A

SYARIKAT SEBATI SDN BHD v. PENGARAH JABATAN PERHUTANAN & ANOR

FEDERAL COURT, PUTRAJAYA
HASAN LAH FCJ
AZAHAR MOHAMED FCJ
B
BALIA YUSOF WAHI FCJ
JEFFREY TAN FCJ
ALIZATUL KHAIR OSMAN FCJ
[CIVIL APPEAL NO: 01(f)-29-06-2017(B)]
10 JANUARY 2019

C

TRADE & INDUSTRY: *Forestry – Logging concession – Agreement – Whether there was valid and binding contract – Doctrine of res judicata – Whether arose – Whether defendants entitled to invoke para (j) of letter of approval to terminate logging contract – Issue estoppel – Whether applicable – Whether defendants*
D *precluded from re-arguing its right to withdraw concession area – Whether there was mandatory requirement for contract made on behalf of Government or State Government to be reduced into writing – Whether plaintiff entitled to claim for compensation or damages – Government Contracts Act 1949, ss. 2 & 3*

CONTRACT: *Agreement – Forestry – Logging concession – Whether there was*
E *valid and binding contract – Doctrine of res judicata – Whether arose – Whether defendants entitled to invoke para (j) of letter of approval to terminate logging contract – Whether applicable – Whether defendants precluded from re-arguing its right to withdraw concession area – Whether there was mandatory requirement for contract made on behalf of Government or State Government to be reduced into*
F *writing – Whether plaintiff entitled to claim for compensation or damages – Government Contracts Act 1949, ss. 2 & 3*

STATUTORY INTERPRETATION: *Government Contracts Act 1949, ss. 2 & 3 – Intention of Parliament – Whether there was mandatory requirement for contract made in Malaysia on behalf of Government or State Government to be reduced into*
G *writing – Whether to safeguard Government against unauthorised contracts – Whether lack of formal contract could serve as loophole – Whether Government Contracts Act 1949 could be used by Government as cloak for denial of responsibilities*

H

The appellant ('plaintiff') applied for a long term sustainable management of forests concession to the respondents ('defendants'). The first defendant approved the said application by way of a letter ('letter of approval') and the plaintiff was given the right to carry out logging activities in Hutan Simpan Gading and Bukit Belata ('the concession areas'). Pursuant to the letter of approval, the plaintiff sent draft agreements to the first defendant but there
I was no response from the defendants. In the meantime, the plaintiff was permitted to commence and carry out logging activities, and also paid the

necessary cess and premium for the licenses. Eventually, four years after the issuance of the letter of approval, the first defendant responded with a proposed standard format of agreement for execution ('the draft agreement'). The plaintiff adopted the said format and sent a revised draft agreement to the first defendant ('draft revised agreement'). Both the said agreements contained a termination clause. Subsequently, the first defendant informed the plaintiff to cease its logging activities immediately on the basis that the areas which it carried out its logging activities were now designated as a reserved forestry area ('the affected area'). The plaintiff identified alternative areas but was informed by the first defendant that they were unsuitable. The first defendant did not issue any further logging license or permit to the plaintiff. The plaintiff then commenced a civil suit at the High Court ('Civil Suit 136') against the defendants on the basis that there was in existence a logging contract between the plaintiff and the defendants based on the letter of approval and the performance thereunder and that the contract was terminated by way of the defendants' conduct. The plaintiff sought for damages for breach of contract. The Judicial Commissioner ('JC'), in dismissing the plaintiff's claim, held that there was a valid and binding logging contract between the parties, comprising both the letter of approval and the draft revised agreement ('first finding') but that the plaintiff's claim was premature as there was no act of termination nor repudiatory breach of the contract by the defendants ('second finding'). The plaintiff appealed against the second finding at the Court of Appeal, in Civil Appeal 226, which was dismissed. Based on the first finding, the plaintiff requested for the first defendant to perform the logging contract by granting the plaintiff the license to log. The first respondent responded that it was withdrawing and terminating the letter of approval pursuant to para (j) of the letter of approval ('the letter of termination'). The plaintiff then commenced originating summons ('originating summons 733') at the High Court against the defendants for, *inter alia*, a declaration that the first defendant's letter constituted a termination of the logging contract and for the appointment of an independent valuer for the purposes of the assessment of damages. The High Court Judge allowed the plaintiff's claim and held that the plaintiff was entitled to compensation, as assessed by an independent valuer, for the termination. Aggrieved, the defendants appealed to the Court of Appeal. The Court of Appeal allowed the defendants' appeal as it was not satisfied that there was in existence a valid and binding logging contract between the parties. Leave to appeal was granted by the Federal Court to determine the following question of law 'whether by virtue of s. 3 of the Government Contracts Act 1949 ('GCA'), only written contracts, executed in the manner provided thereunder with the State Government, were valid.' The issues that arose were (i) whether the finding of the Court of Appeal that there was no valid and binding logging contract between the plaintiff and the defendants was caught by the doctrine of *res judicata*; and (ii) whether s. 3 of the GCA applied to the present case.

A B C D E F G H I

Held (allowing appeal with costs)
Per Alizatul Khair Osman FCJ delivering the judgment of the court:

(1) It was unequivocally clear that the JC had determined Civil Suit 136 on its merits that there was a valid and binding logging contract between the parties and that the terms of the logging contract comprised those in the approval letter as well as the draft formal agreement. Thus, the findings of the Court of Appeal on this issue was caught by the doctrine of *res judicata* and therefore unsustainable. The Court of Appeal fell into error when it exercised its power and jurisdiction to set aside the perfected judgment of the High Court in Civil Suit 136 which was affirmed by the Court of Appeal in Civil Appeal 226. (paras 36-41)

(2) The issue of compensation arose only after the issuance of the letter of termination by the defendants which letter was issued after Civil Suit 136 had been disposed of. The defendants were not entitled to invoke para (j) of the letter of approval to terminate the logging contract as the JC had, in Civil Suit 136, already made a determination on this issue. In the premises, an issue estoppel had arisen and the defendants were precluded from re-arguing its right to withdraw the entire concession area (the balance of what was left) by invoking para (j) of the letter of approval. The question of whether the logging contract had been repudiated by the issuance of a directive under condition (j) was a matter that was 'necessary to decide' and which was 'actually decided, as the ground work of the decision' in Civil Suit 136. (paras 53-57)

(3) Based on the wordings of ss. 2 and 3 of the GCA, there is no mandatory requirement for a contract made in Malaysia on behalf of the Government or State Government to be reduced into writing as both provisions are merely worded in a contemplative manner with the use of the word 'if'. Thus, the logging contract was a valid and enforceable contract between the parties and the plaintiff was entitled to claim compensation or damages from the defendant arising from the termination of the said contract. The Court of Appeal had misapplied the provision of the GCA to the facts. (paras 69 & 84)

