KNOWLEDGE & INSIGHTS

Section 44 of the Courts of Judicature Act 1964 – Does the Court of Appeal Have Original Jurisdiction or Appellate Jurisdiction?

October 2024

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INTRODUCTION

In this article we seek to examine the application of Section 43 and Section 44 of the Courts of Judicature Act 1964 ("**CJA 1964**") pertaining to the grant of interim orders by reference to the decision of the Court of Appeal of Malaysia ("**Court of Appeal**") in *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd*[1] ("***Silver Concept***") in seeking to ascertain if the Court of Appeal has original jurisdiction to determine such applications.

The application of Section 43 and Section 44 of the CJA 1964 is of particular importance given that the very often interim relief to prevent prejudice to a claim of parties pending an appeal is sought. There is therefore a need for consistency in the approach of the appellate courts in invoking its jurisdiction by reference to the construction and application of Section 43 and Section 44 of the CJA 1964.

SECTION 43 & 44 OF THE COURTS OF JUDICATURE ACT 1964

Section 43 of the CJA 1964 provides that:

> "43. *Applications*
>
> ***Wherever application may be either to the High Court or the Court of Appeal, it shall be made in the first instance to the High Court.***"

Section 44 of the CJA 1964 reads as follows:

> "44. *Incidental directions and interim orders*

[1] [2002] 4 MLJ 113.

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(1) ***In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceedings, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceedings for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.***

(2) *Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.*

(3) ***Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.***"

SUMMARY OF THE DECISION IN *SILVER CONCEPT*

On many an occasion, a party in seeking interim orders pursuant to Section 44 of the CJA 1964 will refer to the decision in *Silver Concept*. It is therefore important to properly examine the decision in *Silver Concept* with regard to the factual matrix of the said decision and the dicta that has emanated from this decision.

Facts

The facts in *Silver Concept* may be summarised as follows.

Brisdale Rasa Development Sdn Bhd ("**Brisdale**")[2] (i.e. the Respondent in the Court of Appeal) had paid money into the High Court and after the conclusion of the trial, Brisdale applied for payment out of the said sum. This was allowed by the High Court. Silver Concept Sdn Bhd ("**Silver Concept**")[3] (i.e. the Appellant in the Court of Appeal) applied for an oral stay before the High Court because it wanted to take the matter up on appeal. The High Court requested that a formal written application be filed.

Silver Concept that indicated to the High Court that it would file the formal written application and applied orally for an interim stay pending the filing of the said application in case the funds were released. The High Court refused the request for an oral interim stay sought by Silver Concept.

Silver Concept then lodged an appeal against the dismissal of the oral application for an interim stay pending the filing of the written application for a stay and applied to the Court of Appeal for a stay relating to the release of the funds pending appeal. The application for an interim stay was initially granted by a single judge the Court of Appeal, and later extended by a three (3) person panel of judges of the Court of Appeal. All the proceedings were thereafter withdrawn and the only issue that the Court of Appeal was required to determine was whether Silver Concept had to pay costs.

Brisdale contended that it was entitled to all costs incurred with regard to the stay of proceedings before the Court of Appeal because the order refusing the interim stay was non-appeable such that the Court of

[2] Brisdale were represented by Messrs Logan Sabapathy & Co.
[3] Silver Concept were represented by Messrs VK Lingam & Co.

Appeal had no jurisdiction to deal with the matter in the first place. It was contended by Brisdale that the only avenue open to Silver Concept was to appeal against the order directing the release of the funds from the High Court and to move the Court of Appeal to stay those proceedings.

The Court of Appeal disagreed with the arguments advanced by Brisdale. The Court of Appeal held that[4]:

> *"That brings us to the facts of the present case.*
>
> *We think that the circumstances here were really most exceptional. We will recount them. The judge had already ordered the monies to be paid out and then directed the making of a written application for a stay. In the meantime, the appellant was left without any protection. Any written application would have been rendered academic if, pending the making or the hearing of that application, the monies were released. Hence the request for an interim stay. When that was refused as well, the appellant found itself in an invidious position.*
>
> *It was unable to apply to this court for a stay within the substantive appeal because the High Court had not refused a stay: all it had done was to simply require a written application. It is to meet this deadlock that the appellant lodged the present appeal and made the application we spoke of earlier. That it seems to us to have been driven entirely by the way in which the matter developed before the High Court. None of it was of the appellant's making.*
>
> *This is therefore a case where the appellant in the exercise of its undoubted right of appeal conferred by the Act came before this court. We can hardly punish it in costs for this."*

Ratio Decidendi of the Court of Appeal in *Silver Concept*

In reaching its conclusion, Justice Gopal Sri Ram in delivering the judgment of the Court of Appeal held as follows[5]:

> *"We will now address two other provisions of the Act, namely, ss 73 and 43. The former confers concurrent jurisdiction on the High Court and this court to grant a stay of execution. The latter says that where an application may be made to the High Court or to this court, it must be made to the High Court in the first place.* ***So, if an order is made to the prejudice of a litigant and a stay of that order is necessitated, then it is the High Court that must be moved for such a stay first before this court is approached. If, this court is moved for a stay without an application having been made to the High Court in the first instance, this court should normally adjourn such application until s 43 is complied with. In our view, this is plain upon a joint reading of ss 73 and 43. It is a view that derives some support from the judgment of Buhagiar J in Annamalai Chettiar v Yeoh Kee Tin [1956] MLJ 49. That was a case in which Buhagiar J sitting as a single judge of the former Court of Appeal dismissed an application for stay on the ground that the High Court had not first been moved. This is a course we would not approve as it increases costs and inconveniences the court and parties. An adjournment of***

[4] [2002] 4 MLJ at pg. 121.
[5] [2002] 4 MLJ 113 at pg. 119 to 120.

