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**IN THE MATTER OF THE HIGH COURT IN MALAYA
IPOH, PERAK DARUL RIDZUAN
CIVIL APPEAL NO. AA-12ANVC-2-01/2021**

BETWEEN

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CARSEM (M) SDN BHD

(COMPANY NO: 124522-U)

....

APPELLANT

AND

FATIMAH BINTI NOORDIN

....

RESPONDENT

(NRIC NO: 600522-07-5376)

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**(IN THE MATTER OF NOTICE OF APPLICATION DATED 28.7.2020
(ENCL 81)**

CIVIL SUIT NO. AA-A52NCVC-40-04/2018

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IN SESSIONS COURT AT IPOH

IN THE STATE OF PERAK DARUL RIDZUAN, MALAYSIA)

BETWEEN

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CARSEM (M) SDN BHD

(COMPANY NO: 124522-U)

....

PLAINTIFF

AND

FATIMAH BINTI NOORDIN

....

DEFENDANT

(NRIC NO:600522-07-5376)

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JUDGMENT

Introduction

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[1] The Court was tasked with the query as to whether the learned Senior Assistant Registrar has the jurisdiction and power to make an order which has the effect of disposing with finality an appeal from the Subordinate Court to a Judge in Chambers of the High Court.

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[2] The Appellant was the Plaintiff and the Respondent the Defendant in the court below and the parties shall be referred to as they were in the Subordinate Court, which in this case, is the Sessions Court.

45 Chronology of salient events

[3] On **18.12.2020** the learned Sessions Court Judge (“**LSJ**”) dismissed with costs (“**Sessions Court Order of 18.12.2020**”) the Plaintiff’s application for discovery and inspection of documents under Order 24 rule
50 3 and or rule 7 Rules of Court 2012 (“**ROC 2012**”).

[4] Dissatisfied, by notice of appeal dated **13.1.2021** (Encl 1) the Plaintiff appealed to the High Court.

[5] The Plaintiff's record of appeal (Encl 3 to 6) was filed on **10.2.2021**.

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[6] On **24.3.2021**, the Defendant filed an application (Encl 8) to have the appeal struck out on the ground that the notice of appeal (Encl 1) and the record of appeal have been filed out of time.

60 [7] We now come to the critical event which forms the crux of the decision under appeal. On **25.3.2021**, a case management was conducted by way of e-Review before the learned Senior Assistant Registrar ("SAR"). The Court's minutes of this event is set out in extenso hereunder so as to better appreciate what took place:

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"Tarikh : 25 Mac 2021

Peguam Responden 1 : Selamat pagi dan dengan izin Puan. Norleena peguamcara bagi Responden. Pihak Responden telah menfailkan Notis Permohonan berserta Afidavit Sokongan untuk
70 membatalkan rayuan Perayu pada 24.03.2021. Salinan dokumen tersebut juga telah diserahkan kepada peguamcara Perayu semalam secara emel dan akan dikurier pada hari ini. Untuk makluman Mahkamah saya mempunyai perbicaraan di Mahkamah Rayuan secara dalam talian. Pohon tangguh sebentar, jika perlu
75 dan sekiranya terdapat apa-apa isu untuk ditangani.

Peguam Perayu 1 : Selamat pagi Puan, Nicola Tang bagi pihak Perayu.

Peguam Perayu 1 : Pihak kami ingin memaklumkan Mahkamah yang Mulia ini bahawa pada 24.3.2021, Tuan Hakim Mahkamah Sesyen telah menolak permohonan kami untuk lanjutan masa bagi memfailkan dan menyampaikan Notis Rayuan ini.

Mahkamah : Mahkamah ambil maklum akan keputusan tersebut, Lanjutan daripada keputusan tersebut, Rayuan ini dibatalkan. Oleh yang demikian, mahkamah berpendapat permohonan Responden di Lampiran 8 iaitu untuk membatalkan Rayuan ini telah menjadi akademik.

Peguam Responden 1 : Kami ambil maklum perintah Mahkamah di atas. Namun begitu pihak Responden memohon kos daripada Perayu sebanyak RM10, 000.00.

