

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: W-02-546-2004

ANTARA

BERJAYA TIMES SQUARE SDN BHD ... PERAYU
(dahulunya dikenali sebagai Berjaya Ditan Sdn Bhd)
(No. Syarikat: 119614-V)

DAN

M-CONCEPT SDN BHD ... RESPONDEN
(No. Syarikat: 310662-T)

**(Dalam perkara mengenai Saman Pemula No. S3-24-473-2003)
(Dalam Mahkamah Tinggi Malaya di Kuala Lumpur)**

Dalam Perkara mengenai Perjanjian Jual Beli bertarikh 24.8.1995 di antara M-Concept Sdn Bhd dan Berjaya Ditan Sdn. Bhd. berkenaan dengan harta tanah yang dikenali sebagai Parcel No. 07-63, Commercial Shop Lot, Berjaya Star City (sekarang dikenali sebagai Berjaya Times Square) di bawah Geran No. 7866, Lot No. 339 dan Geran No. 10798, Lot No. 145, yang kedua-duanya berada dalam seksyen 52 Kuala Lumpur;

Dan

Dalam Perkara mengenai seksyen-seksyen 56(1), 65, 66, 74, 75 dan 76 Akta Kontrak 1950;

Dalam Perkara mengenai seksyen-
seksyen 34(1)(a) dan 41 Akta Relief
Spesifik 1950

ANTARA

M-CONCEPT SDN BHD
(No. Syarikat: 310662-T)

... PLAINTIF

DAN

BERJAYA TIMES SQUARE SDN BHD ... DEFENDAN
(dahulunya dikenali sebagai Berjaya Ditan Sdn Bhd)
(No. Syarikat: 119614-V)

CORAM:

- (1) ZALEHA ZAHARI, JCA
- (2) RAUS SHARIF, JCA
- (3) ABDUL MALIK BIN ISHAK, JCA

JUDGMENT OF ABDUL MALIK BIN ISHAK, JCA

Introduction

[1] I have read the judgment in draft of my learned brother Raus Sharif, JCA and I would like to add my own reasons for dismissing this appeal with costs.

[2] For convenience, the parties shall be referred to in the same manner as they were referred to in the High Court. The parties will be described as the plaintiff and the defendant accordingly.

Facts of the case

[3] By way of a Sale and Purchase Agreement (hereinafter referred to as the “**agreement**”), the plaintiff (who was the respondent in this appeal) purchased at the price of RM1,149,771.00 a commercial shop lot (hereinafter referred to as the “**property**”) developed by the defendant (who was the appellant in this appeal). That agreement was dated 24.8.1995 and by clause 22(1) of the agreement, the defendant was required to deliver vacant possession of the property to the plaintiff 36 months from the date of the agreement (hereinafter referred to as the “**completion date**”) and there was also an automatic extension of 3 months from the expiry of the completion date (hereinafter referred to as the “**extended period**”).

[4] Calculation wise, the completion date expired on 23.8.1998 and the extended period expired on 23.11.1998.

[5] The property was not completed nor delivered to the plaintiff by the extended period. In fact, on 20.3.2003 when the plaintiff filed the originating summons seeking for the principal relief of

a declaration that the plaintiff had rescinded the agreement together with the other reliefs, the defendant had still failed to deliver vacant possession of the property.

[6] On 27.12.2001, the plaintiff's former solicitors wrote a letter to the defendant informing the latter that the plaintiff had decided to rescind the agreement.

[7] The plaintiff's former solicitors' letter dated 27.12.2001 also demanded payment of RM1,704,329.70 and the defendant said that this sum was an extortionate claim.

[8] On 3.1.2002, the defendant by letter rejected the plaintiff's unilateral rescission of the agreement and averred that the plaintiff was only entitled to claim for liquidated damages.

[9] There were two significant episodes that have to be mentioned. Firstly, after the expiry of the extended period, the plaintiff's director by the name of Lee Teen Nguan met with the defendant's sale and marketing officers namely, Ms Esther and Ms Pey Yee and they promised that the property would be completed by the end of 2001. But, unfortunately, the defendant still failed to deliver vacant possession of the property to the plaintiff as promised. Secondly, again on 1.10.2002, Lee Teen Nguan met the defendant's sale and marketing officer by the name of Ms Dianne

Chan and the latter gave an assurance that vacant possession of the property would be delivered by the end of 2002. Again, the assurance came to nought and the vacant possession of the property remain undelivered.

[10] On 5.3.2003, the plaintiff's former solicitors wrote to the defendant's solicitors and requested the defendant to accept the plaintiff's rescission of the agreement and it also requested the defendant to give an undertaking to refund all the monies paid by the plaintiff as well as to settle any other damages sustained by the plaintiff within 14 days.

