

**Ho Kam Wah @ Ho Kim Wah****v****Began Land Sdn Bhd**

**High Court**, Shah Alam – Suit No. BA-22NCvC-627-11/2015  
Mohamad Shariff Abu Samah JC

March 5, 2018

*Civil procedure – Stay – Pending appeal – Plaintiff seeking stay of proceedings in instant suit pending appeal in another suit against dismissal of appeal to set aside consent order obtained in instant suit – Defendant applying for consequential order to enforce consent order ("encl 55") – Whether special circumstances warranting stay – Whether encl 55 an attempt to vary/change consent order – Whether court has jurisdiction to grant consequential order as prayed for*

The plaintiff had refused to comply with a consent order dated June 28, 2016 ("the said order") and had vide another suit i.e. Originating Summons No. BA-24-523-05/2017 ("the setting aside suit") applied to set aside the said order. The setting aside application was dismissed and the defendant applied for a consequential order to enforce and/or give effect to the said consent order ("encl 55"). The plaintiff opposed the said application and filed an appeal against the dismissal of its setting aside application. The plaintiff thereafter applied for a stay of proceedings ("the second application") pending the determination of its appeal in respect of the setting aside suit. In support of the said second application, the plaintiff submitted that if the stay is not granted and encl 55 is allowed to proceed, it would result in a waste of time and effort in the event the Court of Appeal allows the appeal as the consent order will be set aside and the proceedings conducted by the court in this instance would have to be expunged.

**Issues**

1. Whether there are any special circumstances warranting a stay of the proceedings.
2. Whether encl 55 is an attempt to vary and change the said order.
3. Whether the court can grant the consequential order as prayed for in encl 55.

**Held**, dismissing the plaintiff's application with costs and granting order in terms of defendant's application

1. Having failed to apply to stay the said order in the setting aside suit, the said order thus takes full effect and the points raised by the plaintiff now

- are merely res judicata. All of the issues raised by the plaintiff to oppose  
encl 55 have already been dismissed in the setting aside suit. Hence the  
principle of estoppel clearly, is applicable in this instance. The stay if  
granted, will be highly prejudicial to the defendant. On the facts there is  
nothing irreparable nor is there any nugatoriness to warrant a stay.  
[see p 809 para 17; p 810 para 19 - p 812 para 20] 1 5
2. There is no merit to the allegation that encl 55 is an attempt to change the  
said order. All that was sought by the defendant is for the plaintiff to  
comply with the terms of the said order that had already been mutually  
agreed upon. [see p 812 para 21 - p 813 para 22] 10
3. The court has the inherent powers to make consequential orders and give  
directions to give effect to its decision or orders "when it's working out  
might involve matters on which it might be necessary to obtain a decision  
of the court". [see p 812 para 22 - p 814 para 23] 15
- Cases referred to by the court** 20
- Abdul Rahman b Hj Yaacob (representing the estate of the deceased Hj Yaacob b Awang)  
v Mohd Salleh b Hj Yusoff* [2001] 5 MLJ 637, HC (ref)
- Abdul Razak b Sheikh Mahmood & 3 Ors v Amanah Raya Bhd & 2 Ors* [2018] AMEJ  
0030; [2018] 1 LNS 30; [2018] 5 CLJ 273, CA (ref) 25
- Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 AMR 2559; [1995]  
3 MLJ 189, SC (ref)
- Chang Shu Hua (P) v Goon Fook Hong* [2008] 4 AMR 285; [2008] 3 CLJ 429, CA (ref) 30
- Citibank NA v Mrs ND Chandrasegaran Nee Nirmala Devi a/p P Ratnadurai* [2007] 6  
AMR 357; [2007] 8 MLJ 149, HC (ref)
- Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 6 AMR 429; [2004] 4 MLJ 259,  
HC (ref) 35
- HSBC Bank Malaysia Bhd v Jejak Maju Resources Sdn Bhd & 6 Ors* [2015] 2 AMR 428;  
[2015] 10 MLJ 645; [2015] 4 CLJ 81, HC (ref)
- Hartecon JV Sdn Bhd v Hartela Contractors Ltd* [1996] 2 AMR 1457; [1996] 2 MLJ 57,  
CA (ref) 40
- Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi Serbausaha Makmur Bhd* [2003] 5  
AMR 758; [2004] 1 MLJ 257, FC (ref)
- Leong Chee Kong & Anor v Tan Leng Kee* [2001] 1 AMR 1117; [2001] 5 CLJ 408, HC  
(ref)
- Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 AMR 2867; [2002]  
5 CLJ 380, CA (ref)
- Societe Des Etains De Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267, HC  
(ref)
- Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No. 2)* [1970] 2 MLJ 226, FC  
(ref)

