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DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. W-02-10-2007

B

ANTARA

WOOLLEY DEVELOPMENT SDN. BHD. ... PERAYU

DAN

MIKIEN SDN. BHD. ... RESPONDEN

**[Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
Guaman Sivil No: S4-22-43-2006**

C

Antara

Mikien Sdn. Bhd. ... Plaintiff

Dan

1. Cherating Development Sdn. Bhd.

**2. Woolley Development Sdn. Bhd. ... Defendan-
defendan**

D

**yang diputuskan oleh Yang Arif Pesuruhjaya Kehakiman Dato'
Tengku Maimun binti Tuan Mat pada 7hb Disember 2006]**

E

Coram: Tengku Baharudin Shah bin Tengku Mahmud, JCA

Zaleha Zahari, JCA

Abdull Hamid bin Embung, JCA

A

JUDGMENT OF ZALEHA ZAHARI JCA

This appeal is against the decision of the learned Judicial Commissioner High Court Kuala Lumpur entering summary judgment under Order 81 of the Rules of the High Court 1980 (“the Rules”) on the application of the Respondent (the Plaintiff in the Court below) against Cherating Development Sdn. Bhd. (the 1st Defendant in the Court below, who is not a party in this appeal), and Woolley Development Sdn. Bhd. (the 2nd Defendant in the Court below), the Appellants in this appeal. In this judgment, parties will be referred as cited in the Court below.

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The dispute in this appeal is concerned with the rights and interest of a victim of an abandoned project as against firstly, the original developer from whom the properties had been purchased and to whom the purchase price had been paid, and secondly, as against a rehabilitating developer who has taken over the abandoned project from the original developer.

The Judicial Commissioner had on the facts of this case found no difficulty in granting an order-in-terms of the alternative prayer applied for by the Plaintiffs in Enclosure (7). She granted an order of rescission of 12 Sale and Purchase Agreements, all dated 28.8.1997, executed between the 1st Defendant as vendor of the one part, and the Plaintiffs, as Purchaser on the other part (“the 12 Agreements”). In addition to the order

A of rescission, the 2nd Defendant was directed, jointly or severally with the 1st Defendant, to refund the total purchase price paid by the Plaintiffs to the 1st Defendant in respect of all of 12 Agreements amounting to RM2,316,580.00 together with interest at 11% per annum from 28.08.1997 to date of realization.

B

The 2nd Defendant appealed against the judgment recorded against them, which is the subject matter of this appeal. The 1st Defendant did not. The 2nd Defendant's appeal was heard by this Court on 16.5.2007 and dismissed by a majority. With respect, I was unable to agree with the majority decision and am of the view that this appeal should be allowed with costs and the case be remitted back to the High Court for trial. My reasons are as follows.

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An application which is the subject matter under appeal can successfully be resisted by a Defendant if it can be shown that there are bona fide issues to be tried. Each case necessarily turns on its own peculiar facts. The issue for determination is whether, on the facts of this case, the 2nd Defendant had discharged the burden of establishing that there are bona fide issues to be tried, and accordingly, not an appropriate case for summary judgment to be entered against them.

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The background facts are as follows: The 1st Defendant, a

A developer, is the registered and beneficial owner of lands held under Geran No. 15113, Lot No. 190, Geran No 4500 Lot No 198, Geran No 14423 Lot No. 374, Geran 4501 Lot 784, Geran No. 4502 Lot No 786, Geran No. 4503 Lot No. 788, all at Sek 2 Bandar Butterworth, Pajakan Negeri 1146 Lot No. 1, Geran No. 4508 Lot No 5, Geran No 13528 Lot No. 6, Geran No. 15167 Lot No. 564 Sek 3, Bandar Butterworth, Geran No. 13786 Lot No. 1961, Geran No. 45091 Lot No. 180, Geran No. 4511 Lot No. 674 all at Sek 3, Bandar Butterworth, Geran Mukim No. 754 Lot 117, Geran Mukim No. 770 Lot No. 134, Geran Mukim 757 Lot No. 120, Geran Mukim 755 Lot No. 118 all at Mukim 9, in the district of Seberang Perai Utara, State of Pulau Pinang (“the said lands”).

