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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 8/2024)

The Publications Committee is pleased to circulate the eighth edition in this case note series.

The cases covered in this edition are as follows:

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Contract law – Validity of agreements executed by minor – Group Settlement Areas Act 1960 – Limits on transfer of land – Whether trust can be created over land
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Thank you.

Gregory Das
Chairperson
Publications Committee

Highlights from the Appellate Courts

Kuala Dimensi Sdn. Bhd. v. Port Kelang Authority (FC)
Contract law – Proving consideration – Variation of agreements – Contractual estoppel

The Federal Court delivered its broad grounds in ***Kuala Dimensi Sdn. Bhd. v Port Kelang Authority*** which principally concerned the validity of an agreement, specifically whether the same was made without consideration and therefore null and void pursuant to Section 26 of the Contracts Act 1950.

Brief Facts

Port Kelang Authority ("**PKA**") appointed Kuala Dimensi Sdn Bhd ("**KDSB**") as the turnkey contractor to construct and develop the Port Klang Free Zone Project. For this purpose, parties entered into various contracts including the Supplemental Agreement for Additional Development Works ("**ADW1**"), the Agreement on the Supplemental Agreement for the Additional Development Works ("**ADW2**") and the Supplemental Agreement for New Additional Development Works ("**NADW**"). Importantly, ADW2 was entered into solely for the purpose of varying the interest chargeable by KDSB to PKA under ADW1 from 5% per annum to 7.5% per annum.

As a consequence of ADW2, the last repayment sum due by PKA to KDSB was increased by approximately RM 49.367 million. The main issue on appeal was whether ADW2 was made with valid consideration from KDSB for PKA's benefit.

The Federal Court found that ADW2 is null and void for want of consideration. This was bceause KDSB did not carry out any additional works for the increased payment under ADW2 beyond the scope of works under ADW1 which KDSB was already contractually obliged to perform, and for which it had received consideration. Therefore, PKA did not receive any additional benefit or consideration for making this additional payment.

The Federal Court also found that consideration could not be derived from KDSB's decision to enter into NADW as consideration for the same was already accounted for via the agreed payment for works under the same.

The Federal Court affirmed the Court of Appeal decision, which had overturned the High Court decision.

The Federal Court found that contrary to the High Court's findings, there was no basis for the High Court's finding that the consideration for ADW2 was the completion of works by KDSB under ADW1. The High Court dismissed the contention that all the contracts were to be read together because there was no common objective to be achieved from the contracts. The terms of ADW1, NADW and ADW2 were separate and distinct and should be construed as such. The work scopes in ADW1 and NADW were completely different. There was no incorporation of ADW2 in NADW or vice versa. A breach of any of the terms of the contracts would not trigger a breach of all contracts relating to the Port Klang Free Zone project.

Therefore, the Federal Court answered the questions of law raised in the following manner:

Question 1: Where it is alleged that there was no consideration for the agreement between the parties, is consideration to be proved only within the four corners of the said agreement or can the same be proved by extrinsic evidence?

There was no admissible extrinsic evidence to prove that KDSB would not be able to carry out the works under ADW1 or NADW if ADW2 was not entered into or that the consideration for PKA entering into ADW2 was KDSB's decision to enter into NADW. A letter dated 19.04.2006 from PDA to KDSB relied on by KDSB failed to state any nexus between ADW2 and NADW.

The Court declined to answer this question as there was no extrinsic evidence available to support the assertion that ADW2 was supported by consideration.

Question 2: Whether the practical benefit test, as laid down in Williams v Roffey Bros and Nichollas (Contracts) Ltd (1991) 1 QB 1, is good law?

Williams v Roffey Bros and Nichollas (contractors) Ltd 1991 1 QB 1 held that in varying a contract, a promise to perform a pre-existing contractual obligation will constitute good consideration so long as a benefit is conferred upon the 'promisor'. The Federal Court remarked that ***Williams (supra)*** departed from the previously established principle that promises to perform pre-existing contractual obligations could not be good consideration.

However, the Court did not apply ***Williams (supra)*** finding that there are no reported Malaysian cases which have accepted the application of the "practical benefit" principle in ***Williams (supra)***. The Court remarked that there has been hesitancy in applying and accepting the "practical benefit" principle and found that it would not be appropriate to apply it in this case as the full impact of the same was not argued in the Courts below.

In any event, the Court found that there was no practical benefit to PKA as a result of ADW2 and that the facts of ***Williams (supra)*** could be distinguished from here.

