JADE HOMES SDN BHD

v.

SIVANANTHAN KRISHNAN

Federal Court, Putrajaya
Abang Iskandar Abang Hashim CJSS, Mohd Zawawi Salleh, Zabariah Mohd Yusof FCJJ
[Civil Appeal No: 02(f)-71-09-2019 (B)]
16 June 2021

Building And Construction Law: *Building plans — Conditions — Interpretation — Dispute based on interpretation of condition in approved building plan and development order — Whether such disputed condition ought to be interpreted in simple and straightforward manner and given a plain literal meaning — Whether Court of Appeal erred in construing the condition*

Civil Procedure*: Appeal — Appeal to the Court of Appeal — Facts, finding of — Intermediate appellate court reversing findings of facts made by trial court without impeaching such findings — Whether grave and fundamental error by intermediate appellate court — Whether such decision of intermediate appellate court warranted appellate interference by apex court*

Evidence*: Expert evidence — Non-experts — Opinions of non-expert persons having experience in certain fields — Circumstances when such non-experts allowed to give their opinions in court — Nature of such evidence — How courts ought to determine whether to accept such evidence — Evidence Act 1950, s 49*

Evidence: *Expert evidence — Non-experts — Opinions of non-expert persons having experience in certain fields — Evaluation by court of such evidence — Opinions of local authority's officers involved in building construction — Opinions sought in relation to condition stated in building approval/development order — Whether appellate court failed to give sufficient weight to such officers' evidence — Evidence Act 1950, s 49*

The plaintiff had purchased a property from the developer defendant ("the defendant"). Even after taking possession of the property, the plaintiff could not physically occupy the property due to alleged material defects in the construction of the property. The plaintiff claimed that the defendant failed or refused to rectify the alleged defects by failing to build a "Reinforced Concrete Wall" ("RC wall") at the slope bordering the boundary between his lot and his neighbour's lot at the back of his property. The plaintiff claimed that the building of the RC Wall was as required under Condition 8 of Annexure F ("Condition 8") of the Approved Building Plan/Development Order ("DO") issued by the MPKJ ("MPKJ"). The plaintiff averred that instead of constructing an RC Wall as required under the DO, the defendant had merely constructed a rubble wall to protect the stability of the adjoining property. The plaintiff alleged that the construction of the rubble wall by the defendant was essentially costs driven. The plaintiff also alleged that the defendant had failed and/or neglected to abide by its own undertaking to construct the RC wall on the slope of the plaintiff's property. The plaintiff's case was that the defendant's failure to construct the RC wall had caused water and sediment to flow into the plaintiff's property every time it rained and the plaintiff and his family were deprived of the full use and enjoyment of the property especially the wet kitchen area. The plaintiff thus sued the defendant in the High Court for breaching Condition 8 of the DO and sought various reliefs. The defendant in its defence pleaded that: (i) it had complied with the conditions attached to the approved DO; (ii) the requirement of an RC Wall under Condition 8 of the DO only applied to a platform level where there was an immediate vertical drop exceeding 1200mm; (iii) there was no immediate vertical drop between the slopes at the plaintiff's property and the neighbouring lot that required construction of an RC wall; and (iv) the defendant was under no obligation to construct an RC Wall as the rubble wall was in accordance with the approved DO issued by the MPKJ. The defendant also counterclaimed against the plaintiff. The High Court decided the plaintiff's suit in the defendant's favour but dismissed the defendant's counterclaim. The plaintiff appealed to the Court of Appeal which allowed his appeal with costs. The defendant obtained leave to appeal to the Federal Court. The main issue between the parties concerned the construction of the rubble wall instead of an RC Wall. The drawings submitted by the defendant and approved by the MPKJ ("Approved Drawings") provided for a "slope and rubble wall" ("rubble wall") to be built for units comprising the plaintiff's property whereas Condition 8 of Annexure F to the DO issued by the MPKJ required a RC Wall, which was different than a rubble wall in that an RC Wall required steel, concrete and surrounding excavation. Thus the defendant contended that it had built the rubble wall in accordance with the Approved Drawings and building plans and that Condition 8 could not be considered in isolation of the documents relevant to the Approved Building Plans and related correspondences. The defendant submitted that the Court of Appeal erred when it adopted a literal interpretation of Condition 8 Annexure 8 of the DO without considering all the other evidence under s 49 of the Evidence Act ("EA"). The defendant also submitted that the Court of Appeal erred in choosing to consider the evidence of PW2 over DW5 under s 45 of the EA.

Held (allowing the defendant's appeal with costs):

(1) The defendant as developer was obliged to seek Building Plans Approval from the Local Authority before proceeding with the development of any project — including the plaintiff's property. This was in line with s 70 of the Street, Drainage and Building Act 1974 ("SDBA") and the Uniform Building By-Laws 1984. The construction of any building had to comply with the Building Plans approval issued and any amendments to such plans had to be resubmitted to the Local Authority for approval. Section 70 of the SDBA imposed a duty and authority upon MPKJ which covered the entire process from the submission of building plans for approval until completion of construction. (paras 61-63)

(2) In the defendant's housing development in the instant case (Jade Homes), the MPKJ had issued various letters confirming the defendant's compliance with the Approved Building Plans. In response to the plaintiff's complaints, the MPKJ had also confirmed that there was no requirement for an RC Wall to be built at the boundary of the plaintiff's lot with his neighbour. Such decisions of MPKJ were decisions of the Local Authority pursuant to s 70 of the SDBA and Part II of the Selangor Uniform Building By-Laws (SUBB 1986). The plaintiff's own expert witness — PW2 — agreed that the MPKJ had the final say. (paras 64-65)

(3) There was a difference between the evidence of a person that was based on his special knowledge and expertise within the meaning of s 45 of the EA and persons who were not experts but have had experience in certain fields. Non-experts were allowed to give their opinion on certain areas in court as enumerated under s 49 of the EA. Non-experts were people that did not have to be regarded as professional experts by the court in such areas, as stated under ss 47, 48, 49 and 50 of the EA. These exceptions allowed for opinions of persons experienced in certain fields to assist the court in arriving at a decision in a case in a fair and just manner. In determining whether to accept the opinion of certain persons (non-experts) in certain areas/fields, the court would also look into how the particular witness formed his or her opinion and the basis for such opinion. Such opinion could not be by a bare assertion. (paras 69, 70 & 77)

(4) A sensible and a reasonable interpretation of Condition 8 was that, an RC Wall was only required when two platforms with a level difference exceeding 1200 mm were immediately adjacent to each other. Condition 8 was one of the many general conditions set out by the various Departments in MPKJ, which was attached to the Letter of Approval by MPKJ when it issued the Building Approval to developers for the construction of the project. (para 81)

(5) The Court of Appeal had failed to evaluate the evidence of DW5 and DW7 under s 49 of the EA and had failed to give sufficient weight to the "usage of a body of men" or "meaning of words and terms used by a class of people having special means of knowledge" — namely the Local Authority's Officers (officers from MPKJ), and those involved in the construction industry. The Court of Appeal did not evaluate the evidence of DW5 and DW7 at all, save and except in saying that Condition 8 was simple and straightforward and should be given its plain literal meaning, giving preference to the interpretation by PW2. In accepting the interpretation as suggested by PW2, the Court of Appeal failed to address the apparent contradiction between the Building Plans Approval and Condition 8, when both were issued by MPKJ. The Court of Appeal took a simplistic view when it agreed with the evidence of PW2 that the words used in Condition

8 were simple and straightforward. The totality of the evidence from DW5, DW6 and DW7 showed the conduct and practices of the Local Authority and the people in the construction industry. DW5 and DW7 were privy to the practices and usages of the Local Authority. Section 49 of the EA was applicable in those circumstances as it involved the opinion and practices of the Local Authority and its officers (DW7), given to the meaning and the terms used by that particular class of people (DW5, DW6 and DW7), namely the construction of Condition 8 of Annexure F which was attached to the Building Plans Approval. Those in the construction industry and the Local Authority must be considered a particular class of people and evidence detailing the practice and the procedure and the language that they use attest to that, rather than any literal interpretation. (paras 89, 90 & 115)

(6) The opinion evidence of persons having special knowledge must not be a repetition of hearsay evidence but must be based on his or her own opinion. In the instant case, DW7 gave evidence from his own personal knowledge and on the practices of his Department in issuing Condition 8. It could not be said that DW7 was not an independent witness and his evidence could not amount to hearsay. There was also no merit that DW7's evidence was contradictory to the evidence of the other expert witness — PW2. The Court of Appeal ought to have considered and given substantial weight to the evidence of DW5 and DW7 as evidence under s 49 of the EA to conclude that Condition 8 did not affect the Approved Drawings which depicted the slope and rubble wall at the boundary between the plaintiff's property and his neighbour. There was no contradiction between Condition 8 and the Approved Building Plan issued by the MPKJ on the construction of the slope and rubble wall. (paras 94, 95, 96 & 99)

(7) The defendant did canvass the applicability of s 49 of the EA and s 70 of the SDBA although it was never addressed in oral arguments before the Court of Appeal. However, the Court of Appeal did not deal with the issue of s 49 of the EA at all in its grounds although it was addressed by the defendant in its submission. In any event, leave had been granted by the Federal Court in relation to s 70 of the SDBA and s 49 of the EA and as such it was not for the court to revisit the merits of the granting of such leave or the relevance of those two provisions at the hearing stage. (paras 102-103)

(8) An appellate court should not interfere with the factual findings of a trial judge, save and except where the decision of the trial judge was "plainly wrong" where in arriving at the decision it could not reasonably be explained or justified and was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid categories, it is irrelevant, even if the appellate courts think that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge. In the instant case, the Court of Appeal failed to appropriately determine whether the trial judge had gone plainly wrong in her findings, ie that the trial judge's could not be reasonably explained or justified and was one which no reasonable judge could have reached. The Court of Appeal had reversed the conclusions on the findings of facts by the trial judge without impeaching such findings. There had been a grave and fundamental error made by the Court of Appeal in its failure to correctly apply the principles governing the review of findings by the appellate courts. This was sufficient to warrant appellate interference. (paras 104, 124, 125, 126 & 127)