(4) The GCA was enacted by Parliament with the intention of safeguarding the Government or the State Government against unauthorised contracts. It is to ensure that contracts made on behalf of the Government or the State Government are properly and/or expressly authorised. This is to avoid any liability for contracts which are entered into without its authority, knowledge and/or consent. The GCA should not be used by the Government or State Government as 'a cloak for denial of responsibilities'. The lack of a formal contract should not serve as a loophole for the second defendant to deny its contractual

responsibilities arising from a logging contract. The conduct of the parties, particularly the defendants', who benefited from the forest produce cess collection, would make it inequitable for the defendants to now claim that there was no contract to begin with. This court did not think it was accurate to say that the GCA, to use the words of the Court of Appeal 'displace(s) the common law position as well as principles relating to contract.' Instead, the GCA complemented the same in contracts made on behalf of the Government or State Government. Thus, the question of law posed must be answered in the negative. (paras 78-83)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') membuat permohonan pengurusan jangka panjang mampan konsesi hutan pada responden-responden ('defendan-defendan'). Defendan pertama meluluskan permohonan tersebut melalui satu surat ('surat kelulusan') dan plaintif diberi hak menjalankan aktiviti-aktiviti pembalakan di Hutan Simpan Gading dan Bukit Belata ('kawasan-kawasan konsesi'). Selaras dengan surat kelulusan, plaintif menghantar deraf-deraf perjanjian pada defendan pertama tetapi tiada jawapan diberi oleh defendan-defendan. Pada masa yang sama, plaintif dibenarkan memulakan dan menjalankan aktiviti-aktiviti pembalakan, dan juga membayar cess dan premium yang diperlukan untuk lesen-lesen. Empat tahun selepas pengeluaran surat kelulusan, defendan pertama menjawab dengan cadangan format perjanjian standard untuk pelaksanaan ('deraf perjanjian'). Plaintif menggunakan format tersebut dan menghantar satu semakan deraf perjanjian pada defendan pertama ('semakan deraf perjanjian'). Kedua-dua perjanjian tersebut mengandungi klausa penamatan. Kemudian, defendan pertama memaklumkan plaintif agar menghentikan aktiviti pembalakan dengan serta-merta kerana kawasan-kawasan aktiviti-aktiviti pembalakan dilaksanakan kini telah ditetapkan sebagai sebuah kawasan perhutanan terpelihara ('kawasan yang terjejas'). Plaintif mengenal pasti kawasan-kawasan alternatif tetapi dimaklumkan defendan pertama bahawa ini tidak sesuai. Defendan pertama tidak mengeluarkan apa-apa lagi lesen atau permit pembalakan pada plaintif. Plaintif kemudiannya memulakan guaman sivil di Mahkamah Tinggi ('Guaman Sivil 136') terhadap defendan-defendan atas dasar bahawa wujudnya satu kontrak pembalakan antara plaintif dan defendan-defendan berdasarkan surat kelulusan dan pelaksanaan di bawahnya dan bahawa kontrak ditamatkan melalui tindakan defendan-defendan. Plaintif menuntut ganti rugi untuk pelanggaran kontrak. Pesuruhjaya Kehakiman ('PK'), dalam menolak tuntutan plaintif, memutuskan terdapat kontrak pembalakan yang sah dan terikat antara pihak-pihak merangkumi kedua-dua surat kelulusan dan semakan deraf perjanjian ('dapatan pertama') tetapi tuntutan plaintif pramatang kerana tiada tindakan penamatan atau pelanggaran undang-undang kontrak oleh defendan-defendan ('dapatan kedua'). Plaintif merayu terhadap dapatan kedua di Mahkamah Rayuan di Rayuan Sivil 226 tetapi ini ditolak.

Berdasarkan dapatan pertama, plaintif meminta defendan pertama melaksanakan kontrak pembalakan dengan memberi lesen pembalakan kepada plaintif. Responden pertama menjawab bahawa, responden pertama akan mengambil balik dan menamatkan surat kelulusan menurut perenggan (j) surat kelulusan ('surat penamatan'). Plaintif kemudiannya memulakan saman pemula ('saman pemula 733') di Mahkamah Tinggi terhadap defendan-defendan untuk, antara lain, satu pengisytiharan bahawa surat defendan pertama adalah penamatan kontrak pembalakan dan untuk satu pelantikan seorang penilai bebas untuk tujuan taksiran ganti rugi. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif dan memutuskan plaintif berhak mendapat ganti rugi, yang ditaksirkan oleh penilai bebas, untuk penamatan. Terkilan, defendan-defendan merayu ke Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan defendan-defendan kerana tidak berpuas hati bahawa wujud satu kontrak pembalakan yang sah dan terikat antara pihak-pihak. Kebenaran merayu diberikan oleh Mahkamah Persekutuan untuk menentukan soalan undang-undang berikut 'sama ada menurut s. 3 Akta Kontrak Kerajaan 1949 ('AKK'), hanya kontrak bertulis, yang dilaksanakan dalam cara yang diperuntukkan bawahnya dengan Kerajaan Negeri, adalah sah.' Isu-isu yang timbul adalah (i) sama ada dapatan Mahkamah Rayuan bahawa tiada kontrak yang sah dan terikat antara plaintif dan defendan-defendan terhalang oleh doktrin *res judicata*; dan (ii) sama ada s. 3 AKK terpakai pada kes ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Alizatul Khair Osman HMP menyampaikan penghakiman mahkamah:

(1) Jelas bahawa PK telah memutuskan Guaman Sivil 136 atas merit-merit terdapat kontrak pembalakan yang sah dan terikat antara pihak-pihak dan syarat-syarat kontrak pembalakan merangkumi apa-apa yang terdapat dalam surat kelulusan serta deraf perjanjian rasmi. Oleh itu, dapatan-dapatan Mahkamah Rayuan berkenaan isu ini terhalang oleh doktrin *res judicata* dan tidak boleh dipertahankan. Mahkamah Rayuan terkhilaf apabila melaksanakan kuasa dan bidang kuasanya untuk mengetepikan penghakiman Mahkamah Tinggi yang telah disempurnakan dalam Guaman Sivil 136 yang disahkan oleh Mahkamah Rayuan dalam Rayuan Sivil 226.

(2) Isu ganti rugi hanya timbul selepas pengeluaran surat penamatan oleh defendan-defendan yang suratnya dikeluarkan selepas Guaman Sivil 136 dilupuskan. Defendan-defendan tidak berhak mengguna pakai perenggan (j) surat kelulusan untuk menamatkan kontrak pembalakan kerana PK telah, dalam Guaman Sivil 136, membuat keputusan tentang isu ini. Dalam premis itu, isu estoppel telah timbul dan defendan-defendan dihalang memberikan alasan semula hak untuk menarik balik seluruh kawasan konsesi (baki kawasan yang tertinggal) dengan mengguna pakai

perenggan (j) surat kelulusan. Soalan sama ada kontrak pembalakan telah ditamatkan oleh pengeluaran arahan bawah syarat (j) adalah satu perkara yang 'perlu diputuskan' dan 'telah diputuskan, sebagai alasan keputusan' dalam Guaman Sivil 136.