The Court declined to answer Question 2.

Question 3: Whether parties who had made their intention clear by entering into legal relations, are bound by an agreement to vary their previous agreement when they have acted upon the former, namely the variation agreement?

The Court found that even if ADW2 is taken to be a variation of ADW1, this does not absolve the requirement of valid consideration from KDSB to PKA under ADW2. If parties could not establish consideration for the variation of an agreement, the variation is void and the parties' obligations are only confined to the original contract.

Thus, Question 3 is answered in the negative.

Question 4: Whether the doctrine of estoppel should be invoked against PKA, the Respondent, when it had agreed to the proposal to increase the interest rate and made payment of the same without reservation?

The Court rejected the contention that PKA is estopped from challenging the validity of ADW 2 as it had made payments under ADW2. The Court relied on another Federal Court decision in ***Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor*** [2016] 7 CLJ 823, which states that estoppel cannot be used to defeat clear statutory provisions, namely the requirement for consideration in a valid contract, as per section 26 of the Contracts Act 1950.

The Court thus answered Question 4 in the negative.

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Si Soo Hong (Sebagai Wakil Diri Kepada Si Ching Boon) v Si Yeow Wee (Sebagai Wasi Tunggal Sah Kepada Harta Pusaka, Si Hock Seng, Si Mati) (CA)
Contract law – Validity of agreements executed by minor – Group Settlement Areas Act 1960 – Limits on transfer of land – Whether trust can be created over land

The key issues in the appeal of ***Si Soo Hong (Sebagai Wakil Diri Kepada Si Ching Boon) v Si Yeow Wee (Sebagai Wasi Tunggal Sah Kepada Harta Pusaka, Si Hock Seng, Si Mati)*** **(Civil Appeal No. N-02(NCvC)-64-01/2022)** were whether the Distribution Order remains valid and binding even though the waiver was signed by a minor and whether the Agreements that the Lands be divided equally among beneficiaries signed by a minor, remains valid and binding.

Background Facts

The material facts were as follows:

a) Mdm Chei Chan owned two pieces of land, GM 247, Lot 5354 and GM 248, Lot 5582 ("**the Lands**"), both in Seremban;

b) Upon her death, her siblings intended to apply to the District Land Administrator for the distribution of the Lands. Due to a restriction that the Lands could only be transferred to one person, all the beneficiaries signed a waiver of their rights, to the son of Mdm Chei Chan ("**the Deceased**");

c) The Distribution Order dated 24.4.1987 for the Lands was issued with the Deceased listed as being entitled to them and subsequently was registered as the proprietor of the Lands;

d) There were two undated Agreements signed by the Deceased, the Respondents and Si Kiam Joo ("**the Minor**") in respect of both Lands. It was agreed that the Lands were to be divided into 5 pieces of equal size so that each brother would own a piece;

e) The Respondents' claims are essentially for a declaration that the Deceased held the Lands for the benefit of the Respondents and the Minor;

f) The Respondent's main argument for their claims is premised on the Distribution Order arising from which the Agreements were signed creating a trust for the Respondents and the Minor;

g) The Defence raised by the Appellant was that the Minor signed the waiver and the Agreements when he was a minor, which rendered the same null and void. The Respondents also had no right to claim for the estate of the Minor;

h) The Learned Judge found that the Distribution Order was valid and binding until it is set aside pursuant to section 29(1) of the ***Small Estates (Distribution) Act 1955***. In this case, no such application was made to set aside;

i) The Learned Judge also found that the 2 Agreements were valid declarations of trust on behalf of the 5 siblings. The Agreements met the elements of a trust namely, certainty of words (intention to create a trust), certainty of subject (the Lands) and certainty of object (the names of the beneficiaries);

j) The lack of consideration was not material and the consideration would be natural love and affection and the Deceased had resided on the Lands and enjoyed the benefits and proceeds from the Lands; and

k) The Appellant appealed the decision.

The Issues

i. Validity of the Distribution Order

The Court of Appeal agreed with the High Court's finding on this point. The law is clear in that until the Distribution Order is set aside, it remains valid and in force (see ***Ng Poh Yong v Kek Yok Lan [2018] MLJU 1283***). It is not disputed that there was no application to set aside the Distribution Order.

ii. Validity of the Agreements

However, on this point, the Court of Appeal differed. Section 11 of the ***Contracts Act 1950*** provides that persons competent to contract are those of the age of majority which by definition in section 2 of the ***Age of Majority Act 1971*** is 18 years. Therefore, the Learned Judge had failed to judicially appreciate the age of the Minor at the time of entering into the Agreements (see ***Leha binte Jusoh v Awang Johari bin Hashim [1978] 1 MLJ 202***).

