KEMBANG SERANTAU SDN BHD

v.

PERBADANAN PUTRAJAYA & ANOTHER APPEAL

Court of Appeal, Putrajaya
Kamaludin Md Said, Hashim Hamzah, Wong Kian Kheong JJCA
[Civil Appeal Nos: W-01(NCvC)(W)-124-03-2022 & W-01(NCvC)(W)-167-03-2022]
29 April 2024

Civil Procedure: *Judgment and orders — Consent judgment obtained in previous suit ('1st Suit') — Dispute over payment due and owing by defendant — Appeal by plaintiff against dismissal of suit — Cross-appeal by defendant against order for payment of amount stated in draft final accounts to plaintiff — Whether court should have given effect to consent judgment and not considered matters that were extraneous to consent judgment — Whether consent judgment contained condition precedents — Whether defendant estopped from raising issue previously raised in 1st Suit — Whether extrinsic evidence admissible — Whether court could in interest of justice and pursuant to general prayer for relief, grant any relief that was not specifically pleaded — Distinction between 'judgment' and 'order'*

The plaintiff had entered into a contract with the defendant on 28 October 2003 whereby the plaintiff had agreed to carry out certain tree planting and maintenance works ('works') and to replace dead/rejected trees, for a price of RM58,757,209.25. Disputes arose between the parties during the Defects Liability Period ('DLP') and the plaintiff commenced proceedings against the defendant vide Kuala Lumpur High Court Civil Suit No: S21-188-2010 ('1st Suit') for damages for breach of contract and for the remaning payment due for the works. A consent judgment ('Consent Judgment (1st Suit)') was subsequently entered into between the parties on 9 November 2011 for the defendant to pay damages of RM2,449,358.49 (judgment sum/damages) and the sum of RM4,273,086.27 being the balance due under the contract. The defendant paid the judgment sum/damages and the plaintiff subsequently by way of a letter dated 27 February 2012, sought payment of the sum of RM3,136,293.25 as its final claim from the defendant for the works done. The defendant however by way of a letter dated 21 June 2012, forwarded its draft final accounts to the plaintiff stating that only a sum of RM58,417.57 was due to the plaintiff after deduction of the sum of RM3,077,875.68 as stated in its Variation Order No 15 (VO No 15) which was not attached to the said letter, but was only sent to the plaintiff on 8 August 2012. Consequent thereto the plaintiff commenced the instant suit seeking a declaration that the sum of RM3,136,293.25 was due from the defendant pursuant to the Consent Judgment (1st Suit) and that the defendant's draft final accounts was invalid. The learned Judicial Commissioner ('JC') found the draft final accounts to

be valid and dismissed the plaintiff's suit. The learned JC also found that the defendant was only liable to pay the sum stated in the said draft final accounts. Hence the instant appeal by the plaintiff against the said decision vide Civil Appeal No: W-01(NCvC)(W)-124-03-2022. The defendant in turn vide Civil Appeal No. W-01(NCvC)(W)- 167-03-2022 appealed against the order for it to pay the sum stated in the draft final accounts on the ground that the present suit was premature as the parties had yet to reach an agreement regarding the draft final accounts, and therefore ought to have been dismissed. The plaintiff's appeal was premised on the grounds, *inter alia,* that the learned JC ought to have given effect to the Consent Judgment (1st Suit) and not considered matters that were extraneous to the said judgment, and that the learned JC had failed to consider that the issue regarding the dead/rejected trees had already been addressed by the defendant's contract representative in the Variation Order No 14 ('VO No 14') and considered by both parties prior to the recording of the Consent Judgment (1st Suit). The defendant's appeal in turn was premised on the grounds, *inter alia*, that its payment of the outstanding due to the plaintiff was subject to two condition precedents in the 2nd paragraph of the Consent Judgment (1st Suit), the second of which was not complied with due to the plaintiff's disagreement with the draft final accounts. The defendant thus submitted that the present suit was premature and the learned JC had erred in ordering it to pay the said sum in the draft final accounts, and on that ground alone, its appeal ought to be allowed.

Held (allowing the 1st appeal by the plaintiff; and dismissing the 2nd appeal by the defendant; ordered accordingly):

(1) The learned JC's repeated reference to 'Consent Order' instead of 'Consent Judgment (1st Suit)' constituted a legal error because unlike an 'order', a 'judgment' in an action meant a judgment that had finally determined the rights and liabilities of the parties in the action. (para 25)

(2) The Consent Judgment (1st Suit) was to be construed as if it was a contract between the parties and any letter, email, document, correspondence, event and conduct of the parties after the recording of the said judgment, could not be considered by the court. Contrary to the defendant's submission, the 2nd paragraph of the Consent Judgment (1st Suit) did not provide for two condition precedents. Thus, the defendant's submission that the instant suit was instituted prematurely due to the non-compliance with the 2nd condition precedent if accepted, would militate against the policy considerations that underpinned the finality of the Consent Judgment (1st Suit). (paras 26(1)(a), (3) & 28(2))

(3) It was clear from VO No 14 and the simple calculation interpretation of the 2nd paragraph of the consent judgment (1st Suit) that the said judgment had disposed of the issue of the dead/rejected trees. Accordingly, the defendant was estopped by the 2nd limb of issue estoppel from resisting the instant suit based on the aforesaid issue and the learned JC thus, had erred in law in not applying issue estoppel against the defendant. (para 32)

(4) In view of the simple calculation interpretation of the 2nd paragraph of the Consent Judgment (1st Suit) the defendant could not lawfully issue VO No 15 and the draft final accounts, and was estopped from doing so. The learned JC had erred in law by accepting the said VO No 15. In the premises the plaintiff was entitled to a declaration that the draft final accounts was invalid. (para 33)

(5) The contract could not be interpreted by way of oral evidence of a witness because the construction of an agreement was a question of law to be decided by the court and not by factual and/or expert witnesses through their oral evidence. Premised on ss 91 and 92 of the Evidence Act 1950, no evidence could be adduced by the defendant to contradict, vary, add to, or subtract from the contents of the contract. (paras 34-35)

(6) It could not be said that the learned JC had erred in granting judgment for payment of the sum in the draft final accounts because there was no specific prayer for such relief in the plaintiff's statement of claim. Given that there was a general specific prayer for relief in the statement of claim, the court had a discretionary power to award any remedy in the interest of justice pursuant to the said general prayer. (para 36)

Case(s) referred to:

Abd Rahman Soltan & Ors v. Federal Land Development Authority & Anor And Other Appeals [2023] 4 MLRA 567 (folld)

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 1 MLRA 611 (refd)

Chow Chuan Fat v. Yeo Chai Seng & Ors [2016] MLRHU 1420 (refd)

Kamil Azman Abdul Razak St Ors v. Amanah Raya Bhd & Ors [2019] 4 MLRA 349 (refd)

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2002] 2 MLRA 510 (refd)

Onslow v. Commissioners of Inland Revenue (1890) 25 QBD 465 (refd)

Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235 (refd)

Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Appeal [2017] MLRHU 1156 (refd)

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 MLRA 81 (refd)

Legislation referred to:

Evidence Act 1950, ss 91, 92(a), (b), (c), (d), (e), (f)

Rules of Court 2012, O 18 r 7(1)

Counsel:

