



properties in question. Eastern and Hampstead delivered a counterclaim against each other. The trial judge found for Emtex in the original action and entered judgment against Hampstead. He then went on to find for Hampstead on its counterclaim against Eastern. There is no appeal against the orders made in favour of Emtex. The present appeal has been brought by Eastern against the judgment entered in Hampstead's favour.

2. Now for the facts. On 28 February 1981, Eastern and Hampstead entered into a joint venture agreement to develop five parcels of land owned by the former. Hampstead was to develop the lands. The lands were charged to a bank (I will call it UMBC) to whom Eastern owed RM 1.2 million. Hampstead, in performance of its obligations under the joint venture agreement paid off UMBC and redeemed the lands. It did this by getting the lands transferred to it and then charging them to UMBC to borrow RM 1.2 million from it. It then used the RM 1.2 million to pay off Eastern's debt to UMBC. About two years later the parties decided to call off the joint venture. On 17 February 1983, they entered into a Rescission Agreement under the terms of which:

- (i) Hampstead was to pay Eastern RM 75,000;
- (ii) Eastern was to pay Hampstead RM 1.2 million less the RM 75,000 not later than 15 May 1983;

(iii) on Eastern making payment, Hampstead was to deliver valid and registrable memoranda of transfers of the lands in question to Eastern.

3. There is no doubt that Eastern paid off Hampstead. What became an issue – and remains an issue before us – is whether Eastern paid Hampstead in accordance with clause 2 of the Rescission agreement. That clause reads:

“2. The owner hereby covenant that the owner shall as soon as possible but in any event not later than 15 May 1983 arrange to repay to the company the sum of M\$1.2 million but less the sum of \$75,000.00 payable hereunder to the owner by the company where upon the company shall execute and deliver to the owner a valid and registrable Memorandum of Transfer of the said land to the owner together with the relevant documents of titles’ – For clarification the term ‘owner’ refers to Eastern Properties and ‘company’ refers to Hampstead.”

4. The learned judge held that Eastern had not paid Hampstead by 15 May 1983. He held that payment was made only on 24 April 1990. He therefore entered judgment for Hampstead on its

claim against Eastern for interest during the period of delay in payment. In doing so the judge relied on Eastern's own letter of 9 October 1986 in which Eastern had (among other things) said this:

“While it is regretted that we have to date failed to observe the provision of the Rescission Agreement, we shall use our best endeavour to arrange for the repayment of the United Malayan Banking Corporation Berhad (‘UMBC’) loan referred to in the Rescission Agreement no later than 29<sup>th</sup> day of November, 1987.”

5. Before us learned counsel for Eastern said that his client ought not to be held liable for the interest over the whole period of delay in payment. He accepted that Eastern was liable to pay Hampstead interest for the period 17 February 1983 (the date of the Rescission Agreement) and 15 May 1983 (the date on which payment ought to have been made). He argues, however, that his client is not liable to pay interest until 28 August 1985 which is the date of Hampstead's letter. The essential part of that letter reads as follows:

“We confirm our verbal agreement that the abovementioned term loan together with interest thereon are to be settled as follows:-

1. The entire principle amount of \$1.2 Million of the aforesaid term loan is to be fully settled by you. Please write to UMBC to authorise them to debit your account and simultaneously to credit our account with the monies.
2. The interest on the said term loan being \$966,028.36 as at 28 August 1985 will be paid by us on the same day.
3. You will bear a portion of the interest of \$966,028.36, being \$319,000.00 (this amount is subject to verification according to UMBC's bank statements) from which you shall deduct the sum of \$75,000.00 being the amount that you are to withhold as provided for in the agreement between Hampstead and yourselves dated 17 February 1983, thus leaving a amount of \$244,000.00 due from you to us as at 28 August 1985.
4. Any further interest from 28 August 1985 up to the date of payment of (1) above shall be shared between Hampstead and Eastern in the following ration as calculated below:-

Total amount outstanding		
As at 28 August 1985		\$2,166,028.36
Less: Eastern Properties portion		
Principal	1,200,000.00	
Interest	<u>319,000.00</u>	<u>\$1,519,000.00</u>
		<u>\$647,028.36</u>

The sharing ratio is therefore:-

Hampstead	<u>647,028.00</u>	
	2,166,028.00	
Eastern	<u>1,519,000.00</u>	
	2,166,028.00	

As UMBC will require a new charge over the said land therefore simultaneous with the presentation of the UMNC charge (for Eastern Properties account) our solicitors, Abdul Aziz, Ong & Co. shall present the following:

- i. the discharge of the UMBC charge (for Hampstead's account).
- ii. the memorandum of transfer of the land into your name.

For the purpose of expediency, we will try to arrange for our solicitors to attend the presentation of the UMBC charge failing which we will instruct our solicitors to attend as above.

- i. attend to your execution of the memorandum of transfer.
- ii. undertake to pay us no later than 31 December 1985 your portion of interest, however, subject to registration of the said land into your name.

Upon receipt of your solicitor's letter of undertaking we will arrange to pay the interest \$955,028.36 as stated in (2) above."

