LH AG ADVOCATES AND SOLICITORS

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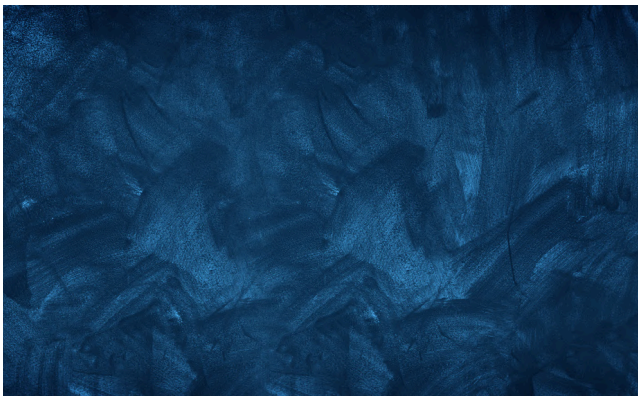

# THE BRUTALITY OF PERFORMANCE-BASED EMPLOYMENT FOR PROFESSIONAL ATHLETES

In the high-stakes world of professional sports, every game, race, or match is a test of skill and resilience. For professional athletes competing in arenas like Formula 1 or top-tier football leagues, the relentless demand for peak performance leaves little margin for error and even less room for underperformance. Careers that once seemed promising can pivot abruptly, resulting from a single mistake or a streak of poor results.

This emphasis on results draws a striking parallel to the experiences of employees in the corporate world, where job security is often tied to measurable success. Yet, while corporate employment typically includes safeguards such as improvement plans and legal protections, professional athletes navigate unique contractual frameworks that prioritise performance above all else, which can come at the cost of job stability and personal well-being.

## FORMULA 1: HIGH-SPEED TERMINATIONS

Formula 1 operates within a fiercely competitive environment, where every driver is under relentless pressure to deliver exceptional results. This high-stakes reality subjects drivers to unique employment pressures that differ from traditional workplace protections. Recent examples, such as Daniel Ricciardo's unexpected release from Red Bull's Visa Cash App team just six races before the conclusion of the 2024 season, and Logan Sargeant's dismissal from Williams Racing, highlight the speed of performance-based terminations in F1. Despite Ricciardo's impressive record of eight Grand Prix wins, his recent performance fell short of his team's expected standards, resulting in his replacement by reserve driver, Liam Lawson[1].

In contrast, Alexander Albon has emerged as a beacon of resilience. Despite initial setbacks in his career, including a high-profile exit from Red Bull in 2020, Albon has redefined his narrative with standout performances at Williams Racing. His consistency and ability to outperform expectations provide a sharp contrast to the fate of his former teammate, Sargeant. This demonstrates that in F1, delivering results consistently is the ultimate safeguard against its brutal employment realities.

Corporate employees typically receive warnings or are placed on performance improvement plans (PIPs) to address and improve poor performance. These processes are designed to provide employees with opportunities to improve before termination becomes a consideration. In contrast, F1 drivers often operate under contracts that include express performance clauses. These clauses give teams the right to terminate drivers' contracts if certain performance benchmarks are not met, often leading to abrupt or mid-season dismissals.

[1] https://www.gpfans.com/en/f1-news/1031129/daniel-ricciardo-f1-exit-red-bull-vcarb-official-statement/

This “perform or leave” dynamic creates a high-pressure environment where immediate results are paramount. Drivers must balance the demand for top-tier performance with the physical and mental toll of competing in one of the most gruelling sports in the world. An injury, such as Ricciardo’s hand fracture earlier in the 2024 season, exemplifies how quickly circumstances can shift[2]. A driver sidelined by injury risks losing their primary seat to a reserve or support role, as teams prioritise results over rehabilitation. This uncompromising performance culture highlights the differences between the employment realities of corporate employees and the precarious contracts of F1 drivers.

## The Unique Nature of F1 Contracts

F1 driver contracts are typically determined season by season. These contracts are also highly incentivised, with bonuses linked to targets such as race performance and championship standings. This structure differs from traditional corporate roles, where employees usually have fixed salaries and annual performance reviews rather than ongoing assessments tied directly to points classification. F1 drivers are expected to bring immediate results, or they risk being replaced by another driver, as seen with Lawson stepping in for Ricciardo. This contrasts with a traditional workplace environment, where performance evaluations are conducted over an extended period, with structured support for improvement.


Furthermore, F1 driver contracts may also include sponsorship obligations, team appearances, and requirements to maintain a public image that aligns with the team. When there is a performance decline, F1 drivers may face reputational risks, adding to the pressure to constantly meet team expectations and their sponsor’s image requirements. Unlike corporate roles, where employment laws provide for warnings, F1 drivers typically receive minimal notice upon termination.

