

DALAM MAHKAMAH RAYUAN MALAYSIA
RAYUAN SIVIL NO: J-02-1160-2006

ANTARA

DREAM PROPERTY SDN BHD

... PERAYU

DAN

ATLAS HOUSING SDN BHD

... RESPONDEN

[Dalam Mahkamah Tinggi Malaya di Johor Bahru
Guaman Sivil No. MT2-22-642-2006

Antara

Atlas Housing Sdn Bhd

... Plaintiff

Dan

Dream Property Sdn Bhd

... Defendan]

Coram: Zulkefli bin Ahmad Makinudin, J.C.A.
Low Hop Bing, J.C.A.
Zainun Binti Ali, J.C.A.

JUDGMENT OF ZULKEFLI BIN AHMAD MAKINUDIN, J.C.A.

Introduction

This is an appeal by the defendant against the decision of the learned Judicial Commissioner of the High Court at Johor Bahru allowing the plaintiff's application for summary disposal of the suit filed by the plaintiff against the defendant on a point of law under Order 14A of the Rules of the High Court 1980 ["RHC 1980"] and entering summary judgment in favour of the plaintiff.

At the appeal stage before the Court of Appeal the defendant filed a Notice of Motion in Enclosure (24a) pursuant to Rule 7 of the Rules of the Court of Appeal 1994 and section 69 of the Courts of Judicature Act 1964 for an

order that the defendant be at liberty, upon the hearing of the present appeal to adduce and refer to the fresh and further evidence as exhibited in Exhibits “YTC-1”, “YTC-2”, “YTC-3”, “YTC-4” and “YTC-5” to the affidavit of Yiap Toon Cheng affirmed on 16-8-2007. Having heard the arguments of learned Counsel for the defendant and the plaintiff we unanimously allowed the defendant’s application in Enclosure (24a) and made an order in terms of the application. We find that the defendant has satisfied the necessary conditions as set out in Rule 7(3A) of the Rules of the Court of Appeal 1994 and section 69(3) of the Courts of Judicature Act 1964. We also find the defendant has justified the reception of the fresh evidence under the principles as set out in the case of **Ladd v. Marshall** **[1954] 3 All ER 745.**

Background Facts of the Case

The relevant background facts of the case are as follows:

(1) By a written agreement dated 19.11.2004 [“the Agreement”] entered between the plaintiff and the defendant, the plaintiff agreed to sell to the defendant a piece of land held under Geran 101840 Lot 325, Mukim Simpang Kanan, District of Batu Pahat, Johor [“the said Property”] for RM33,500,000.00 [“purchase price”], and the defendant agreed to purchase the same subject to the terms and conditions as agreed by the parties.

(2) One of the terms and conditions of the Agreement provides that the plaintiff shall be

given nine months from the date of the said Agreement to relocate a Chinese school built on the said Property, namely, SJK (C) Hwa Nan [“the said School”] in order to hand over vacant possession of the said property to the defendant.

- (3) It is also a term of the Agreement that, from the date the plaintiff confirms in writing that vacant possession of the said property is ready to be delivered to the defendant and upon inspection and confirmation by the defendant, the defendant shall have four months from the said date to settle the balance purchase price to the plaintiff, with an automatic extension of two months on condition that the defendant shall pay late interest to the plaintiff.

- (4) It is claimed by the plaintiff that vacant possession of the said school, hence the said property, was delivered to the defendant on 21.11.2005. However, the defendant is contending that vacant possession of the said school was not delivered to the defendant on 21.11.2005, but instead, it was on 28.2.2006.
- (5) The plaintiff proceeded to file an action against the defendant in the court below, and in its action, the plaintiff claims against the defendant, inter alia:
- (a) a declaration that vacant possession of the said property has been delivered by the plaintiff to the defendant on 21.11.2005; and

- (b) a declaration the defendant has failed to pay to the plaintiff the balance purchase price and the interest for extended period on or before 21.5.2006, and therefore, the deposit of 10% of the purchase price paid by the defendant is forfeited by the plaintiff.
- (6) The plaintiff thereafter filed an application under Order 14A of the RHC 1980 vide Summons in Chambers dated 12.9.2006 [“Plaintiff’s Order 14A Application”] for the court to determine the date of delivery of vacant possession of the said school (hence, the said property) to the defendant.
- (7) The defendant opposed the plaintiff’s Order 14A Application, inter alia, on the ground that there is a dispute as to the material facts which is evident

in the parties' affidavits and therefore the action is not suitable to be determined under Order 14A of the RHC 1980. It is also the defendant's contention that the plaintiff's Order 14A Application has failed to satisfy the prerequisites of Order 14A of the RHC 1980 for the action to be determined under the said Order.

- (8) On 10.10.2006, the learned Judicial Commissioner decided that the issue on the date of delivery of vacant possession of the said property is suitable to be determined under Order 14A of the RHC 1980, and proceeded to allow the plaintiff's Order 14A Application ["Order"]. This is the defendant's appeal against the said Order.

