IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. A-02(IM)-876-08

BETWEEN

FOONG SEONG EQUIPMENT SDN BHD (Receivers & Managers Appointed)	……	**APPELLANT/ DEFENDANT**

AND

KERIS PROPERTIES (PK) SDN BHD	…….	**RESPONDENT/ PLAINTIFF**

(In the matter of Ipoh High Court of Malaya Civil Action No. M3-22-212-2007)

Between

Keris Properties (PK) Sdn Bhd
……. Plaintiff

And

Foong Seong Equipment Sdn Bhd (Receivers & Managers Appointed)
…….. Defendant

CORAM:

LOW HOP BING, JCA
RAUS BIN SHARIF, JCA
ABU SAMAH BIN NORDIN, JCA

LOW HOP BING, JCA
(DELIVERING THE JUDGMENT OF THE COURT)

I. APPEAL

[1] On 31 July 2008, in the the Ipoh High Court, the respondent ("the plaintiff") obtained an interlocutory mandatory injunction against the appellant ("the defendant") [Receivers and Managers (R & M) appointed] in the following terms:

(1) Within seven days from the date thereof, to execute 15 memoranda of transfer ("the 15 MOT") (the particulars of which are contained in encl. 5 therein);

(2) To fulfil the defendant's obligations under the joint venture agreement dated 4 May 1996 ("the JVA") entered into between the defendant, the plaintiff, U-Meng Corporation Sdn Bhd and U-Meng Holdings Sdn Bhd (collectively "U-Meng"), and to execute all documents in future sales under the development project and to return the same to the plaintiff within seven days of notification of sales; and

(3) To perform smoothly and proceed with the execution of the above orders.

[2] This is the defendant's appeal against the interlocutory mandatory injunction.

II. FACTUAL BACKGROUND

[3] The plaintiff does not dispute the appointment of the R & M for Foong Seong Equipment Sdn Bhd ("Foong Seong").

[4] Pursuant to the JVA, on a joint venture basis, the plaintiff was to develop several pieces of land with an aggregate area of 181.516 acres owned respectively by the defendant and U-Meng (collectively "the land").

[5] The defendant does not dispute the terms and conditions of the JVA, pursuant to which:

(1) The plaintiff as developer has agreed to bear the entire costs of development;

(2) The plaintiff has paid a sum of RM3million as security deposit to the respective land owners viz the defendant and U-Meng;

(3) The plaintiff had also made payment of premium for the land;

(4) The plaintiff was not allowed to create any charge on the land and had to rely on its own financing;

(5) The JVA was for mutual benefit; and

(6) Time shall be of the essence.

[6] Between May and September 2003, the defendant received from the plaintiff further advances amounting to RM2,421,681.63.

[7] In 2004, pursuant to a petition presented in the Ipoh High Court by certain shareholders of Foong Seong, the R & M were appointed to manage the affairs of Foong Seong. The High Court also ordered the production of statements of account and payments of entitlement by the plaintiff in respect of the development project outside the Housing Development (Control and Licensing) Act 1966 ("the 1966 Act").

[8] Upon the defendant seeking clarification on the defendant's entitlement under the 1966 Act, the High Court confirmed that such entitlement would only be due upon completion of the development project and the release of monies from the Housing Development Account under the same Act.

[9] Pursuant to the High Court order, the plaintiff produced the statements of account and informed the defendant that in relation to the defendant's current entitlement, there was an overpayment

of RM1million by virtue of the advances given by the plaintiff to the defendant. Vide letter dated 7 June 2007, the plaintiff had duly informed the defendant of the same which the defendant had not denied.

[10] The defendant had also not denied the plaintiff's payment of the defendant's entitlement in relation to 15 commercial lots.

[11] After the confirmation by the High Court that the defendant's entitlement would only be due upon completion of the development project and the release of monies from the account under the 1966 Act, and the plaintiff's notice pertaining to the overpayment, the defendant had refused to execute transfer documents in relation to the sale of the houses developed by the plaintiff under the JVA.

[12] By way of illustration, and notwithstanding the demand by the individual purchasers' solicitors, the defendant had refused to execute and return the 15 MOT (for the 15 commercial lots) to effect the registration of the transfer of titles to the purchasers, as a result of which the purchasers could not obtain loans from their banks or financial institutions.

[13] More specifically, one Ibiza, the purchaser of Lot No. 112 in the development project, has taken action to terminate the purchase of the property.