## Lack of Collective Bargaining Power for Drivers

While other professional athletes may have trade unions that negotiate protections on behalf of them, F1 drivers lack a formal collective bargaining organisation that could advocate for more balanced contract terms. This leads to a lack of standard protections, such as a grievance process, which athletes in other sports may have access to. This gives team owners and management the discretion to replace drivers on a whim, leaving drivers with lower job stability.

Individual contract negotiations also mean that drivers face large disparities in pay and sponsorship

[2] https://www.formula1.com/en/latest/article/ricciardos-broken-hand-a-lot-worse-than-it-first-seemed-as-he-opens-up-on.2RtVNDB3J3JdfApvxa8S9v

requirements. Higher-profile drivers with personal sponsors (such as Lewis Hamilton) can negotiate better terms, while newer or less popular drivers often accept restrictive terms that favour the team. In a unionised context, collective bargaining could help ensure fair compensation across the board, not just the top earners.

In a corporate setting, trade unions often help negotiate better protections and resolve employment disputes. F1's lack of traditional unionisation leaves drivers without a similar level of protection or negotiation power, which can result in contracts that prioritise the team's interests over the driver's employment security.

## FOOTBALL: KICKED OFF THE PITCH

Football also operates within a unique employment structure that includes performance-based clauses and transfer windows, whereby football clubs can buy, sell, or loan players. This system creates a high-stakes environment for players, where underperformance can lead to mid-season transfers or even contract terminations. The transfer window structure enables football clubs to adjust their rosters based on players' performance and team requirements. To top it off, players must maintain peak performance to avoid being moved or replaced.

For example, players who fail to meet expectations can be loaned to lower-tier teams, replaced by new talent, or even released from their contracts during transfer windows. In some cases, high-profile players may find themselves sidelined or benched due to underperformance or injury, impacting their market value and potentially leading to unplanned career shifts. Players like Philippe Coutinho, who moved from Barcelona to Aston Villa following underwhelming performances[3], illustrate how football clubs would not hesitate to exercise these contractual rights to ensure that only top-performing players remain on the roster.

## Impact of Injuries on Football Players

For football players, their contracts may include clauses that allow clubs to reduce their salaries or terminate contracts if they sustain an injury that renders them unable to perform. While this approach is financially advantageous for football clubs, it increases the pressure on players to maintain their physical fitness under challenging conditions. Compared to a corporate environment, where employment laws often mandate reasonable accommodations for injured or disabled employees, talks of an injured football player will often be replacement rather than rehabilitation.

The intense focus on performance can take a toll on players' health. Players face constant pressure not only to perform but also to avoid injuries in order to maintain their market value amidst fierce competition. Mental health challenges are also common, especially when players are sidelined or benched. The stigma surrounding mental health in sports can further aggravate their struggles. For instance, football players have reported experiencing depression and anxiety related to the uncertainty of their futures[4].

Football clubs are increasingly recognising these pressures and small steps are being taken to support players' well-being. Organisations like FIFPRO, the global players' union, have advocated

[3] https://www.goal.com/en/lists/fall-philippe-coutinho-barcelona-record-signing-unwanted-aston-villa/blt9439a7ecc0635596#csb33a808c1c47fe64
[4] https://www.forbes.com/sites/vitascarosella/2023/11/02/depression-anxiety-suicide-mental-health-issues-plaguing-football/

for mental health support[5]. FIFPRO also works alongside players and their unions to strengthen the power of their collective bargaining, ensuring that the players' terms and conditions of employment adhere to a fair standard across the industry[6].

Nevertheless, despite the support provided, the transient nature of football careers remains, with performance being the primary determinant of job security.


# LESSONS FOR EMPLOYERS FROM THE PROFESSIONAL ATHLETE EMPLOYMENT MODEL

The professional athlete employment model offers valuable insights for traditional workplaces, particularly in managing performance-based terminations. While such terminations are increasingly common in high-stakes corporate roles, like those in positions of power, they are typically conducted through more gradual and structured processes. Lessons from the intense environment of professional sports emphasise the importance of establishing clear and mutually understood performance expectations. Defining KPIs and setting out goals provide employees with a framework to understand and meet performance standards.

However, the ruthless approach of abrupt terminations can leave athletes feeling expendable, negatively impacting morale and long-term career prospects. In the corporate setting, a similarly harsh approach could lead to excessive pressure, diminished workplace morale, and increased turnover. All of which are costly for workplaces.

Unlike the sports industry, most employment contracts are governed by employment laws that emphasise procedural fairness, termination with just cause and excuse, and opportunities for improvement. Systems such as PIPs and regular feedback are essential for helping employees address shortcomings and make real-time adjustments. These measures not only protect employees' rights but also contribute to a more sustainable and productive work environment.