Decision on Appeal

It is my judgment that the plaintiff's Order 14A Application ["Enclosure (8)"] fails to satisfy the prerequisites of Order 14A of the RHC 1980. The plaintiff's application in Enclosure (8) as I see it is seeking determination of a question of fact and not law. Order 14A of the RHC 1980 provides that the court may upon the application of a party determine any question of law or construction of any document arising in any cause or matter where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the cause or matter. The plaintiff's Order 14A Application essentially seeks the High Court determination a question based on prayer (1) as follows:

“(1) Menurut Aturan 14A Kaedah-Kaedah Mahkamah Tinggi 1980, kandungan Perjanjian Jualbeli bertarikh 19hb November 2004 dibuat di antara plaintif dan defendan ditafsirkan, terutamanya klausa 12 Perjanjian tersebut dan Syarat-syarat Khas No. 1 dan No. 3 dalam Perjanjian tersebut untuk memutuskan tarikh plaintif menyerahkan milikan kosong tanah yang dikenali sebagai Geran No. 101840 Lot Not 325, Mukim Simpang Kanan, Daerah Batu Pahat kepada Defendan...”.

English Translation

“(1) Pursuant to Order 14A Rules of the RHC 1980, the contents of the Sale and Purchase

Agreement dated 19 November 2004 made between the plaintiff and the defendant be construed, in particular clause 12 of the Agreement and Special Conditions No. 1 and No.3 of the Agreement to determine the date the plaintiff delivered vacant possession of the land known as Geran No. 101840, Lot No. 325, Mukim of Simpang Kanan, to the Defendant....”

It is clear that based on the said prayer (1) it is for a determination on a question of fact. A factual question, such as that posed by the plaintiff above should be determined in a full trial, and should not be determined summarily under the Order 14A of the RHC 1980 procedure. It is also to be noted that there is no question of law framed or a specific question on the construction of the

Agreement forwarded by the plaintiff to the court for consideration. This is apparent in the plaintiff's Order 14A Application. On the need to have proper question of law or a specific question on the construction of document framed, I would like to refer to the case of **Petroleum Nasional Bhd. v. Kerajaan Negeri Terengganu [2004] 1 MLJ 8** wherein the court therein inter alia had this to say:

“The primary issue in the suit was whether the plaintiff had, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu. This primary issue was contained in the first three questions posed in the defendant's application. All the questions were purely questions of law.”

On this ground alone wherein there is no question of law or a specific question on the construction of the document framed, the said application by the plaintiff ought to have been dismissed by the learned Judicial Commissioner.

I am also of the view that Order 14A of the RHC 1980 is not a vehicle for which the court is required to interpret the statement of claim to decide what point of law arises before deciding on it. An application under Order 14A of the RHC 1980 is to decide clear points of law or construction that are apparent on the pleadings. It is to be noted in this case the learned Judicial Commissioner proceeded to hear the plaintiff's Order 14A Application without the benefit of the defendant's defence which had yet to be filed at that time of the hearing of the application.

Instead, the learned Judicial Commissioner thought it fit to

choose to only confine himself to the averments made by the plaintiff in its Statement of Claim. The learned Judicial Commissioner has failed to sufficiently identify the relevant issues arising from the action, which necessarily ought to include the defendant's defence to the action. Therefore, the learned Judicial Commissioner was not in any position to make the said Order that he did, i.e. that the plaintiff's action against the defendant was suitable for determination under Order 14A of the RHC 1980. On this point I would like to refer to the case of **Watson & Anor. v. Dutton Forshaw Motor Group Ltd. & Ors., EWCA, 22 July 1998** wherein the Court of Appeal therein stated inter alia as follows:

“With the benefit of hindsight it is possible to see

that this is where things began to go wrong. In

fact the particulars would not be relevant to the O.14A application either so far as the plaintiffs were concerned or so far as the defendants were concerned. The issue of law, if it was discernible at all, had to be discernible from the statement of claim and the defence. The judge himself ruled at the outset of the hearing of the O.14A application on 17 October 1994 that he should not adjourn that hearing as he was requested to do by the plaintiffs' counsel on the basis that particulars were about to be delivered 'since it is not the function of particulars to take the place of necessary averments in the pleading.'

It is trite law that, for the court to exercise its power to summarily dispose off an action under Order 14A of the RHC 1980, there should not be any dispute by the parties as to the relevant facts, or that the court, upon scrutinizing the pleadings, concludes that the material facts are not in dispute. [**See the case of Petroleum Nasional Bhd. v. Kerajaan Negeri Terengganu** (supra)]. In this case it is noted that from the affidavits filed by the defendant in opposing the plaintiff's Order 14A Application, it is clearly shown that there is a serious dispute as to the material facts vis-à-vis the date of delivery of vacant possession of the said school to the defendant. The said school was still not relocated in November 2005 contrary to the plaintiff's claim. Yiap Toon Cheng from the defendant company who was asked by the plaintiff's representatives to inspect the said school, did not confirm on 21.11.2005 that vacant

possession of the said school was given on the said date. The said school administration did not allow the defendant unrestricted access to the said school after the visit on 21.11.2005 contrary to the plaintiff's claim. It was only on 28.2.2006 that the defendant was given the keys to the said school by the plaintiff. [**See pages 137-140 Part B of the Appeal Record**].