[11] On 10.3.2003, the defendant by letter rejected the plaintiff's request and categorically said, **"Please be informed that the construction works of the project is nearing completion and we expect to hand over the property by July of this year."**

[12] On 20.3.2003, the plaintiff filed the originating summons at the High Court registry after it obtained the consent and re-assignment of all rights, title and interests from the plaintiff's financier AmBank Berhad to institute legal proceedings against the defendant.

[13] On 30.6.2003, the property was completed and ready for delivery of vacant possession.

[14] On 1.7.2003, the plaintiff's financier AmBank Berhad paid on behalf of the plaintiff, the final 10% of the purchase price in the sum of RM114,977.10 to the defendant. This meant that the plaintiff had paid the full purchase price of the property.

[15] On 1.7.2003, the defendant sent a letter to the plaintiff notifying the latter to take delivery of vacant possession of the property.

[16] On 16.7.2003, the defendant issued an official receipt acknowledging payment of the final 10% amounting to RM114,977.10.

[17] The plaintiff had by their solicitors' letter dated 5.12.2003 refused to take vacant possession of the property pending the outcome of the originating summons application in the High Court.

[18] The delay in completing and delivering of vacant possession of the property calculated from the extended period of 23.11.1998 to 30.6.2003 would be 4 years 7 months 7 days.

[19] It must be borne in mind that clause 32 of the agreement stipulates that time shall be of the essence in relation to all provisions of the agreement.

[20] The learned High Court judge gave judgment in favour of the plaintiff and the defendant filed an appeal to this court against

that decision. We agreed with the decision of the learned High Court judge and unanimously dismissed the appeal with costs. The deposit of this appeal was ordered to be paid to the plaintiff to account of its taxed costs.

Analysis

[21] Five observations must be made here.

[22] Firstly, although the plaintiff had fulfilled its obligation by making those payments under clause 3(1) of the agreement, yet the defendant failed to deliver vacant possession of the property on the completion date or on the extended period or on or before any other date as promised by the defendant.

[23] Secondly, the defendant held the views that the plaintiff was not entitled to rescind the agreement for late delivery of the property but rather the plaintiff was entitled to claim liquidated damages calculated from day to day at the rate of 12% per annum of the purchase price from the date of the expiry of the extended period up to the date of delivery of vacant possession of the property under clause 22(2) of the agreement.

[24] Thirdly, it was never the defendant's case that the agreement was frustrated because of the delay in handing over vacant possession of the property to the plaintiff.

[25] Fourthly, because of the long delay in handing over vacant possession of the property, the plaintiff had no alternative but to file the originating summons before the learned High Court judge and sought for a declaration that the plaintiff was entitled to rescind the agreement as well as to seek a refund of the monies paid and to recover all damages suffered as a result of the defendant's breach under the agreement and, in addition thereto, to recover financing costs, legal expenses incurred by the plaintiff in purchasing the property as well as interest at the rate of 8% per annum on all sums to be paid from the date of the order to the date of full settlement together with costs of the application and incidental costs on a solicitor client basis to be paid by the defendant to the plaintiff.

[26] Fifthly, a declaration is a discretionary remedy and it is up to the court to grant it. The discretionary element was emphasised by Lord Sterndale M.R. in **Hanson v. Radcliffe Urban District Council** [1922] 2 Ch. 490 at 507 in these salient words:

“..... the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide.”

[27] The High Court judge granted the declaratory reliefs sought by the plaintiff and this court would only interfere if it can be

shown that the learned High Court judge has exercised his discretion wrongly. Here, nothing was shown to us to merit our interference with the exercise of discretion by the learned High Court judge. Reasons were given by the learned High Court judge and those reasons showed that the discretion was not exercised in a selective and discretionary manner, and neither was it done arbitrarily or decided upon his own judicial whim (see the speech of Lord Diplock in **Cookson (Widow And Administratrix of the Estate of Frank Cookson, Decd.) v. Knowles [1979] A.C. 556, 565 H.L.**). And Viscount Kilmuir L.C. in **Vine v. National Dock Labour Board [1957] A.C. 488 at 500** rightly said that, “**the discretion should not be exercised save for good reason**”.

[28] Here, the crucial issue for determination was whether the failure by the defendant to deliver vacant possession of the property on the completion date or on the extended period or on or before any other date as promised by the defendant constitutes a fundamental breach of the contract which entitles the plaintiff to rescind the agreement. In considering this crucial issue, it must be borne in mind that time has been made the essence of the contract. That being the case, section 56(1) of the Contracts Act 1950 should be invoked and

that section provides that failure to perform within a fixed time in a contract, where time is essential, would render the contract voidable.

