IN THE COURT OF APPEAL OF MALAYSIA

Coram: Hamid Sultan Abu Backer, JCA; Hasnah Hashim, JCA; Harmindar Singh Dhaliwal, JCA

Ong Koh Hou @ Won Kok Fong v Da Land Sdn Bhd and 2 Others

Citation: [2018] MYCA 207 **Suit Number:** Rayuan Sivil No. B-02(NCVC)(W)-487-03/2018

Date of Judgment: 05 July 2018

Litigation & court procedure – Application for a stay of execution pending appeal – Jurisprudence related to stay under sections 44 and 73 of the Courts of Judicature Act 1964 – Whether special circumstances need to be shown before a stay could be granted – Whether minute consideration of allegations of both sides required at the stay application stage – Whether the instant case a fit and proper case for a section 44 stay

JUDGMENT

[1] The appellant/ purchaser of a landed property filed an application in Enclosure 7 for an order seeking for a stay of the decision of the High Court pursuant to sections 44 as well as 73 of **Courts of Judicature Act 1964 (CJA 1964)**. In essence, the purchaser is seeking for specific performance and the vendor is saying that the agreement is terminated and wants to forfeit the deposit. The judgment was in favour of the vendor and the purchaser wants a stay pending appeal. Sections 44 and 73 of **CJA 1964** read as follows:

> **"Incidental directions and interim orders**
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> **44.** (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
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> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
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> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

Appeal not to operate as stay of execution

73. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct."

[2] The importance of these two sections is that it gives a say to the Court of Appeal to stay the order of the High Court. It also does not condone interference in the administration of justice by the respondent to the appellant's appeal process or dispose of the subject matter of the appeal, etc.; where an appellant has promptly filed his appeal and is also seeking a stay of the order of the High Court. Until the decision of the Court of Appeal is made, pursuant to section 44, the order of the High Court and its enforcement may stand subjudice. An intentional interference to deprive an appellant from approaching the Court of Appeal by surreptiously and/or expeditiously disposing of the subject matter of the appeal, may entail the respondent liable for committal proceedings and those who acted in the interference of administration of justice, when the matter can be said to be subjudice may also be liable. It all depends on the facts and circumstance of the case. In addition, those who secure title tainted with contemptuous conduct may ultimately have to return the property if the appellant succeeds in the appeal, says the learned counsel for the appellant, Datuk Seri Gopal Sri Ram.

[3] In the instant case, we have been informed that the subject property has been disposed of and the respondents say the stay is academic. We do not think so. We find merit in the application for stay. On the issue of interference of administration of justice which we have mentioned earlier, we take the view it must be by way of separate application and/or action and it depends entirely on the court after hearing submissions on the law whether there was indeed an interference in the administration of justice and whether the new purchaser has to return the property if the appellant succeeds in his appeal proper itself. In that sense, the appeal is not academic as the appellant has been endowed with the benefit of sections 44, 73, 69 of **CJA 1964**, etc. inclusive of section 11(2) of the **Specific Relief Act** as well as articles 5 and 8 of the **Federal Constitution** which has nexus to preserve the right of appeal. We will elaborate further on some of those provisions shortly.

Brief Facts

[4] As the threshold test to grant a section 44 stay is low, we will not deal with the substantive law related to the grievance of the appellant, save for the sections and Constitutional provisions limited to the stay application only.

[5] In the instant case, the appellant has agreed to purchase the lands of the 1st respondent pursuant to a sale and purchase agreement dated 1-10-2015. The purchase price of the property was RM84 million. The appellant had paid the deposit of RM23 million. The appellant had also caveated the land. Dispute has arisen in respect of the completion of the Sale and Purchase Agreement. The 1st respondent says he had terminated the agreement and forfeited the deposit. The 1st defendant filed suit No. BA-22NCVC-396-07/2017 to seek a declaration that the Sale and Purchase Agreement had been terminated. The prayers in that suit read as follows:

"29. Based on the above, the Plaintiff claims against the Defendant for the following:-

~~(1) A declaration that the SPA is terminated;~~

(1) A declaration that the Sale and Purchase Agreement between the Plaintiff and the Defendant dated 1.10.2015 ("SPA"), in respect of the land held under the following titles in the Mukim of Rawang, District Gombak is terminated:

(i) Grant 124341, Lot 25032;

(ii) Grant 54446, Lot 18057; and

(iii) Grant 62373, Lot 15751.