Peguam Responden 1 : Atas alasan meskipun Perayu masih belum mendapatkan kebenaran untuk memfailkan notis rayuan di luar masa, Perayu telah memfailkan Notis Rayuan berserta Rekod rayuan yang mana tanpa prejudis kepada hak Responden, kami telah meneliti, meminda, dan meminta Perayu mengemukakan

sekali lagi deraf indeks rekod rayuan kerana tidak mematuhi standard indeks rekod rayuan yang dipraktikkan oleh peguam.

100 Peguam Responden 1 : Lanjutan daripada itu kami juga telah memfailkan permohonan untuk membatalkan rayuan Perayu. Oleh itu saya pohon kos sebanyak RM10, 000.00 Puan.

Peguam Perayu 1 : Pihak kami mengambil maklum perintah Mahkamah.

105 **Peguam Perayu 1 : Untuk makluman Puan, pihak kami sedang mengambil arahan daripada pelanggan untuk memfailkan rayuan bagi keputusan bertarikh 24.3.2021.**

Peguam Perayu 1 : Puan, Defendan telah memfailkan permohonan tersebut selepas Mahkamah Sesyen telah memberi keputusan
110 supaya menolak permohonan Plaintiff untuk lanjutan masa.

Peguam Perayu 1 : Berkenaan dengan dakwaan bahawa pihak kami tidak mengikut standard praktis, itu adalah tidak benar. Standard praktis yang dirujuk oleh Defendan adalah Practice Directions for the Court of Appeal.

115 Peguam Perayu 1 : With respect Puan, Costs of Rm10,000.00 is not reasonable. We have also been ordered to pay costs of RM3,000.00 in the Sessions Court for the dismissal of our application for extension.

Peguam Perayu 1 : In any event, the Appellant is entitled to file the
120 Notice of appeal before the notice of application is filed.

Peguam Perayu 1 : With respect Puan, the Respondent had only
commented on the draft Index which consisted of 3 pages. In fact,
we had prepared the Record of Appeal based on the Respondent'
wishes, which as we mentioned, was based on the Practice
125 Direction of Court of Appeal which are not relevant to the
proceedings here. As such, it is our side who has incurred costs on
the preparation of the Records.

**Peguam Perayu 1 : Puan, memandangkan pihak kami akan
memfailkan notis rayuan terhadap keputusan Mahkamah
130 Sesyen, rayuan ini tidak patut dibatalkan.** Dalam hal ini, pihak
kami baru mendapat arahan anak guam kami.

Peguam Perayu 1 : Dalam apa jua keadaan, memandangkan
Responden telah memfailkan permohonan mereka untuk
membatalkan Rayuan ini, pihak kami mempunyai hak untuk
135 membalas terhadap affidavit sokongan Responden tersebut.

**Peguam Responden 1 : With respect to my learned friend, this
Honourable Court had made a decision and /or Order that this
appeal is dismissed and enclosure 8 is academic. And this
140 honourable court had taken cognisance of the lower courts'**

decision. And again, with respect, it is improper for my learned friend to insist this Honourable Court to hear this appeal when the court already made a decision and/or Order. On the issue of costs, I humbly pray so.

145 Peguam Responden 1 : In short, we abide by the court's decision.

Peguam Perayu 1 : Puan with respect, the matter is not fixed for disposal today, it is only fixed for case management.

150 **Peguam Perayu 1 : Furthermore, The Respondent has also filed a notice of application in this Court to strike out the appeal, as such, we should be given the opportunity to respond to the affidavit.**

155 **Peguam Perayu 1 : More importantly, given that we have received our client's instructions to appeal against the Sessions Court decision, this matter ought to be heard by the Judge, and should not be struck out today.**

160 Peguam Perayu 1 : May I just add Puan, the application that the respondent has filed in on 24.3.2021, directions were previously given for any applications to be made by 19.3.2021. That was not complied with and we have informed the court of this during our last CM on 22.3.2021.

Peguam Perayu 1 : Puan, given that today is only fixed for case management, we humbly ask for a date before the Judge. This appeal ought to still stand based on the above mentioned matters.

