YOGANANTHY AS THAMBAIYA

v.

HARTA PUSAKA IDRIS OSMAN

Federal Court, Putrajaya
Ahmad Maarop PCA, Ramly Ali, Alizatul Khair Osman Khairuddin, Abang Iskandar Abang Hashim, Idrus Harun FCJJ
[Civil Appeal No: 02(f)-25-04-2018(J)]
20 November 2019

Contract: *Illegality — Void contract — Appellant claimed for an amount of deceased's shares based on an alleged agreement between parties — Whether agreement between parties a sham — Whether agreement illegal — Whether agreement unenforceable on ground of public policy — Whether public policy as a ground to void a contract existed as separate ground from ground of illegality — Contracts Act 1950, s 24(e)*

The appellant in this case claimed against estate of one Idris Osman ('the deceased') 55% of the deceased's shareholding in the latter's stock broking company, R & I Securities Sdn Bhd ('R & I') which at the material time was under receivership. The appellant's claim was grounded on two documents, namely, a statutory declaration ('SD') allegedly affirmed by the deceased, whereby the deceased agreed to transfer the said 55% of the equity capital in R & I to the appellant; and an alleged agreement ('the Agreement') between the appellant and the deceased which articulated the broad terms established by the SD. In this case, the appellant contended that the deceased had breached the SD and the Agreement by not transferring the 55% shares in R & I to the appellant. The deceased had instead sold the entire said shares to a third party. The respondent on the other hand, contended that the appellant failed to specify the terms and conditions the appellant was relying on to sustain her claim; and the appellant had failed to prove that the alleged SD was sworn by the deceased and instead had been signed by the deceased at the insistence of one Bala, the husband of the appellant, and an employee of the receiver and manager which was managing the affairs of R & I. The appellant's claim was dismissed both at the High Court and the Court of Appeal. Hence this appeal.

Held (dismissing the appeal with costs):

(1) The Agreement between the appellant and the deceased was intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create. The real intention was to create an obligation between Bala with the deceased, but that intention could not find expression on paper, properly inked by them, because that would be a fraud upon the employer of Bala. Hence, the appellant was brought in to

give a veneer of normalcy to the Agreement by her executing the Agreement with the deceased. The intention was to enable the deceased to be saved, on the side by means of a modus that was inherently deceptive. It provided total cover for Bala to deal with the deceased without his employer's knowledge. It was an abuse of his position in his capacity as the agent of the receiver who was managing the affairs of R & I and would be against public policy as it would be injurious to the public good. Therefore, the Agreement was a sham. Both the High Court and the Court of Appeal found the Agreement to be repugnant and refused to assist the appellant. While the sham and public policy arguments were not specifically pleaded by the respondent, it was quite well ventilated during the examination of the relevant witness in the course of trial and thus, did not militate against the rule that parties were bound by their pleadings. (paras 37-39)

(2) On the issue of illegality, the pleaded case was in relation to the issue of bumiputera shareholding in R & I, where shares of R & I could not be transferred to a non-bumiputera. As Bala was admittedly a non-bumiputera, it would be illegal for him to hold shares of R & I Securities which prohibited such shareholding. However, it was provided that such an embargo was only for a period of five years from the time R & I first commenced business. In fact, there was no such legal provision that would make it enforceable. In any event, that embargo period had well elapsed. As such, the illegality premised upon the alleged embargo on non-bumiputera shareholding of the R & I company issue was not successful. (para 40)

(3) The courts below had come to the correct conclusion, based on the evidence adduced in this case that the Agreement was a sham and that it was against public policy to enforce. In the circumstances of this case, the Judicial Commissioner of the High Court was justified when he voided the Agreement as unenforceable, on the ground of public policy under s 24(e) of the Contracts Act 1950 ('CA 1950'). The Court of Appeal was also correct when it affirmed the High Court's decision. (para 52)

(4) For an agreement to be void under s 24(e) CA 1950, it need not be established that the contract was illegal. Voiding an agreement on account of illegality was captured by s 24(a) CA 1950. As such, to say that a contract had to be illegal in the sense that it had to contravene a legal provision of a statute before it ran afoul of public policy under s 24(e) CA 1950 would render the relevant provision redundant. Illegality as a ground to void a contract was a separate head on its own while public policy as a ground to void a contract existed as a distinct excuse which was entrusted by Parliament to the courts to determine premised on the peculiar circumstances of a particular case. Therefore, while the Agreement in this case did not contravene any express legal provisions and did not provoke any consideration of illegality, nevertheless, it was void because it was found to be a sham and was regarded as being opposed to public policy under s 24(e) CA 1950. (para 62)

Case(s) referred to:

AG Securities v. Vaughan [1990] 1 AC 417 (refd)

Autoclenz Ltd v. Belcher [2011] UKSC 41 (refd)

Blay v. Pollard & Morris [1930] 1 KB 628 (refd)

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 1 MLRA 738 (refd)

Central Inland Water Transport Corpn Limited v. Brojo Nath Ganguly AIR 1986 SC 1571 (refd)

Cherulal Prakath v. Mahadeodas Maiya 1955 Supp SCR 406 (refd)

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLRA 348 (refd)

Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] MLRAU 170 (refd)

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 MLRA 247 (refd)

Donald v. Baldwyn [1953] NZLR 313 (refd)

Enderby Town Football Club Ltd v. The Football Association Ltd [1971] Ch 591 (refd)

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 2 MLRA 1 (refd)

Henderson v. Foxworth Investments Ltd and Another [2014] 1 WLR 2600 (refd)

Hitch and Others v. Stone (Inspector of Taxes) [2001] STC 214 (refd)

ICS v. West Bromwich Buildings Society [1998] 1 All ER 98 (refd)

Lord Mansfield in Holman v. Johnson [1775] Cowp 341 (refd)

Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 1 MLRA 274 (refd)

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 5 MLRA 377 (refd)

Miller v. Minister of Pensions [1947] AER 372 (refd)

OCBC Ltd v. Philip Wee Kee Puan [1984] 1 MLRA 161 (refd)

Pang Mun Chung & Anor v. Cheong Huey Charn [2019] 1 MLRA 486 (refd)

Prenn v. Simmonds [1971] 3 All ER 237 (refd)

Snook v. London and West Riding Investments Ltd [1967] 2 QB 786 (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLRA 16 (refd)

Theresa Chong v. Kin Khoon & Co [1976] 1 MLRA 307 (refd)

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 2 MLRA 668 (refd)

UKM v. Attorney-General [2018] SGHCF 18 (refd)

Watt v. Thomas [1947] AC 484 (refd)

YB Menteri Sumber Manusia v. Association Of Bank Officers Peninsular Malaysia [1998] 1 MELR 30; [1998] 2 MLRA 376 (refd)

Legislation referred to:

Contracts Act 1950, s 24(a), (b), (e), (g)

Courts of Judicature Act 1964, s 78(1)

Other(s) referred to:

Mulla Indian Contract and Specific Relief Acts, 13th edn, vol 1, pp 702-703

Counsel:

For the appellant: Malik Imtiaz Sarwar (Renu Zechariah, G Ragumaren & Priscilla Chin with him); M/s G Ragumaren & Co

For the respondent: T Gunaseelan (PK Nathan, Keshvinjeet Singh & Fadzilah Mansor with him); M/s P K Nathan & Co

JUDGMENT

Abang Iskandar Abang Hashim FCJ:

Preliminary

[1] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as my learned brother Justice Ramly Ali FCJ and my learned sister Justice Alizatul Khair Osman Khairuddin FCJ have since retired. My learned brother Ahmad Maarop PCA, and my learned brother Justice Idrus Harun FCJ had read this judgment in draft and both of them agreed that this be our Judgment.

Salient Facts Of The Case

[2] The plaintiff in this case, Yogananthy A S Thambaiya ("the appellant") claims against Idris bin Osman ("the deceased") 55% of the deceased's shareholding in the latter's stock broking company, R & I Securities Sdn Bhd ("R & I") which at the material time was under receivership. It was a consideration for the appellant who gave financial assistance in the reorganisation of R & I by injecting monies into the latter to salvage it from financial difficulties.

