

**Yap Kim Hin & Anor
v
Chua Boon Hock & 2 Ors
(and Another Appeal)**

("CA order"). Accordingly, the plaintiffs filed an application to join Soo and Lim as parties in the suit supported by an affidavit affirmed by the second plaintiff before a commissioner for oaths ("CFO"). The defendants objected to the said application on the ground that the second plaintiff's affidavit had not been affirmed before the CFO. The High Court struck out the plaintiffs' joinder application with liberty to file a fresh application subject to directions which maybe obtained from the Court of Appeal regarding the 14-day period in the CA order. The defendants filed an appeal against such order ("the second appeal").

Issue(s)

1. Whether the Court of Appeal was functus officio for varying the CA order. 15
2. Whether the Court of Appeal was empowered to vary the CA order to extend the time-period for the plaintiffs, without any specific application or appeal. 20

Held, dismissing the first and second appeals with costs of RM5,000 for each appeal to the defendants, subject to allocatur 25

1. The Court of Appeal has a discretionary power to extend any time period which had been previously ordered by it, which is clear from rule 93 of the Rules of the Court of Appeal 1994 ("the RCA"). The functus officio doctrine was provided by case law and could not override written law. Accordingly, the instant court was not functus officio and had a discretionary power under rule 93 read with rule 1A of the RCA to extend the 14-day period in the interest of justice. [see p 395 paras 21-22] 30
2. (a) The purpose of the CA order was for the trial of the suit to proceed despite the plaintiff's non-joinder of Soo and Lim; ensure finality to the court's decision in the suit which would bind Soo and Lim too; the CA order pre-supposed that the defendants would not object to the joinder application by the plaintiffs otherwise the plaintiffs could not be expected to obtain a joinder order within the 14-day period. [see p 396 para 24 - p 397 para 24] 40
- (b) The CA order was varied in the manner stated therein since the variation would give effect to the purpose of the CA order and otherwise, it would cause injustice to the plaintiffs. The variation did not cause any injustice to the defendants. The court could 45

1 exercise its inherent power without any specific application or
 appeal filed to invoke such power. Notwithstanding the fact that the
 plaintiffs had not applied or appealed to the Court of Appeal, it was
5 empowered under s 69(4) and (5) of the Courts of Judicature Act
 1964 to make such variation to the CA order. [see p 397 para 25;
 p 399 para 28]

Case(s) referred to by the court

10 *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 AMR 1730; [2000] 2 MLJ 353, FC
 (foll)
 Stone World Sdn Bhd v Engareh (M) Sdn Bhd [2020] 7 AMR 233; [2020] 12
15 MLJ 237, FC (ref)

Legislation referred to by the court

Malaysia
20 Courts of Judicature Act 1964, ss 69(4), (5), 70
 Rules of Court 2012, Order 15 r 6(1)
 Rules of the Court of Appeal 1994, rules 1A, 54, 93, 96, 105

25 **Solicitors**

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 appellants
30 *Lim Kien Huat and Kathy Wong Ker Sing* (Lee & Lim) for respondents
 Appeal from High Court, Kuala Lumpur – Civil Suit Nos. WA-22NCvC-
 199-04/2020 and WA-22NCvC-199-04/2020

35 *Judgment received: December 8, 2023*

Wong Kian Kheong JCA

40 **A. Background**

 [1] For ease of reference, we shall refer to parties as they were in the High
 Court ("HC").
45 [2] Three plaintiffs ("plaintiffs") have filed a suit in the HC ("suit") against
 two defendants ("defendants") for, among others, an order of specific
 performance of a sale and purchase agreement dated February 24, 2016
50 ("SPA").
 [3] According to the SPA, among others, the defendants as co-proprietors of
 a piece of land held under Grant 47136, Lot No. 4472, Mukim Ulu Langat,