[14] The defendant has also refused to execute new sale and purchase agreements, unless the individual purchasers execute a "Letter of Acknowledgment" (LOA), purportedly to ensure that the purchasers would not hold the R & M liable under any circumstance, although the LOA is not a requirement under the JVA or the statutory sale and purchase agreement prescribed in Schedule G to the 1966 Act.

[15] As a result, the plaintiff was unable to receive a total sum of RM2,714,575 being the proceeds of sale from the houses developed by the plaintiff pursuant to the JVA.

[16] Having no other alternative, the plaintiff commenced an action in the High Court, and obtained the interlocutory mandatory injunction.

III. INTERLOCUTORY MANDATORY INJUNCTION

[17] In **Gibb & Co v Malaysia Building Society Bhd (1982) CLJ (Rep) 99,** Malaysia Building Society Bhd (MBSB), a company providing finance for housing development, had approved the developer's application for end-finance amounting to RM1,457,100 to develop 85 units of a housing project. Individual purchasers of several units have applied to MBSB for loans. Gibb & Co acted as solicitors for all the parties viz MBSB, the developer and the purchasers. MBSB paid the amount due to the chargee of the land to enable the separate titles to be issued to the purchasers to be free from encumbrance. On obtaining the issue documents of title for

the 85 units and other relevant documents, MBSB handed them to Gibb & Co for the requisite documentation. At this stage, a dispute developed between Gibb & Co and the developers who appointed new solicitors to act for them, and also between the purchasers and the developer. The purchasers alleged that the developer had collected money for extras from them and as a result, the price of the units had been increased. Gibb & Co had caused the transfers in favour of the purchasers to be registered but, in spite of repeated requests by MBSB, failed to register the charges in favour of MBSB in respect of 82 units. MBSB appointed other solicitors to protect its interests. MBSB then lodged caveats against the land and issued a writ to claim declarations that it was entitled to custody of the documents of title and instruments of charge and an order for Gibb & Co to deliver the documents to MBSB. MBSB then applied for an interlocutory mandatory injunction to compel Gibb & Co to forthwith deliver to it the issue documents of title and the instruments of charge. The High Court granted the interlocutory mandatory injunction which was affirmed by the Federal Court on appeal. The Federal Court, speaking through Eusoffe Abdoolcader J (later SCJ) enunciated the relevant principles governing the grant or refusal of an interlocutory mandatory injunction. These principles may be extracted as follows:

(1) An interlocutory application for a mandatory injunction is a very exceptional form of relief: **Canadian Pacific Railway v Gaud (1949) 2 KB 239, 249;**

(2) There is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the Court has jurisdiction to so order: **Bonner v Great Western Railway Company (1883) 24 Ch 1, 10**;

(3) The applicant's case must be "unusually sharp and clear", and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted; the questions of degree would depend, *inter alia*, upon considerations of hardship and inconvenience to the parties: **Shepherd v Sandham (1971) Ch 304**;

(4) In addition, Courts of Equity will take into account other relevant considerations which may arise e.g:

(a) how the interests of the parties may best be protected;

(b) ease or difficulty with which a mandatory order and the extent of hardship which compliance will cause to the respondent; and

(c) the nature of the injury which will be caused to the applicant if he does not obtain

protection at once: **Strelley v Pearson (1880) 15 Ch.113, 117;**

(5) The stronger the applicant's case that the matters complained of are unlawful, the more likely it is that it will be just and equitable that his interest will be protected by the immediate issue of an injunction: *Bonner, supra*.

(See also **Bank Islam Malaysia Bhd v Tinta Press Sdn Bhd & Ors (1986) 1 MLJ 256; Sivaperuman v Heah Seok Yeong Realty Sdn Bhd (1979) 1 MLJ 150; Tay Tuan Kiat & Anor v Pritam Singh Brar (1987) 1 MLJ 276; Thomas M Heyse & Anor v Boyden World Corp (1989) 1 MLJ 219; Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd (1987) 2 MLJ 192; Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok (1975) 2 MLJ 109; Leisure Data v Bell (1988) FSR 367, H & R Johnson (Malaysia) Bhd v H & R Johnson Tiles Ltd (1995) 2 AMR 1390; Von Joel v Hornsey (1895) 2 Ch 774; SJ Securities Sdn Bhd v Esmail bin Naziadin (1999) 1 AMR 1179, HC; Lim Piak Chai v Bukit Gombak Development Sdn Bhd & Anor (2003) 4 AMR 46, 48 HC; Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd (2002) 1 MLJ 33;** and Malaysia High Court Practice 2006 Desk Edn. Vol. 1 p.397 para 29.1.3).

