

JUDGMENT OF
ZAINUN BINTI ALI, J.C.A.

I have read the judgment of my learned brother, Low Hop Bing, JCA in this appeal and my response is as appended below.

Both the factual background and facts including the reliefs sought have been clearly set out by His Lordship. Thus I shall dispense with them here, save where they appear necessary and relevant in the context of my judgment.

THE MOTION ENCLOSURE 24(a)

At the start of hearing of the appeal proper, Mr. Segaram, Counsel for the appellant moved the court to hear his motion in Enclosure 24(a). Enclosure 24(a) filed on 22nd August 2007, is a motion to adduce further evidence under Rule 7 Rules of the Court of Appeal and Section 69 Court of Judicature Act, 1964.

It is Mr. Segaram's case that the evidence which he sought to produce and be admitted are those exhibits in YTC - 1 to YTC - 5.

Mr. Segaram intimated that these documents were not available at the time of hearing of the Order 14A application before the High Court.

In invoking the principle found in **Ladd v Marshall (1954) 1 WLR 1489**, Mr. Segaram submitted that all these letters (Exhibits YTC – 1 to YTC – 5) go towards proving that the school was still on the premises and that the Respondent had failed to comply with its obligation under the Agreement and therefore vacant possession had not taken place.

It is Mr. Segaram's case that if one were to carefully peruse the contents of some of these letters, particularly YTC – 4 and YTC – 5, the refutation of certain assertions therein clearly indicate that there is a dispute. In short, the date of vacant possession is in dispute.

After having heard learned counsel for the Respondent, D.P. Vijandran, who said that these documents were already available

earlier, and that therefore the Appellant should not be allowed their motion in Enclosure 24(a), and after having considered both parties' submissions in their entirety, we gave order in terms of the Appellant's motion in Enclosure 24(a).

Exhibits YTC – 1 to YTC – 5 in Enclosure 24(a) now form part of the appeal record.

However, as the facts of this matter unfold, my view is that the reception of the said evidence in Enclosure 24(a) was unnecessary.

FACTUAL BACKGROUND

Briefly the Appellant and Respondent entered into a Sale and Purchase Agreement on 19th November 2004 (“the Agreement”) in consideration of RM33.5 million, where the Appellant agreed to buy and the Respondent agreed to sell the land with an area of 5.8274 hectares or 14.4 acres, with 40 squatters and a school known as Sekolah Rendah Hwa Nan (“the School”) thereon.

The Agreement contained Special Conditions (1) and (3) which require compliance.

In Special Condition (1) the Respondent was to evict 40 squatters and relocate the School from the land.

The Respondent had duly performed both these requirements. This had been confirmed and acknowledged by the Appellant's representative upon the joint inspection of the said land on 21st November 2005, together with the Respondent's representatives as required under Special Condition (3).

Special Condition (3) states that from the date the Respondent confirms in writing that vacant possession of the land is ready to be delivered to the Appellant and upon inspection and confirmation by the Appellant, the Appellant shall have four (4) months from the said date to settle the balance of the purchase price to the Respondent. The Appellant is given an automatic extension of two (2) months in

which to pay the balance of the purchase price on condition that the Appellant pay late interest to the Respondent.

Since the School and its attendant issues seem to be central to the question before the court, a short description of the School would be helpful.

The School occupied 0.75 acres or about 5% of the total land area, which is 14.4 acres. The School had four gates. Three of the gates were open, giving unlimited access to the premises to the Appellant. However the fourth gate was not open due to its proximity to a busy road. The key to the fourth gate was given to the Appellant only on 28th February 2006 upon its request.

SEQUENCE OF EVENTS

On 16th November 2005 the Respondent's Solicitors wrote to the Appellant's Solicitors that their clients were ready to deliver vacant possession of the land. A date and time was set by the

Respondent for inspection of the site. However, the date for the said inspection was altered to the 21st November 2005, at the Appellant's request through its Solicitors. The Appellant named one Yiap Toon Cheng as the Appellant's representative for this purpose.