(9) The first question ought to be answered in the affirmative. The second question was fact sensitive and the Federal Court would decline to answer it. The appeal ought to be allowed with costs and the decision of the High Court reinstated. (paras 128-129)

Case(s) referred to:

Armoogum Chetty v. Lee Cheng Tee [1868] 1 Ky 181 (refd)

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

Garuradhwaja v. Saparnadhwaja 27 1A 238:23 A 37: 5 CWN 33 (refd)

Gregory v. Christie (BR Tr 24 G III) (refd)

Leong Wing Kong v. Public Prosecutor [1994] 2 SLR(R) 681 (refd)

Mc Graddie v. Mc Graddie [2013] WLR 2472 (refd)

Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors [2013] 2 MLRA 598 (refd)

Ng Hooi Kui & Anor v. Wendy Tan & Ors [2020] 6 MLRA 193 (refd)

Pacific Tin Consolidated Corporation v. Hoon Wee Thim [1967] 1 MLRA 465 (refd)

Public Prosecutor v. Lee Ee Teong [1953] 1 MLRH 608 (refd)

Raphael Pura v. Insas Bhd & Ors [2002] 2 MLRA 349 (refd)

Reg v. Lim Chin Shang [1956] 1 MLRH 389 (refd)

Sim Ah Song & Anor v. Rex [1951] 1 MLRH 448 (refd)

Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Berhad & Another Case [2018] 1 MLRA 263 (refd)

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications [2012] 5 MLRA 618 (refd)

Legislation referred to:

Evidence Act 1950, ss 45, 47, 48, 49(c), 50, 51, 98

Street, Drainage and Building Act 1974, s 70(3), (4), (5), (6)

Uniform Building By-Laws 1984, s 10, 12(2)

Counsel:

For the appellant: Gopal Sreenevasan (Ng Siau Sun & Loi Kin-Hoe with him); M/s Sun & Michele

For the respondent: Sri Dev Nair (Ramesh Kanapathy, Shamala Selvarajah & Pang Li Xuan with him); M/s Chellam Wong

JUDGMENT

Zabariah Mohd Yusof FCJ:

A. Introduction

[1] This is the appeal by the appellant/defendant against the decision of the Court of Appeal (COA). The COA allowed the appeal of the respondent/ plaintiff and set aside the decision of the learned trial judge, who decided in favour of the appellant/defendant.

[2] In this judgment, parties will be referred to as they were in the High Court.

[3] The Federal Court had granted leave to the defendant for the following questions of law:

> "1. Whether the court, in interpreting the meaning of particular directions or conditions issued by a local authority in the exercise of its statutory power under s 70 of the Street, Drainage and Building Act 1974, is in fact forming an opinion as to usages of any body of men or meaning of words used by particular classes of people, having regard to s 49 of the Evidence Act 1950 and as such the court is entitled to rely on the opinions of persons having special means of knowledge.
>
> 2. If Question 1 is in the affirmative, whether the court in assessing opinion evidence should give more weight to opinion evidence under s 49 Evidence Act 1950 than evidence under s 45 Evidence Act 1950."

B. Background

[4] By a Sale and Purchase Agreement (SPA) executed in March 2012, the plaintiff and his son purchased 2½-storey Quad Villa held under HS (D) 156356 PT 75801, Pekan Kajang (the property) from the developer, the defendant. Initially the plaintiff sued two defendants, namely the developer and the Majlis Perbandaran Kajang (MPKJ). However, the plaintiff has since withdrawn his action against MPKJ. Therefore all references to "defendant" herein is to the developer which is Jade Homes Sdn Bhd.

[5] Although the plaintiff took possession of the property on 29 June 2013, he could not physically occupy the property due to some alleged material defects in the construction.

[6] The plaintiff claims that the defendant failed and/or refused to rectify the defects when it failed to build a "Reinforced Concrete Wall" (RC Wall) outside the property at the slope bordering the boundary between his lot and his neighbour at the back of the property. The plaintiff asserts that the building of the RC Wall was a requirement under Condition 8 Annexure F (Condition 8) of the Approved Building Plan/Development Order (DO) issued by the Local Authority, MPKJ dated 24 December 2010.

[7] The plaintiff further avers that instead of constructing the RC Wall as mandatorily required according to the Approved Building Plan, the defendant merely constructed a three-feet high rubble wall on the slope to protect the stability of the adjoining property. The plaintiff alleges that the construction of the slope and rubble wall by the defendant was essentially costs driven (according to their own architect, DW6's evidence).

[8] The plaintiff also alleges that the defendant has failed and/or neglected to abide by their own undertaking to construct an RC Wall for the slope on the plaintiff's property. The undertaking which was referred to, by the plaintiff is the Letter of Undertaking in B1 12-14 which was issued by the defendant to MPKJ which essentially states that:

> "...saya/kami berjanji bahawa saya/kami bersetuju melepaskan dan menanggung rugi MPKJ daripada segala tuntutan, tindakan, penalty, tuntutan kos, pembayaran, perbelanjaan dan permintaan berkaitan dengan pembinaan CERUN (SLOPE) dan TEMBOK PENAHAN (REINFORCED CONCRETE WALL) di atas tanah milik saya tersebut."

[9] According to the plaintiff, the construction of the three-feet high rubble wall on the slope at the boundary between the plaintiff's property and his neighbour, had caused water and sediment to flow into the plaintiff's property every time it rains and the plaintiff and his family is deprived of the full use and enjoyment of the property especially the wet kitchen area.

[10] In the amended Statement of Claim, the plaintiff claimed that despite several enquiries, the defendant:

(a) failed to give any confirmation as to whether the RC Wall will be constructed in accordance to the requirements of the Approved Building Plan and/or DO;

(b) failed/or neglected to comply with the Approved Building Plan to construct the RC Wall; and

(c) failed/or neglected to issue the Certificate of Completion and Compliance (CCC) to the unit which was sold to the plaintiff as per the terms and conditions of the SPA.

The defendant's failure to construct the RC Wall had caused hardship to the plaintiff and his family.

[11] The plaintiff filed claims in the High Court against the defendant for breaching Condition 8 of the Approved Building Plan and/or DO and sought, *inter alia*, for the following reliefs:

(i) A declaration that the construction of the rubble wall without a supporting RC Wall by the defendant has encroached upon the plaintiff's land and prevented the plaintiff from enjoying full usage of the land and the Property;

(ii) A declaration that the construction of the property and the rubble wall constructed by the defendant was not in accordance with the Approved Building Plan and/or DO that was approved by the Local Authority, MPKJ;

(iii) An order that the defendant removes the existing rubble wall and slope on the plaintiff's property and further constructs an RC Wall on the Property for the full height of the slope within three months of the Order of the court;

(iv) In the alternative, an Order that the defendant constructs and builds the RC Wall in accordance with the approved Building Plan and/or any undertaking given by the defendant to MPKJ; and

(v) General damages to be assessed for the damage and for the inconvenience caused.

[12] The defendant in its defence states that it did comply with the conditions attached to the Approved Building Plan and/or DO and that the requirement of an RC Wall as required under Condition 8 of the Approved Building plan and/or DO applies only to platform level where there is an immediate vertical drop of land exceeding 1200 mm.

[13] As there is no immediate vertical drop between the slope at the property of the plaintiff and the neighbouring lot, the defendant is under no obligation to construct the RC wall and the use of the three-feet rubble wall was in accordance with the Approved Building Plan and/or DO issued by MPKJ.

[14] The defendant contends that the plaintiff's claim and complaint are baseless and a sham with an ulterior motive to compel the costs and risk beyond the ambit of the agreed SPA. Essentially, what the plaintiff wanted was for the defendant to remove the slope which is on the plaintiff's land at the defendant's expense.

[15] The defendant filed counterclaims against the plaintiff and contends the following:

(i) Since the plaintiff took vacant possession of the property in June 2013, he made various different complaints of the slope and the rubble wall;

(ii) Despite the defendant's offer on goodwill to solve the alleged problems of the slope and the rubble wall, the plaintiff insisted that the defendant remove the slope and the rubble wall,

and that the action by the plaintiff is an abuse of process and has caused the defendant's loss and damage. As a result, the defendant claims for general damages to be assessed, interests and costs.

C. Proceedings At The High Court

C.1. Issue On Condition 8 Of The DO/Approved Plan

[16] It is the plaintiff's case that:

(a) Condition 8 requires to have a site RC Wall for platform level which has a difference in level between platforms exceeding 1200 mm; and

(b) As the platform levels between the property and the neighbouring lot exceeds 1200 mm, RC Wall ought to have been built by the defendant.

[17] The learned trial judge considered the evidence of the expert witness of the plaintiff, namely PW2 and also the witnesses of the defendant's namely DW5, DW6 and DW7.

[18] According to PW2, there is a difference between the two platform levels between the plaintiff's lot and his neighbour of 3.5 meters (3500 mm) and thus an RC Wall is required because there is a difference of more than 1200 mm, which is as stated in Condition 8.

[19] However, DW5, a professional engineer practicing in YL Consultancy Services, explained that, to construe Condition 8 as suggested by PW2 would result in Condition 8 (which requires an RC Wall to be built) contradicting with the Approved Building Plan (which indicates that a slope and rubble wall is to be built). Both Condition 8 and the Approved Building Plan were issued by MPKJ. It does not make sense for MPKJ to issue Condition 8 which contradicts with the Approved Building Plan.

[20] DW5 said that Condition 8 should not be read in its plain language but in the engineering context. He said that Condition 8 would only be applicable when two platform levels are adjacent to each other (next to each other), where the height could be readily measured. Unlike the platform levels at the plaintiff's lot and the platform level of his neighbour, where they are distance apart. In such situation, the height cannot be readily measured. Hence the slope and rubble wall were approved by MPKJ to address the situation. If MPKJ had wanted them to build an RC Wall, they would not have approved the Building Plans and the Drawings which depicted the slope and the rubble wall.

