

REPORTED CASE LAWS AND/OR PREVIOUS LITIGATION
EXPERIENCE OF PARTNERS OF JCW

[Note: JCW was set up in April 2012 and cases below referred to before April 2012 will be in relation to cases where the respective partners of JCW was involved in whilst attached to other firms]

- 1) Country Heights Marketing v Firstland Management (High Court) [1998] 3 CLJ 17
Justin was the counsel for Country Heights. This is a case on transfer of proceedings from the Subordinate Court to the High Court. A novel point was raised in the judgment in relation to Section 65(3) of the Subordinate Courts Act 1948 as to whether the application to transfer must first show that there is a refusal by the other side to agree under the said provision to enable the Sessions Court to have jurisdiction beyond the value limit. The High Court's decision that this provision must first be resorted to was overturned by the Court of Appeal. The Court of Appeal decision/order was also reported in [1999] 3 CLJ 299.

- 2) Tan Ah Chim & Sons Sdn Bhd v Lim Kean Siew & Others (High Court) [2000] 6 MLJ 670
Justin was the counsel for the plaintiff, Tan Ah Chim. In this case, the plaintiff successfully obtained a summary judgment against the defendant for negligence in failing to file the Record of Appeal within the prescribed time resulting in the Appeal being struck out.

- 3) Soda KL Plaza Sdn Bhd v Noble Circle (M) Sdn Bhd (High Court) [2002] 2 MLJ 367
Justin was the counsel for Soda KL Plaza. In this High Court decision, Justin has successfully set aside of an invalid Summons by the defendant which failed to comply with Form 1 of the relevant rules and also did not append a Notice of Appearance as required by the rules.

- 4) Jupiter Securities Sdn Bhd v Wan Yaakub bin Abd Rahman (High Court) [2002] 3 MLJ 264

Justin was the counsel for Jupiter Securities. This case is an authority for the legal principle that an application to amend the pleadings (the statement of defence) to add an allegation of fraud would not be allowed if the facts relating to the fraud were known by the party making the application at the time the original pleading was filed.

5) Andrew Charles Gomez v Harpal Singh Grewal & Others (High Court) [2002] 3 CLJ 469

Justin was the counsel for 4th & 5th defendants. In this case, Justin successfully extricated the 4th & 5th defendants from the suit at the Registrar level. The plaintiff filed a Notice of Appeal but did not serve it and adjourned the Appeal until much later. The Appeal was dismissed by the Court as the failure and delay to serve the notice is in breach of the rules which require service before the first appeal hearing date has prejudiced the 4th & 5th defendants as they thought that they are no longer parties to the suit.

6) Universiti Malaya & Anor v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur (High Court) [2003] 3 MLJ 185

Justin was the counsel for Universiti Malaya (“UM”) in relation to land acquisition of the land owned by UM which was subject to compulsory acquisition. This is one of the few reported cases where the Land Acquisition Court proceedings is not just between the (previous) landowner (who is interested to increase the market value of the subject land) and the Land Administrator but also involves the agency applying for the acquisition (who is interested to reduce the market value of the subject land). The Court in this case amongst others held that the hearing at the High Court is an original hearing and the decision of the Land Administrator at the enquiry is an administrative decision.

7) RepcO (M) Sdn Bhd v Tan Tho Fatt & Ors (High Court) [2003] 6 MLJ 146

Justin was the counsel for Repco. This is a case on application for an urgent hearing date, interrogatories and case management procedure in a

case involving trade secrets/confidential information between the employer and employees.

- 8) Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd (High Court) [2004] 5 CLJ 167

Justin was the counsel for Global Destar. In this case, an application was made for judgment on admission for part of the claim pursuant to Order 27 rule 3 of the Rules of the High Court. The principles pursuant to such an application were extensively discussed in this case.

- 9) Chen Joon Onn v Kong Siew Kin (High Court) [2006] 4 AMR 435 / [2006] 7 CLJ 1

Justin was the counsel for Kong Siew Kin. This is a case on application to strike out an action in relation to a High Court suit filed to circumvent Session Court proceedings and the issue of duplicity of proceedings amounting to an abuse of process.

- 10) Multi-Purpose Bank Berhad v Uniphoenix Corporation Bhd (High Court) [2006] 5 AMR 545

Justin was the counsel for Uniphoenix. This is a case of winding up action by the Bank without a Judgment being struck out in favour of Uniphoenix. The issues that arose were inter-alia (a) whether the winding up proceedings herein constituted an abuse of process and ought to be struck off; (b) whether there were serious disputes raised by the respondent in relation to the whole of the petitioner's claim; and (c) whether the alleged debt was *bona fide* disputed on substantive grounds.

- 11) Chuah Teik Huat v Citibank Berhad (High Court) [2006] 7 CLJ 20

Chooi Peng was the counsel for Citibank Berhad. This is a case on striking out the writ and the statement of claim by the appellant that the declaration for sale of the property by the Bank is null and void.

- 12) Wong Yu Ke v Wong Yew Kwan (High Court) [2006] 7 CLJ 288
Justin was the counsel for Wong Yu Ke. This is a case on claiming vacant possession by Wong Yu Ke against alleged licensee and interpretation of Section 41 of the Specific Relief Act 1950.
- 13) Biopride Sdn Bhd v Malaysian Airline System Bhd (High Court) [2006] 8 CLJ 38
Justin was the counsel for MAS and assisted by Alvin. This is a case on contractual claim against MAS.
- 14) Metro Giant Group Sdn Bhd v Gala Sari Resources Sdn Bhd & Ors (High Court) [2007] 7 MLJ 52
Justin was the counsel for the first & third contemnors and assisted by Alvin. This is a case on contempt of Court. In this case, the issue was whether the filing of documents in Court which are intentionally back-dated letters would constitute contempt. The Court held that the mere ante-dating of the letters would not constitute contempt which requires an intention to use them to mislead the Court and this should be raised at the Trial and not at the discovery stage.
- 15) Raja Singam a/l Velu v Affin-Acf Finance Bhd & Others (High Court) [2007] 6 MLJ 430
Justin was the counsel for Affin-Acf Finance & 2 others. This case relates to a striking out application and hire-purchase. The legal principle of this case is that the plaintiff cannot resort to declarations in relation to public interests to further his private rights and that a declaration will not be allowed where it is useless or infructuous.
- 16) Metro Giant Group Sdn Bhd v Gala Sari Resources Sdn Bhd & ors [2007] 8 MLJ 586
[further and better particulars]
- Justin was the counsel for the 4th defendant. In this case, the High Court allowed the plaintiff's application for further and better particulars against the defendants. The High Court found that a particular paragraph in the

defence lacks particulars sufficient to enable the plaintiff to prepare its case for trial.

- 17) Kamra Jaya Sdn Bhd v Mulia Cemerlang Sdn Bhd (High Court) [2007] 3 CLJ 1993

Justin was the counsel for Mulia Cemerlang and assisted by Alvin. This is a case for removal of caveat lodged by Mulia Cemerlang on the land where the right to enter caveat was expressly agreed by the plaintiff in the various agreements executed with Mulia Cemerlang. The application to remove the caveat was dismissed in favour of Mulia Cemerlang.

- 18) Excapt Services Sdn Bhd v New Heritage Limousine Services Sdn Bhd (High Court) [2008] 2 MLJ 419

Justin was the counsel for New Heritage and assisted by Alvin. This is a case on injunction and setting aside of ex-parte injunction in a loan transaction involving issues of fraud and forgery. The main principle in this case is in relation to an abuse of process and that a party cannot act on the Order without first serving it.

- 19) Sheila Sangar v Proton Edar Sdn Bhd (High Court) [2009] 8 CLJ 200/ 2 ILR 489

Justin was the counsel for Proton Edar and assisted by Alvin. This is a case on application for judicial review for an order of certiorari to quash the award of the Consumer Claims Tribunal.

- 20) HTC Global Service MSC Sdn Bhd v Kompakar Ebiz Sdn Bhd (High Court) [2009] 3 AMR 52

Justin was the counsel for HTC and assisted by Alvin. This case involves summary judgment in respect of recovery of sums due for services rendered and the High Court took into account and admitted e-mail correspondences to support the entry of summary judgment against the defendant.

- 21) Wong Yew Kwan v Wong Yu Ke & Anor (Court of Appeal) [2009] 2 MLJ 672

Alvin was the co-counsel for Wong Yu Ke. This is an appeal by the appellant against the decision of the High Court in favour of Wong Yu Ke where bare allegation of fraud is not a defence that could create exception under Section 340 of the National Land Code and cannot defeat the indefeasible title of Wong Yu Ke. The Court of Appeal dismissed the appellant's appeal.

22) Proton Parts Centre Sdn Bhd v Mohamed Zainal & Another Appeal (Court of Appeal) [2010] 1 CLJ 348/ 2 MLJ 207

Justin was the counsel for Proton Parts. This is an appeal to strike out the cause of action based on slander by the respondent. The Court of Appeal propounded the principle that conduct per se cannot amount to slander.

23) Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd (Court of Appeal) [2010] 3 MLJ 656

Justin was the counsel for Albilt Resources and assisted by Alvin. This is an appeal in relation to an application for stay of the proceedings and to refer the dispute to arbitration. The Court of Appeal held that all PAM contracts have an Arbitration clause and where the main letter of award referring to a PAM contract was adopted in the impugned letter of award, the Arbitration clause in the PAM contract is similarly adopted.

24) Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & 2 Ors (High Court) [2010] 3 AMR 835

Justin was the counsel for second defendant and assisted by Alvin. This is a case relating to tender for building construction and whether there is cause of action by plaintiff against the defendants under a pre-tender agreement which was held to be void as a result of non-fulfillment of pre-conditions.

25) Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd (High Court) [2010] 5 CLJ 83

Alvin was the co-counsel for Dindings Corporation. This is a case where the plaintiff applied to set aside an arbitration award (where the arbitration proceedings were conducted by Justin and Alvin) obtained by Dindings

against the plaintiff and the case was decided by the High Court in favour of Dindings.

26) Low Kim Cheong v SSF Curtain Sdn Bhd & Ors (High Court) [2010] 7 CLJ 877

Justin was the counsel for SSF Curtain. This is a case by the petitioner (a minority shareholder) who claimed oppression under Section 181 of the Companies Act 1965.

27) Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor (High Court) [2011] 7 MLJ 52

Justin was the counsel for Couture Homes and assisted by Alvin. This is a case on striking out a case and a dismissal of an application for interlocutory injunction against the defendant and the allegation that the plaintiff was induced by the defendant's oral representation to enter into the Sale and Purchase Agreement in respect of a unit LG-27 on the basis it had dual frontage and Couture Homes submitted that the unit has been renumbered to LG – 26 due to an amendment to the building plan. The Plaintiff's application for an injunction was dismissed and Couture Homes application to strike out the case was allowed.

28) Khor Lye Hock & Anor v Makassar Engineering & Construction Sdn Bhd & Ors (High Court) [2011] 8 CLJ 476

Justin was the counsel for 2nd, 3rd and 4th respondents. This is a case on striking out of certain prayers of a petition under Section 181 of the Companies Act 1965, as they are inter-alia not suitable under the said Section 181 jurisdiction.

29) Mersing Construction and Engineering Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Ors (High Court) [2011] 3 MLJ 264

Alvin was the counsel for Mersing Construction. This is a case on a dispute as to whether the building contract is subject to arbitration or dispute adjudication board, which is a novel point in Malaysia.

- 30) Dato' Raja Azwane Raja Ariff v Dato' Man Mat & Ors (High Court) [2011] 8 CLJ 633/ 9 MLJ 467
Justin and Chooi Peng were co-counsel in this case for Dato' Raja Azwane. This is a case on a dispute on whether the Director's Circular Resolutions seeking to "resign/ remove" a director under the Companies Act 1965 is tainted with mala fides.
- 31) Affin Bank Bhd v MMJ Exchange Sdn Bhd & Anor (High Court) [2011] 2 AMCR 505
Chooi Peng and Alvin were the counsel for Affin Bank. This is a case for return of money remitted pursuant to forged remittance forms. After a full Trial, the Court ruled in favour of Affin Bank and this case canvass important principles such as "money had and received" and unjust enrichment.
- 32) Shencourt Sdn Bhd v Prima Ampang Sdn Bhd & 4 Ors (High Court) [2011] 4 AMR 449
Justin was the counsel for 4th & 5th defendants and assisted by Alvin. This is a case on striking out of the plaintiff's case against the defendants based on alleged misrepresentation by the defendants to the public at large pursuant to a website and/or facebook under the Housing Development (Control & Licensing) Regulation 1989 and dismissal of an application for an interlocutory injunction against the defendants.
- 33) Re Chen Teck Foong & 2 Ors (and Another Petition) (High Court) [2011] 4 AMR 557
Justin and Chooi Peng conducted this Probate Action which proceeded for Trial for the Petitioners and the issues involved *inter alia* the testamentary capacity of the Deceased in an alleged subsequent Will, whether the specific and mandatory requirements under Order 71 r 7(1) of the Rules of High Court 1980 for the original Will to be filed in Court has been complied with, the credibility of witnesses and forgery.
- 34) MIDF Amanah Ventures Sdn Bhd v Bostonweb Academy Sdn Bhd & Ors (High Court) [2011] 5 CLJ 778

Alvin was the counsel for MIDF Amanah. This is a case on appeal by the defendants to set aside a judgment in default granted by the Senior Assistant's Registrar against them and the said Appeal was dismissed by the High Court.

35) Tan Ming Yeow & Anor v Lee Chuen Tiat & Anor (High Court) [2012] 8 MLJ 805

Justin was the counsel for the plaintiffs. This is a case on dispute of the legal fees payable to the defendant, a solicitor, for handling the plaintiff's case, which proceeded for Trial. The Court ruled based on Section 116 of the Legal Profession Act that unless the agreement on fees was in writing, it is not enforceable.