The 1st Defendant took steps to develop the said lands into a commercial centre and shop office known as “Raja Uda Commercial Centre” (“the development project”). By the 12 Agreements executed, the Plaintiffs agreed to purchase, and the 1st Defendant agreed to sell, shop offices more particularly described in the respective Sale and Purchase Agreement (“the said properties”), free from all encumbrances upon delivery of vacant possession subject to the terms and conditions specified therein for a total purchase price of RM2,316,580.00.

Clause 7 of each of the 12 Agreements states that time shall be of the essence. Clause 20 provides that vacant possession of the property

A purchased shall be handed over to the purchaser within 36 calendar months from the date of execution of the Agreement. In the event of the 1st Defendant failing to deliver vacant possession of the properties purchased within the stipulated period, the 1st Defendant shall pay the Plaintiffs liquidated damages to be calculated from day to day at the rate of 11% per annum of the total purchase price of the said properties.

Two clauses of the 12 Agreements referred to in argument in this appeal (which provisions were relied upon by the Judicial Commissioner in arriving at the conclusions which she did) reads as follows. Clause 38(f) of the Agreement provides that *“vendor” includes its successors in title and permitted assigns...*” and clause 41(a) provides that the Agreement *“shall be binding upon the successors in title and permitted assigns of the Vendor and the heirs, personal representatives, successors in title and permitted assigns of the Purchaser.”*

D The development project in which the Plaintiffs purchased the said properties was abandoned by the 1st Defendant sometime in 1998. In year 2000, the 1st Defendant, the 1st Defendant’s financier, [i.e. Malaysian Building Society Berhad (“MBSB”)] and the 2nd Defendant, reached an understanding by which agreement the 2nd Defendant was to rehabilitate and complete the development project upon terms.

A On 20.9.2000 the 1st Defendant and the 2nd Defendant executed a
Transfer Agreement (“the Transfer Agreement”). Recital H of the Transfer
Agreement refers to letter dated 27.7.2000, that the 1st Defendant was to
transfer the said lands to the 2nd Defendant, subject to existing charges
created in favour of MBSB, without any money consideration. Clause 3.1
B of the Transfer Agreement states that *‘in consideration of the mutual
agreements and undertakings herein set out, the Parties to this Agreement
have granted the rights and accepted the obligations herein appearing’*. By
Clause 3.2, the parties agreed and declared that the basic purpose of
entering into the Agreement was to transfer the said lands to the 2nd
C Defendant by the 1st Defendant free from encumbrances in order for the 2nd
Defendant *“to rehabilitate, continue to carry out the development
construction and completion of the Project.....”*.

 Recital L states that the 1st Defendant *“has by separate and
D individual Sale and Purchase Agreements made with individual purchasers,
details of which are more particularly described in Annexure H to the
Transfer Agreement”*. Recital K and Clause 4(e) vii of the Transfer
Agreement envisaged the execution of a novation agreement, between the
1st Defendant, the 2nd Defendant and the 1st Defendant’s individual
E purchasers, such as the Plaintiffs.

 The Plaintiffs entered private caveats against the lands upon which

A the properties were to be erected on 24.11.2001 vide presentation No. 14396/2001 under the National Land Code 1965 (“the Code”).

According to letter dated 18.2.2005, the 2nd Defendant intended to proceed with the subdivision of the said lands. To enable them to do so, it was necessary for the Plaintiffs to remove the caveats lodged against the said lands. The correspondence exchanged between the 2nd Defendant and the Plaintiffs shows that the Plaintiffs were only prepared to remove the caveats lodged upon terms, by obtaining certain undertakings on the part of the 2nd Defendant, which the 2nd Defendant failed to do.

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On 16.1.2006 the Plaintiffs filed an action against the 1st and the 2nd Defendant, by which action they sought for an order for specific performance of the 12 Agreements, liquidated damages at the rate of 11% of the total purchase price from 29.08.2000 until date of delivery of vacant possession. Alternatively, for rescission of the 12 Agreements, restitution of the total purchase price including interest at the rate of 11% on the total purchase price from 28.08.1997 to the date of realisation.

