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To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 20/2025)

The Publications Committee is pleased to circulate the 20th edition of this case note series for the year.

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Sincerely,

Gregory Das
Chairperson
Publications Committee

Highlights from the Appellate Courts

Icon City Development Sdn Bhd v Lee Kean Hwa & Ors (FC)
Property law – Sale and purchase of commercial property – Computation of time for delivery of vacant possession – Computation of liquidated ascertained damages

The Federal Court in ***Icon City Development Sdn Bhd v Lee Kean Hwa & Ors*** (Civil Appeal No.: 02(i)-3-01/2025(W)) considered matters of contractual interpretation in determining the manner in which time was to be computed in a claim for liquidated damages for the late delivery of stratified mixed commercial and residential units in a development project.

The appeal arose from a summary judgment application filed by the purchasers of the units. The claim was initiated by the Respondents at the Federal Court, who were 62 purchasers who each executed Sale and Purchase Agreements ("**SPAs**") with the developer (the Appellant) for the purchase of the units (that were small office versatile office units (or 'Sovo Units').

Under Clause 35A of the SPAs, the Appellant was required to obtain conversion approval of the subject land and building plan approval within 12 months from the date of the SPA, with further extension of 6 months permitted. Section 10 of Schedule A of the SPA provided that vacant possession of the units was to be delivered within 42 months from the said approval or extended approval periods.

The High Court allowed the Respondents' summary judgment application and ruled that the 42 month time period should be computed from the date of the approvals. The Court of Appeal affirmed the High Court decision.
The Federal Court granted the Appellant leave to appeal on the following questions of law:

"***(a) First Question of Law***
Whether in a sale and purchase contract for commercial property, when the "time for delivery of vacant possession" is provided to be calculated from a date of a period of time set out in the said contract for an event which occurred within the said period of time, whether the said calculation ought to begin from the expiry of the said period of time and not prior to the said expiry?

(b) Second Question of Law
Whether in a sale and purchase contract for commercial property, when the "time for delivery of vacant possession" is provided to be calculated from a date of a period of time for approval of building plans and "building plans" has been defined to include "any and all such amendments, alterations and modifications thereto", whether said calculation ought to begin from the date of the first/original approval of the building plan or the relevant date of the last amendment of the building plan subject to the prescribed said period of time?"

The Federal Court first recognised that a matter of contractual interpretation is suited for determination on affidavits and without a trial. This applied even in cases where "*The question of construction or interpretation of the relevant clauses in the contract may require longer scrutiny in some cases where parties take a diametrically different stance, but as no further facts and indeed nothing new would emerge at the trial, there is no necessity to proceed to decide that issue of construction of documents at trial merely because the exercise of construction posed some considerable difficulties*".

Lee Swee Seng FCJ, who wrote for the Federal Court, then considered the first question of law. It was held that "*There is also no rationale for postponing the date time starts to run for completion since construction can already be commenced once the Building Plans are approved*". This finding was premised upon the acceptance that the terms of the SPA were to be interpreted in a business common sense manner. This was because the SPA was a commercial agreement and "*It does not comport with Business Common Sense to say that whilst the Building Plans Approval had been before the expiry of the Approval Period, one must still wait for the expiry of the Period of Approval when Section 10 does not say that*".

The second question of law was then addressed. On this issue, the Appellant argued that the time period for the delivery of vacant possession ought to be based on the date of the approval of the last amendment to the Building Plans. This argument was in part based on the definition of "*Building Plans*" under Clause 1.1 of the SPAs to "*include any and all such amendments, alterations and modifications to the Building Plans*". The Federal Court rejected this interpretation of the relevant terms of the SPAs as "*That kind of an interpretation would not comport with Business Common Sense and indeed it would fly against the provision of 38.16 that had made time wherever mentioned to be of the essence of the contract in relation to all provisions of the SPA. Indeed Clause 38.16 would be rendered otiose and denuded of any meaning*". The Appellant's position on the point failed also because of the absence of evidence in the affidavits on, amongst others, the nature of the amendments to the Building Plans.