[21] DW5's evidence was supported by the evidence of DW6, who was the architect with Akitek KDI Sdn Bhd who said that Condition 8 only applies to adjacent platforms and the building plan depicts a slope and rubble wall, which was approved by MPKJ.

[22] DW7, a director in Bahagian Kawalan Bangunan, MPKJ at the material time, who issued Condition 8, said that Condition 8 is only meant to apply to structures inside of buildings and not outside of buildings. Structures outside buildings are matters within the jurisdiction of the Engineering Department of MPKJ. His department is only concerned with structures inside buildings. Hence, Condition 8 of Annexure F which he issued is not meant to be applicable to the slope between the plaintiff's lot and his neighbour which is outside the property.

[23] The learned trial judge found that PW2 also agreed that when MPKJ issued the letter of approval, it showed the slope and rubble wall and there is no requirement in the Approved Building Plans, that an RC Wall should be built. PW2 agreed that if MPKJ had wanted an RC Wall to be built at the boundary, MPKJ would have asked the developer to change the drawings and issued an approval for the RC Wall. But in this case there is no such approval by MPKJ.

[24] After analysing the evidence of the witnesses of the plaintiff and the defendant, the learned trial judge ruled that the interpretation of Condition 8 as accorded to by the defendant is to be preferred, as to hold otherwise, would lead to a situation where the Approved Building Plan and/or DO issued by MPKJ would be negated.

C.2. Letter of Undertaking

[25] The learned trial judge found that the Letter of Undertaking in B1 12-14 issued by the defendant to MPKJ is a standard letter required by MPKJ for all projects during or before the application of CCC.

C. 3. Issue Of Cost Saving

[26] On the issue that the defendant did not build the RC Wall to save costs, the learned trial judge ruled that this was certainly a consideration but not the sole one. The primary consideration being that Condition 8 did not apply to the boundary outside the property where the rubble wall was built.

D. Proceedings At The COA

[27] Aggrieved, the plaintiff and the defendant appealed to the COA.

[28] The focus of the COA hinged on the interpretation of Condition 8 of the approved letter dated 24 December 2010 issued by MPKJ and whether the defendant breached Condition 8.

[29] The COA held that the learned trial judge erred when Her Ladyship adopted and accepted the evidence of the defendant's witnesses, DW5 and DW6 who said that the interpretation of Condition 8 "... requires the addition of the word "adjacent" and concluded that Condition 8 refers to a wall to address the difference in levels and that the meaning of platform would mean two adjacent platforms".

[30] The panel of the COA agreed with PW2 that the words used in Condition 8 are simple and straightforward, that is, if the level between the two platforms is higher than 1200 mm, an RC Wall must be built.

[31] The COA was of the view that nowhere does it state in Condition 8 that it only applies to adjacent platforms as suggested by DW5 and DW6. The COA in its grounds said that DW7 who was the Superintending Officer for the project confirmed in oral evidence that the level difference between the properties exceeded 1200 mm (Actually it is DW6 who is the Superintending Officer of the project, not DW7). DW7 was the former Director of Bahagian Kawalan Bangunan, MPKJ at the material time, who issued Condition 8 of Annexure F as can be seen from the notes of proceedings.

[32] The COA said that, even assuming Condition 8 is vague and applies to adjacent platform as suggested by DW5, the defendant did not seek any clarification from MPKJ but instead chose to interpret Condition 8 according to their own considerations and ignored completely the conditions imposed by MPKJ.

[33] Evidence also showed that the defendant's consideration was essentially costs driven.

[34] Further, by a Letter of Undertaking dated 3 May 2013, issued after the approval and after the MPKJ confirmed the level difference of the plaintiff's platform and that of his neighbour's is 3500 mm, the defendant undertook to be fully responsible in respect of the design and construction of the slope and to comply with all conditions imposed by MPKJ.

[35] The COA opined that, as there was a divergence of view between the expert reports of DW5 and PW2, it is incumbent upon the learned trial judge to weigh carefully the evidence and accept if necessary the most reliable parts in forming its decision (*Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors* [2013] 2 MLRA 598). The COA said that the learned trial judge failed to give her reasons as to why she preferred the evidence of the defendant's expert witness, DW5, hence the learned trial judge erred.

[36] Therefore premised on the contemporaneous evidence, both oral and documentary, the COA held that an RC Wall must be built instead of a rubble wall in view of the undisputed height difference of more than 1200 mm. The plaintiff is entitled to require the defendant to deliver the property under the SPA, according to the approval of MPKJ.

[37] The COA allowed the appeal, in particular prayers 25(iii) & (iv) of the Statement of Claim with costs and general damages to be assessed by the High Court.

[38] A sum of RM100,000.00 awarded for costs here and below subject to payment of allocator and deposit to be refunded.

E. Proceedings At The Federal Court

[39] Dissatisfied with the COA's decision, the defendant appeals to the Federal Court. Leave to appeal was granted on 21 August 2019 by the Federal Court panel premised on the two questions as set out at para 3 of this judgment.

E.1. Notice Of Motion (Encl 16)

[40] At this juncture, we need to mention that the defendant, vide encl 16, had filed an application for an Order that the defendant be granted leave to admit the Expert Opinion Report on Reinforced Concrete Wall at Lot Boundary of Unit QV 568 (Report No CMKS/P1902911GEO/01/RO) dated 15 May 2019 by Cheah Siew Wai at the hearing of the main appeal. This was opposed by the plaintiff.

[41] However, it was intimated to us by the defendant's counsel that the defendant will not be proceeding with the said application in encl 16 in the event that this court allows the main appeal. Hence, it was agreed that this court proceed with the hearing of the main appeal first before dealing with the hearing of encl 16. We, therefore, proceeded to hear the main appeal without hearing encl 16 first.

E.2. Submission By The Defendant

[42] The crux of the defendant's submission is that the COA erred in evaluating expert evidence under s 45 of the Evidence Act 1950 (EA) and not s 49 of the same and failed to give sufficient weight to the "usage of a body of men" or "meaning of words and terms used by a class of people having special means of knowledge" namely, officers from MPKJ and those involved in the construction industry.

[43] It is established through the evidence of the witnesses from the plaintiff and the defendant (namely PW2, DW5, DW7) that if the Local Authority (in this case MPKJ) required any amendment to the drawings, its practice and procedure is to request the developer to resubmit a new set of drawings with the required amendments.

[44] What is undisputed is that the approved drawings by the Local Authority contained the slope and rubble wall and did not provide for an RC Wall at the boundary between the plaintiff's lot and the neighbour's lot.

[45] It is submitted by the defendant that the local authority follows a particular practice when considering and giving approvals. Such practice, if ignored may lead to misunderstanding and misinterpretation of the Local Authority's approvals, in this context Condition 8.

[46] This is where s 49 of the EA upon which two questions for leave were granted by this court, is relevant. These two questions relate to whether a court, in assessing the meaning of these approvals by the Local Authority, should rely on:

(i) a particular usage of a body of men; or

(ii) the meaning of words and terms used by a particular class of people

namely those in the trade, as provided for in s 49 of the EA, or whether a literal interpretation should be levied upon the approvals.

[47] Learned counsel for the defendant submitted that the evidence of the conduct of local authority and developers, read together with s 49 of the EA lends towards the court giving effect to the usage of the body of men on the meaning of the words (in Condition 8) used by that particular class of people rather than any literal interpretation.

[48] The dispute between the parties in this appeal turns upon the fact that the set of drawings submitted by the defendant and approved by the MPKJ (Approved Drawings) provided for a "slope and rubble wall" to be built for units comprising the cluster in which the plaintiff was a purchaser. Under the Approved Drawings, the slope was to be reinforced by a wall built using a technique known as rubble pitching, which involves using cemented rubble to reinforce the slope.

[49] The main contention between the parties lies in Annexure F to the letter of approval dated 24 December 2010 from the MPKJ which contained many general conditions. One of which is that, if there is a difference in platform levels that exceeds 1200 mm, then an RC Wall has to be built. This is Condition 8 of Annexure F. RC Wall is different from a "slope and rubble wall", in that it requires steel and concrete and excavation into surrounding areas.

[50] The defendant's stand is that in accordance with the practice of the Local Authority, namely, as the Approved Drawings by MPKJ provides for the "slope and rubble wall", the slope and rubble wall is the approved design, which should be constructed. Hence the defendant built the "slope and rubble wall", which was according to the Approved Building Plans.

[51] It is the defendant's case that Condition 8 (which requires for the RC Wall to be built) cannot be considered in isolation of the documents relevant to the Approved Building Plans and related correspondences. The letter of approval of the Building Plans submitted by the defendant through its architect, Arkitek KDI Sdn Bhd, had stated that the approval was subjected to the stipulated conditions. One of the conditions is to comply with the conditions of Jabatan Teknikal as attached in Annexures A, C, E, F, G and H. The relevant Condition 8 Annexure F stipulates:

> "8. Hendaklah mengadakan tapak dinding konkrit bertetulang bagi perbezaan aras platform yang melebihi 1200 mm"

[52] The defendant's witness, DW6 confirmed that the platform level difference at the affected area is 3.5 m (more than 1200 mm). However, DW5 said that the intent and the application of Condition 8 applies only to platform levels where there is an immediate vertical drop exceeding 1200 mm, which is not the case here, as the platform levels were distance apart and not immediate. The learned High Court Judge accepted the evidence of DW5.

[53] It is the submission of the defendant that the COA erred when it adopted a literal interpretation of Condition 8, Annexure F of the Building Approval/ Development Order dated 24 December 2010 of PW2 without considering all the other evidence including letters issued by MPKJ and the evidence of DW5 and DW7 under s 49 of the EA. DW7 came as director of MPKJ, who testified that Condition 8 of Annexure F (which his Department, the Building Department, prepared and issued to regulate the building structure, ie the house only), does not apply to the slope and rubble wall. Further the defendant submitted that the COA had erred in choosing to consider the evidence of PW2 over DW5 under s 45 of the EA as opposed to s 49 of the EA.

