

**IN THE HIGH COURT OF MALAYA AT SHAH ALAM  
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA  
CIVIL SUIT NO: BA-22C-6-03/2020**

**BETWEEN**

**SS PRECAST SDN. BHD.  
(Co. No. 971510-K)**

... **PLAINTIFF**

**AND**

**1. SERBA DINAMIK GROUP BHD.  
& 9 OTHERS**

... **DEFENDANTS**

**JUDGMENT**

(Court enclosure nos. 12, 13 and 17)

**A. Introduction**

1. This judgment discusses, among others, the validity of the hearing of three notices of application which have been conducted through “*Skype*” during the enforcement of the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 [P.U. (A) 91/2020] (**PCIDR**). PCIDR has been extended thrice (up to the date of this judgment) as follows:
  - (1) Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 (No. 2) [P.U. (A) 109/2020] [**PCIDR (2)**];

- (2) Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 (No. 3) [P.U. (A) 117/2020] [**PCIDR (3)**]; and
- (3) a third extension of PCIDR (**3<sup>rd</sup> Extension**) was announced by the Right Honourable Prime Minister on 23.4.2020. As of the date of this judgment, the 3<sup>rd</sup> Extension has not been gazetted.

## **B. Background**

2. The plaintiff company (**Plaintiff**) has filed this suit against 10 defendants (**Defendants**).
3. In this suit, on 28.3.2020 (during the enforcement of PCIDR), P has obtained a judgment in default of defence (**JID**) against the first to sixth defendants (“**1<sup>st</sup> Defendant**” to “**6<sup>th</sup> Defendant**”). According to the JID, among others -
  - (1) D1 to D6 shall pay to the Plaintiff a sum of RM14,020,601.56 (**Judgment Sum**); and
  - (2) interest at a rate of 8% per annum on the Judgment Sum shall be paid to the Plaintiff by D1 to D6 from the date of the filing of this suit until the date of full payment of the Judgment Sum (**Post-Judgment Interest**).
4. On 14.4.2020, the solicitors for D1 to D6 have filed two applications in court enclosure nos. 12 and 13 to set aside the JID (**Encs. 12 and 13**). Encs.12 and 13 have been filed together with a certificate of urgency by

Ms. Rajashree A/P Suppiah, learned counsel for D1 to D6 (**Ms. Rajashree's Certificate**).

5. Enc. 12 is supported by an unaffirmed affidavit by Puan Wan Nurfarha Binti Wan Ali (**Enc. 15**) while Enc. 13 is supported by an unaffirmed affidavit by Encik Syaiful Radzman Bin Osman (**Enc. 20**).
6. On 16.4.2020, the Plaintiff filed an *ex parte* application in court enclosure nos. 17 (**Enc. 17**) for a court order to freeze -
  - (1) two bank accounts of D1; and
  - (2) one bank account belonging to D5.
7. Enc. 17 has been filed with a certificate of urgency by the Plaintiff's learned counsel, Mr. Paul Raj A/L Samy Raj (court enclosure no. 19) (**Mr. Raj's Certificate**), and is supported by an unaffirmed affidavit by Puan Aiesyah Binti Mohd. Mustafa Kamal (**Enc. 18**).
8. At about 11 am, Thursday, 16.4.2020, by way of an email, my learned Deputy Registrar, Puan Amira Sariaty Binti Zainal (**DR**), brought to my attention Ms. Rajashree's Certificate and Mr. Raj's Certificate. After perusing both certificates of urgency and the relevant cause papers in the "*Case Management System*", especially Enc. 17 which was in effect a post-judgment Mareva injunction application to freeze the bank accounts of D1 and D5, I directed my learned DR to inquire from learned counsel for P and D1 to D6 on -

- (1) whether parties were agreeable to hear Encs. 12, 13 and 17 by way of a video conference through Skype (**VC**) the next day, Friday, 17.4.2020; and
- (2) if learned counsel were agreeable to have the VC, what would be the convenient time on 17.4.2020 for learned counsel to have the VC.
9. I received an email from my learned DR at about 1.30 pm, Thursday, 16.4.2020 (**DR's Email**) which stated that Mr. Raj and Ms. Rajashree had agreed to the VC to be held at 10 am, Friday, 17.4.2020. Attached to the DR's Email are emails from, among others, Mr. Raj. For reasons which will be clear in this judgment, I refer to Mr. Raj's email which has been sent to my learned DR at 7.56 pm, Thursday, 16.4.2020 (**Mr. Raj's Email**). Mr. Raj's Email stated as follows:

*"Tuan/Puan,*

***Kami merujuk kepada emel-emel Tuan/Puan berkenaan video conferencing yang ditetapkan esok 17-04-2020 jam 10.00 pagi di hadapan YA Datuk.***

***Tuan/Puan boleh menghantar link untuk VC tersebut kepada emel kami seperti berikut:-***

***[a.g.roselipaul@gmail.com](mailto:a.g.roselipaul@gmail.com)***

***Kami juga pohon klarifikasi berkenaan kod pakaian untuk menghadiri VC tersebut.***

*Sekian, terima kasih.*

***S.Paul Raj"***

(emphasis added).