Civil Appeal No: W-01(NCvC)(W)-124-03-2022

For the appellant: Yusfarizal Yusoff (Rafizal Ahamadin, Mohd Iskandar Ismail, Mohd Munzeer Zainul Abidin & Nur Syamila Abu Bakar with him); M/s Shahrul & Rafizal

For the respondent: Mohd Rosly Khady Mohd Ayub Khan (Saiyidah Sidek with him); M/s Hisham Sobri & Kadir

Civil Appeal No: W-01(NCvC)(W)-167-03-2022

For the appellant: Mohd Rosly Khady Mohd Ayub Khan (Saiyidah Sidek with him); M/s Hisham Sobri & Kadir

For the respondent: Yusfarizal Yusoff (Rafizal Ahamadin, Mohd Iskandar Ismail, Mohd Munzeer Zainul Abidin & Nur Syamila Abu Bakar with him); M/s Shahrul & Rafizal

JUDGMENT

Wong Kian Kheong JCA:

A. Introduction

[1] The above two appeals (2 Appeals) discuss, among others, a novel question, namely, after an employer of a construction project (Employer) has entered into a consent judgment with the project's main contractor (Main Contractor) regarding their dispute concerning the works in the project, can the Employer lawfully issue to the Main Contractor a "variation order" in respect of the same works?

B. Background

[2] For ease of reference, we shall refer to parties as they were before the High Court.

[3] By way of a "Letter of Award" dated 6 May 2003 with the title "Cadangan Kerja-Kerja Penanaman dan Penyelenggaraan Spesies Pokok Hutan Termasuk Kerja-Kerja Infrastruktur dan Landskap untuk Taman Rimba Alam di Presint 14 & 15, Wilayah Persekutuan Putrajaya Untuk Perbadanan Putrajaya" (LA), the defendant (Defendant) accepted the tender from the plaintiff company (Plaintiff) to perform certain works (Works) in a project (Project) at a price of RM58,757,209.25 (Tender). According to the LA, among others -

(1) paragraph 2 – the Plaintiff and Defendant would execute a formal contract which would contain all the terms of the Tender (Contract);

(2) sub-paragraph 3(f) – the representative for the Defendant in the Contract is the Defendant's Town Planning Director (Defendant's Contract Representative); and

(3) sub-paragraph 3(i) – the Plaintiff was required to complete the Contract in 156 weeks (Contract Period).

[4] The Contract was executed on 28 October 2003. The Contract provided for, among others -

(1) "Special Provisions to the Conditions of Contract" (Special Conditions). According to cl 12.6 of the Special Conditions (Special Condition 12.6), among others:

(a) payments for all the plants in the Project [Total Payment (Plants)] would be paid progressively as follows:

(i) 40% of the Total Payment (Plants) shall be paid progressively by the Defendant to the Plaintiff if the Plaintiff fulfils its obligations to plant during the Construction Period;

(ii) 20% of the Total Payment (Plants) shall be paid progressively by the Defendant to the Plaintiff if the Plaintiff fulfils its obligations to maintain the plants during the "Pre-Maintenance" Period, namely, during the Construction Period and before the issuance of the "Certificate of Practical Completion" (CPC); and

(iii) 40% of the Total Payment (Plants) shall be paid progressively by the Defendant to the Plaintiff if the Plaintiff fulfils its obligations to maintain the plants during the "Post-Maintenance" Period, ie during the 24 months' "Maintenance Period' or "Defects Liability Period' (DLP); and

(b) the Note to Special Condition 12.6 stated that, among others, if the Plaintiff fails to maintain the plants in the Project during the Construction Period, the Defendant shall be entitled to deduct "pre-maintenance costs" from any sum due and payable by the Defendant to the Plaintiff; and

(2) "Conditions of Contract" (Conditions). The following Conditions are relevant -

(a) clause 4.1 of the Conditions states that, among others, the Plaintiff "shall also make good any defect, imperfection, shrinkage or any other fault whatsoever which may appear during" the DLP in accordance with cl 45 of the Conditions (Condition 45)

(b) clause 5.1 (i) of the Conditions provides that the Defendant's Contract Representative has the "absolute discretion" to issue

"written instructions" [Instruction (Defendant's Contract Representative)] regarding variation of the Works as referred to in cl 24 of the Conditions (Condition 24). Condition 24.1 further provides that no variation required by the Defendant's Contract Representative shall vitiate the Contract;

(c) according to cl 5.2 of the Conditions, among others, the Plaintiff shall forthwith comply with all the Instructions (Defendant's Contract Representative);

(d) clause 25.1 of the Conditions provides that all variations authorised by the Defendant's Contract Representative shall be measured by the Defendant's Contract Representative and the Defendant's Contract Representative shall give the Plaintiff an opportunity to be present at the time of the measurement;

(e) clause 39.2 of the Conditions states that, among others, when the "whole of the Works have reached practical completion" according to the provisions of the Contract and to the satisfaction of the Defendant's Contract Representative, the date of such completion shall be certified by the Defendant's Contract Representative in the CPC and this date shall be the date of commencement of the DLP;

(f) according to cl 42.3 of the Conditions, at the end of the DLP, if in the opinion of the Defendant's Contract Representative any defect, imperfection, shrinkage or any other fault whatsoever which the Defendant's Contract Representative may have required to be made good under Condition 45.1 and 45.2, has been made good by the Plaintiff, the Defendant's Contract Representative shall issue a CMGD;

(g) Condition 45.1 provides that, among others, if at any time during the DLP, any defect, imperfection, shrinkage or any other fault whatsoever which may appear and which are due to materials or goods or workmanship not in accordance with the Contract, the Defendant's Contract Representative shall notify the Plaintiff as such in a written instruction and the Plaintiff shall within a reasonable time to be specified by the Defendant's Contract Representative, make good such defect, imperfection, shrinkage or any other fault whatsoever at the Plaintiff's own cost;

(h) Condition 45.2 states that notwithstanding Condition 45.1, among others -

(i) any defect, imperfection, shrinkage or any other fault whatsoever which may appear during the DLP to be made good by the Plaintiff, shall be specified by the Defendant's Contract Representative in a "Schedule of Defects" which shall be delivered to the Plaintiff not later than 14 days after the expiry of the DLP; and

(ii) the defect, imperfection, shrinkage or any other fault whatsoever specified in the Schedule of Defects shall be made good by the Plaintiff at the Plaintiff's own cost and be completed within a reasonable time but in any case, not later than three months after the Plaintiff's receipt of the Schedule of Defects;

(i) according to Condition 45.5, when in the opinion of the Defendant's Contract Representative the Plaintiff has made good the imperfections, shrinkage or any other fault whatsoever which the Plaintiff is required by the Defendant's Contract Representative to be made good under Conditions 45.1, 45.2 or both, the Defendant's Contract Representative shall issue a CMGD;

(j) clauses 48.1, 48.2 and 48.3 of the Conditions concern the "Final Certificate" which shall state, among others, the "final balance"-

(i) due from the Defendant to the Plaintiff; or

(ii) due from the Plaintiff to the Defendant; and

(k) clause 49.1 of the Conditions provides that, among others, no certificate of the Defendant's Contract Representative under any provision of the Contract -

(i) shall be considered as conclusive evidence of the sufficiency of Works, materials or goods stated in the certificate in question;

(ii) shall relieve the Plaintiff from the Plaintiff's liability to amend and make good all defects, imperfections, shrinkages or any other fault whatsoever as provided by the Contract; and

(iii) shall be final and binding in any dispute between the Plaintiff and Defendant if the dispute is brought before an arbitrator or court.

