Tal Property Sdn Bhd v Ng Kiat Kong @ Karim & Anor [2022] MLJU 2933

Malayan Law Journal Unreported

HIGH COURT (PENANG)

KENNETH ST JAMES JC

GUAMAN SIVIL NO PA-22NCVC-31-02/2020

23 November 2022

Joshua Kong Jun Wai (with Daljit Singh) (Daljit Singh Partnership) for the plaintiff.
Sathya Kumardass (with Pauline Koh) (Shearn Delamore & Co) for the defendants.

Kenneth St James JC:

JUDGMENT

(ORDER 33 APPLICATION)
PRELUSION

[1]There was a previous suit between the parties. A Consent Order was recorded in the previous suit.

[2]The Plaintiff then files this current suit to impeach the Consent Order that was recorded in the previous suit. The Plaintiff asserts that the Consent Order should be set aside on grounds of fraud and misrepresentation on the part of the Defendants.

[3]The Defendants now make an Application under Order 33 to determine a preliminary issue that has the effect of prohibiting the Plaintiff from relying on, or even referring to, certain paragraphs in the Plaintiff's Statement Of Claim, on the grounds of *res judicata* and issue estoppel. The preliminary issue, if it is answered in the affirmative, will have the effect of expunging those paragraphs from the Plaintiff's pleadings. The Plaintiff would then be prevented from proving the facts pleaded in those paragraphs.

[4]Should the Defendants' Order 33 Application be allowed?
THE BRIEF BACKGROUND OF THIS DISPUTESuit 173

[5]The starting point is the previous suit between the parties. In 2018, the Plaintiff filed the previous suit against the Defendants. The suit was Penang High Court Civil Suit No. PA-22NCVC-173-11/2018 (**Suit 173**).

[6]Suit 173 was about a contractual transaction gone wrong. The transaction was about the sale and purchase of the Defendants' three- storey shop lot (**Property**). The Plaintiff pleaded that the Defendants made certain representations that the Plaintiff relied on.

[7]In January 2018, the parties entered into a sale and purchase agreement (**SPA**). In addition to the SPA, the Plaintiff pleaded that the parties also signed:

(i) a deed of assignment (**DA**), for the Plaintiff to obtain certain consents to eventually transfer the Property to the Plaintiff;

(ii) a letter of undertaking (**LOU**), for the Plaintiff's solicitors to release the sale proceeds in various manners to several other persons; and

(iii) a tenancy agreement (**TA**), for the Defendants' company to rent the Property to operate it as a budget hotel, and to pay rent to the Plaintiff.

[8]The Plaintiff pleaded that the Defendants breached the SPA by failing to perform their obligations under the SPA.

[9]The Plaintiff prayed for reliefs and remedies that included—

(1) an injunction to restrain the Defendants from dealing with the Property;

(2) an Order for specific performance for the Defendants to transfer the Property to the Plaintiff;

(3) an Order that the Defendants perform all their obligations under the SPA, and if the Defendants fail to do them, the Registrars of the High Court are then empowered to do so;

(4) declarations that the DA, LOU and TA are valid; and

(5) damages for breach of contract.

[10]In opposing Suit 173, the Defendants denied the Plaintiff's assertions against them. In particular, the Defendants alleged that the 2nd Defendant did not sign the LOU and the TA; asserting a fraud on the part of the Plaintiff.

[11]The Defendants mounted a Counterclaim, praying for reliefs and remedies that included—

(1) a declaration that the SPA was validly terminated;

(2) an Order that the Defendants be allowed to forfeit the RM135,000.00 SPA deposit that the Plaintiff had paid to them;

(3) an Order that the private caveat that the Plaintiff entered over the Property be removed, and an injunction to stop the Plaintiff from lodging any more caveats;

(4) damages for breach of contract and wrongful lodgment of caveat;

(5) damages for fraud.

Mediation and Consent Order in Suit 173

[12]On 28.1.2020, there was a Mediation session before the learned High Court Judge. The Mediation led to the recording of the impugned Consent Order.