On 21st November 2005, the said Mr. Yiap together with the Respondent's representative inspected the site. He acknowledged this in these terms:-

“I have jointly inspected the school site with Mr. Edwin Tan and Mr. Tang and confirm that the school administration had been relocated.”

The next day, the Respondent's Solicitors by a letter dated 22nd November 2005, wrote to the Appellant's Solicitor confirming the above and stated that accordingly the completion date will fall on 21st March 2006. (i.e when balance of the full payment is due).

The Appellant's Solicitors by letter dated 29th November 2005 replied, accepting the contents of the said letter from the Respondent's Solicitors.

The Appellant added a proviso to the effect that it be allowed to use the school house and for the said School not to be dismantled.

The Respondent's Solicitors replied in a letter of 21st December 2005, agreeing that the Appellant take over the School building upon payment of a purchase price of RM20,000. However the Respondent stated in clear terms that this sale of RM20,000 was "not a condition precedent" to the handing over of vacant possession.

The Respondent once again stated and confirmed that the completion date was 21st March 2006. The Appellant accepted this proposition. Thereafter the Appellant took possession of the premises and commenced construction works thereon.

However on 8th March 2006, i.e. about a fortnight before the completion date (when balance payment is due), the Appellant's Solicitors, out of the blue, disputed the date of handing over of vacant possession and date of completion, alleging that vacant

possession was only delivered to them on 28th February 2006, i.e. the date when the key to the fourth gate was given them by the Respondent.

Arguably, this would mean that the completion date (in the Appellant's estimation), would fall approximately on 28th June 2006, with two months extension.

Try as they might, the Respondent and Appellant were unable to resolve the issue between them. Following this impasse the Respondent then filed this suit on 28th August 2006.

Subsequently the Respondent by way of an Order 14A application sought inter alia, the court's determination with regard to the construction of the Sale and Purchase Agreement dated 19th November 2006 entered into between the parties. Of particular interest would be the construction to be given to Clause 12 and Special Conditions No (1) and (3) of the Agreement, to determine when the Respondent had to deliver vacant possession of the

Respondent's land and further for a declaration of paragraphs (a) – (g) of the Statement of Claim.

In so far as the Respondent is concerned, this vexed question as to what was the date that vacant possession was in fact given, is obviously a pure question of interpretation and construction of the Agreement and admitted documents, which could be determined by the court under Order 14A, Rules of the High Court, 1980.

Predictably, the Appellant took an opposite stance. The Appellant contends that what the Respondent sought to determine is no more than a determination of fact, namely on what date did the Respondent deliver vacant possession of the land to the Appellant. The Appellant submitted that therefore the Respondent's Order 14A application is inappropriate when it is clear that the manifest object of Order 14A is only with regard to the court's determination of a question of law or construction of any document arising in any cause or matter without a full trial and such determination will finally determine the cause or matter.

The Appellant also contends that more importantly the Respondent's Order 14A application is further jeopardized since it is replete with serious disputes as to material facts.

The Appellant cited several authorities to support this argument. They are inter alia :-

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8

Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang [2004] CLJ 1

Federal Insurance Co. v Nakano Singapore (Pte) Ltd [1992] 1 SLR 390.

The Appellant went on to argue that even if Order 14A is appropriate, the Respondents had not fully complied with its requirements. This is evident when there is no question of law framed by the Appellant. Neither was there a specific question on

the construction of the Agreement forwarded by the Respondent to the court for consideration.

The Appellant cited **Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8** and **Lekaz Constructions Sdn Bhd v KOP Petroleum Sdn Bhd [2003] 4 CLJ 377** in support of this contention.

The Appellant further submitted that the points of law to be determined should be discernible from the pleadings, i.e. the Statement of Claim and Defence. But since the Appellant had yet to file its defence at the hearing of the Order 14A application, the learned Judicial Commissioner in the Court below could not have sufficiently identified the relevant issues arising from the action, without the benefit of the Appellant's Defence.