*This article was co-authored by a former team member, Summer Chong Yue Han*

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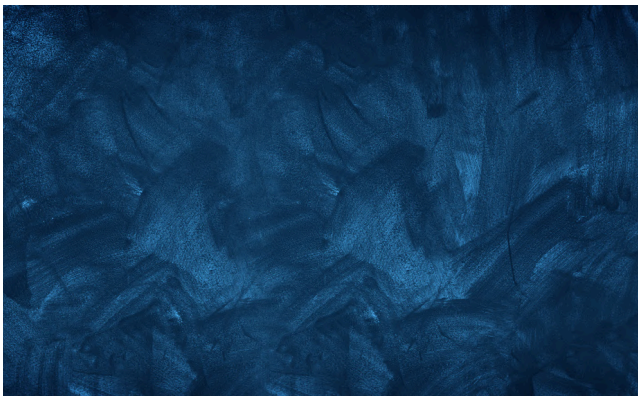
[5] https://fifpro.org/en/supporting-players/health-and-performance/mental-health
[6] https://fifpro.org/en/supporting-players/conditions-of-employment/collective-bargaining-and-agreements



# CLIMBING INTO TROUBLE: A CAUTIONARY TALE ON THE MISUSE OF SICK LEAVE

## Introduction

Medical leave is a statutory and contractual entitlement intended to enable employees to recover from illness or injury. However, when such leave is misused, particularly in ways that contradict the claimed incapacity, it may amount to misconduct justifying dismissal. The Industrial Court's decision in *Che Zamberi Che Ani v MAB Kargo Sdn Bhd*[1] provides a timely reminder of the fiduciary obligations employees owe to their employers, even while on sick leave.

## Factual Matrix and Grounds for Dismissal

The claimant was employed by MAB Kargo Sdn Bhd as an Officer in the Cargo Handling – Export Acceptance Department. In May 2021, he was involved in a serious motor vehicle accident that resulted in multiple injuries, including a left clavicle fracture, a fibular head fracture, and a wrist injury. Following his discharge from Nilai Medical Centre, he was placed on prolonged medical leave with full pay to allow for recovery.

The company's panel orthopaedic surgeon diagnosed that the healing process would take approximately three months. It was also reported by the company's panel orthopaedic surgeon that the claimant had complained of wrist and shoulder pain sometime in July 2021 and was treated with steroid injections on his left wrist and left shoulder in September 2021.

While the company had no dispute regarding the authenticity of his medical certificates, it subsequently discovered that the claimant had engaged in physically strenuous activities inconsistent with his medical condition and prescribed rest. Specifically, photographic and video evidence showed him climbing a tree, hanging from a branch with his injured arm, sawing off a tree stump with a chainsaw in July 2021—despite having been placed in a cast only two days earlier.

Upon this discovery, the company issued a show cause letter citing misconduct for misusing medical leave, misleading the company, and breaching its trust. The claimant responded in writing, admitting to the activities but characterising them as light tasks and merely social activities in his neighbourhood. He claimed that these actions were consistent with his rehabilitation process and that he had been allowed to perform "light exercises".

[1] [2025] 2 MELR 430

The company viewed his misconduct as being particularly serious given the operational strain it was facing during the COVID-19 pandemic. The aviation and logistics sectors were under immense pressure, and the claimant's department was operating with limited staffing due to pandemic-related restrictions. His extended absence forced colleagues to work overtime to cover his duties, resulting in additional costs and disruptions to cargo handling operations.

## Sick Leave Abuse as Serious Misconduct

It is a settled principle of industrial relations that malingering—feigning or exaggerating illness to avoid work—constitutes misconduct. In *The Regent Kuala Lumpur v Gerard Anthony*[2], the Industrial Court upheld a dismissal when an employee attended a company event while on medical leave. Similarly, in *Kumpulan Guthrie Bhd v Sugumaran Kittu*[3], the Court found that conducting taekwondo classes while on medical leave undermined the employer's trust.

In the present case, the Court found that the claimant had unequivocally admitted to the activities in both his reply to show cause and under cross-examination. Importantly, his medical consultant, an orthopaedic surgeon, confirmed that the claimant's actions were inconsistent with medical advice and risked further aggravating his injuries. Whilst the claimant contended that he felt well enough to engage in "light exercises" and "neighbourhood activities", the Court held that it was not for the claimant to determine his fitness, particularly when such activities were contrary to medical advice.

The claimant's argument that his years of service and clean disciplinary record should mitigate the punishment was rejected. As noted in *Harianto Effendy Zakaria v Mahkamah Perusahaan Malaysia & Anor*[4], a single act of serious misconduct may justify dismissal, regardless of an employee's prior record. The Court held that the claimant had misused his medical leave and acted inconsistently with the trust and confidence reposed in him. His actions were found to be incompatible with the discharge of his contractual obligations, thereby justifying his dismissal.