On the definition of "*Building Plans*" under Clause 1.1 of the SPA, the Federal Court found as follows:

"*We hasten to add that context is paramount and this is captured by the qualifying words in Clause 1.1 of the SPA,* "***where the context so admits.***" *It does not necessarily mean that each time the expression "Building Plans" appear one must read it to cover "Amended or Altered or Modified Building Plans." The context may not justify that interpretation as to allow that would mean that even though the Building Plans had been approved, the time to deliver vacant possession would be extended each time an Amended Building Plan is approved by the Local Authority such that if the Last Approval is past the "Extended Approval Period" then the last date of that period is taken as the commencement date of the calculation of the 42 months to deliver vacant possession.*"

The Federal Court therefore dismissed the appeal and declined to answer the questions of law. This was in view of the recognition that "*the Questions of Law posed are case-specific and case-sensitive in that the interpretation of the relevant clauses would be dependent on the way they are drafted as interpreted against the context of the whole SPA. Little value would be served by giving direct answers to the Questions of Law posed as each case would be different from the others in bespoke SPAs drafted by developers as they do not fall in the case of offices within the statutory prescribed Standard Form SPAs under Schedule G or H of the HDR*".

Written by
Gregory Das
Chairperson, Publications Committee

Adderina Kaharudin & Anor v Lim Yew Jin (CA)

Trusts law – Admissibility of trust documentation – Enforceability of trust – Whether valuable consideration furnished

In the case of ***Adderina Kaharudin & Anor v Lim Yew Jin*** (Civil Appeal No.: W-02(NCVC)(W)-621-04/2023), the Court of Appeal upheld the High Court's finding that there was an express trust over four (4) properties registered in the name of the Appellants' late father.

The Appellants are the beneficiaries and administrators of their late father's ("**the Deceased**") estate. The Deceased was the registered proprietor of four (4) properties ("**the Properties**"). The Deceased had sold three (3) of the Properties ("**Sale Properties**") to third-party purchasers through arrangements made by the Respondent, but the Deceased passed away before the purchase price of the Sale Properties had been fully paid.

Following the Deceased's death, the Respondent alleged that the Deceased held the Properties on trust for him and claimed the outstanding balance of the purchase price for the Sale Properties, but the Appellants refused.

As a result, the Respondent commenced a suit against the Appellants seeking, amongst others, declarations that the Respondent was the beneficial owner of the Properties pursuant to a Trust Deed and Power of Attorney ("**Trust Documentation**") and that he is entitled to receive the purchase price for the Sale Properties. He contended that he purchased the Properties with his own funds but had caused them to be registered in the name of the Deceased.

The High Court allowed the claim, holding that the Respondent had proven the existence of an express trust and that the Trust Documentation was valid and binding on the Appellants.

On appeal, the Court of Appeal dismissed the Appellants' appeal for, amongst others, the following reasons:

(1) The Appellant challenged the admissibility of the Trust Documentation. However, the Court of Appeal found that the High Court was correct in admitting the Trust Documentation into evidence relying on sections 31(1)(g) and 65 Evidence Act 1950 ("**EA**"). Alternatively, the Trust Documentation could have also been admitted under section 73A of the Evidence Act 1950;

(2) In respect of the evidential weight of the Trust Documentation, the Court of Appeal found that the High Court rightly relied on the testimony of the Respondent's witnesses, particularly the solicitor who attested to the signatures;

(3) The Appellant contended that the trust was unenforceable as no valuable consideration had been given by the Respondent in acquiring the Properties. However, the Court of Appeal found there was evidence that the purchase price of the Properties was wholly paid by the Respondent, which was expressly recorded in the Trust Documentation and corroborated by other oral and documentary evidence. In any event, an express trust is valid once there are the three (3) certainties in trust law (certainty of words, certainty of subject, and certainty of object), regardless of whether valuable consideration is furnished;

(4) The Appellants alleged that the trust had not been registered pursuant to section 344 National Land Code 1965 ("**NLC**"). This matter was not pleaded in the Appellants' pleadings. In any event, the Court of Appeal found that it is not mandatory for the Deceased or Respondent to register the trust pursuant to section 344(2) NLC. The dominant purpose of section 344 NLC is to ensure that the interest of third parties involved in land dealings are protected when the land is subject to trust. In this case, there is no challenge made by third parties on the Properties but merely a monetary claim made by the Respondent on the sale of the Sale Properties, based on the relationship between the Respondent and the Deceased as governed by the Trust Documentation; and

(5) The Appellants alleged that the trust was illegal as the Properties were Bumiputra lots and the Respondent, as a non-Malay, could not have a beneficial interest in the same. However, the Court of Appeal found that the burden lies on the Appellants to demonstrate that the Properties are Malay reserved land under the Malay Reservations Enactment and that the said Enactment expressly prohibits or restricts dealings with non-Bumiputras. Here, there was insufficient evidence that the Properties were Malay reserved land.