Secondly, the Deceased was the proprietor of the Lands and only he could determine how the Lands were to be distributed. However, the express words in the Agreements "*Kami yang bertandatangan dibawah ini adalah pemilik-pemilik harta tanah seperti yang tersebut dibawah ini" and the words "kami semua bersetuju*". These words indicate that all five siblings including the Minor had determined and agreed on the distribution.

Further, the Lands are subject to 3 specific restrictions (the ***Land (Group Settlement Areas)*** **Act 1960 ("GSA Act")**):

a) cannot be transferred except along with the tapak rumah and ladang to penerima yang sama;

b) cannot be transferred except with the consent of the State Authority; and

c) cannot be transferred to more than one person.

With such restrictions attached to the Lands, the Agreements provide for the transfer of the Lands to five persons. It was not disputed that the ***GSA Act*** did not allow for such a transfer. To this, the Respondents argued that the ***GSA Act*** issue was not raised in the pleadings but the Court of Appeal viewed this was a legal issue and could be raised.

There was also the uncertainty as to which part of the Lands is to be distributed and to whom. The lack of measurements and dimensions renders it uncertain as to how the Lands can be divided. Therefore, the Court of Appeal found the Agreements invalid.

iii. Trust

On the argument raised by the Respondents that the ***GSA Act*** only limits registration to not more than one person but does not prohibit the declaration of trust by a registered owner for the benefit of other beneficial owners, the Respondents have relied on the case of ***Chong Yaw Ming v Hew Ah Fatt [2021] MLJU 999***. In the case, notwithstanding the land was also a GSA land and there was a declaration of trust, the Court of Appeal did not give much weight to the fact that it was a GSA land.

However, the Court of Appeal had earlier viewed that there was no certainty of subject, and therefore no trust could be created. Referring again to the case of ***Leha binte Jusoh***, the Court of Appeal viewed that where it concerned an agreement signed by a minor, there can never be a constructive trust as that would tantamount to giving effect to a void agreement.

The appeal was allowed with no orders as to costs.

Written by
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Fadhil Husseiin Ishak Yassin bin Mansor v. Public Islamic Bank Berhad & Anor
Land Law – National Land Code 1965 - Order for Sale – Extension of time for payment of balance purchase price

The Court of Appeal recently in ***Fadhil Husseiin Ishak Yassin bin Mansor v. Public Islamic Bank Berhad & Anor*** held that an extension of time cannot be granted for a successful bidder to pay the balance purchase price of a property that was sold under an order for sale made under section 257 of the National Land Code 1965 (the "**NLC**").

Background

The Appellant was the registered owner of a property held under Geran No. Hakmilik 194223, Lot 109568, Mukim Klang, Daerah Klang, Negeri Selangor Darul Ehsan ("**the subject property**"). The subject property was charged to the 1st Respondent, Public Islamic Bank Berhad (the "**Bank**") as a security for a financing taken out by the Appellant (the "**Charge**").

After the Appellant defaulted on his payment obligations to the Bank, the Bank commenced proceedings to enforce the Charge under the NLC and obtained an order for sale on 20 February 2018. Subsequently and after several attempts to sell the subject property through Court auction, the Bank successfully sold the subject property in an auction to the 2nd Respondent, MS Citijaya Sdn. Bhd. for the reserve price of RM1,600,000 on 5 April 2021. The Appellant paid the deposit of RM160,000.00 on the same day. The 2nd Respondent then applied for a financing in the amount of RM965,100.00. The differential sum of RM480,000.00 was paid by the 2nd Respondent to the Bank on 16 July 2021.

Condition 16 of the Memorandum of Sale provided that the Appellant was under an obligation to pay the balance purchase price of RM1,440,000.00 within 120 days i.e. on or before 3 August 2021. This was a mandatory requirement by virtue of section 257(1)(h) of the NLC. Section 257(1)(h) and section 267A of the NLC further provided that a successful bidder's deposit will be forfeited if he fails to settle the balance purchase price within 120 days.

