IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

(COMMERCIAL DIVISION)

CIVIL SUIT NO: 22IP-26-08/2013

BETWEEN

CHOW CHUAN FAT
(NRIC No. 690127-01-5033) … PLAINTIFF

AND

1. **YEO CHAI SENG**
   (NRIC No. 510919-01-5818)
2. **CHOONG HWA DOONG**
   (NRIC No. 420227-10-5271)
3. **PENDAFTAR PATEN, MALAYSIA**
4. **CHD GLOBAL IP SDN BHD**
   (Company No. 804127-K) (In Liquidation) … DEFENDANTS

JUDGMENT

(Court enclosure nos. 24 and 40)

A. Issues

1. This case raises the following questions, among others:

   (1) whether the Court has jurisdiction to set aside its own perfected consent judgment dated 24.10.2013 (**Consent Judgment**) entered into by the plaintiff (**Plaintiff**) and the first defendant (**1st Defendant**)

when the fourth defendant company (in liquidation) (**4th Defendant**) had not been heard before the entry of the Consent Judgment. Regarding this issue -

(a) should a fresh suit be filed by the 4th Defendant to set aside the Consent Judgment (instead of the 4th Defendant's application to this Court to set aside its own Consent Judgment)?;

(b) is the 4th Defendant barred by Order 42 rule 13 of the Rules of the Court 2012 (**RC**) from applying to Court to set aside the Consent Judgment?; and

(c) should the Court refuse to set aside the Consent Judgment on the ground of inordinate delay on the part of the 4th Defendant?; and

(2) if the Court has jurisdiction to set aside the Consent Judgment, should the Court do so and reinstate this case for trial? In this regard, is the third defendant [Registrar of Patents (**3rd Defendant**)] estopped from disputing the Consent Judgment by its undertaking to Court on 8.10.2013 to comply with any order which may be made by this Court (**3rd Defendant's Undertaking dated 8.10.2013**)?

B. Background

2. On 29.1.2005, the 1st Defendant and the second defendant (**2nd Defendant**) filed patent application no. PI 20050282 with the 3rd

Defendant. This patent application was allowed by the 3rd Defendant on 31.1.2008 and a Grant of Patent registration no. MY-134916-A was issued to the 1st and 2nd Defendants (**Patent No. 916**).

3. On 1.2.2008, each of the 1st and 2nd Defendants executed an assignment of Patent No. 916 to the 4th Defendant (**Assignment**). The 1st and 2nd Defendants filed an application with the 3rd Defendant on 4.3.2008 to record the Assignment. At this juncture, the 4th Defendant had not been wound up.

4. On 1.4.2008, the 3rd Defendant recorded the Assignment. A "*Recordal of Assignment*" was issued by the 3rd Defendant to the 4th Defendant.

5. The 4th Defendant and CHD Engineering Sdn. Bhd. filed Johore Bahru High Court Civil Suit No. MT4-22-252-2009 (**1st Suit**) against the Plaintiff and Awan Timur Kluang Sdn. Bhd.[**Defendants** (**1st Suit**)].

6. The 2nd Defendant filed a suit under s 181 of the Companies Act 1965 against, among others, the 4th Defendant, in the Kuala Lumpur High Court Civil Suit No. 26NCC-97-11/2011 (**2nd Suit**). In the 2nd Suit, a consent order was recorded on 11.1.2012 wherein, among others, the 4th Defendant was wound up and the Official Receiver (**OR**) was appointed as the 4th Defendant's liquidator (**Liquidator**).

7. On 13.8.2012, the 1st Suit was withdrawn and costs of RM50,000.00 was to be paid by the 4th Defendant to the Defendants (1st Suit) from the liquidation of the 4th Defendant's assets.

8. The Plaintiff had filed this suit against the 1st to 3rd Defendants only (**This Suit**). The Plaintiff had not only failed to cite the 4th Defendant as a co-defendant in This Suit but had also refused to notify the 4th Defendant of This Suit.

9. This Suit was withdrawn by the Plaintiff against the 3rd Defendant on 8.10.2013. Hence, This Suit was struck out on 8.10.2013 against the 3rd Defendant with no order as to costs.

10. On 24.10.2013, the Consent Judgment was recorded by Azizah Bt. Haji Nawawi J as follows (in the National Language):

> "*TINDAKAN INI telah ditetapkan untuk pengurusan kes di hadapan Yang Arif Hajah Azizah Bt. Haji Nawawi pada 24 Oktober 2013* ***dalam kehadiran Yang Lee Yuen, peguamcara [sic] bagi pihak Plaintif dan menyebut bagi pihak Defendan Pertama****.*
>
> ***MAKA ADALAH DIHAKIMI SECARA PERSETUJUAN antara Plaintif dengan Defendan Pertama seperti berikut****:*
>
> *A.* ***Plaintif merupakan pemilik bersama [Patent No. 916] ("Paten tersebut")***

B. ***Plaintif dalam apa jua keadaan adalah pengguna terdahulu Paten tersebut dan berhak untuk mengeksploitasi Paten tersebut walau apa pun pemberian Paten tersebut****; dan*

C. Tiada apa-apa perintah terhadap kos terhadap Defendan Pertama."

(emphasis added).

