DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO.W-02-243-1999

ANTARA

INVESCOR SDN. BHD. …. PERAYU

DAN

SOBENA MAJU SDN. BHD. …. RESPONDEN

(DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR)
GUAMAN SIVIL NO.S7-22-366-1989

ANTARA

SOBENA MAJU SDN. BHD. …. PLAINTIFF

DAN

INVESCOR SDN. BHD. …. RESPONDEN

CORAM:

MOKHTAR SIDIN, J.C.A
JAMES FOONG CHENG YUEN, J.C.A
ZAINUN ALI, J.C.A.

GROUNDS OF JUDGMENT

Both the appellant (the developer) and respondent (the landowner) are companies with limited liability. The respondent is the landowner and the appellant is the developer.

The parties had, on 20.11.1987, entered into an agreement (which they called a Joint Venture Agreement), where the respondent for consideration of RM15 million, allowed the appellant to "develop the said land by building therein various types of building together with infrastructures, common facilities, convenience and other amenities in accordance with plans to be approved by the relevant authorities and subject to terms and upon the conditions hereafter contained."

There were two (2) pieces of land which were alienated to the respondent from the Government. It is important to look at

the language of the Agreement, particularly with regard to the mode of payment of the RM15 million.

This was how it is to be paid:

(i) RM200,000 upon execution of the agreement;

(ii) "a further sum of Malaysian Ringgit Fourteen Million Eight Hundred Thousand only (RM14.8 million) within one hundred (100) days from the date of the Agreement,

and this consideration is to be known as the "Security Deposit." (my emphasis).

It is also significant to note that the payment of the Security Deposit shall be deemed to be unconditioned payment of the landowner's share in the Joint Venture Project payable by the developer to the landowner upon due observance and performance by the developer of all the covenants stipulations and undertaking on its part to be observed and performed herein."

There were obligations imposed on both parties. The more significant ones affecting the respondent were that:-

(i) The landowner under clause 4 (a) shall apply for and use its best endeavour to obtain the approval of layout plans for the development of the said land from the authorities……"

(ii) The landowner under clause 4 (b) shall be jointly responsible for evicting the squatters from the said land….."

For doing these, the landowner was to get RM15 million and discount of 10% from the selling price offered by the appellant to the public.

Should the landowner not exercise his entitlement at the final phase of the development, "the Security Deposit shall be

deemed in full satisfaction of the Landowner's right and interest in the said land." (Clause 13 (b) Agreement).

And what of the appellant's obligation?

The appellant has to pay the respondent the initial sum of RM200,000 which had since been paid. The appellant is to also pay the balance sum of RM14.8 million within one hundred days "from the date hereof" (i.e. the date of the agreement). The appellant must, at its own cost and expenses submit plans and build on the said land, including infrastructures and then sell those constructed buildings of which the appellant is to keep the entire purchase price from those sales.

The Appellant's Case

It would appear from both the testimony and documentary evidence that the appellant tried to secure a bank loan after the agreement was signed. This bank loan is to pay respondent the balance due from appellant i.e. RM14.8 million.

However its banker MBF Finance Bhd informed the appellant that a company called Pembinaan dan Pemaju Malaysia (Selangor) Sdn Bhd (PPMS) had lodged a caveat on the said land. It transpired that PPMS had signed an earlier agreement with the respondent (on 26.5.1987) where PPMS was appointed the main contractor by the respondent. The PPMS loaned the respondent a sum of RM442,914 as consideration for this appointment.

It is this PPMS Agreement which the respondent had entered into, which prompted the appellant to contend that the respondent had committed a breach of the fundamental term of the Agreement which they both had signed (the appellant and respondent). According to the appellant, the existence of the PPMS Agreement had deprived the appellant the exclusive right to develop the said land.

