

A

DALAM MAHKAMAH RAYUAN MALAYSIA

(DALAM BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. T- 02- 557- 2004

ANTARA

B

ISMAIL BIN MUDA

...

PERAYU

DAN

DANAHARTA URUS SDN. BHD.

...

RESPONDEN

(DALAM PERKARA MENGENAI MAHKAMAH TINGGI (1)

DI KUALA TERENGGANU

GUAMAN SIVIL NO. 22-55-2003

MENGENAI LAMPIRAN 3)

C

ANTARA

DANAHARTA URUS SDN. BHD.

...

PLAINTIF

DAN

ISMAIL BIN MUDA

...

DEFENDAN)

D

Coram: Abdul Aziz bin Mohamad, JCA

James Foong Cheng Yuen, JCA

Zaleha bt Zahari, JCA

JUDGMENT OF THE COURT

E

It was the unanimous decision of this Court on 18.4.2006 that this appeal be dismissed with costs. The High Court Judge's decision dated

A 7.6.2004 allowing the Respondent's application in Enclosure (3) was affirmed. We now state our reasons for doing so.

B The principles guiding Courts whether to allow an interlocutory relief before trial are clear. A Plaintiff seeking interlocutory relief must establish a prima facie case of a breach of its rights. Courts must however be mindful of the words of Lord Diplock in *American Cyanamid Co. v. Ethicon (1975) 1 AER 504 510* that it is no part of the Court's function at this stage of litigation to resolve conflicts of evidence as to the facts on which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. A decision at this stage must necessarily be based on facts which are not disputed or deemed admitted.

D The issues for determination in this appeal revolve around whether there are issues to be tried, whether damages would be an adequate remedy and where the balance of convenience lies.

E Before dealing with the background facts and rival contentions leading to this application I propose to set out the statutory provisions raised in arguments in this application. They are as follows:

“PART VII
ADDITIONAL RIGHTS

B 57. (1) Notwithstanding any other law and in addition to any other power the Corporation may have under... any other law, the Corporation ... as holder of any security, whether as chargee ... assignee ... or otherwise, over any property shall be entitled –

C (a) to dispose of such property by way of private treaty; and

D (b) where such property consists of land, to take all steps as it deems fit to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land ... to inspect, protect, secure, maintain or repair the land.

....
.....

(6) The Corporation’s rights under subsection (1) –

E (a) may be exercised notwithstanding any order for sale made pursuant to any rules of the court, the National Land Code ... or any other law.....;

(b) may be exercised without the need for any

A approval, confirmation or order of court;
...
...

PART IX
APPLICATION OF THE ACT

B 60. (1) Subject to subsections (2), (3) and (4), the provisions of Parts VII of this Act shall apply to every subsidiary of the Corporation prescribed under subsection (2) as if the subsidiary is the Corporation itself.

....
....”

C (b) THE NATIONAL LAND CODE

D “5C. (1) Upon the coming into force of the Pengurusan Danaharta Nasional Berhad Act 1998, the Fifteenth Schedule which provides for the modifications to the National Land Code to facilitate the implementation of the Pengurusan Danaharta Nasional Berhad Act 1998 shall apply and the Act shall be read subject to the provisions of the Schedule.

FIFTEENTH SCHEDULE

(Section 5C)

MODIFICATIONS TO FACILITATE THE
IMPLEMENTATION OF THE PENGURUSAN DANAHARTA
NASIONAL BERHAD ACT 1998

E 4 A. (1) Danaharta shall, in addition to the rights of a chargee under the Code, have at all times the right –

A (a) to employ guards to protect and secure the land and all buildings on the land;
....
....

10. Danaharta's rights under this Schedule –

B (a) may be exercised notwithstanding any order for sale made whether pursuant to any rules of court, the Code or any other law ...;

C (b) may be exercised without the need for any approval, confirmation or order of court;
....
....”

BACKGROUND

D The background facts upon which the abovementioned legal provisions have to be considered are these: Danaharta Urus Sdn. Bhd (the Plaintiff in the Court below and Respondent in this appeal), a company incorporated under the Companies Act 1965, is a wholly-owned subsidiary of Pengurusan Danaharta Nasional Berhad (“Danaharta”) and has been prescribed as a subsidiary of Danaharta pursuant to section 60(1) and (2)
E of the Pengurusan Danaharta Nasional Berhad Act 1998 (“the Danaharta Act”).

A Pursuant to Agreements via letters dated 5.10.1981 and 20.8.1983
(Exhibits “KA-1” and “KA-2”, “the Loan Agreements”) Bank Bumiputra
Malaysia Berhad [now known as Bumiputra Commerce Bank Berhad (“the
Bank”)] had agreed to extend credit facilities totaling RM3,402,365.85 (“the
B Loan”) to Gabungan Ismail Penarek Sdn Bhd (“Gabungan”) upon the
request of Gabungan. The Loan was secured, *inter alia*, by third party
charges over immovable property known as HS(D) 310, Lot No. PTG 2094,
Mukim of Penghulu Diman, District of Ulu Terengganu, State of
Terengganu (“the Charged Land”) belonging to the Appellant in favour of
the Bank. The Respondent’s case was that pursuant to the loan
C Agreements, the Bank had disbursed the loan amounts to Gabungan.

