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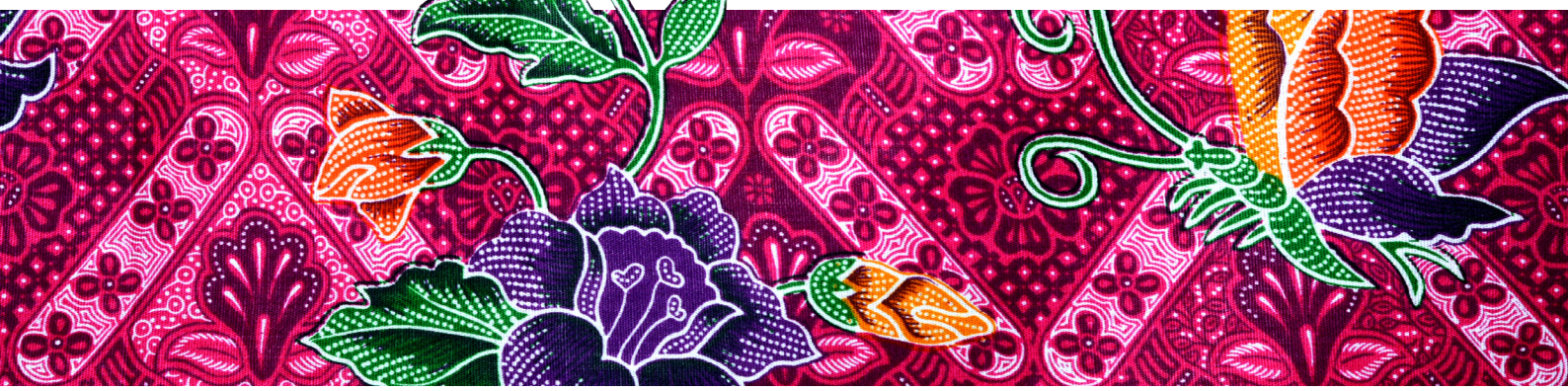

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On 28 October 2025, RDS hosted the book launch of "Perspectives on Public Law: Essays on Fundamental Rights", a timely and substantial contribution to Malaysian legal scholarship. Bringing together authoritative voices on constitutional development and the protection of fundamental rights, the publication arrives amid renewed scrutiny of public law's role in mediating the balance between state power and individual liberty.

Held at The St. Regis Kuala Lumpur, the launch drew senior members of the judiciary, legal profession and academia, underscoring the book's relevance to both theory and practice. More than a formal unveiling, the event served as a forum for reflection on constitutional principles and the evolving contours of public law in Malaysia.

A central moment of the afternoon was the royal address by DYMM Yang di-Pertuan Besar Negeri Sembilan Darul Khusus, Tuanku Muhriz Ibni Almarhum Tuanku Munawir. Tuanku Muhriz emphasised the enduring importance of constitutional values and the rule of law, while highlighting the institutional responsibility of courts, practitioners and scholars in safeguarding fundamental rights. The royal address set a thoughtful and principled tone, anchoring contemporary legal debate in foundational constitutional commitments.

This royal address was completed by the keynote address from the Chief Justice of Malaysia, YAA Datuk Seri Utama Wan Ahmad Farid bin Wan Salleh. Drawing on judicial experience, the Chief Justice examined the practical challenges of constitutional adjudication, particularly the task of reconciling governmental authority with individual rights. The speech underscored the dynamic nature of public law and the critical role of rigorous legal scholarship in informing sound judicial reasoning.

In this edition of Legal Insight, we publish the full texts of both speeches. Presented in their entirety, they capture not only the significance of the book launch but also offer enduring reflections on the principles shaping public law and fundamental rights in Malaysia today.

ROYAL ADDRESS BY DYMM YANG DI-PERTUAN BESAR NEGERI SEMBILAN DARUL KHUSUS

TUANKU MUHRIZ IBNI ALMARHUM TUANKU MUNAWIR

FOR THE OFFICIAL BOOK LAUNCH OF "PERSPECTIVES ON PUBLIC LAW ESSAYS ON FUNDAMENTAL RIGHTS"

The St. Regis Kuala Lumpur
28 October 2025

Bismillahhir Rahmanir Rahim

Assalamualaikum Warahmatullahi Wabarakatuh and a very Good Afternoon,

I am very pleased to be invited to launch "Perspectives on Public Law: Essays on Fundamental Rights", a book published by the law firm Rosli Dahlan Saravana Partnership (RDS). I would like to record my appreciation to Dato' Seri Mohd Hishamudin Yunus and the partners of RDS for inviting me today.

I am also pleased at the presence of many senior judges, including the four office holders. A previous launch of a book by Dato Seri Mohd Hishamudin Yunus was similarly well attended. This is a testimony of the high regard held by members of the judiciary for Dato Seri Hishamudin Yunus. In my speech on that previous occasion, I quipped that the Chief Justice must have put the dispensation of justice on hold for that day. It seems to be the same today.

Ladies and gentlemen,

The essays in this book remind us of a truth that must always remain at the heart of nation-building: that law is not merely a technical instrument, nor a rigid set of rules. It is a living framework- a moral and institutional architecture that protects the dignity of every citizen, ensures fairness in public life, and guarantees that justice is not just promised, but practised. The essays in this collection reflect a deep engagement with these issues.

This publication is a commendable initiative as it brings together the voices of our young legal minds, guided by the experience of Dato' Seri Mohd Hishamudin Yunus.

The essays show that our younger generation of legal minds understands that the Constitution is not a relic of the past, but a living promise to future generations-

one that must be protected, interpreted, and at times, courageously defended. Their work also reminds us that legal education must go beyond textbooks and case law. It must instil values of fairness, intellectual honesty, respect for human dignity, and an unshakeable commitment to the rule of law. Only then can we hope to raise lawyers and judges who will carry the torch of justice with courage and wisdom.

Judicial independence is the bedrock of any functioning democracy. It is the cornerstone upon which the rule of law rests. Without an independent judiciary, the supreme law of the land, i.e. the Federal Constitution becomes merely a symbolic document, and not a living, enforceable guarantee of the rights and freedoms of the rakyat.

As Malaysia continues to evolve socially, politically, and economically, judges must be free to make decisions based solely on the law and the facts before them; free from external influence, be it political pressure or otherwise; free from fear of reprisal. This is not merely a legal requirement. It is a moral obligation owed to the rakyat.

Ladies and gentlemen,

The judiciary cannot stand alone in this mission. Its independence must be respected by all-by the executive, the legislature, the legal profession, the media, and indeed by society at large. And this respect must go beyond words. It must be reflected in action, through sufficient resources, institutional safeguards, transparent appointments, and the defence of judicial integrity at all levels.

I have emphasised in the past on the need to reform the existing judicial appointment process. As we all know, the selection of judges is made through the Judicial Appointments Commission. Whilst the primary intention of the Commission is to uphold the independence of the judiciary, it appears that its governing provisions may not be in accordance with such intent. As it stands, the Prime Minister appoints five of the nine members of the Commission. Under the Federal Constitution, he also has the final say in the appointment of judges to the superior courts.

Immediate reforms need to be considered to strengthen the independence of the Commission, and ultimately the Judiciary. There is a need for a diverse and independent mechanism when it comes to the selection of the five eminent persons on the Commission. The persons selected must not only be independent from any form of political influence but I suggest, also be inclusive reflecting the diversity of our multi-racial society and the composition of our Federation, namely the Peninsular states, Sabah and Sarawak.

Independence is the essence of the Judiciary. Hence, it is imperative that judicial independence is always maintained and protected. It is the Judiciary to whom we entrust to protect the fundamental principles embodied in our Federal Constitution. I take this opportunity to remind the judges, that, on their part,

they must always uphold their judicial oath steadfastly and constantly remind themselves that their decisions have a profound impact on society. They bear a solemn responsibility to preserve their own independence - not only from external interference but also from personal bias, public pressure or institutional influence. Judges are expected to uphold the law and apply the law without fear or favour. There should be no compromise on this principle in any circumstances.

As we strive to move forward, let us remember that the legitimacy of any government, the fairness of any policy, and the justice of any law, all depend on the strength and independence of the judiciary. Let us never take judicial independence for granted. It must be defended, supported, and above all, honoured, for in doing so, we uphold the dignity of the rakyat and the spirit of our Federal Constitution.

My heartiest congratulations to Dato' Seri Mohd Hishamudin Yunus and the book's Editor, Mr S. Saravana Kumar on the occasion of this book launch. May this book serve not only as a scholarly contribution to constitutional law, but also as a symbol of our collective commitment to justice, accountability, and good governance.

With the grace of Allah S.W.T., I hereby launch the book, "Perspectives on Public Law: Essays on Fundamental Rights".

Wabillahittaufiq Walhidayah, Wassalamualaikum Warahmatullahi Wabarakatuh and Thank You.

KEYNOTE SPEECH BY

THE RIGHT HONOURABLE THE CHIEF JUSTICE OF MALAYSIA

DATUK SERI UTAMA WAN AHMAD FARID BIN WAN SALLEH

AT THE LAUNCH OF "PERSPECTIVES ON PUBLIC LAW: ESSAYS ON FUNDAMENTAL RIGHTS"

The St. Regis Kuala Lumpur
28 October 2025

Menghadap

DYMM Tuanku Muhriz Ibni Almarhum Tuanku Munawir Yang di-Pertuan Besar Negeri Sembilan Darul Khusus.

Ampun tuanku beribu-ribu ampun, sembah patik mohon diampun, Alhamdulillah, dimulai kalam dengan mengangkat setinggi-tinggi kesyukuran ke hadrat Allah SWT kerana berkat kebesaran dan keagungan-Nya jua, patik serta sekalian hadirin berdatang sembah, menjunjung setinggi-tinggi kasih di atas limpah perkenan Duli Yang Maha Mulia Tuanku bercemar Duli, berangkat dan seterusnya melancarkan buku Perspective on Public Law: Essays on Fundamental Rights pada petang ini.

Ampun Tuanku,

Patik mohon perkenan untuk turut mengalu-alukan kerabat diraja yang turut mengiringi keberangkatan Duli Tuanku ke majlis ini.

Menghadap:

YAM Tunku Ali Redhauddin Ibni Tuanku Muhriz, Tunku Besar Seri Menanti

YAM Tunku Zain Al-Abidin Ibni Tuanku Muhriz

Ampun Tuanku,

Patik mohon perkenan untuk turut mengalu-alukan dif-dif jemputan, para anggota utama Badan Kehakiman dan sekalian yang hadir dan seterusnya menyembahkan ucapan patik.

- YABhg Tun Tengku Maimun Bt Tuan Mat, Former Chief Justice of Malaysia
- YAA Dato' Abu Bakar bin Jais, President of the Court of Appeal
- YAA Tan Sri Hasnah binti Dato' Mohammed Hashim, Chief Judge of Malaya
- YAA Datuk Hajah Azizah binti Haji Nawawi, Chief Judge of Sabah & Sarawak.
- YBhg Dato' Seri Mohd Hishamudin Yunus, RDS Consultant

Distinguished guests, ladies and gentlemen

It is both a privilege and a profound honour to stand before you today for the launch of this remarkable publication "Perspectives on Public Law: Essays on Fundamental Rights".