The Appellant submitted that in the absence of its Defence, the learned Judicial Commissioner confined himself merely to the averments of the Respondent in its Statement of Claim. (See

Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors

EWCA, 22 July 1998 Court of Appeal)

The Appellant also found fault with the Respondent's affidavits affirmed by one Dato' Tan Eng Boon and one Tang Pei Hua respectively, since they deposed to such facts as are not within their own personal knowledge and they would therefore not be in a position to personally verify the facts. Among others, this relates to the fact that the School administration had allegedly moved out from the School premises.

The Appellant contends that since the nature of an Order 14A application will finally determine the rights of parties, affidavits such as those affirmed by Dato' Tan Eng Boon and Tang Pei Hua, based on hearsay as it were, should not be admissible. Thus in this connection, the issue regarding the date of delivery of vacant possession of the School ought to be determined in a full trial.

The Appellant did not also find favour with the Respondent being allowed to argue non-pleaded issues. This arose when at the hearing in the High Court, the Respondent counsel raised the issue that under Special Conditions No. (1) and (3) of the Agreement “*to relocate the school must be construed as “to move the school to a new premise, thus confirming that the date of delivery of vacant possession was on 21st November 2005.”*”

The Appellant contended that the Respondent did not plead this in its pleadings.

The question that looms large is this.

Is the issue regarding the date when vacant possession is to be given to the Appellant, (based on the relevant clauses of the Agreement and joint acts of inspection and confirmation of parties) a question of fact, OR is it a question of law or construction as envisaged under Order 14A?

Order 14A reads as follows:-

“(1) The Court may upon the application of a party or of its own motion determine any question of law or

construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

- a) such question is suitable for determination without the full trial of the action; and
- b) such determination will finally determine the entire cause or matter or any claim or issue therein.” (emphasis added)

It is the Appellant’s case that the determination of the date of vacant possession is no more than a question of fact, rendering an Order 14A application wholly inappropriate.

To compound the problem, the Appellant also made it clear that there are disputed questions of fact involved, disentitling the Respondent from making an application under Order 14A.

Let us now look at the said “disputed questions of fact”.

DISPUTED QUESTIONS OF FACT

- (a) The Appellant’s first allegation of “disputed fact” concerns the school’s relocation. The Appellant contended that the school was not relocated by 21st November 2005.

However this ‘dispute’ becomes irrelevant in the light of the acknowledgment by the Appellant’s representative, Mr. Yiap Toon Cheng, who in clear terms on 21st November 2005, confirmed the school’s relocation.

- (b) The Appellant’s second allegation of fact in dispute relates to the written acknowledgment given by the said Appellant’s representative, Mr. Yiap Toon Cheng. The Appellant contended that the said written acknowledgment by Yiap after the joint inspection did not amount to vacant possession being given on 21st November 2005 since Yiap had merely said:

“...I have jointly inspected the school site with Mr. Edwin Tan and Mr. Tang and confirm that the school administration had been relocated.”

My view is that the purpose of the joint inspection as provided in the Agreement was to ascertain whether the school had been relocated to another site. Mr. Yiap’s acknowledgment that it had, is clear and unequivocal. The question is, in the light of Clause (3) of the Agreement, does the joint inspection and confirmation of the School’s

relocation amount to vacant possession being given on 21st November 2005? The Respondent says it does. If the Appellant contended otherwise, then this issue can only be determined on a proper interpretation and construction of the act of acknowledgment by the Appellant's representative on 21st November 2005, taken and read in conjunction with the Respondent's letter dated 16th November 2005 and the subsequent confirmation thereof through letters dated 17th November 2005, 22nd November 2005 and 21st December 2005.

- (c) The Appellant's third allegation of "disputed fact" is that the School did not allow unrestricted access to the School after 21st November 2005.