1 *Univein Sdn Bhd v Malaysia Building Society Bhd* [2003] 3 AMR 181; [2003] 4 MLJ  
618, CA (ref)  
Yap Kian @ Yap Sin Tian v Poh Chin Chuan & 17 Ors [2015] AMEJ 1257; [2016] 7 MLJ  
805, HC (ref)

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**Legislation referred to by the court**

*Malaysia*

Rules of Court 2012, Order 92 r 4

10 *Bahari Yeow Tien Hong, Vanessa Wong and Choo Wen Chun* (Azlan Shah Sukhdev  
& Co) for plaintiff  
*Justin Voon* (KS Ong & Co) for defendant

15 *Judgment received: March 7, 2018*

**Mohamad Shariff Abu Samah JC**

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**Introduction**

[1] By notice of application dated May 8, 2017, the defendant seeks for a  
consequential order ("encl 55") to enforce and/or give effect in relation to the  
25 consent order dated June 28, 2016 ("first application"). Nevertheless, the plaintiff  
had filed an application dated February 8, 2018 seeking an order from this court  
for a further stay of proceedings pending an appeal to the Court of Appeal in  
another court Suit No. SAHC OS No. BA-24-523-05/2017 ("second  
30 application" – "the setting aside suit").

[2] The defendant's claim (first application) is a straightforward matter and the  
35 plaintiff has no case at all to oppose the said application herein. In fact, it would  
be an abuse of process for the plaintiff to oppose the said application at this  
juncture.

[3] The cause papers for this first application are as follows:

- 40 (a) The defendant's summon in chambers dated May 8, 2017 – encl 55;
- (b) The defendant's affidavit in support duly affirmed by Yeo Wee Meng on  
May 8, 2017 ("Yeo's first affidavit");
- (c) The plaintiff's affidavit in reply duly affirmed by Ho Kam Wah @ Ho Kim  
Wah on June 13, 2017 ("Ho's first affidavit");
- (d) The defendant's affidavit in reply (1) affirmed by Yeo Wee Meng on  
June 29, 2017 ("Yeo's second affidavit"); and
- (e) The plaintiff's affidavit in reply No. 2 duly affirmed by Ho Kam Wah @  
Ho Kim Wah on July 14, 2017 ("Ho's second affidavit").

[4] To simplify the above affidavits, the said application is filed by the defendant to enforce and/or give effect to the consent order dated June 28, 2016. 1

[5] The plaintiff's claim (second application) is to apply for a stay of proceeding pending appeal to the Court of Appeal in another court Suit No. SAHC OS No. BA-24-253-05/2017. Vide Shah Alam High Court Originating Summons No. BA-24-523-05/2017, the plaintiff commenced suit to set aside the said consent order alleging that the consent order was obtained by fraud and/or misrepresentation. The plaintiff took the drastic stand that the said consent order ought to be set aside and alleged that the consent order is obtained by "fraud and/or misrepresentation" and even commenced a fresh suit vide Shah Alam High Court Originating Summons No. BA-24-523-05/2017 to set aside the said consent order ("the said setting aside suit"). Nevertheless, on January 30, 2018, Yang Arif Datuk Azimah binti Omar had dismissed the said setting aside suit on its merits with cost. 5  
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[6] The cause papers for this second application are as follows:

- (a) The plaintiff's notice of application dated February 8, 2018 ("encl 71"); 20
- (b) The plaintiff's affidavit in support affirmed by Ho Kam Wah @ Ho Kim Wah on February 8, 2018;
- (c) The defendant's affidavit in reply affirmed by Yeo Wee Meng on February 26, 2018; and 25
- (d) The plaintiff's affidavit in reply affirmed by Ho Kam Wah @ Ho Kim Wah on February 28, 2018. 30