[3] The deceased passed away in 2004 and his sons were substituted into the action as administrators of the estate of the deceased pursuant to the Federal Court's Order dated 12 September 2018. The estate of the deceased is thus referred to as the respondent.

[4] The appellant's claim is grounded on two documents listed as 'a' and 'b' below, namely:

> a. A Statutory Declaration ("SD") allegedly affirmed by the deceased, dated 12 August 1987 which, according to the appellant evinced the fact of an agreement between the appellant and the deceased. The material part of the SD is set out in paras (2) and (3), where the deceased had stated as follows:

"(2) I am transferring the said 55% of the equity capital in R & I SECURITIES SDN to YOGANANTHY A/P A S THAMBAIYA in consideration for her help in proposing the reorganization scheme and putting forth the required collateral and cash as deemed necessary by the bankers for the revival and reactivation of the stock broking business of R & I SECURITIES SDN.

(3) I shall hold in trust the share certificates for the said 55% of the equity capital of R &I SECURITIES SDN belonging to YOGANANTHY A/P A S THAMBAIYA for the benefit of her or her nominees until such time as the conditions for the holding of equity in the stock broking company as required by the Kuala Lumpur Stock Exchange is satisfied by her or her nominees."

b. An agreement dated 8 February 1988 ("the Agreement") between the deceased ("as Qualifier"), the company, and the appellant ("referred to as the Financier") which articulated the broad terms established by the SD. Clause 1(d) of the Agreement provides:

"1) the Financier shall loan the sum of Malaysia Ringgit Five Hundred Thousand (MYR $500,000.00) in the company via a personal loan to the Qualifier on condition that the Company shall reconstitute itself, pay off creditors partially in accordance with the Deed of Arrangement and resume business as follows ..."

(d) the Qualifier shall hold 95% of the Shares in the company on his own behalf and as Trustees for the other names in the "Schedule of Shares" in the following proportion:

Qualifier	40% or 1,280,000 shares
Yogananthy NP A.S Thambaiya	55% or 1,760,000 shares"

[5] The appellant contended that the deceased had breached the SD and the Agreement by not transferring the 55% shares in R & I to the appellant. The deceased had instead sold the entire said shares to a third party which had caused the appellant to suffer loss and damages, which became the basis of this legal action filed by the appellant against the deceased's estate.

[6] The respondent in its defence, on the other hand, contended that:

(i) the appellant only averred that the entitlement as promised was upon the terms and conditions of the Agreement without specifically stating which terms and conditions the appellant was relying on to sustain her claim.

(ii) the appellant had failed to prove that the alleged SD dated 12 August 1987 referred to in para 4 of the Statement of Claim was sworn by the deceased.

(iii) As such, the appellant clearly appeared to have omitted pleading material facts, specifically the relevant terms of the Agreement alleged to have been breached by the deceased, in contravention of the aforesaid principle of pleadings.

[7] The respondent also had filed a counterclaim against the appellant for a liquidated sum of RM507,999.50 being an overpayment over the sale and purchase of the share transaction, to the appellant.

Findings Of High Court

[8] The case went through a whole trial proceedings involving examining of witnesses called on behalf of both parties. On 29 July 2016, the High Court dismissed both the appellant's claim and the respondent's counterclaim with costs. In finding so, the learned Judicial Commissioner ("JC") held that:

(i) the appellant did not specify which terms and conditions the appellant was relying on to sustain her claim. The appellant had omitted pleading the material facts, the relevant terms of the agreement alleged to have been breached by the deceased and as such, had contravened the basic principle of pleadings. However, despite agreeing with the respondent on that score, the learned JC held that such a failure or omission on the part of the appellant was not fatal. The learned JC was of the view that the claim had to be adjudged on its merits and the facts proven or admitted.

(ii) On the SD ("P3") dated 12 August 1987, the learned JC found that the contents of the SD are inadmissible as evidence and could not be used as proof to establish the truth of its contents that there was in existence an agreement between the appellant and the deceased for equity sharing in R & I. Further, the learned JC found that the mere admission of the execution of the SD did not absolve the appellant from discharging its onus of proving the contents of the SD produced in court. Apart from the question of admissibility, on the undisputed evidence of the deceased's solicitor, Mr Robert Lai Poh Fye ("DW1"), the circumstances did not allude to P3 being executed freely and voluntarily by the deceased, but in haste, at the request and representation of Balakrishnan a/l Ponniah ("PW27" "Bala"), who is the appellant's husband. The evidence did not disclose that the deceased had voluntarily made P3 but that rather, he had merely signed it at the insistence of Bala.

(iii) On the Loan Agreement (P2) dated 8 February 1988, the learned JC found that it was the sole document that the appellant could rely on to find her claim, if at all.

(iv) On the important and central role played by Bala in respect of the execution of the Loan Agreement and the performance of the

obligations thereunder, the learned JC found that based on the evidence of the appellant and Bala and the documentary evidence, that all the transactions were between the deceased and Bala and the appellant was merely being used as a front to pursue monetary benefits for Bala. The learned JC also found that the appellant had no *locus standi* to institute the suit against the deceased as both the SD and Loan Agreement did not reflect the truth as to the party who had entered into the agreement with the deceased.

(v) On the payment of the loan and 55% shares to the appellant, the learned JC found that the appellant knew about the disposal of the R & I's shares to a third party and had received her portion of the proceeds amounting to 55%. The learned JC touched on the credibility of the appellant. He had serious doubts as to the truth and veracity of the appellant's allegation and found her explanation had lacked credibility.

(vi) On the Loan Agreement being void and unenforceable on the ground of public policy, the learned JC found the Loan Agreement between the appellant and the deceased was void and unenforceable pursuant to s 24(e) of the Contracts Act 1950 (Act 136) ("CA 1950") on the ground that it was contrary to public policy. The learned JC found that Bala, in his capacity as agent of the Receiver managing the affairs of R & I, had placed himself in a position of conflict of interest by using that position to benefit and to enrich himself through his impugned dealing with the appellant. This appeared at para 52 of his Grounds of Judgment ("GOJ"). A void contract cannot therefore be enforced.

(vii) On the inconsistency/conflict between the evidence and the pleaded claim, the learned JC found at para 28 of GOJ that the appellant's evidence presented a version that was in conflict or was inconsistent with the version that was pleaded in her SOC. The appellant's pleaded claim was in direct conflict with the contemporaneous documentary evidence and at para 55, the learned JC concluded that the promise of a 55% stake of the equity was claimed by Bala for all that he had done for the deceased in regard to R & I which was contrary to the substratum of the pleaded claim contained in paras 4 and 5 of the SOC. All dealings and arrangements were between Bala and the defendant only whilst the appellant was merely being used as a front to pursue monetary benefits for Bala. The contradiction between Bala's evidence and the pleaded claim on material facts were serious and manifestly clear. As it was not resolved with any credible evidence, it rendered the claim unsustainable on the proven facts.

[9] Based on the reasons given above, the learned JC found that the appellant had failed to prove her claim on the balance of probabilities and dismissed the appellant's claim with costs. As was alluded to, the counterclaim was also dismissed for lack of requisite evidence being adduced by the respondent to prove the same.

At The Court Of Appeal

[10] Dissatisfied with the decision, the appellant had lodged an appeal to the Court of Appeal ("COA"). Having heard the submissions before them, the panel dismissed the appeal on 29 May 2017 and affirmed the decision of learned JC. But in the course of doing so, the COA made the following findings in respect of the SD as appeared in para 35 of its GOJ:

> "[35] Owing to the death of both the defendant and the Commissioner for Oaths, P S Naidu, prior to the commencement of the retrial, the admissibility of the SD was challenged by the defendant. The learned JC found at para 15 of the GOJ that the contents of the SD are inadmissible as evidence and could not be used as proof to establish the truth of its contents that there was in existence an agreement between the plaintiff and the defendant for equity sharing in R&l. Further, the learned JC found that the mere admission of executing the SD did not absolve the plaintiff from discharging its onus of proving the contents of the SD produced in court. On this aspect, with respect, we disagree with the findings of the learned JC. As stated earlier, the defendant had admitted in his Defence that he signed the SD. His solicitor, Mr Robert Lai Poh Fye (DW1), in cross-examination, when showed the SD, (then ID3 dated 12 August 1987) and asked whether the deceased defendant had instructed him to file the Defence answered in the affirmative. DW1 was further asked whether the defendant had acknowledged signing the SD in haste at the request and representation of Bala and DW1 agreed. DW1 was then asked whether he could show which SD was acknowledged by the deceased defendant and DW1 said:
>
> > "I would rephrase my answer. This was the SD that I was instructed the late Idris signed."