11. In the 2nd Suit, on 20.2.2014, the Kuala Lumpur High Court ordered Mr. Wong Ching Yong (**Mr. Wong**) to replace OR as the Liquidator.

12. The Plaintiff withdrew This Suit against the 2nd Defendant on 3.4.2014 with liberty to file afresh. Hence, This Suit was struck out against the 2nd Defendant with liberty to file afresh.

13. The 1st Defendant had earlier filed Shah Alam High Court Originating Summons No. 24-917-2011 against the 4th Defendant to nullify the Assignment (**3rd Suit**). In the 3rd Suit –

(1) on 11.10.2012, the Shah Alam High Court allowed the 3rd Suit and invalidated the Assignment (**Shah Alam High Court's Decision**);

(2) the Court of Appeal reversed the Shah Alam High Court's Decision on 31.5.2012 and remitted the case to be tried in the Shah Alam High Court; and

(3) on 9.3.2015, the 3rd Suit was struck out by the Shah Alam High Court with no order as to costs.

14. The Plaintiff filed Kuala Lumpur High Court Civil Suit No. 22IP-54-11/2015 against the 2nd, 4th Defendants and Mr. Wong (**4th Suit**). On 19.2.2016, the Plaintiff withdrew the 4th Suit.

C. 2 applications in This Suit

15. In Court enclosure no. 24 (**Court Enc. No. 24**), the Plaintiff applied for the following orders, among others:

(1) the Plaintiff be granted leave to file Court Enc. No. 24 under Order 92 rule 4 RC;

(2) the 3rd Defendant to register the Plaintiff as a co-proprietor of Patent No. 916 pursuant to the Consent Judgment within 7 days from the date of the order of this Court under Order 45 rule 6(1) RC and Order 92 rule 4 RC;

(3) the 3rd Defendant to do all the necessary amendments and/or corrections to the registration of Patent No. 916 pursuant to the Consent Judgment within 7 days from the date of the order of this Court under Order 45 rule 6(1) RC and Order 92 rule 4 RC;

(4) damages to be assessed by this Court; and

(5) costs of Court Enc. No. 24 shall be borne by the 3rd Defendant.

16. Court Enc. No. 24 was only served on the 1st and 3rd Defendants.

17. The 3rd and 4th Defendants applied to intervene in This Suit. This Court allowed the intervention applications of 3rd and 4th Defendants on 29.3.2016.

18. The 4th Defendant filed Court enclosure no. 40 (**Court Enc. No. 40**) for the following orders, among others:

(1) the Consent Judgment be set aside; and

(2) the Plaintiff and 1st Defendant to pay costs of Court Enc. No. 40 to the 4th Defendant.

19. All parties agreed that Court Enc. No. 40 would be heard and decided first before Court Enc. No. 24.

D. <u>Whether Court has jurisdiction to set aside sealed Consent Judgment</u>

20. Based on my understanding of case law, there are at least 5 circumstances wherein the High Court may exercise its exceptional jurisdiction to set

aside an earlier perfected judgment or order of the High Court (which has not been appealed to the Court of Appeal):

(1) when the sealed judgment or order has been made without jurisdiction (**1st Vitiating Circumstance**). In this regard, s 44 of the Evidence Act 1950 (**EA**) provides the statutory basis for the application of the 1st Vitiating Circumstance. Section 44 EA provides as follows -

> "***Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion***."
>
> (emphasis added).

The following cases have alluded to the 1st Vitiating Circumstance –

(a) please see Azmi FCJ's judgment in the Federal Court case of **Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd** [1998] 2 CLJ 75, at 92-93 [which was concurred by Eusoff Chin CJ and Wan Adnan Ismail FCJ (as he then was), at p. 97];

(b) the Federal Court's judgment delivered by Abdoolcader J (as he then was) in **Eu Finance Bhd v Lim Yoke Foo** [1982] 2 MLJ 37, at 39-40;

(c) LC Vohrah J's judgment in the High Court case of **Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd** [1989] 2 MLJ 425, at 426; and

(d) **Panaron Sdn Bhd v Univac Switchgear Sdn Bhd** [2014] 6 AMR 432, at paragraphs 23-27;

(2) when the perfected judgment or order has been obtained by way of fraud or collusion as stated in s 44 EA (**2nd Vitiating Circumstance**). The following cases explained the 2nd Vitiating Circumstance -

(a) the Court of Appeal's judgment given by Gopal Sri Ram JCA (as he then was) in **Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd** [2001] 2 CLJ 321, at 334-336;

