

CIVIL APPEAL NO. W-02-10-2007

BETWEEN

WOOLLEY DEVELOPMENT SDN BHD (Claire Estate) Cha
Appellant

AND

MIKIEN SDN BHD
Respondents

8 Ors.

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
Guaman Sivil No. S4-22-43-2006

Mikien Sdn Bhd Plaintiff

1. Cherating Development Sdn Bhd
RespondentsDefenden-

Wooley Development Sdn Bhd8 Ors.
Defenden

oram**Tengku Dato Baharudin Shah**
Tengku Mahmud, J.C.A
Datin Paduka Zaleha Zahari, J.C.A.
Abdull Hamid Embong J.C.A.

MAJORITY JUDGMENT OF THE COURT

This is the majority judgment of this Court. My learned brother Tengku Baharudin Shah Tengku Mahmud, JCA has agreed with this judgment in draft and consented that it be our judgment.

In this judgment the parties shall be referred to as the plaintiff and 2nd defendant as they were in the court below. We had, in the majority, dismissed this appeal and affirmed the decision of the learned Judicial Commissioner in allowing for a summary judgment to be entered under 0.81 RHC 1980

Facts

1. The salient facts as agreed were as follows :
 - 1.1 The plaintiff (Respondent here) and the 1st Defendant (not a party in this appeal) entered into 12 sales and purchase agreements (SPA) all dated 28.8.1997, purchasing various commercial properties in a project (the Project) developed by the 1st Defendant on its lands in

Butterworth for a total purchase price of RM 2,316,580.00.

1.2 The purchase price was paid in full to the 1st Defendant, and was duly acknowledged by 1st Defendant.

1.3 Some of the pertinent clauses in the SPA are these -

“(a) time shall be the essence of the SPA (**clause 7**);

(b) the 1st Defendant shall at its own cost and expense apply for subdivision of the building so as to obtain the issue of a separate strata title to the Properties under the Strata Titles Act 1985 (**clause 10(a)**);

(c) upon the issuance of the separate title to the Properties and subject to the payment of all monies due under the SPA by the Plaintiff to the 1st Defendant and the observance of all terms and conditions provided in the SPA, the 1st Defendant shall execute valid and registrable transfer of the separate strata title of the Properties to the Plaintiff, its heir or nominee or lawful assign, as the case may be

- (d) vacant possession of the Properties shall be handed over to the Plaintiff within 36 calendar months from the date of the SPA (**clause 20 (a)**)
- (e) if the 1st Defendant fails to hand over vacant possession of the Properties in time, the 1st Defendant shall pay to the Plaintiff liquidated damages to be calculated from day to day at the rate of 11% per annum of the total purchase price of the Properties (**clause 20 (b)**);
- (f) the “Vendor” includes its successors in title and permitted assign (**clause 38 (f)**);
- (g) the SPA shall be binding upon the successors in title and permitted assigns of the 1st Defendant and the heirs, personal representatives, successors in title and permitted assigns of the Plaintiff (**clause 41**). “

1.4 Subsequent to the execution of the SPA the plaintiff entered several private caveats against the lands pending completion of the SPA.

- 1.5 The 1st Defendant later abandoned the Project, thus breaching the express term in the SPA to deliver vacant possession within 36 months from the date of the SPA.
2. The plaintiff contended that it suffered loss and damages calculated as agreed at 11% of the total purchase price already paid from 29.8.2000. The plaintiff sought for damages or alternatively prayed for a rescission of the SPA and a return of the total purchase price of RM 2,316,580.00 with interest at 11% from 28.8.1997 till date of full realization.
3. On 20.9.2000 the 1st Defendant and the 2nd Defendant (the Appellant here) entered into a Transfer Agreement wherein some of the relevant recitals are now listed -

“ 3.1 CDSB (i.e 1st Defendant) is the registered proprietor to all those pieces of land more particularly referred to and described in Annexure A hereto (the land).

3.2 Pursuant to a private title search conducted on 3rd August 2000, there are numerous

corporation and financial institution over the land to protect their respective interests. The particulars are described in Annexure C hereto.

- 3.3 CDSB is desirous of developing the land into a township consisting inter alia of commercial, residential, mega mall and budget hotel known as Raja Uda Commercial Centre (CDSB has partly developed the land into four (4) storey shop-office).
- 3.4 CDSB commenced development of the Project in 1996 and has abandoned the Project since 1998.
- 3.5 By a letter dated 27th July 2000 addressed to CDSB, MBSB (the financiers) has agreed with CDSB's proposal in granting WDSB (i.e 2nd Defendant) the rehabilitation and completion of the Project ... whereby CDSB will transfer the Land to WDSB subject to the existing charges created in favour of MBSB without any money consideration.¹² In fact, before the learned judge, the counsel for the appellant drew the attention of the court to the provisions of regulation 4 (3) of the 1999 Regulations. According to the

party gives notice of his intention to terminate the contract of service, such notice cannot be revoked unilaterally, is a common law principle and is not applicable due to existence of the statutory provision and in particular the appellant relied on r. 4(3) of the 1980 Regulations. Unfortunately, the learned judge was unable to subscribe to the submissions put forward by the appellant for the reason that the letter of 20th November 1995 issued to the respondents cannot be said to be issued under the said r. 4(3). The letter made no mention or reference to the said regulation. To the learned judge, the said letter is more of a withdrawal letter of the earlier notice of termination. So, based of the case of *Slingsby*, supra, the services of the respondents were terminated by the appellant and as such the respondents are entitled for the termination benefits as so ordered by the Pengarah.