[11] In the immediately ensuing paragraph, the judges of the COA had gone on to state the following:

> "[36] From the evidence of DWI and the admission in the Defence that the deceased defendant did sign the SD, it is apparent that the SD is an admitted document and is admissible and was rightly marked by the learned JC as exhibit P (though he should have marked it earlier). That being so, the onus does not rest upon the plaintiff to prove the contents of the SD but instead the onus has shifted to the defendant to prove to the contrary by forwarding other evidence to neutralise or attach little weight to the SD. Thus in reaching the conclusion that the SD, (P3) is inadmissible and that the plaintiff had not "proved its contents", the learned JC erred and is plainly wrong in his finding."

[12] Having so ruled, the COA had ruled that the SD had been subsumed into the Agreement signed on 8 February 1988, where the SD had contained terms which were substantially similar with those contained in the SD.

[13] Apart from finding as such, the COA also affirmed the learned JC's finding that the 8 February 1988 Agreement was void for being one that was opposed to public policy under s 24(e) of the CA 1950.

[14] The decision of the COA had caused grief to the appellant and it had brought parties to the Federal Court for Leave to Appeal by the appellant.

[15] Originally, the proposed Questions of Law proposed for consideration of the leave panel have been as follows:

(i) Whether the failure by the courts below to take into account at all or sufficiently the genesis of the business relationship between the parties (and spouse), the surrounding circumstances and the factual matrix, as required by the decisions of the House of Lords in *Prenn v. Simmonds* [1971] 3 All ER 237 and *ICS v. West Bromwich Buildings Society* [1998] 1 All ER 98, which represent good law in Malaysia, in interpreting the contracts and documents executed by the parties was fatal to their decision.

(ii) Whether a person who freely and voluntarily makes a Statutory Declaration pursuant to the provisions of the Statutory Declarations Act 1960, thereby attracting criminal sanctions under the Penal Code is:

a. estopped or otherwise precluded from challenging the existence of his Statutory Declaration; and

b. estopped or otherwise precluded from challenging the contents thereof .

(iii) Whether the conduct of a person who executed a Statutory Declaration, a Power of Attorney and signed Agreements, which are consistent with and only explicable by the covenants he made therein, are relevant in determining the legality of his subsequent shift in position.

(iv) Whether a declaration by a trustee that he is holding in trust 55% of the share capital of his company for the benefit of a beneficiary would extend to include all rights issues, bonuses and dividends payable on the said 55% shares so long as their trust relationship continues.

(v) Whether having regard to the totality of the evidence and the fact that the business of the trustee was

> "rescued" and "saved" by the infusion of capital from the beneficiary, it is unconscionable for the trustee to renege on his promise made to the beneficiary.

[16] However, on 28 March 2018, this court allowed the application for leave to appeal only on Question (ii) namely:

> ii. Whether a person who freely and voluntarily makes an SD pursuant to the provisions of the Statutory Declarations Act 1960 ("SDA"), thereby attracting criminal sanctions under the Penal Code, is:
>
> i. Estopped or otherwise precluded from challenging the existence of his SD; and
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> ii. Estopped or otherwise precluded from challenging the contents thereof.

The Appeal Before Us

[17] In the course of oral submission at the hearing of this appeal, both learned counsel for the respective parties submitted on the following issues:

a. Extrinsic evidence could not be relied upon to contradict the SD and the Agreement which were clear and unambiguous;

b. The issue of *locus standi* and consideration;

c. The public policy/ illegality issue;

d. Discretion to consider the public policy/ illegality issue.

[18] At the end of those submissions, we indicated that we needed time to deliberate on the same and thereby reserved our decision to a later date. Having considered the submissions, both written as well as oral, together with the appeal records, we now set out our deliberation of the issues raised in this appeal.

[19] We shall deal with issues together as they are inevitably related.

[20] We find it necessary to dwell a little on the manner in which this issue played out in this case both in the High Court as well as in the COA. In that regard, we must have sight of the pleadings in respect of this issue. As to be expected, it appeared in the Statement of Defence ("SOD") and also in the counterclaim of the respondent. In the SOD it appeared in para 5 which stated thus:

> "5. At all material times neither the defendant nor his solicitors was given a copy each of the aforesaid Statutory Declaration and the aforesaid Agreement (although the said Bala Krishnan Ponniah had promised to do so) until sometime in the year 1990 when the solicitors demanded for the same for

notification thereof to the Inland Revenue Department, Johar Bahru. When the same were perused by the defendant's solicitors, the said documents were found to be completely at variance with what had been discussed for the revival of the operations of R & I Securities Sdn. The defendant's solicitors informed the said Bala Krishnan Ponniah (who was at all material times active in this transaction in place of the plaintiff) that the validity of the said documents was in question because R & I Securities Sdn was a Bumiputra company and a Member of the Kuala Lumpur Stock Exchange and it was contrary to the defendant's understanding of the scheme to revive the said company."

[21] The illegality issue was couched in respect of the alleged non-bumiputera shareholding embargo issue. It was averred by the respondent that as the R & I was a bumiputera company it would be illegal to have Bala (PW2), being a non-bumiputera, as a shareholder of R & I. Evidence were led on this issue when it was ventilated before the learned JC. As it had come to pass, while there was a prohibition for non-bumiputera to participate in its shareholding, the time embargo was limited for five years from the date R & I first commenced its business. On evidence, that time embargo had long since lapsed and was no longer relevant, even during the time parties in this case were involved in this transaction. On top of that, even the KLSE was unaware of such a legal requirement on the alleged embargo. If at all, it might have been a policy, but definitely not a legal imperative.

[22] However, the learned JC went a step further and went on a public policy consideration based on his view that Bala had acted in conflict of interest. On evidence, Bala had testified that his principal was aware of his enterprise in relation to sharing of R & I's equity holding. However the learned JC noted that Bala's evidence was merely oral and devoid of any documentary support. At the end of the day, the learned JC found that there was a conflict of interest committed by the PW2, which he regarded as being opposed to public policy. As a result, he went on to rule that the Agreement was void and unenforceable under s 24(e) of the CA 1950. Further, avoiding the Agreement on the ground of public policy was never pleaded by the respondent. The COA, while trying to justify the width of para 5 averment of illegality, had gone on to affirm the finding of the JC on that conflict of interest issue that had netted for the appellant a huge monetary gain.

[23] We had looked at the original proposed questions posed by the appellant before the leave panel of this court and there was no proposed question that was raised pertaining to the public policy or illegality, although this issue on illegality or public policy was one of the reasons upon which the learned JC had premised his decision in dismissing the appellant's claims. That decision was subsequently affirmed by the COA.

[24] As such, while it was true that the proposed questions were articulated without the advantage of having been supplied with the GOJ of the COA it was apparent to us that the live issues that were raised before the COA Judges were the same issues that were ventilated before the learned JC. In fact, it appeared

to us that the issue on public policy was quite instrumental in the scheme of things as to how the learned JC had dismissed the appellant's claim. Para 52 of his GOJ could not have been more emphatic in exhibiting how he had regarded the Agreement between the parties in the suit before him.

[25] Learned counsel for the appellant had urged upon us to consider the manner in which public policy may be invoked by the court in voiding an agreement in exercise of s 24(e) of the CA 1950.

