IN THE FEDERAL COURT
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 02(f)-135-11/2017 (W)

TAN SRI DATO' LIM CHENG POW **…APPELLANT**

BELLAJADE SDN BHD **…RESPONDENT**

IN THE FEDERAL COURT
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 02(f)-136-11/2017 (W)

CME GROP BERHAD
(No. Syarikat 659668-W **…APPELLANT**

BELLAJADE SDN BHD **…RESPONDENT**

CORAM :

ZULKEFLI AHMAD MAKINUDDIN, PCA
ZAINUN ALI, FCJ
AZAHAR MOHAMED, FCJ
ZAHARAH IBRAHIM, FCJ
BALIA YUSOF HAJI WAHI, FCJ

Dissenting Judgment

Introduction

1. Appeal no 02-135-11/2017 (W) (“Appeal 135”) and Appeal no. 02-136-11/2017 (W) (“Appeal 136”) arose from the same action in the High Court.

2. At the High Court, the Respondent, Bellajade Sdn Bhd (“Bellajade”)’ filed an action for recovery of rental under a Tenancy Agreement dated 21.2.2013 (“the Tenancy Agreement”). The Appellant in Appeal 136, CME Group Berhad (“CME”) was the tenant whilst the Appellant in Appeal 135, Tan Sri Dato' Lim Cheng Pow (“the Guarantor”) stood as guarantor to the Tenancy Agreement.

3. On 20.5.2015, the High Court dismissed the Respondent’s claim on the ground that the Tenancy Agreement was illegal and void *ab initio* as the commercial use of the premises contemplated under the agreement contravened the express condition of title which restricted the use of the lands to residential only. The learned Judicial Commissioner (“JC”) found that the application made for land development under section 204D of the National land Code (NLC) for the purpose of changing the express condition of the lands from residential to mixed development had not been completed. The approval granted by the State Authority in respect of the change had yet to be endorsed on the documents of title.

4. On appeal, the Court of Appeal reversed the finding of the trial judge. The Court found that the Tenancy Agreement was not void for illegality. The process of conversion had been completed upon payment of the premium sum imposed by the State Authority for the change of condition. The Court was of the view that subsection 124(4) of the NLC does not contemplate that an application for a change of an express condition to a land is effective only upon an endorsement made on the documents of title.

5. On 13.11.2017, the Appellants in both appeals were granted leave of this Court to appeal the decision of the Court of Appeal dated 24.8.2016 on the following questions**:**

Questions of Law

1) Whether an approval by the State Authority given under section 204D of National Land Code 1965 ("NLC") operates as an approval of land use under section 124 of NLC?

2) Whether change of condition of land under section 124 of NLC take effect upon endorsement of the same on the issue document of title to the land in question?

3) Whether a tenancy for commercial use of land which is by condition for residential use is illegal and void having regard to the decisions of the Federal Court in **Singma Sawmill co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd** [1980] 1 MLJ 21 and **Toh Huat Khay v Lim Ah Chang (in**

his capacity as the executor if the estate of Toh Hoy Khay, deceased) [2010] 4 MLJ 312.

Facts

1. Bellajade is the registered owner of a 23 storey office building together with four levels of basement consisting of 453 car parking bays and 46 motorcycle parking bays called Plaza Palas located in Lorong Palas, off Jalan Ampang, Kuala Lumpur ("the Premises").

2. The Premises is located on nine pieces of lands known as GM 2045 for Lot 45, GM 35 for Lot 50, GM 36 for Lot 51, G37 for Lot 52, Geran 539 for Lot 57, Geran 540 for Lot 58, GM2402 for Lot 90 and Geran 29727 for Lot 93 all in section 88, Town of Kuala Lumpur ('the lands").

3. The lands consist of the premises (Block A- Commercial Building) and a service apartment (Block B).

4. The premises, was purchased by Bellajade from one, Orion Choice Sdn Bhd ("Orion") vide sale and purchase agreement dated 26.3.2012 ("the SPA"). Orion however retained proprietorship of the service apartment.

5. Orion was the beneficial owner of the lands. Orion had purchased the lands from the original proprietor, Kris Angsana Sdn Bhd ("Kris Angsana").

6. The SPA between Bellajade and Orion in respect of the Premises was completed on 20.2.2013. An arrangement was made by Orion for CME to rent the premises from Bellajade and to execute the Tenancy Agreement simultaneously with the execution of the SPA.

7. As a result, on 21.2.2013, Bellajade entered into a tenancy agreement with CME ("the Tenancy Agreement"). The latter agreed to rent Plaza Palas at a rental of RM1,018,750 per month. Based on section E of the First Schedule to the Tenancy Agreement, the tenancy was for a term of 3 years commencing from the completion of the SPA between Orion and Bellajade.

8. The performance of the Tenancy Agreement was guaranteed by the Guarantor pursuant to a guarantee of tenancy agreement executed on the same date as the tenancy agreement.

9. The premises was being let by CME for commercial purposes as specified in section H of Schedule 1 of the Tenancy Agreement namely:

> "Lounge, private club, recreational premises and entertainment/recreational bistro, convenient shop, café, hair saloon, fitness centre, clinic, laundry, beauty saloon, florist, banking services and facilities, food court, fast food outlets and office."