E.3. Submission By The Plaintiff

[54] In reply, the plaintiff submitted that the COA's judgment is based on findings of fact which do not warrant any appellate intervention and the proposed leave questions clearly do not arise from the facts as found by the COA and that this appeal is doomed to fail.

[55] It is the plaintiff's stand that it is accepted that the difference in platform levels between the plaintiff's and the neighbour's property exceeds 1200 mm. Hence Condition 8 prevails and that he is entitled to an RC Wall, instead of a "slope and rubble wall". Therefore an RC Wall is required to be built.

[56] Counsel for the plaintiff submitted that the core issue (which is the common agreed issue to be tried at the full trial before the High Court between the parties) deals with the interpretation/construction of terms in relation to the defendant's stringent obligation to comply with Condition 8 of the MPKJ's approval letter/DO dated 24 December 2010 read together with the approved building plans and the other related correspondences. It has got nothing to do with the purported questions of law proposed by the defendant.

[57] The plaintiff submitted that the COA had proceeded on the submissions of the parties premised on the evidence led by the parties and in consonance with the pleadings of the parties which resulted in judgment of the plaintiff. Section 49 of the EA was raised for the very first time by the defendant before the COA, even then, only in its written submissions but not in the oral arguments before the COA thus failing to establish before the COA or even in the High Court (by way of cogent evidence or even in the pleadings), their basis for saying that, the acknowledged practice of MPKJ to interpret the effect of the approved building plans and the special conditions including Condition 8 Annexure F, as the words/terms used "by particular classes of people within s 49 Evidence Act 1950".

[58] The plaintiff submitted that there is ample contemporaneous documents and evidence of technical experts and even DW7 supports the plaintiff's case that "the level difference between the property and the back of the neighbour's property exceeded 1200 mm" and hence the requirement that an RC Wall ought to have been built and not a rubble wall. Hence there is no role for "practice and usages" of MPKJ in the issuance of the Building Plan Approval/Development Order dated 24 December 2010 as all are based on contemporaneous documents, which means that there was no basis nor relevancy of s 49 of the EA to the peculiar facts of our case. Perhaps that may have been the reason together with failure to raise it before the High Court, for the defendant abandoning their arguments on s 49 of the EA.

[59] Given the aforesaid, the plaintiff submitted that this court should reject the application of s 49 of the EA to the case. It never was the central plank of the defendant's case in the COA and in any event the aforesaid section is inapplicable because DW7 was not an independent witness and that the other expert witness (PW2) contradicted the evidence of DW7. The plaintiff also submitted that the High Court did not go into s 70 of the SDBA and nowhere did the High Court held that the plaintiff was wrong and that in accordance with the usual practice of the Local Council, the Approved Drawings prevail.

[60] The plaintiff's expert PW2, prepared his report dated 21 November 2016 based on relevant plans, documents and after inspecting the property. In his report he stated that premised on the drawings and the plans the difference in platform levels between the plaintiff's Property and that of his immediate neighbour is 3500 mm. Hence PW2 was of the view that an RC Wall is required to be built. It was emphasised that PW2 did a physical inspection of the site as compared to the expert by the defendant DW6, who never went to the site for inspection of the affected area.

H. Our Decision

H.1. Section 70 of the Street, Drainage And Building Act 1974 (SDBA) And The Law On Building Plans Approval

[61] Being a developer, the plaintiff is obliged to seek for Building Plans Approval from the Local Authority before proceeding with development of any project (which include the property which the defendant had purchased). This is in line with the provision of s 70 of the SDBA, which is the governing statute for buildings in Malaysia.

[62] Building Plans Approval is also governed by the Uniform Building By-Laws 1984 which requires details to be provided in the drawings that form part of the application for the Building Plans Approval (refer to By-Laws 10 of the Uniform Building By-Laws 1984 (UBBL)). By-Law 12 (2) provides that:

> "(2) when a building has been approved in principle, plans in accordance with By-laws 3 to 10 and 14 to 16 shall be submitted and approved before erection of the building in principle may be commenced."

Part II of Selangor Uniform Building By-Laws (SUBB 1986) also spelt out the procedure for building plan approval which is applicable to Jade Hills Development.

[63] The above provisions show the primacy of the Building Plans Approval before any commencement of construction of any building. Construction of any building must comply strictly with the Building Plans Approval issued. If there is to be any amendments to the Approved Building Plans, such amendments must be resubmitted to the Local Authority for approval (ss 70(5) and 70(6) of the SDBA). Section 70 of the SDBA imposes a duty and authority on MPKJ which covers the entire process, from submission of building plans for approval until completion of construction.

H.2. The Application Of Section 70 of the SDBA

[64] MPKJ is the authority entrusted with the duty to monitor and control the development of construction under the SDBA. With regards to Jade Homes development, MPKJ has issued various letters confirming the defendant's compliance with the Approved Building Plans, and also in response to the plaintiff's complaints, where MPKJ has also confirmed that there was no requirement for an RC Wall to be built at the boundary of the plaintiff's Lot with his neighbour. The letters are:

(i) dated 4 February 2013 and 21 May 2013 from Jabatan Kawalan Bangunan, MPKJ stating that based on their visit to the site, it confirmed that the slope and rubble wall is in accordance to the approved plan;

(ii) dated 21 June 2013 from the Engineering Department, MPKJ where it states that based on their site inspection on 29 April 2013, it was found that the infrastructure works are completed and in accordance to the approved plan for infrastructure. Based on such inspection the Engineering Department, MPKJ has no objection to the issuance of the CCC;

(iii) dated 3 March 2015 from the Engineering Department where it states:

> "4. Berhubungan keperluan tembok penahan jenis "RC Wall" di bahagian belakang cerun dan "rubble wall" tersebut, pihak Jabatan Kejuruteraan, MPKJ telah menyemak kelulusan pelan infrastruktur yang telah diluluskan dan didapati **tiada keperluan tembok penahan di kawasan tersebut kerana tiada perbezaan aras melebihi 1 meter, dimana cerun dan tembok penahan telah dibina."**

(iv) dated 11 May 2015 from the Engineering Department where it states:

> "3. Demikian juga berhubungan keperluan tembok penahan jenis "RC Wall" di antara sempadan rumah pengadu, Jabatan Kejuruteraan,

> MPKJ mengambil maklum bahawa perbezaan aras diantara kedua-dua lot adalah setinggi 3.750 meter (12.3 kaki). Walaubagaima pun, **rekabentuk tembok penahan dan cerun yang dibina di bahagian tersebut adalah mematuhi keperluan teknikal sebagai system penahan antara kedua-dua lot**."

[Emphasis Added]

[65] The acts (namely the inspection) and decisions (that it complied with the approved plans issued by MPKJ), are acts and decisions of Local Authority pursuant to s 70 of the SDBA and Part II of the SUBB 1986. From the aforesaid letters, it is confirmed by MPKJ that the defendant has complied with its requirement and that no RC Wall was required to be built at the boundary of the plaintiff's lot and his neighbour. What is pertinent is that PW2, the plaintiff's expert agreed that it is the MPKJ that has the final say.

H.3. The Law On Section 49 of the EA

[66] Apart from s 70 of the SDBA, the proposed questions also hinged on s 49 of the EA which provides that:

> "49. When the court has to form an opinion as to:
>
> (a) the usages and tenets of any body of men or family;
>
> (b) ....
>
> (c) the meaning of words or terms used in particular districts or by particular classes of people, the opinions of people having special means of knowledge thereon are relevant facts."

[67] This section deals with the relevancy of opinion of persons who have special means of knowledge on the matters stated in the aforesaid section.

[68] In this regard, it is the case of the defendant that the COA erred in law and fact when it gave a literal interpretation of Condition 8 of the Building Plan Approval dated 24 December 2010 and accepted the evidence of PW2, without giving judicial appreciation of:

(i) the evidence of the witnesses of the defendant's, especially DW5, DW6 and DW7; and

(ii) the various letters issued by MPKJ as mentioned in para 64 in this judgment, confirming the defendant's compliance with the Building Plan Approval,

such evidence being evidence under s 49 of the EA. The panel of the COA chose to consider only the evidence of PW2 and DW5, and considering them as evidence under s 45 as opposed to s 49 of the EA.

[69] There is a difference between the evidence of a person which is based on his special knowledge and expertise within the meaning of s 45 of the EA and persons who are not experts but has experience in certain fields. It is the norm that court relies on expert opinion on certain subjects to help it, in arriving at decisions of a particular case. However, non-experts are also allowed to give their opinion on certain areas as enumerated under s 49 of the EA. Non-experts are people that do not have to be regarded as professional experts by the court in these areas. These areas are stated under ss 47, 48, 49 and 50 of the EA. In the present context of our case, we shall just narrow it to s 49.

[70] Related to s 49 is s 51 of the EA, which states that:

> "Whenever the opinion of any living person is relevant, the grounds on which his opinion is based is also relevant."

Hence, in determining whether to accept the opinion of certain persons in certain areas/fields, the court would also look into how the particular witness formed his or her opinion and the basis for such opinion, which means that such opinion cannot be by a bare assertion.

[71] Illustrations of instances where s 49 of the EA was devised in arriving at a decision by the court can be found in an old case of *Sim Ah Song & Anor v. Rex* [1951] 1 MLRH 448, where the accused was arrested for assisting in carrying on a public lottery. The prosecution then called a police officer from the Gambling Suppression Branch as a witness who had three years of experience as an assistant to a lottery ticket promoter. The witness was called under ss 49 and 99 of the Evidence Ordinance then. The police officer gave a detailed account of how the lottery system works and the court accepted this.