[13]The Plaintiff asserts that the Defendants made certain misrepresentations during the Mediation that are relevant to this current suit (**this Suit**)

[14]The pertinent terms of the Consent Order dated 28.1.2020 include—

(1) the Plaintiff is to pay the RM1.215 million balance of the purchase price within 7 days;

(2) the parties are to make a site visit to the Property on or before 31.1.2020 (two days after the Consent Order);

(3) the Plaintiff reserves its right to commence a suit on the issue of the TA in a separate proceeding. (It is important to note the Plaintiff's reservation of its rights to sue under the TA.)

The causes of action, and the reliefs and remedies prayed for in this Suit

[15]Two years later in February 2020, the Plaintiff filed this Suit against the Defendants. The purpose of this Suit is to impeach the Consent Order, on the ground of fraud and fraudulent misrepresentation. The Plaintiff's causes of action in this Suit are for breach of contract, fraud and misrepresentation. The Plaintiff also pleaded that the Defendants repudiated and fundamentally breached the contract.

[16]The Plaintiff prays for the reliefs and remedies that include—

(1) a declaratory Order that the Defendants breached the Consent Order, and accordingly the Consent Order be set aside;

(2) a declaratory Order that the Defendants obtained the Consent Order by fraud or fraudulent misrepresentation;

(3) damages for breach of the Consent Order;

(4) a declaratory Order that the SPA is terminated, and is null and void;

(5) the return of the RM135,000.00 that was paid under the SPA;

(6) general, aggravated and exemplary damages.

[17]The Defendants resist this Suit and deny the Plaintiff's assertions. The Defendants, as they did in Suit 173, mount a similar Counterclaim. In the Counterclaim in this Suit, the Defendants seek similar reliefs and remedies that include—

(1) a declaration that the SPA is null and void;

(2) a declaration that the Defendants are entitled to forfeit the RM135,000.00 SPA deposit;

(3) a declaration that the Plaintiff has no rights over the Property.

THE DEFENDANTS' PRELIMINARY ISSUE

[18]The Defendants apply, under Order 33 Rules 2 and 5 of the Rules Of Court 2012, to **summarily determine** this preliminary issue **before the trial of the other issues** in this Suit—

> "Whether the Plaintiff is prevented by the doctrine of *res judicata* and/or issue estoppel from re-litigating the issues in **paragraphs 5 – 44** (**including any references to these paragraphs**) of the Re- Amended Statement of Claim dated 20.8.2021, which were previously raised in Penang High Court Suit No. PA-22NCVC-173- 11/2018 [Suit 173] and resolved by way of the Consent Judgment [actually: Consent **Order**/**Perintah** Persetujuan] dated 28.1.2020 until and unless the Consent Judgment [Consent **Order**] is set aside by way of an Order of Court."
>
> [notes and emphasis added]

ORDER 33 RULES 2 AND 5

[19]For reference, I set out here the terms of Order 33 Rules 2 and 5—

> **Order 33. Mode of trial**
>
> **Time of trial of questions or issues** (O. 33, r. 2)
>
> 2. The Court **may** order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried **before, at or after** the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.
>
> **Dismissal of action after decision of preliminary issue** (O. 33, r. 5)
>
> 5. **If it appears to the Court** that **the decision of any** question or **issue** arising in a cause or matter and tried separately

from the cause or matter **substantially disposes of the cause** or matter **or renders the trial of the cause** or matter **unnecessary**, it may

dismiss the cause or matter or make such other order or give such judgment therein **as may be just**.

[emphasis added]

[20]Putting the Defendants' preliminary issue within the parameters of Order 33 Rules 2 and 5, the Defendants are effectively asking this Court—

(1) to **disallow** the Plaintiff—before the trial of this Suit, and before any Pre-Trial process including Discovery, possible Interrogatories and other pre-trial directions that will be made under Order 34—**from relying on the facts pleaded in paragraphs 5 – 44** of the Plaintiff's pleaded case, including any references to these paragraphs, until the Consent Order is set aside;

(2) in other words, to **expunge paragraphs 5 – 44** from the Plaintiff's pleaded case in this Suit, bearing in mind that this Suit is a fraud and misrepresentation suit. Its very purpose is to impeach and to set aside the Consent Order in Suit 173.