Surely this allegation is to be treated with askance, in the light of the Appellant's commencement of construction works on the premises. If vacant possession had not already been

given as Appellant contended this could only mean that the Appellant had been trespassing on the said premises.

- (d) The fourth allegation of “disputed fact” relates to the issue that the Appellant was given keys to the school only on 28th February 2006, thus precluding access to the premises.

I find this contention baseless and misleading. Considering that three of the four gates were not locked, the question of accessibility is a non-issue, a fortiori when considering that the Appellant had begun construction works on the premises. It was only the fourth gate which remained locked, due to its proximity to a busy road. Upon its request, the key to the fourth gate was given to the Appellant on 28th February 2006.

Now, flying in the face of the Appellant’s own conduct and letters to the contrary, the Appellant contend that vacant possession was given them only on 28th February 2006, i.e. the

date the key to the fourth gate was given. This also means that in so far as the Appellant was concerned, the date of completion is consequently shifted to 28th June 2006, plus two months extension.

- (e) The Appellant's fifth allegation of "disputed fact" relates to the central issue of the date when vacant possession was given. The Appellant took the position that it was not given on 21st November 2005 as submitted by the Respondent but only on 28th February 2006.

It is evident that the Respondent's letters spoke in clear terms regarding confirmation of the date of vacant possession being 21st November 2005, which was not only NOT challenged by the Appellant, it was in fact ACCEPTED by the Appellant in its letters.

It is of course banal to state that any denial, objection or challenge, should there be any, ought to be made promptly.

As Lord Esher MR, in Wiedeman v Walpole [1891]

2QB 534 tersely observed:-

“... if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.”

Clearly the Appellant’s lack of promptness in objecting to the contents of the Respondent’s letters as to the date and vacant possession and date of completion, now works against the Appellant. More importantly, the Appellant’s clear acceptance of the contents of the Respondent’s letters did not reconcile with the Appellant’s later and subsequent position denying them.

- (f) The Appellant’s sixth issue concerns the problem of its representative Mr. Yiap Toon Cheng having to contact the school’s administrators to seek permission to access the school compound.

This latest non-issue thought up by the Appellant reinforces my view that the alleged disputes of fact are largely misconceived, since the said “disputes of fact” relate to the problems the School had with the Respondent. The Appellant is not privy to the understanding or agreement which the Respondent had long had with the School and its administrators.

For the Appellant to now take advantage of the School’s problems with the Respondent merely to show existence of facts in dispute, manifests the Appellant’s machinations in trying to put off paying the balance of the purchase price. It is also irrelevant, since the Appellant had nothing to do with the Respondent’s problems with the School.

In any event the sixth alleged “dispute of fact” has no bearing whatsoever on the question of interpretation as to the date of vacant possession.

It would appear that the alleged “disputes of fact” are contrived by the Appellant, as an afterthought. In any case, the alleged “disputes of fact” have been sufficiently addressed by the learned Judicial Commissioner in his judgment.

Such being the position, the next question is whether this matter can be resolved through the Order 14A regime.

What then is the ambit of Order 14A?

The English Court of Appeal, in reviewing the scope of Order 14A in the unreported 1994 case of **Korso Finance Establishment Anstat v John Wedge** inter alia, had this to say:-

- “ 1. An issue is a disputed point of fact or law relied on by way of claim or defence.
2. A question of construction is capable of constituting an issue.
3. If a question of construction will finally determine whether an important issue is suitable for determination under Order 14A and where it is a dominate feature of the case, a court ought to proceed to so determine such issue.”

Then again in **Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8**, our Court of Appeal observed that:-

“... In our view even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of Order 14A and Order 33 Rule 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found.”

My view is that the question of what or when is the date of vacant possession in this case, depends very much on how one interprets or construes the terms of the Agreement. A simplistic approach such as that taken by the Appellant, where it was argued that it merely bears on it being a question of fact, makes for a superficial understanding of the question posed for the court's determination under Order 14A.