[72] Section 49(c) must be read together with s 98 of the EA which provides that evidence may be given to show the meaning of intelligible or not intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense (See *Evidence, Practice and Procedure* by S. Augustine Paul). This proposition was also illustrated in the case of *Sim Ah Song & Anor v. Rex (supra)* where the witness therein explained the contents of slips of papers in the accused's hand which had writings of Chinese characters and symbols. The court was to determine whether any of the documents included "account, memorandum or record of stakes or wagers in or relating to a lottery so as to raise the presumption contained under s 9 of the Common Gaming House Ordinance (Cap 9)". Similarly in the case of *Public Prosecutor v. Lee Ee Teong* [1953] 1 MLRH 608, the court was faced with an appeal against a conviction for "assisting in carrying on a 1,000 character lottery". The court relied on the evidence of a police officer who was not an expert as envisaged under s 45 of the EA, but as an "expert" under s 49 of the EA to explain the contents of a document by explaining the technical and unintelligible terms contained in it. The relevant passages of the case which reads:

> "In cases of this type, the prosecution frequently and quite properly rely upon the evidence of detectives and other persons who by reason of their experience have special knowledge of methods of gambling. This sort of evidence is not, strictly speaking, the evidence of expert as that expression is used in the Evidence Ordinance and it is admissible not under s 45 but under ss 49 and 98 of that Ordinance. As regards its admissibility and its effect I would quote the following passage from the judgment of Sir John Beaumont, CJ (as he then was) in the Bombay case of *Harilal Gordhon v. Emperor* [1973] AIR Bom 385, 386:
>
>> 'It may be that under that section (49) a police officer might give evidence that he had had a long experience amongst people who indulged in satta gambling in a particular district, and from that experience, supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning'."

[73] Further in the Singapore Court of Appeal Case of *Leong Wing Kong v. Public Prosecutor* [1994] 2 SLR(R) 681 the court accepted the evidence of a police officer on habits of drug addicts in purchasing and consuming drugs, the officer being an officer of the Central Narcotics Bureau (CNB) who had more than 20 years of experience in the enforcement division of the CNB. The court held that:

> "18. We turn now to the prior question... Whether this was a situation where expert evidence within the meaning of s 47 of the Evidence Act was admissible. As far as is material to the present case, s 47 provides for the admission of expert evidence if the evidence covers an area of "science or art". The scope of the term has been widely construed and is not restricted to the subjects of pure science and art. Stephen Digest (art 49) states that the words should "include all subjects on which a course of special study or experience is necessary to the formation of an opinion". The court has a discretion to decide whether an issue is one of science or art and consequently whether expert evidence is admissible. However, it is difficult to categorise the practise of drugs users and suppliers as either science or art. To admit the evidence of ASP Lim by virtue of s 47 of the Evidence Act requires us to strain the meaning of the term "science or art". Instead, we would prefer to base the admissibility of ASP Lim's evidence on s 51 of the Evidence Act. Section 51 (a) provides:
>
>> 'Where the court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge thereon are relevant facts'."

[74] In *Reg v. Lim Chin Shang* [1956] 1 MLRH 389, in determining whether the respondent was a member of "the 108 Group", the court applies the principle as envisaged under s 49 of the EA, and accepted the opinion of persons having special knowledge in usages and practices of the "108 Group", although it was not stated expressly that the learned judge applied s 49 of the EA in arriving at the conclusion that an accused person was a member of the "108 Group" by reason of the fact that he had tattoo marks on his left and right arms. The court held that it was established by the evidence of a detective who had himself being the head of this secret society from 1946-1948. "He described in detail the various kinds of marks which members initiated into the society had tattooed on their bodies and said that the members of the society depended, not on a card of identification, but on these tattoo marks for the purposes of identifying themselves as members of the society".

[75] The same principle was also applied by the Federal Court in *Pacific Tin Consolidated Corporation v. Hoon Wee Thim* [1967] 1 MLRA 465 where the defendants had two large ponds situated on an inclined valley for the purposes of dredge mining operations. There was a large breach between the two ponds which caused a violent outflow of water from the higher pond and caused significant damage to life and property in the low lying lands adjacent to the ponds. The defendants had called experts to court to determine what caused the breach in the ponds and whether they had done all they could to prevent it. In examining the expert's opinion, the court had stated that:

> "...in all cases in which opinion is receivable, whether from experts or not, the grounds or reasoning upon which such opinion is based may be properly inquired into. Where the opinion of experts is based on reports of facts, those facts, unless within the expert's own knowledge must be proved independently."

This just shows how much the basis of the opinion of non-experts, but have specific knowledge on usages and certain fields is taken into account by the courts to ensure it isn't based on any fictional sources.

[76] There has been occasions that courts admit extrinsic evidence under the aforesaid section to show the meaning of a contract, as per Maxwell CJ in *Armoogum Chetty v. Lee Cheng Tee* [1868] 1 Ky 181 where the court had to determine a bond relating to sea voyage as to whether "a voyage from Singapore to Penang" means "a voyage from Singapore to Penang with liberty to call at Malacca". Although the case does not concern the direct application of s 49 nevertheless it is of relevance to our present context, at p 183:

> "The object of all exposition of written instruments is to ascertain the meaning and intention of the parties to them. This is, in general, accomplished by applying the rules of grammar to the words taken within ordinary and popular meaning. But if **words have acquired a peculiar meaning in any locality or trade, persons making a contract in or with reference to such locality or trade,** are presumed to use its language and also to intend to be bound by its usage, if either they belong to the place or trade, or **are acquainted with its language and usages**. Thus, it may be shown by extrinsic evidence that in a lease of a rabbit warren, "one thousand" rabbit mean, by the custom of the place, twelve hundred, that "days" mean "working days" in a bill of lading, and that "years" mean

> "seasons" in a theatrical engagement... So in construing policies, the known usage of trade has always been freely invoked. "To understand the policy," said Lord Mansfield in *Gregory v. Christie*, "you must refer to the course of trade to which it relates"..."

At p 184:

> "...and for this reason, that to establish a usage of trade, the evidence of men personally connected with the trade and who have acquired their knowledge of its usage not from hearsay but from experience, is required."
>
> [Emphasis Added]

[77] Hence, while a person's opinion (who is not an expert) is generally not admissible in court, the exceptions discussed above enables judges to have an understanding of an issue that is out of his or her expertise and would allow for opinions of persons experienced in certain fields to assist the courts to arrive at a decision on the case in a fair and just manner. Section 49 of the EA allows the admissibility of such opinions.

H.4. The Application Of Section 49 Of The EA To The Present Appeal

[78] The complaint by the plaintiff is founded upon his preferred interpretation of Condition 8 of Building Plans Approval. Upon a perusal of the Records of Appeal, it is common ground in the present appeal that:

(a) the construction of any building, must comply with the Building Plan which was approved by the Local Authority, in this case, MPKJ; and

(b) the Building Plans Approval by MPKJ shows and depicts the rubble wall at the boundary between the property of the plaintiff and the neighbour's lot.

Condition 8 which is attached to the Approved Building Plans stipulates:

> "8. Hendaklah mengadakan tapak dinding konkrit bertetulang bagi perbezaan aras platform yang melebihi 1200 mm.",

which essentially states that an RC Wall is to be built.

[79] At first blush, it appears that Condition 8 contradicts with the Approved Building Plans by MPKJ. The question is: how does one reconcile this apparent contradiction? It is illogical that the MPKJ would issue out Approved Building Plans and annexed to it, is Condition 8 which appears to be inconsistent with the Approved Building Plans.

[80] PW2, the expert witness from the plaintiff, on whose evidence the COA heavily relied on, could not explain why this was so and how to reconcile these contradictions, except to say changes or amendments can be done on site, which does not find favour with the learned trial judge.

[81] What can be discerned from the evidence of DW5 is that, one must construe Condition 8 in the Engineering context, not in its plain language. Reading Condition 8 in its plain language would result in absurdity for the following reasons:

(i) If one is to accept the interpretation of Condition 8 as suggested by PW2, it seeks to introduce to Condition 8, elements which were not present, eg the location of the RC Wall, the purpose of the RC Wall being an earth retaining wall, its alleged effect of requiring a replacement of the slope and rubble wall with the RC Wall; and

(ii) The development being located in a hilly area, the defendant is required to build an RC Wall between two platforms with height difference exceeding 1200 mm, no matter how far the two platforms are. This would result in the defendant having to remove any natural slope between such platforms, eg the two ends of a road, and replace it with an RC Wall, which renders the road unsafe.

In our view, such an interpretation cannot be the case. A sensible and a reasonable interpretation of Condition 8 is that, an RC Wall is only required when the two platforms with level difference exceeding 1200 mm are immediately adjacent to each other. Condition 8 is one of the many general conditions set out by the various Departments in MPKJ, which was attached to the letter of Approval by MPKJ dated 24 December 2010, when it issued out the Building Approval to developers for the construction of the project.

[82] The various departments in MPKJ which issued out the general conditions which came with the Letter of Approval are:

- Engineering Department - Annexure A
- Indah Water Konsortium - Annexure C
- Fire and Rescue Department - Annexure E
- **Building Department - Annexure F**
- Development Planning Department - Annexure G
- Solid Waste and Public Cleansing Management Department. - Annexure H

These general conditions stipulated in the *Annexures* are general requirements and shall be deemed to be applicable only if it is relevant for the project. The developer **is required to commence construction work in accordance with the Approved Drawings** within 12 months from the date of the Letter of Approval. [Emphasis Added]

[83] DW5 reiterated that where plans have been approved, such as in the case of Jade Homes, it means that all the details in the plans have been approved, and construction must follow accordingly. DW5 gave an example directly on point, which is the slope and the use of "rubble wall" as the retaining wall for the slope have been approved for Jade Hill's cluster Homes, as shown in Building Plan "Jenis RK-C & RK-D-Pelan Tingkat Bawah" No Lukisan AKDI-1165-10-A-RK-101a.

[84] This practice of the Local Authority as established via evidence of DW5 (Tu Yong Eng) was not disputed and is in line with the procedure set as out in s 70(3), (4), (5) and (6) of the SDBA which provides as follows:

"70(1) ...

(2) ....

(3) No plans for the erection of a building shall be approved-

(a) ...

(b) ...

(c) before any other conditions which the local authority may deem necessary to impose have been complied with.

(4) The local authority may give written directions to the principal submitting person or submitting person with regard to any of the following particulars-

...