(b) the judgment of Siti Norma Yaacob JCA (as she then was) in the Court of Appeal case of **Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)** [2000] 3 CLJ 16, at 24 (**Selvam Holdings**); and

(c) **KTL Sdn Bhd & Anor v Leong Oow Lai & other cases** [2014] AMEJ 1458, at paragraphs 147-149;

(3) when the sealed judgment or order has been obtained in contravention of a mandatory statutory prohibition (**3rd Vitiating Circumstance**). The 3rd Vitiating Circumstance is explained in the following cases –

(a) Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court in **Badiaddin**, at p. 113; and

(b) **Selvam Holdings**, at p. 24 and 26;

(4) when there is a breach of the first rule of natural justice, namely when the perfected judgment or order may be impugned on the ground of biasness (**4th Vitiating Circumstance**). The 4th Vitiating Circumstance is illustrated in the following cases –

(a) the judgments of Lords Browne-Wilkinson, Goff, Hope and Hutton in the House of Lords case of **R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte (No 2)** [1999] 1 All ER 577; and

(b) the English Court of Appeal's decision given by Woolf CJ in **Taylor & Anor v Lawrence & Anor** [2002] 3 All ER 353; and

(5) when there is a breach of the second rule of natural justice, namely when a party has been deprived of his or her right to be heard before the judgment or order is pronounced (**5th Vitiating Circumstance**). The 5th Vitiating Circumstance is explained in the following cases –

(a) Mohd. Azmi SCJ's judgment in the Supreme Court case of **Toh Seow Ngan & Ors v Toh Seak Keng & Ors** [1990] 2 MLJ 303, at 306;

(b) Edgar Joseph Jr FCJ's judgment in the Federal Court in **Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor** [1996] 1 MLJ 374, at 381-382 and 383;

(c) **Selvam Holdings**, at p. 24 and 26; and

(d) **Adon bin Mohd. Pendik & Anor v Danaharta Urus Sdn Bhd** [2015] 1 AMEJ 1783, at paragraphs 68 and 69.

21. The 1st and 2nd Vitiating Circumstances are based on s 44 EA while the 3rd to 5th Vitiating Circumstances are premised on the Court's inherent jurisdiction.

22. I am of the view that the Court has the inherent jurisdiction to set aside the Consent Judgment by reason of the occurrence of the 5th Vitiating Circumstance in This Suit. This decision is premised on the following evidence and reasons:

(1) the Plaintiff cannot feign ignorance of the 4th Defendant's claim of ownership of Patent No. 916 (by reason of the Assignment). This is because even before the institution of This Suit, the 4th Defendant and

another co-plaintiff had filed the 1st Suit against, among others, the Plaintiff, regarding Patent No. 916. There is therefore no justification for the Plaintiff's omission to cite the 4th Defendant as a co-defendant in This Suit; and

(2) it is clear that the Plaintiff had surreptitiously omitted to make the 4th Defendant a co-defendant in This Suit so as to obtain the Consent Judgment behind the 4th Defendant's back. As such, when the Plaintiff entered into the Consent Judgment with the 1st Defendant, there was a breach of the second rule of natural justice because the 4th Defendant had been deprived of its right to be heard before the entry of the Consent Judgment.

E. <u>Whether Court should set aside Consent Judgment</u>

23. In **Adon**, at paragraphs 81-85, I have followed the Court of Appeal's judgment in **Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors** [2007] 1 CLJ 1 and the Singapore Court of Appeal's decision in **Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd** [2010] SGCA 39:

> "*84.* ***For the reasons given in Lee Tat Development, I accept that there is a difference between the consequences arising from a contravention of the first rule of natural justice and the effect of a breach of the second rule of natural justice. Such a difference is as follows****:*

(a) if there is a breach of the first rule of natural justice -

*(i) the High Court **must** set aside -*

(1) the earlier order and judgment of the High Court; or

(2) the relevant part of the order or judgment

- which has been made in contravention of the first rule of natural justice; and

(ii) the original dispute must be re-heard by the High Court;

*(b) **if the second rule of natural justice has been infringed, the High Court should decide whether the "ultimate outcome" of the case will be changed if the aggrieved party is given a right to be heard** -*

*(i) **if the court decides that the "ultimate outcome" of the case remains the same even if the aggrieved party is given a right to be heard on the matters which the aggrieved party has not been heard (Subject Matter of Complaint), the court should not exercise its discretion to hear the aggrieved party in respect of the Subject Matter of Complaint. In such an event, the court order or judgment continues to be valid and binding on the parties**; and*

(ii) ***if the court decides that the "ultimate outcome" of the case may be changed if the aggrieved party is given a right to be heard on the Subject Matter of Complaint –***

(1) ***the court should allow the aggrieved party to be heard only on the Subject Matter of Complaint****; and*

(2) ***after hearing the aggrieved party only on the Subject Matter of Complaint, the court may decide to uphold, vary or set aside the order or judgment in question****; and*

*(c) if a court order or judgment has been made in breach of the rules of natural justice (**Breach**), be it the first or the second rule -*

(i) only the part of the order or judgment which is tainted by the Breach, is liable to be set aside; and

(ii) the other parts of the order or judgment which are untainted by the Breach, are still valid and binding on the parties.