[2] [1996] 1 ILR 658
[3] [1997] 1 ILR 409
[4] [2014] 4 ILJ 399

# Conclusion

This case underscores that medical leave must be used for its intended purpose—recovery. Activities that undermine this purpose are inconsistent with the employer's expectations and may justify summary dismissal, based on the circumstances of the case. Abuse of medical leave not only defeats the purpose for which such leave is granted but also erodes the fundamental trust that underpins an employer-employee relationship. The claimant in this case had risked reinjury through such strenuous activities instead of recuperating to return to work in the best state of health. The decision reaffirms the Industrial Court's stance that dismissal in such circumstances—particularly when supported by documentary evidence and expert medical testimony, would be warranted.

The decision, which drew media attention, was reported in Free Malaysia Today (FMT). There has been no appeal against the decision of the Industrial Court. The Company was represented by Partner, Nurul Aisyah Hassan.

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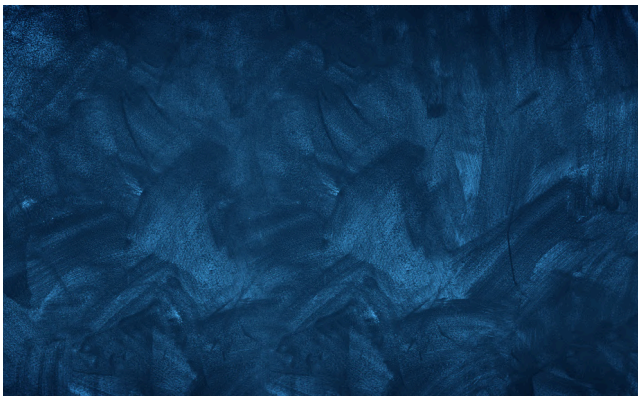


# UNDERSTANDING STRATIFIED PROPERTY AND LEGAL REMEDIES UNDER THE STRATA MANAGEMENT ACT 2013

## What is a Stratified Property?

"Stratified property" refers to a property development where the land is divided into individual units or parcels. Common examples include apartments, condominiums, and landed homes within guarded communities.

Stratified developments come with "common property" which are those parts of the development that are not comprised in any parcel and are capable of being used or enjoyed by more than one resident[1]. For example, the swimming pool or the gym.

In Malaysia, stratified developments are governed by the Strata Management Act 2013 ("**SMA 2013**"). The SMA 2013 was enacted to provide a legal framework for the proper maintenance and management of stratified developments and their common property[2].

## Who is Responsible for the Maintenance and Management of Stratified Developments and Their Common Property?

**A. Developer**

Initially, the responsibility for the maintenance and management of stratified developments and their common property lies with the developer. The developer's responsibility period, known as the "developer's management period", is the period commencing from the date of delivery of vacant possession until one month after the establishment of the joint management body[3].

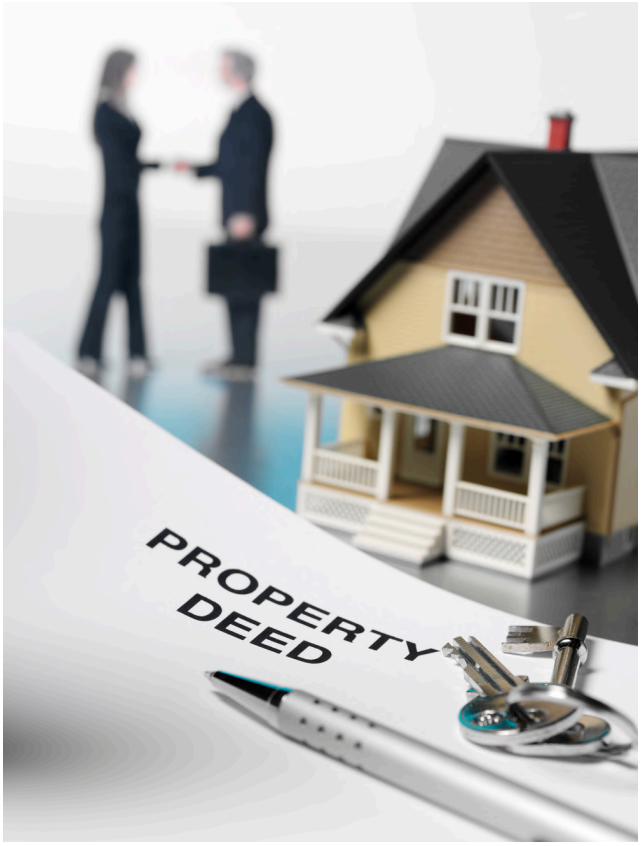
During this time, the developer has the duty and power to collect maintenance fees and contributions to the sinking fund[4].

The maintenance fees are used, amongst others, for maintaining and cleaning the common property and taking out insurance over the building[5]. The sinking fund, on the other hand, is used, amongst others, for buying movable property and fixtures for use in the common property[6].