10. The titles of the lands were endorsed with an express condition restricting the use of the land for residential only. On 22.11.2011, the original proprietor, Kris Angsana applied to the Land Administrator of Kuala Lumpur for the surrender and re-alienation of the lands under section 204D of the NLC, with a view to changing the express condition of the lands from *residential* to mixed *development*. Pursuant there to, the following events took place:

    i. By a letter dated 9.5.2012, the Land Administrator of Kuala Lumpur notified Kris Angsana that on 8.5.2012, the State Authority had approved Kris Angsana's application for surrender and re-alienation of the lands and the change in the express condition of the lands to "Pembangunan bercampur bagi tujuan pangsapuri dan pejabat sahaja" (mixed development).

    ii. It is stated in the letter dated 9.5.2012, that the approval of the State Authority was subject to the conditions stipulated in the said letter. Among others, Kris Angsana was required to make a total payment of RM1,550,172 comprising RM1,531,179 being the amount of premium payable for the change of use, RM18,873.00 being the first year assessment rate and RM120.00 for the preparation of title to the lands.

iii. On 14.2.2013, Kris Angsana paid the full premium of RM1,531,179.

iv. On 18.2.2013 Pengarah Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur ('PTG') issued a certificate; *"Sijil Pengesahan Kelulusan Permohonan Di Bawah Seksyen 124, 124A, 137, 142, 148, 197, 200 Atau 204D Kanun Tanah Negara, 1965"*. The certificate acknowledged payment of the premium sum. The approval of the State Authority on the section 204D application was stated in the following terms:

> "*Pihak Berkuasa Negeri telah meluluskan permohonan yang dikemukakan di bawah seksyen 204D Kanun Tanah Negara daripada pemilik tanah Kris Angsana Sdn Bhd*."

v. Meanwhile, on 27.11.2012 Dewan Bandaraya Kuala Lumpur ("DBKL") issued a certificate of fitness of occupation ("CFO") for the Premises. The CFO was for the premises and the adjacent service apartment.

11. CME entered into possession of the premises on 21.2.2013 and paid rental for only six months amounting to RM6,110,100. CME defaulted in the payment of rental for the period beginning May 2013.

12. On 5.9.2013 i.e. some 7 months after the commencement of the Tenancy Agreement, the Land Administrator of Kuala Lumpur sent a letter to Kris Angsana confirming the State Authority's approval dated 8.5.2012 but purported to increase the premium to RM5,341,322.10 i.e. increasing the premium by RM3,810,143.10 ("the letter of increase in premium"). Kris Angsana appealed to the State Authority against the imposition of the additional premium.

Action filed by Bellajade

13. On 21.1.2014, Bellajade filed an action against CME and the Guarantor seeking recovery of rentals. Bellajade claimed for a sum of RM8,401,756.85 being the overdue rentals and interest at the time of filing of the action and rentals for the remainder of the three year tenancy.

14. CME in its defence and counterclaim challenged the validity of the Tenancy Agreement. It submitted that the lands upon which the premises is built were subject to an express condition that the lands must be used only for residentials. Therefore the Tenancy Agreement was tainted with illegality as the contemplated use of the premises as specified in section H of the Tenancy Agreement contravened the above express condition of title for the lands (which restricted the use of the property to residential purposes).

15. The above contention was supported by land search results in respect of the lands which were obtained by CME on 28.10.2013 (“the search results”). These land searchers revealed that the land was transferred from Kris Angsana Sdn Bhd to Bellajade on 11.01.2013. However, the express condition of title for the lands on which the subject properties were located provided as follows:

> *Tanah yang dimaksudkan hendaklah digunakan semata2 untuk rumah kediaman.*

16. In its counterclaim, CME sought a declaration that the Tenancy Agreement was illegal and sought restitution for the rentals paid to Bellajade amounting to the sum of RM9,411,062.50.

17. Bellajade referred to the salient terms of the SPA between Bellajade and Orion.

18. Clause F acknowledged that the previous owner of the land Kris Angsana had applied to the Land Administrator of Kuala Lumpur for the surrender, re-alienation and change of use of the land (from residential) to commercial under s.204 D of the NLC.

19. By clause 6A of the SPA, arrangement was made by Orion Choice for CME Group Berhad to rent the property from Bellajade. It was agreed that upon completion of the SPA, Orion Choice shall cause CME Group Berhad to rent the

properties and to execute the Tenancy Agreement Simultaneously with the execution of the SPA.

20. Approximately one and half months after the execution of the SPA, Kris Angsana's application for the "Surrender, Re-alienation, Amalgamation and Conversion of Land use" was approved by the State Authority for Wilayah Persekutuan. And as had been previously stated, Kris Angsana, present the letter of 9.5.2012 from the Land Administrator of Kuala Lumpur, pad the premium payable for the conversion, on 18.2.2013. Following which the Kuala Lumpur City Hall (DBKL) issued a certificate for fitness of Occupation (CFO) for Plaza Palas.

21. It is Bellajade's case that, at the time of the execution of the Tenancy Agreement, the express condition of title had for all intents and purposes been changed from 'residential' to 'mixed development'. Kris Angsana had paid the full premium of RM1,531,179 for the change of express condition of the lands and that Dewan Bandaraya Kuala Lumpur had already issued the CFO in respect of the premises. The CFO was for the said premises and the adjacent 24 storey condominium Block. In view of the above and pursuant to clauses 3.2 and 4.1 of the SPA, on 20.7.2013, Bellajade paid the balance 90% of the purchase price thus completing the second SPA.

