MING ANN HOLDINGS SDN BHD v. DANAHARTA URUS SDN BHD
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, JCA; K C VOHRAH, JCA; FAIZA THAMBY CHIK, J
CIVIL APPEAL NO: W-02-698-2000
18 JUNE 2002
[2002] 3 CLJ 300

CIVIL PROCEDURE*: Execution - Stay - Application for stay pending appeal - Test to be applied - Review of authorities - Special circumstances - Nugatory test - Whether appeal if successful rendered nugatory if stay not granted - Whether applicant's appeal against money judgment - Whether applicant could be reimbursed in the event appeal was successful - Whether merits of appeal and validity of judgment to be taken into consideration*

The applicant applied, by way of a summons-in-chambers, to stay the execution of a High Court judgment against it pending appeal. The grounds of the application were that there were special circumstances, that there were merits in the appeal and also that if stay was not granted, the appeal would be rendered nugatory. The application, however, was dismissed. Hence, the applicant's appeal.

Held:

Per Abdul Hamid Mohamad JCA

[1] There is a unanimous view from the authorities that to grant or not to grant a stay of execution pending appeal is an exercise of discretion by the court on established principles. (p 403 f-g)

[2] The approach taken by most judges appears to be that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or special grounds) that justify a stay of execution to be granted. The weight of authorities consider that special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal). The most important factor for consideration in granting a stay appears to be whether the appeal, if successful, is rendered nugatory. It does not matter whether the nugatory factor is considered under the head of "special circumstances", so long as it is considered. (pp 403 h-i & 404 a-c)

[3] The Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* declared "special circumstances" as bad law and should no longer be followed. That could not be done in view of the Federal Court decisions in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors, Kerajaan Malaysia v. Jasanusa Sdn Bhd, Kerajaan Malaysia v. Dato Haji Ghani Gilong*. (p 404 g)

[4] In *See Teow Guan, supra,* the learned judge found that the appeal would be rendered nugatory because it was doomed to failure. This court agreed that in an application for a stay of execution that the appeal if successful would be rendered nugatory is the paramount consideration. It matters not whether it is considered under the head of "special circumstances", so long as it is considered with all other relevant factors. However, the nugatory test that the courts consider in an application for a stay of execution goes to the subject matter of the case and not the merits of the appeal. In other words, the appeal, if successful, is worthless because the appellant cannot be put into its former position. That the "appeal is doomed to failure" goes to the merits of the appeal and not to the execution. (p 405 e-g)

[5] Where the Court of Appeal or the Federal Court is concerned, the court that sits to hear the stay application is only constituted to hear the stay application and not the appeal. The appeal may not even be heard by the same panel of judges. Further, the grounds of judgment and the appeal records are not usually before the court. The court, too, does not have the benefits of the argument on the merits of the appeal. In the circumstances, as a general rule, it is not only premature but it is also unfair to the parties and wrong for the court, hearing an application for a stay, to make a finding that the "appeal is doomed to failure", without any prospect of success", "has no merits" and the like. (pp 405 h-i & 406 a-b)

[6] The case of *See Teow Guan, supra,* should not be treated as laying down new principles to be applied in an application for a stay of execution. It should be confined to its own facts in an application for a stay of proceedings. (p 406 f)

[7] The affidavit in support of the application herein stated that there were special circumstances, that there were merits in the appeal and also that if stay was not granted the appeal would be rendered nugatory. The function of the court is not to look at the phrases used but to look at the substance, consider the facts and the circumstances of the case in the light of the relevant factors that should be considered in the exercise of the discretion of the court. (p 406 h)

[8] The applicant's allegation that the learned judge had unilaterally directed that the case be tried on issues after having fixed a date for a full trial was actually an allegation that went to the correctness or validity of the judgment. Further, on the merits of the appeal, this court would prefer to be neutral at this stage on the issue as it did not have the benefit of the grounds of judgment and a full argument on the merits. (p 407 a-d)

[9] The special circumstances referred to by the applicant was in fact an argument that if stay was not granted, the appeal, if successful would be rendered nugatory, or that the applicant, if successful in the appeal, could not be restored to its former position. The judgment was a money judgment and there was no allegation or evidence that the respondent was not in a financial position to repay the applicant if need be. Further, the respondent was

Danaharta Urus Sdn Bhd. (p 407 e-f)

[10] The grounds relied on by the applicant were nothing more than a fear of losing its business, customers, suppliers and goodwill. Also, the applicant feared of not being able to collect its debts from third parties in the event it was wound-up. All that the applicant had to do to avoid such fears was to settle the judgment debt. The winding-up petition was still pending. The applicant still had every opportunity to contest it. Those factors were not special circumstances nor do they show that the appeal, if successful, would be rendered nugatory. Execution is a natural process after obtaining judgment and winding-up was one of them. (p 407 f-h)

[11] From the notes of proceeding, the respondent and the learned judge had been very accommodative with the applicant. Even after a final date of hearing, a number of postponements were granted to suit the applicant. In the circumstances, this was not a case in which the court in the exercise of its discretion should grant a stay. (p 408 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pemohon telah memohon melalui saman dalam kamar untuk menggantung perlaksanaan penghakiman Mahkamah Tinggi terhadapnya sementara menantikan keputusan rayuannya terhadap penghakiman tersebut. Alasan-alasan permohonan tersebut adalah bahawa terdapatnya keadaan-keadaan khas, terdapat merit-merit di dalam rayuan tersebut dan juga bahawa jika penggantungan tidak diberikan, rayuan tersebut akan menjadi sia-sia. Permohonan tersebut, walaubagaimanapun, telah ditolak. Maka, rayuan ini.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR

[1] Terdapat pandangan sepakat daripada otoriti-otoriti bahawa untuk memberikan atau tidak memberikan penggantungan perlaksanaan sementara menantikan rayuan adalah merupakan perlaksanaan budibicara oleh mahkamah atas prinsip-prinsip yang tetap.

[2] Pendekatan yang diambil oleh kebanyakan hakim nampaknya bahawa seseorang litigan yang berjaya tidak seharusnya dilucut daripada hak menikmati hasil penghakiman yang diperolehinya kecuali terdapatnya keadaan-keadaan khas (atau alasan-alasan khas) yang mewajarkan penggantungan perlaksanaan diberikan. Otoriti-otoriti menekankan bahawa keadaan-keadaan khas semestinya bersifat khas, bukan biasa, keadaan-keadaan yang biasa atau lazim dan yang berhubung dengan perlaksanaan penghakiman tersebut dan bukan kepada keesahan atau ketepatan penghakiman tersebut (atau merit rayuan tersebut). Faktor paling penting untuk dipertimbangkan dalam memberikan sesuatu penggantungan nampaknya adalah sama ada rayuan tersebut, jika berjaya, adalah menjadi sia-sia. Ianya tidak menjadi hal sama ada faktor sia-sia dipertimbangkan di bawah tajuk "special circumstances", asalkan ianya dipertimbangkan.

[3] Mahkamah Rayuan di dalam *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* mengisytiharkan "special circumstances" sebagai tidak wajar di sisi undang-undang dan tidak seharusnya diikuti lagi. Itu tidak dapat dilakukan memandangkan keputusan-keputusan Mahkamah Persekutuan di dalam *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors, Kerajaan Malaysia v. Jasanusa Sdn Bhd, Kerajaan Malaysia v. Dato Haji Ghani Gilong*.