[21]Order 33 Rule 5 discloses two alternative requirements that must be satisfied before the Court considers whether to exercise its discretion to allow a determination of a preliminary issue before the trial—

(1) the **Answer** to the issue posed should **substantially dispose of the whole suit**—both the Claim and the Counterclaim; or

(2) the Answer to the issue **renders the trial**—of the Claim and the Counterclaim—**unnecessary**.

THE PRINCIPLES TO APPLY IN ORDER 33 APPLICATIONS

[22]It is important to set out a few of the principles that I must bear in mind when deciding on this Order 33 Application. First, it is not appropriate to allow the issues to be tried in a trial— or worse still: only **some**, **but not all**, of the issues to be tried in a trial—to be determined by an Order 33 Application, when the **facts are disputed** or when there is a **need to call "extrinsic evidence"** to ascertain the facts: *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC); [1991] 3 CLJ 2781.

[23]In *Newacres* (supra), the Supreme Court held (at MLJ page 480)—

…these are matters that ought to be tried at the trial proper. At this juncture it is pertinent to quote Sachs LJ in the case of *Radstock Co-operative & Industrial Society Ltd v Norton-Radstock Urban District Council* [1968] Ch 605 At p 632. Sachs LJ says:

> In the category of cases which come before the courts in an unsatisfactory form, the one now under consideration ranks high. **Any preliminary issue which falls to be tried in the course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well-defined and that the facts upon which it has to be considered are clearly ascertainable**. In the present case there is not simply a single point for consideration but a whole series, and no such care was taken as regards any of them; moreover, when the pleadings came to be amended in the middle of the trial before the judge at first instance, **the result was to make the matters less rather than more clear.**

This is an apt quotation applicable in the present appeal. **The issues in this case are riddled with complexities and the facts are in dispute so that to have recourse to** O 33 r 2**, in our review, should not be had in the first place. In this respect, the observation of Lord Evershed MR in** *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375 at p 396 is appropriate to show that **under certain circumstances** O 33 r 2 **is not the correct procedure to adopt**:

> … I repeat what I said at the beginning, that the course which this matter has taken emphasizes, as clearly as any case in **my experience has emphasized the extreme unwisdom — save in very exceptional cases — of**

> **adopting this procedure of preliminary issues**. My experience has taught me (and this case emphasizes the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.
>
> [emphasis added]

[24]Second, to allow a preliminary issue to be determined first, the preliminary issue should, in the words of Order 33 Rule 5—"substantially dispose" of the entire suit, or render the trial of the case "unnecessary". This is in line with the view that the Order 33 procedure should not be allowed, if after the Court decides on the preliminary issue, there are **still other issues** in the suit **that remain to be decided on**: *Krishnan Rajan N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149 (HC); [2003] 1 AMR 518; [2003] 1 CLJ 388.

[25]In *Krishnan Rajan* (supra), Justice Abdul Malik Ishak J. (as he was then), analyzing the authorities, had this to say (at MLJ page 167, 168)—