85. ***Based on Annie Quah Lay Nah and Lee Tat Development, I am not inclined to hold that a mere breach of the second rule of natural justice will entitle an aggrieved party to set aside a sealed order or judgment ex debito justitiae****.*"

(emphasis added).

24. The question that now arises is –

(1) whether this Court should set aside the Consent Judgment or allow it to stand despite the breach of the second rule of natural justice concerning the 4th Defendant (please see the above Part D); and

(2) if the Court decides to impugn the Consent Judgment, should the Consent Judgment be set aside in whole or in part?

25. I am of the view that the Consent Judgment should be set aside in its entirety. My reasons are as follows:

(1) if the 4th Defendant had been cited by the Plaintiff as a co-defendant in This Suit, I am certain my learned predecessor would not have recorded the Consent Judgment. This is because the validity of the Assignment is an issue which can only be decided by this Court after a trial and cannot be agreed only by the Plaintiff and 1st Defendant (without the 4th Defendant's consent). As the *"ultimate outcome"* of this case will definitely be affected if the 4th Defendant is given the right to be heard, the entire Consent Judgment must be set aside; and

(2) the Consent Judgment cannot be severed because if I allow either one of paragraphs (a) or (b) of the Consent Judgment to stand, this will cause irreparable prejudice to the 4th Defendant regarding the validity of the Assignment without giving the 4th Defendant a right to be heard.

F. Should 4th Defendant file a fresh suit to impugn Consent Judgment?

26. The Plaintiff's learned counsel, Ms. Kho Zhen Qi (**Ms. Kho**), had contended that Court Enc. No. 40 was defective. This is because the Consent Judgment had already been perfected and a perfected consent judgment can only be set aside by way of a fresh suit (**Fresh Suit**). Ms. Kho relied on the following cases:

    (1) the Federal Court's judgment in **Khaw Poh Chhuan v Ng Gaik Peng & Ors** [1996] 1 MLJ 761; and

    (2) the Court of Appeal case of **Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors** [2000] 3 MLJ 699.

27. Firstly, I am of the view that if a party relies on the 2nd Vitiating Circumstance (fraud or collusion), the party has to file a Fresh Suit to set aside the perfected judgment or order. This is because the 2nd Vitiating Circumstance cannot be proven by way of affidavit and can only be proven in a trial. I rely on the Federal Court's judgment delivered by Chang Min Tat FJ in **Hock Hua Bank Bhd v Sahari bin Murid** [1981] 1 MLJ 143, at 144, as follows:

> "***Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule***

11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: Re St Nazaire *Co 12 Ch D 88,* ***Kelsey v Doune*** *[1912] 2 KB 482;* ***Hession v Jones*** *[1914] 2 KB 421,* ***unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: Hip Foong Hong v Neotia & Co*** *[1918] AC 888* ***and Jonesco v Beard*** *[1930] AC 298. ...*"

(emphasis added).

28. If a party wishes to set aside a sealed judgment or order under the 1st, 3rd, 4th or 5th Circumstance, whether the party should file a Fresh Suit or apply to the same Court which has granted the perfected judgment or order, depends on the justice of the matter. I rely on **Selvam Holdings**, at p. 24 and 26-27, as follows:

*"**Under the aforesaid circumstances, a court is seised with the necessary jurisdiction to entertain an application to set aside the earlier order ex debito justitiae. Expressed in another way there is no need to adopt the appeal procedure nor to file a fresh suit to set aside the defective order. That can be done in the same proceedings where the impeached order was granted and before the same judge or another judge with concurrent jurisdiction.***

…

In this regard, the conduct of the appellant is most relevant and most telling. The originating summons was filed whilst the originating motion before Abdul Aziz Mohamad J was part heard pending decision. Both summonses seek remedies that have the same effect. The originating

summons was heard two weeks after it was filed, thereby stealing a march on the originating motion.

We say that the appellant's behaviour is highly questionable and that of their solicitors most unprofessional. Under these circumstances we consider that filing a fresh action to set aside the 1993 order is an exercise in futility as it is counter productive and it will be adding another suit to an already long list of actions relating to the same subject matter. One need only read the judgment of the trial judge to appreciate the numerous suits and summonses filed by the appellant following their non-acceptance of the winding up order as they contend that they were not the entity affected by the order. But they had not appealed against that order. Instead they filed the originating motion which has since been decided by Abdul Aziz Mohamad J. Again no appeal had been lodged by the appellant in that originating motion. This later judgment runs contrary to the 1993 order and whilst we appreciate that a court is not bound by a decision of another court exercising concurrent jurisdiction, nonetheless the appellant are now placed in the most anomalous position in that there are two existing and conflicting orders as to their legal status. Since the appellant had not appealed against both orders, the interveners have provided the alternative whereby the appellant's legal status can be finally resolved.