**C. Hearing of Encs. 12, 13 and 17 by VC**

10. At 9.45 am, Friday, 17.4.2020, I emailed the Skype link for the VC (**Skype Link**) to my learned DR, Mr. Raj and Ms. Rajashree.
11. With the Skype Link, my learned DR, Mr. Raj and Ms. Rajashree “*logged in*” and VC was carried out in the following three sessions on 17.4.2020 (**3 Sessions**):
  - (1) from about 10.00 am to about 10.40 am (**1<sup>st</sup> Session**);
  - (2) from about 11.30 am to about 11.35 am (**2<sup>nd</sup> Session**); and
  - (3) from about 3.30 pm to about 3.50 pm (**3<sup>rd</sup> Session**).
12. The VC for this case on 17.4.2020 was the fourth VC which had been held by me since the commencement of PCIDR. Coincidentally, there was a VC scheduled for another case at 3.00 pm, Friday, 17.4.2020.
13. All VC’s conducted by my learned DR and I, including this case, are recorded audio-visually based on “*real time*” (there is a recording function in Skype which is available to all its users) and the recording is kept by my learned DR and me. Learned counsel who take part in VC are also entitled to record the VC.
14. At the VC (attended by my learned DR) -
  - (1) in the 1<sup>st</sup> Session -

- (a) I asked Mr. Raj and Ms. Rajashree whether they agreed to the hearing and disposal of Encs. 12 and 13 by way of VC. Both Mr. Raj and Ms. Rajashree had expressly consented to hear and dispose of Encs. 12 and 13 by way of VC [**Parties' Consent (VC)**]. I then directed Ms. Rajashree to prepare a consent order to record the Parties' Consent (VC) [**Consent Order (VC)**];
- (b) in view of the urgency to hear Encs. 12 and 13, Ms. Rajashree applied orally to the court to abridge the time period to serve Encs. 12 and 13 on the Plaintiff's solicitors (**Application To Abridge Time Period**). This is because O 32 r 3 of the Rules of Court 2012 (**RC**) requires every notice of application (**NA**) to be served on the opposing party not less than two clear days before the hearing of the NA (**2 Clear Days' Period**). The court has a discretionary power to abridge the 2 Clear Days' Period under O 3 r 5(1) and O 32 r 3 RC.

Mr. Raj did not object to the Application To Abridge Time Period. In view of the urgency to hear Encs. 12 and 13 and the fact that Enc. 17 had been filed by the Plaintiff, I exercised my discretion under O 3 r 5(1) read with O 32 r 3 RC and allowed the Application To Abridge Time Period;

- (c) in view of the unaffirmed affidavits in Encs. 15 and 20, I have requested for Ms. Rajashree gave a counsel's undertaking that after the lapse of PCIDR, she would -

- (i) get Encs. 15 and 20 to be affirmed before a Commissioner for Oaths (**CO**); and
- (ii) refile the affirmed affidavits in the “*E-Filing System*”

**(Counsel’s Undertaking).**

I emphasized to learned counsel that the affirmed affidavits to be refiled must have the same contents as those in Encs. 15, and 20 because the court is hearing Encs. 12 and 13 based on Encs. 15 and 20. Ms. Rajashree gave the Counsel’s Undertaking;

- (d) I then gave directions for Encs. 12 and 13 in respect of the exchange of affidavits and the filing of written submission. Regarding unaffirmed affidavits to be filed by the Plaintiff and D1-D6 for Encs. 12 and 13, I requested for Counsel’s Undertakings by Mr. Raj and Ms. Rajashree to have those affidavits affirmed before a CO and to refile the affirmed affidavits in the “*E-Filing System*” after PCIDR cease to have effect. Both Mr. Raj and Ms. Rajashree gave the Counsel’s Undertakings;
- (e) based on the availability of Mr. Raj and Ms. Rajashree, a date for clarification or decision of Encs. 12 and 13 [**Clarification/Decision (Encs. 12 and 13)**] was fixed on 29.5.2020;
- (f) all the above dates for filing of affidavits, written submission and Clarification/Decision (Encs. 12 and 13) have been given by me

based on the convenience of learned counsel, especially Mr. Raj who practices in Penang. Furthermore, I take judicial cognizance that the operation of PCIDR does hamper communication between lawyers and clients;

