the email notified the Plaintiff that they intended to file the defence by 5.12.2022. On 1.12.2022, the Defendant served a Notice of Arbitration on the Plaintiff and then on 2.12.2022, the Defendant filed the stay Application. The Learned High Court Judge (“**H CJ**”) on 21.3.2023 heard the Defendant’s Application for stay and dismissed it. She ordered the Defendant to file its defence on 7.3.2023. On 2.3.2023, the Defendant filed a Notice of Appeal against the decision the Learned HCJ to the Court of Appeal. The Defendant then filed an application for an ad interim stay order on 6.3.2023. On 7.3.2023, the Defendant filed its defence and counterclaim as per the instructions of the Learned HCJ with a covering letter which expressly reserved its right to refer the dispute to Arbitration. On 18.4.2023, the Learned HCJ dismissed the Defendant’s second stay application. Hence this appeal.

In supporting the appeal, the Defendant submitted that there was no clear intention on its part to waive its right to arbitration. In resisting the appeal, the Plaintiff submitted that the Defendant had taken steps in the proceeding when they:

- i. Requested for at least 2 extensions of time from the Plaintiff to file its defence;
- ii. Indicated three times that it will file the defence; and
- iii. Served the Plaintiff the Notice to Produce Document

In coming to its conclusion, the Court of Appeal looked at the construction of s 10 (1) of the Act, its effects on contracting parties and the breadth of case laws that dealt with the interpretation of “*taking any other steps in the proceedings*”.

The Court of Appeal first dealt with the effect of the s 10 (1) of the Act and its effect on contracting parties:-

- i. In the case of **Press Metal Sawarak Sdn Bhd v Etiqa Takaful Bhd** [2016] 9 CLJ 1, the Federal Court held that “*the clear effect of s 10 (1) of the Act is to render a stay mandatory if all the relevant requirements have been fulfilled*”.
- ii. In the case of **Airbus Helicopters Malaysia Sdn Bhd v Aerial Power Lines Sdn Bhd** [2024] 4 CLJ [243] the Court of Appeal held that “*an arbitration agreement is a term of the underlying contract and the court would enforce it unless it can be shown that the agreement is null and void*”. The Court of Appeal also stated that the in addition to the arbitration clause, “*there must be an equally clear intention reflected in the action of the Defendant in not wanting to proceed to arbitration but instead to litigation*”.

This led the Court of Appeal to deal with the cases on what constituted “*steps in the proceedings*”;

- i. In the case of **Sanwell Corporation v Trans Resources Corp Sdn Bhd** [2002] 3 CLJ [213], the Federal Court had summarised the test as follows:
 - (a) The entry of appearance is a mandatory step in a proceeding and therefore does not amount to a step in the proceedings.
 - (b) If the applicants have served any pleadings, then he has clearly taken a step in the proceeding, and thereby elected to proceed with litigation.
 - (c) If the applicants have taken any other action in the proceedings other than (a) and (b), then the court will have to consider the action taken.
- ii. In the case of **Corona Holdings Pte. Ltd. v Go Go Delicacy Pte. Ltd.** [2008] 4 SLR [460], the Singapore Court of Appeal held inter alia that “*the act will be regarded as a step in the proceeding if it is a step in furtherance of the action by advancing the hearing of the matter in court in contrast to one that serves to smother the action and stop the proceedings in its tracks*”.

From its scrutiny of the above cases, the Court of Appeal had to consider whether the actions taken by the Defendant in this case amounted to an advance of the litigation or to smother it. Upon their analysis, it was held that the actions taken by the Defendant did not amount to *steps in the proceedings* for the following reasons:-

- i. The covering letter of the Notice to Produce served on the Plaintiff had reserved the Defendant's rights when it stated *"In the meantime, all our Client's rights are reserved."*
- ii. The Defendant requested for extension of time to *"prepare and finalise the defence"* with no suggestion that they would be filing it.
- iii. The covering letter when filing the defence unequivocally stated *"tanpa prejudis kepada hak Defendan untuk merujuk pertikaian antara Plaintiff dan Defendan di sini kepada prosiding timbang tara"*

The Court of Appeal also took the opportunity to remind itself that s 10 of the Act should be constructed so that there would be minimum intervention of the court and that the court should as far as possible lean in favour of the arbitration agreement that the parties had agreed to at the outset of the contract.