Under these circumstances we consider that the justice of the case entitles the interveners to apply to set aside the 1993 order ex debito justitiae in the same proceedings in which the 1993 order was made and further that the High Court was not functus officio to hear and determine such application under its inherent jurisdiction and we so hold."

(emphasis added).

29. I am of the view that the justice of this case does not require the 4th Defendant to file a Fresh Suit. Suffices for the 4th Defendant to file Court Enc. No. 40. This decision is premised on the following reasons:

(1) the Plaintiff had filed Court Enc. No. 24 to enforce the Consent Judgment. If the 4th Defendant files a Fresh Suit, it is clear that the Fresh Suit cannot be disposed of before the hearing of Court Enc. No. 24. As such, the 4th Defendant has to file an application to stay the hearing of Court Enc. No. 24 pending the final disposal of the Fresh Suit (**Stay of Court Enc. No. 24**). If there is no Stay of Court Enc. No. 24, there will be an injustice to the 4th Defendant if Court Enc. No. 24 is allowed; and

(2) the Consent Judgment clearly stated that the Consent Judgment was only made by the Plaintiff and the 1st Defendant. There is no dispute that the 4th Defendant has not been cited in This Suit. Hence, the existence of the 5th Vitiating Circumstance (breach of second rule of natural justice) is clear and need not be proven by way of oral evidence in a trial. There is therefore absolutely no need for the Fresh Suit to be commenced.

30. **Khaw Poh Chhuan** can be easily distinguished from This Suit as follows:

(1) the material facts of **Khaw Poh Chhuan** are as follows -

(a) the plaintiff/appellant claimed that one Madam Yap Ah Looi, a beneficiary of the estate of the deceased, Mr. Yap Cheng (**Estate**), had assigned her interest in the Estate to the plaintiff/appellant by way of 2 agreements dated 1.4.1964 and 20.1.1965;

(b) the administrators of the Estate filed an administration action in 1973 (**1973 Suit**). The plaintiff/appellant (as an assignee of a beneficiary of the Estate) was not cited as a party in the 1973 Suit. Nor was the plaintiff/appellant informed of the 1973 Suit. In the 1973 Suit, a consent order regarding certain assets of the Estate had been entered (**1973 Consent Order**). The 1973 Consent Order totally ignored the interest of the plaintiff/appellant in the Estate by virtue of the assignment;

(c) the plaintiff/appellant subsequently knew about the 1973 Consent Order and filed a fresh action to set aside the 1973 Consent Order; and

(d) the Federal Court reversed the High Court's decision and set aside the 1973 Consent Order in so far as 1973 Consent Order affected the plaintiff/appellant; and

(2) in **Khaw Poh Chhuan**, there was no issue of applying to the High Court which had granted the 1973 Consent Order to set aside the 1973 Consent Order. This was because there was no more pending

matter before the Court which had made the 1973 Consent Order. In This Suit, the Plaintiff had filed Court Enc. No. 24 to enforce the Consent Judgment. As explained in the above paragraph 29 –

(a) justice is served by an application by the 4th Defendant to this Court to set aside the Consent Judgment; and

(b) it will be unjust to require the 4th Defendant to file a Fresh Suit.

31. **Yee Seng Plantations** did not concern an application to set aside an earlier consent order. In **Yee Seng Plantations**, the plaintiffs/respondents filed a fresh action for a declaration that the plaintiffs/respondents were not bound by the consent order because the consent order had been frustrated by a supervening event in the form of the decision of Terengganu State Executive Council's decision. Accordingly, **Yee Seng Plantations** is not an authority that an application to invalidate a consent judgment or order under the 1st, 3rd, 4th or 5th Circumstance, can only be made by way of a Fresh Suit.

G. <u>Whether Order 42 rule 13 RC bars Court Enc. No. 40</u>

32. Ms. Kho had submitted that Order 42 rule 13 RC bars the 4th Defendant from proceeding with Court Enc. No. 40. Order 42 rule 13 RC states as follows:

"***Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him***."

(emphasis added).