22. On the other hand, CME and the Guarantor averred that the process of conversion had not been completed because

payment for the amount of additional premium imposed by the State Authority was still outstanding.

The Decision of the High Court

23. After a full trial, on 20.5.2015, the learned JC dismissed Bellajade's claim against CME and the Guarantor and allowed CME's counterclaim.

24. The learned JC found that the tenancy agreement was illegal and void *ab initio* as it had contravened the express condition of title of the lands. Premised on the same reason, the learned JC found the guarantee of Tenancy Agreement was also null and void. The learned JC found the "the fact that the process of conversion had been commenced did not change the fact that the express condition of title prohibited the use of the building for the purposes specified in section H of Schedule 1 of the tenancy agreement."

25. In arriving at his decision, the learned JC relied on the Federal Court decision of **Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd** [1980] 1 MLJ 21 (FC) where the Federal Court held that a tenancy agreement allowing the use of the lands in contravention of the express condition of title of the land was null and void under section 24 of the Contracts Act 1950, for illegal consideration. The learned JC also found that CME had no notice of the illegality at the time it entered into the Tenancy Agreement. Hence the Tenancy Agreement was a contract that was

'discovered to be void' within the meaning of section 66 of the Contracts Act 1950. The learned JC then ordered restitution in favour of CME for the return of the rent paid under the contract thus allowing CME's counterclaim.

At the Court of Appeal

26. Aggrieved by the decision of the trial judge, Bellajade filed an appeal to the Court of Appeal.

27. Before the hearing of the appeal, Bellajade filed an affidavit dated 19.11.2015, producing a letter dated 16.11.2015 from the Pejabat Pengarah Tanah dan Galian to Bellajade's solicitors. It is stated in the said letter that Bellajade's appeal to the State Authority against the increase of premium was still pending.

28. However, at the hearing of the appeal before the Court of Appeal, Bellajade filed another affidavit dated 7.1.2016 producing another letter from Pejabat Pengarah Tanah dan Galian dated 16.12.2015 to Bellajade's solicitors. By the said letter, the Letter of Approval dated 9.5.2015 which was previously issued to Kris Angsana was extended to Bellajade, as the new proprietor. Bellajade was also informed of the decision of the State Authority in maintaining its approval given on 8.5.2012. There was also no mention of any increase in the amount of the premium.

29. The Court of Appeal allowed Bellajade's appeal. The Court was of the view that such change in the express condition of the lands falls within the context of subsection 124(1)(c) of the NLC. By subsection 124(4) of the NLC, the provision does not state that an application for change in the express condition of the land is effective only upon endorsement made on the documents of title; that based on the facts of the case, all conditions imposed by the State Authority for the conversion of the lands had been fulfilled and that the full amount of premium in the sum of RM1,531,179 was paid on 14.2.2012. This had resulted in a change of use of the land from 'residential' to 'mixed development'.

30. Referring to the PTG's letter dated 16.12.2015, the Court found that the approval given by the State Authority on 8.5.2012 was unrevoked.

31. Alizatul Khair JCA (has she was then) held that:

> "The process of conversion was essentially completed at the time the tenancy agreement was entered into upon approval of the application for change by the state authority on 8 May 2012 and upon fulfilment of all conditions imposed including the payment of premium of RM1,531,179 on 14 February 2012. Since the present case is concerned only with change in the express condition, based on s 124(4) it cannot be said that such change is only legally effective upon endorsement. The subsequent demand by the state authority for additional premium of RM3,810,143,10 to be paid for the conversion on 5 September 2013 some seven months after the tenancy agreement, does not in our view alter the position. This is because the approval given

on 8 May 2012 remains unrevoked and was in fact reaffirmed in the PTG's letter of 16 December 2015".

(emphasis added)

32. The Court of Appeal then concluded that the process of conversion was essentially completed at the time the tenancy agreement was entered into and what remained pending was merely the administrative process of endorsing the state authority's approval on the new titles.

The Law

33. The NLC provides various provisions on land development. Land development involves the process of changing the category of land use, restriction in interest and express conditions and applications for sub-division, partition or amalgamation of land, wherever applicable as required by the proposed development plan.

34. Land proprietors may choose the provisions that suit their proposed development plan and encumbrances on the title and other surrounding circumstances.

35. Under the NLC, among others, land development is applicable in the following forms:-

    1. Application for variation of conditions, restrictions and categories of land (Section 124)

2. Simultaneous applications for sub-division and variation of conditions, restrictions and categories (Section 124A), and

3. Application for Sub-division (Sections 135 – 139)

4. Application for Partition of land (Sections 140 – 145)

5. Application for Amalgamation of land (Sections 146 - 150)

6. Application for Surrender and re-alienation – of lands by special provisions (Sections 204A – 204H)

36. In the present appeals, Kris Angsana made an application under section 204D namely an application for surrender and re-alienation for contiguous lots held by the same proprietor.

37. In 1984, the NLC was amended by Act A587; By section 76 of Act A587, the NLC amended was made to insert in Part Twelve, a new subheading and new sections 204A-204H which are provisions on surrender and re-alienation of lands. The amendment took effect on 28.6.1984.