Written by
Aimi Syarizad Bt Kuthubul Zaman
Member, Publications Committee

In **Badan Pengurusan Bersama Avenue K Dan K Residence v. City Properties Sdn Bhd & Ors [2025 MLJU 210]**, the Court of Appeal ruled that parcel owners who have arrears of maintenance charges and sinking fund contributions cannot vote in an Annual General Meeting ("**AGM**") under the Strata Management Act 2013 ("**SMA**"), even if the arrears are disputed, until the dispute is fully resolved.

The Appellant was the Joint Management Body ("**JMB**") of Avenue K and K Residence and the first to eighth Respondents ("**R1-R8**") were corporate bodies and individuals who were parcel owners of units in K Residence. A number of the directors in the corporate Respondents were affiliated with the Yap Family, whereby they had a collective majority voting shareholding in the strata development scheme.

R2, the developer, did not form the JMB within the statutory period of 12 months and instead collected maintenance charges and sinking fund contribution payments directly for 10 years until the JMB was formed pursuant to the first AGM on 15 September 2018. Between 2016 and 2018, R2 entered into several agreements with R1, leading to "Contra Adjustments," whereby the maintenance charges and sinking fund contribution payments payable by *inter alia* R2 were offset by utilities and services provided by R1. Furthermore, the Respondents did not pay their corresponding maintenance charges and sinking fund contribution payments. Additionally, the project's maintenance charges and sinking fund contributions accounts were not fully prepared or audited.

During the 1st AGM on 15 September 2018, the Commissioner of Building ("**COB**") ruled that R1 and R2 were not entitled to vote due to *inter alia* their failure to pay outstanding maintenance charges and sinking fund contributions. Consequently, control of the JMB shifted to parcel owners not associated with the Yap Family. The JMB, upon reviewing the accounts, decided to reverse the Contra Adjustments.

With 2 other related suits pending trial, the Respondents filed this action by way of an Originating Summons. Among the declarations sought by them were that the 1st and 2nd AGMs which had been held were invalid; that all motions which had been passed during said AGMs were invalid; and that the Respondents have a right to attend and vote at the upcoming 3rd AGM.

High Court Decision

The High Court, relying only on affidavit evidence, made an order in favour of the Respondents.

The High Court held that the issue it had to determine was whether the Respondents had a valid dispute over the arrears in accordance with the Court of Appeal decision of **Tetap Tiara Sdn Bhd v Pengurusan Perbadanan Jaya One & Prs [2023] CLJU 2648 ("the Tetap Tiara case")**. If there was a valid

dispute, the Respondents would be entitled to vote notwithstanding the proviso at paragraph 21(2) of the Second Schedule in the SMA which states:

"(2) A proprietor shall not be entitled to vote if, on the seventh day before the date of the meeting, all or any part of the Charges, or contribution to the sinking fund, or any other money due and payable to the management corporation in respect of his parcel are in arrears."

It was the High Court's determination that the Respondents did have a valid dispute that was neither deliberate nor negligent.

Findings of the Court of Appeal

The Court of Appeal unanimously allowed the appeal and set aside the High Court decision. In the upshot, the Court of Appeal found that the Learned High Court Judicial Commissioner had failed to exercise its discretion properly to have all matters of fact and law resolved satisfactorily.

Firstly, the Court of Appeal disagreed with the High Court's approach that the Originating Summons could be resolved by the determination of a single issue of whether there exists a valid dispute over the arrears. In this regard, it was held that the High Court erred in failing to consider paragraph 21(2) of the Second Schedule in the SMA which expressly curtails a parcel owner's voting rights when arrears remain unpaid.

Secondly, it was ruled that the High Court had erred in disposing the entire Originating Summons based on affidavit evidence without a trial when there were serious dispute on facts. The Court of Appeal found that the High Court had misapplied the Tetap Tiara case as that case involved an interlocutory injunction relief in a writ action, as opposed to final reliefs in an Originating Summons (as per the present case).

Thirdly, the Court of Appeal also found that the High Court should have, in the interests of justice, exercised its discretion to convert the Originating Summons into a writ action under O.28 r.8 of the Rules of Court 2012.

The Court of Appeal directed that the Originating Summons be converted into a writ action and heard by the same judge as the 2 other related suits. The Respondents were ordered to bear costs of RM 30,000.

Written by
Voon Su Huei
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