[4] Di dalam *See Teow Guan, supra*, hakim yang bijaksana mendapati bahawa rayuan tersebut akan menjadi sia-sia kerana ianya pasti akan gagal. Mahkamah ini bersetuju bahawa di dalam sesuatu permohonan untuk penggantungan perlaksanaan bahawa sekiranya rayuan tersebut berjaya ianya akan menjadi sia-sia merupakan pertimbangan yang paling penting. Ianya tidak menjadi hal sama ada ianya dipertimbangkan di bawah tajuk "special circumstances", asalkan ianya dipertimbangkan bersama kesemua faktor-faktor lain yang relevan. Walaubagaimanapun, ujian sia-sia yang dipertimbangkan oleh mahkamah dalam sesuatu permohonan untuk penggantungan perlaksanaan berhubung dengan hal perkara kes tersebut dan bukannya merit-merit rayuan tersebut. Dalam ertikata lain, rayuan tersebut, jika berjaya, adalah tidak berguna kerana perayu tidak boleh kembali kepada keadaannya yang dahulu. Bahawa "appeal is doomed to failure" berhubung dengan merit-merit rayuan tersebut dan tidak kepada perlaksanaan tersebut.

[5] Di mana ianya berkaitan dengan Mahkamah Rayuan atau Mahkamah Persekutuan, mahkamah yang bersidang untuk mendengar permohonan penggantungan hanya diberi kuasa untuk mendengar permohonan penggantungan tersebut dan bukan rayuan tersebut. Rayuan tersebut mungkin tidak akan juga didengar oleh panel hakim-hakim yang sama. Selanjutnya, alasan-alasan penghakiman dan rekod-rekod rayuan selalunya tidak dikemukakan di hadapan mahkamah. Mahkamah juga tidak mempunyai manfaat hujahan atas merit-merit rayuan tersebut. Dalam keadaan tersebut, secara umumnya, ianya bukan hanya pra-masa tetapi adalah juga tidak adil kepada pihak-pihak tersebut dan salah bagi mahkamah, yang mendengar sesuatu permohonan untuk penggantungan, untuk membuat keputusan bahawa "appeal is doomed to failure", "without any prospect of success", "has no merits" dan seumpamanya.

[6] Kes *See Teow Guan, supra*, tidak seharusnya dianggap sebagai membentangkan prinsip-prinsip baru untuk dipakai di dalam sesuatu permohonan untuk penggantungan perlaksanaan. Ianya haruslah terlingkung kepada fakta-faktanya tersendiri di dalam sesuatu permohonan untuk penggantungan prosiding.

[7] Afidavit yang menyokong permohonan di sini menyatakan bahawa terdapatnya keadaan-keadaan khas, bahawa terdapatnya merit-merit di dalam rayuan tersebut dan juga bahawa jika penggantungan tidak diberikan rayuan tersebut akan menjadi sia-sia. Fungsi mahkamah bukannya untuk melihat ungkapan-ungkapan yang digunakan tetapi melihat pada substannya, pertimbangkan fakta-fakta dan keadaan-keadaan kes tersebut memandangkan faktor-faktor relevan yang harus dipertimbangkan dalam melaksanakan

budibicara mahkamah tersebut.

[8] Dakwaan pemohon bahawa hakim yang bijaksana telah secara sebelah pihak mengarahkan supaya kes tersebut dibicarakan atas isu-isu selepas menetapkan satu tarikh untuk perbicaraan penuh adalah sebenarnya satu dakwaan terhadap ketepatan atau keesahan penghakiman tersebut. Selanjutnya, berdasarkan merit-merit rayuan tersebut, mahkamah ini lebih suka bersikap neutral di peringkat ini atas isu tersebut kerana ianya tidak mempunyai manfaat alasan-alasan penghakiman dan hujahan sepenuhnya atas merit-merit tersebut.

[9] Keadaan-keadaan khas yang dirujuk oleh pemohon adalah pada hakikatnya suatu hujahan bahawa jika penggantungan tidak diberikan, rayuan tersebut, jika berjaya akan menjadi sia-sia, atau bahawa pemohon tersebut, jika berjaya di dalam rayuan tersebut, tidak boleh dikembalikan semula kepada kedudukannya yang dahulu. Penghakiman tersebut adalah penghakiman wang dan tidak terdapat dakwaan atau keterangan bahawa responden tidak mampu di sisi kewangan untuk membayar balik pemohon tersebut jika diperlukan. Lagi, responden tersebut adalah Danaharta Urus Sdn Bhd.

[10] Alasan-alasan yang diharapkan oleh pemohon adalah tidak lebih daripada perasaan bimbang akan kehilangan perniagaannya, pelanggan, pembekal-pembekal dan nama baik. Juga, pemohon bimbang tidak akan dapat mengutip hutang-hutangnya daripada pihak-pihak ketiga sekiranya ianya digulung. Apa yang harus dilakukan oleh pemohon untuk mengelakkan kebimbangan sedemikian ialah menjelaskan hutang penghakimannya. Petisyen penggulungan masih menantikan penyelesaian. Pemohon masih mempunyai setiap peluang untuk mencabarnya. Faktor-faktor itu bukannya keadaan-keadaan khas dan tidak juga menunjukkan bahawa rayuan tersebut, jika berjaya, akan dijadikan sia-sia. Perlaksanaan adalah suatu proses biasa selepas mendapatkan penghakiman dan penggulungan adalah salah satu daripadanya.

[11] Daripada nota-nota prosiding, responden dan hakim yang bijaksana telah bekerjasama dengan pemohon. Malahan selepas satu tarikh perbicaraan yang muktamad, beberapa penangguhan telah diberikan mengikut kesesuaian pemohon. Dalam keadaan tersebut, ini bukannya satu kes di mana mahkamah dalam melaksanakan budibicaranya seharusnya memberikan satu penggantungan.

[Permohonan ditolak.]

Reported by Usha Thiagarajah

Case(s) referred to:

Ajaib Singh v. Jeffrey Fernandez [1970] 1 LNS 4, [1971] 1 MLJ 139 ***(refd)***

Alexander v. Cambridge Credit Corp Ltd [1985] 10 ACLR 42 ***(refd)***

All Persons In Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 ***(refd)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 ***(refd)***

Dickson Trading (S) Pte Ltd v. Transmarco Ltd [1989] 2 MLJ 408 ***(refd)***

Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd [1997] 1 CLJ 70 ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***

Leong Poh Shee v. Ng Kat Chong 1965] 1 LNS 90, [1966] 1 MLJ 86 ***(refd)***

Lim Joo Thong v. Koperasi Serbaguna Taiping Barat Bhd [1998] 1 CLJ 947 ***(refd)***

Matang Holdings Bhd & Ors v. Dato' Lee San Choon & Ors [1985] 2 MLJ 406 ***(refd)***

Mohamed Mustafa v. Kandasamy (No 2) [1979] 2 MLJ 126 ***(refd)***

Monk v. Bartram [1981] QB 346 ***(refd)***

Perwira Affin Bank Bhd v. KI Production Sdn Bhd [2000] 4 CLJ 482 ***(refd)***

Perwira Affin Bank Malaysia Bhd v. Sunny Travel & Tour Sdn Bhd & Ors (Mallal's Digest 4th edn, vol 2(2) para 4254) ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Syarikat Johore Tenggara Sdn Bhd & Ors [1989] 2 CLJ 470; [1989] 2 CLJ (Rep) 248 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1974] 1 LNS 136 , [1976] 1 MLJ 131 ***(refd)***