[5] The Defendant's Contract Representative had initially issued 14 "Variation Orders" (VOs) regarding the Works. There is no dispute between the parties regarding the validity and accuracy of the 14 VOs.

[6] On 5 November 2009, the Defendant's Contract Representative issued the CPC. According to the CPC -

(1) the Works had been satisfactorily completed by the Plaintiff on 15 October 2009; and

(2) the DLP commenced on 15 October 2009 and would end on 15 October 2011.

C. First Suit

[7] During the DLP, there was a dispute between the parties regarding the Contract. Hence, the Plaintiff filed Kuala Lumpur High Court Civil Suit No: S-21-188-2010 against the Defendant (1st Suit). In the 1st Suit, the Plaintiff claimed from the Defendant for -

(1) damages for the Defendant's breach of the Contract; and

(2) payment for the Works which was still due from the Defendant to the Plaintiff.

[8] The Defendant sent a letter dated 15 July 2011 to the Plaintiff [Defendant's Letter (15 July 2011)]. The Defendant's Letter (15 July 2011) was signed by the then President of the Defendant, Tan Sri Samsudin bin Osman (Defendant's President). The Defendant's Letter (15 July 2011) stated as follows, among others:

(1) according to para 3, a sum of RM4,273,086.27 was due from the Defendant to the Plaintiff for the Works [Sum (Works)];

(2) paragraph 4 stated that, with regard to the Plaintiff's claim for damages in the 1st Suit, the Defendant's President decided that damages of an amount of RM2,449,358.49 shall be paid to the Plaintiff [Sum (Damages)]; and

(3) according to para 5, the Defendant shall pay to the Plaintiff as follows -

(a) the Sum (Works) shall be paid after -

(i) the expiry of the DLP; and

(ii) the Final Accounts had been prepared and agreed by the Plaintiff and Defendant; and

(b) the Sum (Damages) shall be paid by the Defendant to the Plaintiff.

[9] By way of a letter dated 20 October 2011 from the Plaintiff to the Defendant [Plaintiff's Letter (20 October 2011)] -

(1) the Plaintiff submitted its final claim of RM3,136,293.25 for the Works [Plaintiff's Final Claim (Works)]; and

(2) according to the Plaintiff, the Plaintiff's Final Claim (Works) was based on -

(a) the Defendant's Letter (15 July 2011); and

(b) a discussion on 14 July 2011 between the Plaintiff's "Corporate Advisor" (Dato' Mohamad Khay bin Ibrahim) and the Defendant's President.

A copy of the Plaintiff's Final Claim (Works) was attached to the Plaintiff's Letter (20 October 2011).

[10] On 9 November 2011, the Plaintiff and Defendant recorded a consent judgment before Hue Siew Kheng J in the 1st Suit [Consent Judgment (1st Suit)]. The Consent Judgment (1st Suit) stated as follows:

(1) the Defendant shall pay to the Plaintiff damages in a sum of RM2,449,358.49 [Judgment Sum (Damages)] on or before 31 July 2011 {1st Paragraph [Consent Judgment (1st Suit)]};

(2) the balance sum under the Contract in an amount of RM4,273,086.27 shall only be paid by the Defendant to the Plaintiff after -

(a) the expiry of the DLP; and

(b) the Final Accounts have been prepared and agreed by the Plaintiff and Defendant {2nd Paragraph [Consent Judgment (1st Suit)]}; and

(3) no order as to costs.

D. Events After Consent Judgment (1st Suit)

[11] The Defendant had paid the Judgment Sum (Damages) to the Plaintiff. The Judgment Sum (Damages) consisted of the following loss suffered by the Plaintiff due to the Defendant's breach of the Contract:

No.	Nature of Plaintiff's loss	RM
1.	Cost of the Plaintiff's remobilisation due to the Defendant's variation regarding earth works	40,000.00
2.	Idle machinery	900,215.00
3.	Fixed cost to maintain nursery and irrigation system	1,509,143.49
	Judgment Sum (Damages)	2,449,358.49

[12] On 5 January 2012, the Defendant's Contract Representative had issued the CMGD to the Plaintiff. The CMGD stated that in accordance with Condition 45.5, the Defendant's Contract Representative "certified that the defects, imperfections, shrinkages or any other fault whatsoever" in respect of the Works which were required to be made good under the Conditions "have been completely made good on" 12 December 2011.

[13] By way of a letter dated 27 February 2012 from the Plaintiff to the Defendant [Plaintiff's Letter (27 February 2012)], among others, the Plaintiff applied for the Defendant to pay a sum of RM3,136,293.25 as the Plaintiff's Final Claim (Works). The Plaintiff's Letter (27 February 2012) referred to the Defendant's Letter (15 July 2011) and Plaintiff's Letter (20 October 2011). According to the Plaintiff's Letter (27 February 2012), the amount of RM3,136,293.25 as the Plaintiff's Final Claim (Works) was derived as follows:

Item	RM
Original value of the Contract	58,757,209.25
Deductions by the Defendant	(17,608,684.97)
Additional Works by the Plaintiff	537,740.99
Sum due under the Contract from the Defendant to the Plaintiff	41,686,265.27
Judgment Sum (Damages) {as stated in the 1st Paragraph [Consent Judgment (1st Suit)]}	2,449,358.49
Total sum due from the Defendant to the Plaintiff [including the Judgment Sum (Damages)]	44,135,623.76
Total Payment by the Defendant to the Plaintiff [including the Judgment Sum (Damages)]	(40,999,330.51)
Total sum due from the Defendant to the Plaintiff pursuant to the 2nd Paragraph [Consent Judgment (1st Suit)]	3,136,293.25

[14] The Defendant sent the draft Final Accounts to the Plaintiff (Draft Final Accounts) in a letter dated 21 June 2012 [Defendant's Letter (21 June 2012)]. According to the Draft Final Accounts, among others, only an amount of RM58,417.57 was due from the Defendant to the Plaintiff for the Works [Sum (Draft Final Accounts)]. The Sum (Draft Final Accounts) was arrived at by the Defendant after a deduction of an amount of RM3,077,875.68 as stated in "VO No 15' (VO No 15). VO No 15 was not attached to the Defendant's Letter (21 June 2012).

[15] By way of the Plaintiff's letter dated 6 July 2012 to the Defendant, the Plaintiff objected to the Draft Final Accounts, in particular the Sum (Draft Final Accounts).

[16] VO No 15 was only sent by the Defendant to the Plaintiff on 8 August 2012. According to VO No 15, the Defendant deducted a sum of RM3,077,875.68 [Deduction Sum (VO No 15)] from the amount due from the Defendant to the Plaintiff for the Works. The Deduction Sum (VO No 15) was based on -

(1) dead plants allegedly planted by the Plaintiff in the Project; and

(2) plants planted by the Plaintiff in the Project which had been rejected by the Defendant.