(5) **The principal submitting person or submitting person to whom any written directions are given shall amend the plans and specifications accordingly and re-submit the amended plans and specifications within such period as the local authority may specify.**

(6) Where such amended plans are not re-submitted within the specified period, or such extended period, they shall not be reconsidered and shall be deemed to have been withdrawn but he may submit fresh plans and specifications."

[Emphasis Added]

DW5 who has more than 20 years of experience in the civil and structural work as well as project management since 1988, provided his CV which was attached to his affidavit in encl 24. In fact the evidence of PW2 also echoed what was said by DW5 in evidence with regards to the practice and procedure in the Local Authority prior to the issuance of the approval of the building plans, save and except on the interpretation of Condition 8 of Annexure F.

[85] The Approved Drawings are pertinent and forms the primary document before commencement of any construction of a project. Whatever construction proceeded will be based on the Approved Drawings, which, relevant to our case, would be the construction of the slope and rubble wall between the boundary of the plaintiff's and the neighbour's property.

[86] The evidence of DW5 is supported by the evidence of DW6, who is an architect with Akitek KDI Sdn Bhd and also a Superintending Officer to the project in question. DW6 said that construction will have to abide by the Building Plans which had been approved by the Local Authority.

[87] On the interpretation of Condition 8, DW5 and DW6 said that Condition 8 only applies if the level of difference between two adjacent platform levels exceeds 1.2 m. It does not apply where the two platform levels are distance apart, as in the present case, because such platforms cannot be readily measured, unlike two platforms which are adjacent to each other.

[88] Apart from the evidence of DW5 and DW6, DW7, who is a former Director in the Building Department in MPKJ, whose Department was responsible in issuing Condition 8, said that the Building Department is only responsible for whatever structures inside the building. Anything outside the building, the responsibility lies with the Engineering Department of MPKJ. Hence, Condition 8 is not applicable to be imposed to the boundary between the plaintiff's lot and his neighbour, as that slope is outside the building. Anything outside of the building lies with the Engineering department, which is outside the scope of the Building Department in MPKJ.

[89] With respect, the COA failed to evaluate the evidence of DW5 and DW7 under s 49 of the same and failed to give sufficient weight to the "usage of a body of men" or "meaning of words and terms used by class of people having special means of knowledge" namely the Local Authority's Officer, officers from MPKJ and those involved in the construction industry. This relate to the two questions which were framed by the defendant for this court's consideration. In fact the COA did not evaluate the evidence of DW5 and DW7 at all, save and except in saying that Condition 8 is simple and straightforward and should be given its plain literal meaning, giving preference to the interpretation by PW2. In accepting the interpretation as suggested by PW2, the COA failed to address the apparent contradiction between the Building Plans Approval and Condition 8, when both were issued by MPKJ.

[90] The totality of the evidence from DW5, DW6 and DW7 show the conduct and practices of the Local Authority and the people in the construction industry. DW5 and DW7 are privy to the practices and usages of the Local Authority. We agree with the submission by the defendant's counsel that s 49 is applicable in these circumstances as it involves the opinion and practices of the Local Authority and its officers (DW7), given to the meaning and the terms used by that particular class of people (DW5, DW6 and DW7), namely the construction of Condition 8 of Annexure F which was attached to the Building Plans Approval. Those in the construction industry and the Local Authority must be considered a particular class of people and evidence detailing the practice and the procedure and the language that they use attest to that. Such evidence falls under s 49 of the EA which lends towards the court giving effect to the usage of the body of men or the meaning of the words (in Condition 8) used by that particular class of people rather than any literal interpretation.

[91] A reading of s 70 of the SDBA leads to the conclusion that the primary documents to be considered by the court is the Building Plan Approval by MPKJ which is to be considered together with the evidence under s 49 of the EA.

[92] In addition, the plaintiff had agreed that cls 12(4) and 13 of the SPA which he signed with the defendant was his acceptance of the description and plans in the Second Schedule and the mock up unit which he viewed before signing SPA, which showed the slope and rubble wall. Clauses 12(4) and 13 provides that:

> "12. (4) Where the Layout Plan of the housing development, including the said Lot, has been approved by the Appropriate Authority, no alteration to the layout Plan shall be made or carried out except as may be required or approved by the Appropriate Authority. Such alteration shall not annul the Agreement or be the subject of any claim for damages or compensation by or against any party to the Agreement except where the alteration to the Layout Plan results in a change of the land area or the built-up area.
>
> 13. The said building shall be constructed in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule and in accordance with the plans approved by the Appropriate Authority as in the Second Schedule, which description and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made without the prior consent in writing of the Purchaser except as may be required by the Appropriate Authority..."

The Second Schedule of the SPA which is at p 41 of encl 26 which shows the side elevation of the plan of the property depicting the slope at the back of the property.

[93] As to the bone of contention by the plaintiff on the non-independence of DW7; our view is that, firstly, DW7 was from the Local Authority's office and was involved in the preparation of Annexure F, secondly, we find that such was not the requirement of s 49 of the EA. The plaintiff's reliance to support his proposition on the requirement of independence of the defendant's witness if reliance is to be placed under s 49 of the EA, is the case of *Garuradhwaja v. Saparnadhwaja* 27 1A 238:23 A 37: 5 CWN 33, in misplaced. The court said as follows:

> "By s 49 when the court has to form an opinion *(inter alia)* on the usage of any family, the opinions of persons having special knowledge thereon are relevant. But it must be expression of independent opinion based on hearsay, and not mere repetition of hearsay."

[94] Clearly, the plaintiff's counsel had misinterpreted what the court has said in the case as nowhere did it say that opinions of persons having special knowledge has to be an independent witness. What it says is an opinion independent of hearsay that forms the basis of such opinion. The evidence from such witness must not be a repetition of hearsay evidence but based on his opinion. DW7 gave evidence which was from his personal knowledge and the practices of his Department in issuing Condition 8.

[95] DW7 is an officer of the Local Authority who was subpoenaed to give evidence. From the nature of his evidence it cannot be said that he is not an independent witness. He came from the office of the Local Authority explaining the process and practice of that particular office in issuing Condition 8 and the effect of the Approval given by the Local Authority of the Building Plans. His evidence cannot amount to hearsay.

[96] On the alleged contradictory evidence of DW7 with the evidence of the other expert witness (PW2), we found that it has no merits because:

(i) Annexure F were conditions issued by MPKJ's Building Department (refer to the notes of evidence at pp 66-67 encl 23);

(ii) The Building Department is in charge of the structures inside the building and the Engineering Department is in charge of structures outside the house. Condition 8 is therefore not applicable to structures outside the building; and

(iii) Despite Condition 8, the Approved Drawings cannot be changed by way of a mere "Syarat" in the Annexure F. The Approved Drawings required a slope and rubble wall and PW2 was not aware of any instructions from MPKJ to change the Approved Drawings which required the building of the slope and the rubble wall (refer to notes of evidence at pp 64-65, encl 23);

(iv) The Engineering Department that was in charge of the slope and the retaining wall area had confirmed that they did not require the building of reinforced concrete wall at the boundary as claimed by the plaintiff (refer to the notes of evidence at pp 90-91 encl 23).

[97] The defendant submitted a number of cases in relation to circumstances where the courts relied on the opinions of persons having special knowledge to establish particular types of conduct and meaning of words and terms. The plaintiff is of the view that those cases are mostly criminal cases and it is inapplicable to the facts of our case. However, we are of the view that it is the principle that can be derived from the aforesaid cases that matters.

[98] The present case turns upon a particular usage in the context of written instruments. The person giving evidence on the interpretation of a particular document or instruments need not be an expert but the cases cited suggest that resort can be had to common practice and meaning of terms used by those in similar trade to ascertain the meaning and intention of the parties. This is illustrated by the case of *Armoogum Chetty v. Lee Cheng Tee & Anor (supra)*.

[99] Therefore, applying the principles as set out in the aforesaid cases the COA ought to have considered and given substantial weight to the evidence of DW5 and DW7 as evidence under s 49 of the EA to conclude that Condition 8 did not affect the Approved Drawings which depicts the slope and rubble wall at the boundary between the plaintiff's property and his neighbour. Hence there is no contradiction between Condition 8 and the Approved Building Plan issued by the MPKJ on the construction of the slope and rubble wall.

H.5. Section 70 of the SDBA and Section 49 Of The EA Were Never Raised In The High Court Nor In The COA

[100] The plaintiff submitted that the defendant's submission is a complete distortion of the facts. The judgment of the High Court never held that the plaintiff was wrong and that in accordance with the usual practice of the MPKJ, the Approved Drawings prevailed. In addition, the COA did not venture at all into this nor was there any arguments on s 70 of the SDBA for the COA to "ignore" s 70 of the SDBA as submitted by the defendant in its written submission. Section 70 of the SDBA and s 49 of the EA were never raised in the lower courts nor addressed at the High Court nor at the COA.

[101] As for s 49 of the EA, it is the plaintiff's stand that there is no evidence taken in this case that would qualify the evidence of any of the witnesses here as "expert" evidence under s 49 of the EA. They were either witnesses of fact or expert witnesses pursuant to s 45 of the EA. It was contended by the plaintiff that DW7 is a witness of fact. It was further argued by the plaintiff before us that s 49 of the EA was never the basis of the defendant's argument at the COA and that the evidence of DW7 contradicted with the evidence of the other experts. DW5 and DW7 are not only witnesses on facts but also gave their opinion on how to construe the Approved Building Plans and Condition 8 in the engineering context.

[102] On this issue, our perusal of the written submissions of the defendant in the High Court and the COA, showed that the defendant did canvass the applicability of s 49 of the EA and s 70 of the SDBA, although it was never addressed in its oral argument before the COA. More often than not, in hearings before the courts, due to time constraints, the courts do not wish to hear repetitions of what had been stated in the written submission but invite parties to merely highlight or add on to what already was stated in the written submission. It was just that, in the present appeal that is before us, the COA did not deal with the issue of s 49 of the EA at all in its grounds, although it was addressed by the defendant in their written submissions.