[29] There is a Privy Council's case that goes by the name of **Jamshed Khodaram Irani v. Burjorji Dhunjibhai [1915] L.R. 43 IA 26** which held that the equipollent section 55 of the Indian Contract Act (ours is section 56 of the Contracts Act 1950) did not lay down any principle which differed from the equitable principles as set out in the English law relating to time in contracts for sale of a piece of land. In delivering the judgment of the Board, Viscount Haldane had this to say at pages 31 to 32:

“The law applicable to the point is contained in s. 55 of the Indian Contract Act, 1872, which provides that ‘when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.’

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon v. Napper* [1802] 2 Sch. & Lef. 682, which was adopted by Knight-Bruce L.J. in *Roberts v. Berry* 3 D.M. & G. 284, at p. 289. The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley v. Thomas* L.R. 3 Ch.

61 and by the House of Lords in the recent case of *Stickney v. Keeble* [1915] A.C. 386. Their Lordships are of opinion that this is the doctrine which the section of the Indian statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley v. Thomas* L.R. 3 Ch. 61: 'The construction is and must be in equity the same as in a Court of Law'."

[30] Continuing at the same page and spilling over to page 33,

this was what Viscount Haldane said:

"Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of Equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract."

[31] The same approach was adopted by Edmonds JC in **Lai Yew Seong v Wong Chieu Gook [1913] F.M.S. LR 125** when his Lordship said at page 128 of the report:

“Section 55 of the Contract Enactment provides that whether time is or is not to be regarded as of the essence of a contract depends on what was the intention of the parties at the time they made the contract. This is an adoption of a principle of English Law and having regard to the way the English Courts of Law and Equity deal with covenants for payment of rent and re-entry conditions in leases I am of opinion that time is not of the essence in this case.”

[32] The headnote of the case of **Muhammad Habidullah v. Bird and Company [1922] A.I.R. 178 P.C.**, merits reproduction.

There it states as follows:

“The effect of S. 55 of the Act is, where the party having the option elects not to avoid, to put the agreement after the original date on the same footing as an agreement just before the original date. Where a specific time is stated, then that substituted date must hold. If there is a simple waiver of the right to extension of the original time, then a reasonable time will be the proper time for delivery. S. 55, para. 3 means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time. In an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance, an intermediate contract entered into with a third party for the purchase or sale of goods.”

[33] In **S. Ayadurai v. Lim Hye [1959] 25 M.L.J. 143**, Ismail Khan J. (as he then was) also adopted the view of the Privy Council in **Jamshed Khodaram Irani v. Burjorji Dhunjibhai (supra)**.

[34] Ibrahim Manan J., in **Ismail bin Haji Embong v. Lau Kong Han [1970] 2 M.L.J. 213**, and Visu Sinnadurai J., in **Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action [1996] 3 MLJ 385** dutifully applied **Jamshed Khodaram Irani v. Burjorji Dhunjibhai (supra)** in their judgments.

[35] Salleh Abas F.J. speaking for the then Federal Court in **Sim Chio Huat v. Wong Ted Fui [1983] 1 MLJ 151** had this to say of section 56 of the Contracts Act 1950 at page 156:

“However, the rules contained in section 56 of the Contracts Act are not different from the position arrived at in common law. *Yeoh Kim Pong Realty Ltd. v. Ng Kim Pong* [1962] M.L.J. 118, 126. The position is this: If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion.”

[36] Seah F.J., delivering the judgment of the then Federal Court had this to say in **Ganam d/o Rajamany v. Somoo s/o Sinnah [1984] 2 MLJ 290, 294** in regard to time being the essence of the contract:

“In a contract for the sale of land the time fixed by the parties for completion or performance is not to be strictly construed

unless it is the intention of the parties that time should be of the essence of the contract [see *Jamshed v. Burjorji* A.I.R. 1915 P.C. 83, *Stickney v. Keeble* [1915] A.C. 386, *Warren v. Tay Say Geok & Ors* [1965] 1 M.L.J. 44, and section 56(1) of the Contracts Act 1950]. Intention may either be express or implied and there are three cases in which time is of the essence of the contract.

- (a) where the contract expressly states that time shall be of the essence of the contract [*Steedman v. Drinkle* [1916] 1 A.C. 275 and *Brickles v. Snell* [1916] 2 A.C. 599].
- (b) where time was not originally of the essence of the contract but has been made so by one party giving a notice to the other. Such notice can only be given after the other party has been guilty of unreasonable delay and the time mentioned in the notice must be reasonable [*Stickney v. Keeble (supra)*].
- (c) where from the nature of the property time may be considered to be of the essence of the contract [*Tilley v. Thomas* [1867] 3 Ch App. 61].