38. Based on the Hansard of Parliament dated 6 April 1984, the purpose of sections 204A-204H is to expedite the process for land development. It is said that the land proprietor, instead of making separate applications for change of condition and subdivision of his land is given an alternative, namely to surrender the land to the State for the land to be re-alienated to the same proprietor in a different form and intended use as approved by the appropriate authority.

39. According to Judith Sihombing in The National Land Code- A Commentary (2009, Issue 25,Lexis Nexis):

> "Sections 204A-204H are designed for those situations where the State Authority has agreed to re-alienate the surrendered land in a different form then previously held, to the surrendering party."

40. Based on section 204D, a land proprietor is required to submit an application in Form 12D, accompanied by the prescribed fees and documents in respect of the land. Such documents include a plan showing the units to be re-alienated by the State Authority and layout plan as approved by the relevant authority. This is to enable the land to be re-alienated in the form and unit conforming to the intended use of the land.

41. The application for surrender and re-alienation is to be endorsed on the register document of title by the Land Administrator. In the present case, based on the search results, Kris Angsana's application under section 204D was registered on 22.11.2011.

42. Section 204E describes the power of the State Authority and the considerations to be given in allowing an application for surrender and re-alienation. Section 204E is to be read together with section 204C of the NLC. The latter governs the conditions for approval of surrender and re-alienation. Among others, subsection 204C(1)(a) prescribes that an application for surrender and re-alienation can only be approved by the State

Authority if “the portions and units of the land to be re-alienated conform in shape, area, measurements, location and intended use with a layout plan approved by the appropriate authority”.

43. Based on subsection 204E(4) of the NLC, the State Authority in approving an application for surrender and re-alienation shall determine the matters specified in subsection 79(2) on alienation of State land. Such matters include, the area approved for alienation, the form of final title, payment of premium, the category of land use and any express conditions and restrictions in interest. The State Authority will then give a notification of its approval and determination required under subsection 79(2) to the proprietor.

44. Upon receiving the notification under section 204E(4), the land proprietor shall notify the State Authority if he accepts the determination made by the State Authority under section 79(2).

45. In the present appeals, Kris Angsana’s application under section 204D was approved by the State Authority on 8.5.2012. Kris Angsana was informed of the said approval via the letter of approval dated 9.5.2012, issued under subsection 204E(4). In the same letter, Kris Angsana was also informed of the State Authority’s determination under subsection 79(2) of the NLC in the following terms:

Kawasan Berkeliling Warna Biru Untuk Pembangunan Bercampur

Jenis Suratan Hakmilik: Hakmilik Pejabat Tanah

Mukim: Bandar Kuala Lumpur

Taraf Pemilikan: Selama-lamanya

Premium: Tanah Kerajaan berasal dari tanah milik
RM215.00 s.m.p

Cukai Tahunan : RM2.65 s.m.p tertakluk kepada minimumRM100.00 per hakmilik (kadar Pembangunan bercampur bagi tanah bandar)

Jenis Penggunaan Tanah : Bangunan

Syarat Nyata: Tanah ini hendaklah digunakan untuk Pembangunan bercampur bagi tujuan pangsapuri dan Pejabat sahaja.

Sekatan Kepentingan:

2. Berikutan dengan keputusan tersebut di atas, bayaran yang perlu dijelaskan adalah seperti berikut:

i) Premium : RM1,531,179.00

ii) Cukai Tahunan Pertama : RM 18,873.00

Penyediaan dan Pendaftaran bagi satu (1) : RM 120.00

pasang hakmilik sepasang bagi hakmilik

pertama RM70.00 sepasang hakmilik berikutnya

Jumlah : RM1,550,172.00

46. The above determination of the State Authority was accepted by Kris Angsana. On 18.2.2013, Kris Angsana paid the full premium payable for the surrender and re-alienation. This is evident from the Sijil Pengesahan Kelulusan Permohonan issued by the PTG on 18.2.2013.

47. The next procedure involves the surrender of the land to the State. This is governed by section 204G. Based on subsection 204G(1), the land shall revert to the State upon the making of the memorial of surrender of the land in the register document of title. At this stage, the issue document of title in respect of the land will also be destroyed. Subsection 204G(2) reflects the

agreement between the State Authority and the land proprietor for re-alienation of the land. Subsection 204G(2) reads:

> (2) Upon the making of any memorial pursuant to subsection (1), the land to which it relates shall revert to and vest in the State Authority as State land but the land shall be treated as being subject to the approval under section 204E of the re-alienation of the portions or units in question.

48. The land which has been surrendered to the State is to be re-alienated to the proprietor under section 204H of the NLC. The section reads:

> The provisions of this Act shall apply to all questions, matters and procedures relating to a portion or unit approved for re-alienation under this Part and arising after the land in which it is comprised has reverted to the State Authority pursuant to subsection (2) of section 204G as they apply to the alienation of State land under this Act.

49. Based on section 204H, provisions under the NLC which apply to alienation of State land are applicable to determine any matters arising from re-alienation of land surrendered to the State. This brought to the application of subsection 78(3) of the NLC. Subsection 78(3) of the NLC reads:

> "(3) The alienation of State land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to subsection (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time."