- (g) Ms. Rajashree applied orally for a stay of execution of the JID pending the disposal of Encs. 12 and 13 (***Ad Interim Stay Application***) which was strenuously objected to by Mr. Raj;
- (h) the *Ad Interim Stay Application* was directly related to Enc. 17. Hence, I informed all learned counsel that Enc. 17 should not be heard until the *Ad Interim Stay Application* was decided by me. This is because if Enc. 17 is heard before the *Ad Interim Stay Application*, this will render redundant not only the *Ad Interim Stay Application* but also Encs. 12 and 13. Such an event is clearly unjust to D1 to D6. I then fix Enc. 17 for case management on 29.5.2020 after the Clarification/Decision (Encs. 12 and 13); and
- (i) in the course of oral submission by Ms. Rajashree and Mr. Raj regarding the *Ad Interim Stay Application*, I posed a question to Ms. Rajashree on whether D1 to D6 would consider proposing to court to place a sum of money in a stakeholder's interest-bearing bank account as a condition for the court to grant the *Ad Interim Stay Application* (**Court's Question**). Ms. Rajashree answered that she needed to get instruction from her clients regarding the Court's Question. Consequently, I adjourned the hearing of the *Ad Interim Stay Application* until 11.30 am the

same day so that Ms. Rajashree could obtain her clients' instruction in respect of the Court's Question;

(2) when the 2<sup>nd</sup> Session resumed at 11.30 am, Ms. Rajashree informed the court and Mr. Raj that she did not have sufficient time to obtain her clients' instruction regarding the Court's Question. I then adjourned the hearing of the *Ad Interim* Stay Application until 3.30 pm the same day; and

(3) at the 3<sup>rd</sup> Session -

(a) Ms. Rajashree informed the court that she had instructions from D1 to D6 to place RM500,000.00 in a stakeholder's interest-bearing bank account in the sole name of the Plaintiff's solicitors so as to persuade the court to allow the *Ad Interim* Stay Application;

(b) Mr. Raj replied that, among others, the sum of RM500,000.00 proposed by D1 to D6 was too low. Mr. Raj suggested a minimum sum of RM7,000,000.00;

(c) after hearing oral submission, I granted the *Ad Interim* Stay Application as follows - all forms of execution of JID, including winding up proceedings and bankruptcy actions, shall be stayed pending the disposal of Encs. 12 and 13 on the condition that D1 to D6 shall deposit RM500,000.00 on or before 5.00 pm, Friday, 8.5.2020, in a stakeholder's interest-bearing bank account in the sole name of the Plaintiff's solicitors (***Ad Interim Stay Order***); and

(d) I have informed Mr. Raj that if D1 to D6 fail to fulfil the condition within the time stipulated in the *Ad Interim* Stay Order, Mr. Raj has the liberty to apply to court to bring forward the hearing date of Enc. 17 in the following week after 8.5.2020 and I shall hear Enc. 17 accordingly.

**D. Plaintiff's "dissatisfaction" with VC and Ad Interim Stay Order**

15. On Monday, 20.4.2020, the Plaintiff's solicitors sent a letter to court which enclosed the following documents:

(1) a letter dated 20.4.2020 from the Plaintiff's "*Senior Manager*", Encik Mustafa Kamal Bin Yahya, to the Plaintiff's solicitors (**Plaintiff's Letter**); and

(2) a police report lodged by Encik Mustafa on behalf of the Plaintiff (**Plaintiff's Police Report**).

16. The Plaintiff's Letter and Plaintiff's Police Report made various allegations against D1 to D6, Ms. Rajashree and the court. According to the Plaintiff's Letter and Plaintiff's Police Report, among others:

(1) D1 to D6 had cheated the Plaintiff;

(2) D1 to D6 together with Ms. Rajashree had deceived the court by giving false evidence and false statements;

(3) the court had no power to hear Encs. 12, 13 and 17 by VC;

(4) the Plaintiff did not consent to the VC on 17.4.2020;

- (5) the court could not consider unaffirmed affidavits in Encs. 15 and 20 filed by D1 to D6 to support Encs. 12 and 13;
- (6) the *Ad Interim* Stay Order was unjust to the Plaintiff and should not have been granted by the court; and
- (7) in view of the unjust *Ad Interim* Stay Order, another learned Judge should hear this case.

**E. Plaintiff is bound by conduct of its counsel and solicitors**

- 17. Firstly, O 5 r 6(2) RC requires a company, such as P, to “begin” and “carry on” legal proceedings through a solicitor. In other words, a company’s director, employee and shareholder cannot commence and carry on legal proceedings on behalf of the company. As provided in O 5 r 6(2) RC, only the company’s learned counsel and solicitor may “begin” and “carry on” legal proceedings on behalf of the company.
- 18. Secondly, the Plaintiff does not deny that Mr. Raj has actual authority to act for the Plaintiff in this case at all material times.