Salim Ismail & Ors v. Lebby Sdn Bhd (No 1) [1997] 1 CLJ 98 ***(refd)***

Sarwari Ainuddin v. Abdul Aziz Ainuddin [1999] 8 CLJ 534 ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(dist)***

Serangoon Garden Estate Ltd v. Ang Keng [1953] 1 LNS 98, [1953] 19 MLJ 116 ***(refd)***

Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***

The "Yih Shen": Lai Lai Yin v. MV "Yih Shen", Owners of and Other Persons Interested

[1986] 2 MLJ 65 ***(refd)***

Tropiland Sdn Bhd v. DCB Bank Bhd & Anor [2000] 1 CLJ 568 ***(refd)***

Wu Shu Chen v. Raja Zainal Abidin Raja Hussain & Anor [1996] 2 CLJ 353 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

Rules of the High Court 1980, O. 33 r. 2, O. 47 r. 1, O. 89

Counsel:

For the applicant/appellant - Richard Tee; M/s SK Lim & Assoc

For the respondent - N Chandran; M/s Albar & Partners

JUDGMENT

Abdul Hamid Mohamad JCA:

In this notice of motion the applicant prays for an order to stay the execution of the judgment of the High Court dated 11 August 2000 until the appeal against that judgment is heard and decided upon. We dismissed the application.

An action was commenced in the High Court at Kuala Lumpur (Civil Suit No. D6-22-1211-97) by Bank Bumiputra Malaysia Berhad, (the former plaintiff) against the applicant claiming a sum of RM1,137,997.79 and costs. The action was based on a banking facility in the form of an "Irrevocable Letter of Credit" given by the respondent to the applicant.

The former plaintiff applied for a summary judgment. The senior assistant registrar allowed the application and gave judgment for the former plaintiff. The applicant appealed to the judge in chambers. On 31 March 1999, after hearing the appeal, the learned judge made the following order:

> Court:
>
> I have read the written submission and there appears to be an issue as to who and on whose authority the *lien* of RM1,046,200/- was released to third party and whether the person giving the instruction is an authorised person. The court requires evidence to be tested at the trial.
>
> I accordingly allow the appeal with costs of RM1,800 all-in.

On 3 November 1999, the case came up for a date of hearing to be fixed. Counsel for the former plaintiff was present. Counsel for the applicant was absent. The court fixed 21 January 2000 for the hearing of the case with a note "(No postponement) one day."

On 21 January 2000, counsel for both parties were present. Respondent's counsel informed the court that the debt of the applicant company had been taken over by the respondent and that both parties were negotiating a settlement of the debt and applied for a mention date in two months.

The notes of proceedings recorded by the learned judge reads as follows:

> If the matter cannot by then be settled, then the parties have decided to go under Order 33 r. (2) on the question whether the *"lien"* was intended to be a specific charge over the facility, or was of a general nature; and that by itself would decide the outcome of the liability on the quantum.

It must be emphasised that on that day the counsel for the applicant was present.

The learned judge adjourned the case to 1 March 2000 for mention.

On 1 March 2000, counsel for both sides appeared before the learned judge. The notes recorded by the learned judge reads:

> Solicitors inform that no settlement reached and have decided to make a written submission on the point of law under Order 33 Rule 2 as to whether the *lien* given in favour of the Plaintiff was a **general** or specific in nature; and which would decide the issue on liability. Mr. Loy needs two weeks to have another round with his client towards settlement.

Again, the court adjourned the case to 22 March 2000 for mention.

On 22 March 2000, counsel for the respondent was present. The applicant's counsel was represented by a "pupil in chambers" who informed the court that the applicant's counsel wanted to discharge himself and required time to file the necessary papers.

The learned judge recorded as follows:

> To 27th April 2000 (H) Final and also the discharge application to be heard on the same date.

On 27 April 2000, respondent's counsel appeared in court. The applicant company was not represented by counsel. A director of the applicant company appeared. He applied for postponement because the applicant's counsel had discharged himself. The counsel for the respondent had no objection. The court again postponed the case to 9 May 2000, again for mention to enable the applicant to engage another counsel and to fix a date of hearing.

On 9 May 2000, the respondent's counsel was present in court. The applicant was represented by a newly appointed solicitor, Mr. Richard Tee. This is what the learned judge recorded:

Mr. Vijay Kumar for the Plaintiff.

Mr. Richard Tee for the Defendant the newly appointed solicitors, who undertake to file a written submission for a point under Order 33 Rule 3, whether the *lien* given to the Bank was a general or specific *lien*.

COURT: To 3rd July 2000 (H) (Directions given). (No postponement).

And this is what happened on 3 July 2000:

3rd JULAI 2000

Perbicaraan

Mr. Richard Tee together with Miss Y. H. Chin for the Defendant.

Miss Phang Sweet Ping for the Plaintiff.

Mr. Richard Tee wants postponement to amend his pleadings.

Miss Phang objects says ready to proceed as the solicitors had on 21st January 2000, and 1st March 2000, agreed to proceed only on a point of law under Order 33 Rule 2 of the Rules of the High court; and should be estopped from going back to the writ and amendments.

COURT:

Request for postponement is granted conditionally upon the payment of the sum of RM1,137,997.79 sen into court; or to produce an irrevocable Demand Bank guarantee in favour of the Plaintiff within 14 days of today's date undertaking to pay the sum only upon a final Judgment. It is further ordered that if the sum or guarantee as the case may be is not deposited into Court within the 14 days; then default Judgment shall forthwith be entered against the Defendant.

COURT: To 19/7/2000 (Mention).

The court again postponed the case to 19 July 2000 for mention.

This is what happened on 19 July 2000, as recorded by the learned judge:

19HB JULAI 2000

Kandungan (1).

Mr. Vijay Kumar for the Plaintiff.

Mr. Richard Tee for the Defendant.

The Court directed the Defendants at the last hearing date on 3rd July

> **2000, to deposit the sum or to produce a Bank guarantee as a pre-condition in favour of the Plaintiffs within 14 days of 3rd July i.e. by 17th July 2000. Mr. Tee informs Court that his clients have attempted to obtain the Bank guarantee; but the Bank requires more time to process the application and or take counter security as a consideration for the loan and thus needs extension of time of two weeks to finalise.**
>
> **Mr. Vijay says his clients object to this request because Danaharta is involved.**
>
> **COURT:** Further time of 14 days granted. Court to 11/8/2000 (Final) Mention.

On 11 August 2000, counsel for both parties were present. Counsel for the respondent had already filed his written submission as directed by the learned judge. Counsel for the applicant failed to do the same. The court made the following order:

> ... maka Mahkamah memutuskan bahawa *lien* yang diberikan oleh Defendan kepada Plaintif adalah secara am iaitu *lien* secara am, pihak Plaintif mempunyai hak untuk menolak ("set-off") *lien* am tersebut atas jumlah yang tertunggak dan kena dibayar oleh pihak Defendan DAN SETELAH MENDENGAR Encik V. Vijakumar peguam bagi pihak Plaintif dan Encik Richard Tee Sze Ping peguam bagi pihak Defendan DENGAN INI ADALAH DIPERINTAHKAN bahawa Defendan membayar kepada pihak Plaintif jumlah wang sebanyak RM1,137,997.79 setakat 31hb Ogos 1997 dan faedah selanjutnya ke atas jumlah tersebut pada kadar 5% setahun atas Kadar Asas Pinjaman (BLR) iaitu 9.65% setahun dari 1hb September 1997 sehingga tarikh penyelesaian penuh dan kos RM20,0000. 00.