E. This Suit

[17] In this suit (This Suit), the Plaintiff claimed for, among others, the following relief from the Defendant:

(1) a declaration that-

(a) a sum of RM3,136,293.25 is due from the Defendant to the Plaintiff under the Consent Judgment (1st Suit); and

(b) the Draft Final Accounts [including the Sum (Draft Final Accounts)] are invalid; and

(2) an order for the Defendant to pay to the Plaintiff an amount of RM3,136,293.25 with interest at the rate of 5% per annum from the date of filing of This Suit (29 August 2019) until full payment of the same by the Defendant.

[18] After a trial of This Suit, the learned Judicial Commissioner (JC) (as he then was) decided as follows:

(1) This Suit is dismissed;

(2) the Draft Final Accounts is valid and the Defendant is only liable to the Plaintiff for the Sum (Draft Final Accounts); and

(3) the Plaintiff shall pay RM30,000.00 to the Defendant as costs.

(High Court's Decision).

F. Two Appeals

[19] The 2 Appeals against the High Court's Decision are as follows:

(1) Civil Appeal No W-01(NCvC)(W)-124-03-2022 had been filed by the Plaintiff against the High Court's Decision (1st Appeal). In the 1st Appeal, the Plaintiff has applied for the Court of Appeal to-

(a) reverse the High Court's Decision; and

(b) order the Defendant to pay a sum of RM3,136,293.25 to the Plaintiff under the Consent Judgment (1st Suit); and

(2) the Defendant has lodged Civil Appeal No W-01(NCvC)(W)-167-03-2022 against a part of the High Court's Decision (2nd Appeal). According to the 2nd Appeal, premised on the 2nd Paragraph [Consent Judgment (1st Suit)], This Suit was pre-

mature because the Plaintiff and Defendant had yet to reach an agreement regarding the Draft Final Accounts. Consequently, the High Court should have dismissed This Suit without ordering the Defendant to pay the Sum (Draft Final Accounts) to the Plaintiff.

[20] These 2 Appeals were heard together.

G. Grounds For High Court's Decision

[21] According to the "Grounds of Judgment" (GOJ) for the High Court's Decision, among others -

(1) after the Plaintiff had supplied the plants and planted them in the Project, the Plaintiff was required under the Contract to maintain them. In this regard, the court construed the Contract based on -

(a) minutes of meetings between the Plaintiff and Defendant [sub-paragraph 34(a) GOJ];

(b) letters between the Plaintiff and Defendant [paras 34(b) to (d) and 35 GOJ];

(c) evidence from the Plaintiff's witness [sub-paragraph 34(e) GOJ]; and

(d) subsequent conduct of the parties (paras 39 to 43 GOJ);

(2) paragraph 38 GOJ stated that the Plaintiff had admitted in its letter dated 31 March 2010 to the Defendant that there were 15,958 trees which were either dead or rejected by the Defendant (Dead/Rejected Trees). The Plaintiff was required under the Contract to replace these Dead/Rejected Trees (paras 39, 43 and 56 to 58 GOJ);

(3) the CMGD was not a final document but was "merely *prima facie* evidence of work done" by the Plaintiff (paras 52 to 62 GOJ). The "final' document was the "final certificate" to be issued by the Defendant to the Plaintiff for the Works (paras 52, 54, 58, 62 and 63 GOJ);

(4) according to paras 64 to 73, 76, 77 and 89 GOJ -

(a) as the Defendant had adduced evidence to prove the 13,390 Dead/Rejected Trees in the Project, the Plaintiff had the burden to prove that the Plaintiff had replanted these 13,390 Dead/Rejected Trees in the Project; and

(b) the Plaintiff failed to discharge the burden to prove that the Plaintiff had replanted these 13,390 Dead/Rejected Trees in the Project. Consequently, the Plaintiff should not be allowed to claim for the "full contract sum". Instead, the Plaintiff was only entitled to be paid the Sum (Draft Final Accounts) by the Defendant;

(5) the true nature of VO No 15 was not a "variation order" but a "certificate to confirm the amount of actual work undertaken by the Plaintiff' (paragraphs 74, 75 and 84 GOJ);

(6) the effect of the "Consent Order" was as follows -

(a) the "final payment must be undertaken through the process of issuance of the final account as provided under the terms of the [Contract]";

(b) the amount to be paid by the Defendant to the Plaintiff for the Works "must be determined by the Defendant's representative in accordance with the amount of actual work done, including any work undertaken during the [DLP]" (paras 85 to 88 GOJ); and

(7) in paras 90 to 94 GOJ, the learned JC explained why he had found the evidence of the Defendant's witnesses to be true.

H. Submission By Parties

[22] The Plaintiff's learned counsel had advanced, among others the following contentions to support the 1st Appeal and to oppose the 2nd Appeal:

(1) the learned JC had committed the following legal errors -

(a) the High Court should have given effect to the Consent Judgment (1st Suit); and

(b) the learned JC should not have considered matters which are extraneous to the Consent Judgment (1st Suit);

(2) with regard to the CMGD -

(a) the High Court should have accepted the contents of the CMGD; and

(b) the learned JC should not have decided that the contents of VO No 15 had successfully rebutted the *prima facie* evidence stated in the CMGD; and

(3) the High Court had failed to consider that the issue regarding the Dead/Rejected Trees [Issue (Dead/Rejected Trees)] -

(a) had already been addressed by the Defendant's Contract Representative in VO No 14; and

(b) had been considered by both the Plaintiff and Defendant before the recording of the Consent Judgment (1st Suit).

[23] For these 2 Appeals, the Defendant's learned counsel had submitted as follows, among others:

(1) the 2nd Paragraph [Consent Judgment (1st Suit)] laid down two "conditions precedent for the Defendant's payment of the outstanding sum due to the Plaintiff under the Contract, namely-

(a) the DLP had expired (1st Condition Precedent); and

(b) both the Plaintiff and Defendant had agreed to the Final Accounts (2nd Condition Precedent);

(2) the 1st Condition Precedent had been fulfilled in this case but not the 2nd Condition Precedent. This was because the Plaintiff had disagreed with the Draft Final Accounts;

(3) as the 2nd Condition Precedent had not been complied with -

(a) the learned JC was correct in dismissing This Suit. Hence, the 1st Appeal should be dismissed with costs; and

(b) This Suit was premature and the High Court had erred in ordering the Defendant to pay the Sum (Draft Final Accounts) to the Plaintiff {High Court's Judgment [Payment of Sum (Draft Final Accounts)]}. On this ground alone, the 2nd Appeal should be allowed with costs; and

(4) in making the High Court's Judgment [Payment of Sum (Draft Final Accounts)], the learned JC erred in law because the High Court had granted a relief which had not been specifically pleaded by the Plaintiff and Defendant in This Suit.

I. Issues

[24] These 2 Appeals raise the following questions:

(1) what is the effect of the Consent Judgment (1st Suit)? In this regard -

(a) did the Consent Judgment (1st Suit) provide for the 2 Conditions Precedent?; and

(b) whether the Issue (Dead/Rejected Trees) had already been raised in the 1st Suit. If the answer to this question is in the affirmative, is the Defendant estopped by the second limb of the doctrine of *res judicata* (issue estoppel principle) from resisting This Suit based on the Issue (Dead/Rejected Trees)?;

(2) could the Defendant lawfully issue -

(a) VO No 15; and

(b) the Draft Final Accounts

- after the recording of the Consent Judgment (1st Suit)?;

(3) whether the High Court could interpret the Contract premised on the following evidence -

(a) testimony from the Plaintiff's witness;

(b) minutes of meetings between the Plaintiff and Defendant;

(c) letters between the Plaintiff and Defendant; and

(d) subsequent conduct of the parties

(Extrinsic Evidence); and

(4) whether the court can grant any relief in the interest of justice -

(a) which has not been specifically pleaded by the parties; and

(b) pursuant to a general prayer for any just remedy [General Prayer (Relief)].