Peguam Responden 1 : Puan, I stand to be corrected, but if my learned friend is dissatisfied with the Court's decision today, she may file an appeal to the court of appeal. With respect, this Honourable cannot withdraw the decision and/or order that has been pronounced.

Peguam Perayu 1 : Just to update Puan, we have filed our notice of appeal against the Sessions Court's dismissal of our application to extend time to file and service this notice of appeal. As mentioned, we humbly request for this matter to be fixed before the learned Judge so that the issues can be ventilated before this Honourable Court."

[8] Thereafter, the learned counsel for the Plaintiff, Ms Nicola Tang, followed up with the learned SAR on 26.3.2021 and the minutes of the communication is set out hereunder:

“Tarikh : 26 Mac 2021

185 Peguam Perayu 1 : Selamat sejahtera Puan, pihak kami ingin tanya
sama ada sebarang pengemaskinian tentang pemohonan kami
supaya perkara ini dirujuk kepada Yang Arif Hakim untuk tindakan
selanjutnya. Seperti yang dimaklumkan pada hari semalam
(25.3.2021), perkara ini hanya ditetapkan untuk CM pada hari
190 semalam. Oleh itu dengan rendah dirinya, rayuan ini tidak harus dan
tidak boleh dibatalkan. Pihak kami memohon untuk arahan
selanjutnya daripada Puan untuk perkara ini. Sekian, terima kasih.”

[9] The learned SAR then referred the matter to me and the minutes
195 of the Court’s records of the communication by the learned SAR to the
solicitors for the parties show as follows:

“Tarikh : 29 Mac 2021

Mahkamah : Saya telah merujuk kepada Yang Arif akan perkara ini
200 dan Yang Arif mengarahkan untuk satu pengurusan kes ditetapkan
di hadapan beliau Mahkamah : Mahkamah menetapkan 16.4.2021
sebagai Pengurusan Kes di hadapan YA Tuan Su Tiang Joo.

Peguam Perayu 1 : Selamat sejahtera Puan Hafiza, pihak kami
205 mengambil maklum tentang arahan Mahkamah yang Mulia ini.

Peguam Perayu 1 : Pihak kami ingin tanya sama ada pengurusan kes tersebut adalah secara fizikal ataupun atas talian Zoom/Skype?

Mahkamah : secara fizikal @kehadiran peguam di mahkamah.

210 System : Next Schedule : A-Track - 16 Apr 2021 09:00 AM (YA Tuan Su Tiang Joo)”

[10] On **16.4.2021** after hearing parties, I posed the query as to whether the learned SAR has the power to strike out the appeal which learned
215 counsel for the Defendant submits had been ordered by the learned SAR on 25.3.2021. The matter was then adjourned to 8.6.2021 for this issue to be argued but this date was subsequently vacated and rescheduled to **2.8.2021** by reason of the Movement Control Order restricting travel and operations by reason of the COVID-19 pandemic.

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[11] After hearing parties on 2.8.2021, I reserved my decision to 6.9.2021.

[12] On **6.9.2021**, I gave a brief decision that the learned SAR does not
225 have the power to make any order that would have the effect of disposing with finality an appeal from the Subordinate Court to the High Court which is to be determined by a Judge in Chambers and that the learned SAR

could not have made such an order on 25.3.2021 and even if she had, the order is a nullity and of no legal effect and for good order is set aside or
230 deemed to be set aside.

[13] On the **6.9.2021**, the appeal by the Plaintiff against the order of the Sessions Court of 24.3.2021 dismissing the Plaintiff's application for extension of time to file the Notice of Appeal was also before me for case
235 management. This other appeal carries the title AA-12NCvC-16-03/2021 (hereinafter referred to as "**Appeal No. 16**") which had, upon the application of the Plaintiff, been ordered by Abdul Wahab Bin Mohamed J. on 26.8.2021 to be transferred to this Court to be heard together with this action. To avoid any confusion, the appeal in this action shall hereafter
240 be referred to as **Appeal No. 2**.

