CME Group Bhd v Bellajade Sdn Bhd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-136–11 OF 2017 (W) AND 02(f)-135–11 OF 2017 (W)
ZULKEFLI PCA, ZAINUN ALI, AZAHAR MOHAMED, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ
25 SEPTEMBER 2018

Contract — Tenancy agreement — Validity of — Whether tenancy agreement was illegal and void for contravening express condition of land use stated in land title of demised premises — Whether tenant knew about breach of the condition when it entered into the tenancy agreement — Whether tenant entitled to reclaim all rentals paid under s 66 of the Contracts Act 1950

The respondent in the two appeals herein ('Bellajade') agreed to rent its office building complex ('the demised premises') to the appellant CME Group Bhd ('CME') for commercial use for a fixed term of three years pursuant to a tenancy agreement. The other appellant, Tan Sri Dato' Lim Cheng Pow ('LCP') guaranteed the due performance of the tenancy agreement by CME. After paying rental for only six months, CME defaulted, causing Bellajade to sue CME and LCP for recovery of outstanding rental plus the rental for the remainder of the fixed term period. The main ground in the defences of CME and LCP was that the tenancy agreement was void for illegality because the titles of the lands ('the lands') on which the demised premises stood expressly stated that the lands were only to be used for residential purpose. CME counterclaimed for a declaration that the tenancy agreement was void and sought an order that Bellajade refund the rentals CME had paid. The High Court dismissed Bellajade's claim and allowed the counterclaim. It found that the tenancy agreement was void for breach of the express condition of use of the lands and that CME could claim back the rentals it had paid pursuant to s 66 of the Contracts Act 1950 ('the CA') as it was not aware of the breach of the condition when it entered into the tenancy agreement. The Court of Appeal ('COA') allowed Bellajade's appeal and its claims against CME and LCP, set aside the High Court's decision and dismissed CME's counterclaim. The COA held that the tenancy agreement was valid and enforceable. Inter alia, it found that: (a) the state authority had approved an application made under s 204D of the National Land Code ('the NLC') by a former owner of the demised premises for surrender, re-alienation, amalgamation and conversion of the lands' use from residential to 'commercial' and 'mixed development' and that the conditions attached to the approval had been fulfilled; (b) the local authority (DBKL) had thereafter issued a certificate of fitness for occupation ('CFO') for the demised premises; (c) the state authority had approved the change in the express condition of use of the lands pursuant to s 124(1)(c) of

the NLC and that it was not stated in s 124(4) that the approval of the change was only effective upon endorsement of the change on the document of title; (d) on the facts of the case, the process of conversion was essentially completed at the time the tenancy agreement was entered into and all that remained pending was merely the administrative process of endorsing the change of condition of land use on the new land titles; and (e) CME could not reclaim the rentals it had paid under s 66 of the CA. CME and LCP were granted leave by the Federal Court to appeal against the COA's decision.

Held, by majority, allowing the appeals, setting aside the COA's decision and reinstating the orders of the High Court:

(1) (**per Zulkefli PCA, majority**) The tenancy for the commercial use of the lands, which in the instant matter was expressly conditioned only for residential use, was illegal and void. The COA erred in finding that the tenancy agreement was not unlawful because the state authority did not take any action against the owner of the lands for contravention of the condition pursuant to s 128 of the NLC. Although no action was taken by the state authority in respect of the contravention, the tenancy agreement nonetheless remained illegal. The COA also erred in clothing the tenancy agreement with legality by reason of the issuance of the CFO by the DBKL. As rightly found by the High Court, the CFO had no bearing on the express condition of title to the lands (see paras 21–22).

(2) (**per Zulkefli PCA, majority**) The COA erred in holding that CME knew about the contravention of the express condition of land use at the time it entered into the tenancy agreement. It was never Bellajade's pleaded case that CME had such knowledge or that it was in pari delicto with Bellajade with regard to the illegality of the tenancy agreement. During oral arguments before the High Court judge, Bellajade's counsel conceded that CME did not know about the illegality of the tenancy agreement at the time it entered into the agreement. The COA should not have substituted the findings of facts made by the High Court on this point by imputing to CME constructive notice of the illegality which its solicitors might have had. In the circumstances of the case, Bellajade had failed to prove its case against CME and LCP on balance of probabilities (see paras 26–31 & 33).

(3) (**per Zulkefli PCA, majority**) The COA whilst acknowledging that the application in the present case was for surrender, re-alienation, amalgamation and change of use under s 204D of the NLC went on to apply the provisions of s 124 of the NLC and the cases dealing with s 124 and erroneously ruled that s 78(3) of the NLC was not applicable. The approval for change of condition of land use in the present case was given under s 204D of the NLC, and not under s 124, and was therefore different from an approval sought and obtained under s 124. Where there

was a surrender, amalgamation and re-alienation, such as in the instant appeal, then the provisions of s 78(3) applied so that the change in condition of use of the land would be endorsed on the new title and become effective upon registration and issuance of a new issue document of title pursuant to s 78(3) (see paras 6, 12–13 & 15–16).

(4) (**per Zainun Ali FCJ, dissenting**) The proposition that a tenancy agreement was void for allowing the land to be used in contravention of its express condition of usage could only extend to situations where the contravention was deliberate and could not be applied where approval for change in the express condition prior to the tenancy 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. If the only steps left to be accomplished were in the exclusive purview of the State and not on the proprietor, the latter ought not to be burdened with having his agreement rendered void on a purported illegality that was neither his fault nor within his control (see paras 122 & 125).

(5) (**per Zainun Ali FCJ, dissenting**) The tenancy agreement in the instant case could not be said to be illegal upon consideration of all the factors. There was substantial compliance on the part of the applicant-proprietor in its application for variation of the express condition. The application was approved by the state authority and the conditions attached to that approval were met. The proprietor had done all that was required of it under the NLC. The only acts left to be accomplished were the acts of the state which were inexplicably left undone. Notwithstanding the fact the state authority had not registered and re-issued the new documents of title in the instant case, the combination of factors prevented the tenancy agreement from falling foul of the provisions of s 24 of the CA. The agreement was not in any meaningful way forbidden by law. Had the law operated in propriety, the tenancy agreement would not have contravened any law nor defeated the purpose of any law (see paras 128–129).

(6) (**per Zainun Ali FCJ, dissenting**) Section 204 of the NLC was a procedural regime, setting out how an application for surrender and re-alienation was to be made by a proprietor. It was not the provision under which the state authority granted the approval. That was the province of s 124 of the NLC (see paras 96 & 106).