[26] We wish to reiterate that under s 24 of our CA 1950, there is a clear demarcation between voiding an agreement which consideration or objective is illegal and one which is regarded by the court as being immoral or being opposed to public policy. An illegal agreement is void by virtue of s 24(a) and an agreement may also be void because to enforce it would be opposed to public policy. Voiding an agreement under s 24(e) on account of it being opposed to public policy appears in the same provision that voids an agreement premised on the fact that its consideration or objective is regarded by the court to be immoral. Applying the *ejusdem generis* principle of statutory interpretation, the impugned latter word in the subsection 24(e) provision must be construed to be in tandem with the flavour of what the earlier word that precedes it. In other words, an agreement that is to be voided on the ground of public policy has to be proven to be one more akin to it being an immoral, rather than it is an illegal agreement. In other words, subsection (e) to s 24 of the CA 1950 is a provision which caters for a specific category of agreements which consideration or object is regarded as being either immoral or against public policy in the estimation of the court in the circumstances of the case. What is also clear from a reading of that s 24(e) of the CA 1950 is that the element of illegality or contravention of any statutory provision as a basis for voiding an agreement under it is conspicuous by its clear omission. [See the Supreme Court case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLRA 348 ("*Chung Khiaw Bank* case")]. That omission is to our minds a deliberate act by the drafters because any consideration of illegality in voiding an agreement has been housed under s 24(a) and (b) of the CA 1950. To contend that in considering the applicability of s 24(e) one ought to take into account the illegality element in considering public policy would, in effect render the provisions under s 24(a) and (b) of the CA 1950 redundant. Clearly, public policy as a circumstance to void an agreement under s 24(e) of the CA 1950 is a special provision whereby the drafters of the CA 1950 had deemed it fit to expressly trust the court to void an impugned agreement which it regards as adverse to public policy, or otherwise it being immoral. Together with immorality, public policy is a statutorily provided head upon which an agreement may be impugned and if the court regards it as being immoral or is opposed to public policy, then such an agreement will be struck down as void, on either account.

[27] Learned counsel for the appellant also complained before us that the learned JC had erred when he found that there was a conflict of interest

committed by the Bala in light of the fact his principal was engaged as the R & M of the deceased's ailing company, and that he was further aggrieved by the learned JC who had invoked public policy to void the Agreement without first undertaking the proper approach as enunciated in the Singapore case of *UKM v. Attorney-General* [2018] SGHCF 18 (HC) ("the Gay Adoption case"). It was premised on the approach laid down by the Gay Adoption case [*supra*] that learned counsel for the appellant had submitted before us that the decision of the learned JC be set aside for his failure to undertake the same approach. He urged us to allow his belatedly proposed question to be considered by this court.

[28] That proposed question appeared at the end of his written submission and it read as follows:

> "In determining whether a contract is void for being illegal or contrary to public policy, is a court obliged to determine whether the alleged public policy exists based on authoritative sources and, if so, whether the said public policy would be violated if the claimed right were given effect."

Our Deliberations And Findings

[29] As regards the answer to the sole leave Question on the SD, we had noted the following. This document was the first of the series of documents that were in play in this case. It was purportedly signed by the deceased in 1987. It was alleged to have contained averments which the appellant claimed to have adverted to the R & I Securities share arrangement between the appellant and the deceased in consideration for the appellant having provided financial assistance to the R & I's rescue effort. This SD was contested in the High Court and it was alleged to have been secured in haste as a result of insistence by Bala. In other words, it was not made voluntarily by the deceased. At the end of the day, the learned JC did not admit the SD in evidence.

[30] In the COA, the learned justices there agreed with the appellant's counsel that the learned JC was wrong in the way he dealt with the SD. According to them, the SD should have been admitted in evidence and that it was up to the respondent to deal with its contents by leading evidence. However, in any event, the COA had ruled that the SD had been subsumed in the Agreement that was signed on 8 February 1988. It was of the view that the gist of the SD had been subsequently subsumed by the Agreement which in essence had reproduced the provisions in the SD on shareholding of the equity in the R & I stock-broking firm. The COA found that the learned JC was wrong to not admit the SD at the earliest opportunity when it was introduced to be tendered during the plaintiff's stage of the case. But that failure on the part of the learned JC to do so was not fatal, in the circumstances of this case. We found nothing amiss in such finding by the COA.

[31] In the circumstances of this case, we do not propose to answer this question.

Sham Document Issue

[32] The learned JC had treated the Agreement as a sham document. But was it a sham document? In *Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] MLRAU 170 ("*Mansur Hussain* case"), the COA had referred to *Snook v. London and West Riding Investments Ltd* [1967] 2 QB 786 ("the *Snook* case") where Lord Diplock LJ (as His Lordship then was) had occasion, at p 802, to say the following:

> "As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham', it is, I think necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intention of a 'shammer' affect the rights of a party against whom he deceived."

[33] In a subsequent case, about three decades down the road, the English Court of Appeal in *Hitch and Others v. Stone (Inspector of Taxes)* [2001] STC 214 ("*Hitch* case") referred to the *Snook* case *[supra]* and laid down the applicable test to ascertain a sham document, which to our minds, would serve us well by reproducing the said test here. The steps to be taken in such determination as outlined by Arden LJ, had been stated as follows:

> "[64] An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.
>
> [65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.
>
> [66] Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> [67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.

> [68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied (see for example *Garnac Grain Co Inc v. HMF Faure & Fairclough Ltd* [1966] 1 QB 650 at 683-684 per Diplock LJ, which was cited by Mr Price).
>
> [69] Fifth, the intention must be a common intention (see *Snook*). This is relevant to issue 3 below."

[34] It had been observed that the policy considerations that underpin the concept of sham are the protection of the rule of law, to prevent abuse of fundamental legal principles and the prevention of evasion of statutes, among others. It was also commented that the *Snook* case (*supra*) had narrowed down the test for sham. See the relatively recent case of *Autoclenz Ltd v. Belcher* [2011] UKSC 41, a landmark case in the UK on labour law and contract law; and the related article by Toby Graham, appearing in *Trusts and Trustees*, vol 22, issue 8, October 2016. Indeed, on the authority of the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLRA 16, the courts are entitled to go behind the impugned agreement or transaction to ascertain the true nature of such agreement or transaction. In the case of *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 1 MLRA 274, it was there observed by our apex court that in other Common Law countries, courts were slow to declare commercial contracts as void on ground of illegality, but having said that if the circumstances so warrant, the courts would not shy away, from doing what would be in accord with what the law expects to be done, as a keeper of the public conscience. The fact that the apex court had done that could be seen in the recent case of *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 5 MLRA 377 FC ("*Merong Mahawangsa* case"), among others.

[35] Put simply, a sham exists where the parties say one thing but intending another. See, *Donald v. Baldwyn* [1953] NZLR 313, 321, per F B Adams J, cited by Bingham LJ in *AG Securities v. Vaughan* [1990] 1 AC 417. "Sham" is not a concept of tax law, or trust law, but of the general law. None of the leading cases are tax cases or trust cases. All parties to the sham documentation must have the same intention to come out with such a document of such nature.

[36] Back to the present case, was there sufficient evidence to evince the intention of both the parties, namely the appellant and the deceased to deceive a third party as to the real intention of their enterprise by coming into this Agreement? The intention of both parties could be deduced from the fact that both of them would stand to gain by having the appellant as a party to the Agreement, instead of Bala.

[37] Departing from where Diplock LJ left in the *Snook*'s case *(supra)*, and applying that 'sham concept' to the facts of our instant appeal, it is clear to us, that the Agreement between the appellant and the deceased was a document

executed by them which was intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create. The real intention was to create an obligation between Bala, the accountant husband of the appellant, with the deceased, but that intention could not find expression on paper, properly inked by them, because that would be a fraud upon the employer of Bala. So the wife, the appellant here was brought in to give a veneer of normalcy to the Agreement by her executing the Agreement with the deceased. The intention was to enable the deceased to be saved, on the side by means of a modus that was inherently deceptive. It provided total cover for Bala to deal with the deceased without his employer's knowledge. The learned JC found the conduct of Bala as being in conflict of interest *vis-a-vis* his employer and the R & I's debenture holders. It was an abuse of his position in his capacity as the agent of the Receiver who was managing the affairs of R & I. It would be against public policy as it would be injurious to the public good.