[14] Seeing that the issue in the application to strike out (Encl 8) in this Appeal No. 2 is intertwined with Appeal No. 16 which is whether the Plaintiff's Appeal No. 2 should be struck out by reason of the appeal being
245 filed out of time or whether Appeal No. 16 ought to be allowed so as to give the Plaintiff an extension of time to regularise its appeal, I had on 6.9.2021 directed that both Encl 8 and Appeal No. 16 were to be heard together on 10.11.2021.

[15] Dissatisfied with the decision I have made on 6.9.2021, the Plaintiff
250 now appeals to the Court of Appeal.

Issue

[16] **Order 55 rule 5 (1) of the ROC 2012** provides that:

255 “An appeal from any decision other than a decision made after trial by the
Subordinate Court shall lie to a Judge in Chambers of the High Court.”

[17] There is no dispute and in fact indisputable that the Sessions Court
260 Order of 18.12.2020 under appeal in Appeal No. 2 is a decision other than
a decision made after trial by a Subordinate Court.

[18] As an appeal shall lie to a Judge in Chambers, the issue thus is
whether a “Judge in Chambers” includes a Senior Assistant Registrar.

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Rival contentions

[19] The Defendant drew the Court’s attention to the definition of
‘Registrars’ under subsection 10 (3) of the **Courts of Judicature Act**

270 **1964** (Revised 1972) Act 91 (“CJA”) as well as the definition of ‘Registrar’
and ‘Judge’ under Order 1 rule 4 ROC 2012.

[20] Thereafter, the Defendant went on to draw my attention to:

275 i) the jurisdiction of the Registrar as provided under Order 32
rule 9 ROC 2012 which for convenience is set out below:

“9. Jurisdiction of Registrar (O. 32 r. 9)

280 The Registrar shall have power to transact all such business and
exercise all such authority and jurisdiction as under the Act or these
Rules may be transacted and exercised by a Judge in Chambers
except such business, authority and jurisdiction as the Chief Judge
may from time to time direct to be transacted or exercised by a Judge
285 in person or as may by any of these Rules be expressly directed to
be transacted or exercised by a Judge in person.”;

ii) the provisions of power and/or jurisdiction of the “Court” in
“Pre-Trial Case Management” under Order 34 rule 2 ROC
290 2012; and

iii) the definition of “Court” under Order 1 rule 4 (2) ROC 2012;

- iv) the definition of “matter” under section 3 CJA which includes every proceeding in court not in a cause; and
- v) the definition of “proceeding” which is defined to mean any proceedings whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

[21] Mr Raam Kumar, the lead counsel for the Defendant, cited and also placed reliance upon the Federal Court authority of **Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461** where the decision of the Deputy Registrar to strike out the Plaintiff’s appeal (see Plaintiff’s written submissions Encl 21 para 31) during case management for the Plaintiff’s failure to comply with the Court’s direction was affirmed to advance the point that the Registrar does have power to strike out a matter during a case management (Encl 21 para 32).

[22] Learned counsel for the Defendant asserted that the learned SAR is seized with a wide jurisdiction under Order 32 rule 9 ROC 2012 including that to strike out the Plaintiff’s appeal. And, he added that this is consistent with Order 56 rule 1 ROC 2012 wherein any judgment, order or decision of the Registrar is appealable to the Judge (Encl 21 para 33). With the Plaintiff not having appealed to a Judge in Chambers, the Plaintiff must have taken full acceptance of the learned SAR’s Order of 25.3.2021

striking out Appeal No. 2 and is estopped from contending otherwise with
315 reliance placed on the Court of Appeal's authority of ***Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57.***

[23] Mr. Raam Kumar concluded with the assertion that in the
circumstances, the Order of 25.3.2021 is an order of the High Court and
320 it is settled law that one High Court cannot set aside a final order regularly
obtained from another High Court of concurrent jurisdiction with reliance
placed on the oft-quoted Federal Court authority of ***Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 2 CLJ 75.***

325 [24] After making reference to Order 55 rule 5 (1) ROC 2012 (supra) and
making emphasis that the appeal shall lie to a Judge in Chambers, Mr Hoi
Jack S'ng, lead counsel for the Plaintiff referred to the Federal Court
authority of ***Setali Development Sdn Bhd v Lim You Leng [1984] 1 MLJ 26 at 28C*** where the words "in Chambers" was construed to mean the
330 Judge sitting in private.