6. Learned counsel also drew our attention to Hampstead's pleaded case in which it claimed:

"(vi) the sum of M\$290,375.00 being Eastern Properties' portion of the accumulated interest on Hampstead's loan as at 28 August 1985;"

7. It is learned counsel's submission that Eastern's liability to pay interest ceased as at 17 November 1983. He says that his client was ready, willing and able to pay the debt as at that date and Hampstead was aware of that fact. According to him, Eastern obtained a loan of RM 1.2 million from UMBC and had written to Hampstead over a period of about 12 months of its ability to pay the sum due under the Rescission Agreement. As a result of Hampstead's dilatoriness, Eastern had had to pay a sum of RM 2.2 million to UMBC in 1990 to obtain a discharge of the charges

created by Hampstead over the lands in question.

8. Mr. Ho of counsel for Hampstead was able to demonstrate that the correspondence relied on by Eastern did not span the entire period relied on by it. It is clear from the record provided to us that some of the letters pre-date the Rescission Agreement and could not possibly have anything whatsoever to do with Eastern's ability to pay the sum due.

9. In response, Eastern relies on the fact that Hampstead stood in a fiduciary position towards it by virtue of their being joint venturers. Hence, it was a breach of the duty of good faith owed by Hampstead not to have acted on Eastern's notification that it was ready, willing and able to pay the sum due under the Rescission Agreement. I must confess that this point has caused me much anxiety. But, after careful consideration I am inclined to the view that Eastern must fail in this appeal for the reasons I shall now provide.

10. It is settled law that joint venturers owe a fiduciary duty to each other: just as partners do. In the words of Cardozo CJ in **Meinhard v Salmon (1928) 249 NY 456 at p 464** (a case of joint venturers):

“Many forms of conduct permissible in a workaday world for those acting at arm's length

are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate.”

11. In **Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474**, the Supreme Court held that the relationship of parties to a joint venture is fiduciary in nature. The court in that case recognised that the essential element for the working of a fiduciary relationship is that parties act in good faith to each other.

12. In **O’Neill v Phillips [1999] UKHL 24**, Lord Hoffmann discussed the intrusion of equitable principles in the regulation of the affairs of a limited company. There are some useful passages in his speech in which he discusses the nature of the duty to act in good faith. I will quote them:

“One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith.

...

An example of such equitable principles in action is *Blisset v. Daniel* (1853) 10 Hare 493 [68 ER 1022] to which Lord Wilberforce referred in *In re Westbourne Galleries Ltd.* at p. 381. Page-Wood V.-C. held that upon the true construction of the articles, two-thirds of the partners could expel a partner by serving a notice upon him without holding any meeting or giving any reason. But he held that the power must be exercised in good faith. He said that ‘the literal construction of these articles cannot be enforced’ and, after citing from the title ‘De Societate’ in Justinian's *Institutes*, went on:

‘It must be plain that you can neither exercise a power of this description by dissolving the partnership nor do any other act for purposes contrary to the plain general meaning of the deed, which must be this, that the power is inserted, not for the benefit of any particular parties holding two-thirds of the shares but for the benefit of the whole society and

partnership.””

13. Returning to the present instance, I have taken a step back and looked at the case as a whole. Having done so, I am unable to find anything in the conduct of Hampstead on the basis of which equity will be inclined to interfere. What is it that Hampstead did or omitted to do that demonstrates an absence of good faith on its part? The answer is: nothing. Hampstead did not insist on its strict legal rights to inflict a harm upon Eastern. Neither did it refuse to hand over the relevant memoranda of transfers at the appropriate time. Eastern’s case appears to be that Hampstead acted unconscionably by delaying the redemption of the charges. But the evidence does not support that charge of inequitable conduct. On the contrary, Eastern’s letter referred to by the learned judge and reproduced earlier in this judgment makes it plain that Eastern was not in a position to meet its obligations under the Rescission Agreement.

14. It is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion. They are by their very nature flexible and meant to be applied in such a fashion as produces a just result on the facts and circumstances of a given case. But there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. One of these is that a supplicant who prays

in aid equitable assistance must himself or herself be not guilty of equitable misconduct. This is sometimes put in the form of the maxim: He who comes to equity must come with clean hands. So, a contract breaker cannot successfully invoke the remedy of specific performance. So too, a trespasser may be unable to restrain the true owner of land from denying him access. Likewise, a tenant who is guilty of a breach of a covenant in his lease may be refused equitable relief from forfeiture. These are all but individual illustrations of the basic fabric.

15. Now apply that to the present case. Here we have a litigant which is guilty of a failure to abide by the promise it had made. It would be contrary to all principles of equity to allow it to succeed.

16. For the reasons already given, I am in agreement with the conclusions arrived at by the learned judge. I would therefore dismiss this appeal. All the orders of the High Court are affirmed. The appellant (Eastern) must pay the respondent (Hampstead) the costs of this appeal. The deposit in court shall be paid out to the respondent to account of its taxed costs.

20. My learned brothers Richard Malanjum and Hashim bin Dato' Haji Yusoff, J.J.C.A. have seen this judgment in draft and have expressed their agreement with it.

Dated this 22<sup>nd</sup> day of October 2007.

Gopal Sri Ram  
Judge, Court of Appeal  
Malaysia

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