[38] The learned JC had found it to be unconscionable and had struck it down as being against public policy under s 24(e) of CA 1950 and illustration (g) to s 24. This finding was affirmed by the COA:

> "[51] In our instant appeal, the plaintiff was used as a facade by her husband Bala. In that we could infer that Bala knew that it was contrary to public policy for him to own 55% shares in R&I which is a Bumiputra company. Bala, a chartered accountant in Hanafiah Raslan & Mohamad stood in a position of conflict of interest as he, in his capacity as the agent of the Receiver who is managing the affairs of R&I, had used that privileged position to wrongfully profit or enriched himself. He now claims or seeks remedy in an illegal transaction in which he had participated. As the learned JC stated:
>
> > "To condone his act of obtaining a substantial benefit wrongfully from this position would be tantamount to allowing abuse and exploitation of his privileged position without disclosing his interest to his employer and also to debenture holders."
>
> The High court refused to assist him. We are of the view that this court too, should not render assistance to him to pursue this appeal to overturn the decision of the learned JC."

[39] Therefore, the Agreement dated 8 February 1988 was a sham. Both the High Court and the COA found the Agreement to be repugnant and refused to assist the appellant. Although the sham and public policy were not specifically pleaded by the respondent, it was quite well ventilated during the examination of the relevant witness in the course of trial. In fact, Bala was cross-examined on this, and instead of objecting its introduction as a non-pleaded issue, Bala answered the same by stating that his employer was aware of his arrangement with the deceased and had no objection with it. The learned JC found Bala's response to be one that was merely a bare denial without more. There was no documentary evidence to evince such a situation between them. He found

Bala's evidence to lack credibility. In the circumstances, the non- pleading of the sham and public policy issues did not militate against the rule on parties to be bound by their pleadings. [See, Gopal Sri Ram in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 1 MLRA 738 ("*Boustead Trading* case")].

Illegality Issue

[40] On the issue of illegality, the pleaded case on this issue was contained in para 5 of SOD in relation to the issue of bumiputera shareholding in the R & I, where shares of R & I could not be transferred to a non-bumiputera. As Bala was admittedly a non-bumiputera, it would be illegal for him to hold shares of R & I Securities which prohibited such shareholding. But, it was provided that such an embargo was only for a period of five years from the time R & I first commenced business. In fact, there was no such legal provision that would make it enforceable. Even the KLSE, the former name of the present-day Bursa Malaysia had no knowledge that there was such legal requirement that it had to enforce. In any event, that embargo period had well elapsed, to be of any significant consequence. As such, the illegality premised upon the alleged embargo on non-bumiputera shareholding of the R & I company issue was not successful.

[41] That having been said, there was evidence led before the trial court of what the learned JC had concluded to be a sham transaction especially in his appreciation of the true intent of the P2 Agreement dated 8 February 1988. As it had come to pass, this P2 was regarded by the learned JC as being opposed to public policy under s 24(e) of CA 1950.

Public Policy Issue

[42] Now, the public policy issue was concerned with the issue of conflict of interest. PW2 was an employee of the receiver and manager which was managing the affairs of the R & I. The learned JC found that the conduct of the PW2 was in conflict with the interest of his employer despite his denial in court which was not supported by any documentary evidence, to the effect that the his employer had no objection to his dealing with the deceased, who was the majority shareholder of R & I. The JC was of the view that PW2's side dealing in respect of the very client who was being managed by his employer acting as the R & M, which would result in PW2 ending up with a hefty profit was one that was unconscionable and was against public policy. See, s 24 of CA 1950 and the illustration (g) thereto. A judge cannot just simply, at his personal whim invoke public policy as a ground to strike down a contract. [See the decision in *Theresa Chong v. Kin Khoon & Co* [1976] 1 MLRA 307, and *Pang Mun Chung & Anor v. Cheong Huey Charn* [2019] 1 MLRA 486 and the Singapore *Gay Adoption* cases]. In the *Gay Adoption* case, the long and short of that decision has been that before considering to invoke the public policy as the ground to void a contract, the court would be best advised to take the two-tier approach.

[43] In our case, the learned JC apparently did not embark on that exercise before he decided to void the agreement on ground of public policy. We had referred to the s 24(e) of the CA 1950. We also had sight of illustration (g) to the same section. The conduct of PW2 in this appeal is not much different from the conduct of the property agent envisaged by Parliament in illustration (g) to s 24, which is as follows:

> "(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal."

[44] What is more significant is that sub-section (e) of s 24 CA 1950 reads as follows: "the court *regards* it as immoral, or opposed to public policy." [Italics is ours for Emphasis]. It is clear from the peculiar wording to that subsection, that Parliament had left it to the wisdom and discretion of the court hearing the case in which the issue involving public policy elements emerges, to decide whether or not to invoke public policy in order to void the agreement that is being impugned. The court can so invoke if 'it regards' the agreement to be immoral or is opposed to public policy. Of course, the court will have to consider all the relevant factors into account in coming to its decision whether or not to invoke that ground.

[45] Section 24(e) of the CA 1950 is an enabling provision, in particular, it enables and empowers the court to void an agreement which, *inter alia*, it regards it as one that militates against public policy, in the circumstances of the case before the court. That subsection (e) gives the court the necessary leeway to decide the matter on public policy. Of course, the judge will have to identify the mischief caused by the impugned agreement in the larger consideration of the interest that may well be adversely affected if the impugned contract were to be enforced and then take that into consideration.

[46] It was rather easy for us to discern the public policy consideration which had driven the learned JC to decide the way he did. It had been this. To enforce a contract that was shrouded with such manipulative elements that were intended to create a curtain behind which the PW2 could act undetected by his employer in the circumstances of this case would amount to the courts condoning such less than honest and frank transaction behind the back of one's employer, all done by him for his own benefit, to enrich himself at the expense of his employers. If what was being done pursuant to the agreement between the deceased and the appellant was well and truly above board, then why PW2 did not enter into the said agreement with the deceased directly? Why the need to bring in his wife, the appellant, into the transaction? The less than honest intention on the part of the PW2 was laid bare from the correspondences between them, where at times, PW2 referred himself as partner.

[47] The SD cannot be regarded separately and in isolation from the other documents in this case, especially the Agreement which essentially reproduced

the arrangements between the appellant and the deceased. The COA was justified to hold that the SD was subsumed in the tripartite agreement and the SD contained in documentary form for the first time the arrangement between the parties on the share transaction involving R & I, that was then under receivership that was managed by Bala's employer. In other words, the SD was part of the sham arrangement designed to blindside Bala's employer. The learned JC had called out the documents for what they really were in his GOJ when he considered the handwritten letters of Bala and the Power of Attorney from the deceased that was given to Bala, instead of to the appellant. In one of those documents, Bala had referred the deceased to their 'gentlemen's agreement' pertaining to the arrangements involving the very transaction affecting the financial assistance and the equity holding of R & I Securities. That reference to the gentlemen's agreement between Bala and the deceased must surely, in the circumstances of this case, refer to the very understanding between Bala and the deceased which both of them could not ink on paper for to do otherwise would expose Bala's conflict of interest situation with his employers. Clearly the SD and the Agreement and the cheque and voucher were sham documents to conceal the real nature of the transaction pertaining to the shareholding of R & I Securities. The fact that the cheque and payment vouchers were made in the appellant's name further bolstered the conclusion that it was so done so as not to leave any paper trails pertaining to payments made to Bala, coming from the deceased, whose financially distressed company, to wit, R & I Securities, was at the material times being managed by Bala's employers. Of course the fact that the power of attorney was granted to Bala instead of the appellant, in the overall scheme of things in this case spoke volume of the real deal.

[48] The leave Question that was allowed related to the issue of SD. The JC had ruled it to be inadmissible. The COA while stating that the JC was wrong, further stated that the 1987 SD had been subsumed by the subsequent tripartite Agreement in 1988. It was its finding that the respondent may lead evidence to challenge its contents.