It is also noted that the defendant's conveyancing solicitors, namely, Messrs. Ajmer Sandhu & Ong, did write and did refute the plaintiff's solicitors' suggestion that vacant possession of the said property had been delivered on 21.11.2005. [**See pages 276-280 Part C of Appeal Record**].

It is to be noted in this case despite the entrenched principles of law that the court will not exercise its jurisdiction under Order 14A of the RHC 1980 on the basis of facts which are strenuously being disputed, yet, the learned Judicial Commissioner proceeded with the plaintiff's Order 14A Application by embarking on an expedition to evaluate conflicting affidavit evidence. This is evident in the learned Judicial Commissioner's Grounds of Judgment wherein amongst others he had stated as follows:

- (i) *“.... A few photographs of the new school and those present at the Opening Ceremony of the new school premises for Sekolah Hwa Nan were published in the article which*

reported, inter alia, that the Member of

*Parliament of Seri Gading Datuk Mohd Aziz announced a donation of RM30,000.00 for the school development funds. The photographs exhibited in the plaintiff's manager Tang Pei Hau's affidavit were confirmed as those taken by him personally on 18th November 2005. Those photographs showed the process of moving of the school....". **[See page 98 Part B of Appeal Record]**.*

- (ii) “.... In Yiap's O.S. Affidavit, he had named 3 persons as being the 'school administration' who prevented the defendant from entering the school and who allegedly had a meeting with him on 17.2.2006 and 22.2.2006. A few letters were also exhibited in Date' Tan's

affidavit to show that 2 of those 3 persons denied preventing the defendant from entering the school. The third person named by Yiap Toon Cheng was one “Tan Yu Keng”. However, Tan Yu Keng in his letter stated very clearly that he did not even meet Yiap Toon Cheng on 17.2.2006 or 22.2.2006....”

[See page 100 Part B of Appeal Record].

(iii) *“... Looking at all the evidence submitted by both parties, I am sure if the headmaster and the school teachers of the School are called as witnesses in court, they will all confirm that the School had moved to their new premises in November 2005, and the parents of the students will also confirmed*

*that they started attending classes at their new school premises in January 2006. I also have no doubt that if Y.B. Datuk Mohd Aziz (the Member of Parliament of Sri Gading) is asked in court as a witness, he will also confirm that he attended the Opening Ceremony of the new school premises for Sekolah Hwa Nan....” . **[See pages 102-103 Part B of Appeal Record]**.*

I am of the considered view the defendant’s contention that the plaintiff’s application for the Summary disposal of the suit under Order 14A of the RHC 1980 is inappropriate and must fail is further strengthened by the fact that this Court had already allowed the defendant’s application to adduce and refer to the new and further evidence during the

present appeal under the defendant's Notice of Motion in Enclosure (24a). Exhibits "YTC-1", "YTC-2", "YTC-3", "YTC-4" and "YTC-5" are the new documentary evidence the defendant seeks to be considered in this appeal and are relevant to the issue raised in this appeal.

The plaintiff is adamant with its position that the said school has been vacated and that it has delivered vacant possession of the said property on 21.11.2005. Contrary to the plaintiff's claim, the defendant has stated that it did not obtain vacant possession of the said property on 21.11.2005 as the defendant still did not obtain vacant possession of the said school premises which is part of the said property. The defendant has also stated that the said school administration of SJK (C) Hwa Nan repeatedly disallowed the defendant from entering the said school premises after

21.11.2005. The defendant was being denied access to the said school premises from time to time by the said school administration until February 2006 when the plaintiff handed over the keys to the said school premises to the defendant on 28.2.2006.

It is also pertinent to note that the learned Judicial Commissioner had reached the decision that the date of delivery of vacant possession of the said property must be on 21.11.2005 since he had found that the said school had been relocated before the date of joint inspection on 21.11.2005, and he therefore proceeded to allow the plaintiff's Order 14A Application. [**See paragraphs 13-16 of the Grounds of Judgment at page 98 Part B of Appeal Record**]. However, Exhibits "YTC-1", "YTC-2", "YTC-3", "YTC-4" and "YTC-5" produced at this appeal

stage clearly show that the said school had not been relocated on 21.11.2005, contrary to the claim made by the plaintiff as in its affidavits in support of the said Order 14A Application. Exhibits “YTC-1”, “YTC-2”, “YTC-3”, “YTC-4” and “YTC-5” are all documents emanating from the said school administration which clearly and distinctly support the defendant’s position and contention in the Court below that the defendant did not obtain vacant possession of the said property on 21.11.2005.

Conclusion

For the reasons above stated, I am of the view that the learned Judicial Commissioner had arrived at a wrong decision in the Order 14A Application of the plaintiff. I would allow the defendant’s appeal with costs and set aside

all the orders made by the High Court. Deposit paid by the defendant for this appeal is to be refunded to the defendant.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)
Judge
Court of Appeal

Dated: 2nd November 2007.

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Counsel for the Respondent:

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Messrs. Robert Devan & Co.