("the properties");

(2) A declaration that the Supplementary Agreements are not valid and/or void and not enforceable;

(3) An Order under Section 327 of the National Land Code 1965 ("NLC") that the private caveat that was registered on 22.2.2016 under presentation No.7940/2016 ("private caveat") in respect of the properties be removed;

(4) An injunction restraining and/or prohibiting the Defendant whether by himself or through his servants, representatives and/or agents or otherwise howsoever, from lodging or causing to lodge any caveat on the properties;

(5) An Order that any private caveats presently unknown to the Plaintiff which have been entered by the Defendant in respect of the properties be removed;

(6) An order that the deposit of RM23,000,000.00 paid by the Defendant stands forfeited in favour of ~~by~~ the Plaintiff;

(7) An order that the titles to the subject properties, pre-signed Memorandum of Transfer and all documents related to this SPA be returned to the Plaintiff within 5 days of the date of judgment;

(8) Damages and interest thereon to be assessed against the Defendant;

(9) The Plaintiff be at liberty to apply for any further appropriate directions;

(10) Interest at the rate of 5% per annum on the sum(s) awarded for the damages above, from the date of judgment until full and final settlement of the said sum(s), or alternatively, at such rate and for such periods as this Honourable Court deems appropriate;

(11) Costs; and

(12) Any further reliefs deemed just and fit by this Honourable Court."

[6] The appellant resisted the claim and also has filed a counterclaim in that suit seeking the following prayers which read as follows:

"39. The defendant (by original action) therefore counterclaims:-

(1) against the first defendant (by counterclaim):-

(a) an order for specific performance of the sale and purchase agreement dated 1.10.2015 entered into between the defendant (by original action) and the first defendant (by counterclaim);

(b) consequent to relief in (a) above, an order that the first defendant (by counterclaim) take all necessary steps to, and/or to cause, the transfer of the title of the lands held under Grant 124341 for Lot 25032, Grant 54446 for Lot 18057 and Grant 62373 for Lot 15751 all in the Mukim of Rawang, District of Gombak and State of Selangor to the defendant (by original action) within 7 days from the receipt of the payment of the balance purchase price from the defendant (by original action);

(c) Further or in the alternative, damages in lieu of specific performance in the sum of RM61 million or any sum deemed fit and just by this Honourable Court;

(d) Further or in the alternative, damages for breach of contract in the sum of RM61 million or any sum deemed fit and just by this Honourable Court;

(e) interest on the sums awarded for damages in (c) and/or (d) above at the rate of 5% p.a. from the date of judgment to the date of full payment;

(2) against the second and third defendants (by counterclaim) jointly and severally:-

(a) the sum of RM61 million paid under the sale and purchase agreement dated 1.10.2015;

(b) the sum of RM8.4 million as agreed liquidated damages;

(c) interest on the sums ordered in (b) and/or (c) above at the rate of 5% p.a. from the date of judgment to the date of full payment;

(3) against all the defendants (by counterclaim):-

(a) costs;

(b) such further and other relief as this Honourable Court may deem fit and just."