[49] As alluded to by us, learned counsel for the appellant had posed belatedly, a question of law which he urged upon us to answer. That question appeared at the end of his written submissions and it related to the issue of public policy. He had proposed that the question if allowed to be considered by this court, ought to be answered in the affirmative. Granted that the COA's GOJ was supplied only after the leave application had been heard, however we noted that the learned JC had factored into his GOJ this issue of the Agreement being bad as it was opposed to public policy. He had reasoned out why in his view the transactions between the parties in relation to the share transfer between them was bad as it was caught by public policy consideration. The learned Judges of the COA had affirmed that finding and the basis upon which the public policy was couched and founded. The only elaboration made by the COA had been on the alleged non-pleading of illegality pertaining to public interest. After citing the *Merong Mahawangsa* case (*supra*) the COA decided that the court was

at liberty to consider the evidence on illegality that was led before it although there was no express pleading upon it. On the facts of this case, the issue of conflict of interest that could be occasioned by the agreement was ventilated. It was raised by the respondent and there was no objection on it being led as an issue. The PW2 actually responded by saying that his employers were aware of his activity pertaining to the share transaction with the deceased, whose company R & I was being managed as to its financial affairs by his employer. Apart from the bare denial of any conflict of interest and the averment by Bala that his employer did not object, there was no documentary evidence emanating from his employer regarding the same. On authority of *Boustead Trading* case (*supra*), not pleaded issue may be allowed if the not pleaded issue was nevertheless freely ventilated by parties without any objection. In fact, it was recognised in the *Boustead Trading* case (*supra*) as follows:

> "Thirdly, where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances to say that the point was not pleaded."

The case of *OCBC Ltd v. Philip Wee Kee Puan* [1984] 1 MLRA 161 was cited in support thereof by the apex court in *Boustead Trading* case (*supra*).

[50] We are aware that new questions of law may be posed even after the leave application has been dealt with. In this regard, we quote Edgar Joseph Jr FCJ in *YB Menteri Sumber Manusia v. Association Of Bank Officers Peninsular Malaysia* [1998] 1 MELR 30; [1998] 2 MLRA 376 as follows:

> "Clearly, therefore, having regard to these provisions, the Federal Court has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice."

[51] However that does not apply in all circumstances. Those questions are allowed belatedly as an exception rather than a practice based on the general rule. In the circumstances of this case, we could see no reason as to how the belated Question that was proposed before so late in the day ought to be allowed for our consideration. The reason advanced by learned counsel for the appellant could not justify us to allow it. The issue on public policy was ventilated in the High Court and was decided upon by the JC and so was it ventilated in the COA. The appeal was dismissed by the COA. Surely, that issue of public policy was key in the deliberation of the JC in coming to his decision in dismissing the appellant's claim by voiding the Agreement. As such, the appellant did not have the proverbial legs upon which to found her claim against the respondent.

[52] In any event, we have found that the courts below had come to the correct conclusion, based on the evidence adduced in this case that the Agreement (P2) was a sham and that it was against public policy to enforce it for the very

reason as articulated by the learned JC. In the circumstances of this case, we are of the unanimous view that the learned JC was justified when he voided the Agreement as unenforceable, on the ground of public policy under s 24(e) of the CA 1950. The COA was also correct when it affirmed the learned JC's decision on appeal by the appellant. Both the courts below regarded the Agreement that had subsumed the material terms of the SD to be one that was against public policy. They found it to be an agreement that was hammered at the back or behind Bala's employers for his sole benefits. What would amount to something that is against public policy would vary from place to place. But one universal element in an agreement that would weigh considerably against public policy is one that concerns the matter of honesty or the lack of it. It may or may not amount to outright fraud or an outright illegality for an agreement to be struck down as being void on the ground of public policy, in the context of our existing statutory regime. A thing or conduct that is bad need not necessarily be illegal, as not everything reprehensible is expressly made illegal by statute. Dishonesty comes in many forms and manifestations. The fact that a dishonest act is not made an offence or a tort does not disqualify it from being regarded by a court of law to be unenforceable on the ground of public policy. Jeffrey Tan FCJ in *Merong Mahawangsa* case (*supra*) had referred to *Mulla Indian Contract and Specific Relief Acts* 13th edn, vol 1 at pp 702-703, which I quote:

> "An agreement, the object of which is to use the influence with the Ministers of Government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. It is immaterial, if the persons intended to be influenced are not amenable to such recommendations."

[53] A conduct or transaction may not fit into any tortious pigeon holes, but its infamy or notoriety may be such that one may recall Lord Denning's exclamation in his famous speech in the case of *Miller v. Minister of Pensions* [1947] AER 372 adverting to the obviousness of the matter, when he said, "Of course it is possible, but not in the least probable". It is too clear to even single out the conduct or transaction as being one that is against the public interest and therefore to enforce a party's alleged right under such a circumstance, would militate against the public policy. Sometimes a conduct is so obnoxious to public policy that it need not be made a statutory wrong, in order to appreciate how inimical it is to the public good. Any reasonable person would regard it as reprehensible and bad and unacceptable by reason of public policy.

[54] As is known to all parties, learned JC found the Agreement to be void as he regarded it to be against public policy. The COA had affirmed it. Section 24(e) of the CA 1950 is uniquely crafted or drafted. It provides for a separate head under which an agreement whose consideration or object it is which the court regards as being immoral or is opposed to public policy to be void. There is no nexus to the element of illegality, which has been provided for under subsections (a) and (b) to s 24 of the CA 1950. An irresistible conclusion which can be derived from this situation is that an agreement may be void if the court

hearing the case regards its object as being either immoral or is opposed to public policy. Also inherent in that conclusion is that to be opposed against public policy, an impugned agreement need not be shown to be illegal. As was stated by Lord Justice Scrutton in the case of *Blay v. Pollard & Morris* [1930] 1 KB 628 it falls to the court to arrest improprieties on its own motion at limine. Section 24(e) of the CA 1950 expressly provides for such authority for the court to do so if it regards the object of the agreement was one that would militate against the public policy. Such an agreement has the tendency to corrupt and encourage dishonest practices among men and women of commerce by being actively involved in dubious deals behind the backs of their principals. To our minds, the Agreement and the relevant documents which the courts below had concluded to be shams are documents which they regarded to be against public policy within s 24(e) of the CA 1950. Such was the *Merong Mahawangsa* case (*supra*) which depicted a blatant and outrageous use of improper influence with the Ministers of Government to obtain a favourable decision in awarding a contract to undeserving bidders. This case before us involved a surreptitious design involving a professional employee to profit behind his employer's back and the back of the debenture holders. Both cases show a corrupt tendency, the former overt while the latter covert. In the *Merong Mahawangsa* case (*supra*), the court was correct to regard influence peddling as being opposed to public policy and such agreement was rightly voided by the Federal Court. We are of the considered view that the lower courts, with regard to this instant appeal, were both correct when they regarded the real object of the Agreement between the appellant and the respondent to be against public policy and was therefore void and of no effect. This court is aware of the need to give effect to commercial agreements between free and consensual business people, but when an agreement between them has as its object a deliberate dishonesty that directly injures another, then the court would be right to regard such an agreement as being against public policy and act in accordance with what s 24(e) of the CA 1950 envisages and empowers the court to do.

[55] Public policy doctrine as a consideration to void a contract is recognised at common law as well. It is a principle which declares that no man can lawfully do that has the tendency to be injurious to the public welfare. *Ex dolo malo non oritur actio*. It promotes public good. More importantly, under this doctrine, freedom for contract of private dealings is restricted by law for the common good of the community. It takes into account the interests of persons other than the parties. So, if a contract is voided on ground of public policy, it does not necessarily mean that the defendant has a better case than the plaintiff on its merits, rather, on a wider consideration of the general public good, the plaintiff's claim is injurious to the common welfare and ought not to be enforced. A well entrenched legal principle has been that a right of action cannot arise out of fraud, see speech of *Lord Mansfield in Holman v. Johnson* [1775] Cowp 341 at p 343.