(3) Berdasarkan perkataan-perkataan yang terdapat dalam ss. 2 dan 3 AKK, tiada keperluan mandatori untuk kontrak dibuat di Malaysia dalam bentuk bertulis bagi pihak Kerajaan atau Kerajaan Negeri kerana kedua-dua peruntukan semata-mata dikatakan dalam cara kontemplatif dengan penggunaan perkataan 'if'. Oleh itu, kontrak pembalakan adalah sah dan boleh dikuatkuasakan antara pihak-pihak dan plaintif berhak menuntut ganti rugi atau pampasan daripada defendan yang berbangkit daripada penamatan kontrak tersebut. Mahkamah Rayuan terkhilaf mengguna pakai peruntukan AKK pada fakta-fakta ini.

(4) Parlimen menggubal AKK dengan niat melindungi Kerajaan atau Kerajaan Negeri daripada kontrak-kontrak yang tidak dibenarkan. Ini untuk memastikan kontrak yang dibuat bagi pihak Kerajaan atau Kerajaan Negeri diberi kuasa secara betul dan nyata. Ini untuk mengelakkan apa-apa liabiliti kontrak yang dimasuki tanpa kuasa, pengetahuan atau kebenarannya. Kerajaan atau Kerajaan Negeri tidak boleh menggunakan AKK sebagai 'perlindungan untuk penafian tanggungjawab'. Ketiadaan kontrak rasmi tidak boleh berfungsi sebagai jalan keluar untuk defendan kedua menafikan tanggungjawab kontraktualnya yang timbul daripada kontrak pembalakan itu. Kelakuan pihak-pihak, khususnya defendan-defendan yang telah mendapat manfaat daripada pengumpulan hasil koleksi cess hutan itu, akan menjadikannya tidak adil untuk defendan-defendan mendakwa bahawa tiada kontrak wujud. Mahkamah ini berpendapat tidak tepat untuk menyatakan AKK, dengan menggunakan kata-kata Mahkamah Rayuan 'menggantikan kedudukan undang-undang am serta prinsip-prinsip berhubungan kontrak.' Sebaliknya AKK melengkapkan yang sama dalam kontrak-kontrak yang dibuat bagi pihak Kerajaan atau Kerajaan Negeri. Oleh itu, soalan undang-undang yang dikemukakan dijawab secara negatif.

Case(s) referred to:

Arnold v. National Westminster Bank Plc [1991] 2 AC 93 ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Bhikraj Jaipura v. Union of India AIR 1962 SC 113 ***(refd)***
Chatturbhuj Vithaldas v. Moreshwar Parashram AIR [1954] SC 236 ***(refd)***
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***
Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy [2016] 8 CLJ 293 FC ***(refd)***
Government of India v. Petrocon India Limited [2016] 6 CLJ 321 FC ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Joseph Paulus Lantip & Ors v. Unilever Plc [2012] 7 CLJ 693 FC ***(refd)***
KP Chowdhary v. State of Madhya Pradesh AIR (1967) SC 203 ***(refd)***
Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Another Appeal [2013] 7 CLJ 713 CA ***(refd)***
Petrojasa Sdn Bhd v. The State Government of Sabah [2002] 1 LNS 105 HC ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***
Tong Lee Hwa & Anor v. Lee Yoke San [1978] 1 LNS 218 FC ***(refd)***
Union of India v. NK (P) Ltd (1973) 3 SCC 388 ***(refd)***
Westech Sdn Bhd v. Thong Weng Lock [2014] 8 CLJ 1050 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78
Government Contracts Act 1949, ss. 2, 3, 8
Government of India Act 1935 [Ind], s. 175(3)
The Constitution of India [Ind], art. 299(1)

Other source(s) referred to:
Pollock & Mulla, *Indian Contract & Specific Relief Acts,* vol 1, 13th edn, p 334
Spencer Bower and Turner, *Res Judicata,* 3rd edn, 1996, p 10, para 19

For the appellant - Malik Imtiaz Sarwar, K Kirubakaran, Ramanathan Pillai, Nadzarin Wok Nordin, Chan Wei June & Wong Jing En; M/s Nadzarin Kuok Puthucheary & Tan
For the respondents - Nik Suhaimi Nik Sulaiman & Wan Norazimin Kassim, State Legal Advisor, Selangor

[Editor's note: For the Court of Appeal judgment, please see Pengarah Jabatan Perhutanan Negeri Selangor Darul Ehsan & Anor v. Syarikat Sebati Sdn Bhd [2017] 4 CLJ 101 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Alizatul Khair Osman FCJ:

Introduction

[1] This judgment is delivered pursuant to s. 78 of the CJA 1964 as our brothers Hasan bin Lah and Jeffrey Tan have since retired. This is a unanimous decision by the remaining members of the panel who heard this appeal.

[2] The appeal before us arose out of the decision of the Court of Appeal on 7 December 2016 in Civil Appeal No. B-01(A)-72-03-2016 where it had allowed the appeal of the respondents (the defendants in the court below) against the decision of the High Court in Originating Summons No: 24-733-06-2015 dated 16 February 2016.

[3] Leave to appeal was granted by this court on 31 May 2017 to determine the following question of law:

> Whether by virtue of section 3, Government Contracts Act 1949 ("GCA"), only written contracts, executed in the manner provided thereunder with the state government are valid.

[4] For convenience, parties in this judgment will be referred to as they were referred to in the High Court.

Factual Background

[5] The factual background leading to this appeal is important to give context to the question before us. We propose for this purpose to adopt the plaintiff's (the appellant before us) submission with some modification.

[6] The plaintiff applied for a long term sustainable management of forests concession *vide* letters dated 11 April 1996 and 15 May 1999 to the defendants.

[7] The first defendant approved the said application by way of a letter dated 30 September 1999 ("the letter of approval"). The plaintiff was given the right to carry out logging activities in Hutan Simpan Gading and Bukit Belata, which were approximately 9000 hectares (the "concession areas"). The terms contained in the letter of approval are, namely:

> (a) Satu Perjanjian hendaklah ditandatangani di antara Kerajaan Negeri dan pihak Syarikat Sebati Sdn. Bhd. dalam masa 6 bulan kelulusan diberikan;
>
> …
>
> (j) **Kerajaan Negeri juga berhak menarik balik semua atau sebahagian kawasan bila-bila masa apabila diperlukan.** (emphasis added)

[8] Pursuant to the letter of approval, the plaintiff sent a draft agreement *vide* letter dated 16 November 1999 to the first defendant. There was no response from the defendants notwithstanding the six month requirement stipulated in the letter of approval.

[9] In the meantime, the plaintiff was permitted to commence and carry out logging activities. The defendants were aware of the on-going activities, in particular the first defendant who approved and issued logging licenses to the plaintiff pursuant to the National Forestry Act 1984 and the Selangor Forestry Rules 1988. The plaintiff also paid the necessary cess and premium for the licenses.

