

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANG KUASA RAYUAN)  
RAYUAN SIVIL NO. W-02-546-2004**

ANTARA

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

... PERAYU

DAN

M-CONCEPT SDN BHD  
(No. Syarikat: 310622-T)

... RESPONDEN

**(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 Grant 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;

Dan

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  
(dahulunya dikenali sebagai Berjaya Dita Sdn Bhd)  
(No. Syarikat: 119614-V)

... DEFENDAN

Coram:     Zaleha Zahari, J.C.A.  
              Raus Sharif, J.C.A.  
              Abdul Malik Ishak, J.C.A.

## **JUDGMENT OF ZALEHA ZAHARI, JCA AND RAUS SHARIF, JCA**

1. This is an appeal by the defendant against the decision of the learned High Court Judge, Kuala Lumpur, given on 6 May 2004. We heard and unanimously dismissed the appeal with costs. We now give our reasons. But first the facts.
2. On 24 August 1995, the plaintiff and the defendant entered into a sale and purchase agreement (“agreement”) in respect of a property known as parcel No. 07-63 Commercial Shop Lot Berjaya Star City and now known as Berjaya Times Square (“property”). The plaintiff was the purchaser and defendant was the seller.
3. The purchase price of the property was RM1,149,971.00 (“purchase price”). The plaintiff paid RM1,034,793.90 being 90% of the total purchase price to the defendant (“monies paid”), part of which was financed by a loan from AmBank Berhad.
4. Under clause 22(1) of the agreement, the completion date for the property was 36 months from the date of agreement (completion date). Under the same clause, there was an automatic extension of 3 months from the expiry of the completion date. The completion date of 36 months expired on 23 August 1998. The extended period of 3 months expired on 23 November 1998. However, the construction of the property

was not completed and delivered to the plaintiff within the extended period or on or before 23 November 1998 as according to the agreement.

5. After 23 November 1998, the plaintiff's director, Lee Teen Nguan, met the sales and marketing officers of the defendant; others Ms. Esther and Ms. Pey Yee, who promised that the construction of the property would be completed by the end of 2001. Again, the defendant failed to keep its promise.
6. On 27 December 2001, the plaintiff's former solicitors, Messrs Gan & Low, issued a letter, informing the defendant that the plaintiff had decided to rescind the agreement. The reason to rescind being the defendant had committed a fundamental breach of its contractual obligation i.e. to complete and deliver vacant possession of the property to the plaintiff on or before the completion date.
7. The defendant refused to accept the rescission of the agreement. In a letter dated 3 January 2002, the defendant claimed that the plaintiff was not entitled to rescind the agreement, instead would only be entitled to claim for liquidated damages.
8. Subsequently, the plaintiff sought consent and obtained reassignment of all right, title and interest from AmBank to institute legal proceedings against the defendant.

9. But on 1 October 2002, when the plaintiff's director, Lee Teen Nguan met the defendant's sales and marketing officer, Ms Dianne Chan, he was assured that vacant possession of the property would be delivered by end of 2002.
10. Despite the assurance, the defendant again failed to complete and deliver vacant possession. As a consequence thereto, on 5 March 2003, the plaintiff's solicitors sent a letter demanding the defendant to accept the rescission of the agreement, to refund the monies paid and to pay all damages suffered by the plaintiff within 14 days.
11. The defendant in letter dated 10 March 2003 disputed the plaintiff's right to rescind the agreement. Hence, the plaintiff filed this originating summons seeking the following orders:-
  - (i) a declaration that the plaintiff had rescinded the agreement dated 24 August 1995 entered into between the plaintiff and the defendant vide a letter dated 27 December 2001 from the plaintiff's solicitors, Messrs Gan & Low to the defendant;
  - (ii) the defendant shall repay the plaintiff the sum of RM1,149,771.00 being the 100% of the purchase price already paid by the plaintiff to the defendant under the agreement;

- (iii) the defendant shall pay the plaintiff a sum of RM241,820.99 as at 27 December 2001 being the financing costs, legal expenses and others incurred by the plaintiff for the purpose of purchasing the property;
- (iv) the defendant shall pay the plaintiff all financing costs, legal expenses and others incurred by the plaintiff for the purpose of purchasing the property from 27 December 2001 till the date of the order where the damages would be assessed by the Senior Assistant Registrar;
- (v) the defendant shall pay the plaintiff damages as a result of the defendant's breach of the agreement for a sum to be assessed by the Senior Assistant Registrar;
- (vi) the defendant shall pay the plaintiff 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;
- (vii) cost of the application and incidental costs thereto be fixed on a solicitor client basis to be paid by the defendant to the plaintiff.