In view of the above, the Court of Appeal found no appealable error and dismissed the appeal, affirming the High Court's findings that there was a valid trust.

Written by
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CJ Polymers Sdn Bhd v Kerk Han Meng & Anor (CA)
Civil procedure – Transfer of proceedings – Consolidation – High Court jurisdiction – Inconsistent findings – Fraud allegations – Oppression action – Delay – Rules of Court 2012, Order 4 rule 1, Order 57 rule 1(1) – Courts of Judicature Act 1964, Item 12, Schedule

This was an appeal by the plaintiff to have its writ action (*Suit 786*) transferred and consolidated with a related oppression action (*OS 547*) in which it was the defendant. Both Suit 786 and OS 547 were filed in the Kuala Lumpur High Court but in different divisions.

The High Court Judge acknowledged that the High Court possessed the jurisdiction to consolidate the two cases pursuant to Order 4 rule 1 of the Rules of Court 2012. However, the High Court Judge dismissed the application on the ground that there was no common issue arising in both suits which warranted an order for consolidation. The Court of Appeal case of *Kerajaan Negeri Kelantan v Petroliam Nasional Berhad* [2011] 6 CLJ 649 was referred to by the High Court.

Issues In The Appeal:

(1) Whether the High Court possessed jurisdiction to order a transfer and consolidation of proceedings between two divisions of the same High Court in light of the Court of Appeal case of *Kerajaan Negeri Kelantan v Petroliam Nasional* [2011] 6 CLJ 649 and the proper construction of Item 12 of the Schedule to the Courts of Judicature Act 1964, and Order 4 rule 1 and Order 57 rule 1(1) of the Rules of Court 2012.

(2) Whether the two suits (Suit 786 and OS 547) shared sufficient common issues of fact and law to justify consolidation.

(3) Whether delay in filing the consolidation application should prohibit the application being heard.

Decision of the Court of Appeal

The Court of Appeal allowed the appeal in part. Suit 786 was to be transferred to the High Court hearing OS 547, Both cases were to be heard in a manner to be determined by the presiding High Court Judge.

Findings on the First Issue

(a) The High Court was correct in holding that it possessed jurisdiction to consolidate the two cases. The decision of the Court of Appeal in *Kerajaan Negeri Kelantan v Petroliam Nasional* does not stand for the proposition that an application for transfer cannot be made within the same branch of the High Court, whether between divisions in the same station (for example, between the commercial and civil divisions of the High Court at Kuala Lumpur), or between two stations (for example, between the High Court at Kuala Lumpur and the High Court at Shah Alam).

(b) The application for transfer in *Kerajaan Negeri Kelantan* appeared to have been premised entirely on item 12 of the Schedule to the Courts of Judicature Act 1964, and not Order 4 rule 1 nor Order 57 rule 1(1) of the Rules of Court 2012. Such being the case, the Court of Appeal in that case would have been entirely correct to have ruled that, on the basis of the definition of "court" in section 3 of the Courts of Judicature Act 1964, item 12 of the Schedule refers only to transfers between the two branches of the High Court (i.e.. the High Court of Malaya and the High Court of Sabah and Sarawak)

(c) Section 25(2) of the Courts of Judicature Act 1964 only provides for the *additional* powers of the High Court and does not seek to limit either its powers arising from its inherent jurisdiction, nor powers that have been vested in the courts prior to 16 September 1963. The power to transfer cases, whether with or without an application for consolidation, would have existed before Merdeka Day and hence would not have been ousted by item 12 of the Schedule to the Courts of Judicature Act 1964.

(d) Further, the case of *Kerajaan Negeri Kelantan* can be distinguished on its peculiar facts. That case involved an application for re-transfer that had been preceded by an administrative transfer of the proceedings by the managing judge of the commercial division in Kuala Lumpur pursuant to the applicable practice direction that categorised the case as one coming within the civil division. Following this, the usual considerations relating to a transfer of a proceeding ought not apply in such circumstances.