[7] The appellant also filed a separate suit No. BA-22NCVC-88-02/2017 seeking similar prayers to the counterclaim to sustain his rights. The prayers read as follows:

"31. Based on the above, the Plaintiff claims against the Defendant for the following:-

a) An order for specific performance of the sale and purchase agreement dated 01.10.2015 entered into between the Plaintiff and the Defendant (the SPA);

b) Consequent to relief (a) above, an order that the Defendant takes all necessary steps to, and/or to cause, the transfer of the title of the said lands in the SPA to the Plaintiff within 7 days from the receipt of the payment of the balance Purchase Price from the Plaintiff;

c) Further and/or in the alternative, damages in lieu of specific performance in the sum of RM61,000,000.00, or any sum deemed appropriate by this Honourable Court.

d) Further and/or in the alternative, damages for breach of contract in the sum of RM61,000,000.00, or any sum deemed appropriate by this Honourable Court.

e) Interest at the rate of 5% per annum on the sum(s) awarded for the damages above, from the date of judgment until the full and final settlement of the said sum(s), or alternatively, at such rate and for such periods as this Honourable Court deems appropriate.

f) Costs; and

g) Any further reliefs deemed fit and reasonable by this Honourable Court."

[8] What is interesting to note on the face of record is that:

(i) it is the 1st defendant who comes to court to seek a declaration that the sale and purchase agreement has been terminated. That is to say, the 1st defendant has left it to the court to decide whether the sale and purchase agreement is terminated. A party only seeks a declaration when he is not sure of his rights. Until the court determines the issue, that too until all the statutory appeal process is completed, it will naturally follow that the 1st defendant ought not to deal with the subject matter of the property as declaration is an equitable relief. In the instant case, what the 1st defendant has done is that he has entered into a Sale and Purchase Agreement with Luxueux (M) Sdn Bhd to sell the property for RM150 million, i.e. nearly double the price in contrast with the sale to the appellant. On the facts, it is difficult to fathom why the appellant will not want to complete the purchase when the property now has doubled the value. That is precisely the dispute in court where the appellant as well as respondent is seeking for specific relief which requires the consideration of the appellate court in the substantive appeal.

(ii) the 1st respondent is also seeking to forfeit the deposit sum. In this case, there is a dispute as to the deposit sum. However, as per the Sale and Purchase Agreement, the deposit sum is RM25.5 million. In normal circumstances and as matter of conveyancing practice courts have readily allowed a deposit sum of 10 percent of value of the Sale and Purchase Agreement to be forfeited if there is a provision. Any excess sum may be treated as a penalty clause and the court ordinarily will not entertain a penalty clause.

(iii) in addition, learned counsel for the respondent in the submission says:

> "6. On 2 March 2018, after a two-day trial and listening to 4 witnesses, the High Court found on the facts that the SPA was at an end and as such:
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> (i) Allowed the 1st Respondent's claim in Suit 396 and dismissed the Appellant's counterclaim for specific performance. The High Court found as a matter of fact that the SPA had expired as of 31 October 2016 and was validly terminated or void for uncertainty thereafter;
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> (ii) Dismissed the Appellant's Suit 88 which was for specific performance premised on the same findings of fact."

[9] If the contract is void for uncertainty, it must be pleaded in that manner, as per the requirement of Specific Relief Act and the money advanced under void agreement must be refunded. Thus, even from the submission of the respondent, it will appear the judgment of the learned Judicial Commissioner requires appellate scrutiny to sustain rule of law.

Jurisprudence related to stay under s. 44 and 73 of CJA and Kosma case

[10] Section 73 of the **Courts of Judicature Act 1964** states that an appeal shall not operate as a stay of execution or of proceeding under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceedings shall be invalidated except so far as the Court of Appeal may direct. It is a cardinal rule that where a party is exercising his right of appeal, the court ought to ensure that the appeal, if successful, is not nugatory. This rule is based on logic and common sense. (See **Wilson v Church (No. 12)** [1879] 12 Ch. D 454). However, the scope of this rule has vastly been restricted by judicial fetters rather than rules of the court. (See **Yin Shen** [1985] 1 LNS 121; [1986] 2 MLJ 65). Section 73 says that the judgment of the High Court can be enforceable unless the High Court or Court of Appeal Orders otherwise. In practical terms, it means the High Court on its own motion can grant a stay and if a stay is not successful, the Court of Appeal can do so. The section itself does not say that there must be special circumstance shown before the stay is granted.