36) Lagenda Kencana Sdn Bhd v Peter's Holdings Sdn Bhd & Anor (Court of Appeal) [2012] 3 CLJ 824

Justin was the counsel for Lagenda and assisted by Alvin in this appeal to the Court of Appeal. This is a case on application to set aside consent order and the Court of appeal held that a consent order should be set aside when there was "grave injustice" caused and the lawyer who attended court on behalf of Lagenda has no locus to appear when his legal firm had been dissolved.

37) Plastech Industrial Systems Sdn Bhd v N & C Resources Sdn Bhd & Ors (High Court) [2012] 5 MLJ 258

Justin was the counsel for Plastech and assisted by Alvin. This is a case on infringement of copyright and action against the defendants for inter-alia passing off, and breach of fiduciary, where Plastech successfully proved this case for inter-alia passing off, breach of copyright, wrongful taking and using of Plastech's proprietary information, breach of duty of confidentiality and breach of fiduciary duties by the Directors/ Officers.

38) Thambiraja Annamalai v Mammoth Empire Construction Sdn Bhd (Industrial Court) [2012] 3 ILR 148

Alvin was the counsel for Mammoth Empire. This is a case on dismissal of an employee where the Industrial Court ruled that the dismissal by the

company is with just cause and excuse as the company has successfully proven that the employee was found to have committed misconduct to the extent that the company's image was tarnished or caused financial loss to the company. The Industrial Court also further ruled that domestic inquiry is not compulsory in the circumstances if the misconduct by the employee is a very serious misconducts amounting to criminal offences.

- 39) Raja Singam Velu v Affin- ACF Finance Bhd & ors [2012] 3 CLJ 906
Justin was the counsel for the 1st to 3rd Defendants. In the taxation of Cost proceedings, the Plaintiff raised a preliminary objection that the defendant failed to produce a copy of the Bill of Costs together with the necessary papers and vouchers. The Court held that :-

“(1) Order 59 r. 20 does not stipulate as to the timeline for the production of the 'copy thereof with all necessary papers and vouchers'. Therefore, the purposive interpretation of these words would mean that they are to be produced as and when necessary. It was thus directory and not mandatory and the deliberate insertion of the word 'necessary' emphasised the directory nature of the order and denoted a discretion vested in the party wishing to tax his costs. (*Sarjit Singh Khaira v. Government of Sarawak*)”

- 40) Kha Seng Group Sdn Bhd (yang terdahulunya dikenali sebagai Mula Unggul Sdn Bhd) v Lee Mun Swee @ Lee Hing Chai & 9 Ors (High Court) [2012] 6 AMR 682

Alvin was the counsel for Kha Seng Group. This is a case on an application to set aside the judgment in default of appearance by the defendants which was dismissed by the Court and decided in favour of Kha Seng Group on the ground that it is not a good defence to defeat the landowner's right to the possession of the land by mere occupation on the land for a long period of time. The interest in equity also cannot defeat the landowner's right to the property. The Court ruled that whether or not the defendants are entitled to compensation and from whom is a separate and distinct issue which may be the subject matter of a separate and distinct suit and not relevant in this case.

- 41) Tetuan Ros, Lee & Co v Tan Ming Yeow (Court of Appeal) [2013] 1 AMR 156

Justin was one of the counsel for Tan Ming Yeow, the respondent. This is an appeal by the appellant against the High Court decision to strike out the appellant's claim for substantial legal fees against the respondent which was dismissed by the Court of Appeal based on the doctrine of res judicata on the "wider sense" and consideration of important legal issues relating to the recovery of legal fees, taxation and bill of costs.

- 42) Vivamall Sdn Bhd & 2 Ors v TDC Construction Sdn Bhd & 2 Ors (High Court) [2013] 1 AMR 279/ 8 MLJ 1

Justin was the counsel for Vivamall and assisted by Alvin. This is a case on an application for Quia timet injunction i.e. to restrain the defendants from approaching, interfering, contracting and harassing the plaintiffs and their family members arising from a commercial dispute which is pending arbitration. We believe this is the first reported case of such nature of injunction application allowed by Court in Malaysia in respect of a "commercial dispute" as most other cases relate to family/ private dispute.

- 43) Carl Zeiss Sdn Bhd v Delphax Sdn Bhd (High Court) [2013] 1 AMRC 550

Alvin was the counsel for Delphax (Respondent). This is a case on winding-up petition by the Petitioner against Delphax on the ground of Delphax's "inability to pay" an undisputed judgment debt. Even though the case was not decided in favour of the Respondent, the Court has decided on points of law i.e. the procedural provisions including Rules 22, 25, 26 and 194 (1) of the Companies (Winding-Up) Rules 1972 and Sections 4, 12, 20, 127, 176, 218, 243 and 350 of the Companies Act 1965. The High Court also held that the test to be applied is the test of "inability to pay" and in the event the "white knight" is able to discharge the liability of the Respondent, the liquidator or any creditor or contributory of the Respondent may apply for a permanent stay of the winding-up proceedings under Section 243(1) of the Companies Act 1965.

- 44) Unijaya Teknologi Sdn Bhd v Syarikat Elektrik RBA Sdn Bhd & Ors (High Court) [2013] 9 MLJ 452

Justin was the counsel for Unijaya (Plaintiff) and assisted by Alvin. This is a building contract case where judgment was entered against all Defendants which include the Directors of Syarikat Elektrik RBA Sdn Bhd for a debt due to the Plaintiff. The Defendants appealed against the Senior Assistant Registrar (SAR)'s decision to disallow the "4th Defendant's" (which is not a party to the suit) application for an extension of time (encl 31) for the 2nd & 3rd defendants to file an application to set aside the judgment in default entered against them. The High Court dismissed the appeal on the ground that the SAR had a discretion to allow or disallow the defendant's oral application to withdraw encl 31 which is "defective".

- 45) Mutiara Mukara Sdn Bhd v Unijaya Teknologi Sdn Bhd (High Court) [2013] 9 MLJ 165

Justin was the counsel for Unijaya (Defendant). This is a case on claim for damages by the Plaintiff from the Defendant for sub-contract works allegedly done which was struck out due to the Plaintiff's failure to comply with courts' direction/ order on the case management. The Defendant on the other hand counter claimed against the Plaintiff for failure to carry out the works and subsequently abandoning the project site which was allowed by the Court and substantial damages were assessed against the Plaintiff.

- 46) Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors (High Court) [2013] 10 MLJ 805

This case involves a dispute on pre-tender works. This is a case on application under Order 92 Rule 4 of the Rules of Court 2012 to review the amount of RM60,000 of the getting up fees awarded by the Senior Assistant Registrar (SAR) and sought for it to be increased to RM150,000 which was allowed by the Court on the grounds that there were many complicated issues involved in this case and the solicitor and/or counsel for the defendants had to prepare their clients' case in greater depth.

- 47) Plastech Industrial Systems Sdn Bhd v N&C Resources Sdn Bhd & Ors (High Court) [2013] 10 MLJ 837

Justin was the counsel for Plastech (the Plaintiff) and assisted by Chooi Peng. This is a case by the third defendant to set aside the ex-parte application for leave to commence committal proceedings against all the Defendants for failure to comply with the judgment and order granted by the Court against the Defendants earlier after a Full Trial. The Court dismissed the application on the grounds inter-alia, that the third defendant has constructive knowledge of the terms of the judgment as he and other Defendant had formally applied for a stay of the Judgment and he has also waived the right to object to the ex-parte order by his own action by filing 2 affidavits to oppose the Plaintiff's application for committal proceedings.

- 48) Lee Guek Sian v Kenanga Wholesale City Sdn Bhd [2014] 1 MELR 693

This is an Industrial Court case. Justin was the counsel for Kenanga (the Company) and assisted by Alvin. The case involved the Company's application to amend its Statement In Reply to inter-alia include purported misrepresentation as a ground for the Plaintiff's dismissal. More importantly, the novel point of law involved was whether the purported misrepresentation could be included as it was only discovered after the Claimant's dismissal. We took the issue on behalf of the Company that such matters discovered after the employee's dismissal is still relevant. The Court, in considering s30(5) of the Industrial Relations Act 1967, allowed the Defendant's application to amend its Statement in Reply, save for the paragraphs relating to this purported "misrepresentation" discovered after the dismissal of the Claimant has transpired.

Note : On appeal by the Company to the High Court for review on this point, where Alvin was the counsel, the judicial review application was allowed by the High Court and the purported misrepresentation was allowed to be included in the Statement In Reply even though this purported misrepresentation was only discovered after the employee's dismissal.

49) Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & another [2014] 1 AMR 49, [2014] 7 MLJ 812 & [2014] 1 CLJ 598

Justin was the counsel for the Defendants in this High Court matter. This is a novel and/ or landmark decision after a Trial involving, amongst others, the following findings/ issues :-

- (i) The legality of a sale of additional accessory carparks by the developer of units of condominium which comes up to 8-15 carparks each which are more than necessarily required for each condominium where the extra carparks are intended to be used for commercial rental to occupants of the residential condominium project for profit;
- (ii) The interpretation of Sections 34(2) and 69 of the Strata Titles Act 1985 and whether the word "dealt" in Sections 34(2) and 69 of the said Act include the act of "renting out" or "tenanting out", which was also answered in the affirmative;
- (iii) The interpretation of the phrase "used" or "intended to be used in conjunction with" in the definition of an "accessory parcel" in Section 4 of the Strata Titles Act will prohibit such acts of renting out not intended to be used with the main condominium unit;
- (iv) That the said sale of carparks contravened the Town and Country Planning Act 1976 by reason of breach of conditions of the Development Order;
- (v) There was no lawful consideration given under Section 24 of the Contracts Act 1950 for the sale of the said carparks;
- (vi) The issue of defeasibility of titles of the accessory parks where Section 5(1) of the Strata Titles Act 1985 read together with Section 340 of the National Land Code, where the Court held that by reason of the unlawful transfer of the accessory carparks, the registration of 394 accessory carparks in the name of the Plaintiff is unlawful and

offended the Strata Titles Act, the Town and Country Planning Act and Sections 24 (a), (b) & (c) of the Contracts Act; and

(vii) There was insufficient visitors' carpark for the Project and that some of these accessory carpark should be "Common Property" for the benefit of the Palm Spring Condominiums.

We believe that this is the first time that a case of this nature involving use of accessory carpark in a condominium for a commercial purpose and the legality of transfer of titles of a big number of carpark attached to a single unit of condominium, is decided in Malaysia. The High Court decided in favour of the Defendants where in essence the Plaintiff's claim was dismissed and the 1st Defendant's Counterclaim was allowed.

Note: This High Court decision has been set aside by the Court of Appeal due to the issue of validity of the JMB and the case has been refiled by the Management Corporation.

50) Seacera Development Sdn Bhd v Newlake Development Sdn Bhd & Anor; Antara Vista Sdn Bhd (Third Party) [2014] 2 MLRH 677

Alvin was the counsel for the Third Party, Antara Vista Sdn Bhd. This is a case on application by the Third Party to strike out the 1st Defendant's claim vide a Third Party Notice against the Third Party. The Court held that there cannot be any misrepresentation when there is no underlying contract between the 1st Defendant and the Third Party for the sale of the land. This is because misrepresentation must be made either by the other contracting parties or by an agent acting within the scope of his authority. The Court also further held that the particulars of misrepresentation ought to be pleaded in detail in the pleadings and any defect on the pleadings cannot be made good by affidavit of evidence. The Third Party's application to strike out the 1st Defendant third party action was successful because the 1st Defendant has no cause of action against the Third Party.

Note : The 1st Defendant appealed to the Court of Appeal, but their appeal was not successful.

- 51) Plastech Industrial Systems Sdn Bhd v N&C Resources Sdn Bhd [2014] 2 MLRH 231

Justin was the counsel for the Plaintiff in this contempt application filed at the High Court. The Court found that the contempt was proven beyond reasonable doubt and the Defendants committed and still continued to commit acts of contempt of Court when they failed and/or continued to fail to comply with the Judgment and the Order, in respect of inter-alia the mandatory injunctive orders therein.

- 52) Tiong Cheng Peng v Anor v Ker Min Choo & 6 ors [2014] 1 AMR 893 & [2014] 9 MLJ 311

Justin was the counsel for the first and second Respondent in the case. This case involved an application by the respondents to remove a liquidator appointed by the Courts upon the winding up of the company on the basis of inter-alia conflict of interest. In this unusual case, the liquidator had allowed 2 persons to attend the committee of inspection meeting. The Court ordered the removal of the Liquidator under s232(1) of the Companies Act 1965. Further, an issue was raised as to the altering of the Form 75 of the Companies Act 1965.

- 53) Mohamed Sam Bin Sailan v Syarikat Asal Construction Sdn Bhd (High Court) [2014] 10 MLJ 293 & [2014] 2 MLRH 608

Justin was the counsel for Syarikat Asal Construction (the Defendant). The Plaintiff contended that in order for the Defendant to maintain its bumiputra status, the Defendant had purportedly re-appointed the Plaintiff after his retirement as a Director without his consent and knowledge and the Defendant had been forging the Plaintiff's signature. The Plaintiff therefore claimed that he was entitled to 37% from the profit earned from the relevant projects. After a full trial, the Court dismissed the Plaintiff's claim and inter-alia held that the Plaintiff failed to prove forgery without any handwriting expert evidence and further, since the Plaintiff disclaimed and disagree he was a shareholder, he could not claim for any profits in the form of dividends. The case involved the Plaintiff claiming for damages as well as profits and claimed the Defendant forged his signature

to re-elect him as director of the company. The High Court after a Full Trial found in favour of the Defendant, dismissing the Plaintiff's claim due to the lack of evidence on the side of the Plaintiff.