These three principles are cited by the then Court of Appeal in the case of *Haji Hasnan v. Tan Ah Kian* [1963] M.L.J. 175, 176. In *Yeow Kim Pong Realty Ltd. v. Ng Kim Pong* [1962] M.L.J. 118, 120, the Privy Council said at page 120:

‘The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances’.

[37] I have said that time was the essence of the contract, and there was certainly delay on the part of the defendant to deliver vacant possession of the property. The delay was far too excessive and cannot be tolerated. When one considers section 56(1) of the Contracts Act 1950, it must be read together with section 65 of the same Act which provides for the consequences of rescission of a voidable contract. This was the approach adopted by Lord Hailsham

L.C. in **Linggi Plantations Ltd. v. Jagatheesan [1972] 1 M.L.J. 89,**

P.C. There at page 91 this was what the Lord Chancellor said:

“Section 65 of the Ordinance (now the Contracts Act 1950) and section 64 of the Indian Act are to be found in that part of the statute which deals with the performance of contract and, as has been pointed out in several places, must be read closely in connection with section 39 (the effect of refusal of the party to perform the promise wholly) and section 56(1) (the effect of failure of a party to perform in a fixed time a contract in which time is essential).”

[38] Since the defendant failed to deliver vacant possession within the stipulated time frame, the plaintiff was entitled to elect to treat the contract as coming to an end. This was the approach adopted by Lord Diplock in **Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 M.L.J. 212** and at page 218 his Lordship said:

“Time being of the essence of the provisions in the Sale Agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end.”

[39] Two letters were written by the plaintiff’s former solicitors to rescind the agreement. The first was on 27.12.2001. The second was on 5.3.2003. That would be sufficient to bring an end to the agreement because time was the essence of the contract and the delay in delivering vacant possession of the property amounted to a

fundamental breach or breach going to the root of the contract which entitled the plaintiff, as the innocent party, to rescind the agreement.

[40] The phrase “**fundamental breach**” has since been refined by Lord Diplock in **Photo Production Ltd v. Securicor Ltd [1980] A.C. 827 at 849; [1980] 1 All ER 556 at 566**, where his Lordship said that:

“.... the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract”

[41] Way back in 1838, the principles underlying both fundamental term and fundamental breach were well illustrated by Lord Abinger C.B. in the case of **Chanter v. Hopkins [1838] 4 M. & W. 399 at 404, 150 E.R. 1484 at 1487** where his Lordship aptly said: **“..... if a man offers to buy peas of another, and he sends him beans, he does not perform his contract the contract is to sell peas, and if he sends him any thing else in their stead, it is a non-performance of it.”**

[42] The net result of finding that there has been either a breach of a fundamental term or a fundamental breach is this. That the innocent party or the party who is not in default may put an end to the contract – in the sense that any obligations then outstanding need no longer be performed by either party, and the innocent party too

may sue for damages for any loss suffered as a result of the defaulting party's non-performance. The plaintiff here has done just that. Having rescinded the agreement, the plaintiff filed the originating summons and sought for all those reliefs and the learned High Court judge rightly granted those reliefs.

[43] The plaintiff was entitled to rely on section 56(1) of the Contracts Act 1950 in rescinding the agreement notwithstanding the absence of an express provision in the agreement in regard to termination. The rescission of the agreement by the plaintiff did not deprive the plaintiff of its entitlement to liquidated damages arising out of the delay in delivering vacant possession of the property to the plaintiff.

[44] My learned brother Raus Sharif, JCA referred to **Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308**, a decision of Abdul Malek bin Ahmad J., (as he then was), and **Kang Yoon Mook Xavier v Insun Development Sdn Bhd [1995] 2 MLJ 91**, a decision of mine, and I, likewise, would like to refer to these two cases.

[45] The case of **Chye Fook** dealt with late completion of a building where time was of the essence of the contract. And the specific question which Abdul Malek bin Ahmad J., (as he then was)

had to answer in that case pertained to the question of whether the purchaser could sue for rescission on the agreement when the house was not completed on the completion date. On the options that were available to the purchaser, this was what his Lordship said at page 310 of the report:

“Section 56 of the Contracts Act 1950 states that a contract is voidable at the option of the promisee if the intention of the parties was that time should be the essence of the contract but if it was otherwise the promisee is entitled to compensation from the promisor for any loss occasioned to him by the latter’s failure to do the thing at or before the specified time. In this particular instance, I was of the view that the first limb of the section applied. Therefore, time was the essence of the contract and the contract was voidable. Consequently, since the building was not completed within 24 months from the date of the agreement, the purchaser plaintiff had the option either to continue with the contract or to rescind it.”