[7] As both the applications would involved the same issue i.e. the consent order dated June 28, 2016, I would consider the merit of both applications at the same time. Nevertheless, it is to be noted that for whatever reasons it be, the decision of any application, it would affect the situation of another application. 35

#### **Fact of case**

[8] Both the plaintiff and the defendant had entered into a consent order dated June 28, 2016. Pursuant to paragraph (iii) of the said consent order, the defendant was obliged to give notice to the plaintiff to choose seven units of semi detached houses and two units of town houses and the plaintiff shall do so within seven days from receipt of the said notice from the defendant. Notice have been given vide inter alia the defendant's solicitors letters dated November 25, 2016 and December 27, 2016. Nevertheless, till to date the plaintiff has not complied with the same. Instead of complying with the said consent order, the plaintiff sought to challenge it and now lost their case in the setting aside application. It is to be noted that, there was no stay of this January 30, 2018 order was obtained. Therefore, to my mind, the plaintiff have no more case at all to set aside the said 40

1 consent order and the plaintiff also has no more case to oppose the said  
application herein to enforce and/or give effect to the said consent order. By  
right, when the said setting aside suit has been dismissed, there is no more basis  
for the plaintiff to oppose encl 55. Nevertheless, the plaintiff had opposed this  
5 application and the court's decision was scheduled to be delivered on March 1,  
2018. Only thereafter, an appeal to the Court of Appeal was filed in respect of the  
said setting aside suit and encl 71 was filed herein for a stay of proceedings.

10 [9] The learned counsel for the plaintiff had submitted that in the event that a  
stay a proceedings is not granted and encl 55 is to be allowed to proceed, it would  
result in a waste of time and effort by all persons involved since if the Court of  
Appeal allows the appeal, the consent order will be set aside and the whole  
proceedings conducted by this court would have to be completely expunged. In  
15 the circumstances it would be more expedient to allow a stay of the proceedings  
until the hearing of the appeal has been completed.

20 [10] The counsel for the plaintiff further submitted that in encl 55, the defendant  
is making an attempt to seek for an order, purportedly on the pretext that it is  
seeking for a "consequential order" arising from the consent order. In *HSBC Bank  
Malaysia Berhad v Jejak Maju Resources Sdn Bhd & 6 Ors* [2015] 2 AMR 428; [2015] 10  
MLJ 645; [2015] 4 CLJ 81, Azimah Omar JC:

25 ...[28] In this situation, special circumstances would arise in which obviously there  
would be duplicity of decisions which would probably result in contradictory  
decisions by the two courts. Particularly in this case, the duplicity would be the  
decision between the Sessions Court inquiry and the High Court here. I must say  
30 that both of the two actions would achieve the same effect relating to these monies  
in which both of the two actions would ultimately decide which party is entitled  
to the monies. This may give rise to two conflicting decisions on the same monies.  
The duplicity here is not so much on the proceedings which saw the same parties'  
35 involvement but instead would be the proceeding hypotheses, which entails the  
duplicity of decisions from the proceedings in which both causes of action would  
decide which party is entitled to the monies.

40 [29] Thus, the ensuing effect of both decisions may contradict each other even if  
the two decisions derive from different causes of actions and/or burden of proof.  
It is my judgment that this situation falls squarely into the category of special  
circumstances. *A stay of proceedings should be granted in order to avoid unnecessary  
contradictions and appeal processes.*

[30] In this regard, I would like to refer to the decision of the Supreme Court in the  
case of *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ  
184; [1987] CLJ (Rep) 160; [1987] 2 CLJ 290. In the case of *Lesco Development*, the  
Supreme Court had already envisaged that it is undesirable to allow a situation  
where two different courts would try and determine the same issues arising  
between the same parties relating to the same subject matter. In this case, the  
Supreme Court had dealt with a foreclosure proceeding which resulted in an

order for sale and a claim for default of payments on the same monies claimed in the foreclosure application. The Supreme Court had held the following: 1

- (a) *it is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter;* 5
- (b) *in this case the hearing of the foreclosure proceeding should have been postponed until the final disposal of the claim on the debt;* and
- (c) *the order of sale should be set aside and the hearing of the foreclosure application be dealt after the final disposal of the claim on the debt..* 10

(Emphasis added.)