Ulu Langat District, Selangor ("land"), had sold the land at a price of RM2.6 million to five co-purchasers, namely, the plaintiffs, Mr Soo Teck Lee ("Mr Soo") and Ms Lim Siew Kien ("Ms Lim"). 1

[4] The defence in the suit had pleaded, among others, that the SPA was a sham agreement because the land was actually used as a security for certain purchases between the parties. 5

[5] The defendants filed an application in the HC to strike out the suit on the ground that the plaintiffs had failed to join Mr Soo and Ms Lim as parties in the suit ("defendants' striking out application"). 10

[6] The learned HC judge dismissed the defendants' striking out application with costs ["HC's dismissal (defendants' striking out application)"]. 15

[7] The defendants appealed to the Court of Appeal ("CA") against the HC's dismissal (defendants' striking out application) ["defendants' first appeal (CA)"]. 20

[8] With regard to the defendants' first appeal (CA), the following order was made by CA on August 25, 2021 ["CA's order (August 25, 2021)"], among others: 25

- (1) the defendants' first appeal (CA) was dismissed {"paragraph (a) [CA's order (August 25, 2021)]"}; and
- (2) the HC's dismissal (defendants' striking out application) was varied wherein the plaintiffs were required to join Mr Soo and Ms Lim as co-plaintiffs or co-defendants in the suit within 14 days from the date of CA's order (August 25, 2021) {"14 days' period [paragraph (b)]"} and if the plaintiffs fail to do so, the suit shall stand as struck off {"paragraph (b) [CA's order (August 25, 2021)]"}. 30
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[9] Pursuant to paragraph (b) [CA's order (August 25, 2021)], on September 2, 2021 the plaintiffs filed an application to join Mr Soo and Ms Lim as parties in the suit ["plaintiffs' joinder application (HC)"]. The plaintiffs' joinder application (HC) was supported by an affidavit purportedly affirmed on September 2, 2021 by the second plaintiff ("second plaintiff") before a commissioner for oaths, YM Tengku Fariddudin bin Tengku Sulaiman ("CFO"). 40
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[10] The defendants objected to the plaintiffs' joinder application (HC) on the ground that, among others, the second plaintiff's affidavit had not been affirmed before the CFO. 50

1 [11] The learned HC judge struck out the plaintiffs' joinder application (HC) with:

- (1) no order as to costs; and
- 5 (2) liberty to file a fresh plaintiffs' joinder application (HC) subject to "direction" (*arahan*) which may be obtained by the plaintiffs from the CA with regard to the 14 days' period [paragraph (b)] (time period for the plaintiffs to join Mr Soo and Ms Lim as parties in the suit)
- 10 ["HC's order (plaintiffs' joinder application)"].

[12] The defendants have filed an appeal to CA against the HC's order (plaintiffs' joinder application) ["defendants' second appeal (CA)"].

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B. Proceedings in CA

[13] In the defendants' first appeal (CA), the defendants filed a notice of motion in court encl No. 19 ["encl 19 (defendants' first appeal)"] for the following orders from the CA, among others:

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- (1) an order to enforce paragraph (b) [CA's order (August 25, 2021)]; and
- 25 (2) an order for the suit to be struck off.

[14] The defendants' second appeal (CA) has sought for the CA to reverse the HC's order (plaintiffs' joinder application) and for the suit to be struck out pursuant to paragraph (b) [CA's order (August 25, 2021)].

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[15] As encl 19 (defendants' first appeal) and the defendants' second appeal (CA) concerned the same facts and issues, we have decided to hear together encl 19 (defendants' first appeal) and the defendants' second appeal (CA).