[25] Mr. Hoi Jack S'ng asserted that Order 55 rule 5 (1) ROC 2012 does
not confer jurisdiction or power on a Registrar to decide and make
dispositive orders in relation to an appeal from a Subordinate Court.

335 [26] On the contention by the Defendant that the learned SAR has the
power to strike out an appeal under Order 32 rule 9 ROC 2012 which for
ease of reading and convenience is reproduced below, emphasis was laid
by learned counsel for the Plaintiff on the words in bold:

340 “9. Jurisdiction of Registrar (O. 32 r. 9)

The Registrar shall have power to transact all such business and exercise
all such authority and jurisdiction as under the Act or these Rules may be
transacted and exercised by a Judge in Chambers **except** such business,
345 authority and jurisdiction as the Chief Judge may from time to time direct to
be transacted or exercised by a Judge in person **or as may by any of these
Rules be expressly directed to be transacted or exercised by a Judge
in person.**

350 [27] Reference was made to the Court of Appeal authority of ***RHB Bank
Bhd v Puyang Laing (F) 2017 2 MLJ 63*** where Rohana Yusof JCA (now
PCA) held at page 66 para [7]:

“[7] The power of the registrar, to exercise the authority and jurisdiction of
355 a judge in chamber(s) found in O 32 r 9 is subjected to two provisos namely:

(a) such business, authority and jurisdiction as the Chief Justice (sic) may from time to time direct to be transacted by a judge in person; or

360 (b) as may by any of these rules be expressly directed to be transacted or exercised by a judge in person.”

[28] Learned counsel for the Plaintiff concludes that Order 55 rule 5 (1) ROC 2012 makes it clear that an appeal from a Subordinate Court can
365 only be transacted or exercised by a Judge in person.

[29] As for the provisions of Order 34 ROC 2012, learned counsel for the Plaintiff pointed out that the provisions housed therein are not applicable to an appeal under Order 55 rule 5 (1) ROC 2012 because read in its
370 entirety the provisions are to do with the giving of directions to ensure the disposal of an action which originates or is brought in the High Court. Further, the learned SAR could not have availed of the provision to strike out under Order 34 rule 1 (3) ROC 2012 when there was no direction having been issued under Order 34 rule 1 (1) ROC 2012 as to lead to
375 there being a non-compliance in the first place. Indeed, this Court found that there was no direction issued for compliance prior to the e-Review on 25.3.2021.

[30] From the minutes of what took place before the learned SAR and which I have set out above, learned counsel for the Plaintiff asserts that the learned SAR did not confirm that the appeal was struck out after the Plaintiff's counsel submitted at length as to why the appeal should not be struck out, did not consider the Defendant's application for costs and had instead referred this matter to me and, therefore, the learned SAR did not strike out the appeal.

[31] With an application to strike out the appeal (Encl 8) still extant, learned counsel for the Plaintiff submits that to have the appeal struck out at an e-Review where there is an appeal against the Sessions Court's order dismissing the application for an extension of time on foot would be a decision made in breach of natural justice with reference made to the case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 at para [188].

Analysis and findings

[32] With there being a specific provision in Order 55 ROC 2012 on Appeals to High Court from Subordinate Courts and in particular, Order

55 rule 5 (1) ROC 2012, there cannot be any resort to the general provisions in Order 32 and Order 34 ROC 2012.

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[33] If there is a conflict between the specific provisions of Order 55 rule 5 (1) and the general provisions in Order 32 and Order 34 ROC 2012, the rule of statutory provision, *generalibus specialia derogant* would apply to give effect to a specific provision in preference to a general provision. See

405 ***Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu***

Samah & Ors [1988] 1 MLJ 178 at 181, [1988] 1 CLJ 31 where the

Supreme Court held that it will not invoke its inherent powers under Order

92 r 4 when the rules contain provisions making available sufficient remedies and although this was decided under the Rules of the High Court

410 1980, the principle will apply with equal force to the Rules of Court 2012.

