

# Lower threshold for staying proceedings pending appeal

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## Introduction

Malaysia has a two-tier system of appeal. There are two appellate courts with appellate jurisdiction: the Court of Appeal and the Federal Court. Generally, a high court judgment can be appealed to the Court of Appeal and subsequently to the Federal Court, provided that certain legal requirements are met.

The question is, when the losing party is appealing to the Court of Appeal against a high court order, can the winning party enforce the order before the appeal is heard? The answer is yes, unless the losing party obtains a stay from the high court order pending the appeal.

This article explores the recent Court of Appeal decision in *Ong Koh Hou @ Won Kok Fong v Da Land Sdn Bhd*([1](#)) with regard to the law on staying proceedings pending appeal.

## Facts

In the case at hand, the appellant agreed to purchase the first respondent's land via a sale and purchase agreement. The appellant paid the deposit and caveated the land. When disputes arose, the first respondent claimed that the agreement had been terminated and therefore forfeited the deposit. The first respondent then filed suit before a high court seeking a declaration that the sale and purchase agreement had been terminated. The appellant submitted a counterclaim for an order for specific performance.

The high court ruled in favour of the first respondent. The appellant appealed. While the appeal was still pending, the appellant applied for a stay under Sections 44 and 73 of the Courts of Judicature Act 1964.

## Court of Appeal decision

According to the respondents, the land had already been disposed of and thus the appellant's stay application was merely academic.

The Court of Appeal disagreed and opined that the abovementioned two sections do not condone interference in the administration of justice by the respondent to the appeal process – for example, by disposing of the subject matter of the appeal. It was held that "until the decision of the Court of Appeal is made, pursuant to section 44, the order of the High

Court and its enforcement may stand *sub judice*".

## **Law on stay applications**

Section 44 of the Courts of Judicature Act holds as follows:

*In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.*

Section 73 of the Courts of Judicature Act holds that:

*An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.*

The law clearly states that the appellant must show special circumstances in order for the court to grant a stay pending appeal. This was expounded in the Federal Court's decision in *Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Berhad*.**(2)**

In the present case, the Court of Appeal referred to and cited with approval the Court of Appeal's decision in *See Teow Guan v Kian Joo Holdings Sdn Bhd***(3)** regarding stays under Section 44. In that case, the Court of Appeal eliminated the 'special circumstances' rule and recognised the statutory right of appeal (although in a restricted sense), providing some discretion to the courts to consider each case on an individual basis.

The Court of Appeal further remarked that the special circumstances test enunciated in the Federal Court's decision *Kosma Palm Oil* did not apply to a stay under Section 44.

Based on the above, the Court of Appeal suggested that there should be a distinction between a stay under Section 44 and a stay under Section 73 – specifically, when a stay application is made under Section 44, the 'special circumstances' test does not apply.

The Court of Appeal emphasised that the right to appeal is an entrenched constitutional right and restraints like the special circumstances rule cannot be a dictating force, as to do so would defeat the spirit of the Constitution. In addition, as an appeal is a rehearing process, a high court's decision is not final.

The appellant's stay application was allowed.

## **Comment**

Pursuant to the Court of Appeal decision, the test as to whether a stay ought to be granted under Section 44 of the Courts of Judicature Act has been simplified (ie, it now focuses on whether the true purpose of the stay is to preserve the integrity of the appeal).

The new threshold to obtain a stay is considerably lower than that of the special circumstances rule under Section 73 of the Courts of Judicature Act.

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## **Endnotes**

(1) [2018] MLJU 778.

(2) [2003] 4 CLJ 1.

(3) [1997] 2 CLJ 299on.

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