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the motion for stay until after the High Court has been moved is, in our view, the proper order to make.

We must now address s 44 of the Act. It is an important provision. For that reason we will reproduce it.

> *(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.*
>
> *(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.*
>
> *(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.*

Now, it is significant that the section is markedly different from s 73. The latter is much narrower. It is confined entirely to applications to stay execution upon a judgment. ***By contrast, s 44 is far wider. It empowers this court to make interim orders to preserve the integrity of an appeal or other proceeding, including the very application under the section itself (see sub-s (2)). Such interim preservation orders may take the form of an injunction or other relief designed — in the words of the section — 'to prevent prejudice to the claims of parties'. Further, s 44, unlike s 73, does not confer concurrent jurisdiction on the High Court and this court. It confers original jurisdiction on this court. Hence, s 43 does not apply and there is no requirement that a separate application to the High Court be made before a litigant may invoke the s 44 jurisdiction of this court. In other words, s 44 is not to be read as being subject to s 43.***

However, this court has on several occasions treated s 44 as governing applications for a stay of execution (see See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 Penang Port Commission lwn Kanawagi a/l Seperumaniam [1997] 2 MLJ 300 Jurutera Consultant (SEA) Sdn Bhd & Ors v Eddie Lee Kim Tak & Ors [1999] 1 MLJ 381). ***Having carefully considered the relevant statutory provisions, my learned brothers and I have come to the conclusion that this is an unnecessarily restrictive view of s 44 in the absence of any express or implied limitation imposed by the language employed by Parliament. Further, it is most unlikely that Parliament would have enacted two provisions governing the stay of execution. And if Parliament intended the s 44 jurisdiction to be concurrently exercisable by this court and the High Court, it would have said so. Accordingly, it is our view that an application to this court under s 44 which is not in the nature of an application for a stay of execution may be made without the necessity of complying with s 43 of the Act.***"

Justice Gopal Sri Ram in delivering the judgment of the Court of Appeal interpreted Section 44 of the CJA 1964 as being far wider than Section 73 of the CJA 1964 and hence held that there was no requirement to read Section 44 of the CJA 1964 as being subject to Section 43 of the CJA 1964 in seeking interim orders.

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In so doing Justice Gopal Sri Ram held that Section 44 of the CJA 1964 confers original jurisdiction on the Court of Appeal to determine applications other than stay of execution applications without the necessity of complying with Section 43 of the CJA 1964.

IS THE REASONING IN *SILVER CONCEPT* SOUND?

The issue that arises for consideration is whether the Court of Appeal in *Silver Concept* is correct in its interpretation of Section 44 of the CJA 1964 in conferring original jurisdiction on the Court of Appeal.

In the view of the authors of the this article, the following concerns arise in so far as the reasoning of the Court of Appeal in *Silver Concept* is concerned.

Firstly, as a matter of construction of the provisions of the CJA 1964, the Court of Appeal in *Silver Concept* has not provided any clear basis by reference to the law as to why Section 73 of the CJA 1964 must be read with Section 43 of the CJA 1964 whilst Section 44 of the CJA 1964 need not be read in such a manner but rather in isolation or as a standalone provision. The approach of the Court of Appeal with regard to the interpretation of the CJA 1964 by reference to the provisions of Section 43, Section 44 and Section 73 of the CJA 1964 appears to lack consistency.

Secondly, it is pertinent to note that the decision in *Silver Concept* was delivered on 13th May 2002. By this juncture, the Federal Court of Malaysia ("**Federal Court**") had delivered its decision in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd*[6] ("**Lam Kong**"), where Justice Dzaiddin (as he then was), in delivering the majority judgment of the Federal Court held that the Court of Appeal no longer had any original jurisdiction but merely criminal and civil appellate jurisdiction in the following terms[7]:

> ***"It is trite that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss 45–49 of the Act by the Courts of Judicature (Amendment) Act 1994 (Act A886). What remains is its criminal and civil appellate jurisdiction.*** *Section 67 gives the Court of Appeal jurisdiction to hear and determine civil appeals from judgments or orders of the High Court. Section 68 deals with non-appealable matters to the Court of Appeal.* ***We agree with counsel that under s 44 of the Act, a judge of the Court of Appeal can give incidental directions and make interim orders in any proceeding pending before it which do not involve the decision of the proceeding****. Quite clearly, this jurisdiction is conferred on the Court of Appeal to prevent any prejudice to the claims of the respective parties pending the hearing of the proceeding. In our view, the key words in s 44 are ' not involving the decision of the proceeding '."*

The judicial pronouncement of the majority in *Lam Kong* was not considered by the Court of Appeal in *Silver Concept*.