In this case, the 2nd Respondent was not able to pay the balance purchase price within 120 days. It then filed an application to intervene in the order for sale proceedings and for an extension of time to pay the balance purchase price. According to the 2nd Respondent, it could not pay the balance purchase price due to disruption caused by the movement control orders ("**MCO**") implemented by the Government of Malaysia due to the COVID-19 pandemic, which affected the operations of its financier and the completion of the loan documentation. The Appellant, as the chargor, opposed the application, arguing that the Court has no power under the NLC to grant the 2nd Respondent any extension of time.

High Court's Decision

The 2nd Respondent's application was heard before the Deputy Registrar ("**DR**"), who on 24 August 2021 dismissed the 2nd Respondent's application but at the same time, 'excluded' a total of 28 days from 1 June 2021 to 28 June 2021 from the computation of 120 days for payment of the balance purchase price. The DR accepted that the Court has no power or discretion to extend time under sections 257(1)(g), 257(1)(h), and 267A of the NLC, but found that it has some discretion to 'exclude' the MCO period from 1 June to 28 June 2021 from the computation of time. On that basis, the 120 days had not yet lapsed as of the date of the DR's decision.

The 2nd Respondent's financier then disbursed its financing 2 days later on 26 August 2021, and the Court then proceeded to issue the Certificate of Sale (Form 16F) to complete the transfer of the subject property to the 2nd Respondent.

The Appellant then filed its appeal to the Judge in Chambers. On 9 September 2022, the Judicial Commissioner ("**JC**") affirmed the decision of the DR and dismissed the Appellant's appeal. The learned JC in essence held that the 2nd Respondent was a bona fide purchaser of the subject property and having paid the full balance price of the auction has the locus to participate as a party to defend its rights in this proceeding. Further, the learned JC found that the requirement to pay the balance purchase price within 120 days from the date of the sale is mandatory as the word "shall" that appears in section 257(1)(g) of the NLC is "directory" and whilst the Court does not have the power to grant the extension of time to the purchaser to pay the balance purchase price under section 257 (1)(g) of the NLC, the Court has the inherent powers to allow suspension of time during the total lockdown period announced by the Government during the MCO. The learned JC found that the Court can take judicial notice of matters, events and public announcements by the Government in relation to the COVID-19 pandemic, including the lockdown imposed by the Government. In the circumstances, the learned JC found that the exclusion of the period of lockdown imposed by MCO when computing the deadline for payment of the balance purchase price was justified.

The Appellant then appealed to the Court of Appeal.

Court of Appeal's Decision

There were two main issues in the appeal. First, whether the High Court has any 'inherent powers' to extend time (whether through a suspension of time during the total lockdown period of 28 days during the COVID-19 pandemic). Second, whether after dismissing or striking out an application by an intervener, the court thereafter, has any power or jurisdiction to grant any orders, including
but not limited to orders which are for the benefit of the proposed (unsuccessful) intervener.

In relation to the first issue, the Court of Appeal found that a successful bidder has an obligation to strictly comply with the 120-day time period to pay the balance purchase price under section 257(1)(g) of the NLC. The High Court did not have an inherent power to extend time. There is also no power vested upon the High Court to 'exclude' any days from the computation of time for compliance with the deadline to make payment.

The Court of Appeal also found that the 2nd Respondent cannot rely on paragraph 8 of the Schedule to the Courts of Judicature Act 1964, which pertains to the general powers of the High Court to enlarge or abridge the time prescribed for doing an act under any written law. This is because the wording of section 257(1)(g) of the NLC is mandatory, and the 2nd Respondent cannot invoke paragraph 8 of the Schedule to the Courts of Judicature Act 1964 to justify the exemption or extension of 28 days.

On the second issue, the Court of Appeal found that as the 2nd Respondent's intervener application was struck out/dismissed by the DR, then it is "spent" and there is nothing left before the DR to enable him to make any order whatsoever. Thus, there is no legal or procedural basis for the orders that were made by the DR to 'exclude' 28 days from the computation of time for payment, after striking out (or dismissing) the 2nd Respondent's application.

For the reasons above, the Court of Appeal then allowed the appeal and reversed the decision of the High Court.

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Mahiaddin Bin Md Yasin v Public Prosecutor (CA)
Criminal procedure – Inherent jurisdiction of Court of Appeal to review under r. 105 of the Rules of Court of Appeal 1994 – s. 50 Courts of Judicature Act 1964

In ***Mahiaddin Bin Md Yasin v Public Prosecutor*** (Criminal Appeal No.: W-06-1-03/2024), the Court of Appeal decided that when an accused person applied to the High Court to strike out the charges against him/her, the Court exercises its revisionary jurisdiction in adjudicating the application.