54) PKNS Engineering & Construction Bhd v Global Inter-Dream (M) Sdn Bhd [2014] 1 AMCR 883

Justin was the counsel for the Appellant in this Appeal before the Court of Appeal. This appeal involved a complicated building contract claim where the findings of the High Court were overturned by the Court of Appeal. The Court of Appeal allowed the Appeal and amongst other, held that :-

- (i) The Respondent/ Plaintiff's complaint on the failure by the Appellant to produce a "Method Statement" is not pleaded and the High Court Judge ought not to have considered this ground at all;
- (ii) Further, a careful examination of Clause 15 of the Instruction to Tenderers will reveal that it is not the Appellant's responsibility to produce the "Method Statement" but instead the responsibility of the Respondent;
- (iii) By various contemporaneous correspondences, the Appellant had made known to the Respondent of the delay of work and the only response was to request for an extension of time;
- (iv) The Respondent did not comply with the relevant clauses in the contract for extension of time; and
- (v) The complaint by the Respondent on the purchase of building materials is devoid of merits as the Respondent had agreed pursuant to Tender Questionnaire that all major building materials has to be purchased from the Appellant.

The Court of Appeal allowed the Appeal and after evaluating the evidence, were constrained to rule that this is a fit and proper case for Appellate intervention.

- 55) Azman bin Jufri v Medtronic Australasia PTY Limited [2015] 4 AMR 45; [2015] 5 CLJ 1026 (Court of Appeal)

Chooi Peng was the counsel for the appellant/judgment. In this landmark Court of Appeal's decision, the Court set aside the service of the Bankruptcy Notice and Creditor's Petition on the ground that the application for substituted service of the Bankruptcy Notice and Creditor's Petition is invalid and ought to be dismissed; and consequently, the Order for substituted service of the Bankruptcy Notice and Creditor's Petition are null and void. The Court of Appeal held that for bankruptcy proceedings, the mandatory provision under rule 18(1) of the Bankruptcy Rules 1969 is for an application to be made by way of summons in chambers and not via a "notice of application". The judgment creditor's filing of a notice of application as opposed to a summons in chambers is a clear breach of the mandatory provision and the breach is not a mere irregularity or formal defect which is capable of being cured under Section 131 of the Bankruptcy Act 1967.

- 56) Medallion Development Sdn Bhd v Bukit Kiara Development Sdn Bhd (Court of Appeal) [2015] 4 MLJ 350 / [2015] 1 AMR 537

Justin was the counsel for the appellant/defendant. Dissatisfied with the High Court's decision, the Appellant appealed to the Court of Appeal and the High Court's decision was overturned by the Court of Appeal. In this case, there was a Sale and Purchase Agreement of the development land and a Supplementary Agreement to deal with part of the purchase price of RM4 million to be paid in kind by contra of 2 units of property. The Supplementary Agreement provides that should the Purchaser (Appellant) fail to deliver the condominium units to the vendor (Respondent) within 36 months, the Appellant is liable to pay interest to the Respondent. The Appellant did not deliver the units to the Respondent within 36 months and the Respondent rescinded the agreement and demanded for payment of RM4 million. In this case, the Court of Appeal held that the respondent was only entitled to demand for the payment of interest for late delivery of condominium units, but not entitled to rescind the supplementary agreement purely because the

appellant was not able to meet the deadline. A mere failure to meet the deadline of 36 month cannot in law amount to “total failure of consideration”. The appeal was decided in favour of the appellant/defendant.

57) Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & 2 Ors (Court of Appeal) [2014] 4 AMR 409/ [2015] 2 MLJ 562

Justin and Alvin were the counsel for the second respondent/defendant in the Court of Appeal. The appeal was decided in favour of the second respondent/defendant. This is a case involving a claim in respect of the construction of a dam where the Pre-Tender Agreement was signed between parties. The Court of Appeal held that an invitation to participate in the joint venture to submit the tender, on its own, did not create a contractual relationship between the appellant/plaintiff and the first and second respondents/defendants. It was merely an invitation for a discussion and negotiation which culminated in the preparation and signing of the pre-tender agreement between parties. Further, the parties were not allowed to adduce evidence to contradict and vary the Pre-Tender Agreement under Section 91 and 92 of the Evidence Act 1950. The Court of Appeal also re-affirmed the principle of law that a party who seeks the court’s intervention to pierce the corporate veil must establish special circumstances to show that the company is a mere façade concealing the true facts.

58) Yong Lai Ling v Ng Seow Poe & 2 Ors (High Court) [2015] 8 MLJ 351/ [2014] 5 AMR 621

Justin was the counsel for the first and second defendants. The 1st and 2nd Defendants were successful in their application to strike out the plaintiff’s writ and statement of claim as well as the application to set aside the ex-parte injunction order obtained by the plaintiff. It is worth noting that this is also the a case where the Malaysian Court held that when the land is owned by two or more registered proprietors, only one of registered proprietors cannot sue without involving the other(s). Further, the plaintiff’s failure to comply with the mandatory provision of Order 18 Rule 7 of the Rules of Court 2012 rendered the claim liable to be struck

out and the breach of the mandatory rule cannot be cured under Order 1A or Order 2 Rule 3 of the Rules of Court 2012. This is also a case on the principle of law in respect of the prolixity and failure to plead material facts under Order 18 Rule 7 and the wrongful pleading of evidence leading to the striking out of the whole civil action.

59) Teu Shek Fai v Aarolyn Yip Yu Ming (sole ownership of Messrs Azlinda & Agnes Chan) (High Court) [2015] 8 MLJ 283

Justin was the counsel for the petitioner. In this case, the petitioner disputed the unsigned bills issued by respondent for legal fees. Thus, the petitioner commenced the Court proceeding to seek for declaration that the purported unsigned bills are void and unenforceable on the grounds that the purported bills were unsigned and the respondent failed to comply with the mandatory provisions of Section 124 of the Legal Profession Act 1976. The High Court held that the failure to sign the bill of cost is a breach of the mandatory provision of law. However, as the petitioner made some payments towards the bill and therefore acquiesced and acted upon the bill, the High Court allowed the petition in respect of the alternative prayer for taxation.

60) BRG Polo Haus Sdn Bhd & Anor v Blay International (M) Sdn Bhd & others (High Court) [2015] 8 MLJ 176

Alvin was the counsel for the defendants. This is a judgment after a full trial involving a claim by the plaintiffs against the defendants for “money had and received”. The High Court was of the view that when there are 2 conflicting versions of the case between the 2 parties, the contemporaneous documents are more probable and reliable. The Court also held that the shareholders are not liable for the liability incurred by the Company. In respect of the counterclaim, the Court held that the defendants are entitled to claim against the plaintiff for the loss of the stocks and assets after the plaintiff abandoned the operation and business of the first defendant and refused to return the assets and stocks of the defendants. The High Court dismissed the plaintiff’s claim and allowed the defendant’s counterclaim. The case was decided in favour of the defendants.

- 61) Perbadanan Pengurusan Palm Spring @ Damansara v Muafakat Kekal Sdn Bhd & 2 Ors (High Court) [2015] 2 AMR 168
Justin was the counsel for the plaintiff. In this case, the High Court dismissed the 1st Defendant's application to set aside the Court Order striking out the defendant's defence by reason of the 1st Defendant's delay in filling the witness statement and the breach of the Court's "Unless Order" by the 1st Defendant. The delay in filling the witness statement purportedly caused by the change of witnesses and "cuti raya" were unacceptable and not a good reason to justify the delay.
- 62) Chan Yew Mun & Anor v Faber Union Sdn Bhd (High Court) [2015] 4 CLJ 239
Justin was the counsel for the plaintiffs. This case involved a bungalow unit which was not built by the developer in accordance with the Sale and Purchase Agreement and the building plan in respect of the front car porch where the length of the car porch was reduced when the unit was delivered to the Purchasers (the Plaintiffs). Therefore, the plaintiffs (Purchaser) sued for inter-alia rescission of the sale and purchase agreement and refund of the purchase price plus damages for breach of contract. However, the Court entered judgment in favour of the purchasers (plaintiffs) for damages for the breach. The Court did not allow the prayer for rescission of the contract on the basis that the plaintiffs had renovated the property. The Court held that the evidence do not show consent by the purchasers to the changes of the layout plan and the mere initial or signature of the purchaser on the amended floor plan without anything more cannot signify consent to the changes but mere acknowledgement of receipt.
- 63) Tiong Cheng Peng & Anor v Ker Min Choo & Ors (High Court) [2015] 2 CLJ 720
Justin was the counsel for the first and second respondents ('Ker Boon Kee and Ker Min Choo'). This is a case concerning an application by the 1st and 2nd Respondents for committal order against the court appointed liquidator and involved the issue as to whether the failure by the

liquidator to hand over the relevant documents to the Official Receiver in accordance with the Court Order to remove the liquidator is contempt of the Court.

64) Press Metal Sarawak Sdn Bhd v Etiqa Takaful Sdn Bhd (Court of Appeal) [2015] 4 CLJ 734

Justin and Alvin were the co-counsel for the appellant in this case where the counsel was Mr. Lim Kian Leong. This case concerning an appeal against the High Court's decision in allowing the Respondent's application under Section 10 of the Arbitration Act 2005 for stay of the proceedings pending the matter to be referred to arbitration. The Court of Appeal dismissed the appeal and decided that the question of whether the arbitration clause was part of the contract of insurance is a matter that goes to the jurisdiction of the arbitrator. The Court of Appeal considered Section 10(1)(b) of the Arbitration Act 2005 in the said Judgment.

65) Cottage Home Sdn Bhd v Wong Kau @ Wong Kon Lin & Anor (Court of Appeal) [2014] 3 MLJ 580

Chooi Peng was the counsel for the respondents/plaintiff in respect of a dispute between 2 landowners concerning the issue of encroachment and equitable right of way. The High Court allowed the respondents' / plaintiffs' claim for equitable right of way and encroachment and granted damages. On appeal, the Court of Appeal partially reversed the decision of the High Court and held that such claim for an equitable right of way was in the nature of an easement and not for a right of way under Section 390 of the National Land Code.

66) Tiong Cheng Peng & Anor v Ker Min Choo & 6 Ors [2015] 5 AMR 665

Justin and HV Yoong were the counsels for the applicants who were the first and second respondents in the winding up petition. One of the main issues before the Court was whether the applicants had the locus standi to institute the contempt actions. The High Court in allowing the applicants order for committal held that any party having sufficient interest in the outcome of the case can in law initiate an action for committal. On the

facts and in law, the applicants being shareholders/ contributories of the company had sufficient interest and capacity in the matter to bring the contempt action that is premised upon breach of the order obtained by the applicants for removal of liquidator.

- 67) Kalimantan Plantations Pte Ltd v Wakil diri kepada Syamsuri bin Abdullah (juga dikenali sebagai Wong Sai Kow (si mati) & 3 ors [2015] 5 AMR 641

[Summary Judgment on specific performance of Share Subscription Agreement]

Justin was the counsel for the Plaintiff in an application for Summary Judgment pursuant to Order 81 of the Rules of the Court for an Order for Specific Performance of Share Subscription Agreement (“SSA”). The Plaintiff was successful in the said application whereby the Court held that since the Defendants failed to fulfill the condition precedents under the said SSA, the Plaintiff is entitled to effect the transfer of the relevant land to itself as its nominee.

- 68) Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449 (Federal Court)

[Pleadings requirement to lift the corporate veil and whatever pleading of “family related companies” is sufficient]

Justin was the counsel for the second respondent/ second defendant and assisted by Alvin. In dismissing the plaintiff’s appeal with costs, the Federal Court held that the plaintiff had not adduced any evidence of fraud, actual or equitable, or of any special circumstances that would have justified the lifting the veil of incorporation of the defendants. The pleading that the 1st and 2nd Defendants are part of a group of family companies with common/connected shareholders were insufficient and there is no further allegation that the plaintiff was not awarded the sub-contract works as a result of manipulation or abuse of the “single entity” by the defendants. Since the first defendant was not awarded the

subcontract works for the project, the plaintiff also could not be awarded the sub-subcontract works and the pre-tender agreement was therefore void.

69) Plastech Industries System Sdn Bhd v N & C Resources Sdn Bhd & Ors [2015] 7 CLJ 252

[Contempt of Court for lying on oath and discrepancy in documents ordered to be disclosed (including the changing of dates on the invoices)]

Justin was the counsel for the plaintiff. This is the 2nd contempt proceedings taken against the defendant for non-compliance of the Judgment after Trial on the basis of averments in Affidavit filed in the 1st contempt proceeding which are untrue plus there are major discrepancies In the documents and/or its contents with other contemporaneous documents. It is also clear to the Court that 1st defendant, through the 2nd and 4th defendants continued to sell the impugned product after the delivery of the judgment. The contempt proceedings succeeded with custodial sentence were meted out to the relevant individual defendants and the 1st defendant company was fined.

70) MKC Corporate & Business Advisory Sdn Bhd v Cubic Electronics Sdn Bhd & ors [2015] 11 MLJ 775

[Claim based on breach of a Master Tenancy Agreement, disputes on Vacant Possession and the Court can lift “privilege” under without prejudice correspondence when the justice of the case require it]

Justin and Chooi Peng were the counsel for the Plaintiff. The plaintiff succeeded in the case after Trial based on amongst other the breach of a Master Tenancy Agreement entered between the plaintiff and the 1st defendant in respect of a Building. The plaintiff claimed that the 1st defendant failed to give vacant possession for the entire Property. The 1st defendant claimed on the other hand that the plaintiff failed to pay rental and took vacant possession. Whilst the Master Tenancy Agreement was subsisting, the 2nd defendant entered into another tenancy agreement with

the 3rd defendant and the 3rd defendant sub-let the same to the 4th Defendant. The 1st defendant was found to have failed to give vacant possession of the premises to the Plaintiff and the 1st defendant's contention that the Plaintiff refused to take possession is a not true. The 1st defendant knew it had to give Vacant Possession of the entire premises of 1,234,197 square feet before it can collect rental from the Plaintiff. The Court further found that the without prejudice letters were admissible in the circumstances of the case where inter alia justice required it.