[11] Similarly in the case of *Citibank NA v Mrs ND Chandrasegaran Nee Nirmala Devi a/p P Ratnadurai* [2007] 6 AMR 357; [2007] 8 MLJ 149, the plaintiff had sought to stay the execution of the order for sale of her property, pending the determination of her impeachment proceedings of all order judgments or decrees granted by the High Court. The plaintiff alleged that the power of attorney that the defendant had given to her attorney was fraudulent. Abdul Malik Ishak J (as he then was), in granting the stay, held that the plaintiff would suffer irreparable damage which could not be compensated with costs, and that the impeachment proceedings would be rendered nugatory, if a stay is not granted. His lordship held that if proceedings were allowed to continue, there is a real danger of the alleged fraud being perpetuated against the court and the plaintiff, and that that these are special circumstances which warranted a stay. 15 20 25

[12] In another case *Chang Shu Hua (P) v Goon Fook Hong* [2008] 4 AMR 285; [2008] 3 CLJ 429, CA, Abdul Malik Ishak JCA delivering judgment of the court: 30

...[33] At the High Court, in the case of *Leong Chee Kong & Anor v Tan Leng Kee* [2001] 1 AMR 1117; [2001] 5 CLJ 408, I added two other factors in order to decide whether a stay ought to be granted or not. And that would be *whether the applicant will suffer "irreparable damage" and "irremediably injured" if no stay was granted.* That was a case where the plaintiffs there would suffer "irreparable damage" and be "irremediably injured" if the estate of the deceased were to fail into the hands of the defendant there and the plaintiffs there would certainly not be able to return to their original positions if the stay was not granted. For that and other reasons, the stay was granted. On "irreparable damage" as a factor to decide the stay, I had this to say at p 430 of the report: 35 40

- (2) whether irreparable damage would be done to the plaintiffs should the stay be refused because the plaintiffs may not be able to obtain the fruits of their litigation.

Continuing at p 431 of the report, I had this to say about the "irremediably injured" factor:

1 (4) *even in a situation where there are no special circumstances present but where the*  
*appellants would be irremediably injured if there was no stay should their appeals*  
*succeed, the court would still be empowered and has the discretion to grant a stay*  
*(Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors*  
5 *[1989] 1 CLJ (Rep) 469; [1989] 2 CLJ 1200 and Chong Wooi Leong & Ors v*  
*Lebbey Sdn Bhd [1998] 3 CLJ 685)...*

(Emphasis added.)

#### 10 Principles on stay of execution

[13] Having had in mind of the above authority and the reasons behind the  
plaintiff's application for stay, I shall now consider the merit of such application.  
15 In considering this application, it is trite law that the burden and onus is on the  
plaintiff to prove special circumstances and this must be explained and/or  
shown in the affidavit. *Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi Serbausaha*  
*Makmur Berhad [2003] 5 AMR 758 at 770; [2004] 1 MLJ 257 at 269, Augustine Paul*  
20 *JCA (as he then was) delivering judgment of the court:*

... [1] There are many factors that may constitute special circumstances and the  
fact that an appeal would be rendered nugatory if stay was refused is the most  
common one; it is an example of special circumstances. As nugatoriness is a  
25 species of special circumstances, a mere reference to it is sufficient to convey the  
correct legal impression, and any attempt to restrict the grant of stay to  
nugatoriness, quite apart from its impropriety, will severely restrict the grounds  
upon which an applicant may rely. Therefore, the applicants were wrong in  
submitting that the nugatory approach was not a matter for consideration in this  
30 case that only the special circumstances approach was relevant They would have  
been correct if they had said that they were not relying on nugatoriness but on  
some other species of special circumstances ... The onus is on the applicants to  
demonstrate the existence of special circumstances *to justify the grant of a stay of*  
*execution. The reasons must relate to the enforcement of the judgment. They must be*  
35 *deposed in the affidavit filed in support of the application (see Syarikat Berpakat v*  
*Lim Kai Kok [1983] 1 MLJ 406). Where it is alleged that there is a danger of the*  
*unsuccessful party not being repaid if its appeal is successful for any reason like,*  
40 *for instance, the insolvency of the other party, this must be shown in the affidavit (see*  
*The Annot Lyle (1886) 11 PD 114) ...*

(Emphasis added.)