**F. Did Plaintiff consent to VC?**

- 19. In view of the Plaintiff’s Letter and Plaintiff’s Police Report, I have directed my learned DR to prepare a transcript of the VC (**Transcript**) based on the audio-visual recording of VC (**Recording**). It is to be noted that the Recording is done automatically by Skype, an independent and reliable third party. The Recording could also had been done by Mr. Raj and Ms. Rajashree. I have verified the accuracy of the Transcript based

on the Recording (which I have also recorded in my notebook) and my own hand-written notes of the VC.

20. In this case, the Plaintiff has consented to the VC (**Plaintiff's Consent**). The Plaintiff's Consent is clear from the following evidence and reasons:

- (1) Mr. Raj could have easily informed my learned DR that the Plaintiff did not instruct him to consent to the VC. Instead, Mr. Raj's Email had sent his email address which enabled me to send the Skype Link to Mr. Raj;
- (2) Mr. Raj could have refused to log in on Friday, 17.4.2020 and the VC could not proceed thereafter;
- (3) at the beginning of the 1<sup>st</sup> Session, I had expressly asked Mr. Raj in the presence of my learned DR and Ms. Rajashree as to whether the Plaintiff would consent to the VC. Mr. Raj had expressly answered me in the affirmative. This is clear from the contemporaneous Recording;
- (4) after Mr. Raj had expressly agreed to the VC, I had directed Ms. Rajashree to draft the Consent Order (VC). By a letter dated 20.4.2020, Ms. Rajashree's firm had sent three draft orders, including the draft Consent Order (VC), to be approved by the Plaintiff's solicitors. The Plaintiff's solicitors did not reply at all regarding the draft Consent Order (VC). Hence, the Plaintiff's solicitors are deemed under O 42 r 8(2) RC to have agreed to the draft Consent Order (VC). I reproduce below O 42 r 8(1) and (2) RC

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***“Preparation of judgment or order***

O 42 r 8(1) ***Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor, if any, of the other party who shall within two days of the receipt thereof, or within such extended or abridged time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.***

(2) ***When the solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms thereof.”***

(emphasis added);

(5) Mr. Raj had participated actively in the VC on behalf of the Plaintiff as follows -

(a) Mr. Raj did not object to the Application To Abridge Time Period made by Ms. Rajashree. The court’s order to abridge the 2 Clear Days Period [**Draft Order (Abridgement of Time Period)**] had been drafted by solicitors for D1 to D6 and forwarded to the Plaintiff’s solicitors in accordance with O 42 r 8(1) RC. Once again, the Plaintiff’s solicitors had failed to revert regarding the Draft Order (Abridgement of Time Period). Accordingly, by reason of O 42 r 8(2) RC, the Plaintiff’s solicitors are deemed to have consented to the Draft Order (Abridgement of Time Period);

(b) upon the court’s inquiries, Mr. Raj had confirmed orally with the court the following dates -

- (i) the date to file the Plaintiff's affidavit to oppose Encs. 12 and 13;
  - (ii) the date for the Plaintiff to file written submission to resist Encs. 12 and 13; and
  - (iii) the date of Clarification/Decision (Encs. 12 and 13); and
- (c) upon request by the court, Mr. Raj gave a Counsel's Undertaking to get his client's affidavit (to oppose Encs. 12 and 13) to be affirmed before a CO and to re-file it after the lapse of PCIDR;
- (6) Mr. Raj had vigorously objected to the *Ad Interim* Stay Application. In fact, Mr. Raj had proposed a sum of RM7,000,000.00 as a condition for the *Ad Interim* Stay Order; and
- (7) Mr. Raj did not inform the court and Ms. Rajashree at any time during the 3 Sessions that the Plaintiff did not instruct Mr. Raj to agree to the VC. Mr. Raj had the right to log out at any time during the 3 Sessions but did not do so. Needless to say, Mr. Raj could have refused to log in for the 2<sup>nd</sup> and 3<sup>rd</sup> Sessions.
21. In view of the Plaintiff's Consent, the court could proceed to hold the VC. It is to be noted that parties can even consent to witnesses giving evidence by way of Skype during trials. In **Merck Sharp & Dohme Corp. & Anor v Hovid Bhd** [2017] AMEJ 0117, at 1[2], all the parties consented for their experts to give their expert opinions through Skype in a patent trial.

