

# Lim Ban Kay @ Lim Chiam Boon v Kilang Kelapa Sawit Morib Sdn Bhd & Ors [2022] MLJU 2572

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

JAMHIRAH ALI JC

GUAMAN CIVIL NO MT4(2)-22-2109-07

12 October 2022

*April Tay (with Pey Chau Xuan) (Rama Velu & Assoc) for the plaintiff.  
Chan Kok Keong (Chan & Assoc) for the first defendant.  
Reny Rao (AJ Ariffin, Yeo & Harpal) for the second and third defendants.*

## Jamhirah Ali JC:

### GROUND OF JUDGEMENT INTRODUCTION

[1] This is an application by the Applicant (Lim Yan Peng) for an order that the Applicant is made a party in this suit to substitute the Respondent/Plaintiff (deceased) pursuant to Order 15 rule 7 (1) and (2) of the Rules of Court 2012 (ROC 2012).

[2] The 1<sup>st</sup> Defendant objected to the said application. The 2<sup>nd</sup> Defendant had not filed an Affidavit in Reply to object, however, the learned counsel for the 2<sup>nd</sup> Defendant had informed this Court that the 2<sup>nd</sup> Defendant is supporting the 1<sup>st</sup> Defendant's objection.

### BRIEF FACTS

[3] The Applicant is the executor of the Deceased Lim Ban Kay @ Lim Chiam Boon's (the Plaintiff) estate pursuant to a grant of Probate dated 27.08.2019.

[4] The Plaintiff had obtained an order for the specific performance of four (4) agreements against the Defendants at the Court of Appeal on 27.08.2015 (the COA Order). On 25.01.2017, the Plaintiff filed an application to specifically perform the four (4) agreements in the High Court at Kuala Lumpur vide Originating Summons No. WA- 24NCVC-149-01/2017 for either money to be paid or to transfer a portion of the targeted lots. However, the Plaintiff passed away in the middle of the suit. The High Court at Kuala Lumpur allowed the Applicant to be substituted as a party to the suit. Nonetheless, the suit was dismissed with liberty to file afresh as the Defendants' solicitors had argued that the proper forum to decide the matter should be the High Court at Shah Alam.

[5] The executrix of the deceased estate then filed an Originating Summons against the Defendants in the High Court at Shah Alam vide BA-24NCVC-547-06/2020 to specifically enforce the COA Order. However, the learned Judge had struck out the said application with liberty to file the said application at the original suit in the High Court at Shah Alam suit no. MT4(2)-22-2109-07.

[6] Therefore, the Plaintiff has filed a Notice of Application to enforce the said COA Order against the Defendants vide Shah Alam High Court Civil Suit No: MT4(2)-22-2109-07 (the Application) to seek an order of specific performance on the said agreements to work out or give effect to the said COA Order. The Application was filed with the Affidavit in Support affirmed by the Applicant. However, the 1<sup>st</sup> Defendant raised a preliminary objection on the *locus standi* of the Applicant to affirm the Affidavit in Support filed therein with the said Application.

[7] Hence, this application was filed by the Applicant for an order to substitute the deceased Plaintiff.

### THE LAW

[8] Order 15 rule 7(2) of the ROC 2012 states as follows: -

***“Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party. An application for an order under this paragraph may be made ex parte.”***

## FINDINGS OF THE COURT

[9]The learned counsel for the 1<sup>st</sup> Defendant submitted that the Court is now *functus officio* since the final order of the action had been made and perfected in the form of the Judgment dated 21.07.2014, pursuant to a full trial of the matter. The learned counsel referred to the case of *Degom ak Agol v Forescom Sarawak Sdn Bhd* [2016] MLJU 1021.

[10]The 1<sup>st</sup> Defendant also contended that neither the deceased Plaintiff nor the 1<sup>st</sup> Defendant has any interest in the suit herein upon the COA Order for specific performance of the agreements. The 1<sup>st</sup> Defendant further contended that none of the agreements has a successor clause which would enable the heirs, assigns, executors, administrators or legal representatives of the deceased Plaintiff, who were not a party to the contract to enjoy its benefits.

[11]The Applicant contended that this Court is empowered to order the Applicant as the party in the said Application under Order 15 Rule 7(2) of the ROC 2012 as the Applicant is the executrix of the deceased Plaintiff and thus the deceased’s legal interest and liability will devolve on the Applicant.

[12]The Applicant also contended that the Applicant has the *locus standi* to execute the said COA Order and/or to specifically perform the agreements in the capacity of the executrix of the estate of the deceased. The Applicant stated that the contracting parties to the agreements are obliged to perform the obligations of the agreements and the agreements are not terminated by the death of the deceased Plaintiff. The agreement binds the deceased’s representative.

[13]The Applicant further contended that Clause 4.1 of the Supplementary Agreement affirms the deceased’s proprietary rights on the land. Therefore, the deceased’s proprietary rights of the land will automatically be vested in the estate of the deceased upon his death.

[14]The Applicant submitted that if the Applicant’s application is disallowed, the estate of the deceased will suffer a substantial miscarriage of justice and the 1<sup>st</sup> Defendant would escape its long overdue contractual obligations.