Our Decision

J. What Is The Effect Of Consent Judgment (1st Suit)?

J(1). Distinction Between Judgment And Order

[25] In the GOJ, the learned JC had repeatedly referred to the "Consent Order*' and not to the Consent Judgment (1st Suit). With respect, this constitutes a legal error on the part of the High Court (1st Legal Error). This is because we are of the view that there is a difference between a "judgment" and an "order". Our reasons are as follows:

(1) unlike an "order", a "judgment" given in an action means a judgment which has finally decided on the rights and liabilities of parties in the action. We cite the following judgment of Lord Esher MR in the English Court of Appeal case of *Onslow v. Commissioners of Inland Revenue* (1890) 25 QBD 465, at pp 465 to 466:

> "**In the present case it becomes necessary for us to determine what is meant by an order and a judgment, and to see what is the distinction between them. I entirely adopt the decision of Cotton, L.J., in *Ex parte Chinery*, a decision supported by Bowen and Fry, L.JJ. In that case Cotton, L.J., says: "In legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order.' No doubt the Orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment; but still judgments and orders are kept entirety distinct. It is not said that the word judgment' shall in other Acts of Parliament include an 'order.' I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, ie, a judgment**

> **obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established, unless there is something to shew an intention to use the words in a more extended sense." In the same case Bowen, L.J., says that there is an inherent distinction between judgments and orders, and that the words "final judgment" have a professional meaning; by which expression I think he meant to say, as Cotton, L.J., had previously said, that a "judgment" is a decision obtained in an action, and if that was his meaning, both those learned lords justices gave judgment to the same effect, and Fry, L.J., agreed with them. A "judgment, " therefore, is a decision obtained in an action, and every other decision is an order**."

[Emphasis Added]; and

(2) "*Black's Law Dictionary*", Ninth Edition (2009), at p 918, has defined a "judgment as, among others, "A court's final determination of the rights and obligations of the parties in a case." According to the same law dictionary, at p 1206, an "order" has the following meanings-

"1. **A command, direction, or instruction**....

2. **A written direction or command delivered by a court or judge**...."

[Emphasis Added]

J(2). How To Construe 2nd Paragraph [Consent Judgment (1st Suit)]?

[26] This judgment shall refer to a consent judgment and consent order collectively as "Consent Judgment/Order". We adopt the following approach in the interpretation of a Consent Judgment/Order:

(1) in *Kamil Azman Abdul Razak & Ors v. Amanah Raya Bhd & Ors* [2019] 4 MLRA 349, at [27], [28], [33], [35] and [41], Rohana Yusuf FCJ (as she then was) has delivered the following judgment of the Federal Court -

> "[27] **On these rival contentions, it became apparent to us that the very basic issue in dispute that needs to be resolved is whether or not the consent judgment may be construed as consisting of mutual promises that depend on each other in terms of the performance of the obligations contained therein. The only way to resolve it is by giving the consent judgment its proper construction. These issues too involved finding of facts and law and have been given interpretation by both the courts below**.
>
> [28] **In this regard we are mindful that this court in** *Tan Geok* ***Lan v. La Kuan @ Lian Kuan*** **[2004] 1 MLRA 165, had ruled that a consent order is akin to a contract with superadded command of the court. Thus it must be given its full contractual effect. It is to**

be interpreted in the same manner as the court would a contract The canons of interpretation are as familiar as any canons of construction would be to a legal practitioner. The paramount consideration is to ascertain the intention of the parties to the consent judgment. Such intention is to be objectively assessed by the court, in particular by reviewing the language employed in the consent judgment.

...

[33] We agree with the respondents that, it is amply clear that there is no precondition to the repayment of the loan sums. **Looking at the surrounding background too, the fact was the loans were granted to both Abdul Razak and Kamil Azman on 17 September 2007 and 19 October 2007 respectively and the loan documents disclose that they were granted individually to each of them**....

[35] **We will echo the observation of the Court of Appeal where in the same tone at para 31 it was observed that**:

> 31. **The terms of the consent judgment do not contain words which state that the repayment of the loan amount by the appellants are to be sourced from the proceeds of the joint venture. We must not lose sight that respective parties were represented by legal advisers and if that had been the intention of the parties, such wordings would have been easily inserted in the consent judgment Without such dear words, the court cannot infer meanings as put forth by the appellants.**

We agree with the Court of Appeal and we too have difficulty in discerning anything from the consent judgment which even remotely suggests that the repayment of the loan is conditional upon the conclusion of the JV agreement.

...

[41] **We further agree with the respondents' submissions that the consent judgment must be construed as a commercial instrument. The aim is to ascertain the contextual meaning of the relevant contractual language. It must be done objectively as to what a reasonable person, circumstanced as the actual parties in a commercial environment were, would have understood it to mean. This must be gathered from the language used and its relevant contextual sense (see *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 MLRA 1). Applying all the required principles of construction, in our view, both the Court of Appeal and the High Court had arrived at the correct conclusions that the repayment of loans is not conditional upon the parties entering into the JV agreement**."

[Emphasis Added]

Premised on *Kamil Azman* -

(a) a Consent Judgment/Order is to be construed as if the Consent Judgment/Order is a contract between the Plaintiff and Defendant. Hence, the "paramount consideration" is for the court to ascertain objectively the intention of the parties to the Consent Judgment/Order;

(b) if the Consent Judgment/Order arises from a commercial transaction, the Consent Judgment/Order should be interpreted in a commercially sensible manner, namely, "what a reasonable person, circumstanced as the actual parties in a commercial environment were, would have understood [the Consent Judgment/Order] to mean", and

(c) the court should undertake an objective assessment of -

(i) the language used in the Consent Judgment/Order [Language (Consent Judgment/Order)]; and

(ii) the context and surrounding circumstances regarding the recording of the Consent Judgment/Order [Context/Surrounding Circumstances (Consent Judgment/Order)].

In this regard, the court can consider the fact that parties have the benefit of legal advice and representation when they entered into the Consent Judgment/Order;

(2) if the Language (Consent Judgment/Order) is clear, the court need not refer to the Context/Surrounding Circumstances (Consent Judgment/Order).