[Bahasa Malaysia summary

Responden dalam dua rayuan ('Bellajade') bersetuju menyewa kompleks bangunan pejabatnya (premis tersebut') kepada perayu CME Group Bhd ('CME) untuk kegunaan komersial bagi tempoh tetap selama tiga tahun menurut perjanjian penyewaan. Perayu lain, Tan Sri Dato' Lim Cheng Pow ('LCP') telah menjamin prestasi pelaksanaan perjanjian penyewaan oleh CME.

Selepas membayar sewa untuk hanya enam bulan, CME telah gagal, menyebabkan Bellajade menyaman CME dan LCP untuk mendapat balik sewa tertunggak beserta baki sewa untuk tempoh jangka masa tetap. Alasan utama dalam pembelaan CME dan LCP adalah bahawa perjanjian penyewaan itu tidak sah kerana menyalahi undang-undang sebab hak milik tanah ('tanah tersebut') di mana wujud premis tersebut jelas menyatakan yang tanah tersebut hanya boleh digunakan untuk tujuan kediaman. CME telah menuntut balas untuk satu deklarasi yang perjanjian penyewaan itu tidak sah dan memohon perintah agar Bellajade membayar balik sewa yang telah dibayar oleh CME. Mahkamah Tinggi telah menolak tuntutan Bellajade dan membenarkan tuntutan balas. Ia didapati bahawa perjanjian penyewaan adalah tidak sah kerana pelanggaran syarat nyata berhubung penggunaan tanah tersebut dan bahawa CME boleh menuntut balik sewa yang telah dibayarnya menurut s 66 Akta Kontrak 1950 ('AK') kerana ia tidak menyedari tentang pelanggaran syarat itu apabila ia memasuki perjanjian penyewaan tersebut. Mahkamah Rayuan ('MR') telah membenarkan rayuan Bellajade dan tuntutannya terhadap CME dan LCP, mengetepikan keputusan Mahkamah Tinggi dan menolak tuntutan balas CME. MR memutuskan bahawa perjanjian penyewaan itu adalah sah dan boleh dikuatkuasakan. Antara lain, ia mendapati bahawa: (a) pihak kuasa negeri telah meluluskan permohonan yang dbuat di bawah s 204D Kanun Tanah Negara ('KTN') oleh bekas pemilik premis tersebut untuk menyerahkan, mengasingkan, menggabungkan dan menukarkan penggunaan tanah tersebut daripada kediaman kepada 'komersial' dan 'pembangunan bercampur' dan agar syarat-syarat yang dilampirkan pada kelulusan telah dipenuhi; (b) pihak berkuasa tempatan (DBKL) selepas itu telah mengeluarkan sijil layak menduduki ('CFO') untuk premis tersebut; (c) pihak berkuasa negeri telah meluluskan perubahan dalam syarat nyata untuk penggunaan tanah tersebut menurut s 124(1)(c) KTN dan bahawa ia tidak dinyatakan dalam s 124(4) bahawa kelulusan perubahan itu hanya berkuat kuasa selepas pengindorsan perubahan itu pada dokumen hak milik; (d) berdasarkan fakta kes, proses penukaran itu pada asasnya selesai pada masa perjanjian penyewaan itu dimasuki dan semua yang masih belum selesai adalah hanya proses pentadbiran untuk mengesahkan perubahan syarat penggunaan tanah tersebut pada hak milik tanah yang baharu; dan (e) CME tidak boleh menuntut semula sewa yang telah dibayar di bawah s 66 AK tersebut. CME dan LCP telah diberi kebenaran oleh Mahkamah Persekutuan untuk merayu terhadap keputusan MR.

Diputuskan, secara majoriti, membenarkan rayuan-rayuan, mengetepikan keputusan MR dan mengembalikan perintah-perintah Mahkamah Tinggi:

(1) (**oleh Zulkefli PMR, majoriti**) Penyewaan untuk penggunaan komersial tanah tersebut, yang mana dalam perkara ini telah disyaratkan secara nyata hanya untuk penggunaan kediaman, adalah menyalahi undang-undang dan tidak sah. MR terkhilaf kerana mendapati bahawa

perjanjian penyewaan itu tidak menyalahi undang-undang kerana pihak berkuasa negeri tidak mengambil apa-apa tindakan terhadap pemilik tanah tersebut untuk pelanggaran syarat tersebut menurut s 128 KTN. Walaupun tiada tindakan telah diambil oleh pihak berkuasa negeri berkaitan pelanggaran itu, perjanjian penyewaan tersebut walau apa pun masih menyalahi undang-udang. MR juga terkhilaf dengan mengatakan perjanjian penyewaan itu adalah sah oleh sebab keluaran CFO oleh DBKL. Sepertimana sewajarnya telah diputuska oleh Mahkamah Tinggi, CFO tersebut tidak mempunyai kesan ke atas syarat nyata hak milik tanah tersebut (lihat perenggan 21–22).

(2) (**oleh Zulkefli PMR, majoriti**) MR terkhilaf memutuskan bahawa CME mengetahui tentang pelanggaran syarat nyata penggunaan tanah tersebut pada masa ia memasuki perjanjian penyewaan itu. Ia bukan kes yang dipli oleh Bellajade bahawa CME mempunyai pengetahuan tersebut atau bahawa ia adalah in pari delicto dengan Bellajade berkenaan perjanjian penyewaan yang menyalahi undang-undang. Sepanjang penghujahan lisan di hadapan hakim Mahkamah Tinggi, peguam Bellajade mengakui bahawa CME tidak mengetahui tentang perjanjian penyewaan yang menyalahi undang-undang itu pada masa ia memasuki perjanjian tersebut. MR tidak patut menggantikan penemuan fakta yang dibuat oleh Mahkamah Tinggi berhubung perkara ini dengan menuduh CME notis konstruktif penyalahn undang-undang yang mungkin ada pada peguamnya. Dalam keadaan kes itu, Bellajade telah gagal untuk membuktikan kesnya terhadap CME dan LCP atas imbangan kebarangkalian (lihat perenggan 26–31 & 33).

(3) (**oleh Zulkefli PMR, majoriti**) MR sementara mengakui bahawa permohonan dalam kes ini adalah untuk penyerahan, pemberian milik semula, penggabungan dan pertukaran penggunaan di bawah s 204D KTN seterusnya memohon peruntukan 124 KT dan kes-kes yang berkaitan dengan s 124 dan terkhilaf dalam memutuskan bahawa s 78(3) KTN adalah tidak terpakai. Kelulusan untuk perubahan syarat penggunaan tanah dalam kes ini telah diberikan di bawah s 204D KTN, dan bukan di bawah s 124, dan oleh itu berbeza daripada kelulusan yang dipohon dan diperoleh di bawah s 124. Di mana terdapat penyerahan, penggabungan dan pemberian milik semula, seperti dalam rayuan ini, maka peruntukan s 78(3) adalah terpakai agar perubahan syarat penggunaan tanah itu boleh diindorskan pada hak milik baru dan berkuat kuasa setelah pendaftaran dan keluaran dokumen hak milik baharu menurut s 78(3) (lihat perenggan 6, 13–12 & 15–16).