In that regard my view is that this matter is suitable and appropriate to be considered within the dynamics of the Order 14A regime.

Under Order 14A, the court can resolve issues of fact by examining such “facts” in order “to ascertain whether the allegations made are inherently incredible or patently inconsistent with contemporaneous documents” (per Court of Appeal in **Hock Hua Bank v Yong Link Thiu [1995] 2 MLJ 213**).

Before I proceed further, my view is that it is necessary to firstly address a pertinent point raised by the Appellant as alluded to earlier. It is this; since the Appellant had yet to file its defence, the Appellant contends that the learned Judicial Commissioner had not had the benefit of reading the entire pleadings and was confined to reading only the Statement of Claim.

The Appellant’s vigorous argument is that this is not what is contemplated under Order 14A since the arbiter must be fully appraised of the issues therein which can be discerned only when the Defence is filed.

However, authorities such as Watson & Anot v Dutton Forshaw Motor Group Ltd v Ors [1998] EWCA 3245 22 July 1998 CA indicate that applications under Order 14A is to decide clear points of law or construction apparent on the pleadings. “Pleadings” as defined in the Rules of the High Court, 1980 merely says it “does not include petitions summons or preliminary act”.

Pleadings therefore cover a wide spectrum of the cause papers. The court can avail itself to the affidavits in support for example, which would depose the material facts relating to the questions of law or construction to be determined by the court. In the instant appeal, the affidavits filed bear testimony to the unequivocal factual events. The court is competent to identify the material facts pleaded and conclude that they should not have been disputed at all or otherwise.

In this connection one has to envisage the purport of Order 14A, which is that where it appears to any party that a question of law or construction is apparent on the pleadings and determination

by the court will finally dispose of the matter, this Order can be invoked without the necessity of having to wait for the defence to be filed or waiting for the gamut of case management to take place and finalised. Waiting for these would defeat the very reason for the existence of the Order. Apart from the requisite provisions in the Order, as long as the Statement of Claim is clear, as are the affidavits in support as regards the question of law or construction to be determined, which would finally dispose of the matter, the court's power for summary disposal under this Order is assured.

The said approach, read with the express terms of the Order which specify that applications can be made "at any stage of the proceedings" is to be distinguished from the provision of other Orders in the Rules of the High Court 1980, which expressed that applications can be made only after "pleadings are closed".

As succinctly put by Lightman J. in **Mohamed v. Alaga & Co** **[1998] 2 All ER 720**:-

“... Under Order 14A, the Court can decide any question of law at any stage of the proceedings if that question is suitable for determination without a full trial of the action and such determination will finally determine the entire action or any claim or issue therein. Order 14A is accordingly not apt for determining a question which involves a question of fact.” (my emphasis).

This point is reinforced in the case of **Muhamad Zain bin Sidek v Suruhanjaya Perkhidmatan Awam Malaysia [2002] 779**

MJU 1 where Syed Helmy, J observed that:-

“... It should be borne in mind that Order 14A was introduced to cater for situations where points of law (and not facts) are fit for summary disposal.”

The position of an application under Order 14A is similar to that under Order 14 in that it should be made only if the Court thinks it is a plain case and ought not to go for trial....”

Thus if a party has a simple matter of construction to be determined such as in the instant appeal, the Court in such summary application should decide what in its judgment is the true construction and effect thereof. (See **Esso Standard Malaysia Berhad v South Cross Airways (Malaysia) Bhd [1972] 2 MLJ 168.**

Then again, in MP-Bilt Pte Ltd v Oey Widarto [1999] 3 SLR 592, a Singapore case involving the sale and purchase of a condominium unit where the developer sued the purchaser to recover unpaid progress payment, and the developer subsequently applied under Order 14 Rule 12 (which is equivalent to our Order 14A), the court below based as it were, on the Statement of Claim and supporting affidavits, gave the purchaser unconditional leave to defend. The developer appealed. G.P Selvam, J. had this to say:-

“.... Order 14 rule 12 was introduced to enable the Court to effect summary disposal of cases by determining any question of law or construction arising in any cause or matter at any stage of the proceedings. This is an implementation of a recent and present movement towards a speedy solution to civil disputes where oral evidence is unnecessary. The new procedure should be put to use in cases where all relevant and necessary evidence is documentary.....”