The applicant appealed against the order. The applicant then filed a summons in chambers to stay the execution of the judgment. The application was dismissed. Hence, the applicant made the present application in this court.

In an affidavit in support of the application, the director of the applicant says that the applicant's appeal has merits because the learned judge only heard and decided the claim by the respondent on issues of law without hearing evidence of witnesses. According to him, there are issues of facts which can only be decided after hearing evidence of witnesses. He also avers that there are special circumstances ("fakta-fakta luarbiasa") to support the application. The "special circumstances" are that there are other companies that depend on the applicant company to obtain the supply of traditional medicines from China. The execution of judgment by way of company's winding-up by the respondent will cause the applicant company to lose its ability to continue to trade and the goodwill that has been established between the applicant company, the supplier and the consumers. That loss, according to the applicant, cannot be compensated with money. The business started in 1987 and has continued without any disturbance ("tanpa gangguan") until now. If it is wound up, its business might be seized ("dirampas") by others. A winding-up order will also affect the applicant's ability to collect its debts from its debtors. He says that if the stay is not granted then the appeal will be rendered academic and nugatory. He says that as proof that it is never the applicant's intention to escape from its responsibility, the applicant has offered a piece of land in Johore belonging to a third party to be charged to the respondent as security but it was

not accepted by the respondent. The respondent has on 18 January 2001 issued a notice under s. 218 of the Companies Act 1965 demanding payment. The respondent has on 2 April 2001 filed the petition of appeal and served it on the applicant on 15 May 2001. The date of hearing was fixed on 12 July 2001.

In its affidavit in reply, the respondent through its General Manager, *inter alia*, denies that the learned judge had unilaterally directed that the trial be a trial on issues under O. 33 r. 2, Rules of the High Court 1980. Referring to the notes of evidence, he says that it was agreed to by the former counsel for the applicant. He also says that the new counsel for the applicant had, on 9 May 2000 agreed to and undertook to file written submission but failed to do so. He referred to the various postponements and indulgence of the respondent and the court, all of which I have narrated earlier and will not repeat. The respondent says that it is a money judgment, and there are no special circumstances that warrants a stay of execution to be granted.

It was not my intention, at first, to review the law on the subject of stay of execution pending appeal. However, in view of the judgment of this court in *See Teow Guan & Ors v. Kian Joo Holdings Sdn. Bhd. & Ors* [1997] 2 CLJ 299, I think it is time that the authorities be reviewed. I only hope that I am not causing further confusion on the subject.

I shall take the cases in chronological order.

Serangoon Garden Estate Ltd. v. Ang Keng [1953] 19 MLJ 116, though only a judgment of the High Court (Singapore), is perhaps the most quoted case on the subject. That case is an appeal from the District Court against an order granting a stay of execution in a case where an "order for possession" had been made. The subject matter was an illegal pig-sty. It must be noted that when the application was made, not at the conclusion of the case but subsequently, no affidavit in support was filed. This is what Brown J says in his judgment:

> The learned District Judge had a discretion to grant a stay of execution. And I should not think it right to interfere with the exercise of his discretion if I was satisfied that he had exercised it on correct principles. There is no rule of practice limiting the exercise of his discretion. But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. The only ground, so far as appears in the written grounds for granting this stay, is that if the defendant succeeded in his appeal he could not be restored to the same position as before because the plaintiffs would have removed his pig-sty. That ground, standing alone, in my opinion cannot be a sufficient ground on which to grant a stay of execution. It seems to me that to hold otherwise would be to establish a precedent, and in effect to lay down a rule of practice, that in all cases where the defendant cannot be restored to his original position if his appeal succeeds, a successful litigant is to be deprived of the fruits of his litigation until such time as the appeal is determined. Such a ground might well be an important factor to take into consideration if there were other grounds. If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned District Judge in exercising his discretion to grant a stay; and I should not have

thought it right to interfere.

The following points emerge from that judgment:

(1)granting a stay pending appeal is an exercise of discretion;

(2)there is no rule of practice limiting the exercise of the discretion;

(3)it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until the appeal is determined unless there are special circumstances;

(4)the ground that, if the defendant is successful in his appeal, he cannot be restored to the same position as before, standing alone, is not a sufficient ground on which to grant a stay, however, it is "an important factor" to take into consideration, if there are other grounds, for example merit of the appeal. Both grounds, together, may well amount to "special circumstances."

Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 is a judgment of the High Court. The plaintiff had obtained a judgment in default of appearance for the land in question to be transferred to him. The defendant applied for a stay of execution. The relevant part of the judgment of Raja Azlan Shah J (as he then was) reads as follows:

> Although the court has an unqualified discretion to grant a stay it has never been the practice to do so unless it is supported by an affidavit of special circumstances. The law on the point is well settled. I quote a passage from *Halsbury's Laws of England*, 3rd Edition, Volume 16, paragraph 51 at page 35:
>
> > The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.
>
> I would also adopt a passage in *Mallal's Supreme Court Practice* at page 573 where the learned author said:
>
> > A stay will not be allowed unless there are special circumstances.
>
> The substantial question now to be posed, as I see it, is whether the allegation that the land office might take three years to sub-divide the land in question affords special circumstances for a stay. Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common. For the land office to sub-divide a piece of land is common or usual. For it to do so for a period of one, two or three years is usual or common. It is nothing distinctive or out of the way and therefore, to my mind, that by itself does not

constitute special circumstances to persuade the court to stay the execution.

In *Ajaib Singh v. Jeffrey Fernandez* [1971] 1 MLJ 139, Yong J referred to a number of cases, including a Privy Counsel judgment from India and concluded:

> After consulting these and other authorities up to the present day I am of the opinion that an application for stay of proceedings should be made promptly, and it must be proved to the satisfaction of the court that special circumstances exist such as if the stay was not granted serious or irreparable injury would result to the party applying.

It is to be noted that the court considered the fact whether the application was made promptly was also relevant. This is understandable in an exercise of a discretion. Secondly, the learned judge treated "serious or irreparable injury" as an example of special circumstances.

Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2) [1976] 1 MLJ 131 is a judgment of the Federal Court. In that case the first respondent applied to the then Federal Court for leave to appeal to the Yang DiPertuan Agong (Privy Council) and for a stay of execution. Lee Hun Hoe CJ (Borneo), in his judgment referred to a number of English cases and held that no special circumstances were shown to support the application for stay of execution and dismissed the application. This is what the learned Chief Justice (Borneo), *inter alia*, said in his judgment:

> It is my view that where stay of execution has previously been refused by this court after a hearing of an appeal lasting over a week, an application made to the same court for stay pending an appeal must be supported by special circumstances. Allegations that there has been misdirections that the verdict of judgement was against the weight of evidence, or that there was no evidence to support the verdict or judgment, are not special circumstances on which the court will grant the application. See *Monk v. Bartram* [1981] QB 346. Those are matters to be decided in the proper forum.