33. According to Ms. Kho –

(1) the Plaintiff's then solicitors, Messrs Visalakshi Azlinda & Co. (**Messrs VA**), had sent a letter dated 17.10.2014 to the OR (**Messrs VA's Letter dated 17.10.2014**). Messrs VA's Letter dated 17.10.2014 had informed the OR of the Consent Judgment. A copy of the Consent Judgment had been enclosed with Messrs VA's Letter dated 17.10.2014;

(2) Messrs VA sent a letter dated 12.1.2015 to Mr. Wong and informed Mr. Wong of the Consent Judgment (**Messrs VA's Letter dated 12.1.2015**). A copy of the Consent Judgment had been enclosed with Messrs VA's Letter dated 12.1.2015;

(3) Court Enc. No. 40 had been filed by the 4th Defendant on 18.4.2016. In view of Messrs VA's Letter dated 17.10.2014, there had been a delay of almost 1 year and 6 months in the filing of Court Enc. No. 40. Order 42 rule 13 RC mandatorily requires a party to apply to set aside a judgment or order within 30 days after the party's receipt of the judgment or order. Ms. Kho relied on the following cases –

(a) the Federal Court's judgment in **Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal** [2009] 4 MLJ 149;

(b) the Court of Appeal case of **Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)** [2003] 4 MLJ 647;

(c) the High Court's decision in **Pan Malayan Forwarding & Shipping Sdn Bhd v Wing Tiek Holdings Bhd** [1998] 1 LNS 179; and

(d) the Court of Appeal's judgment in **Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd** [1998] 3 CLJ 335;

(4) the 4th Defendant did not apply for an extension of time to file Court Enc. No. 40. Ms. Kho cited the following cases –

(a) the Federal Court case of **Hong Kwi Seong v Ganad Media Sdn Bhd and another appeal** [2013] 6 MLJ 765;

(b) the Supreme Court's decision in **Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal** [1995] 3 MLJ 465;

(c) the Court of Appeal's judgment in **Hock Seng Construction Sdn Bhd & Anor v Yong Kon Fatt & Anor** [2001] 3 MLJ 499;

(d) the Court of Appeal case of **Tan Siew Peng v OCBC Bank (M) Bhd** [1998] 2 MLJ 420; and

(e) the High Court's decision in **Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor** [2007] 1 MLJ 140;

(5) this Court should not assist the 4th Defendant who had "*slept*" on its rights despite being informed of the Consent Judgment. The following High Court cases had been referred to by Ms. Kho –

(a) **Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd & Anor** [1986] 1 CLJ 417;

(b) **Nadarajan s/o Verayan v Hong Tuan Teck (Part 1)** [2008] 1 MLJ 436; and

(c) **Othman Puteh & Anor v Ku Azman Ku Bahari** [2002] 7 CLJ 64;

(6) after the 4th Defendant had failed to apply to set aside the Consent Judgment within the time period stipulated in Order 42 rule 13 RC, the Plaintiff had taken a fresh step by filing Court Enc. No. 24. Reliance was placed on the Court of Appeal's decision in **Mirra Sdn Bhd v The Ayer Molek Rubber Co Bhd** [2008] 2 MLJ 348;

(7) the 4th Defendant could not resort to the Court's inherent jurisdiction when there is a clear provision in Order 92 rule 4 RC. For this contention, Ms. Kho cited the following cases –

(a) the Federal Court case of **Majlis Agama Islam Selangor v Bong Boon Chen & Ors** [2009] 6 MLJ 307;

(b) the Supreme Court's judgment in **Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors** [1988] 1 MLJ 178; and

(c) the High Court's decision in **Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor** [2015] 7 MLJ 305;

(8) the 1st Defendant had admitted the Plaintiff's claim to Patent No. 916 by agreeing to the Consent Judgment. Ms. Kho relied on the following High Court cases –

(a) **Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors** [1994] 1 MLJ 740; and

(b) **Ban Hin Lee Bank Bhd v Long Hua Corp Sdn Bhd & Ors** [2000] 2 MLJ 245; and

(9) the Assignment is null and void by reason of total failure of consideration. As such, the 4th Defendant had no right in Patent No. 916 and could not maintain Court Enc. No. 40. In any event, the 4th Defendant's right in Patent No. 916, if any, was subject to the Plaintiff's equitable rights according to s 4(3) of the Civil Law Act 1956.

34. Firstly, I am not able to apply Order 42 rule 13 RC to the 4th Defendant. This is due to the following reasons:

(1) the thirty-day period in Order 42 rule 13 RC only applies "*where provisions are made in [RC] for the setting aside or varying of any order or judgment*". There is no provision in the RC which provides for an application to set aside a consent judgment based on the 5 Vitiating Circumstances. As explained in the above paragraphs 20 to 22, Court Enc. No. 42 is based on the 5th Vitiating Circumstance and is made pursuant to the Court's inherent jurisdiction (not under RC); and

(2) the 4th Defendant was not a "*party*" in This Suit until the 4th Defendant successfully applied to Court to intervene on 29.3.2016. Order 42 rule 13 RC mandatorily requires a "*party*" in an action to file an application to set aside a judgment or order within 30 days after the "*party*" has received the judgment or order. Accordingly, the thirty-day period in Order 42 rule 13 RC does not apply to the 4th Defendant (before the successful intervention of the 4th Defendant). Messrs VA's Letters

dated 17.10.2014 and 12.1.2015 (which enclosed the Consent Judgment) were of no consequence because the 4th Defendant was not a "*party*" in This Suit before 29.3.2016.

All the cases on Order 42 rule 13 RC cited by Ms. Kho can be easily distinguished on either one or both of the above grounds.