[10] The plaintiff wrote again to the first defendant, *vide* letter dated 5 September 2001, with a draft agreement but did not receive any reply.

[11] Eventually, almost four years after the issuance of the letter of approval, the first defendant, *vide* letter dated 10 May 2003, responded with a proposed standard format of agreement for execution ("the draft agreement"). The plaintiff adopted the said format and sent a revised draft agreement to the first defendant (the "draft revised agreement") *vide* letter dated 7 July 2003. Both the draft agreement and the draft revised agreement contained the following termination clause (the "termination clause").

> M. Termination On National Interest
>
> (a) Notwithstanding any provision of this Agreement, the Government may terminate this Agreement by giving not less than sixty (60) days notice to that effect to the Company (without any obligation to give reason thereof) if it considers that such termination is necessary for national interest, in the interest of national security or for the purposes of Government policy or public policy.
>
> (b) Upon such termination, the Company shall be entitled to compensation which shall be determined by an independent auditor appointed by the Government after due consultation with the Company.
>
> For the purposes of this Clause, what constitute "national interest", "interest of national security", "the Government policy" and "public policy" shall be solely made and determined by the Government and such determination shall for all intent and purposes be final and conclusive and shall not be open to challenge whatsoever.

[12] The defendants did not respond nor did they object to the draft revised agreement. It is not disputed that parties did not execute any formal agreement.

[13] Whilst the plaintiff carried on with the logging activities, the first defendant, *vide* letter dated 5 October 2005, informed the plaintiff to cease its logging activities immediately on the basis that the areas which it carried out its logging activities were now designated as a reserved forestry area (the affected area). By way of letter dated 27 December 2005 the first defendant further requested the plaintiff to apply for alternative areas as a replacement for the affected area.

[14] The plaintiff identified the alternative areas but was informed by the first defendant, by letter dated 20 February 2006, that the alternative areas proposed by the plaintiff were unsuitable. The plaintiff did not apply for other alternative areas and the first defendant did not also issue any further logging license or permit to the plaintiff for the affected area.

[15] The plaintiff then commenced Shah Alam High Court Civil Suit No. 21-136-2008 ("Civil Suit 136") against the defendants on the basis that there was in existence a logging contract between the plaintiff and the defendants

based on the letter of approval and the performance thereunder and that the contract was terminated by way of the defendants' conduct and sought for damages for breach of contract.

[16] The learned Judicial Commissioner who heard the case dismissed the plaintiff's claim. In doing so, the learned Judicial Commissioner made the following findings which, as we shall see later forms the crux of this appeal:

(a) there was a valid and binding logging contract (the logging contract) between the parties comprising both the letter of approval and the draft revised agreement ("first finding"); and

(b) the plaintiff's claim was, however, premature as there was, at the material time, no act of termination nor repudiatory breach of the contract by the defendants ("second finding").

[17] The plaintiff appealed against the second finding in Civil Appeal No. B-01-226-06-2014 ("Civil Appeal 226") but their appeal was dismissed by the Court of Appeal on 10 March 2015. It should be noted that the defendants did not appeal against any of the findings of the learned Judicial Commissioner, in particular, the first finding.

[18] Based on the first finding, the plaintiff wrote to the first defendant requesting the latter to perform the logging contract by granting the plaintiff the license to log. The first defendant responded by issuing a letter on 27 April 2015, stating that it is withdrawing and terminating the letter of approval pursuant to para. (j) of the letter of approval. (the letter of termination)

[19] Pursuant thereto, the plaintiff wrote to the first defendant on 15 May 2015 requesting for the appointment of an independent valuer to assess the losses incurred by the plaintiff as a result of the termination of the logging contract. The first defendant refused the plaintiff's request alleging that para. (j) of the letter of approval did not oblige the defendants to do so.

[20] The plaintiff then commenced Originating Summons No. 24-733-06-2015 ("originating summons 733") in the Shah Alam High Court against the defendants for, *inter alia*:

(a) a declaration that the first defendant's letter dated 27 April 2015 constitutes a termination of the logging contract as evidenced by the letter of approval dated 30 September 1999 and the final draft agreement as determined by the High Court on 19 May 2014 *vide* the Shah Alam High Court Civil Suit No. 136 in Civil Suit 136;

(b) damages; and

(c) the appointment of an independent valuer for the purposes of the assessment of damages.

[21] The learned High Court Judge allowed the plaintiff's claim basing his decision principally on these two issues:

(a) Whether *res judicata* applied to the plaintiff's claim for damages as it was already decided in Civil Suit 136 and subsequently affirmed by the Court of Appeal in Civil Appeal 226; and

(b) What were the consequences of the letter of termination by the defendants under condition (j) of the letter of approval?

[22] The plaintiff took the position that the defendant's decision to withdraw or terminate the letter of approval was in pursuance of their policy to cease all logging activities in the concession areas. Thus taking into consideration the logging contract as a whole it was entitled to damages pursuant to termination clause (M) of the draft agreement.

[23] The defendants on the other hand contended that *res judicata* applied as the learned Judicial Commissioner in Civil Suit 136 had already decided on the issue of compensation in the event of termination on the ground of national interest. They further contended that the termination was based on condition (j) of the approval letter which gave them the right to terminate and the termination was not on the basis of national interest as stated in the termination clause of the draft agreement.

[24] The learned High Court Judge held that *res judicata* did not apply as the cause of action in Originating Summons 733 is "totally different" from that in Civil Suit 136 and secondly based on condition (j) of the letter of approval read together with the final draft revised agreement, the plaintiff is entitled to compensation, as assessed by an independent valuer, for the termination.

[25] Aggrieved with the decision, the defendants appealed against the said decision to the Court of Appeal. The Court of Appeal allowed the appeal with costs.

Findings Of The Court Of Appeal

[26] In arriving at its decision, the court made the following findings:

(a) In the instant case, there are two documents which are said to be evidence of a contract. The only document where both parties agreed to binding is the "Approval Letter". The plaintiff's assertion is that the termination must be pursuant to clause M of the draft agreement. The defendants' assertion is that the termination ought to be based on the "Approval Letter". *There was no evidence led by the plaintiff in the Originating Summons for this court to ascertain based on which agreement the parties were proceeding with the conduct of the business.* This court is not bound by the grounds of decision of the first judgment, though the decision of the court is relevant. The decision of the

court as we had said earlier was that the plaintiff's claim was premature and in consequence was dismissed with costs. In our view, the plaintiff's failure to lead evidence on which agreement the parties were conducting on day to day affairs is fatal to the plaintiff's case.

(b) To say that the 'Approval Letter' as well as the draft agreement had become one contract is not sustainable in law. It is either the terms of the 'Approval Letter' or the terms of the draft agreement. Any construction otherwise by the courts will breach the rule as to the requirement of 'certainty of terms'. (See A*ir Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 MLJ 108].