This volume represents something rather extraordinary in our legal landscape - a collection that captures the intellectual journey of our emerging and young legal professionals during their formative pupillage years. It is during this critical period that the theoretical foundations laid in law school meet the demanding rigours of practice, and it is here that we witness the transformation of students into budding practitioners.

And for this, please allow me to thank Dato' Seri Mohd Hishamudin Yunus, former Judge of the Court of Appeal, whose distinguished mentorship has shaped the contributors to this volume, and Encik S. Saravana Kumar, whose editorial expertise has ensured that these diverse perspectives cohere into a work of scholarly merit.

I have had the opportunity of reading the twenty-one essays incorporated in the book that discuss subjects of profound national importance. They examine the fundamental principles enshrined in our Federal Constitution — the balance between executive authority and individual liberty, the architecture of institutional accountability, and the frameworks that ensure governance remains both effective and just.

An independent judiciary is the ultimate safeguard of human rights. When individuals seek redress for violations, they need judges free from government, political, or powerful interests or even their peers, to serve as truly impartial arbiters. Human rights often require holding the state accountable—only an independent judiciary has the courage to scrutinise executive decisions, strike down unconstitutional laws, and ensure no one is above the law.

As for lawyers or would be lawyers in this hall, allow me to say that for every file that you handle there is always a story. It may be a good story or a bad story. But it is a story nevertheless. In Cummings v Granger, the story is about a barmaid who was badly bitten by a big dog. The story about a snail in the ginger bottle can be seen in Donoghue v Stevenson. Thornton v Shoe Parking Lane is about the incorporation of exclusion clauses into a contract. But the side story as Lord Denning captured it is that Mr Thornton was a freelance trumpeter of the highest quality, which of course has nothing to do with the merits of the case.

The same applies to the issues of human and fundamental rights. There is always a story about a Malaysian citizen holding a valid Malaysian passport but is denied from going overseas at the immigration counter. Or a stateless child born in Malaysia, but whose mother is unknown and having a biological father that could not be traced. Of course, there are other sensitive alleged breach of human rights which I won't dwell here.


officiated by
D.Y.M.M. Yang di-Pertuan Besar Negeri Sembilan Darul Khusus
Tuanku Muhriz Ibni Almarhum Tuanku Munawir
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Your job as a lawyer is to craft these stories, to the best of your ability and provide your input based on the accepted legal propositions to enhance your client's right as protected in the Federal Constitution. It is no easy feat. But nobody says that the enforcement of human rights is an easy task. There are challenges – little Napoleons here and there that will divert your attention or you may face other legal challenges that you never thought will arise when you first embark with this task.

The truth is, talking about human rights can be a bit like hosting a dinner party where the main course is systemic injustice and the side dish is unshakeable optimism. It is not always an easy meal.

We all know that the great irony of human rights is: they are universal, they are inherent, they are well codified in the Federal Constitution, and yet they are constantly conditional on the courage of people, the civil society, the Bar and certainly the judiciary to defend them.

Ladies and gentlemen,

There is no doubt that this book takes a Herculean effort and involves a lot of painful revisions. The effort reflects that human rights are not just a fancy phrase for a high-minded ideal. For the dramatis personae in the stories, that I referred to earlier, their rights mean the world to them. Hence this book deserves the attention it commands.

To the contributing authors, allow me to express my confidence that you will serve as conscientious guardians of our constitutional democracy — interpreting our fundamental laws with both fidelity to text and sensitivity to purpose, always mindful of the constitutional values that define our nation.

May this publication enhance our collective understanding of constitutional principles and their application in contemporary Malaysia. I trust you will find this work both illuminating and invaluable.

Ampun Tuanku,

Demikian berakhirnya sembah ucapan patik.

Sebelum mengundurkan diri, patik dengan penuh hormat takzimnya merafakkan sembah menjunjung setinggi-tinggi kasih di atas limpah perkenan Duli Tuanku sudi bercemar duli berangkat ke majlis pada petang ini.

Semoga Duli Yang Maha Mulia Tuanku dan Duli Yang Maha Mulia Tunku Ampuan Besar, serta seluruh kerabat diraja, sentiasa mendapat perlindungan dari Allah SWT, kekal di atas takhta dengan sihat walafiat serta dilimpahi rahmat dan nikmat kesejahteraan, keimanan dan keberkatan.

Sekian, Wabillahitaufiq Walhidayah Wassalamualaikum Warahmatullahi Wabarokatuh.

Patik menjunjung kasih Tuanku.

STAMP DUTY ON NOVATION AGREEMENT: ANALYSIS OF THE MESRA RETAIL CASE

by S. Saravana Kumar & Nur Hanina Mohd Azham

This article examines the High Court's decision in *Mesra Retail & Cafe Sdn Bhd v Pemungut Duti Setem, Malaysia* [2025] MLJU 3979, which considered whether a Novation Agreement is subject to nominal stamp duty of RM10 under Item 4 of the First Schedule of the Stamp Act 1949 (SA) or ad valorem stamp duty under Item 32(a) of the First Schedule.

The key issue before the High Court was whether the novation resulted in a conveyance or transfer of property within the meaning of Section 16(1) of the SA, or whether it merely extinguished existing contractual rights and obligations and substituted them with a new contractual relationship. The Taxpayer was successfully represented by our firm's Tax, SST & Customs Partner, S. Saravana Kumar together with Senior Associate, Nur Hanina Mohd Azham.

This article provides an in-depth analysis of the arguments presented by both parties, the findings of the High Court, and the broader implications on the classification and stamp duty treatment of novation agreements in Malaysia.

Facts

Petronas Dagangan Berhad (PDB) is the owner of various petrol station premises and ancillary facilities. PDB had entered into several operating agreements with Golden Scoop Sdn Bhd (Golden Scoop), under which Golden Scoop was granted a licence to occupy designated areas within selected petrol stations to operate Baskin-Robbins outlets. In consideration, Golden Scoop paid monthly sums to PDB.

On 8 July 2021, PDB incorporated Mesra Retail & Café Sdn Bhd (Taxpayer), a wholly owned subsidiary, to focus on PDB's non-fuel business segment. Subsequently, on 14 January 2022, PDB, the Taxpayer and Golden Scoop entered into a Master Novation Agreement (Novation Agreement). Pursuant to the Novation Agreement, PDB novated and transferred all its rights, interests, obligations and liabilities under the existing operating agreements to the Taxpayer. Golden Scoop agreed to release and discharge PDB from the operating agreements, while the Taxpayer undertook to perform all obligations thereunder.

The Novation Agreement was submitted for adjudication. On 14 September 2023, the Collector of Stamp Duties (Collector) assessed stamp duty of RM7,478.00 on the basis that the Novation Agreement was chargeable to ad valorem stamp duty. The Taxpayer paid the stamp duty under protest and filed a Notice of Objection pursuant to Section 38A of the SA. The objection was rejected, leading the Taxpayer to appeal to the High Court under Section 39(1) of the SA.

The Law

The relevant provisions of the SA examined by the Courts in this case are as follows:

i. Section 16(1) of the SA reads as follows:

"Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale."

ii. Item 4 of the First Schedule prescribes fixed duty of RM 10 for general agreements:

AGREEMENT OR MEMORANDUM OF AGREEMENT made under hand only, and not otherwise specially charged with any duty, whether the same is only evidence of a contract or obligatory on the parties from its being a written instrument	RM10

iii. Item 32(a) of the First Schedule prescribes ad valorem duty for conveyances, assignments, and transfers of property:

"CONVEYANCE, ASSIGNMENT, TRANSFER OR ABSOLUTE BILL OF SALE:

(a) On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph (c))	For every RM100 or fractional part of RM100 of the amount of the money value of the consideration or the market value of the property, whichever is the greater— (i) RM1.00 on the first RM100,000; (ii) RM2.00 on any amount in excess of RM100,000 but not exceeding RM500,000; (iii) RM3.00 on any amount in excess of RM500,000. (iv) RM4.00 on any amount in excess of RM1,000,000

The Taxpayer's Contention

The Taxpayer contended that the Novation Agreement should only attract nominal duty of RM 10 pursuant to Item 4 of the First Schedule of the SA based on the following reasons:

i. The Novation Agreement constituted a true novation in law and did not give rise to any transfer or conveyance of property. A novation operates to extinguish the original contractual rights and obligations and replaces them with a new contract by consent of all parties involved. This position is in line with Section 63 of the Contracts Act 1950 which reads as follows:

"Effect of novation, rescission and alteration of contract

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

ii. It was submitted that, upon the execution of the Novation Agreement, PDB's rights and obligations under the operating agreements were fully discharged and ceased to exist. As such, there were no subsisting rights capable of being transferred or assigned to the Taxpayer. The Novation Agreement merely substituted the Taxpayer as the contracting party in place of PDB and did not involve any transfer of proprietary rights; and

iii. The Taxpayer further argued that Section 16(1) of the SA was inapplicable as there was no conveyance or transfer operating as a voluntary disposition inter vivos. In the absence of any transfer of property, the Novation Agreement could not fall within Item 32(a) of the First Schedule. Accordingly, the Novation Agreement was properly chargeable only to nominal stamp duty under Item 4 of the First Schedule.

The Collector's Arguments

The Collector's arguments can be summarised as follows:

i. The Novation Agreement resulted in the transfer of property from PDB to the Taxpayer without valuable consideration;

ii. The actual effect of the Novation Agreement is to move the original owner's (i.e. PDB) rights, obligations, liabilities, title, interests and benefits to the Taxpayer and the Taxpayer is now bound by the terms of the operating agreements with the Operator (ie Golden Scoop); and

iii. Thus, the rights under the operating agreements constituted "property" and that the novation therefore amounted to a voluntary conveyance inter vivos, attracting ad valorem stamp duty under Section 16(1) read together with Item 32(a) of the First Schedule of the SA

Findings Of The High Court

Upon hearing the submissions of both parties, the High Court held that the Novation Agreement does not constitute an assignment or transfer of property and is therefore not subject to ad valorem stamp duty under Section 16(1) and Item 32(a) of the First Schedule of the SA. Instead, the High Court ruled that the Novation Agreement falls under Item 4 of the First Schedule and is therefore subject to nominal stamp duty of RM10.
The High Court's judgment can be summarised as follows:

i. The substance of the matter and not the form must be taken into consideration in determining the applicable stamp duty rate for an

instrument as established by the Federal Court in *BASF Services (M) Sdn Bhd v Pemungut Duti Setem* [2010] 5 CLJ 109;

ii. The High Court referred to the Supreme Court's decision in *LYL Hooker Sdn Bhd v Tevanaigam Savisthri KT Chitty & Anor* [1987] 2 MLJ 52 which examines the distinction between novation and assignment. The effect of novation is as follows:

   a. A novation agreement extinguishes rights and obligations under an old contract for which the new contract is made; and

   b. It requires the consent of all parties and fresh consideration, and the rights and obligations under the new contract are not transferred from the old contract, which has already been extinguished.

iii. Upon examining the terms of the Novation Agreement, the High Court found that:

   a. The Novation Agreement is a tripartite agreement between PDB, Golden Scoop, and the Taxpayer, the subject matter of which are the operating agreements;

   b. Under the Novation Agreement, the non-fuel business of PDB is novated with the transfer of all rights, interests, obligations, and liabilities under the operating agreements to the Taxpayer;

   c. Golden Scoop expressly released and discharged PDB from its obligations under the operating agreements; and

   d. The Taxpayer assumed all rights, obligations and liabilities in place of PDB.

iv. Therefore, there was no transfer or conveyance of property from PDB to the Taxpayer.