> Since the issue as framed in encl 16 and as reproduced in the early part of this judgment **fails to conclusively resolve the matter** under O 33 r 2 of the RHC, **one way or the other**, then in the words of Chang Min Tat FJ, in the case of *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313 at p 314, **it is 'an unjustified waste of time and occasions an equally unjustified increase in costs.'** His Lordship Chang Min Tat FJ further states at the same page of the same case, the following words:
>
> > Preliminary points of law have been described as too often treacherous short cuts and their price can be delay, anxiety and expense: see *Tilling v Whiteman* (1979) 2 WLR 401, per Lord Wilberforce at p 403 D-G and per Lord Scarman at p 410C-E.
>
> In Newacres Sdn Bhd v Sri Alam Sdn Bhd, the then Supreme Court vigorously applied the principle that was laid down in the case of *Everett v Ribbands & Anor* [1952] 2 QB 198 and said (see p 476 of the judgment of Jemuri Serjan CJ (Borneo)):
>
> > We would interpolate to say that O 33 r 2 **is suitable if there is a point of law which, if decided in one way, is going to be decisive of litigation** and the advantage should be taken of these facilities.
>
> Here, in adjudicating encl 16, I found that **the issue as framed cannot decisively determine and put an end to the litigation.** It is part and parcel of my judgment that **even if I were to hold that the BMC Guidelines that was issued by the first defendant is ultra vires — a decision that would favour the plaintiff, yet it would not be decisive as to put an end to the whole suit. The litigation would still continue. The disposal of the proposed question of law as framed in encl 16 will not and cannot render the trial of the action for defamation unnecessary.This court will still have to adjudicate on the issue of defamation**. This court too will have to adjudicate on the issue of negligence.
>
> [emphasis added]

[26]Third, the Order 33 procedure should not be utilised unless it can bring about a **substantial saving of time and costs** in the course of the trial of the suit: *Petroleum Nasional Berhad v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 (CA); [2003] 5 AMR 696; [2003] 4 CLJ 337.

[27]In *Petroleum Nasional Berhad* (supra), the Court Of Appeal enunciated as follows (at paragraph 16)—

> 16 …The Federal Court in *Palaniappa Chettiar v Sithabaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents was upheld, **that could conclude the whole proceedings and it would be unnecessary to try the other issues.** In *SI Rajah & Anor v Dato' Mak Ron Kam & Ors* [1993] 3 MLJ 741, Lim Beng Choon J, after considering a large number of authorities on the ambit of O 33 r 2 and its equivalent, stated that **before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations**:
>
> > (a)as a general rule, the court will exercise its power under O 33 r 2 **if and only if the trial of the question will result**

> **in a substantial saving of time and expenditure** which otherwise would have to be expended should the action go to trial as a whole;…
>
> [emphasis added]

[28]And fourth, under general principles, since the determination of a preliminary issue is a "departure" from the **prescribed process** of determining **all the issues in one proceeding**, the Court should not readily allow Order 33 applications. The Order 33 procedure should only be made on "special grounds" i.e. **exceptionally**: *Piercy v Young* (1880) 15 Ch D 475.

[29]In *Piercy v Young* (supra), Master Jessel MR stated (at page 479)—

> The object of the *Judicature Act* was to try all disputes together, and it was considered a beneficial object. Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds.

THE DEFENDANTS' ARGUMENTSThe preliminary issue is essentially a question of law to be decided based on undisputed facts

[30]The Defendants argue that the preliminary issue that they pose is a question of law that can be decided on "undisputed facts". The Defendants submit that the facts are undisputed because the parties recorded the Consent Order. In other words, the facts are undisputed because the parties "resolved" the issues of fact by recording the Consent Order.

[31]I find that this argument lacks cogency. Firstly, the pleaded facts in both the Claim and the Counterclaim in Suit 173 were far from being undisputed. And the pleaded facts in the Claim and the Counterclaim in this Suit are also far from being undisputed. In fact, the facts in both suits are **seriously disputed**.

[32]Secondly, the Consent Order was a consequence of the Mediation before trial. Just because the Plaintiff was willing to compromise its Claim in Suit 173 does not mean that the Plaintiff had **admitted to** all the factual assertions that the Defendants made against the Plaintiff. The effect of recording the Consent Order cannot tantamount to the Plaintiff having agreed to the adverse facts that were pleaded by the Defendants against the Plaintiff. Recording the Consent Order cannot have the legal effect of turning the disputed facts into undisputed facts, as the Defendants seem to suggest.