(c) In addition, we are not prepared to condone the proposition of the learned Judicial Commissioner in the first judgment which was followed by the learned judge in the instant case that 'the Defendants had acquiesced to those terms' when sections 2 and 3 of GCA 1949 requirements have not been met. (emphasis added)

Our Findings

[27] It is apparent from the above findings that the Court of Appeal's main ground for allowing the appeal was that they were not satisfied that there was in existence a valid and binding logging contract between the parties as found by the learned Judicial Commissioner in Civil Suit 136. This is reflected in their findings (above) which in summary read as follows:

(a) In our view, the plaintiff's failure to lead evidence on which agreements the parties were conducting on day to day affairs is fatal to the plaintiff's case.

(b) To say that the 'Approval Letter' as well as the draft agreement had become one contract is not sustainable in law.

(c) Both the learned Judicial Commissioner and the learned judge erred when they held that "the Defendants had acquiesced to those terms when sections 2 and 3 of GCA 1949 requirements have not been met.

In relation to ground (c), the Court of Appeal was of the view that:

… **the government and/or government bodies may not be liable on the basis of 'conduct' and/or implied contract and/or acquiescence, etc.; to conclude that there was in fact a contract based** on a draft agreement which has not been duly executed.

… the draft agreement in law cannot be construed as a contract without execution as well as evidence that it has been executed as per the requirement of GCA 1949. (emphasis added)

(see pp. 7 and 8 of ikatan teras responden bah. 1 & 2).

This last ground (c) relied on by the Court of Appeal to reverse the finding of the learned High Court Judge resulted in this court granting the plaintiff leave to appeal on the question of law as set out in para [2] above.

[28] The findings of the Court of Appeal (above) gave rise to two issues:

(i) whether the finding of the Court of Appeal that there was no valid and binding logging contract between the plaintiff and the defendants was caught by the doctrine of *res judicata*.

(ii) whether s. 3 of the Government Contracts Act 1949 (GCA) apply to the present case. This second issue relates directly to the question of law before us (see para [2], *ante*).

(i) Whether The Finding Of The Court Of Appeal That There Was No Valid And Binding Logging Contract Between The Plaintiff And The Defendants Was Caught By The Doctrine Of Res Judicata

[29] The plaintiff argued that the issue of whether there was in existence a valid and binding contract had already been determined by the learned Judicial Commissioner in Civil Suit 136 who found that the letter of approval and the draft agreement constituted a valid and binding logging contract between the parties. As stated earlier, there was no appeal specifically against this finding by the defendant. As such, the decision of the learned Judicial Commissioner on this issue had become *res judicata.*

[30] The defendant whilst conceding that they did not appeal against the learned Judicial Commissioner's specific finding on this issue, nevertheless contended that the said logging contract was not a valid contract because it did not comply with s. 3 of the GCA.

[31] As the issue of the applicability of s. 3 of the GCA was not an issue in Civil Suit 136 the defendants submitted that the decision of the Court of Appeal on this issue was not caught by the doctrine of *res judicata*. The defendants relied on the case of *Tong Lee Hwa & Anor v. Lee Yoke San* [1978] 1 LNS 218; [1979] 1 MLJ 24 where the Federal Court decided that the plea of *res judicata* was not sustainable as it had not been shown that the earlier judgment necessarily and with precision determined the point in issue, which in that case relate to the liability of the appellants to pay the respondent for work done at their request.

[32] The defendants' submission found favour with the Court of Appeal when it found as follows:

> Further, we take the view that the principles of *res judicata* on the facts are not applicable. The plaintiff's reliance on the principles of *res (sic) judicata* here is misconceived taking into consideration the provision of GCA 1949.

[33] In holding as such, the Court of Appeal relied extensively on the Court of Appeal case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346, CA where the court in essence held that as the doctrine of *res judicata* (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result.

[34] Firstly, on the issue of *res judicata*, it is necessary to reiterate the elements which constitute *res judicata*. For this purpose, we find the book Spencer Bower and Turner, *Res Judicata*, 3rd edn. (1996) particularly useful. There the learned authors set out at p. 10, para 19 what is involved in the burden of showing *res judicata* which consist of six matters:

(i) the decision was judicial in the relevant sense;

(ii) it was in fact pronounced;

(iii) the tribunal had jurisdiction over the parties and the subject matter;

(iv) the decision was – (a) final, and (b) on the merits;

(v) it determined the same questions as that raised in the later question; and

(vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*.

[35] The learned authors further stated that the determination must not be collateral to the decision and for this one has to look at the formal judgment or order. Where an express declaration as to any particular question or issue appears on the face of the record of a formal judgment or where from the judgment itself the actual grounds of the decision can be clearly ascertained, there is no necessity for further search.

[36] On the facts herein, it is unequivocally clear that the learned Judicial Commissioner had determined Civil Suit 136 on its merits that "there is a valid and binding logging contract between the parties … The terms of the logging contract comprise those in the approval letter as well as the draft format agreement …" when His Lordship held:

> 28. Accordingly, I find and hold that there is a valid and binding logging contract comprise those in the Approval Letter as well as the Draft Formal Agreement following the Court of Appeal case of *Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Anor* [2013] 7 CLJ 713 since the latter was not contested by the Defendants in any way. In other words, the Defendants had acquiesced to those terms.

[37] In view of His Lordship's unequivocal finding on this issue, there is no doubt in our minds that the findings of the Court of Appeal on this issue is caught by the doctrine of *res judicata* and therefore unsustainable.

[38] Further, it is trite that a High Court is not empowered to set aside a perfected judgment of another High Court save and except where the final judgment of the High Court is proved to be null and void on the ground of illegality or lack of jurisdiction as determined in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Berhad* [1998] 2 CLJ 75 and further confirmed in the fairly recent case of *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1.

[39] This principle applies equally to the Court of Appeal which cannot set aside a final order regularly obtained from another coram of the Court of Appeal of concurrent jurisdiction except in the limited circumstances set out earlier.

[40] This was established in the case of *Westech Sdn Bhd v. Thong Weng Lock* [2014] 8 CLJ 1050; [2014] 3 MLJ 427 where Abdul Aziz JCA (as he then was) speaking for the Court of Appeal held as follows:

> [41] … Further, in this case the Court of Appeal's order had been perfected and sealed. This fact is not in dispute. In this regard we agree with the submission by learned counsel for the defendant that the **Court of Appeal has inherent jurisdiction to review its own previous decision on limited grounds and only in very exceptional circumstances.**
>
> …
>
> At this juncture we also mention the principle deduced from the Federal Court's decision in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 that a High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction except where the order or judgment could be proved to be null and void on the ground of illegality or lack of jurisdiction. *Corollary, the same principle applies to a coram of Court of Appeal hearing an appeal against the order of another coram of the Court of Appeal of concurrent jurisdiction.*
>
> (emphasis added)

[41] We would therefore agree with learned counsel for the plaintiff that the Court of Appeal fell into error when it exercised its power and jurisdiction to set aside the perfected judgment of the High Court in Civil Suit 136 which was affirmed by the Court of Appeal in Civil Appeal 226.