Commentary

The *Mesra Retail* case affirms that a true novation extinguishes the original contract and creates a new contractual relationship without transferring property or rights. As such, novation agreements do not fall under Item 32(a) of the First Schedule of the SA and are instead subject to nominal stamp duty of RM10 under Item 4. The High Court's decision offers a clear and authoritative distinction between novation and assignment, particularly in the context of stamp duty classification. The High Court emphasised that novation does not involve the transfer of property, as the original contract is extinguished and replaced with a new agreement. This case reinforces the doctrine of substance over form, affirming that the substance of the instrument, not its form or label, determines its stamp duty implication.

Furthermore, this ruling bears significant implications for corporate restructuring, intercompany financing, loan refinancing, intra-group realignments, and M&A transactions, where novation agreements are common. It is therefore essential for practitioners to ensure that novation agreements are properly drafted to demonstrate the substitution of both rights and obligations, rather than merely the transfer of benefits.

It must be highlighted that the Collector has filed an appeal to the Court of Appeal and as such, the matter is now pending before the Court of Appeal.

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REASSESSING LIQUIDATORS' POWERS, RIGHTS, AND LIABILITIES AFTER THE *VICTOR SAW SENG KEE* CASE

by Tan Jun Yu

Towards the end of 2025, the Federal Court, in *Victor Saw Seng Kee ((As joint liquidator of London Biscuits Bhd) (In liquidation)) v Wong Weng Foo & Co & Anor and other appeals* [2025] MLJU 3886, reversed the Court of Appeal's decision in four related appeals, which are reported as, among others, *Wong Weng Foo & Co v London Biscuits Bhd* [2024] MLJU 1981, and *Wong Weng Foo & Co v Lim San Peen (in capacity as liquidator for London Biscuits Bhd (in liquidation)) & Anor and another appea*l [2024] 1 MLJ 132.

The apex court's decision in *Victor Saw Seng Kee* is particularly significant, as the Court addressed eight questions of law, thereby shedding light on an area that one might perceive as not having been as widely reported as others. Notably, the Court affirms the legal test for the removal of a liquidator and clarifies the scope of the powers of joint liquidators, both of which form the focus of the present article.

Proceedings At The High Court

London Biscuits Berhad (LBB) was wound up on 13.1.2020 with Mr Lim San Peen (LSP) appointed as the sole liquidator. On 6.5.2021, LSP applied to the High Court for his release and discharge upon retirement, and for Mr Victor Saw (Victor) to be appointed as his successor. On 9.12.2021, the High Court directed that meetings be held to select a new liquidator, which then saw Victor being supported by an overwhelming majority of creditors. Another candidate, Gabriel Teo (Gabriel), secured only a negligible share.

One of LBB's unsecured creditors, Wong Weng Foo & Co (WWF), opposed the application for LSP's release and discharge. At the same time, it initiated its own application to remove LSP for an alleged breach of duty. It nominated its own candidate, Gabriel, to act as the liquidator.

On 3.10.2022, the High Court found that LSP had acted reasonably and lawfully, and accordingly allowed his discharge, appointed Victor as the sole liquidator, and dismissed WWF's application for removal.

Proceedings At The Court Of Appeal

Dissatisfied, WWF appealed to the Court of Appeal. On 30.10.2023, the Court of Appeal allowed the appeals in part, accepting that certain payments made by LSP are in breach of the law. The Court of Appeal set aside LSP's release and discharge, and subsequently removed LSP as the liquidator. The Court further affirmed Victor's appointment but ordered Gabriel to be appointed as the Joint Liquidator to safeguard creditors' interests. An application to stay the Court of Appeal's decision made by Victor was dismissed by the Court on 24.7.2024.

Federal Court's Decision Concerning Removal Of LSP

As explained above, the Court of Appeal set aside LSP's release and discharge granted by the High Court, and removed him as the liquidator.

The difference here is not just the terminology between "release", "discharge" and "remove". The legal consequences are profound.

A release order stems from section 491(4) of the Companies Act 2016 (CA 2016). It has the effect of discharging a liquidator "from all liability in respect of any act done or default made by him in the administration of the affairs of the company or otherwise in relation to his conduct as liquidator". In other words, the release and discharge order is a pass given by the Court evidencing a released and discharged liquidator's due performance of his duties as a liquidator.

On the other hand, an order to remove a liquidator has the effect of inevitably impugning a liquidator's professional standing and reputation, a fact acknowledged by the Federal Court in *Victor Saw Seng Kee 2025.* In practice, such an order often invites subsequent proceedings against the removed liquidator in attempts to impose personal liability on him. A removal order is, quite literally, a drop of blood in an ocean of sharks.

The basis for WWF's complaints against LSP, which also formed the premise of the Court of Appeal's removal order, was the payment of termination benefits and indemnity in lieu of notice made by LSP to LBB's employees, who continued to be employed post-winding-up.

LSP had previously carried out LBB's business for 180 days without leave of the Court in accordance with his power derived from paragraph 1(a) of Part II of the Twelfth Schedule, read together with section 486 CA. He subsequently, on 10.7.2020, obtained leave of the Court to continue LBB's business for another 180 days. The High Court was in agreement with LSP's business judgment that the continued operation of LBB is commercially justified to preserve value and maximise recovery for creditors.

Against this power to continue LBB's business, LSP retained LBB's employees for several months, and upon their termination, paid them termination benefits and indemnity in lieu of notice. In the course of doing so, LSP treated those payments

as "costs and expenses of the winding up" prescribed under section 527(1)(a) of the CA 2016, and accorded those payments priority over debts owed to LBB's unsecured creditors.

Unfortunately, the Court of Appeal treated the payments made and the priority accorded by LSP as contravening the statutory priority in payment laid down by section 527 of the CA 2016. Essentially, the Court of Appeal found that the termination benefits and indemnity in lieu of notice paid to LBB's employees did not amount to wages or salary envisaged by section 527(1)(b) of the CA 2016. The Court of Appeal did not discuss whether the same could fall within the purview of "costs and expenses of the winding up" prescribed under section 527(1)(a) of the CA 2016.

On appeal, the Federal Court, in contrast, took into account LSP's lawful authority to continue carrying on LBB's business, and was of the view that LSP's decision to retain LBB's employees, as well as his subsequent payments of termination benefits and indemnity in lieu of notice upon their termination, fall within the "costs and expenses of winding up" envisaged under section 527(1)(a) of the CA 2016. These payments form part of the duly authorised winding-up process.

It accordingly follows that there are no inappropriate payments or breaches of duty made or committed by LSP that can warrant his removal.

The Revival of the "All Creditors Must Support" Test?

In arriving at its conclusion that the Court of Appeal's removal of LSP was erroneous, the Federal Court took the opportunity to reaffirm the trite principle that the court should be slow to interfere with any act or decision of a liquidator in the discharge of his role in a company liquidation, and will only do so where the act or decision is so unreasonable and absurd that no reasonable person would have acted in that manner. The Court will not intervene merely because its opinion may differ from that of the liquidator.

The Federal Court also recounted and approved the often-cited test for the removal of a liquidator laid down by Ramly Ali J (as His Lordship then was) in the *locus classicus of Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners)* [2006] 3 CLJ 360. Interestingly, in the course of doing so, the Federal Court might have inadvertently reopened a debate on one of the principles laid down in Ng Yok Gee 2006.

There are a considerable number of legal principles crystallised and formulated by Ramly Ali J in Ng Yok Gee 2006. One of them that later proved contentious is the principle that in a case where the application for removal is made by a creditor, all the creditors must be given notice of the application. As made clear in the judgment, Ramly Ali J derived this principle from the New Zealand Supreme Court's decision in *In re White Cliffs Dredging Co* (1893) 11 NZLR 711.

On its face, the above principle is grounded in natural justice and commercial morality, and makes good logical sense. It is only fair that no creditor can steal a

march by surreptitiously applying to remove a liquidator without the knowledge of other creditors. The requirement has been repeatedly approved, for example, by the Court of Appeal in *Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193 and *Majidee Park Auto Spares & Services Sdn Bhd (in liquidation) & Anor v N Thanavathy a/p Rajah & Anor* [2025] 3 MLJ 941.

The same principle was also approved by the Federal Court in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629. In *Wong Sin Fan 2013*, the Federal Court referred to Ramly Ali J's formulation in Ng Yok Gee 2006 with approval, and proceeded to summarise the legal principles crystallised by Ramly Ali J. Notably, the Federal Court has summarised and construed the principle that "all creditors ought to be notified" as "all the contributories and creditors must support the removal application".

This summarisation by the Federal Court was once relied upon by the courts as a concrete requirement that a removal application would be dismissed so long as there is a single creditor that opposes the application. See, for example, *Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193 where the Court of Appeal disagreed with such a requirement of "all creditors must support" distilled from *Wong Sin Fan 2013*. The Court of Appeal was of the view that the requirement is merely a non-binding obiter dictum and is neither practical nor workable. The Court of Appeal was of the view that out of hundreds or thousands of creditors, it is logical that one or two might oppose the removal application, especially those who are given undue preference by the liquidator. To insist on the principle that "all creditors must support" would mean that an aggrieved creditor could almost never successfully remove a misbehaving liquidator. The Court of Appeal in *Jagdis Singh 2020*, therefore, held that the "all creditors must support" requirement distilled from the Federal Court's judgment in Wong Sin Fan 2013 should not be acted upon.

Interestingly, the Federal Court in the present *Victor Saw Seng Kee 2025* quoted Wong Sin Fan 2013 with complete approval, including the principle that all creditors must support the removal application. The Federal Court concluded at paragraph 42 of the judgment that *"Wong Sin Fan & Ors remains the leading Federal Court authority on the removal of liquidators"*, and propounded that *"(r)emoval must be in the best interests of all parties involved, with support from both contributories and creditors"*. The Federal Court did not discuss the Court of Appeal's judgment in *Jagdis Singh 2020.*

On its face, the Federal Court's decision in the present *Victor Saw Seng Kee 2025* appears to revive the "all creditors must support" principle laid down in Wong Sin Fan 2013 (assuming that "revive" is the appropriate term, given that the Court of Appeal in *Jagdis Singh 2020* is in no position to extinguish or overrule that principle under the doctrine of stare decisis). Nonetheless, in the Author's view, the reasoning advanced by the Court of Appeal in Jagdis Singh 2020 remains intact, and it remains to be seen whether the "all creditors must support" principle will be followed and applied in subsequent cases. To date, it appears that the test has not yet been affirmed as a binding ratio decidendi by the apex court.