Thirdly, the Federal Court in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd*8 has held that Court of Appeal only possesses appellate jurisdiction and not

[6] [2000] 4 MLJ 1.
[7] [2000] 4 MLJ 1 at pg. 13.
[8] [2006] 1 MLJ 113.

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original jurisdiction as can be seen from the dicta of Justice Augustine Paul in delivering the judgment of the court[9]:

> "[15] *The appealability of the orders made on 25 October 2005 became the subject matter of argument, perhaps, due to the stand taken by Gopal Sri Ram JCA with whom Zulkefli Makinudin JCA agreed on the nature of the jurisdiction pursuant to which the orders were made under s 44(1). James Foong JCA expressed his own views. Their judgments are reported as Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd* [2006] 1 MLJ 435. *Gopal Sri Ram JCA said at pp 440–441:*
>
> > *We are here exercising our original jurisdiction under* s 44 *of the* Courts of Judicature Act 1964 *('CJA'). See Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2002] 4 MLJ 113. *I am aware that in Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1, *Dzaiddin FCJ remarked by way of obiter that: 'It is trite that the Court of Appeal today no longer has any original jurisdiction'. That, with respect, is too wide and is an incorrect observation. It overlooks the actual wording of s 44 which reads:*
> >
> > (1) *In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceedings, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a judge of the Court of Appeal.*
> >
> > (2) *Every application under sub-s (1) shall be deemed to be a proceeding in the Court of Appeal.*
> >
> > (3) *Every order made under sub-s (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the court.*
>
> *It is important to notice that s 44(1) uses the words 'in any proceeding'. It does not say 'in any appeal'. Parliament has gone on to clarify the position in the second subsection which deems an application under s 44(1) to be a proceeding. And s 3 CJA defines 'proceeding' to mean any proceeding whatsoever of a civil or criminal nature and 'includes an application at any stage of a proceeding'. So, when this court makes an order under CJA s 44(1) it does not deal with the appeal proper at all. Hence it is an original jurisdiction, albeit a very limited one.*
>
> *Take this very case. The appeals by both sides have been heard and judgment reserved. All that remains is the giving of the decision and reasons for it. There is therefore no appeal pending before this court. We are asked to act under s 44 to grant interim protection between now and the date on which our decision will come. That, with respect is an invitation to exercise original jurisdiction and we can exercise it because of s 44.*
>
> *Since we are not exercising appellate jurisdiction in respect of a matter that originated in the High Court, an appeal to the Federal Court is not available. Similarly, there is no appeal from a decision of*

[9] [2006] 1 MLJ 113 at pg. 122 to 126.

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this court refusing leave to appeal. See Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549. *It may have been different if we had been exercising our appellate jurisdiction in respect of a matter that originated in the High Court. In that event an appeal to the Federal Court would, in my respectful view, be competent despite the decisions in Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ1 *and Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65. *This is because doubt has been cast over these cases by the majority judgments in Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. *Also, because, in my respectful view, both Lam Kong and Capital Insurance were wrongly decided and the dissent of Chong Siew Fai CJ (Sabah & Sarawak) in Lam Kong is correct.*

[16] *James Foong JCA said at pp 444–445:*

> *I have read the draft judgment of my learned brother, Justice Gopal Sri Ram. Though we both agreed to the conclusion arrived at and the material part of the contents therein, I am not in favour of the approach adopted in respect of how the Court of Appeal's jurisdiction is secured in dealing with this application of the appellant before us.*
>
> *By the doctrine of 'stare decisis' the common law in this country has developed much in line with that inherited from the mother of common law — England. This means that the ratio decidendi from a judgment or decision of a more superior court is binding on all later courts under the system of judicial precedent. This is trite law.*
> *I therefore feel that the Federal Court's decision in Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 *and Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65, *in declaring that the Court of Appeal has no original jurisdiction, save and except, in the limited scope granted under* s 44 *of the* Courts of Judicature Act *to deal with 'any proceedings pending before the Court of Appeal' is binding on this court. The dissenting view of Chong Siew Fai (CJ Sabah & Sarawak) in Lam Kong Co Ltd v Thong Guan Co Pte Ltd over this point cannot be accepted as the correct state of law over the majority judgment of two other Federal Court judges who sat on that case.*
>
> *In this instant case, I am of the view that since there is a pending proceeding before of this court where the decision in the appeal proper has yet to be delivered, though the appeal was argued, this court is clothe with jurisdiction to hear this notice of motion brought by the appellant for our consideration.*
>
> *By this provision, I approached this motion and arrived at the conclusion which is similar to those of my other two brother judges in ordering the defendant be restrained from disposing or dissipating its assets up to RM100 million.*