[33]Thirdly, the Defendants seem to be submitting that paragraphs 5 – 44 of the Plaintiff's Claim in this Suit are a reproduction of the Plaintiff's Statement Of Claim in Suit 173. And since Suit 173 led to the Consent Order, the issues arising from the Suit 173 are all "resolved". I find that this is not so.

[34]In this Suit, the Plaintiff pleaded **more facts** and **different facts** compared to the facts pleaded in Suit 173. Within paragraphs 5 – 44 of the Claim in this Suit, which the Defendants are asking this Court to exclude, the following are the paragraphs that contain **additional and different facts**—paragraphs 8.7, 8.8, 8.9, 8.11, 8.12, 8.13, 8.14, 10.1, 10.2, 10.3, 10.4, 10.5, 10.7, 11, 11.1, 11.2, 11.3, 11.4, 12, 15A, 15A.1, 15A.2, 15A.3, 15A.4, 15A.5, 15A.6, 16.3.1, 16.3.5, 17, 17A, 17B, 17C, 21.8, 23, 24, 25, 25.1, 25.2, 25.3, 26, 27, 27.1, 27.2, 27.3, 27.4, 27.5, 27.6, 28, 28.1, 28.2, 28.3, 28.4, 28.5, 28.6, 29, 29A, 29B, 29B.2, 29B.3, 29B.4, 29B.5, 29B.6, 29B.7, 29B.8, 29B.9, 30, 31, 35, 36, 37, 37.1, 37.2, 38, 39, 40, 41, 42 and 44.

[35]These paragraphs (in this Suit) contain facts that were **not pleaded**, or **pleaded differently**, in Suit 173. So, these paragraphs could not contain facts that were "previously raised" and "resolved" by way of the Consent Order, as argued by the Defendants. Instead, these paragraphs clearly plead facts that are disputed.

[36]As the facts are disputed, **evidence needs to be led** by both sides at the trial of this Suit, particularly

by oral evidence, to respectively prove their pleaded facts. If paragraphs 5 – 44 of the Claim in this Suit are expunged from the Plaintiff's plea, the Plaintiff may not be able to adequately present the evidence to sustain its Claim.

[37]In my judgment, it would be unfair and unjust to prohibit the Plaintiff from relying on, or referring to these paragraphs.

[38]And as the facts are disputed, I hold that it is not appropriate, nor is it just, to determine the preliminary issue about paragraphs 5 - 44, separately from all the other issues to be tried in this Suit: *Newacres* (supra).

The Plaintiff is estopped by *res judicata* and issue estoppel from re- litigating the issues in Suit 173

[39]The Defendants argue that the Plaintiff is estopped by the doctrine of *res judicata* and issue estoppel from raising again the issues that arose in Suit 173, such that reliance on paragraphs 5 – 44 of the Plaintiff's Claim, and any reference to these paragraphs, are prohibited at the trial.

[40]I am of the view that it would be unjust to make an Order to that effect. First, the Plaintiff seeks to impeach the Consent Order on the ground of fraud and misrepresentation. A Judgment or Order **can**, in a fresh action, be **impeached and set aside for fraud**: *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC); [1980] 1 LNS 92.

[41]In *Hock Hua Bank* (supra), the Federal Court propounded (at MLJ page 144)—

> …**if a judgment or order has been obtained by fraud** or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, **a fresh action will lie to impeach the original judgment**: *Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298.
>
> [emphasis added]

[42]Second, a Consent Order or a Consent Judgment **can** be set aside by way of a fresh action: *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC); [1998] 1 AMR 909; [1998] 2 CLJ 75. And, the list of grounds or reasons to set aside a Consent Order or Consent Judgment is **not limited**: *Bandar Subang Sdn Bhd v Persatuan Penganut Sri Maha Mariamman Kajang Selangor* [2019] 5 MLJ 732 (CA); [2019] 7 CLJ 444; [2019] AMEJ 0365.