[103] Be that as it may, leave has been granted by this court in relation to s 70 of the SDBA and s 49 of the EA. Therefore, it is not for this court to revisit the merits of the granting of the leave questions or the relevance of the two provisions at this stage (See *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2012] 5 MLRA 618, *Raphael Pura v. Insas Bhd & Ors* [2002] 2 MLRA 349).

H. 6. Did The Learned Trial Judge Err In Preferring The Evidence Of The Witnesses Of The Defendant (DW5, DW6, DW7) Than The Witness Of The Plaintiff (PW2)?

[104] It is trite law that an appellate court should not interfere with the factual findings of a trial judge, save and except where the decision of the trial judge was "plainly wrong" where in arriving at the decision it could not reasonably be explained or justified and was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid categories, it is irrelevant, even if the appellate court thinks that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge. (*Ng Hooi Kui & Anor v. Wendy Tan & Ors* [2020] 6 MLRA 193, *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Berhad & Another Case* [2018] 1 MLRA 263; *Mc Graddie v. Mc Graddie* [2013] WLR 2472, *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 2 MLRA 1))

[105] The panel of the COA said in their judgment at para 40 that:

> "[40]...In her Grounds of Judgment the learned Judge referred to the evidence of PW2, however, failed to give any reason why she preferred the evidence of the Defendant's expert, DW5...
>
> ...
>
> [42]...the **learned Judge erred in failing to conduct critical evaluation of the conflicting evidence,** of which there are many, of both the experts. The learned Judge accepted wholly the evidence of DW5 for reasons only known to her Ladyship. However, any acceptance or rejection of one version over the other must be based on proper evaluation, detailed analysis and weighing of the entire body of evidence of both the experts. Without evaluating the opinions of the experts, the learned Judge went on to make a finding that there is no necessity for the Defendant to construct the RC Wall as required by Condition 8. We therefore agreed with learned counsel for the Plaintiff that **had the learned Judge evaluated the competing views, her ladyship would have found there to be reason to discount the opinion of DW5…**
>
> [44]...the learned Judge erred when she said that the interpretation of Condition 8 "...requires the addition of the word "adjacent". Her ladyship concluded that Condition 8 refers to a wall to address the difference in levels and that the meaning of platform would mean two adjacent platforms We are in agreement with the view expressed by PW2 that **the words used in Condition 8 is simple and straightforward**, that is, if the level between the two platforms is higher than 1200 mm, an RC Wall must be built. It is neither stated nor specified under Condition 8 that it only applies to adjacent platforms as suggested by DW5 and DW6. **DW7 who was the superintending officer for the project confirmed in his oral evidence that the level**

> **difference between the Property and the back of the neighbour's property exceeded 1200 mm.** This is not only to ensure structural integrity between the two properties but the safety of the occupiers as well. Even assuming Condition 8 is vague and applies to adjacent platform as suggested by DW5, the Defendant did not seek any clarification from MPKJ but instead chose to interpret Condition 8 according to their own considerations and **ignored completely the conditions imposed by MPKJ.** And the evidence showed that the Defendant's consideration was essentially costs drive."
>
> [Emphasis Added]

[106] Our perusal of the grounds of the learned trial Judge showed that Her Ladyship took cognisance of the primary document and primary fact, that, firstly, the plaintiff can only rely on the Building Plans Approved by MPKJ by letter dated 24 December 2010 which stated "telah diluluskan permohonan tersebut dengan syarat" which included syarat (6) which "mematuhi syarat-syarat teknikal mengikut Lampiran A, C, E, F, G dan H disertakan untuk rujukan" in construction.

[107] The learned trial judge evaluated the evidence of PW2 and DW5, DW6 and DW7. DW5 stated specifically that firstly, what was approved by MPKJ in the Building Plan Approval was the slope and rubble wall and not the RC Wall, as contended by the plaintiff.

[108] Secondly, in analysing the plaintiff's construction of Condition 8, Her Ladyship found that PW2 confirmed that the details of the slope and rubble wall were in the Approved Building Plan and there was none for RC Wall. Her Ladyship further went into the evidence of PW2 at para 8 of her Grounds. The details of the evidence of PW2 can be found at para 9 of her Grounds:

> "9. PW2 was taken through a series of questions on the process of building plan approval where the evidence was various departments in MPKJ would give their comments on the plans to the One Stop Centre (OSC) which compiled the comments for the application to be processed, any comments requiring amendments (pembetulan) would require resubmission by the principal submitting person (PSP) and once all departments confirmed the details the building plan would be approved. He agreed the letter in B1 1 was a clear approval and there could not be any deviation from the approved building plans...He disagreed condition 8 does not have the effect of amending the details in the approved building plan.He was then asked if **MPKJ wanted the RC Wall to be built at the boundary it would have to ask the developer to change the drawing and only then it would approve he said yes**. The follow up question was as **that did not happen the slope and rubble wall without RC Wall at the back is the approved design to which the answer was yes**...It was then asked this meant the plan cannot be changed by a syarat in the lampiran he said it can be changed by condition 8...As to how a developer would know it has been changed he said where there are report or requirement that the local council says must be changed according to that syarat and as to whether the local council had given any instruction it has been changed he said "not that I am aware of during the stage, construction stage, no.

> 10. In re examination, PW2 reconciled condition 8 and the building plan "where the condition has to be applied according to the conditions at site when during the construction adjusted on site but they must carry out amendment to building plan approval...There are many changes on site must be done, I mean can be done and submitted as amendment to building plan."
>
> [Emphasis Added]

[109] Her analysis of the evidence of the PW2 can be found at para 11 of her Grounds where she said:

> "11. Accepting PW2's evidence that condition 8 required the building of RC Wall where there is a difference in PL (platform level) of more than 1200 mm between Plaintiff's property and the neighbouring property would mean **there is a contradiction between condition 8 and the approved building plan in B3 284. This is because PW2 had confirmed the details of a slope and rubble wall were in the approved building plan in B3 284 but not for RC Wall. He also agreed that according to the plan the developer could not build RC Wall nor remove the slope and rubble wall.** This therefore means the building plan required a slope and rubble wall and not RC Wall and yet condition 8 required RC wall.
>
> 12. **The analysis of the evidence shows any construction has to comply with the approved building plan and if there are any changes it has to be done by an amendment. According to PW2 that amendment can be in the form of condition 8 which this Court is unable to accept given that there was no instruction from MPKJ to amend and the letter of approval of B1 1 was clear approval to proceed.** This was also the evidence of DW5 and DW6 which the Court will subsequently refer to. Under the circumstances **the interpretation of condition 8 as given by PW2 cannot have the effect of overriding the building plans already approved.**
>
> ...
>
> 14. On the plan in B3 273 which showed details of RC wall PW2 agreed this did not state where it was to be built and if RC wall to be built these would be the details to be followed. **He agreed his conclusion on the requirement of RC wall was based purely on condition 8 and not the details in the approved building plan.** He agreed condition 8 was a requirement of the Building department and disagreed it only applied to the building and not outside the building."
>
> [Emphasis Added]

[110] From the aforesaid, the learned trial judge had taken the trouble to explain why she accepted and preferred the evidence of the defendant over that of the plaintiff. From the evidence of DW5, DW6 and DW7, Condition 8 is not applicable to the wall boundary between the plaintiff's lot and his neighbour.

[111] The learned trial judge considered the Approved Drawings by the Local Authority which contains and stipulates the "slope and rubble wall" at the boundary between the plaintiff's and the neighbour's property. Never did it provide for an RC Wall to be constructed. This was in evidence by DW5 (Tu Yong Eng) when he said that:

> "3.4 It must be understood that if the approving authority, in this case MPKJ, did not accept any part of the building plans, it would return the plans and require resubmission. Where plans have been approved, such as in the case of Jade Hills, it means that all details in the plans have been approved. An example directly on point is the slope and the use of "rubble wall" as the retaining wall for the slope have been approved for Jade Hills' cluster homes..., as shown in the Building plan..."

[112] The learned trial judge considered the admission by PW2 that:

(a) Condition 8 in Annexure F is not a direction by the Council or its Building Department to amend the Approved Drawings; and

(b) Without such directions the plaintiff is not allowed to deviate from the Approved Drawings, namely, it has to comply with all the details in the Approved Drawings, including the slope and rubble wall.

(refer to notes of evidence at pp 52-65 of encl 23)

[113] As can be discerned from the totality of the evidence of PW2, DW5 and DW7 (being the Director and the Head of the Building Department of the Local Authority responsible for Condition 8 of Annexure F of the Letter of Approval) showed that:

(a) The Building Department is in charge of structures inside the building ie, the house on Lot QV 568;

(b) The Engineering Department is in charge of structures outside the building;

(c) Annexure F was issued by the Building Department; and

(d) The MPKJ through its Engineering Department (which is in charge of infrastructure outside buildings) has carried out site inspection of the development and confirmed that the infrastructure work has been carried out in accordance with the Approved Infrastructure Plan. These infrastructure works include the slope and the rubble wall which is outside the building.

(refer to the notes of proceedings at p 68 of encl 23)

[114] The learned trial judge also took note of the fact that PW2 agreed that Condition 8 was a requirement of the Building Department, however, he disagreed it only applied to the building and not outside the building. PW2 could not rebut the evidence of DW7 who said that it was his Department who issued Condition 8 and he confirmed that Condition 8 does not apply to the boundary between the plaintiff's property and his neighbour.

[115] In our view, the panel of the COA took a simplistic view on the construction of Condition 8 when they agreed with the evidence of PW2 and held that the words used in Condition 8 is simple and straightforward, namely if the level between the two platforms is higher than 1200 mm an RC Wall must be built. It is not specified in Condition 8 that it only applies to adjacent platforms as suggested by DW5 and DW6. The COA said that DW7 confirmed that the level difference between the property and the back is more than 1200 mm. Actually it was DW6 who said that, because the COA referred to DW7 as the Superintending Officer for the project. It is a fact that the Superintending Officer of the project is DW6 not DW7.