**G. Whether court may rely on Counsel's Undertaking and unaffirmed affidavits**

22. O 1A, O 2 r 1(2), O 41 r 9(1) and (2) RC provide as follows:

***“Regard shall be to justice***

O 1A                    ***In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.***

O 2 r 1(2)            ***These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.***

***Filing of affidavits***

O 41 r 9(1)        ***Except as otherwise provided by these Rules, every affidavit shall be filed in the Registry.***

(2)                    ***Every affidavit shall be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so endorsed may not be filed or used without the leave of the Court.”***

(emphasis added).

23. In view of O 1A and O 2 r 1(2) RC, all the rules in RC [including O 41 r 9(1) and (2) RC] should be administered by the court with regard to the “*overriding interest of justice and not only to the technical non-compliance*” with RC. Cases decided before the enforcement of O 1A and O 2 r 1(2) RC should be read with caution. It is decided in **Jyothy**

**Laboratories Ltd v Perusahaan Bumi Tulin Sdn Bhd [2019] 3 MLRH 454, at [16(5)], as follows:**

***“[16(5)] O 2 r 1(2) RC is not found in the Rules of High Court 1980 (RHC). Provisions in RHC which are identical to O 1A and O 2 r 3 RC were only introduced in RHC with effect from 16.5.2002 [please see Rules of the High Court (Amendment) 2002, PU(A) 197/02]. The present O 2 r 1(3) RC is worded differently from the previous O 2 r 1(2) RHC. ...”***

(emphasis added).

24. The court takes judicial notice that with the enforcement of PCIDR, PCIDR (2), PCIDR (3) and the 3<sup>rd</sup> Extension, affidavits cannot be affirmed before CO's. Having said that, O 41 r 9(2) RC has expressly provided that unaffirmed affidavits *“may not be filed or used without the leave of the Court”*. It is thus clear that the court may grant leave under O 41 r 9(2) RC for parties to use unaffirmed affidavits. In this case, I am of the view that in light of the operation of PCIDR (3) on 17.4.2020 (when the VC was held), the court has a discretionary power under O 41 r 9(2) read with O 1A and O 2 r 1(2) RC to allow a party to use an unaffirmed affidavit provided that the party's learned counsel gives a Counsel's Undertaking to court to -

- (1) get the unaffirmed affidavit (with the same contents as that filed earlier) to be affirmed before a CO after the lapse of any extension of PCIDR; and
- (2) refile the affirmed affidavit in the *“E-Filing System”*.

25. It is to be noted that a breach of a Counsel's Undertaking may render the learned counsel in question to be punished as follows:

- (1) the learned counsel may be cited for contempt of court; **and/or**
- (2) the Disciplinary Board may punish the learned counsel for professional misconduct under s 94(3)(b) of the Legal Profession Act 1976 (**LPA**). I reproduce below s 94(1), (2) and (3)(b) LPA -

***“Power of Disciplinary Board to strike off the Roll, suspend for misconduct, etc.***

***94(1) All advocates and solicitors shall be subject for the purposes of all disciplinary actions to the control of the Disciplinary Board.***

***(2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishments:***

- (a) to be struck off the Roll;***
- (b) to be suspended from practice for any period not exceeding five years;***
- (c) to be ordered to pay a fine not exceeding fifty thousand ringgit;***  
***or***
- (d) to be reprimanded or censured.***

***(3) For the purposes of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes –***

***...***

(b) *breach of duty to a court including any failure by him to comply with an undertaking given to a court; ...*”

(emphasis added).

26. In this case, Ms. Rajashree had given a Counsel’s Undertaking regarding the unaffirmed affidavits in Encs. 15 and 20. Mr. Raj did not object to the Counsel’s Undertaking by Ms. Rajashree. In fact, Mr. Raj also gave a Counsel’s Undertaking regarding the unaffirmed affidavit of the Plaintiff which would be filed later to oppose Encs. 12 and 13.
27. In view of the Counsel’s Undertakings by Ms. Rajashree and Mr. Raj, in the interest of justice as mandated by O 1A and O 2 r 1(2) RC, I gave leave under O 41 r 9(2) RC for the Plaintiff and D1 to D6 to rely on unaffirmed affidavits for the hearing of Encs. 12 and 13.