**B. Joint Management Body** ("**JMB**")

The developer's management period ends one month after the establishment of the temporary management entity known as the JMB.

[1] See definition in section 2 of the Strata Management Act 2013 ("**SMA 2013**")
[2] See Preamble, SMA 2013
[3] See section 7, SMA 2013
[4] See section 9(2)(a) and (b) and 9(3)(a) and (b), SMA 2013
[5] See section 10(4)(c), SMA 2013
[6] See section 11(4)(c), SMA 2013




The JMB is established upon convening the JMB's first annual general meeting ("**AGM**"). The AGM must be convened not later than twelve months from the date of delivery of vacant possession[7].

Thereafter, the duties of maintenance and management are passed on by the developer to the JMB[8].

**C. Management Corporation** ("**MC**")

Once 25% of the strata titles have been issued, the developer must, within one month, convene the first AGM of the MC[9].

Not more than one month from the date of the MC's first AGM, the JMB shall hand over all monies, accounts, and documents relating to and necessary for maintenance and management to the MC[10]. Thereafter, the duties of maintenance and management are passed on to the MC. The JMB is dissolved three months from the date of the MC's first AGM[11].

# Common Breaches

During the management period of the developer, JMB, and/or MC, various forms of actionable mismanagement may arise. Common examples are discussed below:

3.1 | Failure to Maintain Common Property

The developer, JMB, and MC all have statutory duties under the SMA 2013 to ensure the proper maintenance and upkeep of common property[12]. Examples of failure to maintain common property include:

- Failure to properly maintain and service a sewerage pipe, resulting in the pipe bursting and discharge from then pipe damaging furniture and equipment in a condominium unit[13].
- Failure to replace sealant material which has deteriorated over time at construction movement joints, resulting in water leakage at the joints[14].
- Failure to maintain the central cooling system and failure to clean public toilets[15].

[7] See section 17, SMA 2013
[8] See section 21, SMA 2013
[9] See section 57(1), SMA 2013 read with definition of "initial period" in section 46(2), SMA 2013
[10] See section 27(2), SMA 2013
[11] See section 27(1), SMA 2013
[12] For Developer see section 9, SMA 2013; For JMB see section 21, SMA 2013; For MC see section 59, SMA 2013
[13] See *ACN Infra Sdn Bhd v Perbadanan Pengurusan & Anor* [2019] MLJU 1849
[14] See *Dua Residency Management Corporation v Edisi Utama Sdn Bhd & Anor* [2021] MLJU 140
[15] See *Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd & Anor and another civil* [2019] MLJU 1983. This case concerned the Strata Titles Act 1985, the predecessor to the SMA 2013.

3.2 | Financial Mismanagement and Misuse of Funds

As mentioned above, the developer is duty-bound to collect maintenance fees and contributions to the sinking fund. This duty is then passed on to the JMB and subsequently to the MC[16].

All three bodies must also oversee and manage these accounts transparently. This includes preparing financial statements and audited accounts[17].

Any mismanagement, misappropriation, or misuse of funds can be challenged. For example, if officers of the JMB fail to present audited accounts and fail to demonstrate how the monies collected from homeowners are kept and accounted for[18].

3.3 | Unjustified or Excessive Fees

Homeowners should remain vigilant about their maintenance fees and sinking fund contributions to ensure they are not being overcharged.

Under the SMA 2013, maintenance fees and sinking fund contributions are determined by the developer, JMB, and MC[19]. Maintenance fees are determined in proportion to the allocated share units of each parcel, and sinking fund contributions are usually equivalent to ten per cent of the maintenance fees[20].

Purchasers are entitled to request a certificate certifying the amount of maintenance fees and sinking fund contributions payable by them[21]. Purchasers who are unsatisfied with the maintenance fees and sinking fund contributions determined by the developer may apply to the Commissioner of Buildings ("**COB**")[22] or the Strata Management Tribunal ("**SMT**")[23] for a review.

Legal proceedings may also be brought in court. For example, a parcel owner may challenge a JMB for charging sinking fund contributions on a per square foot basis instead of on a share unit basis[24].

3.4 | Unfair or Illegal By-Laws

The developer, JMB, and MC have the power to make and enforce by-laws to regulate the control, management, administration, use, and enjoyment of common property. These by-laws may cover areas such as safety and security measures, parking regulations, and/or fines or penalties for breach[25].

However, any wrongfully enacted or enforced by-laws can be challenged. For example:

- A by-law requiring any parcel owner who initiates litigation against the MC to reimburse all legal fees and costs in the event they lose the suit, can be nullified as (i) such a by-law is not for a purpose prescribed by the SMA 2013, which is for the proper management and maintenance of the development area, and (ii) the recovery of legal fees and costs is a judicial matter, outside the purview of a MC[26].