35. Assuming I have erred in deciding the way I did in the above paragraph 34, I am of the view that Order 42 rule 13 RC does not bar Court Enc. No. 40 in This Suit. This view is premised on the following reasons:

(1) the purpose of Order 42 rule 13 RC is to ensure that a "*party*" intending to set aside or vary a judgment or order, should do so promptly and in any event, within 30 days after the "*party*" has received the judgment or order. The purposive interpretation of Order 42 rule 13 RC does not mean that this provision is intended to bar applications to set aside perfected judgments or orders which are invalid pursuant to the 5 Vitiating Circumstances. The words "*any order or judgment*" in Order 42 rule 13 RC must, in my opinion, mean valid orders and judgments which cannot be invalidated by any of the 5 Vitiating Circumstances; and

(2) according to Order 1A RC, in administering RC, including Order 42 rule 13 RC, the court "*shall have regard to the overriding interest of justice and not only to the technical non-compliance*" with RC. Order 2 rule 1(2) RC provides that RC are a procedural code which is subject to the overriding objective of enabling the court to deal with cases justly. The purposive interpretation of Order 42 rule 13 as elaborated in the above sub-paragraph 35(1), is in consonance with Order 1A and Order 2 rule 1(2) RC to ensure that justice is attained by not applying Order 42 rule 13 to bar an application to set aside a consent judgment or order which has been made in contravention of the second rule of natural justice.

H. <u>Whether Plaintiff could save invalid Consent Judgment</u>

36. Once the 4th Defendant has established the 5th Vitiating Circumstance to invalidate the Consent Judgment (please see the above Parts D and E) –

(1) parties cannot consent, elect, waive or acquiesce to the invalid Consent Judgment. I cite the following cases -

(a) the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in **Fung Beng Tiat v Marid Construction Co** [1996] 2 MLJ 413, at 421; and

(b) **EON Bank Bhd v Sri Tanjong Travel Sdn Bhd & Ors** [2014] 5 AMR 693, at 701;

(2) the *functus officio* doctrine does not bar the setting aside of a perfected but invalid Consent Judgment – please see the judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court case of **Badiaddin**, at p. 117;

(3) the doctrines of estoppel and/or *res judicata* do not apply to prevent an application to set aside a sealed but invalid Consent Judgment - please see the judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court case of **Badiaddin**, at p. 117. In this regard, the Plaintiff cannot rely on the 3rd Defendant's Undertaking dated 8.10.2013 to enforce the invalid Consent Judgment; and

(4) inordinate delay, procedural non-compliance and/or inequitable conduct by an applicant (to set aside a perfected but invalid Consent Judgment) does not bar the applicant - **EON Bank Bhd**, at p. 701. Accordingly, I cannot accede to the Plaintiff's contention that the 4th Defendant had been guilty of inordinate delay in the filing of Court Enc. No. 40.

37. In this case, the Plaintiff had relied on an order of "*Suratthani Provincial Court*" (**Thai Court's Decision**). In view of the existence of the 5th Vitiating Circumstance (please see the above Parts D and E), the Plaintiff cannot

rely on the Thai Court's Decision to uphold the validity of the Consent Judgment.

I. Whether Court should allow Court Enc. No. 24

38. I have no hesitation to dismiss Court Enc. No. 24 on the following grounds:

(1) as the Consent Judgment is invalid (please see the above Parts D and E), Court Enc. No. 24 should be dismissed with costs on this ground alone;

(2) in any event, the Consent Judgment (recorded by the Plaintiff and the 1st Defendant) did not concern and bind the 4th Defendant; and

(3) the Consent Judgment did not order any damages to be paid by one party to another party. As such, Court Enc. No. 24 cannot apply for an assessment of damages. In fact, paragraph 60(ii), p. 44 of the Plaintiff's written submission had prayed for an order in terms of Court Enc. No. 24 except for an order for assessment of damages.

J. Court should set down This Suit for trial

39. In view of the invalidation of the entire Consent Judgment, This Suit should be set down for trial. Hence, an early date for pre-trial case management

was fixed so as to secure a just, expeditious and economical disposal of This Suit under Order 34 rule 1(1) RC.

40. To preserve the integrity of the trial of This Suit:

(1) the Court does not express any view in respect of the strength or weakness of the parties in this case;

(2) no finding of fact is made by the Court in deciding Court Enc. Nos. 24 and 40 (**This Decision**). In making This Decision, this Court did not embark on a trial based on the affidavits filed in both of these applications, especially when there were conflicting averments in the affidavits. This is because in interlocutory applications, such as Court Enc. Nos. 24 and 40, the Court should not resolve any conflict in affidavit evidence – please see **Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor** [2014] 5 AMR 57, at paragraph 18. Accordingly, at this juncture, this Court did not decide on the issue on the validity of the Assignment; and

(3) all the parties are at liberty to conduct their cases during the trial of This Suit as they see fit without being constrained in any manner by This Decision. In other words, This Decision does not trigger the application of the issue estoppel doctrine to bar the parties in respect of This Suit.