[Note: This case was partially overturned by the Court of Appeal in [2016] 3 CLJ 676]

71) Hasrat Idaman Sdn Bhd v Mersing Construction Sdn Bhd [2015] 11 MLJ 464

[Building Construction dispute – the meaning of “variation works” and the difference between “re-measured works” and “variation work”]

Justin was the lead counsel assisted by Alvin, acting for the defendant. The defendant was the principal sub-contractor to carry out works in relation to the “Electrified Double Track Project between Rawang and Ipoh”. The plaintiff was appointed as the Defendant's sub-contractor and made progress claims via 115 claim certificates for RM9,779,933.52.

The defendant maintained that the plaintiff has been duly paid and the defendant having instructed or issued any variation order for additional work. The Court held that “re-measurement works” are part of the original contract and is by no means “variation work”. The plaintiff failed to produce its source documents (“Detail Method Statement”) to prove its claim plus failed to distinguish between original and additional/variation works in its certificate of claim. The Plaintiff was found to be adjusting its figures as the claim proceeds. The Plaintiff's claim was dismissed after Full Trial.

72) Perbadanan Pengurusan Palm Spring @ Damansara v Muafakat Kekal [2015] 5 MLRH 426

[Common Property of “kindergarten” recovered in favour of Management Corporation (“MC”) – State title issued in respect of the said Kindergarten with accessory carparks was cancelled in favour of the MC, locus standi of MC to sue]

Justin was the counsel for the plaintiff. The MC successfully sued and recovered the Kindergarten known as “Block J”. Block J was identified in the Development Order as “Kemudahan Umum Yang Disediakan”. The 1st defendant applied for Strata Title to be issued for Block J which was approved by the 3rd defendant. The 1st Defendant then sold the Block J to the 2nd defendant. The Court held that the MC had locus standi to file the suit for common property under Section 76(1) of the Strata Title Act 1985. Block J was held to be common property for the enjoyment of all the occupiers of the building. By rules of Section 42(1) of the Strata Titles Act 1985, the Plaintiff was the legal owners of Block J, the Strata Title of Block J was unlawfully issued and the 2nd defendant did not acquire an indefeasible title to Block J.

73) Teo Cheng Hua v Ker Min Choo & Ors [2015] 7 CLJ 328 (Court of Appeal)

[Contempt of Court – issue of tampering with documents, issue of mens rea]

Justin was the counsel for the Respondents. The Appellant’s appeal was dismissed and the Court of Appeal had amongst others ruled as follow (summarized in the Head Note of no. (5) of the law report) :-

“(5) The first Form 75 and statutory declaration was material as well as an important documentary evidence in the applicants’ removal application. Hence, the conduct of the appellant in tampering with material documentary evidence clearly amounted to an interference with the due administration of justice and constituted contempt of court. The appellant had not just acted in a manner which was likely to interfere with the proper administration of justice but had actually directly interfered with it by the positive act of amending the first Form 75 by way of lodging

the second Form 75 and affirming the second statutory declaration. (paras 20, 25 & 26)”

The Court of Appeal further held that although mens rea was not a necessary element of contempt, there was clear cut mens rea in the conduct of the Appellant here.

- 74) Yap Kian @ Yap Sin Tian (suing as Chairman of the Untied Chinese School Committees’ Association Malaysia (Dong Zong) and members of the Community Centre apart from named Defendants) v Poh Chin Chuan & Ors [2016] 7 MLJ 805

[Doctrine of functus officio and consequential orders to give effect to the to the decision of the Court]

Justin was the counsel for the defendants in this application by the defendants under Enclosure 45. Enclosure 45 was dismissed by the High Court with no order as to costs on the grounds that the court was functus officio. However, the dismissal of Encl 45 did not preclude the court from giving consequential directions to give effect to the terms. The court may, pursuant to its inherent powers, make consequential orders or directions to give effect to its decision, “when its working out might involve matters on which it might be necessary to obtain a decision of the court”. The doctrine of functus officio does not take away this inherent power of the court.

- 75) Palm Spring Joint Management Body & Anor v Muafakat Kekal Sdn Bhd & Anor [2016] 2 MLJ 191 (Federal Court)

[Whether a Joint Management Body can co-exist with the establishment of a Management Corporation]

Justin was the counsel for the appellants. In dismissing the appeal, the Federal Court bench which consisted of Chief Justice Tun Arifin Zakaria (as he then was) in dismissing the appeal held that the Joint Management Body (“JMB”) was an interim body established for the purpose of carrying out the functions of the Management Corporation(“MC”) pending the

establishment of the MC and once the MC is established, the JMB was automatically dissolved.

- 76) Ho Min Hao & Anor v Ho Yee Chin & Anor [2016] 2 AMR 455
[striking out of Pleadings on illegality]

Justin was the counsel for the defendants. In striking out the plaintiff's claim with costs, the High Court held that the defendants were correct in their position they take that the plaintiff's claim must fail on the ground of illegality. A plaintiff cannot found his cause of action on an illegal act.

Note : This case has been subsequently overturned by the Court of Appeal which found "triable" issues.

- 77) Cubic Electronic Sdn Bhd (In Liquidation) v MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 MLJ 797, [2016] 3 CLJ 676 (Court of Appeal)
[mearing of "vacant possession" and "predominant purpose" in a lawful means conspiracy]

Justin was the counsel for the respondent/plaintiff and assisted by Chooi Peng. The Court of Appeal whilst allowing the appellants' appeal against the finding of conspiracy by the High Court found that the predominant purpose of the Tenancy Agreement was the lawful promotion of the lawful interests of the defendant. The Court also held that the term "vacant possession" means the actual and empty possession as would allow a party to occupy and use the property transferred without impediments.

- 78) Teang Soo Thong dan satu lagi lwn Malaysia Venture Capital Management Bhd dan lain lain [2016] 9 MLJ 777
[Pre-condition for filing of a suit for malicious prosecution]

Justin was counsel for the defendants and assisted by Chooi Peng. In allowing the Defendant's application under Order 18 Rule 19(1)(a) Rules

of Court 2012 to strike out the suit by the Plaintiff for “malicious prosecution” with costs, the High Court held that as it was clear that the plaintiffs had no cause of action against the defendant as the precondition for such a suit is not met where the suit by the Plaintiff has not ended in favour of the Plaintiff and therefore the filing of the suit by the plaintiffs against the defendant could not be maintained in law.

- 79) Ho Yee Chin v Ho Min Hao & Ors [2016] 6 CLJ 728
[Application for inspection of account and records of the company under Section 167(6) of the Companies Act 1965]

Justin was the counsel for the plaintiff. In allowing the plaintiff's application to inspect the accounting books of the company pursuant to Section 167(6) of the Companies Act, the High Court held inter alia that:-

- (i) The onus was on the defendants to prove mala fides and unless the burden was discharged, it must be assumed that the plaintiff would exercise the right for the benefit of the company;
- (ii) A director who does not take part in the management remains liable as a director with fiduciary and statutory duties and for the discharge of these duties, the plaintiff must hold the right to inspect;
- (iii) There was no clear proof that the plaintiff intended to exercise her right of inspection as a director for an ulterior or improper purpose; and
- (iv) When there is suspicion and lack of co-operation, a director is all the more entitled, perhaps even obliged, to inspect company's accounts to protect the interests of the company and its shareholders.

- 80) Ting Chuen Peng (suing as representative of State Member for the State of Negeri Sembilan of the United Chinese School Committees' Association of Malaysia (Dong Zong)) & Ors v Yap Kian @ Yap Sin Tian (sued in his personal capacity and as Chairman of the United Chinese School

[Quia timet Anti-suit injunction to prevent any Court proceeding and/or injunction proceedings to prevent the calling of an Extraordinary General Meeting of the society "Dong Zong" from deregistration by the Registrar of Societies, implied terms when the Constitution of the Society is silent]

The plaintiffs filed an originating summons to obtain a protective order by way of a 'quia timet' injunction as they feared that the first defendant ('D1') might obtain an injunction to restrain the holding of the Extraordinary General Meeting ("EGM") of the United Chinese School Committee's Association Malaysia ('Dong Zong') scheduled to be held on 23 August 2015. The purpose and agenda of the EGM was to solve the leadership crisis by conducting a re-election of committee members. According to the plaintiffs, the EGM was to facilitate a re-election to be carried out so that central committee ('CC') members may be elected afresh and for a fresh central executive committee ('CEC') to be elected by the CC. According to the plaintiffs, the leadership crisis has had a crippling effect on the Dong Zong and placed the UEC examination which is traditionally held in the month of October of each year, in jeopardy. Apparently, the leadership crisis has also caused much confusion and consternation amongst the Chinese community in Malaysia. The leadership disputes have also led to a physical stand-offs between the parties and police reports have been lodged by the parties concerned. Meanwhile, the Registrar of Societies have issued a notice to deregister Dong Zong.

The Court held inter-alia that :-

- (i) When the Dong Zong's Constitution is silent, the legal basis on which a term may be implied into the rules or constitution of a society was no different from the test applicable when considering whether a term should be implied to an ordinary contract. The test for implying a term is the business efficacy test and the officious bystander test. After all, the relationship between a society and its members is contractual in nature.

Thus the rules or constitution or by-laws constitute the contract and these are to be construed in accordance with the laws of contract.

- (ii) It was entirely consonant with business efficacy to imply a term in the rules of Dong Zong that the supreme body ie the EGM may deal with and resolve the leadership crisis by conducting a re-election of the committee members which as a collective body would in turn appoint the office bearers of the Dong Zong. A term may also be implied on the basis of the officious bystander test as the members of Dong Zong, if asked, would undoubtedly agree that there should be such a term to allow the EGM to resolve the leadership crisis.
- (iii) There was no basis for the complaint that the plaintiffs are guilty of subterfuge. They obtained a *quia timet* injunction on an ex parte basis which way the only way to do it. Given D1's propensity to injunct meetings (whether rightly or wrongly), the plaintiffs could not be faulted for proceeding on an ex parte basis. In any event, once the ex parte order was served, all cards were on the table and D1 could have taken immediate steps to set it aside, so that he could make whatever application he wanted to injunct the EGM which was to be held on 23 August 2015.

- 81) Malaysia Venture Capital Management Bhd v Teang Soo Thong & Anor [2016] 9 MLJ 766
[Post Judgment Mareva Injunction to preserve assets of the Defendants and the "real risk of dissipation]

Justin was the counsel for the plaintiff. In allowing the plaintiff's application for mareva injunction after Summary Judgment can obtained against the defendants, the Court held that the plaintiff has a good arguable case as summary judgment was obtained. The Court held that given the defendants' failure to disclose the bank account and the real trail

of funds given by the plaintiff, there was a real risk that the defendants will dissipate their assets. The plaintiff ought not to be denied from obtaining the fruits of the judgment as the purpose of the mareva injunction is to prevent the defendants from removing their assets.

- 82) Yap Kian @ Yap Sin Tian (suing as Chairman of the United Chinese School Committees' Association Malaysia (Dong Zong), and also on behalf of other committee members except the name defendants) v Poh Chin Chuan (suing as Secretary General of United Chinese School Committees' Association Malaysia (Dong Zong)) & Ors and another Appeal [2016] 6 MLJ 685 (Court of Appeal)
[Appeal struck out for being “academic”]

Justin was the counsel for the respondents. In allowing the application filed by the respondents for an order of striking out of the appeals, the court held that it is trite that where there is no longer any “living issue” between the parties, there is no “appeal” that the court has any discretion or power to deal with. The appeal was struck out and removed from the cause list.

- 83) Nordin Ali & Ors v Focus Development Sdn Bhd & Ors [2016] 9 CLJ 907
[Action against bank to set aside the Order for Sale in a foreclosure proceeding]

Justin was the counsel for the plaintiffs. In allowing the plaintiffs’ claim with costs after a Full Trial, the High Court held amongst others that:-

- (i) The question of res judicata did not arise at all as the cause of action in this case was different from the foreclosure action and any other action between the parties;
- (ii) Since the purchase monies had been paid in full to the first defendant by the plaintiffs, the burden shifted to the defendants to account for the monies.

Note: A retrial was ordered in respect of the above case which judgment was set aside following an appeal to the Court of Appeal.

- 84) RHB Bank Bhd v. Unijaya Teknologi Sdn Bhd [2016] 11 MLJ 731
[Striking Out – Estopped from filing Originating Summons]

Justin was the counsel for the Defendant, Unijaya Teknologi Sdn Bhd. This is a case involving an application filed by the Defendant to strike out the Originating Summons filed by the Plaintiff. The Originating Summons was filed by the Plaintiff seeking a Court Order to sell the Defendant's charged land due to a default by the Defendant. The Court allowed the Defendant's application and ordered that the Originating Summons be struck out and held that the Defendant had made payments to the bank (after the default) based on the time fixed upon the request of the Plaintiff's officers. Given that the payments were acknowledged received by the Plaintiff, the Plaintiff is estopped from filing this Originating Summons.