[42] We further agree that in setting aside the perfected High Court judgment, the Court of Appeal had misapplied the doctrine of *res judicata*. It will be recalled that the Court of Appeal in holding that the principles of *res judicata* do not apply on the facts of this case, relied on the Court of Appeal decision in *Chee Pok Choy & Ors (supra)* where Gopal Sri Ram JCA (as he then was) expounded the following view:

> Now, there is a dimension to the doctrine of *res judicata* that is not always appreciated. It is this. *Since the doctrine* (whether in its narrow or broader sense) *is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result.* And there is respectable authority in support of the view I have just expressed.
>
> …
>
> On the authorities discussed thus far, the principle comes to this. *Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.* (emphasis added)

[43] It is clear however from decided cases that the circumstances alluded to by the Court of Appeal (ie, non-consideration of the provisions of the GCA (1949)) do not fall within the exceptions to the doctrine of *res judicata* which are limited to the following situations: fraud or where evidence not available at the original hearing becomes available (see *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93 and *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143. Whether an 'unjust result' or the justice of the case constitutes a further exception to the doctrine of *res judicata* remains to be seen. For the moment, based on decided cases (as seen above) it is not yet a recognised exception to the doctrine of *res judicata*.

[44] Quite apart from not falling within the limited exceptions to the doctrine of *res judicata*, it was also the contention of the plaintiff that the application or rather the failure to apply s. 3 of the GCA was never pleaded nor raised in Civil Suit 136 and Originating Summons 733. In fact, learned counsel contended that it was only raised for the first time, in the defendant's written submission before the Court of Appeal in Civil Appeal 72 as an afterthought. The fact that the issue of the GCA was not stated in the defendant's memorandum of appeal for Civil Appeal 72 is ample proof of it being an afterthought.

[45] Learned counsel drew the court's attention to the case of *Dato' Tan Chin Woh v. Dato' Yalumallai V. Muthusamy* [2016] 8 CLJ 293 where this court cautioned against the Court of Appeal exercising its jurisdiction in considering an issue not expressly raised in the memorandum of appeal or argued before the Court of Appeal.

[46] In our view as this court had granted leave to appeal on a question of law pertaining specifically to s. 3 of the GCA, it is not necessary for us to consider whether the Court of Appeal had exercised its jurisdictional power correctly in deliberating and determining an issue which was neither pleaded nor raised in the court below nor stated as a ground of appeal in the defendant's memorandum of appeal. Suffice it for us to state that given the fact that s. 3 of the GCA was neither pleaded nor raised before the learned

Judicial Commissioner or the learned High Court Judge, the defendants cannot seek to rely on the Federal Court case of *Tong Lee Hwa & Anor (supra)* to support its contention that the Court of Appeal's finding is not caught by the principles of *res judicata*.

[47] Before addressing the issue on s. 3 of the GCA and the question of law relating thereto, we would like for completeness to deal with the defendant's contention that the issue of compensation in the event of termination on the ground of national interest is *res judicata*.

[48] The defendants contended that the termination of the logging contract was based on condition (j) of the letter of approval which gave them the right to terminate and the termination was not on the basis of national interest as provided in the termination clause of the draft revised agreement (cl. M). Consequently, no compensation is payable to the plaintiff.

[49] It was contended further that the learned Judicial Commissioner had already decided in Civil Suit 136, on the issue of compensation in the event of termination on grounds of national interest and therefore the issue is now *res judicata*.

[50] We agree with the plaintiff that the defendants' contention on this issue is misconceived for the following reasons:

(a) there were only two issues for determination before the learned Judicial Commissioner in Civil Suit 136 as seen from the following excerpt of his judgment:

> There are essentially two issues for determination at this stage of the trial on liability, *to wit*: firstly **whether there was binding contract between the parties** and secondly, **if there was a binding contract, whether the contract was terminated and the consequences thereto.** (emphasis added)

Pursuant thereto, the learned Judicial Commissioner had decided, as regards the first issue, that there was a valid and binding logging contract between the parties and in relation to the second issue the learned Judicial Commissioner found as follows:

> 37. As to the consequences of the exercise of the power conferred by condition (j) of the Approval Letter, *I find and hold that it does not attract clause M on Termination on National Interest in the Draft Formal Agreement because the logging contract was not in substance terminated in entirety.* Furthermore there was at all material times no act of termination of the logging contract by the second Defendant or the First Defendant on its behalf. In other words, the logging contract subsisted as far as the Defendants are concerned. *Since, I have also found and held that the Plaintiff was not in the position to justify that the contract was terminated as well for repudiatory breach, there is accordingly no compensation or damages payable by the Defendants either through clause M or at common low.* (emphasis added)

Having found that the defendants had not repudiated for terminated the logging contract to justify the plaintiff's claim for compensation or damages, the learned Judicial Commissioner went on to make the following observation at para. 38 of his judgment:

> 38. I note that condition (j) of the Approval letter is silent on the financial consequence if that provision is exercised. As a matter of general principle, I hold that since it is a right accorded by the contract, it cannot attract compensation unless it is expressly so provided or if the condition was exercised in bad faith. Based on the circumstances herein where condition (j) had been exercised in the national interest, I hence find and hold that there is no compensation payable by the Defendants to the Plaintiff …

(b) the learned Judicial Commissioner's observation on compensation in para. 38 of his judgment was clearly *obiter dicta* as correctly held by the learned judge in Originating Summons 733. In holding that the said para. 38 was *obiter*, the learned judge opined as follows:

> A careful reading of this Judgment shows the *ratio* of the case is as stated in paragraph 37 of the judgment. Paragraph 38 is merely an *obiter dicta*. In paragraph 38 the learned Judicial Commissioner is just expressing an opinion as to what the consequence would be in the event the Defendants chose to terminate the contract under condition (j).

[51] We agree with the learned judge's view as this is palpably clear from a reading of paras. 37 and 38 of the learned Judicial Commissioner's judgment (above).

[52] In the premises the learned judge was correct to hold that "… the issue of *res judicata* does not apply as the cause of action is totally different and has not been decided earlier simply because the issue did not exist earlier."

[53] The issue of compensation arose only after the issuance of the letter of termination by the defendants which letter was issued after Civil Suit 136 had been disposed of. It will be recalled that the plaintiff's appeal (Civil Appeal 226) was dismissed by the Court of Appeal on 10 March 2015. The letter of termination was issued in 27 April 2015.

[54] We would however agree with the plaintiff's contention that the defendants are not entitled to invoke para. j of the letter of approval to terminate the logging contract as the learned Judicial Commissioner had, in Civil Suit 136 already made a determination on this issue. This is apparent from paras. 33 to 37 of His Lordship's judgment. At para. 33, His Lordship found as regards para. (j) of the letter of approval as follows:

> The letter of 5 October 2005 is upon its true construction an exercise of the power conferred by the condition (j) of the Approval Letter. The clause is in substance an 'omission' contractual provision and that power must be exercised in good faith, otherwise it would be a breach of contract following the Federal Court case of *Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd* [2013] 2 AMR 210. An example of bad faith is the exercise of power to omit and permit another third party to log instead. It is undisputed that the conception of the Taman Warisan was made in the public interest as a national park. The power was therefore in my view exercised reasonably for a lawful purpose.