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3.6 To achieve the Objective, the parties together with MBSB further agreed to enter into inter

upon execution of this Agreement on terms mutually agreed upon.

3.7 CDSB has by separate and individual Sale and Purchase Agreements made with the individual Purchasers details of which are more particularly described in Annexure H, agreed to sell and transfer their rights and title to and interest in the relevant Unit erected or to be erected on part of the Land (the Unit) to the individual Purchasers upon payment of the full purchase price and the terms and conditions stipulated in the S&P. ”

4. The summons in chambers filed by the plaintiff seeking for a summary judgment under 0.81 RHC 1980 was not opposed by the 1st Defendant.
5. The 2nd Defendant, in its opposing affidavit however stated the following points which its learned counsel before us adverted to as raising a bona fide issue to militate against granting a summary judgment. They are –

bahawa Plaintiff tidak mempunyai sebarang kausa tindakan serta pertalian kontrak (“privity of contract”) terhadap Defendan Kedua

- 5.2 Saya mengatakan bahawa adalah menjadi syarat dan terma Perjanjian tersebut Defendan Kedua akan menyempurnakan kerja-kerja pembinaan projek tersebut dan menyempurnakan obligasi kepada pembeli-pembeli dalam projek tersebut di mana senarai pembeli diberikan oleh Defendan Pertama yang dilampirkan perjanjian tersebut dalam annexure ‘H’
- 5.3 Saya seterusnya mengatakan bahawa nama Plaintiff tidak disenaraikan
- 5.4 Defendan Kedua hanya bertanggung-jawab terhadap pembeli-pembeli yang disenaraikan sahaja dan bukan kepada pihak-pihak yang tidak disenaraikan tersebut. ”

6. Before us, learned counsel for the 2nd Defendant, raised the same issue namely that there was no contractual relationship, and as such no privity of contract, between the plaintiff and the

appear as a purchaser in Annexure H and that secondly, there was no Novation Agreement entered into between the plaintiff, the 1st and 2nd Defendants.

7. The learned Judicial Commissioner having perused and considered all the relevant documents supporting the plaintiff's claim came to this conclusion –

“ Save for the fact that the second defendant denies liability to the plaintiff under the Agreements for the reason that it is not privy thereto, it has not denied that it is the successor in title and permitted assigns of the first defendant.

The second defendant had relied on Annexure H of the Transfer Agreement to disclaim liability to the plaintiff. Given the fact that the lands referred to in Annexure H of the said Transfer Agreement are the same lands averred to by the plaintiff as being the lands upon which the properties are to be erected and purchased by the plaintiff, and given the fact that the purchase by the plaintiff had not been denied and neither has the payment of the full purchase price, it is my view that Annexure H is not sufficient to displace the plaintiff's claim.”

The Law

8. In *BANK NEGARA MALAYSIA v MOHD ISMAIL & ORS*, (1992) 1 MLJ 400, the Supreme Court had succinctly formulated the principles to guide a judge in deciding whether or not to grant a summary judgment when it held in the following terms –

- “ (1) In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.
- (2) Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to

the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

- (3) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because ‘the question of law is at first blush of some complexity and therefore takes a little longer to understand.’

9. The Supreme Court also accepted and applied the principle as enunciated by the Privy Council in *ENG MEE YONG & ORS v LETCHUMANAN* (1979) 2 MLJ 212 where Lord Diplock in his advice stated -

“ Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking

contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he “may think just” the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge’s exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong.”

10. When an issue of fact is raised in an affidavit opposing an application for a summary judgment the trial judge thus is duty bound not to merely accept it superficially and in a cursory manner. He is not bound to accept any allegation uncritically. In exercising his judicial discretion the judge is obliged to critically examine any assertion of fact and to do so in a fair

toothcomb manner if need be to determine if it were a bona fide factual dispute worthy of determination at a full trial.

11. We are also reminded that O. 81 RHC is a summary judgment procedure and not a summary trial procedure (see NG HEE THONG v PUBLIC BANK BHD. (1995) 1 MLJ 281).

12. In MALAYAN INSURANCE (M) SDN BHD v ASIA HOTEL SDN BHD (1987) 2 MLJ 183, it was held that a summary judgment procedure under O.14 RHC 1980 is not intended to shut out a defendant and should only be exercised in clear cases. We also adhere to this principle in coming to our decision. It must be emphasised conversely, that a plaintiff should not be put through the long –drawn costly process of a full trial in an action against a defendant who is without a bona fide defence. This is the philosophy behind a summary judgment procedure.