Dynamics Between Joint Liquidators

The Federal Court in the present *Victor Saw Seng Kee 2025* further vindicates LSP's conduct in appealing to the Federal Court without the approval of Gabriel, the Joint Liquidator appointed by the Court of Appeal. The Federal Court agreed with LSP's contention that, as the appeal concerns the Court of Appeal's appointment of Gabriel, he is conflicted from acting or being involved in the appeal-related affairs and decision-making. The apex court held that requiring Gabriel's approval to proceed with the appeal would constitute a breach of the rule of natural justice, *nemo judex in re sua*, namely that no one should be a judge in his own cause.

More importantly, the Federal Court accepted LSP's alternative contention that, under section 478(2) of the CA 2016, even where joint liquidators are appointed, one of the two may perform the functions and exercise the powers of the liquidator on his own, so long as the Court does not make an express order requiring otherwise.

The Author is of the respectful view that such a proposition may be too broad and is inconsistent with current practice, in which the Court distinguishes between "joint liquidators" and "joint and several liquidators." Evidently, the use of the title "joint liquidators" is sufficient to imply that their powers must be exercised jointly, with each liquidator's knowledge and approval. To suggest that joint liquidators can act unilaterally in all circumstances risks conflating "joint liquidators" with "joint and several liquidators."

It remains to be seen whether the Federal Court's decision on this issue will be further tested and refined in subsequent cases. In the meantime, to safeguard their interests, the Author is of the view that, in every case where the Court appoints joint liquidators, the liquidators should insist on an express order specifying that their powers are to be exercised jointly and with each other's consent. Such an express order is essential to ensure that a liquidator is neither taken by surprise nor held liable for actions undertaken by a counterpart without prior knowledge.

Conclusion

The Federal Court's decision in *Victor Saw Seng Kee 2025* reflects a pro-liquidator approach in the absence of damning or implicating evidence. Notably, the Court also made an alternative ruling that a payment made by a liquidator in good faith, even if potentially in breach of the statutory priority under section 527 of the CA 2016, does not constitute a ground for the liquidator's removal, nor for leave to commence proceedings against the liquidator. While a few legal issues may still require further refinement and clarification by subsequent courts, the commercial pragmatism demonstrated in the judgment is likely to be warmly welcomed by insolvency practitioners.

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FROM BERJAYA TIMES SQUARE TO LIM SWEE CHOO: REVISITING THE TOTAL FAILURE OF CONSIDERATION DOCTRINE

by Nishooldran Ravindran

At the heart of every commercial dispute lies a fundamental question: who gets the money?

The law, therefore, must provide clear and predictable answers for commercial entities to deal with confidence.

For fifteen years, the legal principles governing contract termination and restitution in Malaysia have been guided by the Federal Court's decision in *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd.*[1] This ruling, while intended to bring clarity, inadvertently created a degree of uncertainty by intertwining the distinct doctrines of termination for breach and restitution for unjust enrichment.

This period of ambiguity has now been addressed. The Federal Court's recent ruling in *Lim Swee Choo & Anor v Ong Koh Hou @ Won Kok Fong and another appeal* has revisited these principles, offering a welcome clarification that restores doctrinal precision to Malaysian contract law. [2]

Termination

A contract, in its essence, is an exchange of promises. If one reneges on that promise, the other party should be able to walk away. Premised on this principle, s.40 of the Contracts Act 1950 (CA) provides as follows:

> *When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct his acquiescence, in its continuance.*

Section 40 is rooted in common law.[3] It allows an injured party to terminate a contract in three key situations:

i. Breach of condition

A condition is an essential term — the very heart of the contract. Breaching it strikes at the contract's root and justifies termination. A warranty, by contrast, is a collateral term; its breach only supports a claim for damages.

In *Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd*,[4] the plaintiffs bought a house. However, the building delivered was laden with defects, requiring

1 *[2010] 1 MLJ 597*
2 *[2025] MLJU 3155*
3 *Hwa Chea Lin & Anor v Malim Jaya (Melaka) Sdn Bhd [1996] 4 MLJ 544*
4 *[1996] 4 MLJ 544.*

complete reconstruction. The Court found this to be a fundamental breach. The developer had not just delivered a faulty product; it had failed to deliver the very thing promised.

ii. Breach of an innominate term

The case *Hongkong Fir Shipping* introduced the test for innominate terms.[5] The test focuses on the severity of the breach. If the breach undermines the very purpose of the contract, it allows the innocent party to terminate. If it is minor and fixable, only damages are available.

This principle prevents absurd outcomes. As Lord Upjohn noted: *should a charterer be allowed to cancel an entire shipping contract over a single missing nail? Of course not*.[6]

iii. Repudiation

Repudiation occurs when one party, through their words or conduct, shows they no longer intend to be bound by the contract.

a) By Words: An explicit refusal to perform, even before the performance date is due *(Hochster v De La Tour)*. [7]

b) By Conduct: Actions that make performance impossible, like selling promised goods to a third party *(Lovelock v Franklyn)*. [8]

The test is objective:[9] would a reasonable person conclude the defaulting party no longer intends to be bound?

Remedy

After a valid termination, the injured party stands at a crossroads. It must choose one of two available paths: damages or restitution. It cannot take both.

This is the crucial, often-missed distinction. The legal principles for terminating a contract are entirely separate from those governing the remedy that follows.

Damages are meant to compensate for the loss caused by the breach. Its goal is to place the injured party in the same position they would have been in if the contract had been performed. The law protects two interests:

- Expectation Interest: The value the injured party expected to receive from the contract.
- Reliance Interest: The loss suffered in performing the contract prior to the termination.

Typically, damages aim to protect the expectation interest. This inherently includes any reliance loss, as money spent in reliance was an investment toward the expected return. Only when expectation losses are too speculative to prove will

5 *[1962] 2 QB 26*

6 *[1962] 2 QB 26*

7 *(1853) 2 El & Bl 678; 118 ER 922*

8 *(1846) 8 QBD 371; 115 ER 916.*

9 *Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd. [1985] 2 MLJ 291*

the court fall back to protecting the reliance interest, aiming simply to restore the claimant to their pre-contract position.

Restitution, on the other hand, is based on unjust enrichment. Its purpose is not to compensate for a lost future, but to restore benefits conferred. It aims to return the parties to their pre-contract positions, as though the deal never occurred. Restitution, in particular, only becomes available when there has been a total failure of consideration. The test is strict: did the promisor perform any part of the contractual duty for which it was paid? If it performed even minimally, restitution fails.

Hence, the sequence is clear: first termination, then remedy.

The doctrine of total failure of consideration has no role in deciding whether a party can terminate. That question is answered solely by Section 40 and the principles of fundamental breach. The "total failure" test applies only after termination, to determine whether an injured party can get its money back.

As observed in *Kartar Singh v. Pappa:*[10]

> ***The truth is that an action for money had and received has nothing in common with an action in contract.*** *In the case of contract the obligation arises from the agreement of the parties and in the present case it was for the performance of this obligation that the security was given.* ***In the case of an action for money had and received, the obligation is created by operation of law once certain facts which do not include agreement between the parties are established.***

Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd

A property developer, Berjaya Times Square, failed to deliver vacant possession of a shop lot on time. The purchaser, M Concept, wanted out — to rescind the contract and get its money back.

The Federal Court ruled that M Concept was not entitled to rescind the contract.

In doing so, it ruled that Section 40 represents the common law right of rescission, which can only be exercised when there is a total failure of consideration. The phrase *"his promise in its entirety"* was interpreted strictly. As a result, the Court concluded that a non-defaulting party cannot terminate the contract if there has been any part performance by the defaulting party.

In the court's words, the test is:

> *"Whether the party in default has failed to perform his promise in its entirety."*

In essence, the Court held that the innocent party cannot end the contract if there has been part performance, even if that performance is incomplete or unsatisfactory.

10 [1954] 1 MLJ 193

While the Court's intention to provide clarity was evident, the ruling created tension with two key aspects of contract law.

a) The Guidance of Statutory Illustration.

The decision did not engage with Illustration (a) to Section 40, which provides a clear example of termination following part-performance. The illustration permits a theatre manager to dismiss a singer after she misses one performance, even though she performed for five previous nights. This suggests that the legislative intent behind "in its entirety" was not to require absolute non-performance, but to address a failure that goes to the root of the contractual bargain.

b) The Scope of Precedent

The Court relied on the UK case of *Stocznia Gdanska SA v Latvian Shipping Co* to support its linking of termination with total failure of consideration.[11]

However, in *Stocznia*, the right to terminate the contract was never in dispute. The court's analysis focused exclusively on a separate issue: the right to the restitution of money paid after the contract had been discharged.

The "total failure of consideration" doctrine in that case was confined to determining the availability of that specific restitutionary remedy, not the right to terminate itself.

The *Berjaya* decision thus had the effect of merging two distinct legal questions: the right to terminate for breach, and the right to restitution for unjust enrichment.

This interpretation led to challenging outcomes in practice. It created a situation where any degree of part-performance by a defaulting party could potentially bar termination, even for a fundamental breach. This presented commercial parties with a difficult dilemma, as it limited their ability to cleanly exit agreements that were no longer serving their intended purpose.

Damansara Realty Bhd v Bungsar Hills Holdings Sdn Bhd & Anor

In *Damansara Realty*[12], the Federal Court attempted to distinguish Berjaya on the facts:

> *[58] In Berjaya Times Square Sdn Bhd it was held as long as some work has been done indicating that the development or construction had commenced, there would be no total failure of consideration because the promise had been performed although not in its entirety. On the facts of that case the decision may be supportable.* ***But we do not agree with the stand that there can be no total failure of consideration so long as part of the promise has been fulfilled.***

11 *[1998] 1 All ER 883*

12 *[2011] 6 MLJ 464*

> *[59] In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar. We are inclined to take the view that minimal works such as getting development permission orders or taking possession over the land for development purposes may not in most instances fall on the same side as Berjaya Times Square Sdn Bhd.* ***This is simply because such an interpretation does not make commercial sense. What good is a mere foundation of an office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety.***

This passage reveals that the Court accepts and develops from the premise laid down in Berjaya Times Square. On that basis, the Federal Court formulated the following test:

> *[60] ...* ***As such the principle should therefore be this. There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance.***

While this test introduced a welcome element of commercial practicality, it was important to note that it was constructed upon the same foundational premise as Berjaya — it continued to link the right to terminate directly to the restitutionary doctrine of total failure of consideration. This new test, though well-intentioned, represented a departure from established precedent.