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C. Issues

[16] The following three questions shall be decided in this judgment:

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- (1) whether the CA is *functus officio* and cannot extend the 14 days' period [paragraph (b)]. This issue discusses the CA's discretionary power under rule 93 read with rule 1A of the Rules of the Court of Appeal 1994 ("RCA");
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- (2) can the CA vary paragraph (b) [CA's order (August 25, 2021)] and order the plaintiffs to *file* an application in the HC to join all relevant parties in the suit within 14 days from the date of the order of this CA on April 18, 2023 (instead of the requirement for the plaintiffs to obtain an *order* from the HC to join Mr Soo and Ms Lim in the suit)?
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- This concerns an interpretation of the purpose of CA's order (August 25, 2021); and 1
- (3) whether the CA can vary paragraph (b) [CA's order (August 25, 2021)] pursuant to: 5
- (a) rule 105 of the RCA; and
- (b) s 69(4) and (5) of the Courts of Judicature Act 1964 ("CJA"); 10
- without any appeal or application by the plaintiffs to the CA.
- [17] We are not able to find any previous Malaysian case which has decided on the above questions. 15
- D. Whether CA is *functus officio* with regard to CA's order (August 25, 2021)**
- [18] The first question to be determined is whether this CA: 20
- (1) has a discretionary power to extend the 14 days' period [paragraph (b)]; or
- (2) is barred by the *functus officio* doctrine from revisiting the 14 days' period [paragraph (b)]. 25
- [19] The doctrine of *functus officio* has been explained by Nallini Pathmanathan FCJ in the Federal Court case of *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 7 AMR 233; [2020] 12 MLJ 237 at paragraph [13], as follows: 30
- [13] *It is settled law that once a court has pronounced a final order it does not possess the authority to re-open, alter, amend and supplement the final order and judgment relating to the dispute it has adjudicated upon. This rule, known as the doctrine of functus officio, stems from the principle of finality in litigation. There would be great uncertainty and chaos if courts were permitted to review and reconsider final orders and judgments.* 35
- (Emphasis added.) 40
- [20] We reproduce below rules 1A and 93 of the RCA: 45
- RCA
- 1A. *Court or Judge shall have regard to justice*
- In administering any of [RCA] herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of [RCA] herein.* 50

93. *Power of Court or Judge to enlarge or abridge time*

The Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fix by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction on or under the summons for directions or by an order of the Court or a Judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application.

(Emphasis added.)

[21] We have no hesitation to decide that the CA has a discretionary power to extend any time period which has been previously ordered by the CA. Such a discretionary power is clear from rule 93 of the RCA (the CA "*shall have power to ... fix by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require*"). Furthermore, by virtue of rule 1A of the RCA, in the application of rule 93 of the RCA, the CA "*shall have regard to the justice of the particular case and not only to the technical non-compliance of any of [RCA].*"

[22] The *functus officio* doctrine is provided by case law and cannot override written law. Accordingly, this CA is not *functus officio* and has a discretionary power under rule 93 read with rule 1A of the RCA to extend the 14 days' period [paragraph (b)] in the interest of justice. In paragraph [26] below, we provide our reasons for extending the 14 days' period [paragraph (b)] as well as to why paragraph (b) [CA's order (August 25, 2021)] should be varied by this court.

E. What was purpose of CA's order (August 25, 2021)?

[23] With regard to the construction of CA's order (August 25, 2021), we adopt the following approach laid down by Chong Siew Fai CJ (Sabah & Sarawak) in the Federal Court case of *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 AMR 1730 at 1759; [2000] 2 MLJ 353 at 374:

In Re Strand Music Hall Co Ltd (1865) 35 Beav 153, Sir John Romilly MR observed (at p 158):

"The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed."

Though the above quoted passage related to a deed, the declared principle applies, in my view, equally to a court order. 1

(Emphasis added.)