[17] *It is first necessary to determine the nature of the jurisdiction under which the orders were made pursuant to s 44(1) before embarking on a consideration of their appealability. In ruling that an order made under s 44(1) is one that is made in the exercise of the original jurisdiction of the Court of Appeal, Gopal Sri Ram JCA noted that s 44(1) uses the word 'in any proceeding' and not 'in any appeal'. He then referred to the definition of 'proceeding' in* s 3 *of the* Courts of Judicature Act 1964 *('s 3') and to s 44(2)*

which provides that every application under sub-s (1) shall be deemed to be a proceeding in the Court of Appeal. He then construed the word 'proceeding' in s 44(1) as a reference to the motion filed by the respondent. The conclusion of Gopal Sri Ram JCA is that since an order made under s 44(1) does not deal with the appeal proper at all it amounts to one made in the exercise of the original jurisdiction of the Court of Appeal. This raises the question of whether the 'proceeding' in this case for the purpose of s 44(1) contemplates the motion itself which is deemed to be a proceeding by s 44(2) or the appeal proper which is also a proceeding. It cannot be both but has to be one or the other. In determining the proper construction to be accorded to the word 'proceeding' in s 44(1) it must be observed that the meaning of a word given in an Act of Parliament cannot be blindly and slavishly applied each time it appears in the Act. This is made manifestly patent by section 3 itself which, like other definition provisions, makes the definitions provided applicable ' … … … unless the context otherwise requires … … … '. Thus, as SK Das J said in Ram Narain v State of UP AIR 1957 SC 18 at p 23:

> *The meanings of words and expressions used in an Act must take their colour from the context in which they appear.*

[18] In Laxmana Rao v China AIR 1980 Andh Pra 191, it was held that the meaning given to a particular expression by the definition clause is always subject to the context. The context in which the word is used may therefore render the meaning prescribed inapplicable.

[19] The propriety of the process of reasoning adopted by the majority in the Court of Appeal in arriving at its conclusion that the word 'proceeding' in s 44(1) refers to the motion will become apparent if s 44(1) is read cautiously as a whole and with a proper appreciation of the meaning of the words 'pending' and 'hearing' in the section. Black's Law Dictionary (6th Ed) defines the word 'pending' as:

> *Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is 'pending' from its inception until the rendition of final judgment.*

[20] As Thomson J (as he then was) said in Sockalinga Mudaliar v Eliathamby & Anor [1952] MLJ 77 at p 78:

> *… I would adopt the following passage from Stroud's Judicial Dictionary (2nd Ed, p 1445):*
>
> *A legal proceeding is 'pending' as soon as commenced … … … and until it is concluded, ie so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein.*

[21] Further reference may be made to Goh Teng Hoon & Ors v Choi Hon Ching [1987] 1 MLJ 95 where Sinnathuray J said at p 96:

> *It would appear that there is no reported authority directly to the point on the word 'pending' in respect of an appeal from one court to another. Some assistance is to be had in Stroud's Judicial Dictionary on the meaning given to the word 'pending'. The first illustration explains that 'a legal proceeding is pending as soon as commenced, and until it is concluded, ie so long as the*

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> *court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein'. It seems to me that a clear distinction has to be made between an appeal from a judgment and those other steps taken by way of execution of the judgment. On this, there is another illustration in Stroud's Judicial Dictionary:*
>
> > *As to what is a cause or proceeding 'pending' within Judicature Act 1873, now Judicature Act 1925, a cause is 'pending' even after final judgment, so long as such judgment remains unsatisfied … … …*
>
> *In this context, I agree with Mr Liu for the respondent that garnishee proceedings are pending proceedings just as execution by way of writs are also pending proceedings.*

[22] In commenting on the scope of the word 'hearing' Abdul Hamid Mohamad FCJ in writing for a five-member panel of this court said in Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia [2006] 1 MLJ 403 at p 412:

> *First, we do not think that we should or could separate the date of hearing from the date of decision. The date fixed for a decision in fact forms part of the hearing. As always happens, even on the date fixed for decision, counsel still seek, and are usually allowed, unless the request is unreasonable, to make further submissions or to clarify a fact or to bring to the court's attention of a newly discovered authority or, as in this case, to inform the court of the latest development. The hearing of an application certainly includes the decision thereof.*

[23] Having ascertained the meaning of the words 'pending' and 'hearing', it is now necessary to consider the orders that may be made under s 44(1). They are:

> *(a) any direction incidental thereto (that is to say, the proceeding) not involving the decision of the proceeding;*
>
> *(b) any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding;*
>
> *(c) any order for security for costs; and*
>
> *(d) for the dismissal of a proceeding for default in furnishing security so ordered.*

[24] Items (c) and (d) listed above are not relevant. In item (a), the order made must be one that does not involve the decision of the proceeding and in item (b) the order made must be one that is only pending the hearing of the proceeding. Thus, the order made must be one that does not involve the decision of the proceeding or which is interim in nature pending the hearing of the proceeding. In other words, the proceeding itself must still be pending when orders in respect of it are made. It is only then that a matter will qualify as a 'proceeding' for the purpose of s 44(1). In this case, the orders made on 25 October 2005 involved a decision of the motion itself after it was heard resulting in it being disposed of. Thus, the orders made cannot be said to be incidental or interim in nature in respect of the motion