[14] In the case of *Leong Chee Kong & Anor v Tan Leng Kee [2001] 1 AMR 1117;*  
*[2001] 5 CLJ 408*, the court considered the special circumstances approach and the  
nugatory approach and came to the conclusion that the nugatory principle is in  
itself a special circumstance and the correct legal position is the special  
circumstance test. Similarly in the case *Ming Ann Holdings Sdn Bhd v Danaharta*  
*Urus Sdn Bhd [2002] 3 AMR 2867; [2002] 5 CLJ 380, Abdul Hamid Mohamad JCA*  
in the Court of Appeal held as follows:

- ... [2] ... The most important factor for consideration in granting a stay appears to be whether the appeal, if successful, is rendered nugatory. It does not matter whether the nugatory factor is considered under the head of "special circumstances" so long as it is considered... 1
- First issue** 5
- Any special circumstances?*
- [15] Pursuant to paragraph (iii) of the said consent order which read as below: 10
- ... (iii) berdasarkan pelan-pelan pembinaan yang telah di luluskan ("approved layout plans' oleh Pihak Berkuasa berhubung pembangunan di atas Hartanah tersebut, Defendan adalah dibenarkan untuk membina tujuh puluh (70) unit rumah kediaman berkembar (3) tingkat di atas hartanah tersebut. Sehubungan dengan perkara ini selepas Defendan menjual tiga puluh lima (35) daripada tujuh puluh (70) rumah kediaman berkembar tiga (3) tingkat yang dibina tersebut, Defendan akan memberi notis kepada Plaintiff untuk memilih tujuh (7) unit rumah kediaman berkembar tiga (3) tingkat yang dirujuk dalam perenggan (i) di atas dan dua (2) unit rumah berupa rumah bandar ("town houses") yang dirujuk dalam perenggan (ii) di atas dan Plaintiff adalah di kehendaki untuk memilih tujuh (7) unit rumah kediaman berkembar tiga (3) tingkat tersebut dari baki tiga puluh lima (35) unit rumah kediaman berkembar tiga (3) tingkat serta dua (2) unit rumah berupa rumah bandar ("town houses") tersebut dalam tempoh tujuh (7) hari dari tarikh penerimaan notis Defendan. Sekiranya Plaintiff gagal untuk membuat pilihan tujuh (7) unit rumah kediaman berkembar tiga (3) tingkat tersebut serta dua (2) unit rumah berupa rumah bandar ("town houses") tersebut dalam masa sepuluh (10) hari dari tarikh penerimaan notis tersebut, Defendan adalah bebas untuk memilih tujuh (7) unit rumah kediaman berkembar tiga (3) tingkat tersebut serta dua (2) unit rumah berupa rumah bandar ("town houses') tersebut bagi pihak Plaintiff. Bagi maksud klausa ini, notis kepada Plaintiff hendaklah dihantar kepada alamat No. 1, Jalan Baru, Desa Ros, 43000 Kajang, Selangor melalui surat pas berdaftar... 15  
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- [16] By reading the above clause, it is clear to my mind that what the plaintiff needs to do is just to choose the units at this moment. *It is pertinent to the defendant which otherwise would be prejudiced as without knowing what units has been chosen by the plaintiff, the defendant cannot sell and/or deal with other units and the project will be delayed.* Similarly under paragraph (ix) of the said consent order which reads as below: 40
- ... (ix) bahawa Peguamcara Defendan adalah diberi kuasa yang tidak terbatal ("irrevocably authorized? untuk menyerahkan ("deliver'? Borang-Borang Pindah-Milik (Borang 14A Kanun Tanah Negara 1965) memilih plaintiff, suratan-suratan ikatan hak milik ("original documents of title'?, suratan ikatan hak milik strata ("original strata document of title'? dan kunci-kunci berhubung unit-unit rumah kediaman berkembar dan rumah kediaman jenis rumah bandar ("town houses'? yang dirujuk dalam perenggan (i) dan (ii) di atas apabila