[18] With particular reference to the factual background as unfolded in the instant appeal, the elements of hardship and inconvenience to the plaintiff deserve careful consideration.

IV. HARDSHIP AND INCONVENIENCE

[19] In objecting to the grant of the interlocutory mandatory injunction, Mr. Robert Lazar, learned counsel for the defendant, doubted whether hardship and inconvenience had been caused to the plaintiff and the purchasers. He contended that the respective sale and purchase agreements ("the SPAs") had been executed by the defendant's directors after the R & M were appointed, in which case, the Court should not condone the wrongdoing of the directors. He referred to **Suntoso Jacob v Kong Miao Ming & Anor (1984) 2 MLJ 95, 97 HC Singapore**.

[20] Plaintiff's learned counsel Mr Leong Sai Wah submitted that the execution of the SPAs by the defendant's directors had been accepted by the plaintiff in good faith and that the defendant's refusal to execute the transfer documents clearly constitutes a breach of the defendant's obligations under the JVA, in particular cl.17(1)(a), thereby causing hardship and inconvenience to the plaintiff and the plaintiff's *bona fide* purchasers under the SPAs. The plaintiff relied on:

(1) **John Edward Miller & Anor v Jackson & Anor (1977) QB 966 CA;**

(2) **Gall v Mitchell (1924) 35 CLR 222 HC of Australia;**

(3) **"The Principles of Equitable Remedies" by I.C.F. Fry, 1984 pp. 435, 454 and 455.**

[21] On the basis of the above submissions, I identify the question for determination as follows:

> "Given the factual background as unfolded above, and upon a true construction of the JVA and the SPAs, has the plaintiff established an unusually sharp and clear case of hardship and inconvenience to warrant the grant of the interlocutory mandatory injunction?".

[22] In my view, the execution of the SPAs by the directors of the defendant, after the R & M had been appointed, must be seen in the context of the parties' dealings in general and the JVA in particular. Be it noted that at all material times, the plaintiff has delivered the relevant SPAs to the defendant for execution and there had never been any question raised in relation to the execution thereof by the directors of the defendant. The plaintiff is clearly entitled to have the SPAs duly executed pursuant to Cl. 17.1(a) of the JVA which, where relevant, reads as follows:

"17. COVENANTS BY THE LANDOWNERS

17.1(a) to sign execute and deliver the Sale and Purchase Agreements and Memoranda of Transfer to be created in respect of the separate and individual titles and also the applications for consent of the Menteri Besar of Perak, if so required."

[23] Under Cl.17.1(a), it is the contractual obligation of the defendant to execute not only the SPAs but also the memoranda of transfer. The defendant's contractual rights and obligations under the JVA would upon the appointment of the R & M continue as the R & M are the successors-in-title. That is expressly agreed in cl. 36.1(c) which defines the parties to the JVA in the following words:

"36.1 (c) "Developer", "U-Meng Corporation", "U-Meng Holding" and "Foong Seong Equipment" include their respective successors-in-title….".

[24] Upon a true construction of Cl. 36.1(c), which is the "successor clause", it is clear that the acts of the defendant including the execution of the SPAs by the directors of the defendant are binding on the R & M as the successors-in-title.

[25] In the instant appeal, I am unable to find any wrongdoing on the part of the plaintiff when SPAs were executed by the defendant's directors.

[26] In *Suntoso Jacob, supra*, on which the defendant relied, the plaintiff had sought a declaration that the first defendant was holding 92,000 shares of $1 nominal value each in the second defendant company, upon trust for him and for an order that these shares be transferred to him. The company had a paid-up capital of 200,000 shares. If the plaintiff succeeded, he would altogether own 190,000 shares in the company and would be its controller. In 1980, the plaintiff bought a tug from Japan and instructed the first defendant to register it under the Singapore flag in the name of the company. At the material time, the Registrar of Singapore Ships had issued an administrative guideline announcing the policy that vessels such as the tug could not be accepted for registration under the (Singapore) Merchant Shipping Act unless the corporate owner was itself owned as to at least one-half of its equity by Singapore citizens. The plaintiff was aware of this requirement and admitted that the true ownership of the shares had to be kept away from the Registrar of Singapore Ships in order to obtain registration. Lai Kew Chai J (as he then was) of the Singapore High Court dismissed the plaintiff's claim on grounds of false representation and deception, as no Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. I am of the view that the factual matrix in *Suntoso Jacob, supra*, is readily distinguishable. No question of injunction arose there. It is of no assistance to the defendant.