- 85) Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd [2017] 1 MLJ 453 (Court of Appeal)
[Sale of defective “steel bars” does not meet the requirement of “Grade 500”, the sampling of “underspec steel bars”]

Justin was the counsel for the appellant/defendant. In allowing the appeal with costs against the claim by the Respondent/Plaintiff for the supply of Steel Bars. The Court of Appeal held inter alia as follows:-

- (i) The conclusion of the trial court that the respondent had “fulfilled their obligation” and had a “legitimate claim” was diametrically and wholly against the weight of the evidence;
- (ii) The respondent cannot complain that the appellant did not raise any issues within 7/14 days from the Invoices/delivery order when the respondent failed to comply with the primary obligation to supply steel bars according to the required specification;

- (iii) The steel bars sampled did not meet the requirement of “Grade 500” where the 4 test results do not support this;
- (iv) The appellant would be suffering further loss and damages by reason of the defective steel bars, hence judgment for the appellant in the counterclaim ought to be given.

86) Dato’ Aishaf Falina Ibrahim v Ismail Othman & Ors [2017] 4 CLJ 490
[Tort of invasion of privacy and tort of “misuse of personal information”]

Justin was the counsel for the plaintiff. In dismissing the 1st defendant’s application to strike out the plaintiff’s claim, the Court held that it was premature to say that the plaintiff had no cause of action at all against the 1st defendant. Although tort of invasion of privacy has not gained traction in Malaysian jurisprudence, there are other causes of action, which may well succeed and which at the very least, would warrant a full hearing. “Therefore, the plaintiff should be allowed to have her day in court so as to allow her to ventilate her several causes of action against D1 and the other defendants, no matter how weak these causes of action appeared to be presently. It is both desirable and imperative that the various legal arguments and formulations are given mature consideration at a full trial.

87) Riders Lodge Sdn Bhd v Tropik Sentosa Sdn Bhd & Anor [2017] 4 AMR 369
[Application for further and better particulars]

Justin was the counsel for the plaintiff. The High Court in dismissing the defendants’ application for further and better particulars with costs held that the defendants had more than sufficient material particulars to state their defence. The defendants’ request was amongst others for matters of evidence for a trial. Further, there was no special reason for the court to allow the defendants’ application when in actual fact the defendants had already filed in their defence and counterclaim.

- 88) Pengurusan Palm Spring @ Damansara (suatu badan yang ditubuhkan di bawah Akta Hakmilik Strata 1985 (Akta 318)) v. Muafakat Kekal Sdn Bhd & 2 Ors [2017] 8 AMR 513

[Vacant Possession – eviction of occupiers from common property of a condominium]

Justin argued this case and was assisted by CY Leong (who attended the decision). Justin was the counsel for the Plaintiff, the management corporation of Palm Spring. This is a case involving an application by the Plaintiff against the Defendants to deliver vacant possession of the common property to the management corporation. The Plaintiff is entitled to a vacant possession of the common property pursuant to an order by Court of Appeal and the 2nd Defendant is supposed to deliver vacant possession to the Plaintiff. However, the 2nd Defendant failed to deliver vacant possession by allowing its sub-tenant to remain in the common property and continue to collect rent from its sub-tenant for some time. The Court allowed the Plaintiff's application and ordered the 2nd Defendant to deliver vacant possession within 30 days of the order, failure of which, the 2nd Defendant run the risk of being held in contempt of court.

- 89) Eow Fun Siew & Anor. v. Mutual Life Sdn Bhd. [2017] 5 MLRH 270

[Derivative Action – leave to commence derivative action on behalf of the company]

Alvin was the counsel for the Defendant, Mutual Life Sdn Bhd. This is a case involving an application filed under Section 181A, 181B, 181C, 181D and 181E of the Companies Act 1965 by the Plaintiffs, the shareholders of the Defendant, seeking leave to commence derivative action for and on behalf of the Defendant against the other directors of the Defendant. The Plaintiffs alleged that the Defendants, either individually or in concert, have unjustly enriched themselves and to the detriment of the Defendant. The Court dismissed the Plaintiffs' leave application and inter-alia held that the proposed action was for the collateral purpose to achieve the personal gains and were merely using the company for the same.

- 90) Pang Shyue Ming v Couture Homes Sdn Bhd [2017] 8 MLJ 204
[striking out – purchaser sued developer based on an allegation that his unit had been “substituted” with another unit]

Justin and Alvin acted for the defendant in this case and successfully struck out the plaintiff's claim. The High Court held that the plaintiff's claim ought to be struck out under Order 18 rule 19 (1) of the Rules of Court 2012.

The plaintiff submitted that the defendant had unilaterally and without the plaintiff's knowledge unlawfully changed and/or substituted the parcel with a different unit ie LG-29. The plaintiff insisted for LG-30 not LG-29 for reasons that the notice of delivery of vacant possession dated 8 October 2009 was issued to the plaintiff in respect of LG-30 and the plaintiff took possession of LG-30 only. The certificate of fitness was also duly issued to the plaintiff for LG-30 and not any other units.

On the other hand the defendant explained that the parcel described as LG-30 in the SPA had been relocated and re-designated as LG-29 due to the amendment to the building plan on 4 August 2009 and was approved by MPSJ.

Based on the amended building plan, the original location of the LG-30 had been replaced by ‘Switch & Meter Room’ and the staircase. The location of LG-29 on the amended building plan is the nearest and next to the original location with the similar size of the parcel was allocated to the plaintiff.

The Court is of the view that such amendment and substitution of LG-30 by the defendant was meant for an expedient and necessary purpose since the building plan had been approved by MPSJ and the original LG-30 is no longer in existence since it had already been replaced by ‘Switch & Meter Room’ and staircase and cannot be used anymore for the parcel. Therefore based on cl 10.1 the building plan is subject to any

amendments, variations, modifications and adjustment the position of LG-30 would include changing of its position and permits the defendant to substitute the plaintiff's unit to another unit. Therefore, such amendment and substitution was meant for 'expedient or necessary' purpose and does not amounts to an unjust enrichment by the defendant or otherwise to benefit the defendant by giving ownership of LG-30 to the defendant.

Based on the above clear terms, the defendant has a right to amend, vary, substitute, reconstruct and/or in any manner deal with the parcel unit without the need to seek consent from the plaintiff. On the same footing the plaintiff shall accept any changes, variation, modification and any adjustment of the parcel as the position and description of the parcel are not guaranteed to be correct.

It is settled law that parties are bound by the terms of the contract that they have entered into. In the present case, the Court held that defendant has fulfilled its contractual obligation under the contract by giving LG-29 with almost similar size to the plaintiff after the building plan has been amended subsequent to the signing of the SPA.

- 91) Stronpac Construction Sdn Bhd v. Vast Consortium Sdn Bhd [2019] 1 MLJ 264, [2018] 4 AMR 760 ; [2018] 3 MLRA 389 (Court of Appeal)
[Building Contract – Whether the construction works is not in accordance with construction drawings prepared by engineer]

Justin was the counsel for Stronpac Construction Sdn Bhd, the Appellant (Defendant). In this case, the Plaintiff alleged that the Defendant constructed 61 units of houses with discrepancy of 2 sq.ft. per unit (38 sq.ft. instead of 40 sq.ft.) causing the Plaintiff to suffer losses as sale price of the houses was reduced. As such, the Plaintiff claimed that the Defendant failed to carry out the construction works in accordance with the construction drawings prepared by the engineer and consequently breached three (3) construction contracts. The claim was allowed by the

High Court and was subsequently overturned by the Court of Appeal. In this case, the Court of Appeal allowed the appeal and held that there was no clause in the contract specifically provides that the houses built must be 40 sq.ft. and that the Defendant had constructed the houses based on the construction drawings given to them which was specified that the length of houses to be built was 38 feet. The Court also finds that the Plaintiff failed to produce any of the plans which they had relied on and throughout the construction period and there was no evidence of non-compliance and delay by the Defendant.

- 92) Hong Poh Teck & 3 Ors. v. Effort Ezy Sdn Bhd [2018] 2 AMR 833
[Summary Judgment – Tenancy Agreement – Specific Performance to reinstate the premises to original state and condition when handing over vacant possession]

Justin was the counsel for the Plaintiffs, the owner of the premises. In this case, the Plaintiffs rented 2 adjoining unit of premises to the Defendant and the Defendant removed the partition wall between the 2 premises. A tenancy agreement was entered into with specific terms that the Defendant is to reinstate the premises and give vacant possession to the Plaintiffs upon expiration of the tenancy agreement. The tenancy agreement was subsequently terminated and the Defendant returned the keys of the premises without reinstating the premises in its original state. The Plaintiffs filed an application for summary judgment against the Defendant to reinstate the premises to original state and subsequently to give vacant possession of the premises after the reinstatement. The Plaintiffs' application for summary judgment was allowed by the Court and the Court held that there are no triable issues.

- 93) Teoh Soo Beng v. Golden Castle City Sdn Bhd & Ors [2018] 2 CLJ 631; [2018] 8 MLJ 166
[Disqualifying solicitors from representing in winding up proceedings due to conflict of interest]

Justin was the counsel for the Petitioner and was assisted by Chooi Peng. This is a case involving an application to disqualify a firm of solicitors from representing a party in a winding up proceedings due to conflict of interest. The Court held there was an absence of particulars of the meeting which took place between the Petitioner and the solicitors and the Court was not satisfied that the Petitioner showed a strong case to disqualify the solicitors

- 94) Yap Khay Cheong Sdn Bhd v. Susan George TM George [2019] 1 MLJ 410, [2018] 5 CLJ 345; [2018] 5 AMR 79 (Court of Appeal)
[Sale and Purchase Agreement – Vendor exercised right to vitiate an agreement entered without free consent and undue influence – Vendor liable to refund monies received under a voidable contract]

Justin and Chooi Peng were the counsel for the Appellant. This is a case involving an appeal against the High Court decision in dismissing the Appellant's claim for specific performance of a sale and purchase agreement and an alternative claim for the return of monies paid pursuant to the said agreement. The Court of Appeal allowed the Appellant's alternative claim. In this appeal, the Court of Appeal allows part of the appeal and one of the issue was whether the Respondent can absolve her responsibility by blaming a third party where the third party was given blanket authority in respect of the bank account.

- 95) Ting Chuen Peng (mendakwa sebagai wakil bagi ahli negeri untuk Negeri Sembilan untuk United Chinese School Committees' Association of Malaysia (Dong Zong)) & 5 Ors v. Yap Kiam @ Yap Sin Tian (didakwa secara peribadi dan sebagai bekas pengerusi yang dikatakan untuk United Chinese School Committees' Association of Malaysia (Dong Zong)) [2018] 2 AMR 81
[Contempt of Court – Breach of order of court]

Justin was the counsel for the Plaintiff, Ting Chuen Peng. This is a case involving an application to contempt against the Defendant for breaching an ex-parte order of court which was extended to an ad-interim order for a

quia timet injunction, amongst others, restraining the Defendant from commencing any action to stop and/or frustrate an EGM of Dong Zong (“Injunction Order”). Despite the said order, the Court finds that one of the alleged contemnor filed a suit in Shah Alam High Court in breach of the said order and acted as the agent of the Defendant in doing so. In this case, the Court finds that not all cases prosecuted in court whether by way of criminal prosecution or civil proceedings requires direct evidence to be mandatory and took the view that circumstantial evidence can be used for the purpose of proving contempt. The Court held that the Defendant and another contemnor are guilty of contempt and sentenced the defendant for a term of imprisonment for 30 days and fined the other alleged contemnor.

- 96) Ho Kam Wah @ Ho Kim Wah v. Began Land Sdn Bhd [2018] 4 AMR 801 (High Court)
[Stay of proceedings pending appeal in another suit to set aside consent judgment]

Justin was the counsel for the Defendant. This is a case involving an application by the Plaintiff to stay the execution of a consent order pending an appeal in another suit to set aside the said consent judgment (“setting aside suit”). In dismissing the Plaintiff’s application, the Court finds that since the Plaintiff failed to apply for a stay of the order in the setting aside suit, the order of the setting aside suit takes full effect and the Plaintiff is estopped from raising it in the present application to stay the execution of the consent order. The Court further held that the execution of order will not cause nugatoriness towards the appeal of the setting aside suit and it can be compensation by damages. Consequently, there are no special circumstances justifying a stay of the said consent judgment.

- 97) Datuk May Phng @ Cho Mai Sum (mendakwa sebagai pengerusi, ahli jawatankuasa dan wakil Persatuan Penganut Buddha Rumah Kechara Malaysia (Kechara House) (“Kechara House”), sebuah pertubuhan yang didaftarkan di bawah Akta Pertubuhan 1966 dan dalam kapasiti perwakilan mewakili Kechara House dan/atau semua ahli-ahli Kechara House) & 2 Ors v. Tan Pei Pei [2018] 4 AMR 784

[Defamation – Circulation of email containing defamatory statement]

Justin and Chooi Peng were the counsel for the Plaintiffs. This in a case involving an email circulated via the internet defaming the Plaintiffs. The Court finds that the statement in the email made by the Defendants was highly defamatory and that the Defendant had deliberately and intentionally calls out to public to widely circulate the email. The Court held that since it is practically impossible to prove that any third person read it, the Court will presume the email circulation over the internet is wide publication and the onus is on the Defendant to prove the limited publication as alleged. The Court held that the Defendant must be held accountable and awarded damages to the Plaintiffs.

98) Nor Hisham Mohamed Hashim v. Imaxx Services Plus Sdn Bhd [2018] 2 ILR 273

[Industrial Court – Frustration of Contract – Termination of contract of service due to work injuries]

Alvin Lai was the counsel for the Respondent. This is a case involving a claim brought by the employee (Claimant) against the employer (Respondent) for the alleged wrongful termination of the employment contract. In this case, the Claimant was employed as the Sales Merchandiser of the Respondent. During the course of employment, the Claimant fell and suffered injuries when he was performing his duties in a supermarket. As a result, the Claimant was given a Certificate of Light Duties and medical leave for a period of more than 60 days and the Respondent had to employ a temporary worker to perform the Claimant's duties. After a long period of not being able to work, the Claimant was subsequently terminated by the Respondent. The Court found that the Respondent had been very reasonable in allowing the Claimant for more than 60 days of medical leave and the Claimant had been given ample time to recover from his injury. The Court held that the contract of service had been frustrated as the Claimant could not perform his duties after his injury and that the dismissal of the Claimant is lawful.