Paragraphs 4 to 9 of the Statement of Claim filed relates to the 1st Defendant, describes the contractual relationship between the 1st Defendant and the Plaintiffs, and the alleged breaches committed by the 1st Defendant. In paragraph 16 the Plaintiffs alleged that by reason of the 2nd

A Defendant having taken over the rehabilitation of the development project from the 1st Defendant pursuant to the Transfer Agreement, the 12 Agreements were binding on the 2nd Defendant, inclusive of the obligation to deliver vacant possession of the properties purchased within 36 calendar months of execution of the 12 Agreements. It was then contended that the

B 2nd Defendant was liable to pay the Plaintiffs loss and damages in the same terms as that claimed against the 1st Defendant. Further and in the alternative, the Plaintiffs alleged that the 2nd Defendant, having taken over the development project from the 1st Defendant as developer, owed them a duty of care to ensure that their acts or omissions does not adversely affect

C any of their rights, title and interest in the said properties under the 12 Agreements.

It was then alleged that, by reason of the Plaintiffs having paid the total purchase price of the properties amounting to RM2,316,580.00 to the

D 1st Defendant, (letter dated 17.10.1997 of the 1st Defendant to the Plaintiffs was to be accepted as proof that such payment had in fact been made), by reason of the 1st Defendant's refusal to inform the Plaintiffs as to when vacant possession of the said properties purchased were to be delivered, as well by reason of the failure to deliver vacant possession of the said

E properties within 36 calendar months from execution of the Agreements, they had suffered loss and damage entitling them to liquidated damages at the rate of 11% per annum of the total purchase price of RM2,316,580.00

A from 29.8.1997 until the date of delivery of vacant possession.

Vide Enclosure (7) filed on 24.4.2006, the Plaintiffs sought to enter summary judgment under O. 81 of the Rules against both the 1st Defendant and the 2nd Defendant for specific performance of the 12 Agreements; alternatively, for the 12 Agreements to be rescinded. The Plaintiffs elected, by their solicitor's written submissions, to seek for an order in terms of the alternative prayer for rescission, and not that for specific performance, and other consequential orders.

C The Judicial Commissioner relied on clause 38(f) and 41(a) of each of the 12 Agreements, i.e. the definition of "*vendor*" as including "*successors in title and permitted assigns*". She ruled that clause 41(a) was binding on the 2nd Defendant as the 1st Defendant's "*successors in title and permitted assigns*". She was of the considered opinion that by reason of the lands in Annexure A to the Transfer Agreement being the same lands upon which the said properties were to be erected, and by reason of the Plaintiffs having paid the full purchase price to the 1st Defendant, the fact that the Plaintiffs' name was not listed in Annexure H annexed to the Transfer Agreement was not a sufficient ground to displace the Plaintiffs' claim.

In his submission Counsel for the 2nd Defendant stressed the fact

A the 2nd Defendant was not a party to the 12 Agreements, which fact, according to him, had not been given due consideration by the Judicial Commissioner. There was, on the facts of this case, no contractual relationship between the Plaintiffs and the 2nd Defendant. On the facts of this case the purchase price was paid to the 1st Defendant, not to the 2nd Defendant. He submitted that the Judicial Commissioner had therefore erred in making the 2nd Defendant jointly and severally liable to reimburse the sums paid by the Plaintiff to the 1st Defendant. He submitted that in this situation, whether the 2nd Defendant was liable to reimburse the sums of which they were not a recipient of, constitutes an issue to be tried.

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The 2nd Defendant's Counsel further submitted that the Judicial Commissioner was in error in construing the terms of the Transfer Agreement. Annexure H of the Transfer Agreement must necessarily be read to mean that the 1st Defendant had represented to the 2nd Defendant that the purchasers of the development project were that as listed in Annexure H. Encik Kirubakaran pointed out that the Plaintiffs was not listed as one of the 1st Defendant's purchasers in Annexure H. By reason of this omission he submitted that the 2nd Defendant had accordingly not been put to notice of the Plaintiffs' alleged interest in the said lands.

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E Further, the fact that a Novation Agreement had not been executed between the 1st Defendant, the 2nd Defendant, and the Plaintiff (as the 1st Defendant's purchasers), as envisaged by Recital K and clause 4(e)vii of

A the Transfer Agreement, was a material factor which had not been given due consideration by the Judicial Commissioner. On the issue of liability of the 2nd Defendant towards the Plaintiffs by reason of the obligations under the 12 Agreements not having been novated, is also a triable issue.

