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## The Force Of A Consent Order

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It is well established that the orders of the court must be obeyed and respected. A court order is said to enjoy ‘*the entire armory that the law possesses for the enforcement of its judgment*’. As regards an order by consent of parties, our courts have held that it is effective and binding on all parties until and unless the order is set aside. However, the recent High Court decision in *Greenpower Value Sdn Bhd v Universal Trustee (Malaysia) Bhd & Ors*<sup>1</sup> appeared to have cast doubt on this position.

### Background Facts

Prior to 11 April 2014, there were various legal proceedings related to a 5-year redeemable convertible set of secured notes issued by Gula Perak Bhd (RCSN) and lands charged to secure the said notes. The RCSN was held by the Plaintiff, the 2<sup>nd</sup> Defendant (D2), the 3<sup>rd</sup> to 7<sup>th</sup> Defendants (Banks) and one individual known as TSL. The 1<sup>st</sup> Defendant was the trustee for all the noteholders (D1). The aforesaid legal proceedings stemmed from Gula Perak Bhd’s failure to pay and redeem the RCSN by the maturity date.

On 11 April 2014, the Plaintiff, D1, D2 and the Banks agreed for a consent order to be recorded with the objective to put an end to all disputes relating to the said notes (Consent Order). Although TSL is a not party to the Consent Order, he nonetheless confirmed his agreement to the same. According to the Consent Order, the Plaintiff, D2 and TSL undertook not to take any actions relating to the RCSN or the prevention of the auction of the charged lands. Subsequently, an agreement dated 5 August 2014 (Agreement) was executed which incorporates the salient clauses of the Consent Order. Pursuant to the Agreement, TSL had guaranteed the purchase of the RCSN through Million Westlink Sdn Bhd (Million Westlink).

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<sup>1</sup> [2020] 10 CLJ 462

In 2015, Million Westlink defaulted in payments, which caused the Banks to commence action to enforce the Agreement. In response, TSL and Million Westlink filed a counterclaim and injunction to enlarge the timeline for the performance of the Agreement, and to restrain the recovery actions. D2 also filed for both an application and an action in the Kuala Lumpur High Court, which the Banks alleged, were aimed at impeding the auctions of the charged land. The Banks claimed that the actions undertaken by TSL, Million Westlink and D2 are breaches of the Consent Order.

The Banks obtained leave to commence committal proceedings on 20 January 2016 and subsequently filed an application for a committal order against the TSL, Million Westlink, D2 and 2 of its representatives (Alleged Contemnors). In response, the Alleged Contemnors filed applications to set aside the leave.

### **Decision**

On 23 October 2019, the High Court decided in favour of the Alleged Contemnors and set aside the leave for committal. Consequently, the Applicant's application for contempt was also struck out. The primary basis in the Court's decision was that the Consent Order was clearly spent and no longer of effect. In its grounds of judgment, the Court held that the Consent Order was essentially contractual in nature. In this regard, the Court treated the Consent Order as no more than an ordinary contract that has been superseded by the Agreement.

Since the Consent Order was superseded and spent, the Consent Order was no longer enforceable. If at all, the Applicant should enforce the Agreement (which incorporated the salient terms of the Consent Order) by way of civil proceedings instead of by quasi-criminal contempt proceedings. The Court also held that the Agreement contained an entire agreement clause, whereby the full contractual terms are to be found in the Agreement and not the Consent Order. Additionally, the Court held that TSL cannot be liable for non-compliance of the Consent Order as he was not a party to it.

## Commentary

This decision suggests that a consent order may be stripped of its legal force by a private agreement superseding the same. This is inconsistent with the Court of Appeal decision in *Lee Heng Moy* which held that a consent order is valid, effective, and binding on all parties until and unless it is set aside. By the doctrine of *stare decisis*, the High Court is bound by the decisions of the Court of Appeal. In this regard, the decision in *Greenpower Value* may be *per incuriam* as it is inconsistent with *Lee Heng Moy*. Furthermore, the decision in *Greenpower Value* ignored the principle propounded by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd*,<sup>2</sup> which held that court orders must be complied with, until it is set aside or stayed, even if the order is wrong.

As regards the High Court's reliance on the entire agreement clause to exclude the Consent Order, the Court cited a few cases in support of its decision including *Malayan Banking Bhd & Ors v Pang Sor Tin*<sup>3</sup>. However, far from supporting the Court's finding, the decision in *Malayan Banking Bhd* upheld the validity and binding force of the consent judgment. According to the High Court in *Malayan Banking Bhd*, "it must also be the case that until and unless an order or judgment has been set aside, it remains binding and enforceable on all parties".

Considering the above, the decision in *Greenpower Value* is likely to be prone to legal challenge. One should always ensure compliance with court orders (including consent orders) until they are set aside. In the event that parties subsequently wish to resile from the terms of the consent order, they should apply to set aside the consent order out of an abundance of caution.

Authored by Hayden Tan<sup>4</sup>

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<sup>2</sup> [1998] 1 MLJ 393

<sup>3</sup> [2015] 1 LNS 577

<sup>4</sup> Hayden Tan is an Associate with the firm's Dispute Resolution practice. He read law at the University of Reading and is an English barrister by training.

## How can we help you?

We are operating as usual and clients may pose any queries on employment and industrial relations matters including those in relation to this alert via e-mail to:

- **Datuk D.P. Naban**  
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