#### H. Should *Ad Interim* Stay Order be granted?

28. I am of the view the court has a discretion under O 92 r 4 RC, the court’s inherent jurisdiction and/or power to grant an *ad interim* stay of a judgment or order pending the disposal of an application to set aside the judgment or order - please see **China Harbour Engineering Co Ltd v Lunar Shipping Agencies Sdn Bhd** [2016] 6 AMR 193, at [13].
29. This court exercised its discretion to grant the *Ad Interim* Stay Order for the following reasons:
- (1) the JID had been obtained by the Plaintiff when PCIDR was first enforced. The merits of the Plaintiff’s claim against D1 to D6 have yet to be decided by the court. By virtue of the JID, the Plaintiff is

only an unsecured judgment creditor against D1 to D6. The JID does not create any security interest whereby the Plaintiff is a secured creditor of D1 to D6;

- (2) the *Ad Interim* Stay Order merely preserves the status quo pending the outcome of Encs. 12 and 13. If the *Ad Interim* Stay Order was not given, Encs. 12 and 13 would be rendered nugatory in view of Enc. 17 and Mr. Raj's Certificate of Urgency. This would be unjust to D1 to D6 as D1 to D6 are entitled to have Encs. 12 and 13 be decided by the court on their merits;
- (3) the *Ad Interim* Stay Order does not prejudice the Plaintiff because the Plaintiff is entitled to enjoy Post-Judgment Interest by reason of the JID if Encs. 12 and 13 are subsequently dismissed by the court; and
- (4) the court could have granted an absolute *ad interim* stay order pending the disposal of Encs. 12 and 13. Instead, the court exercised its discretion to impose a condition in the *Ad Interim* Stay Order (D1 to D6 shall deposit RM500,000.00 on or before 5.00 pm, Friday, 8.5.2020, in a stakeholder's interest-bearing bank account in the sole name of the Plaintiff's solicitors). The court inquired from Ms. Rajashree in the 3 Sessions on what amount of money could be deposited by D1 to D6. According to Ms. Rajashree, D1 to D6 were only financially able to deposit RM500,000.00. I accepted such a sum because if I had imposed a higher sum, such as RM7,000,000.00 as proposed by Mr. Raj, this would be oppressive to D1 to D6 in view of the "*challenging*" financial climate due to the

Covid-19 epidemic and the operation of PCIDR and its three extensions.

30. In granting the *Ad Interim* Stay Order, the court did not consider the merits of Encs. 12 and 13 because the parties had not completed their exchange of affidavits. Nor had parties filed their written submission regarding the merits of Encs. 12 and 13.

**I. Whether Plaintiff is estopped from denying validity of VC and reliance by D1 to D6 on unaffirmed affidavits**

31. A party in a contentious case may be estopped from relying on a certain position in the case if the party has earlier conducted his or her case in a manner contrary to that position - please see **Charles Koo Ho-Tung & Ors v Koo Lin Shen & Ors** [2016] 2 CLJ 267, at [11]-[13].

32. I am of the view that the Plaintiff is estopped from challenging the validity of VC because of the following conduct of the Plaintiff's learned counsel (which binds the Plaintiff):

(1) as elaborated in the above sub-paragraphs 20(1) to (7), Mr. Raj had participated actively in the VC; and

(2) the Plaintiff's solicitors did not object to the draft Consent Order (VC).

33. The Plaintiff is estopped from challenging the right of D1 to D6 to rely on Encs. 15 and 20 (with a Counsel's Undertaking from Ms. Rajashree) because -

- (1) in the 1<sup>st</sup> Session, Mr. Raj did not object to the reliance by D1 to D6 on Encs. 15 and 20 based on a Counsel's Undertaking by Ms. Rajashree; and
- (2) Mr. Raj had given a Counsel's Undertaking regarding an unaffirmed affidavit to be filed by the Plaintiff to resist Encs. 12 and 13; and
- (3) the Plaintiff itself had filed an unaffirmed affidavit in Enc. 18 to support Enc. 17!

**J. Does court have power to conduct VC if only one party applies for VC?**

34. On the assumption that the Plaintiff has objected to the VC, I will now discuss the issue of whether the court has the power to hear Encs. 12 and 13 by VC if only D1 to D6 have applied for the VC.
35. Article 5(1) of the Federal Constitution (**FC**) provides that no person shall be deprived of his or her life or personal liberty save in accordance with law. In the Federal Court case of **Sivarasa Rasiah v Badan Peguam Malaysia** [2010] 3 CLJ 507, at [4], Gopal Sri Ram FCJ has explained that Article 5(1) FC provides for a fundamental right of access to justice as follows:

*“[4] **Article 5(1)** may be selected to illustrate the point that is sought to be made since it is one of the provisions relied on in this case. **That article proscribes the deprivation of life or personal liberty, save in accordance with law.** “Law” wherever mentioned in Part II of the Constitution includes - by statutory direction - the common law of England (see art. 160(2) read with s. 66 of the Consolidated Interpretation Acts of 1948 & 1967). **It is now well settled that by the common law of***

***England the right of access to justice is a basic or a constitutional right. See, Raymond v. Honey [1983] 1 AC 1, 13; R v. Secretary of State for the Home Department, ex parte Leech [1993] All ER 539. In Thai Trading Co (a firm) v. Taylor [1998] 3 All ER 65 at 69, Millett LJ described it as a fundamental human right. Thus, the common law right of access to justice is part of the “law” to which art. 5(1) refers. In other words, a law that seeks to deprive life or personal liberty (both concepts being understood in their widest sense) is unconstitutional if it prevents or limits access to the courts.”***

(emphasis added).