[116] Although DW6 confirmed that the level difference between the property and the back is more than 1200 mm, but DW5 said that the two platform levels were not together, they are of a distance apart. This is where the COA failed to appreciate in giving due weight to the evidence of DW5 and DW7, which was referred to, by the learned trial judge. DW7's evidence was not considered at all by the COA which is crucial in interpreting Condition 8 because he was the one responsible in issuing Condition 8, and surely he is the best person to explain what Condition 8 entails. DW7 unequivocally said that Annexure F is only applicable to the structure in the house of the plaintiff, not outside of the house. Further, DW7 evidence is consistent with contemporaneous documents:

(i) Jabatan Kawalan Bangunan by its letter dated 4 February 2013 stated that it had carried out site inspection and found that the construction was in accordance with the approved plans; and

(ii) The Engineering Department which responded to the plaintiff's complaint of the absence of the RC Wall, confirmed that there was no requirement of boundary RC Wall at the slope.

[117] The learned trial judge considered the evidence of DW5 on how Condition 8 ought to be construed, not in its plain language but in the engineering context. Construing Condition 8 in its plain language would lead to it being inconsistent with the Building Plan Approval by MPKJ, which results in absurdity.

[118] Therefore, the learned trial judge was correct when Her Ladyship relied on the acknowledged practice of MPKJ to interpret the effect of the Approved Building Plans and the general conditions including Condition 8, as they are words/terms used by "particular classes people" within s 49 of the EA. In accordance to the acknowledged practice by MPKJ and the construction industry, Condition 8 is not a "comment" from the MPKJ and does not have the effect of requiring the alleged change as claimed by PW2. To require the defendant to build the RC Wall at the boundary, would be asking the defendant to breach the Building Plans Approval.

[119] The objective of all exposition of written instruments is to ascertain the meaning and intention of the parties to them. If words acquires a certain or peculiar meaning in that particular trade, profession or context, the court is to be assisted by persons who are acquainted with its language and usages in that particular trade, profession or context. "In construing policies the known usage of trade has always been freely invoked To understand policy, you must refer to the course of trade to which it relates (See *Armoogam Chetty v. Lee Cheng Tee*, which referred to the judgment of Lord Mansfied in *Gregory v. Christie* (BR Tr 24 G III). In our present case the learned trial judge relied on the evidence of DW5 and DW7 who are persons acquainted with the language and usages in the construction industry and the Local Authority.

[120] PW2 did not offer any explanation on how to reconcile the apparent conflict between Condition 8 and the Building Plans Approval, except to say that Condition 8 must be looked at from its language which is simple and straightforward, which was readily accepted by the COA. PW2's interpretation of Condition 8 also could not stand in view of the evidence of DW7.

[121] DW5 said that, firstly, although Condition 8 clearly says it requires an RC Wall, one must firstly determine whether such condition applies to the project situation. Secondly, if it applies, what type of wall is needed to address the situation. If in the first place the condition is not applicable to the project then one does not have to look at the condition at all. If Condition 8 is applicable then an RC Wall is needed. In this case it is not applicable. Another point which was pointed out by DW5 is that Condition 8 only mention RC wall and not RC retaining wall as these are two different things.

[122] After analysing the evidences of PW2, DW5, DW6 and DW7, the learned trial judge did not accept the evidence of PW2 that amendment of the Building Plans can be done in the form of Condition 8, given that there was no instruction from MPKJ to amend and the clear approval from MPKJ to proceed with construction. Her Ladyship relied on the evidence of DW5, DW6 and DW7, and concluded that the interpretation of Condition 8 as given by PW2 cannot have the effect of overriding the building plans already approved.

[123] Hence, it is incorrect for the COA to state that the learned trial judge failed to justify her preference of the evidence of the defendant's witnesses over that of the plaintiff's witness, PW2. The learned trial judge has found as a fact that there was approval in the Building Plans on the construction of the rubble wall and there was no instruction to amend the same. The letter of approval from MPKJ was a clear approval to proceed with construction. It is a fact that Condition 8 is applicable to structures inside the building and it has got nothing to do with structures outside the house. Therefore, it is the learned trial judge's finding that Condition 8 is not applicable to the plaintiff's case.

[124] Given the aforesaid, we cannot find any flaw in the way Her Ladyship analysed the evidence of the witnesses, in particular, PW2, DW6 and DW7. The findings and conclusions by the learned trial judge on the construction to be accorded to Condition 8 based on the evidence of PW2, DW5, DW6 and DW7 was premised on the primary facts and the primary documents that were before her. Condition 8 cannot be considered in isolation. It must be read together with the approved Building Plans and the Letter of Approval dated 24 December 2010. The effect and the application of the aforesaid documents must be gathered from the practice of the authority which issued the Building Plan Approval, namely MPKJ. We do not find anywhere in the COA Grounds of any findings by the panel that the learned trial Judge had gone plainly wrong in her factual findings derived from the primary documents, namely the Building Plans Approval on the issue that was before Her ladyship.

[125] The COA failed to take the appropriate review exercise and failed to make the appropriate determination that the learned trial judge had gone plainly wrong in her findings, namely, that it could not reasonably be explained or justified and was one which no reasonable judge could have reached.

[126] The COA had reversed the conclusions on the findings of facts derived from the primary documents by the learned trial judge without impeaching such findings by the learned trial judge on the interpretation of Condition 8, *vis-a-vis*, the difference in the platform levels which is adjacent and platform level which is of distance apart and the inapplicability of Condition 8 as it was only applicable to structures inside the building. There was no impeachment of the trial judge's analysis of the evidence on these vital facts in the interpretation of Condition 8, and her preference of the evidence from the defendant's witnesses.

[127] There has been a grave fundamental error made by the Court of Appeal in its failure to apply correctly the principles governing the review of findings by appellate courts. This is sufficient to warrant appellate interference on our part.

G. Conclusion

[128] Therefore, we answer the 1st question in the affirmative. As for the 2nd question, it is facts sensitive and we therefore decline to answer the question.

[129] The appeal by the defendant is therefore allowed with costs of RM200,000.00 here and below. Costs is subject to allocatur. The order of the COA is set aside and we reinstate the decision of the High Court. Enclosure 16 is struck out accordingly.

LEX NON DISTINGUITUR NOS NON DISTINGUERE DEBEMUS

The Legal Review

The Legal Review

The Definitive Alternative

The Legal Review Sdn. Bhd. (961275-P)
B-5-8 Plaza Mont' Kiara,
No. 2 Jalan Mont' Kiara, Mont' Kiara,
50480 Kuala Lumpur, Malaysia
Phone: **+603 2775 7700** Fax: **+603 4108 3337**
www.malaysianlawreview.com

Introducing eLaw
Experience the difference today

eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross-searched and mined by a feature-rich and user-friendly search engine—clearly the most efficient search tool for busy legal professionals like you.

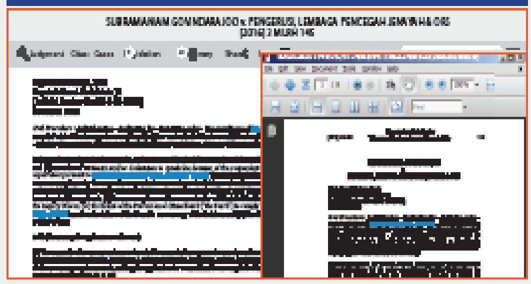
A Snapshot of Highlights

Our Features

Search Engine

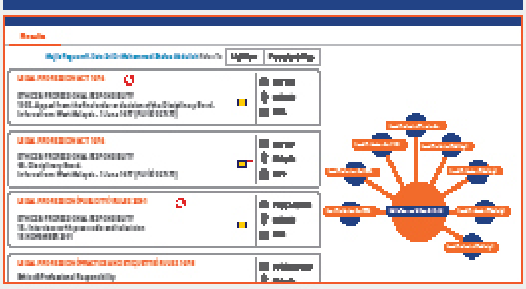
- Easier
- Smarter
- Faster Results.

Judgments Library



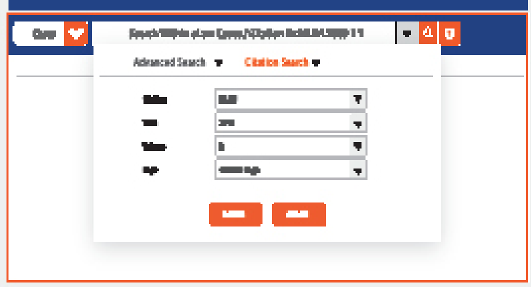
eLaw has more than 80,000 judgments from Federal/ Supreme Court, Court of Appeal, High Court, Industrial Court and Syariah Court, dating back to the 1900s.

Find Overruled Cases



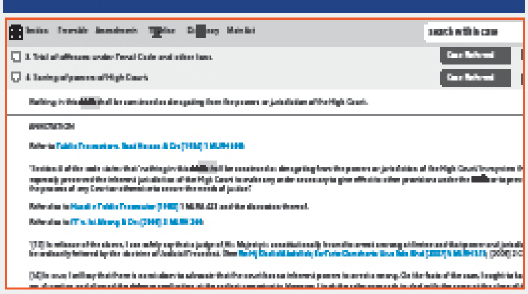
The relationships between referred cases can be viewed via precedent map diagram or a list — e.g. Followed, referred, distinguished or overruled.

Multi-Journal Case Citator



You can extract judgments based on the citations of the various local legal journals.*

Legislation Library



You can cross-reference & print updated Federal and State Legislation including municipal by-laws and view amendments in a timeline format.

Main legislation are also annotated with explanations, cross-references, and cases.

Dictionary/Translator

eLaw has tools such as a law dictionary and a English - Malay translator to assist your research.

Clarification: Please note that eLaw's multi-journal case citator will retrieve the corresponding judgment for you, in the version and format of The Legal Review's publications, with an affixed MLR citation. No other publisher's version of the judgment will be retrieved & exhibited. The printed judgment in pdf from The Legal Review may then be submitted in Court, should you so require.

Please note that The Legal Review Sdn Bhd (is the content provider) and has no other business association with any other publisher.

Start searching today!

www.elaw.my