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> *filed by the respondent as required by s 44(1) for the simple reason that it had been heard and decided and it was no longer a proceeding pending any hearing.* ***Gopal Sri Ram JCA said that the fact that the appeal has been heard leaving only the giving of the decision meant that there is no appeal pending and that the making of an order under s 44(1) pending the decision is therefore an exercise of original jurisdiction. The validity of this conclusion would depend on whether the appeal proper was a proceeding pending in the Court of Appeal when it had been heard with only the decision to be given. As stated earlier, the word 'pending' refers to a case from its inception till its conclusion while the word 'hearing' includes the decision on it. It is thus abundantly clear that at the time the motion was heard the appeal proper was still pending in the Court of Appeal as, at that time, no decision had been given on it. The motion cannot therefore qualify as a 'proceeding' for the purpose of s 44(1) though, as provided by s 44(2), it is a proceeding in the Court of Appeal. The pending proceeding for the purpose of s 44(1) is nothing else but the appeal itself. The conclusion of Gopal Sri Ram JCA based on an erroneous interpretation of the words 'pending' and 'hearing' must thus collapse as of necessity. Since the orders were made in relation to the pending appeal, the question of the existence of any original jurisdiction cannot and does not arise at all. The substratum of the argument of Gopal Sri Ram JCA that the orders were made in the exercise of the original jurisdiction of the Court as they do not deal with the appeal cannot therefore stand***
>
> ***As a matter of fact, this question has been lucidly explained by Mohamed Dzaiddin FCJ (as he then was) in Lam Kong Co Ltd v Thong Guan Co Ptd Ltd [2000] 4 MLJ 1 at p 15:***
>
> > ***It is trite that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss 45–49 of the Act by the Courts of Judicature (Amendment) Act 1994 (Act A886). What remains is its criminal and civil appellate jurisdiction.***
>
> **[25]** ***Unfortunately, this view was summarily rejected by Gopal Sri Ram JCA. It is perhaps appropriate for us to reiterate that the Court of Appeal possesses only appellate jurisdiction.***"

In the circumstances, the decision in *Silver Concept* ought to perhaps be viewed with caution.

It is pertinent to note that on 26 November 2009, Justice Gopal Sri Ram in delivering the judgment of the Federal Court in **Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)**[10] ("***Takako Sakao***"), in construing Section 80 of the CJA 1964 contended that the said provision is in pari materia with Section 44 of the CJA 1964 and endorsed His Lordship's earlier decision in Silver Concept. This is evident from a plain reading of the following passage[11]:

> "[5] ***It is to be noted that s 80 is in pari materia with s 44 of the Act, the latter conferring similar power in the Court of Appeal. The latter section has been interpreted as applying to cases where an appeal is pending before that court. See Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd) [2002] 4 MLJ 113. In our judgment s 80 should be construed likewise. When viewed in its proper perspective, what s 80 is designed to address is a situation where there is either an application for leave to appeal or an appeal pending before this***

[10] [2010] 2 MLJ 141.
[11] [2010] 2 MLJ 141 at pg. 147 to 148.

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> ***court the integrity of which is required to be preserved. It would be futile for an appellant or an intended appellant to prosecute his appeal or application for leave before this court if the subject matter of the appeal is dissipated or otherwise disposed of. Power is necessary in an appellate court, in particular the apex court, to preserve and maintain the status quo until the matter is finally disposed of. Section 80 does precisely that. It empowers us to make interim preservation orders to protect the integrity of an appeal or a leave application until it is finally disposed of.*** *Once an application for leave is refused or an appeal is finally disposed of by this court, there is nothing left to protect or preserve. If the second respondent's argument is correct then an appellant who fails in his appeal will equally be entitled to ask for a stay pending a review. That proposition need only be stated to recognise its fallacy. Once an appeal is disposed of there is no power in this court to stay its effect. And s 80 certainly does not confer such a power upon us."*

Due cognisance ought to be given to the fact that in Takako Sakao, the earlier decisions of the Federal Court in *Lam Kong* and *Metramac* were not considered or addressed.

More recently, the Court of Appeal in **Tamabina Sdn Bhd & Anor v Nakamichi Corp Bhd**[12] ("***Tamabina***"), had to deal with the interpretation of Section 44 of the CJA 1964. The High Court had granted the Respondent's application under section 150 of the Companies Act 1965, ordering the First Appellant to convene an extraordinary general meeting of shareholders within seven days of the order. This order stemmed from a dispute concerning the Appellants' management. The Appellants then approached the Court of Appeal, seeking a stay of execution of the Order of the High Court. The Respondent opposed the application, arguing that it constituted an abuse of the court's process due to: (a) an improper attempt to invoke Section 44 of CJA 1964, and (b) failure to comply with Section 43 of CJA 1964.