1 Certificate of Practical Completion untuk bangunan unit-unit rumah kediaman  
yang dirujuk di perenggan (i) dan (ii) di atas dikeluarkan oleh Arkitek atau pada  
satu masa yang lebih awal yang dipersetujui di antara Plaintiff dan Defendan  
berserta wang sebanyak Satu Juta (RM1,000,000.00) yang di rujuk dalam  
5 perenggan (vi) di atas kepada peguamcara Plaintiff sebagai ' Pemegang Amanah  
("Stakeholders"? untuk dimajukan kepada Plaintiff dalam masa Dua puluh Satu  
(21) hari dan tarikh Borang Pindahmilik Hartanah Lot 2889 diadjudikasikan dan  
dikemukakan kepada Pejabat Tanah berkenaan untuk didaftarkan di atas nama  
Defendan atau nomineenya dengan kos dan perbelanjaan berkaitan dibiayai oleh  
10 Defendan; ...

[17] To my mind, by choosing the unit at this moment, such title would not pass  
or get registered as transfer of the chosen units to the plaintiff as yet. Form 14A  
15 and the original documents of title for the chosen units will only be given to the  
plaintiff's solicitors after the certificate of practical completion has been issued.  
This would clearly take some time and by that time the appeal by the plaintiff to  
the Court of Appeal in respect of the January 30, 2018 decision on the separate  
20 said setting aside suit will be over. I agree with the learned counsel for the  
defendant, by that time if the plaintiff succeeded in their appeal at the Court of  
Appeal, the "choosing of units" will be automatically cancelled or otherwise they  
are bound by the chosen units. In that situation, to my mind the project can  
25 proceed and the said appeal can also proceed and there is no harm nor prejudice  
caused to the plaintiff.

On the other hand, the counsel for the plaintiff had submitted that since the  
plaintiff refused to choose, why can't the defendant choose such units for the  
30 plaintiff. To this extent, I would once again agree with the defendant's counsel  
that there may be other disputes because the plaintiff may then allege that "lousy  
units" are chosen for them. Nevertheless, by submitting the same, to my mind the  
plaintiff is admitting that units can be chosen by now. The question is why didn't  
35 the plaintiff made their choice at this moment??? *It is my considered view that by  
making such tentative choice of units pending appeal that would not prejudice the  
plaintiff. There is no "nugatories" at all in this situation. In this instance, I hardly find  
any reasons or explanations being given in the affidavit as to how the appeal will become  
40 nugatory simply because the plaintiff is choosing such units now.* The plaintiff already  
delayed the "choosing of units" for so long and almost two years had lapsed. Is the  
plaintiff now willing to pay for the damages caused by such delay?? To my mind,  
if such stay to be granted, it is highly prejudicial to the defendant as well as the  
project.

[18] Further, the issue is not about land because both PT 74914 and PT 75491 do  
not belong to the plaintiff. The statement of claim is about "trespass" on another  
land and compensation for alleged trespass. The whole issue is about dollars and  
cents and the said consent order was entered into so that the plaintiff obtain  
compensation in value of units which is a commercial value. *As the plaintiff is not  
staying in the units which has yet to be built, there is no sentimental value and it is only*

*a commercial value with no special circumstances for any stay.* In the case of *Univein Sdn Bhd v Malaysia Building Society Bhd* [2003] 3 AMR 181 at 184-185; [2003] 4 MLJ 618 at 621-622, Abdul Aziz JCA (delivering judgment of the court):

... The appellants' other counsel thereupon embarked on his submission for a stay of execution. It was not clear to me why the appellants' counsel made the disclosure. The matter disclosed certainly did not enter into the substantive submission on stay of execution. It was, however, obvious to me from the disclosure that the appellants would not mind losing the lands if they got the right price for them. The respondents had therefore been right in saying in paragraph 17 of their affidavit in reply that the lands were commercial property of no sentimental value to the appellants. That being the case, to my mind the point of nugatoriness and any submission about it did not have to be considered ...