[15]Upon perusal of the application and upon reading and hearing both the Plaintiff and the 1<sup>st</sup> Defendant’s submissions, I allowed the Applicant’s application and my reasons are stated below.

[16]The Applicant as the executrix of the deceased’s estate is the legal representative of the deceased. This is provided in section 59 of the Probate and Administration Act 1959 which states as follows:

***“59. Subject to any other written law, a personal representative has the same powers to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts due to him at the time of his death as the deceased had when living”***

[17]Further in the of *Ng Cheah Kow v Low Hock Lai* [2020] 1 LNS 2102, the Court of Appeal held that:

***“[24] ...It is well settled that once probate is granted, the person appointed as executor continue to be the legal representative of the deceased testator. See: Re Timmis [1902] 1 Ch 176.”***

[18]As such, the 1<sup>st</sup> Defendant’s submission that since the deceased had not taken any action to enforce the COA Order, therefore, upon his death the legal representative has no locus to pursue the enforcement of the COA Order does not hold water.

[19] The Applicant as the executrix of the deceased's estate has the locus to continue the action as the specific performance application made in this instance is necessary so to give effect to the original judgment of the Court of Appeal. The deceased Plaintiff is no longer a legal entity to the action as the legal entity now resides in the executrix of the deceased.

[20] It is my considered view that this Court has inherent powers to allow consequential orders and liberty to apply for consequential orders in order to work out or give effect to the final judgment or order of the court. It is well within the inherent jurisdiction of this Court. The rule of *functus officio* was not transgressed. This was decided in the Federal Court case of *Stone World Sdn. Bhd. v Engareh (M) Sdn Bhd* [2020] 12 MLJ. The Federal Court held as follows:

***“(1) Liberty to apply for consequential orders in order to work out or give effect to the final judgment or order of the court was well within the inherent jurisdiction of the court. The rule of functus officio was not transgressed. Both the High Court and the Court of Appeal concluded on well-articulated grounds that the consequential order was required to give effect to the original judgment against Stone World for liability in detinue. There was no reason to disagree with the courts below. The consequential order that was made by the High Court subsequently was at all times ‘consequential’ upon the findings of the trial judge.***

***(2) The doctrine of functus officio had not been flouted in relation to the consequential order. The conduct of Stone World necessitated the making of the consequential order. The effect of the consequential order was to substitute the delivery up with damages to be assessed equivalent to the value of the marble stone. The substitution in itself could not amount to a variation calculated to infringe the functus officio rule. The original judgment and the findings were in no way impaired, reopened, varied or altered by the grant of the consequential order. The finding of liability for detinue against Stone World was intact, meaning that the essence of the finding and judgment of the trial court remained intact. Therefore, the argument that the reliefs were mutually exclusive and the consequential order was a variation of the original judgment and order was without merit. The High Court was fully entitled to make the consequential order as the doctrine of functus officio did not take away the inherent power of court to make consequential orders. A change and or replacement of one form of remedy with another form of remedy via a subsequent application resulting in the consequential order did not amount to a variation. The consequential order was not made in ‘want of jurisdiction.’ The consequential order did not transgress the functus officio rule. On the contrary, the court retained jurisdiction, particularly under the ‘liberty to apply’ exception to grant such an order which was calculated to ensure that the final judgement or order was not rendered useless.”***

[21] In this case the Applicant is applying to substitute the deceased Plaintiff to enforce the COA Order which originated from this Court. In my view, this Court is not *functus officio* in order to give effect to a previous order. The original order and findings were in no way impaired, reopened, varied or altered by the grant of this substitution order as the executrix of the deceased's estate has locus to represent the estate. The substitution in itself would not amount to a variation to infringe the *functus officio* rule.

[22] I agree with the learned counsel for the Applicant's contention that if the Applicant's application is disallowed, the estate of the deceased will suffer a substantial miscarriage of justice as the deceased's estate would be deprived of the fruits of its litigation. Therefore, the consequential order is required to give support to the final order so that it would not be rendered nugatory. As decided in ***Stone World Sdn. Bhd. v Engareh (M) Sdn Bhd (supra)***, the Court stated as follows:

***“[48] The net result is that Engareh was deprived of the fruits of its litigation, requiring it to procure a consequential order to give support to the final order so that it would not be rendered nugatory. As outlined above both in Sungai Biak Tin Mining and Kanawagi, the court recognised that the doctrine of functus officio was not infringed when the order sought were purely to give effect to the original final order.”***

[23] Thus, based on the factual matrix of this case and for the interest of justice, it is my considered view that the Applicant ought to be allowed to be made a party in this suit to substitute the deceased Plaintiff to pursue the Application to enforce the said COA Order against the Defendants vide Shah Alam High Court Civil Suit No: MT4(2)-22-2109-07.

**[24]**For the reasons stated above, I ordered that the Applicant's application dated 22.10.2021 be allowed with costs in the cause and as agreed by parties, the said costs are only against the 1<sup>st</sup> Defendant.

---

End of Document