The Respondent contended that Gabungan was in breach of the
Loan Agreements in that it failed to settle any of its indebtedness to the
Bank. Gabungan’s loan was thus a non-performing loan under the
D applicable banking rules. On 7.5.1999, the Respondent acquired from the
Bank by way of Statutory Vesting under section 14 of the Danaharta Act
the rights, title and interest relating to the Loan to Gabungan. Notice of
the Statutory Vesting was given to Gabungan by the Bank and the
Respondent via letters dated 7.5.1999 and 10.5.1999 respectively. By a
E letter dated 14.5.1999, the Bank gave further notice of the vesting to the
Appellant. The Respondent’s interest as chargee of the Charged Land has
been registered at the Kuala Terengganu Land Registry. According to the

A Respondent, at all material times, Gabungan was and still is in breach of the Loan Agreements in that it failed to settle any of its indebtedness after the statutory vesting.

B It was the Respondent's case that section 57 of the Danaharta Act and paragraph 5 of the Fifteenth Schedule to the National Land Code ("the Code") conferred upon them the right to sell the Charged Land by way of private treaty. In exercise of this right they had entered into a Sale and Purchase Agreement dated 1.7.2002 as Vendor, with Foy Construction Sdn. Bhd. as Purchaser. By reason of the Respondent's inability to fulfil its C obligations under the said Sale and Purchase Agreement to deliver vacant possession of the Charged Land as a result of the Appellant's failure to vacate the Charged Land, the Purchaser had terminated the Sale and Purchase Agreement effective from 1.4.2003.

D The Respondent's complaint was that its employees, servants and agents had been prevented from entry and access onto the Charged Land contrary to their entitlement in law to possession and control of the Charged Land. Access to the Charged Land could only be made via an adjacent land owned by the Appellant held under Lot No. PTG 3222 ("the Appellant's adjacent land"). The Respondent's servants or agents had, on E 15.7.2002 and 24.9.2002, attempted to make site visits to the Charged Land via the Appellant's adjacent land but were denied entry by the

A Appellant, his servants and/or agents.

The Respondent then caused a Writ of Summons to issue on 13.9.2003 against the Appellant seeking:

B

(a) a declaratory order that they were entitled to possession of the Charged Land;

(b) a permanent injunction restraining the Appellant from carrying out any form of excavation or mining activities on the Charged Land; and

C

(c) other consequential reliefs.

On the same day, 13.9.2003, the Respondent also filed a Summons-in-Chambers [Enclosure (3)] under Order 29 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the Court for, *inter*

D

alia, interim orders pending trial–

(a) An Order that upon the Plaintiff's undertaking to abide by any order the Court may make as to damages, the Defendant be restrained from carrying out/on any form of excavation and/or quarrying and/or mining activity/operations whatsoever or from carrying out/on any other form of development whatsoever on the said land,

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A activities of the Appellant on the Charged Land was not restrained pending the adjudication and determination of their action against the Appellant.

B The Appellant took issue. He disputed that Gabungan was indebted to the Respondent as alleged. According to the Statement of Defence filed, the contention of the Appellant was that the Bank had granted two separate credit facilities to Gabungan (RM3,002,365.85 and RM400,000.00) and one to Jerlan Kuari Sdn. Bhd. (RM300,000.00) and that there were three charges of the Charged Land. The Appellant alleged that the 1st Charge covered only RM1,602,365.85 of the loan of C RM3,002,365.85 to Gabungan and the 3rd Charge covered the loan of RM400,000.00 to Gabungan, making a total of RM2,002,365.85 only, while the 2nd Charge covered the loan to the other company. The Appellant therefore denied that the charges covered the entire loan of RM3,402,365.85 to Gabungan. It was further alleged that although the D loan secured by the 1st Charge was for RM1,602,365.85, only RM1,000,000.00 was released by the Bank to Gabungan and that this amount had been fully settled by Gabungan.

E The validity of the said 1st, 2nd and 3rd Charges are the subject matter of separate proceedings (i.e. Kuala Terengganu High Court Civil Suit No.22-81-2003) between the Appellant as Plaintiff, the Bank as 1st Defendant, the Respondent as 2nd Defendant, and the Registrar of Titles

A as the 3rd Defendant.

B In opposing the Respondent's application for an interim order pending trial, the Appellant's case was that, as the registered proprietor of the Charged Land, he was entitled to peaceful possession and enjoyment thereof. The Appellant then contended that the Respondent had to proceed under sections 270 - 277 of the Code concerning "Remedies of Chargees: Possession" in order to recover possession of the Charged Land; that a chargee is only entitled to possession of the Charged Land in the limited circumstances set out in Chapter 4 of Part Sixteen of the Code and that the Respondent's application was contrary to section 44 of the Code.