This is manifested when in its reply to the respondent for its failure to pay the balance of the security deposit of RM14.8 million, the appellant in a letter of 19.4.1989 stated that:-

> "The Joint Venture Agreement was not proceeded with by reason of your failure to surrender the Document of Title to the Bankers and for the rescission of the contract you have entered into with Pembinaan dan Pemaju Mahajiwa (Selangor) Sdn Bhd and further you have failed to refund the sum of RM300,000 to us by 12th June 1988 …."

The said sum of RM300,000 was actually in reference to a purported loan of RM200,000 which was supposed to be given by the appellant under the Agreement, to the respondent for payment of quit rent and other charges imposed on the land.

The appellant did not pay the said charges. Instead the appellant requested that respondent company shareholders deposit their share certificates in the respondent company, with the appellant and in return, the appellant would lend RM200,000 to the respondent.

However, though the share certificates were handed over to the appellant, the RM200,000 was not forthcoming from the appellant.

However the rents and outgoings were duly paid by the respondent when a new group of shareholders took over the respondent.

The real turning point for this case occurred when the appellant failed to pay the balance of the security deposit of RM14.8 million.

Thus on 6.4.1989, the respondent by letter demanded from the appellant "full payment of this sum within 14 days failing which the Agreement would be terminated and the sum equivalent to 10% of the security deposit forfeited."

The Respondent's Case

The respondent's cause of action was founded on breach of contract by the appellant for non-payment of the balance of the security deposit of RM14.8 million, since it had complied with it's side of the bargain.

The critical issues before this Court are two-fold:-

(a) which of the parties is guilty of breach of contract?;

(b) whether there is a right of forfeiture in the JVA and If so, what is the quantum forfeitable?

The appellant contend that it was the respondent who had breached the agreement when the respondent entered into the PPMS Agreement on 26th May 1987 with Pembinaan and Pemaju Mahajiwa (Selangor) Sdn Bhd making PPMS its "main contractor".

Thus when, on 20th November 1987, the parties entered into an agreement (JVA), the respondent would provide the land and the developer was to have the right to construct building thereon, and take over all infrastructures works. The developer would sell the lands and appropriate all payments made by purchasers of the building.

In return for this right to construct and develop and sell, the developer was to pay the sum of RM15 million to the landowner (respondent) within a period of 100 days from 20.11.1987.

It was only in February 1989 that the appellant discovered the existence of a caveat over the land lodged by PPMS, when the appellant applied for a loan facility with MBF Finance Bhd. for the 'development' of the land.

According to the appellant this transaction was unknown to the appellant at the time the JVA was executed on 20.11.1987 (about 6 months later).

The appellant contend that the respondent ought to have but did not, inform the appellant of this PPMS Agreement. And for this reason the respondent was in no position to and disabled itself from giving good consideration to the appellant for its payment of RM15 million.

The appellant contend that the entire JVA became "voidable" at the appellant's option for the total failure of consideration for as long as the contract between respondent and PPMS existed, since the appellant could not 'build' or 'develop' the land as envisaged by the parties. Moreover this was the sole consideration the respondent had to grant to the appellant, in exchange for payment of RM15 million.

For the respondent, it was argued that there was good consideration because at the material time when the JVA was signed between appellant and respondent, although there was this Agreement with PPMS, there was no caveat on the land at the material time. Thus the land was then unencumbered. Though there was a subsequent caveat, the respondent had it removed by order of Court.

The respondent, as did the learned trial judge, found that appellant was in breach for non-payment of the deposit and quit rent. In any case, payment is a fundamental term and even if time originally fixed had ceased to be of the essence, the appellant can reimpose time which it did.

The appellant had also stated that the respondent had failed in its obligation since by virtue of the caveat, it was unable to charge the land. The appellant's purpose for the charge in

question was to take out a loan to pay the respondent the balance sum of the security deposit.

Be that as it may, in view of these conflicting issues, the appellant argued that it is allowed to now raise the point of "failure of consideration" for the first time on appeal. The appellant says total failure of consideration renders the JVA voidable with restitution under Sections 65 and 66 (Contracts Act, 1950) or affirmation thereof with damages for breach of contract under the Act.