(4) (**oleh Zainun Ali HMP, menentang**) Saranan bahawa suatu perjanjian penyewaan adalah tidak sah kerana membenarkan tanah digunakan bertentangan dengan syarat nyata penggunaannya hanya setakat keadaan di mana pelanggaran itu disengajakan dan tidak boleh terpakai jika

kelulusan untuk pertukaran dalam syarat nyata sebelum perjanjian penyewaan itu dmasuki telah dipohon dan diperoleh, terutamanya di mana apa yang perlu dilakukan adalah dalam kuasa pihak berkuasa negeri. Jika satu-satunya langkah yang perlu dilaksanakan adalah dalambidang kuasa eksklusif negeri dan bukan pemilik, pemilik tidak patut dibebankan dengan menyebabkan perjanjiannya menjadi tidak sah kerana dikatakan menyalahi undang-undang yang mana bukan kesalahannya atau pun bukan dalam kawalannya (lihat perenggan 122 & 125).

(5) (**oleh Zainun Ali HMP, menentang**) Perjanjian penyewaan dalam kes ini tidak boleh dikatakan seagai menyalahi undang-undang dengan mengambil kira semua faktor. Terdapat pematuhan yang substantial di pihak pemohon-pemilik dalam permohonannya untuk perubahan syarat nyata itu. Permohonan itu telah diluluskan oleh pihak berkuasa negeri dan syarat-syarat yang dilampirkan bersama kelulusan itu telah dimenuhi. Pemilik telah melakukan semua yang dikehandaki olehnya di bawah KTN. Satu-satunya tindakan yang tinggal untuk dilaksanakan adalah tindakan pihak berkuasa negeri yang tidak dilakukan secara terperinci. Walau apa pun hakikat bahawa pihak berkuasa negeri tidak mendaftarkan dan mengeluarkan semula dokumen hak milik baharu dalam kes ini, gabungan faktor-faktor yang menghalang perjanjian penyewaan daripada melanggar peruntukan s 24 AK. Perjanjian itu tidak dalam apa-apa cara yang bermakna dilarang oleh undang-undang. Sekiranya undang-undang dikendalikan secara wajar, perjanjian penyewaan tidak akan melanggar mana-mana undang-undang atau menggagalkan tujuan mana-mana undang-undang (lihat perenggan 128–129).

(6) (**oleh Zainun Ali HMP, menentang**) Seksyen 204 KTN merupakan regim prosedur, yang menetapkan bagaiman suatu permohonan untuk penyerahan dan pemberian milik semula perlu dilakukan oleh pemilik. Ia bukan suatu peruntukan yang mana pihak berkuasa negeri memberi kelulusan. Itu adalah dalam peruntukan s 124 KTN (lihat perenggan 96 & 106).]

Notes

For cases on validity of tenancy agreement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7503–7504.

Cases referred to

Ahmad bin Udoh & Anor v Ng Aik Chong [1969] 2 MLJ 116 (refd)

Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor [1982] 1 MLJ 38 (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi [2018] Supp MLJ 293; [2011] 2 CLJ 292, FC (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21, FC (refd)

Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased) [2010] 4 MLJ 312, FC (refd)

Legislation referred to

Contracts Act 1950 ss 24, 66

National Land Code ss 78, 78(3), 79, 79(2), (2)(g), 89, 113, 113(a), 124, 124(1), (1)(a), (1)(b), (1)(ba), (1)(c), (2), (3), (4), (4)(a), (4)(b), (4)(c), (5), (7), 124A, 127, 128, 129, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 197, 200, 204, 204A, 204B, 204C, 204C(1)(a), 204D, 204D(3), 204E, 204E(1), (2), (4), 204F, 204G, 204G(1), (2), 204H, Part Twelve, Form 12D

Gopal Sri Ram (KY Sim and David Yii with him) (KY Sim & Co) for the first appellant.

K Kirubakaran (Desmond Ng with him) (Shui-Tai) for the second appellant.

M Pathmanathan (Michele Kaur, Shanti Pathmanathan and Shireen Pathmanathan with him) (Sun & Michele) for the respondent.

Zulkefli PCA (delivering majority judgment):

INTRODUCTION

[1] These are two appeals by the two respective appellants against the decision of the Court of Appeal which allowed the appeal by the respondent against the decision of the High Court. In the High Court, the first appellant, CME Group Bhd was the first defendant and the second appellant, Tan Sri Dato' Lim Cheng Pow, was the second defendant. The respondent, Bellajade Sdn Bhd, was the plaintiff before the High Court. The parties will be referred to in this judgment as they were before the High Court.

[2] This court had granted leave to appeal against the decision of the Court of Appeal on the following questions of law:

(a) whether an approval by the state authority given under s 204D of the National Land Code ('the NLC') operates as an approval of land use under s 124 of the NLC?

(b) whether change of condition of land under s 124 of the NLC takes effect upon endorsement of the same on the issue document of title to the land in question? and

(c) 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 A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)* [2010] 4 MLJ 312.

BACKGROUND FACTS

[3] The relevant background facts of the case are as follows:

(a) the plaintiff 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 said premises');

(b) previously, the plaintiff had purchased the land from one Orion Choice Sdn Bhd ('Orion' — not a party in this proceeding) and the sale and purchase agreement ('SPA') was completed on 20 February 2013. On 21 February 2013, the plaintiff entered into a tenancy agreement with the first defendant for a term of three years ('tenancy agreement'). The owner of the land prior to Orion was Kris Angsana Sdn Bhd ('Kris Angsana');

(c) pursuant to the tenancy agreement, the first defendant agreed to rent from the plaintiff the said premises at a rental of RM1,018,750 per month for a fixed term of three years commencing from the date of completion of the sale and purchase agreement. Under the terms of the tenancy agreement, the first defendant was deemed to have taken possession of the said premises upon completion of the SPA. The performance of the tenancy agreement was guaranteed by the second defendant pursuant to a guarantee of tenancy agreement executed on the same day as the tenancy agreement;

(d) the premises were tenanted to the first defendant for commercial use as follows:

> Lounge, private club, recreational bistro, convenient shop, cafe, hair saloon, fitness centre, clinic, laundry, beauty salon, florist, banking services and facilities, food court, fast food outlets and office. (*section H of the First Schedule of the Tenancy Agreement*.)