[11] Presently, for an application for stay to succeed, the applicant must show special circumstances. The court has an unqualified discretion to grant a stay of execution. It has never been the practice of the court to grant a stay unless the application is supported by an affidavit of special circumstances. As a rule, the court will only grant stay if there are special circumstances. (See **Syarikat Berpakat v Lim Kai Kok** [1983] 1 MLJ 406; **Leong Poh Shee v Ng Kat Chong** [1965] 1 LNS 90; [1966] 1 MLJ 86). In **Serangoon Garden Estates Ltd v Ang Keng** [1953] 1 LNS 98; [1953] MLJ 116, Brown J stated that the granting of stay of execution, though discretionary, should be exercised on correct principles. The court stated that the fact that the defendant cannot be restored to his original position if his appeal succeeds is not a sufficient ground though it might be an important factor to be taken into consideration if there were other grounds, for example that there were merits in the appeal. Further, His Lordship asserted that it is a clear principle that the court will not deprive a successful

party of the fruits of his litigation until it is determined that the unsuccessful party can show special circumstances to justify it. This case was distinguished in **Dickson Trading (S) Pte Ltd v Transmarco Ltd** [1987] 1 LNS 139; [1984] 2 MLJ 408.

[12] We take the view the decision of **Serangoon Garden** was not in reliance of statute or rules of procedure. It was the courts' own innovation to create fetters when there is no such legislative intention. Subsequent decisions of court also favoured the decision of **Serangoon Garden**. For example, in **Re Kong Thai Sawmill** [1975] 1 LNS 147; [1976] 1 MLJ 131 the Federal Court stated that stay of execution pending appeal is granted only where exceptional circumstances are proved, such as for instance, where execution would destroy the subject matter of the action or deprive the appellant the means of prosecuting the appeal by reason of poverty. Further, the court stated that allegations that there have been misdirection in the judgment against the weight of evidence, or that there was no evidence to support the judgment are not special circumstances on which the court will grant the stay.

[13] In **See Teow Guan & 1 Ors v Kian Joo Holdings Sdn Bhd & 3 Ors** [1997] 2 CLJ 299 (hereinafter referred to as **See Teow Guan**) the Court of Appeal stated that in the past, it was thought that the appellant has to demonstrate special circumstances warranting a stay so as not to deprive a successful litigant of 'the fruits of his litigation'. Further, the court stated that in light of recent decisions, (the judge referring to English cases) the decision in **Serangoon Garden**, which has been faithfully relied on as the authority for such a proposition, is no longer good law. The court asserted that in an application for a stay of execution or of proceedings, a more practical, flexible, realistic and less stringent approach should be adopted and the paramount consideration is whether the appeal would be rendered nugatory if a stay were not granted. Further, the court observed that if the Court of Appeal, after balancing all relevant factors, concludes that an appeal would be rendered nugatory if the stay or other interim preservation order is not granted, the court should direct a stay or grant other appropriate interim relief, which will effectively maintain the *status quo*. Further, the court stated that if the Court of Appeal concludes that the point in the pending appeal is obviously unarguable, it would not be a proper exercise of the court's discretion if the court nevertheless proceeds to grant a stay.

[14] The above decision is most gratifying as it demolishes the 'special circumstances rule' and recognises the statutory right of appeal though in a restricted sense providing some discretion to the court to consider the case according to justice of the case. It must be emphasized that after the decision of **See Teow Guan** many High Courts refused to follow the decision of the Court of Appeal and attempted to diminish the value of the principles enunciated for stay in **See Teow Guan**. (See **Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Berhad** [2000] 3 CLJ 361). A **See Teow Guan**'s stay was in actual fact an application for stay under section 44 of **CJA 1964**. A stay in the High Court or Federal Court has nothing to do with a section 44 stay.