The authorities referred to were:-

(1) **Fibroska Spolka Keyjna v Fairbairn [1943]**

(2) **Koh Siak Poo v Sayang Plantation [2002] 1 MLJ 65**

The appellant contended that on this ground of total failure of consideration, the appellant as the innocent party had one of 2 choices:-

(i) He could treat the contract as at an end and seek refund of all monies paid; or

(ii) he may rest his claim on the basis of the contract and seek damages for breach.

More importantly it is the appellant's contention that the respondent's ability to forfeit 10% of the Deposit is irrelevant because no forfeiture can be made on a void/voidable agreement. The appellant says it is inequitable for the respondent to demand forfeiture when its own conduct brought about the breach of the JVA.

In addition the appellant contended that the respondent was in breach of fiduciary duties, entitling the appellant to general damages.

One fact must not be lost sight of. It is this. The appellant, upon discovery of the caveat staged a protest in

correspondences with the respondent. If there was a breach by the respondent in this regard, the appellant chose not to terminate the JVA, neither did it rescind the JVA for alleged misrepresentation. The end result was that, the appellant conceded to appoint PPMS as it contractor in the joint venture project.

The other question raised by the appellant was with regard to the charge to secure the loan to pay the security deposit. The appellant laid blame squarely on the respondent, when the appellant could not obtain the loan due to the caveat. On this point, I have this to say: Reading clauses 5 and 2 (a) of Agreement, there is nothing to suggest that the creation of a charge is a condition precedent for the payment of the balance of the security deposit. In other words, the payment of the security deposit was not conditional upon the creation of the charge. In fact clause 4 (c) make the payment of deposit a condition precedent before the grant of the power of attorney to

the appellant to create a charge: In short, the obligation to create the power of attorney only arose "upon full payment of the security deposit".

To top it all, there is nothing in clause 5 (c) to suggest that the loan is to pay the security deposit.

The way I see it, there was a misconception on the appellant's part with regard to the contract with PPMS. This contract was not an encumbrance binding on the land but a personal obligation. In any case, that contract with PPMS was inchoate, subject to further terms and conditions [Para (3)].

In the context of this case, it is instructive to also look at the conduct of parties.

It is clear that the appellant was either unsure of what to do after signing the JVA, or that it was in a dilemma of sorts, after obtaining legal opinion from Tetuan Shearn Delamore & Co.

Even the appellant's own witness DW1 (Dato' Chan) could not give an intelligible reply during cross-examination as to why the appellant had wanted to revoke the agreement on the same day it was signed.

The appellant, if it truly believed the respondent was in breach of the agreement could exercise any of its options. They never did. Instead, the appellant applied to re-negotiate new terms especially towards payment of the security deposit.

The defendant had asked for several extensions to pay the balance of the security deposit and thereafter, fixed extensions were given.

The respondent granted an extension of 30 days from the expiry of the original 100 days from 20.11.1987 which should expire on 29.2.1988 and a further 30 days which expired on 29.3.1988.

Still, the balance was not paid on 29.3.1988. The appellant sought a further extension of 30 days which expired on 28.4.1988.

However before the 28.4.1988 was up, the parties met on 8.4.1988 and the respondent agreed to an extension of 75 days to "expire on June 1998 at midnight". This was an extension of fixed time.

The appellant accepted the extension on terms that a supplementary agreement was drawn up. When no payment was forthcoming from the appellant, the appellant proposed changes to the agreement which the respondent rejected.

However the continued negotiations did not alter the appellant's primary obligations in the JVA but merely postponed it. So when no payment was made, the respondent demanded the payment of the balance of the security deposit by its letter dated 6.8.1989, within 14 days.

This made time the essence of the contract. The appellant replied that the agreement can only be terminated if the initial payment of RM200,000 was refunded. I find this suggestion baseless.

In fact, what I do find is that by making the proposal, for the execution of a new joint venture agreement, on new terms and conditions the appellant clearly evinced an intention that it was not able to and did not want to perform the earlier agreement and this amounts to a clear repudiation. Yet the appellant did not repudiate the agreement.