The Context/Surrounding Circumstances (Consent Judgment/Order) is only applicable for the court to resolve any ambiguity in the Language (Consent Judgment/Order). The court should be wary of any attempt by a party (X) to a Consent Judgment/Order to contrive any ambiguity in the Consent Judgment/Order so as to allow X to evade X's obligations under the Consent Judgment/Order, especially X's mandatory obligations;

(3) the court cannot consider any letter, email, document, correspondence, event and conduct of the parties after the recording of the Consent Judgment/Order [Subsequent Evidence (Consent Judgment/Order)]. Subsequent Evidence (Consent Judgment/Order) cannot be referred to in the construction of a Consent Judgment/Order because -

(a) the intention of the parties to the Consent Judgment/Order should first be ascertained objectively from the Language (Consent Judgment/Order);

(b) if and only if there is an ambiguity in the Language (Consent Judgment/Order), the court may then refer to the Context/ Surrounding Circumstances (Consent Judgment/Order) to resolve the ambiguity;

(c) Subsequent Evidence (Consent Judgment/Order) cannot constitute the intention of the parties at the time of the recording of the Consent Judgment/Order; and

(d) Subsequent Evidence (Consent Judgment/Order) may be self-serving and may amount to an unlawful attempt by a party to rewrite, if not to circumvent, the Consent Judgment/Order; and

(4) as explained in the above para 25, a "judgment' of a court finally decides on the rights and liabilities of parties in an action. Hence, a court's 'judgment' in an action is final and binding on the parties to the action until -

(a) the judgment is reversed on appeal by a higher court; or

(b) the judgment is subsequently set aside by the same or another competent court on exceptional, "vitiating circumstances" — please refer to *Chow Chuan Fat v. Yeo Chai Seng & Ors* [2016] MLRHU 1420, at [20]

[Finality (Judgment)].

Finality (Judgment) is not only in the interest of the parties to a suit but more importantly, Finality (Judgment) is in the public interest (Policy Considerations). The following Policy Considerations support the need for Finality (Judgment):

(i) Finality (Judgment) ensures that a judgment, including a consent judgment, cannot be unjustly revisited by any party to the action in question. If otherwise, there will be duplicity, if not multiplicity, of proceedings;

(ii) if any judgment in an action, especially a consent judgment, can be relitigated willy nilly by any party to the action, this will erode public confidence in the administration of justice in this country; and

(iii) Finality (Judgment) enables parties in a dispute to move on. In this sense, there is closure and certainty after the delivery of a judgment in a suit. It is axiomatic that there should be certainty in commercial matters.

In view of the Policy Considerations, in the interpretation of a consent judgment, the court has to bear in mind the significance,

if not the need, of Finality (Judgment). Policy Considerations may also support the finality of a consent order.

[27] We construe the 2nd Paragraph [Consent Judgment (1st Suit)] as follows:

(1) the 2nd Paragraph [Consent Judgment (1st Suit)] has provided for the Defendant to pay to the Plaintiff the net sum due from the Defendant to the Plaintiff under the Contract for the Works performed by the Plaintiff (Net Sum Due) after -

(a) the expiry of the DLP; and

(b) the Final Accounts have been prepared and agreed by the Plaintiff and Defendant;

(2) VO No 14 constituted part of the context and surrounding circumstances leading to the recording of the Consent Judgment (1st Suit). Hence, the court can and should take into account the contents of VO No 14 in the interpretation of the Consent Judgment (1st Suit).

In VO No 14, the Defendant's Contract Representative had deducted a sum of RM8,044,601.48 [Deducted Sum (VO No 14)] from any payment due from the Defendant to the Plaintiff for the Works (Gross Sum Due). VO No 14 stated as follows, among others -

"**VO Details**:

You [Plaintiff] are required to proceed with the followings *[sic]*:

...

4) **To omit all plant [*sic*] that have died during [DLP]**)"

[Emphasis Added]

In view of the Deducted Sum (VO No 14), the Net Sum Due pursuant to the 2nd Paragraph [Consent Judgment (1st Suit)] can be easily arrived at by the Plaintiff and Defendant by way of simple calculation (Simple Calculation). In accordance with the 2nd Paragraph [Consent Judgment (1st Suit)]-

(a) the Simple Calculation could only be carried out after the expiry of the DLP; and

(b) after the Net Sum Due had been derived by way of the Simple Calculation, the Net Sum Due would then be included in the Final Accounts.

We shall refer to the above interpretation of the 2nd Paragraph [Consent Judgment (1st Suit)] as the "Simple Calculation Interpretation";

(3) the Simple Calculation Interpretation is supported by the following surrounding circumstances leading to the recording of the Consent Judgment (1st Suit) -

(a) the Defendant's Letter (15 July 2011); and

(b) the Plaintiff's Letter (20 October 2011);

(4) both the Plaintiff and Defendant were represented by legal counsel in the 1st Suit. If the Plaintiff and Defendant had intended for the Net Sum Due to be only paid by the Defendant to the Plaintiff after a valuation of the Dead/Rejected Trees by both parties [Valuation (Dead/Rejected Trees)], both parties would have specifically provided for the requirement of Valuation (Dead/Rejected Trees) in the 2nd Paragraph [Consent Judgment (1st Suit)]. This was not however done when the Consent Judgment (1st Suit) was recorded; and

(5) if we have accepted the Valuation (Dead/Rejected Trees) as a condition precedent of the Consent Judgment (1st Suit), this is contrary to the Policy Considerations which support the finality of the Consent Judgment (1st Suit).

[28] As explained in the above para 27 -

(1) the learned JC has committed a legal error in not giving effect to the Simple Calculation Interpretation (2nd Legal Error). Upon the recording of the Consent Judgment (1st Suit), the Defendant cannot rely on any provision in the Contract, be it the Special Condition or Condition, to revisit the Issue (Dead/Rejected Trees); and

(2) the 2nd Paragraph [Consent Judgment (1st Suit)] does not provide for the 2 Conditions Precedent (as submitted by the Defendant's learned counsel). If we have accepted the submission by the Defendant's learned counsel that This Suit had been instituted prematurely by the Plaintiff (due to non-compliance with the 2nd Condition Precedent), this will militate against the Policy Considerations which underpin the finality of the Consent Judgment (1st Suit). In any event, it is inconceivable for the Plaintiff and Defendant to have expended much time, effort and costs in the 1st Suit and yet their dispute under the Contract had not been finally resolved by way of the Consent Judgment (1st Suit).

[29] All the cases cited by the Defendant's learned counsel can be easily distinguished because of the application of the Simple Calculation Interpretation of the 2nd Paragraph [Consent Judgment (1st Suit)] in the instant case.

[30] We have not overlooked the submission by the Defendant's learned counsel that the Plaintiff's Statement of Claim in This Suit (SOC) had not pleaded VO No 14. We cannot accept this contention because VO No 14 only constituted evidence regarding the context and surrounding circumstances leading to the recording of the Consent Judgment (1st Suit). Hence, the Plaintiff was not required by O 18 r 7(1) of the Rules of Court 2012 (RC) to plead VO No 14 in the SOC. We reproduce below O 18 r 7(1) RC:

> "Order 18 r 7(1). **Subject to the provisions of this rule and rr 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.**"
>
> [Emphasis Added]

K. Is Defendant Estopped By Issue Estoppel Principle From Relying On Issue (Dead/Rejected Trees) In This Suit?

[31] Once a court has finally decided a case (1st Case), the decision in the 1st Case may affect subsequent cases by way of an application of the doctrine of *res judicata*, in the Supreme Court case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 1 MLRA 611, Peh Swee Chin FCJ has explained that the *res judicata* doctrine consists of two limbs as follows:

(1) the principle of cause of action estoppel applies to bar a party (Z) in the 1st Case and/or Z's "privy" from filing any action after the 1st Case (Subsequent Case) based on a cause of action which has been decided in the 1st Case [1st Limb (Cause of Action Estoppel)]; and

(2) the issue estoppel principle operates to prevent Z and/or Z's privy from raising any issue in the Subsequent Case which -

   (a) has been raised in the 1st Case; or

   (b) can be raised with reasonable diligence in the 1st Case [2nd Limb (issue Estoppel)].