- A by-law imposing a daily fine of RM200.00 for each day the infringement continues can be struck down, as the SMA 2013 only allows for a one-off RM200.00 fine[27].

- By-laws introduced without a special resolution, as required by the SMA 2013, are void[28].


[16] For Developer see sections 9, 10, 11 and 15, SMA 2013; For JMB see sections 21, 23, 24 and 27, SMA 2013; For MC see sections 59, 60 and 61, SMA 2013
[17] For Developer see section 14, SMA 2013; For JMB see section 26, SMA 2013; For MC see section 62, SMA 2013
[18] See *Perbadanan Pengurusan The USJ 19 City Mall & Anor v Tiow Weng Theong & Ors and another case* [2021] MLJU 2919
[19] For Developer see sections 9(2)(a) and (b), SMA 2013; For JMB see sections 21(1)(b) and (c), SMA 2013; For MC see sections 59(1)(b) and (c), SMA 2013
[20] See sections 12(3) and (4), 25(3) and (4) and 52(2) and (3), SMA 2013
[21] See section 31(a), SMA 2013
[22] See section 12(7), SMA 2013
[23] See sections 105(1), 107 and Part 1 of the Fourth schedule, item 1, SMA 2013
[24] See *Sime Darby Brunsfield Damansara Sdn Bhd v Oasis Corporate Park JMB* [2024] MLJU 1123
[25] For Developer see sections 9(2)(g), 32(2), SMA 2013; For JMB see sections 21(1)(h), 21(2)(g) and (h) and 32(3), SMA 2013; For MC see sections 59(1)(h), 59(2)(g) and (j) and 70(2), SMA 2013
[26] *Perbadanan Pengurusan Bersama Main Place & Ors v Loke Yeu Ling & Ors* [2024] MLJU 2762
[27] See *Innab Salil & Ors v Verve Suites Mont Kiara Management Corp* [2020] 2 MLJ 163
[28] See *John Denis de Silva v Crescent Court Management Corp* [2006] 3 MLJ 631. This case concerned section 44 of the Strata Titles Act 1985, the predecessor to section 70(2), SMA 2013.

# Legal Remedies

Under the SMA 2013, various legal remedies are available to address mismanagement of stratified developments and their common property.

(a) Engaging with the COB

The COB is the regulatory authority responsible for administering the provisions of the SMA 2013[29].

The COB has various powers, such as the power to:

(i) Investigate the commission of any offence under the SMA 2013. The Commissioner or an authorised officer carrying out investigations may exercise all powers of a police officer of whatever rank in relation to police investigation in seizable cases as provided under the Criminal Procedure Code[30].

(ii) As mentioned above, to review and determine maintenance fees and sinking fund contributions.

(iii) Appoint any person to convene the first AGM of the JMB or the MC if the developer fails to convene the same[31].

(iv) Appoint a managing agent to carry out the duties and powers of the developer, JMB or MC if, upon a complaint made, the COB finds that the maintenance and management of the stratified development is not carried out satisfactorily by the developer, JMB or MC[32].

(v) If a claim is made against the Common Property Defects Account, to issue a notice to a developer requiring the developer to rectify defects[33].

(b) Filing a Claim with the SMT

The SMT is a tribunal set up specifically to resolve strata-related disputes in a cost-effective and timely manner.

Developers, purchasers, proprietors, JMBs, MCs, and other interested persons, with leave of the SMT, are entitled to file a claim with the SMT[34].

The SMT has jurisdiction to hear and determine any claims specified in Part 1 of the Fourth Schedule of the SMA 2013 (where the total amount sought does not exceed RM250,000.00)[35] such as:

- the failure to exercise a duty or power under the SMA 2013.
- a claim for recovery of maintenance fees or sinking fund contributions.
- a claim for an order to convene a general meeting.
- a claim for an order to invalidate proceedings of a meeting where any provisions of the SMA 2013 have been contravened.
- a claim for an order to revoke amendments to by-laws.
- a claim for an order to affirm, vary, or revoke the COB's decision.

[29] See section 4, SMA 2013
[30] See section 125(1) and (4), SMA 2013
[31] For JMB see section 18(5), SMA 2013; For MC see section 57(5), SMA 2013
[32] See section 86, SMA 2013
[33] See sub-regulation 50 and 51, Strata Management (Maintenance and Management) Regulations 2015
[34] See section 107, SMA 2013
[35] See section 105(1), SMA 2013

After a hearing, the SMT has the power to issue awards which carry the force of a court order[36][39][40]. A SMT award may order, amongst others:

- a party to pay a sum of money to another party.
- the rectification, setting aside, or variation of a contract or additional by-laws, wholly or in part.
- costs of not more than RM5,000.
- interest at a rate not more than 8% per annum[37].

A dissatisfied party may challenge a SMT award in the High Court on grounds of serious irregularity[38].