Mohamed Mustafa v. Kandasamy (No. 2) [1979] 2 MLJ 126 is a judgment of the Federal Court consisting of Lee Hun Hoe CJ (Borneo), Wan Suleiman FJ and Abdul Hamid J (as he then was). It was an application for leave to appeal to the Yang DiPertuan Agong and for a stay of execution. The court granted both applications, the stay being granted "to maintain status quo."

The judgment of the court was delivered by Abdul Hamid J (as he then was).

On the question of stay this is what the learned judge (as he then was) said:

> On the question of stay of execution it is I think settled law that the granting of such a stay is a matter of the court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. One of the determining factors that calls for consideration is whether by not making an order to stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the

> circumstances of each particular case.

No reference was made to earlier decisions, local or otherwise. No mention was made about "special circumstances" or "merits of the appeal", but the "nugatory test" was used in the sense that "it would deprive an appellant the results of the appeal."

In *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406, Hashim Yeop A. Sani J (as he then was) held:

> Held: as a rule the court will only grant a stay if there are special circumstances. In this case no special circumstances had been shown to justify a stay.

The learned judge (as he then was) referred to *Serangoon Garden Estate Ltd*. [1953] 19 MLJ 116 and *Monk v. Bartram* [1891] QB 346.

In *Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors.* [1985] 2 MLJ 406, there was an application for a stay of the order of dissolution of injunction pending appeal to the higher court. Yusoff Mohamed J (as he then was) referred to *Leong Poh Shee* [1966] 1 MLJ 86, *Serangoon Garden Estate Ltd*. [1953] 19 MLJ 116 and *Ajaib Singh v. Jeffrey Fernandez* [1971] 1 MLJ 139, all mentioned earlier and held held:

> There are no special grounds in this application except the appeal pending the merits of which have been discussed above.
>
> In my view, the application should be dismissed.

The *"Yih Shen": Lai Lai Yin v. M.V. "Yih Shen", Owners Of And Other Persons Interested* [1986] 2 MLJ 65 is a judgment of Mohamed Dzaiddin J (as he then was). That was an application for a stay of execution of an order for the vessel "YIH SHEN" to be appraised and sold *pendente lite*. The grounds were, first, the defendants intended to appeal against the said order and, secondly, unless restrained, the vessel, if sold prior to the appeal will render the appeal, if successful, nugatory. The learned judge (as he then was) dismissed the application. The learned judge (as he then was), *inter alia*, said:

> This is a case where the Court has an absolute and unfettered discretion to grant or refuse the stay. *Halsbury's Laws of England,* 4th Edition, Vol. 17, para. 455 states as follows:
>
> > The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.
>
> Thus, it is incumbent upon the defendant in this case to show from the affidavit the special circumstances to enable this court to grant a stay of execution. Examples of "special circumstances" are many and are enumerated at the footnote of *Halsbury's Laws (supra)*. However, the leading authority relied upon by the defendant is *Wilson v. Church (No. 2)* where Cotton LJ laid

> down the principle at p. 458 "... when a party is appealing, exercising his undoubted right to appeal, this Court ought to see that the appeal, if successful, is not nugatory." This principle was applied in *Orion Property Trust Ltd. v. Du Cane Court Ltd.*; and in the local case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*
>
> From the affidavit of Mr. Chan and the submission of counsel I cannot find anything which would amount to being nugatory in the event the appeal (Supreme Court Civil Appeal No. 173 of 1985) being successful.
>
> I should also add that the fact that the defendants believe they have a reasonable chance of success in the appeal is no ground for granting a stay. See: *Atkins v. Great Western Railway Co*., where the English Court of Appeal held that strong grounds of appeal are not sufficient to grant the application.

In *Perwira Habib Bank Malaysia Bhd. v. Sunny Travel & Tour Sdn. Bhd. & Ors.*, *Mallal's Digest* 4th edn, vol. 2(2) para; 4254, in a judgment dated 13 August 1988, Siti Norma Yaakob J (as she then was) held:

> (1) courts have an inherent jurisdiction to stay proceedings but only on grounds which are relevant to a stay. It does not extend to grounds which are properly matters of defence of law or relief in equity, for these must be raised in the action itself. Special circumstances must be shown which must relate to the enforcement of the judgment and not those which go to its validity or correctness;

In *Perwira Habib Bank Malaysia Bhd. v. Syarikat Johore Tenggara Sdn. Bhd & Ors* [1989] 2 CLJ 470; [1989] 2 CLJ (Rep) 248, Gunn Chit Tuan J (as he then was), in setting aside an order for a stay of execution, held that in hearing commercial cases, courts should recognise business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that creditors would be paid early by guarantors when the principle debtors are unable or unwilling to do so.

In *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1989] 2 CLJ 584; ([1989] 1 CLJ (Rep) 366), NH Chan J (as he then was) wrote a lengthy judgment, relying mainly on English cases again applied the "special circumstances" test. In his judgment, the learned judge, *inter alia*, says at p. 588 (p. 370) of the report:

> Put shortly, it is this: that the court has a discretion as to the granting or refusing of a stay of execution pending appeal and that as a rule it will only grant a stay if there are special circumstances, which circumstances must be deposed in the affidavit supporting the application.

On discretion of the court, the learned judge says:

> In this country, the words of s. 73 of the Courts of Judicature Act 1964 are, 'unless the court... so orders'. Plainly, this gives a discretion to the court. A judicial discretion, no doubt, which must be guided by proper rules founded on principle.

On special circumstances, the learned judge, *inter alia*, says:

> It is plain that the validity or correctness of the decision appealed from are not special circumstances.

At p. 589 (p. 371) of the report:

> Merits or strong grounds for an appeal are also not special circumstances.

At p. 595 (p. 376) of the report:

> Again there is no evidence which has been deposed on affidavit which would enable this court to find that if a stay is granted the appeal if successful would become nugatory.

In the concluding paragraph of the judgment, at p. 597 (p. 377) of the report, the learned judge says:

> The plaintiff has obtained judgment, and it seems to me impossible to suggest that on the basis of the orders which I have made, the plaintiff ought to be deprived of its rights on the judgment the fruits of which it would have been fully entitled. Therefore, whether the judgment and the orders which I have made are right or wrong and that is a matter which may be tested in the Supreme Court I reach the conclusion that there is nothing in the law and the facts which I have already mentioned which would make it just or proper for me to grant a stay of execution.

We now come to two Federal Court judgments both delivered on 3 May 1995. They are *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* [1995] 2 CLJ 701 and *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161. Both are income tax cases. Both applied the "special circumstances" test. The judgment of the court in both cases were written by Edgar Joseph Jr. FCJ. I shall only quote from the second case, ie, *Kerajaan Malaysia v. Dato' Haji Ghani Gilong*. In that case, the appellant having obtained a summary judgment, the respondent applied for and obtained an order for a stay of execution of the judgment. In allowing the appeal, the learned judge said at p. 169 of the report:

> However, in the instant appeal, the question arose whether having regard to the particular circumstances of the case, the judge was entitled to exercise his power to grant a stay.
>
> We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorised agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay. The *Jasanusa* case, was therefore readily distinguishable, on the facts. We thus had no option but to discharge the order for stay.