See also ***Muraly Subramaniam v PP [2021] 7 CLJ 794 HC and PP v Chew Siew Luan [1982] CLJ 354, [1982] CLJ Rep FC.***

[34] With due respect to learned counsel for the Defendant, the facts in

415 ***Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd (supra)***

are easily distinguishable in that the matter did not deal with an appeal from a Subordinate Court to the High Court. Instead, the Deputy Registrar struck out the action after there was non-compliance with directions for discovery given under pre-trial case management in an action which

420 originated in the High Court and the appeal to the Judge in Chambers was
dismissed and instead of appealing to the Court of Appeal, the plaintiff
initiated a fresh or second suit which was struck out and the Federal Court
in the second suit held that the plaintiff's failure to appeal to the Court of
Appeal was fatal. In our case in Appeal No. 2, we are dealing with an
425 appeal from the Subordinate Court to the High Court which ought to be
disposed of by a Judge in Chambers under Order 55 rule 5 (1) ROC 2012.

[35] Indeed, taking the Defendant's position to its logical conclusion that
a Judge in Chambers for purposes of Order 55 rule 5 (1) ROC 2012
430 includes a Registrar would result in absurdity because it would mean the
learned Registrar's alleged order of 25.3.2021 striking out Appeal No. 2
would be subjected to another appeal to yet another Judge in Chambers
under Order 56 ROC 2012 on Appeals from Registrars of the High Court
to a Judge In Chambers. The absurdity being that an appeal from the
435 Subordinate Court to a Judge in Chambers can be heard by a Registrar
and whose decision can be further appealed to another Judge in
Chambers who by the Defendant's contention would also include a
Registrar.

440 **[36]** On the power granted to the Registrar housed within Order 39 rule
2 ROC 2012, I am of the opinion that the provisions of Order 55 rule 5 (1)

ROC 2012 expressly direct that an appeal from any decision other than a decision made after trial by the Subordinate Court shall be transacted and exercised by a Judge in person. The expression “in Chambers” is only to
445 differentiate it from an appeal from a decision made after trial where the appeal is to be heard by the Judge in Open Court instead of “in Chambers” which means “in private” as held by **Setali Development (supra)**.

[37] The following provisions in subsection 18 (1) and section 3 CJA
450 reproduced hereunder, provide reasons in support for the above view:

- i) subsection 18 (1) - “Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be **heard and disposed of before a single Judge.**”
- 455 ii) section 3 - “Judge” means a Judge of the Federal Court, of the Court of Appeal or of the High Court and includes the Chief Justice, the President and a Chief Judge.”

[38] What becomes immediately apparent is that a Registrar is not
460 included in the definition of a Judge. Instead, there is a separate provision altogether for the Registrar making it clear that the office of that of a Judge and a Registrar is separate with the provision for the latter’s office coming under section 10 (3) CJA which is reproduced below:

465 “The Chief Registrar, Registrars, Deputy Registrars, Senior Assistant
Registrars and Assistant Registrars appointed under this Act shall subject
to this Act or any other written law have the same jurisdiction, powers and
duties as the Masters of the Supreme Court, Clerks of Criminal Courts,
Registrars and like officers in the Supreme Court of Judicature in England
and, in addition, such further jurisdiction, powers and duties as may be
470 prescribed by rules of court.”

[39] Save for the rules discussed above, despite the efforts made by
counsel which this Court appreciates, no provision in England that would
confer upon the Master, which is equivalent to our Registrar, the power to
475 hear and dispose of appeals from the Subordinate Courts could be found
to assist in this matter.

[40] It was submitted by the Defendant (Encl 31 para 30 and 31) that a
Judge also means a Registrar. And references were made to the
480 definitions of that of a Registrar and Judge under **Order 1 rule 4 ROC
2012** which provides that a “Judge” means a Judge or Judicial
Commissioner of the High Court and includes, where he is empowered to
act, a Judge of the Sessions Court, a Magistrate or **a Registrar, as the
case may require** (emphasis added by the Defendant).