Background

The Applicant was charged in the Sessions Court with four charges of abuse of power under s. 23(1) of the Malaysian Anti-Corruption Act 2009 ("**MACC Act**") for misusing his position to obtain bribes for Parti Pribumi Bersatu Malaysia ("**BERSATU**").

The Applicant filed an application in the High Court to strike out/quash the charges on two grounds:

(i) BERSATU as a political entity was not qualified as an "associate" under s. 3 of the MACC Act. Thus, the charges did not disclose any offence recognised by law; and
(ii) The charges lacked sufficient particulars for the Applicant to mount an effective defence.

The High Court allowed the application and struck out the charges preferred against the Applicant. Consequently, the Applicant was acquitted and discharged in respect of the charges.

The Respondent ("**Prosecution**") appealed. The Court of Appeal allowed the appeal and set aside the decision of the High Court ("**Decision**").

The Applicant then filed a motion in the Court of Appeal to review the Decision made by the previous panel pursuant to r. 105 of the Rules of Court of Appeal 1994.

Motion to review the Decision: The earlier panel lacks jurisdiction

The Applicant's motion was premised on the ground that the previous panel of the Court of Appeal had acted in excess of its jurisdiction under s. 50(1) of the Courts of Judicature Act 1964 ("**CJA 1964**") in hearing the Prosecution's appeal.

The Court of Appeal's jurisdiction in respect of criminal appeals is set out in s. 50(1) of the CJA 1964. The Court has the jurisdiction to hear and determine criminal appeals against any decision made by the High Court, in the High Court's exercise of its original, appellate or revisionary jurisdiction.

It was submitted for the Applicant that when the High Court invoked its inherent jurisdiction to strike out/quash the charges against the Applicant, the High Court was not exercising its original, appellate nor revisionary jurisdiction. Thus, the Prosecution's appeal did not fall within the ambit of s. 50(1) of the CJA 1964. On this account, the previous panel lacked jurisdiction, and the Decision was a nullity and/or illegal.

The Court did not exercise original and appellate jurisdiction

Both parties took the common position that the High Court was not exercising its original jurisdiction within the ambit of para. 50(1) of the CJA 1964.

The Court of Appeal found that the application before the High Court was not to correct the decision of the Sessions Court. Therefore, the High Court was not invoking an appellate jurisdiction.

Revisionary jurisdiction

The Applicant submitted that the High Court Judge was not exercising its revisionary jurisdiction. A literal interpretation of para. 50(1)(b) of the CJA 1964 provided that the High Court may exercise its revisionary jurisdiction in respect of any criminal matter "***decided by the Sessions Court***". In the circumstances of the Applicant's case, there was no decision made by the Sessions Court.

The Court of Appeal held that para. 50(1)(b) cannot be read in isolation. Such an interpretation would mean there can be no appeal against the decision of the High Court in dismissing the charges and acquitted the Applicant. The Prosecution would be left without a remedy to challenge the propriety and correctness of the said decision.

Therefore, para. 50(1)(b) must be read and construed harmoniously with the other provisions in the CJA 1964 and the Criminal Procedure Code, particularly s. 31 and s. 35 of the CJA 1964, read with s. 323 and s. 325 of the Criminal Procedure Code. Based on these provisions, the High Court may review and take action on any criminal matter, either on its own or upon request, if necessary, to ensure the accuracy, legality or appropriateness of a decision, sentence, or order and the proper conduct of the court's proceedings.

By filing the application at the High Court, the Applicant was seeking the High Court to review the charges preferred against him in the Sessions Court. This approach is in line with the nature of the revisionary jurisdiction exercised by the High Court.

The Court of Appeal held that the High Court was exercising its revisionary powers by reviewing the legality of the charges, as well as strike out the charges against the Applicant and acquitted him of the same. Thus, the Prosecution's appeal against the decision of the High Court falls within the ambit of para. 50(1)(b) of the CJA 1964.

Conclusion

Having found that the appeal falls within the ambit of s. 50(1) of the CJA 1994, the Court held that the previous panel of the Court of Appeal had the requisite jurisdiction to hear and adjudicate the appeal.

The motion to review the earlier panel's Decision was dismissed.

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