K. Costs

41. In respect of Court Enc. Nos. 24 and 40, the questions of who is entitled to costs and its amount are at the discretion of the Court – please see Order 59 rule 21 RC.

42. I exercise my discretion under Order 59 rule 21 RC not to order any costs to be paid by the 1st Defendant to the 3rd and 4th Defendants. This is because the 1st Defendant, unlike the Plaintiff, did not seek to maintain the validity of the Consent Judgment. On the contrary, the 1st Defendant's learned counsel, Mr. Ken St. James, had opposed Court Enc. No. 24.

43. I exercise my discretion under Order 59 rule 21 RC –

    (1) to award costs of RM8,000.00 to be paid by the Plaintiff to the 4th Defendant for Court Enc. Nos. 24 and 40; and

    (2) to order the Plaintiff to pay costs of RM3,000.00 to the 3rd Defendant in respect of Court Enc. No. 24.

44. Generally, costs for interlocutory proceedings shall be paid after the trial of the case in question (**General Rule**) – please see Order 59 rule 7(1) RC and Shaik Daud JCA's judgment in the Court of Appeal case of **Hai Yue Hin v Public Feedmill (M) Sdn Bhd** [1997] 3 MLJ 730, at 733-734. Order 59 rule 7(1) RC provides as follows:

"*Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and* ***any costs ordered shall be paid at the conclusion of the proceedings unless the Court otherwise orders****.*"

(emphasis added).

45. There is an exception to the General Rule – the Court may exercise its discretion to order costs of an interlocutory application to be paid "*forthwith*" (**Exception**). Order 59 rule 1(3) RC has provided a definition of "*costs paid forthwith*" as "*the plaintiff or defendant, as the case may be, shall be entitled to his costs of that part of the proceedings in respect of which such an order is made, notwithstanding that the cause or matter has yet to be tried*". In **Charles Koo Ho-Tung & Ors v Koo Lin Shen & Ors** [2016] 2 CLJ 267, at paragraph 33, I have explained the Exception as follows:

"*33.* ***The present Order 59 rule 7(1) RC, in my view, has given effect to the 1st Approach – as a general rule, costs of interlocutory proceedings shall only be paid at the conclusion of the proceedings unless the court orders costs to be paid forthwith (Exception). Order 59 rule 7(1) RC does not prescribe the circumstances for the application of the Exception. I am of the opinion that the court's discretion to invoke the Exception is unfettered and needless to say, the exercise of such a discretion is based purely on the particular facts of the case in question****.*"

(emphasis added).

46. I have decided to exercise my discretion to apply the Exception under Order 59 rule 7(1) RC (*unless the Court otherwise orders*) to order the Plaintiff to pay the above sums of costs to the 3rd and 4th Defendants within 7 days from the date of the oral decision of Court Enc. Nos. 24 and 40 on 29.9.2016 (**Oral Decision**). The exercise of this discretion is based on the following evidence:

(1) despite having actual knowledge of the 4th Defendant's claim to Patent No. 916 (by reason of the Assignment), the Plaintiff did not cite the 4th Defendant as a party in This Suit;

(2) the Plaintiff did not notify in writing the 4th Defendant of This Suit;

(3) the Plaintiff had surreptitiously entered into the Consent Judgment with the 1st Defendant without giving the 4th Defendant any prior written notice of the Plaintiff's intention to record the Consent Judgment; and

(4) the Plaintiff did not even inform the 4th Defendant in writing about Court Enc. No. 24.

L. <u>This Decision</u>

47. A summary of This Decision is as follows:

(1) Court Enc. No. 40 is allowed and the entire Consent Judgment is set aside;
(2) Court Enc. No. 24 is dismissed;
(3) costs of RM3,000.00 for Court Enc. No. 24 shall be paid by the Plaintiff to the 3rd Defendant within 7 days from the date of the Oral Decision;
(4) costs of RM8,000.00 for Court Enc. Nos. 24 and 40 shall be paid by the Plaintiff to the 4th Defendant within 7 days from the date of the Oral Decision; and
(5) an allocatur fee shall be imposed on the above costs in accordance with Order 59 rule 7(4) RC.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 19 DECEMBER 2016

Counsel for Plaintiff: *Ms. Kho Zhen Qi & Mr. Ng Li Kian (Messrs Li Kian & Co)*

Counsel for 1st Defendant: *Mr. Ken St. James & Encik Mohamad Zufarsyah bin Mohamad Idrakisyah (Messrs Michael Chai Ken)*

Counsel for 3rd Defendant: *Cik Iylia Hashim (Perbadanan Harta Intelek Malaysia)*

Counsel for 4th Defendant: *Ms. Frida Krishnan (Messrs The Chambers of Frida)*