The Correction: *Lim Swee Choo* Resets The Law

The Plaintiffs had purchased four parcels of land and assigned their rights to the Defendant for RM25.5 million. The Defendant paid RM23 million of this sum.

The Defendant then orchestrated a separate, illegal deal directly with the original landowner for three parcels of land.

When the courts later declared this side deal void, the Plaintiffs then sued the Defendant for the outstanding RM2.5 million. The Defendant counterclaimed, demanding a full refund of the RM23 million already paid, arguing there had been a "total failure of consideration" — that he had received nothing of value for his money.

The Federal Court took this opportunity to make three crucial clarifications:

i. Restoring the Correct Test for Repudiation

The Court reinstated the correct test for repudiation: whether the actions of the defaulting party would lead a reasonable person to conclude they no longer intend to be bound by the contract.

This objective test focuses on the breaching party's conduct and its impact on the contractual relationship, not on whether consideration had totally failed.

ii. Untangling Termination from Restitution

The Court drew a bright line between termination and restitution. It held that the "total failure of consideration" doctrine applies only to restitutionary claims. It has no role in determining the right to terminate a contract for breach.

A restitution claim arises only after a contract is voided or terminated, and only if the claimant has received no benefit whatsoever. Any partial performance, however small, defeats a claim of total failure.

The Court established the proper sequence:

a) First, determine the right to terminate under Section 40.
b) Only after valid termination, consider a restitution claim.

The cause of action for breach (termination) is entirely separate from the cause of action for unjust enrichment (restitution).

iii. Clarifying the test of total failure of consideration

The Court went a step further. It corrected the substantive test for what constitutes a "total failure of consideration." It explicitly rejected the formulation in *Berjaya Times Square* and instead reinstated the authoritative test from *Stocznia Gdanska*.

The *Berjaya* test asked: "whether the party in default has failed to perform his promise in its entirety."

The *Stocznia* test asks: "whether the promisor has performed any part of the contractual duties in respect of which the payment is due."

The difference is critical.

Under the correct *Stocznia* test, any performance by the promisor — however minimal — negates a total failure of consideration. If they did anything they were paid to do, a full refund is off the table.

In contrast, the *Berjaya* logic implied that only complete performance would preclude it. This would mean that in nearly every cases of breach — where a party by definition has not performed "in its entirety"— there would be

a total failure. This would make restitution the default remedy (once a contract has been terminated), thereby undermining the entire structure of contractual damages.

The Court reaffirmed the established common law principle: restitution is a drastic remedy reserved for the rare case where a claimant has received absolutely nothing for their payment. The weight of authority has always denied recovery where the claimant derived any benefit, however small.

Further, to preserve legal certainty and prevent the re-litigation of past cases decided under *Berjaya*, the Federal Court ruled that this clarified legal principle would apply prospectively from this decision onward.

Conclusion: Clarity Restored

The Federal Court's ruling in *Lim Swee Choo* has successfully resolved the legal uncertainty created by *Berjaya Times Square*. By untangling termination from restitution, the Court restored clarity to Malaysian contract law. The right to walk away from a broken contract is now once again separate from the right to demand a full refund. This return to legal precision ensures commercial parties can navigate disputes with the certainty and confidence the law requires.

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PRIVATE CAVEATS: FORM 19B WITH BIG CONSEQUENCES

by Khoo Jia Hui

Section 322 of the National Land Code (NLC) allows a person with a caveatable interest over the land (or an undivided share in the land) to enter a private caveat over the land by using Form 19B of the NLC. This effectively prohibits the registration, endorsement or entry on the register document of title any instrument of dealing executed by or on behalf of the proprietor and any certificate of sale.

It has been recognised by the Malaysian courts that a private caveat can be filed expeditiously by merely filling in the requisite form prescribed under the NLC, stating the nature of the claim the applicable is based, affirming a statutory declaration to verify his claim and paying a small fee to lodge a private caveat.

This article explores caveatable interest, and its consequences against the caveator for a wrongfully entered private caveat.

What Is A Caveatable Interest?

Not all can enter a private caveat.

Section 323 of the NLC stipulates that *any person or body claiming title to, or any registered interest in, any alienated land, or any right to such title,* may lodge a private caveat to secure its interest. The Federal Court in *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475 made it clear that only those who have a claim to a registrable interest may enter a private caveat.

The parameters of a caveatable interest have been expounded by the Court of Appeal in the landmark case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, at 742), which are,

i. Any person claiming title to any alienated land;
ii. Any person claiming any registrable interest in any alienated land; or
iii. Any person claiming any right to such title or registrable interest.

A private caveat, in practice, is usually entered by a buyer who is in the process of completing his purchase transaction on a property. Pending payment of the full purchase price, the buyer may enter a private caveat over the property to protect his interest over the property.

Another common example would be the case of a financial institution entering a private caveat over the property for the purpose of redeeming the property

from the existing chargee. By securing its interest over the property, the financial institution will only disburse a portion (or all) of its financing facility to enable the property to be redeemed from the existing chargee.

Does A Shareholder In A Company Have A Caveatable Interest Over A Piece Of Land Owned By The Company?

The short answer is no. The Court found that a shareholder of a company is *sui juris* and has no caveatable interest in his company's land.

In *Tanjung Rhu Land Sdn Bhd & Anor v Kauthar Venture Capital Sdn Bhd & Anor* [2025] 1 CLJ 479 (Tanjung Rhu Land), the first plaintiff is a company whereby the first defendant held 80% of the shares in the company, and the 20% shares were held by the Perbadanan Kemajuan Negeri Kedah (PKNK). The first plaintiff had entered into a joint venture agreement with the second plaintiff to develop three pieces of land.

A private caveat was entered by the first defendant based on the following reasons:

(a) The first defendant and PKNK became shareholders of the first plaintiff to use the commercial expertise of the first defendant and the 3 pieces of land owned by the first plaintiff to help PKNK achieve its statutory obligations and commercially develop the three pieces of land for the first defendant.

(b) Although the first defendant and PKNK are shareholders of the first plaintiff, the first defendant and PKNK are always involved in important decisions made by the first plaintiff to develop the three pieces of land holistically that will impact the socio-economy of Langkawi as a whole.

The first and second plaintiffs sought to remove the private caveat lodged by the first defendant, claiming that the first defendant had no caveatable interest.

The Kuala Lumpur High Court found in favour of the plaintiffs and held that the caveat entry application form (Form 19B) filed by the first defendant lacked facts that amounted to a caveatable interest. Referring to the case of *Hew Sook Ying v Hiw Tin Hee* [1992] 3 CLJ 1325 and relying on the doctrine of separate legal entity between a company and its shareholders, the Court found that under company law, a shareholder does not have any personal interest in the assets of the company.

The Court went further to state that a shareholder of a company may enter a caveat belonging to a company, if and only if, the shareholder is doing so in a different capacity – for example, as a purchaser of the land, or as an intended transferee pursuant to any voluntary liquidation exercise pursuant to an order authorising the company to distribute its real properties to its shareholders.

Therefore, based on the case of *Tanjung Rhu Land*, even though the shareholders of the company do have a genuine concern over the management of the property owned by its company, this does not give rise to a caveatable interest on the property.

Can A Debt Arising From The Failure To Pay Maintenance Charges Give Rise To Caveatable Interest?

This was the question posed before the Shah Alam High Court in *Ridzuan Sulaiman v Perbadanan Pengurusan Subang Square [2025] CLJU 225 (Ridzuan Sulaiman)*.

The defendant is the Management Corporation of Subang Square, who had lodged a private caveat over the property belonging to the plaintiff on account of allegedly unpaid management fees totalling to RM61,546.15. The purpose behind the private caveat was to prevent any transaction on the plaintiff's property until the debt was settled.

The plaintiff, being the registered proprietor, claimed that he had initially secured a purchaser over his property on 13.04.2022 for RM1.6 million. However, the deal fell through after the intended purchaser discovered the private caveat lodged by the defendant. On 22.08.2024, the plaintiff was only able to sell his property at a lowered consideration of RM945,000.

The defendant relied on Section 77 of the Strata Management Act (SMA), which stipulates that the plaintiff, as the proprietor, shall guarantee the payment of amounts lawfully incurred by the management corporation, the defendant. This was rejected by the High Court as Section 77 of the SMA is irrelevant to the question of caveatable interest. Furthermore, as decided by the Federal Court in *Dubon Bhd v Wisma Cosway Management Corporation* [2020] 6 CLJ 589, debt owing to the management corporation is not a secured debt, much less a registrable interest or claim to the title to the property which it relates.

Alternatively, the defendant argued that the NLC form for private caveats distinguished between "*Kaveat Persendirian Atas Tanah*" (a private caveat over the land) and "*Kaveat Persendirian Atas Kepentingan*" (a private caveat over the interest on the land). The defendant sought to claim that the private caveat entered was to bind the interest on the land, instead of the title of the property. This too, was rejected by the High Court as the defendant had failed to submit how the defendant's interest fell within the parameters of Section 323 of the NLC and the categories of persons entitled to enter a caveat as enunciated in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi and anor* [1995] 3 CLJ 520.

Ultimately, the Court decided that the defendant never had a caveatable interest in the property. The interest was a contractual claim on a debt. The defendant, as the management corporation, is not entitled to claim for title of the property or any registrable interest in the property.

Loss And Damages For A Wrongfully Entered Private Caveat

If a private caveat was entered on a property without reasonable cause, Section 329 of the NLC provides that the caveator will be liable to pay compensation to any person or body who suffers any damage or loss due to the wrongful caveat.

Damages under Section 329 of the NLC must be assessed in accordance with the principles of the law of tort *(Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien*

Chi [2003] 6 MLJ 279 and Lo Foi v Lee Ah Hong @ Lee Lum Sow [1997] MLJU 310), where the damages suffered must be reasonably foreseeable and that the damages suffered were real and actual.

Ridzuan Sulaiman v Perbadanan Pengurusan Subang Square [2025] CLJU 225

In the *Ridzuan Sulaiman* case discussed earlier, the plaintiff claimed that due to the wrongfully entered caveat by the defendant, the intended purchaser pulled out of the transaction. Thereafter, he was unable to get another sale at the same price. There was a price difference of RM655,000 in the sale of the property.

The defendant, in attempting to argue against the plaintiff's claim for damages, claimed that the intended selling price of RM1.6 million for the property in 2022 was too high compared to the market valuation of RM900,000 in 2023. Furthermore, the defendant alleged that the plaintiff's claims were merely corroborated by the plaintiff in an affidavit, but not by the intended purchaser, nor any of the witnesses to the Offer to Buy or the law firm handling the conveyancing transaction. The plaintiff had also failed to provide evidence of encashment of the earnest deposit or payment of the compensation to the purchaser.

The High Court considered the defendant's arguments and rejected the defendant's assertion that the plaintiff fabricated the Offer to Buy and its cancellation was made wholly on the basis of speculation. Without any evidence of falsification, the Court is unable to accept such arguments.