(see also para. 37 (*ante*))

[55] In the premises, an issue estoppel had arisen and the defendants were precluded from re-arguing its right to withdraw the entire concession area (the balance of what was left) by invoking para (j) of the letter of approval. (see *Joseph Paulus Lantip & Ors v. Unilever Plc* [2012] 7 CLJ 693 at paras. 30 and 32).

[56] In this connection Arifin Zakaria CJ's observations on issue estoppel in *Government of India v. Petrocon India Limited* [2016] 6 CLJ 321 are pertinent:

> [52] Question no. 3 also raises the issue of whether estoppel would apply against the respondent in the circumstances of this case. Estoppel may be invoked in order to prevent a party from relitigating against a counter party, an issue, be it of fact or law after the same had been previously contested or decided in an earlier litigation between the same parties. (see generally P Ramanatha Aiyar, *'The Law Lexicon'* 2nd edn Reprint, 2010, LexisNexis at pp. 656-657).
>
> [53] It is settled law that for issue estoppel to operate against a party the decision on an issue must have been a "necessary step" to the decision or "a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision" (See *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 at p. 965). To put it simply, the issue in question must have been litigated between the parties and the issue was material to the decision of the court.

[57] In our view the question of whether the logging contract had been repudiated by the issuance of a directive under condition (j) was a matter that was "necessary to decide" and which was "actually decided, as the ground work of the decision" in Civil Suit 136 within the meaning of the observation of Tun Arifin CJ in *Petrocon India Limited*.

(ii) Section 3 Of The GCA

[58] We now turn to the second and main issue before us which is the applicability of s. 3 of the GCA or more specifically:

Whether by virtue of section 3, Government Contracts Act 1949 ("GCA"), only written contracts, executed in the manner provided thereunder with the state government are valid.

[59] It is the plaintiff's submission that the Court of Appeal misapplied the provisions of the GCA to the facts herein. The provisions of the GCA that were relied on by the Court of Appeal are ss. 2 and 3 of the GCA. Section 2 refers to contracts entered into on behalf of the Government whilst s. 3 relates to contracts entered into on behalf of the State Government. As our case concerns the State Government only s. 3 is relevant. Nevertheless, we reproduce below both ss. 2 and 3 of the GCA for completeness:

2. Contracts on behalf of the Government

All contracts made in Malaysia on behalf of the Government shall, **if reduced to writing**, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorised in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorisation.

3. Contracts on behalf of a State Government

(1) All contracts made in Malaysia on behalf of a State Government shall, **if reduced to writing**, be made in the name of the Government of that State, and may be signed by the Chief Minister of the State, or by any public officer duly authorised in writing by the Chief Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorisation.

(2) In the application of this section to Sabah and Sarawak "Chief Minister" includes any State Minister.

This is what the Court of Appeal said in relation to the above provisions:

The jurisprudence relating to execution of Government Contracts is anchored pursuant Government Contracts Act 1949 (Revised 1973) Act 1202 (GCA 1949). Essentially it displaces the common law position as well as principles relating to contract … in our view, the government and/or government bodies may not be liable on the basis of conduct' and/or implied contract and/or acquiescence, etc …

[60] The Court of Appeal in construing ss. 2 and 3 of the GCA sought to rely on the Indian Supreme Court cases of *Bhikraj Jaipura v. Union of India* AIR 1962 SC 113 and *K.P. Chowdhary v. State of Madhya Pradesh* AIR 1967 SC 203: (1966) 3 SCR 919 to conclude as follows as regards s. 3 of the GCA:

… the draft agreement in law cannot be construed as a contract without execution as well as evidence that it has been executed per the requirement of GCA 1949.

(see para [11] of the judgment of the Court of Appeal)

[61] The Indian Supreme Court in *Bhikraj* and *K.P. Chowdhary (supra)* adopted a strict view of art. 299 of the Indian Constitution and held that a contract between the Government and a person envisages a formal written contract with no scope for an implied contract. (see para. 9 of the Court of Appeal judgment). Article 299 of the Indian Constitution reads as follows:

> 299. Contracts. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

The Supreme Court in the *Bhikraj* and *K.P. Chowdhary (supra)* construed the terms of art. 299(1) as mandatory and not directory and these formalities could not be waived or dispensed with.

[62] However, the Indian Court have also realised that insistence on too rigid an adherence to the conditions stipulated in art. 299 may not always be practicable nor equitable. As observed by Bose J (speaking for the Supreme Court) in *Chatturbhuj Vithaldas v. Moreshwar Parashram* AIR 1954 SC 236:

> It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form …

[63] A similar stance was adopted by the Supreme Court in the case of *Union of India v. A.L. Rallia Ram* AIR 1963 SC 1685 when it held that the provisions of s. 175(3) of the Government of India Act, 1935 (which were in *pari materia* with art. 299(1) of the Indian Constitution) have been complied with although no formal contract was executed.

[64] The court held that the Act did not expressly provide for execution of a formal contract between the contracting parties. Thus, in the absence of any specific direction by the Governor-General prescribing the manner or mode of entering into the contracts, the court concluded that a valid contract may result from the correspondence between the parties.

[65] The same view was echoed by the Supreme Court in the case of *Union of India v. N.K. (P) Ltd;* (1973) 3 SCC 388 which observed as follow:

> It is now settled by this court that though the words 'expressed' and 'executed' in Article 299(1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India.

[66] It could therefore be safely concluded from the catena of cases above that art. 299 of the Indian Constitution does not require any formal document to be executed on behalf of the Government in order to constitute a valid and binding contract. Any form of "offer and acceptance" complying with art. 299 of the Constitution (ie, by an authorised person as prescribed in the article) would be a valid and binding contract.

[67] In light of the above, the Court of Appeal was misconceived when it sought to rely on art. 299 and the decision of the Indian Supreme Court in *Bhikraj* and *K.P. Chowdhary* to hold that ss. 2 and 3 of the GCA require a formal written contract to be executed before it can bind the Government or State Government as the case may be.

[68] Although the wording of art. 299 is not identical with ss. 2 and 3 of the GCA, its underlying rationale, as we shall see later in the judgment, is the same and in that regard it is actually in *pari materia* with ss. 2 and 3 of the GCA.

[69] As submitted by learned counsel for the plaintiff, based on the wordings of ss. 2 and 3 of the GCA, there is no mandatory requirement for a contract made in Malaysia on behalf of the Government or State Government to be reduced into writing as both provisions are merely worded in a contemplative manner with the use of the word "if". Learned counsel had referred to us the unreported decision of *Petrojasa Sdn Bhd v. The State Government of Sabah* [2002] 1 LNS 105; [2002] MLJU 223, where Richard Malanjum J (as he then was) concluded that there was a valid agreement between the parties by virtue of their conduct and that a formal agreement was not a mandatory requirement under the GCA.