- 99) Lifomax Woodbuild Sdn Bhd v Ng Yee Teck [2018] 1 MLRA 350
[Striking out – liability of guarantor – issue of res judicata]

Justin was the counsel for the respondent/defendant. The plaintiff filed a suit against the principal borrower and at the same time, also subsequently filed a suit against the guarantors, one of them is the defendant in this case. The suit against the principal borrower was dismissed by the Court of Appeal and the principal borrower's counterclaim against the plaintiff was allowed with damages to be assessed. The plaintiff filed a notice of motion for leave to appeal to the Federal Court. Following the Court of Appeal's decision which dismissed the plaintiff's claim against the principal borrower, the defendant in this case, filed an application to strike out the plaintiff's claim. The High Court allowed the defendant's application but the Court of Appeal allowed the plaintiff's appeal and held that the defendant having given a guarantee, is primarily liable for losses and his liability is not dependent or secondary to the liability of the principal borrower. On the issue of res judicata, the Court of Appeal held that since the notice of motion for leave to appeal to the Federal Court is still pending, the issue of the liability of the principal borrower cannot be considered as res judicata.

(Note : This Court of Appeal decision has been subsequently reversed by the Federal Court on 5/9/2017 in Federal Court Civil Appeal No. 02(f)-57-05/2017(W))

- 100) Teoh Soo Beng v Golden Castle City Sdn Bhd & Ors And Another Case [2018] 1 MLRH 583
[Just and equitable Winding Up – Section 218 (1) (f) and/or (i) Companies Act 1965]

Justin and Chooi Peng acted for the plaintiff in this case. The High Court dismissed the plaintiff's winding up petition after a full trial as the High Court amongst others, found that there was no mutual understanding between the shareholders but merely casual and informal communication between corporate personalities which do not give rise to a quasi-partnership. Further, the Court held that there were alternative remedies available, apart from winding-up.

101) Perbadanan Pengurusan Palm Spring @ Damansara v. Ideal Advantage Sdn Bhd & Anor [2018] 10 MLJ 302

[Legality of the selling of condominiums with excessive accessory parcel (car parks) to a single purchaser – Whether owner of the condominiums can commercialise the accessory parcel (car parks) in renting the accessory parcel]

Justin was the counsel for the Plaintiff, the Management Corporation (MC) of Palm Spring. This is a case involving the selling of 45 units of condominium to a single purchaser (“**the Purchaser**”) together with 439 car parks as accessory parcel attached to the units of condominium. In this case, the MC filed the action claiming that the extra car parks of 394 (439 car parks less 45) are common property of the condominium and it was given to the purchaser for no consideration. The MC alleges that the Purchaser is essentially carrying out car rental business in the condominium by renting the car parks to the residents for a fee. The MC had suffered serious prejudice as out of 2,449 car parks built, 2,180 car parks should have been given to 2,180 condominium units (as per the Development Order) and the 218 car parks allocated for the visitors and there should be 51 extra car park parcels. As such, the MC claimed that the giving of 394 car parks to the Purchaser is invalid and ought to be revoked as there is a breach of Development Order, breach of the Strata Title Act 1985, the extra car parks was not sold with consideration, the extra car parks given to the Purchaser is against public policy and the registration of the extra car parks in the strata title is void ab initio under the National Land Code and Strata Title Act 1985.

The Court allowed the MC’s claim and held that:

- (i) The Development Order cannot override the contractual obligation and the agreement reached between the parties, so long as the contract or the consideration for the contract or the object was not illegal;

- (ii) The renting and/or the usage of the 394 extra car parks by the Purchaser was a 'dealing' of the accessory parcel was prohibited by s.34(2) and 69 of the Strata Title Act 1985. Therefore, it is illegal and the sale of the 394 extra car parks by the developer to the Purchaser shall be struck down pursuant to s. 24(b) of the Contracts Act 1950;

The 394 extra car parks which are accessory parcels registered in the name of Purchaser becomes null and void and is defeasible under s.340 of the National Land Code.

102) Chin Huat Yean @Chin Chun yeon & Anor v Chin Jhin Thien & Anor
[2018] 8 AMR 421 (Court of Appeal)

[Law and Application of Secret Trust in relation to a Will]

Chooi Peng was the counsel for the Appellants. A Will was challenged with a Full Trial. The Court of Appeal expounded on the important principles of law in relation to "Secret Trust" and held amongst others that :

- (i) The requirements for the formality of the will has been satisfied and the Appellant's defence (against the Respondent challenging the Will) is simple and straightforward and they had pleaded a secret trust;
- (ii) The common law concept of "secret trust" is recognised in Malaysia despite the law of will placed under the statutory regime in Malaysia. The Court's endorsement of the secret trust does not breach the Wills Act or any other statutory law;
- (iii) The High Court misdirected on the issue of testamentary capacity by combining the issue of secret trust with that of testamentary capacity. Testamentary capacity is related to medical evidence of related credible evidence, and has nothing to do with a story related to secret trust

- (iv) The law of secret trust was developed to assist the testator’s purported “sins” are what is often said “skeleton in the cupboard” for just and equitable reason to benefit his genes or acquaintance, whether lawful or otherwise to provide some form of security to his beloved ones. The law on secret trust has developed in a manner to close its eyes on public policy or breach of rule of law related to monogamous or polygamous marriage inclusive of polyandry or relationship of cohabitee, etc. The court does not strike out secret trust argument based on illegality or public policy.

103) Gan Cheng Khuan v Gan Kah Yang & 2 Ors [2018] 7 AMR 317

(Court of Appeal)

[distribution during intestacy- only brothers and sisters living at time of death of deceased was entitled to his estate]

Justin and Chooi Peng were counsel for the Appellant. The Court of Appeal held that pursuant to Section 6 (1)(i) of the Distribution Act, only the brothers and sisters of the deceased living at the time of his death was entitled to his estate.

The Court of Appeal further amongst others held that

- (i) The English Administration of Estate Act 1925 and the provisions of the Indian and NSW legislations are not in pari materia with Section 6 and 7 of the Distribution Act;
- (ii) The emphasis is on the phrase “living at the death of the intestate” in Section 6 (1) (i) of the Distribution Act;
- (iii) If the nephews of the intestate are taking a share of their late father’s entitlement in the estate of the intestate under Section 7 of the Distribution Act, they are caught by subsection 6 (1)(i)

The Respondent’s application for leave to appeal to the Federal Court was refused.

- 104) Beyond Hallmark Sdn Bhd v Leong Tuck Onn & Anor [2019] 2 AMR 550
[recovery of Stakeholder sums]

Justin and Alvin Lai were counsel for the Plaintiff. The Court Decision covered amongst others the following points including important points of law:

- (i) The solicitors holding monies as Stakeholders hold it as a trustee for both Vendor and Purchaser and not in a contractual capacity;
- (ii) The solicitors holding as Stakeholders need not be a party to the Memorandum of Agreement are bound by the terms of the stakeholding and is not exonerated from liability;
- (iii) The breach of a stakeholding term is not just a breach of undertaking but also a breach of trust;
- (iv) The deposit of and holding the monies as a refundable deposit by the legal firm as a stakeholder is in the ordinary course of its business and the 1st Defendant had acted within the scope of his apparent authority

- 105) Mann Holdings Pte Ltd & Anor v Ung Yoke Hong [2019] 8 MLJ 186
[setting aside of Judgment under Reciprocal Enforcement of Judgment Act]

Justin Voon was the counsel for the Defendant. We believe that this is the first case in Malaysia where an attempt to register the Singapore Judgment was made whilst the Malaysian Suit was on-going which inter-alia canvass the same issues. The following issues emerge from this decision :

- (i) *Res Judicata applies in a REJA case* – whether the decision in the JB Suit on 2 occasions that the Singapore Suit will not prevail over the JB Suit would be binding here in the REJA Case;
- (ii) Whether Res Judicata is a facet of public policy and therefore, whether the said Foreign Singapore Judgment can be set aside under Section 5

(1)(a)(v) of the REJA “that the enforcement of the judgment would be contrary to public policy in Malaysia”

The High Court set aside the registered Judgment based on Res Judicata accepted as part of public policy [overturned on appeal]

[Note: This High Court decision has been overturned by the Court of Appeal vide Civil Appeal No. J-02(IM)-1509-07/2018]

106) Merai Sdn Bhd v Lai King Lung (Practising as an advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners Advocates and Solicitors) & Anor [2019] 2 AMR 761; [2019] 7 CLJ 1 (Court of Appeal)

[Law on retrospective sanction from the Liquidator to commence proceedings on behalf of a wound-up company]

Justin was counsel for the Respondents in this case who applied to strike out the Appeal on the basis that no proper sanction has been obtained by the Respondent/Appellant to appeal to the Court of Appeal.

The Court of Appeal dismissed the application and amongst others held that :-

- (i) With the presence of s 236 of the Companies Act, it is the liquidator who has the authority to bring or defend any action or proceedings in court. The term “bringing” must necessarily include continuing with any action or proceedings already brought or commenced and any such action or proceedings must also extend to the conduct and continuation of appeals.
- (ii) The Official Receiver as the liquidator of the appellant has the necessary authority to consider and grant a sanction which is effective on a date other than the date it was made i.e. retrospective sanction. Bearing in mind that the Official Receiver had already granted the

necessary sanction, the respondents' application thus is without merit and must be dismissed.

- 107) Barakah Offshope Petroleum Berhad & Anor v Mersing Construction & Engineering Sdn Bhd [2019] 3 AMR 673
[Pre-conditions to apply for a Restraining Order]

Alvin was counsel for the 1st Intervener in this suit.

Alvin raised the point that the pre-condition of Section 368(2)(a) to (d) of the Companies Act 2016 needs to be complied with even in the application for restraining order under Section 368(1) and not just subsequent extensions of the same.

The Court accepted the said argument and amongst others held :

- (i) It cannot be the legislative intent that only s368(2)(a) and (d) of the Act need be complied with when applying for a restraining order. The conditions under s368(2)(a) to (d) need all be complied with. To hold otherwise would do violence to the manner in which s368(2)(a) to (d) was drafted and would call, unjustifiably, for ignoring the fact that the conditions set out in s368(2)(a) to (d) are cumulative, having regard to the semicolon after each subsection and the use of the conjunction “and” placed between s368(2)(c) and (d).
- (ii) Upon its proper construction, the conditions set out in s368(2)(a) to (d) of the Act need to be complied with when an application is made for a restraining order under s368(1) of the Act. Such a result is consonant with the plain language used and the legislative intent and purpose for the conditions in s368(2)(a) to (d) of the Act. In this regard, the applicants, having conceded that the conditions in s368(2)(c) and (d) of the Act were not complied with when making and securing the ex parte order, the restraining order thus cannot stand.

108) Hedgeford Sdn Bhd v Lynda Quah May Lu [2019] 3 AMR 525
[Unlawful representation of third party on behalf of Claimant in the Tribunal for Homebuyer Claims and calculation of LAD is taken from the date of SPA and not the booking form]

Justin was the counsel for Hedgeford Sdn Bhd, the developer in this Judicial Review.

A novel point was raised on behalf of the Developer that the Homebuyer cannot be represented by a third party who is not an advocate and solicitor before the Tribunal.

The Court inter-alia held as follows :-

- (a) The parties to a claim before a tribunal are the homebuyer as defined under s16A of the HDA i.e. the claimant and the housing developer who is the respondent. It is only in cases where complex issues of law are involved and where a party “will suffer severe financial hardship”, that a party may be represented by an advocate and solicitor pursuant to s16U of the HDA.
- (b) The tribunal cannot on its own motion allow a homebuyer to be represented by a third party who is not an advocate and solicitor. In this regard, s16E of the HDA specifically provides that the tribunal can only adopt procedures it thinks fit and proper subject to the provisions of the HAD and any regulations made thereunder. In the circumstances, the tribunal’s decision to allow the third party to represent the first applicant at the hearings before it is procedurally improper and goes against the purpose and intent of the setting up of the tribunal and the natural justice principle of *nemo judex in sua causa*.

Further, the Court held that it is clear from reg 22 of the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 (“the 2002 Regulations”) that the legislative intent of Parliament is that in the event of a claimant not appearing at the hearing, the tribunal

must either dismiss the claimant's claim or allow the respondent's claim if any. In the premises and pursuant to reg 22(1) and (2) of the 2002 Regulations, the tribunal did not have the option to keep on adjourning the hearing as it had done, until the first respondent decided to attend the same. Regulation 22(1) and (2) of the 2002 Regulations must be interpreted strictly and take precedence over the general provision in reg 27. The tribunal's purported exercise of its powers to allow the first respondent to be represented by a third party and to adjourn the hearings due to the first claimant's absence, is ultra vires the HDA.

In respect of the of the issue of Liquidated Damages (LAD), the Court held that the tribunal's finding that the date of payment of the booking fee is the date of the sale would mean that there exists a binding contract for the sale and purchase of the property between the parties at the date of payment of the booking fee. If that is the case, then in the event of a purchaser deciding to not execute a formal contract in the form of contract in Schedule H, the purchaser would then be in breach of the sale and purchase agreement since the agreement would already have come into being upon payment of the booking fee thus rendering the purchaser liable to the developer for any loss or damage suffered by the developer instead of merely forfeiting the booking fee. Such an outcome could not have been the legislative intent of the HDA. Accordingly, the tribunal had erred in law in calculating the LAD from the date of the booking fee instead of from the date of the SPA.