(e) the first defendant entered into possession of the said premises on 21 February 2013 and paid rental for only six months amounting to RM6,110,100. The first defendant failed and defaulted in the payment of rental for the period beginning May 2013;

(f) the plaintiff then filed this suit against the first defendant and the second defendant seeking recovery of rentals and interest, totaling RM8,401,756.85. The plaintiff also claimed rentals for the remainder of the three year tenancy;

(g) the first defendant's defence was that the plaintiff had by an assignment dated 1 November 2013 assigned absolutely the tenancy agreement to its financier, OCBC Bank (M) Bhd, and thus has no locus to commence and maintain the action;

(h) it was also pleaded by the first and second defendant that since there was dispute between Orion and the plaintiff on the additional purchase price payable under the SPA, not known to the first defendant, the first defendant was under the mistaken belief that the SPA was completed and the tenancy agreement had commenced, when in fact the SPA was not completed and the tenancy agreement had not commenced;

(i) the first and second defendant pointed out that land searches over the subject properties were obtained on 28 October 2013 which revealed that the express condition of title for the lands on which the subject properties were located was for residential as follows:

> Tanah yang dimaksudkan hendaklah digunakan semata-mata untuk rumah kediaman.

(j) the first defendant counterclaimed, seeking, inter alia:

(i) a declaration that the said tenancy agreement has not commenced and the first defendant is not obliged to pay the monthly rent;

(ii) in the alternative, a declaration that the said tenancy agreement is void; and

(iii) an order that the plaintiff pay to the first defendant the said sums of RM9,411,062.50, being payment of rent which had been received by the plaintiff.

FINDINGS OF THE HIGH COURT

[4] The High Court dismissed the plaintiff's claim and allowed the first defendant's counterclaim. the findings of the learned judicial commissioner ('JC') of the High Court are summarised as follows:

(a) the assignment of tenancy was, on its true construction, not an absolute assignment of the tenancy agreement, but merely an assignment by way of security. Therefore, the plaintiff did not lack locus to prosecute the claim;

(b) the tenancy agreement was illegal on the basis that the contemplated use of the premises contravened the express condition of title for the land.

The tenancy agreement was accordingly void, and the plaintiff may not claim for the arrears in rental from the first defendant;

(c) the court found as a matter of fact that the first defendant did not know of the contravention of the express condition of title at the time it entered into the tenancy agreement. Therefore, s 66 of the Contracts Act 1950 ('the Act') applies, in that the tenancy agreement was a contract that was 'discovered to be void' within the meaning of s 66 of the Act. The first defendant may therefore claim for the return of the rental payments previously made to the plaintiff; and

(d) the guarantee was, on its true construction, a contract of guarantee and indemnity. As such, the guarantor undertook obligations as principal vis a vis the plaintiff. The obligations of the guarantor accordingly remained extant notwithstanding that the tenancy agreement was found to be void. However, based on the principle that the courts will not permit a person to claim a remedy under an illegal transaction in which he has participated, the plaintiff's claim against the guarantor was disallowed.

FINDINGS OF THE COURT OF APPEAL

[5] The plaintiff appealed to the Court of Appeal against the decision of the High Court. The appeal was allowed and the order of the High Court was set aside. The tenancy agreement was held to be valid and enforceable. The plaintiff's claim against both the defendants was allowed and the first defendant's counterclaim was accordingly dismissed. The Court of Appeal, inter alia, made the following findings:

(a) the previous proprietor, Kris Angsana had on 1 December 2011 made submission for surrender, realienation, amalgamation and conversion of land use from residential to commercial under s 204D of the NLC. This was before the SPA between the plaintiff and Orion was signed. On 8 May 2012 the state authority for Wilayah Persekutuan approved the registered proprietor's (Kris Angsana) application for the 'surrender, re-alienation, amalgamation and conversion of land use' pursuant to s 204E of the NLC. The change of use thereof was to 'commercial' and 'mixed development' from 'residential';

(b) on 27 November 2012 Dewan Bandaraya Kuala Lumpur ('DBKL') issued the certificate of fitness of occupation ('CFO') for the said premises and on 18 February 2013, upon payment of the full premium of RM1,531,179 on 14 February 2013, the Pengarah Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur ('PTG') issued the 'Sijil Pengesahan Kelulusan Permohonan' to reconfirm the state authority's approval of the change of use under s 124 and subdivision and re-alienation under ss 124A, 137, 142, 148, 197, 200 and 204D of the NLC;

(c) on 21 February 2013, the plaintiff and the first defendant entered into the tenancy agreement for a three-year term. Thus, at the time the plaintiff entered into the tenancy agreement with the first defendant or rather at the inception of the tenancy agreement, the express condition had for all intents and purposes been changed from residential to 'commercial' and 'mixed development'. What remained pending was merely the administrative process of endorsing the state authority's approval on the new titles;

(d) even if the court were to agree with the learned JC and find the tenancy agreement illegal and void ab initio, the court was of the view that the learned JC's finding that the first defendant did not know of the contravention of the express condition at the time it entered into the tenancy agreement was, on the facts, erroneous;

(e) the solicitors for the first defendant in the tenancy agreement, Messrs Faizah, Lim & Assoc, had earlier acted as solicitors for Orion in the SPA between Orion and the plaintiff. The solicitors' awareness of the condition on the land, and the application for conversion thereof, is evident from their letters dated 14 February 2013 and 19 February 2013, respectively, enclosing the payment receipt for the premium for conversion and the certificate of approval (*sijil pengesahan kelulusan*) by the state authority. The tenancy agreement was only subsequently entered into by the parties on 21 February 2013. As solicitors, Messrs Faizah, Lim & Assoc could not have been ignorant of the fact that the use of the said premises as contemplated by the tenancy agreement was in contravention of the express condition.

DECISION OF THIS COURT

[6] I shall first deal with the first question of law posed in this appeal. It was contended for the plaintiff that the approval granted in respect of the change of condition of land use was pursuant to s 124 of the NLC. With respect it is my considered view this is patently wrong. The application for change of condition of use of the land and the approval given was in fact pursuant to s 204D of the NLC. This undisputed facts can be gleaned from the following documents:

(a) recital F of the sales and purchase agreement between Orion and the plaintiff; and

(b) the letter dated 5 September 2013 from the Pejabat Tanah dan Galian Kuala Lumpur ('KLPTG') to Kris Angsana, the then registered proprietor, confirming the approval for surrender and re-alienation of the said lands pursuant to s 204D of the NLC.

[7] Section 204D of the NLC states as follows:

204D Applications for approval of 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 lot or lots to be surrendered and a pre-computation plan showing the details of the portions and 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 re-alienated; 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.