Three months later, on 2 August 1995, Abdul Malik Ishak J delivered his judgment in *Wu*

Shu Chen v. Raja Zainal Abidin bin Raja Hussain & Anor [1995] 2 MLJ 224. That is a case where an application for a stay of execution pending appeal that involves sum of money amounting to RM25,892,000. The decision is well summarised in the headnote:

> (2) The court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. What may amount to special circumstances it a question of fact in each case. It must be something distinctive and out of the way. An appeal to the Court of Appeal and the fact that a large amount of money is involved do not constitute special circumstances.
>
> (3)The applicant had failed to establish by affidavit evidence that the first defendant was insolvent and therefore would not be in a position to reimburse the award and to pay damages in the event that the applicant were to succeed in her appeal.

Salim bin Ismail & Ors. v. Lebbey Sdn. Bhd. (No. 1) [1997] 1 CLJ 98 is a judgment of this court consisting of Siti Norma Yaakob, Mahadev Shankar JJCA and Abdul Malik Ahmad J (as he then was). Even though the judgment was delivered on 14 August 1995, which is about three months prior to See Teow Guan & Ors v. Kim Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299, it was reported later than See Teow Guan, in the Malayan Law Journal. In that case the respondent had obtained a summary eviction order under O. 89 of the Rules of the High Court 1980. The applicant, having failed to get an order in the High Court, applied for a stay of execution in the Court of Appeal. The Court of Appeal granted a stay. Mahadev Shankar JCA, delivering the judgment of the court, inter alia, said:

> It is to be noted that the orders in the court below were not made after full trial, but on a summary application by Lebbey on affidavit evidence. The grounds of judgment of the trial judge are not before us and it would be premature for us to say that this appeal is without any prospect of success.
>
> In deciding whether to grant a stay, we have to balance the financial repercussions which will be suffered by Lebbey with the imminent destruction of the homes of the applicants if the orders appealed against are enforced.
>
> The subject-matter of this appeal from the applicants' point of view is their continued right to stay in their homes until their claims have been finally disposed of in a full trial. The destruction of that right cannot be adequately compensated with money. This is a special reason why a stay should be granted. Lebbey's counsel requested that the court only grant a conditional stay and require the applicants to deposit RM1m if a stay is to be granted. We did not think that such a request was realistic.

We now come to *See Teow Guan*. In that case the appellants presented a petition to wind-up the first respondent company of which they were shareholders. So were the respondents. The petition contained, *inter alia*, prayer 4(a) that reads:

> (4) for an order pursuant to s. 221 of the Companies Act 1965:
>
> (a)That there be a distribution in specie of shares and

investments;

The second, third and fourth respondents took out a motion to strike out prayer 4(a) on the ground that it was plain and obvious that the relief claimed therein could not be granted by the court at the hearing of a winding-up petition. The learned Judicial Commissioner who heard the motion acceded to it and struck out the prayer. Against this, the appellants appealed. The appeal was then pending before the Court of Appeal. In the meantime, the learned Judicial Commissioner proceeded to fix the petition for hearing. The appellants then moved the court for a stay of the proceedings on the petition pending the hearing and disposal of their appeal. The court consisting of Gopal Sri Ram JCA, Siti Norma Yaakob JCA (as he then was) and Mokhtar Sidin J (as he then was) unanimously dismissed the motion with costs.

The court, through the judgment of Gopal Sri Ram JCA, found that:

> It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure.

On "special circumstances", the learned judge says:

> At one time it was thought that an appellant had to demonstrate that there were special circumstances warranting a stay of proceedings or of execution. This was founded on the notion that a successful litigant ought not to be deprived of the fruits of his litigation. See the case of *The Annot Lyle* [1886] 11 PD 114. The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted is the judgment of Brown J in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116. For my part, having considered the more recent authorities on the subject, I have come to the conclusion that that decision is bad law, and ought no longer to be followed by this court.

The learned judge then quotes from the judgment of Chan Sek Keong JC for the reasons thereof and says:

> For my part, I am unable to see any good reason for our courts to cling on to a legal test which has been repudiated, for good reasons, by the courts of the jurisdiction from which that test emanated. In any event, I find that there is respectable authority in our own jurisdiction that points to a more practical and less stringent approach to the problem.

For the purpose of the discussion of this judgment later, it is important to reproduce some other parts of the judgment. This is what the learned judge says:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory

without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.

But cases may arise where, in determining the critical question whether an appeal would be rendered nugatory, this court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable. In such cases it would not, as I perceive the law, be a proper exercise of discretion for this court to shut its eyes to the practical realities of the situation, and to nevertheless proceed to grant a stay.

Take this very case. It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure. In this state of affairs, would it be a proper exercise of discretion to permit a stay and cause a delay in the prosecution of the petition? I think not. Apart from the absence of merits, there are other reasons as well.

Encik Thomas informed this court that his instructions are to consent to a winding-up order at the hearing of the petition. Indeed, the second respondent has, in para 4 of the affidavit filed in opposition to the motion, explicitly confirmed this. So, this is not a case where there will be a bitter opposition to the winding-up of the first respondent. To delay the hearing and disposal of such a case as this will, in my judgment, cause a manifest injustice to the parties. It will also put the list of the commercial court in hopeless disorder.

There is the added consideration that this is a winding-up petition which, on authority, ought to be prosecuted to a conclusion with all due speed.

...

I am convinced that it would, in the face of the judicial pronouncements which I have referred to, be a poor exercise of discretion to grant a stay in this case. What good will come of it? None, as far as I can see.

The appellants will not suffer any prejudice. They want the first respondent to be wound-up. The other respondents are agreeable to that course. So they will get their primary relief. They want the assets of the first respondent company to be distributed in *specie*. That, as I have said, is a matter over which the High Court has no jurisdiction at the hearing of the appellants' petition. But the appellants have, as I earlier observed, the right to raise this with the liquidator. He may or may not agree with the request. Either way, the party who is dissatisfied with the decision of the liquidator is entitled to raise the matter on a summons taken out before a judge of the High Court. He may affirm, vary or set aside the liquidator's decision. A further appeal against his decision lies to this court.

As against all this is to be weighed the consequences of granting a stay in this case. There is no doubt that the effect of such an order would be to prolong the disposal of what in essence is a simple matter. There will be a delay of several months while awaiting the hearing of an appeal that is bound to fail.

> Ultimately, after the passage of many wasted months, the petition will be heard unopposed and the first respondent will be wound-up. When viewed in this way, it is not difficult to see where the justice of the case lies.
>
> Accordingly, in the light of the circumstances presented to this court, I am of the view that the appellants' application for a stay should not be granted. It was, therefore, dismissed with costs. A consequential order was made directing an early hearing and disposal of the petition.