- 109) Mann Holdings Pte Ltd & Anor v Ung Yoke Hong [2019] 6 CLJ 475; [2019] 4 MLRA 640 (Court of Appeal)
[Setting aside of Judgment under Reciprocal Enforcement of Judgment Act]

Justin was the counsel for the Respondent in this case. The Court of Appeal held that res judicata do not apply in this case and reversed the High Court Judgment (kindly refer to item no 101 above)

- (i) The Respondent submitted to jurisdiction in Singapore by filing a Defence and taking point in the Trial plus appealing to the Singapore Court of Appeal.
 - (ii) The concept of public policy is a narrow and restrictive doctrine. It could not be seen how the registration of a Singapore Judgment at the Johor Bahru High Court could be said that to be contrary to the public policy in Malaysia.
- 110) Hedgeford Sdn Bhd v Jennifer Fu Woan Lin & Ors [2019] 10 MLJ 729
[Judicial Review against decision of Tribunal for Homebuyer]

Justin was counsel for the Applicant for Judicial Review in this case.
The Court inter-alia held that :-

- Pursuant to s16AE of the Housing Development (Control and Licensing) Act 1966 (“the HDA”), the tribunal can only adopt procedures it thinks fit and proper subject to provisions of the HDA and any regulations made under the HDA.
- The tribunal cannot ignore the express provisions in the HDA and regulations in making and adopting any procedure. A template “Surat Wakil Kuasa Bagi Menghadiri Pendengaran” which allowed a homebuyer to authorise a third party to represent him/her was contrary and ignored the provisions of the Part VI of the HDA.
- Therefore, the tribunal’s decision in allowing the third parties to represent homebuyers at hearings before it went against the purpose and intent of setting up the tribunal, which was to provide a quick, simple and inexpensive forum for homebuyers to pursue their claim against housing developers.
- This ability to appoint a third party which was not extended to the housing developer went against the natural justice principle of rule against bias.

- Therefore, the decision to allow a third party to represent the purchasers at a hearing was procedurally improper and the tribunal had breached the principles of natural justice and failed to observe the procedural rules laid down in the HDA by which the tribunal's jurisdiction was conferred.
- 111) Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara (and Another Appeal) [2019] 5 AMR 201, (Court of Appeal)
[Unlawful accessorizing of carparks accessory parcels in the strata title and definition of “accessory parcel”, unlawful rental of Carparks and commercial business within a Residential Condominium]

Justin was counsel for the Respondent in this case.

In this case, the developer (D2) in this case sold 45 units of condominium to a closely related company (D1) with 439 accessory carparks attached to the said units, with 40 of the units having 8 to 15 accessory car parks each.

The Respondent contend that this caused a shortage of carparks at the condominium including lack of visitors' carparks and the D1/D2 proceeded to rent the extra carparks to residents/third parties.

The important points of law canvassed by this case from the report include the following :

- (i) The Strata Titles Act 1985 prohibits the commercial usage of carparks, where in this case the Defendants were renting out the carparks in a residential condominium to third parties.
- (ii) Each condominium unit which is about 1000 square feet at most would require one or two carparks. The usage of the 394 carparks (excessive carparks) constitute a breach of Section 34 (2) and 69 of the Strata Titles Act 1985 namely that the accessory carparks is used or

intended to be used not in conjunction with a parcel unit and dealt with independently of the main parcel unit.

- (iii) “Dealt” in the said Section 34 (2) and 69 include “tenancy” where Section 5 of the National Land Code defines “dealing” as transactions under Division 4 and Division 4 of the NLC include Part 14 and 15 with provisions on “tenancies”.
- (iv) There is a breach of the Development Order where the requirement of the DO is a requirement under the law pursuant to Sections 22 (2) , 22 (3) and 22(4) of the Town and Country Planning Act 1976, where D2 failed to provide 10% of the 2180 carparks as visitors carparks. Here, we are not talking about the number of carparks required to be built by D2, which appear to be regular on paper but the dealing of the carparks for business purpose which caused an acute shortage of carparks.
- (v) There was evidence that the accessory carparks were not sold or transferred with any consideration and/or valuable consideration.
- (vi) The 40 SPAs were not arms length transactions where vacant possession were given to D1 before purchase price were fully paid, D1 took 3 years to pay the purchase price when the SPA require 3 months and there are instances the 10% deposit were made after balance purchase price made. All these could only happen when D1 and D2 have close relationship and controlled by the “Lee” family.
- (vii) Carpark transactions are illegal and ordinarily if the SPAs are struck down as void, the carparks after deducting the visitors’ carparks should revert to D2. However, as no approved strata plan was adduced by D2 as the developer, although available, there is no evidence that these carparks are “accessory parcels” or “comprise in any parcel”. Therefore, an adverse inference under Section 114 (g) Evidence Act is invoked against D2 and these carparks are ruled as common property.

- (viii) Section 143 (2) and (3) of the Strata Management Act 2013 provides that the plaintiff as the management corporation can lawfully sue for the recovery of common property.
 - (ix) The fact that the carparks are already comprised in the strata tiles alone is not a determining factor that they do not form part of common property. If the Court were to agree with the submissions of the defendants in this regard, it will produce an absurd result i.e. any party like the developer can take advantage of the situation by ‘accessorizing” property which should have been “common property”.
 - (x) Once the carparks are no longer part of the strata title, they are no longer accessory parcels and not subjected to Sections 4, 34 and 69 of the Strata Title Act.
- 112) Southville City Sdn Bhd (formerly known as Tristar Acres Sdn Bhd) v Noranisah Binti Mohamed Hisa & Anor (and Another Application)
[2019] 4 AMR 825
[Judicial Review and calculation of LAD]

Justin was counsel for the Developer in this case.

The Court dismissed the Judicial Review application and inter-alia held :-

- (i) The tribunal was correct to find that M/s Khairin Nisan was the lawyer for acting for Applicant.
- (ii) Notwithstanding the fact that it was expressly stipulated in the S&P agreement that vacant possession was to be given within 48 months from the date of the agreement and that the common facilities are to be completed within the same time frame, following *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 3 AMR 2094, the calculation of LAD begins from the date of payment of the booking fee. In this regard, upon payment of the booking fee, the contract is valid as the consideration and object of the agreement are legal.

- 113) Badan Pengurusan Bersama Kristal Heights 2 & Anor v Syarikat Sri Malawati Sdn Bhd & Anor [2019] 11 MLJ 22
[Encroachment of Land, trespass, negligence and/or breach of statutory duty]

Justin was counsel for the Plaintiff in the Counterclaim in this action which proceeded for Full Trial. The case involve encroachment of the said Plaintiff's Land by a right of way where the Pentadbir Tanah issued a letter granting a right of way not in accordance with the National Land Code. and The said Plaintiff sought for declaratory and injunctive relief and also damages for trespass and/or negligence and/or breach of statutory duty. The Court inter-alia held that :-

- (i) The fourth defendant (Pentadbir Tanah) owed a duty of care in common law to the plaintiff as the registered proprietor to ensure its rights of enjoyment to the said land was not deprived or encroached by the fourth defendant's unlawful act. Based on the above, the plaintiff was therefore entitled to judgment against the fourth defendant for breach of statutory duty and negligence.
- (ii) There was no statutory duty owed by the fifth defendant to the plaintiff as the duties owed by the fifth defendant under by-law 25 of the Uniform Building By-Laws were only to qualified persons defined therein.
- (iii) By virtue of the close proximity of the plaintiff's land, it was foreseeable that any planning permission that allowed for the encroachment by the applicant for that planning permission onto the plaintiff's land would cause damage to the plaintiff, and when the added requirement of justice fairness and reasonableness of the case under the *Caparo* test was considered, there was a clear duty or care owed by the fifth defendant to the plaintiff. Nevertheless, the court found that D5 (Land authority) had acted reasonably to ensure that there was no unlawful encroachment onto the said land. Thus, D5 had

properly discharged its duty of care and there was no breach of that duty.

- 114) Southville City Sdn Bhd v Chua Teck Kee & Anor [2019] 5 AMR 386
[Judicial Review – initial sum paid to the Stakeholder to make offer to purchase and LAD]

Justin was counsel for the Applicant for Judicial Review, Southville City Sdn Bhd.

In this case, the first respondent appointed Messrs Khairin Nisa & Co as a stakeholder to represent him to make an irrevocable offer (“IO”) to the applicant to purchase a unit in a housing project (“the project”) to be developed by the applicant. The first respondent then placed a sum of RM3,000.00 (“the stakeholder sum”) with the stakeholder with instruction to release the same to the Applicant once there is acceptance by the applicant of the first respondent’s offer to purchase.

The first respondent subsequently entered into a sale and purchase agreement (“the SPA”) with the applicant on 27/3/2018 and vacant possession was delivered by the applicant on 29/3/2018. The first respondent thereafter filed a claim against the applicant for liquidated damages for late delivery of vacant possession.

The Court in allowing the Applicant’s judicial review application inter-alia :-

- (i) Based on clause 1.2 of the IO, the first respondent was aware that the applicant was under no obligation to collect any payment before the property was opened for sale and pursuant to clause 3 of the IO the stakeholder was instructed to release the monies to the applicant upon the applicant’s confirmation that project was open for sale and acceptance of the first respondent’s offer to purchase and towards settlement of the first 10% of the purchase price. On the facts the

stakeholder sum was only released to the applicant on 27/3/2014 after the SPA was signed by both parties. Thus, the stakeholder sum cannot be constituted as “booking fee” and/or “deposit” towards the sale and purchase of the project. Even if the court were to accept that the stakeholder sum is a booking fee or a deposit, the sum was received by the applicant on 27/3/2014 and not 28/9/2013.

- (ii) There was no agreement or SPA between the applicant and the first respondent on 28/9/2013. For the applicant to accept payment before the contract of sale would contradict reg 11(2) of the Housing Development (Control and Licensing) Regulations 1989 which prohibits any parties from collecting any payment as stakeholder. There is no evidence to show that Messrs. Khairin Nisa & Co had acted as the agent or panel lawyer for the applicant to collect the stakeholder sum.
- (iii) Clause 25 and 27 of the SPA specifically mentions that delivery of vacant possession shall be within 48 calendar months from the date of the SPA, whereas clause 27 states that the completion of common facilities shall be completed within 48 calendar months from the date of the SPA. The SPA does not provide that the delivery of vacant possession and completion of common facilities must be completed from any other date. On the facts, the SPA is in accordance with Schedule H of the Regulation 1989 and the terms thereof are to be strictly followed and cannot be contracted out of.
- (iv) No binding contract was formed on 28/9/2013 as there was no consideration, no acceptance and no intention to create legal relations between the applicant and the first respondent. The second respondent thus had erred in holding that the date of ascertaining the delivery of vacant possession should be 28/9/2013.
- (v) The Tribunal had committed jurisdictional errors and/or Anosminic errors and acted on incorrect basis in fact. The award therefore ought to be quashed for being tainted with illegality and unreasonableness.

- (vi) The liquidated damages payable for late delivery of the vacant possession of the property and late completion of the common facilities should have been calculated from date of the SPA and not from the date of the stakeholder sum was deposited with the stakeholder.

- 115) Antara Vista Sdn Bhd v Rumaya Properties Sdn Bhd [2019] 7 AMR 229
[Project abandoned and converted from medium cost to high end Project]

Justin was counsel for the Appellant.

The Appeal was partially allowed and the Court of Appeal reversed the relief of Specific Performance given by the High Court.

Although the Court of Appeal upheld the High Court's decision that the SPA is genuine and not a sham, the court could not order specific performance as the 18 properties are no longer in existence i. e in the form it was purchased. The Court referred to the Appellant's written submission which stated:

"It is impossible and absurd - D1 has developed the units in a DIFFERENT PROJECT which bears no resemblance to the 18 units. In fact, the P wants an unjust enrichment"

- 116) Lai King Lung & Anor v Merais Sdn Bhd [2020] 6 AMR 217 FC
[Wound up company – retrospective sanction]

Justin was the co-counsel for the Appellants assisting Datuk Seri Gopal Sri Ram (Senior Counsel). The Federal Court clarified the earlier Federal Court case of Winstech Engineering Sdn Bhd v ESPL (M) Sdn Bhd [2014] 1 AMR 797 and inter alia held that the Official Receiver/Liquidator had no power to grant retrospective sanction.

The following Question of Law was answered in the **negative** :

“Whether retrospective sanction from the Official Receiver/Liquidator of a wound-up Appellant/ Applicant in Court by itself can sufficiently clothe the Appellant and/or their solicitors with locus standi to proceed with the Appeal/proceeding in question without leave nunc pro tunc obtained from the Court?”

The Federal Court further ruled and/or provided guidance as follows in respect of the options available to a litigant if they could not obtain sanction and/or could not obtain sanction in time i.e.

- (i) First, the plaintiff could make an urgent application to the Court of Appeal for extension of time to file the notice of appeal where an extension of time would in the normal course have been granted on proof of sufficient grounds.
- (ii) Secondly, if the sanction was given by the liquidator subsequent to the filing of the notice of appeal, the plaintiff could have made a formal application to the Court of Appeal for leave *nunc pro tunc* so as to regularise the sanction by giving it retrospective effect.
- (iii) Thirdly, if the liquidator refused to give his sanction, then the proper authority is the court. The plaintiff could have applied to the court under s 236(3) of the 1965 Act for the sanction, which sanction can be given retrospectively under the inherent discretion of the court.