[15] A middle approach has been stated in the recent Federal Court's decision in **Kosma Palm** (supra) without endorsing the decision of **See Teow Guan**. In the **Kosma Palm** case it was contended, in an application for stay of execution, special circumstances or nugatoriness need not be shown. However,

the Federal Court asserted that the onus was on an applicant to demonstrate the existence of special circumstances to justify the grant of a stay of execution and the reasons must relate to the enforcement of the judgment and the merits of the party's case in a stay application was not a relevant matter for consideration. Further, the court stated that there were many factors that might constitute special circumstances, and the fact that an appeal would be rendered nugatory if the stay were refused, was the most common example of special circumstances. The court took the view that any attempt to restrict the grant of a stay of execution to nugatoriness was wrong and would severely restrict the grounds on which an applicant might rely.

[16] The present position of law is as stated in **Kosma**'s case. The decision of the apex court has given wide latitude to the trial court to grant the stay and has not confined the criteria to cases such as **Serangoon Garden** (supra) or widen the scope as propounded by the court of Appeal in **See Teow Guan** (case). In **Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi Serbausaha Makmur Berhad** it was contended that in an application for stay of execution special circumstances or nugatoriness need not be shown. Augustine Paul JCA sitting in the Federal Court made the following observations:

> '(a) The merits of a party's case in a stay application was not a relevant matter for consideration, (b) The onus was on an applicant to demonstrate the existence of special circumstances to justify the grant of a stay of execution and the reasons must relate to the enforcement of the judgment of the appeal, (c) There were many factors that might constitute special circumstances and the fact that an appeal would be rendered nugatory if the stay were refused was the most common example of special circumstances, (d) Any attempt to restrict the grant of a stay of execution to nugatoriness was wrong and would severely restrict the grounds on which an applicant might rely, (e) As the applicants had not put forward reasons that related to the enforcement of the judgment of the appeal but instead had focused on the problems that the applicants would encounter if the motion were not successful, they failed to raise special circumstances which warrant a stay of execution.'

[17] The law of stay of execution as it stands has developed in a manner that the statutory right of appeal is not recognized neither much thought is given to the Federal Constitution and the presence of the appellate court to address appeals and to be the final arbiter of dispute. Such state of affairs has created much controversies and unfair prejudice, to litigants and thereby often embarrassed decision making process of trial courts. [See **Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor** [1995] 3 CLJ 359; **Insas Berhad & Anor v Ayer Molek Rubber Company Berhad & 10 Ors** [1995] 3 CLJ 328; **Insas Berhad & Anor v Rapheal Pura** [1999] 4 CLJ 784].

[18] Stay in procedural law generally means an order of court temporarily restraining a previous order of court or proceeding as the case may be. There are many types of stay. For example, stay of proceedings, execution, declaratory orders, stay under s. 44 of the **Courts of Judicature Act** and stay of writ of seizure and sale. The principles of law and practice granting stay in various types of stay application are not uniform and/or governed by statute. For example, the principle of law enunciated by the Federal Court in **Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi**

Serbausaha Makmur Berhad [2003] 4 CLJ 1 does not apply to all types of stay and in particular to section 44 of **CJA 1964** application.

[19] It is trite that a right to appeal to the Court of Appeal is an entrenched constitutional right. That being the case, fetters like the 'special circumstances rule' cannot be the dictating force, as it does not accord with the spirit of the constitution. Cases on special circumstances rule which did not consider the constitutional aspect must be treated as *per incuriam*. Common law cases cannot take precedence to the spirit and intent of the statute as well as the Constitution. [See **Jayasena v R** [1970] AC 618; **Mohd Syedol Ariffin v Yeoh Oooi Gark** [1916] 1 MC 165; **Saminathan & Ors v PP** [1955] MLJ 121; **Aizuddin Syah bin Ahmad v Public Prosecutor** [Q-09-98-04/2017]].

[20] In addition, cases which did not consider the provision of section 69 of **CJA 1964** which states that an appeal is a rehearing process must also be read with caution. The reason being that section advocates that the decision of the High Court is not final and the Court of Appeal has powers to do many things including to treat itself as a trial court. The said section read as follows:

> "Hearing of appeals
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> 69. (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
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> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.
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> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.
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> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
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> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision."