[32] It is clear from VO No 14 and the Simple Calculation Interpretation of the 2nd Paragraph [Consent Judgment (1st Suit)] that the Consent Judgment (1st Suit) had disposed of the Issue (Dead/Rejected Trees)]. Accordingly, the Defendant is now estopped by the 2nd Limb (issue Estoppel) from resisting This Suit based on the Issue (Dead/Rejected Trees). With respect, the High

Court has erred in law when the learned JC did not apply the 2nd Limb (Issue Estoppel) in this case (3rd Legal Error).

L. Could Defendant Lawfully Issue VO No 15 And Draft Final Accounts?

[33] We are of the considered view that the learned JC had committed an error of law by accepting VO No 15 and the Draft Final Accounts [including the Sum (Draft Final Accounts)] (4th Legal Error). Our reasons are two-fold, namely:

(1) as explained in the above para 27, in view of the Simple Calculation Interpretation of the 2nd Paragraph [Consent Judgment (1st Suit)], the Defendant could not lawfully issue VO No 15 and the Draft Final Accounts; and

(2) the Defendant is estopped by the 2nd Limb (Issue Estoppel) from issuing VO No 15 and the Draft Final Accounts − please refer to the above paras 31 and 32.

Premised on the above reasons, the Plaintiff is entitled to a declaration that the Draft Final Accounts [including the Sum (Draft Final Accounts)] is invalid.

M. Whether Court Can Construe Contract Based On Extrinsic Evidence

[34] Firstly, with respect to the learned JC, the Contract cannot be interpreted by way of oral evidence of a witness. This is because the construction of an agreement is a question of law to be decided by the court and not by factual and/or expert witnesses through their oral evidence − please refer to the Court of Appeal's judgment delivered by Gopal Sri Ram JCA (as he then was) in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2002] 2 MLRA 510.

[35] Secondly, ss 91 and 92 of the Evidence Act 1950 (EA) provide as follows:

> "**Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**
>
> Section 91. **When the terms of a contract** or of a grant or of any other disposition of property **have been reduced by or by consent of the parties to the form of a document**, and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of the contract**, grant or other disposition of property or of the matter **except the document itself**, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> ...
>
> **Exclusion of evidence of oral agreement**
>
> Section 92. **When the terms of any such contract**, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, **have been proved according to s 91, no evidence of any oral**

agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that-

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts..."

[Emphasis Added]

In this case, the Defendant cannot rely on any one of provisoes (a) to (f) to s 92 EA to admit the Extrinsic Evidence for the purpose of the interpretation of the Contract. As explained by Chang Min Tat FJ in the Federal Court case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 MLRA 81, by reason of ss 91 and 92 EA, no Extrinsic Evidence can be adduced by the Defendant to -

(1) contradict;

(2) vary;

(3) add to; or

(4) subtract from

- the contents of the Contract.

Premised on ss 91 and 92 EA, the High Court cannot construe the Contract based on the following Extrinsic Evidence -

(a) oral testimony from the Plaintiff's witness;

(b) minutes of meetings between the Plaintiff and Defendant;

(c) letters between the Plaintiff and Defendant; and

(d) subsequent conduct of the Plaintiff and Defendant. In this regard, we rely on the following judgment of the Court of Appeal in *Abd Rahman Soltan & Ors v. Federal Land Development Authority & Anor And Other Appeals* [2023] 4 MLRA 567, at [49] -

"[49] **Secondly, in the construction of a contractual clause, the court cannot consider the conduct of contracting parties which has taken place after the execution of the contract. In *Era Kemuncak Jaya (M) Sdn Bhd v. Tenaga Switchgear Sdn Bhd* [2022] 1 MLRH 208, at [29], the High Court has decided as follows**:

> "[29] **In this case, the Plaintiff and Defendant had reduced the Agreement in a "complete written form". The Agreement is not a contract which is partly in writing and partly by way of conduct Based on ss 91 and 92 [Evidence Act 1950], the Defendant cannot rely on extrinsic evidence, including the conduct of the Plaintiff and Defendant (Parties' Conduct), to add TNB's Schedule (Civil Works) to the Agreement There is another reason why I cannot refer to the Parties' Conduct in the interpretation of cl 1.2(a) to (d) LA. I cite the judgment of Lord Reid in the House of Lords in *Whitworth Street Estates (Manchester) Ltd v. James Miller & Partners Ltd* [1970] AC 583, at 603, as follows**:
>
> > "**I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.**"

[Emphasis Added]

Lord Reid affirmed the above decision in the House of Lords' case of *Schuler AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235, at 252, as follows -

> "**I must add some observations about a matter which was fully argued before your Lordships. The majority of the Court of Appeal were influenced by a consideration of actings subsequent to the making of the contract. In my view, this was inconsistent with the decision of this House in *Whitworth Street Estates (Manchester) Ltd v. James Miller & Partners Ltd* [1970] AC 583. We were asked by the respondent to reconsider that decision on this point and l have done so. As a result /**

> **see no reason to change the view which I expressed in that case**. It was decided in *Watcham v. Attorney-General of East Africa Protectorate* [1919] AC 533 that in deciding the scope of an ambiguous title to land it was proper to have regard to subsequent actings and there are other authorities for that view. There may be special reasons for construing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. **Otherwise l find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning. I would therefore reserve my opinion with regard to *Watcham's* case but repeat my view expressed in *Whitworth* with regard to the general principle**."
>
> [Emphasis Added]
>
> **If I have accepted the above submission by Mr See, this will unlawfully allow contracting parties to evade their contractual obligations by acting contrary to the contracts and then unjustly rely on their unlawful conduct to interpret the contracts in their favour. Such an outcome is tantamount to a rewriting of the contract which is contrary to the sanctity of agreements.**""
>
> [Emphasis Added]

N. Can Court Grant Relief Pursuant To General Prayer (Relief)?

[36] For the sake of completeness, we are unable to agree with the submission by the Defendant's learned counsel that the High Court had erred in law by making the High Court's Judgment [Payment of Sum (Draft Final Account)] because the Plaintiff had not specifically prayed for such a relief in the SOC. This is because there is a General Prayer (Relief) in sub-paragraph 24(f) SOC. After a trial, the court has a discretionary power to award any remedy in the interest of justice pursuant to a General Prayer (Relief). We cite the following judgment of the High Court in *Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Appeal* [2017] MLRHU 1156, at [128]:

> "[128] Firstly, the 2 SOCs have prayed for "further and/or other relief" as the court deems fit and proper (General Prayer For Relief). The following appellate cases have decided that the court may grant any remedy in the interest of justice pursuant to a General Prayer For Relief:
>
> (1) Salleh Abas FJ's (as he then was) judgment in the Federal Court case of *Lim Eng Kay v. Jaafar Mohamad Said* [1982] 1 MLRA 71;
>
> (2) **the Court of Appeal's decision delivered by Gopal Sri Ram JCA (as he then was) in *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLRA 186**;
>
> (3) **the majority judgment in the Court of Appeal given by Zainun Ali JCA (as she then was) in *Pentadbir Tanah Daerah Pontian & Ors v. Ossons Ventures Sdn Bhd* [2009] 2 MLRA 635; and**

(4) **Abdul Aziz Abd Rahim JCA's judgment in the Court of Appeal case of *Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors* [2013] 7 MLRA 655, at para 64**."