The Court in *Ridzuan Sulaiman* took the view that foreseeability as a factual element does not require actual knowledge of the specific cause or kind of the loss. It is sufficient as long as constructive knowledge of the losses suffered is foreseeable – in this case, it was reasonably foreseeable that a wrongfully entered caveat would result in the loss of interest by the intended purchasr.

Silveron Builders Sdn Bhd v YHL Property Sdn Bhd [2025] 5 MLJ 830

In this case, the question posed before the Court of Appeal was whether the party who entered the private caveat wrongfully is liable for reasonably foreseeable losses caused by the entry of the private caveat.

The respondent (YHL) had entered into a joint venture agreement with a developer to develop a piece of land owned by YHL in Johor Bahru. Under the terms of the joint venture agreement, YHL is required to enable the land to be used as security for the developer to obtain bank loans to finance the development. The developer was able to secure two loans amounting to RM36 million from two banks, Maybank and RHB, for bridging financing related to the development on the land, which were conditional upon YHL providing the land as security for the land and the registration of a third party charge on YHL's land. The developer had incurred stamp duty payment of RM60,000 to the Stamp Duty Collector for the purpose of the disbursement of the Maybank loan.

However, Maybank cancelled its loan and RHB refused to drawdown on the promised loans as third party charge in favour of the banks cannot be registered due to the existence of a private caveat on the land lodged by the appellant (Silveron). Despite receiving notices from YHL's solicitors requesting to withdraw the private caveat and advising that any damages sustained due to the wrongful caveat could be substantial, Silveron still refused to withdraw the private caveat.

In order to continue with the development of the land, the developer had no choice but to take short-term loans from other sources at a higher interest rate. This resulted in the developer had incurred additional financing costs of RM1,022,472, which includes stamp duty paid on the earlier Maybank loan and additional interest rates incurred. Under the terms of the Joint Venture Agreement, this amount is to be indemnified by YHL to the developer.

YHL sought to claim damages from Silveron for the wrongful caveat at the sum of RM1,022,472, which was the amount indemnified by YHL to the developer for additional financing costs incurred. The High Court allowed YHL's claim against Silveron and ordered Silveron to pay YHL the amount of indemnity paid by YHL to the developer. Silveron appealed against the High Court's decision.

Silveron made the following arguments: -

(1) the additional financing costs suffered as a result of the caveat were the developer's costs, not YHL's;
(2 pursuant to the terms of the Joint Venture Agreement, there were no actual losses suffered by YHL as these were expenses to be incurred by the developer; and
(3) YHL's obligation under the Joint Venture Agreement was to furnish the land for development, it did not include providing the land free from encumbrances or to indemnify the developer against losses suffered due to wrongfully entered caveats on the land.

The Court of Appeal rejected Silveron's argument. Even though it was found that YHL does not have the contractual obligation to indemnify the developer under the Joint Venture Agreement, YHL was statutorily entitled to compensation pursuant to Section 329 of the NLC for the amount it had paid to indemnify the developer of the additional financing costs.

In making its finding, the Court of Appeal had at paragraph 30 in its judgment listed the applicable legal principles governing claims for compensation under Section 329 of the NLC: -

(a) To succeed in a claim for compensation for the wrong entry of a caveat, the claimant must prove to have suffered damage or loss by reason of the wrongful entry *(Cheng Chin Chong v Shak Heng & Sons Sdn Bhd* [1982] 1 MLJ 160);
(b) Compensation can only be awarded for actual damages that are reasonably foreseeable *(Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor; Lo Foi v Lee Ah Hong @ Lee Lum Sow & Ors* [1997] MLJU 310); and

(c) Courts will not award damages where the claimant fails to prove actual loss. The claimant must prove that the damages suffered are real and actual (*Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336).

Were the damages claimed by YHL against Silveron reasonably foreseeable?

Yes. The Court of Appeal found that due to the wrongful private caveat entered by Silveron, the charge could not be registered, ultimately Maybank and RHB would not proceed to drawdown on the promised loans. It was also reasonably foreseeable that the developer would seek alternative sources of financing so as to avoid delay in the completion of its project, which could lead to more severe financial ramifications. With regards to the RM60,000 stamp duty, which was also claimed by YHL, the Court of Appeal decided that it was reasonably foreseeable for the developer to pay stamp duty in order to register the third party charge over the land for the loan.

Ultimately, the damages sought to be claimed by YHL against Silveron were reasonably foreseeable as YHL would be required to indemnify the developer against the additional financing costs.

Conclusion

It has been noted by Malaysian Courts that the responsibility of the officers at the Land Registry is to register the private caveat, without having to verify the contents of the application to ensure that the caveator indeed has a caveatable interest in the subject land (Section 324(1) of the NLC). The entry of a private caveat by the officers of the Land Registry is purely an administrative function (*Nanyang Development (1996) Sdn Bhd v How Swee Poh* ([1970] 1 MLJ 145).

A wrongfully entered private caveat may cause serious ramifications to the registered proprietor of the affected property as elucidated in the cases highlighted in this article. However, the Court in *Tanjung Rhu Land* stated that this is a "necessary evil". If the Land Registry steps in and requires verification for every private caveat entered, it would defeat the fundamental objective of a private caveat – that is to preserve the status quo of a land speedily without applying for an injunction (*Tanjung Rhu Land* at [27]).

Though private caveats may be regarded by proprietors affected by private caveats as restrictive, intrusive and even disruptive, these are the very reason why private caveats play an important role in safeguarding interests of a claimant. If exercised responsibly and in good faith, a private caveat ensures that the interests of a claimant are protected.

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UNDERSTANDING THE DETIK RIA DECISION: THE INTERSECTION OF CONDITIONAL CONTRACTS AND REGULATORY APPROVALS

by Shera Chuah

In corporate transactions, commercial outcomes are shaped not only by timing, structure and strategy, but also by strict adherence to regulatory requirements. Where regulatory approval is a condition imposed by law, its absence operates not merely as a procedural irregularity but as a substantive legal defect capable of rendering the transactional documents void for being contrary to law. The Federal Court's decision in *Detik Ria Sdn Bhd v Prudential Corporation Holdings Ltd & Anor* [2025] 4 CLJ illustrates this principle with striking clarity.

Background Facts

The dispute arose from a call/put option agreement (CPOA) entered into between the appellant, Detik Ria Sdn Bhd (Detik Ria), which held 49% of the shareholding in Sri Han Suria Sdn Bhd (SHS) and the second respondent, Prudential Assurance Company Limited (Prudential Assurance) which held 51% of the shareholding in SHS – under which Detik Ria granted a call option to Prudential Assurance and Prudential Assurance granted Detik Ria a put option. On exercise of the option, Detik Ria's shares in SHS would be sold to and purchased by Prudential Assurance, which would make Prudential Assurance the sole shareholder of SHS. The CPOA was expressly conditional upon obtaining the prior approval of, inter alia, the Minister of Finance, as mandated under the Insurance Act 1996 (IA 1996).

In 2008, Detik Ria issued a notice to exercise the put option to Prudential Assurance. The purchase consideration was RM114,120,328.77. In 2009, Prudential Assurance and Detik Ria entered into a supplemental call/put option agreement (SCPOA) where they agreed that the completion date of the put option would be deferred until Prudential Assurance was able to purchase (or to procure such person(s) acceptable to Bank Negara Malaysia to purchase) the option shares. In 2013, the Financial Services Act 2013 (FSA 2013) repealed the IA 1996. Under the FSA, instead of obtaining the requisite approval from the Minister of Finance, approval was to be obtained from Bank Negara Malaysia.

By a letter dated 30.4.2018, Detik Ria indicated its wishes to rescind its exercise of the put option and to maintain its 49% shareholding in SHS.

Together, Prudential Corporation and Prudential Assurance filed an originating summons in the High Court against Detik Ria and the late Tan Sri Datuk Abdul

Rahim, who was a 50% shareholder and a director of Detik Ria for, *inter alia*, a declaration to seek recognition of the initial arrangement between the parties. The appellants counterclaimed against Prudential for restitution, seeking for amongst others, a declaration that the CPOA and the supplements thereto were illegal and unenforceable.

High Court And Court Of Appeal

The High Court upheld the CPOA on the basis that: (a) it was not illegal, and section 66 of the Contracts Act 1950 (CA 1950) did not apply; and (b) the CPOA was a conditional contract where the obligations of the parties would only be legally enforceable upon obtaining the approval from Bank Negara. The Court of Appeal affirmed the High Court's decision that the agreements were valid and enforceable and that the parties were bound to honour their respective obligations thereunder.

Federal Court

Following the decisions of the High Court and the Court of Appeal, Detik Ria appealed to the Federal Court. The several key issues before the Federal Court are amongst others, as follows:

(1): What is the relevant legislation that applies – the IA 1996 or the FSA 2013?

The Federal Court agreed with the High Court and Court of Appeal that the applicable law is the IA 1996 and that the prior written approval of the Minister was a statutory requirement for the share transaction envisaged in the CPOA. By reason of section 272(1) of the FSA 2013 (which provides that the FSA 2013 is not retrospective in nature), the relevant applicable statutory provision is section 67 of the IA 1996 that prevails and is applicable.

(2): Was the entry into of agreements which contained conditions precedent that require mandatory approvals be obtained prior to performance of contract, illegal?

The CPOA contains a clause that affects the very formation or existence of the contract. The entry into of the CPOA did not amount to a disposal or acquisition by Detik Ria or Prudential, as it was made subject to securing consent from the Minister of Finance. Given that conditional contracts do not come into force or existence until the condition precedent is fulfilled, it was ruled that the entry into of such a contract does not, per se, render the same illegal or void.

In delivering its judgment, the Federal Court held that if parties to a corporate transaction cannot even enter into a conditional contract which sets down the content, object and purpose of the transaction, and is intended to be performed only upon obtaining full regulatory approval, then businesses and corporations would be adversely affected due to the lengthy regulatory approval process.

(3): Was there performance or effective performance of the CPOA and SCPOA notwithstanding the lack of regulatory approval? What is the effect of the substantive or material performance of the agreements?

The Federal Court considered the factual matrix from 2009 to 2018 holistically and

formed the view that the CPOA and SCPOA were substantively put into effect, such that Prudential enjoyed a degree of control over the option shares which enabled it to effectively determine SHS's decision making. Relying on documentary evidence, the Federal Court concluded that the agreements had been effectively and substantially performed and came into existence without the consent of the Minister of Finance. Such performance was therefore carried out in contravention of section 67 of the IA 1996, and the agreements had become void.

(4): Did the CPOA and the SCPOA remain specifically enforceable or become void such that specific performance was unavailable?