485 **[41]** Attention was also drawn by learned counsel for the Defendant to
Practice Direction No. 1 Year 2020 (Encl 31 para 40 to 44) issued by the
Chief Judge of Malaya pursuant to Order 92 rule 3B ROC 2012 and in
particular to paragraphs 6.1 and 9.6 which provides:

490 “6.1 Pengurusan kes secara e-review Kali Pertama di Hadapan
Pegawai Kehakiman.

9.6 Sekiranya mana-mana pihak gagal mematuhi arahan yang
diberikan oleh Hakim atau Pegawai Kehakiman semasa
pengurusan kes sama ada secara e-review atau kehadiran di
495 hadapan Mahkamah, Mahkamah bolehlah membuat perintah
yang lain yang sebagaimana yang difikirkannya patut
termasuklah berkenaan kos atau membatalkan tindakan atau
prosiding itu.”

500 **[42]** I understand the Defendant as asserting that premised upon the
definition of Judge under Order 1 rule 4 ROC 2012 and the said Practice
Direction No. 1 Year 2020, ‘Pegawai Kehakiman’ which indisputably
includes the learned SAR, is equivalent to that of a “Judge in Chambers”
stipulated in Order 55 rule 5 (1) ROC 2012 and the learned SAR would

505 therefore have the power to strike out an appeal from the Subordinate
Court because she would have done so as a Judge in Chambers.

[43] With respect, I disagree for the further following reasons:

- 510 i) it can be readily seen that under the definition for 'Registrar' in
Order 1 rule 4 ROC 2012, it does not provide that it means a
Judge, as the case may require. Applying the principle that the
greater includes the lesser, it can be easily understood that a
Judge would mean a Registrar as the case may require but
the converse do not hold true;
- 515 ii) the underlying jurisprudence of the hierarchy of the judicial
system set out in the Subordinate Courts Act 1948 (Revised
1972) and the Courts of Judicature Act 1964 (Revised 1972)
is such that a matter under appeal will be disposed by a higher
tier which is normally presided by a more senior judicial officer
520 than the tier subordinate to it and with all due respect, it would
not be in accord with such jurisprudence for the learned SAR
to sit in appeal over the decision of a more senior judicial
officer which in this case is a Sessions Court Judge; and
- 525 iii) even if the Registrar includes a Judge for purposes of Order
55 rule 5 (1) ROC 2012 for reasons I have already set out,

there was no earlier direction given during the e-Review as to attract a striking out order to be made as at 25.3.2021.

[44] From the facts that obtain, I am of the opinion that the learned SAR
530 had merely articulated her thoughts on 25.3.2021 that with the Plaintiff
having failed to secure an extension of time in the Sessions Court, to her
mind Appeal No. 2 would logically fail and be struck out without meaning
to make an order which she has no power to make, more so, when the
occasion was only that of an e-Review of the appeal rather than for the
535 disposal of the appeal with an application for striking out still extant. The
learned SAR had then to her credit referred the matter to me for
clarification which led to the decision made on 6.9.2021 and which is now
under appeal by the Defendant.

540 [45] The Defendant pursued the matter seeking to hold on to there being
an Order made by the learned SAR on 25.3.2021 and sought for this
alleged Order to be sealed and extracted.

[46] In ***Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap &***
545 ***Ors [2002] 6 MLJ 619, [2002] 4 CLJ 694*** Ramly Ali J (later FCJ) held:

“It is now well settled that an order pronounced by a court can always be withdrawn, altered, or modified by the same court until it is drawn up, passed and perfected. It is also well settled that when a court has pronounced judgment, it retains control over the case until the order giving effect to its judgment is formally perfected; such control however, must be used in accordance with judicial discretion. The principle relating to the power of a court to recall an unperfected order has been laid down by the English Court of Appeal in *Re Harrison's Settlement* [1955] 1 All ER 185. This principle was followed by our Federal Court in the case of ***Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 265.** It was also followed by our High Court in ***Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417; [2002] 6 MLJ 619** at 627 and *Owners of Cargo carried in the Ship Gang Cheng' v Owners and/or Persons Interested in the Ship Gang Cheng' (No 2)* [1998] 6 MLJ 492.