[24] We are of the considered view that the purpose of CA's order (August 25, 2021) is as follows: 5

- (1) By reason of paragraph (a) [CA's order (August 25, 2021)], the CA had decided that notwithstanding the plaintiffs' non-joinder of Mr Soo and Ms Lim in the suit ["plaintiff's non-joinder (Mr Soo and Ms Lim)"], the CA did not strike out the suit. It is therefore clear that the purpose of paragraph (a) [CA's order (August 25, 2021)] is for the trial of the suit to proceed despite the plaintiff's non-joinder (Mr Soo and Ms Lim) {"purpose [paragraph (a)]"}. The purpose [paragraph (a)] is in consonance with Order 15 r 6(1) of the Rules of Court 2012 which provides as follows: 10 15

A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. 20

(emphasis added); 25

- (2) Paragraph (b) [CA's order (August 25, 2021)] required the plaintiffs to join Mr Soo and Ms Lim in the suit. The purpose of paragraph (b) [CA's order (August 25, 2021)] is to ensure finality in litigation, namely, the court's final decision in the suit ["court's final decision (suit)"] shall not only bind the plaintiffs and the defendants but shall also bind Mr Soo and Ms Lim {"purpose [paragraph (b)]"}. If the CA did not order paragraph (b) [CA's order (August 25, 2021)], Mr Soo and Ms Lim may subsequently impugn the validity of the court's final decision (suit) on the ground that Mr Soo and Ms Lim have not been afforded their right of hearing in accordance with the second rule of natural justice; 30 35 40
- (3) Paragraph (b) [CA's order (August 25, 2021)] pre-supposed that upon the filing of the plaintiffs' joinder application (HC), the defendants would not object thereto and the HC would thereafter make an order to join Mr Soo and Ms Lim as parties in the suit ("joinder order"). This was because if the defendants were to object to the plaintiffs' joinder 45

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1 application (HC) for any reason (as had happened in this case), the
plaintiffs could not be expected to obtain a joinder order within
14 days from the date of CA's order (August 25, 2021).

5 In view of the above interpretation of paragraph (b) [CA's order
(August 25, 2021)], if the defendants were to object to the plaintiffs'
joinder application (HC), paragraph (b) [CA's order (August 25, 2021)]
could not thereafter be invoked by the defendants to strike out the
10 suit. If otherwise, this will defeat the purpose [paragraph (a)] and the
suit will be struck out due to a mere technicality, namely, the plaintiffs'
failure to obtain a joinder order within 14 days from the date of CA's
order (August 25, 2021); and

15 (4) as decided in *Newacres*, the above interpretation will "give effect to
every part" of CA's order (August 25, 2021), namely, paragraph (a)
[CA's order (August 25, 2021)] and paragraph (b) [CA's order
20 (August 25, 2021)].

F. Whether CA can vary paragraph (b) [CA's order (August 25, 2021)]

25 [25] To decide encl 19 (defendants' first appeal) and the defendants' second
appeal (CA), we have no hesitation to exercise our discretion to vary
paragraph (b) [CA's order (August 25, 2021)] as follows – the plaintiffs shall
file an application in the HC to join all relevant parties in the suit within
14 days from the date of the order of this CA (April 18, 2023) and if the
30 plaintiffs fail to do so, the suit shall be struck out ["variation [paragraph
(b)]"].

[26] Our reasons for the variation [paragraph (b)] are as follows:

35 (1) as explained in the above paragraph 24, the variation [paragraph (b)]
gives effect to the CA's order (August 25, 2021), especially purpose
[paragraph (a)] and purpose [paragraph (b)];

40 (2) if the variation [paragraph (b)] is not made, there will be an injustice
to the plaintiffs because:

45 (a) the plaintiffs' joinder application (HC) was made well within the
14 days' period [paragraph (b)] but the defendants had objected
to the plaintiffs' joinder application (HC) ["defendants' objection
(plaintiffs' joinder application)"]. The defendants' objection
(plaintiffs' joinder application) was the sole reason why the
50 previous paragraph (b) [CA's order (August 25, 2021)] could not
be fulfilled by the plaintiffs; and

- (b) the defendants would be able to strike out the suit without a trial. 1
In other words, the plaintiffs would be deprived of their
constitutional right of access to justice without the suit being tried
and decided by the court on its merits. 5