The question arose as to whether CPOA and SCPOA were void by reason of section 33 of the CA 1950 which provides that contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

On this point, Prudential contended that since the contingent condition (i.e. the Minister of Finance's approval) had not occurred, the agreements remained valid and subsisting and could therefore be enforced through specific performance. However, the Court disagreed and held that the agreements in the present case became void pursuant to the application of s. 33 of the Contracts Act 1950 as the consent of the Minister was never obtained. Instead, the Court opined that s. 66 of the CA is relevant and applicable to determine the remedial obligations of the parties.

(5): What is the available remedy? Does Section 66 of the CA 1950 come into play?

As previously mentioned, the Federal Court found that section 66 of the CA 1950 is applicable. 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, to the person from whom he received it.*"

Having examined the principles of applicability of section 66, the Court allowed Detik Ria's appeal with costs and concluded that section 66 is an appropriate remedy to be applied in the present appeal so as to restore the parties to their original position status quo ante i.e. the return of the purchase price paid to Detik Ria for shares in SHS that Prudential is no longer acquiring, and the restoration of Detik Ria's effective ownership and control of the 49% shareholding in SHS, together with other benefits, if any, it lost during this period.

Conclusion

The Detik Ria decision underscores the need for companies and investors to incorporate requisite regulatory approval as a strategic component of transaction planning at the initial stage, as failure to comply with such approval is not a mere irregularity but potentially an illegality which affects the basis of the transactional document, rendering them unenforceable and void.

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AI AND AUTHORSHIP AT THE EDGE: WHAT MALAYSIA'S NEXT IP FRONTIER LOOKS LIKE

by Michael C.M. Soo & Matthew Ho

Malaysia is laying the groundwork for how AI-assisted creativity will be treated in practice before Parliament turns to statutory reform. Recent WIPO–MyIPO partnership moves and MyIPO's own "Dialogue on AI + IP" groundwork, Malaysia is taking proactive steps to place itself within the global conversation on how the law and policy should respond to machine shaped creativity. This recent collaboration marks a noticeable shift in institutional posture. Malaysia is preparing its IP infrastructure to meet the next wave of technological changes rather than merely react to it.

Strategic Backdrop: Why Now, And Why Malaysia?

Last August, MyIPO convened its National Dialogue on IP and AI, gathering policy makers, legal experts, researchers, academics and industry players to confront questions concerning frontier IP policies and legislation. The discussion focused on how other jurisdictions have evolved in light of AI generated works and what steps Malaysia should take in the rapidly evolving technological environment.

Barely a month later, during the ASEAN Economic Ministers' Meeting, WIPO's Director General formalised two Memoranda of Understanding covering international accreditation recognition, technology exchange programmes, patent examiners training, enforcement collaboration, and the strengthening of IP analytics tools. As part of this deepening cooperation, a MyIPO officer will be posted as a WIPO Visiting Fellow in Geneva. In parallel, WIPO has expanded its Academy programmes and regional enforcement capacity-building sessions in which Malaysia plays an active role, signalling that the country is being positioned as part of a broader ASEAN IP capability architecture.

Equally significant is Malaysia's participation in WIPO's IP-Financing Pilot, undertaken with the Malaysian Industrial Development Finance Berhad (MIDF), adding a further layer of significance. The pilot project will test real transactions that use IP as bankable assets. In practical terms, creative companies and technology developers will be evaluated not only on their commercial track record but will have another lever to procure financing based on the robustness of their IP.

Recent months have also seen Malaysia participate in WIPO's Global IP Diagnostics initiative and ASEAN-wide enforcement roundtables, indicating that the country is aligning its internal processes with global best-practice tools designed to assess

IP readiness and innovation capability. The cumulative effect is a steady increase in Malaysia's integration into the technical and policy frameworks WIPO is constructing for the AI era.

Why Malaysia Matters In The Global Flow?

With these initiatives and partnerships, Malaysia is signalling its commitment to operate as a bulwark in the intersection of law, finance and technology. Malaysia is not merely acknowledging the rise of AI-assisted creativity; it is building the institutional architecture to govern it.

ASEAN is already a hot node in content, gaming, streaming, IP and technological development. In a region where law often lags innovation, Malaysia's signals now carry outsized influence. The first jurisdictions that properly embed AI-applied IP rules will set commercial norms for licensing, enforcement, financing and design.

Malaysia's ambition is not simply to keep pace with global developments but to position itself as one of the jurisdictions capable of interpreting and operationalising frontier technology law in a commercially meaningful way. If early indications are correct, the coming year will reveal how effectively the country can translate that ambition into practice.

The Emerging Fault Lines: Law, Practice And Friction Zones

At the core of this transformation lies the old questions of authorship. The first tension point is still copyright. Malaysia's Copyright Act 1987 is built on the assumption that works are created by human authors, and MyIPO's public comments have repeatedly framed AI as a challenge to that assumption rather than a replacement for it. In April 2025, for example, MyIPO's Director General highlighted concerns about authenticity and the protection of copyright in AI-assisted music production, noting that the adoption of AI "challenges the role and contributions of creative talents within the industry". As long as the applicable statutes are left untouched, the likely answer is that Malaysia will insist on some form of meaningful human input as the anchor for originality, and demand that rights-holders be able to demonstrate that contribution with evidence rather than assertion.

That evidential turn brings provenance and process into focus. There is an emerging expectation that creators should document how AI tools are used, what role they played, and how a human ultimately exercised judgment over the output. This is not yet a formal filing requirement in Malaysia, but it is easy to imagine practice notes nudging applicants towards more detailed authorship statements or encouraging the retention of drafts, prompts and edit histories. In that sense, the law on originality may not change immediately, but the standard of proof for AI-touched works almost certainly will.

Patents raise a different, but equally sharp, set of questions. On the face of the Patents Act 1983 and the Patents Regulations, the inventor remains a natural person: applications must name an inventor and, where the inventor does not wish

to be identified, the regulations contemplate a signed declaration from "him", language that sits uneasily with a machine claimant. Malaysian commentators have noted that, if the much-discussed DABUS applications had been filed here, they would probably have met the same fate as in the UK and Europe, where AI was rejected as an inventor. The harder question is not whether AI can be listed as an inventor (current law effectively says it cannot) but how MyIPO and the courts will assess inventive step where AI is used as a problem-solving tool. WIPO has started to explore this in its policy papers, suggesting that innovators should maintain internal records of their use of AI, including what problem was posed, how the system was configured, and what choices the human ultimately made.

Trademarks sit slightly to one side of this debate, but they are not untouched by it. Because trademarks do not have an "author" or "inventor" in the way patents, industrial designs and copyright do, AI does not unsettle the core concept of a mark as an indicator of origin in quite the same way. The interesting issues are at the edges: AI-assisted logo generation and the risk of look-alike marks, the use of AI search tools in clearance and examination, and the possibility that generative systems will push applicants towards similar visual tropes. Practitioners have begun to note, anecdotally, a sharp rise in applications for marks in AI-adjacent goods and services, with one recent Malaysian commentary citing more than 400 "AI-related" applications by mid-2025.

A key element in this space is finance. Around the world, IP-backed financing has taken prominence as a recognisable asset class. WIPO's work on intangible-asset finance notes that lenders and investors now routinely conduct targeted due diligence on IP portfolios before committing capital not just to verify the existence of rights, but to understand their legal status, ownership, validity, freedom-to-operate and fit with the borrower's business model. In parallel, valuation practices have matured: income-based approaches, discounted cash-flow models and market benchmarks are increasingly used to put a number on patents, trademarks, industrial designs and copyright, even though valuation uncertainty and enforcement risk still attract significant haircuts.

WIPO reports that IP-backed financing has grown at double-digit rates globally, with China alone seeing IP-pledged loans of roughly USD 58 billion in the first half of 2024; in the UK, banks such as NatWest have extended loans secured primarily against software and other IP rather than physical plant. Korea's experience, after reforming its legal framework to allow patents, industrial designs, trademarks and copyright to be used as collateral, also shows how quickly IP can become part of mainstream secured lending once the legal framework is in place.

Malaysia now sits directly inside this financing turn. Under the WIPO–MIDF MoU, selected Malaysian companies will be assessed using WIPO's Hands-On IP Finance templates, which require a granular analysis of ownership, market position, validity, enforceability and revenue potential before any loan is approved. If an IP rich business has a significant tranche of its portfolio in AI-affected works or inventions, any uncertainty over authorship, inventorship, training-data licences or freedom-to-operate will be translated into pricing, covenants and, in the worst case, a refusal to lend.

What The Bleeding-Edge Player Does For The Advantage Now

The most forward-looking companies are not waiting for new legislation and regulations; they are re-engineering their commercial frameworks. The first and most obvious step is to update the contract. Contracts need to reflect technological reality: warranties confirming that human input remains central to creative outputs; representations that training datasets were lawfully sourced; obligations to embed and retain provenance metadata; and precise allocations of rights between prompts, fine-tuned models, and generated outputs. In other words, contracts must evolve from being purely legal instruments to being technical compliance blueprints.

Operationally, organisations should begin building what we call creative-compliance pipelines. There is now a broad consensus among leading practices that documentation and disclosure are the new currency. The US Thaler litigation and the wider debate on AI-generated outputs, has stressed that copyright systems remain built around human authorship and that, where generative models are involved, the key is to be able to demonstrate a "perceptible human contribution" not in the abstract, but with evidence of what the human actually did.

Academic and policy work has been pushing in the same direction: both The Organisation for Economic Co-operation and Development (OECD) and recent scholarship on AI-trained-on-scraped-data emphasise the importance of transparency, provenance and traceability as a condition for workable copyright rules in the AI era. Put bluntly, if you are serious about protecting AI-assisted works, you need a paper trail and any business generating intangible assets must architect their production processes so that such a trail exists by design.

The same logic is now being applied to internal governance. AI governance is now treated as a branch of risk management. The better organised companies are building creative and R&D processes that produce evidence as a matter of course: they preserve drafts instead of overwriting them, log prompts and parameters, keep track of which systems were used for which projects and record the human decisions that turned an AI suggestion into a product. This is recognition that, as courts, offices and regulators tighten the expectations around human contribution and provenance, the absence of such records will translate into weaker rights and more expensive disputes.

Where the advantage becomes unmistakably commercial is in finance. WIPO's work on IP finance, and its new ASEAN/MIDF IP Finance Pilot, emphasise that lenders will not treat patents, trademarks and copyrights as serious collateral unless they can be properly identified, owned, valued and enforced. The UKIPO's recent work on IP-backed lending, notes that banks like NatWest and HSBC have started to offer IP-backed loans to SMEs, but only after frameworks were put in place for systematic due diligence on ownership, validity and revenue linkages. OECD reports on secured lending to SMEs tell a similar story at system level: intangible assets now make up a large share of corporate value, but their use as collateral hinges on better disclosure, registries and specialist assessment.

In that environment, the companies that obtain the best terms are those that can tell a clean, well-documented story about their IP. Leading IP and finance strategists routinely describe the lender's lens as a sequence of questions: who owns these rights?; are they valid and enforceable?; how central are they to the business; how exposed are they to challenge?; and what happens to cash flow if a key right is impaired?