This power is exercisable whether it is an order made in open court or in chambers, or whether the order is by consent or otherwise, so long the order has not been perfected, ie drawn up, passed and entered (see *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch D 273)."

(emphasis added)

[47] It becomes apparent that if the expression of thought by the learned SAR made on 25.3.2021 had crystallised into a decision as alleged by the Defendant, the same is a nullity. And, the renowned jurist the late

Aboolcader J (later FCJ) speaking for the Federal Court in ***Eu Finance***

570 ***Berhad v Lim Yoke Foo [1982] 2 MLJ 37*** at 39 & 40 said:

“The general rule is that where an order is a nullity, an appeal is somewhat
useless as despite any decision on appeal, such an order can be
successfully attacked in collateral proceedings; it can be disregarded and
575 impeached in any proceedings, before any court or tribunal and whenever it
is relied upon — in other words, it is subject to collateral attack. In collateral
proceedings the court may declare an act that purports to bind to be non-
existent. In *Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB*
729, 736, Lord Diplock L.J. (now a Law Lord) said (at page 736) that 'it has
580 been long laid down that where an order is a nullity, the person whom the
order purports to affect has the option either of ignoring it or of going to the
court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it cannot be
585 **cured in any appellate proceedings; failure to take advantage of this**
somewhat futile remedy does not affect the nullity inherent in the
challenged decision. The party affected by the decision may appeal
'but he is not bound to (do so), because he is at liberty to treat the act
as void' [*Birmingham (Churchwardens and Overseers) v Shaw (1849) 10*
590 *QB 868 880; 116 ER 329 at page 880 (per Denman C.J.)*]. In *Barnard v*
National Dock Labour Board [1953] 2 QB 18, 34 it was said that, as a notice
of suspension made by the local board was a nullity, 'the fact that there was

an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 per Singleton L.J.). Ridge v Baldwin [1964]

595 AC 40 is to the same effect.” (emphasis added)

[48] Guided by the authorities cited above, I directed that the alleged order of 25.3.2021 said to have been made by the learned SAR is not to be formally perfected pending the disposal of the appeal by the Defendant
600 to the Court of Appeal. To my mind, there will be no prejudice to the Defendant given the decision I had made on 6.9.2021 the effect of which is to set aside the alleged order of 25.3.2021, if one was indeed made by the learned SAR for the reasons I have set out above.

605 **Conclusion**

[49] In the upshot, I decided that the learned SAR does not have the power to make any order that would have the effect of disposing with finality an appeal from the Subordinate Court to the High Court which is
610 to be determined by a Judge in person and not a Registrar. Consequentially, I had decided that the learned SAR could not have made the alleged order of 25.3.2021 and even if she had done so, the same is a nullity and of no legal effect and for good order is set aside or deemed

to be set aside. By agreement of parties, the costs for this set of
615 proceeding is to be in the cause of the appeal.

(SU TIANG JOO)

620 Judicial Commissioner

High Court in Malaya

Ipoh, Perak

Dated: 11 October 2021

625

For the Appellant: Hoi Jack S'ng together with Nicola Tang of Messrs
Lee Hishamuddin Allen & Gledhill

630

For the Respondent: Raam Kumar together with Norleena bt Jamal of
Messrs K.B. Tan Kumar & Partners

“This judgment is subject to typographical revision”

635

Headnotes

Abstract – a Senior Assistant Registrar has no jurisdiction or power to
640 make an order which would have the effect of disposing with finality an
appeal from the Subordinate Court to the High Court which is to be
determined by a Judge in person and not a Registrar.

Civil proceedings – Order 55 rule 5 (1) ROC 2012 – whether Judge in
645 Chambers include a Senior Assistant Registrar

Civil proceedings – whether the Court can recall an order which has as
yet to be perfected – whether if an order is a nullity is there a need to
appeal