[8] I am of the view that the provisions in s 124 of the NLC is quite different in its application from the provisions in s 204D of the NLC. Section 124 of the NLC relates to an application where the land proprietor applies to the state authority to alter or change the category of land use (see s 124 of the NLC). Where there is an application for surrender, amalgamation and re-alienation with a change in category of use, there is a need to surrender the titles for the cancellation and re-issuance of a new title by the state authority (see ss 204E, 204F, 204G and 204H of the NLC).

[9] It is to be noted that when re-alienating the land subsequent to an approval by the state authority pursuant to s 204D of the NLC, the registered proprietor accepts the provision contained in s 79(2) of the NLC (see ss 204G and 79 of the NLC). When the land, subsequent to the surrender and amalgamation is to be re-alienated, then the provisions in s 78 of the NLC will

apply. Section 78 of the NLC provides as follows:

> 78 How alienation is effected
>
> (1) The alienation of State land under final title shall be effected in accordance with the provisions of Chapter 3.
>
> (2) The alienation of State land under qualified title shall be effected in accordance with the provisions of Chapter 2 of Part Eleven.
>
> (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 in 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.

[10] The relevant provisions in the NLC for applications for the surrender and re-alienation of land are as follows:

(a) the provisions in s 124 of the NLC are not affected by the provisions relating to surrender and re-alienation (see s 204A of the NLC);

(b) upon receipt of an application under s 204D of the NLC, the land administrator is required to endorse, or cause to be endorsed a note thereof in the register document of title to the land (see sub-s 204D(3) of the NLC);

(c) on approving the application under s 204D of the NLC, the state authority shall also determine matters in sub-s 79(2) of the NLC which include the imposition of express conditions (see sub-s 204E(4) and para 79(2)(g) of the NLC); and

(d) the provisions of s 79 in relation to the alienation of state land shall also apply to the re-alienation of land as if the land had already become state land (see sub-s 204E(4) of the NLC).

[11] It is my view that the provision in s 124 of the NLC is only in respect of an application for a mere change in use of the land, which attracts different consideration and does not require the surrender of the issue document of title for destruction. Where a change of use is approved under s 124 of the NLC, that change of use must be reflected in the same issue of document of title for it to become effective (see s 124(7) of the NLC).

[12] It is noted that the learned judges of the Court of Appeal in the present case whilst acknowledging that the application in the instant case was for surrender, re-alienation, amalgamation and change of use under s 204D of the NLC went on to deal with the provision of s 124 of the NLC and the cases dealing with s 124 of the NLC. In fact the learned judges of the Court of Appeal went on to erroneously state as follows:

[73] We are here concerned with applications for change of use under s 124(4) of the NLC, and when it takes effect under that section. Consequently s 78(3) and the cases of *North East Plantation* and *Yap Chong Lan* are no applicable to the present case.

[13] I am of the view that where there is a surrender, amalgamation and re-alienation, such as in the instant appeal, then the provisions in sub-s 78(3) of the NLC applies. That subsection states:

(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 in sub-section (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.

[14] On the application of sub-s 78(3) of the NLC in the case of *Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor* [1982] 1 MLJ 38 at p 39, Hashim Yeop Sani J (as His Lordship then was) had this to say:

Looking at the second limb of s 78(3) of the Code it seems clear to me that the restriction in interest could not have commenced before the date of registration because the land remained state land and the restriction could not have meant to operate on the state authority.

(See also the case of *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi* [2018] Supp MLJ 293; [2011] 2 CLJ 292).

[15] It is my considered view that the change of use to 'pembangunan bercampur bagi tujuan pangsapuri dan pejabat sahaja' (as stated in the KLPTG's letter dated 5 September 2013) will be endorsed on the new title and become effective upon the registration and issuance of a new issue document of title pursuant to sub-s 78(3) of the NLC. On this point the learned judges of the Court of Appeal fell into an error of law when they said:

[71] The defendant's reliance on section 78(3) of the NLC and the cases of *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi* [2018] supp MLJ 293; [2011] 2 CLJ 292 and *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123; [1984] 1 CLJ Rep 144 is in our view misplaced.

[72] Those two cases deal with alienation of state land by the State Authority and when it takes effect, whether upon approval by the State Authority or upon registration. As expressly provided for by s 78(3) of the NLC, alienation clearly takes effect only upon registration.

[73] *We are here concerned with applications for change of use under s 124(4) of the NLC, and when it takes effect under that section. Consequently s 78(3) and the cases of North East Plantation and Yap Chong Lan are not applicable to the present case.*

[16] In the circumstances of this case the first question ought to be answered in the negative. The approval given under s 204D of the NLC is quite different in its application and distinct from the approval sought and obtained under s 124 of the NLC. The considerations are different.

[17] I shall now deal with the second question of law posed in this appeal. I am of the view that the change on the condition of the land is only legally effective when the change of use is indorsed on the title as provided for under sub-s 124(7) of the NLC. On this point, in the case of *Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)* [2010] 4 MLJ 312 at p 322, the Federal Court had this to say:

> If at all the state authority had approved the transfer of the said land, the land administrator, pursuant to s 124(7) of the Code shall have to sign a memorandum in Form 7C in accordance with at the direction of the state authority and shall present the same and on the memorial thereof being made, the registrar shall make an entry on the register and issue document of title to the said land shall note the date thereof and the authority thereof, and authenticate the same under this hand and seal. These are mandatory statutory requirements under the Code which have to be adhered to before the said land can be transferred. I am of the view that it cannot be implied that such requirements have been complied with based merely on the said letter from the director of land and mines.

(See also the case of *Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor* [1982] 1 MLJ 38).

[18] It is noted that in the present case the learned judges of the Court of Appeal declined to follow *Toh Huat Khay* and *Dr Ti Teow Siew* but instead preferred to follow the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

[19] It is my judgment that upon a proper interpretation of sub-s 124(4) of the NLC read together with sub-s 124(7) of the NLC and s 89 of the NLC and with the benefit of the principles laid down in *Toh Huat Khay* and *Dr Ti Teow Siew*, the change of use will only become operative when the full premium is paid and the new condition of use is registered on the title. The second question posed in this appeal is therefore answered in the affirmative. In any event, since the change of use in the instant case was not applied for under s 124 of the NLC but under s 204D of the NLC, I take the view that this issue appears to be academic.