Application

50. In the present appeals, despite the fulfilment of all the conditions stated in the letter of approval dated 9.5.2012, the express condition of title of the land remains residential. This is evident from the search results obtained by CME. The endorsements made to the register title of the land as reflected in the search results reads as follows:

> *Tanggungan dan endosan-endosan lain:*
>
> *…*
>
> *Nombor Perserahan: 491/2011 Permohonan serahbalik, pemberimilikan semula tanah didaftarkan pada 22 Disember 2011 jam 03.04:04 petang*
>
> *(No. Rujukan Fail: PTG/WP6/8008/2011)*
>
> *Nombor Perserahan: 67/2013 Pindahmilik Tanah*
>
> *Oleh KRIS ANGSANA SDN BHD ½ Bahagian*
>
> *SUITE 2-1, 2ND FLOOR MENARA PENANG GARDEN 42-A JALAN SULTAN AHMAD SHAH GEORGETOWN 100500 PULAU PINANG*
>
> *Didaftarkan pada 11 Januari 2013 jam 03:02:57 petang*

51. It could be observed that an endorsement was made with respect to Kris Angsana's application for surrender and re-alienation of the land under section 204D on 22.12.2011. However, the endorsement which was required under section 204(G), in respect of the surrender of the lands to the State

was not reflected in the search results. There was also no endorsement made with regard to the re-alienation of the land to Kris Angsana as required under section 204H and subsection 78(3) of the NLC. Despite that, the land had been transferred from Kris Angsana to Bellajade on 10.1.2013.

52. Applying subsection 78(3) of the NLC, it was submitted that the application under section 204D of the NLC was not completed. The change of use to mixed development would have to be endorsed on the new title and become effective upon the issuance of the registration of a new issue document of title pursuant to subsection 78(3) of the NLC.

53. It was also submitted by counsel that, the approval of the State Authority as contained in the letter of approval dated 9.5.2012 cannot be taken to imply that the change of use of the lands had taken place. Instead under the Torrens System, the change of use of the land will only take effect upon endorsement of the change on the title to the land. However this is not the case here.

54. On the other hand, counsel for the Respondents submitted that the Court of Appeal was correct in holding that section 78(3) of the NLC is not applicable to the present case. The Court had rightfully applied section 124(4) of the NLC to the facts and circumstances of the case and concluded that the Tenancy Agreement was not void for illegality.

The Legal Position

55. In the present appeals, the Court of Appeal in acknowledging that Kris Angsana's application was made under section 204D of the NLC had applied the law in section 124(4) of the NLC in determining whether the process of conversion had been completed. The issue was then answered in the affirmative. The court was of the view that subsection 124(4) of the NLC does not state that a change in the express condition of land under subsection 124(1)(c) is effective only upon endorsement on the title.

56. It is critical that a careful study is now made to section 204 D of the NLC, in the context of the first question.

> "**S.204D Applications for approval surrender and re-alienation.**
>
> (1) Any application for approval by a proprietor wishing to surrender his title or titles under this Part shall be made in writing to the Land Administrator in Form 12D and shall be accompanied by –
>
> (a) Such fees as may be prescribed;
>
> (b) All such written consents to the making thereof as are required under paragraph 204C(1)(e).
>
> (c) A plan showing the portion to be surrendered and a pre-computation plan showing the details of the portions and the units to be re-alienated, together with such number of copies

thereof as may be prescribed or, in the absence of any such prescription, as the Land Administrator may require;

(d) A copy of the layout plan, as approved by the appropriate authority, in respect of the said lot or lots, showing the portions and units to be realienated; and

(e) The issue document of title to the land, unless the proprietor declares that it is for any reason incapable of production.

(2) Where the proprietor is unable to produce the issue document of title for the reason that it is in the possession or control of any person or body, the application shall be accompanied by a sworn statement of the proprietor to that effect, and there shall be exhibited thereto a copy of a notice by the proprietor to that person or body requiring the production of the said document to the Land Administrator within fourteen days of the date of the service thereof on such person or body, and also the proof of service of such notice.

(3) Upon receipt of the application, the Land Administrator shall endorse, or cause to be endorsed, a note thereof on the register document of title to the Land."

57. Looking at the entire section 204 regime, it is clear that it sets out how an application for surrender and re-alienation is to be made by a proprietor. In other words, section 204 is a **procedural regime**. It is not the provision under which the State Authority grants the approval. Herein lies the rub.

(our emphasis)

58. Section 124 NLC on the other hand, envisages the power of the State Authority in an application made by the Proprietor to vary the conditions. The language of s.124 is clear.

59. Subsection 124(1)(a), (b), (ba) and (c) deal with the 4 types of power of the State Authority as follows:-

> "**124. Power of State Authority to vary conditions, etc., on application of proprietor.**
>
> (1) The proprietor of any alienated land may apply to the State Authority under this section for –
>
> (a) The alteration of any category of land use to which the land is for the time being subject or, where it is not so subject, for the imposition of any category thereon;
>
> (b) The rescission of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the removal from that document of the expression "padi", or any other expression by virtue of which the land is subject for the time being to the implied conditions specified in section 119; or
>
> (ba) the removal from the document of title of the expression "rubber", "kampung" or any expression pertaining to land use, and the imposition of other express conditions pertaining to land use;
>
> (c) The amendment of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the imposition of any new express condition or restriction in interest;"

60. It is clear that this appeal falls under subsection 124(1)(c). Concomitantly, subsection 124(4) is critical and applies with equal force. It reads:-

> "124(4) The State Authority may approve any application under paragraph (1)(c) either in the terms in which it was submitted or, with the consent of the applicant and any other persons or

bodies whose consent thereto was required under the proviso to that subsection, subject to such modifications as it may think fit, and shall, in either case, direct as appropriate –

(a) The amendment of any condition or restriction in interest endorsed on the document of title to the land; or

(b) The endorsement on that document of title of a note of the amendment of any condition or restriction which is merely referred to therein; or

(c) The endorsement on that document of title of any new condition or restriction in interest."