Clearly from all these authorities, the Appellant’s proposition that a defence must first be filed before the court can hear an application under Order 14A is misconceived.

The scope of Order 14A is such that “real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found”. (See **Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8 Court of Appeal**)

In the Petroleum case above, the Court of Appeal found that the trial judge had failed to identify the material facts which are disputed or undisputed or which ought not to have been disputed.

The Appellant contends that the disputes of fact are apparent from the affidavits.

So how does one treat the issue of conflict of evidence on affidavits as are said by the Appellant to exist in the instant case?

My view is that the principles applicable to affidavits in an Order 14 application is equally applicable to an Order 14A application.

Lord Diplock in the Privy Council decision of **Eng Mee Yong & Ors v Letchumanan (1979) 2 MLJ 212** observed that:-

“...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 rising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.”

In the same vein, it is trite that a mere assertion in an affidavit of a given situation, which is to be the foundation of a defence, does not provide leave to defend. It is imperative for the court to look at the whole situation and ask itself whether the Defendant has satisfied the court that there is a reasonable probability of the Defendant having a bona fide defence.

It is my view that the learned Judicial Commissioner in the court below had identified and made a more than adequate appraisal of the material facts pleaded in the instant appeal and found them to be obviously undisputed.

I agree with the findings of the learned Judicial Commissioner. As was clearly stated in a Supreme Court Practice of 1999 (Singapore):-

“...Where the court is satisfied that there are no issues of fact between the parties, it would be pointless to give leave to defend on the basis that there’s a triable issue of law, and this is so even if the issue of law is complex and highly arguable”.
(See The Supreme Court Practice 1999 para 14/4/12).

This principle was approved and applied in cases such **European Asian Bank AG v Punjab and Sind Bank (No.2)** [1983] 2 All ER and more recently in the Singapore Court of Appeal in **Tokyo Investment Pte Ltd & Anor v Ian Chor Thing** [1993] 3 SLR 170.

It is also competent to take another approach to this matter.

What can also be discerned is that upon a proper and true construction for the handing over of vacant possession, anxious scrutiny must be had to the relevant Clauses in the Agreement. Under Clause 1 of the Special Conditions, the vendor is given nine months with an extension of three months... “to relocate the School in order to hand over vacant possession of the said property to the purchaser”.

The period prescribed is “in order to hand over vacant possession”. No actual reference is made for any time period for the actual handing over.

The material part of Clause 3 reads as follows:-

“From the date that the vendors confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser, the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchaser Price to the Vendor, with an automatic extension of two (2) months...”

So under this clause the vendor is required to confirm in writing that vacant possession “is ready to be delivered” pursuant to Clause 1.

So at which point in time can it be said that the Vendor is in a state of “readiness” to deliver vacant possession pursuant to Clause 1?

Clearly it occurs when the school has been relocated as required under Clause 1. It does not, ipso facto, state that vacant possession must be physically delivered at that time.

In other words, upon relocation of the school, the Respondent is set and prepared and ready to deliver vacant possession. This is to be followed by inspection and confirmation by the Appellant that the School had indeed been relocated.

Even after the said inspection and confirmation of the same, the Agreement does not prescribe any time frame for delivery of vacant possession.

The point of time at which vacant possession must be delivered is contained in Clause 6 of the Agreement which reads:-

“The sale and purchase herein is free from encumbrances and with vacant possession to be given to the Purchaser on completion of the Sale and Purchase herein.”