12. The learned High Court Judge granted the orders as prayed by the plaintiff. The main issue before the High Court as well as before us is whether the failure by the defendant to deliver vacant possession of the property on or before the completion

date constitutes a fundamental breach of the contract which entitles the plaintiff to rescind the agreement. The learned High Court Judge answered the question in the affirmative. He reasoned as follows:-

“The failure of the defendant to deliver vacant possession of the property after 23 November 1998, as agreed under clause 22(1) of the agreement, for nearly 4 years and 4 months until the present originating summons was filed, amounts to a fundamental breach of the agreement by the defendant. The delay on the part of the defendant is excessive and unreasonable given the fact that the defendant was required to deliver vacant possession of the property to the plaintiff within 36 months from the date of signing of the agreement. As under the agreement time is essential, the failure on the part of the defendant to deliver vacant possession at the stipulated time renders the agreement voidable at the option of the plaintiff (see section 56(1) of the Contract Act 1950).”

13. We are of the same view. The defendant's failure to deliver vacant possession has rendered the agreement voidable. The plaintiff therefore had an option either to continue with the contract or to rescind it. Section 56(1) of the Contracts Act 1950, clearly gives the plaintiff that option. The section reads:-

“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.”

14. The application of section 56(1) of the Contract Act 1950 had been dealt with by the High Court in a number of cases. In **Tan Yang Long & Anor v Newacres Sdn. Bhd. [1992] 1 MLJ 289**, an identical application as in the present originating summons was filed and adjudicated by the High Court. In that case the agreement provides that the delivery of vacant possession of the property was to be on or before 17 March 1988. The defendant failed to comply with it. It was held by Shankar J (as he then was):

“The total failure of the defendant to give any credible assurances as to if and when the project would be completed amounted to a renunciation or abandonment of the agreement. Its conduct amounted to a fundamental breach of agreement.”

In that case, it was argued by the developer that the only remedy available is a claim for liquidated damages instead of

the termination of the agreement, but it was rejected by the court.

15. Again, a similar issue was decided by Sibu High Court in favour of the purchaser in the case of **Law Ngei Ung & Anor. v Tamansuri Sdn. Bhd. [1989] 2 CLJ 181**. In that case, it was held by Chong Siew Fai J (as he then was) that:

“... the defendant had in fact failed to complete the premises within the time stipulated in the agreement which made time of the essence of the agreement and the defendant’s failure to complete the premises amounted to a renunciation or abandonment of the agreement and that the defendant had evinced an intention not to be bound by the agreement.”

Further his Lordship stated:

“... the agreement dated 17 October 1983 was rescinded as on 4 July 1986 by reason that the defendant had committed a fundamental breach of the agreement in that the defendant had failed to complete and deliver vacant possession.”

16. Abdul Malek bin Ahmad J (as he then was) in **Chye Fook & Anor v Teh Teng Seng Realty Sdn. Bhd [1989] 1 MLJ 308**

and Abdul Malik bin Ishak J (as he then was) in **Kang Yoon Mook Xavier v Insun Development Sdn Bhd [1995] 2 MLJ 91**, decided similarly.

17. We adopt the same approach. We hold that even though the agreement does not expressly provide for the plaintiff's right to terminate it, this would not take away the plaintiff's right to do so under section 56(1) of the Contracts Act 1950, when the defendant had clearly committed a fundamental breach by failure to complete and deliver vacant possession within the stipulated period. Similarly, the plaintiff's entitlement to liquidated damages for any delay in delivery of vacant possession does not take away the plaintiff's right to rescind and terminate the agreement.
18. There is a further point we must mention. It was argued that the plaintiff is estopped from rescinding the agreement because the plaintiff had chosen not to terminate or rescind the agreement immediately after the alleged breach. On the contrary, the plaintiff had, in fact, elected to make progressive payments and thus affirming the agreement.
19. With respect, the argument is without merit. Estoppel is an equitable doctrine. It could only be invoked by the party who comes to court with clean hands (see **Cheng Chuan Development Sdn Bhd v Ng Ah Hock [1982] 2 MLJ 222**).

20. On the facts of this case, we are unable to hold that the defendant came to the court with clean hands to rely on the doctrine. The defendant had clearly breached its contractual obligation by failing to complete the construction of the property by 23 November 1998 or any other promised dates. Even, as at the date of filing of the originating summons on 20 March 2003, the defendant had still failed to deliver vacant possession of the property.
  
21. It is true that the plaintiff did not immediately decide to rescind the agreement after the defendant had failed to deliver vacant possession of the property on 23 November 1998. But, this is because after 23 November 1998, the defendant's officers had given assurances and promises that the property would be completed within other specific times, initially by the end of 2001 and later by the end of 2002. The plaintiff therefore decided to give the defendant more time to complete the property. But the defendant totally failed to keep its promise. In any event, the plaintiff is obliged to make progressive payments after receiving written notices from the defendant (clause 3 of the agreement). If the plaintiff had failed to make any progressive payment, this would be regarded as a breach which entitles the defendant to terminate the agreement (clause 5(1) of the agreement).
  
22. For the aforesaid reasons, we unanimously upheld the decision of the learned High Court Judge. We dismissed the appeal with

costs. The deposit of this appeal was ordered to be paid to the plaintiff to account of its taxed costs.

Dated this 11 day of May 2009.

Raus Sharif  
Judge  
Court of Appeal Malaysia

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