36. Based on **Sivarasa Rasiah**, D1 to D6 have a fundamental right under Article 5(1) FC to have access to justice by way of Encs. 12 and 13.

37. Article 4(1) FC reads as follows:

***“Supreme law of the Federation***

***4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”***

(emphasis added).

Article 4(1) FC provides for the supremacy of FC - please see the judgment of Suffian LP (sitting alone) in the Federal Court case of **Ah Thian v Government of Malaysia** [1976] 2 MLJ 112, at 113.

38. The term “law” in article 4(1) FC has been defined in article 160(2) FC as follows:

“ **“law” includes written law**, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;”

(emphasis added).

Section 3 of the Interpretation Acts 1948 and 1967 (**IA**) has defined “*written law*” as follows:

“ **“written law” means -**

(a) ...;

(b) **Acts of Parliament and subsidiary legislation made thereunder;**  
...”

(emphasis added).

By reason of the definitions of “*law*” [in article 160(2) FC] and “*written law*” [in s 3(b) IA], the doctrine of supremacy of FC [as embodied in article 4(1) FC] requires all subsidiary legislation made under all Acts of Parliament to be consistent with the FC (the supreme law of the country). Accordingly, by virtue of article 4(1) FC, any delegated legislation (including RC) which is inconsistent with FC “*shall, to the extent of the inconsistency, be void*”.

39. O 32 rr 10 and 11 RC provide as follows:

“**Reference of matter to Judge**

O 32 r 10      *The Registrar may refer to a Judge any matter which he thinks should properly be decided by a Judge, and **the Judge may** either*

***dispose of the matter*** or refer it back to the Registrar, as the case may be, ***with such directions as he thinks fit.***

***Power to direct hearing in Court***

O 32 r 11(1) ***A notice of application or an appeal shall be heard in Chambers, subject to any express provision of these Rules, any written law, any direction of the Court or any practice direction for the time being issued by the Chief Judge.***

(2) ***Any matter heard in Court in accordance with paragraph (1) may be adjourned from Court into Chambers.”***

(emphasis added).

40. I am of the view that notwithstanding the Plaintiff’s objection to the VC, the court has a discretion under -

(1) O 32 r 10 RC (*the Judge may ... dispose of the matter ... with such directions as he thinks fit*); and

(2) O 32 r 11(1) RC (*A notice of application or an appeal shall be heard in Chambers, subject to ... any direction of the Court*)

- to hold the VC in the interest of justice. This view is consistent with a party’s fundamental right under Article 5(1) FC to have access to justice. If otherwise, O 32 rr 10 and 11(1) RC may be inconsistent with Article 5(1) FC [the supreme law of the country as provided in Article 4(1) FC].

41. The above construction of O 32 rr 10 and 11(1) RC is supported by O 1A and O 2 r 1(2) RC which require the court to apply O 32 rr 10 and 11(1) RC with regard to the “*overriding interest of justice*”.

42. Based on the above reasons, even if it is assumed that the Plaintiff had objected to the VC, I would have still exercised my discretion pursuant to O 32 rr 10 and 11(1) read with O 1A and O 2 r 1(2) RC to hold the VC. This decision is premised on the following reasons:

(1) D1 to D6 have a fundamental right under Article 5(1) FC to have access to justice by way of Encs. 12 and 13;

(2) in view of the enforcement of PCIDR (3) on 17.4.2020, the court could not hear Encs. 12 and 13 in chambers. It was therefore in the interest of justice to hear Encs. 12 and 13 by way of VC as mandated by O 1A and O 2 r 1(2) RC. If otherwise, there would be an injustice to D1 to D6; and

(3) Ms. Rajashree's Certificate had disclosed a good reason for the court to hold the VC as soon as it was reasonably convenient for all learned counsel.

43. If I have decided that the court cannot hold a VC if a party (X) applies for the VC and the opposing party does not consent to the VC, this will not only cause an injustice to X but will also render illusory X's fundamental right under Article 5(1) FC to have access to justice.