Findings on the Second Issue

(a) One central justification for consolidation of two separate proceedings is to prevent inconsistent factual findings where the two proceedings arise from the same underlying transactions. In this instance, Suit 786 contained allegations of fraud and misappropriation against former directors, which were also directly relevant to the oppression allegations in OS 547. This was as the legitimacy of the removal of the director, which was one of the grounds raised in OS 547 depended, in part, on whether fraud had occurred.

(b) In the absence of an order for consolidation or a direction from the Court for the cases to be heard together, all the contentions of fraud would have to be proven afresh in the subsequent case in light of Section 43 of the Evidence Act 1950.

Findings on the Third Issue

(a) Although the application for consolidation was filed seven months after Suit 786, the impact of the delay had been significantly lessened by later developments in OS 547. These included the High Court's decision to allow cross-examination of affidavit deponents and the subsequent appeal, as well as trial dates being fixed at a later date. Thus, delay was no longer a decisive factor against consolidation of the two matters.

Written by
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Public Prosecutor v Romika Che Kamarulzaman & Anor (CA)
Criminal law – Procedure for remand of suspects following arrest – Requirement of attendance of Investigating Officer before Magistrate

FACTS

In ***Public Prosecutor v Romika Che Kamarulzaman & Anor*** (Criminal Appeal No.: W-05-219-05/2025), the Respondents were arrested for offences under the Poisons Act 1952 and the Dangerous Drugs Act 1952.

They were brought before the Magistrate for remand proceedings under Section 117 of the Criminal Procedure Code ("**CPC**"). The remand application was made by Sergeant Major Aida, who appeared on behalf of the assigned Investigating Officer ("**IO**"), Inspector Megat Nazmi. The Magistrate granted a two-day remand order.

The Respondents then applied for the High Court to review the Magistrate's remand order. The Respondents contended that the remand application was invalid because it was not made personally by the IO assigned to the case, thereby breaching Section 117(1) of the CPC.

DECISION OF THE HIGH COURT

The High Court allowed the revision application and set aside the remand order for the following reasons:-

(1) The phrase "the police officer making the investigation" in Section 117(1) CPC refers exclusively to the IO in charge of the case – it must be adhered to strictly and that duty cannot be performed by another police officer;

(2) The High Court also referred to the Chief Justice's Practice Direction No. 11 of 2021 ("**the PD**") which states that a remand application must be made by the IO; and

(3) As Sergeant Major Aida was not the formally assigned IO, the remand order was unlawful.

DECISION OF THE COURT OF APPEAL

The Court of Appeal allowed the Public Prosecutor's appeal and set aside the High Court's decision. Its findings were as follows:-

Interpretation of Section 117(1) of the CPC and the PD

(1) Upon examining the provision, the Court of Appeal determined that it was not Parliament's intention to mandate the physical presence of the IO through s. 117 of the CPC;

(2) It held that the core duties under Section 117(1) are: (i) to transmit a copy of the police diary entries to the Magistrate, and (ii) to ensure the accused is produced before the Magistrate;

(3) The provision does not, expressly or impliedly, mandate the physical presence of the assigned IO. The key statutory verb is "transmit," which connotes the forwarding or sending of documents, and not requiring personal attendance;

(4) Hence, to read s. 117 of the CPC as mandating the physical presence of the IO at every remand application could lead to rigidity in the administration of justice;

(5) The PD also do not expressly require the IO to be physically present during remand proceedings. Instead, the PD's emphasis is on timely and proper transmission of documents to the Magistrate;

(6) Hence, the PD reinforces s. 117 of the CPC instead of altering it;

Safeguards in Remand Proceedings

(7) An IO's absence during remand proceedings do not undermine the rights of the accused due to the safeguards in place in Section 117 of the CPC;

(8) The Magistrate serves a judicial function and is not a mere rubber stamp for the police. The Magistrate's exercise of judicial discretion does not depend on the presence of the IO but rather the adequacy and credibility of the investigation and circumstances;

Practical Considerations & Police Operations

(9) The court acknowledged the practical realities of policing. IOs often manage multiple cases, attend court as witnesses, or may be unavailable due to training, illness, or other unforeseen circumstances; and

(10) Requiring the specific IO's presence within the strict 24-hour constitutional timeline is impractical, unduly burdensome, would ultimately hinder the investigative process, and could disrupt the administration of criminal justice.

CONCLUSION

The High Court's interpretation of s. 117 of the CPC was erroneous in law and would impose an unnecessary rigidity on remand proceedings. The appeal was therefore allowed and the decision of the High Court was set aside.

Written by
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