[27] Reverting to the mainstream of the instant appeal, the defendant cannot refuse to comply with the provisions of the JVA

which the parties had voluntarily entered into and pursuant to which the defendant has received benefits. The defendant is estopped from repudiating the burden imposed on it: **Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd and Anor (1989) 2 MLJ 202,** per Edgar Joseph Jr. J (later FCJ).

[28] The application of the doctrine of estoppel was further enunciated by the Federal Court in **Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd (1995) 3 MLJ 331** in the following passage:

> "The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim estoppel may be used as a shield but not a sword does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action." per Gopal Sri Ram, JCA.

[29] The *bona fide* purchasers who have signed the SPAs must not be made to suffer undue hardship and inconvenience as they had to obtain financing from their banks or financial institutions, and ultimately take vacant possession from the plaintiff.

[30] As developer, the plaintiff is required to diligently proceed to complete the development project within the time specified in the SPAs, because upon the execution thereof, time effectively started to run against the developer: **Hoo See Sen & Anor v Public Bank Bhd & Anor (1988) 2 MLJ 170 SC; Faber Union Sdn Bhd v Chew Nyat Shong & Anor (1995) 3 CLJ 797 SC;** and **Lim Eh Fah & Ors v Seri Maju Padu (2002) 4 CLJ 37 HC**.

[31] The defendant's refusal to fulfil the obligations under the JVA has adversely damaged plaintiff's reputation as a licensed housing developer, which could affect the renewal of the developer's licence or even halt the entire development project.

[32] In relation to enforcement of contractual rights, the Courts have taken a more serious view of the default by the defendant in a contract such as the JVA which the defendant had voluntarily accepted and assumed the responsibility. The appointment of the R & M does not affect the rights and obligations of the parties to the JVA in view of the successor clause contained in *cl.36.1(c), supra*.

[33] Illustrations of the hardship and inconvenience caused by the defendant to the plaintiff and the plaintiff's purchasers include:

(1) The plaintiff's inability to receive progress payments under the SPAs from the purchasers' banks or financial

institutions, thereby forcing the plaintiff to slow down the development of the project under the JVA;

(2) The plaintiff had spent astronomical sums by way of development costs which include the costs of procuring plans, approval and licenses, Environment Impact Assessment (EIA) report, layout and building plains, soil tests, land survey, amalgamation and subdivision of titles, infrastructures etc; and

(3) The plaintiff's inability to give individual titles to the plaintiff's purchasers, even after advancing the premium for the land and obtaining sub-divided titles at the plaintiff's own costs, as the 15 MOT and the sub-divided titles had been deposited with the defendant.

[34] As the defendant's conduct had clearly caused hardship and inconvenience not only to the plaintiff but also the plaintiff's purchasers, the Courts will intervene and allow an interlocutory injunction even when it is one of a mandatory nature: "*The Principles of Equitable Remedies" supra,* at p.435, p.454 and p.455, **Miller v Jackson supra CA,** per Cumming-Bruce LJ; and **Gall v Mitchell, supra, High Court of Australia.**

[35] It is clearly inequitable and unconscionable for the defendant to have enjoyed the benefits under the JVA, and yet refused to comply with the obligations to execute the transfer documents,

thereby denying the plaintiff and the plaintiff's purchasers of their corresponding the rights and interests which therefore require immediate protection by way of an interlocutory mandatory injunction.

VI. CONCLUSION

[36] On the foregoing grounds, I hold that the plaintiff has established an unusually sharp and clear case of hardship and inconvenience and has satisfied the principles set out by the Federal Court in *Gibb & Co, supra*. There is no appealable error on the part of learned judicial commissioner in granting the interlocutory mandatory injunction against the defendant. The answer to the above question is in the affirmative. The defendant's appeal, being devoid of merits, is dismissed with costs. The interlocutory mandatory injunction is hereby affirmed. Deposit to the plaintiff on account of taxed costs.

[37] My learned colleagues, Raus bin Sharif and Abu Samah bin Nordin, JJCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the Court.

T.T.

DATUK WIRA LOW HOP BING
Judge
Court Of Appeal Malaysia
Putrajaya

Dated this 5th day of June 2009

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REFERENCE:

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Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd (2002) 1 MLJ 33

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Lim Eh Fah & Ors v Seri Maju Padu (2002) 4 CLJ 37 HC

Miller v Jackson supra CA

Gall v Mitchell, supra, High Court of Australia