Similarly in the case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 6 AMR 429 at 441; [2004] 4 MLJ 259 at 270, James Foong J:

... The said lands are within the golden triangle of Kuala Lumpur. Though there is a house thereon it is of no heritage or sentimental value. The real worth of the said lands is its commercial value with nothing thereon so that it could be developed. Thus, any damages resulting from the disposal of the said lands to a third party, if the caveats are lifted, could be quantified ...

[19] Having said the above, *to my mind the defendant will be more prejudiced in a manner which cannot be adequately compensated by damages alone if the said stay is allowed, units are not chosen and the project is delayed.* Having failed to apply to stay the order dated January 30, 2018 in the said setting aside suit, to my mind the said order takes full effect and the points raised by the plaintiff now are merely "res judicata". It must be emphasised that the grounds and reasons set out in the said setting aside suit are the same as the grounds and reasons in the application for stay. All the issues raised by the plaintiff to oppose the said application, have already been dismissed in the setting aside suit. As such the principle of estoppel will clearly apply. In the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 AMR 2559 at 2574-2575; [1995] 3 MLJ 189 at 199-200:

... On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means a lot more, i.e. *that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision.* In this respect, we respectfully agree with Peter Gibson J In *Lawlor v Gray* [1984] 3 All ER 345 at 350. who said: "Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action".

1 It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

5 There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, i.e. doctrine of estoppel per rem judicatum.

10 We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation...

15 (Emphasis added.)

20 Similarly, in the case of *Hartecon JV Sdn Bhd v Hartela Contractors Ltd* [1996] 2 AMR 1457 at 1468; [1996] 2 MLJ 57 at 66-67, Gopal Sri Ram JCA (delivering judgment of the court):

25 ... We cannot over emphasise the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognising that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests ...

30 [20] Another main point raised by the plaintiff is that they are purportedly entitled to two units of "24 x 75" terraces house. This is in relation to paragraph (ii) of the consent order as quoted below:

35 ... (ii) bahawa Defendan akan memajukan dua (2) unit rumah kediaman jenis rumah bandar ("town houses") di atas lot tanah individu yang sama berkeluasan tanah sebanyak satu ribu Japan ratus (1,800) kaki persegi iaitu dua puluh empat (24) kaki kali tujuh puluh lima (75) kaki dengan kawasan dibina ("built up") seluas kira-kira satu ribu (1,000) kaki persegi setiap satu berdasarkan pelan-pelan pembinaan yang telah diluluskan ( approved building plans") oleh Pihak

Berkuasa berhubung pembangunan di atas Hartanah tersebut dalam tempoh tiga puluh enam (36) bulan dari tarikh perintah ini ... 1

In reading the whole of paragraph (ii) of the consent order, it would reveal that it must be based on "approved building plans" and the approved building plan annexed to the said consent order set out that all the terrace houses are all "24x70". *Even if this is a shortening of 5 feet, this can be compensated by damages. There is nothing irreparable nor is there any nugatoriness for a stay.* 5

**Second issue** 10

*Enclosure 55 – attempt to vary and change the court order*

[21] In furtherance, counsel for the plaintiff alleged that encl 55 is an attempt to change the court order. To my mind this allegation is without merit as the plaintiff is only required to choose units in accordance with the consent order. The plaintiff's counsel referred to a case of *Abdul Razak bin Sheikh Mahmood & 3 Ors v Amanah Raya Berhad & 2 Ors* [2018] AMEJ 0030; [2018] 1 LNS 30; [2018] 5 CLJ 273 which is actually in favour of the defendant herein and reads as follows: 15

... The law on setting aside consent judgment is more than settled and it is this. A consent judgment is only recorded when the respective litigants had agreed in writing as to how to resolve a legal suit. *Once the consent judgment had been perfected, the parties are bound by it and the court is duty bound to enforce the agreed terms of the same.* The court also cannot vary any of the agreed terms unless with the mutual consent of the parties. Hence, one can say that *the court is functus officio or in other words, the court is bereft of jurisdiction to entertain any request to set aside such judgment.* (Emphasis added.) 25 30

**Third issue**

*Court to grant orders* 35

[22] As there is no issue of any attempt to change or vary the court order, to my mind all the defendant wants the plaintiff to do is to comply with the said consent order that was already mutually agreed upon. The plaintiff should not be finding all kinds of ways to avoid the consent order. Having said this, the final questions that need to be considered is whether this court can grant order so as parties to enforce and/or give effect to the said consent order?? In concluding this issue it is best to look at paragraph (xii) of the consent order as below: 40

... (xii) bahawa kedua-dua pihak adalah bebas untuk memohon sebarang perintah Janjut bagi memberi kesan kepada terma- terma perintah persetujuan ini; dan ...