**K. Can Plaintiff appeal against *Ad Interim Stay Order*?**

44. The definition of "*decision*" in s 3 of the Courts of Judicature Act 1964 (CJA) and s 67(1) CJA provide as follows:

***“Interpretation***

s 3. ***In this Act, unless the context otherwise requires -***

...  
***“decision” means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;***

***Jurisdiction to hear and determine civil appeals***

67(1) ***The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.”***

(emphasis added).

45. In the Federal Court case of **Kempadang Bersatu Sdn Bhd v PerKayuan OKS No 2 Sdn Bhd** [2019] 4 MLJ 614, at [28], [29], [36], [37], [40] and [44], Zainun Ali FCJ has decided as follows:

***[28] On the interpretation of the word ‘decision’, the relevant paragraph in s 3 is divided into two parts. The first part identifies ‘decision’ in the form of ‘judgment, sentence or order’ of the court. It provides an extensional definition of the word decision by listing instances of the set of things included therein. In other words the concept of decision is not explained but the objects that fall under this word are listed.***

***[29] The second part of the paragraph qualifies that these forms of decision do not include ‘any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties’. It is noted that the second part was inserted in s***

**3 by Act A1031 which came into effect on 31 July 1998. Based on the said provision, at what juncture a ruling is issued plays a vital role in determining whether such an order is a ruling within the context of s 3. There must be a trial in existence or a hearing and that the order is issued in the course of that trial or hearing. Secondly, the ruling must not have the effect of disposing the final rights of the parties.**

...  
[36] **The intention of the Legislature when drafting the amendment to s 3 was that the amendment should serve as a filter process for appeals. It must be emphasised that for this purpose, s 3 is intended to be read together with sub-s 67(1) [CJA].**

[37] **This is evident from the explanatory statement to the Bill of Act A1031 which reads:**

**2. Clause 2 seeks to amend section 3 of Act 91.**

**At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.**

...  
[40] **At this juncture, it is noted that the decision of the Court of Appeal in Tycoon Realty Sdn Bhd which was relied on by Perkayuan failed to give regard to the purposive and literal construction of sub-s 67(1) and s 3 [CJA].**

...  
[44] **In view of the above, we are unable to agree with the approach taken by learned counsel for Perkayuan, that the scope of a**

*‘decision’ in s 3 is excluded from sub-section 67(1) [CJA]. Sub-section 67(1) [CJA] must be read together with s 3 [CJA].”*

(emphasis added).

46. As explained in the above paragraph 30, the court has yet to decide on the merits of Encs. 12 and 13. As such, the *Ad Interim* Stay Order “*does not finally dispose of the rights of the parties*” and cannot constitute a “*decision*” as defined in s 3 CJA which can be appealed thereafter to the Court of Appeal under s 67(1) CJA - please refer to **Kempadang Bersatu**.

**L. Plaintiff’s Police Report**

47. I have directed my learned DR to forward a copy of the Recording, Transcript, this written judgment and all relevant cause papers of this case to the police officer who investigates the Plaintiff’s Police Report (**Investigating Officer**). This court will cooperate fully with the Investigating Officer regarding the investigation of the Plaintiff’s Police Report.

**M. Summary of court’s decision**

48. In brief -

(1) it is clear from the Recording that the Plaintiff and D1 to D6 have expressly consented for Encs. 12 and 13 to be heard and disposed of by way of VC;

- (2) the court has a discretion under O 41 r 9(2) read with O 1A and O 2 r 1(2) RC to allow D1 to D6 to rely on unaffirmed affidavits in Encs. 15 and 20 with a Counsel's Undertaking by Ms. Rajashree;
- (3) in the interest of justice and to preserve the status quo pending the disposal of Encs. 12 and 13, a conditional *Ad Interim* Stay Order is granted by the court;
- (4) the Plaintiff is estopped by the conduct of its learned counsel and solicitors from -
  - (a) denying that the Plaintiff had consented to the VC; and
  - (b) challenging the right of D1 to D6 to rely on Encs. 15 and 20 (with a Counsel's Undertaking by Ms. Rajashree); and
- (5) even if it was assumed that the Plaintiff had objected to the VC, in view of the fundamental right of D1 to D6 to have access to justice as guaranteed under Article 5(1) FC, the court would nevertheless exercise its discretion to proceed with the VC in the interest of justice under O 32 rr 10 and 11(1) read with O 1A and O 2 r 1(2) RC.

**WONG KIAN KHEONG**

Judge

High Court of Malaya

Shah Alam, Selangor Darul Ehsan

**DATE: 26 APRIL 2020**

*Counsel for Plaintiff:*

*Mr. Paul Raj A/L Samy Raj  
(Messrs AG Roseli & Paul)*

*Counsel for 1<sup>st</sup> to 6<sup>th</sup> Defendants:*

*Ms. Rajashree A/P Suppiah  
(Messrs Rajashree)*