[20] I shall now deal with the third question of law posed in this appeal. I am of the view that the High Court had correctly applied the decision of the Federal Court in *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 in coming to its decision when the

learned JC said:

> [24] The facts of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 are directly on point to the issues at hand. In this case, the plaintiff sought to recover 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 rental upon being warned by a representative of the Industrial Development Department of the government of the State of Johore 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 giving an illegal consideration to the tenancy agreement and as such the contract was void under s 24 of the Contracts Act 1950.
>
> [26] Counsel for Bellajade sought to distinguish the facts of the present case on the basis that:
>
> (a) Dewan Bandaraya Kuala Lumpur had already issued the certificate of fitness for occupant in respect of the premises; and
>
> (b) the process of conversion of the category of land use had already commenced and part of the conversion premium had been paid.
>
> [27] In my judgment, the fact that the certificate of fitness for occupation had already been issued has no bearing on the express condition of title. In addition, 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. It is clear that these purposes contemplated the ability of CME to use the premises for commercial purposes and to sub-let portions of the premises to businesses and retailers, which would not come within the category of 'kediaman' or 'residential'.

[21] The Court of Appeal in the present case erroneously refused to apply the case of *Singma Sawmill Sdn Bhd* when they said that since the state authority did not take any action against the proprietor of the land for the contravention pursuant to s 128 of the NLC, the tenancy agreement was not unlawful. With respect it is my judgement that although no action was taken by the state authority in respect of the contravention, the tenancy agreement nonetheless remain illegal for contravention. The Court of Appeal ought not to have considered the certificate of fitness for occupation ('CFO') issue as legitimising the illegality of the tenancy agreement.

[22] The learned High Court JC had rightly found that the CFO has no bearing on the express condition of title to the land. The learned judges of the Court of Appeal however had erroneously clothed the tenancy agreement with

legality by reason of the issuance of the CFO by the Dewan Bandaraya on 27 November 2012. The third question posed in this appeal in the circumstances of the case should be answered in the affirmative.

Whether the first defendant had knowledge of the contravention of the express condition of the land at the time it entered the tenancy agreement

[23] The learned judges of the Court of Appeal in their judgment appeared to have considered the issue as to whether the defendants in the present case was aware of the illegality at the time when the agreement was entered into with the plaintiff. On this point the provision of s 66 of the Contracts Act 1950 ('the CA') was referred. Section 66 provides as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, tote person whom he received.

[24] In order to invoke s 66 of the CA the invalidity of the agreement should be discovered subsequent to its making and it only applies where a party enters into an agreement under the belief that it was legal, and not where the illegality was known from the beginning (see *Ahmad bin Udoh & Anor v Ng Aik Chong* [1969] 2 MLJ 116).

[25] In the present case the Court of Appeal took the view that the solicitors for the first defendant in the tenancy agreement, Messrs Faizah, Lim & Assoc, had earlier acted as solicitors for Orion in the SPA between Orion and the plaintiff. It was contended that as solicitors, Messrs Faizah, Lim & Assoc could not have been ignorant of the fact that the use of the said premises as contemplated by the tenancy agreement was in contravention of the express condition of the land. The Court of Appeal went on to state that knowledge of the solicitor is regarded by law as the knowledge of the client, except where the solicitor had acted fraudulently.

[26] The Court of Appeal concluded on this issue that constructive knowledge of the breach of the express condition, at the time the tenancy agreement was entered into, can be imputed upon the first defendant, thus rendering the first defendant in *pari delicto*. As such the first defendant is precluded from seeking recourse by virtue of restitution under s 66 of the CA.

[27] With respect, I could not agree with the findings of the Court of Appeal on this issue of the first defendant having knowledge of the contravention of the express condition of the status of the land at the time it entered the tenancy agreement for the reasons set out below.

[28] It should be noted that the plaintiff did not plead in the reply and defence to the counterclaim that the first defendant knew that the permitted use in the tenancy agreement was a contravention of land use prescribed on the title. It was not the plaintiff's pleaded case that the first defendant was in pari delicto with the plaintiff in the illegality of the tenancy agreement.

[29] It is also to be noted that in fact during oral arguments before the learned JC, learned counsel for the plaintiff conceded that the first defendant did not know of the illegality of the tenancy agreement. This was what the court had asked and the answer from learned counsel for the plaintiff reproduced as follows:

> Court: so we have a situation where the CME had entered into a Tenancy Agreement. It appears not to have any notice of the fact the condition of land use right, is residential, and it appears as though it is a contravention of an express condition of title. They entered into the Tenancy and it appears that they only subsequently found out.
>
> Plaintiff Counsel: Yes.
>
> Court: I understand that, Faizal, Lim & Associates did also act for the first defendant.
>
> Plaintiff Counsel: For a short while in February.
>
> Court: In fact they are not obligated from informing the first defendant. In fact the obligation of confidentiality would prohibit them from informing another client of matters relating to another client, right?
>
> Plaintiff Counsel: Yes.
>
> Court: So there is no question at all. It appears as there is no question to all that at least there is no evidence before me right, that can lead me to the conclusion that the first defendant knew at the time which it signed the Tenancy Agreement that there was an express condition of title that would contravene the stated aim of the Tenancy Agreement.
>
> Plaintiff Counsel: Yes My Lord.

(See pp 1645–1646 of additional appeal record).

[30] The High Court therefore found that the first defendant did not know about the express condition at the time it entered into the tenancy agreement and that the first defendant was not aware prior to conducting the land searches that the use of the premises as contemplated by the tenancy agreement contravened the express condition of title.

[31] It is my judgment that the Court of Appeal erroneously substituted these findings with the alleged constructive notice imputed to the first

defendant through its solicitors. In doing so, the Court of Appeal erroneously took into cognisance the following:

(a) Messrs Faizah, Lim & Assoc ('the firm') were the solicitors for the first defendant in the tenancy agreement despite there being no evidence of the same;

(b) the firm were also the solicitors for Orion in the plaintiff's SPA with Orion; and

(c) the firm was aware of the application for conversion of the condition of the said land as evident from their letters dated 14 February 2013 and 19 February 2013.

[32] It is also noted that the letter dated 14 February 2013 is nowhere to be found in the appeal record of the Court of Appeal. The letter dated 19 February 2013 on the other hand came up for the first time when it was introduced by learned counsel for the plaintiff in the plaintiff's written submissions dated 8 January 2016 (see pp 1346–1354 of appeal record-C-6/7).

[33] With respect I am of the view the Court of Appeal ought not have substituted finding of facts that were neither pleaded nor put to the first defendant's witnesses during cross examination. Parties are bound by their pleadings and unpleaded issues cannot be argued and decided upon. It is an established principle of law that an appellate court will only intervene if the decision of the lower court is 'plainly wrong' (see the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). In the present case it is my considered view that the Court of Appeal failed in exercising its powers of appellate intervention in reversing the findings of the learned JC. In the circumstances of this case, the plaintiff had not proved its case on the balance of probabilities against the defendants.

CONCLUSION

[34] For the reasons above stated I allow the appeals by both the first and second defendants with costs. The orders of the Court of Appeal are hereby set aside and the orders of the High Court are reinstated. The deposit is to be refunded to the defendants.