(c) Pursuing legal action in Court

Pursuant to Section 106(1) of the SMA 2013, where a claim is filed with the SMT and the claim falls within the SMT's jurisdiction, the issue in dispute shall not be the subject of court proceedings, unless the court proceedings were filed first or the claim before the SMT is withdrawn, abandoned, or struck out.

If Section 106(1) does not apply, developers, JMBs and MCs can be sued in court.

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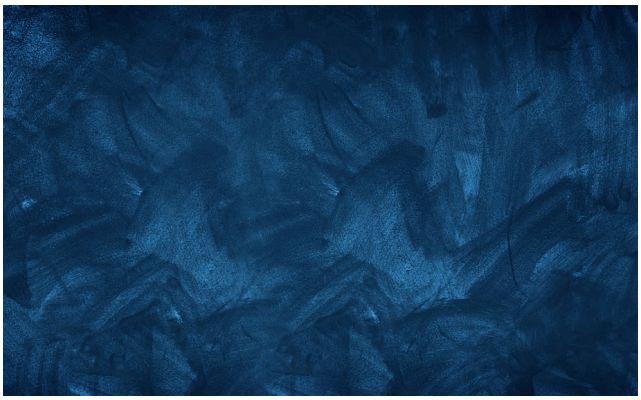
[36] See section 120(1)(b), SMA 2013
[37] See Part 2 of the Fourth Schedule to the SMA 2013
[38] See section 121(1), SMA 2013



# JUDICIAL SHIFT IN MALAYSIA: NON-SIGNATORIES MAY BE BOUND BY ARBITRATION AGREEMENTS

**PT WIJAYA KARYA (PERSERO) TBK & ANOR v ZECON BERHAD & ANOR**
[Civil Appeal No: Q-02(C)(A)-1971-10/2021]

In a landmark decision, the Court of Appeal in *PT Wijaya Karya (Persero) TBK & Anor v Zecon Berhad & Anor*[1] signalled a clear departure from the traditionally narrow and rigid interpretation of consent in arbitration. The Court embraced a more flexible and commercially realistic approach, recognising that consent to arbitrate may be implied through conduct and surrounding circumstances — not merely through express agreement. This judicial shift aligns Malaysia with prevailing international arbitration practices, better reflecting the complexities of modern commercial relationships and providing greater legal certainty in multi-party, cross-border disputes[2].

**Key takeaway**: Corporate groups must exercise diligent oversight and maintain clear governance when engaging affiliates and third parties in contractual assignments, recognising that implied consent or conduct may bind non-signatory entities to arbitration obligations — even in the absence of a formal agreement.

## Background Facts

PT Wijaya Karya (Persero) TBK[3] ("**1st Appellant**") and Zecon Berhad[4] ("1st Respondent") are the parent companies of their respective subsidiaries, Wijaya Karya Perseron Sdn Bhd[5] ("**2nd Appellant**") and Zecon Construction (Sarawak) Sdn Bhd[6] ("**2nd Respondent**").

The 1st Respondent engaged with the 1st Appellant for a scope of project management services and manpower supply for the superstructure works. Subsequently, two (2) agreements were drawn for the same scope of works: (i) **PMSA-1** — between the parent companies; and (ii) **PMSA-2** — between the subsidiaries three (3) months later.

A dispute arose between the Appellants and Respondents[7] due to the Respondents' failure to make payments, leading to the termination of both PMSA-1 and PMSA-2. In response, the Appellants referred the dispute to arbitration, invoking the arbitration clause in PMSA-1. The arbitral tribunal issued an award in favour of the Appellants. Dissatisfied, the Respondents applied to the Kuching High Court to set aside the award on the ground, among others, that there was no valid arbitration agreement binding all four (4) parties to the arbitration.

[1] Civil Appeal No: Q-02(C)(A)-1971-10/2021
[2] Grounds of Judgment of *PT Wijaya Karya (Persero) TBK & Anor v Zecon Berhad & Anor* Civil Appeal No: Q-02(C)(A)-1971-10/2021 ("GOJ"), [37].
[3] A company incorporated under the laws of the Republic of Indonesia.
[4] A public company incorporated under the laws of Malaysia.
[5] A private limited company incorporated under the laws of Malaysia.
[6] A company incorporated under the laws of Malaysia.
[7] The 1st Appellant and 2nd Appellant are collectively referred to as the "**Appellants**," and the 1st Respondent and 2nd Respondent are collectively referred to as the "**Respondents**."

# Findings of the Court of Appeal

The Court of Appeal upheld the arbitral award, affirming that a valid and binding arbitration agreement existed in respect of all four (4) parties[8]. The Court's legal reasoning was grounded in the application of agency principles[9], based on the following findings:

(i) PMSA-1 and PMSA-2 covered the same scope of obligations[10].