Once AI is added into the mix, two further questions arise: can the borrower show that its AI-affected assets are backed by human contribution and proper licences; and can it demonstrate that its governance is robust enough to withstand regulatory or contractual scrutiny. A portfolio that can answer those questions convincingly is one that lenders in Singapore, the UK or, now, Malaysia will be prepared to finance on more favourable terms.

For businesses, the real opportunity in this transitional moment is not simply to avoid regulatory risk, but to distinguish themselves in a market where trust, authenticity and operational discipline will soon be differentiators. As AI becomes embedded in creative and technical workflows, clients, investors and partners will increasingly favour companies that can explain their process, not just showcase their product. In that sense, governance around AI is evolving into a form of brand equity.

A final insight is subtler but ultimately more consequential. AI is collapsing the distance between legal validity and commercial credibility. A portfolio that is technically registrable but operationally opaque will not command confidence from sophisticated counterparties. By contrast, businesses that can demonstrate clarity of authorship, disciplined documentation, and coherent rights architecture will find it easier to license, collaborate, and raise capital across borders. The companies that internalise this now will not just survive an update to the law, they will operate with a degree of clarity and assurance that competitors cannot easily imitate.

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DECLARATIONS, NOT LAND: SEMANTAN ESTATE AND THE FEDERAL COURT'S HARD LINE ON REMEDIES AGAINST GOVERNMENT

by Kavin Raaj

The Federal Court's broad grounds in Semantan Estate (1952) Sdn Bhd v Kerajaan Malaysia & Ors and another application (13 November 2025) arise from two related motions for leave to appeal in a dispute over government occupation of land and the scope of mandamus and section 417 of the National Land Code (NLC).

Semantan Estate sought to use public law remedies to compel the transfer and registration of land in its favour, based on a 2009 High Court declaration recognising its beneficial interest and entitlement to possession. The Federal Court held that the case did not satisfy the threshold for leave under section 96 of the Courts of Judicature Act 1964 (CJA) and reiterated that where the proper constitutional relief is compensation, the courts will not order recovery of land against the Government.

Background Facts

Parties and applications

The applicant, Semantan Estate (1952) Sdn Bhd, claimed a beneficial interest in 263.272 acres of land in Mukim Batu, Wilayah Persekutuan, now held under CT 17038, formerly Lot 4647 (CT 12530).

Two separate motions were before the Federal Court:

1. 08(f)-250-07/2025 (W) – leave to appeal in the Mandamus Appeal, i.e. against the Court of Appeal's dismissal (24.6.2025) of Semantan's appeal from the High Court's dismissal (27.10.2021) of its judicial review for mandamus; and
2. 08(f)-251-07/2025 (W) – leave to appeal in the section 417 NLC Appeal, i.e. against the Court of Appeal's decision allowing the Registrar's appeal and setting aside a High Court order compelling the Registrar of Titles to transfer the land to Semantan Estate under section 417 NLC.

In both matters, Semantan Estate effectively sought to have the Land transferred and registered in its name.

The 2009 High Court order

The foundation of Semantan Estate's position was a 2009 High Court order, which declared that:

i. Semantan Estate retained its beneficial interest in the 263.272 acres;
ii. The Government had, through its servants/agents, taken unlawful possession of the land;

iii. Semantan Estate was entitled to possession as against the Government; and
iv. The Government was to pay mesne profits as damages for trespass, to be assessed by the Senior Assistant Registrar.

The order, however, was declaratory and did not expressly direct the Government or the Registrar to transfer or register the land in Semantan Estate's name.

Later steps – mandamus and section 417

Only in 2017, some eight years after the 2009 order, did Semantan Estate apply for:

i. Judicial review, seeking mandamus to compel the Government to transfer the land; and
ii. An order under section 417 NLC compelling the Registrar of Titles to effect the transfer so as to "give effect" to the 2009 declaration.

These applications eventually culminated in the Court of Appeal decisions of 24.6.2025 and the present leave applications.

The Law

Three main strands of law frame the Federal Court's analysis.

Section 96 CJA – leave test

Section 96 CJA governs civil appeals from the Court of Appeal to the Federal Court. Leave is required and may be granted where:

i. Under s.96(a): the case involves a question of general principle decided for the first time, or a question of importance where further argument and a Federal Court decision would be of public advantage; or
ii. Under s.96(b): a decision as to the effect of a constitutional provision, including the validity of written law relating to it.

The Court cited Terengganu Forest Products and Datuk Syed Kechik, which stress that the question must be one of general legal principle not previously decided.

It also referred to Malanjum CJ's observations in Titular Roman Catholic Archbishop of Kuala Lumpur on the degree of public importance and the need for the legal issue to be finally resolved by the Federal Court.

Government Proceedings Act 1956

Section 29(1)(b) of the Government Proceedings Act 1956 ("GPA") prohibits courts from making any order for the recovery or delivery of land against the Government. This is a key statutory limit: litigants may obtain declarations or compensation, but not an order compelling the Government to hand over land.

Section 417 National Land Code

Section 417 NLC empowers the Registrar of Titles to do all things necessary to "give effect" to any judgment, order or direction of a court. It is ancillary and administrative: the Registrar gives effect to an existing operative order but does not create or enlarge substantive rights beyond what the court has ordered.

Previous Courts' Findings

Court of Appeal – Mandamus Appeal

In the Mandamus Appeal, the Court of Appeal held that the 2009 order was "purely declaratory in nature" and contained no operative or executory order directing the Government to transfer the land to Semantan Estate.

Without such a directive, there was no enforceable public duty upon which mandamus could issue. The Court also held that:

i. Section 29(1)(b) GPA expressly prohibits orders for recovery or delivery of land against the Government;
ii. Granting mandamus would circumvent this statutory bar; and
iii. The proper remedy was compensation, assessed as at 3.12.1956, the date the Government took possession, consistent with section 44 of the Land Acquisition Enactment (Cap 140).

Court of Appeal – Section 417 NLC Appeal

In the section 417 NLC Appeal, the Court of Appeal allowed the Registrar's appeal and set aside the High Court's order compelling transfer. It held that:

i. Section 417 NLC empowers the Registrar only to give effect to an existing judgment or order;
ii. Since the 2009 order did not direct any transfer of title, there was nothing to implement under section 417; and
iii. Both the mandamus and section 417 avenues were therefore legally unsustainable because they attempted to treat a declaration as if it were an executory command.

Counsel's Arguments (Reconstructed)

The broad grounds do not detail submissions, but the general positions can be inferred.

Applicant (Semantan Estate)

Semantan Estate's arguments can be summarised as follows:

1. Enforcement of the 2009 declaration
    a. The 2009 declaration of beneficial interest and entitlement to possession was said to carry an implicit obligation on the Government and land authorities to restore registrable title.
    b. Mandamus and section 417 NLC were presented as lawful mechanisms to give effect to that entitlement, not as attempts to bypass the GPA.
2. Constitutional and public importance
    a. The case was framed as involving constitutional property rights and the consequences of long-term unlawful occupation by the State, thus allegedly satisfying section 96(b) CJA.
3. Public interest and long history
    a. The age of the dispute (with possession taken in 1956) and its implications for government liability in land acquisitions were said to justify Federal Court clarification.

Respondents (Government and Registrar)

The Government and Registrar's likely stance:

1. Fact-centric dispute
   a. The case turned on the wording of the 2009 order, the delay until 2017, and established principles of mandamus, GPA and section 417 NLC – in other words, a fact-driven application of settled law.
2. No new question of law
   a. No novel question of general principle or conflicting Court of Appeal authority was identified; therefore section 96(a) was not engaged.
3. No real constitutional issue
   a. The issues did not truly involve the effect of a constitutional provision, but rather remedial choices and statutory constraints. Section 96(b) CJA was therefore not satisfied.

Federal Court's Findings

Threshold under section 96 not met

The Federal Court reaffirmed the statutory test in section 96 CJA, citing Terengganu Forest Products, Datuk Syed Kechik, and the guidance in Titular Roman Catholic Archbishop. It reiterated that leave is reserved for:

i. Questions of law of general principle not previously decided;
ii. Issues of sufficient importance and novelty that clarification is in the public interest; or
iii. Genuine issues as to the effect of constitutional provisions.

On the facts, the Court concluded that neither limb of section 96(a) nor 96(b) was satisfied.

Nature of the 2009 order

The Court reproduced the 2009 order and endorsed the Court of Appeal's conclusion that it was clear, unambiguous and declaratory:

i. It declared beneficial interest, entitlement to possession, and ordered mesne profits;
ii. It did not direct transfer or registration of the land.

The Court held that the late 2017 mandamus application was fact-centric, and no constitutional question of importance arose that required further ventilation by the Federal Court.

GPA and the limits of mandamus

The Federal Court agreed that section 29(1)(b) GPA barred orders for recovery/delivery of land against the Government, and that issuing mandamus to compel transfer would circumvent this statutory bar. The correct route was compensation, assessed as at 3.12.1956, when Semantan was first deprived of possession, as envisaged by section 44 of the Land Acquisition Enactment.

Section 417 NLC – ancillary only

On section 417 NLC, the Court held that the provision allows the Registrar only to give effect to an existing judgment or order. Since the 2009 order did not instruct

any transfer, there was nothing for the Registrar to implement, and section 417 could not be used to convert a declaration into an executory order.

Outcome and directions

The Federal Court therefore dismissed both leave applications, with no order as to costs, holding that they failed to meet the section 96 CJA threshold. It also directed that a case management date be fixed on 17 November 2025 at 9.00 a.m. before YA Tuan Roslan bin Mat Nor, to secure an early hearing date in the High Court, and ordered all parties to attend.

Commentary

The Semantan Estate decision is concise but significant for public law and land practitioners.

Declarations vs executable orders

The case is a powerful reminder that declaratory relief and executory relief are different. A declaration that a party has a beneficial interest and is entitled to possession does not, by itself, become an order to transfer land. If transfer is the intended outcome, counsel must secure an explicit operative order at the trial stage. Trying to "enforce" a bare declaration years later through mandamus or section 417 NLC is unlikely to succeed.

No backdoor around the GPA

The Court's reliance on section 29(1)(b) GPA confirms that litigants cannot use public law remedies to evade statutory limits on remedies against the Government. Mandamus cannot be a backdoor to land recovery where Parliament has restricted relief to compensation.

This has practical consequences in historical and current acquisition cases: even where occupation was unlawful, the remedy may be monetary, not restoration of title.

Section 417 NLC – strictly administrative

The judgment also reinforces that section 417 NLC is strictly ancillary. The Registrar is not a second court and cannot expand, reinterpret, or "improve" a judgment. Where a judgment is declaratory only, section 417 is not applicable.

Leave discipline – fact-driven cases will stop at CA

Finally, Semantan Estate illustrates the Federal Court's continued insistence on discipline at the leave stage. Long-running, fact-heavy disputes, even with constitutional overtones, will not cross the section 96 threshold unless they raise a clearly framed, novel question of law or a genuine constitutional issue.

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