[70] His Lordship in that case observed as follows as regards s. 3 of the GCA:

> [14] Learned counsel for the Defendant also submitted that there could not have been a contract as no authority was given to (anyone) to bind the Defendant in relation with the Plaintiff. Obviously he was looking for a formal agreement. But I do not think that is a mandatory requirement under the Government Contracts Act 1949. Section 3 thereof should be the answer.

His Lordship after reviewing the evidence in the case proceeded to hold:

> … it is my finding that from the undisputed facts and evidence adduced in this case the inevitable conclusion is that there was a binding agreement concluded between the Plaintiff and the Defendant *albeit* not formally in writing …

[71] The factual matrix in *Petrojasa* is somewhat similar to the instant case and we think it convenient if we reproduce the following excerpt from His Lordship's judgment to understand why he held that there was a binding agreement:

A [9] From the evidence of PW1, DW3 and that of DW4 together with the several letters exchanged and the fact that indeed the Plaintiff was allowed to enter the timberland to extract timber inevitably lead to one conclusion in that the meeting of PW1 with DW3 did produce a result. And that result was in substance the surrender of the approved land by the Plaintiff and in return for the Plaintiff to have the rights to extract
B merchantable timber from the timberland. In short there was an agreement concluded between the Plaintiff and the Defendant though it might not have been formally reduced into one document. The fact that the Plaintiff was issued with TOL and timber license should be an indication of some of the terms of the agreement concluded. I cannot accept the contention of learned counsel for the Defendant that there was
C no agreement concluded due to the absence of intention to enter into any legal relationship. If that was the case then there was no explanation advanced as to why the Defendant through its agencies and departments took the approved land from the Plaintiff and in return issued to the Plaintiff the TOL and the timber license in respect of the timberland.

D **[72]** In the same manner, the learned Judicial Commissioner in Civil Suit 136 held, after examining the conduct of parties that despite the non-execution of a formal contract between the parties, there was a valid and binding agreement. The learned Judicial Commissioner in holding such, observed:

E The conduct of the parties here, particularly the Defendant in treating the logging contract as subsisting notwithstanding the non-execution of a formal agreement and benefiting from the forest produce cess collection is akin to the conduct seen of parties in the case of *Bukit Kiara Resort Bhd v. Dato Bandar Kuala Lumpur* [2012] 2 MLJ 783 …

F **[73]** As stated earlier in the judgment, the learned Judicial Commissioner went on to "… find and hold that there is a valid and binding contract between the parties in the circumstance. The terms of the logging contract comprise those in the approval letter as well as the draft formal agreement following the Court of Appeal case of *Nippon Express (M) Sdn. Bhd. v Che*
G *Kiang Realty Sdn. Bhd v. Another Appeal* [2013] 7 CLJ 713 since the letter was not contented by the defendants in anyway. In other words, the defendants had acquiesced to those terms."

[74] Thus, although s. 3 of the GCA was not raised before the learned Judicial Commissioner in Civil Suit 136, the principle of law as espoused by
H Richard Malanjum J (as he then was) in *Petrojasa vis-à-vis* s. 3 of the GCA applies equally to the instant case given the similarity in the factual matrix.

[75] Accordingly, we agree with learned counsel for the plaintiff that the Court of Appeal misapplied the provision of the GCA to the facts herein. We also hold that the observation of His Lordship, Richard Malanjum J (as he
I then was) in *Petrojasa* that there is no mandatory requirement under s. 3 of the GCA for a formal written agreement reflects the correct legal position insofar as s. 3 of the GCA is concerned.

[76] To lend further support to the view that s. 3 does not require a written contract before the Government or the State Government can be legally bound, it is perhaps useful to consider the parliamentary intention behind the enactment of the GCA. (see *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 4 CLJ 285, 298-299. The Government Contracts Bill (the "Bill") was tabled in Parliament on 22 December 1949.

[77] The second reading of the Bill was moved by the then Attorney-General who said, at p. 593 of the Hansard:

> Sir, the Bill, the title of which I have just read out, seeks to clarify the position in the Malay States and the Settlements – Federation generally – regarding contracts made by the Government of the Federation and by the State and Settlement Governments. At the moment, the position is not at all clear. **It is not, in some cases, clear who may make the contracts or who can be sued in respect of any breach of them.** (emphasis added)

[78] It can be seen from the above statement that the GCA was enacted by Parliament with the intention of safeguarding the Government or the State Government against unauthorised contracts. This is consistent with the underlying rationale of art. 299 of the Constitution of India, which is in *pari materia* with ss. 2, 3 and 8 of the GCA. As explained by the learned authors in *'Pollock & Mulla: Indian Contract & Specific Relief Acts'* (vol. 1) (13th edn) at p. 334:

> The public policy and the public interest underlying art 299(1) is that 'the State should not be saddled with liability for unauthorised contracts which do not show on their face that they are made on behalf of the State'.

[79] Thus the GCA was enacted to ensure that contracts made on behalf of the Government or the State Government are properly and/or expressly authorised. This is to avoid any liability for contracts which are entered into without its authority, knowledge and/or consent.

[80] It is not disputed that the first defendant was authorised by the second defendant to enter into the logging contract with the plaintiff. The capacity of the first defendant to enter into the logging contract with the plaintiff, on behalf of the second defendant, was never a bone of contention between the parties in both Civil Suit 136 and Originating Summons 733.

[81] In our view, the GCA should not be used by the Government or State Government as "a cloak for denial of responsibilities". The lack of a formal contract should not serve as a loophole for the second defendant to deny its contractual responsibilities arising from the logging contract. The conduct of the parties, particularly the defendants who benefited from the forest produce cess collection, would make it inequitable for the defendants to now claim that there was no contract to begin with. To quote Bose J in *Vithaldas v. Moreshwar Parashram (supra)* at p. 243:

A [40] We feel that some reasonable meaning must be attached to art. 299(1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded.

B On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. *In between is a large class of contracts, probably by far the greatest in numbers, which, though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always* C *accept the responsibility.* If not, its interests are safeguarded as we think the Constitution intended that they should be. (emphasis added)

[82] Finally, we do not think it quite accurate to say that the GCA, to use the words of the Court of Appeal, "displace(s) the common law position as well as principles relating to contract". Instead, the GCA in our view D complements the same in contracts made on behalf of the Government or State Government.

[83] For the reasons stated above, the question of law posed to us must be answered in the negative.

E **[84]** The logging contract is a valid and enforceable contract between the parties and the plaintiff is entitled to claim compensation or damages from the defendant arising from the termination of the said contract.

[85] The appeal is accordingly allowed with costs.

F **[86]** The decision of the Court of Appeal is set aside and the decision of the High Court is restored.

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