(ii) PMSA-2 was executed by the subsidiary companies with the consent of their respective parent companies[11].

(iii) PMSA-2 was a supplementary or collateral agreement to PMSA-1[12]. The parent companies, as principals, had consented to assigning their contractual obligations under PMSA-1 to the respective subsidiaries in PMSA-2, as agents or nominees[13]. The word "nominee" was expressly used multiple times in PMSA-2[14].

(iv) The subsidiary companies lacked the authority to rescind, alter, or novate PMSA-1[15].

(v) The parent companies remained liable to each other under PMSA-1, and concurrently through their agents, i.e., the subsidiary companies, under PMSA-2[16].

Further, the Court of Appeal turned its attention to the group of companies doctrine, an area of jurisprudence that, until now, remained largely unexplored in Malaysia. Though previously touched upon in *Padda Gurtaj Singh v Axiata Group Berhad & Ors*[17] as a mere orbiter, the Court of Appeal in the present case gave the doctrine substantive consideration by acknowledging the possibility of binding affiliates to arbitration agreements[18], citing the ICC award in *Dow Chemical v Isover-Saint-Gobain*[19] and the Indian Supreme Court's decision in *Mahanagar Telephone Nigam Ltd v Canara Bank*[20], both of which similarly endorsed the doctrine.

In essence, these findings from the Court of Appeal are best understood through the lens of the **extension principle** — a doctrine that allows arbitration agreements or proceedings to be extended to non-signatories. Rooted in jurisprudence rather than statute, the principle recognises that implied consent, corporate relationships, or participation in contract performance may suffice to bind non-signatories to arbitration. Its application varies across jurisdictions and depends heavily on case-specific facts and the surrounding legal culture.

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[8] GOJ, [33].
[9] GOJ, [28].
[10] *Ibid*.
[11] GOJ, [29].
[12] GOJ, [33].
[13] *Ibid*.
[14] GOJ, [28].
[15] GOJ, [29].
[16] GOJ, [30].
[17] [2022] 8 CLJ 695 (HC) [84-88].
[18] GOJ, [31] where the beginning of the paragraph utters "*It may not be unusual for companies within the same group to be involved in carrying out various parts of a project, even without formal contracts setting out their roles*."
[19] GOJ, [31]; ICC Interim Award of September 23, 1982 in No. 4131.
[20] GOJ, [32]; 2019 SCC Online SC 995.

Key doctrines that fall under or relate to this umbrella of the extension principle include:

(i) **Group of Companies Doctrine** — A non-signatory affiliate may be bound if there was a common intention to arbitrate, inferred from its role in negotiating, performing, or terminating the contract;

(ii) **Agency and Implied Consent** — A non-signatory principal may be bound where an agent had actual or apparent authority; conduct or representation implying acceptance of the arbitration clause may also suffice;

(iii) **Estoppel and Piercing the Corporate Veil** — A non-signatory may be estopped from denying an arbitration clause where it induced reliance or gained benefit; the corporate veil may also be lifted to enforce arbitration obligations and prevent misuse of the corporate structure; and

(iv) **Assignment and Succession** — Legal successors may be bound by contractual obligations, including arbitration clauses, transmitted to third parties by operation of law or contract.

Comparative approaches show that **civil law jurisdictions** (e.g., France) tend to apply these doctrines more liberally, based on commercial reality and implied consent, while **common law jurisdictions** (e.g., England, Singapore) adopt a more conservative, consent-focused stance. Institutional rules, such as those of the **AIAC**, **SIAC**, and **ICC**, also reflect this global evolution by allowing mechanisms like joinder and consolidation, which can bring non-signatories into arbitration in appropriate circumstances.

# Don’t Get Caught Off Guard: How to Future-Proof Your Arbitration Clauses

The Malaysian courts’ recognition of non-signatories within a single composite arbitration, anchored in agency principles, marks a significant evolution in arbitration law. This development compels commercial parties to move beyond rigid, formalistic requirements, embracing a more purposive and fact-driven approach, where conduct, performance, and the realities of inter-party relationships take precedence over mere signatures.

For businesses, this shift presents both opportunity and caution. On one hand, it provides a potent tool to hold operationally involved or financially viable entities accountable through arbitration, even if they have not formally signed the contract. On the other, it heightens legal risks, particularly where nominee or agency relationships lack clear documentation or active management.

While the group of companies doctrine remains persuasive rather than mandatory in Malaysia, the landmark *PT Wijaya Karya* decision signals a growing judicial openness to expand this doctrine where the factual context warrants it. This signals a likely trend towards broader application in future disputes.

In light of these developments, companies are strongly advised to proactively revisit and refine their arbitration clauses and contract governance frameworks. Doing so is essential to manage risks effectively, safeguard their commercial interests, and stay prepared for the evolving realities of arbitration in Malaysia.

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