[21] The previous decisions of court, which relied on English cases, must be rejected, as our constitutional provision is not similar to the position in England. It is clear that all decisions are subject to appeal. A decision in practical terms cannot be said to be final where a matter is on appeal, until the final appellate court delivers its matured decision. When every decision of court is made appealable expressly by Act of Parliament and where no provisions of the Act or rules specifically require the court to place fetters on the right of appeal, that the so called 'special circumstance' does

not support legislative intention. It is trite that procedural jurisprudence will not allow one to be so spell bound by English precedent and fail to appreciate the rationale of our Acts, rules and constitutional guarantees and create hardship to the appellant. If the intention of parliament is clear that there is a right of appeal then judicial fetters cannot be allowed to prevail.

[22] We take the view that the special circumstance rule does not apply to a section 44 stay and the principles in **See Teow Guan** is a sound decision to be guided in granting a section 44 stay. If it is desired that special circumstances should exist then appropriate amendments should be made to the Federal Constitution, Courts of Judicature Act 1964 and the **Subordinate Courts Act 1948** and to the rules of the court. Now the decision of the Court of Appeal in **See Teow Guan** is most enlightening and reflects the contemporary thinking in United Kingdom and other jurisdictions. However, the Federal Court in **Kosma Palm** did not endorse the Court of Appeal's decision though to some extent the decision paves a flexible approach.

[23] We have read the notice of motion and the affidavits filed. After much consideration to the submission of the learned counsel for the respondent, we take the view that it is a fit and proper case to grant the stay, more so when there is a difference in opinion whether the stay application is academic. Our reasons *inter alia* are as follows:

(a) There is an absolute discretion under section 44 of **CJA 1964** whether or not to grant the stay. The exercise of the discretion must not be arbitrary and at the same time there need not be any minute consideration of allegation of both sides at this stage, as the whole purpose of a section 44 stay is to preserve the integrity of a statutory appeal and in consequence the special circumstance rule plays a lesser role in such application. The court as far as practical must lean towards the appellant in a *bona fide* application for stay and in a fit and proper case can be on terms, where the court is doubtful that it may be a frivolous application. If the application for stay is indeed frivolous it must be dismissed *at limine*. The simple test set out in section 44 relates to whether the true purpose of the stay is to preserve the integrity of the appeal. In **Equiticorp Holdings Ltd v United Securities Sdn Bhd** [2007] 6 CLJ 278, the Court of Appeal observed:

> "Now, it is well established that the grant or refusal of a stay pending appeal is a matter within the discretion of the court. The purpose of a stay is to preserve the integrity of an appeal. See Jesasu Pte Limited v. Minister for Mineral Resources [1987] NSWJB 207" (emphasis added).

(b) It was the contention of the learned counsel for the respondent that it was the finding of the court that the sale and purchase agreement was validly terminated and in consequence of 'Suit No. 88' is not capable of being stayed. We do not think it is a proper proposition of the law. The Court of Appeal is a constitutional court to check the propriety of the decision of the High Court. The decision of the High Court which is directly or indirectly in appeal incapacitates that decision given in favour of the respondent, in consequence of the dominant provision of section 69 of **CJA 1964**.

(c) Learned counsel for the respondent relied on the majority decision of the Federal Court in

Taipan Focus Sdn Bhd v Tunku Mudzaffar b Tunku Mustapha [2011] 1 MLJ 441 and asserts as follows:

> "where Raus Sharif FCJ-whom Arifin Zakaria CJ (as he then was) agreed with-refused to grant relief under Section 44 CJA 1964 to preserve the appellant's caveats on the subject properties, or to order the entry of a registrar's caveat under Section 417 National Land Code 1965, *inter alia* on grounds that it would have the effect of granting the appellant what he wanted before the appeal proper was heard. His Lordship makes this point succinctly at Paragraphs 61 and 62 of the judgment:
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> > *[61][...] Thus, in the circumstances of this case, the order of the Court of Appeal that the registrar's caveat be entered on the said land cannot be supported. This is because firstly, the procedure as laid down by ss 319, 320, 321 and 417 of the Code was not followed. Secondly, there was no final judgment or order on the said land for the Court of Appeal to give effect to. In the present case, the only order applied for by TM [i.e. the respondent, Tunku Mudzaffar] was an interim order to preserve and extend TM's private caveat until the disposal of the appeal. Thus, once the Court of Appeal found that TM's private caveat could not be extended, the matter should have ended there. The orders that a registrar's caveat be entered on the said land as well as an injunction restraining Taipan or its servants or agents from dealing with or disposing of or having physical possession of the said land should not have been made. Section 44 of the CJA cannot be invoked to grant those orders.*
> >
> > *[62] No doubt s 44 of the CJA confers power upon the Court of Appeal to make any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding. But, I am of the view that the word 'proceeding' must refer to the appeal pending before the Court of Appeal. And the subject matter of the appeal pending before the Court of Appeal is the extension of TM's private caveat. Thus, as said earlier, once the Court of Appeal found that TM's private caveat could not be extended, I could not see how s 44 of the CJA could be invoked for the Court of Appeal to grant the orders as it did on 9 January 2008. By making the orders as it did, the Court of Appeal effectively granted what TM wanted, i.e. to restrain Taipan from dealing with the said land having earlier held that it had no power to extend the private caveat. In other words, TM got what he wanted without his appeal against the decision of the Shah Alam being heard by the Court of Appeal. This is a clear miscarriage of justice (emphasis added)."*

[24] We do not see how **Taipan**'s case will be relevant here. In **Taipan** the issue was related to registrar caveat. In the instant case, it is related to private caveat and that too the appellant has paid a sum of RM23 million. The distinction is not one of an apple and orange but a marble and pumpkin.

[25] Learned counsel for the respondent also relied on the case of **Takako Sakao v Ng Pek Yuen & Anor (No. 3)** [2010] 2 MLJ 141 to say a declaration cannot be stayed. The submission of the learned counsel for the respondent read as follows:

"16. ... where it was held that a declaration cannot be enforced by execution and since a declaration cannot be enforced, it cannot be stayed. The facts of the case are as follows:

(i) The case involved an application to stay the execution on the judgment of the Federal Court, pending the outcome of an application to review the principal judgment of the court;

(ii) The appellant had entered into a joint venture with the first respondent. The first respondent, however, sold the joint venture property to the second respondent. The appellant then commenced action against the respondents;

(iii) The Federal Court, in an earlier judgment, found that a constructive trust had arisen in favour of the appellant and orders were made to protect the subject matter of the trust in specie. This was the principal judgment;

(iv) Subsequently, it was discovered that the second respondent had sold the property and the sale proceeds were sitting in its hands. The Federal Court then made a second judgment in the form of specific relief to enforce the constructive trust declared under the principal judgment; and

(v) Upon application for review under rule 137 of the Rules of the Federal Court, the respondents then moved to stay the execution of the orders made in the principal judgment and the second judgment.

17. The relevant excerpt from paragraph 6 of the *Takako* [RBA: TAB 2] judgment is reproduced below:

"[6] There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, inter alia, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution.

In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise." (emphasis added)."

[26] We do not think the principles of Takako is in relation to a declaration which does not change the status quo of the party, i.e. the declaration cannot be enforced directly or indirectly. In the instant case, the respondent has had an advantage over the order made by the High Court in that they were able to dispose of the property to third parties who were well aware of the dispute and that they may be liable to return the property in the event the appellant succeed in the appeal. In this respect, we agree with the submission of the learned counsel for the appellant who says:

"The High Court misdirected itself when it applied *Takako Sakao v. Ng Pek Yuen (No. 3)* [2010] 2

MLJ 141 (FC) (Tab 7 IAP) when the judgment in that case does not contain positive order:-