[56] We note that the CA 1950 does not define what public policy mean, although decided cases have assigned to it various descriptions. For instance, as

was observed by the Supreme Court of India, public policy has been described, *inter alia*, as 'an unruly horse', an 'untrustworthy guide', the 'uncertain one' and a thing of 'variable quality'. [See, *Cherulal Prakath v. Mahadeodas Maiya* 1955 Supp SCR 406 ("*Cherulal Prakath* case").] But of course it has its band of supporters, whereby chief among them was no less than Lord Denning MR, who in its defence, had occasion to say the following, in the case of *Enderby Town Football Club Ltd v. The Football Association Ltd* [1971] Ch 591 at p 606:

> "[W]ith a good man in the saddle, the unruly horse can be kept in control, it can jump over obstacles."

[57] Though not defined under the CA 1950, the Supreme Court of India, in the case of *Central Inland Water Transport Corpn Limited v. Brojo Nath Ganguly* [1986] AIR SC 1571, had described public policy as something that connotes some matter which concerns public good and public interest. Indeed, in the *Cherulal Prakath* case (*supra*) the Supreme Court of India had opined that the public policy doctrine is extended not only to harmful cases, but also to harmful tendencies. The *Merong Mahawangsa* case (*supra*) is an illustration of such an application of public policy as a ground to void an agreement that had a tendency to corrupt public officials by practising influence peddling. To enforce the Agreement [together with the SD and the Power of Attorney] in our instant appeal, would amount to condoning agreements that have the tendencies to encourage dishonest behaviour in commercial dealings, for instance, by giving scant regard to sanctity of contracts. Surely it would not be in step with public policy of any community to enforce an agreement like the one between the parties in our instant appeal, which in actuality had been called out by the courts below, as sham.

[58] The court, in its deliberation on whether the Agreement was a sham and therefore void as being against public policy, is entitled to look at not only within the four walls of that document, but also at circumstances, including that of conduct, that took place after the formation of the Agreement. This is clear on the authority of the *Hitch* case (*supra*):

> "[64] An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities:
>
> [65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties." [Per Arden LJ. See also the case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors* [2016] 2 MLRA 141.]

[59] The existence of the handwritten letters of Bala and the Power of Attorney that was given to Bala, instead of the appellant, further evinced the clear intention between the parties that the real party on the opposite side of the deceased in this arrangement was Bala. The JC had so found. The COA had affirmed such a finding. We have no reason to depart from the same.

[60] In *Mansur Hussain* case (*supra*) the COA had occasion to state the following:

> "Indeed, on the authority of the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLRA 16, the courts are entitled to go behind the impugned agreement or transaction to ascertain the true nature of such agreement or transaction."

[61] The impugned contract in the *Merong Mahawangsa* case *(supra)* that involved influence pedalling was struck down, not on account of illegality, but because the Federal Court regarded it to be opposed to public policy, as such contract had the tendency 'to corrupt or influence public servants to give favourable decisions otherwise than on their own merits'. [Leave to appeal by the aggrieved party in the *Mansur Hussain* case (*supra*) was dismissed by the leave panel of the apex court on 25 September 2019].

[62] In our view, for an agreement to be void under s 24(e) of the CA 1950, it need not be established that the contract was illegal. Voiding an agreement on account of illegality is captured by subsection (a) to s 24 of the CA 1950. As such, to say that a contract has to be illegal in the sense that it has to contravene a legal provision of a statute before it runs afoul of public policy under sub-section (e) of the CA 1950 would render, in our considered view, the relevant provision redundant. Illegality as a ground to void a contract is a separate head on its own while public policy as a ground to void a contract exists as a distinct excuse which is entrusted by Parliament to the courts to determine premised on the peculiar circumstances of a particular case. [See, the Supreme Court decision in the *Chung Khiaw Bank* case (*supra*)]. As such, an impugned agreement need not necessarily be illegal before it may be rendered as void under sub-section 24(e). It is sufficient that its consideration or object has been regarded by the court hearing the case, as being opposed to public policy or which it regards as being immoral. The Agreement in this case before us did not contravene any express legal provisions. It did not provoke any consideration of illegality, but it was void because the courts below found it as a sham and regarded it as being opposed to public policy under s 24(e) of the CA 1950. With respect, we concur with such finding.

[63] We noted that the belated Question appeared to be premised on a decision that was decided in Singapore (the Gay Adoption case (*supra*)), that had promoted a two-tier approach before the court may invoke public policy to void a contract. Our initial observation is that Singapore, with a few statutory exceptions, follows the common law of England in legal matters pertaining to law of contracts, and as such there is no equipollent provision like the one we have in s 24(e) of our CA 1950 pertaining to public policy. As was alluded to, the belated Question arose during oral submissions of learned counsel for the Appellant before us. The response by learned counsel for the respondent could hardly be described, with respect, as helpful. But to be fair to him, that belated Question is not one of the leave questions that was applied for in the leave

application before the leave panel. As was clearly seen, the sole question that was allowed by the leave panel has been one that related to the SD. The answer to this belated Question may well have significant ramifications pertaining to the invocation of public policy considerations by our courts in purported exercise of s 24(e) of the CA 1950. Whether that initial observation on our part is material or not, we are of the view that a more matured and fuller argument would need to be ventilated on this issue, in a proper case pertaining to a question of law involving or surrounding the invocation of public policy in order to void an agreement under s 24(e) of the CA 1950.

[64] As such, in the circumstances, we would respectfully decline to answer this belated Question, as posed by learned counsel for the appellant.

***Locus Standi* Issue**

[65] On the issue of *locus standi*, our view is that as the appellant was the person named in the Agreement, she was the proper person to sue on the Agreement. She was properly clothed to initiate this suit against the defendant premised on the Agreement. But whether she would eventually succeed in her suit would depend on what transpired as the evidence unfolded during the court proceedings. As it had come to pass in this case, the evidence led had caused the learned JC to conclude that she was but a mere front or a fagade for what in actuality was a claim by her husband Bala, who for reasons which became apparent in the course of the trial, could not sue in his own name, for to do so would be to expose to the world at large, his untenable conflict of interest situation *vis-a-vis* his employers, who were at the material times, the receiver and manager of the financially crippled R & I belonging to the deceased.

[66] To accede to the argument advanced by the respondents' learned counsel in that Bala ought to be the proper party to sue on the Agreement would go against the rule of privity of contract. Bala was never a named party in the Agreement or in the SD for that matter. Secondly, of course, for Bala to surface as the enforcer of the Agreement would amount to him admitting to the ruse, to wit the sham pertaining to the whole transaction.

[67] But once the appellant, as one of the named parties in the agreement was before the court, it would be open to the adverse party to challenge the integrity or the *bona fides* of the Agreement. However, to say that she was not the correct party to sue on the Agreement would, with respect, be incorrect. In the context of this case, the appellant was properly before the court as the plaintiff. But, as was alluded to, whether she could succeed in this suit, is entirely a different story altogether. The eventual end result has no bearing whatsoever on the issue of whether the appellant, Yogananthy was the correct party to sue on the Agreement.

[68] As such, in the circumstances, we find no merit in the respondent's contention that a wrong person was named as the plaintiff in this case.

The Courts Below Was Not Plainly Wrong

[69] Now, only in a case where it has been shown to the satisfaction of the appeal tribunal that the impugned decision of the lower court has been one that is plainly wrong, would the appeal tribunal weigh in and invoke its appellate power in order to right a wrong decision in plain sight. The well entrenched principle on appellate intervention of a trial court's decision has been consistently applied by the appellate courts and was reiterated by the apex court in the case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 MLRA 247. In citing *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 2 MLRA 1, the apex court also adverted to the case of *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 2 MLRA 668, where it was stated that "a plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of the evidence". The English House of Lords' decision in the case of *Watt v. Thomas* [1947] AC 484 was cited, *inter alia*, in support thereof. In fact, as relatively recently as in 2014, the English Supreme Court in *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600 ("the *Henderson*'s case") considered and explained the 'plainly wrong' test as follows:

> "62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considered that it would have reached a different conclusion. **What matters is whether the decision under appeal is one that no reasonable judge could have reached**."
>
> [Bold provided by us for Emphasis]

Conclusion

[70] After due perusal of the appeal records in light of the respective submissions of both learned counsel, we are unanimous in our view that the decisions of the lower courts could not, in all fairness, be described as being plainly wrong. We agree with their decisions that the appellant's claim could not succeed.