In the present case, the plaintiff did not have the locus standi when it filed the notice of appeal. The sanction given by the liquidator did not have retrospective effect. The liquidator did not have the statutory power to grant retrospective sanction in the absence of any express enabling provision in the enactment. Consequently, the Federal Court held that the notice of appeal filed by the plaintiff is bad in law and of no legal effect.

- 117) Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor
[2020] 5 AMR 541 FC
[Secret Trust]

This is the very first Federal Court decision on secret trust, a novel point of law argued by Justin and Chooi Peng who acted for the Defendants / Respondents. This case confirms that the law and principles of secret trust are part of the jurisprudence of Malaysian law and it applies where appropriate to ensure that the true intentions of the testator where there is a Will are carried out.

This case is an appeal by the Plaintiffs against the Court of Appeal decision, in their attempt to revoke the Grant of Probate issued to the Defendants. The Plaintiffs sought to argue that the deceased did not have the testamentary capacity to make the Will or there was undue influence exerted on the deceased by the Defendants. The deceased's Will named the Defendants as the executors and beneficiaries. The Defendants resisted the Plaintiffs' claim and in their Defence, pleaded that they are not the true beneficiaries of the deceased's estate because of a secret trust created by the deceased.

The Federal Court dismissed the Plaintiffs' appeal, maintained the Court of Appeal decision and answered the Leave Questions as follows :

- (i) Whether the concept of secret trust is applicable to Malaysia as there is no decision regarding the applicability of secret trust? **Affirmative**
- (ii) Whether secret trust is applicable in a case involving the issue of testamentary capacity of a testator? **Need not be answered but if must be answered, it would be in the Affirmative**
- (iii) Whether secret trust is contradictory to the Malaysian Wills Act 1959 and/or is against public policy as it can be abused? **Negative**

The Federal Court also amongst others held that :

- (a) Secret trusts enable a testator to direct the disposition of his or her property upon his or her death without specifying the actual beneficiary in the will whereby the property is bequeathed to a 'legatee' who holds it as a trustee for the secret beneficiary.

- (b) The concept of secret trust, which is part of the law of trust and is governed by the rules of equity and the common law of England, is statutorily applicable in Malaysia by virtue of Section 3 (1) of the Civil Law Act 1956.
- (c) Secret trust operates outside the will, ie. de hors the will. Therefore, the Court's endorsement of the secret trust does not breach the Wills Act or any other statutory law.
- (d) If the testator is ill, it does not deprive his ability or capacity to execute a will.

118) Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd [2020] 2 AMR 387 FC
[Judgment in Default – Right to enforce Arbitration Agreement]

Justin was the counsel for the Appellant in this Appeal which was allowed by the Federal Court. The Federal Court decided on important principles of law relating to the right to set aside a Judgment in Default based on a valid Arbitration Clause. The following Questions of Law were inter-alia answered by the Federal Court :

1. *Can a Judgment in Default in Court be sustained when the plaintiff who obtained the Judgment in Default is bound by a valid Arbitration Agreement/Clause and the defendant has raised disputes to be ventilated via Arbitration pursuant to the Arbitration Clause?*

We answer the question in the negative.

2. *Should the Court in hearing an application to set aside the Judgment in Default where a valid Arbitration Clause is binding on parties consider the “merits” or “existence” of the disputes raised by the defendant?*

We answer the question in the negative.”

The Federal Court further held as follows in respect of important points of law :

- (i) That even when a judgment in default has been procured, Section 10 of the Arbitration Act remains applicable (paragraph 48 (i) of the Grounds)
- (ii) The judgment in default cannot act as a bar to arbitration because the Contractor in initiating Court proceedings has effectively breached the arbitration agreement (paragraph 48(ii) of the Grounds)
- (iii) The Employer’s application to stay the Court proceedings pending arbitration raises a jurisdictional point which the Court is bound to consider(paragraph 48 (iv) of the Grounds)
- (iv) Clause 30.3(ii) of the PAM Contract entitles the Employer to refer any disputes or differences in relation to the set offs our counterclaim or any allegations of defective work to an arbitrator under Clause 34 of the PAM Contract and therefore , the right to payment under Interim Certificates under Clauses 30.2 or Clause 30.3.(i) are not “carved out” from arbitration (paragraph 53 (b) of the Grounds.)

119) Syarikat Logistik Petikemas Sdn Bhd v Maruzen SH Logistics Sdn Bhd [2020] 7 AMR 408

[Striking out – No cause of action for ‘negligence’ in respect of alleged failure to enter contract]

This is an important case argued by Justin for the Defendant to strike out the Plaintiff’s claim. The Plaintiff (Syarikat Logistik Petikemas Sdn Bhd) filed a suit against the Defendant (Maruzen SH Logistics Sdn Bhd) for negligence in failing to enter into a contract with them. This is an important case because if the Plaintiff’s claim is allowed, it may open a floodgate that an alleged failure to enter into a Contract would lead to a Suit for negligence. The Court struck out the Plaintiff’s claim.

The Plaintiff’s claim against the Defendant was based on, amongst others, failing to enter into a contract with the Plaintiff to rent the relevant premises from the Plaintiff, and the alleged:-

- a) Negligent misrepresentation; and/or

- b) Breach of duty of care towards the Plaintiff under the purported business relationship between both parties.

The Court *inter alia* held that :

- (i) Since there was negligent misrepresentation alleged on the part of the Defendant, what is vital to establish at this juncture is an underlying relationship between parties, where one party relies on the other and where one is in a dominant position which requires some fiduciary relationship. This is in line with the principle in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 (“*Hedley Byrne*”)
- (ii) Furthermore even if there was a business relationship between the parties, that by itself did not give rise to a fiduciary relationship, such as between a solicitor and client or any kind of relationship of proximity between the plaintiff and the defendant.
- (iii) It was not pleaded with precision or clarity, any ‘special relationship’ or ‘skills’ on the part of the Defendant to justify a professional duty of care to the Plaintiff.
- (iv) The ‘misrepresentation’ alleged by the Plaintiff is that the Defendant had intended to purchase and/or rent the relevant premises. This did not amount to a misrepresentation, but an expression of the Defendant’s intention that preceded the negotiations that followed.
- (v) It is trite that it is not sufficient to plead the legal consequences without setting out in the pleadings the facts which give rise to that claim, or which impose on the defendant the particular duty or liability.

- 120) Mammoth Empire Construction Sdn Bhd v Kenwise Sdn Bhd [2020] 2 AMR 683
[Fortuna Injunction – pending Section 37 and/or Section 42 Arbitration Act 2005 application]

Justin acted for the plaintiff to apply for an ad interim Fortuna Injunction to restrain the defendant from proceeding or acting upon the statutory notice and proceeding with a winding-up petition against the plaintiff.

This decision further clarifies the position of the law on Fortuna Injunctions and is helpful for litigants as a winding up threatened to be filed based on an award challenged and/or not registered as a Court Judgment yet arise often in Courts.

- (i) The Court held that the case of *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 318 which is a pre-Arbitration Act 2005 case is still applicable to injunct a winding up proceedings when there is a pending Sections 37 and/or 42 Arbitration Act 2005 application to challenge the Arbitration Award plus the recognition and enforcement application by the Defendant.
- (ii) Despite the Final Award, the Plaintiff had been disputing the alleged debt both on liability and quantum right from the stage the dispute was referred to arbitration. It would be premature and improper for the Winding Up Petition to be presented at this stage before the pending actions are disposed of.

The argument by the Defendant that unlike Section 17 of the old Arbitration Act 1952 (relied by Mobikom's case), the wordings of the new Section 36 of the Arbitration Act 2005 grants sufficient power to the party to rely on the Award to initiate Court proceeding is plainly misconceived as there is effect hardly any significant difference in the wording of the finality clause in both sections, except for different usage of words which for all intents and purposes convey the same meaning.

- 121) *Apex Equity Holdings Berhad & Anor v Lim Siew Kim & 17 Ors* [2020] 2 AMR 669
[Locus standi – “persons acting in concert” under Section 360 CMSA 2007]

This case involves the issue of the strict compliance of the Capital Market and Services Act 2007 where the Plaintiffs alleges that the Defendants are “persons acting in concert” and a Suit was filed to seek Injunctive remedies against the Defendants. Justin acted for the 12th and 13th Defendants. All the Defendants applied to strike out the Suit which was allowed by the Court.

The important points of laws canvassed by Yang Arif Ong Chee Kwan includes the following :

1. Sections 218(1) to (3) of the CMSA and s. 60(7), 64(1), 64(1)(h)(iv) and (v) and s.72(2)(a)(i) of the CMSA and / or Rule 4.02(8) and 4.02(9) of the Licensing Handbook SC-GL/2007 (R6-2018)T. 218 are clearly not a "relevant requirement" for the purposes of Section 360 of the CMSA.
2. The Plaintiffs do not have *locus standi* and neither can they be a "person aggrieved" when :
 - (i) The Plaintiffs, as the target companies, are the very subject matter of this case; and
 - (ii) It is the minority shareholders in this case, if at all, who are affected by the acts of 'persons acting in concert' who can sue and not the Plaintiffs.
- (3) This case involves the rights of the minority shareholders against the purported "PAC" or "persons acting in concert" as regards the latter's obligations to them under the provisions of the Code on Take-Overs and Mergers and the relevant provisions of the CMSA. As such, even if there are persons acting in concert, it is the minority shareholders who ought to sue and not the Plaintiffs.

- (4) Accordingly, the basis upon which the Plaintiffs claim to be "aggrieved persons" falls, bringing along with it any *locus standi* the Plaintiffs allege they may have to commence this OS 246.
- (5) Further, whilst prayer 6.1 of the OS 246 seeks to compel the Securities Commission to act, however, the Securities Commission is not made a party in these proceedings.

This is an important case where it appears to be the first case in Malaysia where the Court held that the “target” or “subject matter” company has no locus standi in respect of an allegation of '*persons acting in concert*' and/or suit under Section 360 CMSA or breach of Takeover Code/Rules.

- 122) Fileforce Sdn Bhd v Lai May Ting & Ors [2020] 4 MLRH 93
[Setting aside of an Anton Pillar Order]

Justin was the counsel for the Plaintiff in this case. The 1st Defendant applied to set aside the Anton Pillar Order granted but was unsuccessful. In refusing to set aside the Anton Pillar Order, the Court found that it was quite clear that while in the employment of the Plaintiff, the 1st Defendant is strictly forbidden to divulge any information or trade secret to its customers and from the facts of the case, there exist a strong arguable case which *inter alia* justified the Anton Pillar Order granted.

- 123) Riders Lodge Sdn Bhd v Tropik Sentosa Sdn Bhd & Anor [2020] 8 AMR 283
[Claim for specific performance – refusal by defendants to renew lease]

Justin was the counsel for the plaintiff. This case deals with the important issue of the Specific Performance of a Lease Arrangement for 30 years structured with an initial 5 years plus subject to a Renewal every 5 years for 5 renewable terms. The High Court granted the said Specific Performance after a Full Trial based on *inter alia* the following:

- (a) The Court held that there was an agreement between parties of a 30 years lease broken down to 6 terms of 5 years each and the option to renew the said Lease lies solely and absolutely on the Plaintiff.
- (b) The Court held that the doctrine of equitable estoppel apply to the present case to prevent the Defendants from the non- renewal of the Lease and/or alleging that he Plaintiff is a “monthly tenant” given the huge sums of monies expended by the Plaintiff to build the Horse Ranch (Riders Lodge) on the said Land and rely on remaining tenure of the 30 years lease promised from the outset.
- (c) The earlier notice by the Plaintiff’s solicitors’ letter dated 6/1/2009 asked for renewal for another 5 years and “thereafter for each renewal due” and this phrase clearly shows the Plaintiff intended to renew the lease not only for the period of 5 years from 21/5/2009 to 20/5/2014 but also for the 4 renewable terms of 21/5/2014 to 20/5/2019 (third term), 21/5/2019 to 20/5/2024 (fourth term) , 21/5/2024 to 20/5/2029 (5th term) and 21/5/2029 to 20/5/2034 (6th term).
- (d) The Defendants who received gross revenue sharing (which only exists under the lease agreement) and/or who accepted rent with knowledge of the cause of forfeiture had thereby waived the forfeiture.
- (e) On the separate loan issue, when a loan is unsecured, non-interest and has no fixed repayment terms, the said loan is repayable within a reasonable time of a request for repayment depending on the circumstances of the case and it is not repayable immediately. It is untenable for a demand for the repayment of the said Loan to be made all at once when the Plaintiff is generally making losses overall in recent years and an immediate repayment of the said Loan sum is very damaging and harmful to the Plaintiff’s business, operation and finances.
- (f) The Court granted a specific performance of the renewal of the lease until 2034 and also the Plaintiff is entitled to lodge a caveat on the said Lease Land to protect the Plaintiff’s interests.

- 124) Soo Teck Lee & 4 Ors v Lim Geok Kim [2020] 7 AMR 852
[disqualification]

Justin was the counsel for the defendant. The plaintiff entered into a sale and purchase agreement with the defendant and claimed that there was a breach by the defendant and claimed liquidated damages from the defendant. The defendant in his defence and counterclaim, contended that the agreement was a sham. The defendant applied to disqualify the legal firm from acting for the plaintiffs on the ground that the 4th plaintiff is a partner in the said firm and has a pecuniary interest in the action and that the other partner of the firm had purportedly witnessed the execution of the agreement. It is not disputed that both partners in the law firm are potential material witnesses in the action if it proceeds to trial. The High Court allowed the defendant's application to disqualify the law firm from acting for the plaintiffs.

The High Court also rejected the submission that the legal firm can still act for the relevant partners who will not be conducting the trial when *inter alia* the proximity of relationship of the partners and the legal assistants are too close for comfort to ensure a conflict of interest will not arise.