> "[6] There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, inter alia, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v SS Grewal* (1975) Cri LJ 679, the court held as follows:
>
> > A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgment-debtor and does not, in terms, direct the judgment-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgment-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.
> >
> > In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise."
>
> 12. It is trite that if the judgment contains no positive orders, there is nothing to be executed and therefore nothing to stay. In support, the appellant refers to the decision of this Honourable Court in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49:-
>
> > "...The decision appealed against was the decision of the learned judicial commissioner striking out a prayer in the winding up petition. There was no order that a party was to do something. There was nothing to be executed, really."
>
> 13. However, in our case here, there are positive orders in the Order made by the High Court. See exhibit CRH-1 of the respondents' affidavit in reply for the Order. A copy of the Order is attached hereto as Appendix A.
>
> 14. Besides (iv), the orders in (iii) and (vi) of the Order are positive orders. They are positive orders directing the appellant to remove the private caveats and to deliver documents within a specific time. They are commands issued to the appellant to obey. Committal or execution process can be issued for the compliance of that command. That being the case, the appellant respectfully submits that the decision in Takako Sakao that an order which cannot be enforced cannot be stayed, does not apply in this case, especially in so far as the orders in (iii) and (vi) are concerned."

[27] The learned counsel for the respondent also relied on the fruit of litigation concept, which has been the ghost of the common law in contrast to legislation which gives a positive right to appeal. A statutory right outweighs the common law right and this was explained in the recent decision of the Court of Appeal in the case of **Aizuddin Syah bin Ahmad v Public Prosecutor** [Q-09-98-04/2017]. In our considered view, when the High Court has been informed that an appeal has been filed, it should consider granting an interim stay pending an application under s.44 of **CJA 1964** in the Court

of appeal unless application for stay is frivolous.

[28] For reasons stated above, we take the view that it is a fit and proper case to order a section 44 stay with a direction that an early date be fixed for the trial.

We hereby ordered so.

Dated: 05 July 2018

sgd

DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER
Judge
Court of Appeal
Malaysia.

COUNSEL

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LEGISLATION REFERRED TO:

Courts of Judicature Act 1964, Sections 44, 69, 73

Federal Constitution, Articles 5, 8

Specific Relief Act, Section 11(2)

Subordinate Courts Act 1948

JUDGMENTS REFERRED TO:

Aizuddin Syah bin Ahmad v Public Prosecutor [Q-09-98-04/2017]

Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor [1995] 3 CLJ 359

Dickson Trading (S) Pte Ltd v Transmarco Ltd [1987] 1 LNS 139; [1984] 2 MLJ 408

Equiticorp Holdings Ltd v United Securities Sdn Bhd [2007] 6 CLJ 278

Insas Berhad & Anor v Ayer Molek Rubber Company Berhad & 10 Ors [1995] 3 CLJ 328

Insas Berhad & Anor v Rapheal Pura [1999] 4 CLJ 784

Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Berhad [2000] 3 CLJ 361

Jayasena v R [1970] AC 618

Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi Serbausaha Makmur Berhad [2003] 4 CLJ 1

Leong Poh Shee v Ng Kat Chong [1965] 1 LNS 90; [1966] 1 MLJ 86

Mohd Syedol Ariffin v Yeoh Oooi Gark [1916] 1 MC 165

Re Kong Thai Sawmill [1975] 1 LNS 147; [1976] 1 MLJ 131

Saminathan & Ors v PP [1955] MLJ 121

See Teow Guan & 1 Ors v Kian Joo Holdings Sdn Bhd & 3 Ors [1997] 2 CLJ 299

Serangoon Garden Estates Ltd v Ang Keng [1953] 1 LNS 98; [1953] MLJ 116

Syarikat Berpakat v Lim Kai Kok [1983] 1 MLJ 406

Taipan Focus Sdn Bhd v Tunku Mudzaffar b Tunku Mustapha [2011] 1 MLJ 441

Takako Sakao v Ng Pek Yuen & Anor (No. 3) [2010] 2 MLJ 141

Wilson v Church (No. 12) [1879] 12 Ch. D 454

Yin Shen [1985] 1 LNS 121; [1986] 2 MLJ 65