[Emphasis Added]

O. Conclusion

[37] Premised on the Simple Calculation Interpretation of the 2nd Paragraph [Consent Judgment (1st Suit)], the 1st to 4th Legal Errors and the above reasons, the following order is made in these 2 Appeals:

(1) the 1st Appeal is allowed;

(3) the High Court's Decision is set aside; and

(4) the following judgment is entered -

(a) the Defendant shall pay to the Plaintiff a sum of RM3,136,293.25 (Judgment Sum) pursuant to the Simple Calculation interpretation of the 2nd Paragraph [Consent Judgment (1st Suit)];

(b) a declaration that the Draft Final Accounts [including the Sum (Draft Final Accounts)] is invalid;

(c) the Defendant shall pay to the Plaintiff interest at the rate of 5% per annum on the Judgment Sum from 29 August 2019 (date of filing of This Suit) until full payment of the Judgment Sum by the Defendant; and

(d) costs of RM50,000.00 (subject to allocatur fee) shall be paid by the Defendant to the Plaintiff for the proceedings in the Court of Appeal and High Court.

[38] This case illustrates the final effect of a consent judgment in a suit. Hence, the need for parties and their learned counsel to exercise due care before the parties record the consent judgment.

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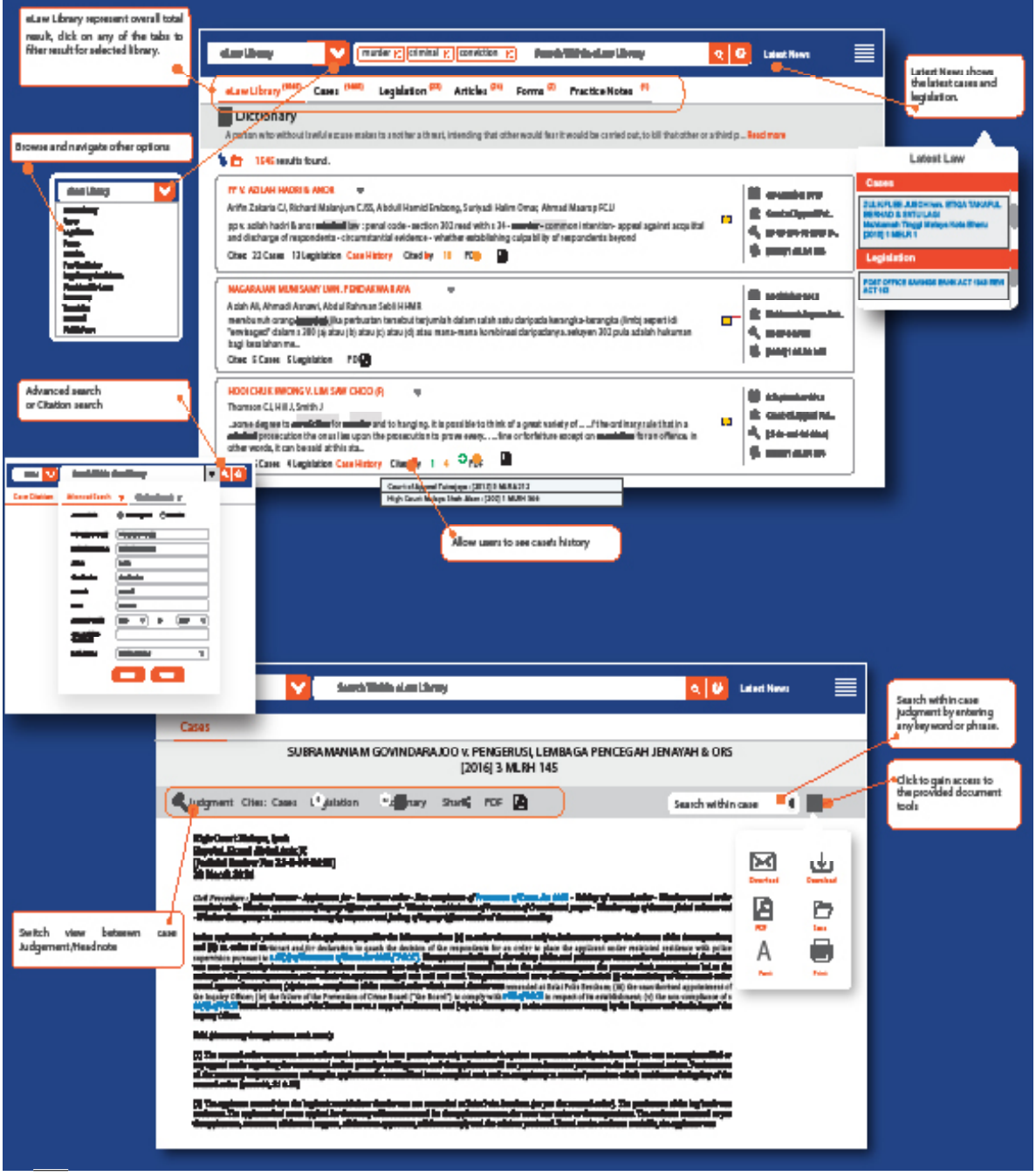

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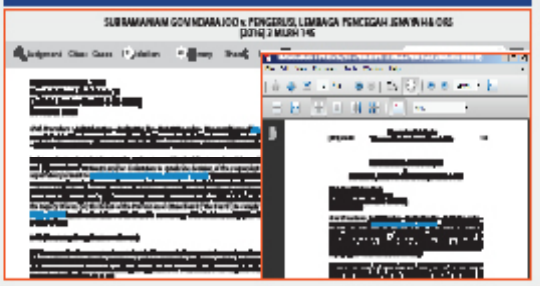

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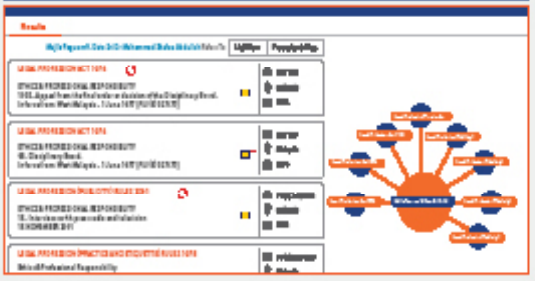

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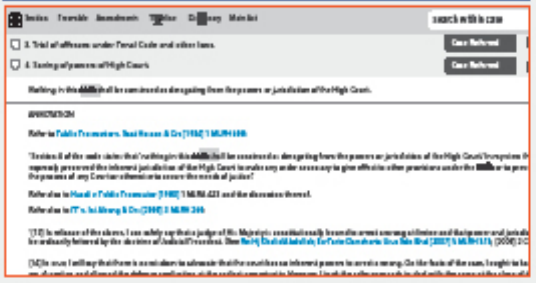

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