Now I come to the heart of the matter. If it is proven that there is breach on the part of the appellant, can the respondent forfeit the deposit? And if so, how much is forfeitable?

As I said earlier the appellant's contention is that it is inequitable for the respondent to demand forfeiture when its own conduct brought about the breach of the JVA, by suppressing material facts, making performance impossible.

The appellant's entire case was that the termination was wrongful and there was no liability for forfeiture but that in fact the respondent itself was in breach of its fiduciary duties and that the respondent was liable to compensate the appellant.

At the risk of repetition, I need to reiterate here that it was the appellant's case that the balance of the security deposit was only payable after the creation of a charge.

I do not agree with the appellants' contention. There is nothing in clause 5 or 2 (a) to suggest this, since these are independent obligations.

In fact in construing the relevant clauses in the agreement, i.e. clauses 5 and 2 (a) and having seen evidence of parties, it is clear that time for payment of the deposit is fixed, whereas there is no time fixed for creation of the charge which inevitably negatives the suggestion of a condition precedent.

This inability to get the loan means that the deposit sum was unpaid.

But what would be the situation if the deposit sum is unpaid? In the instant appeal, the appellant had only paid RM200,000. Perusing authorities on this point, it is shown that even where the deposit sum is unpaid, the respondent can still terminate, forfeit and sue to recover that sum. (See

<u>Pendergrast v Chapman [1988] 2 NZLR 177, Bots v Ristevski [1981] V R 120 (2 IA/R) p.81 headnote; Morello Sdn Bhd v Jacques (International) Sdn Bhd [1995] 1 MLJ 577.</u>

In the circumstances, the respondent can rightly sue for recovery of the deposit even though it remains unpaid.

After all that has been said, the meaning of "deposit" now writs large. James LJ in **Ex p Barrel L.R. 10 Ch 512** observed that:

> "… The deposit as I understand it ... is a guarantee that the contract shall be performed… If the sale goes on, it goes in part payment of the purchase money for which it is deposited, but if on default of the purchaser the contract goes off, that is to say if he repudiates, the contract, then he can have no right to recover the deposit."

A succinct definition of 'deposit' was also stated by Lord MacNaghten in **Soper v Arnold [1889] 14 App Cas 429** where he said:

> "…. A deposit is defined as serving two purposes, that is, if the purchase is carried out, it goes against the purchase money. But the primary purpose for the deposit is to act as a guarantee that the purchaser means business ..."

Coming back to the instant appeal, the issue arose as to whether the sum to be forfeited is the RM200,000 initially paid, or 10% of the entire consideration of RM15 million. An important corollary to that issue is, why should the Court take 10% of the consideration of the deposit as forfeiture, not 20% or 30% as the case may be.

Firstly, a careful reading of the Joint Venture Agreement on 20.11.1987 would show that the agreement makes it clear why the entire purchase consideration was made a security

deposit. As is clear, the title carried a restriction that there can be no charge or transfer without the State consent.

The relevant clauses which manifest the legal position can be found in clause 2 (a) and clause 4 (c) which requires respondent to execute an irrevocable power of attorney to the appellant including power to create a charge; clause 5 (a) empowers the appellant to raise loans on a security of the land and clause 10 enable the appellant to sell the developed units to third parties, but the respondent as landowner must be a party.

Thus these provisions enable the appellant to deal effectively with the land with third parties. However by these acts, the respondent could or would have lost the land, in the event of the appellant's default. The said land would not be reverted to the respondent since the rights of third parties would have intervened.

In this context, it is no surprise therefore that the agreement provides that the entire consideration had to be paid as a security deposit so as to protect the respondent against any default by the appellant and consequent loss of the land.

Given the risk that the Respondent is exposed to, there is nothing unusual in the entire sum being agreed by both parties as a "security deposit" i.e the amount of RM15 million.

However the word "deposit", innocuous as it looks, has a technical life of its own, and thus a careful look at its definition and construction is necessary.