Thus, when the State Authority approves an application to amend an express condition, it can make three directions under s.124(4) (a), or (b) or (c). (Please see above)

61. In this case, the State Authority gave the approval for change and imposed the payment of a further premium of RM1,550,172 under subsection 124(5), which amount was duly paid by Bellajade.

62. The State Authority allowed the application under subsection 124(4)(a). The approval letter of 9.5.2012 did not make any order for endorsement under subsection 124(4) (b) or (c).

63. We must also have regard to the provision of s.113 NLC, which explains the manner in which changes may be effected.

"CHANGES IN CONDITIONS AND RESTRICTIONS

113. Manner in which changes may be effected.

The conditions and restrictions in interest applicable to any alienated land shall, after becoming fixed by the operation of any of the preceding provisions of this Chapter, be subject to all such changes as may result from –

(a) The granting of any application by the proprietor under subsection 124(1); or

(b) The carrying into effect of any direction given by the State Authority under subsection 147(3) on sanctioning the amalgamation of the land with other land."

64. Section 113(a) specifically provides that lands already alienated and already the subject of existing conditions and restrictions, shall be subject to all such changes as a result from:

(a) The granting of any application by the proprietor under subsection124(1);

65. Section 113 is an important provision since it provides that the **change** in condition etc, takes place on the granting of the application under subsection124(1), i.e. upon the State Authority approving the application by the proprietor for a change in the condition.

66. At the risk of repetition, it must be emphasised that approval was granted on 8 May 2012 at the meeting of the Jawatankuasa Kerja Tanah W.P. (Tab A) and the payment of the full premium of RM1,550,172.80 on 14.2.2013 [Tab G & H].

67. All of the above goes to show plainly that subsection 204D is a procedural regime, where an **application** is made under that section. But – and this is critical – the State Authority **does not** grant approved under s.204D. That is the province of section 124 NLC. Thus viewed in perspective, the first question results in the parties getting themselves into a knot.

68. The first question therefore requires no answer, because obviously the question is flawed. If at all, it may be answered in the negative, since notwithstanding that the Sijil issued by the Pengarah Tanah dan Galian Wilayah Persekutuan, was a general or standard certificate applicable for application, inter alia under section 124 or 204D, it did not convert the section 204D application into containing an implicit or subsumed section 124 application within it.

The Second Question of Law :

Whether change of condition of land under section 124 of NLC takes effect upon endorsement of the same on the issue document of title to the land in question?

69. In view of the conclusion reached in the first question of law it is rendered academic and will no longer determine the outcome of the case. What follows in this section is accordingly obiter. While an answer is not necessary in the present circumstances, we find much support for the position adopted by the Court of Appeal in holding that a change of conditions of land under section 124 of the NLC takes place upon approval

rather than upon endorsement on the issue document of title to the land.

70. Crucial to this interpretation is the content of the subsections of section 124. The Court of Appeal made reference to this in its judgment :

> "[54] Section 124(4) merely provides that if the state authority approves an application under s.124(1)(c) in accordance with the provision therein, then the state authority shall direct, as appropriate, inter alia, that the amended condition or restriction of interest as the case may be, be endorsed on the title. The subsection does not state that the change in condition is effective only upon endorsement of such change.
>
> [55] In contrast, s.124(2) provides that where the state authority approves an application for an alteration in the **category** of land use under subsection (1)(a), it shall direct that the new **category** of land use be endorsed on the title and it may direct that there shall be endorsed on the title such new express conditions as are specified in the direction, and, as from the date on which the direction is carried into effect:
>
> (i) the land shall become subject to any conditions endorsed pursuant thereto and (according to the category of land used so endorsed) to the conditions implied by section 115, 116 or 117;
>
> (ii) there shall cease to apply to the land all conditions to which it was previously subject except those implied under section 114 and, where applicable, 118.
>
> [56] Thus, in respect of change in the **category** of land use, the **conditions imposed**, if any, upon approval of any application

> from such change, shall have effect only from the date the conditions are endorsed on the title. Whilst in the case of a change of **express condition** under section 124(4) of the NLC the endorsement of the new condition on the title does not have any legal effect ….."
>
> (emphasised added)

71. It seems to us to be in keeping with the consistent interpretation of the provision to hold that, unlike in the case of a change of **category** of land use, the variation of the express conditions of use where it does not involve a change in category of land use does not require the endorsement of the conditions on the document of title to the relevant land. The comparison is, therefore, not between variations of the category of land use and variations of the express conditions of use but only as to express conditions either within the context of an application to change the category of land or in contrast to change the express condition only.

72. In the circumstances envisaged by subsection 124(2), the primary purpose of the application is to apply for a change in the category of land use. Ancillary or secondary to that, the state authority of its own accord (or, it stands to reason, included in the proprietor's application) decides to impose express conditions which it sees fit to impose, usually related to the change n the category of land use. In this context, the newly imposed conditions only take effect from the date the direction (namely the endorsement on title) is carried into effect. This is the explicit requirement of the statute.