It is to be noted that the judgment was delivered on 27 November 1995, about six months after the judgments of the Federal Court in *Kerajaan Malaysia v. Jasanusa Sdn. Bhd*. [1995] 2 CLJ 701 and *Dato' Hj. Ghani Gilong* were delivered and after they were reported. No reference was made to these two cases. Only one Malaysian case was cited, that is, *Mohamed Mustafa v. Kandasamy (No 2)* [1979] 2 MLJ 126, referred to earlier. Two Singapore cases were referred to, first, the *Serangoon Garden Estate Ltd.* case (which was not followed) and secondly, *Dickson Trading (S) Pte. Ltd. v. Transmarco Ltd.* [1989] 2 MLJ 408, a decision of the High Court of Singapore by Chan Sek Keong JC (which was followed). It should be mentioned that in *Dickson Trading (S) Pte. Ltd*., Chan Sek Keong JC not only distinguished *Serangoon Garden Estate Ltd*. but said that it was wrongly decided. The learned judge in *See Teow Guan* also appears to rely quite heavily on the case of *Alexander v. Cambridge Credit Corp. Ltd.* [1985] 10 ACLR 42, a decision of the Court of Appeal of New South Wales, Australia.

The judgment in *Sarwari a/p Ainuddin v. Abdul Aziz a/l Ainuddin* was delivered on 1 December 1995 but was reported in [1999] 8 CLJ 534. It is a judgment of Shankar J (as he then was) and the learned judge applied the special circumstances test. This is what the learned judge says at p. 538 of the report:

> The issue as to whether a stay should be granted has been hotly contested. All the authorities have been reviewed by my brother NH Chan J in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd.* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366, except the following:
>
> (1)*Mohamed Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126;
>
> (2)*Orion Property Trust & Ors v. Du Cane Court Ltd* [1962] 3 All ER 466;
>
> (3)*Lee Kuan Yew v. Jeyaretnam JB* [1991] 1 MLJ 83.
>
> The core factors in this equation which emerge from these cases can be summarised as follows:
>
> (1)The court will not deprive the successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances otherwise;
>
> (2)The validity or correctness of the decision appealed from are not special circumstances;

> (3)Special circumstances are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness. Merits or strong grounds of appeal are not special circumstances;
>
> (4)Proof that a successful appeal would be nugatory is a special circumstance.

On 12 March 1996, four months after the Court of Appeal delivered its judgment in *See Teow Guan*, Abdul Malik Ishak J delivered his judgment in *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd.* [1998] 5 CLJ 49. In his judgment, the learned judge pointed out:

> With respect, *See Teow Guan* did not consider the Federal Court cases of *Kerajaan Malaysia v. Jasanusa Sdn. Bhd*. [1995] 2 CLJ 701 (FC) and *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 3 CLJ 161 (FC). These two authorities from the highest court in the country, in no uncertain terms, entrenched the special circumstances approach in the context of a stay of execution of a judgment and, I may add, a *fortiori* it must also be extended to apply to an application for a stay of proceedings in order to preserve the integrity of an appeal.

The learned judge held that he was bound by the Federal Court decisions and adopted the special circumstances approach.

On 10 July 1996, ie, the Court of Appeal delivered its judgment in *Gentali (M) Sdn. Bhd. v. Kawasaki Sunrock Sdn. Bhd*. [1996] 3 MLJ 597. Ahmad Fairuz JCA (as he then was), sitting with Lamin PCA and Abu Mansor JCA (as he then was) delivered the judgment of the court in Malay, but for convenience, I shall quote the English translation given in the law report which I find to be accurate:

> Held, dismissing the appellant's application:
>
> > (1)In an application for a stay of execution, one of the deciding factors that should be considered is whether the appellant's appeal, if successful, will become nugatory because the order to stay is not given to him nugatory in the sense that the appellant is deprived of the fruits of his success (see p 602F); *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126 followed.

The learned judge (as he then was) referred to *Mohamed Mustafa* but not to *See Teow Guan*. The judgment is silent about special circumstances. The case appears to have been decided on the "nugatory test" which the learned judge (as he then was) described as "one of the deciding factors", meaning that there are other factors to be considered. Even then the "nugatory test" was used "in the sense that the appellant is deprived of the fruits of his success" as in *Mohamed Mustafa* and not in the sense that "the appeal is doomed to failure" as in *See Teow Guan*.

It is interesting to note that O. 47 r. 1 of the Rules of the High Court 1980 empowers the court

to stay an execution by writ of seizure and sale if the court is satisfied "that there are special circumstances which render it inexpedient to enforce the judgment or order". The relevant case on this provision is *Lim Joo Thong v. Koperasi Serbaguna Taiping Barat Bhd.* [1998] 1 CLJ 947 (CA).

On 19 February 2000, this court delivered its judgment in *Tropiland Sdn. Bhd. v. DCB Bank Bhd. & Anor* [2000] 1 CLJ 568. Abu Mansor JCA (as he then was) delivering the judgment of the court, *inter alia*, said:

> We also found that the plaintiff has not shown any special circumstances for a stay to be ordered. We were fortified in our decision by the Federal Court case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors (No. 2)* [1976] 1 MLJ 131 which refused the application for stay as no special circumstances were shown to support the application for stay.

In *Perwira Affin Bank Bhd. v. K.I. Production Sdn. Bhd.* [2000] 4 CLJ 482 Kamalanathan Ratnam J, relying on the Federal Court judgment in *Jasanusa Sdn. Bhd.* applied the "special circumstances" test and also considered the merits of the appeal.

The cases mentioned above are by no means exhaustive. (I also avoid citing my own judgments). However, I think, they are sufficient to show the law on the subject that has been understood and applied by the courts in this country, at all levels, before and after *See Teow Guan*.

Putting aside *See Teow Guan* for the time being, what do the cases say?

It appears to me that it is a unanimous view that to grant or not to grant a stay of execution pending appeal is an exercise of discretion by the court. Of course some judges merely use the word "discretion", some use the words "unqualified discretion" and some use the words "absolute and unfettered discretion". To me that does not really matter. The point is that, it is an exercise of the discretion by the court on established principles.

The approach taken by most judges appears to be that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or special grounds) that justify a stay of execution to be granted. The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal). Many judges considered the question whether the appeal, if successful, is rendered nugatory under the head of special circumstances. (Sometimes, the phrase used is whether the appellant, if successful, can be restored to its former position). The general view appears to be that that is the more, if not the most, important factor of all. Of course, no one ever attempts to define special circumstances, for good reasons. It is also a common view that it depends on the facts of a particular case. Thus, "business realities" has been taken into consideration, I believe under this head. It is a common view that merits of the appeal (or correctness or validity of the judgment) is not special circumstances. Some judges do not use the term "special circumstances". They straight away consider whether the appeal, if successful, would be rendered nugatory. Examples are *Mohamed Mustafa* and *Gentali (M) Sdn. Bhd. v. Kawasaki Sunrock Sdn. Bhd.* [1996] 3 MLJ 597 (CA) and the term was used "in the sense that the

appellant is deprived of the fruits of his success." I think it does not matter whether the nugatory factor is considered under the head "special circumstances" or not, so long as it is considered.

I shall now come to *See Teow Guan*. The first thing to be noted is that it is an application for a stay of proceedings, not for a stay of execution. The decision appealed against was the decision of the learned Judicial Commissioner striking out a prayer in the winding-up petition. There was no judgment to be executed. There was no order that a party was to do something. There was nothing to be executed, really. However, with respect, the confusion arises because the judgment talks about stay of execution. If we confine that case to applications for stay of proceedings and not for stay of executions that judgment can be left alone and nothing more need be said about it.

However, as the judgment deals with principles of a stay of execution and declares that the long established principle ie, the "special circumstances" test should no longer be followed, the judgment has to be discussed.