[43]The Court Of Appeal in *Bandar Subang* (supra) alluded to these two principles—

> **[20]** …keputusan dalam kes *Badiaddin* dimana Mahkamah Persekutuan dengan jelas menyatakan bahawa **sesuatu perintah atau penghakiman persetujuan boleh diketepikan melalui tindakan baru untuk tujuan tersebut**…
>
> **[22]** …kami tidak fikir bahawa hanya keadaan-keadaan yang dinyatakan dalam kes *Badiaddin* sahaja yang membolehkan sesuatu penghakiman persetujuan diketepikan. Telah diputuskan oleh Mahkamah Tinggi dalam kes *Phuah Beng Chooi @ Koh Kim Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong & Ors* [2007] 2 MLJ 458; [2006] 8 CLJ 364 bahawa senarai alasan- alasan yang membolehkan sesuatu penghakiman persetujuan diketepikan tidak boleh dihadkan. Kami bersetuju.
>
> [emphasis added]

[44]Third, *res judicata* only applies to a **Judgment** obtained **after the merits of the case are heard and determined**. And issue estoppel does not apply on a final **Order** which is **not a Judgment**: *Metroplex Holdings Sdn Bhd v Commerce International Merchants Bankers Bhd* [2013] 4 MLJ 520 (CA); [2013] 3 AMR 782; [2013] 8 CLJ 329.

[45]In *Metroplex* (supra), the Court Of Appeal stated these principles—

> **[47]** The latin phrase 'res judicata pro veritatem accipitur' expresses the meaning of 'the need for decisions of the Court, unless set aside or quashed, to be accepted as incontrovertibly correct' (Honourable Justice KR Handley, *'Res Judicata: General Principles and Recent Developments'* [1999] 18(3) Aust Bar Rev 214). But, it must not be forgotten that **res judicata only arises from a judgment obtained on the merits. And that no estoppel would arise from a final order which is not a judgment** (*Maganja v Arthur Trading As Shirley Arthur's Beauty Centre* [1984] 3 NSWLR 561 at p 564)…
>
> [emphasis added]

[46]Fourth, *res judicata* and issue estoppel **should not prohibit** the Plaintiff from seeking to impeach the Consent Order: *Badiaddin* (supra). **[47]** The Federal Court in *Badiaddin* (supra) opined in this way—

> It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And **the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance**…
>
> [emphasis added]

[48]Fifth, I should not apply the equitable doctrine of res judicata if it would "**lead to an unjust result**": *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors* [2003] 4 MLJ 654 (CA); [2013] 3 AMR 782; [2013] 8 CLJ 329.

[49]In *Farlim* (supra), the Court Of Appeal puts it this way—

> We are in complete agreement with the statement of this court in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, to the effect that the doctrine of res judicata has its roots in equity and hence, retains its discretionary nature that is common to all equitable doctrines. Further**, since the purpose of the doctrine of res judicata is to achieve justice, a court may decline to apply it where do so would lead to an unjust result**…
>
> [emphasis added]

[50]As the Plaintiff seeks to impeach the Consent Order for fraud and misrepresentation, the Plaintiff will naturally be compelled to plead the facts that led to the Consent Order.

[51]The Plaintiff relies on paragraphs 5 – 44 of its Claim to sustain its cause in this Suit to impeach the Consent Order. It is not fair to determine the issues of *res judicata* and issue estoppel summarily by affidavit evidence. These issues of *res judicata* and issue estoppel are issues of **both fact and law**, not just an issue of law.

[52]I am therefore not minded to allow the preliminary issue to be determined ahead of the trial, because I am guided and bound by the authorities cited above, and I am of the view that it will be unjust if paragraphs 5 – 44 are expunged and the Plaintiff cannot rely on them at the trial proper.
The Plaintiff must comply with the Consent Order and not be allowed to go behind the Consent Order to set it aside

[53]The Defendants argue that the Consent Order must be "respected and observed" by the Plaintiff until it is set aside. But at the same time, the Defendants argue that the Plaintiff cannot be allowed to "go behind" the Consent Order by "re-litigating" the issues that arose in Suit 173, "**before** obtaining an Order to set aside" the Consent Order.