Zainun Ali FCJ (delivering dissenting judgment):

INTRODUCTION

[35] Appeal No 02–135–11 of 2017 (W) ('Appeal 135') and Appeal No 02–136–11 of 2017 (W) ('Appeal 136') arose from the same action in the High Court.

[36] At the High Court, the respondent, Bellajade Sdn Bhd ('Bellajade') filed an action for recovery of rental under a tenancy agreement dated 21 February 2013 ('the tenancy agreement'). The appellant in Appeal 136, CME Group Bhd ('CME') was the tenant whilst the sppellant in Appeal 135, Tan Sri Dato' Lim Cheng Pow ('the guarantor') stood as guarantor to the tenancy agreement.

[37] On 20 May 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 s 204D of the National Land Code ('the 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.

[38] 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 sub-s 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.

[39] On 13 November 2017, the appellants in both appeals were granted leave of this court to appeal the decision of the Court of Appeal dated 24 August 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 A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)* [2010] 4 MLJ 312.

A FACTS

[40] 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').

[41] 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').

[42] The lands consist of the premises (Block A — commercial building) and a service apartment (Block B).

[43] The premises, was purchased by Bellajade from one, Orion Choice Sdn Bhd ('Orion') vide sale and purchase agreement dated 26 March 2012 ('the SPA'). Orion however retained proprietorship of the service apartment.

[44] Orion was the beneficial owner of the lands. Orion had purchased the lands from the original proprietor, Kris Angsana Sdn Bhd ('Kris Angsana').

[45] The SPA between Bellajade and Orion in respect of the premises was completed on 20 February 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.

[46] As a result, on 21 February 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 three years commencing from the completion of the SPA between Orion and Bellajade.

[47] 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.

[48] 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, cafe, hair saloon, fitness centre, clinic, laundry, beauty saloon, florist, banking services and facilities, food court, fast food outlets and office.

[49] The titles of the lands were endorsed with an express condition restricting the use of the land for residential only. On 22 November 2011, the original proprietor, Kris Angsana applied to the Land Administrator of Kuala Lumpur for the surrender and re-alienation of the lands under s 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:

(a) by a letter dated 9 May2012, the Land Administrator of Kuala Lumpur notified Kris Angsana that on 8 May 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);

(b) it is stated in the letter dated 9 May 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 being the first year assessment rate and RM120 for the preparation of title to the lands;

(c) on 14 February 2013, Kris Angsana paid the full premium of RM1,531,179;

(d) on 18 February 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 s 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.

(e) meanwhile, on 27 November 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.

[50] CME entered into possession of the premises on 21 February 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.

[51] On 5 September 2013 ie some seven 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 May 2012 but purported to increase the premium to RM5,341,322.10 ie 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

[52] On 21 January 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.

[53] 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).

[54] The above contention was supported by land search results in respect of the lands which were obtained by CME on 28 October 2013 ('the search results'). These land searchers revealed that the land was transferred from Kris Angsana Sdn Bhd to Bellajade on 11 January 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.

[55] 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.

[56] Bellajade referred to the salient terms of the SPA between Bellajade and Orion.

[57] 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 204D of the NLC.

[58] By cl 6A of the SPA, arrangement was made by Orion Choice for CME Group Bhd to rent the property from Bellajade. It was agreed that upon

completion of the SPA, Orion Choice shall cause CME Group Bhd to rent the properties and to execute the tenancy agreement simultaneously with the execution of the SPA.

[59] 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 May 2012 from the Land Administrator of Kuala Lumpur, pad the premium payable for the conversion, on 18 February 2013. Following which the Kuala Lumpur City Hall (DBKL) issued a certificate for fitness of occupation (CFO) for Plaza Palas.

[60] 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 cll 3.2 and 4.1 of the SPA, on 20 July 2013, Bellajade paid the balance 90% of the purchase price thus completing the second SPA.

[61] 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

[62] After a full trial, on 20 May 2015, the learned JC dismissed Bellajade's claim against CME and the guarantor and allowed CME's counterclaim.

[63] 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'.

[64] 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 s 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 s 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

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

[66] Before the hearing of the appeal, Bellajade filed an affidavit dated 19 November 2015, producing a letter dated 16 November 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.

[67] However, at the hearing of the appeal before the Court of Appeal, Bellajade filed another affidavit dated 7 January 2016 producing another letter from Pejabat Pengarah Tanah dan Galian dated 16 December 2015 to Bellajade's solicitors. By the said letter, the letter of approval dated 9 May 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 May 2012. There was also no mention of any increase in the amount of the premium.

[68] 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 sub-s 124(1)(c) of the NLC. By sub-s 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 February 2012. This had resulted in a change of use of the land from 'residential' to 'mixed development'.

[69] Referring to the PTG's letter dated 16 December 2015, the court found that the approval given by the state authority on 8 May 2012 was unrevoked.

[70] 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.)

[71] 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

[72] 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 subdivision, partition or amalgamation of land, wherever applicable as required by the proposed development plan.

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

[74] Under the NLC, among others, land development is applicable in the following forms:

(a) application for variation of conditions, restrictions and categories of land (s 124);

(b) simultaneous applications for sub-division and variation of conditions, restrictions and categories (s 124A); and

(c) application for sub-division (ss 135–139);

(d) application for partition of land (ss 140–145);

(e) application for amalgamation of land (ss 146–150); and

(f) application for surrender and re-alienation — of lands by special provisions (ss 204A–204H).

[75] In the present appeals, Kris Angsana made an application under s 204D

namely an application for surrender and re- alienation for contiguous lots held by the same proprietor.

[76] In 1984, the NLC was amended by Act A587; by s 76 of Act A587, the NLC amended was made to insert in Part Twelve, a new subheading and new ss 204A–204H which are provisions on surrender and re-alienation of lands. The amendment took effect on 28 June 1984.

[77] Based on the Hansard of Parliament dated 6 April 1984, the purpose of ss 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 realienated to the same proprietor in a different form and intended use as approved by the appropriate authority.

[78] According to Judith Sihombing in *The National Land Code — A Commentary* (2009, Issue 25, LexisNexis):

> 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.

[79] Based on s 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 realienated in the form and unit conforming to the intended use of the land.

[80] The application for surrender and realienation 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 s 204D was registered on 22 November 2011.

[81] 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 s 204C of the NLC. The latter governs the conditions for approval of surrender and re-alienation. Among others, sub-s 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'.

[82] Based on sub-s 204E(4) of the NLC, the state authority in approving an application for surrender and re-alienation shall determine the matters specified in sub-s 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 sub-s 79(2) to the proprietor.