73. However, where the application is for one under section 124(1)(C), namely merely for the variation of express condition, the NLC does not specify the date from which the varied or newly imposed conditions take effect as the date of endorsement of the variation on title. It stands to reason therefore, that the difference in treatment of the various subsections is not accidental and that accordingly, specificity as to the date on which the conditions take effect in the former case within the context of change of category must indicate that it departs from the normal set of rules, otherwise those provisions would be rendered redundant. Therefore, as long as the conditions impose under subsection 124(5) have been complied with, the requirement for the varied condition to take effect have been met and accordingly, the express condition, as varied, takes immediate effect.

74. Furthermore, the structure of section 124 has been meticulously laid out such that the provisions of subsection 124(2), (3) and (4) are designed to deal with the three types of applications under subsections 124(1)(a), (b) and (c). Therefore, it would be perplexing that the NLC would specify the date for which conditions under the change of category application took effect without specifiying the same in subsection 124(4) – not even by reference to subsection124(2) –if they intended both to take effect upon the happening of the same event, namely endorsement of title.

75. In addition, subsection 124(7) does not purport to set out the date for which the variation comes into effect. That in the context of changes in the category of land use is purported to be legislated under subsection 124(2). Instead, subsection 124(7) sets out the obligations of the State Authority post approval with respect to the register and the documents of title, which is in accordance with efficient and efficacious administration.

76. Thus we are in agreement with the Court of Appeal that "once the state authority approves the change of use under subsection 124 of the NLC and the conditions of the approval (under subsection 124(5) of the NLC) are satisfied, the change of use takes effect." This conclusion is reached bearing in mind the view of Harun J (as he then was) in the case of **Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135** where it was held that 'section 124 deals with conversion and that if it is approved the effect will be to change the express conditions imposed on the land.' Had this question been necessary to dispose of the appeal, we would have answered the question in the negative.

The Third Question of Law

Whether a tenancy for commercial use of land which is by condition for residential use is illegal and void having regard to

the decisions of the Federal Court in ***Singma Sawmill co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd*** *[1980] 1 MLJ 21 and* ***Toh Huat Khay v Lim Ah Chang (in his capacity as the executor if the estate of Toh Hoy Khay, deceased)*** *[2010] 4 MLJ 312.*

77. We will now turn to consider the third question of law posed in this appeal, which in our opinion is the crux of the present appeal before the court. The question turns on the interpretation of the cases, in particular the **Singma Sawmill** case.

78. The learned JC in the High Court had this to say regarding the decision in **Singma Sawmill** :

> "[24] In facts of Singma Sawmill Co. Sdn Bhd v Asian Holding (Industral Buildings) Sdn Bhd are directily on points to the issues at hand. In this case, the plaintiff sought to recon arrears of rent from the defendant tenant, who had been let a portion of the plaintiff's land 'solely for the purpose of operating a factory'. The defendant ceased to pay rented upon being warned by a representative of the Industrial Development Department of the Government of the State of Johor that its factory was operating illegally and in breach of an express condition of title. The land in question was agricultural land and was subject to an express condition that it was to be used for the cultivation of pineapple and rubber. The court made a finding of fact that the defendant was not aware of the express condition at the time it entered into the tenancy agreement and only found out about it when it was warned by the authorities.

[25] The Federal Court in this case affirmed the decision of the trial judge, who held that the plaintiff was guilty of going an illegal consideration to the tenancy agreement and as such the contract was void under section 24 of the Contracts Act, 1950."

79. Section 24 of the Contracts Act, 1950 reads as follows:-

"What considerations and objects are lawful, and what are not"

24. The consideration or object of an agreement is lawful, unless –

(a) It is forbidden by law;

(b) It is of such a nature that, if permitted, could defeat any law;

(c) It is fraudulent;

(d) It involves or implies injury to the person or property of another; or

(e) The court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

80. In our opinion, the answer to the third question revolves around the proper interpretation of the **Singma Sawmill** decision. The Federal Court in deciding **Singma Sawmill** did not do so in a vacuum but did so against the backdrop of a number of crucial factors. These factors include:

(i) The land was under the category of agricultural land whereas the tenancy agreement required the land to be under the category of industrial land.

(ii) Prior to entering into the tenancy agreement, the proprietor had applied unsuccessfully to change the category of land use from agricultural to industry.

(iii) A representative from the state government warned the tenant that it was operating the factory illegally and in breach of the express condition.

(iv) The state department informed the proprietor of the breach and requested that it remedy the situation but this was ignored.

(v) No approval for the change of category or condition had been obtained from the State Authority. It was in defiance of the State Authority's decision that the tenancy agreement was entered into. In fact, so egregious was the breach in **Singma Sawmill**, that Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) termed it "wilful, if not, contumacious."

81. This is borne out in a later passage in the judgment which reads :

> "In the present case, the breach of the express condition is wilful, if not contumacious. There is a clear intention on the part of the Appellants [**Singma**] to use the subject matter of the agreement i.e. land on which the factory was created, for an unlawful purpose. The object of the express condition of is that the land must be cultivated with rubber and pineapple, the category of land is agriculture, and any unilateral conversion to industry is not permitted.

> Indeed, neither party had the power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use."