[54]I find this argument to be circular and hence untenable. It is correct that every Order should be complied with until it is set aside. But I do not see that the Plaintiff is "going behind" the Consent Order. To me, the Plaintiff is challenging the Consent Order front-on, by asserting that the Consent Order was recorded by fraud and misrepresentation.

[55]In fact, the Defendants also in turn assert fraud on the part of the Plaintiff. The parties are asserting fraud against each other.

[56]I hold that it would be unfair and unjust to allow the Defendants to prove their pleaded facts in full, but then to confine the Plaintiff only to paragraphs that are not expunged, namely the remaining paragraphs 45 - 54 of the Claim.

[57]I see this Order 33 Application as the Defendants' endeavour to procure not only a tactical advantage, but also a **procedural and evidential advantage** over the Plaintiff.

[58]I hold that it is just and fair to let both sides prove their respective cases at the trial proper—a trial that is **not bifurcated** into first determining the proposed preliminary issue, and then, whatever the outcome on the preliminary issue may be, determining the remainder of the issues that are to be tried.
Determining the preliminary issue in favour of the Defendants will save time and costs

[59]The Defendants argue that if the preliminary issue is determined in their favour, it will "enable the parties to save on their time and costs".

[60]I find that the Defendants have not demonstrated that determining the preliminary issue will result in the saving of time and costs. Instead, the Defendants admit that even if the preliminary issue is determined first, the parties will still have to go through a trial to determine the **remaining issues** to be tried. Put differently, regardless of whether the decision on the preliminary issue is in the affirmative or in the negative, the parties will still have to proceed to trial to determine the other issues in any event.

[61]This also means that the Defendants have not satisfied the Order 33 Rule 5 requirements that determining the preliminary issue should substantially dispose of this Suit or render the trial unnecessary.

[62]That being the case, I find that the aggregate time and costs—the time and costs to summarily determine the preliminary issue, by the filing of affidavits and submissions, and the hearing, as well as the time and costs of the trial proper—will **inevitably be more** if the trial is bifurcated into first determining the preliminary issue and then later the trial proper.
CONCLUSION

[63]In conclusion, I am not with the Defendants for these reasons—

(1) the facts pleaded in paragraphs 5 – 44 of the Plaintiff's Claim are disputed facts, and an Order 33 Application should not be allowed if the facts concerned are in dispute, or if the facts require extrinsic evidence to prove;

(2) the Defendants seek to expunge paragraphs 5 – 44 of the Plaintiff's pleadings in this Suit. But paragraphs 5 – 44 contain more and different facts compared to the facts pleaded in Suit 173 It is unjust to prohibit the Plaintiff from relying on or referring to the facts pleaded in these paragraphs, as the Plaintiff relies on the facts pleaded in these paragraphs to prove their case to impeach the Consent Order;

(3) just because the Mediation resulted in the recording of the terms of the Consent Order, in the circumstances of this Suit, *res judicata* and issue estoppel do not apply to expunge paragraphs 5 – 44;

(4) *res judicata* only applies to a Judgment after the merits of the case are heard and determined, and does not necessarily apply to an Order resulting from a mediated settlement, like the Consent Order here;

(5) *res judicata* and issue estoppel should not prevent the Plaintiff from seeking to impeach the Consent Order;

(6) the equitable doctrine of res judicata **should not** be applied if it achieves an **unjust result** for either of the parties. Here, the Plaintiff should not be deprived of their pleaded facts contained in paragraphs 5 – 44 to prove its Claim;

(7) bifurcating the trial into first determining the preliminary issue, and then later determining the other remaining issues in the trial proper, will not save overall time and costs. Nor will it substantially dispose of this Suit or render the trial unnecessary.

[64]I therefore dismiss the Defendants' Order 33 Application, with costs of RM3,000.00 to be paid by the Defendants to the Plaintiff by 9.11.2022. And costs are subject to the allocatur.

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