[46] And in regard to liquidated damages, his Lordship had this to say at page 311 of the report:

“At this stage of the proceedings, this court was not asked to determine whether the rescission would result in the plaintiffs not being able to receive the liquidated damages but in passing I would say that, as provided by s 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. I had in fact made it clear in my ruling that the plaintiffs’ entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.”

[47] While sitting on the High Court bench, in the case of **Kang Yoon Mook Xavier v Insun Development Sdn Bhd (supra)**, I had a rare opportunity to consider the same matter. In that case, by a sale

and purchase agreement (“**agreement**”), the purchaser purchased a house from the developer. The agreement adopted the version as found in Schedule “**E**” of the Housing Developers (Control and Licensing) Regulations 1982. The developer failed to deliver vacant possession of the house to the purchaser within the stipulated time frame in the agreement. The purchaser sought to terminate the agreement by sending letters of termination to the developer. The purchaser then filed an originating summons and prayed, inter alia: **(i)** for a declaration that the agreement had been properly terminated; **(ii)** that the developer must refund the money that had been paid by the purchaser; and **(iii)** that the purchaser was entitled to liquidated damages at the rate of 10% per annum of the purchase price from the date of delivery of vacant possession until the date of termination of the agreement. The developer conceded to prayers (i) and (ii), but argued that the liquidated damages as sought for should be rejected. The developer also argued that the right time for the purchaser to sue for liquidated damages would be when vacant possession was delivered because by then the sum to be paid could be ascertained and became due and that the limitation period would only be activated when vacant possession was delivered. In regard to time

being the essence of the contract, this was what I said at page 95 of the report:

“Since time is the essence of the S & P agreement, it is appropriate, at this juncture, to refer to s 56(1) of the Contracts Act 1950 which enacts, inter alia, that where time is the essence of the contract, failure to perform within the stipulated time will entitle the injured party to avoid the contract. But the injured party has the right to elect not to avoid the contract but to insist on performance and sue for damages.”

[48] I too spoke of the rights of the purchaser in this way (see page 96 of the report):

“Applying the above principles to the present case, as time was provided to be of the essence of the S & P agreement, the stipulated time period within which the said house had to be delivered to the plaintiff became an essential condition of the S & P agreement. The failure of the defendant to fulfil this condition would entitle the plaintiff to have an option of treating the S & P agreement either: (a) as having been repudiated and sue for damages; or (b) as still continuing. The plaintiff rightly exercised his option to proceed under (a).”

[49] Finally, on post-rescissionary damages, this was what I said:

“In addition to that, an order for post-rescissionary damages in favour of the plaintiff was also made, and these should be assessed by the senior assistant registrar by virtue of O 28 r 4 of the Rules of the High Court 1980 (see also *Tan Yang Long’s* case). Incidentally, the post-rescissionary damages (prayer 4 of encl 3) relate to the compensation which the plaintiff sustained through the non-fulfilment of the contract as envisaged under s 76 of the Contracts Act 1950.”

[50] Likewise here, the plaintiff was also entitled to post-rescissionary damages.

[51] It must be recalled that the plaintiff made progressive payments after receiving written notices from the defendant and such progressive payments were made in compliance with clause 3(1) of the agreement. The plaintiff was obliged to make those payments and if the plaintiff failed to make any progressive payment, this would be construed as a breach that would entitle the defendant to terminate the agreement in accordance with clause 5(1) of the agreement. Indeed that would be the stand of the defendant as reflected in the case of **Lim Yee Khei v. Berjaya Times Square Sdn Bhd [2003] 1 CLJ 527**.

[52] Finally, the regional economic crisis in 1997 and 1998 onwards cannot be an answer to the excessive long delay by the defendant in completing and delivering vacant possession of the property. The agreement did not specify nor envisage a situation where the defendant could delay the handing over of vacant possession on account of the economic crisis. Yet, the defendant now has the audacity to blame the long delay in handing over vacant possession entirely on the economic crisis ignoring completely its own ability and obligation to complete the property on the completion date or on the extended period or on or before any other date as

promised by the defendant. To go a step further, even the economic crisis cannot excuse the plaintiff from paying the progressive payments under clause 3(1) of the agreement.

5 February 2009

Dato' Abdul Malik bin Ishak
Judge, Court of Appeal
Putrajaya

Counsel

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