82. It is evident that in that case, the evidence of a clear intention on the part of **Singma** to contravene the breach of condition against the backlog of a prior refusal of its application to change the category of land use was at the heart of the judgment of the Federal Court. Furthermore, in **Singma** there was an attempt on the part of the proprietor to unilaterally waive the express conditions to land use which is to be distinguished from the exercise of discretion of the relevant State Authority through the provisions of the NLC. This, also, informed the decision of the Federal Court.

83. In formulating the principle that arises out of **Singma Sawmill**, we cannot be unaware of the vast differences between **Singma Sawmill** and the present case. The effect is such as to place **Singma Sawmill** on the far end of the spectrum of purported illegality whereas the present case sits at the other end of the spectrum. Our view is that the proposition in **Singma** that a tenancy agreements is void for allowing the use of land in contravention of the express condition can only reliably be said to extend to situations whereby the contravention is deliberate, and cannot be applied where approval prior to the agreement being entered into had been sought and obtained, especially

where what was left to be done was in the hands of the State Authority.

84. In a similar fashion, the case of **Ton Huat Khay** does not apply where approval from the State Authority has been obtained. In **Ton Huat Khay** the Federal Court was mindful of the fact that the proprietor, while owning land subject to a restriction in interest and purported to transfer it, had not even made an application to the State Authority to rescind or strike off the interest, much less obtained approved. While the State Authority had purported to consent to the transfer, no consent was possible since the application required had not even been made in accordance with the provisions of the NLC. (See the judgment of the Court of Appeal in the instant case at [67].

85. It has been argued that the mere fact that action had not been taken against the plaintiff by the land office or the PTG's office is not a sufficiently good argument for the lack of illegality of the tenancy agreement. In that respect we agree. However, the Court must be able to distinguish between a form of mere inaction by the State Authority arising out of a variety of reasons (including but not limited to ignorance, a shortage of administrative or enforcement resources, or negligence) and a considered refusal to act on the basis of prior approval mounting to what it considers not to be a breach of action. We are of course not unaware that the Land Administrator is required to act under sections 127-129.

86. Though the provisions have been considered at length in his judgment, it is evident that in matters pertaining to the variation of express conditions of land use or the process of surrender and realienation are decided the purview of the State Authority. In each case, it is the State Authority's approval that must be sought before any legal effect to land can be achieved. It is the intention of the National Land Code to vest, or indeed to recognise, such discretion with the State Authority (e.g. section 204B). While this does not mean that the State Authority's decision in its discretion, trumps the provisions of the National Land Code, it ought to mean that if the only steps left to be accomplished are in the exclusive purview of the State and not the proprietor, the proprietor ought not bear the burden of having his agreement be rendered void or a purported illegality that was neither his fault nor within his control.

87. In reaching a conclusion in the instant case, it is necessary to appreciate the extent to which compliance had been achieved or had been sought on the part of the Respondent. An application under section 204D had been duly made by its predecessor in title. Prior to any tenancy agreement being entered into, state approval for the change of express condition had been granted as evidenced in writing. The conditions, insofar as they were applicable, for the payment of the premium had also be satisfied and the State Authority had certified its approval of the surrender and realienation (which involved the change of land use) prior to the tenancy agreement being extent into. What remained was for the memorial of surrender of the land by the State Authority.

88. In legal terms this meant that the section 204D application had been duly submitted without issue; approval indicated that the requirements of section 204C had been met to the satisfaction of the State Authority (per section 204E(1); the first that the Respondent (or the Respondent's predecessor in title) was notified of the approval under section 204E(4) also meant that the determinations in section 79(2) had been satisfactorily completed. All that was left to be done were that requirements of section 204G, which properly construed is a matter for the State Authority, apart from the notification by the proprietor. Where no alterations were made under section 204E(2), it stands to reason that the proprietor's notice to that State Authority may be implied.

89. Accordingly, the CFO does not clothe the tenancy agreement with legality because it could not be said to be illegal upon consideration of all the factors in the instant case. The question of illegality will have to be determined, in such unusual cases, on the individual facts of the case. This does not, however, mean that illegality as a legal concept is subjected to obfuscation but that what constitutes illegality in a multi-step case such as this where substantial compliance on the part of the applicant proprietor (the Respondent) is achieved, and the only acts left to be accomplished are acts of the state – unexplainably left undone – means that the contract cannot fairly be said to defeat the purpose of any law.

90. Taking all the aforesaid into consideration, I have come to the conclusion that the proposition in **Singma Sawmill** is not so broad as to render illegal a tenancy agreement, where an application has been made by the proprietor for the variation of the express condition, and that application has been approved by the State Authority, and the conditions attached to that approval have been met, leading to the conclusion that the applicant proprietor has done all that is required under the National Land Code. Notwithstanding that the registration and re-issue of the documents of title has not yet been actioned by the State Authority, the combination of factors above is such as to prevent the agreement from failing foul of the provisions of section 24 of the Contract Act, 1950. That is to say that it would not be in any meaningful way forbidden by law – since had the law operated in propriety, it would not have contravened any law – neither would it defeat the purpose of any law. It ought to be stressed, however, that we consider this to be an unusual case on the fact, and with likely be of application only in excepted circumstances.

Conclusion

91. For the reasons stated in this judgment, I would dismiss the appeals by the Appellants in Appeal 135 and Appeal 136 with costs.

Dated: 25 September, 2018.

TAN SRI DATUK ZAINUN ALI
Federal Court Judge
Malaysia.

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