C

D The Appellant further contended that the application for an interlocutory injunction pending trial should also be dismissed as the Charged Land was subject to a restriction of interest [i.e. that it cannot be transferred, charged, or leased out without the consent of the State Authority]. The Appellant was of the view that the Respondent would not be prejudiced by the Appellant's continued possession of the Charged Land and that damages would be an adequate remedy.

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A *Are there issues to be tried?*

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C
The Respondent's Counsel in his submission argued that giving the words contained in section 57 of the Danaharta Act and the Fifteenth Schedule to the Code [i.e. paragraphs 4A(1)(a) and 10] their plain and ordinary meaning, the Respondent is clearly conferred with the power to recover possession of the Charged Land without the need to institute proceedings under the Code. Counsel further argued that the existence of a chargee's right of possession under the Code does not preclude the Respondent's recourse to the right of possession under the Danaharta Act which is a special Act enacted to enable the Respondent to discharge their functions quickly and with minimal delay for the purposes of promoting the revitalization of the nation's economy by injecting liquidity into the financial system.

D
Reliance was also placed on section 17A of the Interpretation Acts 1948 and 1967 which states that a construction "that would promote the purpose and object underlying the Act shall be preferred".

E
The Respondent's Counsel further submitted that the intention of the Legislature is amplified by the amendment of the Code by the inclusion of the new Fifteenth Schedule under the heading "Modifications to facilitate the implementation of the Pengurusan Danaharta Nasional Berhad Act

A 1998". The inclusion of this new Fifteenth Schedule in the Code reinforces and confirms the rights and powers of Danaharta and its subsidiaries conferred by the Danaharta Act.

B Before stating our views on this issue we would like to place on record that it is not necessary for us at this stage to give our firm findings as to the meaning to be ascribed to all of the statutory provisions referred to us in argument by the respective parties in this appeal. That must necessarily be determined at trial. The issue before us at this stage is a simple one, has the Respondent discharged the initial burden that lies on C them of showing that there are issues to be tried? Our views on this issue are these.

The Appellant has disputed Gabungan's indebtedness in this suit. He has also instituted separate proceedings challenging the validity of the D Charges which are also the basis upon which this suit is grounded. The Court also notes that the Appellant's attempt to strike out this case based on the same arguments was unsuccessful. The Appellant had filed an appeal against the decision of the High Court dismissing the striking out application vide Court of Appeal Civil Appeal No. T-02-564-2004, and in E January 2006, that Appeal had, with the consent of the Respondent, been withdrawn with no order as to costs. By his conduct in withdrawing that earlier appeal, it could be inferred that the Appellant had accepted that

A there are issues to be tried in this case.

B Giving the words in section 57(1) of the Danaharta Act their plain and ordinary meaning, prima facie it would appear that the Respondent is entitled under section 57(1) to take steps to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land so as to inspect, protect, secure, maintain or repair the land. Under section 57 (6) the rights under section 57(1) are exercisable without the need for any approval, confirmation or order of court.

C The amendment of the Code by the inclusion of a new Fifteenth Schedule under the heading "Modifications to facilitate the implementation of the Danaharta Act" reinforces the rights and powers of Danaharta and its subsidiaries. The special provisions in paragraph 4A of the Fifteenth Schedule confer upon Danaharta, in addition to the rights of a chargee under the Code, the right to employ guards to protect and secure the land and all buildings on the land; and pursuant to paragraph 10, the rights under the Fifteenth Schedule are also exercisable without the need for any approval, confirmation or order of Court. We therefore agree, as submitted by the Respondent's Counsel, that for Danaharta to have the power to secure and protect the Charged Land, they must, by necessary implication, have the power to take possession of it.

A Thus, based on the Appellant's own action, and applying the law to the circumstances of this case, prima facie, the Respondent has satisfied the first test. There clearly are issues to be tried in this case.

B Whether Damages an Adequate Remedy and Where Does the Balance of Convenience Lie?

C On the application of whether damages would be an adequate remedy and where the balance of convenience lie, it cannot be denied that carrying out quarrying and excavation activities on the Charged Land would result in the depletion of the natural resources and diminution in value and quality of the land bearing in mind the fact that the Charged Land has only a leasehold tenure of thirty (30) years expiring on 8th June 2010. We therefore agree that in the circumstances of the present case, in the event of the Respondent succeeding at the trial, damages would not be an adequate remedy.

D The Learned Judge was therefore right in holding that the balance of convenience lies in favour of the Respondent.

E To conclude, the learned Judge was right in allowing the Respondent's application in terms of Enclosure (3) and in issuing the interim order which he did.

A For the abovementioned reasons the Appeal was accordingly dismissed with costs.

B

DATIN PADUKA ZALEHA ZAHARI
Judge
Court of Appeal
Malaysia

Dated 6th December 2006

Note:

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