The CA has an inherent power (as declared by rule 105 of the RCA)
"to make any order as may be necessary to prevent injustice". According to
rule 105 of the RCA: 10

105. *Inherent powers of the Court* 10

*For the avoidance of doubt, it is declared that nothing in these [RCA] shall be
deemed to limit or affect the inherent powers of the Court to make any order
as may be necessary to prevent injustice or to prevent an abuse of the 15
process of the Court.*

(Emphasis added);

The variation [paragraph (b)] is made by us in the interest of justice 20
pursuant to CA's inherent power; and

- (3) with regard to the defendants' second appeal (CA), the CA is 25
empowered by s 69(4) and (5) of the CJA to make the variation
[paragraph (b)]. We reproduce below s 69(4) and (5) of the CJA:

69. *Hearing of appeals*

...

- (4) *The Court of Appeal may draw inferences of fact, and give any 30
judgment, and make any order which ought to have been given or
made, and make such further or other orders as the case requires.* 35

- (5) *The powers aforesaid may be exercised notwithstanding that the notice
of appeal relates only to part of the decision, and the powers may also be
exercised in favour of all or any of the respondents or parties although
the respondents or parties have not appealed from or complained of the 40
decision.*

(Emphasis added); and

- (4) the variation [paragraph (b)] does not occasion any injustice to 45
the defendants. The defendants have the right to resist to the hilt
the plaintiffs' second application in the HC to join all relevant
parties in the suit ["plaintiffs' second joinder application (HC)]. 50

1 If the defendants are dissatisfied with the HC's decision in the
 plaintiffs' second joinder application (HC), they have a further
 right to appeal to CA thereafter.

5 **G. Can CA make variation [paragraph (b)] without any application or
 appeal by the plaintiffs?**

10 [27] Firstly, the above judgment is given pursuant to this court's decision in
 encl 19 (defendants' first appeal) and the defendants' second appeal (CA). In
 other words, the CA is not acting on its own motion in making the variation
 [paragraph (b)].

15 [28] Secondly, as explained in the above sub-paragraph 26(2), the CA is only
 exercising its inherent power to make the variation [paragraph (b)]. We are
 unable to find any case in Malaysia and the Commonwealth which has
 decided that the court can only exercise its inherent power when there is a
20 specific application or particular appeal which has been filed by a party for
 the court to invoke its inherent power.

25 [29] Lastly, in view of the defendants' second appeal (CA), notwithstanding
 the fact that the plaintiffs have not applied or appealed to CA, CA is
 empowered under s 69(4) and (5) of the CJA to make the variation
 [paragraph (b)].

H. Costs

30 [30] It is not disputed that CA has a wide discretion to award costs in all
 proceedings before the CA pursuant to s 70 of the CJA read together with
 rules 54 and 96 of the RCA.

35 [31] We unhesitatingly order the plaintiffs to pay to the defendants costs for
 encl 19 (defendants' first appeal) and the defendants' second appeal (CA).
 This is because if the plaintiffs had at the commencement of the suit joined
 Mr Soo and Ms Lim, either as co-plaintiffs or co-defendants, the defendants'
40 striking out application and all subsequent proceedings thereto would have
 been unnecessary.

I. Conclusion

45 [32] Premised on the above reasons, we make the following orders for
 encl 19 (defendants' first appeal) and the defendants' second appeal (CA):

50 (1) Encl 19 (defendants' first appeal) is dismissed with costs of RM5,000
 to be paid by the plaintiffs to the defendants (subject to allocatur fee);

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- (2) the plaintiffs shall file an application to join all relevant parties in the HC within 14 days from the date of this order of CA (April 18, 2023) and upon such a failure, the suit shall be struck out; and 1
- (3) the defendants' second appeal (CA) is dismissed with costs of RM5,000 to be paid by the plaintiffs to the defendants (subject to allocatur fee). 5
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