Why we dismissed this appeal

13. This application was made under O 81 RHC 1980. 0.81 r 3

“ Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action. ” (our emphasis)

14. The plaintiff in a summary judgment application first needs to establish a prima facie case that “he is entitled to judgment”. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see NATIONAL COMPANY FOR FOREIGN TRADE v KAYU RAYA SDN BHD (1984) 2 MLJ 302 per Seah FJ). “Ought” in O.81 r.3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated and be determined as genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.
15. A judge in allowing for a summary judgment under O.81 RHC 1980, does so in the exercise of his discretionary jurisdiction. He may enter a judgment for the plaintiff or allow leave to

had been judicially exercised in the sense that he had properly evaluated the facts to find no arguable case, and had not been wrong in law or erred in principle, then the judge's decision should not be disturbed here. (see *WEE CHOO KEONG v MBF HOLDINGS BHD & Anor Appeal* (1993) 2 MLJ 217; *ENG MEE YONG & ORS v LETCHUMANAN*, supra).

16. In *DOSHI v YEOH THIONG LAY* (1975) 1 MLJ 85, the Federal Court in allowing for a summary judgment under O 14 RHC 1957, had this to say –

“ I must say in conclusion that an order made by a judge in the exercise of his discretion cannot be disturbed by this court unless it can be shown that in the exercise of such discretion he acted contrary to recognized principles. (*See Culver v Beard.*) As Lord Denning M.R. said in *Hodges v. Harland & Wolff Ltd.* When a judge exercises a discretion and takes all the relevant considerations into account, it is well settled that the burden is on anyone coming to this court to show that he was wrong. I can see nothing wrong in the way in which the learned judge dealt with this case in ordering final judgment to be

17. In this appeal, we are of the view that the learned Judicial Commissioner had correctly approached this application by minutely considering and evaluating all the relevant documents and facts in coming to her decision. Her Ladyship had also concluded that the statements of the 2nd Defendant in its opposing affidavit are inconsistent with contemporaneous documents. We find that she had properly exercised her discretion in allowing the plaintiff's action; and that finding should not be upset.

18. It is noted, as submitted by learned counsel of the plaintiff, that the 2nd Defendant had never disputed that they are the successors in title and the permitted assigns of the 1st Defendant. Thus, by virtue of clauses 41 and 38 (f), the SPA is binding upon the 2nd Defendant.

19. Under the Transfer Agreement, the 2nd Defendant has unequivocally accepted and is obliged to "rehabilitate continue to carry out the development, construction and completion of the Project." We think that it matters not if the plaintiff's name is

is now seeking its remedy is for the failure of the 2nd Defendant to complete this project and for the non-delivery of the commercial units to the plaintiff, the purchase price of which had been fully paid. In our view to say that there is no privity of contract between the plaintiff and the 2nd Defendant is untenable. It is not a bona fide issue worthy of trial.

20. As regards to non execution of the Novation Agreement point, we agree with the plaintiff's stand that this is an issue of fact and not law. It is thus incumbent upon the 2nd Defendant to show that the other purchasers had entered into such an agreement. The 2nd Defendant had not adverted to this fact in its affidavit in opposition. Furthermore under the Transfer Agreement, it is the 2nd Defendant who is obliged to prepare this Novation Agreement within 30 days of signing the Transfer Agreement with the 1st Defendant. This was never done. We would also rule that since this is a fact not asserted or argued before the High Court it should not now be raised in appeal (see MAHARLAL BHAICHAND GATHANI v PERWIRA HABIB

BANK MALAYSIA BHD (2002)1 CLJ 449). However having heard submission on this point we found that it came to nothing.

21. Further, the 2nd Defendant had duly acknowledged and confirmed that pursuant to a private title search on 3.8.2000 it was aware of the numerous private caveats lodged, including the plaintiff's. The effect of the plaintiff's private caveat under our National Land Code is to give notice to the whole world that is had a claim or an interest in the land. (see UNITED MALAYAN BANKING CORPORATION BHD v GOH TUAN LAYE 7 ORS (1976)1 MLJ 169). The 2nd Defendant cannot now plead ignorance of this fact.

22. In fact, before the commencement of this action the 2nd Defendant had on 18.02.2005 requested the plaintiff to remove its caveats. The plaintiff did not object to that request and had in turn asked the 2nd Defendant to give an undertaking to, inter alia, issue to it separate strata titles and to deliver forthwith vacant possession of the purchased properties if they are ready for delivery.

23. In our considered view this Novation Agreement issue is also non triable.

24. For these reasons, this appeal is dismissed with cost, and the order made by the High Court for a summary judgment in the alternative prayer is confirmed.

30th October, 2007

(ABDUL HAMID EMBONG)

CK. Kirubakaran Encik Haripal Singh Tetuan Kiru & Yong cik Yee Tech
Fah cik Ong Gek Lin for tTetuan Yee Teck Fah & Co