Is there a difference between the word "deposit" and "true deposit?" The word "true deposit" means a deposit which is within the bounds of an earnest performance. (Since essentially a forfeited deposit serves as an earnest of performance).

In fact the majority decision in **Morello Sdn Bhd v Jacqaues (International) Sdn Bhd [1995] 1 MLJ 581**, said that:-

> "In considering the question what was expressly stipulated as a deposit in the agreement was a true deposit, we have paid due regard to the terms of the agreement as a whole, and the surrounding circumstances."

Consequently if a deposit is a true deposit, it will be forfeited to the vendor if the purchaser wrongfully fails to perform his part of the bargain. This is so even if the 'vendors', loss is less than the deposit. This is so even if the vendor suffers no loss at all. The test normally accepted to ascertain whether a sum is within the bounds of an earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land. (See **Sun Properties Sdn Bhd v Happy Shopping Plaza [1987] 2 MLJ 711**).

In the instant appeal whether 10% of the "security deposit" in the agreement is a true deposit depends on the construction of the contract between the parties.

Though in some cases such as **Linggi Plantation v Jagatheesan [1972] 1 MLJ 89** the court would grant relief against forfeiture of a deposit, there may be instances where the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun.

Where a deposit is reasonable, it has always been regarded as a true deposit, namely a guarantee of performance as well as part payment on account and that the court will not regard a forfeiture of such payment as a penalty.

It has been suggested that in the instant appeal, a distinction need be drawn between a deposit simpliciter and part payment of a consideration.

Most of the authorities cited in the instant appeal relate to deposit paid or found to be paid under an agreement between parties in dispute.

They do not actually deal with part payment of a consideration. But whether the subject matter under consideration is not a deposit but a part payment towards money consideration, really turns upon the construction of the contract between the parties.

For our purposes here, the question is – Is there a distinction between a deposit and part payment for purchase of land, for example?

Lord Hailsham in **Linggi Plantations** said that :-

> "In particular Lord Dunedin in **Mayson v Clouet [1924] AC 980** establish the fundamental difference between part payments which are recoverable in certain circumstances or deposits which are not."

In **Mayson v Clouet,** the Privy Council in reversing the decision of the Court below held that the right of the parties depended upon the terms of the contract and intention of parties. It is my view that this is the lynchpin to this whole issue.

So in **Mayson's** case, although the purchaser was in default, the instalments were recoverable since the contract itself makes a distinction between the deposit and the two instalments, where the forfeiture is only for the deposit.

In short, the character of the payment depends on the parties' intentions to be obtained by construing the agreement. **(Mayson v Clouet).** Or as the majority decision in **Morello** said, in determining whether money has been paid by way of deposit or by way of part payment, considerable weight is to be given to the label attached by the parties to the payment (See **Howe v Smith (1884) 27 Ch. D 89**. I am in complete

agreement with Edgar Joseph Jr. FCJ (as he then was) when His Lordship said:

> "Especially is this so in a case such as this where the agreement had been entered into by two incorporated companies, engaged in trade, both commercially autonomous fully informed of all the relevant facts, with free access to legal advice and having regard to the degree of formality in the wording of the agreement."

In **Morello's** case, there is clause 3 which expressly provides for an initial payment of RM116,700 by way of "deposit to be paid upon signing of the contract." The seller however agreed to accept late payment of the deposit.

The Federal Court in **Morello** said that this "unpaid" deposit did not lose its character as a deposit and the seller sought recovery of the unpaid deposit, which the Court allowed.

Similarly in the instant appeal, the appellant chose not to pay the "security deposit" according to the terms of the JVA.

The appellant only paid the initial RM200,000. Is the respondent to be in any worse position just because the deposit was not paid when the time came for it to be paid?

Looking again at the JVA, the security deposit is described as "unconditional payment" of the respondent's share in the Joint Venture Project payable by the appellant.