The Court of Appeal in ***Tamabina*** in dismissing the application for stay, held that Section 43 of the CJA 1964 stipulates that there has to be a prior application made before the High Court by the appellants for a stay of execution of the Order of the High Court. See the following passage[13]:

> "[**16**] ***In our judgment it is crystal clear in the present case that the application is in the nature of a stay of execution. Mr Gideon Tan does not appear to dispute this fact. And this being the case, the application then ought to have been made pursuant to s 73 of the Act, read with s 43 of the same Act. The application should not have been made pursuant to s 44 of the Act. To having made the application purportedly pursuant to s 44 of the Act is an abuse of that section.***
>
> *[17] When an application for an interim relief can appropriately be made pursuant to s 44 of the Act (instead of s 44) has been clearly explained by the Court of Appeal in Silver Concept's case, and we do not propose to repeat them here.*
>
> *[18] Mr Gideon Tan further submits in the alternative that even if this court is of the view that there should have been a prior application made to the High Court, as required by s 73 read with s 43 of the Act,* ***this court should not dismiss the motion, but to adjourn the application until s 43 is complied***

[12] [2014] 4 MLJ 613.
[13] [2014] 4 MLJ 613 at pg. 617 to 618.

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with. *Learned counsel referred to that part of the judgment in Silver Concept's case where Gopal Sri Ram JCA (as he then was), in delivering the judgment of the Court, states (at p 119):*

> *If, this court is moved for a stay without an application having been made to the High Court in the first instance, this court should normally adjourn such application until section 43 is complied with. In our view, this is plain upon a joint reading of ss 73 and 43. It is a view that derives some support from the judgment of Buhagiar J in Annamalai Chettiar v Yeoh Kee Tin [1956] MLJ 49. That was a case in which Buhagiar J sitting as a single judge of the former Court of Appeal dismissed an application for stay on the ground that the High Court had not been moved first. This is a course we would not approve as it increases costs and inconveniences the court and parties. An adjournment of the motion for stay until after the High Court has been moved is, in our view, the proper order to make.*

[19] ***With respect, we are unable to agree with this remark which is an orbiter dicta****. Section 73 of the Courts of Judicature Act merely states:*

> *Appeal not to operate as a stay of execution*
>
> *73 An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.*

[20] Reading s 43 with s 73, we fail to see anywhere in these sections implying that we should not dismiss the application (for not complying with s 43) but must grant an adjournment to enable the defaulting the applicants/appellants to comply with s 43 by going to the High Court to make the stay application."

Even more recently, in *Aspen Glove Sdn Bhd v Tialoc Malaysia Sdn Bhd*[14] ("**Aspen**"), by way of a supporting judgment delivered by Justice Wong Kian Kheong, in the Court of Appeal, it was held as follows[15]:

"*[96]* ***I concur with the grounds given in Lee Swee Seng JCA's Judgment save for the following four matters****:*

(1) ***when an appellant applies to the Court of Appeal for a stay of execution of a judgment or order of the High Court (High Court's Judgment/Order) pending the disposal of the appellant's appeal to the Court of Appeal against the High Court's Judgment/Order [Stay Application (Pending Appeal)], the Court of Appeal can only grant a stay of the High Court's Judgment/Order [Stay Order (Pending Appeal)] under s 73 CJA read with r 13 of the Rules of the Court of Appeal 1994 (RCA) [not under s 44(1) CJA]. Section s 44(1) CJA merely allows a Judge of the Court of Appeal (JCA) to grant an interim order pending the disposal of a notice of motion to the Court of Appeal [Stay Order (Pending Notice of***

[14] [2024] 4 MLJ 825.
[15] [2024] 4 MLJ 825 at pg. 855.

Motion)]. The Court of Appeal has no power pursuant to s 44(1) CJA to allow a Stay Order (Pending Appeal);

(2) *as the Court of Appeal can exercise its discretion to grant a Stay Order (Pending Appeal) under s 73 CJA and r 13 RCA, the Court of Appeal cannot therefore resort to r 105 RCA, its inherent jurisdiction and/or inherent power;*

(3) ***before an appellant can apply to the Court of Appeal for a Stay Order (Pending Appeal), s 43 CJA and r 14 RCA mandatorily require the appellant to first apply to the High Court for a Stay Order (Pending Appeal) [Stay Application (High Court)]***; *and*

(4) *in deciding whether to grant a stay order (pending appeal) or otherwise, as a matter of stare decisis, the Court of Appeal is bound to apply the test of special circumstances ('special circumstances test') as laid down by the Federal Court in Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1."

Justice Wong Kian Kheong went on further to state the following[16]:

"[104] *With respect, I am of the following view regarding the effect of* ss 38(1), 44 *and* 73 *of the* CJA:

(1) *by reason of* s 38(1) *of the* CJA, *generally, every proceeding in the Court of Appeal shall be heard and disposed of by three judges of the Court of Appeal ('Court of Appeal (three JJCA'). As such, the term 'Court of Appeal' in* s 73 *of the* CJA *must refer to the Court of Appeal (three JJCA);*
(2) *it is clear from the words in* s 73 *of the* CJA *(an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders) and r 13 of the RCA (an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the court ('Court of Appeal (three JJCA)') so orders) that:*

(a) *as a general rule, the High Court and the Court of Appeal (three JJCA) should not grant a stay order (pending appeal) ('general rule') — please refer to Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor [2015] 7 MLJ 307, at paras [14] and [15]; and*

(b) *as an exception to the general rule, the High Court and the Court of Appeal (three JJCA) can only grant a stay order (pending appeal) if the special circumstances test is fulfilled — please refer to Kosma Palm Oil Mill.*

(3) s 44(1) *of the* CJA *empowers JCA ('not the Court of Appeal (three JJCA)') to:*

(a) *give any 'direction' incidental thereto not involving the decision of the 'proceeding' of the Court of Appeal (three JJCA).* Section 3 *of the* CJA *has defined 'proceeding' to mean 'any*

[16] [2024] 4 MLJ 825 at pg. 860 to 863.