[71] Premised on the above, we are of the considered view that this appeal ought to be dismissed with costs. We hereby affirm the decision of the COA which had affirmed the decision of the learned JC.

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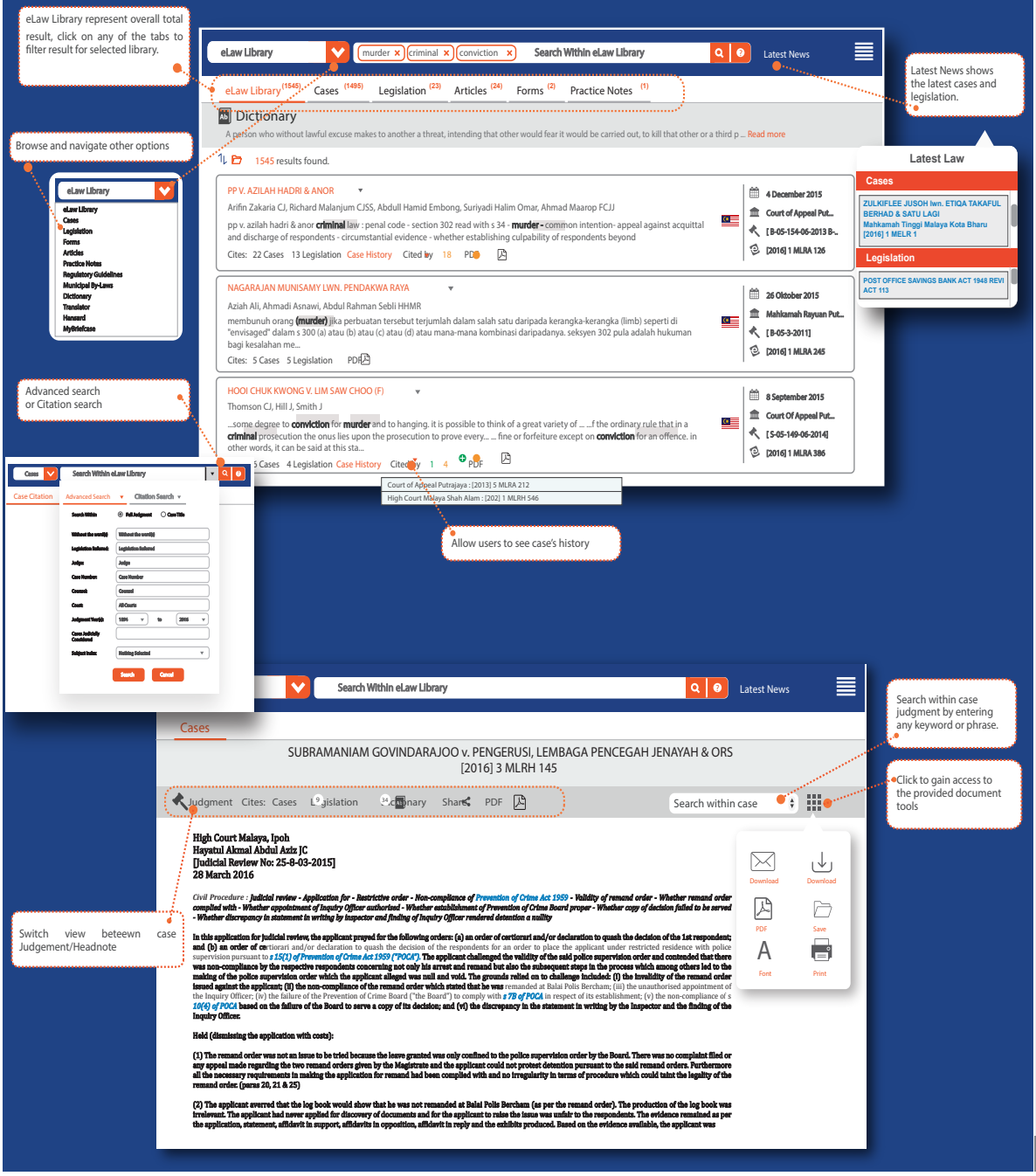

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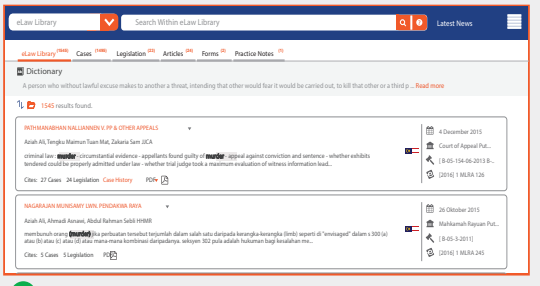

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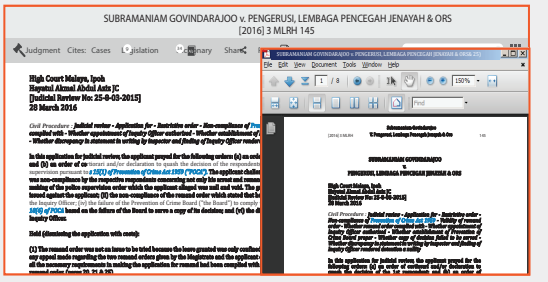

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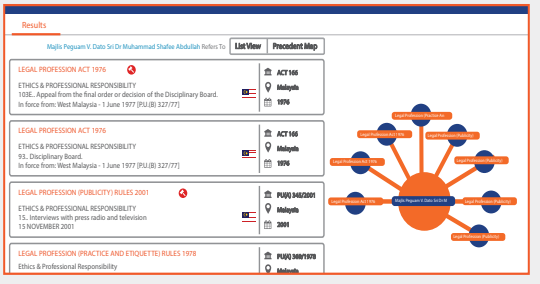

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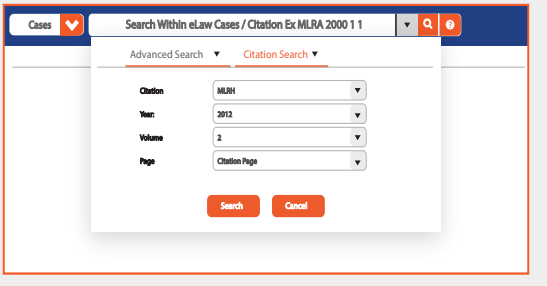

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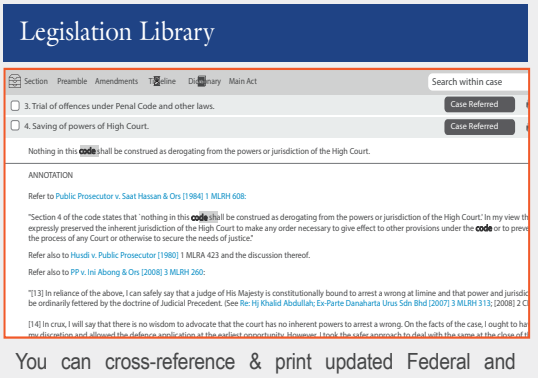

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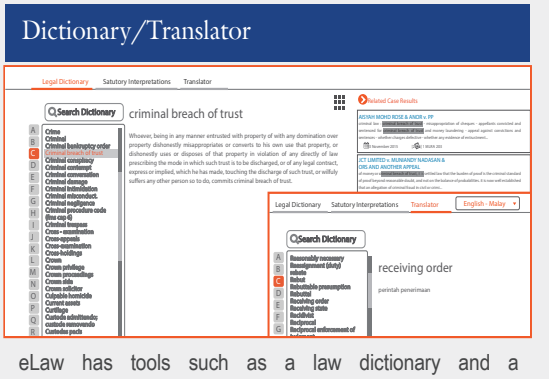

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