Thus in **<u>Bot v Ristevski [1981] VR 120</u>**, Justice Brooking sitting in the Supreme Court of Victoria held that when a vendor had terminated a contract by accepting the purchaser's repudiation, he would be entitled to recover an unpaid deposit on the ground that in such a situation there will have been no failure of consideration since the consideration for the deposit was not the conveyance but the entering into the contract." (per Edgar Joseph Jr JCA in Morello's case).

Likewise in the instant appeal.

Following the principle as found in **Morello** decision, money paid as a deposit cannot be paid on some terms implied or expressed. And monies to be paid as the event of the contract being performed shall be so paid. The monies to be paid in the instant appeal is not merely a part payment, it is also an earnest to bind the bargain so entered into.

Coming back to the instant appeal, the contract clearly describes both payments as "security deposit". Thus the entire amount is the deposit. Both the appellant and respondent have their respective obligations under the agreement. Whether one party's obligation is more onerous than the other is of little consequence. What is important is what is their intention as manifested in the agreement?

As had been expressed earlier, in view of the rights and obligations of the parties and the risk imposed on the respondent against any default by the appellant, and upon a plain reading of

the agreements there is no doubt that RM1.5 million represent a true deposit and that the respondent is entitled to forfeit the sum when the appellant failed to comply with clause 2(a) of the agreement.

Much was said by the appellant about there being no right of forfeiture in the agreement. However I find that an express provision for forfeiture is not an essential component. This is a contract of sale, where a deposit being an earnest for performance of a contract, confers a consequential right of forfeiture (subject to its constructions and terms and conditions).

Again, at the risk of being repetitive, the critical factor is the character of the payment which is largely dependent on the parties' intention, ascertained by construing the agreement. This view finds support in authorities such as **Polyset-Pendergrast v Chapman [1988] 2 NLLR 177** and **Damon Cia Naviera v Hapag-Lloyd [1985] 1 All ER 475.**

In **Polyset Ltd v Panhandat Ltd [2002] 3 HKLRD 319** Bokhary PJ in setting out the facts said that four sums were paid in advance. The first sum was described as "deposit and part payment". The three subsequent payments were also similarly described, the only difference is that they have inserted the word "further" – which now read as "further deposits and part payments."

Thus in **Polyset,** as in the instant appeal, both payments, albeit the entire consideration were described as "security deposit".

Thus it is for the parties to define what sum constitutes a deposit under the contract. In dealing with this point, **Ribeiro PJ in Polyset** observed that:-

> "… distinguishing between deposit and mere advance payment: that the nature or legal incidents of a deposit can be defined. The character of the payment depends on the parties' intention ascertained by construing the agreement …".

So is 10% a reasonable sum to be forfeited from the entire amount of RM15 million? On this point in **Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89** the Privy Council imported a test of reasonableness.

Lord Browne-Wilkinson observed, inter alia that:-

> "… In order to be reasonable a true deposit must be objectively operating as "earnest money" and not as a penalty."

Thus, the reasonableness of a deposit is to be tested against the conventional or customary level of deposits generally taken as an earnest of performance.

As manifested in various authorities, the test normally accepted to ascertain whether a sum is within the bounds of as earnest of performance and therefore deemed a true deposit is

where it represents 10% of the purchase price of the land. In short, it's conventionally accepted that a the deposit of 10% is a true deposit. (See **Sun Properties Sdn Bhd v Happy Shopping Plaza [1987] 2 MLJ 711**).

As case laws in various jurisdictions have shown, a deposit of 10% of the purchase price is quite commonplace and has enjoyed widespread commercial approval and acceptance.

So too, in the instant appeal. I am of the view that the respondent is entitled to a forfeiture of 10% of the total consideration of RM15 million, discounting the RM200,000 already paid.

For the above said reason, I dismiss this appeal with costs and deposit to account for taxed costs.

My learned brother Mokhtar Sidin JCA have seen this judgment in draft and is in agreement with it.

Dated this 18th day of September 2007

(DATUK ZAINUN BINTI ALI)
Judge
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