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proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding';

(b) *make 'any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding' in the Court of Appeal (three JJCA) ('interim order (s 44(1) of the CJA)'). I shall describe the test stipulated in s 44(1) of the CJA as the 'prevention of prejudice test'. It is to be emphasised that the prevention of prejudice test is easier to satisfy[2024] 4 MLJ 825 at 861than the special circumstances test; and*

(c) *order security for costs ('SFC') for a proceeding in the Court of Appeal (three JJCA) and to dismiss the proceeding if SFC is not furnished for that proceeding.*

In view of the words 'subject as hereinafter provided' in s 38(1) of the CJA, it is clear that s 44(1) of the CJA is an exception to s 38(1) of the CJA

(4) according to s 44(3) of the CJA, upon an application by a party aggrieved by an interim order (s 44(1) of the CJA) made by a JCA, the interim order (s 44(1) CJA) may be 'affirmed, varied or discharged by the court'. By virtue of s 38(1) of the CJA, the term 'court' in s 44(3) of the CJA can only mean the Court of Appeal (three JJCA). Accordingly, by virtue of s 44(3) of the CJA, the Court of Appeal (three JJCA) can affirm, vary or discharge an interim order (s 44(1) CJA) made by a JCA;

(5) to prevent prejudice to the claims of parties pending the disposal of a notice of motion, a JCA can make a stay order (pending notice of motion) pursuant to s 44(1) of the CJA. Upon an application by any party aggrieved by the stay order (pending notice of motion) (s 44(3) of the CJA application), the Court of Appeal (three JJCA) can then affirm, vary or discharge the stay order (pending notice of motion) under s 44(3) of the CJA

(6) neither one JCA nor the Court of Appeal (three JJCA) can make a stay order (pending appeal) pursuant to s 44(1) of the CJA. This view is supported by the following reasons:

(a) *s 73 of the CJA has specifically provided for the discretionary power of the Court of Appeal (three JJCA) to grant a stay order (pending appeal). Furthermore, s 73 of the CJA is placed in Part III CJA under the heading of 'Appellate Jurisdiction — Civil Appeals'.*

Section 44(1) of the CJA is placed in Part III of the CJA under the heading 'General'. It is clear that in comparison to the specific provision in s 73 of the CJA, s 44 of the CJA is a general provision. In accordance with the canon of construction generalia specialibus non derogant, the specific provision of s 73 of the CJA (not the general provision of s 44(1) of the CJA) should apply in a stay application (pending appeal).

In the Court of Appeal case of Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, at pp 758 to 759, Gopal Sri Ram JCA has applied the maxim generalia specialibus non derogant to give effect to a specific provision of the National Land Code ('the NLC') in preference to a general provision in the NLC;

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(b) *if a JCA and the Court of Appeal (three JJCA) has the discretionary power to grant a stay order (pending appeal) pursuant to* s 44(1) *of the* CJA:

(i) *this will create an absurdity because any party aggrieved by the stay order (pending appeal) made under* s 44(1) *of the* CJA, *may subsequently file a* s 44(3) *of the* CJA *application to the Court of Appeal (three JJCA) to vary or discharge the stay order (pending appeal)! In such an event, there will be a duplicity in form of the stay application (appeal) and* s 44(3) *of the* CJA *application; and*

(ii) s 44(1) *of the* CJA *provides for the prevention of prejudice test which is a less onerous test vis a vis the special circumstances test. This will then undermine the general rule — please refer to the High Court's judgment in Maziah binti Musa v Zainulabidin bin Mat Akhir, Dato' & Ors* [2014] MLJU 1828; [2014] 5 AMR 793, *at para [28(f)]; and*

(c) ***the following judgment of Mohd Hishamudin JCA in the Court of Appeal case of Tamabina Sdn Bhd & Anor v Nakamichi Corp Bhd* [2014] 4 MLJ 613*, at para [16], supports the above view:***

[16] In our judgment, it is crystal clear in the present case that the application is in the nature of a stay of execution. Mr Gideon Tan does not appear to dispute this fact. And this being the case, the application then ought to have been made pursuant to s 73 CJA, read with s 43 CJA, The application should not have been made pursuant to s 44 CJA. To having made the application purportedly pursuant to s 44 CJA is an abuse of that section. (Emphasis added.)