Which means that vacant possession must be given upon completion of the sale and purchase (item 10 of the Schedule and Clause 1 of the Special Conditions) i.e when the balance of that purchase price is paid i.e four months plus two months from the time the Respondents confirmed that they were ready to give vacant possession and inspection had been held.

On 16th November 2005 the Respondent had intimated that “vacant possession is ready to be given”. But the inspection and confirmation by the Appellant was completed only on 21st November 2005, at the Appellant’s behest.

The balance of the purchase price had then to be paid within four plus two months from 21st November 2005 i.e at the latest, on 21st May 2006. Vacant possession is to be given only after the balance purchase price is paid i.e on or before 21st May 2006.

If this was the case, then vacant possession is to be given only on 21st May 2006, when the balance of the purchase price was to be paid. However, the Appellant contend that vacant possession was only given on 28th February 2006 when the key to the fourth gate was given. Even if this is accepted, on the basis of this interpretation, the Respondent had in actual fact given vacant possession long before the due date.

**Other points raised in the Memorandum of Appeal
Paragraph 4(c).**

This approach was not presented on these terms at the High Court stage, but since this is not a new but an alternative interpretation on the same documents and facts which were before the High Court, this is not a new point raised.

S.69(1) of the Courts of Judicial Act clearly provides that a appeal to be Court of Appeal shall be by way of re-hearing.

As succinctly put by Gopal Sri Ram JCA in Luggage Distributions (M) Sdn. Bhd v Tan Hor Teng & An [1995] 1 MLJ

719:-

“... the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met on a particular case depends on the peculiar facts of that case. The factor for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.”

In fact the Federal Court said this with greater intensity in

Morello Sdn Bhd v Jacques (International) Sdn Bd [1995] 1

MLJ 577, when it observed:-

“.... It is clear law that an appellate court is more likely to entertain a new point if it relates to a matter which had been before the court of trial, for example a new argument based... upon the construction of a document or upon facts admitted or proved beyond controversy....”

My view is that this court is entitled to look for the true construction of this matter albeit when the Respondent had posed Clause 12 and Special Conditions (1) and (3) for determination. In that regard I find that the Appellant’s contention that the Respondent

had failed to pose a question of law or construction for the Court's determination, to be baseless.

Para 4(e) and (h) Memorandum of Appeal

The Appellant's submission that the deponents were incompetent to attest the said affidavits are untenable since the essential facts relied on by the Respondent were not hearsay. They were attested to by persons who had personal knowledge of the same.

Para 4(i) Memorandum of Appeal

This allegation is unfounded since the issue on the School's relocation had been pleaded by the Respondent at paragraph 3.5 and 4.1 (See page 25 – 26 Record of Appeal).

Clearly the Respondent's Order 14A application is appropriate since the question of the construction of relevant clauses pertaining to vacant possession in the Agreement is a central feature of the dispute between the parties.

It is my view that Order 14A gives leverage to the court to finally determine issues such as questions of law or construction which may finally be determined without the need for a full trial of the action.

On a final note, it might be noted that the Order 14A regime is largely put in place to enable courts to effectuate speedy solutions to civil disputes where oral evidence is unnecessary.

In fact courts are encouraged to enforce the rigours of the Order, particularly in commercial and construction cases “where cash flow is the life blood to make commerce work.” (per GP Selvam J in **MP-Bilt Pte Ltd v Oey Widarto [1999] 3 SLR 592.**)

In my view, for as long as it is clear that the legal requirements are in place, the court should not be diffident in confronting the issues in an Order 14A application.

After considering this appeal in its entirety, my view is that the Respondent's application under Order 14A seeking the courts' determination on a point of construction of the relevant Clauses in the Agreement pertaining to the date of vacant possession is pertinent and is in order.

Consequently my view is that the Appellant's appeal is to be dismissed with costs.

Dated this 2nd day of November 2007

(DATUK ZAINUN BINTI ALI)
Judge
Court of Appeal, Malaysia.

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