B As for the definition clause, “*vendor*” “*includes its successors in title and permitted assigns...*” and clause 41(a), he submitted that the 2nd Defendant, in their capacity as a “rehabilitating developer”, cannot be construed to come within the ambit of the definition of being the “*successors in title and permitted assigns of the 1st Defendant*”. This, was
C also a triable issue.

As to the interest rate awarded by Judicial Commissioner of 11% per annum from 28.8.1997, Encik Kirubakaran stressed the fact that although Courts have recognized that a successful litigant who had been kept out of
D monies lawfully due to them is entitled to be awarded interest, the interest rate awarded is only 8% per annum upon the judgment sum from date of the issuance of the Writ, and the rate awarded of 11% in this case has never been ordered by the Courts in the absence of an express provision to that effect in the agreement in issue.

E In reply, the Plaintiff’s Counsel submitted that the Judicial Commissioner was right in holding that there was no issue to be tried, be it

A on facts as well as in the law, and in issuing the orders which she did. He submitted that the fact that the 2nd Defendant had executed the Transfer Agreement which they did, makes the 2nd Defendant, jointly and severally liable with the 1st Defendant for the breaches that had occurred, as the 2nd Defendant came within the definition of “vendor” as the “*successors in title* and permitted assigns” of the 1st Defendant.

He argued that the contention that the 2nd Defendant’s obligation was only towards purchasers listed in Annexure H of the Transfer Agreement was untenable as the 2nd Defendant, in their capacity as a rehabilitating developer, was required to rehabilitate and develop the whole development project, and not confined to the individual purchasers of the 1st Defendant specified in Annexure H.

Having paid to the 1st Defendant the sums due under the 12 Agreements, and in view of the clear breach of the 1st Defendant’s obligations to complete and surrender possession of the properties purchased within the time frame of 36 months, entitled the Plaintiffs to rescind the 12 Agreements, and be reimbursed the sums paid to the 1st Defendant, which obligation lies not only upon the 1st Defendant, but also by the 2nd Defendant, jointly and severally, consequential upon the execution of the Transfer Agreement.

A I am of the view there are clearly issues to be tried in this case. Liability of the 2nd Defendant towards the purchasers of properties from the original developer, to which the 2nd Defendant was not a party of, cannot totally be ignored, especially when read in the context of the Plaintiffs not being listed as one of the purchasers of the 1st Defendant in Annexure H.

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I am of the view that the mere fact that a Transfer Agreement had been executed between the 1st Defendant and the 2nd Defendant does not per se makes the 2nd Defendant jointly and severally liable towards the Plaintiffs for breaches committed by the 1st Defendant in the first instance.

C It must necessarily be read in context of terms agreed upon, as between the original developer, the rehabilitating developer, as well as the particular purchaser concerned. The non listing of Plaintiffs in Annexure H, as well as the fact that there has been no novation of the agreement as envisaged by the Transfer Agreement, clearly has an impact on the issue of whether
D the 2nd Defendant is liable toward an unfortunate purchaser caught in such situation.

I accordingly find that this is not an appropriate case for summary judgment to be entered against the 2nd Defendant. The 2nd Defendant has
E convinced me there are bona fide issues to be tried as far as the Plaintiff's claim against the 2nd Defendant is concerned. It is my finding that the learned Judicial Commissioner had erred in making the orders which she

A did.

For the reasons above mentioned, this appeal is allowed with costs. The decision of the Judicial Commissioner is set aside and this case be remitted back for trial. The deposit to the Appellants.

B

DATIN PADUKA ZALEHA ZAHARI

Judge
Court of Appeal
Malaysia

Dated: 24th August 2007.

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Note:

For the Appellant	...	Encik K.Kirubakaran, (Encik Harpal Singh Grewal with him), Tetuan Kiru & Yong, Damansara Intan E-Business Park, Entrance 6, Suite 1230, Level 12, Blok A, No.1, Jalan SS20/27, 47400 Petaling Jaya.
For the Respondent	...	Encik Yee Teck Fah, (Encik Ong Gek Lin with him), Tetuan Yee Teck Fah & Co., 705, Blok E, Phileo Damansara 1, No. 9, Jalan 16/11, Off Jalan Damansara, 46350 Petaling Jaya.

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