Having had the above provision, it is my considered view that this court is seized with the jurisdiction to make orders to carry to into effect the said consent order without varying it. In the case of *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No. 2)* [1970] 2 MLJ 226 at 227, Suffian FCJ:

1 ... It is true that the order of the Federal Court has been perfected and that nowhere  
in it is mentioned liberty to apply, but in view of what happened immediately  
after delivery of our judgment it was the clear intention of this court to allow the  
defendant to make this application. *In any event in every order of the court, liberty to*  
5 *apply to the court is implied, without its being expressly reserved. Fritz v Hobson (1880)*  
14 Ch D 542 ... (Emphasis added.)

Similarly in the case of *Abdul Rahman bin Hj Yaacob (representing the estate of the*  
*deceased Hj Yaacob bin Awang) v Mohd Salleh bin Hj Yusoff [2001] 5 MLJ 637 at*  
10 *640-641, Suriyadi J:*

... In *Tong Lee Hwa v Chin Ah Kwi [1971] 2 MLJ 75 at holding 6*, the Federal Court  
had intimated that the words "liberty to apply" in an order, prima facie, meant that  
15 when the order was drawn up, its working out might involve matters that might  
require a decision of the court; they do not confer any right to ask the court to vary  
the order. Parties will be at liberty to go back to court for the purpose of working  
out the terms of the settlement. In our present case however, the issue involved  
was more complicated in nature whereby, the plaintiff had come back to court to  
20 obtain leave of the court to execute the terms of the consent order due to the  
uncooperative stance of the defendant. The plaintiff was not asking the court to  
work out the terms of the order, nor asking the court to vary the order. The absence  
of a "liberty to apply" clause in the consent order here therefore, should not  
25 prevent the plaintiff from filing this application in the first place ...

In the case of *Societe Des Etains De Bayas Tudjuh v Woh Heng Mining Kongsi*  
[1978] 2 MLJ 267 at 270, Abdoolcader J:

30 I would add that he further submitted that the order I made in chambers for a stay  
of execution until after the trial of the action and counterclaim should also include  
the words "or until further order", but when I said that both parties were at liberty  
to apply to the court in the event of changing circumstances (as liberty to apply to  
35 the court is implied without its being expressly reserved: *Fritz v Hobson (1880) 14*  
Ch D 542 at 561 per Fry J), he indicated he was not pursuing that argument ...

### Conclusion

40 [23] To conclude, it is my considered view that this court has the inherent powers  
to make consequential orders and give directions to give effect to its decision or  
orders, "when its working out might involve matters on which it might be  
necessary to obtain a decision of the court". In the case of *Yap Kian @ Yap Sin Tian*  
*v Poh Chin Chuan & 17 Ors [2015] AMEJ 1257 at p 9; [2016] 7 MLJ 805 at 811, Vazeer*  
Alam Mydin J:

...*The court may, pursuant to its inherent powers, make consequential orders or directions*  
*to give effect to its decisions or orders, "when its working out might involve matters*  
*on which it might be necessary to obtain a decision of the court" – see*  
paragraph 42/2/5 of *Malaysian Civil Procedure 2013, Sweet & Maxwell Asia*

(2013 edn). *The doctrine of functus officio does not take away this inherent power of the court ...* (Emphasis added.) 1

*After hearing the submission by both the learned counsel, in the premise, I have no other alternative than to conclude that the plaintiff's application for stay of proceedings (encl 71) pursuant to Order 92 r 4 of the Rules of Court 2012 is hereby dismissed with cost of RM2,500. On the other hand, I would allow and grant an order in term of the defendant's application seeking for a consequential order (encl 55) to enforce and/or give effect in relation to the consent order dated June 28, 2016 with cost of RM2,500.* 5  
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