(7) ***in the previous Court of Appeal cases which have granted stay orders (pending appeal) under* s 44(1) *of the* CJA *('previous Court of Appeal cases (*s 44(1) *of the* CJA*)'):***

(a) ***the coram in the previous court of appeal cases (*s 44(1) *of the* CJA*) had not been informed that* s 44(1) *of the* CJA *only confers powers on a single JCA (not the Court of Appeal (three JJCA));***

(b) ***the provision of* s 44(3) *of the* CJA *was not brought to the attention of the coram in the previous court of appeal cases (*s 44(1) *of the* CJA*).***

According to Federal Court's judgment delivered by Peh Swee Chin FCJ in Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1*, at pp 12 to 13, the Court of Appeal is not bound by its own previous decision which is given per incuriam. In this regard, in the English Divisional Court case of Huddersfield Police Authority v Watson* [1947] 2 All ER 193*, at p 196, Lord Goddard CJ has explained the meaning of 'per incuriam' as follows:

What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given

the decision in ignorance or forgetfulness of the existence of that case or that statute. (Emphasis added.)

(c) ***the material facts of See Teow Guan concerned an application to the Court of Appeal to stay winding up proceedings in the High Court and did not involve an application to stay the execution of a High Court's judgment/order; and***

(d) ***the judgment of Tamabina was not cited in Ong Koh Hou and Emrail.***"

From the analysis of the authorities in this article, there appears to be conflicting decisions of the Court of Appeal by reference to the decisions in *Silver Concept*, *Tamabina* and *Aspen*. In addition, there is the added issue as to whether the dicta in *Silver Concept* is in conflict with the judicial pronouncements of the Federal Court in *Lam Kong* and *Metramac* relating to the exercise of original jurisdiction versus appellate jurisdiction of the appellate courts in so far as Section 44 of the CJA 1964 is concerned.

COMMENTARY

In the view of the authors there is a need for the appellate courts in Malaysia, particularly, the Court of Appeal, to properly examine the decisions in *Silver Concept*, *Tamabina* and *Aspen* in order to provide clarity in so far as the application of Section 43 and Section 44 of the CJA 1964 are concerned. In this regard, the Court of Appeal by reference to the guidelines set out by Justice Darryl Goon in *Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong*[17] is in a position to determinedly state whether the decision in *Silver Concept* is in fact good law.

The need for clarity is fortified by recent developments before the Court of Appeal arising from the disputes between *Chin Swee Heung & Ors v Pentadbir Tanah Daerah Raub & 5 Ors by way of Civil Appeal No. C-01(A)-301-04/2024 and Civil Appeal No. C-01(A)-299-04/2024*, wherein two applications for a stay as well as prohibitory orders pursuant to Section 44 of the CJA 1964 were made directly to the Court of Appeal by the appellants, absent an initial application for a stay being made before the High Court pursuant to Section 43 of the CJA 1964. The stay application was initially fixed before a panel of three (3) judges of the Court of Appeal notwithstanding the express requirements of Section 44(1) of the CJA 1964 that an application under Section 44 of the CJA 1964 ought to be heard before a single judge of the Court of Appeal first. The panel of three (3) judges declined to hear the said application and directed it to be heard before a single judge. Thereafter, on 28th May 2024, a single judge of the Court of Appeal determined the said applications. In this regard, the single judge held that the Court of Appeal had original jurisdiction to hear the said applications notwithstanding that no application had first been made to the High Court. The single judge of the Court of Appeal then proceeded to deny the relief sought by the appellants who are alleged to be durian planters to (i) restrain the State Government of Pahang and its regulatory agencies from enforcing the eviction notices issued against these individuals by Director General for Land and the Director General of Forestry in the State of Pahang respectively, and (ii) to enter the affected land to seek to continue to cultivate, grow and sell durians until the appeals are determined. Instead, the single judge of the Court of Appeal directed the 5th Respondent, namely, the Pahang State Agricultural Development

[17] [2021] 2 MLJ 234.

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Corporation ("**PKPP**") is to maintain the relevant durian trees and provide updates as to the condition of the trees and any sale of durians on a monthly basis until the appeals are determined.

Thereafter, on 19th July 2024, following the filing of two applications pursuant to Section 44(3) of the CJA 1964 by PKPP, a panel of three (3) judges of the Court of Appeal set-aside the Order handed down by the single judge. The Court of Appeal took the view that an application for stay should first be made to the High Court under Section 43 of the CJA 1964 read with Rule 14 of the Rules of the Court of Appeal 1994 before Section 44 of the CJA 1964 can be invoked, and that the single judge had no jurisdiction to make the consequential orders despite the arguments of the appellants that they were entitled to do so because the order of the single judge had made provision for "*liberty to apply*" or alternatively on the grounds that had a general prayer for "*such further and other relief as the court deems fit*".

In summation, given that applications under Section 44 of the CJA 1964 are regularly filed before the Court of Appeal, there is a need for clarity from a procedural law and substantive law perspective. To this end, it imperative that the appellate courts relook at the decisions in Silver Concept, Tamabina and Aspen read with *Lam Kong* and *Metramac* so as to provide clarity and public confidence to litigants in so far as the application of Section 43 and Section 44 of the CJA 1964 are concerned.

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