First, *See Teow Guan* declares "special circumstances" as bad law and should no longer be followed. With respect, I do not think that the Court of Appeal can do so, particularly in view of the Federal Court judgments in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors (No 2)* [1976] 1 MLJ 131 (FC), *Jasanusa Sdn. Bhd*. and *Dato' Hj. Ghani Gilong*. *Mohamed Mustafa*, though a Federal Court judgment is no authority to say that "special circumstances" is bad law. The judgment makes no mention of "special circumstances" at all. It may well be that it considers that the appeal being rendered nugatory as "special circumstances" without saying it, or it may consider it under a separate heading, as some judges do. The point is that, that factor (appeal being rendered nugatory) was considered. Furthermore, no reference was made to the earlier Federal Court judgment in *Re Kong Thai Sawmill (Miri) Sdn. Bhd & Ors.*, which used the term "special circumstances." And, sixteen years after *Mohamed Mustafa*, the Federal Court was still using the term "special circumstances" in *Jasanusa Sdn. Bhd.* and *Dato' Hj. Ghani Gilong*. The Singapore High Court judgment and the New South Wales Court of Appeal judgment are no authority for this court to overrule our own Federal Court judgments.

Furthermore, even this court, subsequent to *See Teow Guan* was still using the "special circumstances" test see *Tropiland Sdn. Bhd. v. DCB Bank Bhd & Anor* [2000] 4 CLJ 482. So, with respect, in my judgment, it is not quite right to say that *See Teow Guan* has "jettisoned" the "special circumstances" test. The weight of authorities is simply too heavy for this court to do so and even this court subsequent to the attempt, continues to treat it as still very much alive.

My reading of *See Teow Guan* shows that having "jettisoned" special circumstances the learned judge went on to consider other factors like the appeal, if successful, would be rendered nugatory and concluded that, in that case, the appeal "was doomed to failure."

I agree that in an application for a stay of execution, that the appeal, if successful, would be rendered nugatory is the "paramount consideration" or by whatever name it is called. And, I do not think that it matters whether it is considered under the head of "special circumstances" or not, so long as it is considered and so long as he does not go so far as to say that no other factors may be considered because this is an exercise of discretion, and therefore all the

relevant factors should be considered.

My difficulty with *See Teow Guan* if it were to be applied to an application for a stay of execution is that that the learned judge found that the appeal would be rendered nugatory because it is doomed to failure. As I understand it, the nugatory test that the courts talk about in an application for a stay of execution goes to the subject matter of the case, not the merits of the appeal. In other words, the appeal, if successful, is worthless because the appellant cannot be put in its former position. That "the appeal is doomed to failure" in my view, goes to the merits of the appeal, not to the execution.

I do not think that a court hearing an application for a stay of execution should make a finding that the appeal is doomed to failure or even that there are no merits in the appeal. The reasons are given by Shankar JCA (as he then was in) in *Salim bin Ismail & Ors. v. Lebby Sdn Bhd (No 1)* [1997] 1 CLJ 98 (CA):

> The grounds of judgment of the trial judge are not before us and it would be premature for us to say that this appeal is without any prospect of success.

I would venture to add additional reasons: in the case of the Court of Appeal or the Federal Court, the court that sits to hear the stay application, it is only constituted to hear the stay application, not the appeal. Indeed the appeal may not even be heard by the same panel. Not only the grounds of judgment, usually, are not before the court, but so are the appeal records. The court too does not have the benefits of the arguments on the merits of the appeal. In the circumstances, I am of the view that, as a general rule, it is not only premature but it is also unfair to the parties and wrong for the court, hearing an application for a stay, to make a finding that the "appeal is doomed to failure", "without any prospect of success", "has no merits" and the like.

Think of a trial judge trying to apply the principle when he is hearing an application for a stay of execution against his own judgment, which under the rules will have to be made before him first. Is he going to be his own judge and say that there are no merits in the appeal against his own judgment? Even if he honestly thinks so, experience shows (here I am speaking from my ten years experience as a trial judge in the High Court, not to mention my days in the Sessions and Magistrate's Courts) that there are cases in which the trial judge is very confident of the correctness of his judgment, yet it is reversed on appeal. On the other hand, there are cases in which he is not that confident, in fact has some doubts whether he has given a correct decision, yet, on appeal it is confirmed. That, perhaps, is one of the reasons why a person should not be his own judge.

In the circumstances, I am of the view that *See Teow Guan* should not be treated as laying down new principles to be applied in an application for a stay of execution. It should be confined to its own facts in an application for a stay of proceedings. The principles that have been applied by the courts of all levels in this country remain the same. Call them by whatever name one prefers. So long as the relevant factors discussed earlier are considered, the correct principles are applied, the exercise of the discretion should not be faulted.

Back to present case. It is to be noted that the affidavit in support says that there are special circumstances, there are merits in the appeal and also that if stay is not granted the appeal will be rendered nugatory. I have said the function of the court is not to look for phrases used (as they are not "passwords") but to look at the substance, consider the facts and the

circumstances of the case in the light of the relevant factors that should be considered in the exercise of the discretion of the court and decide.

First the applicant alleges that the learned judge had unilaterally directed that the case be tried on issues after having fixed a date for a full trial. This is actually an allegation that goes to the correctness or validity of the judgment, or merits in the appeal. Even then, looking on the notes of proceedings it is clear that it is not so. Anyway, he raised no objection.

Further, even the new counsel for the appellant gave an undertaking to the learned judge to file his written submission. Why should he undertake to file his written submission before the trial if there was to be a full trial?

The applicant then talks about merits of the appeal. I prefer the more cautious approach taken by Shankar JCA in *Salim bin Ismail & Ors.* and NH Chan J (as he then was) in *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 and not say emphatically that the appeal is "doomed to failure" or otherwise, "has no merits" or otherwise, without the benefit of the grounds of judgment, a full argument on merits and I may not even be on the panel that hears the appeal eventually. I prefer to be neutral, at this stage, on the issue.

Next, the applicant talks about "special circumstances" which, in fact, is an argument that if the stay is not granted, the appeal, if successful will be rendered nugatory, or that the applicant, if successful in the appeal, cannot be restored to its former position.

It must be remembered that the judgment is a money judgment. There is not even an allegation, what more evidence, that the respondent is not in a financial position to repay the applicant if it need be. And bear in mind that the respondent is Danaharta Urus Sdn. Bhd.

The grounds relied on by the appellant are nothing more than "fear of losing"; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound-up. All that the applicant has to do to avoid such "fears" is to settle the judgment debt.

The winding-up petition is still pending. The applicant still has every opportunity to contest it.

Whatever it is, those factors are not "special circumstances" (if we want to use the term) nor do they show that the appeal, if successful, will be rendered nugatory (if we prefer that term). They are nothing unusual. Execution is a natural process after obtaining a judgment and winding-up is one of them.

From the notes of proceedings, we see that both the learned counsel for the respondent as well as the learned judge have been very accommodative with the applicant. Even after a "final" date of hearing, a number of postponements were granted to suit the applicant.

In the circumstances, is this a case in which, this court, in the exercise of its direction should grant a stay? My answer is clearly "No".

On these grounds, I would dismiss the application with costs.

My learned brothers KC Vohrah JCA and Faiza Thamby Chik J have read this judgment in draft and have expressed their agreements with it.