[83] Upon receiving the notification under s 204E(4), the land proprietor shall notify the state authority if he accepts the determination made by the state authority under s 79(2).

[84] In the present appeals, Kris Angsana's application under s 204D was approved by the state authority on 8 May 2012. Kris Angsana was informed of the said approval via the letter of approval dated 9 May 2012, issued under sub-s 204E(4). In the same letter, Kris Angsana was also informed of the state authority's determination under sub-s 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 minimum RM100.00 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:
>
> 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

A Jumlah: RM1,550,172.00

[85] The above determination of the state authority was accepted by Kris Angsana. On 18 February 2013, Kris Angsana paid the full premium payable for the surrender and realienation. This is evident from the *sijil pengesahan kelulusan permohonan* issued by the PTG on 18 February 2013.

B

[86] The next procedure involves the surrender of the land to the State. This is governed by s 204G. Based on sub-s 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:

C

D

> (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.

E

[87] The land which has been surrendered to the State is to be realienated to the proprietor under s 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.

F

[88] Based on s 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 sub-s 78(3) of the NLC. Subsection 78(3) of the NLC reads:

G

> (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.

H

APPLICATION

I

[89] In the present appeals, despite the fulfilment of all the conditions stated in the letter of approval dated 9 May 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 1/2 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

[90] 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 s 204D on 22 December 2011. However, the endorsement which was required under s 204G, 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 s 204H and sub-s 78(3) of the NLC. Despite that, the land had been transferred from Kris Angsana to Bellajade on 10 January 2013.

[91] Applying sub-s 78(3) of the NLC, it was submitted that the application under s 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 sub-s 78(3) of the NLC.

[92] It was also submitted by counsel that, the approval of the state authority as contained in the letter of approval dated 9 May 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.

[93] On the other hand, counsel for the respondents submitted that the Court of Appeal was correct in holding that s 78(3) of the NLC is not applicable to the present case. The court had rightfully applied s 124(4) of the NLC to the facts and circumstances of the case and concluded that the tenancy agreement was not void for illegality.

A THE LEGAL POSITION

[94] In the present appeals, the Court of Appeal in acknowledging that Kris Angsana's application was made under s 204D of the NLC had applied the law in s 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 sub-s 124(4) of the NLC does not state that a change in the express condition of land under sub-s 124(1)(c) is effective only upon endorsement on the title.

[95] It is critical that a careful study is now made to s 204D 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.

[96] Looking at the entire s 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, s 204 is a *procedural regime*. It is not the provision under which the state authority grants the approval. Herein lies the rub. (Emphasis added.)

[97] Section 124 of the 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.

[98] Subsection 124(1)(a), (b), (ba) and (c) deal with the four 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;

[99] It is clear that this appeal falls under sub-s 124(1)(c). Concomitantly, sub-s 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).

[100] In this case, the state authority gave the approval for change and imposed the payment of a further premium of RM1,550,172 under sub-s 124(5), which amount was duly paid by Bellajade.

[101] The state authority allowed the application under sub-s 124(4)(a). The approval letter of 9 May 2012 did not make any order for endorsement under sub-s 124(4)(b) or (c).

[102] We must also have regard to the provision of s 113 of the 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.

[103] 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 subsection 124(1);

[104] Section 113 is an important provision since it provides that the *change* in condition etc, takes place on the granting of the application under sub-s 124(1), ie upon the state authority approving the application by the proprietor for a change in the condition.

[105] 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 WP (Tab A) and the payment of the full premium of RM1,550,172.80 on 14 February 2013 (Tab G and H).

[106] All of the above goes to show plainly that sub-s 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 s 124 of the NLC. Thus viewed in perspective, the first question results in the parties getting themselves into a knot.

[107] 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 s 124 or 204D, it did not convert the s 204D application into containing an implicit or subsumed s 124 application within it.

THE SECOND QUESTION OF LAW

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

[108] 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 s 124 of the NLC takes place upon approval rather than upon endorsement on the issue document of title to the land.

[109] Crucial to this interpretation is the content of the subsections of s 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 sub-s (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 ss 115, 116 or 117;

A (ii) there shall cease to apply to the land all conditions to which it was previously subject except those implied under s 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 s 124(4) of the NLC the endorsement of the new condition on the title does not have any legal effect ... (Emphasis added.)

[110] 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.

[111] In the circumstances envisaged by subs-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.

[112] However, where the application is for one under s 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 sub-s 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.

[113] Furthermore, the structure of s 124 has been meticulously laid out such that the provisions of sub-s 124(2), (3) and (4) are designed to deal with the three types of applications under sub-s 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 sub-s 124(4) — not even by reference to sub-s 124(2) — if they intended both to take effect upon the happening of the same event, namely endorsement of title.

[114] In addition, sub-s 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 sub-s 124(2). Instead, sub-s 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.

[115] Thus we are in agreement with the Court of Appeal that 'once the state authority approves the change of use under sub-s 124 of the NLC and the conditions of the approval (under sub-s 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 's 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 A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased) [2010] 4 MLJ 312

[116] 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.

[117] 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 Holdings (Industrialised 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 s 24 of the Contracts Act 1950.

[118] Section 24 of the Contracts Act 1950 reads as follows:

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

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.

[119] 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:

(a) the land was under the category of agricultural land whereas the tenancy agreement required the land to be under the category of industrial land;

(b) prior to entering into the tenancy agreement, the proprietor had applied unsuccessfully to change the category of land use from agricultural to industry;

(c) a representative from the state government warned the tenant that it was operating the factory illegally and in breach of the express condition;

(d) the state department informed the proprietor of the breach and requested that it remedy the situation but this was ignored; and

(e) 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'. A

[120] 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 ie 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. B
>
> 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. C

[121] 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. D E

[122] 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. F G H

[123] 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 para [67]). I

[124] 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 ss 127–129.

[125] 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 (eg s 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.

[126] 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 s 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.

[127] In legal terms this meant that the s 204D application had been duly submitted without issue; approval indicated that the requirements of s 204C had been met to the satisfaction of the state authority (per s 204E(1); the first that the respondent (or the respondent's predecessor in title) was notified of the approval under s 204E(4) also meant that the determinations in s 79(2) had been satisfactorily completed. All that was left to be done were that requirements of s 204G, which properly construed is a matter for the state authority, apart from the notification by the proprietor. Where no alterations

were made under s 204E(2), it stands to reason that the proprietor's notice to that state authority may be implied.

[128] 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.

[129] 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 s 24 of the Contracts 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

[130] For the reasons stated in this judgment, I would dismiss the appeals by the appellants in Appeal 135 and Appeal 136 with costs.

Order accordingly.

Reported by Ashok Kumar